IN THE WAITANGI TRIBUNAL

OFFICIAL

Wai 2563, Wai 2589, Wai 2590,
Wai 2591, Wai 2592, Wai 2593
Wai 2594, Wai 2595, Wai 2605
Wai 2606, Wai 2609, Wai 2610
Wai 2657

CONCERNING the Treaty of Waitangi Act 1975

AND applications for urgency concerning the Whakatōhea Pre-Settlement Claims Trust Board Deed of Mandate

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DECISION
ON APPLICATIONS FOR AN URGENT HEARING

28 Hōngongoi 2017

Introduction

1. This decision concerns thirteen applications for an urgent Tribunal hearing regarding the Crown's recognition of the Whakatōhea Pre-Settlement Claims Trust Board's (WPSCT) Deed of Mandate to negotiate the settlement of the historical Treaty claims of Te Whakatōhea.

Background

2. The Crown terminated a mid-1990s proposed $40 million comprehensive settlement of Whakatōhea's historical Treaty claims in March 1998, on the basis of a lack of sufficient support for the settlement among members of Te Whakatōhea (Wai 2589, #A1).
3. In August 2003 an interim working party prepared a report setting out a process for re-engaging with the Crown (*Te Ara Tono mō te Raupatu*). This was adopted at a Hui-a-Iwi in August 2007, and a group known as the Whakatōhea Raupatu Working Party was formed to prepare a mandating strategy. However, several hapū withdrew their support from the Party and formed the Tu Ake Whakatōhea Collective (the Collective) in 2010. The Collective was comprised of representatives from Ngāti Ira, Ngāti Ngāhere, Ngāti Rua and Ngāti Patumoana. Between 2011 and 2016, the Collective worked with the Whakatōhea Māori Trust Board (The Trust Board) to hold a series of consultative hui with hapū, marae, the Te Ūpokorehe Treaty Claims Trust, and the Whakatōhea Raupatu Working Party (Working Party) in order to gauge how Te Whakatōhea uri and hapū wished to proceed to settle their historical claims.
4. The Collective eventually proposed that a new entity, to be called the Whakatōhea Pre-Settlement Claims Trust (WPSCT), should be established to seek a mandate from Te Whakatōhea members. A draft mandate strategy was presented to members in November 2014 and a formal mandate strategy was produced in 2015 in consultation with the Crown. A final draft mandate strategy was sent to Te Puni Kōkiri for consideration and submissions in November 2015. The Crown endorsed the mandating strategy in April 2016. Mandating hui were advertised in April 2016. Twelve mandating hui were held in May 2016, and voting on the mandate occurred between 6 May and 3 June 2016. The results of the mandate vote were 91.6% in favour of the mandate. The voter turnout was 23.58% of registered voting members as recorded on the Whakatōhea Māori Trust Board Tribal database (Wai 2589, #3.1.5).[1]
5. The WPSCT Deed of Mandate was recognised by the Crown on 14 December 2016 (Wai 2589, #3.1.1).

The Claims and Applications for Urgency

6. Thirteen statements of claim accompanied by applications for urgency have now been filed with the Tribunal in relation to the WPSCT Deed of Mandate. I have received submissions and evidence from the applicants, the Crown and the WPSCT (which is

[1] The Tribal database records Tribal members who whakapapa to Whakatōhea. It contains the names and details of those who are "registered active adult beneficiaries" and those registered as under the age of 18 and are "recorded under parent" (Wai 2593, #3.1.16).

participating in these proceedings as an interested party) on the issues raised in the applications for urgency.

7. The applicants allege that, in breach of the principles of the Treaty of Waitangi, the Crown has recognised and continues to recognise the mandate of the WPSCT to represent Te Whakatōhea in settlement negotiations with the Crown. Essentially, the applicants do not support the WPSCT's mandate. They have applied for an urgent Tribunal inquiry on the basis that, first, they are likely to suffer significant and irreversible prejudice if the Crown continues to negotiate a settlement of their historical Treaty claims with the WPSCT and second, that there are no alternative remedies available to them.

8. The allegations made by the applicants in respect of the Deed of Mandate can be distilled into four key issues. They contend that:

    a) The Crown's mandating process was neither robust nor transparent and was procedurally flawed;

    b) The WPSCT Deed of Mandate itself is inadequate. The applicants have concerns about the structure of and representation on the WPSCT, as well as problems with the claimant definition and the withdrawal mechanism;

    c) By recognising the Deed of Mandate and proceeding with settlement negotations the Crown is breaching the applicants' rights to have their historical Treaty claims heard by the Waitangi Tribunal; and

    d) In every respect, the Crown has failed to address the applicants' concerns about the Deed of Mandate.

9. Te Ūpokorehe's application stands apart from the other applications received, in that, Te Ūpokorehe contest their inclusion in the WSPCT Deed of Mandate on the basis that they are not a hapū of Te Whakatōhea. However, Te Ūpokorehe also take issue with the Crown's mandating process, the WPSCT Deed of Mandate and the Crown's failure to address these concerns.

10. The Crown opposes the applications for urgency in respect of all issues.

The Applicants

11. The number of groups involved in these proceedings make this decision relatively complex. It is useful at the outset therefore, to establish where the the applicants fit in the context of the proposed settlement.

12. The WPSCT Deed of Mandate defines the Whakatōhea claimant group as:

    a) Affiliates of the six recognised hapū of Whakatōhea, those being; Ngāti Rua; Ngāi Tamahaua; Ngāti Patumoana; Ngāti Ngāhere; Ngāti Ira; Ūpokorehe (clause 4.1.1); or

    b) The descendants of Muriwai and Tūtāmure (clause 5.1.1).

13. The marae of Whakatōhea are listed as; Omarumutu; Opape; Waiaua; Terere; Opeke; Roimata; Kutarere; and Maromahue (clause 4.2.1).

14. The applicants are as follows:

a) Wai 2563, a claim and application for an urgent hearing from Kahukore Baker on behalf of Ngā Uri o Te Upokorehe Iwi, received on 31 May 2016. Te Ūpokorehe is listed as a hapū of Whakatōhea in the Deed of Mandate and accordingly, their historical Treaty claims will be settled through any settlement that eventuates from these negotiations.

b) Wai 2589, a claim and application for an urgent hearing from Tawhirimatea Williams on behalf of himself and the hapū of Ngāti Ruatakena, received on 27 January 2017. The claimants state that Ngāti Ruatakena is a hapū of Te Whakatōhea (Wai 1795, #1.1.1 at [7]). Ruatakena relates to Muriwai (a recognised ancestor of Whakatōhea) through the marriage of Rēpanga and Ngāpoupereta. The claimants' historical Treaty claim Wai 1795 is listed in the Deed of Mandate as a claim that will be settled to the extent it relates to Whakatōhea.

c) Wai 2590, a claim and application for an urgent hearing from Rachel Wolfgramm and Tania Haerekiterā on behalf of themselves and the descendants of Rangihaerepō, received on 31 January 2017. The claimants state that Rangihaerepō was a rangatira of Ngāi Tamahaua and Te Ūpokorehe descent and that Rangihaerepō signed Te Tiriti o Waitangi on their behalf. The claimants "recognise relationships with Whakatōhea" (Wai 1827, #1.1.1). They appear to contest the inclusion of their historical claim in the Deed of Mandate to the extent it is a claim of Te Upokorehe and therefore a claim of Whakatōhea.

