THE PRIORITY REPORT ON THE WHAKATŌHEA SETTLEMENT PROCESS

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Pre-publication Version

WAI 1750

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Kia puta ki te whai ao, ki te mārama

The Honourable Willie Jackson
Minister for Māori Development

The Honourable Andrew Little
Minister for Treaty of Waitangi Negotiations

The Honourable Kelvin Davis
Minister for Crown–Māori Relations

Parliament Buildings
WELLINGTON

10 December 2021

E ngā Minita, tēnā koutou,

Tuiatuia te heke;
Tuituia te kahotū;
He Ariki Tauira.
Ka pikitia te paepae tuatahi –
Ko ia ko ngā kōkōraho a Te Whakatōhea
Te paepae tuarua –
Ko ia ko te whakapae kia haere ngātahi ngā ara e rua
– kia whāia te whakataunga o waenga o Te Karauna me Te Whakatōhea
– kia rongongia e Te Rōpū Whakamana I Te Tiriti ngaua kōkōraho . . .
Te paepae e hira atu ana ia
Ko ia ko te ara ki te hohounga o te rongo . . .
Tuia i runga; Tuia i raro.
Tuia rātou kua wehea atu
Ki te Pō-uriuri –
Ki te Pō-tangotango –
Ki te Pō-i-oti-atu.

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MINISTRY OF JUSTICE
Tāhu o te Ture

Kia wānangananga te Pō
Kia wānangananga te Ao

Tihei mauri ora!

We have the honour to present to you our priority report on the Whakatōhea settlement process, which addresses the two sets of issues set down for inquiry in July this year. The hearings took place between 10-13 September 2021.

Whakatōhea have significant Treaty grievances, including the Crown's waging of war against them and raupatu (confiscation). These have been acknowledged in previous settlements and Tribunal reports as among the worst Treaty breaches in this country's history. The failure of the attempt to settle Whakatōhea's Treaty claims in the 1990s has left a legacy of division which was in part reflected in the claims brought in 2017 about the Crown's recognition of the Whakatōhea Pre-Settlement Claims Trust's mandate. The report on those claims in 2018, the Wai 2662 Whakatōhea Mandate Inquiry Report, found that the Crown had breached the principles of the Treaty of Waitangi in recognising the mandate (including its faulty withdrawal mechanism). The Wai 2662 Tribunal recommended a fresh vote with hapū affiliations recorded so that the will of the Whakatōhea hapū could be tested on the best way forward. This is because Whakatōhea decision-making is traditionally hapū-driven, and the 2016 mandate vote had been an uri vote with no hapū affiliation included.

The results of the vote in 2018 showed significant support for both continued negotiations and an historical inquiry. In response, the Crown offered Whakatōhea a parallel process in which an inquiry could continue alongside (and after) settlement, on the condition that the Tribunal's power to make recommendations be restricted to contemporary (post-1992) issues only. The Crowns proposal was also conditional on the Trust amending the flawed withdrawal mechanism.

The Crown's decision in 2019 to resume negotiations with the Trust on this basis led to further claims being filed with the Tribunal along with applications for urgency in 2020. These claims challenged the Crown's continued recognition of the mandate, its interpretation of the 2018 vote, its decision to resume negotiations, and the offer of a parallel process. The claimants wanted a settlement to be negotiated after a Tribunal inquiry and report. The urgency proceedings were adjourned in October 2020 but the claimants sought to revive their applications in March 2021. By the time these claims were referred to us for consideration (in May 2021), the Crown and the Trust had already decided to initial a deed of settlement and start the ratification process. On the basis that the parties already had

the benefit of the Wai 2662 report on mandate issues, we agreed to hold a rapid priority inquiry into limited issues only. These were: the conditional offer of a parallel process (including whether the Tribunal would be required to suspend the inquiry while a settlement Bill was before the House); outstanding issues in respect of the withdrawal mechanism; and the role of hapū in the ratification process.

On the issue of a parallel process, our view is that the Crown was not in breach of the Treaty for failing to consult more widely than the Trust before making its decision in 2019 to offer Whakatōhea this process. We came to this view because the Crown was informed of the claimants' views (via correspondence) and because the Crown has only made an offer. It is Whakatōhea who will make the final decision through ratification. We also conclude that the Crown has not breached the principle of equity by denying the claimants the right to justice by removing access to the Tribunal for binding recommendations. The key point for us is that hapū and iwi must be able to make a free and informed choice, and the choice of whether to waive the right to seek binding recommendations is for Whakatōhea to make at ratification. This of course requires that Whakatōhea are fully and appropriately informed so as to make that choice.

Overall, we accept that the Crown's decision to offer the parallel process to Whakatōhea is a fair and reasonable response to the finely balanced outcomes of the 2018 vote. There is however one exception. We do not accept that the Crown's condition on the offer, that would see removal of the Tribunal's power to make any recommendations on the historical claims, is a fair and reasonable response having regard to the wishes of those who voted in 2018 to have a Tribunal inquiry that would inform and shape the settlement. The Tribunal's inquiry will be at an early stage when the settlement is completed (on current timeframes). The research has just been commissioned and there have been no hearings. Any report is still some years away. It is likely that hapū-specific and whānau-specific grievances, of a kind that are usually circumscribed or local in nature but strongly felt nonetheless, will arise in these hearings. The Tribunal's power to make specific recommendations in relation to such claims is not binding on the Crown, and the Crown has acknowledged that any risk to the finality of the Whakatōhea settlement from Tribunal findings is low. In all these circumstances, our view is that the Crown could reasonably allow for the possibility of specific recommendations (if such claims are well founded). Otherwise, the Crown runs the risk that the parallel process that is to be offered in conjunction with the settlement will not be seen as meaningful and robust. In our view, this could in itself present a risk to the durability of the settlement.

We do not consider that the Crown is in breach of the principles of the Treaty, however, because it is Whakatōhea who will decide whether the terms of the Crown's offer of a parallel process are acceptable to them. We cannot substitute our judgement for theirs, but we have highlighted the risks and we think that the Crown could reasonably consider changing its position on the issue of specific recommendations. We accept that it would be reasonable to remove the power to make general recommendations on compensation and binding recommendations for the return of land.

We believe the Crown will be in breach of the principle of partnership if the Crown does not ensure that (a) there is a specific proposal about the parallel process for Whakatōhea to vote upon, and (b) there is full information provided from both the Crown and the Trust on the nature and implications of the choice to be made. We make suggestions on these matters in chapter 2.

On the question of the Tribunal's jurisdiction to continue the historical inquiry while a settlement Bill is before Parliament, our view is that the Tribunal is barred under section 6(6) of the Treaty of Waitangi Act 1975 from inquiring into the Treaty consistency of any Whakatōhea settlement Bill unless the Bill has been referred to the Tribunal by Parliament under section 8. We see a district inquiry into the subject matter of the historical claims themselves as being a different matter. We do not see a Tribunal district inquiry into the Whakatōhea treaty claims as the same thing as an inquiry into the Treaty consistency of a Bill that may be introduced to settle those claims. There is no real risk, therefore, of the kind anticipated by the principle of comity, that the Tribunal might trespass on the exclusive jurisdiction of Parliament. This is especially the case since our inquiry is at an early stage and we will not be in a position to report before the settlement Bill is enacted unless the timeframe for settlement changes dramatically. Previous situations, where the Waitangi Tribunal has continued to prepare and release its report while a settlement Bill was before the House, did not give rise to constitutional tension between the Tribunal and the legislature. In the particular case of Whakatōhea, the Crown intends to include a clause in both the deed of settlement and the Bill which will allow the Tribunal to continue our inquiry after the settlement has been enacted. We also note that settlement Bills give effect to deeds and are not usually the subject of significant amendments. In the circumstance it seems to us that continuing with the district inquiry is not inconsistent with the principle of comity.

We accept that we cannot pronounce authoritatively on contested views about the proper scope of our jursidiction. We set out our views so that the parties have clarity about how we intend to proceed. If we are wrong, and the Tribunal is required to stop the inquiry for a year or longer while

the Bill is before the House, this may in itself give rise to a breach of Treaty principles, given the Crown's commitment to provide a parallel process.

In response to the findings and recommendations of the Wai 2662 report, the Crown decided in 2019 to make the resumption of negotiations conditional on the Trust amending the withdrawal mechanism. In our view, the Crown has breached the principles of partnership and active protection because it was directly responsible for the limited and inadequate nature of the amendment made by the Trust in February 2020. The Crown then took no further action until April 2021, despite repeated notice of the claimants' concerns. The action that the Crown did take – asking the Trust to clarify the meaning of its amendment – was insufficient to meet the Crown's duty of active protection. The Trust's explanation of the amendment (to the 5 per cent threshold) put forward in July 2021, does not change our view that the amended mechanism remains unfair.

Those in Whakatōhea who might wish to use the mechanism have been prejudiced by this Treaty breach. They are unable to use the mechanism while the threshold for triggering it is unclear, and we do not accept the Crown's argument that they could simply have tried to use it at any time since the February 2020 amendment. It follows that if the Crown proceeds with ratification now without giving adequate time for further amendments to the withdrawal mechanism and time for the process to be carried out, it would be in breach of the principle of active protection.

On the issue of whether the withdrawal process is still so onerous as to make it unworkable (as the Wai 2662 Tribunal found in 2018), we accept that the Crown has acted consistently with the Treaty by agreeing in principle to provide funding. This has been a welcome change of approach but unfortunately the details of the Crown's funding offer (set out in chapter 3) are confused, inconsistent, and problematic in a number of ways. The most we can say, therefore, is that funding is potentially available, and the Crown is not in breach of the Treaty yet because there is still time for the Crown to act and fix the problems in its funding policy.

On the question of whether the withdrawal mechanism as it currently stands provides appropriately for hapū rangatiratanga, our finding is that the Crown breached the principles of active protection when it decided in 2019 not to require amendments that would make the mechanism more reflective of hapū rangatiratanga. In particular, the Crown failed to require an amendment to the current provisions for an iwi-wide vote, which is a key decision point in the withdrawal process, so as to ensure that the vote will be conducted on a hapū basis. Such an amendment would be essential for a process which appropriately reflects hapū rangatiratanga. On balance, however, we think that the Crown did not breach the Treaty when it decided not to require amendment to the final step in the process

– a decision by the Trust on whether to amend the deed of mandate so as to allow a withdrawal, which is made after consultation with the Crown. This is because there is still time for the Crown to act in a Treaty-consistent manner by ensuring in its discussions with the Trust that the wish of a hapū seeking withdrawal (as recorded in the vote) is properly weighed and respected.

Our recommendations in respect of the withdrawal mechanism are that the Crown make initialling the deed of settlement conditional on two amendments to the withdrawal mechanism in the deed of mandate to (a) clarify the meaning of the 5 per cent threshold so as to provide certainty and (b) to specify that the postal vote may also be an online vote and must include the recording of hapū affiliation, with a process to verify hapū affiliation for non-registered voters. We have also made two suggestions for action to ensure that the Crown avoids Treaty breach: the Crown should amend its funding policy and ensure appropriate funding is available to the correct parties; and the Crown should do what it can in its discussions at the final decision-making part of the withdrawal process to ensure that the rangatiratanga of a hapū that has voted to withdraw is actively protected.

On the role of hapū in the ratification process, the Crown originally approved the Trust's proposal for an iwi-wide vote of individuals to ratify the deed of settlement and post-settlement governance entity. The Crown has recently worked with the Trust to ensure that this vote will also include the recording of hapū affiliation so that the view of each hapū will be known when the Crown decides whether there is sufficient support for it to sign the deed of settlement. This is an important change and we welcome it.

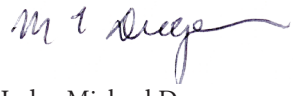
Our view, however, is that this change sought by the Crown does not go far enough to be entirely consistent with the principle of active protection. Settlements have to be seen as durable by both Treaty partners and be founded on a broad base of consent. The Crown's requirement of universal participation in the ratification vote will be met, and has been accorded due respect by the Māori Treaty partner, but the tikanga and traditional decision-making processes of the Māori Treaty partner must also be respected by the Crown. This is especially so when the Crown's Treaty obligation to actively protect hapū rangatiratanga is taken into account. The option of hui-ā-hapū followed by iwi confirmation was the preferred model for ratification in 'Te Ara Tono', the settlement process document developed by the hapū and approved by Whakatōhea in 2007. The claimants argued in our inquiry that the two models of decision-making, hui-ā-hapū and an iwi-wide postal vote (with hapū affiliation recorded) are not mutually exclusive. We agree. The Crown has decided to

accept a ratification process that excludes the traditional process by which decisions were made on the marae in discussion with, and guided by, kaumātua and kuia. Our finding is that the Crown's decision is inconsistent with the principle of active protection of hapū rangatiratanga.

Our recommendation is that the Crown require a further amendment to the ratification strategy so as to provide for hui-ā-hapū after the initialling of the deed but prior to the ratification information hui and the hapū postal vote. This will enable the resolutions of hui-ā-hapū, made in accordance with the tikanga of the hapū, to be circulated among all members of Whakatōhea, who will then have the guidance of the ahi kā before they vote.

Finally, we acknowledge that the Crown has attempted to respect the outcome of the 2018 vote, consistently with the Crown's interest in a timely settlement (an interest shared by the Trust and those who voted to continue negotiations in 2018). The Crown's conduct has fallen short of its Treaty obligations in certain respects but we believe that some relatively small but crucial changes will remedy the prejudice and enable the Crown to settle the long outstanding Treaty grievances of Whakatōhea in a fair and honourable manner.

Nāku noa, nā



Judge Michael Doogan
Presiding Officer

PREFACE

This is a pre-publication version of the Waitangi Tribunal's *Priority Report on the Whakatōhea Settlement Process*. As such, all parties should expect that, in the published version, headings and formatting may be adjusted, typographical errors rectified, and footnotes checked and corrected where necessary. Maps, photographs, and additional illustrative material may be inserted. The Tribunal reserves the right to amend the text of these parts in its final report, although its main findings will not change.

