IN THE WAITANGI TRIBUNAL

Wai 3058
Wai 429
Wai 3068

CONCERNING	the Treaty of Waitangi Act 1975
AND	An urgent claim by Kingi Winiata Smiler on behalf of the shareholders of the Wairarapa Moana ki Pouākani Incorporation (Wai 3058)
AND	An urgent claim by Ryshell Griggs & Mark Chamberlain on behalf of Ngāi Tūmupūhia-ā-Rangi hapū (Wai 429)
AND	An urgent claim by the Rangitāne Tū Mai Rā Trust (Wai 3068)

DECISION OF THE TRIBUNAL

18 November 2021

The Honourable Willie Jackson
Minister for Māori Development

The Honourable Andrew Little
Minister for Treaty of Waitangi Negotiations

Parliament Buildings
WELLINGTON

18 November 2021

He whenua ka tuku, he whenua anō ka riro
Tē rite atu ko te tuku tangata ki te kōpū o Papa
Tē rite atu ko te riro tangata ki te uma o Hine-nui-i-te-pō
Matatū tonu te papa roa ki Wairarapa, toitū tonu te papa tūtū o Rongokako
Kei ngā mata-uraura, kei ngā mata-ahoaho kua whiti ki tua, whakaoti atu ki te pō.
I hoki wairua mai ai koutou, i hoki matatuhi mai, i hoki tuatinitini mai ki mua i te Taraipiunara, me te huihuinga o rau mahara, o rau aroha ki ngā maunga whakahī, ki ngā wai tukukiri, ki ngā takutai, ki te moana karekare o Wairarapa, nā wai, nā wai rā ko te koraha whenua ki Pouākani.

E ngā Minita, tēnei te rauhī nei, tēnei te rauemi nei ngā aronga matua o ngā pou kōrero mō ngā kaikawe kerēme ki ngā ia o tō tātou tiriti, Te Tiriti o Waitangi, e kōrero tonu ana ki roto i tēnei whakatupuranga. E rarau e te kupu, marewa ake te wawata ki te taumata e tika ana.

The decision that follows is the outcome of an urgent hearing in Wellington from 11 to 12 November 2021.

It concerns the process that the Crown followed to arrive at a Treaty settlement with Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua and the trustees of the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust. The parties signed a deed of settlement on 29 October 2021.

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Our decision identified the elements required for a sound and Treaty-compliant settlement process. We examined what happened here in the light of those elements. We concluded that because of the cumulative effect of the deficiencies we identified, the process was unfair, will exacerbate divisions in the claimant community, and will not be durable. We draw your attention particularly to our finding that the Settlement Trust had no mandate to enter into settlement with the Crown concerning the interests of Ngāi Tūmapūhia-ā-Rangi and the Wairarapa Moana ki Pouākani Incorporation in Ngāumu Forest (Wai 429) and land at Pouākani (Wai 85).

Our primary and strong recommendation is that the proposed settlement with Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua does not proceed at this stage. The litigation that is to go before the Supreme Court in February should be allowed to take its course. Meanwhile, the Crown should support the Settlement Trust to engage in processes to renew its mandate to settle the claims in the district, and should support all the parties that appeared before us to commit to a process to resolve their conflicts. This may take time, but the investment will be worthwhile to uphold the mana of all, restore relationships, and come finally to reconciliation with the Crown.

Kia tau ki a koutou katoa te tāwharau mutunga kore a Te Wāhi Ngaro.
E rere e te kupu, rere tāwhangawhanga rā ki te tauranga, tatū atu ai ki te oranga pūmau.

Nāku iti nei

Nā Judge Carrie Wainwright
Presiding Officer

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INTRODUCTION

1. This urgent inquiry is taking place to determine that the Crown has breached the Treaty of Waitangi by moving to reach a settlement with the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust without properly taking into account the interests of the Wai 429 and Wai 85 claimants who sought binding recommendations before us in 2019, and also those of the post-settlement entity, the Rangitāne Tū Mai Rā Trust (Wai 3068). Our focus in this inquiry is on whether the process that the Crown followed leading to signing the deed of settlement breached the principles of the Treaty of Waitangi.

2. The applications for binding recommendations of the claimants in Wai 429 (Griggs and Chamberlain on behalf of Ngāi Tūmapūhia-ā-Rangi) and Wai 85 (the Wairarapa Moana ki Pouākani Incorporation, referred to here as the Incorporation) are ongoing – at least in theory.

3. We heard those applications in 2019 and issued our preliminary determination in March 2020. That determination was the subject of judicial review, and the High Court quashed it. Parties appealed and cross-appealed, and recently the Supreme Court agreed to hear the appeals in February 2022. There is a contest between the parties about the potential outcomes of the Supreme Court's hearing. When it granted leave, the Supreme Court said 'The approved question in each appeal is whether the High Court's decision was correct'.[1] Because the appeals against the High Court's judgment were on fairly narrow grounds, the Crown questions the likelihood of the Supreme Court's conceiving its task as a wholesale reconsideration of that decision. We hesitate to predict what the Supreme Court might or might not do. It is reasonable to suggest that the outcomes might include the Court's finding the High Court's decision wrong, its upholding that decision in whole or in part, and its remitting to us some or all of the matters on which we expressed views in our preliminary determination.

4. This litigation may be derailed, however. The Crown decided not to continue to wait for the outcome of the litigation and instead, on 29 October 2021, signed a deed of settlement with the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust.[2] The bill to enact the settlement may be introduced to the House of Representatives on any day next week (from 22 November 2021). This bill will extinguish the Tribunal's jurisdiction to make binding recommendations in favour of Wairarapa Māori, effectively rendering the Supreme Court's February hearing moot. That is the context for this urgent inquiry.

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[1] *Wairarapa Moana ki Pouākani Incorporation v Mercury NZ Limited* [2021] NZSC 134.
[2] New Zealand Government 'Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua sign Deed of Settlement' (Press Release, 29 October 2021).

PART ONE: WHAT THE PARTIES SAY

5. All of those who successfully applied for an urgent hearing before us argue that the Crown has made the decision to sign the deed of settlement with the Settlement Trust on 29 October 2021 on bases that are unfair or wrong; has proceeded with undue haste to conclude matters with the Settlement Trust without properly involving them; and is unwilling to pause and rectify matters. These actions and omissions, they say, breach the principles of the Treaty of Waitangi.[3]

6. Each of the claimants' arguments against the Crown has its own focus, of course. We now summarise the key points that counsel for each party advanced before us at our hearing on 11 and 12 November 2021.

What the Incorporation says

7. The aspects of the case for the Incorporation (Wai 3058/85) that its counsel, Matanuku Mahuika, emphasised at the hearing are summarised below.

8. In pressing on to settle with the Settlement Trust, disregarding the Incorporation's objections, the Crown is writing another chapter in what the High Court called 'a remarkable story of injustice'.[4]

9. In its recent actions, the Crown continues to act in its own interests – whether that involves achieving another settlement or avoiding resumption orders – in favour of allowing the Incorporation to do what it wants and is entitled to choose: pursue the litigation route to redress that Parliament provided for them in legislation.[5]

10. In the Crown's communications with the Incorporation about why it has chosen to settle the Wai 85 deed, the Crown never engages with the question of mandate – the Incorporation's principal objection to the settlement process.[6]

11. The Crown has been on notice that the Settlement Trust's mandate to settle the Incorporation's claims to the land at Pouākani is unsound. The Incorporation can demonstrate through results of meetings and polls[7] that its shareholders support the course it is taking – to pursue binding recommendations about the land at Pouākani.[8] The Incorporation has never stood in the way of the Settlement Trust settling the other Wairarapa claims with the Crown, but it has consistently reserved to itself the right to speak on behalf of Wai 85 and

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[3] Wai 3058, #2.5.4, #2.5.5, #3.3.1, #3.3.3, & #3.3.5.
[4] Wai 3058, #3.3.3 at [3], quoting *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654 at [87].
[5] Treaty of Waitangi Act 1975, s 8H; Wai 3058, #A8 at Exhibit 'C' at [16] – [18].
[6] Wai 3058, #A12 (a) at Exhibit 'AC1'.
[7] Ballot conducted in November - December 2017, Wai 863, #J6, at [5]; the Special General Meeting held on 24 March 2018, outlined in Wai 85, #2.66 & #2.69. See also Wai 3058, #3.3.3 at [67].
[8] Wai 3058, #3.3.3 at [70] – [74].

determine its path. Counsel said 'The Claimants have remained hopeful that the Crown will reconsider its position in respect of Wai 85 and remove it from the settlement. The Claimants believe there are ways this can be achieved while allowing the settlement, or at least a substantial part of it, to proceed.'[9]

12. Only 14 per cent of the shareholders in the Incorporation are registered with the Settlement Trust and therefore eligible to vote on the Settlement Deed. After a process that has lasted more than ten years, you would expect that there would be a much larger overlap between the Incorporation's shareholders and the beneficiaries of the Settlement Trust. The inevitable inference from most shareholders' choosing not to register is that they do not see the Settlement Trust as the body that handles their Pouākani interests.

13. It follows from the *Haronga* decision that if a claimant takes an action that is inconsistent with a settlement entity having a mandate, that is a good indication that there is an issue with the soundness of the mandate.[10] In *Haronga*, Mr Haronga sought resumption and the Supreme Court found that was 'inconsistent with the negotiations and any mandate relied on by Te Whakarau'.[11] The similar circumstances that applied here should similarly have led the Crown to question whether the Settlement Trust held a mandate for Wai 85.[12] This is more particularly the case because of the other communications between the Incorporation and the Crown over time, and with Minister Little in particular.

14. The Incorporation relies on the Tribunal's East Coast Settlement report for the proposition that although the Crown can in some circumstances settle a claim without the consent of claimants, it is under certain obligations as to process.[13] The numbers involved matter. If a claimant challenges a mandate, the support for that challenge is important.

15. The Crown justifies its derailing the resumption litigation by saying that the Incorporation cannot succeed. The Incorporation wants the Crown to settle with the Settlement Trust excluding Wai 85 and has offered to refund the Crown $20 million from the proceeds of the resumption application if it succeeds.[14] This is the Incorporation's endeavour to ensure that the Crown is not out of pocket if it removes Wai 85 from the claims to be settled. If the Crown is so sure that the

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[9] Wai 3058, #3.3.3 at [140].
[10] *Haronga v Waitangi Tribunal* [2011] NZSC 53.
[11] *Haronga v Waitangi Tribunal* [2011] NZSC 53 at [98].
[12] Wai 3058, #3.3.3 at [88]–[89]. See also the correspondence between the Incorporation and the Minister for Treaty of Waitangi Negotiations at Wai 3058, #A16(a) at Exhibits 'AC4' & 'AC5' and also Wai 85, #A1 at [26] - [42].
[13] Waitangi Tribunal, *The East Coast Settlement Report* (Wai 2190, 2010) at 49–50.
[14] The Wai 3058 claimants have recently written to the Crown undertaking that, in return for the removal of Wai 85 from the Deed of Settlement, they will refund to the Crown 50 per cent of the value of any successful resumption application up to the amount of $25 million; Wai 3058, #3.3.3 at footnote 74.

litigation is pointless, then there is no risk to the Crown of removing Wai 85 from the claims to be settled.

16. The ratification of the Deed of Settlement is flawed because:

(a) the Crown relies on the 2018 ratification vote, which has been overtaken by events and should not be relied on as evidence of approval for the 2021 version of the deed;[15]

(b) there is no more recent ratification upon which the Crown can rely, as it says the vote in August 2021 was not a ratification;

(c) in fact, however, the Settlement Trust and the Crown did rely on the August 2021 vote as if it were a proper ratification.[16] They did so without properly explaining:

i. the options that the voters were choosing between (a settlement worth $110 million or resumption litigation that could potentially deliver considerably more, and the relative risks and benefits);

ii. the preliminary determination and the challenges to it; and

iii. whether the Crown would be relying for ratification on the 2018 or 2021 votes.

(d) the confusion about the status of the August 2021 vote makes it unreliable as an indication of approval. Unanswered in the process are these important questions: if it wasn't a ratification vote, what was it? Why do it? And what influence did it have, and should it have had, on the process?[17]

(e) the numbers who supported the deed both in 2018 and 2021 were inadequate – both as to the numbers who participated in the vote, and the percentage of those that voted in favour;[18]

(f) for the Crown to safely rely on a ratification vote, there must be a sound process leading up to the vote, a suitable number of eligible voters participating in the vote, and a suitable number of those participating voting in favour.[19] In this case, none of these requirements are satisfied.

17. Although the Tribunal's preliminary determination did not find that the Maraetai dam and associated land should go back to the Incorporation, the

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[15] In 2018 when that ratification vote took place, the resumption application had not been heard, the Waitangi Tribunal had not yet produced its preliminary determination, the different emphasis in this revised deed of settlement on the Crown's Treaty breaches at Pouākani and the new apology for those breaches.
[16] Wai 3058, #3.1.7 at [1.5] & [74] – [77].
[17] Wai 3058, #3.3.3 at [133].
[18] Wai 3058, #3.3.3 at [117] – [118].
[19] *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (the Red Book) (Office of Treaty Settlements, Wellington, March 2015) at 65.

determination was preliminary and part of a process that Wairarapa Māori are still working through. The Incorporation accepts that there are obstacles it needs to overcome to achieve resumption, but that is its chosen path and it is an exercise of the rangatiratanga of the people of Wairarapa Moana to choose to take the risk of succeeding or not succeeding in that course of action.

18. In deciding that it was justified in proceeding to settle Wai 85, the Crown conflated the question of whether the Settlement Trust had a mandate to settle that claim with the Crown's assessment of whether the Incorporation would succeed in the litigation. The fact that the Crown and the Settlement Trust think that the Incorporation cannot succeed in the litigation does not have the effect of transferring the mandate for settling the Wai 85 claim from the Incorporation to the Settlement Trust.

19. When the Incorporation expressed their opposition to the settlement proceeding as planned and requested that the Wai 85 claim be removed, the Minister's response was unsatisfactory. He effectively said it was too hard. The Crown has an obligation to be flexible, but it has been anything but. It has been resolutely determined to have everyone in the settlement and has not scrutinised the mandate.

20. The Incorporation relies on the Tribunal's Mana Ahuriri Mandate report for the proposition that the Crown must ensure the maintenance of mandates.[20] The Crown's own requirement is for three-monthly reports detailing engagements between the entity with the mandate and the claimant community.[21] The fact that the Crown has a policy for maintaining mandate means that a mandate gained in 2011:

    (a) will not automatically continue, and a process is required to check it, and

    (b) things might happen to undermine the mandate.

    Mandates are a matter of fact. They do not endure forever. The Crown says itself that it needs a high level of confidence in mandate to ensure that the settlement is supported and will endure.[22]

21. In its process to settle with the Settlement Trust, the Crown's communications with the Incorporation were deficient:

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[20] Waitangi Tribunal, *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573, 2020).

[21] Wai 3058, #3.3.3 at [46], Waitangi Tribunal *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573, 2020) at 23; *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (the Red Book) (Office of Treaty Settlements, Wellington, March 2015) at 46.

[22] *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573) at 70; *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown [Red Book*] (Wellington: Office of Treaty Settlements, 2018) at 44.

(a) The Incorporation heard from Minister Little on Wednesday 21 July 2021 that a settlement deal had been done that would end the Incorporation's litigation, and that 'a vote by the claimant community on supporting the increased settlement package' would now ensue.[23]

(b) The Minister did not respond to the Incorporation's letter of 28 July 2021[24] saying that the Settlement Trust did not have a mandate for Wai 85 until 20 September 2021. Voting on the Deed of Settlement had finished on 22 August 2021. The Crown had approved the 'ratification' by early September;

(c) The amount of notice given for the approval hui was too short to allow a good turnout and, in the event, several planned hui were cancelled because of COVID restrictions. No Zoom or similar alternatives were provided.

