

THE
WHAKATŌHEA MANDATE
INQUIRY REPORT

THE
WHAKATŌHEA MANDATE
INQUIRY REPORT

WAI 2662

WAITANGI TRIBUNAL REPORT 2018



National Library of New Zealand Cataloguing-in-Publication Data
*A catalogue record for this book is available from
the National Library of New Zealand*

ISBN 978-1-86956-329-5 (pbk)

ISBN 978-1-86956-330-1 (PDF)

www.waitangitribunal.govt.nz

Typeset by the Waitangi Tribunal

This report was previously released online in pre-publication format in 2018 as

The Whakatōhea Mandate Inquiry Report – Pre-publication Version

This edition published 2018 by Legislation Direct, Lower Hutt, New Zealand

Printed by Printlink, Lower Hutt, New Zealand

22 21 20 19 18 5 4 3 2 1

Set in Adobe Minion Pro and Cronos Pro Opticals

CONTENTS

Letter of transmittal	ix
CHAPTER 1: INTRODUCTION TO THIS INQUIRY	1
1.1 The urgent inquiry	1
1.1.1 Introduction	1
1.1.2 The journey to settlement	1
1.1.3 The mandating process	2
1.1.4 The applications for urgency	3
1.2 The people of Whakatōhea	4
1.3 The claimants in this inquiry	4
1.4 The structure of this report	5
CHAPTER 2: THE POSITIONS OF THE PARTIES	7
2.1 Introduction	7
2.2 The parties to this inquiry	7
2.2.1 The claimants and their positions	7
2.2.2 The Crown’s position	8
2.2.3 The interested parties	8
2.3 The issues for this inquiry	9
CHAPTER 3: WHAKATŌHEA’S EXPERIENCE IN THE MODERN PERIOD OF CROWN SETTLEMENT POLICY	11
3.1 Introduction	11
3.2 Crown settlement policy	11
3.3 The negotiation process: 1989–98	12
3.4 The latest mandate process: 2010–15	13
3.5 Moving towards recognition of the Pre-settlement Trust mandate: 2016–17	16
3.5.1 Request for Waitangi Tribunal inquiry	17
3.5.2 Agreement to pursue an accelerated negotiation pathway	18
3.5.3 Recognising the Pre-settlement Trust mandate	18
CHAPTER 4: TREATY PRINCIPLES AND STANDARDS	21
4.1 Introduction	21
4.2 Jurisdiction	21
4.3 The Treaty principle of partnership	21
4.3.1 Informed decision-making	22
4.3.2 Whanaungatanga	22
4.4 The Treaty principle of active protection	23
4.5 Conclusion	24

CHAPTER 5: THE TRIBUNAL'S ANALYSIS OF MANDATE ISSUES	27
5.1 Introduction	27
5.2 The 'Te Ara Tono' report	27
5.3 The mandate vote and hapū rangatiratanga	29
5.4 The mandate vote and the Trust Board register.	31
5.4.1 The Trust Board register: eligibility and opportunity to participate in the mandate vote	31
5.4.2 Communicating participation rates to Ministers	33
5.4.3 Conclusions on the use of the Trust Board register as a basis for the mandate vote	34
5.5 Consideration of support for and opposition to the Deed of Mandate.	34
5.5.1 Submissions on the Deed of Mandate	35
5.5.2 The withdrawal petition	37
5.5.3 Consideration of support for a Waitangi Tribunal district inquiry.	39
5.5.4 Conclusions on the consideration of support and opposition	43
5.6 Hapū rangitiratanga and the process for selecting trustees	44
5.7 The process for recognising additional hapū	46
5.8 The process for withdrawing support for the mandate	47
5.8.1 Is there a fair process for determining whether the 5 per cent threshold has been met?	48
5.8.2 Are the requirements for amending or withdrawing the mandate workable?	49
5.8.3 Does the withdrawal process adequately provide for the interests of hapū?	50
5.8.4 Conclusions on the withdrawal mechanism	53
5.9 The impact of the Crown's 2016 strategy for accelerated Treaty settlements: 'Broadening the Reach'	53
5.9.1 September 2016 invitation to participate in accelerated negotiations	54
5.9.2 Including Whakatōhea in the 'Broadening the Reach' strategy	55
5.9.3 Assessing capacity, capability, and cohesion	56
5.9.4 Conclusion on the influence of the accelerated negotiation process	58
 CHAPTER 6: THE TRIBUNAL'S ANALYSIS OF SPECIFIC CLAIMS	 59
6.1 Introduction	59
6.2 Ūpokorehe claim (Wai 2563)	59
6.2.1 Introduction	59
6.2.2 The claim	59
6.2.3 Key issues for Ūpokorehe	60
6.2.4 The positions of the parties	60
6.2.5 Should Ūpokorehe be part of a Whakatōhea mandate?	63
6.2.6 The Crown's 'large natural group' policy and a 'parallel, non- competing' mandate	69
6.2.7 Does the Ūpokorehe Claims Trust speak for Ūpokorehe?	72

6.3	The Mokomoko whānau claim (Wai 2609)	74
6.3.1	Introduction	74
6.3.2	The findings of the Te Urewera Tribunal	75
6.3.3	The 2011 Crown commitment to the Mokomoko whānau	75
6.3.4	Settling the Mokomoko whānau claim and the large natural groups policy	76
6.4	Te Whānau a Te Kahika claims (Wai 2594 and Wai 2605)	80
6.5	The Moutohorā Quarry claim: Whakapaupākihi No 2 Trust (Wai 2592)	81
6.6	The Raupatu Working Party claimants and the section 30 order (Wai 2657)	82
6.7	Conclusion	83
CHAPTER 7: FINDINGS AND RECOMMENDATIONS		85
7.1	Introduction	85
7.2	Issue 1: The Crown's recognition of the Deed of Mandate	85
7.2.1	Issue 1(a): Reasonableness of the Crown relying on the Trust Board register	86
7.2.2	Issue 1(b): Sufficiency of the Crown's knowledge of the support for and opposition to the mandate prior to its recognition	87
7.2.3	Issue 1(c): Sufficiency of support to warrant mandate recognition	88
7.2.4	Issue 1(d): Consideration of reasonable alternative mandating structures	89
7.2.5	Issue 1(e): Appropriateness of Ūpokorehe being included in the Pre-settlement Trust Deed of Mandate	89
7.2.6	Issue 1(f): Appropriateness of Te Whānau a Mokomoko being included in the Pre-settlement Trust Deed of Mandate	90
7.3	Issue 2: Provision for Whakatōhea hapū in the Pre-settlement Trust Mandate and any resultant prejudice	91
7.4	Issue 3: Fairness of the remedies under the Deed of Mandate and recognition and protection of hapū rangatiratanga	91
7.5	Issue 4: Fairness and reasonableness of the Crown continuing to recognise the Pre-settlement Trust mandate	92
7.6	Summary of findings	92
7.7	Provision of information	93
7.8	Prejudice	94
7.9	The current difficulty	94
7.10	Our recommendations – next steps	96
7.11	Further specific recommendations	99
7.11.1	The Mokomoko whānau	99
7.11.2	The Te Kahika claimants	99
7.12	The outcome and consequences of vote	99
APPENDIX I: WHAKATŌHEA PĀNUI		103

CONTENTS

APPENDIX II: SELECT RECORD OF INQUIRY	105
Select record of proceedings	105
1. Statements	105
1.1 Statements of claim	105
Wai 2257	105
Wai 2510	105
Wai 87	105
Wai 203	105
Wai 224, Wai 1082, Wai 1759, Wai 2008, Wai 2049, Wai 2055, Wai 2066, Wai 2097, Wai 2290, Wai 2346, Wai 2462	105
Wai 1092, Wai 1787, Wai 1758	105
1.4 Tribunal statement of issues	106
2. Tribunal memoranda, directions, and decisions	106
3. Submissions and memoranda of parties	106
3.1 Pre-hearing stage, including judicial conferences	106
3.2 Hearing stage	106
3.3 Opening, closing, and in reply	107
3.4 Post-hearing stage	108
4. Transcripts	108
Select record of documents	109
A. Inquiry documents	109



Waitangi Tribunal
Te Rōpū Whakamana i te Tiririti o Waitangi
Kia puta ki te whai ao, ki te mārama

The Honourable Andrew Little
Minister for Treaty of Waitangi Negotiations

The Honourable Nanaia Māhuta
Minister for Māori Development

The Honourable Kelvin Davis
Minister for Crown and Māori Relationships

Parliament Buildings
WELLINGTON

12 April 2018

E ngā minita, tēnā koutou,

*Kia whatua te kāwai o te tangata;
Kia whitauria te kīwai o te kete;
Kia tānikohia ki te kāwei rangatira.*

*To weave the strands of people together,
To give handles to the spiritual kete, and
To embellish that work with a fitting nobility.*

Enclosed is our report on the Whakatōhea mandate. This is the outcome of an urgent hearing held in Whakatāne on 6–10 and 21–22 November 2017.

The primary issue for inquiry was whether the Crown's decision to recognise the Whakatōhea Pre-Settlement Claims Trust (Pre-settlement Trust) Deed of Mandate was fair, reasonable, and made in good faith.

We conclude that there has been a failure to fulfil the Crown's duty to act reasonably, honourably, and in good faith, and that this constitutes a breach of the Treaty principles of partnership and active protection. We believe it came about because the Crown effectively prioritised its political objective of concluding settlements by mid-2020 over a process that was fair to Whakatōhea. This not only caused prejudice to Whakatōhea, but it also puts

Level 7, 141 The Terrace, Wellington, New Zealand. Postal: DX SX11237
Fujitsu Tower, 141 The Terrace, Te Whanganui-ā-Tara, Aotearoa. Pouaka Poutāpetā: DX SX11237
Phone/Waea: 04 914 3000 Fax/Waea Whakaahua: 04 914 3001
Email/E-mēra: information@waitangitribunal.govt.nz Web/Ipurangi: www.waitangitribunal.govt.nz



at significant risk the prospect of a durable settlement based upon a restored Treaty relationship.

Historically, Whakatōhea have endured some of the worst Treaty breaches, which include war and raupatu.

In more recent times, the iwi has been much divided over a failed attempt to settle in 1996.

The particular circumstances within Whakatōhea in 2016 that were known to the Crown required more than the expedient of picking and backing the group considered most likely to achieve the Crown's objective of a quick settlement. In our view, the process lacked balance and strongly implied a pre-determined outcome. Those in opposition to the mandate have good reason to feel that their concerns were not given a fair hearing.

We conclude therefore that the Crown should not have recognised the Pre-settlement Trust Deed of Mandate in December 2016. It was also wrong to include Whakatōhea in the strategy to accelerate settlements known as 'Broadening the Reach' in October 2016.

To compound matters, once the mandate was recognised in December 2016, the Crown and the Pre-settlement Trust moved quickly into substantive negotiations and an Agreement in Principle was signed in August 2017. The Crown and the Pre-settlement Trust expect to conclude negotiations based on the Agreement in Principle within the next 12 to 18 months.

This puts Whakatōhea in a very difficult position. We gave careful consideration to whether we ought to recommend a halt to negotiations and a rerun of the mandate process.

On balance, we decided against this course. To do so may cause prejudice to those who in good faith have supported the work of the Pre-settlement Trust. There is also potential prejudice to all of Whakatōhea in terms of delayed or deferred settlement redress. On the other hand, to simply push ahead and conclude negotiations risks entrenching even further the deep divisions within Whakatōhea that we witnessed at the hearings. The resulting settlement would be constructed upon questionable foundations and the settlement's objectives be put at risk.

We therefore recommend a temporary halt to negotiations in order that all of Whakatōhea be given a chance to vote on how to proceed. We state in draft form what we believe should be the questions to be voted upon. To avoid any further prejudice to Whakatōhea, we recommend that the Crown fund this process and that it commit to maintaining its current settlement offer. We also think it should pay interest on the cash component of the settlement offer from the date of this report until the process we recommend has been completed (or later if that is what good-faith conduct requires).

Importantly, Whakatōhea must be given an opportunity to vote on a hapū basis. This is consistent with the tikanga for mandate recognition endorsed by Whakatōhea in 2007.

In framing our recommendations in this way, we are mindful that both the Crown and the Pre-settlement Trust expressed support for a similar proposal when we raised it with the parties following the first week of hearings.

We acknowledge that there may be issues of implementation or clarification arising from our recommendations (including the final wording on the voting forms). We have reserved leave to the parties to apply for further directions.

Parties wishing to exercise leave must do so on or before 4 pm, 25 May 2018.

Nāku noa, nā

A handwritten signature in black ink, appearing to read 'M Doogan', with a long, sweeping flourish extending to the right.

M Doogan
Presiding Officer

ACKNOWLEDGEMENTS

The Tribunal would like to record its appreciation for the hard work and professionalism of the staff who assisted us in arranging the inquiry, hearing the claims, and preparing this report. They are Abby Hauraki (assistant registrar); Joanna Morgan, Helayna Seuli, Te Rangiapia Wehipeihana, and Keana Wild (claims coordinators); Matthew Cunningham and Hinetaapora Moko-Mead (inquiry facilitators); David Fagan, Joy Hippolite, Cathy Marr, and Richard Thomson (report-writing assistance); Te Amohaere Reihana (judicial administrative support); Tessa Simpson and James Watson (research counsel); and Dominic Hurley and Jane Latchem (editorial and typesetting services).

During the hearings the Tribunal relied on the skills of Conrad Noema (interpreter and translator) and Alan Doyle (sound technician).

ABBREVIATIONS

AJHR	<i>Appendix to the Journals of the House of Representatives</i>
app	appendix
CA	Court of Appeal
ch	chapter
cl	clause
comp	compiler
doc	document
ed	edition, editor
GNA	got no address
ltd	limited
MB	minute book
memo	memorandum
n	note
no	number
NZCA	<i>New Zealand Court of Appeal</i>
NZLR	<i>New Zealand Law Reports</i>
p, pp	page, pages
para	paragraph
pt	part
ROI	record of inquiry
RUP	recorded under parent
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
v	and
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2662 record of inquiry, a select copy of which is reproduced in appendix 11. A full copy of the record is available on request from the Waitangi Tribunal.

CHAPTER 1

INTRODUCTION TO THIS INQUIRY

*Te Whakatōhea Toheraoa*¹

1.1 THE URGENT INQUIRY

1.1.1 Introduction

This report addresses the claims of several Whakatōhea groups (including hapū) that object to the Crown's recognition of the Whakatōhea Pre-settlement Claims Trust (the Pre-settlement Trust) Deed of Mandate. The mandate is to negotiate a settlement of the historical Treaty of Waitangi claims of Whakatōhea. These claims relate to Whakatōhea's historical experiences, which include some of the worst Treaty breaches by the Crown, including war and raupatu (land confiscation).

The Crown recognised the Pre-settlement Trust mandate in December 2016 and then moved quickly into substantive negotiations. The Pre-settlement Trust and the Crown entered into an agreement in principle in August 2017.

We heard the claims under urgency in November 2017. The central complaint was that the Crown had breached the principles of the Treaty of Waitangi by failing to actively protect the ability of hapū and Waitangi Tribunal claimants to exercise their rangatiratanga in determining how they would settle their historical claims. Significant concerns were also raised about the process by which the mandate was recognised. A great deal is at stake for the claimants who appeared before us. Their historical claims currently stand to be extinguished by a body and through a process to which they strenuously object.

The Crown denies the claims and says that the Pre-settlement Trust has the support of a significant majority of Whakatōhea. The Crown and the trust want to conclude settlement negotiations under the current mandate. All the parties asked us to report as quickly as possible because of the potential implications for negotiations.

1.1.2 The journey to settlement

Attempts by Whakatōhea to seek redress from the Crown for raupatu date back at least to the early twentieth century, with petitions filed to the Government in the

1. The Toheraoa is a hardy shrub which can grow in all kinds of terrain, in all kinds of weathers. This whakataukī speaks to Whakatōhea's 'tohe', their persistence; 'raoa' is a 'choking'. Despite the 'choking', Whakatōhea 'persists'.

1910s and 1920s. These efforts led to several inquiries, including by the Sim commission in 1927.² That resulted in a settlement for ‘excessive’ confiscation in 1947,³ and the establishment in 1952 of the Whakatōhea Māori Trust Board (the Trust Board).⁴

The latest attempts to settle with the Crown came after the establishment of the Waitangi Tribunal and the extension of its jurisdiction to inquire into claims from 1840. New Crown settlement policies were adopted from the mid-1990s, including an acknowledgement that raupatu was a Treaty breach. An attempt was made to reach a settlement with the Crown in 1996, but this failed because Whakatōhea would not ratify the offer presented.

1.1.3 The mandating process

This inquiry focuses on the Crown’s recognition of the Pre-settlement Trust mandate. The Pre-settlement Trust was established in 2016. This came after a lengthy process within Whakatōhea that began in 2003. In that year, Whakatōhea began work on a process to negotiate and settle its raupatu claims with the Crown. This represented a concerted effort to overcome the divisive effects of the earlier failed attempt to settle in 1996.

A group known as the Whakatōhea Hapū Claims Process Working Party (the Process Working Party) was formed to prepare a mandate strategy. It produced a report known as ‘Te Ara Tono mo nga Kereme o te Whakatōhea’, which was adopted by Whakatōhea at a hui-ā-iwi in August 2007. ‘Te Ara Tono’ recommended that a new working party be set up. However, it appears that little progress was made following the adoption of ‘Te Ara Tono’.

By 2010, there were three groups developing mandate strategies to negotiate with the Crown. One group was called the Whakatōhea Raupatu Working Party (the Raupatu Working Party). Another group, which included individuals from several hapū, became known as the Tū Ake Whakatōhea Collective (Tū Ake).

A third group, formed by members of Ūpokorehe, established the Te Ūpokorehe Treaty Claims Trust (Ūpokorehe Claims Trust). They went on to develop what they described as a strategy for a parallel but non-competing mandate.

In 2013, the Raupatu Working Party and Tū Ake each submitted a mandate strategy to the Crown for consideration. Tū Ake’s mandate strategy proposed establishing the Pre-settlement Trust to seek a mandate from Whakatōhea members. Tū Ake’s draft mandate strategy went through several iterations in response to consultation with Whakatōhea groups and the Crown. The mandate strategy was formally presented to Te Puni Kōkiri for consideration and submissions in November 2015.

2. Commission to Inquire into and Report as to Grievances Alleged by Maoris, ‘Confiscated Native Lands and Other Grievances: Royal Commission to Inquire into Confiscations of Native Lands and Other Grievances Alleged by Natives (Report of)’, AJHR, 1928, G-7

3. AJHR, 1947, G-9, p1

4. The establishment of the Whakatōhea Māori Trust Board was provided for in the Maori Purposes Act 1949 (section 26) to administer moneys paid to the Maori Trustee under the Finance Act (No 2) 1946 for the benefit of ‘members of the Whakatōhea Tribe and their descendants’.

The Crown endorsed the Tū Ake mandate strategy in April 2016. Voting on the mandate took place between 6 May and 3 June 2016. The Pre-settlement Trust Deed of Mandate was recognised by the Crown on 14 December 2016.

1.1.4 The applications for urgency

On 30 May 2016, the Tribunal received an application for an urgent inquiry from Kahukore Baker on behalf of Ūpokorehe.⁵ A further 12 applications for an urgent inquiry were received in January and February 2017, the last on 28 February 2017.⁶ One application was subsequently withdrawn.

On 28 July 2017, the Tribunal's Deputy Chairperson, Judge Patrick Savage, granted an urgent inquiry. Judge Savage noted the unfortunate history of the relationship between the Crown and Whakatōhea and their protracted efforts to reach a settlement.⁷

On 17 August 2017, the chairperson of the Waitangi Tribunal, Chief Judge Wilson Isaac, appointed Judge Michael Doogan presiding officer for the inquiry.⁸ On 25 August 2017, Chief Judge Isaac appointed Associate Professor Tom Roa, Dr Robyn Anderson, and Basil Morrison as members of the Tribunal panel.⁹

The first hearings took place at the Awakeri Events Centre near Whakatāne from 6 to 10 November 2017. During a chambers conference with counsel on Thursday, 9 November, parties indicated their support for an early indication from us as to whether we saw potential problems with the Pre-settlement Trust mandate that might require remedial action.

By the end of the first hearing week, it was our preliminary view that there were issues with the mandate that needed to be addressed.

We set out these views in a memorandum dated 13 November 2017.¹⁰ We thought that how we proceeded was a matter of such significance to the iwi that all of Whakatōhea should be given an opportunity to express a view on two propositions:

1. Do you support the [Pre-settlement Trust] continuing to negotiate and reach a settlement with the Crown on current timeframes (12–18 months)?
2. Do you support a Waitangi Tribunal inquiry into the historical claims of Te Whakatōhea? And if so, should settlement negotiations continue whilst any Waitangi Tribunal inquiry takes place?¹¹

We stated that, if there were clear support for such a process, we would consider adjourning the inquiry to await the outcome. We also noted that this urgency

5. Claim 1.1.14

6. Claim 1.1.12

7. Memorandum 2.5.6

8. Memorandum 2.5.7

9. Memorandum 2.5.8

10. Memorandum 2.6.2

11. Ibid, p 9

panel had no authority to commit the Tribunal to an inquiry into Whakatōhea historical claims.

Two further days of hearings were then held at Wairaka Marae on 21 and 22 November 2017. During these two days, counsel completed their cross-examination of witnesses and the parties made submissions in response to the Tribunal's preliminary views and suggested process.

The Crown and the Pre-settlement Trust supported our proposal for a new vote. All claimant groups opposed the proposal and requested that we complete our urgent inquiry and issue a full report as soon as possible. Taking into account this opposition from claimants to our proposal, we continued with our inquiry, receiving closing submissions on all inquiry issues in December 2017.

1.2 THE PEOPLE OF WHAKATŌHEA

Whakatōhea's customary rohe occupies an area of the eastern Bay of Plenty centred on Ōhiwa Harbour and Ōpōtiki and extending south into rugged, bush-clad hinterland.

Whakatōhea trace their descent from two primary tūpuna, Tūtāmure of the *Nukutere* waka, and Muriwai of the *Mataatua* waka. Muriwai was famous for saving the *Mataatua* waka from floating out to sea, stating, 'Kia whakatāne au i ahau!' (I shall acquit myself like a man!), from which the name for the town Whakatāne derives.¹² The marriage of Tūtāmure and Hineikauia (daughter of Muriwai) is a foundational event for the iwi of Whakatōhea.¹³

1.3 THE CLAIMANTS IN THIS INQUIRY

The claims in this urgent inquiry were made on behalf of several groups, including whānau, hapū, and iwi. The named claimants are:

- ▶ Kahukore Baker, for and on behalf of herself and Ngā Uri o Te Ūpokorehe iwi (Wai 2563);
- ▶ Tāwhirimatea Williams, for and on behalf of himself and Ngāti Ruatakena hapū (Wai 2589);
- ▶ Te Rua Rakuraku, for and on behalf of himself, the late John Kameta, and Ngāti Ira o Waioweka hapū (Wai 2591);
- ▶ John Hata, Russell Hollis, and John Brown, for Moutohorā Quarry (Wai 2592);
- ▶ John Hata and Russell Hollis, for Ngāti Patumoana hapū (Wai 2593);
- ▶ Wiremu Te Kahika and Joseph Te Kahika, for Te Whānau o Te Kahika, Kahika, Kahikatea, Kahikaroa, and Wharekahika (Wai 2594);

12. Whakatōhea Māori Trust Board, 'Tipuna', <http://www.whakatohea.co.nz/t299puna.html>, accessed 13 April 2018

13. Document A86, p 51

- ▶ Christina Rolleston, Christina Davis, Patricia McMurtrie, and Adriana Edwards, for and on behalf of themselves and Ngāti Muriwai hapū (Wai 2595);
- ▶ Ruiha Edna Stirling and Parehuia Herewini, for and on behalf of themselves, the late Maruhaeremuri Stirling, and the whānau and hapū of Te Whānau ā Apanui and Whakatōhea (Wai 2605);
- ▶ Tracey Hillier and Rita Wordsworth, for and on behalf of themselves and the whānau and hapū of Ngāi Tamahaua (Wai 2606);
- ▶ Pita Biddle and Karen Mokomoko, for and on behalf of themselves, the late Tuiringa Mokomoko, and the other uri of the rangatira Mokomoko (Wai 2609);
- ▶ Nikora Curtis Tautau and Nanette Kernohan, William Peter Hatu, Dr Guy Naden, Takaparae Papuni, John Kahui Hillman, Lee Ann Martin, and Ngarangi Naden, representing various historical Waitangi Tribunal claims (Wai 2610);¹⁴ and
- ▶ Adriana Edwards, Barry Kiwara, and Dean Flavell, for and on behalf of themselves and Whakatōhea hapū (Wai 2657).

1.4 THE STRUCTURE OF THIS REPORT

In chapter 2, we set out the positions of the parties in this inquiry and the issues that we will address.

In chapter 3, we describe Whakatōhea's experience of Crown settlement policy since the 1990s leading up to this urgent inquiry.

In chapter 4, we identify and discuss the relevant Treaty principles that apply in this inquiry.

In chapter 5, we analyse how the relevant Treaty principles apply to the circumstances that led to this inquiry.

In chapter 6, we analyse how the relevant Treaty principles apply to several specific claims in this inquiry.

In chapter 7, we set out our findings and recommendations.

14. Closing submissions were filed on behalf of these named claimants: see submission 3.3.26, para 1.

CHAPTER 2

THE POSITIONS OF THE PARTIES

2.1 INTRODUCTION

In this chapter, we set out the positions of the parties and we identify the issues in our inquiry.

2.2 THE PARTIES TO THIS INQUIRY

2.2.1 The claimants and their positions

The claimants said that the Crown recognised a mandate that was not properly obtained. They said that there had been considerable and sustained opposition, both to Tū Ake and to the Pre-settlement Trust, expressed at hui, in letters, and in submissions, which the Crown did not properly address.¹ The claimants said that the mandate vote was flawed and that the results do not indicate which hapū supported the mandate.²

The claimants submitted that, inconsistent with Whakatōhea tikanga, the mandating process was not hapū driven and had undermined hapū rangatiratanga.³

When the Crown recognised the Deed of Mandate in December 2016, the withdrawal process under the deed had been initiated by several claimants and was still ongoing. The claimants said that the Crown did not act in good faith when it recognised the mandate while the withdrawal process was under way.⁴

The Ūpokorehe claimants (Wai 2563) asserted an identity distinct from Whakatōhea, stating that they were an iwi in their own right.⁵ They said that their attempt to advance a parallel but non-competing mandate alongside Whakatōhea was never properly acknowledged by the Crown. The Ūpokorehe claimants stated that the Crown's acknowledgement of the Tū Ake mandate strategy and the Pre-settlement Trust Deed of Mandate undermined Ūpokorehe's rangatiratanga.⁶

The Ngāti Muriwai claimants (Wai 2595) said that they have been excluded from participating in the mandating process.⁷

1. Submission 3.3.28, pp 15–16; submission 3.3.29, paras 51–55; submission 3.3.31, pp 7, 11, 17–18

2. Submission 3.3.31, pp 26–27; submission 3.3.38, pp 1–8; submission 3.3.40, p 46

3. Submission 3.3.32, p 5; submission 3.3.38, p 25; submission 3.3.39, pp 8–9

4. Submission 3.3.32, p 28; submission 3.3.35, p 19; submission 3.3.38, p 8

5. For convenience, we characterise Ūpokorehe as among the 'hapū' of Whakatōhea in some sections of this report as this is how they are referred to in the trust board structure. However, we discuss this in greater detail in chapter 6.

6. Submission 3.3.28, pp 26–29

7. Submission 3.3.29, pp 18–19

Te Whānau a Mokomoko (Wai 2609) submitted that, by recognising the Pre-settlement Trust Deed of Mandate, the Crown breached an agreement reached with the whānau in 2011 that would allow them to explore with the Crown the possibility of separate settlement negotiations.⁸

Particular issues were also raised by the original Wai 87 raupatu claimants (Wai 2657) concerning the effect of the section 30 order granted in 1994.

The descendants of Tio Te Kahika (Wai 2594 and Wai 2605) raised concerns about the way in which their claims were included in the mandate late in the process and without notice. They also have a concern about ongoing ambiguity over the extent to which their claims will be finally settled under the proposed Whakatōhea settlement.

The Moutohorā Quarry claimants (Wai 2592) raised concerns about the inclusion of their historical claim in the mandate and the status of their trustees and beneficiaries under the mandate.

Given the widespread and sustained opposition to the mandate by the claimants, of which they say the Crown is aware, the claimants assert that there is no basis upon which the Crown can continue to recognise the Pre-settlement Trust Deed of Mandate.

2.2.2 The Crown's position

In response, the Crown stood by its decision to recognise the mandate of the Pre-settlement Trust.⁹

The Crown said that the mandate vote showed significant levels of support for the Pre-settlement Trust mandate and stated that participation and approval rates in the vote were within the normal to high range. However, it stated that the decision to recognise the mandate was not based solely on the outcome of the vote, which was only the final stage of a lengthy process of gaining the support of Whakatōhea.¹⁰ The Crown noted that Tū Ake amended its strategy over time to respond to issues raised by Whakatōhea.¹¹

The Crown recognised that hapū rangatiratanga is an important aspect of Whakatōhea identity. The Crown was satisfied that the Pre-settlement Trust structure provided appropriately for hapū rangatiratanga in the context of Whakatōhea tikanga.¹² It was not necessary for the Crown to require the Pre-settlement Trust to test support for the mandate on a hapū-by-hapū basis.¹³

2.2.3 The interested parties

There were two interested parties in these proceedings. The Pre-settlement Trust took part as an interested party opposing the claimants. It argued that there

8. Submission 3.3.37, p 1

9. Submission 3.3.33, p 2

10. Ibid, p 4

11. Ibid, p 8

12. Ibid, p 17

13. Ibid, p 25

had been a lengthy, transparent, and robust process to obtain a mandate from Whakatōhea.¹⁴

Kate Keita Hudson, the trustee on the Pre-settlement Trust for Maromahue Marae, also took part as an interested party in support of the Pre-settlement Trust. She submitted that it was appropriate for Ūpokorehe to be included in the Deed of Mandate and that the Ūpokorehe Claims Trust lacked a mandate to represent Ūpokorehe.¹⁵

2.3 THE ISSUES FOR THIS INQUIRY

On 22 September 2017, the Tribunal produced a statement of issues:

1. Was the Crown's recognition of the Whakatōhea Pre-Settlement Claims Trust Deed of Mandate fair, reasonable and made in good faith? In particular:
 - (a) Was it reasonable for the Crown to rely on the Whakatōhea Māori Trust Board Register?
 - (b) Did the Crown sufficiently inform itself of the levels of support for and opposition to the [Pre-settlement Trust's] mandate prior to its recognition?
 - (c) Was there sufficient support to warrant mandate recognition?
 - (d) Should the Crown have considered reasonable alternative mandating structures to the [Pre-settlement Trust]? And if so, what were they?
 - (e) Is it appropriate for Ūpokorehe to be included in the [Pre-settlement Trust] Deed of Mandate?
 - (f) Is it appropriate for Te Whānau a Mōkomoko to be included in the [Pre-settlement Trust] Deed of Mandate?
2. Does the [Pre-settlement Trust] mandate make proper provision for the hapū of Te Whakatōhea? Are any hapū prejudiced by reason of inclusion or omission?
3. Are the remedies available under the Deed of Mandate, particularly the withdrawal mechanism, fair? Is there appropriate recognition and protection of hapū rangatiratanga?
4. Is the Crown's decision to continue to recognise the mandate of [the Pre-settlement Trust] fair and reasonable, in light of the substantial and sustained level of opposition to it?
5. Do any of the Crown's policies, practices, acts or omissions in relation to the matters set out at 1–4 above breach the principles of the Treaty of Waitangi?
6. Have any of the claimants been prejudiced by any such breaches? How might any such breaches be remedied?¹⁶

14. Submission 3.3.36, pp 7–8

15. Submission 3.3.27, pp 1, 8

16. Statement 1.4.1

CHAPTER 3

WHAKATŌHEA'S EXPERIENCE IN THE MODERN PERIOD OF CROWN SETTLEMENT POLICY

3.1 INTRODUCTION

In this chapter, we provide an overview of relevant Crown settlement policy. We then describe Whakatōhea's experience of that policy since the 1990s, leading up to this urgent inquiry. We begin by looking at Whakatōhea's attempt to settle with the Crown in the 1990s. We look at the attempts to develop a mandate strategy between 2010 and 2015. Finally, we look at the process leading to the recognition of the Pre-settlement Trust Deed of Mandate in December 2016 and the signing of an agreement in principle with the Crown in August 2017.

