IN THE WAITANGI TRIBUNAL
KEI MUA I TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI

WAI 2561
WAI 745/1308

IN THE MATTER OF	the Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	The Ngatiwai Mandate Inquiry
AND	
IN THE MATTER OF	A claim filed by Paki Pirihi on behalf of Patuharakeke and a claim filed by Ngawaka Pirihi and others

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CLOSING SUBMISSIONS ON BEHALF OF WAI 745 AND WAI 1308

Dated this 23rd day of December 2016

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. These closing submissions are filed on behalf of Patuharakeke and the following claims:

    1.1. Paki Pirihi on behalf of the Patuharakeke Te Iwi Trust Board (**"PTB"**) (Wai 745); and

    1.2. Ngawaka Pirihi and others on behalf of the owners of various Pukekauri and Takahiwai land blocks (Wai 1308) (**"the claimants"**).

2. The claimants now have on the record of this Inquiry a vast amount of evidence in relation to the Crown's recognition of the Ngatiwai Trust Board's (**"NTB"**) Deed of Mandate (**"DOM"**) on 21 October 2015. The Crown has recognised a DOM that is primarily based on a structure established for fisheries allocation. The structure is in no way representative of the hapu that are now included in the NTB DOM. The structure fails to uphold the rangatiratanga of those hapu who have been included without their consent.

3. In many ways, the actions of the Crown leading to its decision to recognise the NTB DOM are exacerbated by the errors and omissions made throughout the mandate strategy phase and DOM recognition phase. In essence, we submit that the only thing the Crown is consistent with is its approach of achieving Treaty Settlements at any cost.

4. While we have set out further on in these submissions the remedies sought, we wish to indicate from the outset that it is necessary that the Tribunal findings and recommendations send a clear message to

the Crown that its Treaty Settlement Policy, particularly those policies relating to the Large Natural Grouping Policy (**"LNG"**) and the mandating policies, remain unworkable and are in effect inconsistent with the principles of Te Tiriti o Waitangi and the underlying tikanga of the hapu that are included in Treaty Settlements.

5. The LNG policy in particular is applied by the Crown in an ad hoc way. There are numerous examples of smaller hapu settling with the Crown with two of those examples being hapu of Ngatiwai (Ngati Manuhiri and Ngati Rehua). There are examples of regional settlements that give effect to hapu rangatiratanga within each region (Ngati Kahungunu) and there are collectives that have enabled the settlement of hapu under it (Tamaki Makaurau). However, in the case of Patuharakeke and indeed others, the Crown ignores them using the LNG policy as it basis to snub hapu settlements or "more" natural collectives.

6. The Crown, as evidenced in various urgent inquiries, including but not limited to the Te Arawa Mandate Inquiry, the Tamaki Makaurau Settlement Process Inquiry (**"TMSP Inquiry"**) and most recently the Ngapuhi Mandate Inquiry, has had ample opportunity to rectify its policies to be reflective of the issues and concerns raised in those inquiries. Despite being put on notice numerous times, the Crown continues on its quest to achieve Treaty settlements at any cost.

Themes

7. These closing submissions on behalf of Patuharakeke are based on the following themes:

7.1. The Crown failed to require the NTB to demonstrate support and consent from Patuharakeke for their DOM;

7.2. The Crown failed to adequately seek to establish the nature and level of support from Patuharakeke who opposed the NTB DOM;

7.3. The Crown have ultimately failed to protect the position of Patuharakeke and their ability to exercise tino rangatiratanga;

7.4. Patuharakeke did not support and/or consent to the NTB DOM;

7.5. The NTB DOM does not provide representation for Patuharakeke;

7.6. The remedies available under the NTB DOM are not workable;

7.7. Patuharakeke are prejudicially affected and are likely to continue to be;

7.8. The prejudice to Patuharekeke is to the extent that their historical claims are currently due to be settled by a group that does not have their mandate but also that the Crown have failed to engage with Patuharakeke as an autonomous hapu in respect of the settlement of their claims; and

7.9. The Crown's decision to recognise the NTM DOM is inconsistent with the principles of the Treaty of Waitangi/Te Tiriti o Waitangi.

8. We wish to signal to the Tribunal that in its deliberation and weighing up of evidence, that the Crown has failed to engage or test the evidence of Patuharakeke to any great extent and this sentiment was also felt by Dr Guy Gudex[1] one of the main witnesses for Patuharakeke whose evidence was not tested by the Crown in cross-examination. The bulk of the evidence as filed therefore is undisputed.

TE TIRITI – JURISDICTION

9. The Waitangi Tribunal's jurisdiction stems from section 6 of the Treaty of Waitangi Act 1975 which provides that any Maori, or group of Maori may make a claim to the Waitangi Tribunal that they have been, or are likely to be, prejudicially affected by any legislation, policies, or practices of the Crown that are inconsistent with the principles of the Treaty.

10. Patuharakeke have presented their claims against the Crown and have sought the findings and recommendations of the Waitangi Tribunal in the following inquiries:

    10.1. Wai 1040 Te Paparahi o te Raki Inquiry – Stage 1 (reported on);

    10.2. Wai 1040 Te Paparahi o te Raki Inquiry - Stage 2 (in hearing) Patuharakeke are highly reliant on the findings of that report particularly in relation to the claims of confiscation made in relation to Poupouwhenua;

[1] Wai 2561, #A 106 at 1.

10.3. Wai 2490 Ngapuhi Mandate Inquiry - (reported on);

10.4. Wai 745 – Application for Urgent Inquiry into the Sale of Mighty River Power Lands at Ruakaka (Urgency declined).

11. The starting point for any discussion relating to the principles of the Treaty and their application in Te Tai Tokerau must be the Waitangi Tribunal's findings in the Stage 1 Report of the Wai 1040 Inquiry[2]. That report has set the framework for determining that the seat of power resides with the hapu in Ngapuhi, demonstrated none more so in their signing of Te Tiriti in 1840 effectively not ceding their sovereignty.

PRINCIPLES

12. The principles as accepted by the Waitangi Tribunal presiding over the Te Arawa Mandate Inquiry as being relevant in considering the claims brought were set out in our opening submissions and include[3]:

12.1. the principle of reciprocity, whereby the cession to the Crown of kawanatanga was in exchange for the Crown's recognition of rangatiratanga;

12.2. the duty of active protection, whereby the Crown is obliged to protect Maori rights under the Treaty in an active rather than a passive manner;

12.3. the principle of partnership, which carries an obligation on the Crown to act towards its Treaty partner in the utmost good faith;

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[2] Waitangi Tribunal *He Whakaputanga me Te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014).
[3] Wai 2561, #3.3.9 at 6.

