

THE
MANA AHURIRI
MANDATE REPORT

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WAI 2573

WAITANGI TRIBUNAL REPORT 2020



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CONTENTS

Letter of transmittal	ix
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CHAPTER 1: INTRODUCTION	1
1.1 The urgent inquiry	1
1.1.1 Overview	1
1.1.2 The settlement background	3
1.1.3 Two applications for urgency	6
1.1.4 Discussions and mediation	10
1.1.5 The urgent hearing	11
1.1.6 The parties to this inquiry	11
1.1.6.1 The claimants	11
1.1.6.2 The Crown	11
1.1.6.3 Mana Ahuriri	12
1.1.7 The representative role of the named claimants	12
1.2 Treaty principles	14
1.2.1 Partnership	15
1.2.2 Māori autonomy and the guarantee of tino rangatiratanga	15
1.2.3 Active protection	17
1.3 The structure of this report	19

CHAPTER 2: THE MAINTENANCE PERIOD, 2010–15	21
2.1 Introduction	21
2.1.1 What this chapter is about	21
2.1.2 What were the Crown's monitoring obligations?	23
2.1.3 What were MAI's obligations in the mandate maintenance period?	24
2.2 Did MAI fulfil its responsibilities to hold elections?	25
2.2.1 Introduction	25
2.2.2 What did the MAI constitution and deed of mandate require?	25
2.2.3 MAI's legal opinions	28
2.2.4 Our view of the election requirements	29
2.2.5 The Crown's monitoring of the mandate: elections	32
2.2.6 Why were representation and accountability issues not raised earlier?	33
2.3 Financial accountability	38
2.3.1 Introduction	38
2.3.2 MAI's financial reporting requirements	39
2.3.3 MAI's failure to present audited accounts	39

CHAPTER 2: THE MAINTENANCE PERIOD, 2010–15—continued

2.3	Financial accountability— <i>continued</i>	
2.3.4	The Crown's monitoring of the mandate: financial accountability . . .	42
2.3.5	Our view of the Crown's monitoring of financial accountability . . .	43
2.3.6	The BNZ loan	44
2.3.7	Our view of the relevance of the loan issue	46
2.4	Engagement issues	48
2.4.1	Introduction	48
2.4.2	Engagement with Ahuriri Hapū claimant community	49
2.4.2.1	The Crown's mandate maintenance and monitoring requirements	49
2.4.2.2	MAI's engagement between February 2013 and June 2015 . . .	50
2.4.2.3	Our view of the engagement issues	53
2.4.3	Engagement on the post-settlement governance entity	54
2.4.3.1	Introduction	54
2.4.3.2	MAI's engagement on the PSGE	55
2.4.3.3	What did the Crown do when made aware of the disagreement?	59
2.4.3.4	Our view of the Crown's response to the PSGE disagreement	61
2.4.3.5	Lack of governance training	62

CHAPTER 3: MANDATE AND RATIFICATION 63

3.1	Introduction	63
3.1.1	What this chapter is about	63
3.1.2	Obligations of the ratification process	64
3.1.2.1	The Crown's obligations in the ratification process	65
3.1.2.2	Mana Ahuriri Incorporated's obligations in the ratification process	66
3.1.3	The structure of this chapter	66
3.2	Did the Crown take sufficient and appropriate action following the ratification vote?	67
3.2.1	Initial results and voting controversies, August–September 2015. . .	67
3.2.2	OTS recommends that the ratification process be rerun	69
3.2.3	MAI blames MTT for 'sabotage' and low results	71
3.2.4	The Minister's meeting with MAI, 8 October 2015	72
3.2.4.1	MAI's presentation to the Minister	72
3.2.4.2	The Minister's decision to review the process	74
3.3	The Crown becomes aware of transparency and accountability issues, October–December 2015	75
3.3.1	No AGM is held in September 2015	75
3.3.2	Ngāti Pārau leaders inform the Crown of their concerns	75
3.3.3	MTT informs the Crown of concerns held by hapū members	76
3.3.4	The Crown's response in November 2015	78

3.3.5	MAI decides to hold a late AGM	79
3.3.6	Transparency and accountability issues are raised with the Crown	81
3.4	Did the Crown take sufficient and appropriate action in response to the Carruthers reviews?	83
3.4.1	OTS and MAI agree on terms of reference	83
3.4.2	Colin Carruthers QC's first report, 13 November 2015	85
3.4.3	What action did the Crown take in response to the first Carruthers report?	87
3.4.3.1	The Crown directs registration verification and a recount	87
3.4.3.2	What did the ratification strategy say about verification?	89
3.4.3.3	What did the MAI constitution say about verification?	90
3.4.4	Reverification and recount, December 2015 – January 2016	91
3.4.4.1	MAI agree to reverify and recount	91
3.4.4.2	MAI's process for reverification in response to the Crown's request	91
3.4.4.3	What was the result?	93
3.4.4.4	What was the outcome for special voters?	93
3.4.5	The second independent review of the ratification process and results	96
3.4.6	The Crown's provisional acceptance of the ratification results, March 2016	98
3.5	The Crown takes action on accountability issues, March–July 2016	98
3.5.1	Introduction	98
3.5.2	The Crown works with MAI on accountability issues, December 2015 – March 2016	99
3.5.2.1	Request for MAI to publish audited accounts, December 2015	99
3.5.2.2	Mandate maintenance requirements, February 2016	99
3.5.2.3	Ministers give assurances to Ngāti Pārau and others, February 2016	100
3.5.2.4	MAI seeks a second legal opinion on elections, March 2016	101
3.5.2.5	OTS and MAI reach an agreed position on elections, March 2016	104
3.5.2.6	The MAI SGM: presentation of audited accounts, 30 March 2016	104
3.5.2.7	The position by the end of March 2016	105
3.5.3	The Crown's facilitation process, May–July 2016	106
3.5.3.1	The Crown and MAI agree on facilitation as the path to durability	106
3.5.3.2	Terms of reference	107
3.5.3.3	Flaws in the facilitation process	108
3.5.3.4	What progress was made in achieving reconciliation?	110
3.6	Was the Crown's decision on ratification reasonable and fair?	114
3.6.1	Delay in the holding of elections	114

CHAPTER 3: MANDATE AND RATIFICATION—continued

- 3.6 Was the Crown's decision on ratification reasonable and fair?—*continued*
- 3.6.2 The Crown's decision to proceed without elections first 116
- 3.6.3 Were the approval rates high enough for a durable settlement? . . 121

CHAPTER 4: CONCLUSION 125

- 4.1 Introduction 125
- 4.2 Conclusions on the issues 125
- 4.2.1 Mandate monitoring prior to the ratification process 125
- 4.2.2 The Crown's improvements to mandate monitoring 127
- 4.2.3 The Crown's decision not to rerun the ratification process 127
- 4.2.4 The Crown's decisions on the Carruthers review 128
- 4.2.5 The actions taken by the Crown on the accountability issues 128
- 4.2.6 The Crown's decision to approve the ratification and sign the deed 130
- 4.3 Did the Crown's acts or omissions breach the principles of the Treaty? . . . 132
- 4.3.1 Treaty compliance 132
- 4.3.2 Prejudice 136
- 4.3.3 Summary of findings 137
- 4.4 Remedies 138
- 4.4.1 The parties' positions 138
- 4.4.2 Mana Ahuriri's post-hearing proposal 139
- 4.4.3 Recommendations 141
- 4.4.3.1 Elections and representation 141
- 4.4.3.2 The Crown's process for monitoring
the maintenance of mandates 142
- 4.4.3.3 Facilitation 143
- 4.4.4 Our suggestion in respect of the historical account 143

APPENDIX: SELECT INDEX TO THE RECORD OF INQUIRY 147

- Record of hearings 147
- Panel members 147
- Counsel 147
- Hearing 147
- Select record of proceedings 147
- 1 Statements of claim 147
- 2 Tribunal memoranda, directions, and decisions 147
- 3 Submissions and memoranda of parties 148
- 4 Transcripts and translations 148
- Select record of documents 148
- A Inquiry documents 148
- Bibliography 151



Waitangi Tribunal
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The Honourable Nanaia Māhuta
Minister for Māori Development
The Honourable Kelvin Davis
Minister for Māori Crown Relations: Te Arawhiti
Parliament Buildings
WELLINGTON

30 June 2020

E ngā Minita, tēnā koutou,

We have the honour to present to you the final published version of our report on the Mana Ahuriri Mandate inquiry. We presented a pre-publication version on 16 December 2019. The text has not changed, but maps and illustrations have been added.

In 2009, Mana Ahuriri Incorporated received a mandate from seven Ahuriri hapū to negotiate their historical claims. Negotiations were interrupted from September 2011 to February 2013 by a period of dysfunction among the komiti members. After the negotiations resumed in mid-2013, an agreement in principle was signed in December of that year, followed by the initialling of a deed of settlement in June 2015. A ratification process was then held for the deed of settlement and post-settlement governance entity, with a ratification vote taking place from 17 July to 21 August 2015.

Originally, the Crown and Mana Ahuriri Incorporated planned to sign the deed in September but this was postponed due to officials' initial concerns about the ratification process and the durability of the settlement. In October and December 2015, leaders from three of the seven hapū – Ngāti Pārau, Ngāti Tū, and Ngāi Te Ruruku – raised serious concerns with the Crown about

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the mandate of Mana Ahuriri Incorporated to complete the settlement. The Crown delayed accepting the ratification results until October 2016. By that time, officials advised Ministers that all issues had been worked through and resolved, although officials stated that a small number of dissentients remained. The Mana Ahuriri deed of settlement was signed on 2 November 2016.

In October 2016, the Wai 2573 claim was filed by leaders of Ngāti Pārau. They objected to the Crown's decision to sign the Mana Ahuriri deed of settlement, claiming that the ratification process was flawed and Mana Ahuriri Incorporated had lost its mandate. Another claim was filed at the same time by some leaders of two other Ahuriri hapū, Ngāti Tū and Ngāi Te Ruruku, (Wai 2574), who raised the same objections. The Tribunal granted an urgent hearing in March 2017, which was followed by Tribunal mediation and discussions between the parties. As a result, the Crown reached agreement with Ngāti Tū and Ngāi Te Ruruku in mid-2018. The Ngāti Pārau claimants, however, decided to continue with the urgent hearing, which was held in Napier on 18–20 February 2019.

The Ngāti Pārau claimants alleged that Mana Ahuriri Incorporated lost its mandate by late 2016 because the komiti failed to remain representative of, and accountable to, its claimant community. According to the claimants, the komiti failed to hold elections and present audited accounts at AGMs, in breach of its own constitution, and thereby lost the mandate to negotiate. In addition, the claimants argued that the ratification process for the deed of settlement was flawed, especially the treatment of special votes. In the claimants' view, the Crown breached Treaty principles by failing to monitor the mandate sufficiently, and by signing the deed of settlement despite a flawed ratification process and loss of mandate.

The Crown acknowledged that there were flaws in its monitoring of the mandate, and that its officials should have been monitoring accountability mechanisms, including financial reporting and the holding of elections. The Crown's witness, Warren Fraser, told the Tribunal that new practices have been put in place recently as a result of this inquiry. The Crown also acknowledged that, if Mana Ahuriri Incorporated had lost its mandate by October 2016, then the Crown breached the Treaty by accepting the ratification results and signing the deed. On the other hand, the Crown argued that the flaws in its mandate monitoring were not of such gravity that they amounted to Treaty breaches, and that the ratification results in 2015–16 showed Mana Ahuriri Incorporated had retained its mandate. The Crown further argued that the ratification process had been reviewed by Colin Carruthers QC and that no flaws had been found in his review.

This claim has put us in the difficult position of assessing the alleged flaws in Mana Ahuriri Incorporated's processes, but this was necessary in order to determine whether the Crown's monitoring had failed and the Treaty had been breached.

We agreed that the Crown's failure to monitor accountability mechanisms was a significant flaw but that it was not a Treaty breach. This was because the Crown became aware of the accountability issues in late 2015, and opportunities still remained at that time for the Crown to take appropriate action before accepting ratification and signing the deed.

In respect of elections, the Crown and Mana Ahuriri argued that, following a full election for the komiti in 2011, the Mana Ahuriri Incorporated constitution only required elections for a minimum of two members every two years. We disagreed, and the legal opinions sought by Mana Ahuriri in 2015 and 2016 did not in fact address this interpretation of the constitution. In our view, the constitution and the deed of mandate clearly required a komiti election every two years after 2011, with a rotation election in alternate years to ensure that the whole komiti would not go out of office at once. But Mana Ahuriri Incorporated only held one election after 2011: an election for two members in 2013. When the 2015 election came due in September 2015, just after the ratification process, the komiti refused to hold one on the grounds that the incorporation would cease to exist in the near future (once the deed of settlement was signed). A late AGM in December 2015, however, rejected the komiti's motion that elections should not be held.

The Crown relied on a facilitation process conducted by Sir John Clarke in May and July 2016, which led to a (temporary) sense of agreement within the claimant community that the settlement should proceed but that transparent elections should be held as soon as possible. Those present at the facilitation hui did not agree on which order these two crucial events should occur. Mana Ahuriri Incorporated offered the Crown a secret deal: elections for only two of nine positions on the Mana Ahuriri Trust (the post-settlement governance entity), well after the signing of the deed.

We considered that it was reasonable for the Crown to rely on the facilitated agreement but that further facilitation hui or consultation were clearly required to determine the order of elections and settlement. The Crown ought to have taken into account (a) the breach of the constitution and deed of mandate (with most komiti members in their *fifth* year of a two-year term), and (b) the decisions of the December 2015 AGM and July 2016 hui. In light of those matters, the Crown ought to have been aware that the komiti did not have a mandate from the Ahuriri claimant community to make a secret decision to hold elections for only two positions following the signing of the

deed. The Crown's decision to accept this secret deal and proceed with the settlement in those circumstances was in breach of the Treaty principles of partnership and active protection. Ngāti Pārau were prejudiced thereby.

In respect of financial reporting and the BNZ loan, Mana Ahuriri Incorporated failed to present any accounts to an AGM for the 2012–13, 2013–14, and 2014–15 financial years until December 2015. This meant, among other things, that a BNZ loan for \$500,000 was taken out in 2013 but the Ahuriri claimant community did not become aware of the loan, or of the incorporation's substantial deficit, until after the ratification process. We found, however, that the Crown required Mana Ahuriri Incorporated to present audited accounts for those three years at a special general meeting in March 2016. The Crown therefore took what action it could reasonably take once it became aware of this accountability failing in late 2015. While not understating the significance of the flaw in the Crown's monitoring of the mandate, the Crown's acts and omissions were not in breach of Treaty principles.

In respect of the ratification, we found that the Crown was in breach of Treaty principles for accepting the ratification results for the PSGE but not for the deed of settlement.

Mana Ahuriri Incorporated initially decided to verify the membership of all special voters for the purposes of ratification. This was certified as consistent with the ratification strategy by Colin Carruthers QC in November 2015. The Crown did not accept this, however, but required Mana Ahuriri Incorporated to verify the whakapapa of all those who applied for registration and cast special votes during the voting period. The process followed by Mana Ahuriri Incorporated to reverify membership was flawed and inconsistent with the ratification strategy. As a result, the Crown relied on a flawed and unfair process for reverifying and recounting the votes; a fact which should have been clear to the Crown on the papers it received, even though Mr Carruthers certified the second process as correct.

The result was the disqualification of over one-fifth of all those who voted, all bar one of whom were in fact members of the Ahuriri hapū and entitled to register and vote. The Crown's decision to accept this result was prejudicial to special voters and distorted the outcome of the ratification, exaggerating the degree of support and concealing issues about the durability of the settlement. In all of the circumstances, including the facilitation process and the very low majority of 56 per cent in favour of the PSGE (if all votes had been included), Treaty principles required the Crown to accept the deed but rerun the ratification of the PSGE. Ngāti Pārau were clearly prejudiced by these Crown acts and omissions.

Having found the Crown in breach of the Treaty, we made a number of

recommendations to remedy the prejudice to Ngāti Pārau and to prevent the recurrence of similar prejudice in the future. Those recommendations are set out in full in chapter 4.

In sum, to remove the prejudice to Ngāti Pārau we recommended that:

- ▶ the Crown obtain an undertaking from the Mana Ahuriri Trust to hold an election for all nine trustee positions before introducing settlement legislation, with an independently-monitored voting process to be completed before the passage of the Bill; and
- ▶ the Crown should pay the costs of the election;

To prevent recurrence of similar prejudice in future settlements, we recommended that:

- ▶ the Crown should embed changes to its practice, including amendments to the *Red Book*, to ensure that mandate monitoring includes the accountability mechanisms in a deed of mandate and constitution;
- ▶ the Crown should provide or fund mandatory governance training for the committee members of mandated entities at the beginning of a negotiations process (and for new committee members as they come on);
- ▶ the arrangements for facilitation should be more equitable in terms of setting the scope and terms of reference, and in terms of reporting back; and
- ▶ the Crown should consider providing funding and any other assistance to mandated entities in the enrolment of members.

Although this urgent inquiry did not consider Ngāti Pārau's concerns about the historical account in the deed of settlement, we did make a suggestion for the consideration of the Crown. It seemed to us that Ngāti Pārau should have the benefit of the same arrangement provided to Ngāti Tū and Ngāi Te Ruruku: a complementary record of Ngāti Pārau's view of the battle of Ōmarunui to be provided on the Te Arawhiti website in association with the Mana Ahuriri deed of settlement.

Nāku noa, nā



Chief Judge Wilson Isaac
Presiding Officer

ACKNOWLEDGEMENTS

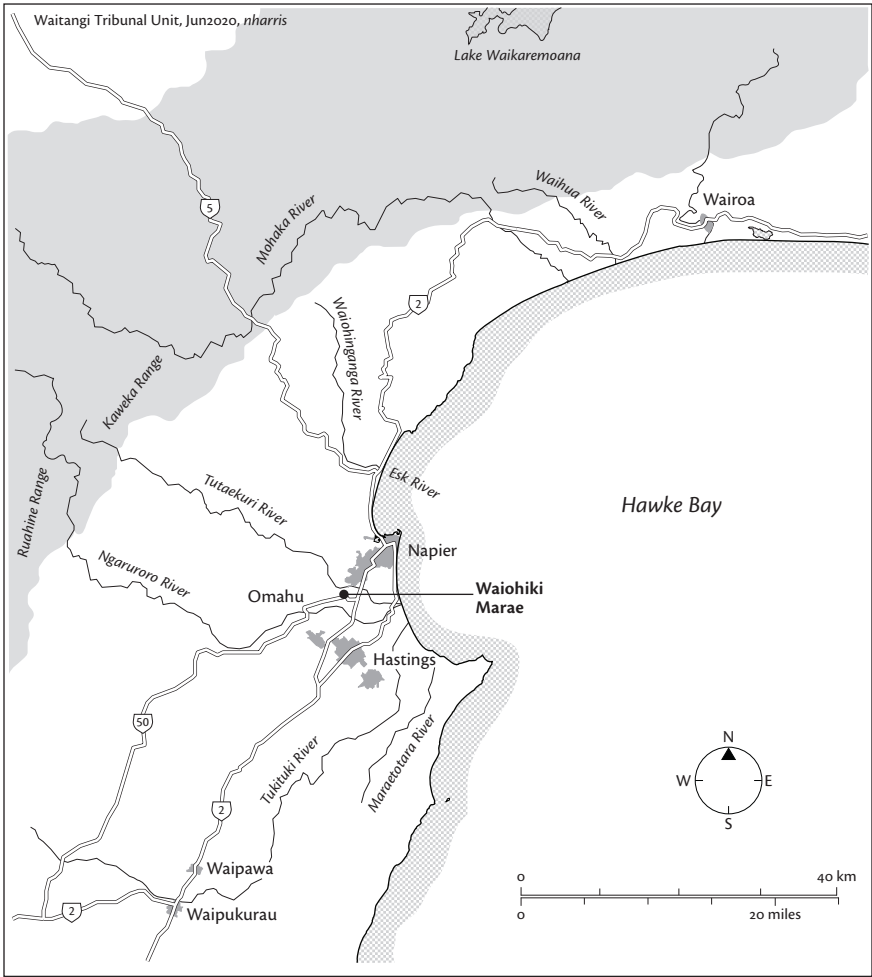
The Tribunal would like to thank all staff involved for their assistance with this report, especially Anna Milne-Tavendale, Ngawai McGregor, and Jane Latchem. We also want to acknowledge the skills of Jim Scott and Dominic Hurley, who edited and typeset the report, and Noel Harris, who designed the maps.

Thanks also to those staff who assisted with the inquiry and hearings, particularly Malesana Tiʻetiʻe, Danny Merito, Awhina Black, Abby Hauraki, Matthew Cunningham, Hinetaapora Moko-Mead, and Jenna-Faith Allan.

ABBREVIATIONS

AIP	agreement in principle
AGM	annual general meeting
All ER	<i>All England Law Reports</i>
app	appendix
BNZ	Bank of New Zealand
CA	Court of Appeal
CFRT	Crown Forestry Rental Trust
ch	chapter
cl	clause
doc	document
DOS	deed of settlement
ed	edition, editor
ltd	limited
MAI	Mana Ahuriri Incorporated
MAT	Mana Ahuriri Trust
memo	memorandum
MTT	Maungaharuru–Tangitū Trust
n	note
no	number
NZLR	<i>New Zealand Law Reports</i>
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
PSGE	post-settlement governance entity
pt	part
QC	Queen's counsel
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
sec	section (of this report, a book, etc)
SGM	special general meeting
TPK	Te Puni Kōkiri
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 2573 record of inquiry, a select copy of the index to which is reproduced in the appendix. A full copy of the index is available on request from the Waitangi Tribunal.



Map 1: Modern location map

CHAPTER 1

INTRODUCTION

1.1 THE URGENT INQUIRY**1.1.1 Overview**

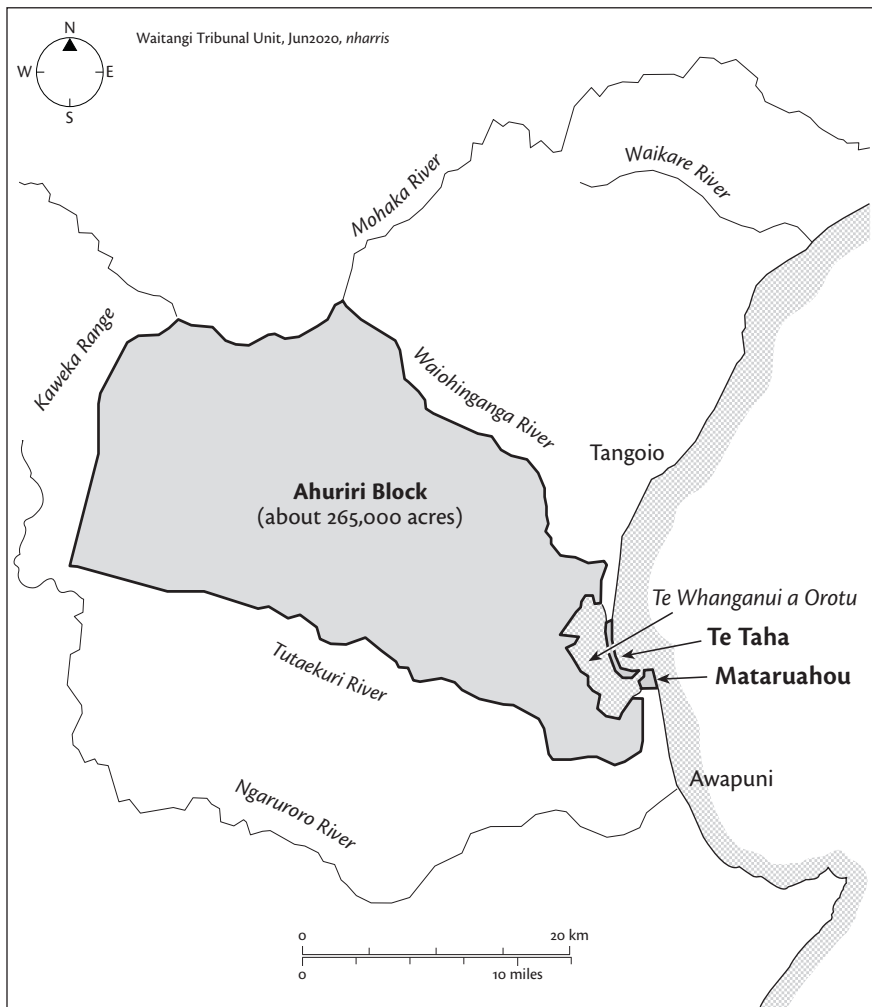
This report addresses the Wai 2573 claim. A pre-publication version of the report was issued on 17 December 2019 to assist the parties with an early resolution of this urgent matter. Maps and illustrations have been added to this final, published version of the report but the text has not been altered. The Wai 2573 claim was brought by Matthew Mullany and others on behalf of the Ngāti Pārau hapū. This hapū is one of seven whose historical claims will be settled through the Ahuriri Hapū Deed of Settlement.¹ The Ngāti Pārau claimants object to the Crown's acceptance of the ratification vote for this deed of settlement and the proposed post-settlement governance entity (PSGE), the Mana Ahuriri Trust.

In July 2009, seven Ahuriri hapū gave Mana Ahuriri Incorporated a mandate to negotiate the settlement of their historical Treaty claims: Ngāti Pārau (which includes Ngāi Tahu Ahi), Ngāti Hinepare, Ngāti Māhu, Ngāti Matepū, Ngāi Tāwhao, Ngāti Tū, and Ngāi Te Ruruku. The Crown recognised this mandate on 29 January 2010 and agreed to terms of negotiation on 22 June 2010. Although the negotiations were interrupted from late 2011 to mid-2013, the Crown and Mana Ahuriri Incorporated (MAI) were ready to initial a deed of settlement by June 2015. A ratification vote for the deed and the proposed PSGE was conducted from 17 July to 21 August 2015. As we explain more fully in the report, the results of the ratification vote were controversial. Also, serious accountability issues were raised by Ngāti Pārau leaders (and others). As a result, the Crown did not accept the ratification results for over a year. The deed of settlement was finally signed on 2 November 2016.

The claimants argued that in the period between 2011 and the initialling of the deed in June 2015, MAI lost its mandate to represent the Ahuriri hapū in settlement negotiations. They claimed that the MAI komiti failed to comply with the terms of its constitution and deed of mandate, and failed to adequately engage and report to claimants during the settlement process. In particular, they were concerned about:

- the holding of elections for the MAI komiti;
- financial reporting at annual general meetings; and
- engagement over the PSGE model.

1. The Wai 2573 claimants are listed later in the chapter.



Map 2: The Ahuriri purchase (1851) and Te Whanganui a Orotu (Napier Inner Harbour)

Further, they alleged that the Crown breached its Treaty obligations by failing to sufficiently monitor MAI's mandate and by accepting the ratification results in the face of the many alleged flaws with the process.

The Crown denied these claims. The Crown submitted that it took reasonable steps to address the concerns of Ahuriri hapū regarding the safety of MAI's mandate. In the Crown's view, the ongoing recognition of the mandate was appropriate, and the Crown's actions throughout the settlement process were consistent with its obligations under the Treaty of Waitangi.

For the convenience of readers, we provide a short timeline of major events for future reference.

Date	Event
2009	Ahuriri hapū established MAI.
2010	The Crown accepted MAI's mandate and signed terms of negotiation.
September 2011 – February 2013	MAI dysfunctional. Negotiations were suspended.
December 2013	An agreement in principle was signed. MAI obtained a \$500,000 overdraft from the BNZ.
June 2015	The Crown and MAI initialled a deed of settlement.
July–August 2015	A ratification vote and hui were held.
September 2015	The Office of Treaty Settlements recommended that the ratification be rerun.
November 2015	Colin Carruthers QC reviewed the ratification process.
December 2015	The Crown asked MAI to verify the whakapapa of special voters and MAI held a late AGM.
January 2016	MAI declined 150 registration applications. Colin Carruthers QC reviewed that process and 106 special votes were disqualified.
March 2016	MAI held an SGM to present audited accounts.
May, June 2016	Sir John Clarke conducted facilitation hui.
September 2016	MAI established the Mana Ahuriri Trust.
October 2016	The Crown approved the ratification results. Members of Ngāti Pārau filed the Wai 2573 claim. Members of Ngāti Tū and Ngāi Te Ruruku filed the Wai 2574 claim.
November 2016	The Crown and Mana Ahuriri trustees signed the deed of settlement.

Table 1.1: Mana Ahuriri timeline

1.1.2 The settlement background

The interests of the seven hapū represented by MAI stretch from Napier inland to the Kāweka Ranges. Piriniha Prentice, chair of the Mana Ahuriri Trust, quoted from the MAI constitution in his evidence:

The Hapū form a group of interconnected hapū within Hawke's Bay with strong whakapapa ties, a shared history, and an affiliation both before and after the arrival of Kahungunu, and are a large natural grouping.

While maintaining distinct identities, these Hapū are naturally connected through their shared rohe and their ancestral connections and whakapapa to varying degrees . . .

The Hapū are neighbouring hapū; between themselves they share common boundaries. In addition, prior to the Napier earthquake, they shared a taonga of immense value, Te Whanganui a Orotu (the Napier Inner Harbour).

The Hapū are also connected by a common history involving the actions of the Crown. In particular, the Ahuriri Purchase in 1851 (which affected the customary interests of all the Hapū in relation to their lands and Te Whanganui-a-Orotu).²

Since the 1980s, the Ahuriri hapū have worked closely together to progress their common claims against the Crown. The first of their claims to be heard related to their shared taonga, Te Whanganui a Orotu, the Napier Inner Harbour (also known as the Ahuriri Lagoon). The hapū established a working group in March 1988 called Te Whangaroa ki Kahungunu Incorporated Society to advance their claims in relation to this taonga.³ The Crown's assertion of ownership and control over Te Whanganui a Orotu had resulted in a long history of grievance, petitions, and complaints to the Crown over many decades. The Tribunal heard this claim (Wai 55) in 1993 and 1994, and issued its report in 1995.⁴

Following this report, the Tribunal held a district inquiry into the Mōhaka ki Ahuriri claims, which included the Mōhaka–Waikare umbrella raupatu claim (Wai 299), the Ahuriri Purchase claim (Wai 400), the Waiohiki claim (Wai 168), and the Napier Hospital claim (Wai 692). The vast 265,000-acre Ahuriri purchase, conducted by the Crown in 1851, was a particular grievance for all the Ahuriri hapū (see map 2).⁵ For Ngāti Pārau, a specific Waiohiki lands claim was filed in 1990 (see map 3). It concerned 'five principal areas of land: the former Waiohiki reserve; the Otatara and Hikurangi Pā sites; the Waitanoa block; Meeanee sections 19 and 20; and that area of the Tūtaekuri River within the claimants' rohe'.⁶ Ngāti Pārau's tipuna, Tareha Te Moananui, was the principal rangatira of Ahuriri, and he lived at Pā Whakairo (near the current Waiohiki Marae). The Mōhaka ki Ahuriri Tribunal explained that 'Ngāti Pārau today includes a large number of the descendants of Tareha and their marae is at Waiohiki'.⁷

The Waiohiki claim was heard alongside the others in the district inquiry. In addition to the shared grievances about the Ahuriri purchase and other alienations, the Tribunal found that the Crown breached the principles of the Treaty in its acquisition of Waiohiki lands.⁸ The Tribunal recommended that the Waiohiki grievances should be 'specifically addressed within a broader Ahuriri–Heretaunga settlement, since the Waiohiki claim so clearly belongs within this context'.⁹

Following the release of *The Mōhaka ki Ahuriri Report*, the Ahuriri Claimant Group (representatives of the Wai 55, Wai 168, Wai 400, and Wai 692 claimant

2. Piriniha Prentice, affidavit, 28 November 2016 (doc A6), pp 2–3; 'Constitution and Rules of Mana Ahuriri Incorporated' (Wellington: Kensington Swan, [2009]), pp 21–22 (doc A18(a)(i), pp 66–67)

3. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, 2nd ed (Wellington: GP Publications, 1997), p 4

4. Ibid, p 6

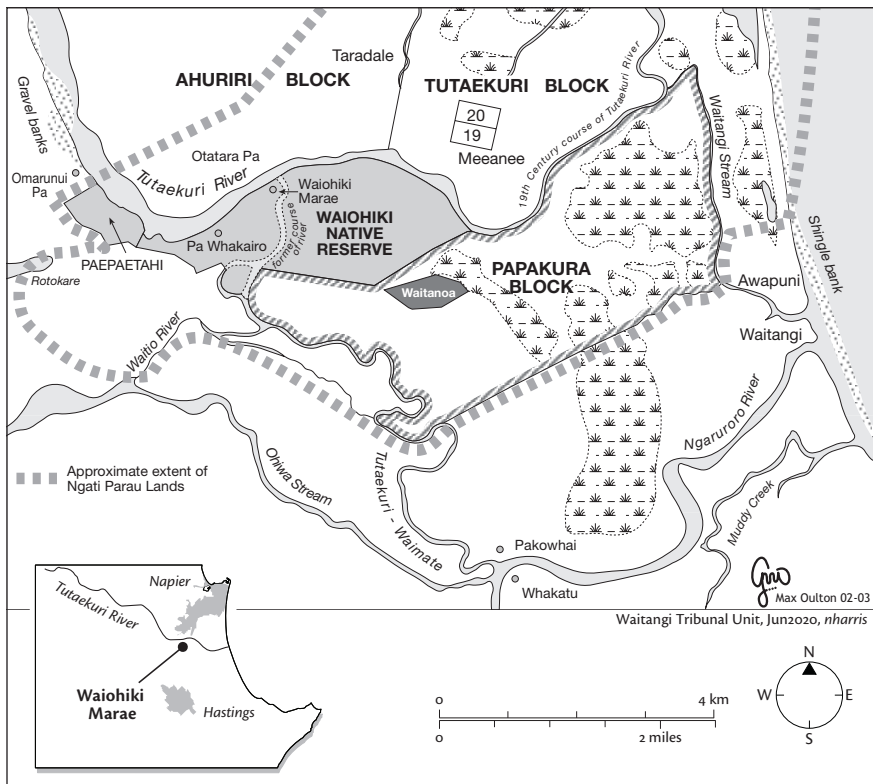
5. Waitangi Tribunal, *The Mōhaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, pp xxiii, 85

6. Ibid, vol 2, p 541

7. Ibid

8. Ibid, p 572

9. Ibid, p 702



Map 3: Ngāti Pārau lands as mapped in the Mōhaka ki Ahuriri inquiry

committees) came together with other representatives to discuss how to handle settlement negotiations. Ngāti Hineuru had established an incorporation, as had members of Ngāti Tū and Ngāi Te Ruruku (Maungaharuru–Tangitū Incorporated). All these groups held hui from 2006 to 2008. They discussed how to advance their claims (some of which were shared by various combinations of groups) and how to minimise overlapping claim issues. They saw the importance of doing this before entering the mandating phase.¹⁰

Ngāti Tū and Ngāi Te Ruruku shared areas and claims with the other Ahuriri hapū, especially the claim in respect of Te Whanganui a Orotu, but also had areas and claim issues exclusive of the others. Importantly, Maungaharuru–Tangitū and the Ahuriri Claimant Group agreed that it would be ‘more constructive and reflective’ of their close relationship if the shared claim issues were to be settled by one group, the Ahuriri Claimant Group. This would keep the hapū together ‘in terms

10. Tania Hopmans, affidavit, November 2016 (doc A5), pp 4–5; ‘Constitution and Rules of Mana Ahuriri Incorporated’, p 22 (doc A18(a)(i), p 68)

1.1.3

of the taonga [Te Whanganui a Orotu], its people and the potential redress.’¹¹ Tania Hopmans, who gave evidence in support of the claimants, told us: ‘The kaumātua in particular, did not want to see the assets relating to the Whanga carved up between the hapū, rather, they preferred to keep it together for the benefit of all the hapū.’¹²

The Crown formally accepted the Ahuriri Claimant Group in 2008 as a ‘large natural grouping’ for the purposes of negotiations. In April 2009, the Ahuriri Claimant Group established an incorporated society as the ‘most practical, transparent, and accountable means’ of negotiating the settlement. This was followed by a mandating process and postal vote, after which the Crown recognised MAI’s mandate in January 2010.¹³

The ‘underlying agreement’ with Maungaharuru–Tangitū was that MAI would negotiate all the claims of Ngāti Pārau, Ngāti Hinepare, Ngāti Māhu, Ngāti Matepū, and Ngāi Tāwhao. In addition, MAI would negotiate on behalf of all seven hapū (including Ngāti Tū and Ngāi Te Ruruku) on the Te Whanganui a Orotu claim and the historical aspects of the Napier Hospital claim.¹⁴ This meant that all of the other claim issues for Ngāti Tū and Ngāi Te Ruruku would be settled by Maungaharuru–Tangitū. Both large natural groupings would negotiate particular aspects of the Ahuriri Purchase and Mōhaka–Waikare confiscation claims.¹⁵

In order to minimise difficulties, the three mandated bodies signed a memorandum of understanding in February 2010. Under this memorandum, MAI undertook to consult with Maungaharuru–Tangitū on ‘key documents, decisions, and stages in the negotiation process that are likely to be material to the outcome of the negotiation of the Shared Interests.’¹⁶ According to Tania Hopmans, the premise of the agreement was that Maungaharuru–Tangitū would have ‘input into protecting the interests of the hapū it represented.’¹⁷ This is important because some of the issues covered in this report were ascribed by the Crown to ‘resentment’ and ‘jostling’ between MAI and Maungaharuru–Tangitū.¹⁸

1.1.3 Two applications for urgency

On 26 October 2016, members of Ngāti Pārau filed the Wai 2573 claim. They were followed by members of Ngāti Tū, and Ngāi Te Ruruku, who filed the Wai 2574 claim with the Tribunal on 28 October. Both claims were accompanied by applications for an urgent hearing. Their claims were broadly summarised as follows:

11. Hopmans, affidavit (doc A5), p 5

12. Ibid

13. Mana Ahuriri Incorporated, ‘Deed of Mandate’, October 2009, p 4 (doc A18(a)(i), p 4); Piriniha Prentice, brief of evidence, 21 November 2018 (doc A16), p 3

14. Mana Ahuriri Incorporated, ‘Deed of Mandate’, p 7 (doc A18(a)(i), p 7)

15. Mana Ahuriri Incorporated, Maungaharuru–Tangitū Incorporated, and Ngāti Hineuru Incorporated, memorandum of understanding, [February 2010], pp 5, 7 (doc A4(a), pp 51, 53)

16. Ibid, p 6 (p 52)

17. Hopmans, affidavit (doc A5), p 5

18. Warren Fraser, answers to written Tribunal questions, [April 2019] (doc A18(d)), p 2

- a. [Mana Ahuriri Incorporated] has not maintained its mandate and the Crown has neither acknowledged nor addressed this. Specifically, the Crown has failed to:
 - i. Address [Mana Ahuriri Incorporated's] non-compliance with its Constitution;
 - ii. Address the applicants' concerns regarding the ratification process for the Deed [of Settlement; and]
 - iii. Address the fact that three hapū have now withdrawn their support from [Mana Ahuriri Incorporated].
- b. The Deed of Settlement is inadequate as elements of the Deed, including the Historical Account, Crown Acknowledgements and Statements of Association do not accurately reflect the views and interests of Ngāti Pārau, Ngāti Tū and Ngāi Te Ruruku.¹⁹

In terms of non-compliance with MAI's constitution, the claimants argued that the MAI komiti had failed to hold elections or provide audited accounts at annual general meetings (AGMs), both of which were necessary for maintenance of the mandate. The failure to hold elections meant that the three hapū were not properly represented on the komiti, and – so it was alleged – therefore had inadequate input into the deed of settlement. Further, the claimants asserted that MAI's failure to present accounts included a failure to disclose a \$500,000 loan taken out with the BNZ. In terms of the ratification process, the claimants argued that MAI had disallowed a significant number of special votes, which distorted the degree of support for the deed of settlement and PSGE. In their view, the Crown ought not to have relied on the results as sufficient to accept the ratification and sign the deed.²⁰

The Crown and counsel for Mana Ahuriri denied these allegations. The Crown argued that the elections issue had been resolved by facilitation hui, which had occurred in 2016 between the ratification vote and the signing of the deed. The facilitation hui were held in good faith and allowed all concerns to be addressed. Further, the Crown argued that MAI had presented all the overdue accounts in 2016, and that there was no impropriety or issue with the accounts once presented. Both the Crown and counsel for Mana Ahuriri denied that the BNZ loan had any relevance. In the view of both of those parties, the claimant hapū did have opportunity to be represented (and were represented) on the MAI komiti. In terms of the ratification process, the Crown argued that 106 special votes were invalidated because those individuals had simply been ineligible to vote. In the Crown's view, it took all reasonable steps to ensure that the ratification process was sound, and the Ministers' acceptance of the ratification result was appropriate.²¹

On 9 March 2017, the deputy chairperson granted an urgent hearing, stating that 'it is almost inevitable that if the Crown settles with a body that does not

19. Judge Patrick Savage, decision concerning applications for urgent hearing, 9 March 2017 (paper 2.5.5), p 3

20. Ibid, pp 3–4, 6–7

21. Ibid, pp 4–7

Ngāti Pārau Concerns about the Historical Account and Other Matters

Although the issues about the historical account are not the subject of this urgent inquiry, it is helpful for background purposes to provide a brief outline of those issues. Every deed of settlement includes a Crown apology, Crown acknowledgements of Treaty breaches, and a negotiated historical account. The latter represents an agreed position of the Crown and claimants on historical grievances. These historical accounts are an integral part of Treaty settlement negotiations and usually involve compromises on both sides. In respect of the Mana Ahuriri deed, Ngāti Pārau were concerned in particular with the 'failure of the Historical Account and Crown acknowledgements sections to appropriately reflect the motives and actions of Ngāti Pārau tipuna in the battle at Ōmarunui'.¹

The battle of Ōmarunui was part of the so-called 'one day war'. In 1866, a group of Pai Marire (including some Ngāti Hineuru) came to Hawke's Bay and settled first at Pētane and then at Ōmarunui, inland from Napier and close to Pā Whakairo. The inhabitants of Ōmarunui evacuated to Pā Whakairo. The Pai Marire rangatira denied that they had any aggressive intentions, and there were efforts at diplomacy by the Pai Marire leaders, some Ahuriri rangatira, and the Crown. But on 12 October 1866, the Crown's 'general agent' on the East Coast, Donald McLean, sent an ultimatum requiring the Pai Marire to surrender within one hour or face attack. A large Crown force attacked Ōmarunui the same day, supported by Māori forces under allied rangatira Tareha and Renata Kawepo. Later in the day, a Crown force also attacked a smaller group of Pai Marire near Pētane. More than 30 defenders were killed in these attacks and many were taken prisoner and sent to imprisonment on the Chatham Islands. The latter included nine members of Ahuriri hapū Ngāti Matepū and seven of Ngāti Tū. The Mōhaka ki Ahuriri Tribunal found the Crown's attacks to be a breach of Treaty principles.²

1. Matthew Mullany, affidavit, 31 October 2016 (doc A1), p 3

2. Waitangi Tribunal, *The Mōhaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, pp 168–220

hold mandate then significant and irreversible prejudice will be caused'.²² He also stated that the Tribunal appointed to hear the claim should consider the following question:

Is the Crown in breach of the principles of the Treaty of Waitangi and thereby causing or likely to cause prejudice to a group of Māori of whom the claimants are

22. Judge Patrick Savage, decision concerning applications for urgent hearing, 9 March 2017 (paper 2.5.5), p 13

According to the Ngāti Pārau claimants, the deed's account of the battle 'gives the wrong impression that the Ngāti Pārau rangatira were part of the Crown'. Rather, Ngāti Pārau were 'primarily concerned with maintaining their own lands and securing their own autonomy and control and thus stand apart from the Crown and its own actions and motivations'. The historical account failed to explain the 'context and dynamics of the time', and therefore portrayed the involvement of Ngāti Pārau rangatira 'incorrectly and, in our view, in a negative light'.³

We make no comment on this Ngāti Pārau perspective of the battle of Ōmarunui or about the accuracy of the historical account in the deed of settlement. We simply note that these concerns were one of the driving forces in the claimants' challenge to the settlement in 2016, and reinforced the view of Ngāti Pārau leaders that they had not been adequately represented on the MAI komiti.

In addition to the historical account, the claimants raised some 'discrete' concerns about cultural sites covered by the settlement, including the 'co-management of Otarara Pā and Tūtaekuri awa'.⁴ For example, Matthew Mullany stated that Ngāti Pārau had had the relationship with the Department of Conservation in respect of Otarara Pā prior to the settlement, but the deed would make MAT the primary contact instead.⁵ Piri Prentice responded by pointing to MAT's 'draft framework of an engagement protocol', under which the trustees would remind the Crown and councils that consultation must still occur with 'duly appointed hapū representatives'.⁶ Although referred to at the hearing, these matters were not pursued as part of the urgent inquiry.

3. Matthew Mullany, affidavit, 15 December 2016 (doc A8), pp 11–12

4. Mullany, affidavit (doc A1), pp 4–5

5. Matthew Mullany, under examination by claimant counsel, East Pier Hotel, Napier, 18 February 2019 (transcript 4.1.1, p 117)

6. Piriniha Prentice, under cross-examination by Crown counsel, East Pier Hotel, Napier, 18 February 2019 (transcript 4.1.1, pp 259–260); Mana Ahuriri Trust, 'Draft Framework of an Engagement Proposal', printout, August 2018 (doc A16(a), p 145)

members by proceeding to settle in terms of the Deed because MAI [Mana Ahuriri Incorporated] have not established or maintained a proper mandate?²³

Although the deputy chairperson envisaged an inquiry focused on the mandate issue alone, our urgent inquiry has also considered the claimants' allegations about the ratification process. Ultimately, the two issues were interwoven, the ratification

23. Ibid

vote was relevant to whether mandate had been retained, and all parties made full submissions on both issues.

We have not, however, inquired into matters to do with the contents of the deed of settlement and its historical account. While the Ngāti Pārau claimants still take issue with the historical account, the greater concern for them is the mandate.