3.2 CROWN SETTLEMENT POLICY

From the early 1990s, the Crown had recognised that settling all historical Treaty claims would require a comprehensive policy approach. Many of the foundations of the modern Treaty settlement framework were laid in the early 1990s, in the lead up to the Tainui and Ngāi Tahu settlements of 1995 and 1996. Treaty settlement policy continued to evolve, and the Crown's policy and practice are now set out in the Office of Treaty Settlements publication *Ka Tika ā Muri, Ka Tika ā Mua / Healing the Past, Building a Future*, commonly referred to as 'the Red Book'.¹

The Crown requires a historical claim to be registered with the Waitangi Tribunal before it will begin negotiating a settlement.²

The Crown 'strongly prefers' to negotiate claims with 'large natural groupings', usually defined by a shared whakapapa or a defined geographical area (or both), rather than with individual whānau or hapū or with the individuals who filed the claims.³ This is known as the large natural groups policy. If such a group wants to enter negotiations, the *Red Book* states that the claimants must cease actively pursuing their claim or claims before the Tribunal.⁴

The Crown requires a large natural group to decide who will represent them and leaves it to the group to determine an appropriate way to select its representatives,

1. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna / Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, revised ed (Wellington: Office of Treaty Settlements, 2015)

2. *Ibid*, p 32

3. *Ibid*

4. *Ibid*

stating that it does not wish to interfere in matters of tikanga. However, the Crown does require assurance that the representatives legitimately gained a mandate to represent the group. ‘The mandating process will usually involve a series of hui that allow members of the group to express their views about who should represent them in negotiations with the Crown.’⁵ A postal ballot may also be carried out to assist in the choice of who should represent the group.⁶

The Crown aims to achieve a fair, comprehensive, final, and durable settlement of all the claimant group’s historical claims. In exchange for settlement redress, ‘the settlement legislation will prevent the courts, Waitangi Tribunal or any other judicial body or tribunal from re-opening the historical claims.’⁷

One consequence of these policies, taken together, is that claims brought by individuals, whether alone or on behalf of their whānau, hapū, or other grouping, may be settled and extinguished against the claimants’ will.

3.3 THE NEGOTIATION PROCESS: 1989–98

Whakatōhea’s experience with the Crown’s modern settlement policy began after the first Whakatōhea historical claim was filed with the Waitangi Tribunal in 1989. In that year, Claude Edwards, the executive chairperson of the Trust Board, lodged a claim ‘on behalf of all the descendants of our tipuna’ regarding the invasion of Whakatōhea tribal lands in 1865 and the resulting consequences, including loss of life, land, and property. This claim was registered by the Waitangi Tribunal as Wai 87.⁸

When it became apparent in the early 1990s that the Crown was willing to negotiate with iwi for the settlement of Treaty grievances, the claimants decided to seek direct negotiations with the Crown rather than wait for a Waitangi Tribunal inquiry. The Crown had acknowledged that raupatu was generally a Treaty breach and that the expeditious settlement of raupatu claims therefore appeared possible.

As the Crown required properly mandated representatives with whom to negotiate, the Wai 87 claimants applied to the Māori Land Court for an order for representation under section 30 of the Te Ture Whenua Maori Act 1993.⁹ In 1994, claim manager Claude Edwards and 13 others were named as the ‘most appropriate representatives to act as negotiators for and on behalf of Whakatōhea in all matters whatsoever connected in achieving a settlement of the claim.’¹⁰ They represented six hapū – Ngāti Ira, Ngāti Ngahere, Ngāti Patumoana, Ngāti Ruatakana, Ngāi Tamahaua, and Ūpokorehe – and became known as the ‘Raupatu Committee’.

Negotiations between the Raupatu Committee and the Crown progressed to the point that a deed of settlement was initialled in 1996. However, objections arose

5. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua*, p 39

6. *Ibid*

7. *Ibid*, p 27

8. Claude Edwards, statement of claim concerning invasion of Whakatōhea lands and subsequent events, 22 May 1989 (Wai 87 ROI, claim 1.1)

9. Document A69(a), p 19

10. *The Whakatōhea Raupatu Claim* (1994) 69 Ōpōtiki MB 11 (69 OPO 11). See order.

to the Crown's requirement for a full and final settlement of all claims when the original claim related only to raupatu.¹¹ There were also objections to the way in which the Raupatu Committee functioned and to what was seen as a lack of transparency and accountability back to the hapū and iwi.¹² On 26 June 1997, at a hui-ā-iwi held at Waiau Marae, 174 individuals voted against ratifying the deed of settlement, with only 16 voting in favour.¹³

As a result of the opposition, the Crown terminated the proposed settlement on 31 March 1998. The Minister in Charge of Treaty of Waitangi Negotiations, Doug Graham, stated:

I understand that at least some of the negotiators wish to conduct some further research in support of their claim. No settlement would be durable in those circumstances and it is best for the parties to return to square one. . . . I am not prepared to give Whakatohea any precedence over current or planned negotiations with other claimants and they must now take their place among other tribes seeking to settle their historical grievances.¹⁴

We do not consider it necessary to explore in any further detail the reasons why this attempt at settlement failed. However, it is important to note that the fallout from this period appears to have contributed further to a sense of grievance against the Crown and to 'suspicion, disunity and factionalism' within the iwi.¹⁵

Isolated attempts by groups within Whakatōhea to settle their claims continued following the withdrawal of the Crown offer in 1998. However, it was not until 2003 that a new iwi-wide process began with the formation of the Process Working Party with representatives from seven hapū: Ngāti Ira, Ngāti Muriwai, Ngāti Ngāhere, Ngāti Patumoana, Ngāti Ruatakena, Ngāi Tamahaua, and Ūpokorehe. This resulted in the endorsement of the 'Te Ara Tono' report in 2007. (We discuss the recommendations of this report in more detail in chapter 5.)

The Raupatu Working Party was set up to develop a mandate strategy based on the 'Te Ara Tono' recommendations. However, by 2010 two further groups, Tū Ake and the Ūpokorehe Claims Trust, were each working on their own mandate strategy. This led to a new phase in Whakatōhea's attempts to settle with the Crown.

3.4 THE LATEST MANDATE PROCESS: 2010–15

As a result of the lack of progress following the endorsement of 'Te Ara Tono', in 2010 four hapū requested that the Trust Board play a facilitative role in progressing a Whakatōhea raupatu settlement. The four hapū were Ngāti Ira, Ngāti

11. Document A69(a), p 20; doc A8(a), p 30

12. Document A69(a), pp 19–20

13. Document A69, p 7

14. 'Whakatohea Deed of Settlement to be Terminated', 14 March 1998, <https://www.beehive.govt.nz/release/whakatohea-deed-settlement-be-terminated>, accessed 15 March 2018

15. Document A69(a), pp 23–24

Patumoana, Ngāti Ngāhere, and Ngāti Ruatakena.¹⁶ It is not clear to us how the Trust Board responded at that time.

However, Tū Ake records indicate that, on 13 August 2012, the Trust Board passed two motions regarding Treaty settlement issues. The first stated that the Trust Board would take a 'leadership role' and work to 'achieve a comprehensive mandate process'. The second endorsed a recommendation that the Trust Board 'resource the claim to mandate'.¹⁷ Since at least that time, the Trust Board actively supported the work of Tū Ake.

During the period from 2010 to 2013, the Raupatu Working Party, Tū Ake, and the Ūpokorehe Claims Trust made some attempts to work together. However, concerns emerged in 2013 when it became apparent that, without the support or involvement of the other groups, Tū Ake planned to hold information hui throughout the country to 'discuss options for moving the Whakatōhea Treaty claims process forward'.¹⁸ In chapters 5 and 6, we discuss in more detail the events of this period and in particular the attempts by the Ūpokorehe Claims Trust to pursue its own path.

In late 2013, the Raupatu Working Party and Tū Ake each submitted mandate strategies to Te Puni Kōkiri. The Raupatu Working Party mandate strategy recognised 11 hapū, while the Tū Ake mandate strategy recognised the same seven hapū as those represented on the Process Working Party that had produced 'Te Ara Tono'. The Tū Ake mandate strategy listed 15 Waitangi Tribunal claims for settlement, including claims that extended beyond the scope of raupatu.¹⁹

Crown officials encouraged the groups to work together to develop a single strategy and, in December, provided the groups with a 'working document' that merged the two groups' mandate strategies together.²⁰

The Raupatu Working Party responded to Crown officials stating that it wished to 'formalize [its] support' for the merged mandate strategy Te Puni Kōkiri had circulated. The party stated that the merged strategy has 'all the elements that the Working Party/Wai 87 has been promoting. It is all inclusive and retains the Mana of the Hapū'.²¹

Tū Ake, in response, submitted a revised mandate strategy in February 2014.²²

On 15 April 2014, Crown officials provided a briefing to the Ministers for Treaty of Waitangi Negotiations and Māori Affairs about the Whakatōhea mandating process. The briefing noted:

officials understand that Tū Ake Whakatōhea Collective and the Whakatōhea Māori Trust Board have decided to progress their own mandate strategy rather than working

16. Document A70(a), pp [68]–[71]

17. Document A69(a), pp 293–294

18. *Ibid*, pp 103, 110

19. *Ibid*, pp 127, 195–196

20. *Ibid*, p 215

21. *Ibid*, pp 140, 157–158, 266

22. Document A69, p 30

with other groups to form a collective strategy [and] officials are of the view that the Tū Ake Whakatōhea Collective and the Whakatōhea Māori Trust Board have decided to progress without the support or involvement of the other groups.²³

In July 2014, however, Tū Ake invited members of the Raupatu Working Party to a hui to discuss the work they had been doing and to seek feedback.²⁴ The Raupatu Working Party declined, preferring to 'stay with our original agreement made in December 2013 that our next meeting be to discuss ways to move forward collectively to achieve a united mandate, with the Officials present and they provide a facilitator for the hui'.²⁵

Crown officials were of the view that a facilitated hui was unlikely at that point to move Whakatōhea forward. Te Puni Kōkiri officials considered whether to provide advice to the Office of Treaty Settlements about how 'parallel processes can and have been used to settle claims within the rohe of [one] iwi'.²⁶ We have not seen any such advice.

Tū Ake provided a third mandate strategy to Crown officials in November 2014. This strategy recognised six hapū, now excluding Ngāti Muriwai. However, it stated that Tū Ake was 'acutely aware that there are some within Whakatōhea who consider that other Hapū continue to exist and should be recognised through this process'. New provisions in the mandate strategy provided for the recognition and representation of additional hapū.²⁷

The mandate strategy recognised the need for a new entity to negotiate on behalf of Whakatōhea and included a draft trust deed for the Pre-settlement Trust.

Te Puni Kōkiri officials provided feedback on this draft mandate strategy and trust deed in December 2014. They also recommended that a new iwi member database be developed for the Pre-settlement Trust, stating:

As good as it is that an existing database is held by the Trust Board, the Pre-settlement Trust must be responsible for growing membership, that cannot fall on the Trust Board. Also, there needs to be a level of comfort from ngā uri o Whakatōhea for who is maintaining the register.²⁸

We discuss this issue in more detail in chapter 5.

Tū Ake and the Raupatu Working Party continued to try to resolve their differences at a meeting in March 2015. The Raupatu Working Party proposed a 13-member representation model for the Pre-settlement Trust that would include representatives for marae, hapū, and other groups.²⁹ In response, Tū Ake submitted

23. Document A28(a), p [24]

24. Document A69(a), p 281

25. Ibid, p 282

26. Document A86, p 443

27. Document A69(a), pp 288, 300

28. Document A86, p 445

29. Document A69(a), p 389

a fourth draft mandate strategy in September 2015 that provided for marae representation in addition to hapū representatives on the Pre-settlement Trust.³⁰

Te Puni Kōkiri provided feedback on the Tū Ake mandate strategy. Officials suggested the addition of a clause in the strategy stating that the Pre-settlement Trust would seek a mandate to represent all hapū of Whakatōhea, including but not limited to the six listed as ‘recognised’ hapū in the strategy. Officials also listed seven additional Waitangi Tribunal claims that an Office of Treaty Settlements historian had identified as relating to Whakatōhea.³¹

In response, Tū Ake submitted a fifth mandate strategy in November 2015, with an amended claimant definition and listing the seven new Tribunal claims, taking to 23 the total number of claims listed for settlement.³²

By this point, it appears that Crown officials were seriously considering only the Tū Ake mandate strategy for endorsement. For example, in late November 2015, the Ūpokorehe Claims Trust submitted a draft mandate strategy to Te Puni Kōkiri proposing that Whakatōhea and Ūpokorehe pursue a Treaty settlement as one large natural group but with parallel, non-competing mandates. Crown officials responded that the Crown would work with only one entity representative of Whakatōhea, and they encouraged the group to work with Tū Ake.³³

3.5 MOVING TOWARDS RECOGNITION OF THE PRE-SETTLEMENT TRUST

MANDATE: 2016–17

By the end of November 2015, the Crown thought that the Tū Ake mandate strategy was sufficiently well developed to call for submissions from Whakatōhea uri.³⁴ The Crown received submissions until 31 January 2016.³⁵ There were 44 submissions in support of the strategy and 39 in opposition. However, many submissions were signed by more than one individual and most signatories were opposed to the strategy.³⁶

Crown officials’ analysis of the submissions noted that the submitters’ main concerns were about the application of the Crown’s large natural groups policy and the perceived lack of hapū recognition and representation. Submitters also requested the removal of several Waitangi Tribunal claims from the mandate strategy’s list of claims that would be settled.³⁷

In March 2016, Crown officials held several hui to meet with representatives from Tū Ake, the Raupatu Working Party, the Ūpokorehe Claims Trust, and others (such as the Mokomoko whānau and Ngāi Tamahaua) to discuss the submissions

30. Document A69(a), pp 445, 454, 461

31. *Ibid*, p 535; doc A8(a), pp 1355–1356

32. Document A69(a), pp 540, 550–555, 580–581

33. *Ibid*, pp 602–603, 636

34. Document A120(a), pp 5–7

35. Document A69(a), p 871

36. *Ibid*; doc A120(a), pp 5–7

37. Document A69(a), pp 727–728

on the Tū Ake mandate strategy.³⁸ Despite the concerns raised by submitters about the strategy, officials were satisfied that it met Crown requirements.³⁹

On 13 April 2016, Tū Ake were formally notified that the Crown had endorsed their mandate strategy and they could implement it.⁴⁰ Officials then recommended to the Minister for Treaty of Waitangi Negotiations that the Crown approve \$50,000 pre-mandate funding and \$120,000 exceptional circumstances funding to the Trust Board to support Tū Ake and (once established) the Pre-settlement Trust. This was despite officials recognising that there was 'strong opposition' to the Tū Ake mandate strategy.⁴¹

Voting on whether to grant the Pre-settlement Trust a mandate took place between 6 May and 3 June 2016, with 6,662 voting packs distributed to voters. The proposition put to them was: 'That the Whakatōhea Pre-Settlement Claims Trust is mandated to represent Whakatōhea in direct negotiations with the Crown for the comprehensive settlement of all of the historical Treaty of Waitangi claims of Whakatōhea.' The total number of votes received was 1,571. Of these, 92 per cent voted in favour of the Pre-settlement Trust mandate.⁴²

Tū Ake called for nominations to fill the six hapū trustee positions on the Pre-settlement Trust and asked that a trustee be appointed from each of eight Whakatōhea marae and the Trust Board. Four hapū trustees were elected unopposed since only one nomination was received. Between 6 August and 6 September, elections were held for hapū trustees for Ngāti Patumoana and Ngāti Ruatakena. There were two candidates for each position. The results were announced on 9 September 2016.⁴³ At the time of our inquiry, seven of the eight marae trustee positions had been filled. We discuss these matters in chapters 5 and 6.

3.5.1 Request for Waitangi Tribunal inquiry

In response to the Crown's endorsement of the Tū Ake mandate strategy, Kahukore Baker filed an application on behalf of herself and Ūpokorehe in May 2016 for an urgent inquiry into Whakatōhea mandating.⁴⁴

The Waitangi Tribunal held a hui in Ōpōtiki the following month to hear the views of all claimants with historical claims in the north-eastern Bay of Plenty on whether or how they wished the Tribunal to hear their claims. At the hui, Whakatōhea claimants made clear their concerns about proceeding towards settlement with the Crown. In response, the chairperson of the Waitangi Tribunal appointed Judge Carrie Wainwright to convene a judicial conference to address the disagreements among Whakatōhea about the best way to proceed.⁴⁵ Parties at

38. Ibid, pp 735–738, 739–742

39. Ibid, pp 750–752

40. Ibid, p 753

41. Document A86, p 520

42. Ibid, p 334

43. Ibid, pp 357–359

44. Claim 1.1.14

45. Chief Judge Wilson Isaac, memorandum appointing Judge Carrie Wainwright presiding officer of panel to conduct judicial review, 17 August 2016 (Wai 2563 ROI, memo 2.5.3)

the judicial conference agreed to participate in a mediation aimed at resolving the issues that had arisen from the Crown's 'pre-negotiations' with Tū Ake.⁴⁶

A mediation took place at Ōpōtiki College Hall on 5 and 6 November 2016 with Judge Wainwright and Dr Hauata Palmer as the mediators. A proposal was put forward by a group of claimants requesting funding from the Crown to support a one-year research project and hearings before the Waitangi Tribunal.

The possibility of a historical north-eastern Bay of Plenty district inquiry had been raised earlier by the Waitangi Tribunal, in September 2015, with the release of the Tribunal's Arotake Kerēme programme. That programme sought to address the remaining historical claims that have not been inquired into or settled.⁴⁷

In November 2016, the Crown rejected the request for the funding of research and a Waitangi Tribunal hearing, noting that it would delay negotiations and that this would risk weighting the views of individual Tribunal claimants over the 'majority' of Whakatōhea, who had voted in favour of the Pre-settlement Trust mandate.⁴⁸

3.5.2 Agreement to pursue an accelerated negotiation pathway

In September 2016, as the Waitangi Tribunal was considering whether to hold an inquiry into the historical claims of Whakatōhea, the director of the Office of Treaty Settlements wrote to the chair of Tū Ake, inviting Whakatōhea to consider participating in an accelerated negotiation process with the aim of achieving a Crown-recognised mandate by December 2016 and an Agreement in Principle by August 2017.⁴⁹

This invitation was part of the Crown's 'Broadening the Reach' strategy, which was presented to Cabinet the following month. Tū Ake had indicated in December 2015 that they were interested in fast-tracking timeframes for negotiations.⁵⁰ We discuss the strategy, and Whakatōhea's involvement, in chapter 5.

3.5.3 Recognising the Pre-settlement Trust mandate

Following the agreement to engage in an accelerated negotiation process, Crown officials invited submissions on the Pre-settlement Trust Deed of Mandate from 1 October 2016 to 21 October 2016. The last day for filing submissions was subsequently extended to 21 November 2016, as a result of the Waitangi Tribunal mediation in Ōpōtiki in November 2016.⁵¹

At the time, officials recorded 91 total submissions received, with 39 in support (supported by 511 signatures) and 52 in opposition (supported by 1,041 signatures).

46. Chief Judge Wilson Isaac, memorandum appointing Judge Carrie Wainwright and Dr Huata Palmer mediators for Whakatōhea claims, 18 October 2016 (Wai 2563 RO1, memo 2.5.4)

47. Waitangi Tribunal chairperson, memorandum concerning remaining historical claims, 22 September 2015

48. Document A86, p 531

49. Submission 3.2.11(a), p 2

50. Document A86, p 500

51. Document A69, p 40

However, after our hearings had concluded, Crown officials provided us with a revised analysis of the submissions. This showed 83 total submissions received, with 28 in support (supported by 482 signatures) and 55 in opposition (supported by 1,361 signatures).⁵² We discuss this further in chapter 5.

On 14 December, a Te Puni Kōkiri official wrote to the submitters, stating that their submissions had been noted and sent to the Pre-settlement Trust for consideration and response.⁵³ By the time the letter was written, however, Ministers had already decided to recognise the Pre-settlement Trust mandate.

A day after submissions on the Deed of Mandate closed, a petition was emailed to the Pre-settlement Trust from Te Ringahuaia Hata, on behalf of individuals from several hapū, seeking to withdraw 25 Waitangi Tribunal claims from the Deed of Mandate. Those seeking to withdraw wanted to proceed with a Tribunal hearing.⁵⁴

Crown officials were 'made aware' of the withdrawal notice and petition on 28 November.⁵⁵ However, they did not consider that this should delay the recognition of the Deed of Mandate, because the deed contained specific provisions setting out several steps to be followed for amendment or withdrawal to be completed.⁵⁶ Establishing whether 5 per cent of Whakatōhea uri recorded on the Trust Board register had signed the petition was the first step.⁵⁷ No further steps would be taken if the 5 per cent threshold were not met.

On 5 December 2016, Crown officials advised the Minister for Treaty of Waitangi Negotiations and the Minister for Māori Development to recognise the Pre-settlement Trust mandate to represent Whakatōhea in settlement negotiations. The Minister for Treaty of Waitangi Negotiations agreed to recognise the mandate on the same day. The Minister for Māori Development agreed a week later, on 12 December 2016.⁵⁸

The Minister for Treaty of Waitangi Negotiations and the chair of the Pre-settlement Trust then signed terms of negotiation on 17 December 2016. Two days later, the Minister advised the chair of the appointment of a chief Crown negotiator.⁵⁹

The following month, the chief executive of the Trust Board wrote to the chair of the Pre-settlement Trust with an analysis of the withdrawal petition signatures. Of 1,951 signatures, only 478 were confirmed as being listed on the Trust Board register, which meant that the 5 per cent threshold had not been met and the petition failed.⁶⁰

52. Document A120, para 27

53. Document A69(a), p 841

54. Document A8(a), pp 62–65. We note, however, that not all of these Wai claims are listed in the Deed of Mandate.

55. Document A69, p 42

56. *Ibid*, p 43

57. *Ibid*, p 44

58. Document A69(a), pp 864, 868

59. Document A17(a), pp 6, 7

60. Document A69(a), pp 860–861

The Waitangi Tribunal then received another 12 applications for an urgent inquiry during January and February 2017. Despite these applications and the continuing concerns about the mandate, the Pre-settlement Trust signed an agreement in principle with the Crown at Parliament Buildings in Wellington on 18 August 2017.⁶¹

61. Document A69, p 49

CHAPTER 4

TREATY PRINCIPLES AND STANDARDS

4.1 INTRODUCTION

In this chapter, we briefly set out our jurisdiction to hear these claims. We then identify the relevant Treaty principles and standards. Some of the Tribunal's previous reports on mandating for Treaty settlements are also highlighted.

4.2 JURISDICTION

The Waitangi Tribunal was established 'to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty'.¹

Section 6 of the Treaty of Waitangi Act 1975 provides that any Māori may make a claim to the Tribunal that they have been, or are likely to be, prejudicially affected by any legislation, policy, or practice of the Crown that is inconsistent with the principles of the Treaty. If the Tribunal finds that a claim is well founded, it may recommend to the Crown ways to compensate for or remove the prejudice or to prevent others from being similarly affected in the future. In making recommendations, the Tribunal must have regard to 'all the circumstances of the case'.

The Tribunal now has a lengthy history of inquiring into mandate issues. We see the Crown's recognition of a mandate as a crucial step towards the settlement of Treaty claims and the process of reconciliation that is intended to re-establish the relationship created by the Treaty. The process of settling Treaty claims also needs to be Treaty compliant if settlement is to be enduring.

4.3 THE TREATY PRINCIPLE OF PARTNERSHIP

In chapter 3, we set out how the Crown and Whakatōhea have been trying to re-establish a Treaty-based relationship since the mid-1990s. The Courts and the Tribunal have previously stated that the Treaty established a relationship akin to a partnership and imposed on the partners the duty to act towards each other fairly, reasonably, and with the utmost good faith.² Two further duties that arise from

1. Treaty of Waitangi Act 1975, long title

2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 664, 667, 682; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed (Wellington: GP Publications, 1996), p 207; *Te Runanga o Wharekaui Rekohu v Attorney-General* [1993] 2 NZLR 301 (CA), 304

the Crown's partnership obligations are informed decision-making and the maintenance of whanaungatanga. We also see the Treaty principle of active protection applying to the circumstances of this inquiry, particularly the Crown's obligation to actively protect hapū rangatiratanga.

4.3.1 Informed decision-making

In *New Zealand Maori Council v Attorney-General* (1987), Justice Richardson observed:

the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty.³

The *Red Book* states: 'Many of the grievances of the past relate to agreements made between Māori and the Crown, where the Crown dealt with people who did not have the authority to make agreements on behalf of the affected community.'⁴ For this reason, our consideration of the mandating process requires a close review of the Crown's assessment of support for the mandate.

4.3.2 Whanaungatanga

A consistent theme for Tribunals considering settlement and mandate issues has been the importance of the Crown actively working to maintain amicable relationships among those affected by the settlement of historical Treaty claims.

In 2002, the Tribunal in the *Ngāti Awa Settlement Report* stated:

The simple point is that where the process of working towards settlement causes fall-out in the form of deteriorating relationships either within or between tribes, the Crown cannot be passive. It must exercise an 'honest broker' role as best it can to effect reconciliation, and to build bridges wherever and whenever the opportunity arises. Officials must be constantly vigilant to ensure that the cost of settlement in the form of damage to tribal relations is kept to the absolute minimum.⁵

In 2007, the Tribunal in the *Tāmaki Makaurau Settlement Process Report* stated its view that Treaty settlements should improve relationships. Protecting

3. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 683

4. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna / Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, revised ed (Wellington: Office of Treaty Settlements, 2015), p 39

5. Waitangi Tribunal, *The Ngāti Awa Settlement Cross Claims Report* (Wellington: Legislation Direct, 2002), p88

relationships – or upholding whanaungatanga obligations – was identified by that Tribunal as a vital aspect of the exercise of rangatiratanga. This is because rangatira are confirmed in their positions of authority by their whanaunga. The Crown's responsibilities are to understand relationships, act wherever possible to preserve amicable tribal relations, and act fairly and impartially towards all groups.⁶

The Tāmaki Makaurau Tribunal determined therefore that, where the settlement process damaged whanaungatanga, the Crown was in breach of its Treaty duty to actively protect tino rangatiratanga.

4.4 THE TREATY PRINCIPLE OF ACTIVE PROTECTION

The cession of kawanatanga in exchange for the recognition of tino rangatiratanga, inherent in the principle of partnership, puts an onus on the Crown to take great care when recognising a mandate. Mandate recognition therefore requires a process of genuine engagement with claimant groups in a way that appropriately acknowledges their tikanga.

In the *Te Arawa Mandate Report*, the Tribunal emphasised the importance of ensuring that support for a mandate should be determined in a tikanga-compliant manner. The Tribunal stated its view that the role of the Crown should be to 'scrutinise actively every stage of the mandating process. The Crown should require the correction of errors and the proper application of tikanga throughout the mandating process, rather than wait until the receipt of submissions to make its assessment.'⁷ The Tribunal highlighted the right of hapū to determine for themselves whether they consented to, and wished to continue to support, a mandate.⁸

The Waitangi Tribunal has previously addressed mandate disputes and noted the Crown's responsibilities by reference to the duty of active protection. The Crown's duty to act reasonably and with utmost good faith, in the words of Justice Cooke, 'is not merely passive but extends to active protection.'⁹

The Crown's obligations to hapū have been considered more recently by the Ngāpuhi Mandate Tribunal and the Ngātiwai Mandate Tribunal.

In the *Ngāpuhi Mandate Inquiry Report*, the Tribunal stated that the support of Ngāpuhi hapū should have been formally tested as part of the process leading up to the Crown's decision to recognise that mandate.¹⁰

In the *Ngātiwai Mandate Inquiry Report* (which was released after the vote was held on the Whakatōhea mandate but before the Crown decided to recognise

6. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), pp 1, 101

7. Waitangi Tribunal, *Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p 111

8. Waitangi Tribunal, *Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), pp 189, 191

9. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 664

10. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Wellington: Legislation Direct, 2015), p 78

the Pre-settlement Trust mandate), the Tribunal noted that the Ngātiwai Deed of Mandate lacked any mechanism to gain hapū consent to the mandate. Voting papers did not require voters to state their hapū. Therefore, the vote could not demonstrate which hapū may have supported or opposed the mandate.¹¹

The Tribunal went on to find that the principal prejudice in the inquiry arose from the Crown's failure to actively protect hapū rangatiratanga in its decision to recognise the mandate of the Ngātiwai Trust Board without the support or consent of the hapū named in that Deed of Mandate. In listing the ways in which prejudice had been manifested, the Tribunal stated: 'Consent to the Deed of Mandate was obtained by a vote of individual members of Ngātiwai, which privileged individuals over hapū'.¹²

The Ngāpuhi Mandate Tribunal determined what it considered to be the minimum standards required of the Crown in fulfilling its duty of active protection during mandating. The Crown has obligations to:

- ▶ ensure that it is dealing with the right Māori group or groups, having regard to the circumstances specific to that claimant community so as to protect its intratribal relationships;
- ▶ practically and flexibly apply the large natural groups policy according to the rangatiratanga and tikanga of affected groups;
- ▶ allow for an appropriate weighing of interests of groups in any recognised mandated entity, one that takes into account factors, including the number and size of hapū, the strength of affected hapū, and the size and location of the population;
- ▶ recognise that the structure of the mandated entity must allow for hapū interests to be tested and heard; and
- ▶ on the basis of this assessment, actively protect the rangatiratanga and tikanga of those hapū that are opposed to their claims being negotiated by the mandated entity, and weigh this protection of hapū with that of non-hapū interests in the modern context.¹³

Although the circumstances of the present inquiry differ from those encountered by the Ngāpuhi Mandate Tribunal, we consider these standards as relevant and applicable to the circumstances of the Whakatōhea mandate.

4.5 CONCLUSION

In this chapter, we identified the principle of partnership as the key Treaty principle underpinning our assessment of Crown actions in this inquiry. In particular, we consider that the Crown has duties relating to informed decision-making and

11. Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report* (Wellington: Legislation Direct, 2017), p 81

12. *Ibid*, p 83

13. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report*, p 31

the protection of whanaungatanga. This requires the Crown to protect hapū interests and to act wherever possible to ensure that amicable tribal relationships are maintained. We also consider the Treaty principle of active protection to apply, particularly as it relates to the Crown duty to protect hapū rangatiratanga.

CHAPTER 5

THE TRIBUNAL'S ANALYSIS OF MANDATE ISSUES

5.1 INTRODUCTION

In chapter 3, we described Whakatōhea's involvement in the Crown's mandating process. Most of the main problems and issues that have given rise to this urgent inquiry emerge from the period 2010 to 2016 and, in particular, in 2016 in the lead-up to the recognition of the mandate. In chapter 4, we set out the Treaty principles we identify as applying to these circumstances. In this chapter, we focus on analysing in greater detail how those Treaty principles apply to the main issues we identified concerning the Crown's recognition of the Pre-settlement Trust Deed of Mandate, in order to set out the foundation for our findings. In the chapter that follows, we will address several specific claim issues.

5.2 THE 'TE ARA TONO' REPORT

All the parties agreed that the report 'Te Ara Tono' was an important milestone. It was produced by the Process Working Party, comprising representatives of seven hapū.¹ Whakatōhea united around the report's recommendations, and it was adopted at a hui-a-iwi in 2007 without controversy. For the purposes of the analysis that follows, it is helpful to highlight some of the report's key features.

The executive summary of 'Te Ara Tono' states that the Process Working Party was formed by hapū to 'investigate and develop options for resolving *process* issues to settle the Whakatohea Raupatu Claims' (emphasis in original) and to determine 'how Whakatohea Hapu can move the claim forward together'.²

The Process Working Party adopted the following principles:

That the process for settling the Whakatohea claim(s) needs to:

- ▶ Be driven by Hapu
- ▶ Be designed by Whakatohea for Whakatohea (not the Crown)
- ▶ Achieve Kotahitanga
- ▶ Be inclusive and involve as many of Whakatohea in decision making as possible
- ▶ Ensure that the settlement fits within a wider strategic plan for Whakatohea³

1. These were the six 'main' hapū and also Ngāti Muriwai.

2. Document A73, p 7

3. Ibid, p 14

Under the heading ‘Tikanga’, the report recommended that ‘all Whakatōhea decisions be recorded and decided on a hapū basis’.⁴

The report addressed what were seen to be the problems that contributed to the failure of the previous attempt to settle with the Crown. The report identified a lack of accountability between the claims committee and the hapū as a major issue.⁵ Section 5 of ‘Te Ara Tono’ carefully considered how future decisions should be made during a mandating process: ‘A major issue of the previous Raupatu negotiations was that some decisions were not made in the appropriate forums and thus those decisions had no credence with the people.’⁶

The report identified five ‘major decisions’ that would be needed for mandating, defining these as ‘a decision that commits all of Whakatōhea to a particular course of action that is difficult to reverse.’⁷ One such ‘major decision’ would be whether to approve the deed of mandate for a new pre-settlement entity to undertake settlement negotiations with the Crown.

‘Te Ara Tono’ identified six potential processes for major decision-making. They were hui-ā-hapū, hui-ā-iwi, hapū regional presentations, iwi regional presentations, hapū postal and online voting, and iwi postal and online voting. These options were assessed against seven criteria: whether the decision-making method was hapū driven, whether it was kano ki te kano (face-to-face), whether it was inclusive, and whether it was transparent; what the financial cost was; whether there was the ability to verify the authenticity of votes; and the extent to which the vote would be an informed one.