d) Wai 2591, a claim and application for an urgent hearing from John Kameta and Te Rua Rakuraku on behalf of Ngāti Ira o Waioweka Rohe, received on 1 February 2017. Ngāti Ira is listed as a hapū of Whakatōhea in the Deed of Mandate and accordingly, their historical Treaty claims will be settled through any settlement that eventuates from these negotiations.

e) Wai 2592, an application for an urgent hearing from John Hata, Russell Hollis and John Brown for Moutohora Quarry, received on 31 January 2017. The claimants' historical Treaty claim Wai 864 is listed in the Deed of Mandate as a claim that will be settled to the extent it relates to Whakatōhea.

f) Wai 2593, a claim and application for an urgent hearing from John Hata and Russell Hollis on behalf of Ngāti Patumoana hapū, received on 31 January 2017. Ngāti Patumoana is listed as a hapū of Whakatōhea in the Deed of Mandate and accordingly, their historical Treaty claims will be settled through any settlement that eventuates from these negotiations.

g) Wai 2594, a claim and application for an urgent hearing from Wiremu Te Kahika and Joseph Te Kahika on behalf of Te Whānau o Te Kahika, Kahikatea, Kahikaroa and Wharekahika, received on 1 February 2017. The claimants' historical Treaty claim Wai 2510 seems to be tentatively listed in the Deed of Mandate as a claim that will be settled to the extent it relates to Whakatōhea, however the Deed notes this as "to be confirmed" (Wai 2589, A1(a) p. 205).

h) Wai 2595, a claim and application for an urgent hearing from Christina Davis, Christina Rolleston, Patricia McMurtrie and Adriana Edwards on behalf of Ngāti Muriwai, received on 9 February 2017. The claimants state that Ngāti Muriwai is hapū of Whakatōhea, but has never been recognised as such for the purposes of settlement negotiations (Wai 2160, #1.1.1). The claimants' historical Treaty claim Wai 2160 is listed in the Deed of Mandate as a claim that will be settled to the extent it relates to Whakatōhea.

i) Wai 2605, a claim and application for an urgent hearing from Maruhaeremuri Stirling, Ruiha Edna Stirling and Parehuia Herewini on behalf of the hapū Te Whanau a Apanui and Whakatōhea, received on 31 January 2017. It is submitted that Te Whanau a Apanui is an iwi in its own right. The claimants state however, that they are also of Whakatōhea (Wai 2605, #1.1.1). While their historical Treaty claim Wai 2257 is not listed in the Deed of Mandate, they note that as it contains "issues in relation to Tio Te Kahika and Kahika claim issues" it will still be settled under the Deed of Mandate (Wai 2605, #1.1.1 at [25]).

j) Wai 2606, a claim and application for an urgent hearing from Tracey Hillier and Rita Wordsworth on behalf of themselves and the hapū of Ngāi Tamahaua, received on 13 February 2017. Ngāi Tamahaua is listed as a hapū of Whakatōhea in the Deed of Mandate and accordingly, their historical Treaty claims will be settled through any settlement that eventuates from these negotiations.

k) Wai 2609, a claim and application for an urgent hearing from Karen Mokomoko and Peter Biddle on behalf of the rangatira Mokomoko and his descendants, received on 22 February 2017. The claimants' historical Treaty claim Wai 203 is listed in the Deed of Mandate as a claim that will be settled to the extent it relates to Whakatōhea.

l) Wai 2610, a claim and application for an urgent hearing from Charlie Hei, Nikora Curtis Tautau and Nanette Kernohan, Wipae Perese and Bell Savage, Peter Wairata Warren, William Peter Hatu, Dr Guy Naden, Takapare Papuni, John Kahui Hillman, Hoani Kerei, Nelson Paynter and Ngārangi Naden, received on 17 March 2017. This claim is filed in relation to a number of historical Treaty claims. The following are listed in the Deed of Mandate as claims that will be settled to the extent they relate to Whakatōhea: Wai 2008; Wai 2055; Wai 2066.

m) Wai 2657, a claim and application for an urgent hearing from Adriana Edwards, Dean Flavell and Barry Kiwara on behalf of themselves and all hapu of Whakatōhea, received on 10 April 2017. The claimants' historical Treaty claim Wai 87 is listed in the Deed of Mandate as a claim that will be settled to the extent it relates to Whakatōhea.

Urgency Criteria

15. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:

- The claimants can 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;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- Any other grounds justifying urgency have been made out.

Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

16. The Tribunal has stated on a number of occasions that it will only grant an urgent hearing in exceptional cases and where it is satisfied that adequate grounds for urgency have been made out. The applicant must establish that there is an exceptional case that warrants the diversion of the Tribunal's resources from other inquiries and priorities to conduct an urgent inquiry into their claim.

Issues

17. In determining these applications, it is not my task to delve too far into the merits of each claim. Rather, I am tasked with assessing, with regard to the broad criteria for urgency set out above, whether the applicants have prima facie made out a case that warrants the Tribunal's urgent attention.
18. In this decision I first summarise the parties' positions on the core issues identified in their submissions. I address the issues in the following order:
    a) The mandating process;
    b) The Deed of Mandate;
    c) Tribunal inquiry into Whakatōhea claims; and
    d) Availability of alternative remedies.

The mandating process

The Applicants' position

19. The applicants raise two issues in regards to the mandating process:

    a) First, they submit that the Crown has recognised a mandate that was not properly obtained;

    b) Second, even if the mandate was properly obtained, they say that it is no longer supported. The Crown has failed to adequately monitor the mandate and ensure the WPSCT has maintained its mandate.

20. The applicants allege that during the pre-mandating stage, the Crown failed to adequately engage with and give consideration to the concerns of the claimants, or to take into account the extent of the opposition to the body that was seeking the mandate.They say that there has been considerable and sustained opposition to the WPSCT since it was conceived (Wai 2589, #3.1.1 & Wai 2606, #3.1.4).

21. The applicants note that they attended hui at Te Puni Kōkiri (TPK), the Office of Treaty Settlements (OTS), and mandating hui, where they voiced their opposition to the WPSCT and the proposed WPSCT mandate; however the Crown consistently failed to address their concerns (Wai 2589, #A1; Wai 2590, #A1; Wai 2606, #A1).

22. Further, they allege that the Crown failed to act impartially in its recognition of the WPSCT and the Deed of Mandate. The Crown, they say, has controlled the mandating process instead of allowing the claimants to decide who should hold the mandate. It failed to ensure that it dealt with appropriate representatives when negotiating the mandate and excluded certain hapū groups from participating in the mandating process (Wai 2609, #1.1.1). The mandating process has therefore not been hapū driven. This, the applicants submit, is inconsistent with Te Whakatōhea tikanga. In fact, they allege the mandating process has undermined hapū rangatiratanga (Wai 2590, #A1 & Wai 2595, #A1). Hapū and claimant groups have not been able to freely express their concerns in a truly open forum.