12.4. the principle of equity, whereby the Crown is to apply the protection of citizenship equally to Maori and to non-Maori, and to safeguard Maori access to the courts to have their legal rights determined; and

12.5. the principle of equal treatment, whereby the Crown is obliged to act fairly and impartially towards Maori by not allowing one iwi an unfair advantage over another.[4]

13. As previously submitted in our opening submissions, the principle of options should also be considered when assessing the Crown's actions in this Inquiry. This principle helps to embed the power of decision making with the claimants[5] in accordance with hapu rangatiratanga.

THE NGAPUHI MANDATE INQUIRY REPORT

14. The Deputy Chairperson, Judge Savage, in his decision to grant urgency in this inquiry dated 2 May 2016 (**"decision"**) stated that,

> *"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."*[6]

15. The Crown has argued that,

> *"Ngatiwai is not Ngapuhi. There are important practical considerations that follow from the difference between the two groups. The Tribunal cannot*

[4] Waitangi Tribunal *Te Arawa Mandate Report* (Wai 1150, 2004) at 94.
[5] Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, Volume 1 (Wellington: Legislation Direct, 2008) at 325.
[6] Wai 2561, #2.5.8 at 60.

assume the conclusions it reached in the Wai 2490 Ngapuhi Mandate Inquiry report apply to the circumstances of Ngatiwai."[7]

16. We do not dispute the fact that Ngatiwai is distinct in some ways from Ngapuhi, as are all iwi and all hapu for that matter. What we submit, however, is that the Crown's actions in respect of the recognition of the mandates to settle the historical Treaty claims in Ngatiwai and in Ngapuhi are significantly comparable.

17. This was acknowledged by the Judge Savage in his decision where he stated that,

> *It cannot go unstated that the issues involved are very close to those considered in the Ngapuhi Mandate Inquiry Report. In her letter of transmittal to the ministers concerned Judge Reeves said,*
>
> > *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 hapu to exercise their rangatiratanga in determining when and how they would settle their claims.*
>
> *That there is again a similar assertion pivotal to the claim before me is unsurprising. Ngatiwai and Ngapuhi 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."*[8]

18. Counsel submits that it is due to the parallel issues between the two that the Ngapuhi Mandate Inquiry report should be considered as

[7] Wai 2561, #3.3.1 at 1.
[8] Wai 2561, #2.5.8 at 55.

being directly applicable to this inquiry and should bear significant weight.

19. As was outlined in the evidence of Ani Pitman[9] and Dr Guy Gudex[10], the Tribunal in that report set out the following minimum standards that they consider the Treaty principle of active protection requires the Crown to adhere to when making the decision to recognise a mandate to negotiate historical Treaty claims:

19.1. ensure it is dealing with the right Māori group or groups having regard to the circumstances specific to that claimant community so as to protect its intratribal relationships;

19.2. practically and flexibly apply the large natural groups policy according to the tikanga and rangatiratanga of affected groups;

19.3. allow for an appropriate weighing of interests of groups in any recognised mandated entity, one that takes into account factors including the number and size of hapū, the strength of affected hapū, and the size and location of the population;

19.4. recognise that the structure of the mandated entity must allow for hapū interests to be tested and heard; and

19.5. on the basis of this assessment, actively protect the rangatiratanga and tikanga of those hapū who are opposed to their claims being negotiated by the mandated entity, and

[9] Wai 2561, #A39 at 10-11.
[10] Wai 2561, #A38 at 14-15.

weigh this protection of hapū with that of non-hapū interests in the modern context.[11]

20. Not only has the Crown failed to adhere to those minimum standards as required as a Treaty partner, but it has failed to do so with the benefit and guidance of that Tribunal report. That report was released on 11 September 2015. The Crown then proceeded to recognise the NTB's DOM the following month on 21 October 2015. The Crown did not act on those recommendations of the Tribunal, rather it proceeded to steamroll ahead in ignorance of the above minimum standards and to recognise the NTB DOM. Its aim, to achieve a Ngatiwai Treaty settlement at any cost.

21. The Tribunal have previously addressed the Crown's continual failure to improve the experience of 'overlapping' claimant groups[12] and we submit that the case of the NTB DOM is yet another example.

THE CENTRAL THEME

22. The central theme, as established by Judge Savage in his decision, covers two fundamental areas:

22.1. The prejudicial effect of a policy or practice act or omission of the Crown that is inconsistent with the principles of the Treaty; and

22.2. The level of support and consent given by those hapu referred to in the NTB DOM.[13]

[11] Waitangi Tribunal *The Ngapuhi Mandate Inquiry Report*, (Wai 2490, 2015) at 38.
[12] Waitangi Tribunal *Tamaki Makaurau Settlement Process Report*, (Wai 1362, 2007) at 14.
[13] Wai 2561, #2.5.8 at 61.

23. These matters underpin the claim that has been bought by Patuharakeke as outlined below.

THE CLAIM OF PATUHARAKEKE

24. Patuharakeke's claim stems from the original Wai 745 Statement of Claim that was filed by Joanne Midwood in 1997. The grievances complained of in that claim relate mainly to the large-scale impact of Crown confiscation and purchasing that took place in the 1850's resulting in Patuharakeke today being virtually landless (retaining only 5 acres (more or less) and limited to the Takahiwai area). The grievances have had a major impact on the structure of Patuharakeke as a tribal entity.

25. That gross attack in the 1850's by the Crown on the rangatiratanga of Patuharakeke is compounded today by the continuation of Crown policy to engage with the first group that comes forward seeking a mandate to settle Treaty claims under the auspices of a LNG. A process that takes away the ability of hapu to determine how they wish to settle the grievances that they have carried alone, which in Patuharakeke's case has been for the previous 18 years.

26. The NTB DOM is yet another example whereby Patuharakeke's grievances against the Crown are exacerbated. At the core of Patuharakeke's claim in this case is the usurpation of hapu mana and rangatiratanga.

27. Patuharakeke's mana whenua and assertion of rangatiratanga over their rohe and affairs has been expressly acknowledged by the NTB. The Chair of the NTB, acknowledged during Hearing Week 1 in

October 2016 that it is a supporting role only that Patuharakeke has expected from the NTB.[14]

28. It is the evidence of Mr Jared Pitman that Patuharakeke is a composite hapu with affiliations to many groups, including Ngatiwai[15]. This has not been disputed by the Crown or the NTB. It is the claimants view that this whakapapa has been manipulated to justify their inclusion in the NTB DOM. Not all of Patuharakeke's members are Ngatiwai, but they are all Patuharakeke.

29. The NTB DOM is only one of three mandates that the historical claims of Patuharakeke have been included in against their wish, the others being that of the Tuhoronuku Independent Mandated Authority and Te Runanga o Ngati Whatua. Since Patuharakeke's comprehensive Wai 745 claim was lodged in the Waitangi Tribunal in 1997, it has been the PTB that has solely progressed and researched Patuharakeke's historical grievances against the Crown. This is without any funding or assistance from any of the other mandated entities.