The report recommended that four of the five major decisions be made via hui-ā-hapū. The exception was the decision to approve a deed of mandate, which was to be made via hapū postal and online voting.⁸ The report stated that, under this option, votes would be recorded according to the hapū, and a majority would mean more than 50 per cent of hapū voted in the same manner.⁹

The Crown cited ‘Te Ara Tono’ in its closing submissions. Given the extensive dealings between Whakatōhea groups and Crown officials before the recognition of the Pre-settlement Trust Deed of Mandate, we assume that officials were familiar with the report. The Crown submitted that ‘Crown officials developed a reasonable appreciation of the tikanga of Whakatōhea and associated groups during the development of the mandate strategy by [the Pre-settlement Trust] and this was a factor in endorsement and recognition of the mandate.’¹⁰

In our view, ‘Te Ara Tono’ is a clear statement of hapū rangatiratanga in the particular circumstances of Whakatōhea. ‘Te Ara Tono’ highlights that Whakatōhea clearly envisaged that hapū decision-making would be central to the process of negotiating and settling with the Crown, including the process of establishing a

4. Document A73, p 11

5. Ibid, p 28

6. Ibid, p 34

7. Ibid, pp 35, 37–41

8. Ibid, pp 36–42

9. Ibid, p 36

10. Submission 3.3.33, p 2

mandate for negotiation. It appears that the Crown was aware of that preference. With this in mind, and in light of Treaty principles, we now turn to consider the mandate issues that we identified for our urgent inquiry.

5.3 THE MANDATE VOTE AND HAPŪ RANGATIRATANGA

Given the importance that 'Te Ara Tono' placed on hapū decision-making and a hapū-driven negotiations process, we would have expected the Crown to be alive to proposals or changes that might depart from that foundation. We would have expected the Crown to require Tū Ake to demonstrate support from the hapū of Whakatōhea to any such departure.

The Tū Ake mandate strategy provided for an iwi-wide ballot by postal and online voting using the Trust Board register.¹¹ It appears, based on the evidence before us, that the Crown did not question Tū Ake's decision to depart from the recommendation of 'Te Ara Tono' to record decisions on a hapū basis.

The Crown argued:

It was not necessary for the Crown to inform itself as to the level of support within particular hapū when Whakatōhea had, through the long journey towards negotiated settlement, chosen to take the decision as an iwi.

The path to ultimately testing support among Whakatōhea uri for the [Pre-settlement Trust] mandate was driven by hapū from the outset. The mandating process balanced the hapū and iwi traditions of Whakatōhea in providing hapū and marae with governance of the [Pre-settlement Trust] and testing support for direct negotiations using the most inclusive process – a vote among all Whakatōhea uri. . . .

In those circumstances, it was not necessary for the Crown to require support for the mandate to be tested hapū by hapū. The decision to take the mandate vote as an iwi was open to Whakatōhea, and the Crown's decision to accept that approach was fair and reasonable.¹²

This seems to us disingenuous. 'Te Ara Tono' recommended that votes be recorded on a hapū basis. The Crown does not say where or when Whakatōhea decided that a decision to confer a mandate would be made 'as an iwi'. We are not aware of any evidence of another collective decision by the iwi to divert from the path recommended in 'Te Ara Tono'. Nor is it accurate, in our view, to claim that hapū drove the process by which support for the Pre-settlement Trust Deed of Mandate was tested. Tū Ake began as a collective purporting to represent four of the six hapū recognised in the Trust Board structure. Its authority to do so was under question before us. We saw no evidence that Ngāi Tamahaua and Ūpokorehe, the two other hapū represented on the Trust Board, ever clearly decided to support Tū Ake.

11. Document A69(a), pp 205, 573

12. Submission 3.3.33, p 25

It is also relevant to note that the six hapū of Whakatōhea recognised on the Trust Board are not of comparable size – Ngāti Ruatakena is significantly larger than the next largest hapū, Ngāi Tamahaua, and almost three times the size of Ūpokorehe.¹³ It is clear to us that the hapū are divided over the mandate. The iwi-wide vote attracted a low turnout. One or two large hapū in support could have determined the outcome.

We noted in chapter 4 that both the Ngāpuhi Mandate Tribunal and the Ngātiwai Mandate Tribunal have addressed the Crown's duty to actively protect hapū rangatiratanga when considering voting procedures and their outcome.

In closing submissions, the Crown argued:

It is clear in both the Ngātiwai and Ngāpuhi reports that the Crown's obligations to hapū are specific to the context of the affected claimant community, which communities are all different. What is important is an assessment of whether the Crown has met its obligations to the claimant community as a whole and its obligations to specific interests within a claimant community. Hapū are one of those interests, and what is required will depend on the role of hapū in the social and political life of the claimant community.

Uncritical application of the Crown obligations to Ngātiwai and Ngāpuhi hapū in other contexts would be inconsistent with the specificity with which the Ngātiwai and Ngāpuhi Tribunals approached the issue.¹⁴

We acknowledge that the Ngāpuhi and Ngātiwai Mandate Tribunals framed their findings by reference to the distinctive characteristics of the two iwi concerned. But that does not make those findings irrelevant.

Given that Whakatōhea had previously agreed to make the mandate decision on the basis of hapū voting, Crown officials should, in our view, have required a mandate vote that was recorded on a hapū basis.

Crown officials were aware of the need to consider the issue of hapū rangatiratanga. In their 5 December 2016 advice to Ministers recommending that the mandate be recognised, officials noted the 'growing body of Tribunal jurisprudence supporting hapū rangatiratanga in Treaty settlements'.¹⁵ However, they offered no substantive analysis of how the Crown's duty to actively protect the rangatiratanga of hapū might be undertaken when deciding whether to recognise the Pre-settlement Trust Deed of Mandate.

Support for the Pre-settlement Trust Deed of Mandate was never properly tested among the hapū of Whakatōhea. The mandate vote did not allow the Crown to assess relative levels of support for and opposition to the mandate within and between hapū. Since it was unable to determine which hapū supported the Pre-settlement Trust and which opposed it, the Crown was unable to actively protect hapū rangatiratanga.

13. Document A69(a), p 860

14. Submission 3.3.33, p 17

15. Document A69(a), p 874

5.4 THE MANDATE VOTE AND THE TRUST BOARD REGISTER

In this section, we consider the adequacy of the Trust Board register of beneficiaries as the basis for the mandate vote.

In our memorandum of directions and panel guidance dated 13 November 2017, we noted that the Trust Board register was a substantial and long-standing database and no comparable alternative register existed that would encompass the entire iwi.¹⁶ With the evidence we then had, our preliminary view was therefore that it was reasonable for the Crown to rely on the Trust Board register as the basis for an iwi-wide vote on the mandate.

However, after considering all the evidence, we have come to the view that, at the time the mandate vote was conducted, the Trust Board register was not adequate for that purpose. We explain our reasons for this view in more detail below. Also of concern to us is that the shortcomings in the register had significant consequences in terms of the reliability of Crown assessments about matters as fundamental as participation rates and overall levels of support for the mandate.

5.4.1 The Trust Board register: eligibility and opportunity to participate in the mandate vote

The Pre-settlement Trust Deed of Mandate states that all Whakatōhea uri over the age of 18 were eligible to participate in the mandate vote.¹⁷ However, it emerged during our inquiry that there are two categories of individuals over the age of 18 who were eligible to vote but were not sent voting papers. The first category comprised those for whom the Trust Board held incomplete or inaccurate contact information at the time of the mandate vote. The second comprised those recorded on the register under the name of a parent.

The evidence on our record does not provide a breakdown of the number of individuals falling into each of these categories on either the day that voting on the mandate opened on 6 May 2016 or the day it closed on 3 June 2016. However, Pre-settlement Trust chair Graeme Riesterer and Trust Board chief executive Dickie Farrar stated that on 9 August 2016, just over a month after voting closed, the Trust Board register comprised 12,240 beneficiaries. Of these, 9,850 were registered adult voters, 1,293 were categorised as 'Recorded/linked' (we explain this term below), 1,083 were juveniles, and 14 fell into a category of beneficiaries 'to be authorised'.¹⁸

Both the Deed of Mandate and the mandate recognition advice from Crown officials to Ministers on 5 December 2016 refer to 6,662 'eligible voters'. Ms Farrar was questioned about the discrepancy between the 9,850 'registered adult voters' referred to in her evidence and the 6,662 'eligible voters'. Ms Farrar stated that, at the time of the mandate vote, the Trust Board did not have accurate postal addresses for more than 3,000 registered adult beneficiaries. These individuals

16. Memorandum 2.6.2, p 4

17. Document A86, p 74

18. Document A70, paras 30, 44

fell into a category she referred to as ‘got no address’ or ‘GNAS.’¹⁹ They were therefore not distributed voting papers and were not included in the 6,662 individuals referred to as ‘eligible voters’.

We are concerned that such a large proportion – almost one-third – of eligible voters were not sent voting information. Although voting was possible online and the vote was advertised in national newspapers and elsewhere, more than 85 per cent of the votes that were received were submitted by hand or by post.²⁰ Ms Farrar stated that she expected that the number of ‘GNAS’ would decline from more than 3,000 to between 800 and 1,500 by the end of November 2017 as a result of an ongoing programme to update the Trust Board register.²¹ It is of concern to us that this work did not take place prior to the mandate vote.

We turn now to those recorded on the Trust Board register under a parent’s name. Only individuals over the age of 18 can register in their own right as beneficiaries with the Trust Board. However, the Trust Board application form allows parents to list the names of their children, who are then linked to their parents’ registration.

The evidence of Ms Farrar about this process, and the distinction between juveniles and those categorised as ‘Recorded/linked’ or ‘recorded under parent’, was at times unclear. However, it appears from Ms Farrar’s testimony and other evidence before us that the category is intended to capture those who have reached the age of 18 but remain linked to their parents’ registration because they have yet to submit their own registration. Since these individuals had not registered with the Trust Board independently from their parents, they would not have received voting information (unless, perhaps, they still lived with a parent). This category represents another significant group of potentially eligible voters who were not sent voting information and who were not included with the 6,662 eligible voters referred to by the Pre-settlement Trust and Crown officials.

Ms Farrar stated during the hearing that there has been ‘an ongoing work process’ to update the ‘Recorded/linked’ category of the Trust Board register.²² There is no automated process that identifies when an individual has reached the age of 18. A Trust Board staff member has therefore been going through the register manually, on a hapū-by-hapū basis, to identify those who have reached that age.

At the time of our hearing, the register had been updated for four of the six hapū recognised by the Trust Board. Ms Farrar was not certain which two hapū remained as a work in progress.²³

As a result of this work, the total number of individuals falling into the ‘Recorded/linked’ category increased from 1,293 on 9 August 2016 to 1,785 on 9 December 2016.²⁴ By 19 October 2017, the number had risen again to 3,811.²⁵ Ms

19. Transcript 4.1.1, pp 769–770

20. Document A70(a), p [260]

21. Transcript 4.1.1, p 771

22. Transcript 4.1.2, p 27

23. Ibid

24. Document A86, p 714

25. Document A70, para 45

Farrar stated that 'resource' issues hampered progress; the Trust Board had only one person employed to work on the register.²⁶

We note at this point that the possibility of developing an alternative iwi register to that held by the Trust Board was a matter raised by Crown officials with Tū Ake as early as December 2014.²⁷ It appears that Crown officials abandoned the idea of creating a new register after encountering some reluctance on the part of the Trust Board and Tū Ake. Cost appears to have been an issue.

By the time of the mandate vote in 2016, the Crown did not appear to have considered the state of the register an issue. However, it is clear to us that by the time advice was presented to Ministers on 5 December 2016 regarding recognition of the Pre-settlement Trust Deed of Mandate, officials possessed enough information to raise serious concerns about possible problems with the register.

5.4.2 Communicating participation rates to Ministers

When communicating with Ministers, Crown officials did not accurately convey either the number of eligible voters or the participation rate in the mandate vote. In their 10 November 2016 advice to the Minister for Treaty of Waitangi Negotiations regarding the request to fund a truncated Waitangi Tribunal process, Crown officials stated: 'The Whakatōhea Māori Trust Board records 12,549 people as registered members who affiliate to hapū of Te Whakatōhea. Of these, 23.8% participated in the mandate vote and 91.7% supported the mandate sought.'²⁸ This is inaccurate. In fact, 1,571 votes were received, which is 12.5 per cent of 12,549. The participation rate referred to by Crown officials was calculated by reference to the number of voting papers distributed, which was 6,662.

The 5 December 2016 advice of Crown officials to Ministers recommending recognition of the Pre-settlement Trust Deed of Mandate relied upon the same calculation.

The recognition advice included an appendix that compared participation rates for mandate votes among different iwi.²⁹ The appendix listed the '% of Register who participated' in the Whakatōhea mandate vote as 23.58 per cent. This placed it in the mid-range of participation rates. However, calculating the total returned votes (1,571) against the total registered adult voters as at 9 August 2016 (9,850) gives a participation rate of 16 per cent. On this calculation, the participation rate for the Whakatōhea mandate vote drops to the fourth lowest of the 14 iwi listed in the appendix.

We now know that there were another 1,293 individuals, categorised in August 2016 as 'recorded/linked', who were also eligible to vote. If they are included, the participation rate drops to just 14 per cent. Of further concern to us is that, since then, the Trust Board's still incomplete work to identify all 'recorded/linked' individuals has uncovered a further 2,500 individuals.

26. Transcript 4.1.2, p 28

27. Document A69(a), p 393

28. Document A86, p 532

29. Document A69(a), pp 885–886

We think it was appropriate for the officials to report to their Ministers in some detail on the outcome of the mandate vote. To do so demonstrated an acknowledgement by the Crown of the importance of this step in the mandating process. The failure by officials to properly identify relevant data and accurately explain its significance to Ministers concerns us. It appears to us that officials simply chose statistics that seemed to best support what they knew to be the Crown's preference for recognising the Deed of Mandate.

5.4.3 Conclusions on the use of the Trust Board register as a basis for the mandate vote

The Crown's partnership obligations impose on it a duty to make informed decisions. Despite initially recognising potential problems with the Trust Board register, Crown officials did not sufficiently inform themselves of its suitability for a mandate vote before recommending endorsing the Tū Ake mandate strategy.

Given the importance of the mandate vote, in our view the Crown had a clear Treaty duty to ensure that, if the Trust Board register was to be relied on, it was as accurate and up to date as possible by the time mandate voting began. The deficiencies in the register resulted in a significant number of Whakatōhea uri not having an adequate opportunity to vote.

It is all the more perplexing to us that crucial work on the Trust Board register was being undertaken *after* the mandate vote. This work has resulted in a significant reduction in the number of beneficiaries without a valid address and a major increase in those who are listed as 'recorded/linked' but are aged 18 or over and are now recognised as eligible to vote.

When the Crown decided to recognise the Pre-settlement Trust Deed of Mandate in December 2016, enough information was available to put the Crown on notice that the voting process was not sufficiently representative.

Crown officials simply did not engage with these matters and went on to overstate the voting participation rate, and therefore the overall support for the mandate, in their advice to Ministers. Our impression is of Crown officials and Ministers in a hurry to meet their settlement goals and impatient with any actual or potential check on momentum towards achieving a mandate.

The vote was a key test of support for and opposition to the Pre-settlement Trust Deed of Mandate. The Crown's Treaty duty of active protection extended to all of Whakatōhea, whether they supported or opposed the mandate. The Crown was obliged to assess the outcome with greater care and accuracy.

5.5 CONSIDERATION OF SUPPORT FOR AND OPPOSITION TO THE DEED OF MANDATE

The question of whether there was sufficient support for the Pre-settlement Trust Deed of Mandate to warrant recognition by the Crown is critical. The Crown's partnership obligation to act reasonably and in good faith required it to be sufficiently informed of the levels of support and opposition before making its decision to recognise the mandate.

In our 13 November 2017 memorandum, we stated that we were concerned that the evidence of support and opposition for the Pre-settlement Trust mandate was far more finely balanced than the Crown was willing to acknowledge.³⁰ After further careful consideration of the evidence and submissions, we have found no compelling reason to change that view.

We have already discussed two factors that inhibited the Crown's ability to properly assess support and opposition to the mandate. Tū Ake decided to record votes on an iwi basis, and this meant that the Crown was unable to determine where the support and opposition lay among the hapū of Whakatōhea. We also noted problems with the Trust Board register that meant that the mandate vote was not as representative as it should have been. A lack of proper attention to those problems contributed to Crown officials overstating the rate of participation in the vote.

In the 5 December 2016 advice to Ministers, Crown officials concluded: 'We consider the Whakatōhea claimant community has demonstrated sufficient support for the Pre-settlement Trust through an open, transparent and fair mandate process.'³¹

In our view, evidence of opposition to the Pre-settlement Trust Deed of Mandate was downplayed throughout the 5 December 2016 advice to Ministers. In their 18 April 2016 advice to Ministers recommending pre-mandate and exceptional circumstances funding for Whakatōhea, Crown officials had acknowledged 'strong opposition' to the Tū Ake mandate strategy.³² By December 2016, officials were advising that opposition was limited to 'a minority' of Whakatōhea.³³

However, prima facie evidence of continuing significant opposition to the Deed of Mandate was available to the Crown in two ways. In October and November 2016, the Crown sought submissions on the mandate. On 22 November 2016, a petition was submitted to the Pre-settlement Trust seeking to withdraw the mandate.³⁴ We turn to these matters now.

5.5.1 Submissions on the Deed of Mandate

The Crown received submissions on the Pre-settlement Trust Deed of Mandate between 1 October 2016 and 21 November 2016.³⁵ A total of 83 submissions were made. Of these, 28 were in support and 55 were opposed. Those in support were signed by 482 individuals and those in opposition by 1,361 individuals.³⁶

In their 5 December 2016 advice to Ministers, Crown officials provided inaccurate figures, both for the numbers of submissions in support and opposition to the mandate and for the total numbers of signatures accompanying those submissions. They stated that there were 91 submissions in total, of which 39 supported the Deed of Mandate (accompanied by 511 signatures) and 52 opposed it (accompanied by

30. Memorandum 2.6.2, p 4

31. Document 69(a), p 876

32. Document A86, p 518

33. Document A69(a), pp 875-876

34. Ibid, pp 845-857

35. Document A69, p 40

36. Document A120, p 5

1,041 signatures).³⁷ Officials thus overstated the support and understated the opposition. It was only following our hearings that officials revised their assessment.³⁸

In closing submissions, Crown counsel argued:

submissions do not carry the same weight as the mandate vote and for good reason. The mandate vote had strict procedures in place to ensure the validity of votes cast. Comparatively, the petitions received during the submissions process contained extensive duplications. Even excluding duplications which could be identified, it is unknown whether all signatures were from people who whakapapa to Whakatōhea, and people who are over 18.³⁹

We accept that the signatures to the submissions in opposition to the Deed of Mandate have never been verified to ensure that all the signatories whakapapa to Whakatōhea and were over the age of 18. However, we would still expect such a demonstration of opposition to be taken more seriously by the Crown. We think this was particularly important, because the 1,361 signatories expressing opposition were not far short of the 1,439 who supported the Pre-settlement Trust in the mandate vote.

The context in which the submissions were received is also important. Relevant events included: the mandate vote; the selection of representatives on the Pre-settlement Trust; the Crown offer of an accelerated settlement process for Whakatōhea; a Waitangi Tribunal mediation process; and the submission of a petition seeking to withdraw support for the mandate.

The Crown needed to take the time to properly assess the views that those opposed to the Pre-settlement Trust mandate expressed in their submissions. In their 5 December 2016 advice to Ministers, delivered only two weeks after submissions closed, Crown officials were dismissive of the views expressed by submitters who opposed the Pre-settlement Trust mandate. Officials stated that the submissions 'did not raise any substantially new issues'. They considered that the issues raised 'have been, or are being, addressed to the satisfaction of the Crown'.⁴⁰ Officials did not respond to submitters until after the Pre-settlement Trust mandate had been recognised by Ministers.

In our view, it is clear that officials were working to achieve the agreed milestone of a deed of mandate in December. The overall impression from the evidence before us is that officials rushed their consideration of the submissions. The results of official haste were inaccurate advice regarding the total number of submissions received and signatures in support and a cursory treatment of the issues raised.

This raises the question of whether the Crown acted in good faith as a Treaty partner in considering the submissions on the Pre-settlement Trust Deed of

37. Document A69(a), p 871

38. Document A120, pp 2-5

39. Submission 3.3.33, p 13

40. Document A69(a), pp 871-872

Mandate. The submissions were a significant demonstration of opposition, which called for due consideration and response.

5.5.2 The withdrawal petition

The petition seeking to initiate the process for withdrawing support for the mandate of the Pre-settlement Trust was lodged with the trust on 22 November 2016. In their 5 December 2016 advice to Ministers, officials noted that the petition needed to be signed by 5 per cent of adult registered members of the Trust Board. Whether this threshold for triggering the withdrawal process had been reached was 'being determined'.⁴¹

Officials stated that the submission of the withdrawal petition was a development that required careful monitoring. However, in their view the petition should not prevent the Crown from recognising the Pre-settlement Trust mandate. The core of their advice was:

While the recent invocation of the withdrawal mechanism presents risks for the Crown, should it choose to recognise the Pre-Settlement Trust's mandate, it also presents opportunities for the Pre-Settlement Trust to demonstrate the robustness of their mandate from the Whakatōhea claimant community. . . .

The risks associated with the withdrawal process include the possibility those presently opposing the Pre-Settlement Trust (a minority of the Whakatōhea claimant community), will gain in numbers and momentum as the withdrawal process progresses, and complete the withdrawal process outlined in the Deed of Mandate such that the mandate of the Pre-Settlement Trust to settle part or all of Whakatōhea's historical Treaty claims is significantly weakened.

This risk should not be easily dismissed, given the history of division in Whakatōhea demonstrated in the breakdown of settlement negotiations in 1996. Nonetheless, based on the strength of mandate processes so far and high levels of support for the Pre-Settlement Trust among the broader Whakatōhea claimant community, we currently assess this risk to be relatively low. Should the Crown recognise the Pre-Settlement Trust's mandate, this is something we would continue to monitor carefully and reassess.

Overall, we consider the Pre-Settlement Trust's mandate should be recognised by the Crown. Crown policy is that all mandates are conditional on the mandated entity maintaining the support of its claimant community. Accordingly, any recognition of the Pre-Settlement Trust's mandate would be subject to the Pre-Settlement Trust maintaining the mandate of Te Whakatōhea. We do not consider, at this stage, that the notice of withdrawal received by the Pre-Settlement Trust, and potential for urgency applications/a further withdrawal notice, is sufficient to neutralise the strong mandate the Pre-Settlement Trust has received as a result of processes undergone thus

41. Ibid, pp 874–875

far. This situation does, however, require careful monitoring by the Crown, and may require further assessment if circumstances change.⁴²

The Crown argued before us that ‘recognising the mandate prior to the results of the withdrawal petition (and if triggered, the withdrawal process) was not of itself prejudicial’.⁴³ We disagree.

The Trust Board conducted an analysis of the withdrawal petition to determine how many signatories were registered with the Trust Board. In January 2017, they reported to the Pre-settlement Trust that there were 1,304 signatures on the petition after removing duplicate pages. Of these, 478 signatures were of individuals who were over the age of 18 and either registered with the Trust Board or recorded under the name of a parent. There were 735 signatures from individuals who were not registered or recorded on the Trust Board register and 91 duplicate signatures.⁴⁴

In order to assess whether the withdrawal petition had met the threshold of 5 per cent of adult registered members of the Trust Board, it was necessary to determine the total number of individuals on the Trust Board register who were over the age of 18 and would therefore have been eligible to vote at the time. The report to the Pre-settlement Trust indicated that there were 11,680 such individuals as at 9 December 2016.⁴⁵

It will be recalled that, on 5 December 2016, officials had told their Ministers that there were 6,662 ‘eligible’ voters at the time of the mandate vote and that the rate of participation in the mandate vote was 23 per cent. If the 1,439 votes in favour of the Pre-settlement Trust mandate is measured against the 11,680 adults registered with the Trust Board as at 9 December 2016, total support comes to only 12 per cent of the eligible voters at that later date.

Using 11,680 as a base number, 584 signatures were needed to meet the 5 per cent threshold required to trigger the withdrawal process as set out in the Pre-settlement Trust Deed of Mandate. With only 478 valid signatures, the petitioners therefore fell 106 signatures short.

While support for the mandate (in terms of a participation rate) was being calculated on the earlier and lower baseline of 6,662 voters, opposition was being measured against an ever-increasing baseline. We can see why the claimants regarded this as unfair and unprincipled.

Before granting urgency for this inquiry, Judge Savage requested a further analysis of the withdrawal petition to determine the number of signatories to the petition on a hapū-by-hapū basis.⁴⁶ The results showed that, even after excluding those who were not registered on the Trust Board register, Ngāi Tamahaua and Ngāti Ira had reached the 5 per cent threshold; Ūpokorehe fell short by three signatures.⁴⁷

42. Document A69(a), pp 875–876

43. Submission 3.3.33, p 15

44. Document A86, pp 714–715

45. *Ibid*, p 714

46. Memoranda 2.5.4, 2.5.5

47. Document A86, p 714

The Crown has since conceded that to discount those who were not registered with the Trust Board was 'to some degree procedurally unfair', given that the mandate vote included a special voting process for those who whakapapa to Whakatōhea but were not registered with the Trust Board.⁴⁸

The Crown argued in submissions that delaying recognition of the Pre-settlement Trust Deed of Mandate until the results of the withdrawal petition were known would not have been fair to those Whakatōhea uri who voted in favour of the mandate.⁴⁹ We think this concern is overstated. An analysis of the withdrawal petition was available on 13 January 2017, only one month after the Deed of Mandate was recognised. The milestones for achieving settlement goals that were set out in the 'Broadening the Reach' Cabinet paper appear to us more likely to have been the dominant consideration rather than concern for those who supported the mandate.

It is troubling to us that the Crown decided to recognise the Pre-settlement Trust mandate without waiting to consider the results of the withdrawal petition. The petition demonstrated that opposition to the mandate was spread across hapū. Two of six hapū reached the 5 per cent threshold, and five of the six hapū recorded signatures in opposition from at least 4 per cent of their members.

In our view, proceeding to recognise the mandate without waiting to consider the results of the withdrawal petition raises a question as to whether the Crown sufficiently informed itself of the levels of support and opposition to the mandate. We reiterate that the Crown's Treaty duty of active protection extended to all of Whakatōhea, whether they supported or opposed the mandate.

5.5.3 Consideration of support for a Waitangi Tribunal district inquiry

Nearly all the claimants who appeared before us in this urgent inquiry now seek a full Waitangi Tribunal inquiry. In the second half of 2016, the Tribunal was assessing the views of claimants in the north-eastern Bay of Plenty district who might want to participate in the Tribunal's Arotake Kerēme project to complete its district inquiry programme. This work included assessing the views of Whakatōhea claimants with outstanding registered claims. Subsequently, the Tribunal sought to mediate differences apparent within the claimant community.

In their 5 December 2016 advice to Ministers, officials stated:

We consider the Tribunal's Arotake Kerēme Project to be separate to the Crown's Treaty settlement process. Should the Tribunal decide to go ahead with a North Eastern Bay of Plenty District Inquiry, this provides no grounds for the prevention of the Whakatōhea mandating or Treaty settlement processes from continuing.

Equally, we do not see that a decision by the Tribunal to not conduct a North Eastern Bay of Plenty District Inquiry should prevent Whakatōhea mandating or Treaty settlement processes from advancing.

48. Document A69, p 44

49. Submission 3.3.33, p 15

To that end, we are working through options the Crown can offer the Whakatōhea claimant community (outside of the Tribunal) which may meet the wishes of some Wai claimants to have their claims heard. For example, the offering of a Whakatōhea airing of grievances process would provide Wai claimants the opportunity to state their Wai claim issues before the Crown in the context of settlement negotiations.

The Crown has also informed claimants of the possibility the Crown could provide special funding to the Pre-Settlement Trust as part of the overall funding package for negotiations to cover the cost of research into Whakatōhea historical claims.⁵⁰

The desire for a full Tribunal inquiry, and in particular the research that it might produce, was certainly a significant theme in the testimony we heard. In our view, this raises two important issues.

The first is the choice that claimants are entitled to exercise about how they wish to proceed to settlement and whether that involves a Tribunal inquiry or direct negotiations alone. A number of named claimants argued before us that the negotiation and settlement of their claims without their consent breaches their rights to justice, and specifically their right to a Tribunal inquiry.

Counsel for Ngāti Muriwai submitted that the Crown is acting in breach of the principles of natural justice and the claimants' right to justice provided by section 27(1) of the New Zealand Bill of Rights Act 1990 by continuing to recognise the Pre-settlement Trust mandate and engage in settlement negotiations with them, as this denies the claimants their statutory right to have their claim heard and inquired into by the Tribunal.⁵¹

Counsel for Ngāi Tamahaua argued that the legal status of claims before the Tribunal means that claimants have the sole right to determine what happens to their claim, and no other individual or entity can extinguish it without their consent.⁵² Counsel cited as support for this proposition the Supreme Court's statement in *Haronga v Waitangi Tribunal* that the Tribunal is obliged to inquire into every claim with limited exception.⁵³ Counsel further submitted that, in order for the Pre-settlement Trust to represent their claims and settle the legal interests involved, the claimants must have given it authority to act as their agent, and this has not occurred.⁵⁴

The Crown acknowledged that settling claims without claimants' consent should be approached with caution, but it submitted that it was aware of the opposition and consulted appropriately.⁵⁵ The Crown also submitted, however, that 'division in the Whakatōhea claimant community is not so much over the roles of whānau, hapū, but over whether it is best for Whakatōhea to enter direct negotiations with the Crown or to pursue a District Inquiry from the Tribunal.'⁵⁶

50. Document A69(a), p 874

51. Submission 3.3.29, pp 2-4

52. Submission 3.3.31, pp 11-12

53. Ibid, p 14; *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53, 80 (SC)

54. Submission 3.3.31, pp 15-17

55. Submission 3.3.33, pp 27-28

56. Ibid, p 2

This tension between the legal rights of claimants to pursue their claims and the rights of a mandated group to negotiate a settlement has been considered by the Waitangi Tribunal previously, most notably in the *East Coast Settlement Report*.⁵⁷ In that report, the Tribunal discussed the 2009 Court of Appeal decision in *Attorney-General v Mair* regarding whether the Crown can extinguish claims against the will of named claimants.⁵⁸ The Tribunal stated:

Nowhere in its 54-page judgment does the court express any general concern that extinguishing an historical claim against a claimant's will might violate their legal rights (such as those protected by the New Zealand Bill of Rights Act 1990) or be in contravention of the principles of the Treaty of Waitangi.

Overall, we cannot support the view that, as a general rule, those submitting claims should be able to prevent settlements. The Crown is acting within its rights when on some occasions it extinguishes a claim without the consent of individual claimants if there is clear evidence that the Crown is following the wishes of a majority of the collective that has been mandated for negotiations.⁵⁹

The Tribunal also discussed the potential implications for the viability of a settlement process if individual claimants were able simply to withdraw their claims from a proposed settlement: 'a recommendation to leave out dissenting claimants might have implications for the future settlement process by potentially allowing individual claimants to hold iwi to ransom until their views are accepted'.⁶⁰

The Tribunal recognised, however, that the power to extinguish claims should be exercised with 'considerable caution' if settlements are to be durable.⁶¹ It referred to the second *Te Arawa Mandate Report*, which stated that, where a position on settlement arrived at by a hui-ā-hapū conflicts with the views of registered claimants, the Crown is right to give precedence to the hapū. The Te Arawa Tribunal stated that such claimants were 'at the least' entitled to consultation regarding the negotiation and settlement of their claims.⁶² The East Coast Tribunal also noted that the Court of Appeal made it clear in *Attorney-General v Mair* that the Crown must consider the level of support behind an individual claim when deciding whether or not that claim may reasonably be extinguished against the claimant's will.⁶³

Taking all these matters into account, we see no reason to depart from the principles set out in the *East Coast Settlement Report* and in the cases relied upon by that Tribunal. We do not accept therefore that the named claimants have an

57. Waitangi Tribunal, *The East Coast Settlement Report* (Wellington: Legislation Direct, 2010)

58. Ibid, pp 48–49; *Attorney-General v Mair* [2009] NZCA 625

59. Waitangi Tribunal, *The East Coast Settlement Report*, pp 49–50

60. Ibid, p 65

61. Ibid, p 49

62. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 111

63. Waitangi Tribunal, *The East Coast Settlement Report*, pp 49–50

effective veto over the settlement of their claims. However, the circumstances of this inquiry are quite different from those considered by the East Coast Tribunal. That Tribunal considered a situation in which opposition came from a minority of claimants, whereas we face a situation in which a clear majority of claimants are opposed to the inclusion of their claims in the mandate.

We also consider that there were deficiencies in the process by which the Pre-settlement Trust mandate was recognised by the Crown. One of these deficiencies was the adequacy of information about the relative levels of support for and opposition to the mandate. In this regard, we doubt that the Crown has met the standard set out by the Court of Appeal and the Tribunal in terms of properly informing itself as to the levels of support and opposition.

It seems possible from the evidence we heard that opinion may have shifted within Whakatōhea about how best to proceed with their claims. We acknowledge the claimants' point that a clear majority of the named claimants whose claims are included in the Pre-settlement Trust mandate are opposed to their inclusion. However, the evidence available to us simply does not allow us to reach a firm view of the relative levels of support for a Tribunal inquiry or direct negotiation. Our concern is that the Crown does not know this either. The Crown, as a Treaty partner, has an obligation to properly assess the extent of support for its settlement process.

The second important issue raised by the desire for a full Tribunal inquiry is whether the Crown can reasonably offer the opportunity for the kind of research and information that the claimants feel they need as part of the settlement process.