23. Indeed, the applicants for Te Ūpokorehe submit that they attempted to advance a non-competing, separate mandate alongside Whakatōhea (Wai 2563, #1.1.1). They submit that this was never properly acknowledged by the Crown. Further, the Crown refused to acknowledge Te Ūpokorehe as a Large Natural Grouping for the purposes of entering into settlement negotiations. The applicants state that the Crown's acknowledgement of the WPSCT Mandate Strategy and then Deed of Mandate undermines Te Ūpokorehe's mana whenua rights and status (Wai 2563, #1.1.1).

24. Applicants also contend that the result of the mandate vote, which the Crown relied on in its decision to recognise the mandate, is not reflective of the extent to which the mandate is actually supported. The WPSCT mandate received 1,439 votes in favour (from 1,571 returned voting papers) out of 6,662 eligible voters (Wai 2591, #3.1.9). The applicants submit that this demonstrates the mandate, when it was obtained, was only supported by a minority of Whakatōhea.

25. Finally, the applicants state that the Crown recognised the Deed of Mandate in early December 2016, despite the fact that the withdrawal process under the Mandating

Strategy had been initiated by a number of claimants and was still unresolved (Wai 2589, #A3). The Crown therefore failed to address any opposition to the mandate in good faith.

26. On the issue of maintenance of the mandate, the applicants submit that even if the mandate was properly obtained in the first instance, the WSPCT no longer enjoys support from Whakatōhea; therefore, the WSPCT has not maintained its mandate and the Crown has failed to monitor this.

27. The applicants submit that in excess of 25 out of the 31 claimants have invoked section 19.1.1 of the Deed of Mandate to withdraw themselves from mandate coverage (Wai 2591, #1.1.1).

28. At this point, I also wish to draw attention to the fact that applications for urgency have been filed in this Tribunal on behalf of 14 of the 24 claims explicitly listed in the Deed of Mandate as claims to be settled to the extent they relate to Whakatōhea. The applications also represent a further 11 claims not specifically listed in the Deed of Mandate.

29. The applicants made further submissions to the Crown in November 2016 outlining their opposition to the mandate. In a letter, dated 21 November 2016, sent to Te Puni Kōkiri, counsel for Ngāi Tamahaua reiterated the claimants' strong opposition to the WPSCT (Wai 2606, #A1). As part of that letter the Crown was notified that 22 out of 27 registered claims for Whakatōhea had chosen to withdraw their claims from the mandate. The letter also emphasised the claimants' numerous expressions of opposition to the WPSCT, including at meetings convened by the Waitangi Tribunal in June 2016, at the judicial conference convened by the Tribunal on 8 October 2016, and again during Tribunal mediation on 5-6 November 2016. The letter noted that 4 out of the 6 main hapū of Whakatōhea had withdrawn their hapū claims and support from the WPSCT.

30. Further opposition to the mandate was outlined by Te Whānau a Mokomoko (Wai 2609, #1.1.1). Te Whānau a Mokomoko first expressed their opposition to the establishment of a Whakatōhea entity to represent their claims in settlement as early as 2013. They have directly opposed the mandating process ever since and have made their opposition known in a number of ways including; by letter, dated 13 February 2015 to the Collective; oral submissions at a hui of the Collective held in March 2015; at a meeting with a Crown Facilitator on 11 August 2015; a hui on 21 November 2015; and again at a WPSCT mandate hui in Tauranga on 22 May 2016 (Wai 2609, #1.1.1).

31. Given the widespread and sustained opposition to the mandate by the applicants, of which they say the Crown is aware, the applicants state that there is no basis upon which the Crown can continue to recognise the WPSCT Deed of Mandate. Indeed, they claim that continued recognition of the Deed of Mandate is in breach of Treaty principles.

The Crown's position

32. The Crown's view is that the Whakatōhea mandating process has been lengthy and robust, spanning over 6 years and involving more than 30 mandating hui. The Crown relies on the affidavit of Ms Jaclyn Elizabeth Williams. Ms Williams is the Crown-Iwi, Hapū, Whanau Māori Relationships Manager at Te Puni Kōkiri (TPK) and formerly the Negotiation and Settlement Manager at the Office of Treaty Settlements (OTS). Ms Williams has particular responsibility for the Whakatōhea mandate process, which was led by TPK in consultation with OTS. She submits that the mandating process was

inclusive and thorough. Ms Williams notes that several proposed mandates were considered, mandating discussions were facilitated, there was a robust submissions process, meetings were held between Crown officials and submitters, and facilitated mediation occurred (Wai 2563, #A2). This meant that the applicants had ample opportunity to participate in the mandating process.

33. The Crown submits that the mandate vote was overwhelmingly in favour of recognising the WPSCT Deed of Mandate (Wai 2589, #3.1.5).

34. The Crown acknowledges that out of 91 submissions received on the draft Deed of Mandate, 52 were in opposition and 39 were in favour. However, the Crown submits that, due to the nature of the issues raised by submitters, the extensive work already carried out by the Collective and the WPSCT, and the mechanisms provided in the draft Deed of Mandate, it had sufficient confidence to proceed with the mandate. Therefore, on 5 December 2016, officials advised the relevant Ministers that the mandate should be recognised by the Crown (2589, #A3).

WPSCT's position

35. The WPSCT's view is that there has been an exhaustive, lengthy and robust process of consultation and engagement, including mediation, with the uri of Whakatōhea (Wai 2589, #3.1.004).

36. The WPSCT submits that the most accurate and recent information of the level of Whakatōhea iwi support for proceeding to direct negotiations is the voting process that was undertaken for the Deed of Mandate. The postal vote was based on an up-to-date and extensive roll of beneficiaries (13,507) of the Whakatōhea Māori Trust Board (Wai 2589, #A2).The result of the vote was that 91.6% of those who voted supported the WPSCT being mandated to represent Whakatōhea in direct negotiations with the Crown.

The Deed of Mandate

37. The applicants submit that the Deed of Mandate and the make-up of the WPSCT denies the right and ability of the claimants to exercise their rangatiratanga within the mandate process (Wai 2590, #1.1.1).

38. Both the Ngāti Patumoana (Wai 2593) and Te Kahika (Wai 2594) applicants submit that there is a lack of accountability within the Deed of Mandate (Wai 2593, #1.1.1; Wai 2594, #1.1.1). The Ngāti Patumoana applicants in particular, allege that the trustees of the WPSCT are conflicted as they also hold positions on both the Collective and the Whakatōhea Māori Trust Board (Wai 2593, #1.1.1). However, the applicants do not elaborate further on this particular submission.

39. Another concern expressed is how hapū are recognised in the mandate. The applicants submit that the mandate does not recognise certain hapū of Whakatōhea and it should not be for the trustees of WPSCT to detemine the participation of the excluded hapū (Wai 2590, #1.1.1). Further, Ngāti Muriwai allege that the mandating process was carried out on the basis of marae not hapū, therefore "the process of gaining support for

the Crown's recognition of the mandate was flawed from the very beginning" (Wai 2595, #1.1.1 at [21]).