ABBREVIATIONS

AGM	annual general meeting
app	appendix
CA	Court of Appeal
doc	document
DOS	deed of settlement
ed	edition, editor
ltd	limited
NZLR	*New Zealand Law Reports*
OTS	Office of Treaty Settlements
p, pp	page, pages
PC	Privy Council
PSGE	post-settlement governance entity
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SGM	special general meeting
TPK	Te Puni Kōkiri
v	and
vol	volume
Wai	Waitangi Tribunal claim
WMTB	Whakatōhea Māori Trust Board
WPCT	The Whakatōhea Pre-Settlement Claims Trust
WPSCT	The Whakatōhea Pre-Settlement Claims Trust

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the index to the Wai 1750 record of inquiry, a full copy of which is available on request from the Waitangi Tribunal.

CHAPTER 1

INTRODUCTION

1.1 What Is at Issue in this Priority Report?

Whakatōhea are an eastern Bay of Plenty iwi. They have endured some of the worst historical breaches of the Treaty of Waitangi, including war and raupatu (land confiscation).

In more recent times the iwi has been much divided over the path towards settlement of their historical Treaty grievances, and in particular over the question of whether a Waitangi Tribunal district inquiry – now underway – should be allowed to run its course before settlement is concluded. There appears to be significant support within Whakatōhea for completion of the district inquiry, but there is also significant support within Whakatōhea for the work of the Whakatōhea Pre-Settlement Claims Trust in direct negotiations. The Trust has a Crown-recognised mandate to negotiate the settlement of Whakatōhea's Treaty claims.

In 2017, the Tribunal heard under urgency claims concerning the Crown's decision to recognise the Trust's mandate. The Tribunal issued its report, *The Whakatōhea Mandate Inquiry Report*, in April 2018. The Tribunal found that the Crown's recognition of the mandate was in breach of Treaty principles and therefore recommended that Whakatōhea be given a chance to vote on the way forward. The vote was to record the hapū affiliation of voters, and the Crown was encouraged to adopt a patient and generous approach in the event the results of the vote were finely balanced between support for the work of the Trust and a settlement, and support for a Tribunal inquiry. The outcome of the 2018 vote was finely balanced, and, as the Tribunal noted, this highlighted the need to rectify the mandate withdrawal mechanism, which the Tribunal had found to be unfair and unworkable.

Negotiations between the Trust and the Crown have now progressed to the point where they expect to be able to initial a deed of settlement before the end of this calendar year. The district inquiry, on the other hand, is still in the final stages of preparation towards hearings, and completion of the inquiry and publication of a report is still some years away. The Crown's decision to resume negotiations with the Trust in August–September 2019, and its offer of a parallel process in which negotiations would occur alongside the historical inquiry (but with a settlement well before the completion of the inquiry), resulted in applications to the Tribunal for a second urgent inquiry in July 2020 and March 2021. This priority report addresses two sets of issues that arise from these new urgency claims, which were referred to the present Tribunal and granted a priority hearing within the district inquiry in July 2021.

1.1

Priority hearings (and subsequent reports) are granted within an inquiry in order to prioritise specific issues for early hearing. Within this inquiry, a priority report was considered necessary due to the Crown's indication that the initialling of the deed of settlement between Whakatōhea and the Crown – and the subsequent ratification process – could commence in November 2021. The claimants raised several issues, including challenging the Crown's decision to resume negotiations, but only two sets of issues were given priority and are addressed in this report.

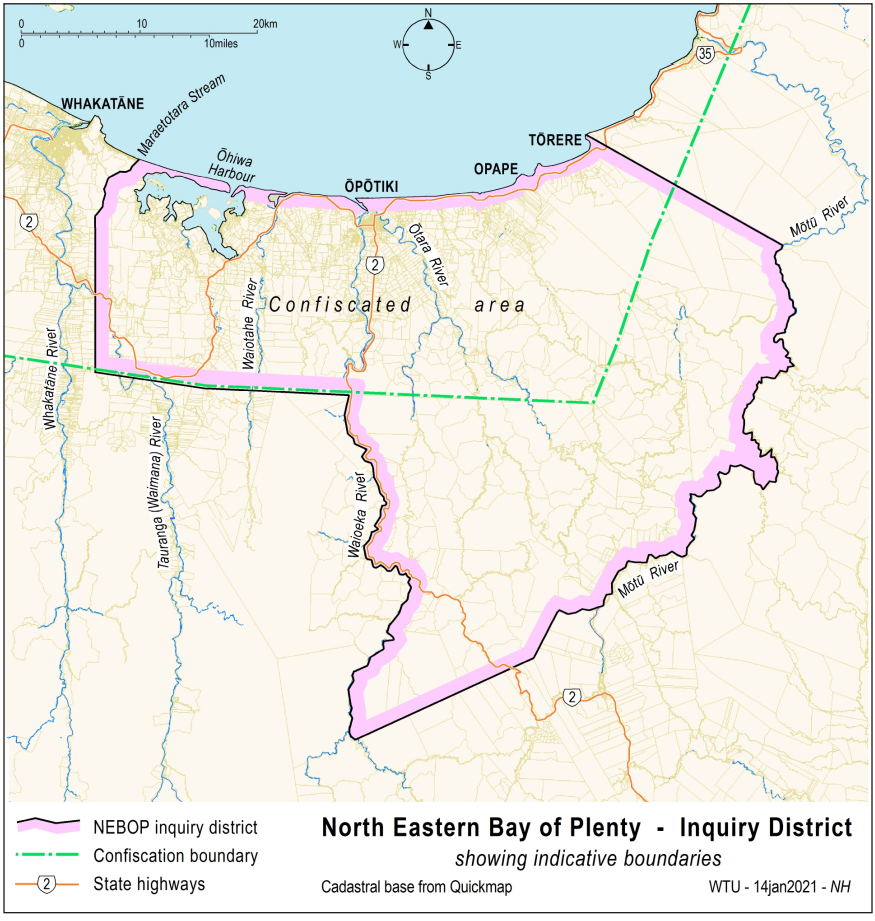
The first set of issues relate to the Crown's offer of a parallel process and the implications of that offer for those who want their historical claims heard in the district inquiry. One of the implications is that the Tribunal's jurisdiction may need to be suspended upon the introduction of a settlement Bill to Parliament, which could significantly delay the inquiry. Secondly, the Crown's offer of a parallel process is conditional on the removal of the Tribunal's power to make any recommendations about the historical claims, which the claimants argued is unjustified and would unfairly restrict the utility of an historical inquiry.

The second set of issues concerns the mechanism in the deed of mandate by which hapū can seek to withdraw from the mandate and the current settlement negotiations, and the question of what role (if any) the hapū will play in the process to ratify the deed of settlement. The claimants argued that the withdrawal mechanism remains unfair and unworkable, despite the findings and recommendations of the *Whakatōhea Mandate Inquiry Report*. They also argued that the Crown agreed to a ratification process that excluded hapū from any significant role, even though decision-making in Whakatōhea is traditionally hapū-driven.

The parties were not in complete disagreement on these issues. The claimants and the Trust, which is an interested party in this inquiry, agreed that the introduction of a settlement Bill would not require the Tribunal's inquiry to be suspended. The claimants and the Trust also agreed that it is not necessary to remove the Tribunal's power to make recommendations after the settlement has been completed. The Crown, however, disagreed with the claimants on all issues. In the Crown's view, the Tribunal's inquiry must cease for the duration of a settlement Bill's passage through Parliament due to parliamentary privilege and the principle of comity (the principle that the Crown and the courts respect each other's exclusive jurisdiction). Also, the Crown maintained that the offer of a parallel process is simply an *offer*, which Whakatōhea will decide upon at ratification. Further, the Crown argued that it did insist on an amendment to the withdrawal mechanism which has addressed what the Tribunal recommended in its 2018 report. The Crown also suggested that the ratification vote includes an appropriate role for hapū because the postal/online vote will record the hapū affiliation of the voters.

The Trust agreed with the Crown on the issues of the withdrawal mechanism and the ratification vote. The Trust's overall position is that the parallel process is a win-win for Whakatōhea, enabling them to gain the benefits of settlement now while still allowing the historical inquiry to continue afterwards.

We turn next to set out in summary form some of the important context for this priority inquiry. We begin with a brief introduction to Whakatōhea and their



Map of the North-Eastern Bay of Plenty Inquiry District
Source: memorandum 2.5.20(a)(i)

constituent hapū and rohe. We then summarise the key events in the settlement negotiation process which have led to the issues being raised in this inquiry. This is followed by the relevant procedural background to this report, along with a fuller description of the issues for determination and the scope of this report. We then provide a brief overview of the parties to this inquiry, before lastly setting out the structure of this report.

1.2 An Introduction to Whakatōhea

The hapū and iwi of Whakatōhea trace their descent from two primary tūpuna: Tūtāmure of the *Nukutere* waka, and Muriwai of the *Mataatua* waka. The following hapū are associated with Whakatōhea: Ngāi Tamahaua (Ngāi Tama), Ngāti Irapuia

(Ngāti Ira), Ngāti Patumoana (Ngāti Patu), Ngāti Ruatākenga (Ngāti Rua), Ngāti Ngahere, Ūpokorehe (Te Ūpokorehe), and Ngāti Muriwai (although we acknowledge a difference of views on whether Ngāti Muriwai is a hapū (or a part of Ngāti Rua) and whether Te Ūpokorehe is correctly described as a hapū of Whakatōhea).[1]

The customary rohe of Whakatōhea hapū and iwi is in the north-eastern Bay of Plenty. Their customary boundaries are shared with Ngāi Tūhoe and Ngāti Awa to the west; Ngāi-Tai and Te Whanau-a-Apanui to the east; and Ngāti Kahungunu, Te Aitanga-a-Mahaki, and Te Whānau-a-Kai to the south.[2]

1.3 Key Events in the Whakatōhea Settlement Process

1.3.1 Introduction

Since the 1990s, Whakatōhea hapū and iwi have been working to settle their claims. In 1996, a proposed $40 million comprehensive settlement of Whakatōhea's historical Treaty claims did not proceed, due to insufficient support from Whakatōhea at the ratification stage. A prolonged period of inter-hapū division followed this outcome. In 2003, a working group of hapū representatives was established to investigate and make recommendations about the process by which Whakatōhea would settle their Treaty grievances. The resulting report, known as 'Te Aro Tono', was adopted by Whakatōhea in August 2007. As part of that process, Whakatōhea decided to pursue direct negotiations with the Crown for a second time. By 2010, three groups were developing mandate strategies to negotiate with the Crown. One was the Whakatōhea Raupatu Working Party (the Raupatu Working Party), and another was the Tū Ake Whakatōhea Collective (Tū Ake). The third group, the Te Ūpokorehe Treaty Claims Trust (Ūpokorehe Claims Trust), went on to develop what was described as a strategy for a 'parallel but non-competing mandate'.[3]

In this section, we provide a brief overview of the urgent inquiry which followed the Crown's decision in 2016 to recognise the Tū Ake mandate, the 2018 vote that was recommended in the *Whakatōhea Mandate Inquiry Report*, and the commencement of the current district inquiry.

1.3.2 The Whakatōhea Mandate Inquiry, 2018

In 2016, the Crown endorsed Tū Ake's mandate strategy and recognised the mandate of the Whakatōhea Pre-settlement Claims Trust to negotiate a settlement with the Crown for all of Whakatōhea's historical Treaty claims. Negotiations to this end immediately followed. The Trust agreed to the Crown's offer of 'accelerated negotiations' under the 'Broadening the Reach' strategy, which resulted in the signing of an agreement in principle in August 2017. However, several groups raised objections to the Crown's recognition of the Trust's mandate and the negotiations. In November 2017, these groups filed an urgency application (Wai 2662)

1. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2018), pp 4, 46–47, 59–74, 89–90, 91
2. Document A3, pp 11–12
3. Memorandum 2.5.34, pp 5–6; Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 2

with the Waitangi Tribunal to hear their claims.[4] The claimants argued that the Crown had failed to actively protect the ability of hapū to exercise their rangatiratanga in choosing their preferred pathway for settlement. The Tribunal heard these claims under urgency in 2017.[5]

In the 2018 *Whakatōhea Mandate Inquiry Report*, the Tribunal found that the Crown 'prioritised its political objective of concluding Treaty settlements by mid-2020 over a process that was fair to Whakatōhea',[6] and that the decision to recognise the Trust's mandate was 'not fair, reasonable, [or] made in good faith and breached the Treaty principle of partnership'.[7]

On the specific issue of the 2016 mandate vote, the Tribunal found that the Crown's reliance on the Trust Board register in 2016 for the purposes of the mandate vote breached the Treaty principle of active protection.[8] It had 'failed to properly inform itself as to the adequacy of the register for the purposes of the vote and to ensure that steps were taken to update the register before a mandate vote was taken'.[9] As a result, 'approximately 3,000 or more eligible voters were denied an opportunity to participate' in the mandate vote.[10] Additionally, the Tribunal found that the Crown acted inconsistently with the principle of active protection by failing to inform itself sufficiently before recognising the Trust's mandate. The Tribunal stated that, in officials' advice to Ministers, '[r]elative support for the mandate was overstated and opposition understated'. The Tribunal also considered that the evidence relied upon by the Crown to assess support to be both insufficient and unreliable.[11] The report observed that:

> Rather than wait to ensure that officials and Ministers were sufficiently informed of the levels of support and opposition, including through a proper assessment of the submissions and an analysis of the results of the withdrawal petition, they moved ahead on the target timeline, which required recognition of the Pre-settlement Trust mandate by December 2016. The Crown has a Treaty duty to actively protect the rangatiratanga of all the groups whose claims will be settled by this mandate. Our view is that the evidence of the support for and opposition to the mandate was too finely balanced to warrant a decision to recognise the mandate at that time.[12]