Counsel for the Ūpokorehe claimants emphasised their strong desire for a full Waitangi Tribunal inquiry. She pointed out that Ūpokorehe have not had a historical hearing and their historical account is yet to be placed on the record or before the Crown. Consequently, without a full Tribunal inquiry, 'Te Ūpokorehe does not believe that the Crown can determine Te Ūpokorehe's origins, tribal status and polity in total contradiction to Ūpokorehe's own evidence at this hearing.'⁶⁴

One result of the Tribunal mediation in October and November 2016 was a compromise 'tono to the Crown' to fund a shortened Waitangi Tribunal research and inquiry programme.⁶⁵ In their advice on this request, Crown officials advised the Minister for Treaty of Waitangi Negotiations to decline the funding request because it would impact on the ability of the Crown and the Pre-settlement Trust to reach an Agreement in Principle by August 2017 and because the proposal risked 'weighting the views of individual [Waitangi Tribunal] claimants and hapū members [who were] present at the mediation over the considerable majority of those uri of Whakatōhea as a whole who have mandated the Pre-Settlement Trust.'⁶⁶

64. Submission 3.3.28, p 27

65. Judge Carrie Wainwright and Dr Huata Palmer, report of mediators, 8 November 2016 (Wai 2563 RO1, memo 2.8.1), para 10

66. Document A86, p 528

The officials stated that 'negotiation funding already covers work to ensure the iwi negotiators understand their claims properly in order to negotiate the best possible settlement'. Any gap in the research could be repaired by information from the Crown to the Pre-settlement Trust and those who have participated in the mediation to date.⁶⁷ The request for funding was declined.⁶⁸

The Crown considers that there is sufficient provision in the existing knowledge base, and in the research assistance on offer, for it to proceed on a sound basis. Further, the Crown pointed to a 'mihi marino' process – a forum for airing grievances and supporting reconciliation with the Crown. The Crown submitted that this process, which would take place before the proposed settlement was initialled, would help to ensure that there is 'appropriate knowledge of the grievances being settled'.⁶⁹ The claimants simply do not accept this.⁷⁰

From what we have seen of the available historical evidence and from what we understand of the mihi marino process, we think that there is some force in the concerns that the claimants are raising over the adequacy of the historical research.

5.5.4 Conclusions on the consideration of support and opposition

The Crown submitted:

The alleged weaknesses in the mandate process highlighted by claimant counsel in this inquiry – including the participation rate in the mandate vote, and levels of opposition to the mandate (demonstrated during the submissions process and by the mandate withdrawal petition . . .) were squarely confronted in the advice [of Crown officials].⁷¹

We disagree. The evidence suggests rather that the Crown placed its own political objectives – particularly achieving the goal of an accelerated Whakatōhea settlement – over the interests of a process that was fair to Whakatōhea. Rather than wait to ensure that officials and Ministers were sufficiently informed of the levels of support and opposition, including through a proper assessment of the submissions and an analysis of the results of the withdrawal petition, they moved ahead on the target timeline, which required recognition of the Pre-settlement Trust mandate by December 2016. The Crown has a Treaty duty to actively protect the rangatiratanga of all the groups whose claims will be settled by this mandate. Our view is that the evidence of the support for and opposition to the mandate was too finely balanced to warrant a decision to recognise the mandate at that time.

67. Ibid, p 533

68. Document A69, p 41

69. Submission 3.3.33, p 21

70. Submissions 3.4.1–3.4.6

71. Submission 3.3.33, p 14

5.6 HAPŪ RANGITIRATANGA AND THE PROCESS FOR SELECTING TRUSTEES

The claimants raised concerns about the transparency and accountability of the process for selecting trustees to represent hapū and marae on the Pre-settlement Trust. The Pre-settlement Trust Deed of Mandate provides for the appointment of eight marae trustees and six hapū trustees. Marae trustees are appointed by marae committees; hapū representatives are elected.

The Deed of Mandate recognises eight marae: Omarumutu, Opape, Waiaua, Terere, Ōpeke, Roimata, Kutarere, and Maromahue. A marae trustee on the Pre-settlement Trust is appointed by each marae committee through written notice to the Pre-settlement Trust. The marae committee must provide the minutes of the meeting at which the motion to appoint the trustee was endorsed.⁷²

The process for electing hapū trustees is set out in the second schedule to the Pre-settlement Trust's trust deed. Candidates must be nominated in writing and the nomination must be signed by at least five registered adult beneficiaries of the Trust Board from the relevant hapū.⁷³ Where there is only one nominee, no election is held and the person nominated is deemed to be elected unopposed.⁷⁴ The Pre-settlement Trust's trust deed states that hapū may remove their hapū trustee by providing a written notice to the Pre-settlement Trust that includes minutes of the hapū meeting at which a motion was passed to remove the trustee.⁷⁵

The hapū trustees for Ngāi Tamahaua, Ngāti Ngāhere, Ngāti Ira, and Ūpokorehe were elected unopposed because only one nomination was put forward. There were two nominations each for the hapū trustee positions for Ngāti Patumoana and Ngāti Ruatakana, so elections took place.

The Ngāti Ira claimants said that the process for selecting trustees was not undertaken in accordance with tikanga Māori and that the hapū and marae trustees for Ngāti Ira were 'self-appointed'.⁷⁶

The Ngāi Tamahaua claimants said that it is insufficient for nominations to be called for without requiring a hui-ā-hapū. They were concerned that the process provided no opportunity, unless the position is contested, to discuss the suitability of nominees or to question them. They objected to the requirement that nominees must register with the Trust Board, noting that members of Ngāi Tamahaua have chosen not to register with the Trust Board for personal, historical, and political reasons, including issues of mistrust. The Ngāi Tamahaua claimants submitted that the process undermines the rangatiratanga of Ngāi Tamahaua by undermining their right to determine their representatives.⁷⁷

The Ūpokorehe claimants submitted that Ūpokorehe does not, collectively, support the individual who was appointed to represent Ūpokorehe as a 'hapū' trustee. They noted that, because nominations require the support of only five registered Trust Board beneficiaries, a trustee can be elected unopposed to represent

72. Document A86, pp 60, 63

73. *Ibid*, p166

74. *Ibid*

75. *Ibid*, p149

76. Submission 3.3.40, pp 24, 25; submission 3.3.46, p10

77. Submission 3.3.31, pp 28–29

Ūpokorehe on the Pre-settlement Trust even if the rest of Ūpokorehe do not support that nominee or wish to abstain from the process altogether. They stated that the Roimata Marae trustee position has remained unfilled because Ūpokorehe do not accept the Pre-settlement Trust mandate.⁷⁸

The Crown, in contrast, submitted that the process for choosing hapū trustees on the Pre-settlement Trust is 'open and contestable'. The process of nomination and, if required, election 'allows for inclusion of all Whakatōhea uri, and each hapū has flexibility in how it debates who should represent the hapū on the [Pre-settlement Trust]'.⁷⁹

With regard to the marae trustees, the Crown submitted:

Marae representatives are appointed by marae according to the processes of each marae. The substantial number of seats for marae representatives on the [Pre-settlement Trust] recognises and provides for the special role of ahi kaa. (To the extent there is any doubt as to whether certain marae are in fact hapū, the provision of marae representation ameliorates any prejudice to those groups by providing representation on the [Pre-settlement Trust].)⁷⁹

We are not convinced. Our main concern is that, because support for the Pre-settlement Trust was never tested among the hapū of Whakatōhea, it is unclear which hapū trustees actually have a mandate to represent their hapū. Peter Selwyn, for Ngāi Tamahaua, told us:

The [Pre-settlement Trust] mandate strategy promotes an uri model as a basis upon which membership and voting rights would be counted. This undermines the significance of hapū rangatiratanga and enables individuals who may not necessarily represent the views of the hapū to be counted as representing the hapū perspective.⁸⁰

We adopt the following statement of principle made by the Ngātiwai Mandate Tribunal:

In situations where hapū play a central role in the social and political life of their communities . . . the Crown has obligations to ensure that hapū can determine how and by whom they will be represented in settlement negotiations and are able to make decisions according to their tikanga.⁸¹

We would also say that the opportunity for hapū to select a representative on the Pre-settlement Trust cannot be a substitute for a process that properly assesses hapū support for the Pre-settlement Trust mandate itself.

78. Submission 3.3.28, pp 45–47

79. Submission 3.3.33, p 21

80. Transcript 4.1.1, p 242

81. Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report* (Wellington: Legislation Direct, 2017), p 78

5.7 THE PROCESS FOR RECOGNISING ADDITIONAL HAPŪ

Which groups should be recognised as hapū of Whakatōhea in the Pre-settlement Trust Deed of Mandate was an issue raised in this urgent inquiry by some claimants. The Trust Board recognises six Whakatōhea hapū, and the Pre-settlement Trust Deed of Mandate follows suit. However, the Process Working Party that produced ‘Te Ara Tono’ consisted of representatives from the six hapū as well as a seventh: Ngāti Muriwai. The first version of the Tū Ake mandate strategy submitted to the Crown also stated that Ngāti Muriwai was a hapū of Whakatōhea. It is not clear to us why this hapū was removed in subsequent versions of the mandate. Ngāti Muriwai maintain their own hapū register and say that they have approximately 426 living registered adult members.⁸²

Questions were also raised in this inquiry about the correct way to characterise Ūpokorehe. Some parties stated that Ūpokorehe have traditionally been considered a hapū of Whakatōhea, while others stated that Ūpokorehe are an iwi in their own right, with five constituent hapū. We address the distinct issues of Ūpokorehe in the next chapter.

The Pre-settlement Trust Deed of Mandate acknowledges the question of which hapū should properly be included in the mandate as a relevant concern. The Deed of Mandate states that, during the consultation process, ‘a view [was] expressed that the traditional list of Whakatōhea hapū may be too restrictive.’⁸³ In section 9.4.5, the Deed of Mandate sets out a process for recognising additional Whakatōhea hapū within the Pre-settlement Trust structure.

Any individual, whānau, or group may submit a request to the Pre-settlement Trust to recognise an additional hapū. They must then present historical evidence for their position to all hapū, via hapū committees, for consideration. All hapū already recognised by the Pre-settlement Trust must consider whether the requesting group:

- i. Descends from a Whakatōhea ancestor;
- ii. Has active, functioning marae;
- iii. Belongs to, or associates with, a maunga (mountain) and an awa (river); and
- iv. Is recognised as a functioning hapū of Whakatōhea.

Each recognised hapū must then recommend either to approve or to decline the request. To be approved, more than half of the hapū must support the request. The newly recognised hapū is then entitled to elect a hapū trustee to represent it on the Pre-settlement Trust.⁸⁴ Despite the requirement that requesting groups demonstrate that they have active and functioning marae, the Deed of Mandate does not provide for the appointment of additional marae trustees.

We note that the trust deed of the Pre-settlement Trust sets out a different process by which the trustees can add a group to the hapū defined in the trust deed.

82. Document A48, p 3

83. Document A86, p 53

84. *Ibid*, p 61

In a definitions section, the trust deed defines 'hapū', as used throughout the document, as meaning Ngāti Ruatakena, Ngāi Tamahaua, Ngāti Patumoana, Ngāti Ngāhere, Ngāti Ira, and Ūpokorehe.⁸⁵

Clause 15.2 provides that the trustees may add to this list if:

- ▶ a written request is submitted to the trustees;
- ▶ the group meets the four criteria set out in section 9.4.5 of the Pre-settlement Trust Deed of Mandate;
- ▶ the trustees have consulted with the Kaumātua Kaunihera;
- ▶ at least 75 per cent of the trustees support the request; and
- ▶ a members' resolution is passed in accordance with the first schedule to the trust deed.⁸⁶

A members' resolution may be passed only at an annual general meeting or a special meeting of the Pre-settlement Trust. At least 75 per cent of those attending the meeting must vote in favour.⁸⁷

Counsel for the Ngāti Muriwai claimants submitted that the Pre-settlement Trust trust deed does not provide Ngāti Muriwai with a viable way to gain recognition within the mandated entity.⁸⁸ The process set out in the Pre-settlement Trust Deed of Mandate, counsel submitted, is 'overly onerous', and the claimants stated that they have the neither the financial resources nor the personnel to fulfil the requirements.⁸⁹

The fact that Ngāti Muriwai had representatives on the Process Working Party that produced 'Te Ara Tono' and were initially included in the first Tū Ake mandate strategy submitted to the Crown gives rise to a question as to why they were ultimately excluded. We think that there is a reasonable prima facie argument that Ngāti Muriwai have been prejudiced by exclusion from the Pre-settlement Trust at the point of its establishment. They now face the burden of proof to establish their identity through the production of historical evidence. They must win the support of four of six hapū committees, 12 of 15 Pre-settlement Trust trustees, or 75 per cent of those Whakatōhea uri who might choose to vote on a members' resolution.

5.8 THE PROCESS FOR WITHDRAWING SUPPORT FOR THE MANDATE

The claimants submitted that the mechanism by which support for the Pre-settlement Trust Deed of Mandate can be withdrawn is unfair and unworkable. They identified three main reasons:

- ▶ The process for determining whether the threshold has been met to trigger the withdrawal mechanism is procedurally unfair.
- ▶ The withdrawal process is too logistically and financially onerous, making it unrealistic and impracticable for any group to successfully complete it.

85. Ibid, pp 140–141

86. Ibid, pp 157–158

87. Ibid, p 139

88. Submission 3.3.29, p 23

89. Ibid, p 15

- ▶ There is a lack of clarity over whether the Pre-settlement Trust Deed of Mandate provides for and allows individual hapū to withdraw their support. In this section, we address each of these issues in turn.

5.8.1 Is there a fair process for determining whether the 5 per cent threshold has been met?

The first issue relates to the requirements for filing a written notice or withdrawal petition to initiate the process for amending or withdrawing the mandate of the Pre-settlement Trust. Section 19.1.2 of the Pre-settlement Trust Deed of Mandate states that the notice must be signed by at least 5 per cent of ‘the adult registered members of Whakatōhea on the register maintained by the Trust Board.’⁹⁰ The claimants submitted that it is unfair to recognise and count only those signatories who are registered with the Trust Board.

In a joint brief of evidence filed prior to our hearings, Crown officials stated that they had

come to the view that the mandate withdrawal trigger is to some degree procedurally unfair, as the withdrawal trigger only allows for signatures of Whakatōhea uri registered with the [Trust Board] to be recognised towards meeting the 5% threshold. Comparatively, the mandate vote included a special procedure for those who whakapapa to Whakatōhea but are not registered with the [Trust Board].⁹¹

The officials said that they had raised these concerns with the Pre-settlement Trust in June 2017. Specifically, ‘officials advised that those who were able to vote on the mandate should also be eligible to participate in any amendment or withdrawal petition regardless of whether [they were] registered with the [Trust Board] or not.’⁹²

The officials told us that they had indicated to the Pre-settlement Trust in June 2017 that the Crown’s concern ‘could be addressed by steps to change the mandate withdrawal trigger or by the [Pre-settlement Trust] moving the process to the next step.’⁹³ However, the Crown has also submitted that at that time it was ‘not practical to engage in detailed discussion’ with the Pre-settlement Trust. This was because officials thought the Tribunal’s decision on whether to grant an urgent inquiry into the Whakatōhea mandate was imminent.⁹⁴ In closing submissions, the Crown stated:

It is not for the Crown to dictate to the mandated entity the form of any modification to the withdrawal mechanism. But the Crown is confident it can work

90. Document A86, p 71

91. Document A69, p 44

92. Ibid

93. Ibid, pp 44–45

94. Submission 3.2.16, p 4

constructively with the [Pre-settlement Trust] to resolve unfairness in the withdrawal mechanism.⁹⁵

For its part, the Pre-settlement Trust has questioned whether a practical solution to the issue is possible. Counsel submitted:

it is very difficult to see how, realistically, provision can be made for including those who are not registered with the Trust Board. The fundamental problem is what should the denominator be – ie, the total number against which the 5% threshold is to be assessed – 5% of which figure?⁹⁶

However, the Pre-settlement Trust has expressed a willingness to engage in discussions with the Crown to overcome the concerns raised.⁹⁷ We see that as constructive, and necessary.

5.8.2 Are the requirements for amending or withdrawing the mandate workable?

The second concern raised by the claimants is that, even if the threshold for triggering the amendment or withdrawal process is met, the subsequent process is so onerous as to make it unworkable. The Pre-settlement Trust Deed of Mandate states that, if the concerns of the group seeking the amendment or withdrawal of the mandate are not resolved by a meeting with the Pre-settlement Trust trustees, the group 'may organise five (or greater) publicly notified hui'.⁹⁸ It appears from the wording of subsequent provisions that the word 'may' is intended to indicate that it is for the group seeking amendment or withdrawal to decide at this point whether to pursue its concerns.

The publicly notified hui must follow the same process and procedures that conferred the mandate on the Pre-settlement Trust. These include providing sufficient public notice, information about the likely effects of any proposal to amend or withdraw the mandate, and an opportunity for as many Whakatōhea uri as possible to vote on a proposition for amendment or withdrawal. The voting should allow for postal voting. The Pre-settlement Trust Deed of Mandate states that, after 'the outcome of the relevant voting process has been determined', the group seeking the withdrawal or amendment must submit a written report to the Pre-settlement Trust and the Office of Treaty Settlements. Those bodies will then 'discuss the proposal'.⁹⁹

Counsel for the Ngāti Patumoana claimants submitted that the expectation that a group could carry out such a process without access to similar funding and logistical support as was available to Tū Ake is 'simply unrealistic' and renders the

95. Submission 3.3.33, p30

96. Submission 3.3.23, para 42; submission 3.3.36, para 50

97. Submission 3.3.23, para 41; submission 3.3.36, para 50

98. Document A86, p71

99. Ibid, p72

provisions obsolete.¹⁰⁰ Counsel for the Ngāti Ira claimants noted that, even after following such a process, the decision remains in the hands of the Crown and the Pre-settlement Trust: ‘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.’¹⁰¹

The logistical requirements and financial burden of withdrawing support from a mandated entity have been addressed in previous Tribunal reports. In the *Ngāpuhi Mandate Inquiry Report*, the Tribunal noted the significant costs incurred by the Tūhoronuku Independent Mandated Authority in securing a Crown-recognised mandate. The Tribunal stated that, without financial support, it was unlikely any Ngāpuhi group could meet the requirement to follow essentially the same process in seeking to withdraw the mandate.¹⁰² The Tribunal found that, in the circumstances, the withdrawal mechanism was not ‘workable’, and it recommended remedial action.¹⁰³

The *Ngātiwai Mandate Inquiry Report* also noted the contrast between Crown funding of the group seeking a mandate and the absence of funding for those seeking to withdraw support. The Tribunal found that the costs of pursuing the relevant withdrawal process were ‘prohibitive and therefore unworkable’, thus rendering the relevant provisions ‘empty’.¹⁰⁴ The Tribunal identified the provision of ‘an agreed withdrawal mechanism’ as one of the issues that needed to be resolved by the parties through mediation or facilitated discussions.¹⁰⁵

We note that the process by which the Pre-settlement Trust obtained a mandate included 12 hui during the period in which the mandate vote took place. In contrast, the withdrawal process requires a minimum of five hui. That aspect of the process is therefore less onerous. However, the requirement to hold an iwi-wide vote, available to as many Whakatōhea uri as possible and including postal voting, is a major financial and logistical challenge for groups that lack funding from the Crown or another body such as the Trust Board.

5.8.3 Does the withdrawal process adequately provide for the interests of hapū?

The third issue relating to the withdrawal process is the question whether hapū or other sub-groups within the mandated entity can withdraw their support or their claims from the Pre-settlement Trust mandate.

Section 19.1.2 of the Pre-settlement Trust Deed of Mandate states that any amendment or withdrawal petition 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, which part of the claimant community, ie which hapū’.¹⁰⁶

100. Submission 3.3.38, para 105

101. Submission 3.3.40, para 140

102. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Wellington: Legislation Direct, 2015), p 66

103. *Ibid*, pp 80, 82

104. Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report*, p 81

105. *Ibid*, p 84

106. Document A86, p 71

This suggests that, when the provision was drafted, a situation was envisaged in which individual hapū might seek to withdraw. However, how that might work in practice is not entirely clear, as was noted by the Pre-settlement Trust in closing submissions:

Previous Tribunal reports have dealt to some extent with the issue of withdrawal mechanisms but we query, with respect, whether the consequences of findings and recommendations have fully been thought through. To our knowledge, there has been little testing of these mechanisms in practice.

In the Whakatōhea context, what would the outcome be if a minority group was able to withdraw from the [Pre-settlement Trust] mandate? There would be a very high risk that that would effectively put the settlement negotiations on hold because the Crown would no longer be willing to negotiate something less than a comprehensive iwi-wide settlement. . . . We do not dispute the importance of hapū rangatiratanga but challenge the extent to which the Tribunal should be encouraging or recognising the ability of individual hapū effectively to veto a settlement that is desired by a majority of the whole iwi.¹⁰⁷

Both the Ngāpuhi Mandate Tribunal and the Ngātiwai Mandate Tribunal addressed the question of whether individual hapū could, or should be able to, withdraw from the mandates in question.

In the *Ngāpuhi Mandate Inquiry Report*, the Tribunal noted a 'lack of clarity' and 'considerable confusion' about whether hapū could withdraw from the scope of the Tūhoronuku mandate and, if so, how. The Tribunal concluded that it was 'virtually impossible for hapū to extricate themselves formally' from that mandate and noted that, in any case, the Crown retained ultimate decision-making power over whether to accept the withdrawal of a hapū, 'since the Crown retains the power to assess the impact of the mandate as a whole'. The Tribunal acknowledged that this was a 'bitter irony' for those hapū that had never approved the mandate according to their customary processes in the first place.¹⁰⁸

The Ngāpuhi Mandate Tribunal recommended, as one of the remedial actions it considered necessary, 'a workable withdrawal mechanism for hapū that do not wish to be represented'. The Tribunal stated: 'Hapū that are included in the mandate must want to be there and not feel that they have been coerced or trapped.'¹⁰⁹

The *Ngātiwai Mandate Inquiry Report* noted that the Ngātiwai Trust Board Deed of Mandate contained a provision stating that withdrawal of the mandate must be undertaken on behalf of 'the whole of the claimant community'. The withdrawal process set out in the Ngātiwai Deed of Mandate 'does not and is not intended to enable "individual hapū or other groups within the wider community" to withdraw from the mandate.'¹¹⁰ The Crown had rejected a request from the

107. Submission 3.3.36, p 14

108. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report*, p 77

109. *Ibid*, p 82

110. Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report*, p 57

Patuharakeke Trust Board for funding assistance to withdraw its hapū from the Ngātiwai mandate.¹¹¹

However, the Ngātiwai Mandate Tribunal stated: ‘If hapū are named as part of the mandate then our view is that, just as the mandate should provide a mechanism to secure hapū consent, it requires a mechanism which allows them to withdraw.’¹¹² The Tribunal recommended that parties discuss ‘an agreed withdrawal mechanism for single hapū or groups of hapū.’¹¹³

As we have discussed earlier, before granting urgency for this inquiry Judge Savage requested a further analysis of the November 2016 withdrawal petition that would determine the number of signatories to the petition on a hapū-by-hapū basis.¹¹⁴ The results were presented in a letter dated 6 July 2017 and showed that Ngāi Tamahaua and Ngāti Ira had reached the 5 per cent threshold; Ūpokorehe fell short by three signatures.¹¹⁵

During cross-examination, Crown witness Dr Benedict Taylor was asked by claimant counsel to consider the provision in the Deed of Mandate concerning withdrawal or amendment by ‘all or part of the claimant community’. He was asked whether Ngāi Tamahaua had met the 5 per cent threshold as demonstrated by the 6 July 2017 letter. Dr Taylor responded that ‘the threshold is not set at a hapū level’. He stated that, while the provision may require the identification of the specific hapū that are seeking to withdraw, ‘it does not provide for the withdrawal specifically of a single hapū.’¹¹⁶

However, we note that the advice provided by officials to their Ministers on 5 November 2016 does not fully accord with this interpretation. They stated:

We also acknowledge the mid-level possibility some claimants for Te Upokorehe, represented by [the Ūpokorehe Claims Trust], may serve a further notice of withdrawal on the Pre-settlement Trust targeted specifically at amending the Deed of Mandate so as to exclude Te Upokorehe hapū.¹¹⁷

This suggests that officials had anticipated hapū or other sub-groups within Whakatōhea using the withdrawal mechanism to attempt to exclude their claims from the Pre-settlement Trust mandate. The Crown’s position is ambiguous as to what the provision does and does not allow.

Our view is that the withdrawal mechanism fails to clearly set out a process by which individual hapū can withdraw support from the Pre-settlement Trust Deed of Mandate. This serves to compound the problems created by the lack of information about which hapū agreed to the Deed of Mandate in the first place.

111. Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report*, p 57

112. *Ibid*, p 58

113. *Ibid*, p 84

114. Memoranda 2.5.4, 2.5.5

115. Document A86, p 714

116. Transcript 4.1.1, p 649

117. Document A69(a), p 875

5.8.4 Conclusions on the withdrawal mechanism

We have identified several problems with the Pre-settlement Trust withdrawal mechanism which in our view make it unfair and unworkable. The Crown has conceded that there is some unfairness in the withdrawal provisions. However, this limited concession relates only to the way that the 5 per cent threshold is calculated. Our view is that all the issues need to be addressed.

We acknowledge that several of the issues we have identified are matters for the Pre-settlement Trust to address. However, both the Crown and the Pre-settlement Trust have committed to working together to resolve the unfairness in the withdrawal provisions.

The Ngāpuhi Mandate Tribunal determined that the duty of active protection required the Crown to 'recognise that the structure of the mandated entity must allow for hapū interests to be tested and heard'.¹¹⁸ The problems that we have identified with the withdrawal mechanism inhibit this and need to be rectified.

5.9 THE IMPACT OF THE CROWN'S 2016 STRATEGY FOR ACCELERATED TREATY SETTLEMENTS: 'BROADENING THE REACH'

After the hearings in this inquiry had concluded, the Crown provided further documents that revealed Whakatōhea had been prioritised in the 2017 negotiation timetable under a new strategy set out in a Cabinet paper titled 'Broadening the Reach of Historical Treaty of Waitangi Settlements'. This strategy sought to enable the Crown to complete settlements with all willing and able groups by 2020.¹¹⁹ It was agreed to by Cabinet on 17 October 2016.¹²⁰

The paper stated that the strategy had four pillars. The 'key pillar', according to the paper, was to 'bring forward' negotiations with eight groups with the aim of achieving significant settlement milestones with each by August 2017. We do not know what the other three pillars were because of redactions to the paper.

The paper acknowledged that limits on the capacity and capability of the groups might constrain their ability to meet the ambitious timeframes. A panel of independent assessors with extensive experience in Treaty negotiations and iwi dynamics was to assess the capacity and capability of each of the groups to participate in a streamlined and intensive negotiation process.¹²¹ Whakatōhea was assessed and identified as one of the eight groups that the Crown would work with to achieve a settlement milestone by August 2017.¹²²

The paper stated that accelerating negotiations and reaching settlement with iwi in accordance with the strategy would support the Government's regional economic development initiatives by enabling iwi to 'inject some of their Treaty

118. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report*, p 31

119. Document A119, p 32

120. *Ibid*, p 27

121. *Ibid*, p 7

122. *Ibid*, pp 3, 6

settlement funds back into their local economies via property development initiatives and other ventures.¹²³

The negotiations would also ‘unlock some of the last remaining difficult overlaps of iwi interests and allow some assets and issues of particular importance to the nation to be addressed’. If successful, by the end of 2017, the Government would also be ‘in a position to signal that Treaty settlement negotiations are coming to an end’.¹²⁴

No publicity was proposed for the Cabinet paper. Instead, the Office of Treaty Settlements would communicate changes in the negotiation program to iwi individually, and a media strategy had been prepared which included key messages for Ministers and officials to use if approached for comment by the media.¹²⁵

5.9.1 September 2016 invitation to participate in accelerated negotiations

In September 2016, the director of the Office of Treaty Settlements wrote to the chair of Tū Ake, stating:

[The Office of Treaty Settlements] invites Whakatohea to consider whether the Whakatohea negotiations should be considered for prioritisation from October 2016 with the goal of achieving Crown recognised mandate by December 2016 and Agreement in Principle by 30 August 2017. Naturally, this means the following 12 months will involve intense negotiations.¹²⁶

The director stated that, if Whakatōhea agreed to the priority negotiations, Crown resources would be allocated ‘to the level necessary to achieve the agreed outcome.’¹²⁷ The director further stated that Whakatōhea representatives and negotiators would need to consider whether Whakatōhea would be able to achieve these milestones:

In my view the factors Whakatohea representatives will need to consider in arriving at a decision on the proposal are similar to the factors the Minister will need to consider. Broadly, the parties need to be satisfied that Whakatohea:

- ▶ is committed to achieving the milestone in the time available (which is shorter than the time we would usually expect for negotiations towards Crown recognised mandate by December 2016 and enter intense negotiations towards an Agreement in Principle to occur);
- ▶ has the capability and capacity to finish negotiations;
- ▶ has robust representation and that the Whakatohea people are largely united behind the aim; and

123. Document A119, p10

124. Ibid, pp 7, 9

125. Ibid, p14

126. Submission 3.2.11(a), p 2

127. Ibid, p1

- ▶ has a good idea of its settlement aspirations and that a successful negotiation is possible.¹²⁸

The director went on to say that the Minister had asked officials to work with three independent advisers to assess the 'willingness and ability of the groups invited to enter intense negotiations' and noted: 'If at any point the negotiation or the milestone becomes untenable negotiations will stop or be deferred unless otherwise agreed.'

On either 14 or 15 September 2016, Tū Ake representatives met with two Crown independent advisers who were to assess Whakatōhea's capability and capacity to participate in a streamlined and intensive negotiation process.¹²⁹ The independent advisers were guided by a document setting out key messages to be conveyed to priority groups. These included the need for the Minister for Treaty of Waitangi Negotiations to be assured that Whakatōhea were engaged and committed to the negotiations path – 'he wants to know that you do not intend to participate in litigation against the Crown or a Tribunal inquiry'. It further stated that priority groups should have a 'unified claimant community with strong and clear leadership' and 'sub-groups (eg whānau and hapū) [that would] support the collective settlement'.¹³⁰

5.9.2 Including Whakatōhea in the 'Broadening the Reach' strategy

Following the meeting, the chair responded to the director's proposal with a 'tentative yes' but stated that this would need to be confirmed by the Pre-settlement Trust once it was established.¹³¹

On 21 September 2016, the Office of Treaty Settlements responded to the chair, thanking him for his response and stating that the Pre-settlement Trust would need to consider and sign Terms of Negotiation before they were submitted to the Minister for Treaty of Waitangi Negotiations.¹³²

The Pre-settlement Trust was the group seeking the mandate and ostensibly accountable to hapū and marae. However, we did not see any evidence that the invitation from the Crown was ever put to the trustees of the Pre-settlement Trust for consideration.

There were several developments in the second half of 2016 that we think were significant and relevant to the assessment of whether Whakatōhea should have been included in the group of iwi with which the Crown would pursue accelerated negotiations. These included the filing of an application for an urgent inquiry in May 2016, a Waitangi Tribunal judicial conference in October 2016, a Waitangi Tribunal mediation in November 2016, and the claimants' request for Crown

128. Ibid, p 2

129. Document A121, para 6; doc A121(a), p 22

130. Document A121(a), p 7

131. Submission 3.2.11(a), pp 4–5

132. Submission 3.2.58(a)

funding for a shortened Tribunal research and inquiry programme. In our view, these matters would tell against expediting the mandate recognition, but we see little evidence that the Crown gave them due consideration.

The evidence shows that there was considerable momentum building towards recognising the Pre-settlement Trust mandate in December 2016. Approval for pre-mandate funding was sought and granted in April 2016. Crown officials had informed Tū Ake in September 2016 that the Pre-settlement Trust would need to have its negotiators selected and ready to start work in late December given the ‘ambitious’ timeframes for an accelerated negotiation. They had also prepared and sent draft terms of reference for the negotiations that were ready to be signed. In November 2016, they informed the Pre-settlement Trust that the Crown was in the process of appointing a chief Crown negotiator and establishing a negotiations team to work with the Pre-settlement Trust towards an Agreement in Principle. Although there were appropriate caveats in several official papers to the effect that these developments were ‘subject to mandate’, the Crown was clearly operating on the assumption that the mandate would be recognised in December 2016.

In the *Tamaki Makaurau Settlement Process Report*, the Tribunal commented on the risks of pursuing Treaty settlements as quickly as possible, without regard to the underlying purpose of settling grievances, stating:

The burden on both Māori and Pākehā of the great wrongs that were done in the past will not be lifted if the process of settling creates new wrongs. We consider that the process for settling now being followed is creating divisions within Māori society that are very damaging.¹³³

Aside from a general concern about the adverse effects of including Whakatōhea in this accelerated process, we do have significant concerns about the way in which the decision appears to have been made.

5.9.3 Assessing capacity, capability, and cohesion

Peter Douglas and Ken Mair were appointed as independent advisers to assess Whakatōhea’s capacity and capability to participate in the accelerated negotiation process. After the hearings, the Crown provided some information about the role of these advisers that indicated that they met at least once with Tū Ake representatives in September 2016 and were given briefing notes by officials. However, the only record of their assessment is included in an appendix to the ‘Broadening the Reach’ Cabinet paper. It appears that this assessment was critical to the inclusion of Whakatōhea in the accelerated process.