40. Overall, the issues raised by the applicants in respect of the Deed of Mandate nevertheless focus primarily on the claimant definition and the withdrawal mechanism. I address the parties' submissions on each issue in turn.

Claimant Definition

The Applicants' position

41. Te Whakatōhea has been recognised by the Crown as a Large Natural Grouping for the purposes of Treaty settlement negotiations (Wai 2563, #A2). Claimants are recognised in the Deed of Mandate as belonging to Whakatōhea if they whakapapa to one of the 6 recognised hapū of Whakatōhea, or descend from one of the following two tūpuna; Tūtāmure and Muriwai (2594, #A3(a)).

42. Several issues have been raised by the applicants in relation to the claimant definition as formulated in the Deed of Mandate.

43. The Ngāti Muriwai applicants (Wai 2595) are concerned that the Deed of Mandate excludes their hapū. The applicants state that Ngāti Muriwai is a hapū of Whakatōhea, but has never been recognised as such for the purposes of settlement negotiations and is not listed in the WPSCT Deed of Mandate (Wai 2595, #1.1.1). The applicants allege that prejudice arises because their participation in the WPSCT is unfairly limited as a result of their hapū not being included.

44. The applicants for Wai 2609, the descendants of Mokomoko, are also concerned with the claimant definition. They state that they have been essentially disowned by Whakatōhea. They have asked to engage with the Crown in their own right (Wai 2609, #1.1.1).

45. The Te Ūpokorehe applicants (Wai 2563) submit that Te Ūpokorehe is not part of Whakatōhea and is an iwi in its own right (Wai 2563, #1.1.1). Te Ūpokorehe have been attempting to negotiate a separate and non-competing mandate alongside Whakatōhea for the last 5 years. Te Ūpokorehe submit that if the mandate is implemented in its current form then the Crown will transfer the mandate of Te Ūpokorehe to Whakatōhea. If this transfer occurs, it will transfer Te Ūpokorehe lands to a body that does not allow Te Ūpokorehe to exercise tino rangatiratanga over their lands and resources; it will supplant and negate Te Ūpokorehe mana whenua and tangata whenua status in their rohe; and remove the Tribunal's jurisdiction to inquire into Te Ūpokorehe greivances (Wai 2563, #1.1.1).

46. On 25 January 2017, I issued directions seeking further clarification from the Te Ūpokorehe applicants on the status of Te Ūpokorehe as a hapū and/or iwi (Wai 2563, #2.5.11). I noted that evidence presented to the Tribunal in the Te Urewera Inquiry (Wai 894) indicated that there was a close relationship between Te Whakatōhea and Te

Ūpokorehe. Indeed, it was stated by some claimants that Ūpokorehe was a hapū of Whakatōhea (Wai 894, #A107; Wai 894, #B19 at Appendix C; Wai 894, #J46).

47. The applicants filed the brief of evidence of Kahukore Baker in response to my directions. Kahukore Baker submits that there were a number of problems with the evidence presented in the Te Urewera inquiry, including that the Wai 339 claim, which was initially filed on behalf of "Upokorehe Hapu of Whakatōhea", was incorrect (Wai 2563, #A1(e)). Wai 339 was not bought on behalf of, or with the support of, Te Ūpokorehe but rather Tuiringa Mokomoko, as "an individual on behalf of the Mokomoko whanau" (Wai 2563, #A1(e).

48. Kahukore Baker also submits that respected kaumatua and spokesperson for Te Ūpokorehe, Charles Aramoana, did not support Tuiringa Mokomoko in his filing of Wai 339. He was so concerned about the claim that he filed a separate claim for Te Ūpokorehe, which became Wai 1092 (Wai 2563, #A1(e)).

49. In his own brief of evidence filed in relation to the Wai 1092 claim, Mr Aramoana states that he felt he had no choice but to say that Te Ūpokorehe was a hapū of Whakatōhea. This was because the Crown had designated Te Ūpokorehe as such when it established the Whakatōhea Māori Trust Board. However, Kahukore Baker asserts that Mr Aramoana's concerns that "the Crown has swept us under the petticoats of Te Whakatōhea" (Wai 2563, #A1(e)) were widely known.

The Crown's position

50. The Crown has not generally responded to the issues raised in respect of the claimant definition. However, with particular regard to Te Ūpokorehe submissions, the Crown notes that officials consider the tribal interests and areas of interest between Whakatōhea and Te Ūpokorehe to be so overlapped that separate negotiations would be difficult. The Crown also considers that while the Te Ūpokorehe applicants seek their own separate negotiations, some members of Te Ūpokorehe are supportive of the WPSCT (Wai 2595, #A3 at [46]).

<u>Withdrawal Mechanism</u>

The Applicants' position

51. The withdrawal mechanism under clause 19.1.1 of the Deed of Mandate requires that written notice of a proposal to withdraw or amend the mandate is to be provided to the Chairperson of the WPSCT. The written notice must; identify whether the proposal seeks to amend or withdraw the mandate in respect of all or part of the claimant community (and, if the latter, identify which part of the claimant community); identify the concerns of the party seeking to amend or withdraw from the mandate; and be signed by at least 5% of the adult registered members of Whakatōhea on the register maintained by the Trust Board (Wai 2589, #A2(a), pp. 29-30). Within two weeks of receiving notice, the WPSCT must convene a hui to try to resolve the matter. If the issues are not resolved following

that inital meeting then the party seeking to withdraw may organise publicly notified hui to discuss, withdraw from or amend the mandate.

52. The applicants say that the withdrawal mechanism in the Deed of Mandate (which mirrors the clause in the Mandating Strategy) is flawed for a number of reasons:

    a) First, it is reliant on a roll of Whakatōhea iwi members that is neither up to date nor complete and is derived from a separate (Trust Board) entity created long ago for different purposes (Wai 2595, #1.1.1). Because of this, a number of claimants who attempted to utilise the withdrawal clause were unsuccessful. For instance, and as outlined in her affidavit, Ms Christina Davis for Ngāti Muriwai, states that the claimants collected the required number of signatures, but upon presentation, the signatures were rejected by the Collective and WPSCT. Ms Davis suggests that this is because the roll relied on by the WPSCT is deficient and a number of valid signatures were therefore discounted (Wai 2595, #A1).

    b) Second, the process is too onerous and the applicants are not adequately resourced to complete it (Wai 2589, #1.1.1, Wai 2590, #1.1.1, Wai 2591, #1.1.1, Wai 2592, #1.1.1). The applicants argue that the withdrawal mechanism holds unfunded claimants to the same public notification standards (including the use of a postal vote) as the WPSCT. The WPSCT was supported by the Whakatōhea Māori Trust Board and the Crown through this process when it sought the mandate. The applicants are not supported in the same way.

    c) Third, the WPSCT has not faciliated the hui required by the clause in a timely or effective fashion (Wai 2589, #1.1.1; Wai 2595, #A1).

53. Referring to the report of the Tribunal in the Ngāpuhi Mandate inquiry, the applicants submit that the Tribunal has previously found similar withdrawal and amendment mechansims to be in breach of the principles of the Treaty of Waitangi. At this point I note that the findings of the Ngāpuhi Mandate Tribunal are important. However, I discuss those specific findings and their relevance later in this decision.

