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that a settlement which marginalises many hapū is unlikely to be final and durable and will obstruct the restoration of their relationship with the Crown. There is also the risk of further division and dissension within Ngāpuhi, further damage to hapū mana, leadership, and ability to self-manage, and remedies not being allocated, or being accessible, to the right groups.

5.3.2 Our recommendations

The Tribunal has grappled with the complexity of the situation presented in this inquiry. Ngāpuhi is New Zealand's largest and most dispersed iwi and also one of its poorest. That there is a desire for settlement of historical grievances as well as an urgent need is generally agreed. We have found that the role of hapū is fundamental to Ngāpuhi tikanga, and hapū must play a decisive role in determining how and by whom the settlement of their historical Treaty claims will be negotiated. We have concluded that the Crown's decision to recognise the Tūhoronuku IMA is in breach of its Treaty duty of active protection because that entity, as it is presently structured, is incapable of properly representing the interests and aspirations of hapū in negotiations with the Crown. We find the claims to be well-founded.

Having reached this conclusion, the Tribunal has several options as to the recommendations we could make. We could recommend that the Crown withdraw its recognition of the mandate, and that the mandating process be re-run. Although this was urged on us by some claimants, we consider that this would be neither a practical nor a constructive outcome. We recognise there is broad support for settlement within Ngāpuhi, and momentum towards settlement should not be stopped dead in its tracks. Although we consider the flaws we have identified in the Tūhoronuku IMA structure to be fundamental, we also consider they can be remedied without restarting the entire mandating process. Once remedied, the Tūhoronuku IMA will be capable of leading a negotiation on behalf of hapū. There are seven key remedial actions that need to take place.

First, the Crown must halt its negotiations with the Tūhoronuku IMA to give Ngāpuhi necessary breathing space to work through the issues that have been identified.

Secondly, hapū must be able to determine with their members whether they wish to be represented by the Tūhoronuku IMA.

Thirdly, those hapū that wish to be represented by the Tūhoronuku IMA must be able to review and confirm or otherwise the selection of their hapū kaikōrero and hapū representatives, so that each hapū kaikōrero has the support of their hapū.

Fourthly, Ngāpuhi hapū should have further discussions on the appropriate level of hapū representation on the board of the Tūhoronuku IMA.

Fifthly, the Crown should require as a condition of continued mandate recognition that a clear majority of hapū kaikōrero remain involved in the Tūhoronuku IMA.

Sixthly, there must be a workable withdrawal mechanism for hapū who do not wish to continue to be represented by the Tūhoronuku IMA.

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Finally, if they exercise their choice to withdraw, hapū must be given the opportunity and support to form their own large natural groups.

We have weighed this approach against likely prejudice to those individuals and hapū who presently support the Tūhoronuku IMA and want the current negotiations to continue without pause. We acknowledge that the process we recommend will take time and could potentially delay settlement. We also acknowledge there is a risk that some groups will choose to leave the mandated structure, but we consider it is crucial that the Crown and Ngāpuhi take the opportunity now to resolve the fundamental issues we have identified, before negotiations proceed further. Leaving those issues unresolved will continue to have a corrosive effect on relationships both within Ngāpuhi and with the Crown. Hapū who are included in the mandate must want to be there and not feel they have been coerced or trapped. While the Crown submitted that a withdrawal mechanism would undermine the existing mandate, it also assured us there is significant support for the Tūhoronuku IMA among hapū. If this is indeed the case, then there should not be many groups who might choose to withdraw from the mandate. But enabling the mandate to be tested in this way may well encourage more hapū to participate actively and have input into the negotiations process, resulting in a stronger mandate and ultimately a settlement which is more likely to be robust, fair and enduring.

We recommend that the Crown's negotiations with the Tūhoronuku IMA must now be put on hold until such time as the Crown can be satisfied of the following matters, which we discuss below:

- that Ngāpuhi hapū have been given the opportunity to discuss and confirm or otherwise whether they wish to be represented by the Tūhoronuku IMA in the negotiation of their historical Treaty claims;
- that hapū who wish to be represented by the Tūhoronuku IMA have been given the opportunity to confirm or otherwise their hapū kaikōrero and the hapū representatives on the Tūhoronuku IMA board;
- that Ngāpuhi hapū have been given the opportunity to discuss and confirm or otherwise whether they consider there is an appropriate level of hapū representation on the Tūhoronuku IMA Board;
- that the Tūhoronuku IMA deed of mandate has been amended to include a workable withdrawal mechanism for any hapū which does not wish to continue to be represented by the Tūhoronuku IMA; and
- in addition, the Crown should require as a condition of continued mandate recognition that a clear majority of hapū kaikōrero remain involved in the Tūhoronuku IMA.

Finally, we recommend that the Crown support hapū which withdraw from the Tūhoronuku IMA to enter into negotiations with the Crown to settle their Treaty claims as soon as possible and preferably at the same time as other Ngāpuhi negotiations. This will involve the Crown supporting and encouraging hapū, through the provision of information and financial support, to form into large natural group(s), and to obtain mandate(s) from their members.