30. This issue was discussed with Mr MacDonald during cross-examination by Ms Castle where Mr MacDonald referred to an offer of money from the NTB to the Takahiwai Marae Representative for claim related research[16]. This was not accepted by the PTB. In fact, with reference to a meeting held between the NTB and Patuharakeke on 11 June 2013, it is Ms Pitman's evidence that,

> *"The PCPC and whanau present were also advised that the research monies allocated to Patuharakeke (approximately $30,000.00) would be*

[14] Wai 2561, #4.1.1 at 423.
[15] Wai 2561, #A8 at 6.
[16] Audio of Hearing Week 2, Day One.

made available to us. On further application for this, NTB Counsel again advised that we would be required to hand over our research. This would not happen and we declined the offer in total at the end."[17]

31. Two primary components of the Wai 745/1308 comprehensive claim in the Te Paparahi o Te Raki Inquiry are the confiscation of Te Poupouwhenua and Crown purchases within the rohe of Patuharakeke. The Wai 244 is the Treaty claim that was lodged in March 1987 by the NTB on behalf of Te iwi o Ngatiwai. To date, there has been no evidence filed under Wai 244 that relates to the confiscation of Te Poupouwhenua or the Crown purchases within the rohe of Patuharakeke. In fact, only one brief of evidence has been filed in support of that claim which relates specifically to the Mangawhai Crown purchase.[18] Patuharakeke, however, have filed substantial evidence for the Wai 745/1308 claim and have presented that before the Te Paparahi o Te Raki Tribunal at hearing weeks 5 and 17 in Whangarei.

32. Patuharakeke did not consent nor did they support to the inclusion of their hapu or their historical claims in the NTB DOM. The Crown is well aware of this fact. Despite this, the rangatiratanga of Patuharakeke and other hapu included in the DOM against their will has been overruled by the Crown's ambition to achieve a Ngatiwai settlement at any cost, with the absence of hapu support or consent, adequate representation or structures for Treaty settlement purposes or workable remedies. The likely result without Tribunal intervention? Significant and irreversible prejudice to the claimants.

33. The Tribunal has heard substantial evidence on behalf of the claimants throughout this inquiry. Attached and marked as Appendix

[17] Wai 2561, #A10(b) at 13.
[18] Wai 1040, #E22.

'A' to these submissions is a table of the evidence filed for the claimants and how that addresses the Tribunal's Statement of Issues[19]. A chronology of relevant events in this inquiry, and more specifically to the claimants, is also attached and marked as Appendix 'B' in order to assist the Tribunal.

LACK OF SUPPORT OR CONSENT

SOI 1: How did the Crown require the Ngātiwai Trust Board (NTB) to demonstrate support and consent for their deed of mandate? To what extent, if any, was that support and consent shown?

SOI 2: To what extent, if at all, did the Crown seek to establish the nature and level of support for groups who opposed the mandate?

SOI 3a: Did the hapu referred to in the NTB deed of mandate support and/or consent to that mandate?

CROWN MANDATING POLICY

34. The Crown's policy on mandating as outlined in the Red Book[20] sets out the 'formal' process for achieving mandate recognition stating that,

> *The Crown has developed a formal procedure to verify that:*
> *• the Crown is dealing with the right claimant group representatives*
> *• the representatives are properly mandated to negotiate an offer for the settlement of the claimant group's historical Treaty claims*
> *• the mandated representatives have a process in place to ensure they are accountable, and*
> *• the mandated representatives have developed a process to identify as many claimant group members as possible – this usually involves establishing, if they have not already done so, a register of members.*

[19] Wai 2561, #1.4.1.
[20] Ka Tika a Maru, Ka Tika a Mara - Healing the Past, Building the Future at 27.

> *Once the Crown is satisfied that the people seeking to represent the claimant group have provided sufficient evidence to verify the above information, it can recognise the representatives' mandate to negotiate on behalf of the claimant group.*[21]

35. The process outlined above places the onus on the group seeking mandate recognition to prove it has the support and consent of those it purports to represent. Essentially, it also indicates that the advantage will always rest with the group that seeks mandate recognition by the Crown first. In the TMSP Inquiry Report, the Tribunal referred to it as the first cab off the rank.

36. With issues strikingly similar to the one before this Tribunal specifically in terms of the Crown's reasoning behind its preferential treatment of one group over others[22], the Tribunal stated that,

> *… in choosing Ngati Whatua o Orakei – a choice not obviously exceptionable – the Crown continued a pattern of preferring Ngati Whatua o Orakei over other groups for settlement purposes;*
> *Had no real strategy for how it was going to deal with the other groups; and*
> *Proceeded over the next few years to engage with Ngati Whatua o Orakei in a way that in effect secured for it a primary place, and for the others a secondary place.*[23]

37. We submit that the NTB is not the right group for the Crown to have dealt with to settle the historical Treaty claims of Patuharakeke. We do not dispute the fact that the NTB has engaged with the Crown on its Treaty fishing settlement and other fishery related matters since at

[21] Ka Tika a Maru, Ka Tika a Mara - Healing the Past, Building the Future at 41.
[22] Waitangi Tribunal *Tamaki Makaurau Settlement Process Report*, (Wai 1362, 2007) at 11.
[23] Waitangi Tribunal *Tamaki Makaurau Settlement Process Report*, (Wai 1362, 2007) at 11.

least 2005 when the NTB was reconstituted to receive fishery settlement allocation. This has resulted in the NTB using the same Trust Deed and Structure to seek a mandate and begin negotiations of the historical Treaty claims of particular groups that fall within its Area of Interest. The notion that NTB is 'the best structure to take Ngatiwai through the negotiations'[24] is absurd. The NTB provides the Crown with an easy means to reach settlement, it does not provide the right means.

ELEVATION OF THE MANDATE VOTE OVER MANDATE SUBMISSION

38. The Crown endorsed two processes that were deemed suitable by the Crown for being able to demonstrate support and consent of the mandate. The first being the mandate vote and the second being the submissions process in relation to the Deed of Mandate.

39. The Crown has argued that the mandate vote provides evidence of the broad support within Ngatiwai for its marae-based structure.[25] Further, the Crown has attempted to limit the level of opposition down to only being from two hapu groups, Patuharakeke and the Te Waiariki, Ngati Korora and Ngati Takapari "cluster".

40. We submit that the mandate vote should bear very little weight in proving support for the NTB mandate. The Crown has relied on the decision of the Chief Judge in relation to an urgency application challenging the Crown's recognition of Te Mana o Ngati Rangitihi Trust's mandate. Essentially, the Crown argues that results of the

[24] Wai 2561, #A94 at 8.
[25] Wai 2561, #3.3.1 at 1.

mandate vote are *'so similar'* that it must follow that there is support for the NTB and that support it believes is significant.