(d) The Incorporation was taken entirely by surprise when it heard that a deal had been done.[25] Usually, the Crown allows litigation to play out before settling. So although the Incorporation knew that the Settlement Trust and the Crown were in discussion, it did not expect that its claim would be settled like this. Previous engagement with the Settlement Trust and with the Crown's negotiator, Rick Barker, had also created expectations that no settlement would be reached without talking first to the Incorporation.[26] The Crown moved to signing of the deed with undue haste and without engaging with the Incorporation's primary objection, which went to mandate.

(e) The only conclusion to draw is that the Crown is extremely keen to get this settlement done, not least to get rid of the resumption applications.[27] These motivations informed an aggressive process that ruled out willingness to engage properly with a legitimately aggrieved claimant and put the settlement on hold.

What the Wai 429 claimants say

22. We now set out the aspects of the case that counsel for the Wai 429 claimants, Phillip Cornegé, emphasised at the hearing.

23. Wai 429 have extant applications for binding recommendations involving the resumption of land before the Waitangi Tribunal; the High Court set aside the Waitangi Tribunal's preliminary determination,[28] and now matters are before the Supreme Court. It is not inevitable that Wai 429 will lose, although that is plainly what officials told the Minister.[29] The Supreme Court implicitly rejected that view when it granted leave to 'leapfrog' the Court of Appeal, and the High Court

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[23] Wai 3058 #A1(a) at 17 – 19.
[24] Wai 3058 #A1(a) at 20 – 21.
[25] Wai 3058, #3.3.3 at [18].
[26] Wai 3058, #3.3.3 at [18] – [21] & Wai 3058, #3.3.2.
[27] Wai 3058, #3.3.3 at [23]. See also Wai 3058, #A8 at Exhibit 'C' at [18].
[28] Wai 3058, 3.3.1, at [38], citing *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654 at [148].
[29] Wai 3058, #3.3.1 at [7].

recently also expressed the view that the striking down of the preliminary determination has, if anything, improved Ngāi Tūmapūhia-ā-Rangi's chances of gaining resumption orders.[30] Counsel submitted:[31]

> [49] Further, the Supreme Court is now seized of these issues including the question of the proper interpretation of section 8HB, and the Claimants are fully engaged with that process. What the Supreme Court has to say on the issues subject to the appeal clearly has the potential to be relevant and, at least possibly, require a new assessment of the Claimants' claim. For this reason alone, this Tribunal will be required to reconsider its findings on the Claimants' claim when the matter returns to it.

24. It is therefore wrong to characterise the claimants in Wai 429 as malcontents whose interests should be ignored, and as litigants who lost and cannot succeed. Such a view of them is therefore an invalid basis for cutting off their chosen litigation path in favour of settlement.

25. At the heart of the Crown's wish to end the resumption litigation is its concern about the potential financial implications if resumption recommendations are ultimately made. This is not a principled basis for rushing to settle.

26. The Crown says in its submissions that the Wai 429 claimants have not demonstrated that they have the support of the hapū,[32] and nor have they demonstrated that the hapū is opposed to the settlement.[33] This is incorrect. On 21 September 2021, the Wai 429 claimants initiated a Survey Monkey survey to ascertain support for continuing with the resumption application.[34] In response to the question whether Ngāi Tūmapūhia-ā-Rangi supported the 'resumption application and the Crown halting the settlement until that application has been determined', 99.5 per cent of 206 respondents said 'yes'.[35]

27. The Crown should have known the Settlement Trust's mandate to represent Ngāi Tūmapūhia-ā-Rangi was an issue, and it did nothing to satisfy itself on this point. Ngāi Tūmapūhia-ā-Rangi may have given the Settlement Trust a mandate to settle on its behalf as part of the mandating process that occurred in 2011-2012, but:

    (a) of the 307 people who voted in favour of the mandate, 292 were in favour. There is no information about the hapū affiliation of the voters, so it is impossible to say how many Ngāi Tūmapūhia-ā-Rangi voted in favour.[36]

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[30] *Griggs and Chamberlain on behalf of Ngāi Tūmapūhia-ā-Rangi Hapū v Attorney-General* [2021] NZHC 2913 at [45].

[31] Wai 3058, #3.3.1 at [49].

[32] Wai 3058, #3.3.2 at [3.3] & [38].

[33] Crown counsel conceded at the hearing that the information recently received about the hapū-by-hapū breakdown of the Settlement Trust's 'approval vote' changed its view on this. However, its submissions do not reflect this change of view.

[34] Wai 429, #A7(b) at Exhibit "A".

[35] Wai 429, #A7(b), at [12].

[36] Wai 3058, #A7(a) at 26 – 27.

However, it appears that there was no objection to the mandate at that stage;

(b) there is no information available about the extent to which the Ngāi Tūmapūhia-ā-Rangi representative on the Settlement Trust conferred with Ngāi Tūmapūhia-ā-Rangi;

(c) the Ngāi Tūmapūhia-ā-Rangi representative on the Settlement Trust in 2021, Mr Mason, voted against the settlement on behalf of Ngāi Tūmapūhia-ā-Rangi in the Trust's own deliberations. He did not come to Wellington to participate in the deed signing.[37] The hapū-by-hapū breakdown of the 'approval vote' shows that 6,830 people voted. Of the 776 Ngāi Tūmapūhia-ā-Rangi registered with the Settlement Trust, 322 voted (42 per cent).[38] Of those, 75 per cent voted against the settlement;

(d) the claimants in Wai 429 received the hapū-by-hapū breakdown on 8 November 2021, as a result of seeking discovery against the Settlement Trust in these proceedings;

(e) it appears that the Settlement Trust did not share this information either with the Crown or with the other parties to the Supreme Court litigation, although the extent to which Ngāi Tūmapūhia-ā-Rangi opposed the settlement was clearly a live issue in the Supreme Court.[39] Counsel attended the hearing before the Supreme Court, at which the Crown asserted there was no evidence that Ngāi Tūmapūhia-ā-Rangi opposed the settlement;

(f) the hapū-by-hapū breakdown was in an (undated) annexure to the affidavit of Mr Haami Te Whaiti,[40] which reveals that the Settlement Trust had the information in its possession since at least 18 October 2021;[41]

(g) a clear inference from the 75 per cent of Ngāi Tūmapūhia-ā-Rangi who voted against the settlement is that Ngāi Tūmapūhia-ā-Rangi wanted to pursue the resumption litigation.

(h) the Crown knew or ought to have known that the voting processes through the Settlement Trust indicated that Ngāi Tūmapūhia-ā-Rangi were not in favour of settlement, that their representatives were in opposition, and that there were problems with mandate. The Crown needs to be scrupulous about process, but it wasn't. It didn't want to know about Ngāi Tūmapūhia-ā-Rangi – its focus was on making the resumption claims go away and justifying that. If the information wasn't directly before the Crown but in the

[37] Wai 3058, #A10 at 6 – 7.
[38] Wai 3058, #A7(a) at 177.
[39] *Wairarapa Moana ki Pouākani Incorporation v Mercury NZ Limited* [2021] NZSC 134.
[40] Wai 3058, #A7(a) at 177.
[41] Wai 3058, #A7(a) at 177.

hands of the Settlement Trust, the Crown could have found out if it had been at all interested.

(i) The claimants in Wai 429 told the Minister about their opposition to the settlement in their letter of 24 August 2021.[42] The Minister replied without addressing the issue of mandate but rather focusing on the failure of the resumption application and the need to move on in the interests of the iwi.[43]

28. The Crown cannot cite the ratification vote of 2018 as evincing approval for the settlement, because it is clear that in fact it relied on the 2021 'approval' vote when it decided to sign the Deed of Settlement. The Minister's letter of 21 July 2021 confirms that the Crown was looking to the trustee elections and the vote by the claimant community to confirm the proposed settlement. How could the Crown now purport to rely on another vote for another settlement package?

29. In the 2021 vote, there was a bigger turnout but lower support for the revised settlement. [44]

30. The Settlement Trust certainly held the vote out to the claimant population as being the one on which the Crown would be focusing, saying in a communication of 30 August 2021,[45] 'we await to hear if the Crown accepts the outcome'; the settlement could proceed 'if the Crown accepts the result as sufficient support'.[46] The only reason for the Crown's denying that the 2021 vote was a ratification is because of the low turnout and low level of approval by those who turned out – the lowest that the Crown has ever accepted.[47]

31. While the Crown was making up its mind about proceeding to sign the Deed of Settlement, the parties were asking the Supreme Court to grant leave to leapfrog the Court of Appeal in the litigation process. When the Supreme Court granted that leave, Wai 429 claimants thought the Crown might say 'taihoa'. On 22 October 2021, they heard that the Crown was determined to proceed.[48]

32. Justice Cooke set this Tribunal's preliminary decision aside,[49] so effectively there is no extant determination of the Tribunal on the Wai 429 resumption application. If it was good enough for the Crown to wait for litigation processes provided in law to take their course in 2017, why not now? Clause 6 of the Forests Agreement provided for the Crown and Māori to work together on claims to Crown forest land in good faith. Now, the Crown is satisfied that the litigation has reached a point as favourable to the Crown as the Crown could hope for, so the Crown chooses to extinguish the claimants' claims. The fact

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[42] Wai 429, #A4(c) at 26 – 27.
[43] Wai 429, #A8(a).
[44] Wai 429, #A4 at [53].
[45] Wai 429, #A4 at Exhibit "I".
[46] Wai 429, #A4 at [55].
[47] Wai 3058, #A14.
[48] Wai 429, #A8(b) at [2]
[49] *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654 at [148].

that a claimant might benefit from a comprehensive Treaty settlement is irrelevant to their right to bring an application for resumption.[50]

33. On 3 September 2021, very close to the point at which it appears the Minister made his decision to proceed to settle, Te Arawhiti reported to the Minister summarising the Crown's view of the inevitability of Wai 429 losing in its litigation.[51] That information was quite wrong. The Supreme Court when it granted leave to leapfrog the Court of Appeal did not give reasons, but inferentially must have accepted that there was a possibility that Wai 85 and Wai 429 might succeed.[52] Justice Cooke said in the recent injunction application that Ngāi Tūmapūhia-ā-Rangi may now have a stronger claim as the preliminary determination has been set aside and the matters are before the Supreme Court.[53]

34. In reality, the Crown is concerned about how much the resumption litigation might cost. In an affidavit, the Minister has discussed the risk to the Crown and says the total resumption package could be nearly $800 million.[54] There is no reason why it can't settle with the Settlement Trust and leave the resumption applications live. It is unprincipled for the Crown to say 'it's going to cost too much, let's get rid of these claims.'

35. The Crown's approach perpetuates a mindset and exacerbates the existing breaches of the Treaty.[55]

36. The Crown hasn't actively monitored the Settlement Trust's mandate from Ngāi Tūmapūhia-ā-Rangi.

37. If the Settlement Trust and the Crown are mistaken about the Settlement Trust's having a mandate to settle Wai 429 (and Wai 85), and in fact the Settlement Trust has no such mandate, then the deed entered into on behalf of those claimants is legally unenforceable. In legal terms, the deed is *non est factum*.

38. Although the settlement had ostensibly improved between 2018 and 2021, fewer voted in favour in August 2021, which should have caused the Crown to pause and ask questions.

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[50] *Haronga v Waitangi Tribunal* [2011] NZSC 53 at [99].
[51] Wai 3058, #A5 at [27] – [28.]
[52] *Wairarapa Moana ki Pouākani Incorporation v Mercury NZ Limited* [2021] NZSC 134.
[53] *Griggs and Chamberlain on behalf of Ngāi Tūmapūhia-ā-Rangi Hapū v Attorney-General* [2021] NZHC 2913 at [45].
[54] Wai 3058, #A8, at Exhibit "C" at [17] – [18].
[55] Wai 429, #A3(a).

What the Rangitāne Tū Mai Rā Trust says

39. We now turn to the aspects of the Rangitāne case (Wai 3068) that counsel for the Rangitāne Tū Mai Rā Trust ('the Trust'), Renika Siciliano, emphasised in hearings.

40. Their claim is a simple one: the Crown made promises to Rangitāne o Wairarapa and Rangitāne o Tamaki nui-a-Rua ('Rangitāne') that it has not kept.[56]

41. The Rangitāne o Wairarapa and Rangitāne o Tamaki nui-ā-Rua Deed of Settlement of Historical Claims ('the Rangitāne Settlement Deed') was full and final, but included specific provisions for the negotiation of joint redress over Wairarapa Moana and the Ruamahanga River. Clause 7.6 of the deed provides for the Crown to continue to negotiate in good faith with the Trust and 'mandated representatives of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust' about the shared redress and the shared redress legislation.[57] The provisions envisage that this redress will be given effect in a joint redress bill to be enacted before the legislation that gives effect to the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua deed of settlement.

42. The affidavit of Piri Te Tau[58] details how Rangitāne found out about the settlement negotiations between the Crown and Ngati Kahungunu concerning Wairarapa Moana indirectly and too late: 'You can imagine our huge surprise and disappointment then when, on 22 July 2021, it came to the [Rangitāne Tū Mai Rā] Trust's attention that Ngāti Kahungunu had negotiated additional redress in relation to their settlement with the Crown, including specific redress in relation to Wairarapa Moana.'[59] It wasn't until 15 October 2021 that it was clear to them that the Crown would pay another $5 million redress relating to the moana directly to Ngati Kahungunu rather than directly to the Statutory Board in which the two iwi were to cooperate.[60] He explains Rangitāne's attempts to get the Crown to engage with them, and the Crown's unsatisfactory responses.

43. Counsel cited the canon of Tribunal jurisprudence that spells out the Crown's duties when settling Treaty claims where interests are shared between iwi. She said that the Crown's duties of active protection and equal treatment have not been fulfilled. Here, the Crown is 'fully aware of, and has acknowledged, the strong Rangitāne interests in Wairarapa Moana and the Ruamahanga River'.[61] She quoted the *Tamaki Makaurau Settlement Process Report* where it said the Crown 'must act fairly and impartially towards all iwi, not giving an unfair

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[56] Wai 3058, #3.3.5 at [1.1].
[57] Wai 3058, #3.3.5 at [2.5].
[58] Wai 3058, #A13.
[59] Wai 3058, #A13 at [13].
[60] Wai 3058, #A13 at [26].
[61] Wai 3058, #3.3.5 at [3.11].

advantage to one, especially in situations where inter-group rivalry is present'.[62] At times – as happened when the Tribunal inquired into the process for the Hauraki settlement – the settlement may need to be delayed if the potential to create fresh grievances arises.[63]

44. The claim is primarily about the harm caused to Rangitāne's mana and tino rangatiratanga – how the Crown does not act in good faith, disregards Rangitāne's interests, and treats it as 'an afterthought and not a Treaty partner'.[64] If the settlement bills are introduced to the House of Representatives without rectifying the situation, the prejudice to Rangitāne will be cemented.[65] Counsel submitted: '[I[t must be said that the manner in which the Crown has proceeded with the negotiations is extraordinary and, if permitted to continue, will significantly prejudice Rangitāne, the Trust and other Māori who seek to enter into good faith negotiations and/or commitments with the Crown.'[66] For the Tribunal to uphold the claim is 'absolutely vital for Rangitāne's ongoing trust and confidence in the Crown as a Treaty partner'.[67]

What the interested party says

45. We granted leave to three parties to be involved in this inquiry: the Pouākani Claims Trust No. 2, Raukawa Settlement Trust, and Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust (whose arguments are summarised separately below).[68] Mr Vertongen attended the hearing on behalf of Ngāti Raukawa,[69] but only Ms Sykes for the Pouākani Claims Trust No. 2 presented a submission.[70]

46. The thrust of Ms Sykes's case was that multiple iwi and hapū have interests in the land at Pouākani, and the Incorporation effectively exercises mana whakahaere and ahi kā there on their behalf.[71] If the Crown extinguishes the resumption litigation, it cuts off a path by which these multiple interests could potentially be reconciled. She cited multiple sources of rights, including tikanga, Te Tiriti o Waitangi, and the United Nations Declaration on the Rights of Indigenous Peoples[72] for the proposition that the Crown is obliged to give mana to the process still underway (and involving the litigation pathway that the Incorporation has chosen) to give effect to the complex tapestry of inter-woven interests at Pouākani. This may involve mediation before the introduction of the

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62 *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 101.
63 *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 1130, 2013) at 76.
64 Wai 3058, #3.3.5 at [7.1].
65 Wai 3058, #3.3.5 at [5.4].
66 Wai 3058, #3.3.5 at [5.5].
67 Wai 3058, #3.3.5 at [7.2].
68 Wai 3058, #2.5.3 at [4] & [8].
69 Wai 3058, #3.1.3 & #3.1.21.
70 Wai 3058, #3.1.21.
71 Wai 3058, #3.1.3 & #3.3.3.
72 *United Nations Declaration on the Rights of Indigenous Peoples* A/Res /61/295 (2007).

settlement legislation, or simply allowing the litigation to take its course and for processes around it to happen organically.