1.1.4 Discussions and mediation

On 17 March 2017, counsel filed a joint memorandum advising that the parties were in discussions to determine whether it was possible to agree a way forward without proceeding to a Tribunal hearing.²⁴ This was followed by a joint memorandum on 22 June 2017, asking for Tribunal-led mediation under clauses 9A–9C of the second schedule of the Treaty of Waitangi Act 1975.²⁵ Those clauses enable the Tribunal to refer claims to any Tribunal member (or anyone else) for mediation. The mediators' responsibility is to use 'best endeavours to bring about a settlement of that claim.'²⁶

Sir Hirini Moko Mead and Ron Crosby were appointed as mediators. They convened mediation sessions on 15 November and 11 December 2017. Parties originally sought to hold a third mediation session in 2018 but eventually advised the Tribunal that they were continuing with private discussions to resolve the claims. These discussions were ongoing over the next several months. By September 2018, Ngāti Tū and Ngāi Te Ruruku claimants (Wai 2574) had reached an agreement in principle with the Crown to resolve their claim issues but Ngāti Pārau (Wai 2573) wished to proceed to hearing.²⁷

Tania Hopmans, who is a trustee of Maungaharuru–Tangitū, explained that Ngāti Tū and Ngāi Te Ruruku reached agreement with the Crown on matters to do with the statements of association and the historical account in the MAI deed of settlement. Although the Crown and Mana Ahuriri did not agree to amend the deed itself, the Crown agreed to a 'complementary record which describes those statements of association and historical account from our point of view'.²⁸ Ms Hopmans noted that, for her two hapū, it was the history and not the mandate that mattered most, and therefore they had prioritised what was most important to them in reaching agreement with the Crown.²⁹

24. Matanuku Mahuika, Geoffrey Melvin, and Mark von Dadelszen, joint memorandum concerning status of discussions between parties, 17 March 2017 (paper 3.1.21)

25. Matanuku Mahuika, Geoffrey Melvin, and Mark von Dadelszen, joint memorandum concerning mediation, 22 June 2017 (paper 3.1.25)

26. Treaty of Waitangi Act 1975, sch 2, cl 9B

27. Tā Hirini Moko Mead and Ronald Crosby, 'Report by Mediators Tā Hirini Moko Mead and Ronald David Crosby', 19 October 2018 (paper 2.8.1); Chief Judge Wilson Isaac, memorandum granting leave for counsel memoranda to be added to record and directing parties to file joint memorandum, 28 September 2018 (paper 2.5.22)

28. Tania Hopmans, under examination by claimant counsel, East Pier Hotel, Napier, 19 February 2019 (transcript 4.1.1, p 133)

29. Ibid (pp 133–134)

The Wai 2574 claimants agreed that their evidence should remain on the record in support of the Wai 2573 claim.³⁰

1.1.5 The urgent hearing

Following the decision of the Ngāti Pārau claimants to continue with the urgent hearing, further evidence was filed in November and December 2018 by the Crown, Mana Ahuriri, and the claimants. The urgent hearing was then held on 18 to 20 February 2019 in Napier (at East Pier Hotel), with Chief Judge Isaac as the presiding officer and Dr Grant Phillipson, Dr Monty Soutar, and Prue Kapua as panel members.

On the last day of the hearing, counsel for Mana Ahuriri advised that his clients had a proposal to put to the Ngāti Pārau claimants which might resolve matters between the parties without the need for a Tribunal report. We discuss this proposal and the claimants' response in some detail in chapter 4 (see section 4.4.2). Suffice to say here that the proposal was not accepted. Closing submissions were then filed in May and June 2019.

1.1.6 The parties to this inquiry

1.1.6.1 The claimants

The named claimants for Wai 2573 are: Matthew Mullany; Taape Tareha-O'Reilly; Hera Taukamo; Jenny McIlroy; Laurence O'Reilly; Te Kaha Hawaikirangi; Hinewai Hawaikirangi; Riripeti Te Koha Mutunga; and Te Koha Tareha.³¹

Matthew Mullany and Tania Hopmans gave evidence on behalf of the claimants, and Jenny McIlroy also filed an affidavit but was not heard. Shayne Walker, general manager of the Maungaharuru–Tangitū Trust, was unable to appear in person at the hearing. Tania Hopmans confirmed and adopted his evidence for the purpose of answering questions at the hearing.³² In addition, the briefs of Charmaine Butler and Trevor Taurima for Wai 2574 were part of the evidence for this urgent inquiry.

The claimants were represented by Matanuku Mahuika and Mawewai Tukapua of Kahui Legal.

During the period covered by this report, the seven Ahuriri hapū were 'claimants' during their negotiations with the Crown (and still are until their claims are settled). In this report, we distinguish in our terminology between the Ngāti Pārau claimants in this urgent inquiry (referred to as 'the claimants') and the broader claimant community (commonly referred to as 'the Ahuriri claimant community').

1.1.6.2 The Crown

The Office of Treaty Settlements (OTS) was the primary Crown agency involved in this claim, but by the time of our hearing OTS had been subsumed within Te

30. Matanuku Mahuika, memorandum concerning evidence, 24 September 2018 (paper 3.1.46)

31. Riripeti Te Koha Mutunga, Te Koha Tareha, Taape Tareha-O'Reilly, Hera Taukamo, Jenny McIlroy, Laurence O'Reilly, Te Kaha Hawaikirangi, Hinewai Hawaikirangi, and Matthew Mullany, statement of claim (Wai 2573), 26 October 2016 (claim 1.1.1), p 2

32. Tania Hopmans, affidavit, 13 February 2019 (doc A4(b))

1.1.6.3

Arawhiti, the Office for Māori Crown Relations. At the urgent hearing, Warren Fraser, a regional director at Te Arawhiti, gave evidence on behalf of the Crown. Mr Fraser assumed responsibility for the Ahuriri settlement negotiations in 2017 and was not personally involved in the events covered by this report.

Other Crown officials also filed briefs of evidence at the time of the urgency application proceedings in 2016–17:

- ▶ Juliet Robinson, OTS deputy director responsible for the Mana Ahuriri negotiations at that time;
- ▶ Michael Macky (OTS principal historian), who provided evidence about issues relating to the historical account; and
- ▶ Susan van Daatselaar (OTS principal adviser), who supplied information about emails between OTS and Matthew Mullany in November and December 2015.

Geoffrey Melvin and Mihiata Pirini of the Crown Law Office appeared for the Crown.

1.1.6.3 *Mana Ahuriri*

The Mana Ahuriri Trust is the PSGE for the Ahuriri settlement. It was established on 24 September 2016, shortly before the deed of settlement was signed on 2 November 2016. The mandated entity, MAI, was supposed to be wound up once the settlement was completed, but it has remained in existence for the purpose of dealing with the claims. Under the terms of the settlement, the members of the MAI komiti became the first trustees of the Mana Ahuriri Trust (MAT). The komiti and the trustees are mostly the same people, therefore, with the exception that an election was held for two trustee positions in 2017. One of the claimants, Matthew Mullany, was at that point elected an MAT trustee but he is not an MAI komiti member.

MAI has been an interested party from the beginning of this process, but MAT was also granted the same status on 15 June 2018.³³ MAI was represented by Mark von Dadelszen and Jodi Lett until mid-2018, when Leo Watson became counsel for both MAI and MAT (referred to collectively as Mana Ahuriri).

Piriniha Tuturu Prentice, chair of the Mana Ahuriri Trust, gave evidence on behalf of Mana Ahuriri.

1.1.7 The representative role of the named claimants

During the urgency application proceedings, the Crown submitted that the final results of the ratification vote showed high support for MAI among those who voted (76 per cent in favour of the deed and 71 per cent in favour of the PSGE). The Crown also argued that the applicants had ‘failed to demonstrate that they command any wider support for the claims beyond those named in the statements of claim’. Counsel for Mana Ahuriri supported the Crown’s submissions, and emphasised that ‘the Deed of Mandate was endorsed by a 98.8% majority of

33. Chief Judge Wilson Isaac, memorandum granting Mana Ahuriri Trust interested party status, 15 June 2018 (paper 2.5.17)

those who voted in 2009.³⁴ The Ngāti Pārau claimants advised that they had been authorised to represent the hapū on these matters at hui-a-hapū. The named Wai 2574 claimants were all trustees of Maungaharuru–Tangitū, with the exception of Bevan Taylor, who was chair of the Kāhui Kaumātua of Maungaharuru–Tangitū. Their trust, they explained, had a representative role for Ngāti Tū and Ngāi Te Ruruku. Further, the claimants argued that the mandate had been lost, and they challenged the validity of the ratification results.³⁵

At that stage, the deputy chairperson's view was that MAI had failed to answer the claimants' allegations that the mandate had been lost. He did not specifically address the issue of support for the claimants among the three hapū on whose behalf the claims had been filed.³⁶

As discussed above, the Wai 2574 claimants agreed to settle with the Crown following mediation and private discussions between the parties. We do not need, therefore, to consider the representativeness of the Maungaharuru–Tangitū trustees to raise issues on behalf of Ngāti Tū and Ngāi Te Ruruku in this particular inquiry (where the mandate had been given to MAI).

By the time of our urgent hearing in 2019, Mana Ahuriri continued to argue that the named Wai 2573 claimants did not have support. According to counsel for Mana Ahuriri, they were 'determined individuals who are of Ngāti Pārau affiliation', but there was no evidence to show that they were 'representative' of the hapū. No minutes or notices had been produced for hui-a-hapū.³⁷

The Crown's position had changed. Crown counsel submitted:

In its response to the application for urgency, the Crown noted – properly, it is submitted – that the claimants had not demonstrated the degree of support they had for their claim, beyond themselves. In its substantive response to the claim, the Crown has not sought to question the extent to which the claimants represent Ngāti Pārau generally. Instead, the Crown's focus in the inquiry has been squarely on the issues the claimants raise. For the purpose of the inquiry, the Crown accepts that the claimants speak for a portion of Ngāti Pārau which has concerns about MAI's mandate. It remains unclear, however, how widely amongst Ngāti Pārau those concerns are held. The Crown's view is that there is also a portion of Ngāti Pārau that supports the Ahuriri Hapū settlement.³⁸

Crown counsel did not specify the evidence relied upon for there being a 'portion of Ngāti Pārau that supports the Ahuriri Hapū settlement', but presumably they continued to rely on the ratification results (which are discussed in chapter 3).

According to the evidence of Matthew Mullany, the named claimants do not 'hold a formal representative capacity for Ngāti Pārau (as our hapū does not have a

34. Judge Patrick Savage, decision concerning applications for urgent hearing, 9 March 2017 (paper 2.5.5), p 9

35. Ibid, pp 6, 8–9

36. Ibid, pp 12–13

37. Leo Watson, closing submissions of MAI and MAT, 30 May 2019 (paper 3.3.5), p 9

38. Geoffrey Melvin, closing submissions of Crown, 31 May 2019 (paper 3.3.6), pp 3–4

formal legal entity as such).³⁹ Instead, Mr Mullany explained that there was a hui-a-hapū at Waiohiki Marae on 3 August 2014. This hui appointed Laurence O'Reilly and Hinewai Hawaikirangi to 'represent Ngāti Pārau's concerns' in respect of the settlement negotiations.⁴⁰ Following that hui, Mr O'Reilly and Ms Hawaikirangi were responsible for raising those concerns with the Crown throughout 2015.⁴¹ Another hui-a-hapū was held at Waiohiki Marae on 11 October 2015, at which Matthew Mullany, Mr O'Reilly, Ms Hawaikirangi, and other named claimants were 'nominated . . . to raise Ngāti Pārau's concerns with the Settlement'.⁴²

Although the claimants did not provide minutes from these hui, Jenny McIlroy, the chair of the Waiohiki Marae Committee, confirmed that the hui-a-hapū occurred, and that these people had been appointed to raise the concerns of the hapū in respect of the negotiations. Ms McIlroy also provided an email which she had sent to Laurence O'Reilly following the August 2014 hui, confirming to 'Mr O'Reilly that the hapū has given him and Ms Hawaikirangi mandate[,] and I emphasise[d] to Mr O'Reilly the importance of communication with the hapū'.⁴³

The claimants have continued to hold hui-a-hapū at Waiohiki Marae. Following the receipt of Mana Ahuriri's proposal in February 2019, two hui-a-hapū were held to consider and decide a response (on 28 February and 7 March 2019).⁴⁴

Having reviewed all the evidence and submissions in this inquiry, we are satisfied that the Wai 2573 claimants have been tasked by hui-a-hapū at the Ngāti Pārau marae, Waiohiki, to raise the concerns of the hapū (including to prosecute the claim).

1.2 TREATY PRINCIPLES

In this section, we discuss the principles of the Treaty of Waitangi that are relevant to the present inquiry. The Tribunal has previously issued a number of reports on mandate claims but all of those reports dealt with an earlier phase of the Crown's negotiations process: the decision whether or not to accept the mandate of a claimant body to negotiate. This inquiry is the first time that the Tribunal has been asked to consider whether a mandated entity has *lost* its mandate during the later stage of the negotiations. One focus of this report, therefore, is the system

39. Matthew Mullany, affidavit, 31 October 2016 (doc A1), p 2

40. Matthew Mullany, affidavit, 15 December 2016 (doc A8), p 3

41. Laurence O'Reilly and Hinewai Hawaikirangi to Minister for Treaty of Waitangi Negotiations, 10 April 2015 (doc A1(a), pp 1–2); Minister for Treaty of Waitangi Negotiations to Hinewai Hawaikirangi and Laurence O'Reilly, 7 May 2015 (doc A1(a), pp 3–4); Minister for Treaty of Waitangi Negotiations to Hinewai Hawaikirangi and Laurence O'Reilly, 5 August 2015 (doc A1(a), pp 6–8); Hinewai Hawaikirangi, Laurence O'Reilly, and Te Kaha Hawaikirangi to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 28 October 2015 (doc A1(a), pp 34–35); Hinewai Hawaikirangi, Laurence O'Reilly, Te Kaha Hawaikirangi, and Matthew Mullany to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 15 December 2015 (doc A1(a), pp 38–39)

42. Mullany, affidavit (doc A1), p 2

43. Jenny McIlroy, affidavit, 8 December 2016 (doc A9), p 2

44. Matanuku Mahuika, Kahui Legal, to Leo Watson, 12 March 2019 (doc A22(b)), p 1

by which the Crown monitors the retention of mandate, and assures itself that a negotiating body still has the support of the people to complete the settlement. We have also been asked to inquire into the ratification process for the first time, by which a claimant group ratifies a deed of settlement and the Crown decides whether there is sufficient support to accept the ratification and proceed to sign the deed.

Nonetheless, our view is that the principles of the Treaty, as articulated in the previous Tribunal mandate reports, apply to all aspects of the negotiations process, including retaining as well as obtaining a mandate.

1.2.1 Partnership

As the Tribunal and the courts have stated many times, the Treaty of Waitangi signified a partnership between Māori and the Crown. The Treaty partners are required to act fairly and reasonably towards one another, and with the utmost good faith.⁴⁵ The Crown's decision-making must be adequately informed by the views of its Treaty partner. Previous Tribunal reports have noted that in hand with informed decision-making, consultation with Māori is often necessary. As the Tribunal stated in *The Tarawera Forest Report*, a 'vital facet of the Treaty partnership is that the Crown will make informed decisions' on matters affecting Māori interests, and 'will need to consult with Māori in certain situations'.⁴⁶

In particular, the principle of partnership carries with it a duty of active protection (which is discussed later) and an obligation to respect and protect the tino rangatiratanga or autonomy of Māori groups. This is especially the case in Treaty settlement processes, because those processes are intended to restore the health of the Treaty relationship after centuries of Crown breaches in its conduct towards iwi and hapū. In order for this restoration to occur, the negotiations and settlement must be supported and ratified by the claimant community, and the Crown has a Treaty obligation to ensure that it is settling the claims and restoring the partnership on a sound foundation of consent.

1.2.2 Māori autonomy and the guarantee of tino rangatiratanga

In a recent report, the National Freshwater Tribunal stated:

Article 2 of the Treaty guaranteed to Māori that their tino rangatiratanga would be respected and protected. The principle of Māori autonomy or self-government (or *mana motuhake*, as it is often called) arises from this guarantee of their pre-existing ability to 'govern themselves as they had for centuries, to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants.' As the Tribunal found in the *Taranaki Report*, autonomy now 'describes the right of indigenes to constitutional status as first peoples, and their rights to manage their own policy, resources, and affairs, within minimum

45. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report* (Wellington: Legislation Direct, 2018), p 21

46. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 26

parameters necessary for the proper operation of the State'. We have already noted above that overlaps between Crown and Māori authority are to be resolved in partnership.⁴⁷

Māori autonomy includes the right of Māori groups to choose their own representative structures for the purpose of negotiating with the Crown. As the Taranaki Tribunal found, the Crown's desire to destroy Māori autonomy was 'the single thread that most illuminates the historical fabric of Māori and Pākehā contact' in the nineteenth century. One aspect of that was the Crown's refusal to 'support or develop customary institutions to provide a negotiating face' in Crown–Māori transactions.⁴⁸ A key development of that era, therefore, was the decision by many iwi and hapū to adapt the elected committee structure for their own purposes, to serve as a collective mechanism for the exercise of tino rangatiratanga and the management of tribal resources. They also soon adopted the 'komiti' as a means of political organisation, both within iwi and on a pan-iwi basis. Māori consistently tried to get Crown recognition and acceptance of such entities through the Māori councils of the 1870s, the 'Native committees' of the 1880s, and the Māori parliament (Kotahitanga) and papatupu committees in the 1890s and early 1900s.⁴⁹

In the twentieth century, Māori leaders won Crown support for Māori councils as local government bodies (temporarily) in the Māori Councils Act 1900. Also, following the Second World War, the Crown attempted to corral the tribal committees of the Māori War Effort Organisation into the committee structure of the Māori Welfare Act 1962. This ultimately led to the creation of the New Zealand Māori Council.⁵⁰ In respect of tribal land management, the Crown reluctantly agreed to land incorporations in 1894. But it was really the second half of the century that saw land trusts and incorporations flourish under the Māori Affairs Act 1953 and Te Ture Whenua Māori Act 1993.⁵¹ By the time the Treaty settlements process began, and the Crown sought certainty that a body of tribal leaders had a mandate to settle on behalf of their people, incorporations and trusts were well known to Māori leaders and communities as vehicles for the exercise of rangatiratanga. Many groups have chosen some form of trust, incorporation, or council to represent them in Treaty negotiations.

In the mandating process for Mana Ahuriri, as discussed above, the Crown

47. Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Claims: Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), p 17

48. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), pp 5–6

49. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, chs 3, 4, 6, 7; Donald Loveridge, *Māori Land Councils and Māori Land Boards: A Historical Overview, 1900–52*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996)

50. See Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wellington: Legislation Direct, 2015), ch 3. The Māori Welfare Act 1962 was later renamed the Māori Community Development Act.

51. See Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 774–795

agreed to accept the Ahuriri hapū as a 'large natural grouping' in whatever configuration they chose. It also agreed to accept an incorporated society as a body mandated by the Ahuriri hapū to negotiate the settlement on their behalf. In mandate matters, previous Tribunals have found that representativeness and accountability are key requirements for all mandated bodies.⁵² Those matters are essential for any structure – whether pan-hapū, hapū-based, or iwi – to remain representative of the group on whose behalf they purport to negotiate. The Crown is required to monitor such matters as part of its obligation to protect the autonomy and tino rangatiratanga of iwi and hapū, and to ensure that a Treaty settlement will be durable and will restore a Treaty-based relationship between the Crown and the settling iwi or hapū.

1.2.3 Active protection

The principle of active protection has been the subject of comment by the courts and the Waitangi Tribunal on many occasions. The Te Tau Ihu Tribunal summarised the principle of active protection in this way:

The Crown's duty to protect Māori rights and interests arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure the Treaty's acceptance, and the principles of partnership and reciprocity. The duty is, in the view of the Court of Appeal, 'not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable', and the Crown's responsibilities are 'analogous to fiduciary duties.' Active protection requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.⁵³

The duty of active protection includes the 'active protection of rangatiratanga',⁵⁴ in this case the tino rangatiratanga of the Ahuriri hapū who gave their mandate to MAI. It also includes the protection of MAI's ability to exercise its authority in the settlement process on behalf of its constituent hapū.

The Ngāpuhi Mandate Tribunal quoted from the OTS *Red Book* on the key issue of representation:

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. A strong mandate protects all

52. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Wellington: Legislation Direct, 2015), pp 78–84; Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), pp 111–114; Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report* (Wellington: Legislation Direct, 2017), ch 4

53. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4

54. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1235

the parties to the settlement process: the Crown, the mandated representatives and the claimant group that is represented.⁵⁵

The Tribunal went on to say:

It is fundamental to the durability and fairness of any settlement that it is negotiated between the Crown and the accepted representatives of the group whose claims are to be settled. A mandating process is the means through which prospective representatives of claimant groups secure the proof of their authority and ability to negotiate with the Crown on behalf of those groups. The Crown's recognition of a mandate confirms that those prospective representatives have provided this proof.⁵⁶

For that reason, the Crown requires mandated entities to provide quarterly reports that show how they have been reporting back to the claimant group and maintaining their mandate to negotiate. The Te Arawa Mandate Tribunal observed that the Crown was obliged 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'.⁵⁷ This statement is equally applicable in the context of mandate maintenance. In particular, previous Tribunal reports have stressed the need for mandated structures or entities to demonstrate 'representivity and accountability'. Requirements for the claimant community to be able to elect and replace mandated representatives are a crucial element in maintaining accountability to the hapū.⁵⁸ Specified lines of accountability between the mandated representatives and the claimant community are also essential, and those include the holding of AGMs, financial reporting, and provision for claimant input and decision-making at key stages of the settlement process.

In the case of Mana Ahuriri, the deed of mandate stated that the intention in establishing an incorporation was to establish a 'practical, transparent, and accountable' mechanism for negotiating the settlement. The constitution and deed of mandate required regular elections (how regular is debated) and presentation of audited accounts at AGMs. The line of accountability between the komiti and the people was to be established through 'reporting and communication processes', including AGMs, marae meetings, hapū and whānau hui, and pānui. In addition, the MAI komiti would hold hui at 'key milestones' of the negotiations process.⁵⁹

The principle of active protection required the Crown to monitor and confirm the representivity and accountability of MAI to its people throughout the negotiations, otherwise the mandate would be put at risk and the durability of the settlement would equally be at risk. We recognise that the Crown is in a difficult

55. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report*, p 20

56. *Ibid*, p 20

57. Waitangi Tribunal, *The Te Arawa Mandate Report*, p 111

58. See, for example, Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report*, pp 73–84; Waitangi Tribunal, *The Te Arawa Mandate Report*, pp 110–113

59. Mana Ahuriri Incorporated, 'Deed of Mandate', pp 4, 11, 14–15 (doc A18(a)(i), pp 4, 11, 14–15)

position in carrying out this Treaty obligation – it cannot be too heavy-handed in its dealing with the mandated representatives of its Treaty partner, but at the same time the Crown’s own mandate and settlement standards require officials and Ministers to be certain that the mandated body still represents the claimant community. In terms of elections, financial reporting, and engagement and consultation with the claimant community, even the most light-handed approach requires the Crown to ‘monitor the staging of those events (ie did they occur?)’⁶⁰

As at 2016, when the Crown decided to sign the Mana Ahuriri deed of settlement, leaders from three of the seven hapū argued that MAI had lost its mandate to complete the settlement. Ultimately, only one of those hapū has chosen to continue with the claim, for reasons discussed earlier.

We apply these Treaty principles to the consideration of the Wai 2573 claim in the following chapters.

1.3 THE STRUCTURE OF THIS REPORT

In chapter 2, we consider the period leading up to the initialling of the deed of settlement in June 2015. We examine the representation and accountability issues raised by the claimants: the holding of elections; the holding of AGMs; the presentation of audited accounts at AGMs; the reporting of the BNZ loan; and engagement between the MAI komiti and the Ahuriri claimant community on settlement matters. We also examine the Crown’s monitoring of the mandate and its acts or omissions in respect of these representation and accountability issues. We do not make final conclusions or findings in this chapter, however, because all of these issues continued into the ratification period. Indeed, the Crown did not find out about most of them until after it initialled the deed in June 2015.

In chapter 3, we examine the ratification process and results, and the Crown’s decision to accept those results in September 2016, followed by the signing of the deed of settlement on 2 November. We also assess the Crown’s acts or omissions in respect of the representation and accountability issues, which were raised with it by the Ngāti Pārau claimants and others during the period from October 2015 to October 2016.

We make our final conclusions, findings, and recommendations in chapter 4. Those findings and recommendations were first made in December 2019, when we released a pre-publication version of this report for the assistance of parties.

60. Fraser, answers to written Tribunal questions (doc A18(d)), p 5

CHAPTER 2

THE MAINTENANCE PERIOD, 2010–15

2.1 INTRODUCTION**2.1.1 What this chapter is about**

In this chapter, we consider the first part of the issue before the Tribunal: whether the Crown took appropriate and sufficient action in monitoring and ensuring the safety of Mana Ahuriri Incorporated's mandate between 2010 and 2015. During this period Mana Ahuriri Incorporated (MAI) underwent a period of dysfunction from late 2011 to early 2013. This was caused by a split within the komiti, including a dispute as to the validity of appointments at an inquorate Special General Meeting in September 2011. Negotiations were suspended until February 2013. After that, MAI negotiated intensively with the Crown for over two years, including signing an agreement in principle on 19 December 2013. The period under discussion ends with the initialling of the deed of settlement on 19 June 2015. The key issues to be discussed in this chapter are the alleged failures of MAI to hold elections and comply with its engagement and financial reporting accountabilities. We also discuss the Crown's alleged failure to sufficiently monitor whether MAI had maintained its mandate. The Crown admitted that some mistakes had been made, but argued that MAI retained its mandate nonetheless.

According to the claimants, MAI was successful in obtaining a mandate from Ngāti Pārau and the other Ahuriri hapū in 2009. MAI held this mandate until it became dysfunctional (late 2011 to early 2013). Claimant counsel argued that MAI ceased to be accountable to the Ahuriri hapū from 2012 onwards:

From 2012 and onwards, the level of engagement by MAI and its approach to its accountabilities changed. In particular MAI breached [its] Constitution and DOM [deed of mandate] by:

- (a) failing to hold elections in each of the 2012, 2014 and 2015 years and only holding elections for two positions in 2013;
- (b) failing to present audited financial statements to AGMs in the 2013, 2014, and 2015 years; and
- (c) failing to hold AGMs in the prescribed period (for example in 2015, an SGM was held on 11 December 2015 rather than prior to 30 September as required by its constitution).¹

1. Matanuku Mahuika and Matewai Tukapua, closing submissions of Wai 2573 claimants, 2 May 2019 (paper 3.3.4), pp 6–7

Annual and Special General Meetings of MAI, 2011–16

March 2011	AGM held. Postal ballot held, 26 February to 29 March 2011, which approved a resolution to defer the 2011 elections.
September 2011	SGM held. Elections for whole MAI komiti (as required in the MAI constitution) conducted by postal ballot.
March 2012	AGM held. No elections. MAI komiti dysfunctional at this point.
March 2013	No AGM held.
September 2013	SGM held. Elections held for two komiti positions. Audited accounts for 2011–12 presented.
March 2014	SGM held. No elections. No accounts presented. Resolution passed to move AGMs from March to September.
September 2014	No AGM held.
September 2015	No AGM held.
December 2015	Late AGM (technically an SGM) held. No elections. Resolution not to hold elections is unanimously rejected. Unaudited accounts presented for 2013–14 and 2014–15.
March 2016	SGM is held to present audited accounts for 2012–13, 2013–14, and 2014–15. No elections.
September 2016	No AGM held.

To assist the reader, we have summarised the sequence of annual general meetings (AGMs), special general meetings (SGMs), the holding of elections, and the presentation of accounts in the sidebar above.

Maintenance of a mandate is key to the durability of settlements. The Crown needs to be sure that a mandated entity has the authority to negotiate the deed of settlement on behalf of the claimant community. Conversely, the claimant group needs to feel assured that the mandated entity is representing them fairly and in good faith. *Ka Tika ā Muri, Ka Tika ā Mua*, or the *Red Book* as it is commonly called, states that a mandate may be lost if the representatives ‘lose the confidence of the wider claimant group.’² Thus the burden is on the mandated representatives to ‘maintain’ their mandate.

2. 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*

The Crown's responsibilities to monitor the mandate do not end with the initialing of the deed of settlement. In this case, the issues in respect of elections and accountability continued into the ratification period. For that reason, we do not make final conclusions or findings in this chapter. Rather, we provide our view on the substance of the issues in this period. Our final conclusions and findings are made in chapter 4, after we discuss the ratification process and the Crown's decision to sign the deed of settlement in chapter 3.

2.1.2 What were the Crown's monitoring obligations?

The *Red Book* states that the Crown's recognition of a mandate is 'conditional on the representatives retaining their mandate to represent the claimant group throughout negotiations'.³ The Crown, consequently, is expected to monitor the safety of the mandate to ensure the entity is fulfilling its obligations to the claimant community. Further, the *Red Book* states that keeping claimant groups fully informed about the negotiations process is a key responsibility of the Crown and the claimants' mandated representatives.⁴ Otherwise, mandates can be lost if the wider group is not kept informed of progress and issues in the negotiations.⁵

The Crown's principal tool to monitor the accountability and conduct of the mandated entity is the quarterly mandate maintenance report. These reports require the mandated body to provide information on steps taken to engage with and account to the claimant community. The key details to be included in mandate maintenance reports are:

- ▶ details and copies of any correspondence in relation to the mandate of mandated representatives;
- ▶ details of any relevant hui; including details of any hui-a-marae/hui-a-hapū at which information about progress in negotiations was discussed; and
- ▶ copies of any relevant pānui to the claimant community.⁶

The Crown prefers that mandate maintenance reports also provide a summary of actions taken during the period, any issues that have arisen, and the steps that the mandated entity took to respond to or resolve those issues. The Crown considers the reports and responds, outlining any issues that might require remediation or further action from the mandated entity to ensure that its mandate remains secure.⁷

The Crown can also obtain information about mandate maintenance through other sources, including correspondence from the members of the claimant community. On this issue, the Crown's position was ambivalent. On the one hand, the

Crown (Wellington: Office of Treaty Settlements, 2015), p 47. We refer to this in further footnotes as *Red Book*.

3. *Ibid*, p 46

4. *Ibid*, p 18

5. *Ibid*, p 27

6. Warren Fraser, brief of evidence, 8 February 2019 (doc A18), p 8

7. *Ibid*

2.1.3

Crown has limited knowledge of its own in terms of what is happening in a claimant community. On the other hand, the Crown's usual response is to direct those with a concern to raise it internally with the mandated body. We saw this tension in the Crown's position throughout this inquiry.

2.1.3 What were MAI's obligations in the mandate maintenance period?

The *Red Book* sets out a checklist of the essential accountabilities of mandated representatives. In particular it notes:

- ▶ the requirements of the representatives to report back to the claimant group and the ability of the claimant group to have input into key decisions;
- ▶ the requirement of the mandated representatives to inform claimants when any milestone is reached in negotiation;
- ▶ the requirement of the mandated representatives to inform claimants;
- ▶ the right of the members of the claimant group to take away authority from some or all of the mandated representatives or replace them; and
- ▶ the duty of the mandated representatives to present the draft Deed of Settlement to the members of the claimant group for their consideration before entering into any binding agreements with the Crown.⁸

As part of its mandate obligations, MAI was required to remain accountable to its claimant community through regular and transparent engagement and reporting. MAI's deed of mandate stipulated:

The Komiti will have the ultimate responsibility for the negotiations, including ensuring that reporting and communication processes are adhered to. The Komiti will report to the Ahuriri Hapū about progress with settlement negotiations through its annual general meeting . . .⁹

The deed of mandate further stated that the komiti would hold hui at key points through the negotiation process and would respond to requests from members to meet.¹⁰ In the absence of hui, the komiti would keep the claimant community informed through pānui and its website.¹¹

The requirements of the deed of mandate and MAI's constitution in respect of elections and financial accountability are discussed in the body of the chapter.

We begin our discussion with the issue of elections, and whether MAI remained representative of the claimant community, a crucial point in maintaining a mandate.

8. *Red Book*, p 45

9. Mana Ahuriri Incorporated, 'Deed of Mandate', October 2009, p 14 (doc A18(a)(i), p 14)

10. *Ibid*, p 15

11. Mahuika and Tukapua, closing submissions of Wai 2573 claimants (paper 3.3.4), p 11

2.2 DID MAI FULFIL ITS RESPONSIBILITIES TO HOLD ELECTIONS?

2.2.1 Introduction

In this section, our focus is on the claim that MAI's decision not to hold elections in the years 2012 and 2014 to 2016, as required under its constitution and deed of mandate, was a crucial factor in MAI's loss of mandate. The claimants further alleged that the Crown failed to monitor the mandate effectively and allowed this situation to occur, to the prejudice of Ngāti Pārau.

The Crown, on the other hand, argued that MAI's interpretation of its constitution was reasonable, and that the claimants acted inconsistently with the Treaty partnership in not raising this matter with the Crown in time for it to be addressed before the ratification. The Crown also argued that most mandate disputes are internal matters and should be dealt with internally, without the Crown's involvement.

Counsel for Mana Ahuriri agreed with the Crown that MAI's interpretation of its constitution was reasonable, and that it maintained its mandate to negotiate the settlement with the Crown.

2.2.2 What did the MAI constitution and deed of mandate require?

According to both the Crown and counsel for Mana Ahuriri, there were internal inconsistencies in the MAI constitution, which created significant ambiguity around election requirements. Crown counsel submitted:

From its establishment until ratification of the draft deed of settlement, MAI held Komiti elections once every two years: in 2009 (for four positions in addition to the five founding Komiti members), 2011 (for all positions) and 2013 (for two positions). In doing so, it applied a reasonable interpretation of its internally inconsistent and ambiguous election rules.¹²

A deed of mandate is required to 'endorse a structure by which the mandated representatives are accountable to the wider claimant group'.¹³ The deed of mandate set out the five members of the 'Founding Komiti', and noted that four more members were elected in July 2009 to ensure that 'the new legal entity was truly representative of the Ahuriri Hapū'.¹⁴ The deed of mandate also set out what was supposed to happen following the establishment of the founding komiti:

Each of these Komiti members will be required to stand for re-election at the annual general meeting of Mana Ahuriri held in 2011. (Clause 9.2 of the Mana Ahuriri Constitution provides that the Founding Komiti will hold office until 31 March 2011, and clause 11.1 provides that elected Komiti members are elected for a term of two

12. Geoffrey Melvin, closing submissions of Crown, 31 May 2019 (paper 3.3.6), p 17

13. *Red Book*, p 44

14. Mana Ahuriri Incorporated, 'Deed of Mandate', p 11 (doc A18(a)(i), p 11)

Clause	Constitution
7.1(d)	Annual general meeting: An annual general meeting of the Society shall be held no later than 31 March* in each financial year. The meeting shall take the form of a hui at a place to be determined by the Komiti. The business of the annual General Meeting shall be: . . . d) Subject to Rule 9.2 (the Founding Komiti), to biannually elect the Komiti members for the ensuing term.
9.2	The founding Komiti: The founding Komiti will consist of the five representatives nominated by the Ahuriri Claimant Group who filed claims in the Waitangi Tribunal Inquiry and have subsequently been mandated by the Hapū in various hui to represent the Hapū in Treaty claims and related matters for the Hapū. These persons are named below and are therefore appointed by these Rules and will take office upon registration of the Society: Komiti: Heitia Hiha, Piriniha Prentice, Roderick Nigel Kerry Hadfield, Barry Wilson and Ranui Toatoa. These Komiti members shall hold office until 31 March 2011.
11.1	Term: Subject to Rule 9.2 (Founding Komiti), the Komiti shall be elected for a term of two years at a general meeting of the Society.
11.2(a)	Rotation: The following provisions shall apply to the retirement of Komiti members on and from the annual general meeting held in the year 2011: a) At each annual general meeting a minimum of two Komiti members shall retire from the Komiti.
11.2(b)	b) The Komiti members to retire at each annual general meeting shall be: i) first, all those Komiti members who have been appointed to the Komiti under Rule 13.1 (Casual vacancies); and ii) second, to the extent there are fewer than two Komiti members who qualify under paragraph (i) above, those Komiti members who have been longest in office since their last election, but as between persons who became Komiti members on the same day, those to retire shall (unless they otherwise agree among themselves) be determined by lot.
11.3	Holding of positions: Those elected to the Komiti shall . . . hold their positions until death, resignation, removal or until their successors are elected in accordance with these Rules, whichever shall occur first.
11.6	Election of the Komiti: The election of the Komiti members shall take place during the year in which the then current terms expire by method of ballot at a general meeting.

* The date of the AGM was moved from 30 March to 30 September by the decision of a special general meeting on 25 March 2014.

Table 2.1: Relevant clauses of the MA1 constitution relating to election and rotation

years). Following this, the Constitution provides for the rotation of Komiti members, with a minimum of two Komiti members being required to retire at each annual general meeting from 2011 (clause 11.2). Komiti members are elected on a pan-Hapū basis, that is, they are not elected to represent particular Hapū.¹⁵

15. Mana Ahuriri Incorporated, 'Deed of Mandate', p 11 (doc A18(a)(i), p 11)

The clauses related to the election cycle in MAI's constitution are set out in table 2.1 on page 26.

Counsel for Mana Ahuriri submitted that an election at each AGM would have conflicted with rule 7.1(d) and rule 11.1, both of which specified elections every two years.¹⁶ This was based on the assumption that rule 7.1(d) mistakenly said 'biannually' instead of 'biennially', and that the 'full Komiti has a term of two years, (noting the other clauses detail how rotation of Komiti members is achieved). At each election, a new full "Komiti" will be constituted for a period of two years.'¹⁷ Further, counsel continued, the 'logical interpretation is that clause 11.2(a) should refer to "at each *alternate* annual general meeting" (emphasis in original)'.¹⁸

Counsel for Mana Ahuriri argued, therefore, that the retirement of two komiti members in 2013 was a reasonable interpretation. This was on the basis of a two-year election cycle following the election of the full komiti in 2011. Additionally, counsel continued, no objections were raised to this interpretation either in 2013 or at the 2014 AGM where, again, no election took place.¹⁹ Indeed, counsel maintained, MAI's practical, two-year interpretation was not questioned by any of its claimant community until after the ratification vote in 2015.²⁰ Counsel for Mana Ahuriri concluded: 'Komiti members were not resisting any call for elections; it was a unanimously accepted two-year cycle approach, with a minimum of two retiring at each alternate AGM.'²¹

The Crown supported Mana Ahuriri's interpretation, submitting that 'the provisions in MAI's constitution are genuinely ambiguous with respect to the frequency with which Komiti elections were to occur after 2011'.²² The Crown argued that the stipulation of a yearly election in the deed of mandate conflicted with the requirement of clause 11.1 in the constitution (two-year terms). Crown counsel also supported MAI's two-year interpretation as reasonable in the circumstances. One such circumstance was the two-year gap between the establishment of MAI and the 2011 election.²³ The Crown also followed MAI's proposition that clause 11.2 should be taken as requiring elections to be held 'at each *relevant* annual general meeting'; 'that is, at each AGM at which an election is required to occur (emphasis added)'.²⁴ During the hearing, however, the Crown admitted that the alleged drafting error ('biannually') could have been intended to say 'annually' rather than 'biennially'.²⁵

Disagreement also existed between the parties on the issue of how the clauses about komiti rotation should be interpreted. The parties agreed that the rules

16. Leo Watson, closing submissions of MAI and MAT, 30 May 2019 (paper 3.3.5), p 17

17. Ibid

18. Ibid

19. Ibid, pp 17–18

20. Ibid, p 3

21. Ibid, p 18

22. Melvin, closing submissions of Crown (paper 3.3.6), p 9

23. Ibid, p 10

24. Ibid

25. Geoffrey Melvin, under questioning by Tribunal, East Pier Hotel, Napier, 20 February 2019 (transcript 4.1.1, p 298)

2.2.3

required a ‘minimum’ of two members to stand down. The claimants argued that this was to occur at every AGM.²⁶ The Crown, however, submitted that ‘those Komiti members who held office from the time of MAI’s establishment gradually stand down two-by-two (at a minimum) over the course of successive elections’. This was to ensure continuity in the leadership of the settlement negotiations.²⁷

The claimants disagreed with both MAI and the Crown, arguing that they had ‘sought to retrospectively re-interpret the election requirements’.²⁸ In the claimants’ view, the MAI constitution was in fact clear on the issue of the election cycle, and the arguments about ambiguity were not supported by the evidence. Claimant counsel submitted that clause 11.1 made it clear the komiti would be elected for two years, and clause 11.2 unambiguously required that elections for MAI would be held yearly. This was consistent with the deed of mandate’s statement that elections would be held annually after 2011.²⁹ In terms of rotation, claimant counsel again argued that the meaning of the constitution was clear. Each komiti member was elected for two years, after which they would have to stand down (but could stand for re-election). Two or more komiti members were required to stand down at each AGM, ‘depend[ing] on the number of members who had reached their 2 year term of office’.³⁰ The main consequence of this not happening, the claimants said, was that the majority of the MAI komiti members never faced an election after 2011, which in turn had consequences in terms of representivity and retention of the mandate.

2.2.3 MAI’s legal opinions

All parties agreed that an election was due in 2015. As we discuss in more detail in chapter 3, MAI decided that it did not need to hold an AGM or elections in that year because the signing of the deed of settlement was imminent. In November 2015, the komiti sought a legal opinion on the matter. Again, we deal with the substance of that opinion in chapter 3, as it was mainly relevant to the question of whether an AGM and elections should have been held in September 2015. But we note here that the author of the legal opinion, Mark von Dadelszen, placed significant emphasis on rule 11.2(b)(ii) of the constitution. He noted that komiti members held office for two years but that that requirement was subject to rule 11.2(b) (see table 2.1). He commented that ‘the result of agreement or the drawing of lots under that Rule could mean that a Komiti member serves a longer than two year term’.³¹ Therefore, as a combination of rules 11.2 –11.6, ‘the terms of Komiti members’ did not ‘expire

26. Mahuika and Tukapua, closing submissions of Wai 2573 claimants (paper 3.3.4), p 9

27. Melvin, closing submissions of Crown (paper 3.3.6), p 11

28. Mahuika and Tukapua, closing submissions of Wai 2573 claimants (paper 3.3.4), p 8

29. Ibid, pp 7–8

30. Matanuku Mahuika and Matewai Tukapua, submissions in reply to submissions 3.35 and 3.36, 19 June 2019 (paper 3.3.7), pp 3–4

31. Mark von Dadelszen to Mana Ahuriri Incorporated, 16 November 2015, p 2 (doc A6(a), p 71)

two years to the day after their election.’³² Mr von Dadelszen did not, however, comment on MAI’s practice of only holding elections every second year.³³

In March 2016, as a result of protest from members of the Ahuriri claimant community at the failure to hold elections in 2015 or 2016, MAI sought a second legal opinion. This opinion was focused on the issue of the 2015 election (which is addressed in chapter 3) but we note that Mr von Dadelszen repeated the point that rule 11.2(b)(ii) allowed komiti members who were due to retire an option of agreeing on who should retire or holding lots to determine that matter, with only a minimum of two needing to actually step down. A komiti member could therefore serve for longer than two years. But the focus was on the imminent dissolution of the incorporation, which – in Mr von Dadelszen’s opinion – justified not holding an election and relying on rule 11.3, which held that members continued in office until replaced by elected successors.³⁴

Both of these legal opinions were clear that a minimum of two komiti members had to retire at every AGM. Neither opinion discussed the use of ‘biannual’ in rule 7.1.

2.2.4 Our view of the election requirements

The MAI constitution has not been the subject of discussion by a court, so we do not have an authoritative judgment to rely on in assessing the constitution or its relationship to the deed of mandate.

First, we agree that the use of the word ‘biannually’ in rule 7.1 was an error. No one suggested that elections were supposed to be held twice a year. It is unlikely, however, that someone who intended to write ‘annually’ would write ‘biannually’. In our view, it is much more likely that the word ‘biennially’ was meant. Rule 7.1(d) stated that one function of the AGM, subject to the provisions relating to the founding komiti, was to ‘biannually elect the Komiti members *for the ensuing term*’ (emphasis added).³⁵ This should read ‘biennially’ (every two years).

Secondly, rule 11.1 stated that the komiti ‘shall be elected for a term of two years at a general meeting of the Society’. This was in keeping with the holding of biennial elections but it specified that those elections could take place at ‘a general meeting’. This meant that the komiti elections could occur at either an AGM or a Special General Meeting (SGM). Rule 11.6 stated that the ‘election of the Komiti shall take place *during the year in which the then current terms expire* by method of [a] ballot at a general meeting’ (emphasis added).³⁶ In combination, rules 7.1(d), 11.1, and 11.6 meant that there would be biennial komiti elections at a general meeting, once the current two-year terms had expired.

32. Ibid, p 3 (p 72)

33. Mahuika and Tukapua, closing submissions of Wai 2573 claimants (paper 3.3.4), p 9

34. Mark von Dadelszen to Mana Ahuriri Incorporated, 8 March 2016, pp 4–5 (doc A6(a), pp 91–92)

35. ‘Constitution and Rules of Mana Ahuriri Incorporated’ (Wellington: Kensington Swan, [2009]), p 9 (doc A18(a)(i), p 55)

36. Ibid, p 13 (p 59)

Thirdly, the constitution did not only provide for biennial komiti elections (rules 7.1(d), 11.1, and 11.6), but also for *rotation* of komiti members. This was to ensure that the whole komiti did not go out of office at a single election, which would have created difficulties for the negotiations. Thus, following the elections for the whole komiti in 2011, rule 11.2 provided for rotation, whereby at each AGM ‘a minimum of two Komiti members shall retire from the Komiti’.³⁷ We know that this was not an error, which would have required – as argued by Mana Ahuriri and the Crown – the interpolation of words such as ‘at each alternate’ AGM or ‘at each relevant’ AGM. The deed of mandate confirmed that annual rotation was supposed to occur after 2011. The deed stated that ‘the Constitution provides for the rotation of Komiti members, with a minimum of two Komiti members being required to retire at each annual general meeting from 2011 (clause 11.2)’.³⁸ This statement in the deed referred to the relevant rule in the constitution. In our view, this shows that there was a deliberate intention for the rotation of MAI komiti members at each AGM after 2011.

The provision for rotation included a requirement that at least two members retire annually. In respect of which members should retire, rule 11.2(b)(i) stated that any casual members appointed to fill vacancies must retire. If there were fewer than two casual members, then rule 11.2(b)(ii) stated that those who had been ‘longest in office since their last election’ would retire. Within that category, komiti members could either agree among themselves as to which would step down or else it would be ‘determined by lot’.³⁹

What does all this mean? In our view, it means that the komiti was elected in 2011 for a term of two years. Once that term expired in 2013, rules 7.1(d), 11.1, and 11.6 required that an election be held at a general meeting. In 2012, however, the rotation requirements meant that at least two of those members ought to have stepped down to ensure that the entire komiti could not be replaced in 2013. We accept that this would have meant that two members of the komiti would not have served a two-year term. Following 2012, however, the cycle would allow all members to serve two-year terms, with at least two retiring every year and biennial komiti elections for the others.