41. The decision of the Deputy Chairperson to grant urgency in relation to the Ngatiwai Deed of Mandate indicates that the issues and level of prejudice are distinguishable. Judge Savage in that decision stated that,

> *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.*
>
> …
>
> *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."*[26]

42. The statements above follow what was established in the Wai 2490 Ngapuhi Mandate Inquiry report in which the Patuharakeke named claim WAI 2489 was included. It was stated in that report that,

> *As we explain, hapu are the fundamental units of political organisation within Ngapuhi. The strength of Ngapuhi itself is embedded in its many constituent hapu. Within Ngapuhi, the rangatiratanga of the hapu has always been respected and Ngapuhi has only ever acted in concert with the agreement of the hapu. In the Ngapuhi context, therefore, the Treaty principle of partnership requires that the Crown has a primary duty to*

[26] Wai 2561, #2.5.8 at 56-57.

protect actively the right of hapu to determine how and by whom the settlement of their historical claims will be negotiated".[27]

43. While the Crown has attempted to distinguish the issues in the Wai 2490 inquiry, it is well established now that Patuharakeke is a composite hapu of at least Ngapuhi, Ngatiwai and Ngati Whatua. Based on the above explanation of the Wai 2490 Tribunal it must then follow that the rangatiratanga of Patuharakeke cannot be recognised as existing in isolation in relation to one iwi and simply wane in relation to its affiliations to other iwi.

44. Hapu rangatiratanga must be recognised as being inherent and constant and therefore the Crown's primary duty to actively protect the right of hapu to determine how and by whom the settlement of their historical claims will be negotiated must be exercised towards Patuharakeke and other hapu. To that extent, the Crown's reliance on a mandate vote that diminishes the hapu voice and therefore hapu rangtiratanga cannot be substantiated. There was no ability within the mandate vote to determine support or consent from hapu.

DIMINISHING THE OPPOSITION

45. The evidence Ms Owen and Ms Warbrick on behalf of the Office of Treaty Settlements (**"OTS"**) and Te Puni Kokiri (**"TPK"**) provides another example of how the Crown dealt with the level of opposition to the mandate as demonstrated by the submission process.[28] Documents filed setting out the Crown's record of advice by TPK to the Minister for Maori Development on the NTB DOM set out the following,

[27] Waitangi Tribunal *The Ngapuhi Mandate Inquiry Report*, (Wai 2490, 2015) at x.
[28] Wai 2561, #A131.

Minister Flavell feels that on the face of it, the paper shows considerable opposition to the deed of mandate, given the number of submissions made in opposition.

Minister Flavell would like the paper to be clear that the voting process for the Ngatiwai Trust Board is the most important factor to consider in determining whether to recognise the mandate of the Ngatiwai Trust Board.

In terms of the public submissions, can you please annex that information, so that it is not in the main brief, or at least separate it away from the voting information…[29]

46. It is of great concern that at a Ministerial level, the Crown is actively seeking to obscure fundamental information in a way that diminishes its significance and reflects a completely different perspective on the level of support and consent to the NTB DOM. Dr Gudex in evidence sets out,

> *Clearly, there was an awareness of the 'considerable opposition' to the mandate, not dissimilar to the OTS Memorandum between officials as an 'unprecedented' amount of opposition to the mandate. However, both Minister Flavell and Minister Finlayson through their offices chose to divert attention away from the level of opposition shown in the submission process in order to provide an artificial basis to sign off and recognise the Ngatiwai Deed of Mandate.*[30]

47. The amendments made by the Ministers were a deliberate attempt to downplay the level of opposition to the mandate as highlighted by the

[29] Wai 2561, #A128 at 22.
[30] Wai 2561, #A133 at 3.

submissions elevating the individual mandate vote. Rather than opting to 'investigate "fundamental" issues with the submissions, as clearly acknowledged by the Minister as being present, the Minister chose to sign off on the NTB recognition of mandate paper. Again we submit that this behaviour and attitude is reflective of the Crown's overall approach to Treaty Settlements being 'settlement at any cost.'

AN UNDERLYING LACK OF EXPERIENCE

48. It has been evident throughout this inquiry that there is considerable lack of experience in key positions in the OTS and the NTB. The high level of turnover within OTS has meant that policy is carelessly applied and the depth of knowledge and understanding required to ensure at the very least Treaty compliance, is negligible. This was an issue identified in the TMSP Inquiry where it states,

> *"We look to methodology. For instance, did the evidence show that these staff members, although junior, were operating, in an environment where they were guided and supported? Were there well-developed understandings within the Office about the principles to be applied where, for example, there were differing opinions of historians or other commentators about customary occupation? Were those understandings recorded anywhere? We saw no evidence of it.* [31]

49. There are several instances on the record that highlights the lack of experience and knowledge in relation the NTB DOM, examples include:

[31] Waitangi Tribunal *Tamaki Makaurau Settlement Process Report*, (Wai 1362, 2007) at 50.

49.1. Ms Owens evidence outlining that she only 'took over' managing the Settlement Development Team (**"SDT"**) in March 2015[32] (approximately 7 months prior to the Crown's recognition of the NTB DOM);

49.2. Ms Owen's further admission that her evidence up and until she took over the role managing the SDT is provided on the basis of a reading of the file as opposed to first-hand knowledge[33];

49.3. In cross-examination of Ms Owen an exchange with Mr Kahukiwa highlighted the minimal experience that Ms Owen has had with hapu in the North[34];

49.4. The evidence of Ms Tia Warbrick that sets out that her role as Acting Manager of Crown-Iwi, Hapu, Whanau Maori Relations, at Te Puru Kokiri was for a period of three months between July and October 2015.[35]

49.5. The admission by Ms Warbrick in cross-examination in relation to Minister Flavell's lack of experience in mandating processes report that,

> *"I definitely think that was the case at that point. At that point in time he'd been the Minister for a short period of time, 6 months). There had been a relatively small number of mandating processes so I think it's fair to say that he was still coming to grips with that process."*[36]

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[32] Wai 2561, #A2, at 1.
[33] Wai 2561, #4.1.1 at 257.
[34] Wai 2561, #4.1.1 at 348.
[35] Wai 2561, #A131, at 1.
[36] Audio of Hearing Week 2, Day Two.

49.6. In relation to the NTB, the Health Check undertaken by the Crown on 30 January 2014 where in assessing the "claimant capability and capacity" it is stated that,

> *"it has become clear that, despite NTB's history and robust structure, there is a lack of experience and knowledge of the settlement process."*[37]

50. It is extremely concerning that both Ms Owen and Ms Warbrick held their respective positions for a short term and appear to have knowledge of the NTB DOM largely based on files, yet they are/were the Managers of their teams of officials of OTS and TPK, who directly provide the advice and information that is relied on by the Ministers in determining whether or not to recognise the mandate.

51. We submit that this illustrates the Crown's lack of care in relation to the NTB DOM and Treaty settlement. For the Crown, it appears to be a case of the NTB settlement merely being a distraction. From the point of view of the claimants they would not be mistaken for thinking that the majority of the Treaty settlement resourcing was to be placed on a Ngapuhi settlement with whoever was left at OTS being diverted onto the Ngatiwai settlement.