47. Counsel submitted that the Crown should not make the decision. If it moves to settle, ignoring the convergence at Pouākani of hapū interests from multiple descent lines, it is overriding the rangatiratanga and mana of the interest-holders at Pouākani – in practical terms, the Incorporation (as a result of the Crown's actions giving its shareholders rights there) now representing multiple underlying interests.

What the Crown says

48. The Crown's written submissions helpfully summarised its key points in paragraph 3.[73] In his presentation of the Crown's case, counsel Andrew Irwin emphasised the following aspects.

49. There is a high threshold for the Tribunal to intervene in mandate challenges, which recognises that unanimity is rarely achievable when it comes to Treaty settlements.

50. There is clear support for the Settlement Trust's mandate and the Deed of Settlement 'which has been maintained over a long period'.[74]

51. In all the circumstances, it was appropriate for the Crown and the Settlement Trust to enter into settlement negotiations.

52. The Crown has taken a view on the likelihood of success in the litigation upon which the Wai 85 and Wai 429 claimants are intent. It has assessed 'the effect, if any, those appeals will have on the ultimate outcome of resumption' and has balanced that consideration against the wishes of the majority of the iwi to settle now.[75]

53. In 2015, the Tribunal declined an urgent inquiry into the decision that the predecessor of the Settlement Trust made to recognise the mandate of the Wairarapa hapū Te Hika ā Pāpāuma. The Deputy Chairperson of the Tribunal said that it was inappropriate for a group of 180-odd people to call the settlement process into question.[76]

54. When the Crown is considering whether to take account of a challenge to mandate, the size of the group in dissent will be relevant – as will how the dissenting group(s) have gone about challenging the mandate. The Crown did not consider that the claimants in Wai 429 or Wai 85 had challenged the Settlement Trust's mandate directly enough. The Crown understood that the

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[73] Wai 3058, #3.3.2 at [3].
[74] Wai 3058, #3.3.2 at [3.2].
[75] Wai 3058, #3.3.2 at [3.6].
[76] Wai 2484, #2.5.3 at [90].

claimants in Wai 85 still want the Settlement Trust to negotiate an iwi-wide settlement from which their shareholders could benefit, but 'redress for claims concerning Pouākani needed to go exclusively to the Incorporation'.[77] Despite Kingi Smiler's communications with the Crown requesting that it negotiate directly with him about the Wai 85 claim, the Incorporation did not challenge the Settlement Trust's mandate directly nor ask that the Wai 85 claim be removed. Similarly, the Crown says that the Wai 429 claimants have not challenged the settlement. The way the Crown understood it was that by making their application for resumption to the Tribunal, they withdrew their mandate from the Settlement Trust to the extent that it related to the Ngāumu whenua. Claimants in Wai 429 confirmed this when they made closing submissions on their resumption application before this Tribunal.[78] In the hearing, Crown counsel said that when the Waitangi Tribunal found in its preliminary determination that Ngāi Tūmapūhia-ā-Rangi was not a suitable recipient of Ngaumu Forest, the Wai 429 claimants had failed in their resumption proceeding and the mandate reverted to the Settlement Trust.

55. The Crown has consistently questioned whether the claimants in Wai 429 represent the hapū they purport to represent.[79] Mr Irwin cautioned against the Wai 429 claimants being allowed to rely too heavily on what the Supreme Court said in *Haronga* about a claim for resumption being evidence of a group withdrawing its mandate.[80] Counsel said that the Crown looked at Ngāi Tūmapūhia-ā-Rangi's processes to see whether the hapū had swung in behind the Wai 429 claimants or not. In an appropriate and careful way, counsel said, the Crown had concluded that the answer was 'no'. But this was in December 2019. Mr Irwin said that the Crown's view has changed in light of the evidence filed this week about the hapū-by-hapū breakdown of the 'approval vote' of the 2021 version of the Deed of Settlement.

56. Mr Irwin depicted the Crown as constantly assessing what it was appropriate for the Crown to be doing after we issued our preliminary determination in March 2020. The context changed again after the High Court judicial review decision in March 2021. The Crown asked itself whether the Tribunal's decision had been quashed in its entirety. It was satisfied that all of the preliminary determination on what 'relates to' means was quashed, but our reasoning on the suitability of Wai 429 and Wai 85 as recipients of resumable land survived. Appeals to the Court of Appeal and the Supreme Court were in prospect, but the Crown thought that Wai 429 and Wai 85 claimants would have a hard job taking their resumption applications any further.[81]

(a) It was entirely appropriate for the Crown to move to negotiate an enhanced agreement with the Settlement Trust. The Minister told the Wai 85 and Wai

[77] Wai 3058, #3.3.2 at [53.7].
[78] Wai 3058, #3.3.2 at [40].
[79] Wai 3058, #3.3.2 at [38].
[80] Wai 3058, #3.3.2 at [43]; *Haronga v Waitangi Tribunal* [2011] NZSC 53 at [98].
[81] Wai 3058, #3.3.2 at [61].

429 claimants about what he had taken into account when reaching an agreement. He invited the claimants to meet with the Crown's Chief Negotiator, but neither took up the offer.

(b) The Settlement Trust 'conducted its own process to explain what it had negotiated to its people. It asked them to vote on it.'[82] What the Crown did was 'fair, reasonable and in good faith in all the circumstances of the case'.[83] The Crown submits that 'it cannot in the circumstances be a breach of Treaty principles for these proceedings [the appeal to the Supreme Court] to come to an end without the consent of the litigants'.[84] That is because the Crown has appropriately weighed the chosen litigation pathway of the claimants in Wai 429 and Wai 85, their narrow chances of success, and the fact that litigation 'will not be quickly resolved', with the deleterious effect of continuing to litigate on 'the will of the majority to conclude a settlement now'.[85]

(c) As to the adequacy of support for the settlement itself, the Crown noted that the Tribunal has never expressly stated a numerical threshold as to what constitutes adequate support. The Crown quoted language used in a number of Tribunal inquiries investigating support for settlements, such as the need for approval 'by a clear majority of the claimant community'[86] and 'results … that reflect the participation of those active in each claimant community'.[87]

(d) The Crown contended that 'The ratification result of 2018 and the more recent vote display a clear majority of support' for the settlement. It denied that the levels of support here are the lowest accepted by the Crown as the claimants allege,[88] but accepted at the hearing that the participation rates here are at the lower end of the spectrum.

(e) As regards calling the 2018 vote in favour of the settlement 'the ratification vote', and not recognising the 2021 vote as formal ratification, counsel said that the Crown's view is that the two needed to be looked at together. He said that the results of both votes are reasonably equivalent and do not indicate an increase in either agreement or dissent. Counsel also pointed to the affidavit of Fern Hyatt of Te Arawhiti, who said that the August 2021 vote 'was in addition to, and not a replacement of, the ratification process'.[89]

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[82] Wai 3058, #3.3.2 at [63].
[83] Wai 3058, #3.3.2 at [64].
[84] Wai 3058, #3.3.2 at [67].
[85] Wai 3058, #3.3.2 at [66.3].
[86] Wai 3058, #3.3.2 at [26]; *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573, 2020) at 122.
[87] Wai 3058, #3.3.2 at [28] – [29]; Waitangi Tribunal, *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573, 2020) at 272.
[88] Wai 3058, #3.3.2 at [35] & #3.3.2(a).
[89] Wai 429, #A5 at [25].

(f) The Crown looked to see whether Ngāi Tūmapūhia-ā-Rangi had swung in behind the Wai 429 claimants or not. The Crown concluded they had not. However, its view changed when last week it saw the evidence of Ngāi Tūmapūhia-ā-Rangi's vote against the settlement, and it would now amend paragraph [45] of its submissions. It remained of the view that the Wai 429 claimants lacked authority to speak for Ngāi Tūmapūhia-ā-Rangi.

(g) Finally, on the question of comity, the Crown said (as it did in response to the application for urgent hearing) that the Tribunal's findings and recommendations should not 'reach to any statement that a bill should not be introduced to Parliament based on the current deed.'[90] However, the Crown implies that an inquiry focused on Crown process (including mandate), rather than on the merits of the settlement, skirts the preclusions of comity.[91]

What the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust says

57. Counsel for the Settlement Trust, Mike Colson, emphasised the following arguments in the hearings.

58. The Settlement Trust has always maintained that reaching a comprehensive settlement through negotiation with the Crown, rather than through litigation, is 'in the best interests of Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua as a whole'.[92] This is consistent with the views claimants have expressed over several years through 'robust and transparent processes … including ratification, pānui, hui and kōrero'. Conversely, in the case of the resumption applications, the Settlement Trust has been aware of dissenting views within the claimant community.[93]

59. The Settlement Trust welcomed the Tribunal's preliminary determination of March 2020 because it left the door open for settlement negotiations to proceed. The Settlement Trust was deeply disappointed in the High Court's overturning of that determination, which has allowed the claimants to pursue the option of settlement through litigation. It is clear that the litigation pathway will be a long one.

60. Although they continue to pursue these applications, neither claimant group has challenged the Tribunal's findings that the land subject to resumption should not be returned directly to them. In the case of the Wai 85 claim, the preliminary determination clearly states that the Tribunal does not 'recommend the return to

[90] Wai 3058, #3.3.2 at [68].
[91] Wai 3058, #3.3.2 at [68].
[92] Wai 3058, #3.3.4 at [4] – [6].
[93] For example, minutes of a meeting of Te Runanga o Ngāi Tūmapūhia-ā-Rangi o Wairarapa on 8 September 2018 and the special general meeting of Ngāi Tūmapūhia-ā-Rangi ki Wairarapa on 13 May 2018, in Wai 3058, #A7(a) at 162–171.

[the Incorporation's shareholders] of the 787 acres … because the value of that land and the assets located there is not proportionate to the prejudice they suffered as shareholders in 1949'.[94] Even if a theoretical possibility exists that, as a result of the Supreme Court appeal, the Tribunal's determination is remitted to it for reconsideration, it would be extremely unlikely that the Incorporation would end up getting what it wants. Similarly, the Tribunal said the Ngāumu forest lands should not be returned directly to Ngāi Tūmapūhia-ā-Rangi, noting that while they had mana whenua in the land, other groups (such as Ngāti Hinewaka and Te Hika ā Pāpāuma) had interests there too.

61. The Settlement Trust has consistently maintained an 'open dialogue' with both the Incorporation and the Wai 429 claimants, repeatedly attempting to find resolutions acceptable to them 'while also being mindful of the Trust's responsibilities not to create unfairness or prejudice to the wider settlement group'.[95] These efforts have not always been reciprocated. In its dealings with the Incorporation since 2012, its representatives have regularly failed to attend meetings or otherwise engage with the Settlement Trust.[96] In respect of Ngāi Tūmapūhia-ā-Rangi, the Settlement Trust has found it difficult to know who they should be speaking with about the Wai 429 claim.[97] They contend that the Wai 429 claimants do not represent the wider Ngāi Tūmapūhia-ā-Rangi hapū and – despite attempts to claim unanimity of purpose within the hapū over the resumption application – the claimants 'cannot demonstrate the necessary cohesive support to back their assertions or to establish their authority to speak' for Ngāi Tūmapūhia-ā-Rangi.[98]

62. The Settlement Trust is adamant it retains the mandate to settle all historical claims of Ngāi Tūmapūhia-ā-Rangi, including Wai 85 and Wai 429. The mandate passed to the Settlement Trust from its predecessor, the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Trust, in 2016. Support for the Settlement Trust and its conduct in carrying out its mandate has been evident ever since. Importantly, up until the present urgent proceedings, neither the Wai 85 claimants, the Wai 429 claimants, nor the Ngāi Tūmapūhia-ā-Rangi hapū has ever formally challenged that mandate.[99]

63. The Settlement Trust initiated the August 2021 vote to approve the revised Deed of Settlement because it recognised 'a lot of water had gone under the bridge' since the vote on the original Deed of Settlement in late 2018. In the August 2021 vote, the claimant community was asked to vote on the following resolution:

> I, as a member of Ngati Kahungunu ki Wairarapa Tamakl Nui-a-Rua, support the improved comprehensive settlement of the Ngati Kahungunu ki Wairarapa

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[94] Wai 863, #2.835 at [278].
[95] Wai 3058, #3.3.4 at [3].
[96] Wai 3058, #A2 at [4].
[97] Wai 3058, #3.3.4 at [38].
[98] Wai 3058, #3.3.4 at [35].
[99] Wai 3058, #3.3.4 at [8] – [15].

Tamaki Nui-a-Rua historical Treaty claims. I also agree to the Ngati Kahungunu ki Wairarapa Tamaki Nui-a-Rua Settlement Trust signing the deed of settlement on behalf of Ngati Kahungunu ki Wairarapa Tamaki Nui-a-Rua.[100]

64. This ‘approval’ vote was not called a ‘ratification’ vote because the Crown did not require another ratification. However, in substance, the process was much the same and voters effectively knew that if they did not ratify the revised deed of settlement, the Crown would not proceed with it.

65. During the 2018 and 2021 voting processes, the Incorporation attempted (and failed) to persuade Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua to vote against the Settlement Trust, mounting ‘aggressive’; and ‘strong’ campaigns.[101] However, the Settlement Trust considers the Incorporation’s shareholders are ‘not in any sense unanimously opposed to settlement’. In the August 2021 vote, 54 per cent of the 389 Incorporation electors who took part supported settlement, while 46 per cent opposed it. These ‘more nuanced’ numbers directly contrast with the Incorporation’s apparent suggestion that ‘on the basis of 62.15 per cent of the participating shares in support in a special resolution of over three years ago, the voting record of Wairarapa Moana electors in 2021 should now be ignored.’ The Settlement Trust’s view is that even if the Incorporation has support for its resumption application, ‘it does not follow ... that [it] has the support to oppose either the wider settlement or the settlement of Wai 85 through the Trust’s negotiations, nor the support to cause delay and prejudice to all of Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua in the process’. [102]

66. In respect of Ngāi Tūmapūhia-ā-Rangi, the Settlement Trust has engaged proactively and in good faith with both the Wai 429 claimants and the hapū – including participating in four days of mediation with the Wai 429 claimants between October and December 2019. This was a genuine attempt to resolve the claim, after which the Trust’s negotiators were hopeful of a positive outcome. Counsel said the Settlement Trust wants to put evidence of this process before the Tribunal, but the Wai 429 claimants will not waive privilege. They have shown no desire to continue mediation since the Tribunal released its preliminary determination.[103] They took no part in the High Court judicial review, nor challenged in their own right the Tribunal’s finding that the Ngāumu forest should not be returned to them. The Wai 429 claimants also rejected the Settlement Trust’s formal offer on 17 February 2021 of ‘kaitiaki rights to Ngāi Tūmapūhia-ā-Rangi over its area of exclusive mana whenua (390 ha of the Te Māipi block)’, along with a monetary contribution recognising Ngāi Tūmapūhia-ā-Rangi’s contribution to the Tribunal process.