Mr von Dadelszen posited that the constitution allowed komiti members to serve terms of more than two years but that opinion was given in special circumstances; the belief that MAI was about to be wound up, and therefore the existing komiti continued in office under rule 11.3 without the need for elections. We address that point in chapter 3.

Crown counsel also relied on rule 4.5 of the MAI constitution. They submitted that MAI had ‘come to an interpretation of its constitution that it considered was

37. ‘Constitution and Rules of Mana Ahuriri Incorporated’, p 13 (doc A18(a)(i), p 59)

38. Mana Ahuriri Incorporated, ‘Deed of Mandate’, p 11 (doc A18(a)(i), p 11)

39. ‘Constitution and Rules of Mana Ahuriri Incorporated’, p 13 (doc A18(a)(i)), p 59)

correct in the circumstances’, and that ‘MAI’s rules provide that, when faced with questions of interpretation, it is for the MAI Komiti to determine the matter, and its decision is final’.⁴⁰ Rule 4.5 stated:

Komiti to determine: Should a question at any time arise which is not provided for in these Rules, or should any doubt exist as to the interpretation of these Rules, or should any other matter arise pertaining to the Society, its property or interests, the Komiti shall determine the matter, whose decision shall be final.⁴¹

Mr von Dadelszen’s opinion was that the courts would probably hold this rule to be ‘contrary to public policy and void’. It must, he said, be interpreted as ‘more in the nature of a “slip rule” providing for situations not foreseen when the constitution was adopted’.⁴² As we discuss in chapter 3, he only applied it to the komiti’s decision to hold the 2015 AGM three months late, and not to the subject of elections.

No elections were held in 2012, 2014, 2015, or 2016, prior to the signing of the deed of settlement on 2 November 2016. The 2013 election was interpreted by the MAI komiti as a rotational election, with only two members needing to retire.

No matter how the constitution is interpreted, we do not believe that the two-year term provisions could be stretched to justify three-year, four-year, or even five-year terms. Yet that is what happened in this case: komiti members were still making crucial decisions about the settlement in October 2016, even though seven out of the nine members had not faced election since 2011. As we discuss in chapter 3, the justification that MAI was about to be wound up was used to cover a 13-month period (30 September 2015 to 2 November 2016) in which negotiations continued and no elections were held.

Further, we do not accept that any reasonable interpretation of the constitution could avoid the requirement for rotation. Mr von Dadelszen’s opinions were clear that the retirement of at least two komiti members was required at each AGM after 2011.⁴³

In order to accept the position of the Crown and Mana Ahuriri, we would have to accept that, after 2011, an election for two komiti members every two years was a reasonable interpretation of the MAI constitution. We do not accept that such an interpretation was reasonable in the circumstances.

40. Melvin, closing submissions of Crown (paper 3.3.6), p 14

41. ‘Constitution and Rules of Mana Ahuriri Incorporated’, p 6 (doc A18(a)(i), p 52)

42. Mark von Dadelszen to Mana Ahuriri Incorporated, 8 March 2016, pp 2–3 (doc A6(a), pp 89–90). This opinion relied on the following cases: *Lee v Showmen’s Guild of Great Britain* [1952] 1 All ER 1175 at 1181 (CA); *Baker v Jones* (1954) 2 All ER 553 at 558; *Tucker v Auckland Racing Club* [1956] NZLR 1 at 12–13.

43. Mark von Dadelszen to Mana Ahuriri Incorporated, 16 November 2015, pp 2–3 (doc A6(a), pp 71–72); Mark von Dadelszen to Mana Ahuriri Incorporated, 8 March 2016, p 4 (doc A6(a), p 91)

2.2.5 The Crown's monitoring of the mandate: elections

In our inquiry, the Crown acknowledged that there were flaws in its monitoring of the MAI mandate. Mr Fraser stated that 'the Crown should monitor the holding of elections in accordance with a mandated entity's constitution'.⁴⁴ He added:

There is room for the Crown to monitor key accountability mechanisms more systematically. New practices have recently been adopted to ensure:

- ▶ negotiations teams are aware of the rules of the constitution of the mandated entity regarding the frequency of elections, the holding of AGMs and the presentation of accounts so that they can monitor compliance with those requirements more actively; and
- ▶ a legal review of the mandated entity governance document is conducted to ensure it is fit for purpose.⁴⁵

In its closing submissions, the Crown acknowledged the following flaws in its practice:

- ▶ the Crown's failure to identify inconsistencies in the MAI constitution when it reviewed that document;
- ▶ the Crown's failure to identify the inconsistencies between the deed of mandate and MAI's practice in respect of elections; and
- ▶ the Crown's failure to monitor MAI's constitutional requirements and assure its compliance with the key accountability measures in that constitution.⁴⁶

Crown counsel also submitted that no process was perfect, and that the need for these matters to be checked more carefully or monitored more closely was only evident in hindsight. Further, the Crown submitted that it took what action it could once the issue of elections (among others) had been raised with it in late 2015.⁴⁷ Crown counsel stated:

A salient feature of this inquiry is the claimants' failure to bring concerns to the attention of the Crown until after the ratification vote had occurred, despite having ample opportunity to do so and despite the principle of partnership requiring both Treaty partners to act reasonably towards each other. The evidence shows, however, that when the claimants raised their concerns with the Crown, the Crown took them seriously and took a range of steps to address them . . .⁴⁸

In particular, the Crown was concerned about the failure of Ngāti Pārau and others to bring the elections issue to its attention in 2012 and 2014, when it could still have taken some action prior to ratification:

44. Warren Fraser, answers to written Tribunal questions, [24 April 2019] (doc A18(d)), p 6

45. Ibid, p 6

46. Melvin, closing submissions of Crown (paper 3.3.6), pp 14, 19; see also Warren Fraser, opening oral statement, no date, p 1 (doc A19, p 17)

47. Melvin, closing submissions of Crown (paper 3.3.6), pp 18–19, 30–31

48. Ibid, p 31



Warren Fraser of Te Arawhiti giving evidence for the Crown, East Pier Hotel, Napier, 20 February 2019

In 2012 and in 2014, when the claimants say elections should have been held, no one from the claimant community raised concerns with the Crown about the failure to hold elections in those years. Rather, the claimants did not raise this issue directly with the Crown until 28 October 2015, when they wrote to the Minister for Treaty of Waitangi Negotiations.⁴⁹

In chapter 3, we address the circumstances in which the claimants raised the matter with the Minister in 2015, and the actions taken subsequently by the Crown. In this chapter we consider the Crown's question: why was the issue not raised in 2012 and 2014?

2.2.6 Why were representation and accountability issues not raised earlier?

According to the claimants, the question of elections for MAI (and MAT) is inextricably bound up with a broader issue of representation for Ngāti Pārau. The claimants did not question the fact that the Ahuriri hapū gave their mandate to MAI in 2009. Mr Prentice pointed out that the founding komiti included Nigel Hadfield of Ngāti Pārau, and that a second Ngāti Pārau member was nominated in 2009 when four additional members were added to the founding komiti. This second representative, Dave Pene, 'withdrew his nomination at the election hui'.⁵⁰ Further,

49. Ibid, p14

50. Piriniha Prentice, brief of evidence, 21 November 2018 (doc A16), p 6

a number of marae had written to confirm their support for MAI in January 2010, and Mr Hadfield had undertaken to ‘arrange for a letter to come from Waiohiki Marae, but no such letter came to hand.’⁵¹ Mr Hadfield was also appointed as one of the MAI negotiators but he resigned from the komiti in August 2010 for ‘personal reasons.’⁵²

It seems clear that Mr Hadfield’s departure from the komiti left a gap for Ngāti Pārau, and they began to raise issues about their representation in 2011. Matthew Mullany told us: ‘Had there been a Ngāti Pārau voice on the MAI Komiti throughout the settlement negotiations, and not sporadically as is set out in Mr Prentice’s brief of evidence, it is unlikely we would be in the position we are in today.’⁵³

In early 2011, Ngāti Pārau asked the MAI komiti to meet with them but the meeting had to be postponed twice.⁵⁴ Following the second postponement, Charl Hirschfeld wrote to the Minister in May 2011 on behalf of Ngāti Pārau, stating that they felt unrepresented in the negotiations, and seeking assistance as to how the ‘representative position of Ngāti Pārau [could] be better advanced in real terms in the circumstances now and leading forward into the settlement of historical claims.’⁵⁵ In the same month, Denis O’Reilly wrote to Dr Cullen, the Crown’s chief negotiator at that time, stating that ‘[c]urrently, Ngāti Pārau feel unrepresented’, noting their low numbers on the MAI register and the ‘absence of Ngāti Pārau at the negotiating table.’ He stated: ‘That this hapū should remain without a voice would be absurd in the historical context and could possibly give rise to a fresh breach of the Treaty.’⁵⁶

The meeting between the MAI komiti and Ngāti Pārau finally occurred in mid-August 2011. According to Mr Prentice, the komiti encouraged Ngāti Pārau to get registered and involved in the upcoming 2011 elections.⁵⁷ Following the meeting, Jenny McIlroy, the chairperson of the marae trustees, wrote to the MAI komiti on 29 August 2011. She advised:

We find ourselves to be numerically under-enrolled, and totally unrepresented on the Mana Ahuriri Board or in the current election process. This immediately signals a serious constitutional fault in the structure of Mana Ahuriri in that there is no mechanism to ensure hapū representation based on whakapapa and the will of each

51. Prentice, brief of evidence (doc A16), p 6

52. Ibid, p 7

53. Matthew Mullany, brief of evidence, 12 December 2018 (doc A17), p 3

54. Unknown to Michael Cullen, email, 24 June 2011 (doc A18(a)(i), p 304). The author’s name has been blanked out in the copy provided to the Tribunal.

55. Charl Hirschfeld to Chris Finlayson, Dr Michael Cullen, and Chris Tremain, [May 2011], p 2 (doc A18(a)(i), p 302). We were not supplied with the first page of this letter but the month is noted in another letter in this document bank.

56. Denis O’Reilly to Dr Michael Cullen, 25 May 2011 (doc A18(a)(i), p 305). This letter was cced to the Minister. Although the writer’s name has been blanked out in our copy, the context identifies the writer as Denis O’Reilly, husband of Taape O’Reilly.

57. Prentice, brief of evidence (doc A16), p 7; Piri Prentice to Jenny McIlroy, 14 July 2011 (doc A18(a)(i), p 298)

individual hapū. This requirement is implicit in the Treaty of Waitangi which underpins the whole process.⁵⁸

By this time, it was too late to put a Ngāti Pārau candidate forward for the September election.⁵⁹ Ngāti Pārau therefore asked for a fresh election to be called. In the meantime, they wanted a new drive for membership to occur. Hapū networks should be ‘encouraged to ensure nomination [of] representatives of their specific hapū’. Following the new election, Ngāti Pārau wanted the komiti to make amending the constitution a priority, so as to ‘ensure hapū representation’.⁶⁰

On 14 September 2011, Mr Prentice advised Ms McIlroy that the komiti had considered the issues raised by Ngāti Pārau and would put them to the new (or re-elected) komiti to review.⁶¹

The September 2011 election was conducted by postal ballot (following an earlier postal vote on postponing the election from March to September). Eight of the nine founding komiti members were re-elected.⁶² The postal vote was followed by an SGM on 23 September 2011, which was actually invalid due to the lack of a quorum. The invalid SGM spawned a period of complete dysfunction within MAI, which lasted from September 2011 to February 2013.⁶³ At the inquorate SGM, Ranui Toatoa was elected chairperson of the MAI komiti and Evelyn Ratima was elected deputy chairperson, with Barry Wilson elected treasurer. As Mr Prentice stated in 2015, this was followed by a split in the komiti for ‘some 18 months during which period MAI experienced 4 chairpersons, 3 secretaries and two committees that were unable to operate’.⁶⁴

The Crown was well aware of MAI’s problems and suspended negotiations during that period. In December 2012, the Crown’s chief negotiator, Paul Swain, was able to facilitate an agreement, which eventually led to the resumption of negotiations in February 2013.⁶⁵ It is not surprising, therefore, that the claimants did not contact the Crown about the lack of elections in 2012, given the level of dysfunction and the suspension of negotiations.

Instead, Ngāti Pārau leaders again approached the MAI komiti in July 2013, after negotiations had been resumed at the end of February. Denis O’Reilly and Taaape O’Reilly met with the komiti, stating that they had been sent to represent the hapū. Denis O’Reilly told the komiti:

58. Jenny McIlroy to Piri Prentice, 29 August 2011, p 1 (doc A18(a)(i), p 300)

59. Mana Ahuriri Incorporated, file note of meeting, 13 August 2011, p 3 (doc A18(a)(i), p 289). Nominations for the elections closed on 2 August 2011, 10 days before the meeting between MAI and Ngāti Pārau on 13 August 2011.

60. Jenny McIlroy to Piri Prentice, 29 August 2011, pp 1–2 (doc A18(a)(i), pp 300–301)

61. Piri Prentice to Jenny McIlroy, 14 September 2011 (doc A18(a)(i), p 303)

62. Cara Bennett to Mana Ahuriri Incorporated, 22 September 2011, pp 1–5 (doc A5(a), pp 310–314)

63. Mana Ahuriri Incorporated, ‘Mandate Maintenance Mana Ahuriri Incorporated (September 2011 to 6 June 2013)’, no date, pp [1]–[2] (doc A5(a), pp 293–294); Mana Ahuriri Incorporated, AGM minutes, 23 September 2011, p 1 (doc A5(a), p 307)

64. Mana Ahuriri Incorporated, AGM minutes, 11 December 2015, p 2 (doc A6(a), p 80)

65. Fraser, brief of evidence (doc A18), p 12; Melvin, closing submissions of Crown (paper 3.3.6), p 8

Ngāti Pārau does not challenge the mandate of Mana Ahuriri but what it challenges is the lack of representation, the quest is to get that representation, makes reference to Remedies Hearing – wai 55, wai 168. Reflects back to beginning of wai 55, hui with Minister Finlayson who said why not look at their Treaty Settlement possibilities to help support the re-building of their Marae, this became paramount at Tipu's Tangi, when they looked at this, they found they were not at the table with Mana Ahuriri Incorporated.

They feel if they do not get representation then they will have no option but to utilise the permission given to them by the Waitangi Tribunal in terms of the Remedies Hearing. Decision was made for Ngāti Pārau to not attend the Hui-a-hapū held at Moteo. Following Tipu's tangi [we] have been sent now to speak directly with Mana Ahuriri of representation at the table to be able to express Ngāti Pārau rangatiratanga. How can we achieve representation of Ngāti Pārau amongst this table, one simple thing, appreciate whanaungatanga, generosity where Ngāti Pārau interests will be addressed by Mana Ahuriri. If at all possible that Ngāti Pārau have a voice and [we all] move ahead as one.⁶⁶

Mr O'Reilly also referred to a ministerial visit: 'Not asking some special thing, when the Minister came they found out we had no representation, that's the Crown, clear with them [that] we do not challenge the mandate . . .'⁶⁷

As in 2011, the response from the MAI komiti to Ngāti Pārau leaders was that their hapū members should get registered and involved in MAI elections: 'Elections coming up for two people, Ngāti Pārau need to be a part of the election process in force.'⁶⁸ At the hearing, Mr Prentice stated:

[T]he opportunity has always been there for them to muster nominations from Ngāti Pārau themselves for these elections, and that wasn't done, that wasn't done. Now, I don't know, my constitution says that, as a trustee, I'm responsible for the seven hapū of Ahuriri. If the hapū like Ngāti Pārau are looking for particular representation on the board despite the constitution, then they need to go and do some work around getting a proper nomination.⁶⁹

Taape O'Reilly stood for election in the September 2013 election but was unsuccessful in obtaining one of only two positions,⁷⁰ and, of course, there were no further opportunities to elect a Ngāti Pārau representative to the MAI komiti.

The minutes from this 2013 komiti meeting were supplied to the Office of Treaty Settlements (OTS) with the omnibus 2011–13 mandate maintenance report, so the Crown was fully aware of the situation.

66. Mana Ahuriri Incorporated, board meeting minutes, 12 July 2013, p 1 (doc A6(a), p 1)

67. Ibid, pp 1–2 (pp 1–2)

68. Ibid, p 1 (p 1)

69. Piriniha Prentice, under questioning by the Tribunal, East Pier Hotel, Napier, 19 February 2019 (transcript 4.1.1, p 263)

70. Transcript 4.1.1, pp 39, 222, 227

In 2014, MAI held an SGM on 25 March at the same time as its AGM was due. At this SGM, two motions were put:

- to change the date of the AGM to September every year, to facilitate the production of audited accounts; and
- to tender for new auditors.

These motions were carried, after which Piri Prentice gave an update on the negotiations and advised members that there would be information-sharing hui about the settlement in May, June, August, and October. These would be held around the country.⁷¹ But no AGM was held in September 2014 (and therefore no elections) in the critical period leading up to the naming of the komiti members in the proposed PSGE for the ratification vote. There should have been an AGM in that month to present the accounts (the meeting had been moved for that very purpose) and to hold elections. By September 2014, the great majority of komiti members had served a three-year term and were about to start on their fourth year if no elections were held.

Unfortunately, we have not been supplied with the Crown's response to the mandate maintenance report for the relevant period. Certainly, the Crown did not take any action to require MAI to hold its AGM when the appropriate time had passed without it, or to hold elections.

Why did the claimants not raise the issue of the AGM and elections with the Crown in late 2014? By September 2014, Ngāti Pārau leaders were still raising matters with MAI, but their focus had shifted to representation on the PSGE (see section 2.4.2 below). It was not until 2015 that these leaders again approached the Crown.

We conclude, therefore, that the claimants could not reasonably have been expected to contact the Crown about the failure to hold elections in 2012, given the MAI dysfunction and the suspension of negotiations. In 2013 and 2014, Ngāti Pārau decided that matters could be resolved with MAI internally, and raised concerns directly with the komiti. Once it became clear that representational matters could not be resolved that way, Ngāti Pārau leaders approached the Crown in 2015. We accept that, as counsel for Mana Ahuriri submitted, the issue of an AGM and election in 2014 was not raised with the komiti.⁷² The fact that concerns were not raised sooner, however, does not invalidate MAI's requirement to hold elections in accordance with its constitution and deed of mandate, or the Crown's requirement to monitor this accountability mechanism to ensure that a mandate had been maintained.

We are unable to make further conclusions or findings at this point. As noted above, the claimants raised their concerns about representation and elections with the Crown in 2015. The question then becomes: what action did the Crown take? We address that question in chapter 3.

71. Mana Ahuriri Incorporated, SGM minutes, 25 March 2014, pp [1]–[5] (doc A5(a)), pp 220–224

72. Watson, closing submissions of MAI and MAT (paper 3.3.5), p18

The issue of elections was only one of the accountability issues in the claimants' argument that MAI lost its mandate. We turn next to consider financial accountabilities.

2.3 FINANCIAL ACCOUNTABILITY

2.3.1 Introduction

In addition to not holding elections, the claimants argued that MAI failed to adequately fulfil its financial accountabilities to its claimant community. The MAI constitution required the komiti to present audited accounts at each AGM, and no accounts were presented for the 2012–13, 2013–14, and 2014–15 financial years until December 2015, and *audited* accounts for those years were not presented until March 2016. Further, the claimants argued that MAI failed to disclose a \$500,000 loan to the claimant community until after the ratification vote. In the claimants' view, these failures – along with the failure to hold elections – contributed to MAI's loss of mandate, such that it did not have a mandate to ratify and complete the settlement in 2016.⁷³

Counsel for Mana Ahuriri did not address the loan issue in his closing submissions. In respect of the audited accounts, counsel submitted that 'MAI remedied deficiencies' by presenting the accounts in 2016, and 'the claimants cannot point to any prejudice arising from the late presentation of accounts.'⁷⁴ Counsel for Mana Ahuriri also stated that there is no evidence of 'financial impropriety, or lack of prudence in terms of investment or expenditure.'⁷⁵

Crown counsel also chose not to address the Bank of New Zealand (BNZ) loan in their closing submissions. In respect of the accounts, the Crown accepted that MAI did not present audited accounts for 2013 and 2014. The Crown further observed that AGMs were held in both of those years, and that the 2015 accounts were due following the ratification process.⁷⁶ As with elections, Crown counsel submitted that the members of the Ahuriri claimant community did not raise the matter with the Crown 'despite a significant opportunity to bring the default to the Crown's attention while negotiations were taking place.'⁷⁷ In any case, the Crown's view is that it took appropriate action once the issue was brought to its attention in 2015, and it is difficult to establish that any prejudice arose as a result of MAI's non-compliance.⁷⁸

73. Mahuika and Tukapua, closing submissions of Wai 2573 claimants (paper 3.3.4), pp 2, 13, 30

74. Watson, closing submissions of MAI and MAT (paper 3.3.5), pp 3, 22

75. Ibid, p 22

76. Melvin, closing submissions of Crown (paper 3.3.6), p 17

77. Ibid, p 18

78. Ibid, p 19

2.3.2 MAI's financial reporting requirements

MAI's financial accountabilities arose from its deed of mandate, its constitution, and the stipulations in the *Red Book*. Taking the latter first, the blueprint of the Crown's negotiations policies stated:

The Deed of Mandate should set out the proposed entity to hold the mandate to receive funding, and the proposed accountability arrangements for managing these funds. Only a legal entity can receive claimant funding from the Crown. Although it is the Crown's preference that a legal entity be established to receive claimant funding, this is not essential as long as the accountability of the mandated representatives for the use of claimant funding to both OTs and the wider claimant group is clear.⁷⁹

The deed of mandate therefore required 'transparent processes for claimant funding', and the *Red Book* specifically noted that a mandate could be lost 'if it is perceived that claimant funding is being managed unwisely'.⁸⁰

The MAI constitution stated that the business of an AGM included 'to receive, consider and adopt the annual financial statements certified by the Komiti as true and correct' (rule 7.1(b)) and to appoint an auditor for the next year (rule 7.1(e)).⁸¹ The treasurer's duties included the preparation of financial statements, the presentation of those statements to the komiti, and then the presentation of the statements 'duly audited' to the AGM (rule 14.4(b)). Rule 17.2 required annual financial statements to be certified by the komiti as true and correct, certified by an auditor, and presented to the AGM. Finally, rule 9.6 stated that the financial statements also had to be filed with the registrar of incorporated societies.⁸²

2.3.3 MAI's failure to present audited accounts

None of the parties disputed that MAI was obliged to present audited accounts at each AGM. Mr Prentice did not explain why MAI did not comply with this obligation for three years.⁸³

MAI received some funding assistance from OTs and the Crown Forestry Rental Trust (CFRT). Neither source of funds was sufficient to cover MAI's costs.⁸⁴ In addition, Te Puni Kōkiri provided funding for work with the claimant community on the PSGE. There appears to have been no problem from 2009 to 2011. MAI first got into financial difficulties during the period of dysfunction (September 2011 to February 2013). At the end of 2013, MAI established a credit facility of \$500,000

79. *Red Book*, p 44

80. *Ibid*, p 47

81. 'Constitution and Rules of Mana Ahuriri Incorporated', pp 8–9 (doc A18(a)(i), pp 54–55)

82. *Ibid*, pp 56, 62, 63

83. See Piriniha Prentice, affidavit, 28 November 2016 (doc A6); Prentice, brief of evidence (doc A16)

84. Prentice, affidavit (doc A6), pp 7–9

Year	Balance
2009–10 MAI (to February 2010)	(\$202) deficit
2010–11 MAI (to 31 March 2011)	\$125,779 surplus
2011–12 MAI (to 31 March 2012)	(\$47,799) deficit
2012–13 MAI (to 31 March 2013)	(\$53,738) deficit
2013–14 MAI (to 30 June 2014)	(\$239,679) deficit
2014–15 MAI (to 30 June 2015)	(\$539,479) deficit
2015–16 MAI (to 30 June 2016)	(\$686,163) deficit
2016–17 MAT (six months to 30 June 2017)	\$2,169,128 surplus

Table 2.2: Statements of financial position for MAI and MAT, 2009–17

Source: Piriniha Prentice, comp, supporting documents to document A16, November 2018 (doc A16(a)), pp 9, 23, 42, 62, 85, 104, 121, 138

with the BNZ (discussed further in the next section). MAI's first significant deficit arose in the 2011–12 and 2012–13 financial years. It was relatively stable in those two years but then rose from \$53,738 as at 31 March 2013 to \$686,163 as at June 2016 (see table 2.2).

CFRT stated in 2016 that there had been no problems with MAI's financial reporting. Darrin Sykes, secretary of the CFRT, stated:

Once the funding was released, Trust staff began actively monitoring MAI's expenditure. Rigorous milestone and financial reporting requirements were in place, which would have quickly identified any reporting issues or expenditure anomalies (if they had existed). I can confirm that MAI met these accountability requirements.⁸⁵

We have no evidence from the Crown that suggests any concerns with financial accountability to OTs for the funding provided (as required by the *Red Book*).

So why did MAI remain accountable to the Crown and CFRT but not provide financial reports to the Ahuriri claimant community for 2013, 2014, and 2015 until March 2016? It appears that the period of dysfunction resulted in the initial problem. At the December 2015 AGM, MAI was able to provide unaudited accounts for two financial years (2013–14 and 2014–15) but was not able to provide any accounts for the 2012–13 year.⁸⁶ By March 2016, however, MAI was in a position to provide audited accounts for all three financial years.⁸⁷

Prior to December 2015, MAI had last provided a financial report to its members in September 2013. There was no AGM in 2013 (which the constitution required to be held by 31 March), presumably due to the earlier dysfunction. Rather, an

85. Darrin Sykes to Terry Wilson, 24 May 2016, p [2] (doc A6(a), p 27)

86. Mana Ahuriri Incorporated, AGM minutes, 11 December 2015, p 2 (doc A6(a), p 80)

87. Prentice, brief of evidence (doc A16), p 5



Piriniha Prentice giving evidence on behalf of Mana Ahuriri Incorporated and Mana Ahuriri Trust, East Pier Hotel, Napier, 19 February 2019

SGM was held six months later, at which the audited accounts were presented. Mr Prentice explained that the accounts presented in September 2013 were for the ‘period to 31 March 2012.’⁸⁸ Thus, MAI was already a year behind in its accounts at this point. There should then have been an AGM in March 2014 but, as we explained above, that AGM did not occur either. Instead, MAI had decided to move the end of its financial year from 31 March to 30 June. This necessitated a change in AGM dates because the constitution required that the audited accounts be presented at the AGM. In March 2014, MAI held an SGM which voted to move the AGM to September. But no AGM was held in September 2014, thus the accounts for 2012–13 and 2013–14 were not presented. MAI was by now two years behind in its presentation of accounts. We have no evidence as to why an AGM was not held in September 2014, despite the SGM in March for the purpose of moving it to that date.

By September 2015, MAI had not held a regular AGM since March 2012 and was three years’ behind in its presentation of accounts. For reasons that we discuss in chapter 3, no AGM was held in that month. Eventually, a late AGM (technically an SGM) was held two and a half months later on 11 December 2015, at which unaudited accounts were presented for two years.⁸⁹

88. Ibid, pp 4–5

89. Ibid, p 5

What this means is that MAI did not report on three years' worth of accounts until after the ratification vote (which closed in late August 2015). As noted, we have no explanation for why this happened, and it appears that MAI reported properly on its finances to OTS and CFRT during that period.

All parties agreed that there is no question of any financial impropriety involved. Mr Prentice noted that all the accounts had obtained 'unqualified audits'.⁹⁰ There is also no dispute that MAI was in a 'negative equity position'. In other words, it was only a 'going concern' because of the expectation that more money would eventually be received.⁹¹ Rather the issues are accountability, confidence, and retention of mandate. Claimant counsel submitted that the lack of financial accountability meant that Ahuriri hapū were not fully informed going into the ratification vote in July and August 2015:

Although the financial statements were eventually provided at the 2016 SGM, it was by this time too late for the MAI members to act on that information. The usefulness of the financial reports as an accountability tool was therefore greatly, if not entirely, diminished. It was certainly too late by this stage to make decisions about the suitability of the MAI Komiti to continue to progress settlement related matters on behalf of the Ahuriri Hapū because the Deed of Settlement and PSGE ratification processes had already been concluded.⁹²

In terms of mandate retention, the *Red Book* made it very clear that financial accountability was a key requirement, as discussed above. We turn next to the question of the Crown's monitoring of MAI's accountability to its claimant community.

2.3.4 The Crown's monitoring of the mandate: financial accountability

The Crown was unaware that no accounts had been presented since September 2013.⁹³ Claimant counsel argued: 'The Crown's lack of awareness of these issues demonstrates the flaws in the Crown's approach to mandate maintenance'.⁹⁴ Further, the claimants argued that the Crown lacked a proper monitoring system, and confined itself solely to information reported by MAI. Claimant counsel submitted:

Had there been proper Crown monitoring in place, the Crown would have become aware of MAI's failures to hold elections and provide audited financial statements much sooner. A simple check on the Incorporated Societies website by the Crown would have shown that MAI had not uploaded its financial statements or election results.⁹⁵

90. Prentice, brief of evidence (doc A16), p 10

91. Prentice, affidavit (doc A6), p 9

92. Mahuika and Tukapua, closing submissions of Wai 2573 claimants (paper 3.3.4), p 13

93. Fraser, answers to written Tribunal questions (doc A18(d)), p 7

94. Mahuika and Tukapua, closing submissions of Wai 2573 claimants (paper 3.3.4), p 15

95. Ibid

According to Warren Fraser, it is up to the claimant community to enforce the accountability of its representatives, and to notify the Crown if there is a problem:

The Crown's day-to-day view of what is happening within a claimant community is limited, so the active engagement of the claimant community itself is an important part of mandate maintenance. Community members need to participate in engagement activities, like hui-a-hapū, and hold the mandated entity to account through its chief reporting and accountability mechanisms – the AGM, presentation of accounts and elections. While the Crown can monitor the staging of those events (ie did they occur?) it does not participate in them; it does not observe them. It is for the claimant community to confer a mandate. And in these senses there is a corresponding testing and mandate maintenance function for the claimant community to exercise.⁹⁶

We accept this argument up to a point. In terms of the Crown's responsibilities to monitor a mandate, however, the fact is that the Crown did *not* 'monitor the staging of those events (ie did they occur?)'.⁹⁷

The Crown has now changed its practice as a result of this case so that the holding of AGMs and the presentation of audited accounts will be a requirement for mandated entities to report upon. Mr Fraser explained:

New practices have recently been adopted to ensure negotiations teams are aware of the relevant rules from the governance document of the mandated entity on the frequency of elections, the holding of AGMs and the presentation of accounts so they can monitor compliance with those requirements more actively.⁹⁸

Previously, the Crown advised MAI (and other mandated entities) that their quarterly mandate reports should include an account of any correspondence relevant to the mandate, copies of pānui, and details of any relevant hui. Mandate reports also needed to include a 'short commentary' on relevant actions taken by the mandated representatives, any issues arising, and any action taken to address them.⁹⁹

2.3.5 Our view of the Crown's monitoring of financial accountability

We agree with the claimants that OTS ought to have been monitoring financial reporting, and that a quick check of the incorporated societies' website would have been possible, even if MAI did not supply the relevant information. The *Red Book* was quite explicit on the point that mandated entities must be accountable to the claimant community on financial matters. This, in turn, required the Crown to monitor MAI's compliance with its financial accountabilities.

96. Fraser, answers to written Tribunal questions (doc A18(d)), pp 4–5

97. Ibid, p 4

98. Ibid, p 7

99. Fraser, brief of evidence (doc A18), p 8; 'Key Requirements for a Mandate Maintenance Report: Information to Assist in the Preparation of Submitting a Mandate Maintenance Report to the Crown', information sheet, no date (doc A5(a), pp 291–292)

The Crown became aware of the issue after approaches from the Maungaharuru–Tangitū Trust (MTT) and the claimants in October and December 2015. The question then becomes: what action did the Crown take, and was this matter considered in the Crown's decision on whether to accept the ratification results?

We address those issues in chapter 3. It is not possible to draw final conclusions or make findings at this stage of our report.

2.3.6 The BNZ loan

According to the claimants, the failure to present audited accounts was compounded by the failure to disclose a \$500,000 loan, secured against the settlement, which had been taken out in 2013. MAI did not disclose this loan until the late AGM in December 2015. In chapter 3, we address what happened once the Crown and Ahuriri hapū became aware of the situation. In this chapter, we provide a brief account of the substance of the issues surrounding the loan.

It is not uncommon for mandated entities to have to take out loans to cover their costs.¹⁰⁰ This particular loan took the form of a \$500,000 overdraft facility, described as a '[w]orking capital facility to assist with costs Mana Ahuriri Incorporated incur in relation to the settlement process only (in excess of CFRT funding support)'. At the time it was taken out, the BNZ overdraft interest rate was 5.38 per cent. The overdraft facility was provided on the understanding that 'immediate repayment of the facility will be made upon disbursement of the proceeds of [the Treaty] Settlement, and that we [BNZ] will have recourse to all proceeds of Settlement'. The bank required the applicants to give an undertaking that they would transfer the obligation to the PSGE and 'procure that the PSGE accepts such transfer', or procure a guarantee from the PSGE that it would repay the loan.¹⁰¹

The loan was arranged by the MAI negotiators, Barry Wilson, Piri Prentice, and Joinella Maihi-Carroll, who signed an acceptance form in response to the BNZ's letter of offer on 20 December 2013. They had been authorised to arrange a BNZ overdraft at a komiti meeting in July 2013, to pay outstanding accounts amounting to \$90,719.¹⁰² During discussions with the bank, however, the negotiators 'realised that [they] needed to secure funding not just for the accounts owed then but also through to Settlement'.¹⁰³ The larger amount was authorised on 20 December through a resolution signed by five of the nine MAI komiti members. Mr Prentice explained that it was just before Christmas but they obtained the signatures of those members 'most readily available to obtain the necessary majority'.¹⁰⁴

The komiti discussed the loan at its first meeting in 2014. Tania Huata-Kupa, who had been elected to the komiti in September 2013, had not been aware of the original komiti resolution or the approval of the much larger overdraft. She raised

100. Darrin Sykes to Terry Wilson, 24 May 2016, p [2] (doc A6(a), p 27)

101. Bank of New Zealand, 'Credit Approved Letter of Offer: Mana Ahuriri Incorporated', 19 December 2013, pp 1–2, 4–5 (doc A6(a), pp 39–42)

102. Mana Ahuriri Incorporated, special meeting minutes, 29 July 2013, p 1 (doc A6(a), p 29)

103. Prentice, affidavit (doc A6), p 7

104. Ibid, p 7

the necessity to disclose the loan and how it was to be repaid. The discussion on this point was recorded in the minutes as follows:

Tania [Huata-Kupa]: The whānau need to be told what happened, Transparency, it's dangerous you are playing with whānau assets.

Piri [Prentice]: Ref to Tom Hemopo and mortgaging his home etc, never told anyone, but was his choice, he picks the time and place to tell the people.

Barry [Wilson]: The story is in the storytellers' story and its their story, trust in our tipuna, we do what needs to be done.¹⁰⁵

That concluded the discussion about the point raised in terms of disclosing the loan. These brief minutes, of course, cannot have captured the full discussion.

In any case, the fact of the loan should have become apparent to the Ahuriri claimant community at the next AGM, when MAI presented audited accounts. As noted above, this was postponed from March to September 2014 to take into account a financial year ending in June 2014. But, as also discussed, no AGM was held in September 2014, and no other SGM was held until after the ratification vote. Thus, members of the Ahuriri claimant community discovered the existence of the loan (and the fact that it would have to be paid out of the settlement) when they attended the belated AGM in December 2015. In the immediate aftermath of this meeting, some hapū members were significantly concerned about the implications of the loan. It was understood that the negotiators had personally guaranteed the loan and that it was to be repaid from settlement money.¹⁰⁶

Both prior to and during the hearing, some of the issues surrounding the terms of the bank loan were clarified. Mr Mullany noted that the provision of audited financial statements at the SGM on 30 March 2016 had gone 'some way to addressing our concerns'.¹⁰⁷ Similarly, more details about the loan emerged at the facilitation hui that were held in May and July 2016 (see chapter 3 for the details of those hui). The issue about the negotiators' guarantee was resolved: the information given at the December 2015 AGM was incorrect, and no personal guarantees had been given.¹⁰⁸ Further, Mr Prentice told us that the loan has since been repaid through 'exceptional circumstances' funding from OTS.¹⁰⁹

105. Mana Ahuriri Incorporated, meeting minutes, 16 January 2014, p 5 (doc A6(a), p 35)

106. Matthew Mullany, affidavit, 31 October 2016 (doc A1), pp 8–9; Tania Hopmans, affidavit, November 2016 (doc A5), pp 22–23; Mana Ahuriri Incorporated, AGM minutes, 11 December 2015, pp 3–5 (doc A6(a), pp 81–83)

107. Matthew Mullany, under questioning by the Tribunal, East Pier Hotel, Napier, 18 February 2019 (transcript 4.1.1, p 92)

108. Mana Ahuriri Incorporated, AGM minutes, 11 December 2015, p 5 (doc A6(a), p 83); John Clarke, facilitation report, [July 2016], p 7 (doc A18(a)(i), p 115). At the December AGM, Tania Hopmans was recorded as asking: 'I was wondering where the guarantees do not show are given, they are personal guarantees given, Mr Chair can you please tell us who are giving guarantees?' The minutes show that the answer was: 'Barry Wilson, Piri Prentice, Joinella Maihi-Carroll, Terry Wilson, Rangi Spooner, not Bev[erly Kemp-Harmer], Tania [Huata-Kupa], Evelyn [Ratima]'.

109. Piriniha Prentice, under cross-examination by claimant counsel, East Pier Hotel, Napier, 19 February 2019 (transcript 4.1.1, p 220)

The *Red Book* describes the requirements for ‘exceptional circumstances’ funding:

SHORTFALLS OR UNEXPECTED COSTS

If claimant groups have costs over and above the amount of approved funding, the Crown may, in exceptional circumstances, consider providing extra funds to cover them. But if the extra amount is approved, it is likely to be payment of a ‘cash advance’ on the final settlement. In other words, it will be deducted from the claimant group’s eventual redress package, once settlement is reached. Such payments will be provided only if there is good progress in negotiations and settlement is close. Alternatively, the claimant group may wish to seek additional funding from other sources.¹¹⁰

Neither the Crown nor Mana Ahuriri assisted us with any evidence about the exceptional circumstances funding or on what basis it was provided. We are unable, therefore, to say whether this funding was an advance on the settlement but it seems likely given the explanation in the *Red Book*.

As with the failure to present accounts, there is no concern about financial impropriety. According to Tania Hopmans, however, the issue of most concern is that of accountability and confidence:

It goes to trust. It really goes to trust. So, why wasn’t it disclosed? It was signed up the day after the AIP was signed, the agreement in principle. There had been hui, I think, prior to that, and there was certainly a whole lot of, you know, there were hui probably after that leading right up to ratification. At no moment at any of those hui did they get to care or disclose that they had to borrow money to meet costs, particularly when a substantial amount of money is being paid to three negotiators. Like I said before, I don’t dispute that people need to be paid ideally or the level of pay, but whānau are very interested in those things, and when you don’t disclose it they think you’re hiding something. So when you don’t go through the processes that seem to be the very base minimum, suspicion arises.¹¹¹

As with the presentation of accounts, the loan issue was raised with the Crown following the ratification vote. The question then becomes: what action did the Crown take, and did it have a bearing on the Crown’s assessment of the ratification results? We address those matters in chapter 3.

2.3.7 Our view of the relevance of the loan issue

In our view, the loan was an aspect of MAI’s failure to report on financial matters to its claimant community. This was an issue of accountability which the Crown failed to monitor. Crown counsel did not cover the loan specifically in closing submissions, presumably taking the same view that it was one aspect of the financial

110. *Red Book*, p 51

111. Tania Hopmans, under questioning by the Tribunal, East Pier Hotel, Napier, 19 February 2019 (transcript 4.1.1, pp 180–181)

The Komiti's Authority to Borrow under the MAI Constitution

Mr Prentice explained that the BNZ overdraft was authorised under rules 5.2 and 9.4 of the MAI constitution.¹ Rule 5.2 stated that the society can 'raise or borrow money in such manner and upon such security (if any) as the Society shall think fit'. Rule 9.4 stated that the komiti may exercise any of the society's powers, which would include the power to borrow money. In exercising the society's powers, however, the komiti must comply with 'any specific directions or resolution of the Society made in general meetings under these Rules'.² Neither an AGM or an SGM had given any specific directions or made any resolutions about the borrowing of money. The komiti had the opportunity to seek such directions or resolutions at the SGM in September 2013 but chose instead to act under rules 5.2 and 9.4.

The komiti meeting in July 2013 had only authorised borrowing some \$90,000 to pay specific overdue accounts. Hence, a written resolution was signed by five komiti members on 20 December 2015 to authorise accepting the \$500,000 overdraft and BNZ's terms for the loan.³ Rule 10.7 stated that a resolution in writing, signed by 'all the Komiti members then entitled to receive notice of a Komiti meeting is as valid and effective as if it had been passed at a meeting of the Komiti duly convened and held'.⁴ Mr Prentice argued that five of nine komiti members could sign the resolution because rule 10.4 said that voting at a komiti meeting would be decided by a majority of those present.⁵ Tania Hopmans disputed this point, arguing that rule 10.7 required unanimous agreement of *all* komiti members to a written resolution.⁶ Ms Hopmans is correct but this particular point may be academic, since the komiti did not dispute the loan at its meeting in January 2014.

1. Piriniha Prentice, affidavit, 28 November 2016 (doc A6), pp 6–7

2. 'Constitution and Rules of Mana Ahuriri Incorporated' (Wellington: Kensington Swan, [2009]), pp 7, 10 (doc A18(a)(i), pp 53, 56)

3. MAI komiti members, resolution, 20 December 2015 (doc A6(a)), p 37. The five signatories were Joinella Maihi-Carroll, Piri Prentice, Barry Wilson, Rangi Spooner, and Beverley Kemp-Harmer.

4. 'Constitution and Rules of Mana Ahuriri Incorporated', p 13 (doc A18(a)(i), p 59)

5. Prentice, affidavit (doc A6), p 7; 'Constitution and Rules of Mana Ahuriri Incorporated', p 12 (doc A18(a)(i), p 58)

6. Tania Hopmans, affidavit, 16 December 2016 (doc A10), pp 6–7

reporting issue. Mr Fraser stated: 'The Crown considered the overdraft an internal matter as the MAI komiti had authority to enter into the overdraft.'¹¹²

We accept that the komiti had authority to take out a loan under the MAI constitution (see sidebar). But, as the *Red Book* stated, mandated representatives must have 'transparent processes for claimant funding' and a mandate could be lost 'if

112. Fraser, brief of evidence (doc A18), p 20

it is perceived that claimant funding is being managed unwisely'.¹¹³ In that sense, it was particularly important that the \$500,000 overdraft was arranged, and no accounts were presented, in the critical period between the signing of the agreement in principle and the ratification vote. Was the mandate lost as a result of this (in combination with other issues)? We can only make findings on that matter in chapter 4, after assessing the Crown's actions following the revelation that no accounts had been presented during the critical period of the negotiations.

2.4 ENGAGEMENT ISSUES

2.4.1 Introduction

Engaging with, and reporting to, are two further mechanisms through which a mandated body remains accountable to their claimant community. Ms Hopmans told us that being accountable and being transparent 'are not nice to have, they are imperatives of the people who hold the mandate and I am sad to say that Mana Ahuriri was neither accountable nor transparent, as it should have been'.¹¹⁴ The claimants argued that MAI failed in this regard, significantly undermining its mandate. As the Crown's policy in the *Red Book* makes clear, 'the requirements of the representatives to report back to the claimant group and the ability of the claimant group to have input into key decisions' is a vital responsibility.¹¹⁵ The claimants alleged that MAI did not adequately consult with the claimant community on the structure of the post-settlement governance entity (PSGE), nor did it report back to claimants or respond adequately to Ngāti Pārau's concerns.

Counsel for Mana Ahuriri argued that MAI regularly convened hui-a-hapū. It did meet with Ngāti Pārau and gave 'opportunities for Ngāti Pārau to be involved in the Mana Ahuriri processes'.¹¹⁶ In Mana Ahuriri's view, it has 'maintained the proper mandate of its members'.¹¹⁷ Piri Prentice suggested in his evidence that Ngāti Pārau were slow to register and get involved by their own choice.¹¹⁸

Crown counsel argued that, in its monitoring of the mandate, the Crown has to strike the right balance between being 'too prescriptive or interventionist' and 'too light-handed'.¹¹⁹ The Crown quoted a decision by Judge Wainwright, as reproduced in the *Tē Arawa Mandate Report*:

It seems to me that the Crown, in attempting to secure a settlement, is sometimes caught between what one might colloquially call a rock and a hard place. On the one

113. *Red Book*, p 47

114. Tania Hopmans, giving evidence, East Pier Hotel, Napier, 19 February 2019 (transcript 4.1.1, p127)

115. *Red Book*, p 45

116. Watson, closing submissions of MAI and MAT (paper 3.3.5), p 12

117. *Ibid*, p13

118. See, for example, Piriniha Prentice, under questioning by Crown counsel and the Tribunal, East Pier Hotel, Napier, 19 February 2019 (transcript 4.1.1, pp 259, 262–263)

119. Melvin, closing submissions of Crown (paper 3.3.6), pp 6–7

hand the Crown needs to be in a position to confirm, in the interests of good government and honouring the Treaty obligation to act in good faith, that claimants have been procedurally fair in managing their own settlement processes. . . . Balanced against this imperative is the need on the other hand for the Crown to avoid offending the claimant community, often in the person of the settlement negotiation body, by being overly patriarchal, and by ‘interfering’ being seen as impinging on the claimant’s tribal authority. This is indeed a difficult and narrow path to tread.¹²⁰

On the specific issue of engagement (which was the primary thing that the Crown monitored), the Crown’s position was that ‘MAI undertook a significant amount of engagement with the Ahuriri Hapū claimant community, including specific engagement with Ngāti Pārau.’¹²¹

2.4.2 Engagement with Ahuriri Hapū claimant community

2.4.2.1 *The Crown’s mandate maintenance and monitoring requirements*

The Crown’s monitoring of MAI’s mandate was focused on the issue of engagement. Warren Fraser explained that the ‘frequency and quality of the mandated entity’s communication with the claimant community is the main indicator’ of whether or not it has maintained its mandate.¹²²

OTS provided MAI with a check list for mandate monitoring, which stated that mandated representatives ‘must retain their mandate to represent the claimant group throughout the negotiations.’ This would:

- ▶ ensure that there is support from the claimant community once the negotiated settlement package goes out for approval;
- ▶ ensure the negotiators continue to be representative of the claimant community;
- ▶ ensure the claimant community continues to support the negotiators;
- ▶ enable a smoother journey through the negotiation process; and
- ▶ ensure the mandate will be better able to withstand external scrutiny, particularly from the Waitangi Tribunal and Select Committees.¹²³

To fulfil these purposes, the ‘base requirements to maintain a mandate’ included:

- ▶ how the claimant community will be kept informed (eg pānui, hui), and how often;
- ▶ on what issues or at what stages in the negotiation process it (as the mandated representatives) needs to seek approval from the claimant community;

120. Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p 105; Melvin, closing submissions of Crown (paper 3.3.6), p 7. The decision cited is: Judge Wainwright, memorandum concerning application for urgency, 21 February 2002 (Wai 889 RO1, paper 2.67), pp 11–12.