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5.3.3 A way forward

In making these recommendations we recognise that the active protection of hapū rangatiratanga in 2015 requires agreement on how hapū members, wherever they may be located, should participate in discussions and decisions on matters of vital importance to the hapū. We considered whether we should give further guidance about what should be entailed in giving hapū the opportunity to discuss and confirm or otherwise the issues identified above, but believe that is a matter for hapū and the Crown to agree. However, the matters we have identified will necessarily require support from the Crown (whether financial or through the provision of facilities, information and other means) to assist hapū to engage with their members at hui a hapū at home marae, and also remotely through use of video conferencing or other live technology or social media, or even hui a hapū outside the rohe where appropriate. We recognise that as part of the process of discussion and confirmation or otherwise of the issues we have identified, hapū will want to know from the Crown and the Tūhoronuku IMA what is proposed regarding confirmation of representation and withdrawal provisions. It is also likely that hapū will want to have a clear view of what is proposed for post-settlement governance. We suggest that discussions on the make-up and structure of the PSGE(s) should begin as early as possible, or at the least be open and transparent, as this is also likely to give hapū further confidence to join the Tūhoronuku IMA.

In relation to our recommendation concerning hapū kaikōrero, we propose that nominations for hapū kaikōrero be decided on home marae and, if more than one nomination is received, that a voting process open to all hapū members, wherever located, be held. We also consider that (following the confirmation process we have recommended) the Crown's continued recognition of the mandate be conditional upon a clear majority of hapū kaikōrero remaining involved in the Tūhoronuku IMA. Our expectation is that a minimum of 65 per cent of the total number of hapū named in the amended deed of mandate would need to continue their support of the Tūhoronuku IMA. This would set a clear threshold to be maintained for a settlement to proceed. It would also recognise that while some hapū may leave, this should not prevent those wanting to remain in the Tūhoronuku IMA from proceeding to a settlement.

Hapū should also have the opportunity to discuss and consider whether the current level of hapū representation on the board of the Tūhoronuku IMA is appropriate to support their settlement aspirations. We acknowledge that the level of representation was increased in the amended deed of mandate but also note that this was a decision made by the Tūhoronuku IMA without seeking the agreement of hapū.

The Crown should also be prepared to 'wind back' the terms of negotiation if further hapū join the Tūhoronuku IMA as a result of the process we have recommended. The Crown told us during the hearing that it could do this, and we agree it should be prepared to, as these hapū may have different views on how negotiations should proceed.

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There were several groups who did not sit comfortably within the scope of the mandate either as Ngāpuhi individuals or as hapū. We refer to Ngā Tauira Tawhito Trust, which represents a group of former pupils of Hato Petera College in a claim involving land belonging to or used by the College, and the Whatitiri Reserves Trust, which claims on behalf of the reserve beneficiaries in relation to the Poroti Springs. Ngā Tauira submitted that as theirs is not essentially a Ngāpuhi claim, it should not be included in the mandate and they should be regarded instead as cross-claimants. We refer to the recent Memorandum-Directions of Chief Judge Wilson Isaac, Presiding Officer in the Veterans Inquiry (Wai 2500). He found that, with regard to claimants whose claims are linked by their shared status as military veterans: 'The non-descent-based claims of individual Māori, whether singly or associated in groups, exist outside the ambit of the settling group, the area of interest and the customary rights as defined by the legislation.'[11] We agree that where the common identifying factor of a claimant group is not whakapapa, their claims are not settled through the Crown policy of settling all historical claims through whakapapa.

We agree with the Wai 2442 Ngā Tauira claimants that their claim cannot be considered to fall within the Tūhoronuku deed of mandate and should not be settled through that process. We suggest that they should be regarded as cross-claimants instead.

The Whatitiri Reserves Trust was an interested party in this inquiry. In essence their submission was the mandating and negotiations process does not provide for groups such as theirs which is a non-hapū entity. They submitted that they are disadvantaged because the Crown does not have a clear and consistent policy or strategy for engaging with the claims of groups such as theirs. Even though they have the support of the hapū from which their beneficiaries are drawn, they are reliant on the goodwill of the Crown to engage with them directly. We agree this is an obvious gap in Crown policy and we suggest that the Crown develop an appropriate policy for inclusion in the Red Book.

5.3.4 Concluding remarks

Many of the witnesses appearing in opposition to the claimants expressed frustration at the possibility of further delay before proceeding to settlement. Yet it is crucial to the ultimate success of the settlement process that the negotiating structure is robust and has the full support of those whom it claims to represent, and whose grievances it intends to put to rest. There is a real danger, if the wairua is not there, if the focus is more on economic stimulus than on healing the injuries of the past, if tikanga is pushed to one side to remove what are perceived as impediments to progress, that the opposite will happen: that further grievances will be caused. The Crown must approach the task of negotiating settlement not only in a timely fashion, but also with a spirit of generosity and, as claimant counsel argued, 'with care, with sympathy, and . . . with humility'.[12] It is clear that, in order for the Treaty relationship to be repaired, hapū must be returned to a position of authority. For this to

11. Wai 2500 ROI, memo 2.5.15, p15
12. Submissions, 3.3.3, p2

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