67. In relation to the claims of the Rangitāne Tū Mai Rā Trust, counsel and witnesses for the Settlement Trust emphasised that the $5 million of redress

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[100] Wai 3058, #A2, [20].
[101] Wai 3058, #3.3.4 at [19].
[102] Wai 3058, #3.3.4 at [20-22].
[103] Wai 3058, #3.3.4 at [41] –[44].

earmarked for the restoration of Wairarapa Moana was not joint redress. It was bargained for expressly by the Trust, they said.

68. The Trust is anxious not to lose the opportunity to settle with the Crown, saying that 'the time to settle and move forward is now'. There is 'no credible alternative that does not prolong the prejudice to Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua'.[104]

PART TWO: WHAT THE TRIBUNAL SAYS

This inquiry

69. In our directions of 29 October 2021 granting the applications for an urgent inquiry, we said we would 'inquire into the process by which the Crown reached a settlement with the Settlement Trust.'[105] Addressing the Crown's submissions that our inquiry could be inconsistent with the principles of comity, we said that it would not. We said 'The focus of the inquiry that we will conduct is not the deed of settlement but the process by which the Crown entered into a deed of settlement with the Settlement Trust that settles the claims of the claimants in Wai 429 and Wai 85. We will consider whether that process was consistent with the principles of the Treaty of Waitangi.'[106] That is what we inquired into over two days on 11 and 12 November 2021 at our offices in Wellington. We gave the Crown leave to object at the hearing if it considered that our inquiry ventured into territory that overstepped the line in terms of jurisdiction and/or comity.[107] The Crown raised no such issues.

Background

70. In this section, we outline this Tribunal's history of dealing with the claims of Wairarapa Māori, going back to 2001. We do so because we believe that our long involvement puts us in a unique position properly to assess the nature and significance of the objections of the claimants in Wai 85 and Wai 429 to the settlement process. We know all the groups involved, their histories both recent and distant, and the part they play in te ao Māori ki Wairarapa. In this, we are in a different position from many of the Waitangi Tribunals that consider objections to mandates and settlements on urgency. Usually, at the time of hearing the urgent claim they have no prior experience of the parties involved. But here, if a party that objects to the settlement process is characterised as a small minority group that lacks support, we already know a good deal about where that group sits in this Māori community, the people who affiliate to it, its

[104] Wai 3058, #3.3.4 at [4-6].
[105] Wai 3058 #2.5.4; Wai 429 #2.44 at [11].
[106] Wai 3058 #2.5.4; Wai 429 #2.44 at [22].
[107] Wai 3058 #2.5.4; Wai 429 #2.44 at [23].

relative size and importance, and the issues it faces. This gives weight to our judgements about process.

71. For indeed, the Wairarapa ki Tāmaki Nui-ā-Rua claimants have been before this Tribunal for a long time. It was on 26 April 2001 that we first entered the district to hold judicial conferences to scope the territory and ascertain willingness and readiness to commence a Waitangi Tribunal inquiry. Immediately, we apprehended that different parts of the claimant community had different views on a number of key issues. It is fair to say that Wairarapa Māori, as we called them in our district inquiry report,[108] seemed fairly divided.

72. Supporting the community to organise themselves into what were called clusters and to work together to prepare for the inquiry was a prime focus of the work of this Tribunal and its facilitation staff for three years from 26 April 2001 to 5 March 2004. We conducted 12 judicial conferences in the Wairarapa during this time, and our collective knowledge about the claimant community slowly built. The claimants did reorganise themselves, and did come together to prepare for the inquiry. There was a Research Co-ordination Committee that enabled co-operation in the production of evidence. As just one example, in directions of August 2002, the presiding officer said that at the judicial conference that has occurred the previous month,[109]

> Representatives from different claimant groups reported on progress, and in particular the clustering of claims with take and whakapapa in common.
>
> The Tribunal is pleased to note the progress made in clustering and the obviously efforts by claimants to group themselves appropriately.

73. Along the way, in February 2003, we arranged for Judge Caren Fox and Tribunal Member John Clark to mediate with Ngāi Tūmapuhia-ā-Rangi about internal conflicts that were affecting those claimants' ability to engage with the Tribunal and its preparations for inquiry. Through mediation, those difficulties were resolved.[110]

74. Our first hearing week commenced on 29 March 2004. We sat for a total of nine weeks between March 2004 and March 2005, holding our hearings variously at Dannevirke Town Hall, Pāpāwai Marae, Kohunui Pā, Pirinoa Hall, Ōkautete School, Mākirikiri Marae, Te Ore Ore Marae, and at the Solway Park Hotel in Masterton. We had site visits all over the large hearing district. Our knowledge about the claimants, their kōrero, and where and how they lived as tangata whenua continued to build.

75. Our report came out in 2010. We formally handed it to the claimants on 26 June 2010 at Te Ore Ore Marae in Whakaoriori (Masterton) at a big and joyful hui. It

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[108] *The Wairarapa ki Tararua Report* (Wai 863, 2010).
[109] Wai 863 #2.126 at 2.
[110] Wai 863, #2.164.

was our impression then, confirmed by what speakers said in whaikōrero on the day, that the community was by this time very much more unified.

76. By the time the first urgent applications for binding recommendations came to the Tribunal in 2017 it was plain that the process of negotiating with the Crown over several years had not been unifying. Although Rangitāne and Ngāti Kahungunu interests were initially going to work together to settle with the Crown, Rangitāne soon pulled out, deciding to work with the Crown separately – even though, as we well understood, many Māori in the Wairarapa are 'aho rua', descending from both Rangitāne and Ngāti Kahungunu tīpuna. Murray Hemi, who played a prominent role at the beginning of negotiations between Wairarapa Māori and the Crown, talked about these topics at our hearing for binding recommendations.[111]

77. Parts of Wairarapa Māori apart from the claimants before us (Wai 429 and Wai 85) were also unhappy with the settlement process along the way. In 2015 the Tribunal received and declined an application from persons who identified themselves as from Te Hika o Pāpāuma seeking an urgent hearing into their objections to the Crown's settlement policy and practice in both the Rangitāne and Ngāti Kahungunu negotiations as it related to them. In 2016 the Tribunal received and declined an application from the Ehetere Rautahi hapū for an urgent hearing into what they said was their wrongful inclusion in the Rangitāne settlement.[112] These were both illustrations of what everyone seems to agree is the inevitability that the path to settlement will not be smooth, and of the Tribunal's reluctance, in most cases, to step in.

78. The claimants in Wai 85, the Incorporation, filed their application for binding recommendations on 10 February 2017,[113] and an application from the claimants in Wai 429 followed on 30 July 2018.[114] These applications were certainly in part a manifestation of opposition to the settlement that the Settlement Trust and the Crown had negotiated, and to the Settlement Trust's mandate to settle on their behalf. Both groups wanted to exercise their right to choose their own path for seeking redress for Treaty breaches. The binding recommendation jurisdiction of the Tribunal was largely untried, but they decided to go down the path that the legislation offered and see how far they could get. The Crown opposed the applications for an urgent hearing, but once it was granted, ministers decided to defer signing the Deed of Settlement until the outcome of this litigation was known.[115]

79. We issued our preliminary determination on 24 March 2020.[116] In a nutshell we said that we would probably issue binding recommendations returning to Māori

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[111] Wai 863, #4.12 at 151-152, evidence of Murray Hemi (#J18).
[112]The applicants in Wai 2484 identified themselves as from Te Hika ā Pāpāuma (Wai 2484, #1.1.1), and the applicants in Wai 2560 said they were of the Ehetere Kawemata Rautahi hapū (Wai 2560, #1.1.1).
[113] Wai 85, #2.9.
[114] Wai 429, #2.26.
[115] Wai 863, #2.636 at [3.3].
[116] Wai 863, #2.835.

ownership the resumable land at Pouākani (including the Maraetai Dam) and the Ngāumu Forest. We said the recipient of the redress should represent all of the claimants of Ngāti Kahungunu Wairarapa ki Tāmaki Nui-ā-Rua descent. We said that for a number of reasons the Incorporation and Wai 429 were not suitable recipients. We indicated that the Settlement Trust had many of the attributes of a suitable recipient although there would need to be a further process to ensure that it was the entity that the claimants chose for this purpose. We reserved this and a number of other matters for future decision.

80. We described the litigation that ensued briefly at the beginning of this decision. We do not think it necessary to say more at this point about the litigation but will refer to particular aspects of the courts' decisions where they bear on our reasoning.

Analysis

81. When the Crown urged upon us its view that 'in all the circumstances of this case there is no breach of Treaty principles', it described the parameters of this Tribunal's task. There is a good deal in what the Crown said about that with which we can agree:[117]

> 15.1 There is a high threshold for Tribunal intervention in matters concerning mandate, but that does not mean the Crown can avoid its Treaty obligations.
>
> 15.2 The Tribunal should not interfere in mandate decisions except in clear cases of error in process, misapplication of tikanga Māori, or apparent irrationality.
>
> …
>
> 15.6 Minority groups do not have a power of veto over the settlement process.
>
> 15.7 The Crown acts properly in settling claims without the consent of claimants, so long as it exercises caution and there may be a need to consult affected claimants.
>
> 15.8 Those challenging settlements should demonstrate the evidence of the level of support to [sic] their claims.
>
> 15.9 Those seeking resumption on behalf of others should also demonstrate the support to [sic] their application.
>
> …
>
> 66.1 The Tribunal needs to weigh the interests of the collective and the reality that all Treaty settlements proceed in the context of extant litigation…Treaty settlements would be impossible if settlements could not proceed wherever there is a resumption application…
>
> 66.2 The Tribunal also needs to weigh the Wai 429 and Wai 85 chosen litigation pathway with the reality that that pathway is by its nature speculative

[117] Wai 3058, #3.3.2; Wai 429, #2.61; & Wai 3068, #3.3.2 at [15] and [66].

and will not be quickly resolve and the effect it has on the will of the majority to conclude a settlement now.

> 66.3 Although to a degree speculative, it is also to be kept in mind that the appeals do not directly engage the Tribunal's earlier findings…that the resumable lands and assets should not return to Ngāi Tūmapuhia-ā-Rangi or the Incorporation.
>
> 66.4 Neither the Wai 429 nor the Wai 85 claimants challenged these findings in judicial review.

82. We also concur with the Crown that support for Treaty settlements is rarely if ever unanimous, and settlements nearly always proceed despite some internal conflict.

83. But fundamental to all Treaty settlements, whatever the context, is that they create or at least materially contribute to reconciliation of past grievances. As the Taranaki Tribunal said:[118]

> The settlement of historical claims is not to pay off for the past, even were that possible, but to take those steps necessary to remove outstanding prejudice and prevent similar prejudice from arising; for the only practical settlement between peoples is one that achieves a reconciliation in fact.

84. Some years later, the Tribunal elaborated on this sentiment in an inquiry that heard challenges to the Crown's settlement process in Tāmaki Makaurau. *The Tāmaki Makaurau Settlement Process Report* said:[119]

> The purpose of settling Treaty claims is, broadly speaking, peace and reconciliation. By settling, the Crown 'hopes to lay the basis for greater social cohesion'. Such objectives can be achieved only when both the process and the outcome of negotiation and settling are manifestly fair – not only the settling party but also to others affected. The burden on both Māori and Pākehā of the great wrongs that were done in the past will not be lifted if the process of settling creates new wrongs.

85. The Tribunal observed that Crown officials' implementation of the Crown's settlement policies was creating divisions within Māori society that were very damaging. It characterised those divisions as 'Damage to whanaungatanga, to te taura tangata' (the bonds of kinship and whakapapa).[120] This was a great wrong, because it 'affects Māori society at its very core' and 'goes to the heart of the Treaty guarantees in article II':[121]

> As a country, we cannot benefit from this. The settlements being negotiated will not be regarded as fair and just...We fear that, like past attempts at settling that were later seen as being unfair, they will not endure.

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[118] *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996) at 315.

[119] (Wai 1362, 2007) at 2. The language in this passage about social cohesion and the great wrongs done in the past came from the then-current manual of the Office of Treaty Settlements (now Te Arawhiti), usually referred to then as now as the Red Book.

[120] *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 2.

[121] *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 2.

We share that Tribunal's concerns about the deleterious effects where process is not fair.

86. Here, we identify the factors we consider relevant to fair process. We go through them one by one, but we emphasise that this exercise is one where we consider all the factors to determine whether, taken together and assessed as a whole, they comprised a process that was fair.

87. It follows that we would not reach a conclusion by considering any factor in isolation. For instance, in issue before us is whether the support for the settlement was adequate in numerical terms. The parties directed us to evidence about who was entitled to vote, who actually voted, and the percentage of those who participated who voted in favour. The Crown brought to our attention at the hearing that the Tribunal has never tried to specify the numbers required for an adequate level of support. We are unsurprised by this, because every situation must be looked at in context. A number that may be acceptable in one context will not exhibit an appropriate level of participation or approval in another.

88. Of course, in the present context – which is to assess the fairness of this Treaty settlement process in light of the principles of the Treaty of Waitangi – the duty to ensure process is fair is always and exclusively the Crown's. Even when another actor – here, the Settlement Trust – was functionally responsible for checking mandate and arranging votes (for example), our focus is on the Crown. If in important areas the Crown did not control what was happening on the ground, it needed at every stage to be close enough to what was happening to be able to step in if there was ever a doubt that the necessary elements were present.

89. We now go through those elements.

The elements of fair process

90. For its decision to proceed to settle with the Settlement Trust to be sound, the Crown had to take into account the right matters, and to ensure that its assessments were correct. In the present case, the Crown needed:

(a) to know that the Settlement Trust held a **mandate** to settle the claims in Wai 429 and Wai 85 with the Crown; and

i. if a mandate was given some time ago, the Settlement Trust has nevertheless engaged in processes to maintain that mandate and to inform the Crown about that; and

ii. nothing had happened to interrupt or remove the mandate, or to suggest that something might have happened which the Crown needed to investigate to reassure itself;

(b) to be fully informed about what happened in the **ratification** process so that it could be confident that

i. the registered beneficiaries of the Settlement Trust understood the vote being conducted was in fact a process to ratify the deed of settlement;

ii. information provided to registered beneficiaries clearly outlined the nature of the vote and also explained any other matters that they needed to take into account;

iii. the rules laid down in the Deed of Mandate and the Settlement Trust's own deed were followed, or if those rules were not followed to the letter at least that the process was sound in substance;

iv. enough of the beneficiaries – including the groups objecting – participated in the vote, and voted in favour of the settlement; and

(c) to correctly evaluate the **other factors** on which its decision relied: the credentials of the groups opposing – their size, nature, and support base – and what was at stake in their choice to pursue litigation rather than support the settlement with the Crown.

91. To ensure fairness of process with Rangitāne Tū Mai Rā Trust, the Crown had to give effect to its undertakings it made when it settled with them. Here, it was obliged to continue **to negotiate in good faith** about redress concerning Wairarapa Moana.

92. In relation to the Wai 429 and Wai 85 claimants, we explore these elements below under the following headings: Mandate, Ratification, and Other factors the Crown relied on. We then turn to the fairness of the Crown's process with Rangitāne.

Mandate

Was the mandate maintained or was it removed?

93. Before us, the claimants in Wai 429 and Wai 85 alleged that the Crown has been on notice that the Settlement Trust's mandate to settle their claims is unsound. The summary of their submissions sets out their arguments in this regard.

94. We are satisfied that back when the Deed of Mandate was signed in 2012, the Settlement Trust did have a mandate to settle aspects of these claims. The Incorporation points to its reserving to itself the mana to speak for land at Pouākani going back to the very beginning. However, we do not think it necessary for us to track through all the meetings, letters, and events on which the claimants in Wai 429 and Wai 85 rely to establish what they said were deficiencies in the Settlement Trust's mandate to represent their interests. We need go no further than our finding that from the time when they applied to this Tribunal for binding recommendations, the Settlement Trust no longer had a mandate to negotiate on their behalf settlement relating to land at Pouākani (Wai 85) or in Ngāumu Forest (Wai 429). The relevant dates were 10 February

2017 in the case of Wai 85, and 20 July 2018 in the case of Wai 429. What the Supreme Court said about Mr Haronga in *Haronga*[122] applies equally to these claimants. Their resumption applications were inconsistent with the negotiations and any mandate relied on by the Settlement Trust.