The Crown's position

54. The Crown did not initially file detailed submissions about the withdrawal mechanism. The original Crown position was that, because there is a withdrawal mechanism in the Deed of Mandate which allows claimants (with sufficient support from the claimant community) to seek mandate amendment, or withdraw from the WPSCT Deed of Mandate, there are alternative remedies available to applicants. To that extent, the Crown argued that the applicants did not meet the high threshold, as outlined in the Tribunal's *Guide to Practice and Procedure*, to warrant an urgent Tribunal hearing (Wai 2589, #3.1.5).

55. On 25 May 2017, the Tribunal requested further information from the Crown and the WPSCT regarding the withdrawal mechanism, including the numbers and groups who signed the mandate withdrawal petition in November 2016 (Wai 2589, #2.5.3).

56. The Crown responded on 6 June 2017, submitting that the petition filed in late November 2016 did not contain enough signatures to trigger the mandate withdrawal process under the Deed of Mandate (Wai 2610, #3.1.6). However, in the process of recognising the

mandate of the WPSCT in December 2016, the Crown notes that the withdrawal petition was taken into account. Further, the Crown has continued to monitor mandate maintenance evaluation processes since then.

WPSCT's position

57. By memorandum dated 6 June 2017, the WPSCT states that the number of signatures received on the petition was not sufficient to the trigger the withdrawal mechanism because it did not meet the mandatory 5% threshold (Wai 2610, #3.1.5). While a total of 1,951 submissions were received, there was significant duplication in the names of individual submitters listed in the withdrawal petition. Duplicate names were subtracted and only those registered on the Tribal database were included. This process left a confirmed total of 425 registered Whakatōhea members having signed the withdrawal petition.

58. A letter dated 13 January 2017 from the Whakatōhea Māori Trust Board to the Chairman of the WPSCT, reports the results of the individual submissions received (Wai 2590, #A2(a) pp. 339-340). It sets out the following:

    a) The current registered roll of adult beneficiaries is 9,895. The 5% threshold required to trigger the withdrawal mechanism is 495 (5% of 9,895). However the number of registered submissions received (after the duplicates were subtracted) was 425, leaving a shortfall of 70 submissions.

    b) The total number of registered members, including those recorded under parents (those under 18) is 11,680 and 5% of that figure is 584. Therefore, the total number of valid registered members who signed the withdrawal petition, if those recorded under parents are included, totalled 478. This left a shortfall of 106.

59. WPSCT state that because the 5% threshold was not met, the applicants have failed to demonstrate a significant level of support for their opposition (Wai 2589, #3.1.4).

60. Further, the WPSCT state that the applicants' contention that "most of the Wai Claimants have withdrawn from the WPSCT's Deed of Mandate is neither reliable nor relevant to ascertaining the level of opposition to the Deed of Mandate" (Wai 2589, #3.1.4 at [28]).

Tribunal inquiry into Whakatōhea claims

The Applicants' position

61. A key issue for a number of the applicants is that they wish to have their historical Treaty claims heard as part of a Tribunal process. The North Eastern Bay of Plenty (NEBOP) has not been the subject of a Tribunal inquiry to date. The applicants say that the Crown has failed to recognise the claimants' rights under s 6(2) of the Treaty of Waitangi Act 1975 to have their claims heard by the Tribunal (Wai 2589, #1.1.1).

62. Further, it is submitted that the named claimants are the only ones who can amend, vary, withdraw or authorise others to progress their claim on their behalf. It is not for the Crown or any other entity to direct how the claim should be progressed.

63. I interject at this point to note that I do not agree with this view. The Crown is entitled to enter negotiations over claims and to settle them, where there is a sufficient level of support in it doing so.

64. On 24 June 2016, the Tribunal convened a hui in Opotiki to give the claimants the opportunity to inform the Tribunal of their views regarding the commissioning of a district inquiry in the NEBOP. The applicants note that at that time it was made known to the Tribunal that there was dissent among Whakatōhea about entering into direct negotiations with the Crown (Wai 2595, #1.1.1).

65. Later in November 2016, at the same time the Crown was receiving submissions on the proposed Deed of Mandate, a mediation hui led by Judge Carrie Wainwright and Dr Hauata Palmer was held in Opotiki to discuss a pathway forward for Whakatōhea claims. Mediation was ultimately unsuccesful.

66. I take the view that what happened at the mediation was without prejudice, and a good faith attempt by parties to come to an agreement as to how to progress the historical claims of Whakatōhea. I note however, that what became evident in the mediation was that there was substantial dissent from the claimants to progress to settlement in the proposed manner.

The Crown's position

67. The Crown submits that while the applicants wish to have Whakatōhea claims heard and reported on by the Tribunal, the Whakatōhea people "as a whole" have voted and indicated that their desire is to enter into direct negotiations with the Crown through the WPSCT (Wai 2589, #3.1.5). A grant of urgency would ignore their wishes and they would suffer significant and irreversible prejudice as a result of settlement negotiations, and their settlement, being delayed.

Availability of alternative Remedies

68. In its response to the applications for urgency, the Crown raised the issue of alternative remedies as weighing against a grant of urgency (Wai 2589, #3.1.5). The applicants responded fully to the submissions of the Crown in their reply submissions and I therefore deal with them in that order.

The Crown's position

69. In the first instance, the Crown submits that the applicants have the ability to participate in the negotiations process moving forward. To that end, the WPSCT is in the process of developing new structures intended to include and reflect the broader views of Te Whakatōhea. These include the Kaumatua Kaunihera, the Whakatōhea Claims Committee, a Research Group and the Negotiating Team. The Crown submits that the applicants could put themselves forward as candiates for any one of these bodies, and in doing so, could actively engage in the negotiation and settlement process. They could also participate in the broader engagement plan that the WPSCT has put forward, attending hui and offering input on decisions.

70. Other alternative remedies suggested by the Crown include the dispute resolution process available under clause 12 of the Deed of Mandate such as submitting a complaint in writing (clause 12.2.1), meeting with the Chairperson of the WPSCT to discuss grievances (clause 12.2.3), or mediation (clause 12.2.6). Further, the applicants are able to seek amendment of, or withdrawal from, the WPSCT Deed of Mandate pursuant to clause 19 of the Deed of Mandate.

71. The Crown notes that the applicants will have the opportunity to vote to ratify or reject any proposed post-settlement governance entity and proposed settlement. The Crown here refers to the Tribunal's decision on an application by Ngāi Takoto for an urgent hearing, in which the Presiding Officer determined that in that case the ratification process was the best way of testing the support for what the Ngāi Takoto negotiators had negotiated in terms of settlement (Wai 613, #2.24).

72. Finally, the Crown signals that in conjunction with WPSCT they are exploring the possibility of holding a process prior to the signing of a Deed of Settlement that will provide the people of Whakatōhea with the opportunity to present their grievances directly to the Crown.