In the Tribunal's assessment, the Crown also failed to make provisions for mandate voting on a hapū basis, despite the guidance on this matter provided in 'Te Ara Tono', and that this breached the principle of active protection. Among other consequences, this meant that the Crown was not informed as to the collective

4. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 3–4, 18, 92
5. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 1, 3
6. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 85
7. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 92
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10. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 88
11. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 88
12. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 43

degree of support (or otherwise) of Te Ūpokorehe for the mandate.[13] These breaches, the Tribunal found, caused 'significant and ongoing prejudice' to the claimants.[14]

Regarding the withdrawal mechanism, the Tribunal found that the mechanism was not a hapū withdrawal mechanism, that the threshold for activating the mechanism wrongly excluded iwi members who were not on the Trust Board's register (which the Crown conceded), and that the withdrawal process was too onerous and therefore unfair. The Tribunal found that the Crown breached Treaty principles by approving a mechanism that the Crown itself had conceded was unfair.[15] The Tribunal noted that all the problems identified with the withdrawal mechanism needed to be fixed.[16]

Finally, the Tribunal concluded that the Crown's settlement policy had damaged whanaungatanga relationships within Whakatōhea. While the Crown was not wholly responsible for the divisions in Whakatōhea, the breakdown of these relationships was 'aggravated by the Crown's conduct'.[17]

1.3.3 The Whakatōhea iwi-wide vote in 2018

In the *Whakatōhea Mandate Inquiry Report*, the Tribunal considered that Whakatōhea 'must be given an opportunity to express a view' on 'whether or not the current settlement negotiations should proceed'. The Tribunal 'decided against simply recommending a halt to the current negotiations and a rerun of the mandate process'. Instead, it considered that – on balance – 'the better course is to now provide Whakatōhea with an opportunity to decide how they wish to proceed'.[18]

Further, the Tribunal recommended that the vote should be recorded 'on a hapū basis (consistent with the recommendations of "Te Ara Tono")'.[19] The Tribunal suggested that Whakatōhea vote on the following questions:

> Q1 – Do you support the Claims Trust continuing to negotiate to reach a settlement with the Crown of the historical Treaty grievances of Whakatōhea? (Yes/No)
>
> If no to question 1:
>
> Q2 Do you wish to see the current Treaty negotiations stopped in order:
>
> (a) that a mandate process be re-run from the start? (Yes/No); or
>
> (b) that the Waitangi Tribunal can carry out an inquiry into the historical grievances of Whakatōhea? (Yes/No)[20]

13. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 90, 91, 92
14. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 94
15. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 92
16. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 53
17. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 92, 94
18. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 96–97
19. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 97
20. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 97

The Tribunal noted that the wording of these questions could be finalised as necessary.[21]

Subsequently, Whakatōhea hapū voted in October 2018 on the following questions:

> QUESTION 1
>
> Do you support the Whakatōhea Pre-Settlement Claims Trust continuing to negotiate to reach a settlement with the Crown of the historical Treaty claims of Whakatōhea?
>
> QUESTION 2(a)
>
> Do you wish to see the current Treaty negotiations stopped in order that a mandate process be re-run from the start?
>
> QUESTION 2(b)
>
> Do you wish to see the current Treaty negotiations stopped in order that the Waitangi Tribunal can carry out an inquiry into the historical grievances of Whakatōhea?[22]

These questions were accompanied by the following explanatory statement:

> These are the questions you are being asked to vote on. You can answer either question (1) or question (2). Or you can answer both questions. So, even if you answer question (1) with a 'Yes', you can still answer question (2) where you have the two choices found in question (2)(a) and question (2)(b).[23]

This meant that the choice between continued negotiations *or* a rerun of the mandate *or* an historical inquiry was removed. As a result, some voters answered one question and others answered all three. This resulted in some confusion as to how to interpret the outcome of the vote. The Crown interpreted the numbers by comparing the support rate for each question to the overall participation rate, which meant that voters who did not vote on a particular question were counted as an 'informal no' on that question. The claimants, on the other hand, argued that the support for each question should be measured against the number who voted on that question. The results are strikingly different, depending on which assessment method is used.[24] In table 1.1, we set out the results of the vote as interpreted by the Crown, characterising the results as 'yes', 'no', and an 'informal no' (which in reality meant 'no vote').

21. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 97
22. 'Whakatōhea Settlement Process, Declaration of Voting Results', 26 October 2018 (doc B3(a)), p [12]
23. Whakatōhea Pre-Settlement Claims Trust, 'Waitangi Tribunal [Vote] Explanatory Statement', September 2018 (doc B1(a)), p 9
24. Submission 3.3.4, pp 7–8; doc B3, pp 3–6

Q1. Do you support the Claims Trust continuing to negotiate to reach a settlement with the Crown of the historical Treaty grievances of Whakatōhea? (Yes/No)

	Āe/Yes	Kao/No	'Informal no'
Ngāi Tamahaua	298	290	26
Ngāti Ira	151	206	9
Ngāti Ngahere	214	87	17
Ngāti Patumoana	293	136	26
Ngāti Ruatakena	402	137	57
Upokorehe	148	203	14
Ngāti Muriwai	28	133	1
Total	**1,534**	**1,192**	**150**

Q2(a). Do you wish to see the current Treaty negotiations stopped in order that a mandate process be re-run from the start? (Yes/No)

	Āe/Yes	Kao/No	'Informal no'
Ngāi Tamahaua	69	346	199
Ngāti Ira	46	216	104
Ngāti Ngahere	28	146	144
Ngāti Patumoana	41	174	240
Ngāti Ruatakena	84	203	309
Upokorehe	34	244	87
Ngāti Muriwai	35	99	28
Total	**337**	**1,428**	**1,111**

Q2(b). Do you wish to see the current Treaty negotiations stopped in order that the Waitangi Tribunal can carry out an inquiry into the historical grievances of Whakatōhea?

	Āe/Yes	Kao/No	'Informal no'
Ngāi Tamahaua	327	118	169
Ngāti Ira	215	59	92
Ngāti Ngahere	112	81	125
Ngāti Patumoana	167	75	213
Ngāti Ruatakena	209	115	272
Upokorehe	213	71	81
Ngāti Muriwai	139	2	21
Total	**1,382**	**521**	**973**

Table 1.1: Table illustrating the results of the 2018 Whakatōhea vote
Source: 'Whakatōhea Settlement Process, Declaration of Voting Results', 13 November 2018 (doc B3(a))

According to the Crown's interpretation, the results showed that a 'slim majority' of Whakatōhea supported the Trust continuing settlement negotiations with the Crown, and a 'substantial minority' supported stopping to hold a Tribunal inquiry. There was virtually no support for rerunning the mandate process. Having concluded that the outcome was 'finely balanced', the Crown investigated options for how the call for an inquiry could be accommodated with the support for continuing negotiations. Between December 2018 and September 2019, the Crown discussed options with the Trust. The Crown also required the Trust to build its support among Whakatōhea. In August–September 2019, the Crown decided to resume negotiations with the Trust and to offer Whakatōhea a parallel process (an historical inquiry alongside negotiations).[25] This decision was controversial and applications for an urgent hearing soon followed.

1.3.4 The Whakatōhea District Inquiry (Wai 1750)

Following the 2018 vote, counsel for the Whakatōhea and Ngāti Muriwai of Omaramutu Lands and Resources (McMurtie) claim, on behalf of Ngāti Muriwai (Wai 2160) and counsel for the Whakatōhea Raupatu claim on behalf of Whakatōhea hapū (Wai 87), filed a joint memorandum on 16 November requesting an inquiry into Whakatōhea's historical claims. Claimant counsel proposed that the Whakatōhea Mandate Tribunal should be reconvened to hear the claims. They proposed an inquiry with four to five weeks of hearings and only gap-filling research for these claims.[26]

The Tribunal's chairperson, Chief Judge Wilson Isaac, asked the parties to the Whakatōhea Mandate inquiry (Wai 2662) to respond. Of the submissions then filed by claimants, all generally supported a Tribunal inquiry into Whakatōhea's historical claims. However, they opposed the idea of an expedited inquiry and instead suggested 11 hearing weeks and historical research into the claim issues.[27] The Crown did not have any developed views on the optimal form of the inquiry.[28]

On 4 June 2019, Chief Judge Isaac initiated the North Eastern Bay of Plenty district inquiry, stating that it was the 'mode of inquiry best suited' for Whakatōhea. He noted:

> The [2018] voting results are capable of varying interpretations. Although the questions were posed as alternative options, the total votes recorded for each question indicate that a number of respondents voted in more than one category. The questions asked also did not contemplate the option of Treaty settlement negotiations proceeding in parallel with a Tribunal inquiry. There appears to be a general agreement, nonetheless, that the voting results indicate widespread interest in holding a Tribunal

25. Document B3, pp 6–7, 11
26. Memorandum 2.5.1, p 2
27. Memorandum 2.5.1, pp 2–3
28. Memorandum 2.5.1, p 3

> inquiry across all hapū, ranging from a third to two-thirds of votes cast by members of six hapū and 86 per cent for the seventh.[29]

The chairperson accorded the new district inquiry priority within the Tribunal's work programme. He appointed Judge Michael Doogan as presiding officer for the inquiry, along with Mr Basil Morrison, Dr Robyn Anderson, and Associate Professor Tom Roa as members of the Tribunal panel.[30] Ms Prue Kapua and Dr Grant Phillipson were also later appointed to this panel.[31]

We note here that the boundaries for the district inquiry (see Map 1.1) are administrative in nature. The claimants may still seek binding recommendations for the return of Crown Forest licensed lands where they have customary interests outside of those boundaries. such as the Mangatū Forest. This forest is located on the Mangatu and Waipaoa blocks, which fall within the Tūranga (Gisborne) and East Coast inquiry districts (see chapter 2).

We turn next to briefly outline the urgency proceedings that resulted in a priority hearing within the district inquiry.

1.4 Urgency Proceedings Result in a Priority Hearing

Following the 2018 vote, many of the claimants did not believe that there was continued support for the Trust's mandate. In February 2019, the Minister for Treaty of Waitangi Negotiations, the Honourable Andrew Little, announced in a press release that he intended to explore the possibility of an historical inquiry process in parallel to, or subsequent to, negotiations.[32] In September, the Minister wrote an open letter to Whakatōhea announcing that the Crown intended to resume negotiations with the Trust, and to finalise the deed of settlement for ratification alongside the Waitangi Tribunal inquiry.[33] He noted that 'it is very uncommon for these two processes to occur alongside each other', and that with this approach

> the Waitangi Tribunal could complete its inquiry and report on both historical and contemporary grievances. It would be able to make findings and recommendations in relation to the contemporary claims, but only findings relating to the historical claims the legislation will settle . . .[34]

The Crown's decision to resume negotiations was also conditional on the Trust amending the withdrawal mechanism, which occurred in February 2020 and was advised to claimants and the Tribunal in April 2020. Following the amendment

29. Memorandum 2.5.1, p 4
30. Memorandum 2.5.1, pp 5–6
31. Memorandum 2.5.6, p 1
32. 'Next steps for Whakatōhea', press release, 22 February 2019 (doc B8(a)), p 130
33. Submission 3.1.32(a)
34. Submission 3.1.32(a), p [2]

and the continued negotiations with the Trust, various claimant groups applied to the Tribunal for an urgent hearing in July 2020.[35]

The claimants who sought urgency argued that the Crown's continued recognition of the Trust's mandate and its decision to resume negotiations breached the principles of the Treaty of Waitangi.[36] These breaches would 'likely prejudicially impact Whakatōhea claimants to have their claims heard by the Wai 1750 Tribunal'.[37] The claimants rejected the Crown's proposal to have a restricted Tribunal inquiry with no recommendations on historical claims, as set out in the Minister's September 2019 letter. They argued that they had not been consulted on this 'curtailed approach' or on the decision to resume negotiations with the Trust.[38] The Crown's failure to adequately engage with hapū of Whakatōhea, the claimants argued, had worsened divisions within the iwi.[39]

The Tribunal's deputy chairperson, Judge Patrick Savage, summarised the issues as follows:

a. Biased and unbalanced approach to engagement with WPSCT [the Whakatōhea Pre-Settlement Claims Trust] and those who do not support the WPSCT following the 2018 vote;
b. Decision to re-engage in settlement negotiations with the WPSCT with the intention to finalise the deed of settlement 'in a timely fashion';
c. Continued recognition of a mandate that does not have sufficient support;
d. Continued recognition of a mandate with a wholly deficient withdrawal mechanism;
e. Finalisation of the Whakatōhea deed of settlement;
f. Continuation of negotiations with the WPSCT during the national state of emergency occasioned by COVID-19;
g. Proposal to restrict the Waitangi Tribunal's historical inquiry by removing the ability of the Wai 1750, North-Eastern Bay of Plenty Tribunal's ability to make recommendations;
h. Allowance of the claimants' claims being negotiated and settled by the WPSCT when the WPSCT has not maintained its mandate to do so.[40]

Opposing the application, the Crown argued that the Waitangi Tribunal 'should not inquire into the same matters twice'. In the Crown's view, the Tribunal had already considered these issues in the *Whakatōhea Mandate Inquiry Report*.[41] Judge Savage disagreed with the Crown's argument. He noted that the urgency application related to matters following the release of the report in 2018 and,

35. Memorandum 2.5.34, p 7; memorandum 2.5.36, p 1
36. Memorandum 2.5.34, pp 3–4
37. Memorandum 2.5.34, p 4
38. Wai 2961 ROI, statement of claim 1.1.1, pp 13–14
39. Memorandum 2.5.34, p 8
40. Memorandum 2.5.34, p 10
41. Memorandum 2.5.34, p 7

therefore, the Waitangi Tribunal had not addressed these issues. After considering the parties' submissions, Judge Savage did not grant urgency. He commented:

> The conflict within Whakatōhea, while unfortunate, is not exceptional. The political process is quite natural and must be allowed to develop and perhaps be resolved in the usual way. It should not be influenced or thwarted by the Waitangi Tribunal unless that becomes necessary. It has not reached that point.[42]

Then, after noting that urgency 'may well be required at some time in the future', Judge Savage stated:

> I would normally make no further comment. In the circumstances of this case I think I should however, signal to the parties that there may be real problems which require urgency. Examples of these could be the '5% of what?' issue [with respect to the withdrawal mechanism], and also the importance of the answer to question 1 of the vote of October 2018. This vote appears to show that there are three hapū for and against and one deadlocked.[43]

The judge commented that it was 'now the obligation of the parties to settle the issues in good faith' and he adjourned the urgency applications 'until parties have moved further in the process and seek to have the issue reconsidered'.[44]

In March 2021, Mr Te Riaki Amoamo and Ms Mereaira Hata on behalf of Ngāti Rua sought to revive the urgency proceedings. They made their application following a confirmation that the Crown and the Trust had agreed to a settlement deed which (at that point) the Crown intended to initial in March 2021.[45] Responding to the claimants' application, the Crown submitted that the initialling would be followed by ratification, and a vote by Whakatōhea on whether they supported the settlement. Further, the ratification process would include Whakatōhea's 'informed consideration' of the settlement package and the proposed impact of the settlement on the district inquiry. If the deed was ratified by Whakatōhea, the settlement legislation would allow the Tribunal to continue its district inquiry and report on contemporary and historical claims 'but be limited to making findings in respect of Whakatōhea's historical claims.'[46] The claimants, however, challenged the decision of the Trust and the Crown to proceed with the initialling of the deed of settlement.[47] The claimants' key allegations in respect of the negotiations were that:

- the Crown failed to adequately engage with them to work towards a settlement in good faith; and

42. Memorandum 2.5.34, p 31
43. Memorandum 2.5.34, p31
44. Memorandum 2.5.34, p 31
45. Memorandum 3.1.224
46. Memorandum 3.1.230, pp 6–7
47. Memorandum 3.1.224, p 2

- the engagement between the Crown and the Trust failed to meet the aspirations of Ngāti Ruatākenga and other Whakatōhea hapū who wanted to pursue a Waitangi Tribunal inquiry before settlement.

On the issue of the withdrawal mechanism, the claimants argued that the Trust's February 2020 amendment had made the withdrawal process more 'onerous', not less, because it failed to define the revised threshold for activating the mechanism, and because the Crown had accepted this amendment without insisting on the other amendments recommended by the Tribunal. Hence, the withdrawal mechanism was 'unworkable and still does not include a process by which hapū can withdraw'.[48]

Judge Savage declined the renewed applications for urgency on 12 May 2021 on the basis that the current district inquiry was an alternative remedy for the applicants to pursue. He noted that the present panel was in a better position to make the decision regarding the urgency applications, and he therefore referred the matter to this Tribunal and transferred all urgency applications related to the proposed settlement for us to consider.[49] This then led to the grant of a priority hearing, which is discussed next.

1.5 The Priority Hearing and its Parameters

1.5.1 Why a priority hearing was granted on certain issues

On 17 May 2021, the claimants filed a joint memorandum seeking priority within the district inquiry for a hearing on the matters raised in the urgency applications. Claimant counsel submitted that the issues needed to be dealt with before the Crown initialled the deed of settlement, which at that point was scheduled for June 2021.[50] The Crown opposed a priority hearing but also advised that, due to outstanding issues relating to overlapping interests, the initialling of the deed could not occur until August 2021.[51] This gave a little space for a priority hearing, although the anticipated date for initialling has since changed to before Christmas 2021.[52]

On 9 July 2021 we convened a judicial conference to consider the applications. After the conference, we decided that a limited and focused hearing was necessary to investigate two issues arising out of the previous urgency applications. This decision for a strictly limited scope was driven by a variety of factors. First, as we saw it, the Crown already had the benefit of the *Whakatōhea Mandate Inquiry Report* on mandate matters, which had resulted in the 2018 vote. The Crown's decision to resume negotiations with the Trust, while also supporting a Tribunal inquiry, reflected the opinion of a considerable portion of Whakatōhea as indicated by the 2018 vote. Furthermore, the negotiations had reached the point that the Crown

48. Memorandum 3.1.224, pp 4–9
49. Memorandum 2.5.35, pp [3–4]
50. Memorandum 3.1.174, pp 2–3
51. Memorandum 2.5.29, pp 3, 6
52. Memorandum 3.1.301, p [2]

and the Trust were ready to proceed with initialling the deed and the ratification process.[53] Matters had therefore reached the point where the claimants had the following options:

> first, to continue with a Tribunal inquiry but, if the settlement is enacted, a more limited inquiry than was envisaged in 2018; secondly, to exercise the right of hapū to withdraw their mandate from the pre-settlement trust and enter into settlement negotiations at some later date; and, thirdly, to vote against ratification in the vote to approve the deed of settlement.[54]

As Judge Doogan noted, these options were

> not necessarily exclusive but the evidence and submissions indicate that the withdrawal mechanism may not have been amended as required to make it a practicable option for hapū who have the right to withdraw if they wish under the deed of mandate. Furthermore, a more limited Tribunal inquiry without certain recommendatory powers was not an option voted upon by the seven hapū who voted in support of a halt to negotiations while a Waitangi Tribunal inquiry took place.[55]

For these reasons, Judge Doogan confirmed that a focused priority hearing would be undertaken to inquire into these two matters, while simultaneously causing no unnecessary delay to those who wished to proceed with settlement.[56] At the request of the claimants, we also added the issue of the role of hapū in the ratification process.[57]

As set out in section 1.1, the priority issues are:

- whether the inquiry must be suspended while a Bill is before Parliament;
- whether the Crown's offer of a conditional parallel process with limited Tribunal recommendations is consistent with Treaty principles;
- whether the withdrawal mechanism has been amended appropriately so that the Crown's acceptance of the mechanism is now consistent with the Treaty; and
- whether the Crown has accepted a ratification process that accords a role for hapū that is consistent with Whakatōhea tikanga and therefore has complied with the principles of the Treaty.

The Tribunal excluded certain matters from consideration in the priority hearing, including allegations about the Crown's continued recognition of the mandate, the Crown's decision to resume negotiations in 2019, and mandate issues generally as well as the ratification process per se (apart from the role of hapū in

53. Memorandum 2.5.29, p 6
54. Memorandum 2.5.29, p 6
55. Memorandum 2.5.29, pp 6–7
56. Memorandum 2.5.29, pp 6–7
57. Memorandum 2.5.32, p 6

the ratification process). The Tribunal also excluded issues about the right of Ngāti Muriwai to participate.[58] On the latter point, we have since noted that

> issues associated with whether or not Ngāti Muriwai can utilise the withdrawal mechanism, both as a matter of interpretation of the clause and as a matter of practicality, are live issues in the priority hearing.
>
> In addition, the Pre-Settlement Trust's closing submissions should address the issue of how those who identify as Ngāti Muriwai will be dealt with in the ascertainment and verification of hapū in the ratification vote. The Crown's closing submissions should also address the issue of how those who identify as Ngāti Muriwai will be dealt with in terms of ascertaining the degree of support for the settlement.[59]

1.5.2 The priority hearing in September 2021

The earliest that the Tribunal was able to schedule the priority hearing was for 19–20 August 2021, to be held at the James Cook Hotel Grand Chancellor in Wellington. However, on 18 August New Zealand entered a level 4 lockdown due to a community outbreak of COVID-19, and the hearing was consequently adjourned. Following a move to lower alert levels, the hearing was rescheduled to 10 and 13 September 2021.[60] The presiding officer, Crown counsel, and the Crown's witness attended in person. Otherwise, attendance was via Zoom. Due to the pressure of time, the focused nature of the priority hearing, and the situation with COVID-19, no new claimant evidence was heard, although the Tribunal has had the benefit of the claimant affidavits (many with supporting documents) filed in the July 2020 and March 2021 urgency proceedings. Only Dr Jacob Pollock, the Crown's witness, gave evidence and was cross-examined at the hearing. The priority hearing was therefore mostly focused on the detailed opening submissions of counsel. The Tribunal has also consulted the submissions filed during the urgency proceedings, as well as the closing and reply submissions filed after the priority hearing.

Following the priority hearing, the Crown's most recent indication on 15 October 2021 is that the deed of settlement will be initialled sometime before Christmas, with the ratification process due to begin in late January or early February 2022.[61] This has given us more time to complete the priority report than earlier anticipated.

1.6 The Parties to this Inquiry

The Tribunal granted eight claims full party status in this inquiry. Numerous applications for interested party status were also granted. Many interested parties for this inquiry had previously been granted interested party status in either one

58. Memorandum 2.5.29, p 6
59. Memorandum 2.5.44, p 4
60. Memorandum 2.5.42, p 3; memorandum 2.5.44, p 2
61. Memorandum 3.1.301, p 2

or both of the earlier urgency applications in 2020 and 2021.[62] We consider the Whakatōhea Pre-Settlement Claims Trust an interested party for the purposes of this inquiry, as the Trust holds a Crown–recognised mandate to negotiate the settlement of Whakatōhea's claims. Finally, Te Arawhiti, the Office for Māori Crown Relations, is the Crown agency participating in this inquiry.

Appendix I to this report details the full list of claims, claimants, and interested parties to this inquiry. The positions of the claimants, the Crown, and the Trust on the issues for determination in this priority report are set out in more detail in chapters 2 and 3.

1.7 The Structure of this Report

In this introductory chapter, we have set out the key events in the Whakatōhea settlement process, the background to this priority report, the issues for determination, and the parties in this inquiry.

In chapter 2 we address the first set of issues for this inquiry: the Crown's decision to offer a parallel process to Whakatōhea, as a result of which the Tribunal's ability to make recommendations on historical claims would be removed, and (according to the Crown) the district inquiry suspended during the period in which a settlement Bill is before the House.

In chapter 3 we address the second set of issues for this inquiry: the withdrawal mechanism, including the Trust's amendment of the mechanism in 2020 following the Crown's conditional resumption of negotiations in August–September 2019, and the proposed role for hapū in the upcoming ratification process.

Our findings and recommendations (where we have chosen to make recommendations) are made at the end of our discussion of each issue.

62. Memorandum 2.5.33, pp 3–4; memorandum 2.5.33(a); memorandum 2.5.33(b)

CHAPTER 2

THE PARALLEL PROCESS AND ITS IMPLICATIONS

2.1 Introduction

2.1.1 What this chapter is about

In this chapter, we address the priority issues that relate to the parallel process and its implications:

- the Crown's proposal for a parallel process, which would enable an historical inquiry to occur alongside (and after) the settlement of historical claims but would prevent the Tribunal from making recommendations on those claims; and
- the question of whether the inquiry must be suspended while a settlement Bill is before Parliament due to Parliamentary privilege and the principle that the courts (including the Tribunal) should not trespass on matters that are within Parliament's exclusive jurisdiction.

These issues were of major significance to the claimants, who do not want a parallel process but rather a settlement after the inquiry is completed, so that the Tribunal's findings and recommendations will inform the settlement. At the very least, the claimants argued, the Tribunal's power to make recommendations could be preserved by the settlement legislation. Nor do the claimants want their hearings delayed for an unknown period while the settlement Bill is in the House, although they argued that the law does not in fact require the Tribunal to suspend its inquiry once the Bill is introduced.

The Crown and the Whakatōhea Pre-Settlement Claims Trust rejected the claimants' arguments about the parallel process. In their view, it would be a win-win for Whakatōhea. The Crown usually requires claimants to choose between direct negotiations and an historical inquiry, so the rare opportunity to have both simultaneously will be of major benefit to Whakatōhea. Also, the Crown argued that the decision as to whether the parallel process is acceptable to Whakatōhea will not be made by the Crown, it will be made by the whole of Whakatōhea at the end of the settlement negotiations when they vote whether or not to ratify the settlement. The Crown and the Trust disagreed, however, about the issue of Tribunal recommendations. In the Trust's view, no prejudice would arise from allowing the Tribunal to make recommendations after the settlement, whereas the Crown considered that it would be necessary to limit the Tribunal's power in that respect to protect the finality of the settlement. They also disagreed on the issue of whether the Tribunal's inquiry must stop while the settlement Bill is before the House. The Crown argued that Parliamentary privilege and the principle of comity

(exclusive jurisdiction) will require the inquiry to be suspended. The Trust, on the other hand, agreed with the claimants that comity precludes inquiry into the Bill itself but not the historical claims that the Bill will settle.

The context for these priority issues is important to understand before we proceed to our substantive discussion. Parliamentary privilege and the principle of comity are well-established legal principles. The Parliamentary Privilege Act 2014 'promotes the principle of comity', which 'requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges'.[1]

Other matters also form essential context to the current dispute between the Crown, the claimants, and the Trust over the parallel process and its implications. These include:

- Whakatōhea's failed attempt to settle in the 1990s;
- the divisions within and between hapū about the best way to progress the claims;
- the Crown's acceptance of the Trust's mandate in 2016 in breach of the Treaty; and
- the 2018 vote recommended by the Tribunal as a remedy.