121. Melvin, closing submissions of Crown (paper 3.3.6), p 23

122. Fraser, answers to written Tribunal questions (doc A18(d)), p 5

123. ‘Key Requirements for a Mandate Maintenance Report’, p [1] (doc A5(a), p 291)

2.4.2.2

- ▶ how and when groups, such as whānau, hapū, marae with particular claims should be informed; and
- ▶ transparent processes for claimant funding.¹²⁴

To demonstrate to the Crown that these base requirements were being met, MAI had to file a three-monthly report that detailed any correspondence about the mandate, provided details of hui at which information about the negotiations was discussed, and provide copies of pānui.¹²⁵ As well as regular hui and pānui, MAI was required to hold occasional hui in ‘larger centres’ outside the rohe for those members who no longer lived in the home territory, and to maintain a ‘robust beneficiary register’.¹²⁶

These were the Crown’s standards for maintaining a mandate during the negotiations, which MAI had to fulfil. Financial transparency was mentioned but, as discussed earlier, there was no specific mention of elections in the requirement that negotiators must ensure that they remained representative of the claimant community. It was not until 2016 that OTS belatedly told MAI that ‘[m]eeting the requirements of your constitution is important to maintain your mandate’ and asked for a report on AGMs, elections, and audited accounts. This was after MAI had already filed its final mandate maintenance report.¹²⁷

2.4.2.2 MAI’s engagement between February 2013 and June 2015

For the purposes of this inquiry, the key period for mandate maintenance was between February 2013 (when negotiations resumed) and the initialling of the deed in June 2015. According to the claimants, the Crown’s monitoring of the mandate was light handed, and purposely overlooked the signs that MAI was not communicating or consulting sufficiently with its hapū community. Matthew Mullany suggested that OTS’ approach was ‘extremely light-handed’.¹²⁸

The Crown’s evidence on this point is rather mixed. Mr Fraser only provided us with four of the Crown’s responses to MAI’s mandate maintenance reports. One of those related to the ratification period and is addressed in chapter 3. In the other three, OTS was concerned at MAI’s failure to communicate regularly with its claimant community.

In June 2013, following the receipt of the first mandate maintenance report after the resumption of negotiations, OTS asked MAI to provide the Crown with a plan of how it aimed to communicate with hapū on ‘the status of negotiations including hui, pānui, and website reactivation’.¹²⁹ This is unsurprising, given the long period of dysfunction and the fact that MAI was in the process of restarting negotiations.

124. ‘Key Requirements for a Mandate Maintenance Report’, p [1] (doc A5(a), p 291)

125. Ibid

126. Ibid, p 2 (p 292)

127. Tobias Lang to Terry Wilson, 11 February 2016, p [1] (doc A18(a)(i), p 336); Warren Fraser, ‘Timeline of Events relating to Wai 2573’, table, [February 2019] (doc A18(a)), p 4. MAI’s final mandate report covered the period from 29 May to 31 August 2015.

128. Mullany, brief of evidence (doc A17), p 5

129. Patricia McNeill to Evelyn Ratima, 12 June 2013 (doc A18)(a)(i), p 332)

We note that the Crown also asked for more information about MAI's plans for the 'reconfirmation' and 'ongoing maintenance' of its membership list. OTS was concerned that the SGM in September 2011 had been invalid (through lack of a quorum). The letter had concluded by stating that following 'the receipt of this information OTS will be in a better position to respond to your mandate maintenance report and report to our Minister'.¹³⁰

The other two Crown responses were dated 14 November 2014 and 14 April 2015 respectively. Both letters referred to the lack of action taken to update the website and a lack of hui with the claimant community – two essential indicators of adequate engagement as stipulated by the Crown and in MAI's deed of mandate. Additionally, both letters referred to the lack of detailed planning or activity in relation to unregistered members.¹³¹ OTS' response in April 2015, as MAI headed towards initialling the deed of settlement, asked for a significant amount of information as to its plans for engaging its claimant community on the impending ratification vote:

- ▶ A detailed plan of how you will communicate negotiation progress to your members prior to ratification, including how you will register their views and respond? Please include:
 - ▶ details of any relevant hui that you will hold, how you will advertise, and how you will gather and respond to attendees views;
 - ▶ evidence of MAI responding to specific questions and concerns raised by claimant members, and how claimant members' views are either responded to or taken into account within the negotiations;
 - ▶ copies of any relevant pānui to the claimant community.
- ▶ When was the last time that claimants on the register were advised of negotiations progress? How many verified claimants do you currently have on the register?
- ▶ Please provide a summary of the plan to ensure the register is sufficiently up-to-date to contact people on the register by phone, mail or email and the date of when this will be complete.
- ▶ Please provide a summary of the plan to make the claimant register searchable, current progress and when this project will be complete.
- ▶ Please provide a summary of the plan to update the website, current progress and when this project will be complete. Please advise how you will ensure that your claimant community will know that the website has been updated.¹³²

This letter was indicative of gaps in MAI's engagement. It noted that no hui had been held in the three-month period covered by the mandate maintenance report, and that the website had not been updated. OTS further pointed out in this letter that engagement with the claimant community was particularly important in the

¹³⁰. Ibid

¹³¹. Benedict Taylor to Terry Wilson, 14 November 2014 (doc A18(a)(i), p 333); Sue van Daatselaar to Terry Wilson, 14 April 2015 (doc A18(a)(i), pp 334–335)

¹³². Sue van Daatselaar to Terry Wilson, 14 April 2015 (doc A18(a)(i), pp 334–335)

context of ratification. The April 2015 letter stated that until OTS received the additional information, officials would be unable to inform the Minister that Mana Ahuriri's mandate had been maintained.¹³³

We do not have MAI's responses to these letters. Also, we only have three of MAI's 11 quarterly mandate maintenance reports to consider. The Crown provided us with two – for the periods April to September 2011 and 30 August to 28 November 2014. A large part of the August to November 2014 report has been blanked out in our copy. Both of those reports showed that MAI was holding hui-a-hapū and engaging with its claimant community, providing updates on negotiations and (in the second one) four hui-a-hapū to provide information on the PSGE.¹³⁴ We also have the mandate maintenance report for the period when MAI was dysfunctional. This covered the period from September 2011 to June 2013.¹³⁵ Because negotiations had been suspended for most of that period, the report is of limited utility in assessing how MAI communicated with the claimants about the settlement.

The piecemeal nature of this evidence makes it impossible for us to get a clear picture of how the Crown was monitoring the mandate or the extent to which MAI was engaging with its claimant community. We have examples of good engagement in the mandate maintenance reports provided and poor or no engagement in the selection of Crown responses.

We acknowledge that the negotiation of a Treaty settlement is an extremely difficult task. As noted in the previous section, MAI struggled financially and had to get into debt in order to keep operating. According to the Crown Forestry Rental Trust, this was not an unusual scenario. We also acknowledge that the evidence shows MAI negotiators worked hard to secure a draft deed of settlement with the Crown. Following the period of dysfunction, MAI reached the initialling stage in just over two years. Those are the crucial years in terms of engagement. Piri Prentice provided a list of the hui held during that period, which is set out in table 2.3.

As noted above, one of OTS' requirements was a regular newsletter. MAI started a pānui called 'Te Karoro' in April 2015, which was published on the website. There were two pānui during this period, one in April and one in June 2015, both issued during the three months leading up to the initialling of the deed. No hui were held during those months.¹³⁶

As far as we can tell from the evidence, hui-a-hapū and AGMS/SGMS were the primary method by which MAI reported to its members on the negotiations. The pānui was not instituted until quite late. It does seem that there were significant

133. Sue van Daatselaar to Terry Wilson, 14 April 2015 (doc A18(a)(i), pp 334–335)

134. Mana Ahuriri Incorporated, mandate maintenance report, April–September 2011 (doc A18(a)(i), pp 284–305); Mana Ahuriri Incorporated, mandate maintenance report, 30 August – 28 November 2014 (doc A18(a)(i), pp 306–331). In the second report, pages 306 to 321 have been blanked out.

135. Mana Ahuriri Incorporated, 'Mandate Maintenance Mana Ahuriri Incorporated (September 2011 to 6 June 2013)', no date, pp [1]–[26] (doc A5(a), pp 293–318)

136. Prentice, brief of evidence (doc A16), p 5

Date	Event
June 2013	A hui-a-hapū update on negotiations
September 2013	Mana Ahuriri Incorporated special general meeting
November 2013	Four hui-a-hapū re negotiations (three at cities outside the rohe)
March 2014	Mana Ahuriri Incorporated special general meeting
October 2014	Two hui-a-hapū, one to provide an update on negotiations and one to provide information on the post-settlement governance entity
November 2014	Three hui-a-hapū on the post-settlement governance entity
March 2015	Two hui-a-hapū on the post-settlement governance entity

Table 2.3: Mana Ahuriri Incorporated hui from February 2013 to June 2015

Source: Piriniha Prentice, brief of evidence, 21 November 2018 (doc A16), pp 4–5

periods when MAI did not hold hui after February 2013, once negotiations had resumed:

- February to May 2013;
- July and August 2013;
- October 2013;
- December 2013 to February 2014;
- April to September 2014 (a six-month period);
- December 2014 to February 2015; and
- April to June 2015.

Following the initialling of the deed, MAI held nine ratification hui around the country between 31 July 2015 and the end of voting in late August 2015. These hui were poorly attended – we discuss that point in chapter 3. But it seems clear to us that a sufficient attempt was made to communicate the contents of the settlement during the ratification voting period in July and August 2015.

2.4.2.3 Our view of the engagement issues

We have no comparative information to judge whether the hui that were held (and the pānui) were the norm for the intensive period between the signing of an agreement in principle and initialling the deed. The Crown provided no evidence as to what level of engagement is sufficient for its purposes. From the OTS reports that we do have, it seems that to hold no hui and issue no pānui in a three-month period gave the Crown concerns as to whether the mandate was being maintained. But Mr Fraser stated that, on ‘each occasion’ that a mandate maintenance report was submitted, the ‘Crown considered MAI was maintaining its mandate.’¹³⁷ Nor do we have any comparative evidence from other negotiations to establish some

¹³⁷ Fraser, brief of evidence (doc A18), p13

2.4.3

kind of baseline. It may be that other settlements have involved more regular communication or it may not.

The claimants have also alleged that MAI failed to hold meetings with them. MAI alleged that Ngāti Pārau failed to get involved and take advantage of the opportunities available to them. The evidence suggests that there is some truth on both sides.

In our view, what really lies behind the claimants' allegations is that Ngāti Pārau did not feel represented in the settlement negotiations conducted by MAI. As we discussed in section 2.2.6, when Ngāti Pārau leaders approached MAI about this issue, the advice they received in 2011 and 2013 was to put forward nominations in the komiti elections. One of the fundamental rights of the claimant community, according to the *Red Book*, was the right to 'replace mandated representatives if necessary'.¹³⁸ This right was denied by MAI's approach to the election requirements in its constitution and deed of mandate, and by the Crown's failure to monitor election requirements and take action to ensure MAI's compliance with them.

Fundamentally, therefore, Ngāti Pārau's concerns about engagement and the settlement could have been met by a seat at the table, but there were too few opportunities for this (as discussed earlier). Representation on the komiti would also have assisted with the trust issue; their confidence in the komiti was clearly shaken by the failure to disclose the loan (and its implications for the settlement proceeds) prior to ratification.

There is, however, one engagement issue on which we have significant evidence, and that was an important issue for the claimants: MAI's engagement on the electoral model for the PSGE. We turn to that issue next.

2.4.3 Engagement on the post-settlement governance entity

2.4.3.1 Introduction

A significant factor in the process through which MAI lost its mandate, according to the claimants, was the komiti's failure to engage adequately with the claimant community on the representational structure for the PSGE.¹³⁹ The claimants argued that MAI's consideration of a hapū-based model was reluctant and insufficient.¹⁴⁰ Further, they argued that the Crown was made aware of the widespread concerns on this issue but did not take any meaningful steps to encourage MAI to engage further.¹⁴¹

The question of whether there was adequate consideration of the claimant community's views on the PSGE is key to the issue of mandate maintenance and to the guarantee of hapū rangatiratanga under the Treaty. Crown counsel quoted from the *Red Book* as follows:

138. *Red Book*, pp 44, 45

139. Mahuika and Tukapua, closing submissions of Wai 2573 claimants (paper 3.3.4), pp 13–15

140. *Ibid*, pp 14–15

141. *Ibid*, p 12

A suitable governance entity is required before settlement assets can be transferred. The Crown does not dictate how settlement assets are to be used, but requires assurance that claimant groups have established an entity that is acceptable to the whole claimant group, and is representative, transparent and accountable.¹⁴²

Crown counsel also cited the *Red Book* in support of its position that the mandated representatives take the lead in ‘exploring and developing options for a governance entity’, but ‘they must also give all members of the claimant group the chance to review and ratify their proposed entity’.¹⁴³

We deal with the ‘ratify’ part of the statement in the next chapter. In terms of giving all members a chance to ‘review’ the proposal, Ms Hopmans told us that the proposition of a hapū-based model had been a key component back when MAI was being set up. To many among the Ahuriri claimant community, this model was the best way to recognise the tino rangatiratanga of each hapū in pursuing settlement.¹⁴⁴ Evidence submitted on behalf of the claimants indicated that from 2014, serious and repeated questions over the structure and representativeness of the PSGE had been put to MAI. Ms Hopmans noted that ‘various whānau had expressed the genuine concern that each hapū must have the ability to elect their own representative to the PSGE to ensure that every hapū has one of their own on the board’.¹⁴⁵

2.4.3.2 MAI’s engagement on the PSGE

The claimant community’s opportunity to ‘review’ the komiti’s proposed PSGE model came in late 2014, when MAI held four ‘information’ hui-a-hapū.¹⁴⁶ Counsel for Mana Ahuriri stated that their purpose was ‘specifically for consultation on PSGE models’.¹⁴⁷ The first hui was held at the MAI office, and was described as a negotiation team update and ‘the pānui for three future Hui-a-Hapū to be held and the PSGE development’. The other three hui were held at Petane Marae on 4 November 2014, Waiohiki Marae on 12 November, and Wharerangi Marae on 13 November, all three described as for the purpose of ‘[n]egotiation team update and PSGE introduction’.¹⁴⁸ These hui were the opportunity for the Ahuriri claimant community to learn about what was proposed and have input. Later hui in 2015 were considered by MAI to be explanations of the model that was going forward for ratification.

142. Melvin, closing submissions of Crown (paper 3.3.6), p 24; *Red Book*, p 27

143. Melvin, closing submissions of Crown (paper 3.3.6), p 24; *Red Book*, p 69

144. Tania Hopmans, under questioning by the Tribunal, East Pier Hotel, Napier, 19 February 2019 (transcript 4.4.1, p 150)

145. Hopmans, affidavit (doc A5), p 17

146. Prentice, brief of evidence (doc A16), p 5

147. Watson, closing submissions of MAI and MAT (paper 3.3.5), p 7

148. Mana Ahuriri Incorporated, mandate maintenance report, 30 August–28 November 2014, no date, p [17] (doc A18(a)(i), p 322). Unfortunately, most of this report has been blanked out in the copy provided to us, so it is not possible to see how MAI reported on the discussion at the hui to the Crown.

Tania Hopmans described what happened at the Waiohiki hui:

Wayne Johnson, a consultant for MAI, gave a general presentation about post settlement governance entities (PSGE). He described the various types of entities that have been used for PSGEs, and how some were based on marae representation, some on hapū representation and others on pan-tribal voting similar to the current MAI model. After some discussion, I moved a resolution asking that MAI develop a PSGE option based on hapū electorates. There was a good turnout of whānau from Ngāti Pārau, Ngāti Matepū and Ngāti Tū at the hui, and strong support for the resolution. Previously, various whānau had expressed the genuine concern that each hapū must have the ability to elect their own representative to the PSGE to ensure that every hapū has one of their own on the board. Currently, there is no representative from Ngāti Pārau.¹⁴⁹

We asked Mr Prentice for the minutes of this hui but he was only able to provide a hand-written list of attendees.¹⁵⁰ Typed minutes for the other two hui were available. These showed that there was discussion of a marae or hapū-based PSGE model at the Petane hui on 4 November 2014. The response about electoral options was: 'Don't want to pre-empt anything here. This needs to be looked at and options chosen that are suitable to everyone.'¹⁵¹ There were no questions or discussion about the PSGE in response to the presentation at the Wharerangi hui on 13 November 2014.

Ms Hopmans followed up her resolution after the Waiohiki hui. The response in February 2015 was that a hapū-based model was one of four under consideration by MAI, and that the purpose of the hui had been to 'share information[,] not for the purpose of predetermination or confirmation of the electoral voting option.'¹⁵² As far as we are aware, there were no further communications about the PSGE model until late March 2015, when MAI held two 'information sharing hui' at Moteo Marae and Timikara Marae. Terry Wilson, who was chair of MAI at that time, described these (and the earlier) hui in this way:

I attended all of the Information Sharing Hui and the issues and concerns around hapū based representation was raised at least three of those hui. Questions were asked and some questions answered but the purpose of the hui was to inform not to debate the question of the electoral voting system. Comments, feedback, and submissions were invited from whānau present back to MAI.¹⁵³

149. Hopmans, affidavit (doc A5), p 17; see also Charmaine Butler, affidavit, 3 November 2016 (doc A3), pp 2–3

150. Mana Ahuriri Incorporated, hui-a-hapū list of attendees, 12 November 2014 (doc A16(c)(i), p [5])

151. Mana Ahuriri Incorporated, hui-a-hapū minutes, 4 November 2014, p [1] (doc A16(c)(i), p [2])

152. Wayne Johnson to Tania Hopmans, 11 February 2015 (doc A5(a)), p 172

153. Terry Wilson to Shayne Walker, 30 April 2015, p [1] (doc A4(a), p 60)

Charmaine Butler, a member of both MTT and MAI, attended the hui at Moteo Marae. According to her account, MAI proposed that the PSGE structure follow the MAI pan-hapū model. Questions were posed about having a hapū-based model, to which the response was that ‘any queries were to be sent to MAI’ within a week.¹⁵⁴ This accorded with Terry Wilson’s account that the purpose of the hui was to inform, not debate, and that feedback and submissions were sought from whānau.

Following these hui, MAI decided to continue with a pan-hapū model for the PSGE. In April 2015, the chairs of MTT and five Ahuriri marae wrote to MAI, seeking a hapū-based electoral model and further hui-a-hapū to discuss the issue. In their view, whānau had ‘expressed a strong desire’ for this. By this time, however, it was understood that ‘the Board prefers a pan-tribal representation model (where representatives are nominated and elected on a “first past the post” pan-tribal basis)’. They argued that a hapū-based model would ‘ensure a broad base of representation across all of the Hapū and it will also enable each Hapū to elect their own member to the PSGE’. This letter was copied to the Crown.¹⁵⁵

In sum, the discussion at the hui-a-hapū, the resolution at the Waiohiki hui,¹⁵⁶ and the letter from the five marae chairs, indicated that there was a body of opinion within the Ahuriri hapū community that preferred a hapū-based PSGE.

MAI’s response to the letter from the marae chairs, which was also copied to the Crown, provides the clearest evidence available to us about MAI’s process and decision-making on the issue. The chair of the komiti, Terry Wilson, stated that only the komiti had a mandated role to represent Ahuriri hapū in the settlement, and therefore MAI could only deal with the marae chairs on the basis that they were individual members. In respect of the PSGE, MAI stated that it was too late in the negotiations process to change things now. They had already reached broad agreement with the Crown about the PSGE, and there were ‘only a few matters left to resolve’. To reopen the issue in April 2015, the komiti considered that it would have to put a ‘strong business case to the Crown’.¹⁵⁷

Further, the chair of the komiti stated:

The MAI Board has been constantly accused of adopting a predetermined pathway regarding the electoral representation system. There has been many statements, discussions and comments made about a hapū based system mostly verbal but the Board has not seen anything to justify giving this matter any serious consideration. In short, the proponents of a hapū based system have yet to present a credible alternative to the existing electoral system. We are well past any discussion stages either with MAI or the

154. Butler, affidavit (doc A3), p 3

155. Chairs of Hamuera Marae, Petane Marae, Wharerangi Marae, Waiohiki Marae, Timikara Marae, and MTT to chair of MAI, 23 April 2015, p [1] (doc A4(a), p 57)

156. We do not have the minutes to corroborate Ms Hopmans’ evidence that a resolution was adopted, but no evidence on the record contradicts it and Mr Prentice did not deny it at the hearing.

157. Terry Wilson to Shayne Walker, 30 April 2015, pp [1]–[2] (doc A4(a), pp 60–61). This letter was copied to the Crown.

2.4.3.2

Crown therefore before the Board would consider calling a Hui a Hapū as requested, there must be a well formed and constructed proposal presented that is capable of not just satisfying the Crown but also the MAI Board that has operated under appropriate mandating rules, OTS guidelines directives, and its own Rules validated by its registered members.¹⁵⁸

Following the March 2015 ‘information hui’, therefore, the negotiators must have largely finished their work on a PSGE model with the Crown. Also, although the komiti had considered four models, it said that it had not given ‘any serious consideration’ to having a hapū-based model. The komiti believed that a hapū-based electoral system would only confuse members, arguing that the members had already endorsed a pan-hapū model by the mere fact of registering with MAI.¹⁵⁹ In sum, MAI’s position was: ‘The MAI Board has been elected by the registered members under the current electoral voting system and therefore has no responsibility, at this time, to formulate and present any other electoral voting system alternative.’¹⁶⁰

As Mr Prentice’s evidence showed, MAI believed there were good reasons for keeping the pan-hapū model established by the Ahuriri claimants in 2009. He opened his first affidavit by stating:

When the Ahuriri Treaty Settlement process commenced the very firm advice of Mana Ahuriri hapū kaumātua was that the Claims were made on behalf of all individuals who traced their whakapapa back to Ahuriri’s eponymous ancestors and that the hapū of Ahuriri should be guided by the principles of kotahitanga – working together. Among the reasons for this is that most of those individuals belong to more than one of the Ahuriri hapū, and also that the geographical boundaries of those different hapū overlap. That is all reflected in the Mana Ahuriri Inc. Constitution . . .¹⁶¹

MAI asked the marae chairs for more information in April 2015, stating that a fully developed model would be necessary for the komiti to consider reopening the question at that stage. Counsel for Mana Ahuriri argued that the only detailed model put forward after this letter was Tania Hopmans’ suggestion of the Ngāruahine PSGE, which she proposed in July 2015. By that time, the ratification process had just begun.¹⁶² It is not clear to us why individual members would need to do the work of coming up with detailed models when MAI had hired a consultant to develop their model. As Ms Hopmans stated when she forwarded the Ngāruahine example to the consultant, he was already familiar with hapū-based models and how they worked.¹⁶³

158. Terry Wilson to Shayne Walker, 30 April 2015, p [2] (doc A4(a), p 61)

159. Ibid, p [3] (p 62)

160. Ibid, p [2] (p 61)

161. Prentice, affidavit (doc A6), p 1

162. Watson, closing submissions of MAI and MAT (paper 3.3.5), p 8

163. Tania Hopmans to Wayne Johnson, 31 July 2015 (doc A5(a)), p 175

2.4.3.3 What did the Crown do when made aware of the disagreement?

On the issue of elections and financial reporting, the Crown responded that it was not made aware of those matters prior to the ratification vote. It is clear, however, that the Crown was well aware of this issue before the ratification process began. In addition to the correspondence copied to it and the mandate maintenance reports, Ngāti Pārau leaders wrote to the Crown in April 2015 and met with the Minister in July (shortly before the ratification process began).¹⁶⁴

Crown counsel submitted that it was unclear what ‘enough consideration’ would have been in the context of MAI’s decision-making. Counsel further submitted that those who ‘advocate for a particular proposal or outcome that is ultimately unsuccessful often feel that the matter was given inadequate consideration, whether or not that was actually the case.’¹⁶⁵ The Crown argued that it was unclear ‘what the claimants say the Crown ought to have done, and did not do, in relation to the correspondence from members of the claimant group about future PSGE arrangements’. In the Crown’s view, it is up to mandated representatives to develop a PSGE proposal for the claimant community to ratify (or not) as they chose. This approach

promotes the rangatiratanga of claimant groups and is consistent with Treaty principles. It does not preclude the Crown taking steps in appropriate cases regarding concerns that members of a claimant group might have about PSGE proposals, but, in this case, the claimants made no direct representation to the Crown for it to be involved.¹⁶⁶

According to Warren Fraser, the issue of a hapū-based PSGE was not raised by hapū but by ‘some individuals and another group’s PSGE’. Mr Fraser noted the July 2015 meeting with Ngāti Pārau leaders (discussed below) but suggested that, ‘to the Crown’s knowledge, the question of hapū-based representation on the PSGE was most obviously pursued by the PSGE of another group, the Maungaharuru Tangitū Trust’. The Crown was aware of what had happened at the Waiohiki hui in November 2014 and what followed, and considered that the events gave ‘a sense of the two groups [MAI and MTT] jostling to define their respective responsibilities and influence’. Mr Fraser pointed to a history of ‘jostling’ between the two, and argued that MAI’s response in February 2015 showed that it had considered four electoral options for its PSGE. The hui had been for information sharing only.¹⁶⁷

According to Jenny McIlroy, chairperson of Waiohiki Marae, and Matthew Mullany, the claimants’ spokesperson at the hearing, Ngāti Pārau held a hui-a-hapū in August 2014 and deputed Laurence O’Reilly and Hinewai Hawaikirangi as spokespersons on their issues. Mr Mullany and the other named Wai 2573

164. Fraser, answers to written Tribunal questions (doc A18(d)), p 2; Laurence O’Reilly and Hinewai Hawaikirangi to Minister for Treaty of Waitangi Negotiations, 10 April 2015 (doc A1(a), pp 1–2). This letter was wrongly dated April 2014.

165. Melvin, closing submissions of Crown (paper 3.3.6), p 23

166. Ibid, p 24

167. Fraser, answers to written Tribunal questions (doc A18(d)), pp 1–2

claimants were later added to that number.¹⁶⁸ On 10 April 2015, Mr O'Reilly and Ms Hawaikirangi wrote to the Minister, advising him of Ngāti Pārau's 'grave and urgent concerns' about MAI's representation of their claims and membership (as one of the seven hapū which had mandated MAI). They suggested that a resolution to check Ngāti Pārau registrations had not been actioned by MAI, that particular claim matters had not been included in the proposed settlement, and that MAI was not 'acting in good faith in dealings with our hapū'. Their proposed solution was for the Crown to arrange facilitation so as to ensure that their concerns were resolved by MAI prior to settlement.¹⁶⁹ This letter did not cover the PSGE issue, however, because that matter was continuing to be addressed internally with MAI at that time. The chair of the Waiohiki marae signed the letter with the other marae chairs, seeking further hui-a-hapū to consider the question.¹⁷⁰

The Crown was not prepared to consider facilitation or any other form of intervention at this point. The Minister responded that these were internal issues that should be dealt with by their participation in hui-a-hapū, and that individual members of MAI were able to check if they were registered. The Minister also encouraged them to assist those who had not yet registered and to either communicate with MAI or use its dispute resolution process.¹⁷¹

The deed of settlement was then initialled on 19 June 2015 but the Ngāti Pārau spokespersons were not satisfied with the Crown's response to their concerns. On 13 July 2015, therefore, the Minister met with them to discuss matters further. By that stage, MAI had rejected the marae chairs' overture. We do not have a record of the meeting, but it is clear that both the composition of the PSGE and the degree to which MAI represented Ngāti Pārau were discussed. Following the meeting, the Minister wrote to Mr O'Reilly and Ms Hawaikirangi, stating that:

- ▶ a pan-hapū structure for a PSGE met the Crown's requirements;
- ▶ they would have the opportunity to vote on the PSGE structure in the ratification; and
- ▶ four of the PSGE's trustees would retire at the end of the first year after settlement, giving them an opportunity to elect a Ngāti Pārau representative.

The Minister also reminded them that 'Nigel Hadfield of Ngāti Pārau' was on the MAI founding komiti when it endorsed a pan-hapū structure for MAI. The Minister also noted that the settlement details (as well as the PSGE structure) would be up for a vote, encouraging them to participate in the ratification and deal with their concerns through the ratification process.¹⁷²

168. Jenny McIlroy, affidavit, 8 December 2016 (doc A9), p2; Matthew Mullany, affidavit, 15 December 2016 (doc A8), p3; see also Mahuika and Tukapua, submissions in reply (paper 3.3.7), p2

169. Laurence O'Reilly and Hinewai Hawaikirangi to Minister for Treaty of Waitangi Negotiations, 10 April 2015 (doc A1(a), pp 1–2)

170. Chairs of Hamuera Marae, Petane Marae, Wharerangi Marae, Waiohiki Marae, Timikara Marae, and MTT to chair of MAI, 23 April 2015, p [1] (doc A4(a), p57)

171. Minister for Treaty of Waitangi Negotiations to Hinewai Hawaikirangi and Laurence O'Reilly, 7 May 2015, pp [1]–[2] (doc A1(a), pp 3–4)

172. Minister for Treaty of Waitangi Negotiations to Hinewai Hawaikirangi and Laurence O'Reilly, 5 August 2015 (doc A1(a), pp 6–8)

2.4.3.4 Our view of the Crown's response to the PSGE disagreement

It seems to us that the Crown could helpfully have offered the facilitation sought at this point, either before initialling the deed (following the 10 April 2015 request) or prior to the ratification vote (following the 13 July 2015 meeting). This might have enabled all issues to be brought out, discussed fully, and perhaps resolved through agreement before positions became so entrenched on both sides. But the Crown chose not to intervene in the period between November 2014 and July 2015, on the basis that the ratification would show the extent of support for a pan-hapū PSGE, and the issue of Ngāti Pārau representation could be resolved after the settlement by PSGE elections.

Was this decision reasonable in the circumstances?

First, we do not accept the Crown's position that those who had wanted a hapū-based PSGE were merely some individuals and MTT. The issue was raised at a number of the 'information' hui, a resolution was passed at the Waiohiki hui, an approach was made by the chairs of five marae as well as MTT, and the Ngāti Pārau leaders were endorsed by a hui-a-hapū at Waiohiki Marae to approach the Crown on this and other issues.

Secondly, there is the question as to whether the Ahuriri hapū community had sufficient input to the decision to adopt a pan-hapū PSGE. The Crown and Mana Ahuriri pointed to the 'information' hui held on the PSGE – four in late 2014 and two in late March 2015. But, despite the statement in February 2015 that it was considering four models, MAI had not seriously considered changing from its current pan-hapū structure to a different one, and it was not prepared to hold further hui as at April 2015. In the words of MAI's chairperson, there had been 'many statements, discussions and comments made about a hapū based system mostly verbal but the Board has not seen anything to justify giving this matter any serious consideration.'¹⁷³ At some of the 'information' hui, however, the pan-hapū model was not queried and presumably had support. Ultimately, we agree that the ratification vote was really the best test of whether the pan-hapū model had the support of Ahuriri claimants, given the 'information' hui that had been held and the disagreement over the matter.

Thirdly, the Crown was faced with a sincere disagreement within the claimant community, and its decision was not to intervene but to await the ratification vote. The question then becomes:

- ▶ What was the result of the ratification vote, and what did the Crown consider when deciding whether or not to accept it as sufficient to proceed with the settlement?
- ▶ Was the knowledge of this disagreement a factor when the Crown evaluated the relatively low results of the vote on the PSGE?

We consider the ratification vote on the PSGE in chapter 3. For that reason, we are not in a position to make findings at this stage of our report.

173. Terry Wilson to Shayne Walker, 30 April 2015, p [2] (doc A4(a), p 61)

2.4.3.5 Lack of governance training

Finally, we would like to note an important point in the Crown's provision of assistance to mandated entities. The process followed by MAI indicates a need for governance training to be provided to mandated entities as well as to PSGES. The Crown expects these entities to consult their claimant communities and seek input throughout the negotiations process, and to report on these matters to OTS so that the Crown can be assured that the mandate to represent the claimants is being maintained. Not least because of the degree of scrutiny put on their actions, mandated representatives need training on procedural matters, including what constitutes consultation and how to conduct a consultation process.

In his opening statement, Warren Fraser told us that, when he looked back 'forensically at everything that happened relevant to MAI's mandate', he recommended a number of changes to Crown processes. These included: 'I also encouraged further discussion with Te Puni Kōkiri to see whether the governance training available to Post-Settlement Governance Entity trustees might also be available to trustees of a mandated entity.'¹⁷⁴ We agree that such training is necessary and, in our view, it should be mandatory. We discuss this point further in chapter 4.

We turn next to the ratification period in the following chapter.

174. Fraser, opening oral statement, p1 (doc A19, p17)

CHAPTER 3

MANDATE AND RATIFICATION

3.1 INTRODUCTION**3.1.1 What this chapter is about**

This chapter considers the ratification period and the Crown's acts or omissions in respect of:

- the ratification process and decision to sign the deed of settlement; and
- the interrelated issue of the Crown's acts or omissions once the accountability problems were brought to its attention, including the facilitation process required by the Crown before it would sign the deed.

These two issues were interwoven because of the timing of when the Crown discovered the issues concerning elections, accounts, and AGMs, and the bearing that that had on the Crown's decision that MAI still had a mandate to complete the settlement. After the voting period was over, the Crown took more than a year to decide whether or not to accept the ratification results and proceed with the settlement. As far as we are aware, that has never happened before. It resulted from a combination of three factors: the issues that had arisen about the integrity of the voting process; the low results from the vote and the difficulty in establishing a final result; and the concerns about accountability issues which required some form of action from the Crown before the settlement could proceed to the next stage.

The Crown's position in our inquiry was that, 'if MAI lost its mandate at some point before the deed of settlement was signed, the Crown's decision on 19 October 2016 to sign the deed of settlement would be inconsistent with the Treaty principles of partnership and active protection'.¹ In the Crown's view, however, MAI retained its mandate and the Crown has not breached the Treaty at any point during the mandate monitoring or ratification phase. The Crown admitted that mistakes were made and that – with 'hindsight' – it could have done better in monitoring MAI's accountability to the Ahuriri claimant community. But, in the Crown's submission, the Treaty principles have not been breached. Counsel for Mana Ahuriri argued that MAI obtained a majority vote in the ratification, that it wanted to count all the special votes but the Crown did not allow this, that its interpretation of its election requirements was reasonable, and that the failure to present accounts prejudiced no one.

The claimants' position was very different. In their view, the Crown's monitoring of MAI's mandate was inadequate, MAI lost its mandate as a result of its failure to

1. Geoffrey Melvin, closing submissions of Crown, 31 May 2019 (paper 3.3.6), p 30

3.1.2

hold elections and remain accountable to the claimant community, and the Crown failed to take sufficient and appropriate action once the flaws in the mandate became apparent. Further, the claimants argued that:

- ▶ the ratification process was flawed, and a large number of special votes were unfairly set aside;
- ▶ the Crown's review of the ratification process was inadequate;
- ▶ the Crown's facilitation process (undertaken by Sir John Clarke in March to July 2016) failed; and
- ▶ MAI had not retained its mandate when the Crown signed the deed of settlement in November 2016.

Procedural flaws are not automatically of such importance that they signify a breach of the Crown's Treaty obligations. The Crown's witness, Warren Fraser of Te Arawhiti, told us that a forensic examination showed there were 'things the Crown could have done better', but that there is 'no such thing as a perfect process'.² Our task in this chapter was made difficult by the scope and extent of the flaws alleged by the Ngāti Pārau claimants. It has entailed a detailed examination of the procedures and events to determine whether the Crown's acts or omissions met the requisite Treaty standards.

The principle of partnership requires that the Crown act reasonably and in utmost good faith, that it ensures that it is fully informed of its Treaty partner's views before making decisions, and that the Treaty partners should respect each other's authority in their respective spheres. The principle of active protection requires that, in Treaty settlement negotiations, the Crown actively protect the tino rangatiratanga, autonomy, and interests of the claimant community – in this case, the seven Ahuriri hapū who had mandated MAI to negotiate on their behalf.

These are the principles we apply when we examine the Crown's acts or omissions in this chapter.

3.1.2 Obligations of the ratification process

The ratification vote is one of the more important milestones in the settlement process. Before the deed of settlement can be signed and legislation enacted, both the deed and the proposed post-settlement governance entity (PSGE) must be approved by a clear majority of the claimant community. Of particular priority to the Crown is that all adult members of the claimant group be able to 'take a full part in the discussion that is part of this final decision-making stage'.³ For Ahuriri Hapū, the process to approve the deed of settlement and the PSGE occurred simultaneously. Registered adult members were asked to vote for two resolutions:

2. Warren Fraser, opening oral statement, no date, pp 1–2 (doc A19, pp 17–18)

3. 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* (Wellington: Office of Treaty Settlements, 2015), p 65. We refer to this in further footnotes as the *Red Book*.

I, as a registered member of the Ahuriri Hapū, agree to accept the Ahuriri Hapū Deed of Settlement. . . .

I, as a registered member of Ahuriri Hapū, agree that Mana Ahuriri Trust will be the Post-Settlement Governance Entity for the Ahuriri Hapū historical Treaty of Waitangi settlement redress. . . .⁴

3.1.2.1 *The Crown's obligations in the ratification process*

In any ratification process, the Crown is expected 'to ensure a fair and open process is followed'.⁵ Crown officials are tasked with approving a ratification strategy and the content for the ratification information hui. Crown officials are also expected to stay in close communication with the mandated representatives to 'help them ensure that the ratification process will be acceptable to the Crown'.⁶

Additionally, an independent Crown 'observer' is expected to be present at each hui. For Mana Ahuriri, this official, usually from Te Puni Kōkiri, was tasked with completing 'a summarised record of events' to assist with briefing the Ministers and 'in the case of challenge'.⁷ Finally, it is the Crown's responsibility to review the results of the ratification process and, if the support is deemed sufficient, the ratification is accepted and the deed of settlement is signed.⁸

The *Red Book* states:

the ratification process is for the claimant group to work through, but the Crown will not sign a settlement if the process used was inadequate, or if the claimant group does not clearly support the proposed settlement. OTS therefore keeps in close contact with the mandated representatives to help them ensure that the ratification process will be acceptable to the Crown. The basic principle is that all adult members of the claimant group must have the opportunity to have a say.⁹

The *Red Book* further states that if the deed of settlement is not approved by the claimant community, reassessment of the situation is required in order to scope the potential for further negotiations. The *Red Book* does not set out the Crown's process for addressing challenges to ratification processes. Nor does it define how much support is enough for a ratification to be approved, but it is not the case that a bare majority is necessarily adequate for a durable settlement. In challenges or disputes in other areas of the settlement process, however, the *Red Book* states that the Crown may suggest using a facilitator 'to crystalise the issues underlying the dispute and assisting the claimant group members to achieve a resolution'.¹⁰

4. Mana Ahuriri Incorporated, *Ahuriri Hapū Ratification 2015 Information* ([Hastings]: Mana Ahuriri Incorporated, no date), p 6 (doc A18(a)(i), p 393)

5. *Red Book*, p 66

6. *Ibid*, p 65

7. Mana Ahuriri Incorporated, 'Ratification Strategy for Mana Ahuriri Hapū', 27 May 2015, p 11 (doc A18(a)(i), p 384)

8. *Red Book*, p 66

9. *Ibid*, p 65

10. *Ibid*, p 47

3.1.2.2

3.1.2.2 *Mana Ahuriri Incorporated's obligations in the ratification process*

The Office of Treaty Settlements (OTS) and Te Puni Kōkiri (TPK) approved Mana Ahuriri Incorporated's ratification strategy on 25 June 2015. Officials accepted the ratification strategy as consistent with the Crown's guidelines for providing iwi members adequate opportunity to participate in the process.¹¹ The strategy set out in detail what was required of MAI to obtain the claimant community's approval for the deed of settlement and the post-settlement governance entity.

MAI's responsibilities for the ratification process were set out in three key phases: the preparation phase; the voting phase; and the verification phase. In the preparation phase, MAI was required to update the member register and to publicise the process among its claimant community. The Crown places particular emphasis on this aspect of the process to ensure that all adult members have the opportunity to take part fully in the ratification process, which assists with the durability of the settlement.¹² MAI was also required to prepare voting packs, which contained registration and voting forms, a prepaid return envelope, and an information booklet. The booklet itself included key information about the voting process, the deed of settlement, and the proposed PSGE.¹³ As we discuss further below, MAI decided to send out the voting packs itself, a task which is usually done by the returning officer.

The second phase was the voting period itself. In addition to continuing its communication and registration campaign, MAI was required to run ratification information hui. In order to access as many of the claimant community as possible, these were not restricted to the Ahuriri Hapū rohe. Only one hui was held at Napier; the rest were held around the country, including at Wellington and Auckland. The first hui was held on 31 July 2015 and the last on 17 August, just four days before the close of voting. Members were able to register and cast special votes at these hui. Thirdly, and finally, MAI was required to register new members and verify their membership before their special votes could be counted.¹⁴

The Tuia Group was engaged as the independent returning officer for the ratification vote to receive and count the votes, and report the results to MAI. It was then MAI's responsibility to communicate the results to the Crown for acceptance.¹⁵ As we discuss further in the chapter, this part of the process was far from straightforward and had to be done twice before the Crown was satisfied that the results were accurate.

3.1.3 The structure of this chapter

The issues of mandate maintenance and ratification are interwoven in this chapter. That is because the Crown must make judgements about whether the mandate has been retained right up until signing the deed of settlement, and because the

11. Juliet Robinson, affidavit, 30 November 2016 (doc A7), p 11

12. *Red Book*, p 65

13. Mana Ahuriri Incorporated, 'Ratification Strategy for Mana Ahuriri Hapū', p 7 (doc A18(a)(i), p 380)

14. *Ibid*, pp 1–11 (pp 374–384)

15. Robinson, affidavit (doc A7), pp 11–12

accountability issues raised by the claimants were only brought to the Crown's attention during the period in which the Crown had to decide whether to accept the outcome of the ratification process and sign the deed. Further, the claimants have alleged serious flaws in the ratification process itself, which they argued were of such gravity that the Crown ought not to have signed the deed of settlement. Our assessment of the issues, therefore, switches back and forth between accountability issues (as these became known and the Crown acted upon them) and the process followed by the Crown to assure itself that the ratification had produced a robust result. The Crown had to satisfy itself that the settlement would be durable before it signed the deed.

The structure of the chapter is as follows:

- ▶ *Section 3.2*: the initial results of the ratification and the Minister's decision once OTS recommended that the ratification process should be rerun (September and October 2015).
- ▶ *Section 3.3*: the Crown's discovery of the accountability issues and its initial reaction to those (October and December 2015).
- ▶ *Section 3.4*: the independent review of the ratification process, and the Crown's decisions following the reviewer's first and second reports (November 2015 to January 2016).
- ▶ *Section 3.5*: the Crown's actions in response to the accountability issues raised with it by the claimants (February to July 2016).
- ▶ *Section 3.6*: the Crown's decisions on the ratification (August to November 2016).

Our final conclusions, findings, and recommendations are made in chapter 4.

3.2 DID THE CROWN TAKE SUFFICIENT AND APPROPRIATE ACTION FOLLOWING THE RATIFICATION VOTE?

3.2.1 Initial results and voting controversies, August–September 2015

The ratification of the MAI deed of settlement and PSGE began when voting opened on 17 July 2015. Soon after the close of voting on 21 August, however, doubt was cast on the integrity of the ratification process from all sides:

- ▶ the Maungaharuru–Tangitū Trust (MTT) and Matthew Mullany raised concerns about the distribution of voting packs;
- ▶ MAI suggested that there may have been tampering with the voting; and
- ▶ OTS advised the Minister that the signing of the deed would need to be postponed for a number of reasons, including that the results were too low for the Crown to accept the outcome of the ratification.