73. The Tribunal sought further information from the Crown as to what the process discussed above might look like. On 6 June 2017, the Crown filed a further memorandum of counsel addressing this issue. The Crown reply was light on detail stating that (Wai 2610, #3.1.6 at [8]):

> "No decisions have been taken yet. However, the parties to the negotiation are exploring ways in which Whakatōhea might ensure that the content of the claims being settled are well understood and made known."

74. In my view therefore, it remains unclear how the Crown intends to use this to address concerns raised by the applicants moving forward.

The Applicants' position

75. The applicants state that while the Crown has pointed to processes that exist under the Deed of Mandate and the WPSCT Trust Deed, as well as the ratification process as alternative remedies, these are not real remedies.

76. Of particular concern, and as already outlined, the applicants' view is that the mechanism (in clause 19 of the Deed of Mandate) by which the applicants could seek to amend or withdrawal from the mandate is too onerous.

77. Further, they say that nothing suggested by the Crown would remedy the actions or omissions of the Crown that are in breach of the principles of the Treaty. Indeed, the Crown proposes that the applicants utilise the processes established under a structure to which they are fundamentally opposed, and which the Crown has and continues to recognise, despite the fact that the applicants say it is not supported.

Readiness to proceed

78. The applicants submit that they are ready to proceed with an urgent inquiry. This has not been disputed by the Crown or the WPSCT.

Discussion

79. The course of negotiations between the Crown and the hapū of the Eastern Bay of Plenty over the last decades has been far from plain sailing. Indeed, from its beginnings in the nineteenth century, their relationship has been unfortunate. The present actions of the Crown in promoting settlement are far from self-serving. Nevertheless, the weight of past history provides a considerable challenge for participants to overcome in accommodating each other's aspirations and in contributing to the propriety of the currently proposed settlement being called into question. It is not my function to apportion fault, I am simply asked to grant or refuse an urgent hearing before the Tribunal.

80. Having regard to the seriousness of the matter, I have taken some time to review the large body of evidence and consider the matters raised.

81. For a number of reasons I avoid making specific findings of fact that might impede the proper progress of the Tribunal that will be required to decide the substantive issue. That is whether or not the acts or proposed acts of the Crown in actioning the proposed settlement will be or are likely to be prejudicial and inconsistent with the principles of the Treaty.

82. The question for me is considerably narrower. I simply consider whether there is a reasonable probability that there will be breach and prejudice as above and whether the circumstances of the situation are such that the applications meet the criteria for urgency.

83. A grant of urgency is not simply a matter of the management of the Tribunal's fixtures calendar. It can have serious implications for the claimants and for the Crown. There are situations where the failure to grant urgency may have the practical effect that a Treaty claim will never be heard. If urgency is to be granted it has far reaching consequences for the resources of the Tribunal and not least for those other claimants who have stood in the long and weary queue patiently waiting for a hearing.

84. This exercise of discretion requires caution for the reasons above, but also bearing in mind that the assertions and counter-assertions made in written evidence have not yet been tested in hearing. The assertions are complex and require careful consideration.

85. It is also to be remembered, as has been often said, that disputes, such as are evident here, are sometimes more to do with personal or kin group disputes than disputes with the Crown.

86. Further, settlements are essentially political undertakings. That being so, the Tribunal should not rush in but should rather let the processes play out as far as possible in the usual manner. An early and intrusive interference can distort the political fray rather than assist.

87. Having said all that, and after considerable reflection, I have decided that overall in this case the tests for urgency are met. However, it is not proper that I attempt to pick through the contests in the evidence and the issues one by one and deal with them in an

extensive manner. To do so would be unhelpful to the Tribunal that follows me and is not required at this stage.

88. In regard to the applications for urgency then, I deal with three general matters raised in respect of the Crown's mandating process and the Deed of Mandate:

    a) The demonstrated level of opposition to the mandate;

    b) The withdrawal mechanism and attempts to invoke the mechanism; and

    c) The unique position of Te Ūpokorehe.

89. There are of course a number of other issues in contention and they will be for the Tribunal hearing the matter to consider. However, in my view, the matters listed at paragraph 88 above are those I need to consider for the matter of urgency.

Demonstrated level of opposition to the mandate

90. It is suggested by the Crown and the WPSCT that the applicants are a small but vocal minority. The Crown and the WPSCT rely primarily on the result of the vote on the Deed of Mandate which they argue demonstrates that there was, and remains, overwhelming support for the Deed of Mandate and the WPSCT. A total of 1,571 votes were received from 6,662 eligible voters (Wai 2590, #A2). 1,439 of those votes were in support of the Deed, which represented 91.6% of the 1,571 votes received. The applicants, by contrast, argue that this result is not reflective of the extent to which the mandate is actually supported. They state that voter turnout was low. It appears that 1,439 votes in support, from a potential 6,662 eligible voters, indicates a level of support that sits at around 21% of Whakatōhea. Therefore, the applicants claim that the mandate, when it was obtained, was only supported by a minority of Whakatōhea. While that may be so, it cannot be contested that this vote at least presented an opportunity to present a view.

91. In the *East Coast Settlement Report* the Tribunal noted that in disputes over mandate "numbers matter".[2] Certainly, the level of support indicated by the result of the postal vote is an important factor in this case. On the other hand, I have now received thirteen applications seeking an urgent hearing in regards to the WPSCT Deed of Mandate. In my view, the volume and nature of the urgent applications received is itself indicative of, not simply the complaints of a "vocal minority" as asserted by the Crown, but rather, a substantial and sustained opposition to the WPSCT and the Deed of Mandate (Wai 2589, #3.1.5).

92. Further, the following applications are brought on behalf of 5 of the 6 hapū of Whakatōhea as defined in the WPSCT Deed of Mandate at clause 4.1.1:

    a) Wai 2563, a claim and application for an urgent hearing from Kahukore Baker on behalf of Ngā Uri o Te Upokorehe Iwi;

    b) Wai 2589, a claim and application for an urgent hearing from Tawhirimatea Williams on behalf of the hapū of Ngāti Ruatakena;

[2] Waitangi Tribunal, *The East Coast Settlement Report* (Wellington: Legislation Direct, 2010), p. 61

c) Wai 2591, a claim and application for an urgent hearing from John Kameta and Te Rua Rakuraku on behalf of Ngāti Ira o Waioweka Rohe;

d) Wai 2593, a claim and application for an urgent hearing from John Hata and Russell Hollis on behalf of Ngāti Patumoana hapū;

e) Wai 2606, a claim and application for an urgent hearing from Tracey Hillier and Rita Wordsworth on behalf of themselves and the hapū of Ngāi Tamahaua.

93. This suggests that 5 of the 6 hapū, even if they initially supported the mandate, no longer do so. While there may well be a question about the extent to which the claimants speak on behalf of those hapū for whom they purport to bring the claims, it is notable that the claims are supported by senior members of those hapū. They include for instance, senior kaumatua members, the Chairman of the Ngāi Tamahaua hapū (in the claim by Ngāi Tamahaua), and an elected representative on the WPSCT (in the claim by Ngāti Ira). I note that the assertions that the claimants were senior members of the hapū concerned and could speak on behalf of them was not contested by the Crown or WPSCT.