95. For reasons that we elaborate in our discussion on the credentials of the groups objecting to the settlement process,[123] we do not accept the Crown's contentions that the issues within Ngāi Tūmapūhia-ā-Rangi about representation means that the claimants in Wai 429 cannot rely on this aspect of the *Haronga* decision, nor that Wai 429 prospects of succeeding in the litigation were bleak and this meant that the mandate to represent them in relation to Ngāumu Forest defaulted to the Settlement Trust.

96. These aspects of the Minister's assessment expressed in letters to the claimants[124] to justify the Crown's continuing to settlement in the face of their opposition was accordingly founded on mistaken advice, and was itself mistaken.

97. A mistake about mandate is no small thing. This is emphasised in what is called The Red Book – the Crown manual for conducting settlement negotiations.[125] That is because, in order for settlements to be durable, the mandated entity must in fact have the authority to settle on behalf of the claimants it purports to represent.[126] For this reason, 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'.[127] The responsibility of the Crown to monitor mandate is an active obligation as the Crown 'is expected to monitor the safety of the mandate to ensure the entity is fulfilling its obligations to the claimant community".[128] 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.[129]

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[122] *Haronga v Waitangi Tribunal* [2011] NZSC 53 at [98].
[123] See below at [121] ff.
[124] In Wai 429, #A4(a) at 3, Wai 3058, #A1(a) at 17; & Wai 3058, #A12(a) at 1-2.
[125] *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown [Red Book*] (Wellington: Office of Treaty Settlements, 2018) at 39; Waitangi Tribunal, *The Ngapuhi Mandate Inquiry Report* (Wai 2490, 2015) at 20.
[126] *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573, 2020) at 22.
[127] *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown [Red Book]* (Wellington: Office of Treaty Settlements, 2018) at 46; Waitangi Tribunal, *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573) at 23.
[128] Waitangi Tribunal, *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573, 2020) at 23.
[129] *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown [Red Book]* (Wellington: Office of Treaty Settlements, 2018) at 18; Waitangi Tribunal, *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573, 2020) at 23.

Mandates can be lost if the wider group is not kept informed of progress and issues in the negotiations.[130]

98. *The Mana Ahuriri Mandate Report* states:[131]

> In mandate matters, previous Tribunals have found that representativeness and accountability are key requirements for all mandated bodies. 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.

99. Also in *The Mana Ahuriri Mandate Report*[132] the Tribunal noted deficiencies in the Crown's monitoring of mandate. It had not 'picked up on' what it called the inconsistencies in the election provisions of the mandated body's constitution when it reviewed that document, nor on the difference between the body's practice and the deed of mandate, which required annual elections. The Crown had not monitored the body's compliance with the accountability requirements in its constitution, especially the presentation of accounts at AGMs. The Tribunal saw the Crown as downplaying the significance of the admitted deficiencies, although it was while the inquiry was underway that the Crown upgraded its monitoring standards. *The Mana Ahuriri Mandate Report* said: [133]

> Crown counsel confirmed that the Crown will henceforth 'monitor and assure compliance' with the accountability mechanisms in a mandated body's constitution (and, presumably, its deed of mandate). 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.

100. Despite ostensibly signing up to these standards in this earlier context, it seemed to us that the Crown similarly here relied on the Settlement Trust to deal with its constituent members and did not itself engage with detail. An example is the three deeds that the Settlement Trust had to comply with – the deeds of 2012 and 2017, and the Deed of Mandate. The Crown seems to have been unaware of the fact that these created overlapping and contradictory obligations that made them a very poor source of rules of procedure for the protection of the claimant community.

101. Mr Colson submitted, and we accept, that the Settlement Trust did try to sort out its problems with the claimants in Wai 429, although not so much its issues

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[130] *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown [Red Book]* (Wellington: Office of Treaty Settlements, 2018) at 27; Waitangi Tribunal, *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573, 2020) at 23.
[131] *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573, 2020) at 17.
[132] *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573, 2020) at 126.
[133] *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573, 2020) at 127.

with the claimants in Wai 85.[134] In any event, it did not succeed in bringing those claimants back under its mana.

102. Neither the Settlement Trust nor the Crown demonstrated to us that at any time after these claimants made their applications for binding recommendations they gave the Settlement Trust a mandate to reach a settlement with the Crown about their interests in Ngāumu Forest or at Pouākani. On 29 October 2021, when the Settlement Trust and the Crown signed a deed of settlement, the Settlement Trust had no mandate to settle the Wai 429 or Wai 85 claims.

103. From our analysis, the fact that Ngāi Tūmapūhia-ā-Rangi went to the Tribunal in 2017-2018 for resumption orders was a clear signal that they didn't support the settlement, whatever had happened mandate-wise previously. But in ruling out Ngāi Tūmapūhia-ā-Rangi's lack of support the Crown has focused on the questions around whether Ms Griggs and Mr Chamberlain represent the interests of the hapū, and its view that the resumption applications cannot succeed. This focus enabled the Crown to minimise any concerns they perhaps ought to have had that the claimants for Wai 429 were not really part of the settlement. The Settlement Trust must have known that there were real issues with their representation of Wai 429. They tried to address their concerns in various ways, including mediation in 2019. There was always an issue with the hapū being fragmented such that the Settlement Trust sent communications to four different parts of Ngāi Tūmapūhia-ā-Rangi when it wanted to communicate with them.[135] The level of support for the revised settlement did not meet the threshold provided in the deed of settlement or the deed of mandate, and we now know that the Settlement Trust was in possession of the hapū breakdown of the approval vote, but did not share that with anyone. The Settlement Trust also knew that Mr Eruera as a representative of Ngāi Tūmapūhia-ā-Rangi had told the Trust that the hapū did not favour moving to settlement.[136] Mr Mason took over from Mr Eruera and he did not go to Wellington to sign the deed. It is difficult to imagine that the trustees of the Settlement Trust, closely connected as they are with all their whanaunga, were unaware that all of these factors indicated that Ngāi Tūmapūhia-ā-Rangi were still committed to resumption proceedings and did not acknowledge a right on the part of the Settlement Trust to settle Wai 429. Our focus is of course on whether the Crown followed a process that was consistent with the principles of the Treaty of Waitangi. The question, therefore, is whether the Crown knew enough for doubts to be raised about whether the Settlement Trust represented Wai 429 and whether the processes had followed were robust and fair. If the Crown did not know enough, should it have known enough? Should it have scrutinised the process for gaining approval more closely?

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[134] Wai 3058, #3.3.4.
[135] Wai 429, #A6(g).
[136] Wai 3058, A9; Wai 429, #A14; & Wai 3068, #A6.

Ratification

The nature of the vote

104. Everyone eligible for the August 2021 vote for the revised Settlement Deed should have known whether the vote was a ratification vote on which the Crown would rely and equally, the relevance of the 'ratification' of 2018.

105. It was not clear to us, nor to any counsel apart from the Crown, why the Crown persisted with the fiction that the true ratification came in 2018 on the settlement package that preceded the resumption proceedings rather than from the vote that the Settlement Trust conducted in August 2021 on the revised settlement. Mr Cornegé for Ngāi Tūmapūhia-ā-Rangi said this otherwise perplexing stance can only be understood in one way. It was an attempt to bat away the problem of the revised settlement package having gained the lowest level of approval ever for a comprehensive Treaty settlement, in combination with the lowest turnout that the Crown has ever accepted. Although there have been lower participation and/or approval for various Treaty-related deals, none was a comprehensive settlement.

Information provided to registered beneficiaries

106. We asked the Settlement Trust at the urgent hearing for the material it provided to voters before they exercised their vote in July to August 2021. The Trust forwarded material that they emailed to their registered members.

107. Hui were held to vote for trustees on the Settlement Trust and to tell members about the vote they were being asked to exercise on the revised settlement. In the information sent out to members by email on 28 July 2021, a link is provided to a website that would enable members to cast an online vote. It appears that there were three methods of voting: at the hui or by mail or online.[137]

108. Because it appeared that the Settlement Trust and the Crown would be relying on this vote for evidence of approval of the revised settlement, it is important that members knew what they were really voting for. It was not simply a yes or no situation. On one hand was the settlement deed with the Crown under which registered beneficiaries of the Trust would get $110m (up from $90m), plus other benefits. The contents of the settlement package are described in a number of places, including in a presentation given at the hui.

109. All the sources of information – whether by email, Facebook post, or 'information document' – are broadly similar. For example, in the information document, under the heading 'What you are voting on', the Settlement Trust lists the apology redress, cultural redress, financial and commercial redress that were all contained in the 2018 deed of settlement. The document goes on to say that 'In addition to this package, we have managed to negotiate...' and

[137] Wai 429, #A4(c) at Exhibits 'D' and 'E'; Wai 3058, #A7(b); Wai #A12(b); & Wai 3068, #A4(b).

then lists the 'further $22 million bringing our total quantum to $115 million', '$5 million to improve the wellbeing of Wairarapa Moana' and a revision of the apology and historical account.[138]

110. The question we asked at the hearing was whether the communication to registered beneficiaries was confined to advocacy of the settlement. Did the Settlement Trust also explain that in settling now rather than waiting for the outcome of the litigation, Wairarapa Māori were potential forgoing some significant benefits that could accrue from the litigation? Essentially, the information – including the video played at the hui – was confined to advocacy. It does not talk about what is at stake in the litigation, and the likelihood or otherwise that assets worth nearly $800 million could potentially be returned to Wairarapa Māori.[139] There would need to be an assessment of risks and benefits around that possibility, of course, but that is not undertaken.

111. Back in June 2020, however, the pānui of the Settlement Trust entitled 'Update on the Waitangi Tribunal report and next steps on our settlement journey' did contain a lot of information about the litigation and its potential risks and benefits.[140] The context at that time was the judicial review proceedings that Mercury had initiated. When the pānui went out, the Crown had not yet decided whether it too would judicially review our preliminary determination. The pānui talked about proposed mediations between it and Incorporation, and between it and Ngāi Tūmapūhia-ā-Rangi, and said 'It is important to note too, that the Crown has indicated it only wishes to talk to the Settlement Trust.'

112. The information provided is complex and difficult for an audience not legally trained to understand. Moreover, it is directed at a context quite different from the imminent vote for or against a deed of settlement. We think it unlikely that many of the beneficiaries would be in a position – without a clear explanation on a white board or similar – to know how they should relate the information now to the vote they are being asked to give in favour of the revised settlement

113. In all the information, the Settlement Trust stresses its preference for a settlement now rather than waiting for litigation to play out. This is a concern worth stressing, of course. But in order for voters to understand whether it might be worth waiting, it would be important for them to understand what was at stake, and the risks and benefits attached

Compliance with the rules laid down in various deeds for voting on a deed of settlement

114. In the context of whether the ratification of the revised deed was procedurally fair, counsel pointed to non-compliance with rules for the level of approval required. The rules are contained in certain deeds relevant to the operation of the Settlement Trust. Let us say immediately that these rules are very difficult to

[138] Wai 3058, #A7(c); Wai 429, #A12(c); & Wai 3068, #A4(c).
[139] Wai 3058 #A8, Exhibit 'C' at [17] – [18].
[140] Wai 429, #A6(e).

follow. Understanding them necessitates crossing between different documents – the deed of 2011 that established the Pre-Settlement Claims Trust, the deed of 2017 that established the Post-Settlement Government Entity, and the 2012 Deed of Mandate. To the extent that good process involves rules that are clear and easily accessed, this aspect of ratification immediately fails. Evidence for this proposition is the judgment of Justice Cooke in the recent application for an injunction in *Griggs and Chamberlain v Attorney-General*,[141] where His Honour devoted five pages of his decision to construing the various documents and their interrelationships to discern what procedures the Settlement Trust needed to follow. He concluded that the plaintiffs 'have an arguable case that the actions of the Trustees in entering the Deed of Settlement is potentially inconsistent with the requirements to obtain a special resolution in the required way'.[142] He decided, though, that the processes followed were 'substantively similar' to the mandated processes and declined the injunction because the situation did not meet the 'balance of convenience' test.[143]

115. In the several sources of rules for the level of support required for a deed of settlement, and whether a special resolution was required, Justice Cooke emphasised the provision on the question of the level of approval required by clause 3 of the Fourth Schedule of the 2011 Trust Deed ('the Original Trust Deed'), which implemented approval requirements of the Deed of Mandate of 2012.[144] Clause 3 provided:

> VOTING
> In order for a Special Resolution to be passed, it must receive the approval of not less than 70% of those Registered Adult Members who validly cast a vote in accordance with this schedule with the **exception of a special resolution for the approval of a Post Settlement Governance Entity or any Deed Settlement in which case whether or not a sufficient degree of approval has been given will be agreed as between the Trustees and the Crown following the completion of this special resolution procedure**.

116. According to Justice Cooke, 'The resolution that was passed by 68.02 per cent in the present case was eligible for consideration under the proviso, and the Trustees and the Crown have agreed that it was sufficient to provide consent to the entry into the Deed of Settlement'.

117. We have two observations about this. The Settlement Trust was reconstituted under a deed signed in 2017 that did not contain the proviso quoted above that allowed the Crown and the Settlement Trust to agree to a lower approval rate than that specified. Moreover, the approval rate for special resolutions (which approval of a settlement deed necessitated) was higher in the 2017 deed – 75 per cent rather than 70 per cent.[145] It is not evident from Justice Cooke's reasoning why he focused on the 2011 deed, with its 70 per cent approval

[141] [2021] NZHC 2931.
[142] At [31].
[143] At [33] and [54].
[144] At [25].
[145] Trust Deed 2017, Eighth Schedule, cl 4.

requirement and its proviso to allow an alternative level rather than on the 2017 deed that required 75 per cent approval and contained no let-out clause.

118. Our second observation is that even if the key deed is the 2011 deed with its let-out provision in clause 3 of the Fourth Schedule, we have seen no evidence that the Crown and the Settlement Trust conferred on whether the lower approval rate was adequate in the circumstances. Thus, we doubt that it is really possible to say that the lower approval rate was 'agreed as between the Crown and the Settlement Trust' as the provision requires, because it seems that all that happened here was that both the Crown and the Settlement Trust kept going with the settlement even though the approval rate was lower than prescribed.

119. In this context of a Waitangi Tribunal inquiry, our emphases – and indeed our legal parameters – are of course different from the injunction context in which the High Court looked at compliance with the deeds' rules.

120. Our criticisms are that:

(a) the process prescribed in three separate deeds is contradictory and arcane;

(b) it provides little to no procedural protection to participants as a result – especially if departure from what is prescribed is regarded as permissible;

(c) it is completely unclear to us why it should be permissible to depart from the process most recently agreed upon, namely that in the 2017 deed;

(d) we have received no evidence to suggest that the Crown has engaged with all of this in light of the principles of the Treaty of Waitangi to decide with the Settlement Trust, in a reasoned way, that a lower level of approval than prescribed in any of the deeds is adequate under the circumstances.

Adequacy of the number of beneficiaries who participated in the vote, and voted in favour

121. Like other aspects of Crown settlement policy to which we have referred, the requirements are set out in the Red Book.[146] A Deed of Settlement initialled by the Crown and mandated representatives must be clearly approved by the wider claimant group before it becomes binding.[147] The process to obtain approval is called ratification. Emphatically, the Red Book states 'Because of the importance of the ratification process, it is essential to allow claimant group members enough time to consider the proposed Deed of Settlement.'[148]

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[146] *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (the Red Book) (Office of Treaty Settlements, Wellington, March 2015).
[147] *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (the Red Book) (Office of Treaty Settlements, Wellington, March 2015 at 66.
[148] *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (the Red Book) (Office of Treaty Settlements, Wellington, March 2015) at 66.