OTS was notified of controversies about the vote almost immediately after voting finished, most of them concerning whānau who registered during the ratification process. Matthew Mullany advised that he had not received a voting pack, despite reporting his change of address at one of the ratification hui.¹⁶ Shayne Walker, who was the general manager for MTT at that point, notified OTS on 28 August:

16. Matthew Mullany, affidavit, 31 October 2016 (doc A1), pp 6–7

3.2.1

- ▶ 26 voting packs were not received by members who registered during the process, mostly two weeks before the voting deadline but all more than one week before the deadline;
- ▶ 53 voting packs were received too late for members to vote – either just before, on, or after the deadline;
- ▶ some members did not receive voting packs because more information was sought before their registration was accepted (whereas people could just vote at the hui and any missing information would be sought later); and
- ▶ whānau could not register online (to speed up the receipt of a voting pack) unless they had an email address, which was considered an unfair and unnecessary restriction (since many did not have email).¹⁷

These concerns were at first directed to the independent returning officer but – after discovering that MAI sent out the voting packs – the issue was raised with OTS. Mr Walker sought an immediate remedy. He requested an extension of the voting period by two weeks so that those who either did not get sent a voting pack (or received it too late to vote in time) could still vote.¹⁸ Unfortunately, there was no response from OTS in time to have allowed such an extension to occur, which might have alleviated some of the concerns about the ratification process.¹⁹

From the other side, MAI communicated its concerns about the voting process to OTS on 4 September. They advised that 133 ‘Special Votes registrations’ had been done in bulk from three IP addresses, resulting in 76 special votes on one day and 57 more over two days. Piri Prentice, deputy chair of MAI, advised OTS that there might have been ‘tampering with the voting process.’²⁰

The concerns from MAI, MTT, and Matthew Mullany formed the context in which OTS evaluated the ratification results. The independent returning officer filed his report on 2 September 2015, stating that the results were:

- ▶ Question 1 (DOS): 340 votes cast; 282 in favour (82.94%), 58 against (17.06%).
- ▶ Question 2 (PSGE): 333 votes cast; 267 in favour (80.18%), 66 against (19.82%).²¹

On the surface, figures of 82.94 per cent and 80.18 per cent indicated high majorities but the question arose as to what proportion of the registered members had actually voted in the ratification poll. OTS officials were concerned because doubts had arisen about the integrity of the voting process, they were unsure what had happened to the special votes, and they had no definite information as to the final figure for the number of registered voters. Based on the figure given in the ratification strategy, which was 2,217 registered members who were eligible to vote, only about 15 per cent of hapū members had voted. This participation rate was

17. Shayne Walker to Tia Walbrook and Tim Townsend, 28 August 2015 (doc A4(a), pp100–102)

18. Ibid, p3 (p102)

19. Tim Townsend to Shayne Walker, email, 7 September 2015 (doc A4(a), p110); Shayne Walker to Tim Townsend, email, 16 September 2015 (doc A4(a), p110)

20. Piriniha Prentice to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 4 September 2015 (doc A18(a)(ii), pp16–17)

21. Tuia Group, *Independent Returning Officer Report – Voting Results: Mana Ahuriri Hapū Ratification Process* (Wellington: Tuia Group, 2015), p5 (doc A18(a)(i), p410)

Special votes	Q1: in favour		Number who voted	Q2: in favour		Number who voted
	No	%		No	%	
<i>First result</i> (14 included)	282	83.74	340	257	80.88	333
<i>Second result</i> (if none included)	273	83.74	326	258	80.88	319
<i>Second result</i> (if all 174 included)	296	60.16	492	276	56.21	491

Table 3.1: Initial ratification results, 2–3 September 2015

‘the lowest rate the Crown has recorded for a ratification process.’²² The Minister agreed, minuting on the OTS report: ‘Results are very poor indeed.’²³

The MAI komiti sought further information from the returning officer about the special votes. The Tuia Group indicated that 174 special votes had been received, of which 160 had not been validated by MAI. The 14 voters whose registration had been approved were included in the 2 September 2015 results. If all or none of the special votes were counted, the Tuia Group calculated the results as summarised in table 3.1.

Clearly, the special votes would have had a significant impact, reducing the approval rates for the deed and PSGE to 60 per cent and 56 per cent respectively.²⁴ Mr Prentice signalled to OTS that MAI now thought that all the special votes should be counted. The komiti had come to this decision even though it considered that ‘there is a case for Mana Ahuriri Inc to invalidate’ them.²⁵

3.2.2 OTS recommends that the ratification process be rerun

OTS met with the MAI komiti on 21 September 2015:

we informed MAI that we did not believe the substance and process of the results were sufficient to recommend acceptance. We suggested they may wish to withdraw the ratification results on the basis that the voter participation rate was insufficient to hold a mandate. We have also told them we will work closely with them to rerun a robust ratification process as soon as possible.²⁶

22. Tim Fraser to Minister for Treaty of Waitangi Negotiations, aide memoire, OTS 2015/2016–165, 9 September 2015, pp 1–2 (doc A18(a)(ii), pp 13–14)

23. Minister for Treaty of Waitangi Negotiations, minute, 9 September 2015 (doc A18(a)(ii), p 14)

24. Juan Prado to Wayne Johnson, email, 3 September 2015 (doc A18(a)(ii), p 24)

25. Piriniha Prentice to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 4 September 2015, p 2 (doc A18(a)(ii), p 17)

26. Tim Fraser to Minister for Treaty of Waitangi Negotiations, aide memoire, OTS 2015/2016–210, 23 September 2015, p 3 (doc A18(a)(ii), p 28)

3.2.2

Following this meeting, officials advised the Minister that the participation result had been revised upwards, based on a significant reduction of the number of eligible voters. This result was identical to the first but the participation rate was now 25 per cent instead of 15 per cent.²⁷

Even though the initial participation rate of 15 per cent had not been confirmed, OTS had considered it indicative of low participation. This view was reinforced by the attendance at the nine ratification hui in July and August 2015. Three of the hui had no attendees at all while only 'a handful' attended the others. MAI suggested that there was 'fatigue' among hapū members, who had been involved in other settlements and 'simply want to finalise the deal'.²⁸ In any case, the number of eligible voters was now lowered from 2,217 to 1,345 (thereby increasing the participation rate to 25 per cent).²⁹ MAI explained that there had been work to update the database since the ratification strategy was approved in May 2015, and that 'a large number of duplicate eligible voter registrations were discovered when the eligible voter list went to the printer'.³⁰ MAI reported that, after updating their register in this way, they had sent out 1,223 voting packs in preparation for the vote.³¹

In the officials' view, the higher rate still did not justify acceptance of the results. They advised the Minister:

- ▶ OTS does not recommend acceptance of a ratification result of less than 85% approval *unless* there has been at least 39% participation (and we are satisfied the process was sound); and
- ▶ approval of ratification is usually granted with 35% participation and 95% approval rates. [Emphasis in original.]³²

In cases where a lower participation rate had been accepted by the Crown, the approval rates had been 87 per cent or higher, there had been a large number of votes cast, and a sound ratification process had occurred.³³

OTS remained concerned about the integrity of the ratification process. MAI had sent out the voting packs itself, despite a warning from OTS that they needed to 'protect themselves from any risk of accusations that they have had an influence on

27. Tim Fraser to Minister for Treaty of Waitangi Negotiations, aide memoire, OTS 2015/2016-210, 23 September 2015, pp 1, 5 (doc A18(a)(ii), pp 26, 30)

28. Tim Fraser to Minister for Treaty of Waitangi Negotiations, report, OTS 2015/2016-183, 14 September 2015, p 4 (doc A19, p 15)

29. Tim Fraser to Minister for Treaty of Waitangi Negotiations, aide memoire, OTS 2015/2016-210, 23 September 2015, pp 1, 5 (doc A18(a)(ii), pp 26, 30)

30. Tim Fraser to Minister for Treaty of Waitangi Negotiations, report, OTS 2015/2016-183, 14 September 2015, p 2 (doc A19, p 13)

31. Ibid, p 3 (p 14)

32. Tim Fraser to Minister for Treaty of Waitangi Negotiations, aide memoire, OTS 2015/2016-210, 23 September 2015, pp 1-2 (doc A18(a)(ii), pp 26-27)

33. Ibid, p 2 (p 27)

who votes'. Further, they had sent out the packs in the mail instead of by courier, which meant that the dispatch and receipt dates could not be verified.³⁴ This was significant given the complaint that Mr Walker had made to both the returning officer and OTS (see above).

The approach to the special votes was also a concern since such a large number had not been validated. MAI now proposed to have all of those votes included in the results – this decision, communicated by MAI on 4 September 2015, was not reflected in the results put to the Minister. In reality, the results were much lower: 60 per cent approval of the deed of settlement and 56 per cent approval of the PSGE.³⁵ OTS commented to the Minister on 23 September 2015: 'The fact that MAI now wish these votes to be validated raises a concern about the special vote process.'³⁶ In the meantime, MTT had advised that it had been responsible for assisting hapū members to register (the bulk registrations).³⁷

Overall, OTS recommended that the ratification process be rerun 'in a robust and independent manner with the aim of achieving an accurate and safe ratification result'.³⁸

3.2.3 MAI blames MTT for 'sabotage' and low results

Following the meeting between OTS and MAI, the komiti responded to the OTS position with a blistering attack on MTT and its involvement in the ratification process (and the MAI negotiations more generally). According to MAI, it had run a sound ratification process until about two weeks before the voting deadline. MTT, they argued, had then 'used all its resources to sabotage and destroy the ratification process'. MTT had been allowed to 'break the rules and possibly the law and get away with it and seriously compromise and damage the Special Voting processes of Mana Ahuriri and the Crown'. The assessment by OTS had missed the cause of all the problems and – by not investigating the 'despicable and bullying actions against Mana Ahuriri' – had effectively condoned this sabotage of their process.³⁹ In addition to block registrations of MTT members late in the process, MAI alleged that there had been block voting as well. The late registrations, it was argued, were

tactically designed to overwhelm and undermine our administration voting pack distribution processes. We had to endure an attack that was nasty, deliberate, and

34. Ibid

35. Ibid; Tim Fraser to Minister for Treaty of Waitangi Negotiations, report, OTS 2015/2016–183, 14 September 2015, pp 3–4 (doc A19, pp 14–15); Piriniha Prentice to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 4 September 2015, p 2 (doc A18(a)(ii), p 17); Juan Prado to Wayne Johnson, email, 3 September 2015 (doc A18(a)(ii), p 24)

36. Tim Fraser to Minister for Treaty of Waitangi Negotiations, aide memoire, OTS 2015/2016–210, 23 September 2015, p 2 (doc A18(a)(ii), p 27)

37. Ibid, p 3 (p 28)

38. Ibid

39. Joinella Maihi-Carroll to Tim Fraser, 29 September 2015 (doc A18(b)), p 3

3.2.4

designed to sabotage our ratification process. This was completely unexpected by anyone.⁴⁰

Further, MAI had only sent out the voting packs itself because of a late decision that TPK could not act as the returning officer. In terms of Shayne Walker's allegations about the non-receipt of voting packs, 32 of the 51 named persons either did cast a vote or had not applied for registration.⁴¹

MAI admitted that their results did not meet the standard now communicated by OTS – at this point, they understood their participation rate to be 33 per cent (which included all special votes and an approval rating of 60 per cent for the deed of settlement and 56 per cent for the PSGE). MAI said that the 'low' acceptance rate should be 'qualified' by an understanding of the 'unprecedented and exceptional circumstances that was clearly the deliberate actions of an external PSGE'.⁴² MAI sought a meeting with the Minister to state their case directly, noting: 'If we had known about the approval rate earlier [in the 80–90 per cent range in the case of a lower turnout] we would never have considered allowing all the special votes to be counted. The acceptance rate was at 80% before the special votes were included.'⁴³

3.2.4 The Minister's meeting with MAI, 8 October 2015

The Minister met with MAI on 8 October 2015, after which he decided not to rerun the ratification (as OTS had proposed). We do not have a record of this meeting. It appears, however, that the Minister decided on a different approach '[f]ollowing the MAI presentation', when he 'proposed a review of their ratification be undertaken by a QC or retired High Court Judge'.⁴⁴

3.2.4.1 MAI's presentation to the Minister

MAI's presentation was provided to us by Mr Prentice. It repeated many of the points made in the 29 September letter to OTS.

First, MAI believed that the only objective of rerunning the process would be to increase the 'acceptance vote'. Such an outcome seemed doubtful: '*The Reality* is that Mana Ahuriri is unlikely to stop or curb the wave of popularity against ratification regardless of how we defend, argue, react or respond to it' (emphasis in original).⁴⁵ The komiti told the Minister that MTT had been lobbying against the deed of settlement and PSGE, and that MAI was 'seriously disadvantaged' because MTT already had its settlement and was well resourced and organised.

40. Joinella Maihi-Carroll to Tim Fraser, 29 September 2015 (doc A18(b)), pp 3, 5

41. Ibid, pp 4–6

42. Ibid, p 7

43. Ibid

44. Tim Fraser to Minister for Treaty of Waitangi Negotiations, report, OTS 2015/2016–299, 3 November 2015, p 2 (doc A18(a)(ii)), p 33

45. Mana Ahuriri Incorporated, presentation to Minister for Treaty of Waitangi Negotiations, 8 October 2015 (doc A16(c)(ii)), pp 1–2

Secondly, MAI argued that its 'loyal member support base' was getting 'tired and disillusioned'; and it would lose rather than gain support if the vote was rerun. MAI again argued that MTT was responsible:

Many will see a re-run as a defeat for MAI and a win for MTT – they will vote accordingly as Mana Ahuriri will have lost the credibility and reputation war if a re-run is absolutely necessary.

As a consequence of the above, it is likely that the approval rate will decrease, but there is a more serious risk that the voting approval will fall below the current approval rate and below the 50% acceptance line.

The latter would be an absolute disaster with demoralising consequences. Not only will it mean a rejection of the DOS and PSGE but the possibility of returning the settlement process back to establishing new or fresh mandates and that organisation may not necessarily be Mana Ahuriri.

Mana Ahuriri wishes to avoid this option for the reasons presented.⁴⁶

MAI, therefore, wanted the Crown to approve the ratification and accept the current results.

Thirdly, MAI addressed the issue of special votes. The approval rate was at 80 per cent before they made the decision to accept all the special votes. MAI noted that 'accepting all Special Votes was a difficult but considered decision'. This was because a '*decision to disqualify them would have disadvantaged too many of our people regardless of their views or beliefs*' (emphasis added). The komiti had therefore decided to accept those votes even though they 'knew that inclusion of the Special Votes would likely be detrimental' to them. This position, however, was undermined by their other argument that MAI was actually entitled to disqualify most of the special votes. The komiti claimed that there had been '[v]ote tampering on behalf of registered Special Voters'. The komiti alleged that:

- ▶ multiple voters had been 'registered to single addresses';
- ▶ some who voted were not aware they had been registered; and
- ▶ some who claimed not to have received their voting packs had nonetheless voted.

MAI noted that the 'strategy or tactics of late registrations two weeks out from closing date' did not break any rules (which was a departure from the earlier position on 29 September). Rather, they saw it as evidence of 'bad faith'. They blamed the 'selfish and deliberate actions that were promoted and organised' by MTT.⁴⁷

Finally, MAI stated that it had achieved a majority despite the 'undermining and bullying assaults' of a neighbouring PSGE. 'Should the current approval rate not be acceptable to the Minister', they said, 'it would be very difficult to explain to our

46. Ibid, pp 2–3

47. Ibid, pp 3–4

members that supported the ratification that although we got over the 50% line we still lost to the Maungaharuru Tangitu Trust.⁴⁸

3.2.4.2 *The Minister's decision to review the process*

We have not been provided any direct explanation of why the Minister decided not to accept OTS's proposal to either (i) rerun the ratification or (ii) go with the present result but refuse to approve the ratification. The Crown's witness, Warren Fraser, simply stated: 'The Minister for Treaty of Waitangi Negotiations met with the MAI Komiti on 8 October 2015 and, following that meeting, the Minister directed that an independent review of the ratification process was to take place.'⁴⁹

Claimant counsel submitted:

The Crown did not seek MTT's response to these very serious allegations from MAI. Certain of these allegations were put to Ms Hopmans at the hearing and were strongly refuted by her. The fact that 105 of the 106 declined registrations have ultimately been accepted by MAI illustrates that there was no substance to what were no more than conspiracy theories used to explain a poor ratification result.

It is unclear the extent to which these allegations influenced the Crown's decision not to re-run the ratification process and instead commission the Carruthers Report. However it is clear that MAI put pressure on the Crown (as demonstrated by these letters), and that subsequently the Crown did change its mind and decided to commission the Carruthers' Reports.⁵⁰

We accept that the late registrations created difficulties for MAI but the main purpose of the ratification process was for as many members as possible of Ahuriri hapū to express their will by voting. The ratification strategy allowed members to enrol right up until the end of the voting period. Every single person that MTT assisted to register was a member of the Ahuriri hapū and therefore entitled to register and vote. Mr Prentice's evidence was that the only special voter who was *not* a member of the Ahuriri hapū had registered and cast a vote at one of the ratification hui.⁵¹ Further, Ms Hopmans denied that MTT assisted anyone to vote. On the issue of large numbers of voting packs being sent to single addresses, Ms Hopmans observed that multiple whānau on the MTT register use single postal addresses, and that this is not uncommon among Māori.⁵²

In any case, OTS doubted that the ratification results showed that MAI had a mandate for settlement. In addition, the officials had raised a number of procedural deficiencies and uncertainties – including the special voting process, the exact

48. Mana Ahuriri Incorporated, presentation to Minister for Treaty of Waitangi Negotiations, 8 October 2015 (doc A16(c)(ii)), p 4

49. Warren Fraser, brief of evidence, 8 February 2019 (doc A18), p 23

50. Matanuku Mahuika and Mawhai Tukapua, closing submissions of Wai 2573 claimants, 2 May 2019 (paper 3.3.4), pp 20–21

51. Piriniha Prentice, answers to written Tribunal questions, 10 April 2019 (doc A16(c)), pp 2–3

52. Tania Hopmans, under cross-examination by counsel for MAI and MAT, East Pier Hotel, Napier, 19 February 2019 (transcript 4.1.1, pp 164–171)

number of registered members entitled to vote, and the final results of the vote. Shayne Walker for MTT had alleged deficiencies in the timeliness of sending out voting packs, and OTS had criticised MAI's decision to distribute the packs and its failure to use couriers rather than the post. MAI, on the other hand, blamed MTT in very strong language for the assistance it had given voters to register so late in the piece. It had also blamed MTT for the relatively poor results of the vote. Importantly, MAI's presentation to the Minister admitted that their mandate could not withstand a rerun of the ratification process.

It is not surprising, therefore, that the Minister decided to commission an independent review of the ratification process by a senior lawyer. We agree that it was necessary for the Crown to have an expert readout on the process issues, before it could evaluate the other matters raised by both OTS and MAI: the relatively low result of the vote and the possibility that five years of negotiations would be wasted if the MAI mandate could not survive a rerun.

3.3 THE CROWN BECOMES AWARE OF TRANSPARENCY AND ACCOUNTABILITY ISSUES, OCTOBER–DECEMBER 2015

3.3.1 No AGM is held in September 2015

By the beginning of October, there was a great deal of uncertainty about what was happening with the settlement. The signing of the deed had originally been scheduled for 18 September 2015 but this had been postponed. In the meantime, MAI was required by its rules to hold its AGM on 30 September 2015. That date had come and gone with no AGM and no notice of an AGM to be called in the near future.⁵³ In fact, MAI had expected that the deed would have been signed by 30 September, MAT would have been established, and MAI could be wound up.⁵⁴ This was not the case and it appears that the komiti did not want to have an AGM with matters so undecided.

Both MTT and Ngāti Pārau wrote to the Crown in late October 2015 once it became clear that MAI was not going to convene an AGM or hold elections. Both groups expressed their concerns about the lack of an AGM and alleged an ongoing failure to hold elections and remain accountable to the claimant community.⁵⁵

3.3.2 Ngāti Pārau leaders inform the Crown of their concerns

As discussed in chapter 2, Ngāti Pārau had met with the Crown prior to the initialling of the deed. Laurence O'Reilly and Hinewai Hawaikirangi had informed the Crown of their concerns about representation on both MAI and the PSGE. The Crown's response had been: participate in the ratification vote and wait for

53. Shayne Walker to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 22 October 2015, p1 (doc A4(a), p103)

54. Piriniha Prentice, affidavit, 28 November 2016 (doc A6), p12

55. Shayne Walker to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 22 October 2015, pp1–4 (doc A4(a), pp103–106); Hinewai Hawaikirangi, Laurence O'Reilly, and Te Kaha Hawaikirangi to Minister for Treaty of Waitangi Negotiations, 28 October 2015 (doc A1(a), pp34–35)

the PSGE elections. In mid-October, concerned that they still did not know the outcome of the ratification vote and that no AGM had been held, a hui-a-hapū was held for Ngāti Pārau at Waiohiki Marae. As discussed in chapter 1, Matthew Mullany and Te Kaha Hawaikirangi were appointed alongside Laurence O'Reilly and Hinewai Hawaikirangi to present their concerns to the Crown.⁵⁶

On 28 October 2015, Mr O'Reilly and Ms Hawaikirangi wrote to the Minister, informing him of the hui and raising concerns about the lack of elections. MAI komiti members, they wrote, were supposed to have two-year terms but there had been no election in 2015 (and no AGM either). Concern was expressed that the change of AGM date from March to September (in 2014) had allowed the current komiti members to entrench themselves as the PSGE trustees. The ratification vote was *not* an alternative to an election. The result was that Ngāti Pārau may have no opportunity to elect a representative for a further two years, despite 'continuously raising our concerns regarding fair hapū representation within the MAI komiti and the PSGE'. Their proposed solution was for elections to be held immediately so that the komiti was properly elected and Ngāti Pārau had a chance to get a representative on it.⁵⁷

3-3-3 MTT informs the Crown of concerns held by hapū members

Ngāti Pārau's concerns were mostly focused on their belief that they were not properly represented in the settlement negotiations and decision-making, and that this situation would continue for at least two more years unless elections were held. MTT had already raised this and other issues with the Crown on 22 October 2015. Their hapū members of Ngāti Tū and Ngāi Te Ruruku had also been concerned about the failure to hold an AGM or elections in September. MTT asked the Crown to stop negotiations until MAI had held its AGM and elections 'in accordance with their rules, and refreshed their mandate at the AGM to negotiate with the Crown'.⁵⁸ In addition to concerns about the ratification and voting process, MTT pointed out to Ministers that there had been no elections since 2013. In its view, the term of at least seven komiti members (elected in 2011) had expired a long time ago. MAI had not held a general meeting since March 2014, and accounts had not been presented since the 2012 accounts in September 2013.⁵⁹

MTT reminded the Crown that AGMs, elections, and accounts are essential for accountability and, 'from the perspective of the Crown, the AGM is the time that a mandated entity is required to confirm its mandate'.⁶⁰ According to MTT's interpretation of the constitution, a komiti member's term was for two years (rule 11.1), at least two members must retire at each AGM (rule 11.2), members held office

56. Jenny McIlroy, affidavit, 8 December 2016 (doc A9), p 2; Mullany, affidavit (doc A1), p 2

57. Hinewai Hawaikirangi, Laurence O'Reilly, and Te Kaha Hawaikirangi to Minister for Treaty of Waitangi Negotiations, 28 October 2015 (doc A1(a)), pp 34–35)

58. Shayne Walker to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 22 October 2015, p 1 (doc A4(a), p 103)

59. Ibid, pp 2–3 (pp 104–105)

60. Ibid, p 2 (p 104)



Matthew Mullany of Ngāti Pārau, giving evidence on behalf of the claimants at East Pier Hotel, Napier, 18 February 2019

till their successors were elected (rule 11.3), and elections must take place at the AGM the year the current term of a komiti member expired (rule 11.6). On that reading of the constitution, MTT argued that the two komiti members elected in September 2013 had expired in September 2015, and the term of the rest had expired in 2013. In respect of ‘accountability and transparency,’ it was argued, ‘it is unacceptable for a mandated entity to fail to comply with its own rules and to fail to hold elections for its Komiti Members.’⁶¹ MAI had to submit mandate maintenance reports to the Crown, and its own mandating strategy ‘highlighted remaining accountable to their people.’ The usual way to do this was by having AGMs and elections: ‘We believe MAI has failed on both counts, and therefore their mandate from their Hapū has been undermined.’⁶²

Writing on behalf of MTT, Shayne Walker added:

It gives us no satisfaction bringing these issues to your attention. However, as the mandated representatives of Marangatūhetaua and Ngāi Te Ruruku ki Tangoio, we are concerned that MAI has not been accountable and transparent to our hapū, nor have they acted in their best interests. It is important that MAI gets its own house in order with the hapū before proceeding any further.⁶³

61. Ibid, pp 2–3 (pp 104–105)

62. Ibid, p 3 (p 105)

63. Ibid, p 1 (p 103)

Thus, both MTT and Ngāti Pārau leaders asked that the Crown not continue to negotiate with MAI until it showed transparency and accountability to its hapū members, and that it still held the mandate, by holding an AGM, presenting accounts, and holding an election. At this point, of course, none of these hapū members knew the results of the ratification process.

3.3.4 The Crown's response in November 2015

We have already addressed the Crown's interpretation of the MAI constitution in chapter 2. As discussed in that chapter, the parties' arguments raised two issues in respect of the Crown's acts or omissions: ought the Crown to have already been aware of these issues through its monitoring of MAI's mandate; and what actions did the Crown take once the issues were brought to its attention by the claimant community in October 2015? We have already addressed the first question in chapter 2. Here, we address the second of these two issues.

We do not have a reply to the claimants' 28 October letter on our record. We do have the Crown's response to the MTT letter of 22 October, which was sent about a month later on 18 November 2015. Essentially, the Crown's response was that these accountability issues were internal matters that should be raised by hapū members directly with MAI, and (politely) that MTT should mind its own business.⁶⁴ Crown counsel explained that the usual 'starting point', where 'the disagreement appears to be one that is primarily internal to the claimant group', is to encourage dialogue between the 'mandated representatives and those who are challenging them' to see if a workable solution can be found.⁶⁵

The Minister advised Shayne Walker that MAI and the Crown were 'committed to ensuring a durable Treaty settlement', and had agreed to an independent review of the ratification process. After considering the review and a ratification report from OTS officials, the Minister would make a decision as to whether to accept the ratification and sign the deed of settlement. The Minister then stated:

I appreciate Maungaharuru Tangitū (MTT) has an existing relationship with Ngāi Te Ruruku and Ngāti Tū Hapū as a result of representing their interests in MTT settlement negotiations with the Crown. MAI have a separate and equally important relationship with these Hapū as they work to finalising the Ahuriri Hapū settlement. MTT seeking to represent all Ngāi Te Ruruku and Ngāti Tū Hapū interests in matters related to the MAI settlement is causing confusion. I would ask that you encourage those individuals who whakapapa to MAI to contact MAI directly with their concerns.⁶⁶

64. Minister for Treaty of Waitangi Negotiations to Shayne Walker, 18 November 2015 (doc A4(a), p113)

65. Melvin, closing submissions of Crown (paper 3.3.6), p7

66. Minister for Treaty of Waitangi Negotiations to Shayne Walker, 18 November 2015 (doc A4(a), p113)

3.3-5 MAI decides to hold a late AGM

In November, MAI decided to hold its AGM and set a date of 11 December 2015. It sought a legal opinion as to whether it also needed to hold elections. Piri Prentice explained as follows:

The reason for seeking legal advice in November 2015 was to address a specific issue which had arisen when it became clear that acceptance of the ratification results of the September 2015 vote had been delayed. That meant that MAI (which was intended to cease after the ratification of the settlement) had to address the fact that our constitution required an AGM and elections to be held. The legal advice gave us various options, and the option that was ultimately taken was set out at paragraph 5(c) of that legal opinion: that the nominations process could not be conducted in time for the December AGM, and that the elected Komiti members continued to hold office.⁶⁷

The other two options were:

- Put a motion at the meeting that, although nominations had not been sought, MAI was about to go out of existence and the 'proposed Treaty settlement has been confirmed by the Crown', therefore the meeting agreed to re-elect the present komiti members.
- Wait and see if the issue was raised at the meeting. If it was, then put a motion that 'this meeting records that, while the society has not complied with Rule 11.8, compliance with Rule 11.8 is dispensed with as members are deemed to have read and be aware of the provisions of the Rules of the society and in any event the society will go out of existence once the Treaty settlement is signed'. Rule 11.8 required the returning officer to call for nominations 21 days before the AGM.⁶⁸

The Minister had not in fact approved the settlement, and the legal advice over-emphasised the idea that the completion of the settlement was imminent – in fact, OTS had advised that the ratification be redone and the Minister had decided to review the process.

The legal opinion advised that the failure to hold the September AGM would be 'cured by holding it as soon as practicable'.⁶⁹ The notice that went out for the meeting had one proposed resolution attached: 'That there will be no rotation of trustees or trustee elections at the 11 December 2015 Annual General Meeting'.⁷⁰

The AGM proved to be quite contentious. Tania Hopmans sent in two resolutions for consideration at the meeting: 'first, for MAI to hold elections in accordance with its Rules and second, for MAI to stop all discussions with the Crown

67. Prentice, answers to written Tribunal questions (doc A16(c)), p 2

68. Mark von Dadelzen to Mana Ahuriri Incorporated, 16 November 2015, pp1–6 (doc A6(a), pp70–75)

69. Ibid, p1 (p70)

70. Mana Ahuriri Incorporated, *Te Karoro*, panui 6 (December 2015) (doc A6(a), p78)



Tania Hopmans giving evidence on behalf of the claimants, East Pier Hotel, Napier, 19 February 2019

until elections have been completed.⁷¹ These proposed resolutions arrived too late to be advertised for the meeting, so they were not put to the vote at the AGM. The komiti's resolution – that no rotation or election should occur – was rejected unanimously. Although there was some disagreement among the witnesses as to whether it was rejected (and by how large a margin), the minutes record: 'The resolution was voted against unanimously.'⁷² According to Ms Hopmans, there was some discussion of her resolutions:

I was advised that my request was out of time, and could not be put to the hui, although at the hui, whānau did discuss them briefly and were supportive of the resolutions. Piri Prentice chaired the hui and commented that MAI would look at holding elections for two positions. I responded that all the komiti members terms' had expired and elections needed to take place for all of the komiti members. Mr Prentice said MAI would take legal advice and declared the meeting closed.⁷³

After the komiti's resolution not to hold elections was defeated, the minutes show that there was further discussion of the elections issue. The MAI komiti confirmed that the only election since 2011 had been the rotation of two trustees in 2013. According to the minutes, however, Mr Prentice did not say that MAI would consider holding elections for two positions. He is recorded as having said: 'There will be a SGM in the first quarter of 2016 and there will be no elections

71. Tania Hopmans, affidavit, November 2016 (doc A5), p19

72. Mana Ahuriri Incorporated, AGM minutes, 11 December 2015, p 6 (doc A6(a), p 84)

73. Hopmans, affidavit (doc A5), p19

for two trustees.⁷⁴ The point was made that elections for the Mana Ahuriri Trust would not take place until after the first financial year following settlement (the settlement legislation); most komiti members would not have faced election for six years. Despite the unanimous rejection of their motion at the AGM, and the pressure from the AGM to hold elections at the upcoming SGM, the komiti remained adamant that no elections were necessary because of MAI's imminent dissolution and the legal position that komiti members continued to hold office until replaced.⁷⁵

As we discussed in chapter 2, another key issue confronted at the AGM was the presentation of audited accounts. MAI had not presented any accounts since 2013. There was no financial information given at the 2014 SGM, and there had been no AGM since March 2012. Nor was the komiti in a position to present audited accounts at the December 2015 meeting. Instead, an accountant showed unaudited accounts from 2013–14 and 2014–15 (but none from 2012–13) on a power point display. No paper copies were distributed.⁷⁶ Those present at the hui 'happened to notice' the presence of a \$500,000 loan, which had never been disclosed prior to this meeting.⁷⁷ Tania Hopmans recalled: 'there were no hard copies and there was nothing supplied prior to the hui, and it was quite amusing at the time because when that came up people all got their phone out to record it because it had come as a surprise.'⁷⁸ The MAI komiti undertook to provide audited accounts for 2013, 2014, and 2015 at a special general meeting in the first quarter of 2016. On the issue of whether the loan should have been disclosed to members prior to ratification – especially since it would need to be repaid from the settlement – no answer was given.⁷⁹

We have already discussed the substance of the loan and accounts issue in chapter 2. What is important here is the timing and the issue of transparency and accountability, which in turn is relevant to considerations of mandate.

3.3.6 Transparency and accountability issues are raised with the Crown

Almost immediately after the AGM, the Crown received a number of letters from the claimants and from hapū members who affiliated with both MAI and MTT.⁸⁰

74. Mana Ahuriri Incorporated, AGM minutes, 11 December 2015, p7 (doc A6(a), p85)

75. Ibid, pp 6–7 (pp 84–85)

76. Ibid, pp 2–5 (pp 80–83)

77. Tania Hopmans, under re-examination by claimant counsel, East Pier Hotel, Napier, 19 February 2019 (transcript 4.1.1, p 203)

78. Ibid

79. Mana Ahuriri Incorporated, AGM minutes, 11 December 2015, pp 2–5 (doc A6(a), pp 80–83)

80. Shayne Walker to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 15 December 2015 (doc A4(a), pp 114–119); Hinewai Hawaikirangi, Laurence O'Reilly, Te Kaha Hawaikirangi, and Matthew Mullany to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 15 December 2015 (doc A1(a), pp 38–39); Charmaine Butler to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 15 December 2015 (doc A3(a), pp 3–4); Tania Hopmans and Whakiao Hopmans to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, email, 16 December 2015 (doc A5(a), pp 196–199); Trevor Taurima to Minister for Treaty of Waitangi Negotiations, 14 December 2015 (doc A2(a), pp 1–2)

As will be recalled, the Minister had written to Shayne Walker on 18 November 2015, stating that MTT's involvement was causing 'confusion', and matters regarding elections and accounts should be raised internally by hapū members with MAI. This had occurred at the AGM on 11 December, with mixed results. Mr Walker wrote to the Crown again on 15 December 2015, stating that while it was correct that 'our people' had mandated MAI to settle part of their historical claims, it was still necessary for MTT to raise issues on behalf of its members when 'MAI has not kept their promise to act transparently and remain accountable to our hapū'.⁸¹ The AGM had revealed a 'lack of transparency, accountability and mandate', because MAI had failed to hold elections, present audited accounts, or disclose the loan over a number of years. According to MTT, members had been 'kept in the dark and prevented from electing representatives to the Board. Therefore, it follows that MAI's mandate to negotiate a settlement on behalf of its members has been seriously compromised'.⁸²

These were serious allegations, and the challenge was presented squarely to the Crown as to whether it had properly monitored the mandate and could continue to rely on it for completing the settlement:

We believe the Crown ought to be concerned about whether MAI has maintained its mandate with its members. It is incumbent on the Crown to monitor MAI's performance in this area during the negotiations and ratification period. A search of the Register of Incorporated Societies clearly shows that MAI has not filed financial statements since 2012. This should have raised a question for the Crown of whether MAI has held an AGM and transacted the business it is required to do so under its Rules (presentation of audited financial statements, clause 17.2 and conduct of elections, clause 11.2(a)) and the Incorporated Societies Act 1908 (approval of financial statements, section 23 of the Act).

These are significant issues for the Crown and our hapū. We are mindful that the hapū did not have the information that was recently revealed at the AGM prior to the ratification. We know that many of our hapū were dissatisfied with the Deed of Settlement and unhappy with the structure of the PSGE and no doubt will have voted accordingly. However, if the above information had been made available prior to the ratification we believe many more whānau would have questioned the competency of the Board members, and their personal motivations for promoting the Deed of Settlement, the PSGE in its current form and their automatic appointment as the initial Trustees. Accordingly, it is highly likely that many more whānau would have voted against the Deed of Settlement and the PSGE.⁸³

On 14 December 2015, Matthew Mullany emailed OTS about the AGM. This was followed up by a letter from Laurie O'Reilly, Hinewai Hawaikirangi, Te Kaha

81. Shayne Walker to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 15 December 2015, p [1] (doc A4(a), p 114)

82. Ibid, pp [1]–[3] (pp 114–116)

83. Ibid, p [3] (p 116)

Hawaikirangi, and Matthew Mullany to Ministers, describing themselves as 'Ngāti Pārau representatives'. Their concerns were similar to those of the MTT/MAI members who had attended the AGM. They argued that seven committee members had not faced election since 2011, and the other two (from 2013) should have faced election in September 2015. In the view of these Ngāti Pārau leaders, the MAI komiti was not validly in office, and OTS had been negotiating with people who were not legally mandated because of this breach of the constitution. The resolution not to hold elections was unanimously rejected. Further, they said, the majority had sought elections in the first quarter of 2016 but failed – the proposed SGM might only be limited to reviewing the audited accounts. Ngāti Pārau leaders also stressed the people's discovery of the BNZ loan, which would need to be repaid out of the settlement. They suggested that the present komiti members may have entrenched themselves on the PSGE to ensure that this happened.⁸⁴

The question of what action the Crown took following this approach from Ngāti Pārau leaders is discussed below in section 3.5. At this point, however, we need to consider the Crown's responses to the independent review of the ratification process.

3.4 DID THE CROWN TAKE SUFFICIENT AND APPROPRIATE ACTION IN RESPONSE TO THE CARRUTHERS REVIEWS?

3.4.1 OTS and MAI agree on terms of reference

Prior to the Crown's response to Shayne Walker on accountability issues (18 November 2015), OTS had already received the report from Colin Carruthers QC. The terms of reference for his review had been prepared jointly by OTS and MAI, and they also agreed the wording of a message to be placed on the MAI website:

To assure our members that the ratification is representative of their views we are working with the Crown on an independent review of our ratification results and process. [Colin Carruthers QC] has been appointed to conduct an independent review to *ensure the transparency of the process and durability of the outcome*. In particular they will be reviewing the special votes and associated registrations. It is expected that the review will take about four weeks. We would like to thank our members for their patience. Once the review is completed we will let you know of the results. [Emphasis added.]⁸⁵

MAI would announce the review so as to give the komiti the opportunity to 'shape the messages' about the delay in signing the deed, show 'transparency and openness to claimants', mitigate 'accusations of secrecy', and 'show the Crown and

84. Hinewai Hawaikirangi, Laurence O'Reilly, Te Kaha Hawaikirangi, and Matthew Mullany to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 15 December 2015 (doc A1(a), pp 38–39)

85. Tim Fraser to Minister for Treaty of Waitangi Negotiations, report, OTS 2015/2016–299, 3 November 2015, p 4 (doc A18(a)(ii), p 35)

MAI working together to ensure a durable settlement without appearing to bring the MAI mandate into question.⁸⁶ OTS noted that the risks associated with the review included the possibility that the Crown might not approve the ratification, and had warned MAI of this accordingly.⁸⁷

On 3 November 2015, officials put forward two potential reviewers to the Minister, who selected Mr Carruthers. This meant that the review period would be very short. Although the agreed message for the website stated four weeks, Mr Carruthers only had 10 days available.⁸⁸ The Minister approved the appointment on 4 November and the report was completed on 13 November 2015.

The objectives of the review were to:

- ▶ confirm the ratification results following a review of the special voting process, and provide a final result ‘based on the consideration of the special votes’;
- ▶ analyse any risks or issues with both the process and the results; and
- ▶ recommend ‘whether there are any issues or risks that could be used to challenge [the Minister’s] acceptance of a low ratification result.’⁸⁹

To meet those objectives, the specific terms of reference were focused on the special voting process, including the bulk registrations which occurred two weeks out from the closing date. The terms of review posed two broad issue questions:

- ▶ Was the ratification process ‘transparent, unbiased, informative, and facilitative of full participation’?
- ▶ ‘Are there any external factors that could have had a material impact on the ratification process or results?’⁹⁰

The second of these questions was clearly aimed at the bulk registrations.

In considering those two broad questions, the terms of reference specified a number of matters for particular consideration and reporting:

- a. What is the number of eligible voters to be counted for the purposes of assessment of the ratification process (Voting) participation rate?
- b. Does the date the number of eligible voters was communicated to the returning officer affect the validity of the voting process?
- c. Was the process of distribution of ratification booklets and voting packs to MAI registrants clear and consistent with the agreed ratification strategy?⁹¹

Finally, the review was to cover specific issues about the special votes:

86. Tim Fraser to Minister for Treaty of Waitangi Negotiations, report, OTS 2015/2016–299, 3 November 2015, pp 3–4 (doc A18(a)(ii), pp 34–35)

87. Ibid, p 3 (p 34)

88. Ibid, p 2 (p 33)

89. Tim Fraser to Minister for Treaty of Waitangi Negotiations, report, OTS 2015/2016–299, 3 November 2015, p 6 (doc A18(a)(ii), p 37)

90. Ibid, p 7 (p 38)

91. Ibid

- Review the special voting provisions against the agreed ratification strategy.
- Provide an interpretation of clause 5.6 in the ratification strategy, constitution, and website in respect to the registration of special votes including 'block registrations' [this may have intended to say special voters].
- How many special votes should be considered as valid?
- What is the final number of eligible special votes?
- Was the validation process used by MAI for determining the eligibility or otherwise of special votes consistent with their constitution?
- Were there any votes not counted because the special voting process did not validate them in time, and if so should they be counted?⁹²

There was also a set of questions relating to the independence of the returning officer, but those do not concern us here as no doubts have been raised with us on that point.

3.4.2 Colin Carruthers QC's first report, 13 November 2015

First, in terms of special votes, Mr Carruthers found that MAI had decided that all the special votes should be counted. MAI had recognised:

[B]ecause of the way that the special votes had been returned there were likely to be informalities.

But as a matter of fairness, the decision was taken to allocate an identifier for each of the special voters and accept the votes for consideration and counting if valid [that is, if the voting forms were valid], by the Returning Officer.⁹³

Due to the timing of registrations during the voting process, MAI decided there was not enough time to gather the necessary information and so simply accepted all special votes. This was a difficult but considered decision because to disqualify the votes would have 'disadvantaged too many of our people'.⁹⁴ The 'informalities suspected', as Mr Carruthers put it, were:

- a potential breach of the rule that individuals must register themselves;
- registration of many voters at single addresses;
- voters who were either unaware they had been registered or who voted despite a claim that they had not received their forms in time; and
- 'vote tampering' [without any explanation of what that meant].

Despite these 'suspected informalities', MAI had decided that the fair thing to do was to accept the validity of the special votes. MAI was aware that many of them went against ratification but that it had an obligation to be fair to all members whatever their beliefs.⁹⁵

92. Ibid, pp 7–8 (pp 38–39)

93. CR Carruthers to Minister for Treaty of Waitangi Negotiations, memorandum, 13 November 2015, p 3 (doc A18(a)(i), p 95)

94. Ibid, pp 3–4 (pp 95–96)

95. Ibid, pp 4–5 (pp 96–97)

Secondly, Mr Carruthers found that MAI had acted in accordance with its ratification strategy, which required MAI to verify registration before special votes could be counted. 'Accordingly', he concluded, 'the special votes have been dealt with in accordance with the Ratification Strategy'.⁹⁶

Thirdly, the review found that the correct results for the ratification vote were 60 per cent in favour of the deed of settlement and 56 per cent in favour of the PSGE. The effect of MAI's decision to accept the special voters had reduced the figures from 82 per cent and 80 per cent respectively.⁹⁷

Fourthly, on the issue of block registrations, MAI were able to allocate a voting identifier for each of the special votes that were considered, and so the registration was verified.⁹⁸

Fifthly, in terms of whether the validation process used by MAI was consistent with the constitution, Mr Carruthers concluded that the ultimate decision was one for MAI. '[A]s a matter of fairness,' he reported, 'they were prepared to overlook any irregularity in the registration process'.⁹⁹

Sixthly, Mr Carruthers advised that he did not think there would be a significant risk of a challenge to this result. This was because 'MAI has dealt with the special votes in accordance with the Ratification Strategy by verifying registration and accepting the votes', and because 'accepting the special votes has worked against the interests of MAI as the mandated body'. In other words, any opponent of ratification would have no grounds for challenging MAI's process or the results.¹⁰⁰ Mr Carruthers advised that the Minister 'should apply his usual criteria to the result on the basis that the process and result do not contain any significant risk of challenge'.¹⁰¹

What is important to note is that these conclusions were the diametrical opposite of those made in Mr Carruthers' second report on the ratification in January 2016, yet both reports certified the process and results as fair, correct, and consistent with the ratification strategy. We explain why in section 3.4.5.

In terms of the overall process, Mr Carruthers reviewed the ratification documentation and the reports of the ratification hui. Based on that information, he concluded that the process was 'transparent', 'unbiased', 'informative', and 'facilitative of full participation'.¹⁰²

In terms of 'external factors', the review noted:

- ▶ disagreement within the claimant community about the deed of settlement and PSGE;

96. CR Carruthers to Minister for Treaty of Waitangi Negotiations, memorandum, 13 November 2015, pp 4–5 (doc A18(a)(i), pp 96–97)

97. Ibid, p 4 (p 96)

98. Ibid, pp 5–6 (pp 97–98)

99. Ibid, p 6 (p 98)

100. Ibid, p 5 (p 97)

101. Ibid, p 12 (p 104)

102. Ibid, p 9 (p 101)

Special votes included	In favour of DOS (%)	In favour of PSGE (%)	Participation rate (%)
174	60	56	33

Table 3.2: Ratification results as confirmed in independent review, 13 November 2015

- ▶ MTT's allegations about voter packs; and
- ▶ MTT's criticisms of 'the governance of MAI and compliance with its constitution'.¹⁰³

It is important to note that Mr Carruthers did not meet with either MAI or those who had criticised its conduct. Based on the documents (and acting within his terms of reference), the independent reviewer was not able to resolve the issue of voting packs or 'constitutional irregularities'. He did note that he expected that constitutional matters would have 'been dealt with as a matter of supervision of the mandate' (an incorrect assumption). From the information available, he did not think that either of these issues had any effect on the ratification process or its results. From the MAI database, which we have not seen, he considered there was 'some doubt' as to the accuracy of the voter pack allegations.¹⁰⁴

In sum, the independent review concluded that MAI had decided to accept all special votes as a matter of both timeliness and fairness, that this was consistent with their constitution and ratification strategy, that potential 'informalities' such as bulk registrations had not prevented verification of special votes, and that the outcome of the ratification vote was 60 per cent approval of the deed and 56 per cent approval of the PSGE. There was little risk of a challenge because MAI had accepted all the special votes as a matter of fairness, a decision which had gone against their own interests.

3.4.3 What action did the Crown take in response to the first Carruthers report?

3.4.3.1 *The Crown directs registration verification and a recount*

OTS reported the results of the Carruthers review to the Minister on 13 November 2015. The officials noted the results (as set out in table 3.2), that 'the ratification process was consistent with the ratification strategy', the process was 'transparent, unbiased, informative, and facilitative of full participation', and there was no significant risk of a challenge to the process or results. The officials also advised that their next step would be to write their ratification report for the Minister, which would be available by early December 2015.¹⁰⁵

103. Ibid

104. Ibid, pp 9–10 (pp 101–102)

105. Tim Fraser to Minister for Treaty of Waitangi Negotiations, aide memoire, OTS 2015/2016–339, 13 November 2015, pp 1–2 (doc A18(a)(ii), pp 45–46)

At some point in late November, however, the Crown decided on an alternative course of action. The Crown did not supply us with any further OTS reports or memoranda after the 13 November 2015 report, apart from a report almost a year later on 7 September 2016, so we are unable to verify exactly how this new course of action was decided. Warren Fraser explained in his evidence:

On 20 November 2015, after Mr Carruthers had conducted his review, officials became aware that, owing to time pressure and the large number of membership applications received during the voting period, MAI had instructed the returning officer to count all 174 special votes that had been cast, even though MAI had not completed the exercise of assessing all the membership applications it had received. The Crown is aware that MAI took this step to try and avoid criticisms that new applicants for membership would not have their vote counted. However, MAI's instruction to count all 174 special votes cast before all membership applications had been assessed raised the possibility that individuals who were not eligible to be on the Ahuriri Hapū membership register had nevertheless participated in the ratification ballot. When the Crown became aware of this, it requested that MAI complete the assessment of all membership applications so that a final count of votes could take place.¹⁰⁶

In effect, the Crown rejected the results of Mr Carruthers' independent review: it decided that the way in which the special votes had been verified and counted was *not* consistent with the ratification strategy, and that it would now insist on the proper process being followed and the votes recounted. From this decision, many of the other conclusions drawn by Mr Carruthers also fell over, including that MAI could validly decide to include all the special votes as a matter of fairness, and that the risk of challenge was negligible (because the outcome of that decision was more favourable to opponents of ratification than to MAI). Further, it reopened the question of what Mr Carruthers had called 'suspected informalities', such as the block registration of members in time for them to cast special votes. It also meant that there was still no decision about the result of the vote or the proportion of eligible members who had voted. The Crown had decided to turn the clock back to 21 August 2015, the deadline for casting votes in the ratification process.