94. The level of opposition to the mandate is further evidenced by the number of claimants who have attempted to withdraw from the mandate to which I now refer further.

Withdrawal clause

95. There has been an unsuccessful attempt made by the applicants, at the Mandate Strategy through to Deed of Mandate phase, to withdraw from the mandate. This speaks again to a sustained level of opposition to the WPSCT mandate such as to cause concern. It also raises a secondary but no less important issue in respect of the withdrawal mechanism itself.

96. The applicants raise a number of specific concerns with the withdrawal clause contained in the Deed of Mandate. They say it is comparable to the withdrawal mechanism in the Tuhoronuku IMA Deed of Mandate and note that the Tribunal in the *Ngāpuhi Mandate Inquiry Report* found that the withdrawal mechanism in that Deed of Mandate was too onerous for hapū attempting to withdraw.

<u>Ngāpuhi Mandate Inquiry</u>

97. The Tūhoronuku IMA mandate required that those seeking withdrawal follow the same process that the Tūhoronuku IMA adopted when obtaining it.[3] In practical terms, this meant that "those seeking the withdrawal, either of the mandate as a whole or of their hapū from the scope of that mandate, must hold a series of well-publicised hui throughout the country, (and perhaps in Australia), before holding a vote on the issue open to all Ngāpuhi".[4]

98. The Tribunal considered that the pan-Ngāpuhi nature of the withdrawal mechanism contemplated a process that no group could realistically hope to succeed in. The

[3] Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Wellington: Legislation Direct, 2015), pp. 66-67
[4] Ibid, p. 66

Tribunal compared the Tūhoronuku withdrawal mechanism to the equivalent clause in the Ngāti Tūwharetoa Hapū Forum Trust's Deed of Mandate. The latter's Deed of Mandate included a withdrawal clause allowing individual hapū to withdraw and set out the process that a hapū would be required to go through to achieve that withdrawal. The Tribunal noted that "provisions of this kind emerge from mandating processes that recognised both the importance of hapū consent to a proposed mandate and the importance of maintaining hapū support".[5] The Crown advised the Tribunal in the Ngāpuhi Mandate Inquiry that this reflected the fact that the Hapū Forum Trust had secured its mandate from Ngāti Tūwharetoa on a hapū-by-hapū basis. Tūhoronuku IMA's choice not to include a similar clause in its Deed of Mandate reflected the fact it sought a mandate from the whole of Ngāpuhi rather than from Ngāpuhi hapū.

99. A group seeking to withdraw from the Whakatōhea Deed of Mandate must first issue a notice of the proposal to withdraw which must be signed by at least 5% of all Te Whakatōhea on the register maintained by the Trust Board. The Te Whakatōhea withdrawal clause, similar to the provision in the Tūhoronuku IMA Deed of Mandate, is non-specific in that it requires the engagement of "as many Whakatōhea uri as possible" (cl. 19.1.5). The applicants have submitted that this is problematic because the process is too onerous; the tribal register is not up to date, valid signatures have been discounted, and the requirements for public hui are too costly.

100. I turn to the attempt to withdraw from the mandate in November 2016, following ratification. A document filed in evidence, titled "Final Submission Report", and addressed to the Chairman of the WPSCT Graeme Riesterer reports the results of submissions to withdraw from the mandate. The report states that, as at 9 December 2016, there were 9,885 current registered active beneficiaries of Whakatōhea, and 1,785 members 'Recorded under Parent' (Wai 2590, #A2(a) at [GR-5, Evidence A]). The total registered members of Whakatōhea at that time, including those recorded under parent, was then 11,680.

101. The report sets out that a total of 495 submissions from registered adult members were required to meet the 5% threshold to trigger the withdrawal mechanism. The number of actual submissions recorded and received was 425, which left a shortfall of 70 registered active beneficiaries. Additionally, the number of submissions received as 'Recorded Under Parent' was 53, leaving a shortfall of 36 out of the required 89 submissions. In total (considering both registered members and those recorded under parent), there was a shortfall of 106 submissions.

102. The Crown and the WPSCT submit that because the 5% threshold was not met, the withdrawal clause was not triggered. While in theory, this is correct, the report is silent on a number of issues, and has the potential to raise further concerns.

103. First, the number of registered submissions *by individual hapū* was not identified. This is problematic. Although the *total* number of submissions may not have reached the 5% threshold, it seems entirely probable that the numbers for individual hapū reached or exceeded the 5% threshold. Indeed, I note that in further evidence submitted by the WPSCT, Ngāi Tamahaua and Ngāti Ira did reach the 5% threshold (Wai 2610,

[5] Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report*, above n 3, p. 67

#3.1.8(a)). If the numbers for a given hapū reach or exceed the 5% threshold, then it has to be asked whether locking that hapū into the mandate is consonant with hapū rangatiratanga.

104. I sought further clarifcation from the Crown and the WPSCT on this matter (Wai 2589, #2.5.4). In essence, the WPSCT says that the numbers of submissions received from individual hapū is not important as the clause requires that 5% is obtained from the whole of Whakatōhea. This reflects the fact that the mandate was sought from all of Whakatōhea and not individual hapū of Whakatōhea (Wai 2610, #3.1.8). The Crown also noted that at the time of its decision to recognise the mandate to the WPSCT, the WPSCT had not yet ascertained whether the withdrawal petitions had been signed by at least 5% of Whakatōhea. Therefore, taking into account the petition, and uncertainty as to what the eventual outcome of the petition would be, the Crown's view was that the withdrawal petition was "not sufficient to neutralise the strong mandate conferred on the WPSCT by the people of Whakatōhea through other processses (Wai 2610, #A2). However, given the WPSCT achieved its mandate with an 80% silent majority, this silent, non-participating majority, make the figures indicating those who wish to withdraw all the more potent.

105. It also needs to be said at this point that the 5% figure is simply an arbitrary figure inserted in the mandate. It could have been 3%, it could have been 10%. The figure therefore, does not shield the Crown or the WPSCT from a claim that the settlement is not in accordance with the principles of the Treaty.

106. A prima facie question may arise then as to whether the clause and the mandate as a whole contemplates a process that is "realistic" and realises the aspirations of hapū in a way that is consistent with the principles of the Treaty. Indeed, it is central to the applicants claim that the mandate fails to recognise hapū rangatiratanga.

107. Given that the Crown made the decision to recognise the mandate, aware of the petition to withdraw, but without yet knowing the results of that process, there is a question also as to whether it sufficiently informed itself of the level and nature of opposition to the mandate at the time it made its decision and considered the grievances of those attempting to withdraw in any meaningful way.

108. A further concern is the difference between the number of registered members at the time the mandate was ratified and the number of registered members at the time that hapū were seeking to withdraw from the mandate. As noted above, when the mandate was ratified, it was supported by 1,439 votes from 6,662 eligible voters, despite the fact that the Deed of Mandate noted that there were 12,549 members of Whakatōhea (Wai 2591, #A4). The latest numbers indicate that there are 9,895 current registered members (this number jumps to 11,680 when it includes those registered under parents). The membership numbers in the Final Submission Report versus the number of eligible voters from whom the mandate was sought (6,662) elevates the difficulty of reaching the required 5% threshold required to trigger the withdrawal mechanism. In short, it appears it was far more onerous to meet than the mandating process, which was calculated solely on the percentage of members who voted, rather than the total number of registered members (if the latter had been the case, then it would have been a small minority who voted in favour of the mandate).