FAILURE TO RESPECT THE MANA AND RANGATIRATANGA OF THE PTB

52. As a consequence of the Crown's flawed Treaty Settlement policies Patuharakeke have been trapped in a structure and process that has failed to respect or take account of the rangatiratanga of Patuharakeke. Patuharakeke have made clear throughout the inquiry

[37] Wai 2561, #A106 at 4.

that the structures of Patuharakeke are credible and robust for the purpose of representing the hapu. There has been no evidence produced by the Crown or NTB that gives any basis for questioning the robustness of the Patuharakeke mandate. It is however, concerning that the Crown[38] and NTB[39] suggest that the NTB mandate is more robust because it has followed the inherently flawed Crown process and policy. We submit, it demonstrates NTB's position of achieving a settlement at any cost.

53. The decision of Patuharakeke to hold its mandate in relation to its historical Treaty claims have not been acknowledged or respected by the Crown or NTB. Ms McPherson refers to the Patuharakeke Position Paper dated 7 November 2011 in her evidence,[40] it provides a clear indication as to the basis on which the PTB bases its decision making in relation to its hapu and particularly in relation to Treaty settlement issues.

54. It is submitted that the way in which Patuharakeke choses to obtain its mandate and how it chooses to maintain it in the future is for Patuharakeke to determine. One thing is certain, Patuharakeke will continue to demand that the mandating and Treaty settlement process that it engages in, is one that upholds the mana and tikanga of Patuharakeke. This position is made clear in the evidence Ms Pitman where she states,

> *For the NTB to have achieved the mandate from the Crown to settle our claims, it is my opinion that there would have had to be an overt act marking this event and evidenced in correspondence. PTB have consistently advised in writing and in person that we hold our own*

[38] Wai 2561, #3.3.1.
[39] Wai 2561, #3.4.14.
[40] Wai 2561, #A28 at 2.

mandate. In terms of providing a legal definition it is a matter of hapu cultural and intellectual property and the duties derived from that. It is a matter of our mana and rangatiratanga as a hapu to represent ourselves and as the most connected to our tupuna who had commenced this journey for us previously and since time immemoriam. We do not have the authority to give away that mana. Therefore, there could not be any other body on this earth who has this same level of duty of care of our matauranga about our affairs and experiences. It is a duty we take seriously.

In a practical sense, we are the only body that holds the information and research that we conducted ourselves and paid for ourselves through years of researching, hui and wananga and it is our absolute duty to hold and present our historical korero of our tupuna. It is a cultural fiction to presume that any other body or organisation could hold this information or mana other than Patuharakeke. On behalf of Patuharakeke, PTB holds such information with the support of our taumata, our Kaumatua and it holds that responsibility with due care, due responsibility and due respect on their behalf. Clearly, relinquishing our mandate would require some very overt and transparent actions as well as rituals.

It is disturbing therefore to be told by the Crown and by an organisation that does not have this body of knowledge, the requisite level of hapu representation that we are expected to have relinquished all care, duty and responsibility of it. In a contemporary sense, it is the same scenario as the false notion that our tupuna gave away their rangatiratanga – their mana – when they signed Te Tiriti o Waitangi. It was a cultural, political fiction. With respect, that is the case here too for Patuharakeke.[41]

55. PTB has endeavoured to always carry out due process in all of its decision making. PTB has been clear in its message and worked hard to fulfil its obligations to the hapu on a voluntary basis. The Crown has not assisted in any way. It is therefore extremely disrespectful of

[41] Wai 2561, #A10(b) at 17-18.

the Crown to now question PTB's mandate and decision to want to withdraw from the mandate of the NTB. The Crown has failed engage with Patuharakeke in a meaningful way. Patuharakeke have met with OTS on only one occasion in relation to the NTB DOM, that being the meeting held in Whangarei on 8 April 2015. The Crown's depth of understanding in relation to Patuharakeke and their internal mechanisms is therefore limited.

EXTENT OF SUPPORT AND CONSENT

56. The second part of the question in Issue 1 of the SOI seeks to ascertain the extent of support or consent shown, if any.

57. The Crown has argued that on 3 and 4 September 2014 four submissions were received from individuals within Patuharakeke in support of the NTB mandate.[42] One of the individuals named is Mr Ngawaka Grant Pirihi who at the time was the Marae Trustee representative on the NTB.

58. Clearly, the submission of Mr Pirihi can no longer be regarded as being valid. Ms McPherson has admitted to inserting further details onto Mr Pirhi's submission and has accepted that those insertions likely elevated the submission of Mr Pirihi to more than what was intended as being made by an individual. These actions placed Mr Pirihi in a precarious position within his whanau and hapu, with much uncertainty as to what it meant for Patuharakeke. Extensive submissions have been made on this issue by counsel and we maintain the position taken there.

[42] Wai 2561, #A26 at 4.

59. Decision-making regarding Treaty settlement processes for Patuharakeke have been by hui-a-iwi, consultation with kaumatua and discussion with and support from all three formal governance entities within Patuharakeke (namely the PTB, the Takahiwai Marae Committee and the Takahiwai Marae Trustees). By placing such weight on the four individual submissions made in support of the NTB DOM the Crown have demonstrated its clear lack of respect and understanding of hapu tikanga.

PATUHARAKEKE AND TAKAHIWAI MARAE

SOI 8: What is the relationship between the claimants hapu that are listed in the NTB deed of mandate and the marae listed in section 14 of the NTB deed of mandate?

60. Takahiwai Marae is the primary marae of Patuharakeke. Mr Pitman has stated that,

> *"Our marae complex is a hive of activity. Our Kohanga Reo, wharekai and wharehui are constantly busy with the mahi of the day. The facilities themselves cater for a wide range of activity. The place lives and breathes. Our whare hui is in constant use by Patuharakeke for manaaki manuhiri, tangihana, kawe mate and waananga. The marae is used to host marriages of Patuharakeke people and memorial services on ANZAC day……I would therefore describe the relationship between Patuharakeke as a people and our marae as functional and reciprocal. We care for the place and it cares for us. In terms of pepeha, whakapapa and Patuharakeketanga our marae is the physical space that spiritually calibrates Patuharakeke."*[43]

61. The Takahiwai marae reservation is vested in the Takahiwai Marae Trustees (**"TMT"**) who discharge the duties associated with that

[43] Wai 2561, #A77 at 5.

trusteeship on behalf of Patuharakeke. The Takahiwai Marae Committee (**"TMC"**) is an active arm of the marae trustees that care for the day-to-day running of the marae facilities and associated administration on behalf of Patuharakeke.

62. The NTB Trust Deed provides the Marae Chairperson with the power of veto in the appointment of a marae representative onto the NTB. In the case of Patuharakeke, the Chairperson of the TMC is Mr Bronwyn Mackie.

HAPU REPRESENTATION

SOI 3b: Does the NTB mandate provide for representation of hapu?