This was an unexpected outcome. Having commissioned an independent review of the process, and agreed with MAI that the Crown would make a decision on whether to accept the ratification result after the process was reviewed, the Crown now reversed its decision, rejected the outcome of the review, and insisted on a rerun of the verification and counting process. OTS had originally recommended a rerun of the whole ratification process (based on low participation and approval results in the low 80s). The Minister had instead decided to review the process. The result was a review that said that the process was fine, but gave a higher participation result (33 per cent) but much lower approval ratings. In our view, the likeliest explanation of what happened next is that the Crown was not prepared to make a decision on the basis of such low approval ratings. Further, although Mr

106. Fraser, brief of evidence (doc A18), pp 24–25

Carruthers had accepted MAI's assessment of what was fair to do with the special votes in the circumstances, the Crown did not.

The Crown's intention was that Mr Carruthers would re-review the process following the verification and recount, and submit a second report to the Minister.¹⁰⁷ It is difficult to see what was intended by this, since he had already done so and the Crown was insisting on redoing aspects of the process that Mr Carruthers had certified as correct.

The issue of timing is also important here. MAI had advised OTS of its decision to verify all the special voters well before the first Carruthers report, and had indicated its view that there were nonetheless grounds for disallowing many of their registrations.¹⁰⁸ Warren Fraser commented that 'MAI had itself begun considering the difficulties concerning the number of membership applications'.¹⁰⁹ MAI's December 2015 pānui notified members that the ability for members to register and cast a special vote during the ratification process was a 'Crown process to ensure wide participation'. The members' register, however, was MAI's and 'not part of the Crown's process once ratification has been completed'. MAI's intention, therefore, was to ask all special voters to submit a new application for registration. The ability for them to do so online would be removed 'until further notice'.¹¹⁰ Thus, MAI's intention was for all of the special votes to count – in fairness to their people – but to have all special voters undergo a second registration process.

It was at this point in December 2015, however, that the Crown asked MAI to verify the whakapapa of all those who had registered and cast a special vote during the ratification process.

Before examining the outcome of that action taken by the Crown, we first need to consider what the ratification strategy and MAI constitution actually required in terms of registration and (for the former) special votes.

3.4.3.2 What did the ratification strategy say about verification?

The independent review was correct in terms of its assessment of the ratification strategy. MAI wanted to get more members registered and would keep updating its register until 'registrations to vote close'. In terms of a closing date, this appears to have been the close of voting. Under the heading 'Registration and the close of voting', the strategy stated that an increase in member registrations was expected, and people who registered *and were verified* during the voting period could cast a special vote. The strategy also stated that special votes could be cast by a member who enrolled 'during the voting period but before the closing date of voting'. That is, new registrations were allowed right up to the second last day of voting. New

107. Mana Ahuriri Incorporated, 'Mana Ahuriri Incorporated Response to OTS Request for Information (19 December 2015)', printout, 15 January 2016, p 3 (doc A18(a)(i), p 448)

108. Piriniha Prentice to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 4 September 2015, p 2 (doc A18(a)(ii), p 17); Juan Prado to Wayne Johnson, email, 3 September 2015 (doc A18(a)(ii), p 24); Mana Ahuriri Incorporated, presentation to Minister for Treaty of Waitangi Negotiations, 8 October 2015 (doc A16(c)(ii)), pp 3–4

109. Fraser, brief of evidence (doc A18), p 25

110. Mana Ahuriri Incorporated, *Te Karoro*, panui 6 (December 2015) (doc A6(a), p 78)

3.4.3.3

members could register electronically but had to cast a postal vote. Alternatively, they could send in a registration by post or attend a ratification hui, where the new member would be able to fill out a registration form and cast a special vote. People could still register and vote at the final hui on 17 August 2015, just four days before the close of voting on 21 August. As discussed above, however, participation was very low at these hui and most registration applications during the voting period were submitted electronically.¹¹¹

The strategy also stated: 'Applications for membership will be considered and decided upon by Mana Ahuriri Incorporated. Applicants will have an opportunity to appeal decisions made on their application.'¹¹²

The special votes section of the strategy reiterated that each special vote would have a unique identifying number, and would be counted 'subject to verification of registration by Mana Ahuriri Incorporated.'¹¹³

Mr Carruthers noted that both of these processes had occurred: MAI had verified the registration of all special voters – a decision taken after the first count of the votes for the reasons explained above. That was all the ratification strategy required.

The ratification booklet did not add to these requirements or offer any explanation of how MAI would verify the registration of special voters.¹¹⁴

3.4.3.3 *What did the MAI constitution say about verification?*

The MAI constitution and rules stated that membership was based on 'whakapapa to the Hapū through descent from the Tipuna of the Hapū' (rule 6.1). Registration of members required 'completion of a registration form' and 'approval of the registration of the member by the Komiti' (rule 6.2).¹¹⁵ The komiti was permitted to terminate the membership of any member who had brought the name of MAI into disrepute, had acted contrary to the objects of MAI, or 'the Komiti believes on reasonable grounds that such membership has been obtained by deceit or fraud' (rule 21.2).¹¹⁶

Thus, the first requirement in the constitution was that a member whakapapa to one or more of the seven hapū. The second requirement was that a member complete a registration form. Mr Carruthers' investigation did not get down to that level of detail because, in his view, MAI was entitled to verify the registrations of *all* special voters for the reasons that MAI had given for doing so. The Crown, however, now wanted MAI to go back and verify the registrations to ensure that

111. Mana Ahuriri Incorporated, 'Ratification Strategy for Mana Ahuriri Hapū', pp 6–7, 9 (doc A18(a)(i), pp 379–380, 382)

112. Ibid, p 6 (p 379)

113. Ibid, p 10 (p 383)

114. Mana Ahuriri Incorporated, *Ahuriri Hapū Ratification 2015 Information* (doc A18(a)(i), pp 386–405)

115. 'Constitution and Rules of Mana Ahuriri Incorporated' (Wellington: Kensington Swan, [2009]), p 8 (doc A18(a)(i), p 54); Prentice, affidavit (doc A6), pp 1–3

116. 'Constitution and Rules of Mana Ahuriri Incorporated', p 18 (doc A18(a)(i), p 64)

only those ‘eligible’ to be members of Mana Ahuriri had cast a special vote.¹¹⁷ It appears that what the Crown wanted was written verification from MAI that the whakapapa of the special voters had been assessed and confirmed.¹¹⁸

3.4.4 Reverification and recount, December 2015 – January 2016

3.4.4.1 MAI agree to reverify and recount

MAI were disconcerted by the Crown’s decision. MAI wrote to the Crown on 15 January 2016:

After our meeting with Minister Finlayson [on 8 October 2015], Mana Ahuriri were confident and optimistic that they had done all they could have done to gain Ministerial approval of our ratification results, awaiting an independent review conducted by Colin Carruthers QC.

Continued delays since our meeting with the Minister waiting for a decision has been stressful and increasingly embarrassing especially after posting updates for our claimant community on our website.

Now that a new set of requests or questions have been asked of Mana Ahuriri we have to guess what is happening with our claim that we are not aware of. However, we welcome the opportunity to address any further concerns but hope that our response to the current requests and presenting a new proposal will be helpful and sufficient to deliver a favourable Ministerial decision.¹¹⁹

3.4.4.2 MAI’s process for reverification in response to the Crown’s request

MAI agreed to revisit its earlier decision to verify all special voters and made some crucial decisions as to how it would do so. The process followed by MAI since its inception had been to verify the whakapapa of applicants as the first step in deciding new member registrations. If the whakapapa was ‘validated’, then MAI would check the application for ‘correct details’. This ‘two step process must be satisfied before approval is given for entry on to the MAI Register.’¹²⁰ This process mirrored the order of rules 6.1 and 6.2 in the MAI constitution (described above).¹²¹

For the reverification process, MAI decided to reverse these two steps in the interests of a more timely outcome. That is, MAI considered that if the registration form did not include the correct details, it would be a waste of time to check the whakapapa first. Vetting of whakapapa was the ‘more time consuming and specialist step’, and MAI considered that the process was time-sensitive.¹²²

MAI also added further steps to their verification process, which proved to be very controversial:

117. Fraser, brief of evidence (doc A18), p 25

118. Mana Ahuriri Incorporated, ‘Mana Ahuriri Incorporated Response to OTS Request for Information (19 December 2015)’, p 3 (doc A18(a)(i), p 448)

119. Ibid, p 2 (p 447)

120. Ibid, p 3 (p 448)

121. ‘Constitution and Rules of Mana Ahuriri Incorporated’, p 8 (doc A18(a)(i), p 54)

122. Mana Ahuriri Incorporated, ‘Mana Ahuriri Incorporated Response to OTS Request for Information (19 December 2015)’, pp 5, 6 (doc A18(a)(i), pp 450, 451)

3.4.4.2

(Category 1) Those applicants that were part of a group registration exercise and did not fill out the application form correctly for example by failing to give their current residential addresses or giving any incorrect or misleading information or where MAI has reasonable grounds to believe that deceptive and dishonest voting practices were involved – these registration applications will be disqualified.

(Category 2) All registrations received under the Special Voting provisions that followed the correct process for registration will be vetted for approval first.

(Category 3) Those applicants that were part of a group registration exercise but otherwise completed their application forms in full with no obvious irregularities or anomalies will be vetted for approval on a case by case basis against normal registration criteria.¹²³

Thus, following an assessment of all registration applications by ‘category’, dealing with the bulk registrations and special voters first, those applications that passed these initial tests were vetted for complete and correct information and then – if they passed that test – for whakapapa to tipuna of the seven hapū.

MAI’s justification for treating the bulk registrations in this way needs to be assessed.

The first point to make is that these applications were singled out because MAI believed that section 5.6 of the ratification strategy required that applications had to be ‘submitted by the individuals applying for ratification.’¹²⁴ Section 5.6 stated that voters must ‘complete a special voting form’ if they:

- ▶ turn 18 years old during the voting period but before the closing date of voting; or
- ▶ enrol as a member during the voting period but before the closing date of voting.

It then stated that special votes closed on ‘the same date as other votes’. Each special vote would ‘use a unique voting identifier that will reference special registration status’. Each special vote form would:

- ▶ note which of the two special conditions the person is voting under [that is, whether they had turned 18 or enrolled during the voting period]; and
- ▶ (if required) have a completed member registration form attached [this applied to those enrolling and voting at the ratification hui].

Finally, section 5.6 stated that special votes would be ‘counted subject to verification of registration by Mana Ahuriri Incorporated.’¹²⁵

These provisions relate to individuals submitting special voting forms. There is nothing in this section – or anywhere in the ratification strategy or MAI

123. Mana Ahuriri Incorporated, ‘Mana Ahuriri Incorporated Response to OTS Request for Information (19 December 2015)’, p5 (doc A18(a)(i), p 450)

124. Ibid, p3 (p 448)

125. Mana Ahuriri Incorporated, ‘Ratification Strategy for Mana Ahuriri Hapū’, pp 9–10 (doc A18(a)(i), pp 382–383)

constitution – that forbids applicants’ registration forms from being submitted electronically by someone else who possessed a computer and internet access. Indeed, there are no specifications at all in either document as to how members are to submit the registration applications that they must submit. We note that MAI had recently opened up the ability to apply online.

The second point to make is that MAI’s approach to the bulk registrations was shaped by its belief that MTT had launched a vicious attack on its ratification process, and that the applicants involved had committed ‘deceptive and dishonest voting practices’. MAI explained to the Crown:

Absolutely critical to the MAI register, as is the case for most other registration systems, is that the information that is received on each application must be full and correct. Anything that conceals or appears deceptive to MAI being able to identify and legitimise individual applicants will be declined. Mana Ahuriri reserves that right.¹²⁶

3.4.4.3 What was the result?

The result of MAI establishing its new categories for assessment and its reversal of rules 6.1 and 6.2 was that:

- ▶ 280 registration applications were received (of which 174 also cast special votes, either at a ratification hui or by postal ballot);
- ▶ 130 applications were validated;
- ▶ 150 applications were ‘Declined (for various reasons) with an unknown number of whakapapa that may have been correct but not vetted.’¹²⁷

Following this reverification process, MAI supplied the results to the returning officer for a recount of the special votes. The returning officer then supplied a third report on the ratification process, recording what we have labelled as the ‘3rd result’ in table 3.3. Although 130 applications were validated, only 68 of that number cast special votes. Of the 150 applicants declined, 106 had voted.¹²⁸

The *final* result, therefore, was that 106 of the 174 special votes were disqualified, resulting in a higher approval rating of 76 per cent in favour of the deed of settlement and 71 per cent in favour of the PSGE.

The returning officer also reported that an additional 20 votes had been received too late to be counted, but did not specify whether any of those had been special votes.¹²⁹

3.4.4.4 What was the outcome for special voters?

The outcome for those hapū members who cast special votes was that 106 were disqualified through the process followed by MAI in December 2015 and January 2016. Two questions arise. First, were they given an opportunity to supply further

126. Mana Ahuriri Incorporated, ‘Mana Ahuriri Incorporated Response to OTS Request for Information (19 December 2015)’, p 5 (doc A18(a)(i), p 450)

127. Ibid, p 6 (p 451)

128. Tuia Group, *Independent Returning Officer Report – Final Voting Results: Mana Ahuriri Hapū Ratification Process* (Wellington: Tuia Group, 2016), p [6] (doc A6(a), p 100)

129. Ibid, pp [5]–[6] (pp 99–100)

Special votes included	Q1: in favour	Number who voted	Q2: in favour	Number who voted	Participation rate*
1st result (14)	282 (83.74%)	340	257 (80.88%)	333	25%†
2nd result (174)	296 (60.16%)	492	276 (56.21%)	491	33%
3rd result (68)	292 (75.65%)	386	275 (71.06%)	387	27%

* The participation rates were calculated afterwards by OTS.

† This was the participation result calculated by OTS on 23 September 2015 after the register was revised downwards from the number stated in the ratification strategy in May 2015.

Table 3.3: Ratification results from September 2015 (1st and 2nd) and January 2016 (3rd)

information? Secondly, was there an opportunity to present their case, given MAI's decision that many had acted in a deceptive and dishonest fashion, justifying their disqualification as members of the body representing their hapū? And they *were* members of the hapū – Mr Prentice confirmed for us that all but one of the 106 special voters have since had their registration confirmed as valid members of the Ahuriri hapū.¹³⁰

The ratification strategy required that applicants would 'have an opportunity to appeal decisions made on their application.'¹³¹ The Crown's witness, Mr Fraser, suggested that this part of the ratification strategy did not apply to applicants who registered during the ratification process.¹³² Crown counsel made no submissions on that point. On our understanding of the ratification strategy, the appeal provision applied throughout the voting period (as did the other stipulations regarding registration and special votes).

We asked Mr Prentice whether a right of appeal had been allowed to the 106 special voters (and others) whose registration was declined. His response was:

The membership applications that were received during or after the ratification process were not in fact 'declined.' I said in my statement of evidence dated 21 November 2018 that many had 'lacked sufficient information to enable a prompt verification.' Our registration team made contact with applicants by letter and by telephone where additional details were sought, or where our team needed assurance that the applicant was aware that the application for membership had indeed been submitted on their behalf. Apart from the example I give below [one applicant], all of the applications for membership were ultimately accepted as members of Mana Ahuriri, although this did take some time.¹³³

130. Prentice, answers to written Tribunal questions (doc A16(c)), pp 2–3

131. Mana Ahuriri Incorporated, 'Ratification Strategy for Mana Ahuriri Hapū', p 6 (doc A18(a)(i), p 379)

132. Warren Fraser, under questioning by the Tribunal, East Pier Hotel, Napier, 20 February 2019 (transcript 4.1.1, pp 343–347); Warren Fraser, answers to written Tribunal questions, [April 2019] (doc A18(d)) pp 10–12

133. Prentice, answers to written Tribunal questions (doc A16(c)), p 2

What this means is that MAI carried out an additional step after the reverification and recount. The komiti's report to the Crown in January 2016 states clearly that 150 applications were 'Declined'.¹³⁴ That information was also passed to the returning officer, who disqualified 106 votes that had previously been counted. It appears that MAI declined membership for the purposes of the vote and then conducted a process to check and verify information, including an assessment of whakapapa.

Claimant counsel submitted:

106 in the context of a vote of less than 400 was a significant number. MAI has later confirmed that, other than one of these applications, all were eventually accepted. Accordingly, 105 of [the] individuals who were entitled to participate in the vote, and did participate, did not have their vote counted.¹³⁵

We agree with this submission. Further, we note that the principle of natural justice required that those who were disqualified because something 'appear[ed] deceptive' to MAI had a right to be heard or otherwise put their case if the decision went against them. That right was clarified in the ratification strategy, which stated that applicants would 'have an opportunity to appeal decisions made on their application'.¹³⁶

Counsel for Mana Ahuriri described the process in this way:

Some of the applications for membership were not verified in time, particularly given the lack of personal details on the application forms, and as such, those applicants for membership ultimately did not have their votes counted for the ratification of the deed of settlement.

Only one application for membership was not accepted, following a process of review by independent historian Patrick Parsons.¹³⁷

Counsel for Mana Ahuriri also pointed out that there were 'reasonable and rational reasons for the difficulties [MAI] faced in processing a bulk application for membership in the last days of the voting period'; and that MAI had in fact been 'prepared to count all of the special votes'. It was the Crown that insisted otherwise. Nonetheless, counsel submitted, even if all special votes *were* counted, there was still a majority in favour of the deed of settlement and PSGE.¹³⁸

We agree that MAI was faced with a difficult situation twice:

- a large number of applications late during the voting period; and

134. Mana Ahuriri Incorporated, 'Mana Ahuriri Incorporated Response to OTS Request for Information (19 December 2015)', p 6 (doc A18(a)(i), p 451)

135. Mahuika and Tukapua, closing submissions of Wai 2573 claimants (paper 3.3.4), p 20

136. Mana Ahuriri Incorporated, 'Ratification Strategy for Mana Ahuriri Hapū', p 6 (doc A18(a)(i), p 379)

137. Leo Watson, closing submissions of MAI and MAT, 30 May 2019 (paper 3.3.5), p 14

138. Ibid, pp 15–16

3.4-5

- ▶ the Crown's rejection of their decision to count all the special votes for reasons of equity, despite the findings of Mr Carruthers' review.

But it was not a matter of simply taking a longer time to verify information; MAI told the Crown that 150 applications were declined (so that 106 votes were not counted) and *then* did the work of checking and obtaining further information.

We do not know when exactly the Crown instructed MAI to rerun the verification and seek a recount, or how long MAI allowed for the process. All we know is:

- ▶ the Crown says that it discovered that MAI had not verified eligibility on 20 November 2015;
- ▶ the Crown sent an email to MAI asking for written confirmation of 'the whakapapa verification of the special votes' on 19 December 2015 so that Mr Carruthers could 'complete' his review; and
- ▶ MAI supplied the information that 150 applications had been declined on 15 January 2016.

We also know that the Crown had insisted MAI follow its '*agreed ratification strategy* (emphasis added)' and satisfy its 'concerns that non-MAI beneficiaries had been able to vote on the settlement'.¹³⁹

In our view, the Crown ought to have ensured that there was sufficient time for MAI to carry out this vital task properly. The evidence suggests that the Crown put pressure on MAI to produce results in a very short timeframe. Under cross-examination by claimant counsel, Mr Fraser explained that the Crown had asked MAI to do the verifications 'promptly'.¹⁴⁰ The Crown also ought to have ensured that MAI did follow the ratification strategy fully, including allowing an appeal to those whose membership was declined in a manner that lacked procedural fairness and resulted in the disqualification of 105 voters who were in fact members of Mana Ahuriri hapū. As claimant counsel said, this was a significant proportion – more than one-fifth of all voters were disqualified.

The Crown did not take either of these necessary steps.

3.4.5 The second independent review of the ratification process and results

The Crown asked Colin Carruthers QC to review the 'validation' of membership and special votes. The Crown received MAI's report and the results of the recount on 15 January 2016. Mr Carruthers provided his second report on 19 January 2016 and, as OTS put it, 'he maintained his original conclusion'.¹⁴¹ The only material he reviewed was those two documents: the MAI report of 15 January and the returning officer's report of the same date. Mr Carruthers simply summarised the information in these reports. He noted that MAI had reversed its usual procedure of verifying the whakapapa first in the interests of a quicker process. But he did not comment on MAI's three categories or its decision to decline applications that

139. Juliet Robinson and Jaclyn Williams to Minister for Treaty of Waitangi Negotiations and Minister of Māori Affairs, report, OTS 2016/2017-153, 7 September 2016, p 2 (doc A18(a)(i), p 72)

140. Warren Fraser, under cross-examination by claimant counsel, East Pier Hotel, Napier, 20 February 2019 (transcript 4.1.1, p 343)

141. Juliet Robinson and Jaclyn Williams to Minister for Treaty of Waitangi Negotiations and Minister of Māori Affairs, report, OTS 2016/2017-153, 7 September 2016, p 3 (doc A18(a)(i), p 73)

it suspected of 'deceptive and dishonest voting practices' without any inquiry or right of appeal. There were some errors in calculations: the independent reviewer stated that there were 28 validated special votes missing, 130 special votes validated, and only 44 special votes not counted. Of the original 106 voters who were initially to be declined, 62 of them had their vote counted.¹⁴² We are not sure how Mr Carruthers came up with these figures but they were not correct.

The reviewer then concluded:

The analysis which I have made of the additional material brings me to the same conclusion and recommendation which I made in my previous memorandum (para 56), namely that the Minister should apply his usual criteria to the result on the basis that the process and result do not contain any significant risk of challenge.

I should record for completeness an approach from Ngāti Pārau, who evidently challenge the proposed settlement. In response, I suggested that they forward the submission which they apparently want to make to the Office of Treaty Settlements. I have heard nothing further at this stage.¹⁴³

The Crown accepted the outcome of this second review without question.¹⁴⁴ In our view, there were issues that were not addressed or resolved in this review, and the Crown ought not to have relied on it without further inquiry. One of those issues was the conclusion that the process and result did not contain significant risk of challenge. Mr Carruthers' original conclusion was based on the points that MAI had included all the special votes as a matter of fairness to their people, and that a challenge was unlikely because this decision had favoured MAI's opponents rather than MAI. We do not see how the same conclusion could be reached in the second report where the circumstances were completely different. Also, this second review did not assess MAI's process against the ratification strategy and constitution (as the first review did), and did not detect the procedural flaws in what MAI had done. The exact same two documents were available to the Crown as well as the reviewer, and the Crown had sufficient information to see that further inquiry and action was required.

The final point to be made at this stage is that there was time for MAI to have conducted a proper process. In the same email that the Crown sent requesting written confirmation that all voters had whakapapa to Mana Ahuriri hapū, the Crown requested that MAI resolve the issue of audited accounts.¹⁴⁵ As will be recalled, MAI had indicated at the December 2015 AGM that an SGM would be held in the first quarter of 2016 to present the audited accounts. This occurred in March 2016, and MAI could *not* be wound up until that issue had been resolved.

142. CR Carruthers to Minister for Treaty of Waitangi Negotiations, memorandum, 19 January 2016, pp 2–3 (doc A18(a)(i), pp 106–107)

143. Ibid, p 3 (p 107)

144. Juliet Robinson and Jaclyn Williams to Minister for Treaty of Waitangi Negotiations and Minister of Māori Affairs, report, OTS 2016/2017–153, 7 September 2016, p 3 (doc A18(a)(i)), p 73)

145. Mana Ahuriri Incorporated, 'Mana Ahuriri Incorporated Response to OTS Request for Information (19 December 2015)', p 3 (doc A18(a)(i), p 448)

3.4.6 The Crown's provisional acceptance of the ratification results, March 2016

On 10 March 2016, the Minister met with MAI. We do not have a record of this meeting. According to an OTS report later in the year, the Minister told the komiti that he 'could accept the MAI ratification results subject to three conditions'. The conditions were:

- provision of audited accounts;
- facilitated hui with some members of the claimant community; and
- holding PSGE elections as soon as possible.¹⁴⁶

What this means is that the Minister was satisfied with the results of the final count (76 per cent in favour of the deed and 71 per cent in favour of the PSGE) following the Carruthers review of January 2016. But the accountability issues still needed to be resolved in some way before the Crown was prepared to sign the deed of settlement. We turn next to the actions taken by the Crown on the accountability issues.

3.5 THE CROWN TAKES ACTION ON ACCOUNTABILITY ISSUES, MARCH–JULY 2016

3.5.1 Introduction

Following the second Carruthers review in January 2016, the Crown took no further action on the ratification process until September 2016. MTT and Ngāti Pārau leaders had approached the Crown in October and December 2015, with concerns about the transparency and accountability of MAI. They queried whether MAI still had the mandate to complete the settlement. The Minister for Treaty of Waitangi Negotiations and the Minister for Māori Development had both expressed 'concerns . . . regarding the election process of MAI'.¹⁴⁷

In this section of our chapter, we focus on the action taken by the Crown to resolve these issues before making its decision on the ratification. As the Ministers explained in their letter appointing Sir John Clarke as facilitator, the Crown wanted 'assurance as to the durability of the Ahuriri Hapū settlement'.¹⁴⁸ The key issue for the Crown at this stage was not whether MAI retained its mandate; the Ministers' position was that the results in the final count of the ratification vote showed that it did. Rather, the Crown wanted the issues of transparency and accountability to be resolved through a process of reconciliation within the claimant community.¹⁴⁹ The question of what action would need to be taken to achieve this – including in respect of elections and financial accountability – was the subject of much

146. Juliet Robinson and Jaclyn Williams to Minister for Treaty of Waitangi Negotiations and Minister of Māori Affairs, report, OTS 2016/2017–153, 7 September 2016, p 10 (doc A18(a)(i), p 80)

147. Mana Ahuriri Incorporated and John Clarke, 'Terms of Reference for the Facilitation Hui for the Members of Mana Ahuriri Incorporated', printout, 17 March 2016, p [4] (doc A18(a)(i), p 125)

148. Minister for Treaty of Waitangi Negotiations and Minister for Māori Development to John Clarke, 11 May 2016 (doc A18(a)(i), p 120)

149. Ibid

disagreement. In particular, the question of elections and representation remained a burning issue for Ngāti Pārau.

3.5.2 The Crown works with MAI on accountability issues, December 2015 – March 2016

3.5.2.1 Request for MAI to publish audited accounts, December 2015

On 19 December 2015, OTS emailed MAI to ask for written confirmation that they had verified the whakapapa of special voters (as discussed above). In the same email, OTS asked MAI that ‘audited accounts and any other information required by the MAI constitution be made publically available’.¹⁵⁰ As will be recalled, the Crown originally told MTT to raise any concerns about elections and accounts with MAI internally. After the December AGM, however, it appears that the Crown had decided to intervene.

In response, MAI advised the Crown that it had fully expected to present audited accounts at the AGM. The komiti had only discovered on 9 December that the accounts were not ready (two days before the AGM). MAI blamed ‘obvious communication issues’ between the auditor and the accountant, and assured the Crown that the accounts would be approved at an SGM in the first quarter of 2016:

The AGM was well attended and our position was explained. Assurances were given by the MAI board and the accountant that the audited account will be completed as soon as possible. The AGM unanimously agreed by resolution that the audited accounts be completed and a Special General Meeting be notified in the first quarter of 2016. The Mana Ahuriri board while being embarrassed and apologising to the AGM, were grateful to those present for their understanding and support.¹⁵¹

MAI did not volunteer an explanation of why three years’ of audited accounts had to be covered at the SGM, or why the loan had not been disclosed earlier.

3.5.2.2 Mandate maintenance requirements, February 2016

On 11 February 2016, OTS followed up its request. For the first time ever in its monitoring of MAI’s mandate, the Crown raised the issue of elections, accounts, and compliance with its constitution as mandating issues requiring urgent action:

Meeting the requirements of your constitution is important to maintain your mandate. It is of concern that you did not hold your annual general meeting (AGM) within the period proscribed by your constitution. I am pleased to hear you have since held the AGM and that you will be holding a special general meeting in the first quarter of 2016 to deliver audited accounts and hold a vote for two new Board members. To meet this timeline you will need to advertise the special general meeting by 15 February. If you do not hold this meeting in the first quarter of 2016 you will be unlikely to meet

¹⁵⁰. Mana Ahuriri Incorporated, ‘Mana Ahuriri Incorporated Response to OTS Request for Information (19 December 2015)’, p 3 (doc A18(a)(i), p 448)

¹⁵¹. Ibid, pp 6–7 (pp 451–452)

3.5.2.3

mandate for the next reporting period. To date, there is no notification of the special general meeting on your website and I ask that you inform me when this meeting is to occur. . . .

You have not posted audited accounts or previous election results for MAI on the www.societies.govt.nz website since 2013. Can you please rectify this matter with some urgency and inform me when this is completed. I understand this matter has been raised with MAI previously.¹⁵²

OTS also reminded MAI that mandate maintenance reports needed to be filed on time (the report for the final quarter of 2015 had not been filed). The conclusion on mandate issues is important to note:

Despite the above issues, I consider that MAI has maintained its mandate to represent Ahuriri Hapū in Treaty settlement negotiations with the Crown. This view is based on the information you have provided me, the ratification process undertaken during the period of this report and the information which we have been provided subsequent to the period of this report. However, to maintain your mandate in the future I urge you to address the issues identified above and inform me of your actions.¹⁵³

In February 2016, therefore, OTS officials believed that the audited accounts would be presented at an upcoming SGM, and that elections for two komiti positions would also be held at that meeting. In their view, this would suffice for mandate maintenance so long as the SGM was held by the end of March, in light of the information provided by MAI and the final results of the ratification vote.

3.5.2.3 Ministers give assurances to Ngāti Pārau and others, February 2016

On the same day that the above letter was sent to MAI (11 February 2016), the Ministers responded to Tania Hopmans and to the Ngāti Pārau leaders about the concerns they had raised with the Crown in December 2015. The Ministers stated:

We take the concerns you have raised seriously and appreciate your patience as our officials work through these matters. Officials from the Office of Treaty Settlements have raised this issue with MAI and advised MAI of the feedback the Crown has received. We understand MAI has undertaken to hold elections and release audited financial information and hope this goes some way towards addressing your concerns.

With regard to the ratification of the Ahuriri Hapū deed of settlement, we are currently considering the ratification results. The Crown has appointed Colin Carruthers QC to review the process and results of the ratification. The Crown seeks durable,

152. Tobias Lang to Terry Wilson, 11 February 2016, p [1] (doc A18(a)(i), p 336)

153. Ibid, p [2] (p 337)

fair settlements and ratification is an important step in settling historical Treaty of Waitangi grievances.¹⁵⁴

Ms Hopmans responded to this letter with a strongly worded attack on after-the-fact solutions. She argued that the term of all komiti members had expired (including the three negotiators) and therefore ‘they can no longer claim to hold a mandate on behalf of the hapū’. She also observed that the komiti had failed to disclose its \$500,000 credit facility, and that the komiti had failed to present accounts for three years. All these things together, she said, meant that hapū members were not properly represented or in possession of all the relevant information when they voted on ratification. Ms Hopmans also alleged that there was a conflict of interest because some komiti members had guaranteed the loan (this was actually a misconception which arose at the AGM). Disclosing information after the vote and holding elections for the MAI komiti were not solutions, because members had already voted and the existing komiti members would still control the PSGE. What was necessary, in other words, was an election for the PSGE komiti, not MAI. Ms Hopmans expressed concern that ‘the Crown’s own requirements for mandate maintenance reports did not highlight some of these issues.’¹⁵⁵

We do not have a Crown response to this letter but, at some point in February or March 2016, the Crown decided that facilitation would be necessary to resolve these issues (as well as an SGM with audited accounts and elections).

3.5.2.4 MAI seeks a second legal opinion on elections, March 2016

The Crown advised Ngāti Pārau leaders and Ms Hopmans that elections would be held. MAI, however, sought a second legal opinion on the question of its constitution, elections, and whether the komiti was still legally in office. Mr Prentice explained:

The reason for seeking legal advice in March 2016 was because there had been submissions received by the Crown from some members who alleged that MAI had not been compliant with our constitution in terms of holding of elections. This issue had also been raised by the Crown with us for a response. We therefore regarded it as prudent to obtain an independent legal opinion and make that available to third parties.¹⁵⁶

154. Minister for Treaty of Waitangi Negotiations and Minister for Māori Development to Hinewai Hawaikirangi, Laurence O’Reilly, Te Kaha Hawaikirangi, and Matthew Mullany, 11 February 2016 (doc A1(a), p 40). An identical letter was sent on the same date to Tania Hopmans and Whakiao Hopmans (doc A5(a), p 201).

155. Tania Hopmans and Whakiao Hopmans to Minister of Treaty of Waitangi Negotiations and Minister for Māori Development, 26 February 2016, pp 1–2 (doc A5(a), pp 202–203)

156. Prentice, answers to written Tribunal questions (doc A16(c)), p 2

We have already discussed the MAI constitution in chapter 2, including aspects of the legal opinion sought by MAI (see section 2.2.3). The legal opinion was, as the author (Mark von Dadelszen) understood, commissioned because ‘the Crown is concerned, essentially, about the legitimacy of the present Komiti and the failure to hold Komiti elections in 2015’.¹⁵⁷ For the most part, the interpretation was based on rule 11, which held (among other things):

- *11.1 Term:* The komiti is elected for a term of two years at a general meeting.
- *11.2 Rotation:* At each annual general meeting, a minimum of two komiti members shall retire – those members ‘to retire at each annual general meeting shall be’ any casual members appointed to fill vacancies. If there are less than two casual members, then those members ‘who have been longest in office since their last election, but as between persons who became Komiti members on the same day, those to retire shall (unless they otherwise agree among themselves) be determined by lot’.
- *11.3 Holding of positions:* Komiti members shall hold their positions ‘until death, resignation, removal or until their successors are elected in accordance with these Rules, whichever shall occur first’.
- *11.6 Election of the Komiti:* The election of the Komiti ‘shall take place during the year in which the then current terms expire by method of a ballot at a general meeting’.¹⁵⁸

Mr von Dadelszen’s opinion was that:

- While rule 11.1 refers to a term of two years, the interaction of this rule with others means that the komiti members do not ‘expire two years to the day after their election’. In particular, under rule 11.2, the drawing of lots or retirement by agreement, ‘could mean that a Komiti member serves a longer than two year term’.
- Rule 11.3 meant that none of the present komiti members had ceased to hold their positions.
- The failure to hold an AGM in September 2015 was ‘cured’ by holding it in December.
- There should have been an election at the December 2015 AGM, but this was not held because the society is due to go out of existence.
- A court would likely agree that rule 11.3 is ‘unequivocal’, that the society is about to go out of existence once the settlement is ratified, and ‘requiring elections to be held would simply further delay the Treaty settlement’, and that the komiti has had a ‘stable membership since 2011, apart from new trustees being elected to replace members who have died or resigned’.
- Even if a court did not agree with this interpretation, it would likely find that no remedy could be granted because ‘there would be no compelling value in requiring elections to be held’. Again, this was because the society was about to go out of existence.¹⁵⁹

157. Mark von Dadelszen to Mana Ahuriri Incorporated, 8 March 2016, p5 (doc A6(a), p92)

158. Ibid, p3 (p90)

159. Ibid, pp 4–6 (pp 91–93)

This advice took no account of the point that MAI had followed the recommendation of the previous legal opinion and put a motion at the AGM that no elections be held. This motion was rejected unanimously, as recorded in the minutes of the AGM. The MAI komiti was acting in defiance of the December 2015 AGM. The komiti went ahead as though the AGM had passed its resolution not to hold elections when in fact the opposite had occurred. Rule 9.4 stated that the komiti ‘shall have, and may exercise, all the powers of the Society but in so doing will comply with any specific directions or resolution of the Society made in general meetings under these Rules.’¹⁶⁰

The second point to make is that it was by no means certain that the Crown would accept the ratification results, and that the society would therefore go out of existence. The possibility of rerunning the process was still an option and the Crown had not made a final decision either way. Nor do we consider that it would have been academic to have held an election for the MAI komiti in September or December 2015. A newly configured komiti would have had options to (i) accept the initial OTS position that the ratification should be rerun; (ii) deal with the registration applications differently when the Crown requested that whakapapa be verified to ensure that eligible members had voted; and (iii) deal differently with the issues raised by Ngāti Pārau and others. If we are to look at prejudice, therefore, we must acknowledge that elections at the end of 2015 could have made a material difference to the claimants in this inquiry.

The third point we would make is that, as at 2015 (von Dadelszen accepted that an election should have occurred then), most komiti members had served *two* consecutive terms without facing election. As we explained in chapter 2, we do not think that the MAI rules, including rule 11.3, could be stretched to cover that circumstance (see section 2.2.4).

Fourthly, we note that the legal opinion relied on rule 4.5, which stated:

Komiti to determine: Should a question at any time arise which is not provided for in these Rules, or should any doubt exist as to the interpretation of these Rules, or should any other matter arise pertaining to the Society, its property or interests, the Komiti shall determine the matter, whose decision shall be final.¹⁶¹

As noted in chapter 2, Crown counsel also relied on this rule, arguing that the MAI komiti had come to ‘an interpretation of its constitution that it considered was correct in the circumstances’, and its decision was final.¹⁶² Mr von Dadelszen, however, noted that this rule would probably be held ‘contrary to public policy and void’. It must, he said, be interpreted as ‘more in the nature of a “slip rule” providing for situations not foreseen when the constitution was adopted’.¹⁶³ He

160. ‘Constitution and Rules of Mana Ahuriri Incorporated’, p10 (doc A18(a)(i), p56)

161. Mark von Dadelszen to Mana Ahuriri Incorporated, 8 March 2016, p2 (doc A6(a), p89)

162. Melvin, closing submissions of Crown (paper 3.3.6), p14

163. Mark von Dadelszen to Mana Ahuriri Incorporated, 8 March 2016, pp2–3 (doc A6(a), pp89–90)

3.5.2.5

applied it only to the decision to hold the AGM in December instead of September, and not to the situation of elections.

Finally, as set out in chapter 2, Mr von Dadelszen did not discuss or endorse the komiti's view that elections should be held biennially after 2011, with only two members retiring each time.

3.5.2.5 OTS and MAI reach an agreed position on elections, March 2016

MAI supplied its legal opinion to OTS and TPK. As part of the discussions about facilitation later in the month (March 2016), OTS and MAI came to an agreed position on elections. Essentially, OTS accepted that the issue of elections need not hold up the signing of the deed of settlement. The full text of the position agreed by OTS and MAI is as follows:

The Crown advised MAI of the concerns Ministers expressed regarding the election process of MAI.

Mana Ahuriri responded to those concerns by advising that they considered the Board of the Society remained validly appointed and had a legal opinion advising them of that fact. Officials and MAI consider that any issues relating to the election process of MAI could well be raised at the facilitation hui outlined above and will need to be addressed by MAI during that process. MAI further advised that Mana Ahuriri Incorporated society will be wound up according to the Constitution and that the PSGE Mana Ahuriri Trust (MAT) will sign the deed of settlement on behalf of the claimant community.

Officials advised that they will not be recommending to Ministers that the election issue be part of the consideration of the deed signing.

Officials advised MAI that at the end of the day Ministers will make the final call on this issue.¹⁶⁴

This was an important step on the path to signing the deed, although – as noted – the Ministers would make the final decision as to whether the elections issue was a relevant consideration.

3.5.2.6 The MAI SGM: presentation of audited accounts, 30 March 2016

The Crown had been requesting MAI to make audited accounts available to the claimant community since December 2015, following the AGM and the protests received from Ngāti Pārau leaders, MTT, and others. This occurred at a special general meeting (SGM) on 30 March 2016. There was some discussion of elections at this meeting but Mr Prentice shut it down, noting the agreement with OTS (discussed above):

164. Mana Ahuriri Incorporated and Clarke, 'Terms of Reference for the Facilitation Hui for the Members of Mana Ahuriri Incorporated', p [4] (doc A18(a)(i)), p125. This agreement was signed by Paul Swain, the chief negotiator, John Clarke as the facilitator, Tim Fraser and Simon Hughes for the Office of Treaty Settlements, Lillian Anderson and Jaclyn Williams for Te Puni Kōkiri, and Barry Wilson, Joinella Maihi-Carroll, and Piri Prentice for Mana Ahuriri Incorporated.

We met with the Crown and Te Puni Kōkiri on Thursday [17 March 2016] in Wellington. It was in answer to those people who had taken the time to write into Te Puni Kōkiri to write into OTS, not to Mana Ahuriri, and we were being asked to respond to those letters not knowing who they were from, and not being allowed to know who they were from and so we did. Some of those questions were also around the removal of the current board of Mana Ahuriri Incorporated and fresh elections, some of those questions were also around the turnover of trustees for the PSGE and for the short[en]ing of that period of time. I can tell you that the Crown and Te Puni Kōkiri and ourselves (Mana Ahuriri Incorporated) have a written agreement that the PSGE will go forward in its present state. I can tell you that there will be no elections and that the Crown and Te Puni Kōkiri wholly agree with that. What was that based on? That was based on, a legal opinion that was given to the Crown by Mana Ahuriri, the legal opinion was given by Mark Von Dadelszen who is recognised nationally as the constitutional guru and his legal opinion some 9 or 10 pages was given to the Crown Law Office who their response was 'No comment' and the legal opinion went further to say that the committee of Mana Ahuriri Incorporated was legal and that there was no need or no requirement for new elections, so we had a signed agreement on Thursday, so what I encourage you from now, is to give your questions directly to Mana Ahuriri Incorporated and I can tell you and assure you every question will be responded to properly like we did today.¹⁶⁵

Thus, the MAI komiti told the SGM that the Crown had agreed that there would be no elections for either MAI or the PSGE, no changes to the PSGE, and that in future those with concerns should raise them with MAI, not the Crown.

In terms of the purpose of the SGM, the audited accounts for 2012–13, 2013–14, and 2014–15 were presented to the meeting. The auditor gave an unqualified opinion that the accounts showed 'a true and correct view of the operations (money in, money out) for the Incorporation, and also for the financial position balance date which in this case is June 30th [2015]'. The auditor could not, of course, comment on the BNZ loan other than to say that it existed and it would have to be paid back.¹⁶⁶ While the financial circumstances of MAI (including the loan) were clearly worrying to some hapū members, the audited accounts were formally accepted and approved by the meeting.¹⁶⁷

3.5.2.7 The position by the end of March 2016

By the end of March 2016, seven months had passed since the close of the ratification vote. The Ahuriri claimant community had still not been informed of the results. Nor had they been told the outcome of the two reviews undertaken by Colin Carruthers QC (which had been completed in January 2016). MAI had not advised 150 applicants that they had been turned down (for the purposes of the vote only) or that the special votes of 106 of them had not been counted.

165. Mana Ahuriri Incorporated, SGM minutes, 30 March 2016, p 8 (doc A6(a), p 50)

166. Ibid, pp 1, 5 (pp 43, 47)

167. Ibid, pp 3–8 (pp 45–50)

The Crown had written to Ngāti Pārau leaders in February 2016, advising them that MAI had undertaken to hold elections and present audited accounts. The Ministers ‘hope[d] this goes some way towards addressing your concerns.’¹⁶⁸ Three years’ worth of audited accounts were presented at the end of March. But the SGM was told that there would be no elections for MAI, no early elections for the PSGE, and that the Crown had signed a written agreement to this effect. Matthew Mullany told us that, on the basis of the Ministers’ assurances in February 2016, Ngāti Pārau had ‘assumed that full elections of MAI would be held.’¹⁶⁹ There was no mention of facilitation at the SGM but part of the signed agreement of 17 March 2016 included that Sir John Clarke would be appointed to hold facilitation hui. We turn to that topic next, as it was through facilitation that the Crown hoped the issues of transparency and accountability (largely the question of elections, accounts, and the loan) could be resolved.

3-5-3 The Crown’s facilitation process, May–July 2016

3-5-3.1 *The Crown and MAI agree on facilitation as the path to durability*

The Crown wanted a durable settlement with Ahuriri hapū but was not yet sure that that had been achieved.¹⁷⁰ Following the March SGM, the emphasis was on resolving the issues by bringing the parties face to face at hui, so that they could work through the disputed matters and find a solution. The facilitation process did not take place until May and June 2016, although the terms of reference were agreed in March of that year. We are not sure what resulted in the slight delay but it is not material for our purposes.

On 17 March 2016, the Crown (OTS and TPK) and MAI signed an agreement about the parameters of the facilitation, having jointly worked out its terms of reference. We have already noted the agreed position reached on the issue of elections and audited accounts (see above). MAI were ‘keen to report to the claimant community that Ministers have approved ratification and as part of that process it is agreed that there will be facilitation hui held.’¹⁷¹

In terms of process, the Crown and MAI agreed that:

- ▶ Sir John Clarke would be the independent facilitator;
- ▶ the terms of reference would describe ‘the issues to be facilitated’;
- ▶ the facilitation would occur in two parts – first, ‘an opportunity for the claimant community to raise specific issues which MAI will respond to’, followed by a second part on ‘the way forward’;

168. Minister for Treaty of Waitangi Negotiations and Minister for Māori Development to Hinewai Hawaikirangi, Laurence O’Reilly, Te Kaha Hawaikirangi, and Matthew Mullany, 11 February 2016 (doc A1(a), p 40). An identical letter was sent on the same date to Tania Hopmans and Whakiao Hopmans (doc A5(a), p 201).