The appendix summarised their advice about Whakatōhea’s capacity and capability. It stated that prioritisation was warranted because the Bay of Plenty’s economy had not performed as well as the national economy on various measures and was an area of high socioeconomic deprivation. Under a section titled ‘Is

133. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 2

the Group Ready?', Whakatōhea's cohesion was assessed as 'Low-Medium'. Their capability was assessed as 'Medium'.

Whakatōhea's commitment to an accelerated process was also recorded as 'Medium', with the observation that the iwi '[h]as had a lot of internal divisions for a long time but [is] now largely united in a desire to settle'. The appendix also recorded that a Deed of Settlement negotiated in 1996 was not ratified by the claimant community due to internal political divisions and dissatisfaction with the Crown's offer.¹³⁴

We issued a direction requesting that the Crown provide the full assessment upon which the summary was based.¹³⁵ The Crown responded that 'the summary prepared for Cabinet was based on discussions with the persons appointed as assessors. No written document was provided by those persons.'¹³⁶ When asked by the panel to clarify how the advice of the assessors was conveyed and recorded,¹³⁷ the Crown responded, stating that 'the advice of the independent advisors was primarily conveyed to officials at [the Office of Treaty Settlements] orally, via telephone calls or at meetings.'¹³⁸ We are sceptical of that explanation.

It appears that the independent advisers met only once with Tū Ake representatives. Tū Ake were clearly united in a desire to settle, but it would have been well known to the independent advisers that there had been sustained opposition to the Tū Ake proposals. Mr Mair, in particular, would have been aware that litigation was highly likely should the Tū Ake mandate proceed. However, the section from the appendix of the Cabinet paper titled 'litigation risk' was redacted, meaning that we are not able to assess what (if anything) the independent advisers said about this or about the risks of further division within Whakatōhea. The inference we draw is that the Crown was well aware of the risks but had taken the decision to press ahead regardless.

The Crown was aware of the division within Whakatōhea, having received mandate strategies from multiple groups and attended facilitated hui at which clear opposition was expressed to the Tū Ake mandate strategy. By the Crown's own assessment, or that of its independent advisers, Whakatōhea had 'Low-Medium' cohesion and had experienced 'a lot of internal divisions for a long time'.

Given the division within Whakatōhea, we would have expected a careful assessment of whether the iwi was indeed willing and able to pursue an accelerated negotiation process with the Crown. From the information we do have, we are left to draw the inference that the assessment conducted by the independent advisers was cursory.

We also consider the later submission of the withdrawal petition significant. Although the signatures were still to be verified, it consisted of scores of pages and purported to represent a significant section of the claimants whose claims would

134. Document A119, p 21

135. Memorandum 2.6.10, p 2

136. Submission 3.2.49, p 2

137. Memorandum 2.7.1, p 2

138. Submission 3.2.58, p 2

be settled through negotiations with the Crown. We do not see how, at this point, the Crown could consider that Whakatōhea remained a ‘unified claimant community’. In turn, the accelerated negotiation timeframe meant that the withdrawal petition was not given the weight and consideration that it should have been.

5.9.4 Conclusion on the influence of the accelerated negotiation process

Our view is that the Crown has focused too much on the goal of achieving a speedy settlement, including meeting arbitrary deadlines for key milestones, to the detriment of Whakatōhea. The process for assessing Whakatōhea’s capacity, capability, and cohesion appears cursory. The decision to prioritise and accelerate negotiations with Whakatōhea in turn had a significant influence on the timing and content of the advice presented by Crown officials to Ministers on 5 December 2016 and on the decision of the Crown to recognise the Pre-settlement Trust mandate when it did. We address the wider implications of this in chapter 7, where we set out our findings and recommendations.

CHAPTER 6

THE TRIBUNAL'S ANALYSIS OF SPECIFIC CLAIMS

6.1 INTRODUCTION

In this chapter, we address specific issues raised by the following claims:

- ▶ the Ūpokorehe claim (Wai 2563);
- ▶ the Te Whānau a Mokomoko claim (Wai 2609);
- ▶ the Te Whānau o Te Kahika claim (Wai 2594) and the Te Whānau ā Apanui claim (Wai 2605);
- ▶ the Moutohorā Quarry claim (Wai 2592); and
- ▶ the Raupatu Working Party claimants (Wai 2657).

6.2 ŪPOKOREHE CLAIM (WAI 2563)

6.2.1 Introduction

Ūpokorehe have a distinctive claim. It includes the assertion that they are not a hapū of Whakatōhea and should not therefore be characterised as such in a Whakatōhea mandate. In the preliminary view we expressed after the first week of hearings, we took issue with this and said we did not think it was wrong to characterise Ūpokorehe as a hapū of Whakatōhea. After considering all the evidence available to us, however, we acknowledge that the issue is complex and we observe that we are not in a position to decide the issue based upon the limited information before us. In this chapter, we outline the Ūpokorehe claim and the context out of which it arises, and we also consider the claim in light of the relevant Treaty standards. We set out our findings in chapter 7.

6.2.2 The claim

Ūpokorehe supported the Whakatōhea raupatu claim made to the Waitangi Tribunal in 1989 (Wai 87). Later Ūpokorehe claims to the Tribunal (Wai 1092, Wai 1758, and Wai 1787) have focused on other issues, including Crown policies and actions in relation to Ōhiwa Harbour, the seabed and foreshore, fresh water, the Tahora block, and the Native Land Court. Ūpokorehe are now listed as a hapū of Whakatōhea in the Pre-settlement Trust Deed of Mandate. All Ūpokorehe historical Treaty claims are included in the mandate for settlement.¹

1. Three of these claims come under the umbrella of the Te Ūpokorehe Treaty Claims Trust. They are the Te Ūpokorehe claim (Wai 1092), filed by the late Charles Aramoana; the Ngati Raumoia Roimata Marae Trust claim (Wai 1758), brought by Wallace Aramoana, Lance Rehia, Gaylene Kohonui, Wayne Aramoana, and Sandra Aramoana; and the Rongopopoia ki Ūpokorehe claim (Wai 1787), brought

Ūpokorehe representatives participated in the preparation of ‘Te Ara Tono’ and in the hui-ā-iwi in 2007 which endorsed the report. Not long after, a group of Ūpokorehe claimants split from the working party set up to implement the ‘Te Ara Tono’ recommendations, apparently initially over issues concerning Ōhiwa Harbour. The group of Ūpokorehe claimants then pursued an increasingly independent path. In 2010, they formed the Ūpokorehe Claims Trust to seek a mandate on behalf of Ngā Uri o Te Ūpokorehe.²

6.2.3 Key issues for Ūpokorehe

Counsel for the Ūpokorehe claimants before us submitted that ‘the Crown has failed to uphold Te Ūpokorehe’s tino rangatiratanga in recognising the [Pre-settlement Trust’s] mandate.’³ The primary arguments on this issue are:

- ▶ Ūpokorehe are an iwi in their own right and the Crown needs to engage with them on that basis.⁴
- ▶ The Crown has endorsed a mandated entity which includes Ūpokorehe, despite their ‘consistent and prolonged opposition’ and their wish to have their claims investigated and reported on by the Waitangi Tribunal.⁵
- ▶ The Crown has applied its large natural groups policy in an inflexible manner and moved with haste to recognise the Pre-settlement Trust mandate, while failing to engage with the desire of Ūpokorehe for a parallel non-competing mandate.⁶
- ▶ Ūpokorehe are included against their will in a mandate that neither affords them proper representation nor provides them with a workable means of withdrawing their support.⁷

6.2.4 The positions of the parties

Counsel for the Ūpokorehe claimants argued in closing submissions that Ūpokorehe cannot be adequately represented within the Pre-settlement Trust mandate. Counsel said Ūpokorehe have a distinct whakapapa and five hapū and five marae in their own right. As we understand it, they claim customary interests in approximately half the rohe and special kaitiaki interests in Ōhiwa Harbour. Their hapū are Te Ūpokorehe, Turangapikitoi, Kutarere, Ngāi Tamatea, and Rongopopoia; their marae are, respectively, Roimata, Turangapikitoi, Kutarere, Maromahue, and Rongopopoia.⁸

by Hinehou Leef, Mekita Te Whenua, Richard Wikotu, Rocky Ihe, and Kahukore Baker. Also of note are the Turangapikitoi claim (Wai 1794), filed by Muriwai Wehi, and the Ūpokorehe and Whakatōhea hapū claim (Wai 2006), filed by Priscilla Sandys. The Ūpokorehe claimants say Turangapikitoi are a hapū of Ūpokorehe.

2. Document A55(a), pp 40–41

3. Submission 3.3.1, p 4

4. Submission 3.3.28, p 58

5. Ibid, pp 2, 57

6. Ibid, pp 3, 24

7. Ibid, pp 45–52

8. Ibid, pp 27–32

While Ūpokorehe may have chosen in the past to accept being labelled as a hapū of Whakatōhea, this is no longer the case. They say the ability to choose their own identity and to collectivise as they wish is a key aspect of rangatiratanga; to deny them the ability to do so is a breach of the Treaty of Waitangi. They argue that evidence that Ūpokorehe are a hapū of Whakatōhea generally reflects historical circumstance or the need to comply with Crown policy, or is the result of the confusion between the actions of individuals, hapū, and iwi. Moreover, Ūpokorehe have reason to understand that in other spheres the Crown does recognise their distinctive identity through separate acknowledgement for various purposes by Crown agencies.⁹

Dissenting views within Ūpokorehe are said to be those of individuals and do not represent their collective will.¹⁰

Evidence in support of these submissions was provided by Kahukore Baker, who outlined historical and contemporary events that Ūpokorehe consider significant in affirming their distinct identity.¹¹ Ms Baker explained the reasons for including Ūpokorehe in the Trust Board – a structure which she condemned as assimilationist. In the 1950s, Ūpokorehe thought that aligning themselves with Whakatōhea would result in the return of their land. In her view, they were acting as they always had: ‘taking advantage of opportunities afforded through whakapapa.’¹²

Maude Edwards, the daughter of Charles Aramoana (both long-serving members on the Trust Board), also gave evidence in support of the position that Ūpokorehe should be regarded as an iwi in their own right. She said this was the view of her father also:

My father always told us that we descend from Te Hapū Oneone and that we are an iwi in our own right. It was not until the 1950s he said, that we were swept under the petticoat of Whakatōhea Maori Trust Board Act as a hapū of Whakatōhea. He had instilled in us, never forget who you are; and where you come from, because our whakapapa is unique to Ūpokorehe and it is an untold story that needs to be recorded and evidenced by Te Ūpokorehe tuturu.¹³

Ms Edwards said her father was ‘saddened that inaccurate accounts of Te Ūpokorehe were out there in the public’: ‘Re-writing our history, changing our whakapapa, without once coming to talk to Te Ūpokorehe was not acceptable to him.’¹⁴

After our first hearing, we set out our preliminary view on the inclusion of Ūpokorehe in the Pre-settlement Trust Deed of Mandate:

9. Ibid, pp 26, 34, 38–42

10. Ibid, p 26

11. Document A43, pp 3–9

12. Ibid, p 6

13. Document A54, pp 2–3; see also doc A43, p 3

14. Document A54, p 4

We are sceptical of the assertion that Te Ūpokorehe are not a hapū of Whakatōhea. We acknowledge that border hapū such as Te Ūpokorehe have complex interrelationships with neighbouring hapū and iwi. Nonetheless we are not aware of any significant history of protest or petition arising from the inclusion of Te Ūpokorehe as one of the six hapū of Whakatōhea when the Trust Board was established in the 1950s.¹⁵

We went on to say ‘it would be appropriate for Te Ūpokorehe to be included in any mandate that was intended to negotiate a comprehensive settlement of Whakatōhea claims.’¹⁶

Counsel for the Ūpokorehe claimants argued in response that this was entirely a matter for Ūpokorehe themselves to decide; that the right to collectivise in a natural group of their choice was an exercise of tikanga and mana motuhake. Counsel relied upon the findings of the Ngātiwai Mandate Tribunal. She acknowledged that there might be some among Ūpokorehe who choose to participate in the Pre-settlement Trust mandate. However, she submitted:

If there are individuals living in the Te Ūpokorehe rohe who wish to identify as Whakatōhea and be part of the settlement, then they can do so as individuals, but it is totally inappropriate to attempt to take Te Ūpokorehe mana, lands, hapū and marae with them against the wishes of the majority of those hapū and marae and the iwi as a whole.¹⁷

The Crown, in closing, supported our preliminary view and argued that ‘the assertion that Te Ūpokorehe are not a hapū of Whakatōhea is a more recent development that has come about as a consequence of division over a mandate for negotiations.’¹⁸ It was therefore ‘appropriate for Ūpokorehe to be included in any mandate for a comprehensive settlement of Whakatōhea claims.’¹⁹ The Crown also questioned the authority of the Ūpokorehe Claims Trust to speak on behalf of Ūpokorehe:

[The Ūpokorehe Claims Trust] purports to represent Ūpokorehe. The process by which it sought any kind of mandate is not adequately in evidence before the Tribunal. Ms Baker’s evidence concerning the establishment of the Trust made it apparent that the minutes of the hui at which it is asserted that [the Trust] gained a mandate to represent Te Ūpokorehe have not been put before the Tribunal.²⁰

Counsel for the Pre-settlement Trust also endorsed the Tribunal’s preliminary view and submitted:

15. Memorandum 2.6.2, p 7

16. Ibid

17. Submission 3.3.28, p 26

18. Memorandum 2.6.2, p 7; submission 3.3.33, p 24

19. Submission 3.3.33, p 24

20. Ibid

the [Pre-settlement Trust] considers that Te Ūpokorehe has always been a hapū of Te Whakatōhea and has been integrally involved with Trust Board matters since its inception. The [Pre-settlement Trust] contends that the argument that Te Ūpokorehe is an iwi in its own right is a recent argument led by the Te Ūpokorehe Treaty Claims Trust and is not widely supported by Te Ūpokorehe whānau.²¹

Keita Hudson, a claimant for the Ngāi Tamatea ki Waiotaha historical claim (Wai 1511), appeared as an interested party in support of the Crown and the Pre-settlement Trust. She stated that she could also speak as 'a descendant of Ūpokorehe Tūturu' and that she was currently the elected Maromahue Marae representative on the Pre-settlement Trust.²² Her claim is included in the Iwi and Hapū of te Rohe o te Wairoa Claims Settlement Bill as well as the Pre-settlement Trust Deed of Mandate.²³

Ms Hudson's counsel submitted that provision made for Ngāi Tamatea ki Waiotaha on the Pre-settlement Trust through Maromahue Marae was 'fair and reasonable in the circumstances' and that it was 'appropriate to include Te Ūpokorehe in the Deed of Mandate.' Counsel submitted that the Ūpokorehe Claims Trust 'had not been mandated by Maromahue Marae in their claim to be an iwi' and that 'The question of whether Ūpokorehe are an iwi has not been definitively determined in accordance with tikanga and there is no broad consensus amongst Te Ūpokorehe on this point.'²⁴

Ms Hudson's position is that 'the prevailing view that Ūpokorehe exercises rangatiratanga as a hapū of Whakatōhea is long standing, well-recognised and broadly accepted.'²⁵

6.2.5 Should Ūpokorehe be part of a Whakatōhea mandate?

Having examined the evidence in our inquiry, we consider that Ūpokorehe have generally sat within the wider 'Whakatōhea collective'. Whether this is by inclination or for lack of a real alternative is unclear to us. It is clear that, within this wider group, Ūpokorehe occupy a distinctive position. We understand Ūpokorehe whakapapa both to Whakatōhea and to Tūhoe. We were told that Ūpokorehe tradition is that they were living on the land before the arrival of the *Mataatua* waka; thus, they have important Hapū-Oneone as well as *Mataatua* origins. Their principal tipuna were named by Charles Aramoana in the Te Urewera district inquiry as Tairongo, Raumoā, Haeora, Tamatea, Taikurere, and Hape.²⁶ Ūpokorehe see themselves as kaitiaki of Ōhiwa Harbour and as sharing interests in lands with Tūhoe; interests that are exercised independently of Whakatōhea hapū.

It is clear as well that the Ūpokorehe Claims Trust's decision to pursue its own settlement path was influenced by events arising out of the Te Urewera district

21. Submission 3.3.36, p10

22. Document A68, paras 10, 18

23. Submission 3.3.14, p 2

24. Ibid, p 4

25. Submission 3.3.27, p 2

26. Charles Aramoana, brief of evidence, 14 January 2005 (Wai 894 ROI, doc J46), p 3

inquiry and the Tūhoe settlement. What was seen as a failure by the Trust Board to act to protect Ūpokorehe interests was a further factor in Ūpokorehe asserting their independence and deciding to form their own trust to progress their Treaty claims.

The Te Urewera district inquiry elicited further information and evidence about the distinctive nature and interests of Ūpokorehe, both historically and more recently. The Te Urewera inquiry district included areas in which Ūpokorehe claimed rights: at Ōhiwa Harbour, Tahora, and Waimanu. Charles Aramoana told that Tribunal that, at Waimana, ‘Ūpokorehe would never consider it could dictate to Tūhoe’, but in the case of Te Moana-o-Tairongo (Ōhiwa Harbour): ‘We are tangata whenua here and we are kaitiaki’, although he acknowledged Tūhoe had rights of access.²⁷

In its report, the Te Urewera Tribunal quoted Tūhoe witness Tamati Kruger as referring to the harbour as a place of ahi tahutahu, where resources were used as required, and concluded that ‘Tūhoe fires did burn at Ōhiwa, but not continuously’. Tūhoe’s connection to the area was particularly maintained through their Waimana hapū and their relationship with Ūpokorehe, whose primary place of residence was at Kutarere.²⁸ That Tribunal also concluded that Mr Aramoana’s evidence demonstrated ‘the strong bonds that exist between Tūhoe and Te Ūpokorehe to this day, and the reciprocal arrangement that allows both to maintain rights in different areas or different rights in the same area.’²⁹

The evidence of Mr Aramoana also touched upon questions of Ūpokorehe identity. He stated before the Te Urewera Tribunal: ‘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 Tūhoe.’³⁰ He went on to say, however, that he believed he had no choice in the matter; that he had to describe Ūpokorehe as a hapū of Whakatōhea because that was how the Crown had designated them when it had established the Trust Board in the 1950s.³¹

There is little scholarly discussion of the issue of a distinctive Ūpokorehe identity. Ms Hudson drew our attention to the conclusion of Waitangi Tribunal researcher Ewan Johnston that Ūpokorehe are a hapū of Whakatōhea. On the other hand, Johnston himself cites the eminent scholar Judith Binney as saying that Ūpokorehe were ‘in actuality . . . a small tribe’ that had ‘closely intermarried with both its neighbouring iwi, but . . . perceived itself as an entity, however few its numbers.’³²

Dr Ranginui Walker was in no doubt that Ūpokorehe were a hapū of Whakatōhea rather than Tūhoe; yet, he also noted that they were ‘an enigma in the tribe’. Notably, none of their leaders had appeared in the hearings of the Native

27. Charles Aramoana, brief of evidence, 14 January 2005 (Wai 894 ROI, doc 146), p 6

28. Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Legislation Direct, 2017), vol 1, p 229

29. *Ibid*, p 208

30. *Ibid*, p 205

31. Memorandum 2.5.6, p 11

32. Ewan Johnston, *Wai 203 and Wai 339 Research Report* (commissioned research report, Wellington: Waitangi Tribunal, 2002) (Wai 894 ROI, doc A14), p 17

Land Court at Ōpōtiki and, as a result, there were only oblique historical references from other witnesses to their whakapapa and traditions.³³ Dr Walker's study also noted distinctive features within the Ūpokorehe history of raupatu, suffering as they did extensive confiscation although they had not participated in the Pai Marire or the killing of the missionary Carl Sylvius Völkner.³⁴

In more recent times, counsel for the Ūpokorehe claimants told us that the negotiations between Tūhoe and Whakatōhea over the allocation of fishing quota at Ōhiwa Harbour, overriding Ūpokorehe status, had been a tipping point in their relationship with the Trust Board.³⁵ Although Charles Aramoana had signed that agreement, he had subsequently withdrawn his assent.³⁶

Since then, some members of Ūpokorehe had begun to question the capacity of the Trust Board, or any Whakatōhea entity, to represent them in Treaty negotiations. In February 2011, the Ūpokorehe Claims Trust set out its desire to progress Ūpokorehe mandate issues and proposed that 'both groups then come together to comprise the Large Natural Grouping to progress *all* the claims that sit within our rohe' (emphasis in original).³⁷

It seems that some sort of accommodation was reached between the Te Kotahi a Tūhoe and the Trust Board as to Ōhiwa Harbour that did not take into account the special and, as Ūpokorehe see it, dominant Ūpokorehe interest there. In May 2012, the Office of Treaty Settlements advised Te Kotahi a Tūhoe to meet with the Trust Board over cross-claims in land and resources that Ūpokorehe consider to be in their rohe.³⁸ According to Ms Baker's evidence: 'Having already experienced the Trust Board twice trying to secure rights for Tūhoe in our rohe, we vehemently opposed this.'³⁹

Ūpokorehe made their objections clear to the Office of Treaty Settlements. In one letter dated 18 June 2012, the Ūpokorehe Claims Trust objected to the Trust Board meeting with Tūhoe on matters they considered to 'clearly lie outside' the Trust Board mandate: 'any cross-claims with Ngai Tūhoe and all neighbouring iwi on the western boundary lie within the mana whenua, mana moana and rangatiratanga of Ūpokorehe hapū, the traditional leadership mai rā no for Te Rohe o Te Ūpokorehe.'⁴⁰

In their view, their leadership on matters concerning the western boundary had been demonstrated when their tipuna Wī Akeake signed the Treaty of Waitangi on behalf of Ūpokorehe. That position had been 'reinforced' at Roimata Marae in 2009, when 'Whakatōhea iwi as a whole agreed that all cross claims on the western boundary with Tūhoe [were] to be led by Te Ūpokorehe'. Ūpokorehe had

33. Ranginui Walker, *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea* (Auckland: Penguin books, 2007), pp 168–169

34. *Ibid*, p 87

35. Transcript 4.1.2, p 209

36. Document A43, pp 3, 7

37. Document A40(a), p 2

38. Document A55(a), p 19. We have not seen the May 2012 letter.

39. Document A55, p 7

40. Document A55(a), p 19

been engaging with Tūhoe on cross-claim matters since then.⁴¹ As for their status as Whakatōhea, their principal tīpuna were different to those shared by the other hapū and, therefore, their ‘hapū and marae are not formally part of the Trust Board which means that the Trust Board as an entity cannot speak for them.’⁴² They asked that the Crown advise Tūhoe to deal directly with Ūpokorehe rather than the Trust Board.

According to Ms Baker, after the May 2012 Office of Treaty Settlements letter ‘matters then quickly escalated between Te Ūpokorehe and Whakatōhea’. In her view, the Trust Board were ‘ramping up’ their mandate process to the ‘detriment’ of Ūpokorehe, confident in the knowledge that the Crown ‘did not support Te Ūpokorehe’s tino rangatiratanga over our own rohe.’⁴³

A further issue arose over the Tahora block. Ūpokorehe ‘vehemently’ opposed a proposal that portions of the block lying within Ūpokorehe and Whakatōhea rohe be included within the area to be administered by the new Te Urewera Board, comprising joint Tūhoe and Crown membership. Ms Baker pointed out that Rongopopoia Marae sits on the Tahora block.⁴⁴ At the time, the Trust Board appeared to draw back from the proposal, but the Ūpokorehe Claims Trust was later informed that the matter was merely in abeyance.⁴⁵

When Ūpokorehe was included in the Tūhoe Establishment Trust Deed, the Ūpokorehe Claims Trust and the Ūpokorehe (Wai 1092) and Rongopopoia Hapū (Wai 1787) claimants applied to the Waitangi Tribunal in November 2012 for an urgent hearing. Ms Baker alleged that Tūhoe were claiming the ‘entirety of Ūpokorehe’s rohe’. She said: ‘We are most concerned that the lack of justice, fairness and due process adopted by the Crown as it attempts to favour large iwi over small, is creating a new generation of grievances for people in our rohe who do not have much to lose.’⁴⁶

Ms Baker suggested that the Crown’s preference to ‘appeal directly to corporate entities’ was undermining the ‘true mana whenua interests’. This would have a destructive impact on a process supposed to be for ‘the rebuilding of the Treaty partnership, healing and repatriation between Ūpokorehe as a raupatu iwi and the Crown.’⁴⁷

Of particular concern was the inclusion of Turangapikitoi, Ngāi Tamatea, and Ngāti Koura at Ōhiwa in the Tūhoe deed of settlement. To be claimed by Tūhoe against their will was ‘devastating.’⁴⁸ Ms Baker also raised the matter of their desire for a ‘parallel mandate process’ and, in response to the Crown’s ‘questioning of who Ngā Uri o Te Ūpokorehe is’, stated that this was ‘how we have restructured ourselves to progress our claims’. There was, she said, a distinction between the

41. Document A55(a), p19

42. Ibid, p 20

43. Document A55, p 7

44. Ibid, p 7

45. Ibid, pp 7–8

46. Document A69(a), p 84

47. Ibid

48. Ibid, p 88

claimant group Ngā Uri o Te Ūpokorehe and the hapū registered with the Trust Board. The failure to recognise all Ūpokorehe hapū was proving a 'significant barrier' to their development, and they had adopted their own mandating process because there was 'no entity in Whakatōhea that is accountable to the hapū and marae within Ngā Uri o Te Ūpokorehe'.⁴⁹

Crown officials were aware of these tensions. Te Puni Kōkiri file notes of facilitated hui held in early 2013 recorded that the Ūpokorehe Claims Trust stated it was set up to maintain mana whenua partly in response to Ngai Tūhoe's 'incursions into Te Ūpokorehe territory' as part of the Tūhoe settlement. They claimed the Trust Board had failed to do this.⁵⁰ A key concern for the Ūpokorehe Claims Trust was the Trust Board's 'apparent acceptance of the Tūhoe claim to what Te Ūpokorehe regard as part of their rohe . . . around Ohiwa Harbour. [The Ūpokorehe Claims Trust] are not happy with what happened.'⁵¹ At that time, it still seems to have been a possibility that all parties could progress as one entity. The hui passed a resolution repeating an earlier commitment that 'all of Te Whakatōhea agrees to work together towards a single inclusive mandate'.⁵²

Tū Ake then organised a 'roadshow' to promote understanding of settlement options. According to the Tū Ake report on their roadshow: 'The presence of representatives from Maromahue and Turangapikitoi must be acknowledged as their support confirmed our relations with our whanau whom have shared interests' within Whakatōhea and Tūhoe. They had also provided 'welcome guidance' Whakatōhea following their experience with Ngai Tūhoe settlement process'.⁵³

However, by July 2012, the Ūpokorehe Claims Trust had informed Te Puni Kōkiri officials that they were in correspondence with the Office of Treaty Settlements over cross-claims with Tūhoe and, at the same time, that they objected to Trust Board involvement in the settlement process because it was outside their mandate. The purpose of the Ūpokorehe Claims Trust, the letter said, was to progress all Treaty claims within their rohe by developing and implementing a mandate strategy. The letter suggested that some Ūpokorehe hapū and marae identified different principal tīpuna to the other five Trust Board hapū. Having 'different origins', the Trust Board could not speak for them.⁵⁴ The Ūpokorehe Claims Trust argued that there had been a lack of good faith and cooperation, and as a result they had decided a parallel but non-competing mandate process should be adopted.⁵⁵

These matters were not addressed directly by counsel for the Crown or counsel for the Pre-settlement Trust. Tū Ake did, however, respond to criticisms levelled at the Trust Board's handling of the Tūhoe negotiations. In response to the Ūpokorehe Claims Trust submission on the Pre-settlement Trust mandate

49. Ibid, p 86

50. Ibid, p 101

51. Ibid, p 103

52. Ibid

53. Ibid, p 381

54. Ibid, p 47

55. Ibid

strategy, in a letter dated 10 February 2016, Tū Ake chair Graeme Riesterer rejected the Ūpokorehe Claims Trust's complaints. Under the heading 'Shared interest with Tūhoe', he stated:

Whakatōhea hapū (including members of Ūpokorehe) had met with members of Te Kotahi a Tūhoe prior to their settlement to discuss overlapping and shared interest areas. Of particular interest was the Tahora block of which Ūpokorehe, Ngāti Patu[moana] and Ira of Whakatōhea had shown historical interests in the area. Tūhoe had at the time decided not to include this into their settlement until Whakatōhea had entered into negotiations, effectively the shared interest discussions are in abeyance. The Whakatōhea hapū had agreed to negotiate directly with Tūhoe the overlapping interests *kanohi ki te kanohi* once it enters negotiations. Tamati Kruger also acknowledged there was shared whakapapa of Ūpokorehe with Tūhoe and Whakatōhea, and that it is the choice of Ūpokorehe uri if they wish to register with both Tūhoe and Whakatōhea. Although Tūhoe had historical interests in the Ohiwa harbour, Tamati Kruger noted that the mana whenua of the area belonged with Ūpokorehe hapū, Te Whakatōhea iwi.⁵⁶

Mr Riesterer's letter added that Tū Ake did not 'recognise Rongopopoia or Turangapikitoi as representative marae in the Mandate Strategy'. The letter referred to statements by trustees of those marae that their claims would be settled by Tūhoe.⁵⁷ In her brief of evidence dated 31 May 2016, Ms Baker stated that the Ūpokorehe Claims Trust did not accept this as an 'adequate response'.⁵⁸

The status of Turangapikitoi and Rongopopoia as either marae or hapū remains unclear to us. They are not included in the Pre-settlement Trust Deed of Mandate. Ms Baker suggested in cross-examination that they had been excluded because the marae were considered 'derelict'; a description she challenged since she argued they still functioned as hapū.⁵⁹ She also stated in evidence that it is not correct to say that the Turangapikitoi claim was settled under Tūhoe. We note that Turangapikitoi are included as a hapū of Tūhoe in their Deed of Settlement, although Rongopopoia is not mentioned at all. We note, too, that the Rongopopoia Hapū claim (Wai 1787) and the Turangapikitoi Hapū claim (Wai 1794) are listed in the Pre-settlement Trust Deed of Mandate as historical claims to be 'settled to the extent that they relate to Whakatōhea'.⁶⁰

We accept that there is some force in Ms Baker's contention that 'having to address significant matters of identity, whakapapa, mana whenua, mana moana, and mana tangata in an urgency hearing, and in the absence of dedicated research

56. Document A55(a), p 23

57. Ibid

58. Document A40, p 12. Ms Baker refers to the Tū Ake letter as being dated 26 February 2016 but does not include it in her documents for that brief of evidence. The letter in her document A55(a) bundle is dated 10 February, but the summary of points she makes indicates that this is the letter to which she is referring.

59. Transcript 4.1.1, p 56

60. Document A86, p 85

and detailed oral evidence, is unsatisfactory and inappropriate.⁶¹ Nonetheless, given the long-standing relationship Ūpokorehe have with the Trust Board, we accept it was reasonable for the Crown to have at least begun mandate discussions with Whakatōhea on the premise that Ūpokorehe were a hapū of Whakatōhea. Whether it was reasonable to continue to do so in the face of sustained opposition is a separate issue. In this context, the minimum standards established by the Ngāpuhi Mandate Tribunal provide a guide to the Crown's performance of its duty to actively protect the rangatiratanga of the affected groups. We have more to say about the levels of support and opposition to the mandate in chapter 7.

6.2.6 The Crown's 'large natural group' policy and a 'parallel, non-competing' mandate

Counsel for the Ūpokorehe claimants argued that the Crown's large natural groups policy has not been applied with the flexibility and fairness required for Treaty compliance.⁶²

The Tribunal has previously endorsed the policy, although it has cautioned that there must be flexibility and adequate protection in its application.⁶³ We would also observe that, when it comes to border hapū or smaller groups with close whakapapa links to their larger neighbours, the Crown's Treaty duty to protect actively the tino rangatiratanga of all groups is heightened.

As Tawhai Te Rupe explained when questioned by the panel:

Now you've got to realise that we've got to walk with all those tribes around us . . . we're on the edge . . . so we have to work with Whakatōhea. We've got to look behind us and we've also got to work with our Waimana Kaaku. We look at Ngāti Awa, we've got a relationship with them. So we can't just go over there with Whakatōhea and make all the decisions on behalf of all of us over there of Ngāti Awa. We can't go to Tūhoe and make a decision with them without consulting with our other whānau.⁶⁴

Counsel for Ūpokorehe submitted that the Crown, although aware of these circumstances, failed to take them sufficiently into account and to exercise its policy discretion accordingly. The Crown endorsed a process and a structure that did not respect Ūpokorehe rangatiratanga and that contravened tikanga. Counsel alleged that this failure resulted, in large part, from the Crown's inflexible application of its 'large natural group' policy in this circumstance.