63. It is counsel's submission that the NTB DOM does not provide for representation of hapu for the following reasons:

63.1. The NTB DOM provides for marae representatives only who were not placed in that position with a purpose of progressing their respective hapu's Treaty claims;

63.2. The implication of the provisions in the NTB Trust Deed are that once those marae representatives, for all intents and purposes they become NTB Trustees and no longer marae representatives;

63.3. Two additional positions on the NTB's Treaty Claims Committee (**"TCC"**), which are yet to be filled, does not amount to adequate hapu representation; and

63.4. The hapu advisory role provided for in the NTB DOM does not amount to adequate hapu representation.

THE MARAE REPRESENTATIVE

64. The Crown has argued that *"because the NTB is comprised of 14 marae representatives, OTS considers that hapu are effectively represented on the NTB."*[44] The claimants find it unconscionable that the Crown can consider that the marae representative is effective representation for hapu on the NTB.

65. We submit that the purpose of the marae representative on the NTB has never included the settlement of Treaty claims. It is the evidence of the TMC Chairperson Mr Mackie that,

> *As the Chairman of the TMC, there has never been any mandate approved by our committee to any organisation including NTB to represent Patuharakeke's interests in anything especially to Waitangi treaty settlements. This could not be achieved by our committee alone as we work closely with all our other committees. If things concern more than the operations of our committee, we pass them onwards to the other committees: For issues around the buildings we refer to the Marae Trustees who are the legal owners of our marae; or the PTB who deal with our legal, political, social, environmental, educational issues on our behalf. The TMC, as well as the other Patuharakeke committees, also have Kaumatua and a Taumata with whom we consult.*

[44] Wai 2561, #A91 at 16.

I am clear that the PTB has been mandated and charged with pursuing the settlement of Patuharakeke treaty claims on behalf of Patuharakeke hapu.

Patuharakeke are clear of what and how we are represented in all our different committees and it is concerning that others outside of our hapu do not and are trying to fashion it as something else. However, and most importantly, we know what we are doing concerning ourselves.

To conclude and to be clear to both NTB and the Crown, PTB has been in charge of our Waitangi Tribunal Claims and have been charged with representing our interests on behalf of Patuharakeke in settling our claims."[45]

66. This is supported by the evidence of previous Takahiwai Marae representative Mr Ngawaka Haswell Grant Pirihi who has said,

"To my knowledge and understanding Patuharakeke Te Iwi Trust Board (PTB) hold responsibility for our Waitangi Tribunal Claims and have been charged with representing our interests on behalf of Patuharakeke."[46]

67. Marae representatives appear to be considered as "hapu representatives" by the Crown by default. Much in the same way that a portion of Patuharakeke's composite whakapapa has meant that their historical claims will be settled by the NTB despite their very vocal and consistent opposition.

68. It is well known to the Tribunal that as far as Patuharakeke are concerned they have not had a marae representative on the NTB since 10 March 2016. Mr Mackie on behalf of the TMC vacated this

[45] Wai 2561, #A41 at 3.
[46] Wai 2561, #A40 at 3.

position due to the actions of the TCC Manager Tania McPherson who amended Mr Pirihi's submission in support of the DOM.

69. Mr Edmonds during cross-examination by our office in Hearing Week 1 conceded that once the marae representative is appointed as a Trustee on the NTB they, for all intents and purposes, become a Trustee with an overriding obligation to all beneficiaries of Ngatiwai, not just those who affiliate to their respective marae.[47] They are no longer representatives of their marae and they are bound by the NTB's Trust Deed.

70. Accordingly, it is counsels submission that the Crown's argument that hapu are effectively represented on the NTB due to the 14 marae representatives is redundant: Patuharakeke does not have a marae representative on the NTB; the purpose of that position has never been for Treaty settlements; and that person effectively becomes a NTB Trustee as opposed to a marae representative upon appointment.

71. Counsel further submit that is it demonstrative of the lack of forethought of both the Crown and the NTB that they are focussed solely on the marae representative as embodying the voice of the hapu.

INADEQUATE PROVISION FOR HAPU REPRESENTATION IN THE DEED OF MANDATE

72. The Crown has argued that there is a place for hapu within the NTB DOM as clause 26 of the NTB DOM provides a mechanism for all

[47] Wai 2561, #4.1.1 at 424.

Ngatiwai hapu and marae to provide advice to the NTB on their involvement in the negotiations and settlement processes.[48]

73. Counsel submit that this *advisory* role does not constitute hapu representation. This provision is tokenistic in nature, is yet to be implemented and the NTB have failed to establish how that will actually work in practice.

74. Further, the Crown has relied on clause 22 of the NTB DOM and the availability of two new positions on the TCC[49]. The evidence of Dr Guy Gudex on this matter is as follows,

> *"The Crown has attempted to justify why there has not been provision for hapu representatives on the NTB TCC. The conclusion that they arrived at with the NTB was that as there are 12 Ngatiwai hapu adding 12 representatives to the TCC would create logistical issues in that it would make the committee too large and could impact on the committee's effectiveness. They rely on the fact that there are two proposed positions on the TCC to be filled by people who demonstrate skills, experience and support from claimants, hapu or rangatahi. That decision making, in my view, is just another example of the Crown trampling on the mana and rangatiratanga of hapu such as Patuharakeke in order to progress their pursuit of a Ngatiwai settlement. That is not active protection."*[50]

75. Counsel submit that the Crown has failed to provide sufficient evidence to support their proposition that the NTB mandate provides for the representation of hapu. There is no representation for hapu on the NTB.

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[48] Wai 2561, #A91 at 15.
[49] Wai 2561, #A91 at 12.
[50] Wai 2561, #106 at 3-4.

76. The Crown have chosen to recognise the mandate of a structure that is inadequate for Treaty settlement purposes. This is due to the Crown's desire to achieve a Ngatiwai settlement at any cost - to their advantage, they have the NTB as a willing accomplice.

ALTERNATIVE STRUCTURES

77. The Crown has stated that *"The Wai 745/1308 claimants have asked the Crown to enter into negotiations for a separate Patuharakeke settlement. The Crown does not wish to do so."*[51]

78. Patuharakeke's opposition to the NTB DOM is not purely on the basis that they seek direct negotiations and nothing less will suffice, but rather that they seek the *right* settlement and that they are afforded the right to decide what settlement is best for them.

79. The Crown have proceeded to recognise the NTB's defunct DOM not only without consideration of the rangatiratanga of the hapu who oppose their inclusion but also without any regard for alternative structures that those hapu such as Patuharakeke do oppose.

80. Not only do Patuharakeke have their own governance structure in the form of the Patuharakeke Te Iwi Trust Board, the Takahiwai Marae Trustees and the Takahiwai Marae Committee but they have also been actively involved in the Whangarei Terenga Paraoa Assembly. Dr Guy Gudex in his evidence stated that,

[51] Wai 2561, #3.3.1 at 11-12.