169. Matthew Mullany, brief of evidence, 12 December 2018 (doc A17), p 7

170. Minister for Treaty of Waitangi Negotiations and Minister for Māori Development to John Clarke, 11 May 2016 (doc A18(a)(i), p 120)

171. Mana Ahuriri Incorporated and Clarke, ‘Terms of Reference for the Facilitation Hui for the Members of Mana Ahuriri Incorporated’, p [3] (doc A18(a)(i), p 124)

- Ministers would need to see ‘progress on facilitation’ before signing the deed of settlement, including that at least one facilitation hui would have been held;
- the report on the facilitation would be the ‘responsibility of John Clarke in consultation with MAI’; and
- the facilitation would not address the ‘first past the post’ election process for the PSGE (that is, its pan-hapū system of representation) or the settlement package.¹⁷²

3-5-3.2 *Terms of reference*

The terms of reference were agreed by Sir John Clarke and MAI, ‘in consultation with OTS and Te Puni Kōkiri’. The intended outcomes of the facilitation process were described as:

- a. Wānanga take (addressing all issues);
- b. Whakawhanaungatanga (strengthening our ties);
- c. Kōkiri ngātahi (moving forward together).¹⁷³

The first part of the process (wānanga take) would address the issues of audited accounts, the loan, elections, and delays in signing the deed of settlement. This part took place at a hui in May 2016. The second part would discuss whakawhanaungatanga (‘including better communication’) and moving forward together. This occurred at a hui held in June 2016. The terms of reference specifically excluded the electoral model for the PSGE and the settlement package. The reason given for this was that these matters had been ‘addressed in the ratification.’¹⁷⁴ It was clear that the Crown considered all matters to do with the ratification had been resolved by the independent reviews, but that the settlement would not be considered durable unless there was some form of ‘reconciliation’ between MAI and those who had raised concerns with the Minister.¹⁷⁵

The terms of reference set out the tasks of the independent facilitator, which were to facilitate the hui, report to Ministers on ‘the progress of the facilitation’, and decide whether additional facilitation hui were required. In the preparation of the facilitator’s report, the draft was to be provided to MAI, OTS, and TPK for comment. MAI and the Crown would then comment on ‘the facts which may be material to the Facilitator’s conclusions and recommendations’. The facilitator was supposed to consider those comments and complete a final report, including ‘conclusions and recommendations.’¹⁷⁶

172. Ibid

173. Ibid, p [1] (p 122)

174. Ibid

175. Minister for Treaty of Waitangi Negotiations and Minister for Māori Development to John Clarke, 11 May 2016 (doc A18(a)(i), p 120)

176. Mana Ahuriri Incorporated and Clarke, ‘Terms of Reference for the Facilitation Hui for the Members of Mana Ahuriri Incorporated’, p [2] (doc A18(a)(i), p 123)

3-5-3-3 *Flaws in the facilitation process*

The claimants argued that the facilitation process was flawed, including its terms of reference and how those terms were chosen. Claimant counsel also argued: ‘The facilitation hui also failed to resolve issues raised in relation to the ratification vote and the conduct of MAI. This process by which facilitation hui was conducted was also flawed but was nevertheless relied upon by the Crown.’¹⁷⁷

Counsel for Mana Ahuriri made no submissions about the facilitation other than to note that it occurred. Crown counsel similarly did not address the facilitation process. The Crown’s only submission on this matter was to state that the Crown had undertaken a number of steps to ‘address concerns and give matters due consideration’, including that it ‘engaged an independent, senior kaumātua, John Clarke (now Tā John Clarke) to undertake a facilitation process with those in the claimant community who had concerns about aspects of MAI’s conduct.’¹⁷⁸

Prior to the first facilitation hui in May 2016, Matthew Mullany and Tania Hopmans both raised concerns with the Crown. Matthew Mullany wrote to the two Ministers, seeking to work with the Crown directly on issues about the ratification process, the settlement (including the historical account), elections, audited accounts, and other process matters. Mr Mullany requested that these issues be worked through with the Crown by all concerned. If everyone agreed that facilitation was the best way to resolve the issues and reach a durable settlement, then they could all ‘agree the process of how that will be done.’¹⁷⁹

Tania Hopmans wrote to the Ministers on 5 May 2016. Ms Hopmans stated that the Crown had decided on facilitation without prior discussion with those who had raised the concerns to be facilitated, including discussion about who the facilitator would be, what issues would be included, and whether facilitation was the right way to resolve these issues. Ms Hopmans pointed out that hapū members did not know whether their registration had been accepted (which affected whether they could attend the hui). She also noted that, despite the Ministers’ assurance in February 2016 that elections would be held, MAI had announced that ‘they will not be holding elections’ (this had happened at the SGM in March 2016). Although it was now claimed that the constitution was ambiguous, she said, MAI knew how it was supposed to be interpreted because their deed of mandate required annual elections. The deed of mandate also required MAI to ‘ensure effective and appropriate representation.’¹⁸⁰

In our view, there were some important flaws in the facilitation process:

- ▶ The terms of reference were decided by MAI and the facilitator, in consultation with the Crown and on the basis of a prior Crown–MAI agreement on the parameters. Although the purpose of the facilitation was to achieve

177. Mahuika and Tukapua, closing submissions of Wai 2573 claimants (paper 3.3.4), pp 22–23

178. Melvin, closing submissions of Crown (paper 3.3.6), pp 27–28

179. Matthew Mullany to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 3 May 2016 (doc A1(a), pp 45–46)

180. Tania Hopmans to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 5 May 2016 (doc A5(a), pp 209–212)

reconciliation between MAI and those who had raised concerns with the Crown, Ngāti Pārau leaders and others had no say in deciding the terms of reference, including the decision to exclude certain matters from discussion in the facilitation process.

- The facilitator was chosen by MAI and the Crown, again excluding the Ngāti Pārau leaders and others who had raised issues with the Crown.
- The Crown and MAI were explicitly allowed to review the facilitator's draft report and have input on any 'facts which may be material to the Facilitator's conclusions and recommendations'. The same opportunity was not provided to Ngāti Pārau and others who had raised the issues that were to be the subject of the facilitation.
- The facilitator went beyond the terms of reference to provide the Ministers with what was called his 'findings throughout the facilitation, including my assessment of the concerns', and an 'independent assessment of the issues that were raised with you'.¹⁸¹ The facilitator did not in fact conduct an *inquiry*, yet the Crown was provided with findings on the merits of the issues, including the accounts, the BNZ loan, the payment of salaries from that loan, the mandate to obtain the loan, the guarantees for the loan, elections, the unity of the komiti, and disputes about the historical account. On almost all matters, the facilitator argued that MAI's point of view was correct. On the issue of the historical account, the facilitator brought along the OTS principal historian to the hui to explain why no amendments could be made to the account.¹⁸² In our view, it was not the role of the facilitator to advise the Crown on who was right and who was wrong, especially since he had not conducted a formal inquiry and only one side was allowed input into his report.

The only point on which the facilitator did not endorse MAI's position was the elections issue, on which he stated that he was not 'qualified to provide a legal analysis'. He advised Ministers of the two alternative perspectives, and concluded: 'My only assessment on this matter is that the constitution appears to be poorly drafted, which has been very difficult to understand and appears to be the source of the confusion'.¹⁸³

- The facilitator's report was not made available to anyone other than the Crown and MAI. Although the facilitator did give a verbal report at the July 2016 hui, the Crown refused to allow the hui participants to see the final, written report. The Crown also refused to release the report in response to a request under the Official Information Act. Although the Crown relied on the facilitation process and the report, those who participated in the facilitation were not allowed to know the results (apart from MAI).¹⁸⁴ Further, MAI refused to let the Ahuriri claimant community see the legal opinion on

181. John Clarke, facilitation report, [July 2016], pp 9–10 (doc A18(a)(i), pp 117–118)

182. Ibid, pp 6–9 (pp 114–117)

183. Ibid, p 8 (p 116)

184. Mullany, affidavit (doc A1), pp 12–13; Juliet Robinson to Matthew Mullany, 15 August 2016 (doc A1(a), p 53)

elections,¹⁸⁵ even though the opinion had been shown to the Crown in support of its position that no elections were required.

In our view, these flaws reduced the utility and effectiveness of the facilitation process in achieving reconciliation, but this did not mean that no progress was made at all.

3.5.3.4 What progress was made in achieving reconciliation?

The facilitation process had two stages. The first stage was the addressing of all issues raised with those ‘concerned members’ who had raised them. This stage consisted of a hui on 15 May 2016, attended by 60 members of the Ahuriri claimant community. The facilitator reported that ‘all attendees’ were allowed to ‘voice their opinions on the matters raised’. This meeting ‘concluded on a positive note with all parties coming together with the unified objective of moving forward’.¹⁸⁶ Sir John Clarke had met with the MAI komiti and ‘concerned members’ both before and after this hui. These meetings gave him a sense, he said, of ‘those who were actively trying to find a way through the issues and those whose positions had not changed since the facilitation began’.¹⁸⁷

On 30 May 2016, the Ministers responded to Matthew Mullany’s letter about the facilitation process (discussed above), in which he had sought an agreed process for (a) deciding that facilitation was appropriate; (b) deciding the facilitator and terms of reference; and (c) deciding the issues to be covered in the facilitation and how it would be conducted. The Ministers stated that the first hui on 15 May 2016 was ‘constructive and open allowing for discussion of all the points of concern you and a number of MAI members raised with us’. The Ministers sought a ‘robust and durable’ settlement. They had authorised John Clarke to conduct the hui as he saw fit, to hold more hui, and to continue until he was satisfied the ‘process has run its course’. The Ministers assured Mr Mullany that they would make no decisions before receipt of the facilitation report, and asked that people remain engaged and to seek resolution of their concerns through the facilitation process.¹⁸⁸ Mr Mullany and other Ngāti Pārau leaders did participate further in the facilitation process, as the Ministers had requested.

Following the May hui, MAI released some information to the claimant community. This included the bank’s letter of offer for the \$500,000 loan, AGM advertisements and minutes, the terms of reference for the facilitation process, and a CFRT letter about financial support. In June 2016, MAI also released a copy of the Carruthers report on its website, although it is not clear to us whether both the November 2015 and January 2016 reports were included.¹⁸⁹ This finally (and belatedly) provided some crucial information to the Ahuriri claimant community, who

185. Clarke, facilitation report, p 6 (doc A18(a)(i), p 114)

186. Ibid, p 5 (p 113)

187. Ibid

188. Minister for Treaty of Waitangi Negotiations and Minister for Māori Development to Matthew Mullany, 30 May 2016 (doc A1(a), p 49)

189. Clarke, facilitation report, p 5 (doc A18(a)(i), p 113)

at last found out the results of the Carruthers reviews and therefore the results of the ratification vote.

The second facilitation hui was held on 9 July 2016 and was attended by about 100 hapū members. The purpose of this hui was to 'report back to members of the claimant community on the issues discussed at the first hui, what steps had been undertaken since the first hui and to get a sense of how people wanted to proceed'. At this hui, Sir John Clarke presented an oral report, which included an account of his various meetings (including with the komiti), the issues raised at the May hui, and his 'findings' and 'assessment of the concerns'.¹⁹⁰ From the final report, we know that his findings were:

- The issue of the audited accounts had been 'mitigated' by the presentation of unqualified audited accounts for all the years concerned.
- He had no 'concerns about MAI's use of the proceeds of the loan'.
- The komiti did not need the approval of the claimant community to borrow money. The PSGE would have to agree to assume responsibility for the debt – this could simply be done by a majority of the MAT trustees following the settlement. MAI was 'unable to legally bind the PSGE to assume responsibility for the loan' but he noted that 'MAI has not yet committed the settlement funds to cover the loan as suggested by complainants'.
- No personal guarantees were made on the loan.
- The MAI komiti was united.
- The OTS principal historian clarified the Crown's approach to historical accounts. Sir John's view was that the 'concerned members' agreed at the hui to 'respectfully disagree on the matter' but did not seek to amend the historical account in the deed.
- He could not decide between the parties as to elections.¹⁹¹

Having presented his verdict on the matters at issue, the facilitator told the second hui that he was 'not interested in re-litigating points already discussed in [his oral] report, and only wanted to hear positive solutions forward'.¹⁹² This caused a degree of consternation at the second hui, where at least some did not accept his 'findings' and considered that matters were not in fact settled.¹⁹³ On the basis that they would still have to 'live alongside one another' regardless of ratification, Sir John Clarke sought 'ideas as to how the community could move forward'. According to his report, three solutions were proposed at the hui: first, that the settlement should be completed; secondly, that the hapū could still be called upon to endorse the ratification results; and, thirdly, that elections could and should still be held. On the latter point, solutions ranged from full elections to elections for one-third of the komiti.¹⁹⁴

190. Ibid, p 9 (p 117)

191. Ibid, pp 6–9 (pp 114–117)

192. Ibid, p 9 (p 117)

193. Trevor Taurima, affidavit, 3 November 2016 (doc A2), pp 3–5; Charmaine Butler, affidavit, 3 November 2016 (doc A3), pp 3–4; Mullany, affidavit (doc A1), pp 11–13

194. Clarke, facilitation report, p 9 (doc A18(a)(i), p 117)

Sir John concluded:

The two key points which were continually raised by members were:

- ▶ the settlement should not be postponed any longer (the deed of settlement should be signed); and
- ▶ some guarantee be made that some form of transparent elections would occur without undue delay.

I outlined these two points and asked members whether they endorsed that these were a good reflection of the main points from the hui. All but one of the hundred plus attendees agreed.

I note there was no consensus as to what order these two events should occur. There were some who thought elections should occur after the deed is signed, and others who thought elections should occur before the deed is signed. I also note that there was no clear coherent communication from the attendees on who should have elections ie MAI or MAT.

At the conclusion of the hui, a number of the complainants thanked me for my work, and stated that they felt the facilitation had adequately considered their concerns.

I have also been advised by a representative of the MAI Board that they had accepted and endorsed the report I gave to the claimant community.

From these points I am satisfied that the facilitation has been a successful collaboration of ideas between members of the Ahuriri Hapū claimant community and the MAI Board.¹⁹⁵

The MAI komiti had some concerns with the facilitation process, including their view that Sir John had 'allowed discussion on issues outside his terms of reference and he also allowed some people who were not members of Mana Ahuriri Inc to speak'. Nonetheless, Mr Prentice told us:

Despite our concerns about aspects of the facilitation hui process, at the end of the second hui, in my opinion, those who had attended were all (including the Komiti) prepared to accept the sentiments expressed at the end of that process as the parties wanted to move on with the settlement.¹⁹⁶

Matthew Mullany and other Ngāti Pārau leaders, however, argued that the majority of hui attendees wanted elections *before* the deed of settlement was signed. They wrote to Ministers on 15 July 2016, immediately after the second hui, stating:

It is assumed the feedback from the hui from John will reflect that the majority attending the hui strongly expressed that elections before ratification must occur in

195. Clarke, facilitation report, pp 9–10 (doc A18(a)(i), pp 117–118)

196. Prentice, affidavit (doc A6), pp 10–11

Alexander Turnbull Library, Wellington, New Zealand



George Hamilton Hammon's painting of Te Whanganui a Orotu (Napier Inner Harbour) in 1905, before the 1931 earthquake. The pursuit of redress in respect of this taonga is a unifying factor for the seven Ahuriri hapū.

order for the MAI claimant group to move forward together. If elections did not happen before settlement, disarray and dysfunction will continue to occur.¹⁹⁷

They told Ministers that the ‘preferred option’ at the hui was an election for all the komiti members. The issue of continuity was also considered. If the elections resulted in a significant change of komiti membership, then those members who were not re-elected would form an advisory group to the new komiti. This would ‘minimise the risk of a majority transfer of the komiti’. In their view of what happened at the hui, ‘[t]his option was seen as fair due to all current komiti members holding expired mandates’. This option of elections for the full komiti would ‘allow for accountability in light of serious issues raised and affirm the support of the komiti moving into settlement’.¹⁹⁸

It seems, therefore, that Sir John Clarke’s summation of the hui – move forward with settlement *and* hold elections – was supported by both sides, although MAI stressed the former (signing the deed) and Ngāti Pārau leaders stressed the latter (elections). In essence, the facilitation had revealed that the only practicable solution to the accountability issues was to hold elections. The audited accounts had been presented (albeit belatedly), the BNZ loan was a fait accompli, and the settlement of Mana Ahuriri claims was urgently needed. Elections were the only practical solution to ensure accountability going forward. It seems also, however, that Ngāti Pārau still wanted elections to the MAI komiti, not MAT.

Tania Hopmans’ evidence was that Sir John Clarke proposed that the deed of settlement be signed first and ‘elections held after’, but that many of those present at the July hui had objected to this order of events. She also described her pre-hui meeting with the facilitator, in which Sir John sought a compromise to move the settlement forward:

We agreed that the lack of elections was a key issue and Mr Clarke acknowledged that elections needed to be held. I was firm that elections needed to be held for *all* of the MAI komiti members, *before* the Deed of Settlement was signed. Mr Clarke disagreed explaining that such a suggestion would not be acceptable to the MAI komiti and was not a compromise, and we needed to find a compromise. Further, that retiring all of the komiti members, particularly the negotiators, did not provide for continuity and failed to acknowledge all the hard work that they have done. Conversely, my view was MAI’s Rules are a covenant with their members. Having elections is not a discretionary matter. MAI and the Crown cannot and should not negotiate or circumvent the application of those Rules. The proper way to deal with such an issue is to propose an amendment to the Rules in accordance with the Rules and to put it to a vote of the members. Retiring komiti members can re-stand for elections and if MAI’s members are satisfied with the performance of those komiti members, they could

197. Hinewai Hawaikirangi, Laurence O’Reilly, Te Kaha Hawaikirangi, and Matthew Mullany to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 15 July 2016, p [1] (doc A1(a), p 50)

198. Ibid

re-elect them. That decision belongs to MAI's members (not the komiti members, and certainly not the Crown).¹⁹⁹

Shayne Walker's evidence was that the 'majority of the comments from those in attendance was that fresh elections should occur as soon as possible and prior to signing the Deed'.²⁰⁰

By this time, however, the Crown had the two reviews of Mr Carruthers, a final result from the vote, and Sir John Clarke's advice that facilitation had resolved the accountability concerns through a practical solution: sign the deed and hold elections (though he could not say which should happen first). The Crown now had to make a decision one way or another on whether it was going to accept the facilitation and the ratification results as the basis for a durable settlement. We turn to that decision next.

3.6 WAS THE CROWN'S DECISION ON RATIFICATION REASONABLE AND FAIR?

3.6.1 Delay in the holding of elections

As will be recalled, the Minister met with MAI in March 2016 and said that he 'could' accept the ratification results provided that MAI presented its accounts, participated in facilitation with those who had raised concerns, and held PSGE elections as soon as possible. The Minister also asked the MAI komiti members (who would form the PSGE's trustees) to undertake governance training. In July 2016, OTS received the report from Sir John Clarke's facilitation hui. OTS summarised it for Ministers in this way:

Mr Clarke noted that:

- a. Ahuriri Hapū were firm in their view that their Deed be signed as soon as possible; and
- b. transparent elections be held as soon as possible.

Mr Clarke found:

- a. that the MAI constitution appears to be the major contributor to the dispute about whether the MAI board are properly elected to their positions;
- b. MAI acted unwisely when providing the bank with an undertaking that the loan they secured would be transferred to the PSGE;
- c. there appears, however, to be no evidence of any financial impropriety or mismanagement by MAI; and
- d. MAI seems unified and shares a desire to see the settlement signed.²⁰¹

199. Hopmans, affidavit (doc A5), p 21

200. Shayne Walker, affidavit, 4 November 2016 (doc A4), p 13

201. Juliet Robinson and Jaclyn Williams to Minister for Treaty of Waitangi Negotiations and Minister of Māori Affairs, report, OTS 2016/2017-153, 7 September 2016, p 3 (doc A18(a)(i), p 73)

Following the Crown's receipt of the facilitator's report, the Crown's chief negotiator, Paul Swain, met with MAI to present the Crown's proposed way forward: that three of the PSGE trustees would announce their retirement at the ceremony to sign the deed, with elections to be held for their positions before the end of the year.²⁰² This called for one-third of the trustees to voluntarily step down, thus enabling PSGE elections two years earlier than would otherwise be the case. The Crown clearly took the view that there was no point in having elections to the MAI komiti, since the Crown had now decided to complete the settlement (whereupon MAI would dissolve itself).

On 29 August 2016, the Minister met with MAI representatives to hear their counter-offer: two (not three) trustees would retire before Christmas, with elections held to fill their positions in March 2017. MAI did not, however, want the retirement of trustees to occur before, or at the same time as, the deed signing. Instead, the komiti was adamant that retirement of trustees and elections must come *after* the settlement was completed.²⁰³ The Minister accepted the MAI position and advised that 'Ministers would be pleased to sign the Deed in early October and recommended the Crown and MAI proceed with ceremony arrangements on this basis.'²⁰⁴ The MAI representatives at the meeting were 'concerned not to conflate the retirement of two trustees from the Mana Ahuriri Trust with the Deed of Settlement signing and to ensure that due attention is given to each event in a sequenced matter.'²⁰⁵ Indeed, MAI was so concerned that it declined to give the Minister an assurance in writing (which had been expected following the meeting on 29 August 2016). Instead, the then counsel for MAI liaised with the Crown Law Office to ensure that 'the proposed retirement of two of its members is handled sensitively while providing Ministers with some certainty as to the arrangements.'²⁰⁶

Thus, the Crown agreed to MAI's request that the retirement of two trustees be kept secret until well after the deed of settlement was signed. This was to have serious consequences. It meant that the settlement went ahead without first holding elections or even notifying the Ahuriri claimant community that elections would be held. Further, an election for only two trustee positions was unlikely to be sufficient for those who had raised concerns with the Crown and participated in the facilitation in good faith. According to OTS's view on 23 September 2016: 'The only risk is that should the elections become known prior to, or shortly after, the Deed of Settlement signing the two matters could be conflated. We have developed an agreed communications strategy to manage this risk.'²⁰⁷

202. Ibid, pp 3–4 (pp 73–74)

203. Ibid, pp 4, 11 (pp 74, 81)

204. Ibid, p 10 (p 80)

205. Juliet Robinson to Minister for Treaty of Waitangi Negotiations, aide memoire, OTS 2016/2017–207, 23 September 2016, p [1] (doc A8(a), p 87)

206. Ibid

207. Ibid, p 2 (p 88)

3.6.2

Apparently, OTS did not consider that a risk arose in respect of fulfilling the agreement facilitated by Sir John Clarke in July 2016. This was likely because the Crown saw those who had raised concerns with the Crown as a ‘small number of disaffected and articulate Ahuriri Hapū members.’²⁰⁸ The 7 September 2016 OTS report, in which officials recommended that the ratification be accepted, characterised those who held concerns as ‘disaffected’ several times. In fact, it was the AGM of the incorporation that rejected MAI’s resolution not to hold elections. Six months later, more than a hundred members resolved at the facilitation hui that elections must be held as soon as possible. To characterise those who insisted on elections before settlement as a small number of disaffected members, therefore, was inaccurate and misleading.

In our view, the Crown made a significant error in agreeing to MAI’s terms in August 2016, without further consultation with the claimant community. Given that the agreement was reached in August 2016, the Crown could have insisted that the question of when elections should be held – and for how many trustees – be put to an AGM, which was due to be held in the following month (prior to the deed signing).

On 29 August, the same day that the Minister met with MAI, Matthew Mullany contacted OTS. Any sense of agreement that had arisen from the facilitation process was beginning to unravel as time went by without elections being announced. Since the July hui, Ngāti Pārau leaders had approached the MAI komiti asking for ‘further follow-up hui’ regarding elections and how the BNZ loan was to be repaid. Also, the issue of the historical account was a matter of dispute. Ngāti Pārau leaders urged the Minister ‘not to approve ratification until MAI has conducted this process (with members of its claimant community) to resolve outstanding matters pertaining to the proposed settlement.’²⁰⁹

3.6.2 The Crown’s decision to proceed without elections first

OTS summarised its advice to Ministers as follows:

Should you accept the ratification results of the Ahuriri Hapū Deed of Settlement and post settlement governance entity any risks may be exacerbated by the comparatively low level of approval for the ratification of 76% and 71%. However, on balance you should accept the ratification results because:

- a. the ratification results, whilst at the lower end of the scale, demonstrate that there is a clear majority of support from those who voted;
- b. the Carruthers Report confirmed that the ratification process was transparent, unbiased, informative and facilitative of full participation and consistent with the approved ratification strategy;
- c. Mr Clarke’s report following facilitation hui shows that whilst some members

208. Juliet Robinson and Jaclyn Williams to Minister for Treaty of Waitangi Negotiations and Minister of Māori Affairs, report, OTS 2016/2017–153, 7 September 2016, p 9 (doc A18(a)(i), p 79)

209. Matthew Mullany to Minister for Treaty of Waitangi Negotiations, email, 29 August 2016 (doc A1(a), p 68)

are still dissatisfied there appears to have been no impropriety by MAI and that Ahuriri Hapū members want to proceed to Deed signing as soon as possible; and

- d. the agreement with MAI that two of the initial Trustees will step down to allow elections to take place before March next year answers the request from members to hold transparent elections.

Officials consider that the Crown has taken all reasonable steps to safeguard the durability of the settlement. Officials therefore recommend that you accept the Ahuriri Hapū ratification results and proceed with the signing of the Ahuriri Hapū deed.²¹⁰

In our view, this advice was not sound because it ignored procedural flaws and MAI's failure to comply with the ratification strategy. Further, we have to ask the question: was it reasonable for the Crown to rely on MAI's promise to hold elections for only two positions without further consultation with the claimant community, and was it reasonable for the Crown to withhold any knowledge of this promise from the claimant community until after signing the deed of settlement? As noted above, we do not accept the Crown's reasoning that those who wanted elections were a small group of disaffected members.

The Minister for Treaty of Waitangi Negotiations accepted the OTS advice on 7 September 2016. The Minister for Māori Development signified his approval on 19 October 2016. We are not sure why there was a delay of more than a month before the Minister for Māori Development, Te Ururoa Flavell, signed off on the OTS recommendation.²¹¹ In any case, both Ministers wrote to MAI on 19 October, advising that they had decided to accept the ratification results. They observed that MAI's agreement to present accounts, participate in the facilitation, and undergo governance training, had been 'testing for Mana Ahuriri Incorporated' but had satisfied Ministers' concerns. It had also given the new PSGE, MAT, a 'pathway to durability'. It was important that the new trust 'does not need to be looking over its shoulder for the next challenge but can look forward to developing its settlement assets for the benefit of all Ahuriri Hapū'.²¹² There was no mention of elections in this letter, as both the Crown and MAI had agreed to keep this part of the arrangements a secret until after the signing of the deed.

MAI had already established the PSGE on 24 September 2016.²¹³ On 14 October, three days before the official approval of the ratification, MAI's lawyers wrote to the Ministers to confirm that elections would be held. Two MAT trustees would retire in December 2016, with elections to follow in February 2017. This letter sought confirmation that the matter would remain confidential:

210. Juliet Robinson and Jaclyn Williams to Minister for Treaty of Waitangi Negotiations and Minister of Māori Affairs, report, OTS 2016/2017-153, 7 September 2016, p 12 (doc A18(a)(i), p 82)

211. Ibid, p 6 (p 76)

212. Minister for Treaty of Waitangi Negotiations and Minister for Māori Development to Terry Wilson, 19 October 2016 (doc A18(a)(i), p 141)

213. Prentice, affidavit (doc A6), p 15

My client considers it is of the utmost importance to upholding the mana of both the PSGE Trust and the initial trustees, that it is the trustees themselves who signal the intention of two trustees to retire, and with that announcement only being made at the time deemed appropriate by the trustees. For those reasons, your confidentiality concerning pending trustee retirement is sought.²¹⁴

Why did MAI decide to establish the PSGE before the Crown had formally accepted the ratification results? First, we note that the establishment of MAT occurred six days before MAI was again due to hold an AGM and present audited accounts (for the 2015–16 financial year). No doubt, there would also have been considerable pressure to discuss and agree an approach to elections. Secondly, it appears that the Crown's decision to accept the ratification was already known to the claimant community.

The decision to proceed without holding elections, or even to inform the Ahuriri hapū that limited elections would be held in 2017, seems to have dissipated any sense of agreement that remained from the facilitation hui. On 23 September 2016, counsel for Ngāti Pārau sought an urgent meeting with OTS. They advised that their clients were concerned at MAI's failure to hold elections, its failure to hold AGMs for the last two years, and its failure to disclose the bank loan.²¹⁵ By now, however, Ngāti Pārau leaders had also seen the Carruthers reports on the ratification process. Mr Mullany noted that the Crown refused to allow anyone access to those reports but a copy was eventually placed on the MAI website.²¹⁶ The komiti had agreed to put this information on their website in June 2016 after the first facilitation hui. For Ngāti Pārau, this was their first (and only) information about the process MAI had followed and the results of the ratification vote.²¹⁷ In their letter of 23 September 2016, counsel took issue with the conduct of the ratification process (including the decision to invalidate so many special votes). They also criticised the design and outcome of the facilitation process.²¹⁸

Ngāti Pārau leaders were aware either that the Crown intended to sign the deed of settlement or that a decision to do so was imminent. Their counsel argued that such a decision would prejudice Ngāti Pārau unless their concerns were resolved first. They formally advised the Crown that a claim would be filed with the Tribunal if this happened, but they hoped to avoid that through urgent discussions with OTS.²¹⁹

OTS staff met with Ngāti Pārau leaders on 30 September 2016. Mr Mullany explained his view of what happened next:

214. Jodi Lett to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, 14 October 2016 (doc A6(a), p174)

215. Matanuku Mahuika and Mātewai Tukapua to Juliet Robinson, 23 September 2016 (doc A1(a), pp 41–42)

216. Mullany, affidavit (doc A1), p10

217. Ibid

218. Matanuku Mahuika and Mātewai Tukapua to Juliet Robinson, 23 September 2016 (doc A1(a), pp 41–42)

219. Ibid

The failure to hold elections was raised again by us in September of this year when our legal counsel, Kahui Legal, wrote to the Office of Treaty Settlements by letter dated 23 September 2016 . . . In response to the 23 September letter from Kahui Legal we met with the Office of Treaty Settlements on 30 September 2016. At that meeting it was agreed that our legal counsel would endeavour to engage with MAI's lawyer to see whether a way forward could be agreed on the outstanding election issue. Despite seeking to engage with MAI's lawyer, no actual discussion occurred until 25 October 2016. By this stage, and despite further discussions at the meeting with the Office of Treaty Settlements on 17 October, the Ministers had resolved to accept the outcome of the ratification vote.²²⁰

With Ngāti Pārau leaders satisfied that there might yet be progress on the elections issue, discussions with the Crown in October 2016 focused on the historical account. As that is not a matter for detailed consideration in this urgent inquiry, we simply note that some minor changes were made to the historical account with MAI's agreement, but the principal changes sought by Ngāti Pārau leaders were not made.²²¹

In the meantime, the Minister for Māori Development, who had not yet signed off on acceptance of the ratification, asked OTS three questions:

What is the outcome of the recent hui between Kahui Legal (representing Ngāti Pārau) and OTS officials and are the two key issues raised by Ngāti Pārau the historical account and elections?

What are the implications of Ngāti Pārau filing in the Tribunal and are other hapū preparing to seek relief from the Waitangi Tribunal or are other hapū comfortable with the signing proceeding?

What is the rationale for the decision that a verbal commitment from Mana Ahuriri Incorporated was sufficient regarding the retirement of 2 trustees and the timing of an election prior to March 2017 when Ministers had agreed a commitment in writing was required and why does Mana Ahuriri Incorporated appear reluctant for hapū to know about the retirement of the 2 trustees and elections to be held before 31 March 2017?²²²

OTS responded to this request on 17 October 2016. Lillian Anderson and Juliet Robinson, director and deputy director respectively, advised that a meeting occurred that same day, at which only concerns about the historical account were covered. There was no mention of any discussions about elections following the approach by Ngāti Pārau on 23 September (which had included that issue). But a paragraph of this section of OTS' report has been blanked out – it may have covered the elections issue. We do not know for sure.²²³

220. Mullany, affidavit (doc A1), p 10

221. Ibid, pp 13–14; Robinson, affidavit (doc A7), p 16

222. Lil Anderson, 'Ahuriri Hapū: Actions to Resolve Outstanding Issues prior to Deed Signing', report to Minister for Treaty of Waitangi Negotiations, OTS 2016/2017–256, 17 October 2016, pp [2]–[3] (doc A8(a), pp 90–91)

223. Ibid, p [3] (p 91)

Date	Event
17 October 2016	OTS reported to Ministers on the three questions posed by the Minister for Māori Development and again recommended approval of the ratification.
19 October 2016	OTS met with Ngāti Pārau to discuss changes to the historical account. After receipt of the report discussed above, the Minister for Māori Development signed his approval of the ratification. The Ministers wrote to MAI, advising them that the Crown accepted the results of the ratification.
21 October 2016	OTS wrote to Ngāti Pārau leaders, advising that the Crown would not agree to amending the historical account in respect of Ōmaranui. Officials expressed optimism that Ngāti Pārau would work with MAT to reconcile differences within Ahuriri hapū.* Counsel for Ngāti Pārau wrote to OTS, noting that MAI had reported the Crown's approval of the ratification on its website. They thought they had agreed with OTS that the elections issue would be resolved through discussions with MAI, but that has not happened and the Crown has approved ratification without elections. Ngāti Pārau will therefore have to file an urgent claim with the Tribunal. They also noted that issues concerning the historical account and the ratification process remained unresolved.†
26 October 2016	Ngāti Pārau leaders filed the Wai 2573 claim with the Waitangi Tribunal, seeking an urgent hearing.
28 October 2016	MTT leaders filed the Wai 2574 claim with the Waitangi Tribunal seeking an urgent hearing.

* Juliet Robinson to Matanuku Mahuika, 21 October 2016 (doc A1(a), pp 78–79)

† Matanuku Mahuika to Juliet Robinson, 21 October 2016 (doc A1(a), p 81)

Table 3.4: Parallel events, 17–28 October 2016

In response to the second question, OTS advised that Shayne Walker, the general manager of MTT, had also contacted the Crown in early October 2016. MTT's concerns also related to the historical account. Minor amendments had been made with the agreement of MAI.²²⁴

In response to the third question, counsel for Mana Ahuriri had confirmed in writing that two trustees would retire following the signing of the deed of settlement. But the MAT trustees (who were identical to the MAI komiti) did not want to inform the claimant community of that fact:

The Mana Ahuriri Trust remains very concerned that the fact of these retirements and the names of the retiring trustees remain confidential at this time to protect the

224. Lil Anderson, 'Ahuriri Hapū: Actions to Resolve Outstanding Issues prior to Deed Signing', pp [3]–[4] (doc A8(a), pp 91–92)

mana of those people. Their concern is that announcing retirements and consequent elections now would look like it was a precondition to the Crown agreeing to sign the Deed and that those people have been forced from office.²²⁵

The OTS report also included a section on the risks of litigation in the Tribunal but this section of the report was blanked out in the copy provided to us.

It is important to note that the retirement of trustees and the holding of elections was in fact a precondition of the Crown signing the deed of settlement. By late October 2016, the sense of agreement reached among the claimant community in July was fast disappearing. The Crown did insist on some form of elections but it agreed to (i) no elections before the signing of the deed; (ii) MAI deciding unilaterally that only two positions should be up for election; and (iii) keeping the proposed elections secret until after the deed of settlement was signed. In our view, this combination of factors ended the shaky unity reached through the facilitation process. Ngāti Pārau leaders became increasingly concerned about elections in August and September, and understood from their meeting with OTS that the issue would be the subject of discussion. By late October 2016, however, Ngāti Pārau had discovered that the Crown had approved the ratification. As far as they or anyone else in the claimant community were aware, this had been done without holding elections or undertaking that elections would be held. Immediately after the Crown's formal acceptance of the ratification, Ngāti Pārau leaders filed a claim with the Tribunal.

The timing of matters included a series of parallel communications and events as shown in table 3.4.

On 2 November 2016, the Crown signed the deed of settlement with the MAT trustees (who were also the MAI komiti).

3.6.3 Were the approval rates high enough for a durable settlement?

On 7 September 2016, OTS formally recommended that the Ministers accept the ratification results and proceed to sign the deed of settlement. There were four key issues to be considered:

- ▶ Were the approval rates high enough for a durable settlement?
- ▶ Was the ratification process sound?
- ▶ Did the facilitation resolve outstanding issues about the accountability of MAI to the claimant community?
- ▶ Did MAI meet the Minister's conditions for approving the ratification?

In terms of the approval rate, the Minister had actually accepted this as far back as March 2016, when he advised MAI that the settlement could proceed upon certain conditions. As will be recalled, the final results were: 76 per cent in favour of the deed of settlement; 71 per cent in favour of the PSGE; and a participation rate of 27 per cent. OTS advised:

225. Ibid, p [4] (p92)

There is no specific threshold for acceptance of ratification results but they must signify broad support for the settlement to proceed. If you approve the ratification results of 76% and 71%, this would be the third lowest approval rate of a deed of settlement and PSGE accepted by the Crown.²²⁶

The only lower results were those for Ngāti Rangiteaorere (68 per cent approval with a 43 per cent participation rate) and the Waikato-Tainui River settlement. The latter was described as having a 65 per cent approval rate and a 40 per cent participation rate.²²⁷ This statistic was queried by claimant counsel, however, who observed that the Waikato River settlement was ratified by the Waikato-Tainui Te Kahanganui (not by a postal vote).²²⁸ The Crown did not provide us with confirmation on that point, but a check of the deed of settlement confirmed that Te Kahanganui ratified the river settlement.

In any case, OTS argued that, even though the results were 'at the lower end of the scale', MAI had undertaken 'additional steps' since the vote which led officials to 'conclude that the ratification results should be accepted'.²²⁹ These additional steps were: presentation of accounts; participation in the facilitation process; agreement to hold elections for two PSGE trustees in 2017; and agreement to undertake governance training.²³⁰ Further, officials relied on Mr Carruthers' certification of the ratification process and Sir John Clarke's facilitation report.

Nonetheless, officials advised that there were risks in accepting a low result, given the 'correspondence from disaffected Ahuriri Hapū members'. OTS advised that the risks should not prevent the Minister's acceptance of the ratification, based on MAI's 'additional steps', the Carruthers report, and the Clarke report. This advice was crucial and needs to be quoted in full:

Risks of accepting the ratification results

Litigation

Should you accept the ratification results, disaffected Ahuriri Hapū members may decide to litigate.

The Carruthers Report confirms the process was 'transparent, unbiased, informative and facilitative of full participation' and suggests that the prospects of any legal challenge being successful are low.

The John Clarke facilitated hui provided an opportunity for Ahuriri Hapū members to discuss their concerns. The outcome of the facilitation is that there is general agreement that the Deed should be signed as soon as possible and elections should be also held as soon as possible.

226. Juliet Robinson and Jaclyn Williams to Minister for Treaty of Waitangi Negotiations and Minister of Māori Affairs, report, OTS 2016/2017-153, 7 September 2016, p 7 (doc A18(a)(i), p 77)

227. Ibid, p 8 (p 78)

228. Transcript 4.1.1, p 361

229. Juliet Robinson and Jaclyn Williams to Minister for Treaty of Waitangi Negotiations and Minister of Māori Affairs, report, OTS 2016/2017-153, 7 September 2016, p 8 (doc A18(a)(i), p 78)

230. Ibid, p 10 (p 80)

Durability

The low ratification results coupled with correspondence from disaffected Ahuriri Hapū members has raised concerns about the durability of the settlement. The Carruthers Report, the facilitation undertaken by Mr Clarke and the additional steps MAI have taken all mitigate the risk to durability.

Mr Clarke has met with the disaffected members and held Hapū-wide hui. The Ahuriri Hapū members Mr Clarke met with have consistently asked that the Deed signing proceed and that PSGE elections occur as soon as possible. MAI's subsequent agreement that two of the initial PSGE trustees step down with elections for these positions held by 31 March 2017 will go a long way to address the concerns raised by some Ahuriri Hapū members and will in our view strengthen the durability of the settlement.²³¹

Officials also identified a third element of risk, which was the unprecedented period of time that had elapsed since the ratification vote. The Crown Law Office, however, had advised that this did not pose a risk 'any greater . . . than in any other settlement'. OTS advised the Minister that the delay was justified by the 'various steps taken by the Crown (independent review and facilitated hui) to ensure that the Ahuriri Hapū claimant community was supportive of the proposed Deed and PSGE before approving the final ratification results.'²³²

In our view, the Crown was wrong to rely on the results of the second Carruthers report as an endorsement of the ratification as 'transparent, unbiased, informative and facilitative of full participation'. In fact, the Crown ought to have been aware (through MAI's January 2016 report) that it was an unfair and unsound process that resulted in the final (and higher) approval rating. MAI had discounted 150 membership applications (and thereby 106 special votes) by:

- ▶ reversing the order of its verification process, which meant that the whaka-papa of many applicants was not checked;
- ▶ disqualifying applicants who were part of the 'group registration exercise' and who gave what MAI considered 'incorrect or misleading information', without checking back with the applicants for more details or allowing the right of appeal stipulated in the ratification strategy; and
- ▶ disqualifying applicants involved in the 'group registration exercise' where MAI considered that it had 'reasonable grounds to believe that deceptive and dishonest voting practices were involved', again without any inquiry or allowing the right of appeal stipulated in the ratification strategy.

As a result of following this procedure, MAI disqualified 106 special voters when in fact all save one were members of the Ahuriri claimant community and therefore eligible to vote. This meant that the Crown's stated concern to MAI – that non-members may have voted – resulted in a process that disqualified over 20 per

²³¹. Ibid, p 11 (p 81)

²³². Ibid, p 12 (p 82)

cent of those who voted (even though all but one were in fact members of Ahuriri hapū). None of the procedural flaws were noted by either OTS or the independent review. In the initial ratification process, which resulted in much lower approval ratings, MAI had decided not to disqualify any of the special votes because that would 'have disadvantaged too many of our people regardless of their views or beliefs'.²³³

Under cross-examination by claimant counsel, Mr Fraser confirmed that the Crown was unlikely to have accepted the lower results as a basis for a durable settlement. This led claimant counsel to query whether OTS had essentially asked MAI to rerun the verification process in order to get a higher result.²³⁴ In his first report (November 2015), the independent reviewer had noted MAI's decision to count all the special votes 'as a matter of fairness', and that this decision carried little risk since it favoured those likely to challenge the result rather than MAI.²³⁵ Mr Fraser stated that it was appropriate for the Crown to raise its 'concern that people who were not members of Ahuriri Hapū could have cast a vote, that was the concern'. In response, claimant counsel put to Mr Fraser: 'It's clear that if all of those votes had been verified the settlement wouldn't have proceeded?' Mr Fraser's reply was: 'If all the votes had been verified and validated and everyone was a member of Ahuriri Hapū then I accept what you are saying, but the point is that they had not been.'²³⁶

In our view, the Crown's decision to rely on the so-called final count was unsound and unfair to the Ahuriri claimant community. It resulted in an exaggerated proportion of voters in support of the settlement and the PSGE. In particular, almost half of those who voted in the ratification process did not support the PSGE. It is possible that the Crown may have accepted a 60 per cent approval rating for the deed of settlement, especially in light of the July 2016 facilitation hui's desire to continue with the settlement. But the evidence suggests that OTS would likely not have accepted the 56 per cent vote in favour of the PSGE. Again, the results of the facilitation hui would support that point, since those present wanted elections to be held as soon as possible.

We make our final conclusions, findings, and recommendations on these matters in the following chapter.

233. C R Carruthers to Minister for Treaty of Waitangi Negotiations, memorandum, 13 November 2015, p 4 (doc A18(a)(i), p 96)

234. Transcript 4.1.1, pp 332–336

235. C R Carruthers to Minister for Treaty of Waitangi Negotiations, memorandum, 13 November 2015, p 3 (doc A18(a)(i), p 95)

236. Transcript 4.1.1, p 336

CHAPTER 4

CONCLUSION

4.1 INTRODUCTION

In this chapter, we draw our final conclusions on the following matters, which have been the subject of discussion in chapters 2 and 3:

- the Crown's monitoring of the mandate prior to the ratification process;
- the Crown's decision in October 2015 not to rerun the ratification process;
- the Crown's decisions in respect of the Carruthers' reports and the outcomes of the independent review;
- the actions taken by the Crown once it became aware of the accountability issues, and that those issues were relevant to the durability of the settlement; and
- the Crown's decision to approve the ratification and sign the deed in light of all the relevant circumstances.

Having drawn our conclusions on those matters, we then make findings as to whether the Crown's acts or omissions have breached the Treaty. As noted in chapter 1, our findings and recommendations were made available to the parties in pre-publication form on 17 December 2019. The text of our report, including our findings and recommendations, has not altered in this final, published version.

4.2 CONCLUSIONS ON THE ISSUES**4.2.1 Mandate monitoring prior to the ratification process**

The Mana Ahuriri deed of mandate stated that the negotiations' guiding principles would include 'respect[ing] the autonomy and mana of the Ahuriri Hapū' and 'ensur[ing] effective and appropriate representation'.¹ In terms of accountability, the MAI komiti would be accountable to the hapū (including through AGMs). The deed also stated that, after the reset of the komiti in 2011, the komiti members' terms would be two years with 'a minimum of two Komiti members being required to retire at each annual general meeting from 2011'.²

From the Crown's perspective, the *Red Book* also required that a mandated entity be accountable to the claimant community, although its emphasis was more on communication and financial reporting than on elections. The Crown monitored whether an entity retained its mandate; the *Red Book* stated that mandated entities must ensure that they kept their mandate to represent the claimant group

1. Mana Ahuriri Incorporated, 'Deed of Mandate', October 2009, p 12 (doc A18(a)(i), p 12)

2. Ibid, pp 11, 14 (pp 11, 14)

in negotiations. In practice, the Crown seems to have monitored the *engagement* of a mandated entity with its claimant community and little else.

The MAI constitution also had accountability requirements in its provision for elections, AGMs, and presentation of audited accounts.

In our inquiry, the Crown acknowledged several deficiencies in its monitoring of MAI's mandate:

- ▶ The Crown had not 'picked up on' what it called the inconsistencies in the election provisions of MAI's constitution when it reviewed that document.
- ▶ The Crown had not 'picked up on' the difference between MAI's practice and the deed of mandate, which required annual elections.
- ▶ The Crown had not monitored MAI's compliance with the accountability requirements in its constitution, especially the presentation of accounts at AGMs.³

Otherwise, the Crown argued that MAI's interpretation of the elections provisions was reasonable, and the main focus of its monitoring showed that MAI was engaging with the Ahuriri claimant community.

In our view, the Crown has downplayed the significance of its admitted deficiencies in the monitoring of MAI's mandate. MAI did not hold an AGM in 2014. It held an SGM in March of that year for the purpose of moving the AGM to September, and then did not hold its AGM in that month. MAI also failed to hold an AGM in September 2015 (eventually holding a 'special annual general meeting' in December of that year). It did not present any accounts for 2013–14 and 2014–15 until December 2015, and no audited accounts for those years until March 2016. Accounts for 2012–13 were not available until the 2016 SGM. Further, the great majority of the komiti members had served a three-year term by September 2014 (when elections should have been held to rectify that fact), and those members had had a four-year term by September 2015, when crucial decisions had to be made about the way forward following the ratification process. As we set out in chapter 2, our view is that this was not compliant with either the constitution or the deed of mandate.