Whakatōhea petitioned the Crown in 1914 and 1915 to have their raupatu grievances addressed, and ever since they have been attempting to get redress from the Crown.[2] A commission of inquiry was proposed in the 1920s. At that time, Sir Apirana Ngata stated that he doubted whether the grievances could be removed but the 'injustice has to be removed, and one of the greatest injustices is that investigation has until now been consistently refused'.[3] The resultant Sim commission proved disappointing, however, and it found that the raupatu in the Bay of Plenty was justified by resistance to Crown forces.[4] Further petitions from Whakatōhea followed and a relatively small payment was made in compensation, to be administered by the Whakatōhea Māori Trust Board.[5] The next major attempt to settle the long-standing grievances occurred in the 1990s, when Whakatōhea chose the path of direct negotiations with the Crown. This resulted in a comprehensive settlement offer of $40 million. The proposed settlement reached the ratification stage but was rejected by Whakatōhea.[6] In 2003, Whakatōhea began the work to prepare guiding principles and a new plan for settlement.[7] The resulting plan, known as 'Te Aro Tono', was adopted by Whakatōhea in August 2007, and the decision was

1. Parliamentary Privilege Act 2014, s 4(b)
2. Submission 3.3.24, p 5
3. Sir Apirana Ngata, 28 September 1925 (doc A11, p 73)
4. Document A11, pp 74–76
5. Document A11, pp 77–88
6. Document A11, pp 100–108
7. Document B36, pp 1–6

made to pursue direct negotiations. The nineteenth-century raupatu and the failed settlement in the 1990s, however, have cast a long shadow over this latest attempt.

The details of the current negotiations and the attempt of two entities to obtain a mandate to represent Whakatōhea (and a third seeking to represent Te Ūpokorehe) have been recited in the Wai 2662 Tribunal's *Whakatōhea Mandate Inquiry Report*. In brief, the mandate of the Whakatōhea Pre-Settlement Claims Trust was recognised by the Crown in 2016 but the Tribunal found that the Crown's recognition of this mandate had breached the principles of the Treaty.[8] Whakatōhea were divided over the mandate, including on which settlement path to take (direct negotiations or the Tribunal). The Wai 2662 Tribunal recommended that the Crown suspend negotiations with the Trust, maintain the base line redress offered to Whakatōhea in the agreement in principle, and await the outcome of a vote by Whakatōhea to 'decide how they wish to proceed'.[9] The Tribunal recommended that Whakatōhea vote on whether they supported the Trust continuing with negotiations, whether they wanted to rerun the mandate process, or whether they wanted an historical inquiry in the Waitangi Tribunal.[10]

The 2018 vote showed that Whakatōhea remained divided: the outcome showed significant support for both continuing negotiations and an historical inquiry. Since the Crown was obliged to respect the outcome of this vote, the result has been an offer to Whakatōhea that they can have both through a parallel process but with conditions, including that the Tribunal will not be able to make recommendations on the historical claims after the settlement is completed. It is this offer which has generated the concerns addressed in this chapter. These matters are discussed more fully below.

Having set out what this chapter is about, we turn next to a summary of the Treaty principles relevant to the issues before us, before briefly outlining some key introductory points about the jurisdiction and core functions of this Tribunal. In section 2.2, we analyse the issues in respect of comity and whether the Tribunal is required to suspend its inquiry while the settlement Bill is before Parliament. In section 2.3, we address the Crown's proposal for a parallel process, the claimants' concerns about that proposal, and the question of whether it is necessary for the Crown to limit the Tribunal's recommendatory power as a consequence of settlement prior to completion of the historical inquiry. We set out our conclusions and findings at the end of each section.

8. Waitangi Tribunal, *Whakatōhea Mandate Inquiry Report* (Legislation Direct: Lower Hutt, 2018), pp 85–90, 92–93
9. Waitangi Tribunal, *Whakatōhea Mandate Inquiry Report*, pp 96, 99–100
10. Waitangi Tribunal, *Whakatōhea Mandate Inquiry Report*, p 97

2.1.2 Treaty principles

In this section, we introduce the Treaty principles – and the obligations or standards arising from them – that we consider most relevant to the issues addressed in this chapter, beginning with the principle of partnership.

2.1.2.1 *Partnership*

As many Tribunal reports and court decisions have found, the Treaty of Waitangi 'signified a partnership between Maori and the Crown', which required the Treaty partners to 'act towards each other reasonably and with the utmost good faith.'[11] This requirement applies particularly to all aspects of the settlement negotiations, which are designed to restore the damaged Treaty relationship between the Crown and Māori on a sound foundation of partnership and consent. In the *Te Arawa Mandate Report: Te Wahanga Tuarua*, the Tribunal found that as a Treaty partner, the Crown should take account of the unique circumstances of a group or groups in a settlement negotiation and be prepared to vary its standard policies as needed:

> Both Treaty partners should make reasonable decisions during the settlement process. In order to ensure that their future relationship is mutually beneficial, the Crown should not pursue its nationwide Treaty settlement targets at the expense of some of its Treaty partners. Where the particular circumstances of a group or groups warrant a more flexible approach, the Crown must be prepared to apply its policies in a flexible, practical, and natural manner.[12]

Such flexibility in the application of policies fosters reciprocity, and helps to ensure the durability of Treaty settlements.[13]

The obligation to act in the utmost good faith has long been recognised as a central tenet of the principle of partnership.[14] In the *Whakatōhea Mandate Inquiry Report*, the Tribunal stated: 'The right thing to do is to honour the Treaty commitment and not let political expediency subordinate the difficult (and at time onerous) task of upholding and maintaining a relationship based on utmost good faith.'[15] In addition, the Crown's partnership obligations require it to ensure that undertakings given to Māori as part of the negotiations (and accepted by Māori in good faith) are carried out. This would include the Crown's offer to Whakatōhea of a parallel process in which Whakatōhea would have the benefit of both a timely settlement and a comprehensive inquiry into their historical and contemporary grievances.

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11. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 667
12. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 72
13. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua*, p 71
14. Waitangi Tribunal, *Whakatōhea Mandate Inquiry Report*, 2018, p 85
15. Waitangi Tribunal, *Whakatōhea Mandate Inquiry Report*, 2018, pp 85, 95

The Treaty partnership also requires the Crown to make informed decisions, and sometimes this will require consultation with Māori.[16] As the Tribunal stated in the *Napier Hospital and Health Services Report*, partnership 'can scarcely proceed in ignorance of the views and wishes of the Maori partner'.[17] Consultation 'can cure a number of problems' whereas a failure to consult may 'lead to a confrontational stance' that could have been avoided, and result in foreclosing on options when 'areas for compromise remain wide'.[18] True consultation also means that the consulting party must keep an open mind, take 'serious account' of the feedback it receives, and be prepared to change its proposals after consideration of the consultee's views. Consultation does not equate to negotiation but consultation tends to at least seek consensus.[19] We refer to the importance of consultation here because the Crown and the Trust were not in negotiations at the time the Crown made the decision to offer Whakatōhea a parallel process. In the absence of negotiation, consultation is required.

2.1.2.2 *Active protection*

On the principle of active protection, the Te Tau Ihu Tribunal stated:

> The Crown's duty to protect Maori rights and interests arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure the Treaty's acceptance, and the principles of partnership and reciprocity. The duty is, in the view of the Court of Appeal, 'not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable', and the Crown's responsibilities are 'analogous to fiduciary duties'. Active protection requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.[20]

The principle of active protection extends to the protection of hapū interests and hapū rangatiratanga in settlement negotiations processes, including the Crown's consideration of 'voting procedures and their outcomes'.[21] Further, the Crown must actively protect the rangatiratanga and tikanga of all hapū, not just those that

16. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 23
17. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), pp 67, 71
18. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 87
19. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 70
20. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4
21. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 23–25, 30

support their claims being negotiated by the mandated entity.[22] These two points are particularly important in the present case. This is because the outcomes of the 2018 vote required the Crown and Whakatōhea to develop and agree on a way to provide for the wishes of all the hapū as expressed in that vote.

2.1.2.3 *Equity*

The principle of equity arises from 'the promise in article 3 of the rights and privileges of British subjects'.[23] This principle requires the Crown to 'apply the protection of citizenship equally to Maori and non-Maori, and to safeguard Maori access to the courts to have their legal rights determined'.[24] The Foreshore and Seabed Tribunal found that the rule of law is a 'fundamental tenet of the citizenship guaranteed by article 3', and that this included the right of access to the courts.[25] The principle of active protection is also relevant here:

> active protection also required the Crown to ensure 'access to the courts in appropriate cases'. Without such access, '[t]he danger is that Maori interests will become, as they have been before, overly susceptible to political convenience or administrative preference'.[26]

According to the claimants, the 'right to justice' extends to access to the exclusive jurisdiction and core functions of the Waitangi Tribunal.[27] The Crown, however, submitted that this argument was 'not supported by authority and Tribunal jurisprudence which approves of Crown settlement policy and the fact that, in some instances, settlement may proceed without a Tribunal inquiry'.[28] We consider these issues further below.

2.1.2.4 *Redress*

The Foreshore and Seabed Tribunal defined the principle of redress as follows:

> Where the Crown has acted in breach of the principles of the Treaty, and Maori have suffered prejudice as a result, we consider that the Crown has a clear duty to set matters right. This is the principle of redress, where the Crown is required to act so as to 'restore the honour and integrity of the Crown and the mana and status of

22. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2015), p 31
23. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 384
24. Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p 94
25. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p 136
26. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Lower Hutt: Legislation Direct, 2020), p 22
27. Submission 3.3.20, pp 3–4
28. Submission 3.3.23, p 13

> Maori'. Generally, the principle of redress has been considered in connection with historical claims. It is not an 'eye for an eye' approach, but one in which the Crown needs to restore a tribal base and tribal mana, and provide sufficient remedy to resolve the grievance. It will involve compromise on both sides, and, as the Tarawera Forest Tribunal noted, it should not create fresh injustices for others.[29]

The Tribunal stated in *Te Raupatu o Tauranga Moana* that the Crown has to consider redress when the Tribunal finds that 'claimants have been prejudiced by an action or omission of the Crown'. The Crown's decision in 1985 to extend the Tribunal's jurisdiction back to 1840 was in itself 'a recognition that the Crown should redress past breaches of the principles of the Treaty'.[30] It is important to note here that, since 1989, redress has also been available through direct negotiations without claims being heard by the Tribunal first. These matters are discussed further below.

2.1.3 The jurisdiction and core functions of the Waitangi Tribunal

Any discussion of the issues laid out for consideration in this chapter must begin with some preliminary jurisdictional 'scene setting'. In this section we therefore discuss the unique jurisdiction and the core functions of the Waitangi Tribunal.

2.1.3.1 *The Waitangi Tribunal's jurisdiction is statutory*

The first point to make is that the Tribunal's jurisdiction is statutory; it does not have the inherent jurisdiction of a superior court. The Tribunal was legislated into existence under the Treaty of Waitangi Act 1975 and, as such, it is within Parliament's power to amend the Tribunal's jurisdiction. The Tribunal's recommendatory powers under section 6(3)–(4), for example, were later amended by the insertion of section 6(4A), which prevented the Tribunal from making any recommendations for the return of any private land to Māori or for the Crown to acquire any private land for that purpose. As a result of the State-Owned Enterprises Act 1986 and the Crown Forest Assets Act, further amendments were made to the Treaty of Waitangi Act to insert binding recommendatory powers.[31] We underline that any such decisions of Parliament are entirely within its purview, and it is not our function as a Tribunal to take issue with the right of Parliament to make such decisions. What Parliament gives, it may also take away.

This does not mean, however, that the Tribunal cannot hear claims about Crown proposals to amend the Tribunal's jurisdiction. In the fisheries settlement inquiry on the 'Sealord deal', for example, the Tribunal heard claims that (among other things):

29. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 135
30. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), p 24
31. Treaty of Waitangi Act 1975, ss 8A-8H

> the tribes would be prejudiced by the repeal of the tribunal's jurisdiction to hear their cases . . . since their side of the story would not be known. Claimants were anxious to have their claims heard, to explain their particular circumstances, the places of special significance in their areas, the impact of quota management on them and their own plans to develop into fishing.[32]

On this matter, the Tribunal found that 'it would be impractical for the tribunal to hear each and every fishing claim', and that the better course was therefore to seek a fisheries allocation scheme that was 'fair to everyone, without hearing every claim'.[33]

The second point to make here is that the Tribunal cannot pronounce authoritatively on the contested issues of law before us. We are not a court of law and have no jurisdiction to decide contested points of law. What we attempt to outline in this chapter, therefore, is our *own* understanding of our jurisdiction. This is so that parties may understand how we intend to proceed.

2.1.3.2 *The core functions of the Waitangi Tribunal*

As the preamble to the Treaty of Waitangi Act 1975 states, it was considered 'desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles'. The Tribunal is required to inquire into every claim submitted, subject to certain limited exceptions and the right to defer inquiry into the claims in certain cirucmstances.[34] The Tribunal was given, for the purposes of the Act, 'exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts [in Māori and English] and to decide issues raised by the differences between them'.[35] The first of the Tribunal's core functions is to make findings on whether an alleged Crown act or omission, policy, practice, or an Act of Parliament is inconsistent with the principles of the Treaty, and – if so – that the claimants have been prejudiced thereby. If a claim is adjudged to be well-founded in this respect,[36] then the Tribunal may carry out its second core function, which is to make recommendations. Section 6(3) provides:

> If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

32. Waitangi Tribunal, *The Fisheries Settlement Report 1992* (Wellington: GP Publications, 1992), p 6
33. Waitangi Tribunal, *The Fisheries Settlement Report 1992*, p 20
34. Treaty of Waitangi Act 1975, s 6(2), s 6AA, s 7
35. Treaty of Waitangi Act 1975, s 5(2)
36. Treaty of Waitangi Act 1975, s 6(1)–(3)

Section 6(4) states that a 'recommendation may be in general terms or may indicate in specific terms what action in the opinion of the Tribunal the Crown should take'. The Tribunal's recommendatory power can only be exercised after findings of breach and prejudice have been made.