As a result of their experience with the Tūhoe settlement negotiations, and due to their close relationship with Whakatōhea, the Ūpokorehe Claims Trust proposed a parallel, non-competing mandate strategy, believing that in doing so they were complying with the Crown's policy parameters. They cited, as a precedent,

61. Document A84, p 11

62. Submission 3.3.28, pp 2–3

63. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Wellington: Legislation Direct, 2015), p 31

64. Transcript 4.1.1, p 70

the Crown's flexibility in applying its 'large natural group' policy by recognising parallel mandates for Ngāti Ranginui and Ngā Pōtiki.⁶⁵

From May 2011, the Ūpokorehe Claims Trust was seeking to pursue a parallel but non-competing mandate alongside Whakatōhea.⁶⁶ Ms Baker told us their mandate had never been fully developed because they had no real opportunity to do so, lacking the resources of the Trust Board or support from the Crown.⁶⁷ Ms Baker said: 'We hoped it was a way we could walk side by side, and the draft mandate strategy was the beginning of a talking point to do that.' The idea, she said, was that they 'come together and develop some draft protocols' before they entered negotiations to work out issues of mutual concern. They would then sit at the table together when negotiating key issues that they jointly shared.⁶⁸

The Crown position in 2012 was that such a proposal was 'a matter for discussion within Whakatōhea and on the face of it, appeared to be a matter of representation which could be addressed in a proposal to establish a new entity that would be representative of Whakatōhea.'⁶⁹ This reflected the Crown's strong preference to negotiate with a single mandated entity. The Crown has not moved from that position. The idea of a parallel non-competing mandate was also opposed by the Trust Board and by Tū Ake in 2012. They opposed the division of the rohe in the way proposed by the Ūpokorehe Claims Trust as well as the claim to independent status.⁷⁰

The final draft mandate strategy prepared by the Ūpokorehe Claims Trust in November 2015 shows the rohe divided into three areas: one in which claims were to be negotiated exclusively by Ūpokorehe, who would receive any compensation that might result; one in which Whakatōhea had all authority and would receive all compensation; and a third in which both iwi would jointly negotiate claims specific to the area, with compensation to go to each iwi's specific interests. The two claimant groups would engage in prior mana whenua discussions in cases where there were specific cross-claims.⁷¹

We note that, with Crown encouragement, Tū Ake made a significant effort to address Ūpokorehe complaints of under-representation by means of greater accommodation within one entity. The Tū Ake mandate strategy submitted to the Crown in September 2015 provided for marae representation on the Pre-settlement Trust for eight marae, including Roimata, Kutarere, and Maromahue.⁷² This potentially allowed Ūpokorehe a total of four representatives within the mandated entity, in contrast to the two accorded to other hapū in the mandate. As far as the Ūpokorehe Claims Trust was concerned, however, it was a case of too late

65. Submission 3.3.28, pp 2–3; transcript 4.1.1, pp 23, 32

66. Document A69(a), pp 47–48

67. Transcript 4.1.1, p 51

68. Ibid, pp 50–51

69. Document A69, p 19

70. Document A69(a), pp 96–98

71. Ibid, pp 604–635

72. Ibid, p 464

and too little; there was too much distrust, they were not fully represented since Rongopopia and Turangapikitoi were still excluded, and they remained a minority within the new structure.⁷³

Tū Ake was not, however, prepared to accommodate the Ūpokorehe Claims Trust within its proposed mandate. Facing separate mandate strategies, Te Puni Kōkiri sought advice from the Trust Board in April 2014, as the next step would be 'key in any litigation for the Crown'.⁷⁴ Trust Board chief executive Dickie Farrar stated that the position that Ūpokorehe were an iwi was 'unacceptable to Whakatōhea, nor do I think it would be acceptable to the Crown'. It was the view of Tū Ake that the Ūpokorehe Claims Trust did not represent Te Ūpokorehe fairly and that it had formed the trust 'undemocratically' and had 'No election process'. Ms Farrar advised that Te Ūpokorehe was 'split', with factions supporting the Ūpokorehe Claims Trust, the Raupatu Working Party, and Tū Ake. Tū Ake would not accommodate the structure proposed by the Ūpokorehe Claims Trust, but 'the damage done is probably irreparable, and they want a separate mandate'. Ms Farrar was of the view that the Ūpokorehe Claims Trust would litigate against the Crown (which we take to mean seeking intervention by the Waitangi Tribunal) and asked: 'Are they a big enough threat to the Crown?'⁷⁵

The Crown also continued to insist on one negotiating entity. Crown witnesses stated that between 2010 and 2016 they sent seven letters to the Ūpokorehe Claims Trust, restating the Crown's 'large natural group' policy and encouraging them to

work towards establishing a single entity, representative of Whakatōhea to enter into Treaty Settlement negotiations with the Crown and stating that the Crown would work to ensure that any entity that achieves a mandate to progress Whakatōhea settlement adequately represents Te Ūpokorehe and its constituent groups.⁷⁶

Counsel for the Ūpokorehe claimants submitted that, while the Crown gave extensive consideration to Tū Ake's strategy, Ūpokorehe received only 'a reiteration' of the Crown's large natural group policy.⁷⁷ The position of the Ūpokorehe claimants is that, once the Crown began to view Tū Ake as its preferred option, its consideration of the Ūpokorehe Claims Trust's alternative approach was relatively perfunctory.

In our view, the complexities of the relationship between Ūpokorehe and Whakatōhea warranted more serious consideration of the parallel but non-competing mandate strategy. However, we acknowledge that there is a further issue about the extent to which the Ūpokorehe Claims Trust had the authority to speak for Ūpokorehe as a whole. We now turn to consider this question.

73. Transcript 4.1.1, pp 56–57

74. Document A69(a), pp 274–275, 280

75. Ibid, p 277

76. Document A41, p 4

77. Submission 3.3.28, p 17

6.2.7 Does the Ūpokorehe Claims Trust speak for Ūpokorehe?

The extent of Ūpokorehe support for the Ūpokorehe Claims Trust was a matter of debate before us. Both during the mandating process and during our inquiry, the Crown questioned whether the Ūpokorehe Claims Trust had the full support of Ūpokorehe. These concerns appear to be based on information provided by the Trust Board and Tū Ake, and were supported by the reports of Te Puni Kōkiri observers and facilitators who noted divisions during hui. Such concerns seem further reinforced by the filling of three Ūpokorehe positions (one for hapū and two for marae) on the Pre-settlement Trust, and by two witnesses with Ūpokorehe whakapapa who appeared in support of the Pre-settlement Trust during our hearings.

This was challenged, in turn, by the Ūpokorehe claimants, who stated that the Ūpokorehe Claims Trust is the properly mandated representative of Ūpokorehe and that its authority to speak on behalf of Ngā Uri o Te Ūpokorehe has been gained and maintained according to their tikanga – by their inaugural hui and by monthly hui-a-iwi. They say all five hapū and five marae are involved.⁷⁸

Crown officials appear to have been aware of division within Ūpokorehe. In September 2016, when officials were discussing how to respond to the Ūpokorehe Claims Trust, they noted that submissions opposing the Tū Ake mandate strategy and an application to the Waitangi Tribunal for an urgent hearing appeared to be made by different groups – Te Ūpokorehe Treaty Claims Trust and Ngā Uri o Te Ūpokorehe. One email stated:

Neither groups are the actual Te Upokorehe entity or Te Upokorehe marae committees. [Ms Baker's] group is a group of Wai claims and claimants, the actual number of Wai claims I am unsure of. Yet this group is talking and presenting itself as the Te Upokorehe hapu.⁷⁹

Ms Baker told us that, if the Crown had concerns about the Ūpokorehe Claims Trust mandate under its trust deed, then it was 'obligated to clarify its understanding about Te Ūpokorehe from Te Ūpokorehe. This has never happened.'⁸⁰

In our view, signs of discord within Ūpokorehe have been seen by Crown officials as negating the Ūpokorehe Claims Trust's stance with regard to their status as an iwi, their parallel mandate strategy, their wish for a Tribunal inquiry, and their opposition to Tū Ake and the Pre-settlement Trust.

This is in contrast to the approach taken towards Tū Ake and the Pre-settlement Trust, where opposition is seen as something to be surmounted rather than as discrediting the entire approach. According to Crown witnesses Jaclyn Williams and Benedict Taylor: 'Officials were aware throughout of the aspirations of some among Te Ūpokorehe to be more independent of Whakatōhea but this was not

78. Document A55, pp 12–13

79. Document A55(a), pp 42–44

80. Document A55, p 13

supported by the iwi itself.⁸¹ This view, that the Crown did not need to engage with the Ūpokorehe Claims Trust's position because it was not supported by Whakatōhea overall, was reiterated in the Crown's closing submissions:

What amounts to being reasonably informed is contingent on the context of the particular claimant community. Given what the Crown knew, the mandate strategy proposed was sufficient to test support for the mandate. It was not necessary for the Crown to inform itself as to the level of support within particular hapū when Whakatōhea had, through the long journey towards negotiated settlement, chosen to take the decision as an iwi.⁸²

The basis on which the Crown reached this conclusion, with respect to Ūpokorehe, is not clear to us. In the context of deciding to recognise a mandate, the Crown's Treaty duty of active protection requires it to ensure that it is dealing with the right group or groups, allow for an appropriate weighing of interests in any recognised mandate entity, and ensure that hapū interests can be tested and heard.

Disagreement over who represents Ūpokorehe has carried forward into deep division over marae and hapū nominations to the Pre-settlement Trust.

Counsel for Ūpokorehe challenged any reliance being placed upon the filling of Ūpokorehe positions on the Pre-settlement Trust. Counsel submitted that: 'The hapū representation process is minimal to say the least, as it only requires five people to nominate someone on to the Pre-settlement Trust.'⁸³ Confirmation of a marae representative, counsel said, requires only notice in writing to the Pre-settlement Trust stating the date and the minutes of the marae trustee meeting at which the appointment was made.⁸⁴ For the Ūpokorehe claimants, the appointment of three individuals purporting to represent Ūpokorehe, and Kutarere and Maromahue Marae, highlighted a basic flaw in the mandate structure. They said a handful of individuals can put a nominee forward, making it extremely difficult to stay outside an entity which the people of their hapū and marae do not, as a whole, endorse.

The Ūpokorehe Claims Trust informed Tū Ake and the Pre-settlement Trust that Ūpokorehe would not be nominating any representatives and that any person that might be nominated would not be mandated from the iwi and did not have the mana to speak on their behalf.⁸⁵

In the Crown's submission, the process for selecting hapū representatives allows for elections and for the inclusion 'of all Whakatōhea uri', and 'each hapū has flexibility in how it debates who should represent hapū' on the Pre-settlement Trust.

81. Document A69, p 3

82. Submission 3.3.33, pp 24–25

83. Submission 3.3.28, p 45

84. Document A86, p 60

85. Document A55(a), pp 74–75

Marae representatives, the Crown submitted, are appointed ‘according to the processes of each marae’.⁸⁶

At the time of our hearing, no appointment had been made to the position on the Pre-settlement Trust for Roimata Marae. In Maude Edwards’ view, this is particularly significant because Roimata ‘holds the mauri of Te Ūpokorehe’. We note that this latter statement was endorsed by Josie Mortenson from Kutarere Marae, who appeared in support of the Pre-settlement Trust.⁸⁷ There is also evidence of opposition to the other three appointments. On 11 February 2017, at the annual general meeting of the Whakatōhea Māori Trust Board, Trevor Ransfield stated ‘on behalf of Ūpokorehe iwi’ that Ūpokorehe ‘did not recognise or give their mandate’ to the three individuals purporting to ‘represent the interests of Te Ūpokorehe and/or any of their marae’ on the Pre-settlement Trust.⁸⁸ This rejection of their mandate was repeated in a ‘position statement’ from ‘Te Ūpokorehe Iwi Kaumatua’ to the Whakatōhea Taumata Kaumatua, dated 29 June 2017. That document stated that none of the persons holding seats on the Pre-settlement Trust had been ‘mandated by Te Ūpokorehe iwi, hapu and marae to represent Te Ūpokorehe Treaty Claims’.⁸⁹

In chapter 7, we set out recommendations that will provide Ūpokorehe and others a chance to clearly express their view on whether negotiations between the Pre-settlement Trust and the Crown should continue. We are conscious that Ūpokorehe have expressed a strong desire for a full Waitangi Tribunal inquiry. They seek such an inquiry in order to have evidence about Ūpokorehe whakapapa, history, rohe, tikanga, and identity placed on the record by Ūpokorehe experts and knowledge holders. We have taken this into account in formulating our recommendations, in terms of the questions on which Whakatōhea should have an opportunity to express their views. It is sufficient to note at this point that we are concerned that the Crown cannot say with confidence what the opinion of Ūpokorehe actually is on the mandate question (and nor can we), because to date Ūpokorehe have not been given an opportunity to express a view on this fundamental question as Ūpokorehe.

6.3 THE MOKOMOKO WHĀNAU CLAIM (WAI 2609)

6.3.1 Introduction

We asked in our statement of issues whether it was appropriate for the historical claim of the Mokomoko whānau (Wai 203) to be included in the Pre-settlement Trust Deed of Mandate.⁹⁰ We did so because, as with Ūpokorehe, this claim has some distinctive features.

86. Submission 3.3.33, p 21

87. Document A65, p 4; transcript 4.1.1, p 866

88. Document A53(b), pp 1–2

89. Document A55(a), pp 139–140

90. Statement 1.4.1

The Mokomoko whānau (Wai 203) claim was filed by Tuiringa Mokomoko in 1991.⁹¹ The claim relates to the trial and execution of their tipuna, Mokomoko, for the alleged murder of Carl Völkner. The Mokomoko whānau say that they have been blamed by Whakatōhea for the raupatu that occurred after Völkner's killing. They say that an important feature of their claim is that, ever since, their whānau has been 'labelled as murderers and criminals, and [has] effectively been disowned by Whakatōhea'. The claimants say that when it comes to the settlement of their claim, therefore, it is not appropriate for them to be represented by Whakatōhea or the Pre-settlement Trust.⁹² Further, they say the Crown has breached the Treaty principles of partnership and good faith by failing to uphold a commitment made to them to explore the possibility of a separate and distinct settlement of their claim.⁹³

6.3.2 The findings of the Te Urewera Tribunal

In 1992, the Governor-General granted Mokomoko a posthumous pardon. The whānau did not consider the pardon went far enough, and they sought a statutory pardon that would restore the character, reputation, and mana of Mokomoko, as well as appropriate compensation.⁹⁴

The Mokomoko claim was heard by the Te Urewera Tribunal by consent on the understanding that the issue of the pardon was a matter for urgent inquiry.

The central issue considered by that Tribunal was whether the pardon of Mokomoko in 1992 was equivalent to the pardon granted to a group of Ngāti Awa individuals who were convicted and executed for the same killing. The Tribunal found that the form and wording of the 1992 pardon was not equivalent and did not properly redress the Treaty grievance.

The Tribunal recommended that the Crown consult with the claimants about the nature of an appropriate tribute to mark the wrong done by perpetuating the false view that Mokomoko was largely responsible for the raupatu within the Whakatōhea rohe.⁹⁵

6.3.3 The 2011 Crown commitment to the Mokomoko whānau

After the pre-publication release of part 1 of the *Te Urewera* report in 2009, counsel for the Mokomoko whānau wrote to the Minister for Treaty of Waitangi Negotiations requesting a meeting with the Minister to discuss a discreet settlement process. The Mokomoko whānau considered it implicit in the Tribunal's findings and recommendations that a separate negotiation process was required.⁹⁶

91. Tuirenga Mokomoko, statement of claim concerning Crown's invasion of Ōpōtiki and treatment of Mokomoko, 14 May 1991 (Wai 203 RO1, claim 1.1)

92. Claim 1.1.11, para 4

93. *Ibid*, para 47

94. Tuirenga Mokomoko, amended statement of claim concerning Crown's treatment of Mokomoko, confiscation of lands, and failure to provide redress, no date (Wai 203 RO1, claim 1.1(b))

95. Waitangi Tribunal, *Te Urewera*, vol 1, p 276

96. Document A69(a), pp 5-7

Officials advised the Minister that the request for a statutory pardon should be dealt with immediately but that consideration of other redress, such as a memorial scholarship, should be deferred and negotiated as part of a wider iwi settlement.⁹⁷

On 28 September 2011, Te Whānau a Mokomoko and the Crown signed an *Agreement to Introduce Legislation to Give Statutory Recognition to the Mokomoko Pardon*. Clause 1.17 of the agreement provided:

The Crown acknowledges that the Mokomoko pardon legislation . . . will not preclude Te Whānau a Mokomoko from seeking, through the Treaty settlement process, the settlement of their historical Treaty of Waitangi claims including exploring the possibility of separate settlement negotiations between Te Whānau a Mokomoko and the Crown.⁹⁸

The previous month, officials had written to the Mokomoko whānau stating the Crown's preference that the claims of the whānau be negotiated as part of wider Whakatōhea negotiations. Officials also said that, after signing the statutory pardon agreement, they would be in contact to discuss the wish of the whānau to enter separate negotiations.⁹⁹

6.3.4 Settling the Mokomoko whānau claim and the large natural groups policy

The Crown commitment to considering the possibility of a separate whānau settlement appears to have quite quickly narrowed into consideration of retaining some Mokomoko whānau 'individuality' within a broader Whakatōhea claimant group and a wider iwi settlement. The deputy director of the Office of Treaty Settlements put this to the whānau in late 2012.¹⁰⁰

In reply, Karen Mokomoko questioned the suitability of this for the Mokomoko claim, given the 'shame, stigma, and prejudice' that was thrust upon the whānau from others in Whakatōhea as a result of Crown actions. She reiterated a desire to settle 'independently' and requested further discussion on this.¹⁰¹

On 17 December 2013, the Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013 (the Mokomoko pardon legislation) received Royal assent. Sections 3(2)(e) and 6(3) record that the Act does not prevent Te Whānau a Mokomoko from seeking the settlement of their historical Treaty of Waitangi claims through the Treaty settlement process.

On 13 May 2014, the Minister for Treaty of Waitangi Negotiations wrote to the whānau acknowledging their 'unique identity' but reiterating his view that the whānau claims 'should be settled as part of the Whakatōhea large natural group claim.'¹⁰²

97. Document A69(a), pp 14, 16

98. Document A13(a), pp [111]–[112]

99. *Ibid*, p [120]

100. *Ibid*, pp [145]–[146]

101. *Ibid*, p [149]

102. *Ibid*, p [160]

In June 2014, Robert Edwards, the Trust Board chairman, wrote to Ms Mokomoko stating that 'the Board supports your claim for an independent settlement and wish you well on this journey.' In a separate letter, dated the same day, Tū Ake chair Graeme Riesterer wrote to Ms Mokomoko expressing Tū Ake's support for the whānau's mandate to negotiate independently.¹⁰³

Nevertheless, it seems that the Crown went ahead with the inclusion of the claim in the wider settlement. In response, in November 2016, counsel for the Mokomoko whānau raised concerns with Te Puni Kōkiri that the claim was listed with those to be settled under the Pre-settlement Trust Deed of Mandate. He cited clause 1.17 of the 2011 agreement and stated the whānau view that 'the claimants have not finished exploring this possibility and neither has there been any communication from the Crown seeking amendment to this Agreement. The Crown is obliged to honour the commitment set out in the Agreement.' In their view, Crown recognition of a mandate including the Mokomoko whānau claim would be in breach of the 2011 agreement.¹⁰⁴

On 16 February 2017, more than two months after the Crown had recognised the Pre-settlement Trust Deed of Mandate, an Office of Treaty Settlements official emailed a pro forma letter from the Chief Crown Negotiator to the Mokomoko whānau, informing them that the Crown had recognised such a mandate. No reference was made to the 2011 agreement.¹⁰⁵

The Crown witnesses told us that they fully understood why the Mokomoko whānau want a separate settlement. They noted that 'one of the key reasons is the relationship between the whānau and the wider iwi and the impact of the sense of blame that has been passed down.'¹⁰⁶ The Crown witnesses also told us that they understood the importance to the Mokomoko whānau of the Crown's commitment to explore a separate Treaty settlement. They acknowledged the consistent efforts made by the whānau to hold the Crown to its commitment.¹⁰⁷

The Crown witnesses told us that the Crown had anticipated that discussions with the Mokomoko whānau would occur 'within the Whakatōhea negotiation framework.'¹⁰⁸ However, they acknowledged that neither the briefing to Ministers on 5 December 2016 recommending the recognition of the Pre-settlement Trust Deed of Mandate, nor the Terms of Negotiation agreed between the Crown and the Pre-settlement Trust, nor the Agreement in Principle signed by the Crown and the Pre-settlement Trust contained any mention of the 2011 agreement with the Mokomoko whānau.¹⁰⁹

In relation to pro forma letters sent to the Mokomoko whānau, the Crown witnesses conceded that 'more care should have been taken . . . around engaging with the Mokomoko whānau given the engagement and the commitments that

103. Ibid, pp [161]–[162]

104. Ibid, pp [165]–[166]

105. Ibid, pp [182]–[183]

106. Transcript 4.1.1, p 550

107. Ibid, pp 550–551

108. Ibid, p 500

109. Ibid, pp 552–554

we made.¹¹⁰ The witnesses also stated that ‘the Crown has a lot of work to do to make [the situation] right’ and that it is open to engaging in discussions with the whānau.¹¹¹ In closing submissions for the Crown, counsel said that, due to these ‘changed circumstances,’ recommendations from the Tribunal are not necessary to address issues raised in this inquiry by the whānau.¹¹²

In reply submissions, the Mokomoko whānau noted that the Crown has not conceded that it breached Treaty principles or that it committed to negotiating a separate settlement with the whānau. Nor had the whānau withdrawn its claim. They therefore continue to seek a finding and recommendations from this Tribunal.¹¹³

At the core of the Mokomoko whānau claim in this inquiry is an allegation that the Crown has not honoured the commitment it made in 2011 to discuss with the whānau the possibility of separate settlement negotiations. It appears that the two parties had, and possibly still have, different understandings of what this means.

The Crown has consistently expressed its preference for the historical claims of the whānau to be negotiated and settled as part of a Whakatōhea settlement. This preference was reiterated in the August 2011 letter sent from officials before the September 2011 agreement was signed. However, in the letter officials also committed to ‘engage with’ the whānau to discuss their wish ‘to enter into separate negotiations with the Crown.’¹¹⁴

The agreement itself does not include an express commitment from the Crown regarding separate negotiations or settlement. However, the Crown does acknowledge in the agreement that the statutory pardon legislation will not ‘preclude’ the whānau from seeking the settlement of their claims through the Treaty settlement process, including ‘exploring the possibility of separate settlement negotiations’. Read together with the August 2011 letter, we infer a commitment from the Crown to at least engage directly with the Mokomoko whānau before acting in relation to their claims.

We reiterate the need for the Crown to flexibly apply its policy of settling with large natural groups.

The Crown acknowledged that the reason the Mokomoko whānau wanted a separate negotiation and settlement process was because of the damaged relationship between the whānau and the iwi. The damage was the result of Crown actions, including the arrest and execution of Mokomoko and the subsequent raupatu.

It is clear that the Mokomoko whānau informed all relevant groups among their whanaunga of their wish to negotiate a settlement of their claims. Both the Trust Board and Tū Ake wrote to the whānau indicating their support for the whānau’s aspirations. Ms Mokomoko told us the whānau received similar letters from the Raupatu Working Party and the Ūpokorehe Claims Trust. Nevertheless, the claims

110. Transcript 4.1.1, p 555

111. *Ibid*, p 500

112. Submission 3.3.33, paras 129–130

113. Submission 3.3.43, paras 5–7

114. Document A13(a), p [120]

of the Mokomoko whānau remained in the Tū Ake mandate strategy and are listed among the claims to be settled in the Pre-settlement Trust Deed of Mandate.

Mr Riesterer told us Tū Ake attempted to engage with the Mokomoko whānau on a number of occasions but the whānau refused to meet.¹¹⁵ He said that he was aware of the 2011 agreement between the Crown and the Mokomoko whānau in his personal capacity, but that he had not been officially informed of it in his capacity as chairperson of Tū Ake (and then as chair of the Pre-settlement Trust).¹¹⁶ Tū Ake, he said, was obliged to include the claims of the Mokomoko whānau within its mandate strategy in order to comply with the Crown's large natural groups policy: "Those are the rules of engagement with the Crown."¹¹⁷

The Pre-settlement Trust Deed of Mandate provides for the establishment of a Claims Committee through which claimants can provide non-binding advice to the Pre-settlement Trust. The Crown has acknowledged that it is not appropriate to expect the Mokomoko whānau to participate in this forum. Te Puni Kōkiri official Jaclyn Williams stated:

in light of the evidence given and these undertakings by the Crown I can certainly see that it would've been a very challenging proposition for the whānau to take up the offer to participate in the Claims Committee of the [Pre-settlement Trust] and I can see that there is work for the Crown to do there about how to make that discussion a safe and constructive one for the whānau.¹¹⁸

It is difficult to see how the Mokomoko whānau could have put their position in any clearer terms than those expressed in its 21 November 2016 submission to Te Puni Kōkiri on the Pre-settlement Trust Deed of Mandate. The submission said that, if the Crown were to approve the mandate, it would do so in breach of its 2011 commitment to the whānau. The whānau invited the Crown and the Pre-settlement Trust to discuss the issues at a hui.

Crown officials do not appear to have responded to this submission other than by a pro forma letter stating that the Crown had recognised the Deed of Mandate. Officials' advice to Ministers to recognise the mandate did not mention the 2011 agreement, the long-held and frequently expressed desire of the whānau to negotiate and settle separately, or the reasons for this. Officials advised merely that issues raised in submissions on the mandate, 'have been, or are being, addressed to the satisfaction of the Crown.'¹¹⁹

The Crown has conceded that the Mokomoko whānau deserved better. How to deal with the Mokomoko whānau claim is a matter for discussion between the Crown and the whānau. In chapter 7, we endorse the Crown's acceptance of this and record those matters we envisage would be the subject of such discussions.

115. Transcript 4.1.1, p 767

116. Ibid, pp 796–797

117. Ibid, pp 797, 800

118. Ibid, p 492

119. Document A69(a), p 872

6.4 TE WHĀNAU A TE KAHIKA CLAIMS (WAI 2594 AND WAI 2605)

There are two claims before us concerning the death of Tio Te Kahika at the hands of Crown soldiers:

- ▶ A claim by Wiremu Te Kahika and Joseph Te Kahika (Wai 2594).¹²⁰ Both are also named claimants for the historical claim, Wai 2510.
- ▶ A claim by Maruhaeremuri Stirling, Ruiha Edna Stirling, and Parehuia Herewini (Wai 2605).¹²¹ They are named claimants for the historical claim, Wai 2257.

In our inquiry, the claimants presented their evidence together, noting that they were ‘inter-related claims with inter-related issues.’¹²²

The Pre-settlement Trust Deed of Mandate lists 24 historical claims for settlement with the Crown. All claims are listed by Wai number, except the last, which is listed as ‘Kahika claim’. In the place of a Wai number are the letters ‘TBC’, presumably ‘to be confirmed’. The named claimant is listed as Hohepa (Joseph) Kahika.¹²³

The Agreement in Principle signed between the Crown and the Pre-settlement Trust on 18 August 2017 states that a deed of settlement will include Wai 2510 in the definition of ‘historical claims’ for settlement, ‘so far as it relates to the settling group or a representative entity.’¹²⁴

The Wai 2257 claim is not listed in either the Pre-settlement Trust Deed of Mandate or the Agreement in Principle as among the claims to be settled. However, the claimants submit that, because the Wai 2257 claim concerns issues relating to Tio Te Kahika, aspects of the claim will still be settled by the Deed of Mandate.¹²⁵

The Wai 2510 claim was the last to be added to the Pre-settlement Trust Deed of Mandate. It was not listed in the Tū Ake mandate strategy submitted to the Crown in November 2015. The claimants state that it was not until they attended the Waitangi Tribunal mediation in November 2016 that the Crown learned of the Wai 2510 claim and that it was included in the Pre-settlement Trust Deed of Mandate.¹²⁶

Both claimant groups object to the negotiation and settlement of their claims without their consent and seek a full Waitangi Tribunal district inquiry.¹²⁷ It is important for the Kahika claimants (Wai 2594) that their historical claim is properly researched and reported on.¹²⁸ Joseph Kahika stated that he regularly attends the Pre-settlement Trust Komiti Whiriwhiri Hitori hui, not because he supports

120. Claim 1.1.7

121. Claim 1.1.5

122. Transcript 4.1.1, p 349

123. Document A86, p 85

124. Whakatōhea Pre-settlement Claims Trust and the Crown, *Agreement in Principle to Settle Historical Claims*, 17 August 2017, cl 1.1.3

125. Claim 1.1.5, para 25

126. Submission 3.3.35

127. Submission 3.3.30, para 56; submission 3.3.35, para 78(b), (c)

128. Submission 3.3.35, paras 33–36

the Pre-settlement Trust or the inclusion of the Wai 2510 claim in the Deed of Mandate, but because 'research into our tupuna is of prime importance' to him. He stated that he is committed to conducting independent research on the Wai 2510 claim 'for the purposes of a Waitangi Tribunal hearing process'.¹²⁹

Counsel for the Kahika claimants (Wai 2594) submitted that the Crown failed to consult with them or to address their opposition to the Pre-settlement Trust before recognising the Pre-settlement Trust mandate to negotiate and settle their claim.¹³⁰ The Tribunal has previously stated that claimants are entitled to be consulted regarding the negotiation and settlement of their claims and such consultation should take place as early as is practically possible.¹³¹

Given the late recognition of their claim as among those to be included in a potential Whakatōhea settlement, in our view the Crown had an even greater duty to consult and inform the Te Kahika claimants. This is particularly so given that there was apparent uncertainty over the Wai number of the claim listed in the Deed of Mandate. The claim is also listed in the Agreement in Principle as one of three claims that will be settled only to the extent it relates to Whakatōhea. The Crown might reasonably have been expected to discuss these issues with the claimants before recognising the mandate of the Pre-settlement Trust to negotiate and settle their claims.

In chapter 7, we propose a Crown-funded process that will give all of Whakatōhea, including the claimants referred to in this section, an opportunity to express a view as to how to proceed. If the Crown agrees to implement those recommendations, we would encourage the Te Kahika claimants to take part. Regardless of the outcome of any such process, the Crown should engage directly with the Te Kahika claimants so as to understand their wishes and to clarify the status of their claims in any settlement process.

6.5 THE MOUTOHORĀ QUARRY CLAIM: WHAKAPAUPĀKIHI NO 2 TRUST (WAI 2592)

The Moutohorā Quarry claim (Wai 864) is included in the Pre-settlement Trust Deed of Mandate to the extent that it relates to Whakatōhea.¹³² Counsel for the Whakapaupākihi No 2 Trust submitted that the Crown and the Pre-settlement Trust have been advancing the negotiation of the Moutohorā Quarry claim on the basis of a mistaken belief that the majority of the Whakapaupākihi beneficiaries are Whakatōhea, when, in reality, they are drawn from a much wider range of descent groups.¹³³ The claimants seek the immediate removal of their claim from the Pre-settlement Trust Deed of Mandate.¹³⁴

129. Document A81, paras 6–7

130. Submission 3.3.35, para 53

131. Waitangi Tribunal, *The East Coast Settlement Report*, p 50

132. Document A86, p 85

133. Submission 3.3.19, para 3; submission 3.3.48, paras 4–5

134. Submission 3.3.19, paras 2, 4

Counsel argued that the Wai 864 claimants are trustees of the Whakapaupākihi No 2 Trust and have a duty to act in the best interests of all beneficiaries in any settlement of their claim.¹³⁵ For this reason, counsel argued that it was unreasonable for the Crown to include the Wai 864 claim in a Whakatōhea-wide settlement without appropriate protections for the claimant trustees. Counsel submitted that Wai 864 is a comprehensive claim that requires a discrete settlement in order to allow the claimant trustees to seek appropriate compensation on behalf of all beneficiaries, not just those who descend from Whakatōhea.¹³⁶ Counsel further noted that the voting process, including the election of representatives, and the structure of the Pre-settlement Trust Deed of Mandate fail to protect the mana whenua and rangatiratanga of the claimant trustees and do not allow for any meaningful participation by them or the beneficiaries they represent, as they are not a marae or hapū.¹³⁷

While we acknowledge the issues raised regarding the inclusion of the Wai 864 claim in the Pre-settlement Trust mandate, there is very little evidence upon which the Tribunal could make any substantive finding in relation to the whakapapa connections between the Trust's beneficiaries and Whakatōhea. We have regard to the fact that the individual beneficiaries of the Whakapaupākihi No 2 Trust who do whakapapa to Whakatōhea would not be prevented from participating in the Whakatōhea settlement process. As regards the position of the trustees, we are simply not in a position on the available evidence to take those issues further. We understand that the quarry has been returned to trust ownership. The trustees will be responsible for the administration of that asset (together with other trust assets) for the benefit of all beneficiaries. Trustees will need to notify the Crown of any particular concerns they have with respect to the potential receipt or allocation of any Treaty settlement redress that might be offered with respect to the Wai 864 claim. If necessary, directions can be sought from the High Court or the Māori Land Court. In addition, should the Crown accept the recommendations we make generally, those trust beneficiaries who whakapapa to Whakatōhea will be provided an opportunity to express a view as to how to proceed.

6.6 THE RAUPATU WORKING PARTY CLAIMANTS AND THE SECTION 30 ORDER (WAI 2657)

The Wai 2657 claim was brought by Adriana Edwards, Barry Kiwara, and Dean Flavell.¹³⁸ Ms Edwards is the principal named claimant for the Whakatōhea Raupatu claim (Wai 87) originally filed by her late father, Claude Edwards, on behalf of all of Whakatōhea. As a Whakatōhea Treaty claim, Wai 87 will be settled under the Pre-settlement Claims Trust mandate.