122. Generally, the Crown's desire for settlements to be durable encourages it to ensure that the level of participation of those entitled to vote is as high as possible, and that of those who vote there is high percentage of votes in favour of the settlement.[149] In the Tribunal's inquiry into the Mana Ahuriri Mandate, the Crown gave evidence that the Office of Treaty Settlements (now Te Arawhiti) does not recommend acceptance of an approval vote of less than 85 per cent unless there has been participation by 39 per cent of eligible voters, and the Crown is satisfied that the process was sound. Where participation rates were lower than 39 per cent, the Crown would seek approval by 87 per cent or more, would want to be satisfied that a large number had cast votes, and the process was sound.[150]

123. We now consider whether the levels of participation and the levels of approval were adequate. We do so in the context of a lack of clarity about whether the relevant ratification was the one that took place in 2018 or the one in July-August of this year, and the problems we have highlighted about the information provided to voters. Counsel for the Incorporation also emphasised the inadequate notice of the recent vote and of the hui to discuss the settlement. We agree that all these were weaknesses.

124. We are treating the recent vote as the most relevant vote, since it is evidently on that the Minister relied in the decision to proceed to settlement that is before us.

125. The 2018 vote was on another settlement package, and happened before the resumption applications, our preliminary determination, and subsequent litigation. These later developments render that vote almost irrelevant, in our estimation, even though the Crown insists that it was the formal ratification. In fact, neither the 2018 vote nor the 2021 vote had the levels of participation or support that the Crown says it looks for in a sound ratification.

Participation and support rates

126. Between September and November 2018, the Settlement Trust held a ratification vote for the initialled deed of settlement. There was a 33.3 per cent participation rate (1,833 of a total 5,503 eligible voters). Of those who cast valid votes, 71.7 per cent voted in support of the settlement (1308 for and 515 against).[151]

127. Between July and August 2021, the Settlement Trust held a further vote to determine support for the enhanced deed of settlement. For this vote, there was a 31 per cent participation rate (2,121 of a total 6,830 eligible voters). Of those who cast valid votes, 68 per cent voted in support of the settlement (1,427 for and 671 against).[152]

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[149] Wai 3058, #3.3.3 at [53].
[150] *The Mana Ahuriri Mandate Inquiry Report* (Wai 2573, 2020) at 70.
[151] See 2018 Deed of Settlement Ratification – Final Poll Result, Wai 863, #J44(a) at 283-285.
[152] See 2021 Settlement Vote and Trustee Elections - Declaration of Results, Wai 3058, #A2(b).

128. In summary, the 2018 vote had a 33.3 per cent participation and 71.7 per cent support rate, and the 2021 vote had a 31 per cent participation and 68 per cent support rate. Plainly, the level of approval fell in 2021 even though the settlement was ostensibly a better one than was on offer in 2018.

How did Ngāi Tūmapūhia-ā-Rangi and the Incorporation shareholders vote?

Ngāi Tūmapūhia-ā-Rangi

129. A hapū breakdown of the 2021 vote was filed on 8 November 2021 following a discovery request from the Wai 429 claimants.[153]

130. For Ngāi Tūmapūhia-ā-Rangi, there was a 41.4 per cent turnout (322 of a total 776 eligible voters). Of those Ngāi Tūmapūhia-ā-Rangi that voted, 74.8 per cent voted against the settlement (76 for and 241 against).

131. It is unclear when exactly the hapū breakdown of the 2021 vote became available to the Settlement Trust. In his 8 November 2021 affidavit, Mr Te Whaaiti refers to the hapū breakdown as being read out at a hui of Settlement Trust trustees on 18 October 2021 where the final decision to sign the enhanced deed of settlement was made.[154] This means that the information was available before the 29 October 2021 signing of the deed of settlement.

132. After becoming aware of the hapū breakdown following its filing on 8 November 2021, Mr Irwin said that the Crown must concede that the settlement was not supported by the majority of Ngāi Tūmapūhia-ā-Rangi. He said at hearing that nevertheless the Crown remained of the view that the Wai 429 claimants had not demonstrated that they have the authority for Ngāi Tūmapūhia-ā-Rangi.

Wairarapa Moana Ki Pouakani Incorporation

133. The hapū breakdown of the 2021 vote does not shed any light on how the shareholders of the Incorporation may have voted. What we do know is that in late 2019 comparison analysis showed there was a low correlation between the registers of the Settlement Trust and the Incorporation:

(a) 611 of the 8565 registered Settlement Trust beneficiaries (of which approximately 6,000 are adult registered members) are also shareholders in the Incorporation;[155] and

(b) 545 of the Incorporation's 3,780 shareholders are also registered as beneficiaries of the Settlement Trust.[156]

134. In other words, at the time of that analysis, only 7.1 per cent of the Settlement Trust beneficiaries were Incorporation shareholders and only 14.4 per cent of

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[153] See Ngati Kahungunu ki Wairarapa Tamaki Nui a Rua Settlement Trust 2021—Trustee Election and Settlement Vote: Election Results by hapu karanga (undated), Wai 3058, #A7(a) at 177.
[154] Wai 3058, #A7 at [42] – [43].
[155] Wai 863, #J98 at [6].
[156] Wai 863, #J100(b) at [96].

the Incorporation shareholders were registered beneficiaries of the Settlement Trust.

135. Counsel for the Incorporation submitted that this low correlation means that a significant number of Wai 85 claimants do not support the Settlement Trust as their representative and a significant proportion of the Wai 85 claimants did not participate in the 2021 vote.[157]

Comparison to other ratification votes

136. On 9 November 2021, the Crown provided a comparative table prepared by Te Arawhiti which shows participation and approval rates for other Deeds of Settlement.[158] It should be noted that this table uses the figures from the 2018 vote for the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua settlement and the figures used are rounded to the nearest whole percentage.

137. At hearing, counsel for the Incorporation and Wai 429 both submitted that, based on either the 2018 or 2021 vote, this would amount to Crown reliance on the lowest ever levels of support for a comprehensive Treaty settlement. In response Mr Irwin noted that there are 22 lower participation rates and two lower approval rates.

138. Based on the 2018 vote's approval rating (72 per cent), the two lower approval rates are the Ngāti Rangiteaorere (68 per cent) and the Waikato-Tainui river (65 per cent) settlements. As we said, we consider the 2021 vote more relevant.

Notice and cancellation of voting hui

139. It is important to observe that the low level of participation in 2021 (31 per cent) may well have been affected by the very truncated period of notice given to voters.

140. In mid-July 2021 the Crown and the Settlement Trust agreed to an enhanced Treaty settlement package.[159] On 21 July 2021, Minister Little sent a letter to the Incorporation and the Wai 429 claimants to inform them of the Crown's intention to continue to advance settlement (including the Wai 85 and Wai 429 claims) despite the on-going litigation and indicated the next step would be for the Settlement Trust to undertake a vote on the enhanced settlement package.[160] The Settlement Trust's voting process on the enhanced settlement package began on 26 July 2021 and ran until 24 August 2021. This effectively provided the Incorporation and the Wai 429 claimants with two working days' notice of the vote for the enhanced settlement package.

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[157] Wai 3058, #3.3.3; Wai 429, #2.62; & Wai 3068, #3.3.3 at [90] – [92].
[158] Wai 3058, #A14; Wai 429, #A19; & Wai 3068, #A11.
[159] Wai 429, #A5 at [23].
[160] For letter to Wai 429, see Wai 429, #A4(c) at page 3. For letter to the Incorporation, see Wai 3058, #A1(a) at page 17-19.

141. For the voting process, the Settlement Trust organised eight regional hui. The last three – at Christchurch, Wellington and Masterton – were cancelled due to a nationwide COVID-19 level four lockdown that began 11.59pm, 17 August 2021.[161]

142. Robin Potangaroa of the Settlement Trust said that, after the lockdown, some people asked if the Settlement Trust could delay the trustee elections and the settlement vote but that he received clear legal advice that the trust deed did not allow the 'elections' to be delayed.[162] However, we know of no reason why the settlement vote could not have been severed from the trustee elections.

143. Counsel for the Incorporation submitted that the notice for these hui was very short ranging from 5 to 10 days' notice. The hui that did have two or more weeks' notice were cancelled due to COVID-19.[163]

144. Counsel for Wai 429 highlighted that the cancelled Masterton hui was the closest venue to Ngāi Tūmapūhia-ā-Rangi and that the haste with which the Settlement Trust and the Crown continued the voting process under lockdown conditions undermined tikanga and the ability for claimants to participate in the vote in a fully informed way.[164]

145. We accept that haste tainted the process. It certainly did not meet the imperative for 'enough time' that the Red Book required. Moreover, once level four lockdown started, could the whole process of seeking approval not have gone on hold until people could once more attend hui? No consideration seems to have been given to the possibility of substituting Zoom hui for three that were cancelled.

Adequacy

146. Both percentage of eligible voters who participated and the level of approval were low. As the Crown conceded – while denying that they were the lowest ever – they are undeniably 'at the lower end of the spectrum' (Counsel's words at hearing).

147. In fact, it seems to us, from inspecting the material provided, that there is no vote for a full and final settlement of Treaty claims that has attracted a combination of such a low participation rate and such a low approval rate. While this would not necessarily always be sufficient to make it unsound to conclude that a claimant community had really ratified a settlement deed, it would take other aspects of sound process to balance it or compensate for it as a weakness. That is what the Crown indicated to the Tribunal in the Mana Ahuriri Mandate Inquiry.

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[161] Wai 3058, #A2 at [22] – [25].
[162] Wai 3058, #A2 at [27].
[163] Wai 3058, #3.3.3 at [97] – [99]
[164] Wai 429, #2.29 at [31] – [32].

148. Here, though, the votes were inadequate both as to levels of participation and support, and we look in vain for aspects of sound process to counterbalance that inadequacy. We agree with Counsel for Wai 85 that for the Crown to safely rely on a ratification vote, there must be a sound process leading up to the vote, a suitable number of eligible voters participating in the vote, and a suitable number of those participating voting in favour.[165] In this case, none of these requirements were satisfied. Accordingly, we find that neither the vote in 2018 nor that in 2021 sufficed as a ratification of the settlement deed.

Other factors the Crown relied on

149. The Minister for Treaty of Waitangi Settlements's letter to the Wai 429 and Wai 85 claimants of 21 July 2021[166] informed them of the decision to continue to advance the Ngāti Kahungunu Treaty settlement. The Minister's letter outlines the factors he took into account, including:

(a) the long delay to this point and the likelihood that further proceedings will cause more delay;

(b) the Tribunal's preliminary determination that it should not recommend the return of land to the Incorporation, the lack of any challenge by way of judicial review to that determination, and the High Court's expressly noting the continued relevance of the Tribunal's preliminary determinations on the Wai 85 and Wai 429 claims;

(c) the Tribunal's own preliminary determination that any resumable assets should be transferred to an iwi representative group;

(d) the interests of the Ngāti Kahungunu community;

(e) the planned processes for Trustee elections and a vote by the claimant community on the settlement; and

(f) the Crown's comprehensive settlement policy.

150. The letter says that the Wai 429 and Wai 85 claimants will participate in the increased settlement package.[167] It does not address mandate.

151. It was not until three months later, on 22 October 2021, that the Minister wrote again to the claimants in Wai 85 and Wai 429,[168] despite their protests about his decision to proceed to settlement. By this time, the revised settlement had been the subject of a vote, and the Minister said he intended to proceed to sign

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[165] *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (the Red Book) (Office of Treaty Settlements, Wellington, March 2015) at 65.
[166] Wai 3058, #A1(a) at 20 – 21.
[167] Wai 3058, #A1(a) at 17; & Wai 429, #A4(a) at 3.
[168] Wai 3058, #A12(a) at 1-2.

the deed. Again, he mentioned the already long delay in settling, and said he was also mindful that:[169]

(a) The Supreme Court appeal does not bear upon the essential finding of the Waitangi Tribunal that the Wai 85 and 429 claimants are not and could not be appropriate recipients of the resumable land;

(b) Raukawa find the involvement in resumption litigation to be an ongoing burden;

(c) No reasons accompanied the Supreme Court's decision to assume jurisdiction from the Court of Appeal nor has there been any direction to pause the settlement and the introduction of legislation and which 'leaves me able only to consider the foregoing points which formed the basis of my previous decision to proceed to settlement, and which I set out more fulsomely in my letter to you of 21 July 2021.'

152. Again, the Minister makes no mention of mandate, although the Incorporation's letter of 28 July 2021 raised it specifically:[170]

> Despite Wairarapa Moana's resumption application (filed in February 2017), its extant appeal to the Court of Appeal, its challenges to the Settlement Trust's mandate in respect of Wai 85, including the passing of several special resolutions of its shareholders, the Crown has at no stage sought to discuss this latest proposal with Wairarapa Moana. The first notice Wairarapa Moana received of the proposal to settle Wai 85 and bring its legal proceedings to an enforced end was your letter of 21 July 2021.

153. These letters are important, because they indicate the factors the Crown relied upon in deciding to proceed to settle despite the objections of the claimants in Wai 429 and Wai 85.

154. Earlier in this decision we outlined the important procedural elements for a fair process. We said that in addition to ensuring that there were fair mandate and ratification processes, the Crown had to correctly evaluate other factors it relied on for its decision to proceed to settlement. The factors we want to address now are two the Minister mentioned in his correspondence: that the interests of Ngāti Kahungunu would be best served by the Crown's proceeding to settle, and that he was justified in ending the resumption litigation.

The Minister's assessment of the 'broader interests'[171] of Ngāti Kahungunu

155. We referred earlier to our long involvement with the Māori people of the Wairarapa. The Māori community there is not very large. According to census figures, Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua has a population of approximately 12,000 people.

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[169] Wai 3058, #A12(a) at 2.
[170] Wai 3058, #A1(a) at 20 – 21.
[171] Wai 429, #A8(a).

156. Implicit in the Minister's assessment that 'the interests of the Ngāti Kahungunu claimant community' militated in favour of settling is that it would not be deleterious to that community if the settlement went forward without the support of the claimants in Wai 85 and Wai 429 – or at least not sufficiently deleterious for him to pause. We now outline our views on the role of the Incorporation and Ngāi Tūmapūhia-ā-Rangi in the Māori community that is Ngāti Kahungunu Wairarapa ki Tāmaki Nui-ā-Rua, and the likely result of overriding their views and proceeding to settlement now.

The Wairarapa ki Pouākani Incorporation

157. In the context of the applications for binding resumptions, we learned a lot about the shareholders of this incorporation that we did not know before. We were taken back to the original list of owners of Wairarapa Moana that went before the Native Land Court. Wairarapa Moana was of course arguably the most substantial asset of Wairarapa Māori, and many descend from that original list. (It was actually argued that others should have been on the list, but that is not a matter for us to take further here.) The number of shareholders today is 3,780. We do not know how many of the shareholders affiliate to Ngāti Kahungunu, but on any view of it nearly 4,000 people is a significant proportion of a population of 12,000. The wealth contained within the Incorporation is the biggest asset of Wairarapa Māori. The shareholders in the Incorporation are an important and influential element in te ao Māori ki Wairarapa.

158. We do not know how the shareholders of the Incorporation voted in the 2021 vote. But we note again that, in 2019, only 7.1 per cent of the Settlement Trust beneficiaries were Incorporation shareholders and only 14.4 per cent of the Incorporation shareholders were registered beneficiaries of the Settlement Trust.

159. Counsel for the Incorporation submitted that this low correlation means that a significant number of Wai 85 claimants do not support the Settlement Trust as their representative and a significant proportion of the Wai 85 claimants did not participate in the 2021 vote. Those submissions seem to us to have weight.

160. In sum, the Incorporation is an influential player in te ao Māori ki Wairarapa, the Settlement Trust does not have a current mandate to represent its interests in Pouākani in the settlement, and its shareholders have registered with the Settlement Trust in very low numbers. This means not only that most of them are not eligible to vote, but also raises the likelihood that they the shareholders in the Incorporation do not see the Settlement Trust as representing their interests in settlement.