As noted above, the Treaty of Waitangi Act has been amended since 1985 to include the power to make binding recommendations for the return of State-owned enterprise lands or Crown Forest licensed lands to Māori. In *Haronga v Waitangi Tribunal*, the Supreme Court found that if a claim has been adjudged well-founded, then the Tribunal must decide whether or not to grant any binding recommendations sought by the claimants; 'it was a jurisdiction that it could not decline'.[37]

Finally, in respect of the Tribunal's jurisdiction with regard to Bills that have been introduced to Parliament, section 6(6) provides: 'Nothing in this section shall confer any jurisdiction on the Tribunal in respect of any Bill that has been introduced into the House of Representatives unless the Bill has been referred to the Tribunal pursuant to section 8.' Section 8(1) relevantly provides that the Tribunal 'shall examine any proposed legislation referred to it under subsection (2) and shall report whether, in its opinion, the provisions of the proposed legislation or any of them are contrary to the principles of the Treaty.'

2.1.3.3 *The role of the Waitangi Tribunal in the settlement of claims*

Tribunal inquiries have a broad role in helping to effect reconciliation between Māori and the Crown. Having the grievances heard and acknowledged is important to *settling* the grievances. The value to claimants of their 'day in court' should not be underestimated. The catharsis of presenting their histories and grievances to an impartial body, and the importance of having those histories recorded and independent findings made, all contribute to a truth and reconciliation process that moves people on from grievance to settlement. Detailed research can also be crucial to uncovering the source of grievances and the reasons why Māori claimants find themselves landless and disadvantaged today.

The Tribunal and the courts have long recognised that the settlement of Treaty claims is not purely legal in nature, but rather is part of a political process. As the Tribunal stated in the *Pakakohi and Tangahoe Settlement Claims Report*:

> [I]n *Kai Tohu Tohu o Puketapu Hapu Inc v Attorney-General*, Doogue J noted that 'The claims are claims entertained by the Crown as part of a political process and not part of a legal process'. Similarly, Hammond J in *Greensill v Tainui Maori Trust Board* considered 'to intervene now would be an outright interference in what is nothing more or less than an ongoing political process as opposed to a distinct matter of law'. A number of other cases have expressed the same sentiment.[38]

37. *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [78]
38. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p 56

The Tribunal's report on the Waiheke Island claim in 1987 observed that an 'eye for an eye approach to reparation' was not possible in settling Treaty claims, would not likely be equitable as between the tribes, and could never deal adequately with the 'consequences of social dislocation'. There was, however, an 'alternative approach':

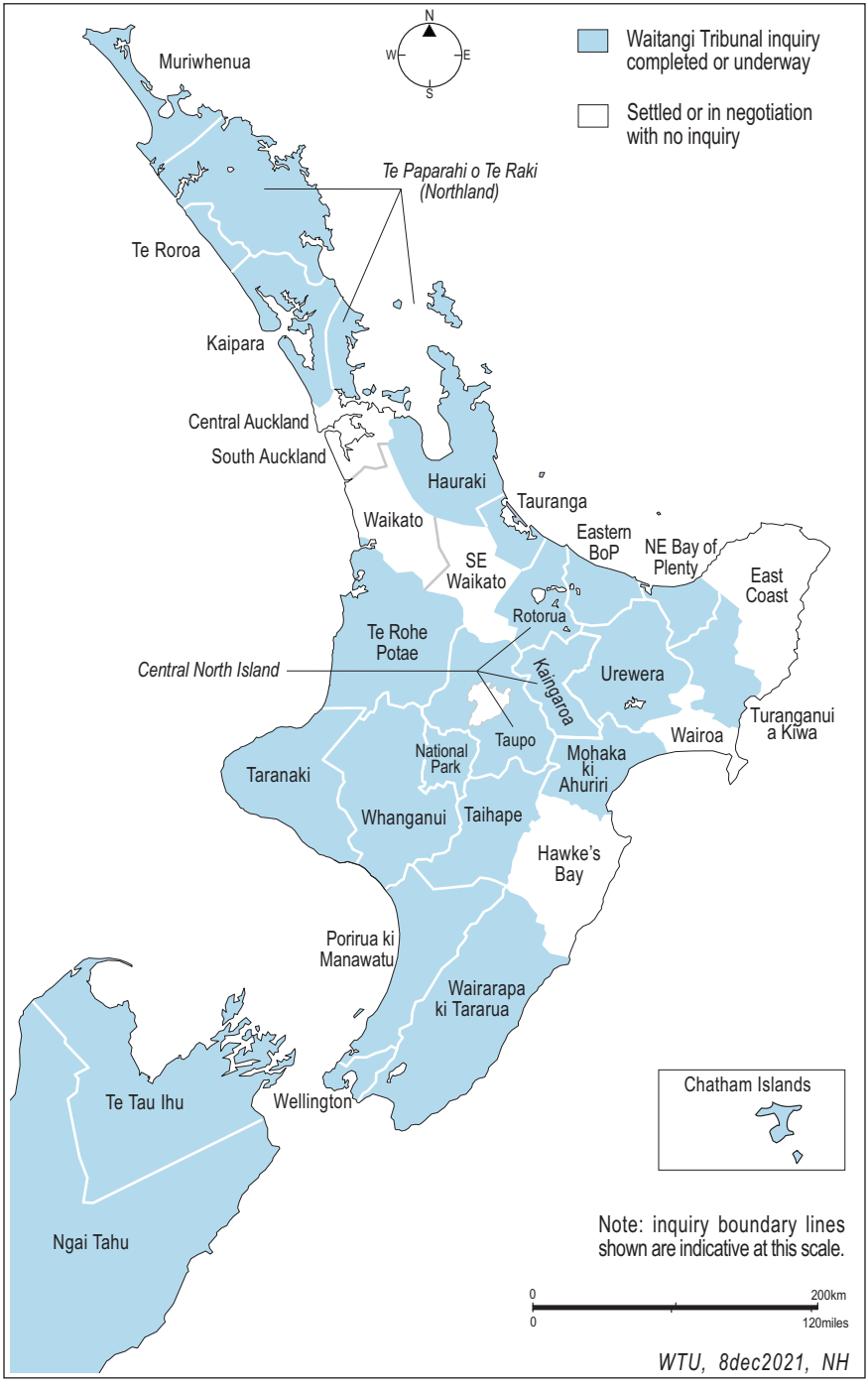
> To compensate a tort is only one way of dealing with a current problem. Another is to move beyond guilt and ask what can be done now and in the future to rebuild the tribes and furnish those needing it with the land endowments necessary for their own tribal programmes. That approach seems more in keeping with the spirit of the Treaty . . .[39]

In its *Report on the Crown's Foreshore and Seabed Policy*, the Tribunal noted that this approach to redress was developed for the settlement of historical breaches where 'Maori *had no legal rights*. They had no legal position to rely on in the courts (emphasis in original).'[40] Hence, historical claims are not inquired into in the same manner as a claim for damages or a civil dispute, and this approach is reflected in the recommendatory nature of the Tribunal's jurisdiction. Tribunal reports are authoritative but (with rare exception) are not binding on the Crown, the exception of course being the Tribunal's exercise of its power to make binding recommendations for the return of certain classes of land, including State-owned Enterprise and Crown Forest licensed lands.

The Tribunal's power to make non-binding recommendations is therefore fundamentally 'based on the concept of a negotiated settlement'.[41] The Crown and Māori Treaty partners negotiate an agreed settlement of the claims but it is expected that due consideration would be accorded the Tribunal's findings and recommendations. While the Tribunal's reports often do inform Treaty settlements, this is not always the case and is not a prerequisite for Māori to reach a Treaty settlement with the Crown. As noted above, the option of direct negotiations has been available since the 1990s. Most hapū and iwi have preferred to have their claims heard in the Tribunal, totally or in part, prior to negotiating a settlement with the Crown (see map below). The key point is that it is up to the claimant community to choose which settlement path to pursue, direct negotiations or an historical inquiry prior to negotiations.

The possibility of bindings recommendations is of course available to claimants as well but not until the end of an historical inquiry, if their claims have been adjudged to be well-founded.

39. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 41
40. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 135
41. Waitangi Tribunal, *The Turangi Township Remedies Report* (Wellington: Brooker's Ltd, 1998), p 23



Map 2.1: Waitangi Tribunal inquiry districts, 2021

2.1.3.4 *Ouster clauses*

Ouster clauses are a standard feature of Treaty settlement legislation. Their purpose is to exclude the historical claims covered by a settlement from any further inquiry by the Waitangi Tribunal or any other court or tribunal. Section 16(4) of the Ngāti Toa Rangatira Claims Settlement Act 2014, for example, states: 'Despite any other enactment or rule of law, on and from the settlement date, no court, tribunal, or other judicial body has jurisdiction (including the jurisdiction to inquire or further inquire, or to make a finding or recommendation) in respect of' the historical claims, the deed of settlement, and the settlement Act. Each settlement Act is then added to schedule 3 of the Treaty of Waitangi Act 1975, a schedule of legislation to which the jurisdiction of the Tribunal is subject.

From time to time, the Crown and claimant groups have settled while the Tribunal was in the process of reporting or while claims were being heard, and the Crown and claimants have negotiated an exception to the ouster clause that allows the Tribunal to complete its inquiry. These exceptions are fairly rare. In Te Urewera, for example, the Tribunal had issued four parts of its report in pre-publication format (volumes 1–6 of the published version)[42] before the Crown and Tūhoe had completed negotiations and initialled a deed of settlement. The Tūhoe Claims Settlement Act 2014 provided that, despite the provisions of the ouster clause, 'the Waitangi Tribunal may complete and release a report on the Te Urewera district, including the historical claims of Tuhoe'. The Tribunal was restricted, however, from making any more recommendations on those historical claims.[43] The Ngatikahu ki Whangaroa Claims Settlement Act 2017 empowered the Tribunal to complete and release reports on historical claims heard in the Te Paparahi o Te Raki (Northland) inquiry. Similarly, the Ngāti Tūwharetoa Claims Settlement Act enabled the Tribunal to complete inquiries in which Tūwharetoa were involved. There were no restriction in those two cases as to recommendations.[44] These exceptions are discussed further below.

We turn next to address issues in respect of whether the Tribunal is obliged by the principle of comity to suspend its inquiry while a settlement Bill is before Parliament.

2.2 What is the Tribunal's Jurisdiction to Inquire into Whakatōhea's Treaty Claims while Settlement Legislation is before Parliament?

2.2.1 Introduction

In August–September 2019, the Minister for Treaty of Waitangi Negotiations and the Minister for Māori Development decided to offer Whakatōhea a parallel process, in which their historical inquiry would occur alongside (and subsequent to)

42. With the exception of chapter 20 in volume 6.
43. Tūhoe Claims Settlement Act 2014, s15(6)–(7)
44. Ngatikahu ki Whangaroa Claims Settlement Act 2017, s15(6); Ngāti Tūwharetoa Claims Settlement Act 2018, s15(6)

settlement negotiations. This raised the prospect that for at least part of the 'parallel' process, the Tribunal's historical inquiry might need to be suspended while settlement legislation was passed through Parliament (possibly 12 to 18 months or longer). The Crown's decision to offer a parallel process is discussed further below. Here, we note that officials advised Ministers in July 2019: 'Introducting the settlement Bill will suspend the Tribunal's ability to conduct the inquiry while the Bill is before the House of Representatives'. Te Arawhiti considered this a settled point of law and also advised Ministers that 'Whakatōhea will need to decide, through the ratification vote, to either delay the introduction of the Bill until the inquiry is complete or to introduce the Bill and suspend the inquiry until the Bill is enacted'.[45] While the intention is not to put the choice to Whakatōhea in precisely those terms,[46] the Crown's view is that the introduction of a Bill will require the suspension of the Tribunal's historical inquiry until the settlement legislation is enacted. As set out above in the discussion of the parties' arguments, the claimants and the Trust do not accept that this is the case.

The prospect of a lengthy delay to the inquiry is significant to the claimants, and the possibility of such a delay appears to be a significant flaw in the Crown's proposal for a parallel process. In this section of the chapter, we consider the relevant provisions of the Treaty of Waitangi Act 1975, and the principles of comity and parliamentary privilege, to determine our own understanding of whether we must pause our district inquiry while the Bill to settle Whakatōhea's Treaty claims is before the House. In doing so, we re-emphasise the disclaimers set out earlier in section 2.1.3. We are not a court of law, and are thus unable to pronounce authoritatively on this issue. Rather, we set out our own understanding of our jurisdiction in the following sections so that parties know how we intend to proceed. An authoritative determination on the issue can be sought from the High Court if required.

We begin our discussion of this issue by setting out a summary of the parties' arguments.

2.2.2 The parties' arguments

2.2.2.1 *The claimants' case*

The claimants submitted that the introduction of a settlement Bill to Parliament should not require the Tribunal to pause its inquiry into historical claims.[47] '[F]ar from challenging the legislative process,' they said, 'the Tribunal's inquiry would complement it.'[48] They objected to the Crown's broad interpretation of section 6(6) of the Treaty of Waitangi Act 1975. The claimants preferred a narrow reading of that section, which would only require suspension of 'inquiries that claimants seek to commence after a Bill has been introduced, [or] that inevitably involve the Tribunal directly scrutinising the Bill and associated Parliamentary material'.

45. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [53]
46. 'Ratification Strategy for Whakatōhea Pre-Settlement Claims Trust, undated (doc A10(a)), p 3
47. Submission 3.3.10, p 20; submission 3.3.12, para 21
48. Submission 3.3.20, p 8

A wide reading, on the other hand, 'operates to stay inquiries irrespective of when they are commenced (ie, before or after the Bill is introduced) and irrespective of whether the Crown conduct that is in issue can be evidenced in extra-Parliamentary material'.[49]

In support of their view that a narrow reading is to be preferred, the claimants cited *Attorney-General v Mair*, where Justice Baragwanath emphasised that 'legislation conferring rights on indigenous peoples should not be read up against them.' The claimants also noted Justice Baragwanath's 'identification' of the 'plain meaning' of section 6(6), which was a reference to his statement that since Parliament 'has authorised the Tribunal to review statutes it must a fortiori countenance review of all Legislative and Executive conduct short of the bills referred to in s 6(6)'.[50] Claimant counsel further submitted that while Justice Baragwanath's comments were obiter, they align with the rights to culture and justice affirmed in the New Zealand Bill of Rights Act 1990 and the United Nations Declaration on the Rights of Indigenous Peoples.[51]

The claimants also objected to the Crown's overly broad application of the principle of comity and parliamentary privilege. They noted that section 15 of the Parliamentary Privilege Act 2014, which codifies the common law on institutional comity, does not prevent or restrict the Tribunal from 'establishing with no impeaching or questioning of the proceedings in Parliament a relevant historical event or other fact.'[52] Indeed, counsel submitted that previous judicial decisions have cautioned against such an application of section 15.[53] For example, an overly broad application of the principle of parliamentary privilege was rejected in *Ngāti Whātua Ōrākei Trust v Attorney-General*, on the basis that the function of the courts is to make declarations as to rights.[54] Similarly, the claimants referred to a decision of Judge Armstrong in the Marine and Coastal Area (Takutai Moana) Act 2011 inquiry, in which he noted that 'orthodox principles concerning the separation of powers, and Parliamentary privilege, must be treated with some caution when exercising the unique jurisdiction of this Tribunal'.[55]

Claimant counsel submitted that there would be no breach of comity if the Tribunal were to merely refer to parliamentary materials 'as a matter of history'. Further, the claimants relied on *Prebble v Television New Zealand* to argue that the principle of comity does not prevent 'a court or tribunal inquiring into the same subject matter' that is being addressed in parliamentary proceedings,

49. Submission 3.3.10, pp 13–14
50. Submission 3.3.10, pp 13–14; submission 3.3.10(c), p [49]; *Attorney-General v Mair [2009]* NZCA 625 at [161–162]
51. Submission 3.3.10, p 15; New Zealand Bill of Rights Act 1909, ss 20, 27; United Nations Declaration on the Rights of Indigenous Peoples 2007, arts 8(2)(a), 11(2), and 40.
52. Submission 3.3.20, p 5
53. Submission 3.3.4, pp 14–15; *Te Ohu Kai Moana Trustee Ltd v Attorney-General* [2016] NZHC 1798, [2016] NZAR 1169 at [24], citing *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9 (CA), and quoted by the Supreme Court with approval in *Ngati Whatua Orakei Trust v Attorney General* [2018] NZSC 84; [2019] 1 NZLR 116 at [44].
54. Submission 3.3.9, pp 7–8; *Ngāti Whātua Ōrākei Trust v Attorney-General [2018]* NZSC at [84]
55. Submission 3.3.9, p 8; Wai 2660 ROI, memorandum 2.6.67, p 6

so long as the court or tribunal does not 'call into question' the proceedings in Parliament.[56] Thus, counsel for Ngāti Patumoana claimants submitted that an intention to legislate cannot be plainly interpreted as a 'ban on the consideration of all related issues'.[57] Further, in the claimants' submission, 'Parliament is entitled to expect exclusive cognisance over its own processes, not the broad subject matter addressed by a Bill'.[58] As the Tribunal is inquiring into allegations of historical Treaty breaches, not alleged breaches concerning the settlement Bill itself, the Tribunal has jurisdiction to progress the district inquiry while the settlement Bill is before Parliament.[59] The claimants and interested parties also emphasised that the application of the principle of comity necessitated restraint on all sides, and was a'two-way street'.[60]

The claimants pointed to two past instances, among others, where the Tribunal considered that it could continue its inquiry while settlement Bills were before the House because of modified ouster clauses in those Bills. These included the Rangitikei ki Rangipō inquiry (Wai 2180) and the Porirua ki Manawatū inquiry (Wai 2200).[61]

Finally, the claimants submitted that pausing the district inquiry upon the introduction of the Bill would be prejudicial to them.[62] They argued that the proposal 'effectively prioritises the goal of settlement over reconciliation'.[63] Further, the claimants argued such a delay would mean that the proposed parallel process would no longer be 'parallel'.[64]

2.2.2.2 *The Crown's case*

Crown counsel submitted that once the settlement Bill is introduced to Parliament, the principle of comity and the Parliamentary Privilege Act 2014 prevent the Tribunal from inquiring into the historical claims covered by the Bill until it is passed.[65] The Tribunal's inquiry into Whakatōhea historical claims, therefore, will have to be paused when 'the Crown's intention to legislate has crystallised and certainly once legislation to settle those claims is introduced to the House of Representatives'.[66] On the issue of exactly when the Tribunal must suspend its inquiry, the Crown submitted that a 'judgement exercise' would be required as to when the Crown's intention to introduce a Bill had 'crystallised sufficiently' for comity to require the Tribunal to pause; in other words, it is not merely the introduction of a Bill but the Crown's *intention* to introduce a Bill that invokes

56. Submission 3.3.10, pp 16, 18; *Prebble v Television New Zealand* [1994] 3 NZLR 1 (PC) at [3], [11]
57. Submission 3.3.4, pp 14–15
58. Submission 3.3.20, p 6
59. Submission 3.3.1, p 11
60. *Attorney-General v Taylor* [2017] NZCA 215 at [74]; submission 3.3.1, p 11
61. Submission 3.3.18, pp 26–27
62. Submission 3.3.1; submission 3.3.4; submission 3.3.12
63. Submission 3.3.9, p 6
64. Submission 3.3.9, p 7; transcript 4.1.5, p 19
65. Submission 3.3.23, pp 17–18
66. Submission 3.3.11, p 11

comity and requires a suspension of the Tribunal's inquiry. The Crown suggested that the Tribunal would still be able to continue its inquiry into contemporary claims while the Bill is before Parliament.[67]

On the interpretation of section 6(6) of the Treaty of Waitangi Act 1975, the Crown submitted that it is not 'feasible' to interpret this section in a narrow way. A 'more realistic view', the Crown argued, is that 'the Tribunal's jurisdiction, if it were exercised under s 6 in respect of any Bill, would normally involve a Treaty evaluation of the content of the Bill, rather than an examination of legislative procedures'.[68] Accordingly, 'the clear meaning of s 6(6)' is to 'prevent any Tribunal inquiry into claims when there is a Bill before the House addressing the same or highly related subject-matter'. Further, the Crown submitted that 'the phrasing "in respect of any Bill" in s 6(6) cannot be divorced from the content of a Bill'. The provision of the power to refer a Bill to the Tribunal under section 8, the Crown argued, further 'reinforces this interpretation'.[69] Moreover, a broad interpretation of section 6(6) is aligned with 'established constitutional precedent as well as prior decisions of the Tribunal'.[70]

The Crown also submitted that the special character of settlement Bills, and the way in which such Bills are only amended in practice with the consent of the affected parties, should not be taken into account. In the Crown's view, the principle of comity 'is not only concerned with the risk of adverse findings or antagonism between branches of government but also with settling disputes over which institution has authority in the matter'.[71] Parliament still has 'exclusive cogniscance' while a settlement Bill is before the House, and the Tribunal is obliged to decide this matter based on principle and 'by reference to established constitutional boundaries'.[72]

The Crown also argued that the 'judicial nature of the Tribunal's inquiry' is important because it 'raises exactly the institutional risks that comity is designed to manage'.[73] In the Crown's view, the claimants' arguments on comity 'misconceive [its] nature and scope' because comity 'works to resolve and avoid the risk of constitutional tension between the branches of government whenever tension may exist in practice, but especially in situations' where the courts and Parliament might inquire into the 'same or highly related subject matter'. In such situtations, there is 'the obvious potential' risk that the judicial proceedings could 'invite the drawing of inferences' about the parliamentary proceedings, and thus breach parliamentary privilege.[74] Crown counsel pointed to section 11(a)–(e) of the Parliamentary Privilege Act, which specifies that '"anything forming part of

67. Submission 3.3.11, pp 16, 18
68. Submission 3.3.23, p 23
69. Submission 3.3.23, pp 17–18
70. Submission 3.3.23, p 18
71. Submission 3.3.23, pp 21–22
72. Submission 3.3.23, p 22
73. Submission 3.3.23, p 21
74. Submission 3.3.23, pp 20, 22

those proceedings in Parliament" is protected against the inviting of the drawing of inferences, whether adverse or not'.[75]

The Crown also argued that there is no room for doubt that in the particular case of a settlement Bill, the 'subject matter of the claims is covered by the Bill – the claims and their content are the very purpose of the Bill to settle them'.[76] Crown counsel referred to a 2016 decision of Judge Savage, the Tribunal's deputy chairperson, in which the judge stated that claims which raise matters of 'indirect relevance' to a Bill can sometimes be severed from the issues in a Bill but not where 'the issues into which the claimants seek inquiry may be so inextricably entwined with the Bill that to sever them without running contrary to s 6(6) would be impossible'.[77]

2.2.2.3 *The Whakatōhea Pre-Settlement Claims Trust's case*

The Trust agreed with the claimants on the issues of comity and parliamentary privilege. In the Trust's view, 'there would be no reason for the Tribunal to pause while legislation is before the House'. Only if the inquiry continued, would the process be 'truly parallel'.[78] In particular, the Trust submitted that the Crown's approach to comity was too broad, citing Chief Justice Elias in *Ngāti Whatua Orakei Trust v Attorney General*:

> It seems to me that some of the recent restatements of the principles of non-interference are unacceptably broad and are not supported by the principal authorities. I am unable to agree with suggestions in the High Court in *Ngāti Te Ata* that '[i]t is well settled that matters contemporaneously before Parliament are non-justiciable'. It is not entirely clear that the statement was intended to suggest that the courts cannot consider disputes touching on the subject-matter of a Bill. But if so, *Te Runanga o Wharekauri Rekohu*, which is cited in Ngāti Te Ata, does not support anything as loose. *Milroy v Attorney-General*, relied on by the Crown, was a case in which it was conceded that no rights were in issue.[79]

The Trust submitted that comity and non-interference is aimed at ensuring that 'courts do not seek to preclude parliamentary consideration', and the jurisdictional bar in section 6(6) of the Treaty of Waitangi Act limits the Tribunal only from 'consideration of the actual Bill that is before Parliament'. Therefore, 'the issue that is precluded relates to the inquiry into the legislation itself and whether or not it in itself is non-compliant'.[80]

75. Submission 3.3.23, pp 20, 22
76. Submission 3.3.23, p 21
77. Submission 3.3.23, p 21; Wai 2560 ROI, memorandum 2.5.2, p 4
78. Submission 3.3.24, p 3
79. Submission 3.3.13, p 12; *Ngāti Whatua Orakei Trust v Attorney General* [2019] 1 NZLR 116 at [113]
80. Submission 3.3.13, p 12

2.2.3 Tribunal jurisdiction and the introduction of a Bill to Parliament

We begin by turning to the effect of section 6(6) of the Treaty of Waitangi Act 1975 which provides that we do not have any jurisdiction with respect to any Bill introduced to Parliament, unless it has been referred to us under section 8.

The Crown maintains that this provision means that we must pause our District Inquiry as soon as the Bill to settle the historical claims of Whakatōhea is introduced to Parliament for so long as it remains before the House (likely to be one year to 18 months). Counsel submitted that the principles of comity and parliamentary privilege (as set out in the Parliamentary Privilege Act 2014) prevent the Tribunal from inquiring into claims concerning matters within Parliament's 'sphere of exclusive cognisance'. Crown counsel argued that pausing the Tribunal's inquiry into historical claims while settlement legislation is before the House is consistent with established constitutional precedent as well as prior decisions of the Tribunal. The position of claimant counsel – and the Trust – is that the Crown's position interprets the principles of comity and parliamentary privilege in an overly broad manner, and that in this instance we are not required to stop the progress of our district inquiry whilst a Settlement Bill is before the House.

2.2.4 Jurisprudence on the principles of comity and parliamentary privilege

We set out the statutory framework of our jurisdiction at section 2.1.3.1 above. We now summarise our understanding of the principles of comity and parliamentary privilege, before considering the relevant jurisprudence on these principles and their application to this inquiry.

Comity is concerned with the freedom of the House to consider and inquire into any matter. Parliamentary privilege is a particular manifestation of the broader principle of comity, and, as a matter of English and New Zealand law, is encapsulated in article 9 of the Bill of Rights 1688, which states that the 'freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'. Section 10(1) of New Zealand's Parliamentary Privilege Act 2014 clarifies the definition of 'proceedings in parliament' and the scope of prohibited impeaching or questioning of things done in the course of parliamentary proceedings. To determine the scope of parliamentary privilege, attention must be paid to the purpose of the privilege and the circumstances,[81] and the mere presence of legislation in the House cannot operate as a ban on consideration of all related issues.[82]

The relevant jurisprudence on these principles in New Zealand is limited. In *Ngāti Whātua Ōrākei Trust v Attorney-General*, the Supreme Court intepreted the application of the principle of parliamentary privilege narrowly, on the basis that the function of the courts is to make declarations as to rights.[83] The court considered that whether litigation interferes with parliamentary privilege requires an analysis of the nature and scope of the litigation and its connection (both tempo-

81. *Attorney-General v Taylor* [2017] NZCA 215, at [129]
82. *Te Ohu Kai Moana Trustee Limited v Attorney-General* [2016] NZHC 1798, at [24], [26]
83. *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [119]

rally and in terms of subject matter) with the Bill before the House. Chief Justice Elias noted that the prospect of legislation should not 'deflect the courts from carrying out their . . . responsibilities'.[84] Parliament is entitled to expect exclusive cognisance over its own processes, not the broad subject matter addressed by a Bill.