109. The figures for the proposal to withdraw should also be viewed in light of the fact that some claimants have refused to register themselves on the Trust Board's register "as they do not consider themselves Whakatōhea" (Wai 2563, #A1(b)). As the withdrawal mechanism can only be triggered by those registered on the Trust Board's register, submissions made by any unregistered members were discounted. Both the Crown and the WPSCT confirm this. At this stage, it is not clear what the extent of the impact was on the outcome of the petition to withdraw.

110. The issues identified above in regards to the operation of the withdrawal mechanism, as well as the level of opposition to the mandate, give cause for serious concern. They suggest that there are questions as to whether the WPSCT has obtained and maintained a mandate to negotiate the historical claims of Whakatōhea. If not, then there is a real risk that the applicants will suffer significant and irreversible prejudice should the settlement proceed.

Te Ūpokorehe

111. Throughout this application process, the claimants for Te Ūpokorehe have asserted their identity as an iwi, as opposed to a hapū of Whakatōhea. On that basis they oppose their inclusion in the mandate. I note that there are conflicting views on the status of Te Ūpokorehe and I briefly address these below.

112. In the Te Urewera Inquiry, Mr Charles Aramoana stated that Te Ūpokorehe whakapapa joins with both Te Whakatōhea and Tuhoe and further that "some people call Ūpokorehe an iwi in itself. We've definitely acted as a separate group of people in the past. Today I describe us as a hapū of Whakatōhea with strong connections to Tuhoe". [6]

113. However, as discussed earlier in this decision, Kahukore Baker submits that Mr Aramoana felt that he had no choice but to describe Te Ūpokorehe as a hapū of Whakatōhea because the Crown designated Te Ūpokorehe as such when it established the Whakatōhea Māori Trust Board in 1952 (Wai 2563, #A1(e)).

114. Te Ūpokorehe have sought a separate mandate but not in competition with Te Whakatōhea so as to recognise their status as an iwi. Te Ūpokorehe accept that the Crown only enters into settlement negotiations with Large Natural Groupings. However, they say that they have provided evidence of their rohe boundaries and iwi numbers, which equate to a Large Natural Grouping for the purpose of settlement with the Crown. Indeed, Te Ūpokorehe submit that their rohe is almost half the entire Ūpokorehe-Whakatōhea area and that Te Ūpokorehe consists of five hapū and five marae (Wai 2563, #A1(e)).

115. The Te Ūpokorehe claimants have taken a consistent position in regards to the WPSCT mandate. That is, they have always opposed their inclusion. Their desire to manage their own claims appears to have been recognised to some extent during the early consultation hui undertaken by the Collective. Minutes of a presentation given by the Working Party to the Collective in March 2015 indicate that a "proposed representation model", which included the 5 hapū of Whakatōhea, initially excluded Te Ūpokorehe as they sought "to manage their own claim" (Wai 2563, #A2(a) p.85). Further, in July that same year at a meeting between the Collective and Te Whakatōhea hapū, it was again

[6] Waitangi Tribunal, *Te Urewera: Part 1* (Wellington: Pre-publication, 2009), p. 208

reiterated to the Collective that Te Ūpokorehe was an iwi in its own right. However, it was also suggested that Te Ūpokorehe would be willing to "walk side by side with Whakatōhea into negotiations" (Wai 2563, #A2(a) p.85). It was noted at that hui that "as an observation the opinions of the hapū of Te Ūpokorehe, and the other hapū they purport to represent, were not unified in their response" (p. 89).

116. It is hard to reach a conclusion as to whether the opinion of the Te Ūpokorehe applicants is based on a fear of being subsumed by Te Whakatōhea with a consequent loss of mana and identity. In view of the Crown's policy of settlement with Large Natural Groupings, it may be that Te Ūpokorehe are unrealistic in their expectations of obtaining their own settlement in even the medium future. It may be that they would accept, as their tūpuna accepted, that they sit naturally beside Te Whakatōhea and should settle beside Te Whakatōhea. If that were the case, one wonders whether the naming of the settlement remains appropriate. The clamour and heat in the issue however, is such that there is a real risk in my view, that Te Ūpokorehe does not give its informed consent to this settlement and the issues must be examined by the Tribunal hearing the urgency claim.

Alternative remedies

117. An important element of the urgency criteria is the alternative remedies issue.

118. The Crown has pointed to the dispute resolution processes under the Deed of Mandate, including the ability to withdraw from or amend the mandate, and the ratification process that will be required for any proposed Deed of Settlement that eventuates from negotiations.

119. However, those processes require that the claimants consider themselves bound by the mandate and use the structures under the Deed of Mandate to achieve their ends. This, when they argue that either they have never given WPSCT a mandate, or that the WPSCT no longer holds a mandate. Further, to the extent they have already attempted to utilise the processes under the Deed of Mandate (i.e the attempt to withdraw from the mandate) they have been wholly unsuccesful.

120. The Crown also suggests that there will be a further process giving claimants the opportunity to have their concerns regarding the mandate recorded. However, when pressed for further information, the Crown was unable to elaborate on what this process would involve (Wai 2610, #3.1.6). There is, in my view, such a degree of uncertainty surrounding this process as to raise sufficient doubt in my mind about whether it does present an alternative remedy for the applicants.

121. I am satisifed therefore that for the purposes of these applications, there are no alternative remedies available to the applicants.

Decision

122. For the reasons set out above, the applications for urgency are granted.

The Registrar is to send a copy of this direction to counsel for the applicants, Crown counsel and those on the notification list for:

- Wai 2563, the Whakatōhea Mandate (Ūpokorehe) claim;
- Wai 2589, the Whakatōhea Mandate (Ruatakena) claim;
- Wai 2590, the Whakatōhea Mandate (Rangihaerepō) claim;
- Wai 2591, the Whakatōhea Mandate (Ngāti Ira o Waioweka Rohe) claim;
- Wai 2592, the Whakatōhea Mandate (Moutohora Quarry) claim;
- Wai 2593, the Whakatōhea Mandate (Ngāti Patumoana) claim;
- Wai 2594, the Whakatōhea Mandate (Te Whānau o Te Kahika) claim;
- Wai 2595, the Whakatōhea Mandate (Ngati Muriwai) claim;
- Wai 2605, the Whakatōhea Mandate (Te Whānau a Apanui) claim;
- Wai 2606, the Whakatōhea Mandate (Ngai Tamahaua) claim;
- Wai 2609, the Whakatōhea Mandate (Mokomoko) claim;
- Wai 2610, the Whakatōhea Mandate (Hei and Ors) claim; and
- Wai 2657, the Whakatōhea Mandate (Edwards and Ors).

DATED at Rotorua this 28th day of July 2017

Judge P J Savage
Deputy Chairperson
WAITANGI TRIBUNAL