Ngāi Tūmapūhia-ā-Rangi

161. The hapū-by-hapū breakdown of the vote that the Settlement Trust conducted in July-August of this year shows clearly that a majority of Ngāi Tūmapūhia-ā-

Rangi voters voted against the settlement proceeding. They were the only hapū to do so.

162. Ngāi Tūmapūhia-ā-Rangi is a significant hapū of Ngāti Kahungunu. Indeed, in evidence in our resumption application hearing, mātanga and tōhunga Takirirangi Smith cited traditional sources that called Ngāi Tūmapuhia the 'iwi matua' or central lineage, with a number of groups named as its sub-hapū. Today, the Ngāi Tūmapūhia people who are registered beneficiaries with the Settlement Trust number 776, so the population of the hapū is likely to exceed that but we do not know by how much. Ngāi Tūmapūhia spokespeople – Takirirangi Smith, Ian Perry, Patrick (Paddy) Mason, Inia Eruera, Mark Chamberlain and Ryshell Griggs, to name but a few – are prominent figures in te ao Māori ki Wairarapa. All of them, plus a majority of Ngāi Tūmapūhia who voted in the August 2021 approval vote, have demonstrated in various ways that they do not support the Settlement Trust settling with the Crown now. While it is not absolutely clear from any of the evidence that the reason for their not supporting settlement is that they prefer the litigation path that the Wai 429 claimants embarked upon, it is likely that is the reason. We say that because the settlement package has improved since 2018, and only Ngāi Tūmapūhia voters can be seen to have rejected the settlement. We consider that support for the litigation path is not the inevitable inference, as Mr Cornegé submitted, but it is a reasonable inference.

163. The Crown has continually questioned whether the claimants in Wai 429 really represent Ngāi Tūmapūhia. It is true that there have been issues over a long period about who can really claim to represent their interests. However, Wai 429 has since 2017 championed litigation in favour of settlement, and it appears from the hapū breakdown that the majority of Ngāi Tūmapūhia are with them on that. The hapū-by-hapū vote breakdown, combined with the Crown's mistaken estimation of the prospect of Wai 429 deriving benefit from the litigation (discussed further below), really scupper the Crown's arguments in justification for its cutting off the litigation path and insisting that the Settlement Trust holds Ngāi Tūmapūhia's mandate.

164. We note that at the hearing Crown Counsel said that until last week the Crown was unaware of the existence of the hapū-by-hapū breakdown of voting. The Settlement Trust did not share the information with the Crown, it seems although it is annexed to the affidavit of Mr Te Whaiti. Because the Crown did not know about it, it follows that they could not inform the Minister that a majority of Ngāi Tūmapūhia had voted against the settlement. Mr Irwin said that the Crown remains of the view that the Wai 429 claimants had not demonstrated that they exercise authority for the Ngāi Tūmapuhia-ā-Rangi hapū.

The Minister's assessment that he was justified in ending the litigation

165. The Minister considered that a reason for progressing to settlement over the objections of the Wai 429 and Wai 85 claimants was that they would not

succeed in the litigation that they want to pursue.[172] His position reflected the advice he had been given – which, in our view, was flawed. The High Court appears to share our view. In the injunction proceedings that Ngāi Tūmapūhia-ā-Rangi commenced immediately before our hearing, the High Court queried the Minister's assessment that the hapū 'are not and could not be appropriate recipients of the resumable land' as a result of what we said in our preliminary determination. Cooke J said:[173]

> I accept that this may involve a misunderstanding. As a consequence of this Court's decision, the Tribunal's decision was set aside. The Court found that the Tribunal had failed to exercise its powers reflecting the close association between the resumption remedy and mana whenua rights. Given that Ngāi Tūmapūhia-ā-Rangi's position in claiming resumption may now be stronger. And the position may change again following the appeal to the Supreme Court. To consider the claim has hopeless, and that Ngāi Tūmapūhia-ā-Rangi "could not be" an appropriate recipient may involve a misunderstanding.

166. The Court's assessment was that this 'misunderstanding' could not found the base for an injunction. However, our lens is a different one of course. We are considering the situation in light of the principles of the Treaty of Waitangi. We must look at the claims of the Incorporation and Wai 429 to be able to exercise rangatiratanga to choose their own path. We must also assess the Crown's kawanatanga interests, which Minister Little expressed in his letters to these claimants. If his exercise of executive discretion was based on misunderstandings on key issues, that will of course influence the balancing exercise in which we are engaged.

167. We agree with the Wai 429 claimants that the High Court's reference to paragraph 283 of our preliminary determination does not mean that our assessment of Wai 429 entitlement to binding recommendations survives.[174] Rather, our preliminary determination has been set aside. The High Court has commented that Wai 429's case is, if anything, stronger now.[175] The Supreme Court has implicitly recognised that Wai 429 has a case worth hearing, and (as the High Court noted), all of these matters are now before the Supreme Court.[176] We cannot predict what approach that court might take. The situation of Wai 429 could conceivably be better than it is in now, and better than it was following our preliminary determination. The prospects for the Wai 85 claimants are also uncertain. But in both cases, the Crown cannot justify its prediction of inevitable failure, upon which the Minister appears to have relied and which is relayed in his letters to the claimants.

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[172] Wai 3058, #A1(a) at 17 – 19; & Wai 429, #A4(a) at 3 – 5.

[173] *Griggs and Chamberlain on behalf of Ngāi Tūmapūhia-ā-Rangi Hapū v Attorney-General* [2021] NZHC 2913 at [45].

[174] *Mercury NZ Ltd v Waitangi Tribunal* [2021] 2 NZLR 142.

[175] *Griggs and Chamberlain on behalf of Ngāi Tūmapūhia-ā-Rangi Hapū v Attorney-General* [2021] NZHC 2913 at [45].

[176] *Griggs and Chamberlain on behalf of Ngāi Tūmapūhia-ā-Rangi Hapū v Attorney-General* [2021] NZHC 2913 at [45].

Conclusion

168. In respect of the Minister's assessment that he was justified in ending the litigation, we find:

(a) The mechanism in legislation to enable claimants to seek binding recommendations was enacted as part of a promise in clause 6 of the Forests Agreement, which provided:

> The Crown and Māori agree that they will jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest reasonable period.

(b) For the Crown to act to extinguish applications for binding recommendations while the process is in train is 'the antithesis of the promise it made in 1989'.

(c) If claimants choose to pursue their claims through applications for binding resumption, that is an expression of their tino rangatiratanga that the Crown should not lightly override.

(d) The Crown previously agreed, when the claimants applied to the Tribunal for binding recommendations, that it would delay settlement until those proceedings were resolved.[177] There is no or insufficient reason for the Crown now to resile from that position.

(e) The Crown's assessment that the Wai 85 and 429 cannot succeed in the litigation they want to pursue is unsafe. We cannot know now where the Supreme Court's decision might take them.

(f) This assessment was a plank on which the Minister's decision to proceed to settlement relied, and the decision is as a result flawed.

(g) Neither the High Court nor, apparently, the Supreme Court have assessed their chances as hopeless. Indeed, Justice Cooke said very recently in *Griggs and Chamberlain v Attorney-General* that the prospects for Wai 429 may have improved as a result of the High Court's quashing our preliminary determination.

(h) In the Supreme Court, seeking to 'leapfrog' the Court of Appeal in the appeal process, the appellants advanced their application on the basis that the appeals raised significant legal issues relating to tikanga and the Treaty of Waitangi, and said that the proposed settlement would extinguish their claims in the Tribunal. The Supreme Court granted the leave sought. The approved question is whether the High Court's decision was correct.

(i) It is a necessary inference from the Supreme Court's decision that it did not regard the appeals as meritless or futile. The leave granted to leapfrog the Court of Appeal is rarely obtained. The Supreme Court must have

[177] Wai 863, #2.636.

considered that there were important matters to be tried, consistently with the provisions of the Senior Courts Act 2016 in section 74 (1) and (2)(a).

169. As to the Crown's assessment of the credentials of the Wai 429 claimants and the Wai 85 claimants to be taken seriously as objectors to the settlement proceeding, its principal failure was in not taking into account all of the relevant matters. It said to us in submission that the size of objecting groups matters, and yet here the objecting groups, especially taken together, are sizeable. In relation to the relevant population as a whole, they comprise more than a third of those whose claims will be settled. Moreover, they are groups of mana led by people of mana.

170. In our judgement, knowing Ngāti Kahungunu ki Wairarapa ki Tāmaki Nui-ā-Rua as we do, a settlement that Ngāi Tūmapūhia-ā-Rangi do not support, that the leaders of the Incorporation do not support, where only 14 per cent of the shareholders in the Wairarapa Moana ki Pouākani Incorporation are registered with the Settlement Trust and entitled to vote, and which settles both Ngāumu and Pouākani interests without a mandate from the claimants in Wai 429 and Wai 85, is not a settlement whose advancement now is in the interests of Ngāti Kahungunu. Although the long wait for settlement is certainly an important factor – and we do understand the need for assets and advancement for Māori in the Wairarapa – we are also very concerned about whanaungatanga. All of these people are closely related. They have been divided since shortly after settlement negotiations began. There is no doubt in our minds that proceeding to settlement without properly addressing those differences first will drive the wedge deeper. The mamae will continue and get worse, as Takirirangi Smith says in his evidence:

> The pouritanga experienced by our tīpuna as a result of the Crown's breaches of te Tiriti has been transmitted through generations. The premature settlement of our claims by the Crown without our consent will compound the impacts we as a hapū have already experienced and it will add to the intergenerational trauma that is being transferred onto our mokopuna.[178]

171. The Minister's assessment that delaying settlement would cause 'considerable prejudice and cost to iwi' does not appear to have taken proper account of the countervailing prejudice to the iwi of the factors we have explained in this section. We find that as a result the Crown's assessment of these factors was flawed and unfair.

Obligation to negotiate with Rangitāne in good faith

172. The trustees of the Rangitāne Tū Mai Rā Trust allege that, when Rangitāne settled its historical claims against the Crown in 2016, the Crown agreed to provide additional joint redress to Rangitāne and Ngāti Kahungunu, enabling the two groups to share responsibility for Wairarapa Moana and the Ruamahanga River (in which they both have interests). However, the

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[178] Wai 429, #A3(a) at [44].

claimants say the Crown has failed to keep this promise. It has instead offered an extra $5 million in redress directly to Ngāti Kahungunu, bypassing Rangitāne. Counsel told us that a Joint Redress Bill giving effect to this arrangement will be introduced into Parliament imminently, soon after the settlement bill. According to the claimants, the Crown's actions in respect of the Joint Redress Bill represents another breach of Treaty principles, and will significantly prejudice Rangitāne and others if it is allowed to stand.

173. Counsel for Rangitāne does not say in submissions that the terms of the Rangitāne Settlement Deed actually give the Crown flexibility about when the shared redress is provided and about when the legislation is enacted.[179] Thus, it seems to us that the Crown's actions as to enacting legislation for the shared redress, and providing the shared redress, are within the scope of what the Rangitāne Deed of Settlement allows. However, clause 7.6 of the deed says that the Crown will continue to negotiate with both tribes' governance entities 'to agree, to the satisfaction of those parties' upon the components of a shared redress so that it is set out in full in the Deed of Settlement with the Settlement Trust, and the shared redress legislation.

174. The Crown outlined in its submissions its view that 'The redress [that is, the extra $5 million] did not involve any amendment to the joint redress negotiated with both iwi.'[180] It was 'negotiated with Ngāti Kahungunu in the context of Nāgti Kahungunu's claims'.[181] While the Crown may be strictly correct when it characterises the $5 million as redress provided in the Ngāti Kahungunu settlement, this approach does not bear the hallmarks of 'utmost good faith' in dealings with the Treaty partner, as the principle of partnership requires – and actually, as clause 7.6 of the Rangitāne Deed of Settlement contemplates. If the Crown had said to Rangitāne when negotiating that deed, 'oh, you realise though that we could provide redress concerning Wairarapa Moana directly to Ngati Kahungunu without talking to you?', Rangitāne would have protested. Haami Te Whaiti, speaking for the Settlement Trust, said in his affidavit that the 'additional $5 million to assist in restoring Wairarapa Moana' was 'not joint redress' but 'a payment that the Settlement Trust bargained for and the mana for the payment is ours'. He said 'it has nothing to do with Rangitāne – who already have their settlement. That is why it's being paid to us, not Rangitāne.'[182] He went on to say that he had explained this view to Tipene Chrisp of Rangitāne 'but he did not accept this was the position'.[183] Quoting from Mr Te Whaiti's affidavit involves no criticism of him. We include it simply to outline what should have been blatantly obvious to the Crown: Ngāti Kahungunu and Rangitāne were not going to agree about this. The Crown, in settling with Ngāti Kahungunu, ought to have been aware of the interests at

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[179] Rangitāne o Wairarapa and Rangitāne o Wairarapa and Rangitāne o Tamaki nui-ā-Rua Deed of Settlement of Historical Claims dated 6 August 2016 at cl 7.7.
[180] Wai 3058, #3.3.2; Wai 429, #2.61; & Wai 3068, #3.3.2 at [69.4].
[181] Wai 3058, #3.3.2; Wai 429, #2.61; & Wai 3068, #3.3.2 at [69.4].
[182] Wai 3058 #A7; Wai 429, #A12; & Wai 3068, #A4 at [37 – 39].
[183] Wai 3058 #A7; Wai 429, #A12; & Wai 3068, #A4 at [40].

play and ought to have taken steps to manage the potential for conflict. The Ngāti Awa Settlement Cross-Claims Report, discussing the Crown's duty, to preserve amicable tribal relations, said:[184]

> We think that the Crown should be pro-active in doing all that it can to ensure that the cost of arriving at settlements is not a deterioration of inter-tribal relations. The Crown must also be careful not to exacerbate the situations where there are fragile relationships within tribes.
>
> Inevitably, officials become focused on getting a deal. But they must not become blinkered to the collateral damage that getting a deal can cause. A deal at all costs might well not be the kind of deal that will effect the long-term reconciliation of Crown and Maori that the settlements seek to achieve.
>
> …The simple point is that where the process of working towards settlement causes fall-out in the form of deteriorating relationships either within or between tribes, the Crown cannot be passive. It must exercise an 'honest broker' role as best it can to effect reconciliation, and to build bridges wherever and whenever the opportunity arises.

175. Whatever the Settlement Trust's views were, the whole tenor of the arrangement in the Rangitāne Deed of Settlement was that both iwi have interests in Wairarapa Moana. While Ngāti Kahungunu's interests dominate, the terms of the deed show that, at the time it was negotiated, the Crown agreed with Rangitāne that remedies for the Crown's breaches concerning that moana would be negotiated with both iwi as part of a shared or joint approach to everything.

176. Despite the efforts of Rangitāne to get the Crown to engage with it on these topics (detailed in the affidavit of Mr Te Tau),[185] the Crown did not tell Rangitāne about the discussions it was having with the Settlement Trust about Wairarapa Moana and the Ruamahanga River. It was only via a media article that Rangitāne learned on 22 July 2021 that the Crown had negotiated with the Settlement Trust to provide additional redress in relation to Wairarapa Moana. Rangitāne promptly communicated its alarm and concern to the Crown.[186] In correspondence between the Crown and Rangitāne about what the Joint Redress Bill would say, the Crown provided a draft that showed the additional $5 million in relation to Wairarapa Moana going to the Wairarapa Moana Statutory Board. It was only on 15 October 2021 that Rangitāne became aware that the Crown 'was potentially giving the redress directly to Ngāti Kahungunu instead'.[187] This changed the picture for Rangitāne. They communicated their concerns to Te Arawhiti and asked the Crown to delay signing the Deed of Settlement with Ngāti Kahungunu to enable these concerns to be resolved.