The claimants were members of the working party set up to chart a way forward

135. Submission 3.3.19, para 3

136. Ibid; submission 3.3.48, para 19

137. Submission 3.3.19, para 3

138. Claim 1.1.10

in the wake of the failed 1990s settlement. Subsequently, they established the Raupatu Working Party, which sought to develop a mandate to represent all the hapū of Whakatōhea in settlement negotiations. While they support a single Whakatōhea settlement, they do not support the Pre-settlement Trust mandate because they say it excludes too many hapū and claimants.

The claimants said that the divisions over mandating led them to conclude that proper research and a full Waitangi Tribunal historical inquiry are necessary.¹³⁹ Further, they said that Waitangi Tribunal claimants have a right to have their claim inquired into by the Tribunal. Their full and informed consent is required for their claim to be included in the Deed of Mandate, and they have not given their consent.¹⁴⁰ We have addressed these issues already in our report.

In addition, the claimants alleged that the Crown's recognition of the Pre-settlement Trust mandate is unlawful, as the Crown was bound by an order issued on 2 February 1994 under section 30 of the Te Ture Whenua Māori Act 1993.¹⁴¹ That order named 14 individuals as 'the most appropriate representatives to act as negotiators for and on behalf of Whakatōhea in all matters whatsoever connected in achieving a settlement of their claim.'¹⁴² At the time of our hearings, the majority of those named in the 1993 order had died.

After our hearings concluded, counsel filed an application for a review of the section 30 order with the Māori Land Court.¹⁴³ The matter was heard between 5 and 7 March 2018, and the Court issued its decision on 12 March 2018. The Court concluded that the section 30 order was still legally valid since it had not been cancelled but that the circumstances of Whakatōhea and the section 30 order had significantly changed, such that the order was no longer effective. The Court considered that it was necessary to amend the order to reflect this change in circumstances and to bring the order to an end. The Court went on to make an order that the section 30 order ceased to have effect on 12 March 2018, the date of the judgment.¹⁴⁴

6.7 CONCLUSION

Despite the diverse nature of the various claims discussed in this chapter, the claimants have in common been affected by a poorly executed Crown process leading to the recognition of the Pre-settlement Trust mandate. In chapter 7, we set out our findings on the issues we included in our statement of issues and our recommendations as to how to address the issues we analysed in chapters 5 and 6.

139. Submission 3.3.34, pp 1–3

140. Ibid, pp 4–6

141. Ibid, pp 19–20

142. *The Whakatōhea Raupatu Claim* (1994) 69 Ōpōtiki MB 11 (69 OPO 11)

143. The application was filed on 12 December 2017 pursuant to section 301 of Te Ture Whenua Māori Act 1993.

144. *Edwards – Whakatōhea* (2018) 183 Waiariki MB 169 (183 WAR 169) at [93]–[94]

CHAPTER 7

FINDINGS AND RECOMMENDATIONS

7.1 INTRODUCTION

Our findings are derived from our analysis in the earlier chapters. We discuss our findings by reference to the issues we identified for this inquiry (see section 2.3). After summarising our findings, we conclude with a section on recommendations.

7.2 ISSUE 1: THE CROWN'S RECOGNITION OF THE DEED OF MANDATE

Our primary finding is that the Crown's recognition of the Pre-settlement Trust mandate was not fair, reasonable, and made in good faith. This is because the Crown prioritised its political objective of concluding settlements by mid-2020 over a process that was fair to Whakatōhea.

Historically, Whakatōhea suffered from some of the worst Treaty breaches, including war and raupatu. In more recent times, the iwi has been much divided over settlement issues. The Crown knew this but decided in September and October 2016 to include Whakatōhea in a strategy to expedite Treaty settlement negotiations. This strategy was known as 'Broadening the Reach'. The overall objective of the strategy was to accelerate progress with eight 'bold goal' iwi so that the Government could then signal that it was on track to conclude Treaty settlements by mid-2020. In Whakatōhea's case, the target was to achieve an Agreement in Principle by August 2017.

In this rush to conclude settlements, we think the Crown has lost sight of some of its own Treaty settlement principles.

Updated negotiating principles were adopted by the Crown in 2000. They were intended to ensure that settlements are 'fair, durable, final and occur in a timely manner'. They include:

Good Faith: The negotiating process is to be conducted in good faith, based on mutual trust and cooperation towards a common goal.

Restoration of Relationship: The strengthening of the relationship between the Crown and Māori is an integral part of the settlement process and will be reflected in any settlement. The settlement of historical grievances also needs to be understood within the context of wider government policies that are aimed at restoring and developing the Treaty relationship.¹

1. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna / Healing*

There is recognition in these principles that the resolution of Treaty grievances can be achieved only through a process that restores the principles that were once undermined and that strengthens the Treaty relationship for the future. This is particularly relevant to the principle of partnership, which underlies the Treaty relationship. It requires a process of genuine engagement with claimant groups in a way that appropriately acknowledges their tikanga. Pragmatism must be balanced with fairness.²

We do not see these principles as controversial or in contention. We reiterate again here what previous Tribunals have said: ‘The purpose of settlements is to enable Māori to feel less aggrieved by Crown conduct of the past. Peace and reconciliation is not the obvious outcome when significant numbers are aggrieved anew by a process that does not respect them.’³

In 2002, the Ngāti Awa Settlement Tribunal said:

The simple point is that where the process of working towards settlement causes fall-out in the form of deteriorating relationships either within or between tribes, the Crown cannot be passive. It must exercise an ‘honest broker’ role as best it can to effect reconciliation, and to build bridges wherever and whenever the opportunity arises. Officials must be constantly vigilant to ensure that the cost of settlement in the form of damage to tribal relations is kept to the absolute minimum.⁴

As we have discussed earlier, opposition within Whakatōhea to the Tū Ake mandate proposal was significant and sustained. The Crown knew this.

Political tensions within hapū and iwi over settlement strategy are not unusual, and a desire to expedite progress towards a Treaty settlement is a legitimate objective. But the process of reaching settlement still requires the exercise of care and a reasonable response to concerns raised. The circumstances within Whakatōhea that were known to the Crown were particularly difficult and required more than the expedient of picking and backing the group considered most likely to achieve the Crown’s objective of a quick settlement.

Simply put, the process lacked balance and adequate protections, and strongly implied a pre-determined outcome. Those in opposition to the mandate have good reason to feel that their concerns were not given a fair hearing.

7.2.1 Issue 1(a): Reasonableness of the Crown relying on the Trust Board register

One consequence of Tū Ake gaining momentum with the Crown was that insufficient attention was paid to the state of the Trust Board register and its suitability for

the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown, revised ed (Wellington: Office of Treaty Settlements, 2015), p 25

2. Waitangi Tribunal, *Te Aroha Maunga Settlement Process Report* (Wellington: Legislation Direct, 2015), p 35

3. Waitangi Tribunal, *The Tamaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 13

4. Waitangi Tribunal, *The Ngati Awa Settlement Cross Claims Report* (Wellington: Legislation Direct, 2002), p 88

the mandate vote. As we have noted, Te Puni Kōkiri raised the issue in December 2014, when they provided comments on a draft of the Tū Ake mandate strategy. The creation of a new database was recommended. Te Puni Kōkiri pointed out that, as good as the Trust Board database was, it was the responsibility of the Pre-settlement Trust to grow membership and that could not fall on the Trust Board. In addition, there would need to be a level of comfort amongst Whakatōhea as to who was maintaining the register. These were valid points but nothing was done.

This meant that, when the mandate vote took place in May and June 2016, only 6,662 voting packs were distributed to those considered eligible based on the state of the Trust Board register at that time. This was considerably short of what appear to be the true numbers of those eligible to vote.

By the time we commenced our hearing in November 2017, the total recorded on the Trust Board register stood at 15,351. Of that total, 10,037 were registered adult beneficiaries and 3,811 were recorded under parents. The ongoing work undertaken by the Trust Board meant that between April 2016 and November 2017 the number of registered adult beneficiaries without an accurate current address had reduced from approximately 3,000 to 800.⁵

Over 1,000 enrolment forms were sent out after the mandate vote, and details of over 2,000 incorrect addresses have been identified since the mandate vote. The implications are significant. Based on the latest information available to us on the state of the Trust Board register at the time of our hearing, it would appear as many as 3,000 adult members of Whakatōhea did not receive voting packs in the May 2016 mandate vote, either because the Trust Board did not have addresses or because they were listed under parents.

This raises serious questions as to the adequacy of the Trust Board register as a suitable database for the mandate vote in May 2016. It appears that the Crown paid very little attention to this issue. The fact that the Crown witnesses could not explain why there was a discrepancy of approximately 3,000 between those registered and those sent voting packs was telling.

We find therefore that it was not reasonable for the Crown to rely on the Trust Board register for the purposes of the mandate vote in May 2016. The fact that the Trust Board has been able to achieve only incremental improvement to the register after the mandate vote, as resources allow, suggests that the dominant objective remained the completion of the mandate process by December 2016. This was in order to move into priority negotiations to achieve an Agreement in Principle by August 2017. Our recommendations arising from this are set out at the end of this chapter.

7.2.2 Issue 1(b): Sufficiency of the Crown's knowledge of the support for and opposition to the mandate prior to its recognition

As will be apparent from our earlier discussion, the issue of whether the Crown sufficiently informed itself of the levels of support for and opposition to the Pre-settlement Trust mandate prior to its recognition was a subject of considerable

5. Document A70, para 45

attention in our inquiry. There are two aspects. The first arises from the fact that the Crown did not insist upon a process that would enable Whakatōhea to indicate support or opposition on a hapū basis. The Crown knew this was inconsistent with the approach endorsed by Whakatōhea in 'Te Ara Tono'. The second problem is that contemporary expressions of support and opposition to the mandate in 2016 suggest that levels of support and opposition were more finely balanced than the Crown allows.

We have noted how officials downplayed indications of opposition. For example, on 5 December 2016 when officials asked the Ministers to recognise the Pre-settlement Trust mandate, the opposition that six months previously had been described as 'significant' was now characterised as coming from a minority within Whakatōhea. Relative support for the mandate was overstated and opposition understated. Potential risk was downplayed and officials advised against waiting for the outcome of the petition lodged in November 2016 to withdraw from the mandate. In our view, all of these factors point to a process and lines of advice shaped to meet political expectations centred upon accelerated settlements with an arbitrary end date. We did not see sufficient evidence of due care and attention being paid to expressions of opposition.

We find that the Crown did not sufficiently inform itself of the levels of support for and opposition to the mandate.

7.2.3 Issue 1(c): Sufficiency of support to warrant mandate recognition

The evidence relied upon by the Crown to assess support was both insufficient and unreliable. It was insufficient because the Trust Board register was in a state that meant that approximately 3,000 or more eligible voters were denied an opportunity to participate. It was also insufficient because the mandate vote did not enable those participating to record their votes on a hapū basis.

We also have a concern about the adequacy and reliability of the information conveyed to Ministers. Because no proper assessment of the state of the Trust Board register appears to have been made, participation and support figures are overstated and opposition understated.

Standing back and considering all the information now available to us, we conclude that the cumulative effect of the inadequacies we have identified means that it was not safe for the Crown to conclude in December 2016 that there was sufficient support to warrant mandate recognition.

The Crown accepts that settlement is not just an end but a means to a restored Treaty relationship for the future. Unless steps are taken to put right inadequacies in the process, there is a significant risk that those who feel disenfranchised by the mandate process will never accept the legitimacy of any resulting settlement and that this will have long-term prejudicial consequences. Whatever, in objective terms, were the true levels of support or opposition to the mandate in 2016, it is clear to us that opposition was significant and cannot just be dismissed as coming from isolated and disaffected minorities within Whakatōhea.

It is not enough for the Crown to point to the mandate vote and express

confidence in the outcome. The participation rate was low (even lower based on the updated Trust Board register), and there is room for considerable ambiguity and argument over the true levels of support based on contemporary expressions of opposition in 2016. The moves to prioritise Whakatōhea for the 2017 negotiations timetable and to commence related work prior to the mandate itself being recognised also give rise to a significant risk that the outcome is seen as predetermined.

So long as there are grounds for these arguments to persist, it would be very difficult for Whakatōhea to unite behind a settlement or to achieve a release from grievance of the kind that the Crown holds up as one of its primary settlement objectives. We find that the Crown breached its Treaty partnership obligations by failing to adequately assess the level of support for the Whakatōhea mandate.

7.2.4 Issue 1(d): Consideration of reasonable alternative mandating structures

Once the Crown began to view Tū Ake as the only serious contender for the mandate, it became increasingly difficult for those in opposition to be heard. We acknowledge that the Tū Ake mandate itself evolved in response to dialogue with the Raupatu Working Party and the Ūpokorehe Claims Trust, but it remains doubtful that the Crown gave more than passing consideration to alternative mandating structures put forward. We do not, however, make specific findings on whether the Crown should have considered reasonable alternative mandating structures to the Pre-settlement Trust or what those structures could have been.

7.2.5 Issue 1(e): Appropriateness of Ūpokorehe being included in the Pre-settlement Trust Deed of Mandate

In our view, in order to answer whether it is appropriate for Ūpokorehe to be included in the Pre-settlement Trust Deed of Mandate, we need to consider two related issues. The first is whether it is appropriate for Ūpokorehe to be included in any deed of mandate purporting to represent all of Whakatōhea. In other words, are Ūpokorehe correctly characterised as a hapū of Whakatōhea and should they therefore be included in any mandate such as that of the Pre-settlement Trust, which purports to represent all of Whakatōhea?

The second issue is whether or not it was appropriate to include Ūpokorehe, given the sustained opposition expressed by a significant section of Ūpokorehe that established the Ūpokorehe Claims Trust to progress the settlement of their claims?

With respect to the first issue, for the reasons we have set out in chapter 6, we do not think it was unreasonable in the circumstances for the Crown to start with the premise that Ūpokorehe were a hapū of Whakatōhea and should therefore be included within the Whakatōhea mandate process. We acknowledge that the situation for border hapū such as Ūpokorehe is complex in terms of overlapping relationships with neighbouring hapū and iwi. There is, nonetheless, evidence that Ūpokorehe have been characterised as a hapū of Whakatōhea for a considerable period, without protest (although this has changed in more recent times).

We also have regard to the fact that Ūpokorehe have had a representative on the Trust Board since the 1950s and they also had representatives on the Process Working Party that produced ‘Te Ara Tono’. Modifications were made to the draft Tū Ake mandate strategy that enlarged representation for Ūpokorehe on the Pre-settlement Trust by adding provision for marae representation (although this too has proved controversial).

The more difficult issue is assessing whether it was appropriate to continue to include Ūpokorehe in the Pre-settlement Trust mandate in light of consistent opposition from a section of that hapū or iwi that claims to be their properly mandated representatives. As Tū Ake began to formulate its proposals, the Ūpokorehe Claims Trust recorded opposition and began developing proposals for a parallel and non-competing mandate.

It is not clear to us on the available evidence where relative levels of support and opposition to the Pre-settlement Trust mandate lie within Ūpokorehe.

Given the particular circumstances faced by Whakatōhea following the failure of the earlier attempt to settle, we believe that the Crown ought to have paid more attention to ‘Te Ara Tono’ and its recommendations as to process. Had the Crown done so, we would expect it to have sought greater clarification from Tū Ake as to why it was not proposing the mandate vote on a hapū basis. Leaving aside the issue of whether Ūpokorehe are an iwi in their own right, such a process would have demonstrated what their collective opinion was. We see this as a more general problem with this mandate and one we attempt to address through our recommendations.

7.2.6 Issue 1(f): Appropriateness of Te Whānau a Mekomoko being included in the Pre-settlement Trust Deed of Mandate

It is not in issue that the Mekomoko whānau belong to Whakatōhea. In that sense, it would be appropriate that they be included in a mandate that purports to represent all of Whakatōhea.

The Tribunal has previously pointed out that the Crown must be careful ‘not to exacerbate the situations where there are fragile relationships within tribes.’⁶ The Crown was well aware of the dynamic between the Mekomoko whānau and the rest of Whakatōhea. By recognising the Pre-settlement Trust mandate to negotiate and settle the Mekomoko whānau claim, the Crown failed in its duty to protect whanaungatanga relationships and failed to honour a commitment to engage directly with the whānau.

The problem, in our view, is the way their claim was included in the Pre-settlement Trust mandate in the face of their opposition, without their consent, and without the Crown honouring commitments earlier made.

How the Mekomoko whānau historical claim is dealt with needs to be a matter for discussion between the Crown and the Mekomoko whānau. We understand that the Crown accepts this, and we address this in our recommendations.

6. Waitangi Tribunal, *The Ngāti Awa Settlement Cross Claims Report*, p 87

7.3 ISSUE 2 : PROVISION FOR WHAKATŌHEA HAPŪ IN THE PRE-SETTLEMENT TRUST MANDATE AND ANY RESULTANT PREJUDICE

Hapū rangatiratanga was not appropriately recognised in the way the mandate vote was structured. As we see it, the tikanga that Whakatōhea themselves endorsed was one by which the election of representatives and the approval of a deed of mandate would occur through hapū postal and web voting, with votes recorded on a hapū basis. It is not clear why this was not the process proposed in the final Tū Ake mandate strategy. There is little evidence that the Crown turned its mind to the issue. We see no good reason why the Crown's large natural group policy should supplant or override respect for hapū rangatiratanga and Whakatōhea tikanga.

Further questions arise about whether or not it was appropriate to include Ūpokorehe and exclude Ngāti Muriwai. In the case of Ūpokorehe, we do not see a difficulty in their inclusion in the Pre-settlement Trust mandate if it could be shown that this was their collective wish.

The fact that Ngāti Muriwai had representatives on the Raupatu Working Party that prepared 'Te Ara Tono' who were initially included in the Tū Ake mandate strategy gives rise to a question as to why they were ultimately excluded. The Pre-settlement Trust mandate provides a process for the addition of hapū, but, as a number of claimant parties have pointed out, the requirements are onerous and place considerable power back with the six hapū recognised under the Trust Board structure, particularly the larger of those hapū, which could potentially outvote a majority in smaller hapū on any iwi-wide vote.

We would also observe that, because the mandate vote was not conducted on a hapū basis, it is conceivable that one or more of the six hapū recognised under the Trust Board structure may have been prejudiced by inclusion because a majority of those hapū members who participated in fact voted against the mandate. We simply do not know what the actual position is because the Crown did not require a vote on this basis. On the other hand, we also have regard to the fact that 'Te Ara Tono' provides that decisions that are to be made by way of hapū postal and online voting would be carried by the majority of hapū. A majority is defined to mean more than 50 per cent of hapū voted in the same manner. These factors highlight for us the importance of having a clear understanding of how hapū voted as hapū. We address this general issue and the position of Ngāti Muriwai in our recommendations.

7.4 ISSUE 3 : FAIRNESS OF THE REMEDIES UNDER THE DEED OF MANDATE AND RECOGNITION AND PROTECTION OF HAPŪ RANGATIRATANGA

We considered the withdrawal process in chapter 5. We find that the withdrawal mechanism under the Deed of Mandate is not fair and needs to be corrected. The Crown has conceded that there is some unfairness in the withdrawal provisions. However, this limited concession relates only to the way that the 5 per cent threshold is calculated. In due course, all of the issues will need to be addressed.

7.5 ISSUE 4: FAIRNESS AND REASONABLENESS OF THE CROWN CONTINUING TO RECOGNISE THE PRE-SETTLEMENT TRUST MANDATE

For the reasons already stated, we conclude that the Crown ought not to have recognised the Pre-settlement Trust mandate when it did. The continued recognition of the mandate is problematic for the same reasons.

It is also appropriate at this point to note the situation of the Te Kahika claimants (Wai 2594 and Wai 2605). A claim was listed in the Deed of Mandate, not by Wai number but by reference to ‘Kahika claim’. This was done late in the process and evidently without notice to the named claimants. The effect of a potential Whakatōhea settlement on these claims remains ambiguous. We find that the way in which the Te Kahika claimants have been dealt with constitutes a breach of good faith conduct and the principle of partnership.

At the conclusion of this chapter, we recommend that the Crown engage directly with the Te Kahika claimants so as to understand their wishes and clarify the status of their claims in any negotiation process going forward.

7.6 SUMMARY OF FINDINGS

We summarise here the findings of Treaty breach that we have made on the issues before us.

Our primary finding is that the Crown prioritised its political objective of concluding Treaty settlements by mid-2020 over a process that was fair to Whakatōhea. This meant that Whakatōhea were included in the ‘Broadening the Reach’ strategy and given priority status in the 2017 negotiation timetable at a time when substantial division within the iwi was apparent. The decision to recognise the Pre-settlement Trust mandate was therefore not fair, reasonable, and made in good faith and breached the Treaty principle of partnership.

We find that, by relying on the Trust Board register in May 2016 for the purposes of the mandate vote, the Crown breached the Treaty principle of active protection. It failed to properly inform itself as to the adequacy of the register for the purposes of the vote and to ensure that steps were taken to update the register before a mandate vote was taken.

We find that the Crown did not sufficiently inform itself of the true levels of support and opposition to the Pre-settlement Trust mandate prior to recognition and it thereby breached the Treaty principle of active protection.

We find that the Crown failed to act reasonably to ensure an adequate means of voting on the mandate on a hapū basis. This was in contravention of what it knew was the tikanga endorsed by Whakatōhea in 2007. In failing to appropriately recognise hapū rangatiratanga in this way the Crown breached the principle of active protection.

We find that the Crown failed to act reasonably when it approved a mandate that contains a withdrawal mechanism it acknowledges to be unfair. In failing to appropriately recognise hapū rangatiratanga in this way, the Crown breached the Treaty principle of active protection.

We find that, by including the Mokomoko whānau claim in the Pre-settlement Trust mandate without consent and without honouring commitments previously made, the Crown breached its duties of good faith conduct and the Treaty principle of partnership.

We find that the way in which the Crown included and described the Te Kahika claimants in the Deed of Mandate fell short of Treaty requirements of good-faith conduct and the principle of partnership.

7.7 PROVISION OF INFORMATION

Before we turn to consider prejudice and our recommendations, we wish to record some concerns about the provision of information to our inquiry by the Crown.

After we had concluded our hearings, the Crown provided further key documents relating to its ‘Broadening the Reach’ strategy.⁷ Crown officials did so only because a reference to the strategy emerged in response to questions from claimant counsel and the Tribunal. The documents included correspondence and Cabinet papers addressing how Whakatōhea were included in a new strategy for expedited settlements and given priority status in the 2017 negotiation timetable.

These documents were clearly relevant and should have been provided to us at the outset. The withholding of relevant information not only reflects poorly on the Crown as a litigant but also impinges on the honour of the Crown as a Treaty partner. The inferences open are either that officials profoundly misunderstood their obligations to disclose relevant information or that they were acting under express or implied direction from Ministers to withhold.

We note that in October 2016 Cabinet agreed that there was to be no publicity about the ‘Broadening the Reach’ strategy. The Cabinet paper refers to a media strategy with key messages for Ministers, Chief Crown Negotiators, and officials to use if approached by media for comment. Officials made no mention of the new strategy in advice to Ministers on the mandate in December 2016, despite the fact that they had been in correspondence with Tū Ake about it since early September 2016. The December advice was disclosed, and officials would have prepared it on the basis that it would be released under the Official Information Act 1982 or in any litigation over mandate recognition. This suggests to us a careful strategy to withhold information about ‘Broadening the Reach’ unless asked. This approach appears to have carried forward to our inquiry.

When the Crown finally did disclose information about the ‘Broadening the Reach’ strategy, it did so by providing heavily redacted versions of the Cabinet paper and related documents. It seems to us that the Crown is treating its approach to disclosure before a standing Commission of Inquiry as if it were being asked to comply with an official information request. We wish to record our concern about this and our dissatisfaction with the adequacy of the disclosure when finally made. We gave serious consideration to reconvening our hearing with directions to

7. Documents A119, A121(a); submission 3.2.58(a)

compel proper disclosure. We decided on balance not to delay our inquiry, given the circumstances now facing Whakatōhea. We have drawn the available inferences, and the Presiding Officer has notified the Chairperson of the Tribunal of our concerns.

7.8 PREJUDICE

It is clear to us that the Crown's failure to follow a process that met the Treaty standard of fair, reasonable, and good-faith conduct has given rise to significant prejudice. There is a risk that further prejudice will be caused if remedial action is not taken.

There has been significant and ongoing prejudice in terms of damage to whanaungatanga relationships within Whakatōhea. During our hearings, we observed instances of tension and acrimony between those supporting and opposing the mandate which are deep seated and bitter. The causes of such divisions are not necessarily the sole responsibility of the Crown, and neither are they likely to be within the Crown's power to resolve. The issue is whether these divisions have been aggravated by the Crown's conduct, and it is clear to us that this is what has happened.

7.9 THE CURRENT DIFFICULTY

Following recognition of the mandate, the Crown and Pre-settlement Trust moved at considerable speed to negotiate an agreement in principle. That agreement in principle, signed in August 2017, now puts before Whakatōhea the prospect of a settlement within the next 12 to 18 months. Significant redress is on offer.

Those who have consistently opposed the mandate and sought alternative options feel that their voices have been marginalised or overridden without due consideration. A clear majority of those who have historical claims registered with the Tribunal or their representatives oppose the Pre-settlement Trust mandate and seek the withdrawal of their claims from the mandate. The fact that the great majority of the named claimants have registered opposition and sought withdrawal from a Treaty settlement mandate is unusual and very concerning.

Whakatōhea are now in an invidious position. What ought now to be done to address the prejudice is a difficult question. Ordinarily, the logical remedy for breaches of the kind that we have identified would be a recommendation that the mandate recognition be withdrawn and a new process be run. However, in this case there are a number of countervailing considerations.

In our November 2017 memorandum of directions and panel guidance for submissions, released after the first hearing week, we said that we would take some persuading before we would conclude that halting negotiations was the right way to respond to the issues we identified. We proposed that Whakatōhea be given an opportunity to express their voice on two key questions (the wording of which would need to be the subject of further consideration). The two propositions were:

- ▶ Do you support the Pre-settlement Trust continuing to negotiate and reach a settlement with the Crown on current timeframes (12–18 months)?
- ▶ Do you support a Waitangi Tribunal inquiry into the historical claims of Te Whakatōhea? And if so, should settlement negotiations continue whilst any Tribunal inquiry takes place?⁸

The Crown and interested parties, including the Pre-settlement Trust, supported our proposed process, subject to clarification of details. Claimant counsel opposed this approach and sought a halt to negotiations in order that a Waitangi Tribunal historical inquiry could take place.

Claimant counsel argued that running another vote would in effect sanction the Crown's fundamentally flawed process and allow the Crown to capitalise upon its Treaty breaches.

There is some force in this argument. We think that the Crown knowingly pushed ahead with a process it knew was likely to be vulnerable to successful challenge. It did so on the expectation that by the time any such challenge materialised events would have moved on and the process would be difficult to reverse or slow.

We also infer a calculation that, once an agreement in principle was concluded, momentum would build behind a settlement. The thinking appears to be that the medium- to long-term benefits of a timely settlement (to Whakatōhea, the region, and the nation) outweigh any short-term prejudice to those who may have opposed the mandate.

We can see why the Crown might think this way. But this is to find good reasons to do the wrong thing.

The right thing to do is to honour the Treaty commitment and not let political expediency subordinate the difficult (and at time onerous) task of upholding and maintaining a relationship based on utmost good faith. Where the historical wrongs are grievous and the contemporary hapū politics complex and divided, the honour of the Crown requires statesmanship over pragmatism. This includes advocacy for taking the time required to get it right. When the Crown reacts to political pressure to get it done, it is Māori who suffer from the divisive and unfair process that follows.

We acknowledge that Crown officials did in fact engage for some time in good-faith attempts to find a constructive pathway that would unite Whakatōhea under a single mandate. It is also clear that until relatively recently nearly all of the parties who appeared before us were supportive of the objective of entering negotiations to settle the Whakatōhea claims.

During the hearing, we questioned a number of witnesses on why representatives of four hapū split from the Raupatu Working Party in 2010. We wanted to try to understand what had led to the breakdown following the consensus reached when 'Te Ara Tono' was adopted in 2007.

There appears to be a complex range of factors that have prevented Whakatōhea coming together under an agreed structure for the purposes of settlement

8. Memorandum 2.6.2

negotiations. These factors include residual division following the failed attempt at settlement in the 1990s, disagreement and mistrust over the appropriate role for the Trust Board, and differences in view about whether a Waitangi Tribunal historical inquiry should precede settlement negotiations.

We would also observe that at least some of the opposition to attempts by Tū Ake to achieve a mandate appears to be largely political or personality driven rather than based upon genuine differences of view over principles such as hapū rangatiratanga or the merits of an alternative process such as a Tribunal inquiry.

What, then, should now be done about the problems with the process and the prejudice arising?

While there is significant opposition to the Pre-settlement Trust mandate, there is also significant support. There are many within Whakatōhea who have worked hard over a long period and in good faith in order to meet the Crown's requirements for an expedited settlement process. Recommending a halt to negotiations and a rerun of the mandate process raises a real possibility of prejudice to those who support the progress that the Pre-settlement Trust has made. There is also potential prejudice to all of Whakatōhea in terms of delayed or deferred settlement redress. At the same time, to simply push ahead risks entrenching the divisions even further and would allow a settlement to be constructed upon questionable foundations.

In considering how to proceed, we have placed some weight on 'Te Ara Tono'. All parties before us accepted that 'Te Ara Tono' was important and relevant, and no one questioned the legitimacy of its recommendations and the tikanga set out.

Of relevance is the recommendation in 'Te Ara Tono' that the election of representatives and the approval of the Deed of Mandate occur through hapū postal voting and web voting, with votes recorded on a hapū basis. This was not the process followed by Tū Ake and the Pre-settlement Trust. It is not clear to us why. It must be borne in mind that Tū Ake began as a collective purporting to represent only four hapū. Perhaps the final mandate strategy with an iwi-wide rather than a hapū vote was a compromise because Whakatōhea remained divided and it was thought that a majority in certain hapū might not support the mandate. We do not know, but we would have expected to see the Crown pay more attention to the implications, given what it knew of the background.

7.10 OUR RECOMMENDATIONS – NEXT STEPS

The immediate question facing Whakatōhea is whether or not the current settlement negotiations should proceed. On current timeframes, the parties expect to be able to conclude negotiations and achieve a deed of settlement within 12 to 18 months. These matters are of such importance that we believe Whakatōhea must to be given an opportunity to express a view on this critical question. We have decided against simply recommending a halt to the current negotiations and a rerun of the mandate process. On balance, we think that the better course is to now provide Whakatōhea with an opportunity to decide how they wish to proceed.

We are concerned about potential further prejudice to Whakatōhea arising from the remedial steps we think necessary. The Crown must accept responsibility for any such effects, and the recommendations that immediately follow are designed to mitigate this.

Any delay consequent upon the implementation of the process we recommend should not prejudice Whakatōhea financially. We therefore recommend not only that the Crown should meet the reasonable costs of implementing the process we outline below but also that, regardless of the outcome:

- ▶ The Crown should commit to maintaining as a base line the redress offered to Whakatōhea pursuant to the current Agreement in Principle. In other words, the redress offered in this or any future settlement with Whakatōhea should not fall below the redress now offered in the current Agreement in Principle.
- ▶ The Crown should pay interest at commercial rates on the cash component of the settlement offer from at least the date of this report until the outcome of the process outlined below is known. Depending upon the outcome of that process, good-faith conduct may require the Crown to consider extending the period for which interest should accrue.

We recommend that substantive work on the Whakatōhea negotiations be suspended until the completion of the steps outlined below. The steps we recommend are what we consider to be the minimum necessary in order to address the serious deficiencies we have identified. We also think it is of fundamental importance that Whakatōhea hapū be given an opportunity to decide how they now wish to proceed in a way that is more transparent.

We recommend that:

- i. A suitably qualified independent returning officer should be appointed who will be given access to the updated Trust Board register and registers or rolls held by claimant groups that have told us they have registers of members.
- ii. The access provided to the returning officer to these rolls would be for the sole purpose of enabling all adult members of Whakatōhea to vote on the following questions:
 1. Do you support the Pre-settlement Trust continuing to negotiate to reach a settlement with the Crown of the historical Treaty grievances of Whakatōhea? (Yes/No)

If no to question 1:

2. Do you wish to see the current Treaty negotiations stopped in order:
 - a. that a mandate process be rerun from the start (Yes/No); or
 - b. that the Waitangi Tribunal can carry out an inquiry into the historical grievances of Whakatōhea? (Yes/No)

The wording of the questions and any supporting materials can be finalised as necessary in accordance with the terms of the leave reserved.

Voting should be through hapū, postal, and online voting, with votes recorded on a hapū basis (consistent with the recommendations of ‘Te Ara Tono’). The work on the Trust Board register that was under way at the time of hearing should be completed and, if necessary, the Crown should provide additional resources to

ensure that the updating of the Trust Board register can be completed in a timely way.

We note that the Process Working Party, which produced ‘Te Ara Tono’, included representatives from the six hapū recognised in the Trust Board structure as well as Ngāti Muriwai. Accordingly, and provided Ngāti Muriwai agree to make available their register, the vote should proceed on the basis that those who whakapapa to Whakatōhea and who are over 18 years of age should be able to vote in accordance with their primary hapū affiliation to any of the following hapū: Ngāti Ira, Ngāti Muriwai, Ngāti Ngāhere, Ngāti Patumoana, Ngāti Ruatakena, Ngāi Tamahaua, and Ūpokorehe.