The main gist of the legal opinions obtained by MAI was that, in the circumstances of an incorporated society that was about to go out of existence in 2015, it was reasonable not to hold elections that year. As we discussed in chapter 3, the legal opinions were based on a faulty premise; that is, an assumption that the Crown was about to accept the ratification results, when that was by no means certain in November 2015 or even in March 2016. In any case, we do not consider it reasonable to interpret the MAI constitution in such a way that it requires *only* two members to retire every two years, or allows two-year terms to become three- or four-year terms or even five-year terms (by October 2016).

We are left with the question: if a mandated entity did engage with its hapū community, and kept its members informed on the settlement, how important were the formal accountabilities to the retention of its mandate? We consider this question further below.

3. Geoffrey Melvin, closing submissions of Crown, 31 May 2019 (paper 3.3.6), pp 14, 19

4.2.2 The Crown's improvements to mandate monitoring

As we discussed in sections 2.2.5 and 2.3.4, Crown practice 'has changed because of what the Crown has learnt through this inquiry process.'⁴ Warren Fraser, regional director at Te Arawhiti, clarified the changes made by the Crown as follows:

In preparing for this hearing I have reflected on the Crown's actions.

When I look back forensically at everything that happened relevant to MAI's mandate, I see there are things the Crown could have done better. There are improvements that can be made to Crown monitoring of mandate such as paying closer attention to an entity's constitutional requirements. I have already taken the opportunity to address Te Arawhiti staff attending our last mandate training module on the need to monitor and assure compliance with key mechanisms for accountability to the claimant community such as the holding of AGMs and the presentation of financial accounts. I also encouraged further discussion with Te Puni Kōkiri to see whether the governance training available to Post-Settlement Governance Entity trustees might also be available to trustees of a mandated entity.⁵

It appears, therefore, that the changes to Crown practice are very recent. Crown counsel confirmed that the monitoring of mandates will henceforth 'monitor and assure compliance' with the accountability mechanisms in a mandated body's constitution (and, presumably, its deed of mandate).⁶ More attention will be paid to *accountability* (such matters as elections and audited accounts) rather than – as in the present case – almost a sole focus on engagement between the mandated body and hapū members.⁷

Whether these changes to Crown practice are enough to stop a recurrence of what happened in this case is a matter that we will consider further when we make our findings and recommendations.

4.2.3 The Crown's decision not to rerun the ratification process

In September 2015, the Office of Treaty Settlements (OTS) advised Ministers that the ratification results were too low, there were doubts about the ratification process and the participation rate, MAI had sent out the voting packs against advice (leaving itself open to criticism), and the ratification process should be rerun. The Minister decided not to follow this advice after his meeting with MAI in early October 2015. Instead, the Crown sought an independent review of the ratification process by Colin Carruthers QC.

We accept that this was a reasonable decision in the circumstances. Before Ministers could decide whether the results were too low, it was necessary to have an external review to certify whether the process itself had been sound and above board.

4. Ibid, pp 30, 30 n

5. Warren Fraser, opening oral statement, no date, p 1 (doc A19, p 17)

6. Melvin, closing submissions of Crown (paper 3.3.6), p 30 n

7. Ibid, pp 13–14, 30

4.2.4 The Crown's decisions on the Carruthers review

We have discussed both of the independent reviewer's reports in some detail in sections 3.4.2 and 3.4.5. The Crown did not accept some of the findings of the first report. Mr Carruthers had found that, for reasons of both fairness and timeliness, MAI had decided to verify the registration of all the special voters. This meant that the final results were: 60 per cent in support of the deed of settlement; and 56 per cent in support of the PSGE. Mr Carruthers said that this process was consistent with the ratification strategy, which required registration to be verified before a special vote could be counted. Mr Carruthers also found that the process was 'transparent, unbiased, informative, and facilitative of full participation', and that there was little likelihood of a challenge because MAI's decision on the special votes had 'worked against the interests of MAI as the mandated body'.⁸

Following the receipt of this report on 13 November 2015, the Crown decided that the verification process must be rerun and the vote recounted. Mr Carruthers was then asked to review the process a second time, following the provision of two papers which explained MAI's process and the revised voting results.

We accept that MAI's decision to verify the membership of all special voters was consistent with the ratification strategy (as Mr Carruthers had found in his first report). It was not, however, consistent with the MAI constitution or MAI's usual practice, both of which required whakapapa to be verified. We also accept that the Crown was justified in requesting that MAI verify that all special voters had the necessary whakapapa to Ahuriri hapū (that was the form that the Crown's request took). We do not accept, however, that the Crown was entitled to rely on the first Carruthers report's certification of this part of the process, given the Crown's action following receipt of that report. Nor do we accept that the Crown was entitled to rely on either the process followed by MAI in January 2016 to verify membership (which was unfair, procedurally incorrect, and inconsistent with the ratification strategy) or the independent reviewer's certification of that second process. OTS had available to it the same information as that put before Mr Carruthers, who had relied on the two documents provided to him by OTS.

For all these reasons, the Crown's decision to rely on the independent review and the revised voting results – 76 per cent in favour of the deed and 71 per cent in favour of the PSGE – was flawed.

4.2.5 The actions taken by the Crown on the accountability issues

In this inquiry, the Crown put great weight on the fact that members of the claimant community had not drawn its attention to the accountability issues prior to the ratification process. As we discussed in section 2.2.6, there was understandable confusion in 2012, when elections could have occurred, due to the fact that MAI was – as all sides admit – dysfunctional, and negotiations had been suspended. The second occasion was in 2014, when no AGM or elections were held (as they ought to have been) in September of that year, following an SGM in March. Importantly,

8. CR Carruthers to Minister for Treaty of Waitangi Negotiations, memorandum, 13 November 2015, p 5 (doc A18(a)(i), p 97)

when the accountability issues *were* raised with the Crown in October 2015, the Crown's response was that members should raise the matter internally with MAI. It was not until the second set of complaints in December 2015 that the Crown took some form of action: it told MAI that it must present audited accounts (December 2015); and gave both the Ngāti Pārau leaders and Tania Hopmans an assurance that elections would be held (February 2016).

The situation had changed by the end of March 2016. By then, MAI had presented three years' worth of audited accounts at an SGM, and OTS and MAI had agreed that elections would not be a consideration in approving the ratification. The latter point was based on the March 2016 legal opinion, which MAI made available to the Crown.

The evidence is clear that the Crown had already decided in principle that the revised results (76 per cent and 71 per cent) were sufficient for approving the ratification. But Ministers were concerned that the settlement would not be durable unless the accountability issues were resolved in some way. The next action taken by the Crown, therefore, was a facilitation process to 'achieve reconciliation' and provide 'assurance as to the durability of the Ahuriri Hapū settlement'.⁹

Was facilitation a reasonable step to take at this point in the settlement process?

On the one hand, the Crown could not, as Mr Fraser put it, 'go back in time and ask MAI to present its accounts in a timely fashion'.¹⁰ On the other hand, as Tania Hopmans argued, hapū members might have voted differently if they had had the accounts when they should have (including information about the BNZ loan) before they voted on ratification.¹¹ We agree that the Crown had taken a practical if belated step in requiring MAI to present three years' worth of audited accounts in 2016. In regard to Ms Hopmans' point, the Crown would have to weigh the significance of accountability flaws when it assessed the ratification results. On the issue of elections, MAI would not agree to elections despite the results of its December AGM and the Crown's assurance to Ngāti Pārau leaders in February 2016 that elections would be held. The Crown's approach to this issue by the end of March was to see if facilitation might achieve some form of agreement among the Ahuriri claimant community on the appropriate way forward.

In our view, given the positions taken by the various parties, a process to facilitate agreement was a reasonable step for the Crown to take as at March 2016.

As we found in section 3.5.3, there were a number of flaws in the actual facilitation process adopted in March to July 2016. The design of the process was one-sided. MAI and the Crown were both involved in deciding the terms of reference and selecting the facilitator, without any involvement from those who had raised

9. Minister for Treaty of Waitangi Negotiations and Minister for Māori Development to John Clarke, 11 May 2016 (doc A18(a)(i), p 120)

10. Warren Fraser, under cross-examination by claimant counsel, East Pier Hotel, Napier, 20 February 2019 (transcript 4.1.1, p 330)

11. Tania Hopmans, affidavit, November 2016 (doc A5), p 24; Tania Hopmans and Whakiao Hopmans to Minister of Treaty of Waitangi Negotiations and Minister for Māori Development, 29 February 2016, pp 1–2 (doc A5(a), pp 202–203); see also Matanuku Mahuika and Matewai Tukapua, submissions in reply to submissions 3.35 and 3.36, 19 June 2019 (paper 3.3.7), p 6

4.2.6

the concerns that were to be facilitated. Further, the terms of reference allowed both the Crown and MAI an opportunity to comment on the draft report and offer corrections. The final report was only made available to the Crown and MAI. In our view, these were significant flaws which reduced the effectiveness of the facilitation process, and left it open to accusations of bias (whether real or perceived). In June 2016, following on from the first facilitation hui, MAI published the Carruthers reports on its website, so that the review and the results of the vote were available to the hapū community for the first time. These raised significant issues around the special votes but those issues were outside the scope of the terms of reference agreed earlier by MAI and the facilitator (with involvement from OTS and TPK).

Nonetheless, we also found that the facilitation process did result in a temporary sense of agreement among the Ahuriri claimant community in July 2016, which coalesced around two key propositions:

- a. the settlement should not be postponed any longer (the deed of settlement should be signed); and
- b. some guarantee be made that some form of transparent elections would occur without undue delay.¹²

Mr Clarke reported that ‘there was no consensus as to what order these two events should occur’.¹³

Instead of holding further hui to reach such a consensus, or consulting further with the Ahuriri claimant community, the Crown agreed to accept MAI’s decision to hold elections after the deed was signed, to hold elections for only two MAT trustees, and to keep that decision secret from the claimant community. We are not surprised, therefore, that any sense of agreement in July 2016 had dissipated when the Crown approved the ratification results in October 2016 and signed the deed of settlement the following month.

4.2.6 The Crown’s decision to approve the ratification and sign the deed

The OTS advice to Ministers in September 2016 was markedly different from what it had been a year earlier. This was partly because the Crown could rely on an independent review of the ratification process, and also because OTS revised its earlier view of the approval rating necessary for durable settlements. The Crown was now prepared to accept much lower results than initially, but still markedly higher than those which Mr Carruthers had confirmed in November 2015. The results from a number of Treaty settlements were provided to Ministers for comparison, with the advice that the MAI results were the third lowest the Crown had been prepared to accept. But OTS considered that the durability of the settlement was demonstrated by the independent review, the facilitation process, and the undertakings that MAI

12. John Clarke, facilitation report, [July 2016], p 10 (doc A18(a)(i), p 118)

13. Ibid

had given the Crown. Those undertakings were: to present audited accounts, to undergo governance training, and to hold elections for two MAI trustees in 2017.

Was the Crown's decision to approve the ratification of the deed and PSGE fair and reasonable in all the circumstances (as set out in section 3.6)?

We think that the Crown put insufficient weight on a number of factors in coming to its decision. First, the Crown relied on MAI's secret undertaking to hold an election for only two positions. In accepting that undertaking as resolving the issue, the Crown did not take sufficient account of:

- ▶ MAI's lack of formal accountability in the years leading up to the Crown's decision in October 2016;
- ▶ the tentative agreement reached through facilitation in July 2016; and
- ▶ how MAI's secret undertaking might be perceived in the future, and what effect that might have on the durability of the settlement.

Secondly, in characterising those who had raised concerns as a 'small number of disaffected and articulate Ahuriri Hapū members',¹⁴ the Crown discounted the weight of opinion in the Ahuriri claimant community in favour of elections. An AGM of the incorporated society and a well-attended hui-a-hapū the following year had both resolved that elections could no longer be deferred. More facilitation could have been undertaken to confirm the view of MAI members: settlement first or elections first (and for how many trustees)? By October 2016, the great majority of the MAI komiti had served a five-year term without facing an election. We do not think the Crown should have accepted the komiti's unilateral decision without further facilitation or input from the claimant community. On this one point, at least, the Crown ought to have been aware that the MAI komiti did not have a mandate from its members to decide the question.

Thirdly, in relying on the independent review and the ratification results as finalised in January 2016, the Crown took no account of the flaws in the process undertaken by MAI to verify the membership of special voters. The result was that 106 special votes were disqualified, even though all but one of those voters were in fact members of the Ahuriri hapū and had their membership verified later through proper inquiry. The effect of this decision on the results was highly significant due to the small number of votes cast overall. The Crown may have been prepared to accept a 60 per cent approval rating for the deed of settlement. We do not believe, however, that the Crown would have accepted 56 per cent as indicating a durable agreement to the PSGE.

The Crown could, in fact, have saved the work done in negotiating the settlement so far, and respected the ratification results and the facilitated agreement, by accepting the deed but rerunning the process to approve the PSGE. It would not be the first time that there had been separate ratification processes for a deed and a PSGE. This might also have allowed the question of hapū representation to be given more attention.

14. Juliet Robinson and Jaclyn Williams to Minister for Treaty of Waitangi Negotiations and Minister of Māori Affairs, report, OTS 2016/2017-153, 7 September 2016, p 3 (doc A18(a)(i), p 73)

For these reasons, we do not agree that the Crown's decision to sign the deed of settlement in October 2016 was reasonable in all the circumstances.

4.3 DID THE CROWN'S ACTS OR OMISSIONS BREACH THE PRINCIPLES OF THE TREATY?

4.3.1 Treaty compliance

As we discussed in chapter 1, the relevant principles in this inquiry are partnership, autonomy, and active protection. A number of Tribunal reports have examined the issue of mandating, although they have focused on the earlier process of obtaining rather than maintaining a mandate. The first key aspect of those reports that we would like to note is that flaws in the Crown's actions or errors in process are not automatically so fundamental or of such significance that a breach of Treaty principles has occurred.¹⁵ The second key point is that the Tribunal's reports have found the Crown must actively protect the tino rangatiratanga or autonomy of claimant communities in settlement negotiations.¹⁶ To fail in that duty is to risk a settlement that is not durable, as well as harm to the claimant hapū and their intra and inter-relationships. The principle of partnership requires that the Crown act fairly, reasonably, and in utmost good faith towards its Treaty partner, and that the Crown should be sufficiently informed of its Treaty partner's view in making decisions. The latter often (but not always) requires consultation.

The reciprocal partnership signified by the Treaty arises from the Queen's promises of protection and from the Māori recognition of kāwanatanga in return for the Crown's recognition and protection of tino rangatiratanga. The role of rangatira is, in the words of the late John Rangihau, 'people bestowed': 'recognition by the people was one of the most important factors in the assumption of leadership', and the 'authority embodied in the concept of rangatiratanga is also the authority of the people'.¹⁷

We agree with the Ngāpuhi Mandate Tribunal, which stated:

As other Tribunals have found, notably in the case of Orakei, Muriwhenua Fishing and, more recently, Tauranga Moana, 'the Crown has a particular duty to respect and actively protect Māori autonomy, which they are entitled to as the natural expression of their tino rangatiratanga'. Key to this is the capacity of Māori to exercise authority over their own affairs as far as practicable within the confines of the modern State. The Crown has a duty to protect and enhance 'the Māori customary principle of social, political and economic organisation, or the right of any or all Māori to identify with

15. See, for example, Waitangi Tribunal, *The East Coast Settlement Report* (Wellington: Legislation Direct, 2010), p 60; Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p 112

16. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Wellington: Legislation Direct, 2015), pp 23–26; Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report* (Wellington: Legislation Direct, 2017), pp 23–24

17. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 419

the communities and support the leaders of their choice, in accordance with Māori custom.¹⁸

As already discussed, rangatiratanga constitutes the essence of Māori political and social organisation, and the foundation of Māori decision-making. The ways that rangatiratanga is exercised will, however, reflect the diverse contexts in which Māori choose to interact. Past Tribunals have seen the duty of active protection as applying to a variety of Māori political/organisational structures – iwi, councils and trusts, as well as hapū – depending on the circumstances of the case.¹⁸

The circumstances of this case are that in 2009, the Ahuriri hapū chose to endorse an incorporated society as the vehicle for the negotiation of their Treaty settlement. In 2008, the Minister for Treaty of Waitangi Negotiations had accepted that the seven Ahuriri hapū formed a ‘large natural grouping’ for Treaty settlement purposes. As we discussed in chapter 1, these hapū had worked together on their joint claim to Te Whanganui a Orotu, and had formed the Ahuriri Claimant Group, made up of representatives from three claims. In 2009, however, it ‘became apparent that the most practical, transparent, and accountable means for doing this would be to establish a new legal entity to seek a formal mandate from the Ahuriri Hapū.’¹⁹ The Ahuriri Claimant Group established MAI in April 2009 and was successful in obtaining a mandate from the seven hapū. No one in this inquiry contests that MAI secured the mandate.

Māori have used elected committees as a vehicle for the exercise of tino rangatiratanga from the nineteenth century onwards, including for the collective management of Māori land. From time to time, the Crown has been prepared to accord legislative recognition and powers, such as for Māori committees (in 1883),²⁰ land incorporations (in 1894),²¹ and Māori councils (in 1900).²² The second half of the twentieth century saw a large growth of incorporations and trusts under the Māori Affairs Act 1953 and Te Ture Whenua Māori Act 1993. Trust boards, councils, committees, incorporations; these all have a place in the modern landscape of Māori representative entities. Māori leaders and communities are familiar with what they are and how they operate. The choice of an incorporated society is not uncommon for a mandated entity, but the key requirement is that the entity has the confidence and support of the claimant community (usually signified by a postal ballot) and that the support of the claimant community is retained.

Transparency, accountability, and representativeness are key requirements for a mandated entity and for any incorporated society. Regular elections are absolutely fundamental to meeting all three requirements. At MAI’s December 2015 AGM, which rejected the komiti’s proposal not to have elections, Tania Hopmans was recorded as saying: ‘it is a fundamental right for our whānau to elect their

18. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report*, p 23

19. Mana Ahuriri Incorporated, ‘Deed of Mandate’, p 4 (doc A18(a)(i), p 4)

20. Native Committees Act 1883

21. Native Land Court Act 1894, ss 122–126

22. Māori Councils Act 1900

representatives and we should not have to beg for the opportunity to do so.²³ We agree. The Crown's approach to the issue of elections in this case was flawed. It did not monitor the transparency, accountability, and representativeness of MAI effectively in the period prior to the ratification. Although the Crown criticised the claimants for not raising these matters earlier, the Te Arawa Mandate Tribunal's findings on the process of obtaining a mandate are equally applicable here:

[T]he 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. A more active role in monitoring and scrutinising is required to ensure the Crown's actions in recognising a mandate remain Treaty-compliant.²⁴

While we accept the Crown's position that OTS does not have a 'day to day view of what is happening within a claimant community',²⁵ it is incumbent on the Crown to monitor transparency, accountability, and representativeness in a more sophisticated way than simply focusing on communications (hui and pānui).

The Crown acknowledged that it did not monitor MAI's compliance with its constitution or deed of mandate in respect of elections and the presentation of accounts. Given that admission, the crucial issue in respect of elections is: what did the Crown do once the issue was raised with it?

In our view, the Crown's attempt to facilitate agreement was reasonable in the circumstances, but its actions following the July 2016 hui were neither reasonable nor consistent with Treaty principles. As discussed above, Sir John Clarke reported the consensus of the people as: complete the settlement and hold transparent elections as soon as possible, but he was not able to say in which order each of those urgent things should happen. At this point, given the outcome of the July hui and MAI's failure to hold AGMs or elections in September 2014, September 2015, or September 2016, we do not accept that MAI had a mandate in October 2016 to decide unilaterally when elections would take place or for how many trustee positions. Additional facilitation or consultation with the claimant community was required, and the Crown ought to have known that that was the case and insisted on further action rather than deciding to settle without elections. Nor should the Crown have accepted a secret deal with MAI on elections as the basis for proceeding to settlement.

For those reasons, we find that the Crown did not act in accordance with its partnership and active protection obligations to Ngāti Pārau (as one of the Ahuriri claimant hapū).

23. Mana Ahuriri Incorporated, AGM minutes, 11 December 2015, p7 (doc A6(a), p85)

24. Waitangi Tribunal, *The Te Arawa Mandate Report*, p111; Matanuku Mahuika and Mātewai Tukapua, closing submissions of Wai 2573 claimants, 2 May 2019 (paper 3.3.4), p27

25. Warren Fraser, answers to written Tribunal questions, [April 2019] (doc A18(d)), p4

As noted above, the regular presentation of audited accounts is required by the MAI constitution. Also, the OTS *Red Book* stipulated that financial accountability was an important part of maintaining a mandate. On this issue, we again note that the Crown failed in its monitoring process, and the question then becomes: what did the Crown do when Ngāti Pārau leaders and others raised the issue? In our view, the Crown's only reasonable response at that point was to (i) require MAI to present audited accounts (which the komiti had already decided to do) and (ii) weigh the significance of financial accountability in deciding whether to accept the ratification results. We accept that the Crown took the first of these actions in late 2015. In respect of the second action, it appears that the Crown relied on the facilitation process as having resolved points of difference and indicating a preference to continue with the settlement.

On balance, we do not believe that the Crown acted inconsistently with the principles of the Treaty. While the Crown's monitoring of MAI accountability was flawed, we accept that the prejudice cannot be identified with any certainty, and that the Crown took what action it could when the issue was brought to its attention.

Having said that, the non-presentation of accounts for three years is a significant issue, and we do not want to understate the flaw in the Crown's system of monitoring. We also accept that a lack of accountability can generate a lack of trust or confidence. MAI got significantly into debt – its deficit was more than half a million dollars by mid-2015 – but its members did not know about this until after the ratification. Indeed, the MAI komiti did not report to members on the incorporation's financial circumstances for three years. In our view, issues of trust and confidence may now best be remedied by the holding of trustee elections. We address the issue of trustee elections further below.

The third matter in which a possible Treaty breach arises is the action taken by the Crown in response to the first Carruthers report, and its subsequent decision to accept MAI's process as a sound basis for the recount of the votes (see sections 3.4 and 3.6). This decision resulted in the disqualification of a large number of voters who were in fact members of the Mana Ahuriri community (more than one-fifth of all those who voted) and raised the approval rating for the PSGE in particular (from 56 per cent to 71 per cent). We note, on this point, the Crown's submission:

The Crown expects a claimant group's mandated representatives 'will have the leading role in exploring and developing options for a governance entity', but 'they must also give all members of the claimant group the chance to review and ratify their proposed entity'. The Crown submits this approach promotes the rangatiratanga of claimant groups and is consistent with Treaty principles.²⁶

26. Melvin, closing submissions of Crown (paper 3.3.6), p 24

4.3.2

In our view, the Crown's decision to accept the revised results was an error. This was because the process followed by MAI in January 2016 was flawed and inconsistent with the ratification strategy, and its outcome was unfair. The Crown insisted that the original verification be redone because that initial process (certified by Mr Carruthers) was inconsistent with the ratification strategy, but appears to have ignored the flaws of the second process. The Crown's decision was prejudicial to special voters and distorted the outcome of the ratification, exaggerating the degree of support.

Do these Crown actions amount to a breach of Treaty principles? In our view, this was not a minor error. The decision to accept the ratification results, and therefore accept the deed and the PSGE, was a highly significant matter for the future of Ngāti Pārau and all the Ahuriri hapū. We are mindful, however, that the Crown did not rely on the ratification results alone. Rather, it relied on a combination of three other things – the independent review, the facilitation process, and MAI's undertakings – in accepting the results as sufficient for a durable settlement. In our view, the more reasonable action in those circumstances would have been to accept the deed but rerun the ratification of the PSGE. This would have respected the mana of MAI and the autonomy of Ngāti Pārau and the other Ahuriri hapū while acknowledging that there was a higher approval rating for the deed of settlement than the PSGE. The facilitation process indicated a desire that the settlement proceed. But, if all the special votes were taken into account (as we think they should have been), the approval rating for the PSGE was unusually and unacceptably low.

Taking all the circumstances into account, we find that the Crown's acceptance of the deed of settlement was compliant with its Treaty obligations but the acceptance of the PSGE was not.

4.3.2 Prejudice

Prior to the ratification process, both the Crown and MAI were aware that Ngāti Pārau felt unrepresented by MAI. The komiti's response in 2011 and 2013 to Ngāti Pārau's concerns was that they should get a nominee into the elections process – but, as will now be very evident, the only opportunity for this after 2011 was the election for only two positions in 2013. Taape O'Reilly was unable to get elected to one of those two spots.²⁷ Although the Crown noted that the issue of elections was not raised with it prior to the end of the ratification process, the Crown was aware of Ngāti Pārau's concerns about representation. Those concerns had taken two forms: representation on MAI, and representation on a pan-hapū PSGE. In April to July 2015, Ngāti Pārau leaders corresponded and met with the Minister, who declined their request to provide facilitation with MAI and advised that they would have a chance to vote in the ratification and elect a Ngāti Pārau representative once the PSGE elections were held (see chapter 2).

In our view, Ngāti Pārau were prejudiced by:

27. Transcript 4.1.1, pp 39, 222, 227; Mana Ahuriri Incorporated, board meeting minutes, 12 July 2013, pp 1–2 (doc A6(a), pp 1–2)

- the Crown's failure to monitor accountability and representativeness for the purposes of mandate maintenance;
- the Crown's decision to accept MAI's secret deal (an election for two MAT positions after the deed was signed) as sufficient for the settlement to proceed, without further facilitation or input from the Ahuriri claimant community (including Ngāti Pārau); and
- the Crown's decision to accept the ratification of the PSGE on the basis of MAI's process to verify special voters, given the obvious flaws in that process and the unusually low approval rating for the PSGE if all special votes were counted.

To the extent that we have found the Crown's acts or omissions inconsistent with the principles of the Treaty, and Ngāti Pārau were prejudiced thereby, the Wai 2573 claim is well-founded.

4-3-3 Summary of findings

In sum, we have made the following findings:

- The Crown's failure to monitor accountability mechanisms was a significant flaw but was not a Treaty breach because opportunities still remained for the Crown to take appropriate action before accepting ratification and signing the deed.
- In respect of elections, the Crown's acts and omissions between July and November 2016 were in breach of the Crown's partnership and active protection obligations to Ngāti Pārau (as one of the Ahuriri claimant hapū). While it was reasonable for the Crown to rely on the facilitated agreement reached in July 2016, it was clear that further facilitation hui or consultation was required to determine the order of elections and settlement. The Crown ought to have taken into account (a) the breach of the MAI constitution and deed of mandate (with most komiti members in their fifth year of a two-year term, and no rotational or substantive elections in 2012, 2014, 2015, or 2016) and (b) the decisions of the December 2015 AGM and July 2016 hui. In light of those matters, the Crown ought to have been aware that the MAI komiti did not have a mandate from the Ahuriri claimant community to make a secret decision to hold elections for only two positions following the signing of the deed. The Crown's decision to accept this secret deal and proceed with the settlement in those circumstances was in breach of Treaty principles, and Ngāti Pārau were prejudiced thereby.
- In respect of financial reporting and the BNZ loan, the Crown took what action it could reasonably take once it became aware of this accountability issue. While not understating the significance of the flaw in the Crown's monitoring of the mandate, the Crown's acts and omissions were not in breach of Treaty principles.
- In respect of ratification, the Crown was in breach of Treaty principles for accepting the ratification results for the PSGE. The Crown did not accept MAI's decision to verify all special voters or Mr Carruthers' certification of the process in November 2015. Rather, the Crown relied on a flawed and

unfair process to reverify and recount the votes, resulting in the disqualification of over one-fifth of those who voted (all but one of whom were in fact members of the Ahuriri hapū and entitled to register and vote). The Crown's decision was prejudicial to special voters and distorted the outcome of the ratification, exaggerating the degree of support and concealing issues about the durability of the settlement. In all of the circumstances, including the facilitation process and the 56 per cent vote in favour of the PSGE (if all votes had been included), Treaty principles required the Crown to accept the deed but rerun the ratification of the PSGE. Ngāti Pārau were clearly prejudiced by these Crown acts and omissions.

We turn next to consider the parties' submissions on remedies, and to make recommendations for the removal of the prejudice and for the prevention of similar prejudice in future settlements.

4.4 REMEDIES

4.4.1 The parties' positions

The claimants submitted that there is a 'strong argument for a re-run of the ratification vote' but 'the Claimants have chosen not to seek this recommendation'.²⁸ The Crown endorsed this submission, arguing that 'the Crown would seek a way ahead that would enable the settlement to proceed without further delay'.²⁹ Counsel for Mana Ahuriri also sought a constructive way forward, but suggested that the most appropriate path at this point is for the settlement legislation to be introduced so that the trust deed's accountability process (including PSGE elections) can continue.³⁰

The remedy sought by the claimants is a review and update of the register, followed by elections for all of the MAT trustee positions. They proposed that the election process would be overseen by an independent returning officer, that an explanation of the claim and the Tribunal's report accompany the voting materials, and that the Crown not introduce the settlement legislation until these steps have been taken.³¹ MAI responded that it had already offered to hold elections (discussed below), and that no remedy is required for this claim.³² The Crown also responded to this proposal, stating that 'MAT is a private trust that is not readily amenable to Crown action or Tribunal recommendation'. Crown counsel suggested that a more practicable remedy would be for MAT's beneficiaries to call an SGM (and seek elections that way).³³

In their reply submissions, claimant counsel stated:

28. Mahuika and Tukapua, closing submissions of Wai 2573 claimants (paper 3.3.4), p 32

29. Melvin, closing submissions of Crown (paper 3.3.6), p 32

30. Leo Watson, closing submissions of MAI and MAT, 30 May 2019 (paper 3.3.5), p 25

31. Mahuika and Tukapua, closing submissions of Wai 2573 claimants (paper 3.3.4), p 32

32. Watson, closing submissions of MAI and MAT (paper 3.3.5), p 25

33. Melvin, closing submissions of Crown (paper 3.3.6), p 32

It should also be noted that although the Claimants have not sought a rerun of the ratification vote this does not mean that the prejudice arising from this process should be disregarded. The decision not to seek a re-run of the ratification vote was not an easy decision for the Claimants to make. However, they ultimately chose not to seek a re-run of the ratification vote in an effort to provide a shared way forward. In particular they are hopeful that with a new set of trustee elections there will be a willingness to engage and find a way to deal with the other outstanding Ngāti Pārau concerns.

Finally the Crown has said that it cannot compel MAT to hold elections. However the Crown does have options available to it should it wish to use those options. As filed at the hearing, the Crown recently delayed the third reading of the Bill giving effect to the settlement of the Wairoa claims pending the completion of certain Crown required amendments to the trust deed of the Wairoa settlement entity. The same type of opportunity is available to the Crown here.³⁴

4.4.2 Mana Ahuriri's post-hearing proposal

During the final day of our hearing, counsel for Mana Ahuriri indicated that his clients had a proposal for the claimants to consider. On 12 March 2019, the parties advised that they had been unable to reach agreement.³⁵ It is necessary, however, to consider the substance of the proposal because it is relevant to the remedy sought from us by the claimants.

During the hearing, Warren Fraser suggested that 'the claimants and Mana Ahuriri Trust are not far apart in terms of how to move forward'. In fact, he saw the situation as not really having progressed since Sir John Clarke reported on the outcome of the July 2016 hui, noting: 'The solution seems to boil down to the timing of Mana Ahuriri Trust elections; and whether settlement should proceed first.'³⁶ Mr Fraser suggested that the MAT trustees could call an SGM or the claimants could seek the requisite support (5 per cent of adult members) to call an SGM. This meeting could consider and vote on a motion about the timing of elections. Such a solution would put the 'resolution of this matter' in 'the hands of the full claimant community', and allow each side's position on elections to be tested and a decision reached.³⁷

Following on from this suggestion, which MAT considered was 'directed squarely at the evidence from the claimants as to their preferred solution', the MAT trustees proposed a two-stage process to determine whether elections should be held early.³⁸ This involved both a postal ballot and SGM:

34. Mahuika and Tukapua, submissions in reply (paper 3.3.7), p 9

35. Matanuku Mahuika, Geoffrey Melvin, and Leo Watson, joint memorandum concerning settlement proposal, 12 March 2019 (paper 3.4.3)

36. Fraser, opening oral statement, p 3 (doc A19, p 19)

37. Ibid

38. Pirinihia Prentice to Minister for Treaty of Waitangi Negotiations, 14 March 2019 (doc A22), p 1

4.4.2

- a postal ballot on (i) whether the current trustees had support to continue with the introduction of settlement legislation and (ii) whether the election of four trustees should happen earlier than the trust deed currently provided; and
- if the vote approved an early election for four trustees, an SGM would be held to amend the constitution to bring that process forward (requiring 75 per cent approval at the SGM to amend the constitution).³⁹

If the SGM agreed to amend the constitution, then the timing of the trustee elections could be altered accordingly.

The trustees proposed the following questions for members to vote on:

Question 1 – Do you support the current trustees of Mana Ahuriri Trust to continue to implement the Deed of Settlement and its introduction as settlement legislation into the House of Representatives? Yes/No

Question 2 – Clause 4.2 of the Second Schedule of the Deed states that an election for four of the trustee positions shall occur at the end of the first year after settlement, and an election of the remaining trustee positions would occur at the end of the second year after settlement. Do you wish to have the current process of staggered elections of Mana Ahuriri Trustees brought forward earlier than provided for under the current Trust Deed? Yes/No

(NB: The poll would make it plain that any amendment to the Trust Deed to bring forward elections will still require a 75% majority vote cast at a subsequent Special General Meeting, time being of the essence.)⁴⁰

The claimants held hui-a-hapū on 28 February and 7 March 2019 to consider this proposal. They decided to reject it because it required two preconditions for elections: first, a poll of all adult members; and then a 75 per cent majority at an SGM. In the meantime, if the claim was withdrawn (a precondition of the proposal), the settlement legislation would proceed without elections first. They noted: ‘This gives no certainty that elections will be held in circumstances where the Claimants consider that those elections are already overdue.’⁴¹ In the claimants’ view, there should be *no* preconditions to holding elections. Further:

We have previously proposed that the MAT trustees resign voluntarily. They can then re-stand. This would avoid the requirement for a change to the MAT Trust Deed and is the best and most efficient way to meet the Claimant’s concerns about the mandate to conclude the settlement.⁴²

39. Pirinihia Prentice to Minister for Treaty of Waitangi Negotiations, 14 March 2019 (doc A22), p 1; ‘Constitution and Rules of Mana Ahuriri Incorporated’ (Wellington: Kensington Swan, [2009]), p 18 (doc A18(a)(i), p 64)

40. Leo Watson to Matanuku Mahuika, Kahui Legal, 28 February 2019 (doc A22(a)), p 2

41. Matanuku Mahuika, Kahui Legal, to Leo Watson, 12 March 2019 (doc A22(b)), p 1

42. Ibid

In addition, the claimants argued that elections must be for all trustee positions (not four of nine), and that they must occur before the settlement legislation is introduced.⁴³

Parties advised the Tribunal on 12 March 2019 that they had not been able to reach agreement.⁴⁴

4.4.3 Recommendations

4.4.3.1 Elections and representation

We agree with all parties that the settlement should proceed with some urgency. There is no point at this late stage in rerunning the ratification of the PSGE (which, as found above, we considered should have occurred in 2016).

We agree with the claimants that the question of elections must now be resolved in a manner that is fair to the whole Ahuriri claimant community. Given our findings of Treaty breach and prejudice in respect to elections and the Crown's approval of the ratification, we recommend that the Crown decline to introduce settlement legislation until MAT has undertaken to hold trustee elections. The Crown should insist on an election taking place either before or after the introduction of the Bill, so long as the process has been completed before the Bill is passed.

We recommend that the Crown require an election to be held for all nine trustee positions. We have considered the arguments put forward about continuity but, in our view, the opportunity to seek re-election provides sufficiently for that point in the context of the breaches and prejudice identified above. We also note that the 2017 election for two MAT positions did not require an amendment to the MAT trust deed. Rather, two trustees simply retired.⁴⁵ That is the obvious way forward at this stage and we recommend that the Crown insist upon it before introducing settlement legislation.

While the Crown has submitted that it cannot compel a private trust, we do not accept that argument. The settlement is not yet complete until the legislation has been introduced and enacted and, given our findings as set out above, the Crown's duty under the Treaty is to ameliorate the prejudice by requiring an election for all nine trustee positions to be held.

In our view, this recommendation is fair to all concerned:

- the settlement will proceed to legislation;
- all registered adult members of the Ahuriri hapū will have the opportunity to participate in the election;
- the opportunity for re-election provides sufficiently for continuity; and
- the prejudice will be remedied while removing any uncertainty relating to the integrity of the settlement.

43. Ibid

44. Mahuika, Melvin, and Watson, joint memorandum concerning settlement proposal (paper 3.4.3)

45. Transcript 4.1.1, p59

4.4.3.2

We hope that all the hapū and members of the Ahuriri claimant community will then be able to move forward in a positive manner.

We further recommend that the Crown should pay the costs of this election. It would be unfair, given the necessity to remove the prejudice occasioned by breach of the Treaty, for the cost to fall on the Ahuriri claimant community. We recommend that the Crown arrange with the Mana Ahuriri Trust for independent oversight of the information to be provided in the voting packs, including reference to this inquiry and its findings and recommendations.

We also note the argument put forward by the Crown and Mana Ahuriri that there will be a structural review of the PSGE, including its electoral arrangements, four years after the settlement (see chapter 2).⁴⁶ We accept that that is a potential remedy for the broader issue of Ngāti Pārau representation in MAT.

We hope that if our recommendations are followed, the Mana Ahuriri settlement will proceed in accordance with the views of all hapū and in compliance with the Treaty, and that the Ahuriri hapū will be able to work together on building a new future for following generations.

4.4.3.2 *The Crown's process for monitoring the maintenance of mandates*

In order to prevent any recurrence of this kind of prejudice in the future, we recommend that the Crown make some necessary changes to its policies and procedures. We note the Crown's submission that 'practice' has already changed, and Mr Fraser's evidence of advice given to staff at a training session. In our view, it is necessary to change policies and embed new practices, including amendments to the *Red Book* and the advice sheet that was provided to MAI (if it is in common use).⁴⁷ Accordingly, we recommend:

- ▶ As a matter of standard procedure, the Crown should have a legal review of the constitution of an entity which is seeking or has been granted mandate, to ensure that its provisions contain no ambiguities or inconsistencies in its rules (including its election provisions). The legal review should also cover the consistency of the constitution and the deed of mandate.
- ▶ The Crown should amend its monitoring practices to include the accountability mechanisms in a mandated entity's constitution and deed of mandate. This would include, among other things, monitoring that AGMs and elections are held as and when required, and that audited accounts are presented as and when required. Compliance with accountability measures should be treated as a bottom line for the maintenance of a mandate to settle claims.
- ▶ The Crown should provide or fund governance training for the committee members of mandated entities at the beginning of a negotiations process (and for new committee members as they come on), including on constitutional

46. Watson, closing submissions of MAI and MAT (paper 3.3.5), p8; Melvin, closing submissions of Crown (paper 3.3.6), p 24; transcript 4.1.1, p 14; Mana Ahuriri Trust, 'Deed', 24 September 2016, pp 34–35 (doc A18(a)(i), pp 182–183)

47. For the advice sheet, which is discussed in chapter 2, see 'Key Requirements for a Mandate Maintenance Report: Information to Assist in the Preparation of Submitting a Mandate Maintenance Report to the Crown', information sheet, no date, pp [1]–[2] (doc A5(a), pp 291–292).

and accountability matters. Such training should be mandatory for mandated representatives.

- The Crown should consider providing funding and any other assistance to mandated entities in the enrolment of members, including during a ratification period, to assist the claimant community in this vital aspect of restoring the tribal base as a necessary precondition to healing the relationship with the Crown.

4.4.3.3 Facilitation

We recommend that facilitation should be arranged more equitably in the future. All parties should have input to the scope and terms of reference for the facilitation, and all parties should have access to any report or recommendations produced by the facilitator.

4.4.4 Our suggestion in respect of the historical account

In this inquiry, we did not consider issues relating to the historical account. We are aware, however, that the Crown and MTT reached agreement on MTT's concerns by way of a separate statement of historical matters (outside of the deed of settlement).⁴⁸ We suggest that the Crown and Ngāti Pārau consider a similar arrangement.

48. Transcript 4.1.1, pp 133–134, 197–198

Dated at *Wellington* this *17th* day of *December* 20*19*



Chief Judge Wilson Isaac, presiding officer



Prue Kapua, member



Dr Grant Phillipson, member



Dr Monty Soutar, member



APPENDIX

SELECT INDEX TO THE RECORD OF INQUIRY

RECORD OF HEARINGS

PANEL MEMBERS

The panel members were Chief Judge Wilson Isaac (presiding), Prue Kapua, Dr Grant Phillipson, and Dr Monty Soutar.

COUNSEL

Leo Watson appeared for Mana Ahuriri Incorporated and Mana Ahuriri Trust; Matanuku Mahuika and Matewai Tukapua appeared for the Wai 2573 claimants; and Geoffrey Melvin and Mihiata Pirini appeared for the Crown.

HEARING

The hearing was held at East Pier Hotel, Napier, from 18 to 20 February 2019.

SELECT RECORD OF PROCEEDINGS

1. STATEMENTS OF CLAIM

1.1.1 Riripeti Te Koha Mutunga, Te Koha Tareha, Taape Tareha-O'Reilly, Hera Taukamo, Jenny McIlroy, Laurence O'Reilly, Te Kaha Hawaikirangi, Hinewai Hawaikirangi, and Matthew Mullany, statement of claim (Wai 2573), 26 October 2016

2. TRIBUNAL MEMORANDA, DIRECTIONS, AND DECISIONS

2.5.5 Judge Patrick Savage, decision concerning applications for urgent hearing, 9 March 2017

2.5.17 Chief Judge Wilson Isaac, memorandum granting Mana Ahuriri Trust interested party status, 15 June 2018

2.5.22 Chief Judge Wilson Isaac, memorandum granting leave for counsel memoranda to be added to record and directing parties to file joint memorandum, 28 September 2018

2.8.1 Tā Hirini Moko Mead and Ronald Crosby, 'Report by Mediators Tā Hirini Moko Mead and Ronald David Crosby', 19 October 2018

App**3. SUBMISSIONS AND MEMORANDA OF PARTIES**

3.1.21 Matanuku Mahuika, Geoffrey Melvin, and Mark von Dadelszen, joint memorandum concerning status of discussions between parties, 17 March 2017

3.1.25 Matanuku Mahuika, Geoffrey Melvin, and Mark von Dadelszen, joint memorandum concerning mediation, 22 June 2017

3.1.46 Matanuku Mahuika, memorandum concerning evidence, 24 September 2018

3.3.4 Matanuku Mahuika and Matewai Tukapua, closing submissions of Wai 2573 claimants, 2 May 2019

3.3.5 Leo Watson, closing submissions of Mana Ahuriri Incorporated and Mana Ahuriri Trust, 30 May 2019

3.3.6 Geoffrey Melvin, closing submissions of Crown, 31 May 2019

3.3.7 Matanuku Mahuika and Matewai Tukapua, submissions in reply to submissions 3.35 and 3.36, 19 June 2019

3.4.3 Matanuku Mahuika, Geoffrey Melvin, and Leo Watson, joint memorandum concerning settlement proposal, 12 March 2019

4. TRANSCRIPTS AND TRANSLATIONS**4.1 Transcripts**

4.1.1 National Transcription Service, transcript of hearing week 1 (18–20 February 2019), [May 2019]

SELECT RECORD OF DOCUMENTS**A. INQUIRY DOCUMENTS**

A1 Matthew Mullany, affidavit, 31 October 2016

(a) Matthew Mullany, comp, supporting documents to document A1, no date

A2 Trevor Taurima, affidavit, 3 November 2016

(a) Trevor Taurima, comp, supporting documents to document A2, no date

A3 Charmaine Butler, affidavit, 3 November 2016

(a) Charmaine Butler, comp, supporting documents to document A3, no date

A4 Shayne Walker, affidavit, 4 November 2016

(a) Shayne Walker, comp, supporting documents to document A4, no date

(b) Tania Hopmans, affidavit, 13 February 2019

- A5** Tania Hopmans, affidavit, November 2016
(a) Tania Hopmans, comp, supporting documents to document A5, no date
- A6** Piriniha Prentice, affidavit, 28 November 2016
(a) Piriniha Prentice, comp, supporting documents to document A6, 5 December 2016
- A7** Juliet Robinson, affidavit, 30 November 2016
- A8** Matthew Mullany, affidavit, 15 December 2016
(a) Matthew Mullany, comp, supporting documents to document A8, no date
- A9** Jenny McIlroy, affidavit, 8 December 2016
- A10** Tania Hopmans, affidavit, 16 December 2016
- A16** Piriniha Prentice, brief of evidence, 21 November 2018
(a) Piriniha Prentice, comp, supporting documents to document A16, November 2018
(c) Piriniha Prentice, answers to written Tribunal questions, 10 April 2019
(c)(i) Piriniha Prentice, comp, documents filed at request of Tribunal, no date
(c)(ii) Treaty Negotiations and Ratification Teams, Mana Ahuriri Incorporated, presentation to Minister for Treaty of Waitangi Negotiations, 8 October 2015
- A17** Matthew Mullany, brief of evidence, 12 December 2018
- A18** Warren Fraser, brief of evidence, 8 February 2019 (originally filed as document A15)
(a) Warren Fraser, 'Timeline of Events relating to Wai 2573', table, [February 2019]
(a)(i) Warren Fraser, comp, supporting documents to document A18, 8 February 2019
(a)(ii) Warren Fraser, comp, documents filed at request of Tribunal, no date
(b) Joinella Maihi-Carroll, Mana Ahuriri Incorporated, to Tim Fraser, deputy director negotiations, Office of Treaty Negotiations, 29 September 2015
(d) Warren Fraser, answers to written Tribunal questions, [April 2019]
- A19** Warren Fraser, comp, documents filed at request of Tribunal, 10 April 2019
- A22** Piriniha Prentice, chairperson, Mana Ahuriri Trust, to Andrew Little, Minister for Treaty of Waitangi Negotiations, letter, 14 March 2019
(a) Leo Watson to Matanuku Mahuika, Kahui Legal, letter, 28 February 2019
(b) Matanuku Mahuika, Kahui Legal, to Leo Watson, letter, 12 March 2019

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