"Patuharakeke is also supportive of a framework that better reflects a hapu structure within the Whangarei area and has been active in the formation of the Whangarei Terenga Paraoa Assembly."[52]

81. The Whangarei Terenga Paraoa Assembly was established by members of various Whangarei hapu for the purpose of being an alternative to other mandated entities and the preference of those hapu involved for a regional based mandate underpinned it. It is the claimants view that the Whangarei Terenga Paraoa Assembly better reflects and upholds the rangatiratanga of those hapu involved. Unfortunately, due to timing constraints and the lack of resourcing the process of establishing this alternative structure further has been halted.

82. The Waitangi Tribunal in the Ngapuhi Mandate Inquiry report recommended that *"the Crown must support hapu that choose to withdraw from the Tuhoronuku IMA in their efforts to form alternative large natural groups."*[53]

83. It is our submission that the Crown, as a Treaty partner and in the interests of hapu, should at least turn their mind to the prospect of a regional settlement which could see greater hapu support and consent than the more convenient single mandated entities that the Crown prefers to deal with. Instead, the Crown has preferred that hapu, such as Patuharakeke, cede their rangatiratanga to the NTB despite their unwavering opposition.

[52] Wai 2561, #A9(b) at 7.

[53] Waitangi Tribunal *The Ngapuhi Mandate Inquiry Report*, (Wai 2490, 2015) at xi.

ALTERNATIVE REMEDIES

SOI 4: Are the remedies under the NTB Deed of Mandate workable?

84. The Crown has argued that there are at least four alternative remedies that are available to the claimants:

84.1. The claimants can participate in the various structures put in place for Ngātiwai to assist and advise the NTB in the negotiation process;

84.2. There is a dispute resolution process in the DOM if disagreements arise;

84.3. The claimants may collect 100 signatures and apply for mandate withdrawal; and

84.4. The claimants will be able to vote to ratify or reject any post-settlement governance entity and settlement which is proposed. [54]

85. It is our submission that the above measures proposed by the Crown as being "alternative remedies" are in no way workable and provide no security or relief to the claimants. We seek to particularly address the withdrawal mechanism as it does not provide a workable process for what the claimants seek to achieve, that is to withdraw from the NTB DOM.

[54] Wai 2561, #3.1.3 at 2.

WITHDRAWAL MECHANISM

86. It is the position of the claimants that the withdrawal mechanism is unworkable and is unduly onerous. The process for mandate removal is set out at clause 57 of the NTB DOM and the requirements for invoking that process include:

86.1. A letter, co-signed by at least 100 adult registered members on the NTB register, must be written by the claimant community representatives (**"representatives"**) to the Chair of the mandated body (**"Chair"**) identifying the nature and extent of their concerns and also seeking a meeting within a reasonable time frame to discuss these matters;

86.2. If a meeting between the representatives and the Chair does not resolve the concerns raised, 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:

86.2.1. a public notice/pānui must outline the kaupapa of the notified hui;

86.2.2. 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 the rohe or Area of Interest;

86.2.3. a consistent presentation must outline the background to the concerns and the parties involved;

86.2.4. a detailed paper must be provided (similar to this one) outlining any alternative proposals or amendments;

86.2.5. the resolution(s) to put to 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

86.2.6. an observer from Te Puni Kōkiri must be invited to observe and record proceedings.

86.3. Once hui are completed and the outcome has been determined, the representatives must inform the OTS of the result by way of letter and discuss the next steps for settlement negotiations. This may involve some changes to the mandated body or another process to be undertaken as agreed with officials.

87. Counsel submit that the withdrawal mechanism is far from workable in that it is a costly process which is unfair and unduly onerous on those seeking to invoke it. In attempting to justify the withdrawal mechanism, the NTB have relied on the argument that the process is appropriately rigorous as it mirrors the steps taken by the NTB to obtain the mandate.[55]

[55] Wai 2561, #3.1.30 at 19.

88. Counsel dispute this argument as the NTB had the advantage of receiving pre-mandate funding and exceptional circumstances funding from the Crown to assist with this process, as evidenced by Ani Pitman in her second affidavit[56]. In fact, the level of funding was so high that OTS officials had recommended at one point that the Minister refuse to approve further pre-mandate funding to the NTB as *"the amount they have received is exceptional."*[57]

89. There is, however, no provision by the Crown to fund the claimant's pursuit of carrying out the withdrawal process. This is confirmed in a letter from the OTS to the PTB which stated that *"no funding has been approved for withdrawal from a deed of mandate."*[58] The PTB is a self-funded roopu who undertake a significant and impressive amount of work, as set out in the evidence of Dr Guy Gudex[59], on a voluntary basis for the benefit of Patuharakeke hapu.

90. Judge Savage's comments on the withdrawal mechanism in his decision are as follows,

> *"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*

[56] Wai 2561, #A39 at 17-18.
[57] Wai 2561, #A39 at 17.
[58] Wai 2561, #A76 at 9.
[59] Wai 2561, #106 at 7-10.

series of publicly 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."[60]

91. Counsel submit that not only is the process unworkable but it is inappropriate to enforce on hapu who have been clear and consistent from the outset in that they do not support or consent to their inclusion in the mandate. During the Tribunal questioning of Kristan MacDonald, Deputy Chair of the NTB, Dr Angela Ballara asked the question *"some of these hapu have said they don't want to be a part of it, shouldn't you release them?"* to which Mr MacDonald replied *"Um, I guess so."*[61] Patuharakeke agree, however this is not reflected in the NTB DOM.

92. Counsel further submit that the outcome of this process as provided is not definitive. Should the process as followed by the claimant community after following such an onerous process the claimant community are to inform the OTS officials and the decision is left in their hands. There is no guarantee that the mandate will be withdrawn and given the events to date and the issues underpinning this urgency, there is an inherent mistrust in the Crown by the claimants to protect their rights as guaranteed under the Treaty.

93. As previously highlighted, the Tribunal in the Ngapuhi Mandate Inquiry recommended that the Crown must support hapu who choose to withdraw from the mandate. To the contrary, the DOM as recognised by the Crown, provides a mechanism for withdrawal of the mandate in its entirety only and there is no provision for hapu

[60] Wai 2561, #2.5.8 at 59-60.
[61] Audio of Hearing Week 2, Day One.

specific withdrawal. This is recognised by the NTB who through their counsel have conceded that the withdrawal mechanism *"is not intended to provide a mechanism for hapu or other groups within that community to withdraw themselves from that collective."*[62]

94. This is not a remedy for hapu. This mechanism is not only unworkable but it fails to recognise the rangatiratanga of those hapu who have been captured by the mandate and it fails to reflect the will of those hapu.

THE LEVEL OF PREJUDICE

SOI 5: Are the claimants prejudicially affected, or likely to be prejudicially affected, by the Crown's recognition of the NTB deed of mandate? If so, to what extent?