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[184] (Wai 958, 2002) at [4.12].
[185] Wai 3058, #A13; Wai 429, #A18; & Wai 3068, #A10 at [13] and [15].
[186] Wai 3058, #A13; Wai 429, #A18; & Wai 3068, #A10 at [35 – 36].
[187] Wai 3058, #A13; Wai 429, #A18; & Wai 3068, #A10 at [26]; Wai 3058, #A13(a); Wai 429, #A18(a); and Wai 3068, #A10(a) at Exhibit 'F'.

177. The Crown's position is that the provision of further Wairarapa Moana redress to Ngāti Kahungunu does not prejudice Rangitāne. This submission is disingenuous. The Crown knows, or ought to know, about the longstanding ngawē[188] of Rangitāne about its having been subsumed under Ngāti Kahungunu in this rohe for more than a century. The consequences for mana were detailed in the *Wairarapa ki Tararua Report*.[189] How could there be any doubt that providing more redress directly to Ngāti Kahungunu would be a serious matter for Rangitāne? Plainly, it is a serious matter for Ngāti Kahungunu too, as Haami Te Whaiti explained in his affidavit.[190]

178. The seriousness, in terms of mana, of the Crown's decision to comply with the wishes of Ngāti Kahungunu about the direct provision to them of this extra redress, and the failure to keep Rangitāne informed about that, certainly raises questions about whether what the Crown was doing complied with clause 7.6 of the Rangitāne Deed of Settlement, which required it to 'continue to negotiate in good faith' with both settlement entities. In settlement negotiations, the Crown must ensure that it does not enhance the mana of one group to the detriment of another's. This applies equally where, as here, one of the groups has already negotiated its Treaty settlement with the Crown.

179. Moreover, it was a plank of Rangitāne's claims before us in the Wairarapa ki Tararua District Inquiry that the Crown historically looked to Ngāti Kahungunu as tangata whenua in the region and overlooked Rangitāne, causing loss of identity and mana for Rangitāne. We characterised this 'emphasis on Ngāti Kahungunu at the expense of Rangitāne'[191] as 'a consequence of ignorance on the part of persons engaged in Crown business in the twentieth century' and 'an unfortunate by-product of the loss of cultural knowledge that came about as a result of urbanisation and the suppression of the Māori language'.[192] Against this background the Crown should have been at pains to be even-handed in its dealings with both groups about joint or shared redress, and always transparent in its good faith negotiations with both.

180. The Crown's failure to keep Rangitāne informed and its failure to apprehend the importance to Rangitāne of its decision to direct redress concerning Wairarapa Moana to Ngāti Kahungunu directly rather than to the Statutory Board means, in our view, that the Crown did not fulfil the requirement in clause 7.6 of the Rangitāne Deed of Settlement to negotiate with both iwi in good faith about joint or shared redress. These failures breached the Treaty principles of reciprocity, partnership, and active protection. As the Tribunal said in *Te Arawa Mandate Report: Te Wahanga Tuarua*, 'To attain true reciprocity, there must be consultation and negotiation in practice as well as in name'.[193] That Tribunal

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[188] Howl.
[189] (Wai 863, 2010).
[190] Wai 3058, #A7; Wai 429, #A12; & Wai 3068, #A4.
[191] *The Wairarapa ki Tararua Report* Volume III (Wai 863, 2010) at [14.4].
[192] *The Wairarapa ki Tararua Report* Volume III (Wai 863, 2010) at [14.4].
[193] (Wai 1150, 2005) at [5.3.1].

also said 'The principle of active protection arises from reciprocity and partnership.'[194] These come from the well-known passage in the Lands Case where the then-President of the Court of Appeal talked about partnership requiring the Treaty partners to act towards each other 'reasonably and with the utmost good faith', entailing 'responsibilities analogous to fiduciary duties'.[195]

181. We reject the Crown's submission that 'The additional redress does not cause prejudice to Rangitāne'.[196] It did and does. While the Crown accepted that its communication with Rangitāne was unsatisfactory,[197] it did not consider that this breached its Treaty obligations. This response is inadequate. We are satisfied that the Crown's poor communication also breached the principles of the Treaty and prejudiced Rangitāne. As well as the mana issues already canvassed, the Crown's conduct has obliged Rangitāne – although ostensibly a settled party, with these worries behind it – to engage again in proceedings before the Tribunal, with concomitant anxieties and expenses.

182. We also accept counsel's submission that the Crown's actions may strain the relationship between Rangitāne and Ngāti Kahungunu,[198] although we did not have before us evidence that the relationship has actually suffered. However, we are mindful of the injunctions of the Tribunal in *The Ngāti Awa Settlement Cross-Claims Report* where it said:[199]

> …the Crown should be pro-active in doing all that it can to ensure that the cost of arriving at settlements is not a deterioration of inter-tribal relations.

183. Whether or not inter-tribal relations have actually deteriorated here, we see no evidence that the Crown has been pro-active in ensuring that this does not happen.

184. Nor have we seen anything that suggests that the Crown 'intends to change its approach or position'.[200] If the settlement bills are introduced to Parliament before the Crown works with Rangitāne and Ngāti Kahungunu to rectify the situation, there will be enduring prejudice to Rangitāne, and also potentially to other Māori if they see that the Crown is not required to honour the same kinds of post-settlement undertakings that it made to Rangitāne.[201]

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[194] Above at no 155 at [5.3.3].
[195] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).
[196] Wai 3058, #3.3.2; Wai 429, #2.61; & Wai 3068, #3.3.2 at [69.5].
[197] Wai 3058, #3.3.2; Wai 429, #2.61; & Wai 3068, #3.3.2 at [69.6].
[198] Wai 3058, #3.3.5; Wai 429, #2.64; & Wai 3068, #3.3.5 at [3.6 – 3.7].
[199] (Wai 958, 2002) at [4.12].
[200] Wai 3058, #3.3.5; Wai 429, #2.64; and Wai 3068, #3.3.5 at [4.1].
[201] Wai 3058, #3.3.5; Wai 429, #2.64; & Wai 3068, #3.3.5 at [5.4 – 5.5].

PART THREE: FINDINGS AND RECOMMENDATIONS

The claimants in Ngāi Tūmapūhia-ā-Rangi (Wai 429) and the Incorporation (Wai 3058/Wai 85)

185. The Crown said in paragraph 15.2 of its submissions that we should not interfere with mandate decisions except in clear cases of error of process, misapplication of tikanga or apparent irrationality.

186. As far as mandate is concerned, there was error here. If no prior or other actions did so, the claimants' resumption applications certainly removed the Settlement Trust's mandate to negotiate on their behalf with the Crown to settle their claims as they respectively related to Ngāumu Forest and Pouākani. The Settlement Trust therefore had no mandate for these claimants to that extent from February 2017 (the Incorporation) and June 2018 (Wai 429 claimants) respectively. We were not pointed to anything that reversed that removal of mandate at least from those dates. The Crown inferred that the claimants' poor prospects in litigation concerning the resumption applications meant that their mandate in relation to the resumption assets reverted to the Settlement Trust. We see no logical basis for that inference.

187. Under our heading 'The elements of fair process' we laid out the matters that the Crown had to take into account here, and added that its assessment of each element had to be correct. Evaluating the overall fairness of the settlement process, we said we would look at the cumulative effect of the Crown's conduct. Then we would be able to ascertain whether, taken as a whole, the necessary elements of fairness were sufficiently present for the process of settlement to be characterised as fair and in accordance with Treaty principles.

188. We find that overall the settlement process here was not fair, and did not comply with the principles of the Treaty.

189. Having inquired into the necessary elements of fairness, we find:

    Mandate

    (a) As to mandate, the Settlement Trust did not engage in processes to maintain its mandate for the claimants in Wai 429 and Wai 85, and any mandate it might once have had to settle on behalf of these claimants in relation to Ngāumu Forest and Pouākani was in fact removed when the claimants applied to the Waitangi Tribunal for binding recommendations in relation to these whenua;

    (b) Nothing happened to enable the Settlement Trust validly to exercise a mandate in relation to Ngāumu Forest and Pouākani after that time;

    (c) When the Crown and the Settlement Trust signed the deed of mandate on 29 October 2021, the Settlement Trust had no mandate to settle on behalf of Wai 429 and Wai 85;

Ratification

(a) The nature of the vote that the Settlement Trust conducted in July-August 2021 was in form and substance a ratification vote, but there was confusion right up to the time of our hearing last week about its status vis a vis the 2018 ratification vote;

(b) In context the 2021 vote was the more relevant vote, and the Crown's motives for characterising the 2018 vote as the ratification vote despite all that had happened since and the package being different in 2021 are unclear. However, it may be that the Crown wanted to rely on the 2018 vote because the numbers then were slightly better. If so, this depicts the Crown as trying to put a positive spin on levels of support about which it ought to have been genuinely concerned;

(c) The information that the Settlement Trust provided to voters at a time proximate to their exercise of their vote said that ending the litigation would allow settlement to proceed without further delay, but did not explain what was happening in the courts, the interests at play, and the potential outcomes;

(d) A pānui a year earlier did give much more information about this, but in order to properly inform voters at the time of the vote, it would have needed to be explained in the context of the vote that the Settlement Trust was asking voters to cast;

(e) The information that the Settlement Trust provided in various materials at the time of the vote, including the video that was played at hui, was more in the nature of advocacy for the settlement rather than dispassionate information for voters to assess;

(f) The process requirements set out in the 2011 and 2017 deeds establishing the Settlement Trust and the Deed of Mandate were convoluted and contradictory;

(g) It was not apparent which process was the relevant one for the Settlement Trust to follow in 2021, but it appears that – to the extent that any was followed – they followed the one in the 2011 deed that gave the Settlement Trust a let-out clause in the event that the required level of approval was not reached;

(h) The 2021 approval vote did not meet the levels of approval specified in the deeds (variously 70 per cent and 75 per cent). It is not apparent that the Crown and the Settlement Trust entered into the kind of process that the let-out clause envisaged for agreeing between them that nevertheless the level of approval was adequate;

(i) Given the other aspects of poor process, the Settlement Trust's approval vote of 2021 attracted too few eligible voters (a turnout of 31 per cent) and

too few votes in support (68 per cent) for the Crown to conclude that there was sufficient support for the settlement;

(j) Especially, the Crown should have realised that there were serious problems with the representation of the groups objecting among those supporting the settlement;

(k) As regards the claimants in Wai 85, very few shareholders of the Incorporations were registered with the Settlement Trust and so were not entitled to vote;

(l) As regards the claimants in Wai 429, the hapū-by-hapū breakdown of the vote revealed that Ngāi Tūmapūhia-a-Rangi opposed the settlement by a good majority, but this information was not brought to the Crown's attention until last week;

(m)Although Ngāi Tūmapūhia-a-Rangi have longstanding issues internally about representation, the hapū-by-hapū breakdown of the approval vote reveals that they are fairly united in their rejection of the settlement;

(n) An obvious reason for most rejecting the settlement is that Ngāi Tūmapūhia-a-Rangi prefer to pursue the litigation path that Wai 429 initiated before us in 2018;

(o) These circumstances taken together probably indicate that Wai 429 claimants do have the support of most Ngāi Tūmapūhia-a-Rangi;

Other factors on which the Crown's decision relied

(a) The size of the group objecting is important and, together, the objecting claimants comprise a good proportion (more than a third) of the population whose claims the proposed settlement will settle;

(b) Both groups are led by people of mana and are themselves are groups with mana and importance in te ao Māori ki Wairarapa;

(c) Their preference to pursue litigation about Ngāumu Forest and Pouākani is an exercise of their rangatiratanga with which the Crown should interfere only for the strongest possible reasons;

(d) Its reasons for electing to end the litigation do not meet that description;

(e) Allowing the litigation to run its course may have the effect of allowing the parties to work together to resolve a number of ancillary issues, including the underlying interests at Pouākani that have been the subject of conflict and mamae;

(f) The context of the Forests Agreement, and also the settlement of the Lands case, engages the honour of the Crown in allowing claimants who choose to bring applications for resumption to pursue them as they choose;

(g) The Crown’s earlier undertaking not to settle until those applications are resolved was appropriate and should not be revoked;

(h) Moreover, the Crown has not properly assessed the claimants’ prospects in the litigation. The High Court recently commented that the Crown’s assessment of Wai 429’s prospects may be mistaken, and the Supreme Court’s granting of leave to the appellants to leapfrog the Court of Appeal implies that it considers their case has merit. We consider it unwise to forecast failure in our highest appeal court, because such a court may take its own view of matters;

(i) The harm to whanaungatanga and related mamae that will result from settling these claims in the face of the opposition of groups of the size and mana of Ngāi Tūmapūhia-ā-Rangi and the leaders and shareholders of the Incorporation outweighs the advantages of moving now to settle, especially in the context of a rushed and flawed process.

190. In light of these findings that, taken together, depict a flawed and unfair settlement process for which the Crown is responsible, we recommend that the Crown:

(a) postpones the introduction of the settlement legislation;

(b) allows the litigation to take its course;

(c) supports Ngāti Kahungunu Wairarapa ki Tāmaki nui-ā-Rua to engage in processes to resolve the conflicts that have come into focus in the course of the Crown’s engagements with Wairarapa Māori over settlement of their claims;

(d) when appropriate, supports the Settlement Trust to engage in processes to renew its mandate to settle the claims in the rohe; and

(e) pays the costs of the parties incurred in making the applications for urgency and the costs of the urgent inquiry.

Rangitāne Tū Mai Rā Trust

191. We find that the Crown failed in its Treaty duty of good faith to Rangitāne. It did not continue to negotiate with them about Wairarapa Moana in good faith as required by clause 7.6 of the Deed of Settlement. It also breached the principle of whangaungatanga. In its dealings with Rangitāne and Ngāti Kahungunu about Wairarapa Moana, it should have been aware of the implications for the mana of each. Knowing the troubles between the two groups in the past, and the historical errors of subsuming Rangitāne interests under those of Ngāti Kahungunu, the Crown should have taken active steps to ensure that the relationship between them was not harmed by its approach to shared or joint redress. It failed to that.

192. In relation to this claim, we recommend that the Crown:

(a) pauses now to take steps to rectify its Treaty breach in failing to conduct negotiations about redress concerning Wairarapa Moana in good faith in accordance with the principles of the Treaty and with clause 7.6 of the Deed of Settlement;

(b) before any matters are concluded about redress concerning Wairarapa Moana, helps Rangitāne and Ngāti Kahungunu to work together to ensure that any such redress, and the process for agreeing upon it with the Crown, do not jeopardise their internal and external relationships;

(c) reimburses Rangitāne for the costs of this urgent claim and the related application for urgency.

Finally...

193. We have recommended that, in relation to all the claimants, the Crown should now pause to rectify the deficiencies that have made the settlement process we heard about unsound and unfair. If the Crown acts on our recommendations, there are implications for the deed of settlement already signed. It is for the Crown to satisfy itself on what basis and how it should withdraw from the deed of settlement. However, counsel for Wai 429 is right. A deed to settle the claims of parties for which the Settlement Trust had no mandate is legally unenforceable. If the Crown and the Settlement Trust were unable to agree to stop in response to our findings and recommendations, it would be available for the Crown under these new circumstances to withdraw from the deed claiming *non est factum.*

The Registrar is to send a copy of this decision and effect service to:

- Claimants and their associated counsel;
- Crown counsel;
- the Minister for Māori Development;
- the Minister for Treaty of Waitangi Negotiations; and
- those on the notification list for:
    - the Wairarapa Moana ki Pouakani Incorporation (Smiler) (Wai 3058) claim;
    - the MacLean Purchases (Wai 429) claim; and
    - the Rangitane Tū Mai Rā Trust (Wai 3068) claim.

DATED this 18th day of November 2021

Judge C M Wainwright
Presiding Officer
WAITANGI TRIBUNAL

Dr Ruakere Hond
Member
WAITANGI TRIBUNAL

Dame Margaret Bazley
Member
WAITANGI TRIBUNAL