Several claimants who appeared before us objected to the Trust Board using their personal details for the purpose of the mandate vote. Privacy concerns were amongst the issues raised, but the underlying objection appears to arise from a view that the Trust Board has been partisan in the political argument within Whakatōhea over how to proceed towards settlement. While we can see how this dispute over the appropriate role of the Trust Board has come about, it need not impede steps to resolution.

The fact remains that the Trust Board holds a substantial tribal database assembled through a verifiable process that is structured so as to enable those who whakapapa to Whakatōhea to vote in accordance with their nominated primary hapū affiliation. That database has been substantially updated since the original mandate vote was taken in May 2016, and we can see no obvious reason why it could not now be utilised by an independent returning officer for the purpose of carrying out a timely vote that would give all adult members of Whakatōhea a chance to have a say in how they now wish to proceed.

A panel of kaumātua representatives who are able to act as scrutineers and resolve any issue of whakapapa should be established to assist the returning officer. We understand the Trust Board already has in place a panel consisting of two kaumātua for each of the six hapū that form part of the Trust Board. Those kaumātua should be available to assist the returning officer. Each claimant group that makes available to the returning officer its register should nominate no more than two kaumātua to assist the returning officer. Ultimately, it will be for the returning officer to decide any disputes over duplicate entries on multiple registers or issues over whakapapa (following advice from kaumātua).

In the event that the returning officer considers that all or part of the register or roll submitted by one or more claimant groups is not suitable for the purpose of a vote, the returning officer should be entitled to compile the final combined register for the purpose of the vote after giving the affected party an opportunity to provide such additional verification or supporting documentation as may be required (within, say, one month).

We recognise that it will be necessary to include an explanatory statement with the voting papers. An indicative draft is attached as appendix 1 to our report. The contents of such a statement and the final composition of the voting form itself can be refined and settled under the terms of the leave reserved.

If a vote of the kind we propose takes place, provision should be made for those who do not wish to register with the Trust Board and who are not voting on an alternative roll to register and cast a special vote.

Beneficiaries of the Whakapaupākihi Trust who whakapapa to Whakatōhea would be entitled to vote in accordance with their hapū affiliation.

7.11 FURTHER SPECIFIC RECOMMENDATIONS

7.11.1 The Mokomoko whānau

How to deal with the Mokomoko whānau (Wai 203) claim needs to be a matter for discussion between the Crown and the Mokomoko whānau. We understand the Crown accepts this.

We envisage that the matters to be discussed would include:

- ▶ a process and timetable for consultation and negotiations around the form and content of an appropriate tribute to be established, as recommended by the Te Urewera Tribunal;
- ▶ the aspirations of the whānau around settling the remainder of the Wai 203 claim, including options for participating independently or in parallel with negotiations between the Crown and the Pre-settlement Trust or another body; and
- ▶ references to Mokomoko in the Agreement in Principle between the Pre-settlement Trust and the Crown and in any subsequent deed of settlement.

7.11.2 The Te Kahika claimants

We recommend that the Crown engage directly with the Te Kahika claimants so as to understand their wishes and to clarify the status of their claims in any negotiation process going forward.

7.12 THE OUTCOME AND CONSEQUENCES OF VOTE

When we raised, in a preliminary way, a similar proposal for a further vote after our first week of hearing, both the Crown and the Pre-settlement Trust expressed support (with some qualifications) and expressed a willingness to be bound by the outcome. This has been an important consideration in the way we have framed our recommendations.

All parties must respect the outcome of any vote. It is our cautious expectation that, given the fact of our hearings and the progress of the negotiations, participation in any such vote is likely to be greater than the original mandate vote. Enabling Whakatōhea to vote on a hapū basis should also enable all parties to assess with more confidence where respective levels of support and opposition lie.

If one of the outcomes of the vote is that clear majorities in one or more of the hapū reject the prospect of the Pre-settlement Trust continuing to negotiate a settlement, this would suggest the need for further dialogue within Whakatōhea and would also highlight the need to rectify the withdrawal mechanism.

If, on the other hand, a clear majority of all hapū support the Pre-settlement Trust continuing to negotiate a settlement, then those who appeared before us to oppose must respect the outcome and accept that an alternative mandate, or an alternative process such as a Tribunal inquiry, is not how Whakatōhea wish to proceed.

If the outcome is more finely balanced and levels of support and opposition are close, the parties will then need to consider how best to proceed. This may include discussions about timeframes that would allow those claimants who seek an alternative process, or something more substantial than the mihi marino process, to do so before a settlement is finally concluded. If such additional dialogue is required, the use of mediators or facilitators may be helpful, and we encourage the Crown to adopt a generous and patient approach.

These are matters for the parties to consider in light of the outcome of the vote. We have stood back from attempting to prescribe or anticipate outcomes for the very reason that we think that the best answer to the failure to provide a truly fair and transparent process is to now do so. It goes without saying that those who choose not to take up such an opportunity cannot credibly complain about the outcome.

We recognise that there may be practical questions arising in terms of the implementation of these recommendations. Accordingly, we reserve leave for the Crown claimants and interested parties to apply for further directions as to implementation or (if necessary) clarification. We acknowledge that settling any argument as to the wording of the questions or explanatory material that would go to Whakatōhea might require expert advice. We will consider commissioning such assistance if necessary.

Any party that wishes to apply in terms of the leave reserved must do so on or before 4:00 pm, Friday, 25 May 2018.

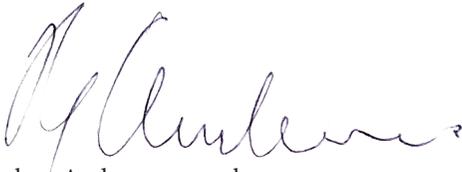
*E roi Te Whakatōhea i te roi a Tinirau*⁹

9. This whakataukī speaks to Whakatōhea's unity. 'Te roi a Tinirau' is a knot strong enough to restrain a whale (Tinirau); 'tini' and 'rau' also refer to the challenge in the myriad of different individual stances within the iwi.

Dated at *Wellington* this *12th* day of *April* 20 *18*



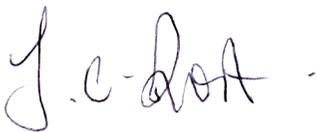
Judge Michael Doogan, presiding officer



Dr Robyn Anderson, member



Basil Morrison CNZM, member



Associate Professor Tom Roa, member



APPENDIX I

WHAKATŌHEA PĀNUI

In December 2016, the Crown recognised the Whakatōhea Pre-settlement Claims Trust as the body that had the authority to negotiate the settlement of all Whakatōhea historical Treaty of Waitangi grievances.

The Whakatōhea Pre-settlement Claims Trust and the Crown then proceeded quickly into negotiations and an agreement in principle was signed in August 2017.

On 28 July 2017, the Waitangi Tribunal granted an urgent hearing into claims objecting to the Whakatōhea Pre-settlement Claims Trust mandate. Hearings took place in November 2017 and the Waitangi Tribunal has now released its report.

The Tribunal has found that the Crown breached the principles of the Treaty of Waitangi when it recognised the Whakatōhea Pre-settlement Claims Trust mandate. The Tribunal recommended that Whakatōhea now be provided with an opportunity to vote hapū by hapū on what should happen next.

The Crown and Whakatōhea Pre-settlement Claims Trust have agreed to this.

That is why you are now being asked to take part in this vote. This is an important time for Whakatōhea. All adult members of Whakatōhea should take this opportunity to have a say in how Whakatōhea should move forward towards resolution of its historical Treaty grievances.

APPENDIX II

SELECT RECORD OF INQUIRY

SELECT RECORD OF PROCEEDINGS

1. STATEMENTS

1.1 Statements of claim

Wai 2257

1.1.5 Maruhaeremuri Stirling, Ruiha Edna Stirling, and Parehuia Herewini for and on behalf of themselves and the whānau of the hapū Te Whānau a Apanui and Whakatōhea, statement of claim concerning Crown recognition of Whakatōhea Pre-settlement Claims Trust deed of mandate, 31 January 2017

Wai 2510

1.1.7 Wiremu Te Kahika and Joseph Te Kahika for Te Whānau o e Kahika, Kahika, Kahikatea, Kahikaora, and Wharekahia, statement of claim concerning Crown recognition of Whakatōhea Pre-settlement Claims Trust deed of mandate, 1 February 2017

Wai 87

1.1.10 Adriana Edwards, Barry Kiwara, and Dean Flavell, application for urgent inquiry into Crown recognition of Whakatōhea Pre-settlement Claims Trust deed of mandate, 15 February 2017

Wai 203

1.1.11 Tuiringa Mokomoko, Karen Mokomoko, and Peter Biddle on behalf of rangatira Mokomoko and his descendants, statement of claim concerning Crown recognition of Whakatōhea Pre-settlement Claims Trust deed of mandate, 22 February 2017

Wai 224, Wai 1082, Wai 1759, Wai 2008, Wai 2049, Wai 2055, Wai 2066, Wai 2097, Wai 2290, Wai 2346, Wai 2462

1.1.12 Charles Hei, Nikora Curtis Tautau, Nanette Kernohan, Waipae Perese, Bella Savage, Peter Wairata Warren, William Peter Hatu, Dr Guy Naden, Takaparae Papuni, John Kahui Hillman, Hoani Kerei, Nelson Paynter, and Ngārangi Nade, statement of claim concerning Crown recognition of Whakatōhea Pre-settlement Claims Trust deed of mandate and requesting urgency, 28 February 2017

Wai 1092, Wai 1758, Wai 1787

1.1.14 Kahukore Baker on behalf of herself and Nga Uri o Te Ūpokorehe Iwi, statement of claim concerning Crown recognition of Whakatōhea Pre-settlement Claims Trust mandate statement, 20 May 2016

1.4 Tribunal statement of issues

1.4.1 Waitangi Tribunal, statement of issues, [22 September 2017]

2. TRIBUNAL MEMORANDA, DIRECTIONS AND DECISIONS

2.5.4 Judge Patrick Savage, memorandum requesting further information from Crown and Whakatōhea Pre-settlement Claims Trust, 25 May 2017

2.5.5 Judge Patrick Savage, memorandum requesting report from Whakatōhea Pre-settlement Claims Trust, 28 June 2017

2.5.6 Judge Patrick Savage, decision granting urgency, 28 July 2017

2.5.7 Chief Judge Wilson Isaac, memorandum establishing new record of inquiry and appointing Judge Michael Doogan presiding officer for Wai 2662, 17 August 2017

2.5.8 Chief Judge Wilson Isaac, memorandum appointing Dr Robyn Anderson, Basil Morrison, and Associate Professor Tom Roa panel members for Wai 2662, 25 August 2017

2.6.2 Judge Michael Doogan, Associate Professor Tom Roa, Dr Robyn Anderson, Basil Morrison, memorandum concerning submissions and cross-examination, 13 November 2017

2.6.10 Judge Michael Doogan, memorandum requesting Crown provide further information on 'Broadening the Reach' Cabinet paper, 19 December 2017

2.7.1 Judge Michael Doogan, memorandum seeking clarification from Crown, granting leave to leave transcript corrections, and directing filing of corrected document, 31 January 2018

3. SUBMISSIONS AND MEMORANDA OF PARTIES**3.1 Pre-hearing stage, including judicial conferences**

3.1.1 Te Kani Williams, Ihipera Peters, and Corel Linstead-Panoho, application for urgent hearing into Crown recognition of Whakatōhea Pre-settlement Claims Trust deed of mandate, 27 January 2017

3.2 Hearing stage**3.2.11**

(a) Lil Anderson to Graeme Riesterer, letter concerning Crown negotiation priorities, 9 September 2016

Graeme Riesterer to Lil Anderson, letter concerning Crown negotiation priorities, 16 September 2016

3.2.16 Craig Linkhorn, submissions of Crown on Tribunal proposal for poll of Whakatōhea uri, 21 November 2017

3.2.49 Craig Linkhorn, memorandum providing further information on 'Broadening the Reach' Cabinet paper, 22 December 2017

3.2.58 Craig Linkhorn, memorandum concerning further information on 'Broadening the Reach' Cabinet paper, 9 February 2018

3.2.58

(a) Emily Owen, Office of Treaty Settlements, to Graeme Riesterer, letter concerning compressed work plan to achieve agreement in principle, 21 September 2016

3.3 Opening, closing, and in reply

3.3.1 Robyn Zwaan and Nicole Scully, opening submissions for Wai 2563, 3 November 2017

3.3.14 Michael Sharp, opening submissions for Wai 1511, 9 November 2017

3.3.19 Annette Sykes, Rebekah Jordan, and Jordan Bartlett, closing submissions for Wai 2592 and Wai 864, 20 November 2017

3.3.23 Peter Andrew, interim closing submissions for Whakatōhea Pre-settlement Claims Trust, 21 November 2017

3.3.26 Darrell Nade, Stephanie Roughton and Stuart Kett, closing submissions for Wai 2610, 21 December 2017

3.3.27 Michael Sharp, closing submissions for Wai 1511, 21 December 2017

3.3.28 Robyn Zwaan and Nicole Scully, closing submissions for Wai 2563, 21 December 2017

3.3.29 Dr Bryan Gilling and Sophie Dawe, closing submissions for Wai 2595, 21 December 2017

3.3.30 Moana Sinclair and Chris Beaumont, closing submissions for Wai 2605 and Wai 2257, 21 December 2017

3.3.31 Te Kani Williams, Ihipera Peters, and Coral Linstead-Panoho, closing submissions for Wai 2602, 21 December 2017

3.3.32 Te Kani Williams, Ihipera Peters, and Coral Linstead-Panoho, closing submissions for Wai 2589, 21 December 2017

3.3.33 Craig Linkhorn, closing submissions for Crown, 21 December 2017

3.3.34 Charl Hirshfeld, Tony Sinclair, and Barney Tupara, closing submissions for Wai 87 and Wai 2657, 21 December 2017

- 3.3.35** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, closing submissions for Wai 2510, 21 December 2017
- 3.3.36** Peter Andrew, closing submissions for Whakatōhea Pre-settlement Claims Trust, 21 December 2017
- 3.3.37** Aidan Warren and Rachel Mullins, closing submissions for Wai 2609 and Wai 203, 21 December 2017
- 3.3.38** Tom Bennion and Emma Whiley, closing submissions for Wai 2593, 21 December 2017
- 3.3.39** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, closing submissions for Wai 2592 and Wai 864, 21 December 2017
- 3.3.40** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, closing submissions for Wai 558, 23 December 2017
- 3.3.43** Aidan Warren, reply submissions for Wai 2609 and Wai 203, 17 January 2018

3.4 Post-hearing stage

- 3.4.1** Robyn Zwaan and Nicole Scully, memorandum concerning mihi marino process, 23 March 2018
- 3.4.2** Annette Sykes, Rebekah Jordan, and Jordan Bartlett, memorandum opposing mihi marino process, 26 March 2018
- 3.4.3** Te Kani Williams, Ihipera Peters, and Coral Linstead-Panoho, memorandum concerning opposition to mihi marino process, 28 March 2018
- 3.4.4** Dr Bryan Gilling and Sophie Dawe, memorandum concerning mihi marino process, 28 March 2018
- 3.4.5** Moana Sinclair and Chris Beaumont, memorandum concerning mihi marino process, 29 March 2018
- 3.4.6** Te Kani Williams, Ihipera Peters, and Coral Linstead-Panoho, memorandum concerning mihi marino process, 29 March 2018

4. TRANSCRIPTS

- 4.1.1** National Transcription Service, 'Wai 2662 – Whakatohea Urgency: Hearing Week 1', transcript of first hearing week, Whakatane, 6–10 November 2017
- 4.1.2** National Transcription Service, 'Wai 2662 – Whakatohea Urgency: Hearing Week 2', transcript of second hearing week, Whakatane, 20–21 November 2017

SELECT RECORD OF DOCUMENTS

A. INQUIRY DOCUMENTS

A8 Te Ringahuaia Hata, brief of evidence, 31 January 2017

(a) Te Ringahuaia Hata, comp, supporting documents to document A8, 31 January 2017

pp 30: Ranginui Walker, 'Report on the Whakatohea Raupatu Deed from Ranginui Walker', typescript, no date

pp 62–63: Te Ringahuaia Hata to Graeme Riesterer, email giving notice of withdrawal of mandate from trust, 23 November 2016

pp 64–65: Te Ringahuaia Hata to Graeme Riesterer, letter giving notice of withdrawal of mandate from trust, 23 November 2016

pp 1355–1356: [Redacted] to Dickie Farrar, email giving feedback on draft mandate strategy, 30 October 2015

A13 Karen Mokomoko, brief of evidence, 22 February 2017

(a) Karen Mokomoko, comp, supporting documents to document A13, 22 February 2017

pp [105]–[119]: The Crown and Te Whānau a Mokomoko, *Agreement to Introduce Legislation to Give Statutory Recognition to the Mokomoko Pardon*, 28 September 2011

p [120]: John Grant to Te Whānau a Mokomoko Leadership Group, letter concerning Mokomoko pardon legislation and Treaty settlement implications, 26 August 2011

pp [145]–[148]: Tania Ott to Karen Mokomoko, letter concerning pre-mandate, 30 November 2012

p [149]: Karen Mokomoko to Tania Ott, letter concerning pre-mandate, 3 May 2013

p [160]: Christopher Finlayson to Karen Mokomoko, letter concerning meeting request, 13 May 2014

p [161]: Robert Edwards to Karen Mokomoko, letter concerning independent settlement of Wai 203 and Wai 339, 9 June 2014

p [162]: Graeme Riesterer to Karen Mokomoko, letter concerning independent settlement of Wai 203 and Wai 339, 9 June 2014

pp [165]–[166]: Rachel Mullins to Te Puni Kōkiri, letter concerning Whakatōhea Pre-settlement Claims Trust mandate, 21 November 2016

p [182]: Jennifer Hale to Rachel Mullins, email attaching correspondence concerning Crown recognition of Whakatōhea Pre-Settlement Claims Trust mandate, 16 February 2017

p [183]: Glenn Webber to Turinga Mokomoko, email concerning Crown recognition of Whakatōhea Pre-Settlement Claims Trust mandate, 15 February 2017

A17 Jaclyn Williams, brief of evidence, 1 March 2017

(a) Jaclyn Williams, comp, supporting documents to document A17, 1 March 2017

pp 5–6: Christopher Finlayson and Graeme Riesterer, 'Matters for Agreement by Crown and Whakatōhea Pre-settlement Claims Trust', typescript, 17 December 2016

p 7: Christopher Finlayson to Graeme Riesterer, email concerning signing of terms of negotiation between Crown and Whakatōhea Pre-settlement Claims Trust, 19 December 2016

A28 Karen Mokomoko, brief of evidence, 21 April 2017

(a) Karen Mokomoko, comp, supporting documents to document A28, 12 May 2017

A28—*continued*

(a)—*continued*

pp [22]–[30]: Te Puni Kōkiri and Office of Treaty Settlements, ‘Whakatōhea: Meeting with Claudette Hauiti regarding Whakatōhea Mandating’, briefing paper for Minister for Treaty of Waitangi Negotiations, 2013/2014-765, 15 April 2014

A40 Kahukore Baker, brief of evidence, 31 May 2016

(a) Kahukore Baker, comp, supporting documents to document A40, 31 May 2016

pp 1–2: Te Ūpokorehe Treaty Claims Trust, ‘Progressing the Treaty Claims of Ngā Uri ō Te Ūpokorehe and Te Whakatōhea’, position paper for Whakatōhea Māori Trust Board, 26 February 2011

A41 Jaclyn Williams, brief of evidence, 24 June 2016

A43 Kahukore Baker, brief of evidence, 10 February 2017

A48 Christina Davis, Adriana Edwards, Nepia Tipene, and John Edwards, joint brief of evidence, 13 October 2017

A53 Trevor Ranfield, brief of evidence, 11 October 2017

(b) Ūpokorehe Iwi, ‘Ūpokorehe Iwi Submission to the Whakatōhea Māori Trust Board’, submission to Whakatōhea Māori Trust Board annual general meeting, 11 February 2017

A54 Maude Edwards, brief of evidence, 13 October 2017

A55 Kahukore Baker, brief of evidence, 13 October 2017

(a) Kahukore Baker, comp, supporting documents to document A55, 13 October 2017

pp 19–21: Kahukore Baker to Lillian Anderson, letter concerning correspondence with Whakatōhea Māori Trust Board, 18 June 2012

pp 22–24: Graeme Riesterer to Kahukore Baker, response to December 2015 submission opposing Whakatōhea Pre-Settlement Claims Trust draft mandate strategy and trust deed, 10 February 2016

pp 40–41: [Nga Uri o Te Ūpokorehe], minutes of 12 September 2010 meeting to elect trustees to Te Ūpokorehe Treaty Claims Trust, no date

pp 42–44: Michael Hollis, Alex Holes, and Jennifer Hale, email correspondence concerning Whakatōhea and Ūpokorehe representation, 29 September 2016

pp 74–75: Lance Reha to Tū Ake Whakatōhea Collective and Whakatōhea Māori Trust Board, letter concerning Ūpokorehe objection to Tū Ake Whakatōhea mandate process, 25 July 2016

pp 139–140: Wayne Aramoana to Whakatōhea taumata kaumatua, letter concerning representation of Te Ūpokorehe Iwi, 29 June 2017

A65 Maude Edwards, brief of evidence, 19 October 2017

A68 Kate Keita Hudson, brief of evidence, 27 October 2017

A69 Jaclyn Williams and Benedict Taylor, joint brief of evidence, 31 October 2017

- (a) Jaclyn Williams and Benedict Taylor, comps, supporting documents to document A69, 31 October 2017
- pp 5–8*: Aidan Warren to Christopher Finlayson, letter concerning Wai 203, 13 November 2009
- pp 9–15*: Te Puni Kōkiri and Office of Treaty Settlements, ‘Mokomoko: Pardon and Scholarship Request’, report to Minister of Māori Affairs and Minister for Treaty of Waitangi Negotiations concerning Mokomoko pardon and scholarship request, TPK 2010/13993, 9 September 2010
- pp 19–24*: Ranginui Walker, ‘The Whakatōhea Raupatu Claim’, briefing paper for Minister of Māori Affairs and Minister for Treaty of Waitangi Negotiations concerning Wai 87, 31 March 2010
- pp 46–50*: Kahukore Baker to Lucy Te Moana, letter concerning Te Ūpokorehe Treaty Claims Trust mandate, 23 July 2012
- pp 81–95*: Kathy Eriel, will say statement of Kahukore Baker, 25 November 2012
- pp 96–98*: Robert Edwards and Graeme Riesterer to Kathy Eriel and Robyn Zwaan, letter concerning mandate process, 20 December 2012
- pp 99–101*: Michael Hollis, notes of Whakatōhea mandate hui, 11 January 2013
- pp 102–104*: Kererua Savage, notes of second Whakatōhea mandate hui, 1 March 2013
- pp 110*: Dickie Farrar to Rita Wordsworth, email advising of board resolution supporting hapū collective, 6 March 2013
- pp 124–139*: Te Whākatōhea Raupatu Working Party, ‘Te Whākatōhea Settlement Trust Mandating Strategy 2013: Amended Draft Document’ (Ōpōtiki: Te Whākatōhea Raupatu Working Party, 2014)
- pp 140*: Michael Hollis to Adriana Edwards, covering email enclosing Te Puni Kōkiri’s comments on Whākatōhea working party mandate strategy, 14 October 2013
- pp 157–158*: [Te Puni Kōkiri], ‘Initial Thoughts on the Whākatōhea Working Party Mandate Strategy’, typescript, no date
- pp 182–197*: Dickie Farrar, ‘Whakatōhea Pre-Settlement Claims Trust Mandate Strategy 2013’ (Ōpōtiki: Tū Ake Whākatōhea Collective, 2013)
- pp 215*: Micheal Hollis to Dickie Farrar, email concerning Whakatōhea Pre-settlement Trust mandate strategy, 8 November 2013
- pp 266*: Adriana Edwards to Mariam Smith and Lucy Te Moana, letter supporting merged mandate strategy, 19 December 2013
- pp 274–275*: Kererua Savage to Dickie Farrar, email concerning updated mandate strategy, 8 April 2014
- pp 277–279*: Dickie Farrar to Kererua Savage, email concerning updated mandate strategy, 8 April 2014
- pp 279–280*: Dickie Farrar to Michael Hollis, email update concerning mandate strategy, 7 April 2014
- pp 281*: Graeme Riesterer to Barry Kiwara, invitation to Whakatōhea information hui presentation, 1 July 2014
- pp 282*: Adriana Edwards and Barry Kiwara to Graeme Riesterer, letter declining invitation to attend Whakatōhea information hui presentation, 2 July 2014
- pp 286–350*: Damian Stone to Lucy Te Moana and Michael Hollis, covering email enclosing Tū Ake Whakatōhea Collective email, consultation record, and Whakatōhea Pre-settlement Claims Trust draft mandate strategy and trust deed, 11 November 2014
- pp 380–382*: Graeme Riesterer to Christopher Finlayson, Tū Ake Whakatōhea Collective activity report for March–July 2013, 12 July 2013

A69—*continued*

(a)—*continued*

- pp 389–390*: Nora Moore, minutes of 21 March 2015 Tū Ake Whakatōhea Collective and working party meeting, 21 March 2015
- pp 393–394*: Michael Hollis to Dickie Farrar, Damian Stone, Nora Moore-Kelly, Nathan Milner, Graeme Riesterer, Ngawa Hall, and Rachel Jones, email concerning Crown position on Whakatōhea uri voting, 17 December 2014
- pp 445–480*: Whakatōhea Pre-settlement Claims Trust, ‘Proposed Draft Whakatōhea Pre-settlement Claims Trust Mandate Strategy’, paper prepared for Tū Ake Whakatōhea Collective, 19 August 2015
- pp 534–536*: Michael Hollis to Dickie Farrar, email concerning Office of Treaty Settlements feedback on draft mandate strategy and trust deed, 30 October 2015
- pp 540–581*: Whakatōhea Pre-settlement Claims Trust, ‘Proposed Draft Whakatōhea Pre-settlement Claims Trust Mandate Strategy’, paper prepared for Tū Ake Whakatōhea Collective, 19 August 2015
- pp 601–603*: Kahukore Baker to Michael Hollis, covering email enclosing Te Ūpokorehe Treaty Claims Trust mandate strategy and letter, 24 November 2015
- pp 604–635*: Te Ūpokorehe Treaty Claims Trust, ‘Te Ūpokorehe Iwi Draft Mandate Strategy: Settlement of Treaty of Waitangi Claims’ (Wellington: Te Ūpokorehe Treaty Claims Trust, no date)
- p 636*: Jaclyn Williams to Kahukore Baker, letter concerning Whakatōhea mandate, 11 December 2015
- pp 727–728*: Jaclyn William, form letter concerning Crown’s large natural groups policy and lack of hapū representation and recognition, 26 February 2016
- pp 735–738*: Office of Treaty Settlements, file note recording key points from submitters’ hui involving Office of Treaty Settlements, Te Puni Kōkiri, Mokomoko Whānau, and Ngāi Tamahau, 19 March 2016
- pp 739–742*: Office of Treaty Settlements, file note recording key points from submitters’ hui involving Office of Treaty Settlements, Te Puni Kōkiri, Tū Ake Whakatōhea Collective, and Te Ūpokorehe Treaty Claims Trust, 20 March 2016
- p 750*: Genevieve Meyer to Alex Holes, Michael Hollis, and Neil Robbins, email concerning Tū Ake Whakatōhea mandate strategy and Crown response to mandate strategy submissions, 13 April 2016
- pp 750–752*: Alex Holes to Genevieve Meyer, email concerning Crown response to Tū Ake Whakatōhea mandate strategy and submissions, 12 April 2016
- p 753*: Jaclyn Williams to Graeme Riesterer, letter endorsing mandate strategy, 13 April 2016
- pp 841–844*: Jaclyn Williams, form letter concerning deed of mandate submissions, 14 December 2016
- pp 845–857*: Te Ringahuaia Hata to Graeme Riesterer, letter advising of claimants’ intention to withdraw from mandate, 22 November 2016
- pp 860–861*: Dickie Farrar to Graeme Riesterer, letter advising of withdrawal submission results, 13 January 2017
- pp 864–886*: Office of Treaty Settlements and Te Puni Kōkiri, ‘Whakatōhea Pre-Settlement Claims Trust: Recognition of Mandate Report’, report to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development recommending recognition of mandate and approval of funding limit, OTS 2016/2017-400, 5 December 2016

- A70** Graeme Riesterer and Dickie Farrar, joint brief of evidence, 27 October 2017
- (a) Graeme Riesterer and Dickie Farrar, comps, supporting documents to document A70, 30 October 2017
- p[68]*: Jim Richardson to Robert Edwards, letter advising passing of motion concerning facilitating of mandating of hapū representatives, no date
- p[69]*: Willie Maxwell to general manager, Whakatōhea Māori Trust Board, letter advising of Ngāti Ngahere's resolution to appoint Whakatōhea Māori Trust Board to facilitate discussions with Office of Treaty Settlements, 1 October 2010
- p[70]*: Geoffrey Bristowe to Adriana Edwards, letter declining invitation for presentation from working group, 24 November 2010
- p[71]*: [Ngāti Ira], minutes of Ngāti Ira hapū meeting, no date
- A73** Whakatōhea Hapu Raupatu Process Working Party, 'Te Ara Tono mo nga Kereme o te Whakatōhea / Final Whakatōhea Raupatu Process Report' (Ōpōtiki: Whakatōhea Hapu Raupatu Process Working Party, 2007)
- A81** Joseph Te Kahika, brief of evidence concerning evidence of Arihia Tuoro, 2 November 2010
- A84** Kahukore Baker, brief of evidence, 2 November 2010
- A86** Claimant counsel, comp, common bundle, 2 November 2017
- pp 43-76*: Whakatōhea Pre-settlement Claims Trust, *Deed of Mandate* (Ōpōtiki: Whakatōhea Pre-settlement Claims Trust, 2016)
- pp 136-171*: Whakatōhea Pre-settlement Claims Trust, *Trust Deed* (Ōpōtiki: Whakatōhea Pre-settlement Claims Trust, 2016)
- pp 360-378*: Te Ūpokorehe Treaty Claims Trust, 'Te Ūpokorehe Iwi Draft Mandate Strategy: Settlement of Treaty of Waitangi Claims' (Wellington: Te Ūpokorehe Treaty Claims Trust, no date)
- pp 442-443*: Lucy Te Moana to Jonathan Easthope, email concerning Crown desire to deal with Whakatōhea as a large natural group, 21 August 2014
- pp 444-445*: Michael Hollis to Damian Stone, email concerning draft Whakatōhea Pre-settlement Claims Trust mandate strategy and trust deed, 2 December 2014
- pp 497-502*: Office of Treaty Settlements, file note of meeting between Office of Treaty Settlements, Te Puni Kōkiri, and Tū Ake Whakatōhea Collective, 3 November 2015
- pp 515-520*: Office of Treaty Settlements, 'Whakatōhea: Pre-mandate Funding' report to Minister for Treaty of Waitangi Negotiations seeking approval to provide pre-mandate and exceptional circumstances funding to Whakatōhea, OTS 2015/2016-641, 18 April 2016
- pp 527-549*: Office of Treaty Settlements, 'Whakatōhea: Request to Fund Shortened Waitangi Tribunal Process', report to Minister for Treaty of Waitangi Negotiations recommending funding for standalone Waitangi Tribunal inquiry into Whakatōhea claims be declined, OTS 2016/2017-342, 10 November 2016
- pp 714-715*: Dickie Farrar to Graeme Riesterer, letter listing results of hapū withdrawal submissions, 6 July 2017

A119

pp 1–26: Minister for Treaty of Waitangi Negotiations, ‘Broadening the Reach of Historical Treaty of Waitangi Settlements’, paper to Cabinet Committee on Treaty of Waitangi Negotiations, 2016 (heavily redacted)

pp 27–30: Secretary of Cabinet, ‘Broadening the Reach of Historical Treaty of Waitangi Settlements’, Cabinet minute of decision, CAB-16-MIN-0525, [19 October 2016] (heavily redacted)

A120 Jaclyn Williams, brief of evidence responding to 24 November 2017 Tribunal memorandum directing filing of documents, 8 February 2018

(a) Jaclyn Williams, comp, supporting documents to document A120

pp 5–7: Dr Matthew Cunningham, no title, paper concerning submissions and petition on Pre-settlement Claims Trust mandating process, 8 November 2017

A121 Benedict Taylor, brief of evidence responding to 30 November 2017 Tribunal memorandum concerning submissions and cross-examination, 6 December 2017

(a) Benedict Taylor, comp, supporting documents to document A121, 6 December 2017

pp 7–8: [Office of Treaty Settlements], ‘Key Messages for Independent Advisor Meetings with 2017 Priority Groups’, typescript, no date

p 22: Patrick Southee to Ken Mair and Peter Douglas, email proposing meeting with Office of Treaty Settlements and Crown Law Office, 16 September 2016

p 22: Peter Douglas to Ken Mair, email confirming availability for meeting with Office of Treaty Settlements and Crown Law Office, 16 September 2016