95. The Crown has absolutely failed Patuharakeke. It has failed to recognise the mana whenua and autonomy that they have consistently exercised over their rohe and affairs and they have blatantly ignored Patuharakeke with complete disregard for their hapu rangatiratanga. It is our submission that the claimants certainly are, and are likely to continue to be, prejudicially affected by the Crown's recognition of the NTB DOM.

96. As it currently stands, Patuharakeke are at risk of having their historical claims settled by three LNGs. The Crown has erroneously used Patuharakeke's composite whakapapa to justify their inclusion in the mandates of three mandated entities; the NTB, the Tuhoronuku Independent Mandated Authority and Te Runanga o Ngati Whatua.

[62] Wai 2561, #3.3.7 at 15.

97. The Crown and the NTB have relied on the Accord Agreement[63] between those three LNG's in an attempt to assure the claimants that their overlapping interests will be dealt with appropriately. However, Mr MacDonald agreed during cross-examination that the Accord does not provide shared hapu, such as Patuharakeke, with firm security that their overlapping interests will be dealt with adequately for the following reasons:

97.1. The Accord is not legally binding;

97.2. It is merely an agreement to agree on a process to reach agreement;

97.3. There is no set process provided for reaching agreement; and

97.4. There is no dispute resolution process in place should the parties be unable to reach agreement.

98. Counsel also view it as important to highlight that despite clause 1 saying that this is an agreement between entities that have a *"Crown recognised mandate to negotiate a settlement on behalf of their respective iwi",* the document was signed prematurely by the NTB Chair Mr Edmonds on 17 March 2015. The NTB's DOM was recognised by the Crown on 21 October 2015, approximately seven months after the signing of the Accord by the NTB.

99. The NTB DOM, as per the Crown's instructions, provides that the NTB will only negotiate the settlement of historical claims of those hapu shared with other LNG's will only be settled to the extent that

[63] Wai 2561, #A28(a) at Exhibit B.

they are descended from Ngatiwai tupuna[64]. The DOM goes on to say that the claimant definition will be further developed to identify the extent to which the claims of each shared hapu will be settled through a Ngatiwai settlement[65]. It was confirmed by Mr MacDonald during cross-examination by our office that the NTB had attempted to establish to what extent Patuharakeke descend from a Ngatiwai tupuna, but that this hasn't yet occurred.

100. During cross-examination by Ms Castle, Mr MacDonald agreed that as a composite hapu, not all members of Patuharakeke would descend from a Ngatiwai tupuna, but that all members of Patuharakeke, are Patuharakeke.

101. Patuharakeke, despite being an autonomous hapu that has progressed their own Treaty claims for the previous 18 years, face having those claims settled by three mandated entities, including the NTB. Those claims will be fully and finally settled. The opportunity to make an application for the resumption of Crown owned lands within their rohe under the Treaty of Waitangi Act 1975, should the Te Paparahi o Te Raki Tribunal find that Patuharakeke have well-founded claims, will be lost. All opportunities to progress their claims in the way that they wish to in accordance with their hapu rangatiratanga will be lost.

REMEDIES SOUGHT

SOI 9: If the Tribunal concludes that any of the claims are well-founded, what, if any, practical recommendations should the Tribunal make?

[64] Ngatiwai Trust Board Deed of Mandate as amended 27 May 2016 at 11-12.
[65] Ngatiwai Trust Board Deed of Mandate as amended 27 May 2016 at 12.

102. The Tribunal in the Ngapuhi Mandate Inquiry did not recommend that the mandate be revoked and it was stated in that report that,

> *"We have not recommended that the Crown withdraw its recognition of the mandate and re-run the mandating process, as we do not consider such a recommendation would be either practical or constructive. There is broad support for negotiations towards settlement within Ngāpuhi. While the flaws we have identified in the Tūhoronuku IMA are fundamental, they can be remedied."*[66]

103. Counsel submit that the Crown and the NTB have failed to provide evidence to show that there is broad support for negotiations towards a settlement with Ngatiwai. Although the results of the vote on NTB's mandate were 82.38% in support, it was only a mere 28.2% of those adult registered members of Ngatiwai who participated.

104. The Crown has attempted to argue that this level of participation is comparable to other mandate participation rates. Counsel submit that the low level of participation across the board for mandating processes is an issue that should be addressed by the Crown, not used to justify ongoing low participation rates. Counsel submit that low participation in the vote could be seen as being indicative of an unwillingness of those in opposition to the mandate to vote on it and rather a desire to set out their reasoned opposition to the mandate through the submissions process.

105. This is demonstrated in the significant level of submissions made in opposition to the NTB's DOM - 144 submissions (one of which was a petition with 119 signatures) of the total 269 submissions received. It has been acknowledged by Crown officials in documents obtained

[66] Waitangi Tribunal *The Ngapuhi Mandate Inquiry Report*, (Wai 2490, 2015) at xi.

under the Official Information Act 1982 that *"officials consider the number of submissions received is unprecedented for an iwi of Ngatiwai's size"* and that OTS hd previously advised the NTB that *"the level of opposition is of high concern to us."*[67]

106. Counsel further submit that the fundamental flaws in the NTB DOM cannot be remedied. This is a mandate based on Crown error, manipulation of whakapapa and a complete disregard for hapu rangatiratanga. Revocation of this mandate is imperative to ensure that the historical grievances of Patuharakeke that have been progressed solely by the Patuharakeke Te Iwi Trust Board since 1997 are not fully and finally settled without their consent and by a group that they do not support.

107. Accordingly, the claimants seek the following relief:

107.1. A recommendation that the Crown, as a matter of urgency, cease negotiations with the NTB and revoke its recognition of the NTB DOM;

107.2. A recommendation that the Crown begins a process of engaging in a meaningful way with hapu in order to settle their claims;

107.3. A recommendation that the interests of Patuharakeke and its respective Wai 745 and 1308 claims be withdrawn from the NTB DOM;

[67] Wai 2561, #A39 at 14.

107.4. A finding that the Crown, in recognising the NTB DOM, acted in breach of the principles of the Treaty of Waitangi; and

107.5. A recommendation that the Crown amend its Treaty Settlement Policy, including the LNG Policy, to ensure that it is consistent with the principles of Te Tiriti o Waitangi and the underlying tikanga of the hapu that are included in Treaty Settlements.

108. We wish to conclude with the remarks of Judge Wainwright in the TMSP Inquiry Report,

> *"….we thought there was a lack of appreciation that a process is not an end in itself : it is something that happens to people. At root, processes are about relationships. In the Treaty context, as we have said, negotiating settlements is about running a set of interactions that bear on rangatiratanga. That is why the Office of Treaty Settlements officials must understand the groups' whanaungatanga, and protect it."*[68]

Dated at Auckland this 23rd day of December 2016.

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Kelly Dixon/Alisha Castle

Counsel for Patuharakeke

[68] Waitangi Tribunal *Tamaki Makaurau Settlement Process Report*, (Wai 1362, 2007) at 10.