In *Ngāti Mutunga o Wharekauri Asset Holding Company Ltd v Attorney-General*, it was held:

> the courts may make declarations of existing rights, interests or entitlements. Such relief is not in relation to parliamentary proceedings . . . [and] does not amount to an interference by the courts in Parliament's "proper sphere of influence and privileges" because such declarations would be about existing rights, interests and entitlements, and not what Parliament may be proposing to do in relation to them.[85]

In the Marine and Coastal Area (Takutai Moana) Act inquiry (Wai 2660), Judge Armstrong also noted that 'orthodox principles concerning the separation of powers, and Parliamentary privilege, must be treated with some caution when exercising the unique jurisdiction of this Tribunal'.[86]

2.2.5 Does introduction of a Bill to give effect to a Whakatōhea settlement mean that the district inquiry must stop while the Bill is before Parliament?

After careful consideration of the submissions filed on behalf of the parties, and after also carefully reviewing the statutory framework we have come to the view that we can continue with the district inquiry, notwithstanding the introduction of a Bill designed to effect settlement of the Whakatōhea claims.

Our principal jurisdiction is to respond to claims of prejudice caused to Māori (or a group of Māori) by a wide range of Crown acts or omissions said to be inconsistent with the principles of the Treaty. We agree with Crown counsel that the limitation of our jurisdiction with respect to a Bill introduced to Parliament, unless specifically referred to us under section 8, reflects established principles of comity and parliamentary privilege. We do not accept, however, that these principles, or a purposive reading of the statutory provisions, operate to prevent us continuing to exercise jurisdiction with respect to the historical claims of Whakatōhea being heard in our district inquiry. In the exercise of jurisdiction to inquire into those claims we will not be inquiring into the Treaty consistency of the Settlement Bill itself.

In our view section 6(6) and section 8 combine to form a clear legislative direction that the Tribunal must not exercise any part of its jurisdiction in order to assess whether any proposed legislation is consistent with the principles of the Treaty, unless that Bill has been referred to the Tribunal pursuant to section 8.

84. *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [116]
85. *Ngāti Mutunga o Wharekauri Asset Holding Company Ltd v Attorney-General* [2020] NZCA 2, at [33]
86. Wai 2660 ROI, memorandum 2.6.67, p 6

This in our view follows from the primary focus of our jurisdiction (Treaty compliance), and from section 8(1) which requires the Tribunal to examine any Bill referred to it and to report on whether the provisions 'are contrary to the principles of the Treaty'.

The point we wish to emphasise is that we see continuing with our district inquiry as a quite different matter from continuing with or inquiring into the Treaty consistency of a Settlement Bill. We accept that we cannot do the latter unless the Bill is referred to us pursuant to section 8.

Parliament publishes a Statement of Parliamentary Practice on its website. The following is from the chapter concerning parliamentary privilege:

> Questions have sometimes arisen about a legislative direction to a court to apply a defined standard, such as an international convention, when interpreting and applying legislation. In such a case, the court must make an objective judgement on whether or not Parliament has legislated consistently with the convention or standard. Ordinarily, this would breach the principle of comity and the relationship of mutual respect and restraint between Parliament and the courts. However, under such legislation, Parliament itself, by its own direction, requires a judgement on the compatibility of its legislation with the prescribed standard.[87]

Parliament has conferred upon the Tribunal a very broad jurisdiction to inquire into the Treaty consistency of a range of statutory instruments, acts, and regulations.

With respect to the underlying principles of comity there is a further consideration. In this case the Crown has advised that, subject to ratification by Whakatōhea, it will include in any Bill a provision that would specifically allow us to continue to complete our district inquiry, to report and make findings (but not recommendations on the historical claim issues).

Comity principles require that we respect the spheres of operation of Parliament and the Executive and that in turn the Executive and Parliament respect our statutory independence and jurisdiction to inquire and report.

In our view, continuing with our district inquiry while a Whakatōhea Settlement Bill is before Parliament does not offend these principles. Indeed, continuing with the district inquiry seems to us entirely consistent with comity principles in light of the political commitment to a parallel process made by the Crown to Whakatōhea.

Claimant counsel made this point in the following terms: 'Far from challenging the legislative process, the Tribunal's inquiry would complement it. The settlement bill, on the Crown's proposal, would provide for the very process that the Tribunal is conducting – a parallel inquiry and settlement.'[88]

87. Mary Harris and David Wilson, eds, *McGee Parliamentary Practice in New Zealand*, 4th ed (Auckland: Oratia Books, 2017), p 713

88. Submission 3.3.20, p 8

The Crown's response is that this misconceives the nature and scope of the comity principle. Crown counsel argued:

> Comity works to resolve and avoid the risk of constitutional tension between the branches of government whenever tension may exist in practice, but especially in situations when two or more institutions are seeking to inquire into the same or highly related subject matter. In such cases, there is the obvious potential for one proceeding to "invite the drawing of inferences" about the other, whether adverse or not. Crown counsel point to s 11 of the Parliamentary Privilege Act 2014 which makes it clear that anything forming part of the proceedings in Parliament is protected against the inviting or drawing of inferences whether adverse or not.[89]

In the Crown's view, this is not a borderline case as the historical claims of Whakatōhea and how to resolve them constitute the core subject matter of both the Bill, and the Tribunal district inquiry. Therefore, the Crown argued that the judicial nature of the Tribunal's inquiry gives rise to exactly the institutional risks that comity is designed to manage.[90]

While we understand the theoretical basis for the Crown's argument, we do not believe that it withstands close scrutiny. The Crown in its executive branch has made a political commitment to Whakatōhea that upon successful ratification of the Deed of Settlement it will introduce a Settlement Bill that will include provision enabling our district inquiry to continue notwithstanding settlement of the historical claims. So long as it retains a parliamentary majority and the confidence of the House, the Executive is entitled to introduce a Bill. Whether correctly described as a convention or not, Bills introduced to give effect to Treaty of Waitangi Settlements fall into something of a special category. Settlement Bills come about because legislation is (almost always) required to give effect to the outcomes of a Deed of Settlement agreed between Crown and iwi negotiators. We are not aware of any circumstance where Parliament has voted down such a Bill or introduced amendments (other than minor amendments of a technical nature necessary to better effect the implementation of the settlement), without the consent of the parties to the settlement. On occasion, where a report of the Waitangi Tribunal has informed the settlement negotiations, relevant findings or recommendations may be referred to or form part of the agreed settlement. Also, on a number of occasions, a Tribunal inquiry has been in progress but not concluded at the time settlement was reached, and the Tribunal continued with the production of its report while a Bill was before the House, as in the case of the Tūhoe Claims Settlement Act 2014. As far as we are aware none of these circumstances have given rise to constitutional tension between the Tribunal, Parliament or the executive. While the executive may not agree with the Tribunal's findings and recommendations it is fair to say that the respective roles of the Tribunal, the

89. Submission 3.3.23, p 20
90. Submission 3.3.23, p 21

Crown, the claimants and the mandated negotiators on behalf of hapū and iwi are well understood. This is important context when considering the operation of our unique jurisdiction.

It is also noteworthy that these features of Treaty settlement Bills and legislation have developed notwithstanding orthodox constitutional principles. Those principles are expressed by Chief Justice Elias in the *Ngāti Whātua* case as follows:

> Parliament speaks to the courts only through enacted legislation. Whether the enactment proposed will proceed and, if so, the form it will take is uncertain because it is a matter for Parliament. Just as the executive cannot bind itself by contract to introduce and pass legislation, it cannot properly give any assurance to the court that the legislation it proposes will be passed.[91]

It is also salient to recall that aside from limited jurisdiction with respect to binding recommendations (which we expect would be removed by settlement legislation) our powers are recommendatory only. Also, we have no power to determine issues of law conclusively. All of this leads us to the view that the Crown has overstated the nature of the risk to the principles of comity and parliamentary privilege when it characterises the 'judicial nature of the Tribunal's inquiry' as giving rise to institutional risks that comity is designed to manage.

Claimant counsel have relied upon the obiter view expressed by Justice Baragwananth in *Attorney General v Mair* that section 6(6) is directed toward non-interference with parliamentary process and would therefore only operate to limit the Tribunal's ability to inquire into the Settlement Bill itself, or into executive action preparatory to the Bill.

In response the Crown said that it is not feasible to interpret section 6(6) in this narrow way. Crown counsel argued:

> It is notable that s 6(6) does not refer to "claims" in respect of any Bill introduced. It refers to the Tribunal's jurisdiction in respect of any Bill. The Crown's position reflects the more realistic view that the Tribunal's jurisdiction, if it were exercised under s 6 in respect of any Bill, would normally involve a Treaty evaluation of the content of the Bill, rather than an examination of legislative procedures.[92]

We agree with Crown counsel, that if we exercised jurisdiction under section 6 with respect to a Bill, this would involve evaluation of the content of the Bill for its consistency with the principles of the Treaty. Section 6(6) must be read in conjunction with section 8, which makes it clear that we could only undertake such an inquiry if the relevant Bill had been referred to us by Parliament.

We acknowledge that through the course of the hearings for this priority report, we have received significant claimant, Crown, and Trust evidence and submissions on the Treaty-compliance of the proposed parallel process. While we can address

91. *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [114]
92. Submission 3.3.23, p 23

these matters now, it is clear to us that we do not have any jurisdiction to consider the Treaty-compliance of the parallel process once the Bill required to give effect to it is before the House, unless the Crown were to refer this matter to us under section 8(2).

With regard to concerns expressed by the Crown that continuation of our district inquiry while a Settlement Bill is before the House may give rise to a potential risk for one proceeding to invite the drawing of inferences about the other (adverse or not) we see no actual or potential risk. On a purely practical basis unless the settlement is substantially delayed there is no prospect that we will be in a position to draw any inferences (adverse or otherwise) in relation to the historical claims whilst the Settlement Bill remains before the House. Our inquiry is still at a relatively early stage, hearings have not commenced and we do not expect to be in a position to report until well after the proposed Whakatōhea settlement would be concluded based on the timeframes the Crown has advised. Given these already protracted timeframes, a pause on our jurisdiction will also cause unnecessary and unreasonable further delay to the continued progress of the inquiry.

We pause here to note that if we are wrong in our understanding of our jurisdiction and we are as a matter of law required to pause our district inquiry until the Bill is passed, a question arises as to whether this circumstance is itself consistent with the principles of the Treaty, given that the Crown's commitment to Whakatōhea in respect of a parallel process will underpin the settlement and the legislation that gives effect to it.

2.2.6 Conclusion

For the reasons given we do not consider that we are required to pause or stop our district inquiry for such period as a Bill to settle the historical claims of Whakatōhea is before the House.

2.3 Is the Crown's Decision to Limit the Inquiry Fair, Reasonable, Informed, and Protective of Hapū Interests and Rangatiratanga?

2.3.1 Introduction

In this section, we address the issues raised by the claimants about the Crown's proposal for a parallel process, including that the process would be conditional on the removal of the Tribunal's power to make recommendations. We examine the following matters in turn:

- What did the Crown decide to do in response to the 2018 vote and why did the Crown decide to explore the option of having an historical inquiry alongside (and after) settlement negotiations?
- Was the Crown sufficiently informed of its Treaty partner's views when it made the decision to offer a parallel process in August–September 2019?
- Has the Crown's decision on the parallel process breached the claimants' right to justice?

- What value do the Crown, the Trust, and the claimants see in an historical inquiry that would be completed post-settlement and without any Tribunal recommendations on the historical claim issues?
- Is it fair and reasonable in the circumstances of Whakatōhea to prevent the Tribunal from making any recommendations at all on the historical claim issues?

After our discussion of these issues, we provide our conclusions and findings in section 2.3.7. We begin, however, by setting out a brief introduction to the parties' arguments on these issues.

2.3.2 The parties' arguments

2.3.2.1 *The claimants' case*

The claimants objected to the Crown's proposed parallel process, including the proposal to remove the Tribunal's power to make recommendations on historical claims. In the claimants' view, the proposal would result in a 'significant alteration to a core function of the Tribunal'. They questioned the utility of an inquiry process in which the Tribunal had been stripped of one of its core functions.[93] The claimants emphasised that the inquiry will result in new understandings of Whakatōhea history and claim issues, and that these should be reflected in any Tribunal recommendations and Treaty settlement.[94] Claimant counsel submitted that if the Tribunal is unable to make recommendations on historical Treaty grievances, then the claimants would not benefit from the Tribunal's recommendations relating to 'some of the worst treaty breaches, including war and raupatu.'[95] They therefore argued that the Crown's limitation on the Tribunal's recommendatory function seriously jeopardises and undermines the Tribunal role envisaged under the Treaty of Waitangi Act 1975.[96]

Further, the claimants argued that the Crown had no proper justification for modifying the Tribunal's power to make recommendations.[97] In their view, the Crown's approach had no clear 'policy rationale' and was simply based on the 'premise of the Crown's preference'.[98] They submitted that the Ngāti Tūwharetoa Claims Settlement Act 2018 and Ngatikahu ki Whangaroa Claims Settlement Act 2017, which preserve the Tribunal's ability to make recommendations on historical claims, are precedents for the Crown to offer the same exception to Whakatōhea.[99] The claimants also stressed the advice from Crown officials that there was only a low risk of a post-settlement report undermining the settlement, given the Crown's acknowledgements about the seriousness of raupatu. In that circumstance, 'there

93. Submission 3.3.14, p 3; submission 3.3.4, p 2; submission 3.3.18, p 23
94. Submission 3.3.4, pp 7, 29–30
95. Submission 3.3.4, p 6
96. Submission 3.3.6, pp 2–3; submission 3.3.17, p 3
97. Submission 3.3.21, p 12; submission 3.3.17, p 5; submission 3.3.1, pp 3–4
98. Submission 3.3.17, p 5
99. Submission 3.3.21, p 12; submission 3.3.1, pp 3–4

is no reasonable or substantive justification for removing the Tribunal's recommendatory powers'.[100] Claimant counsel submitted:

> The argument that settlement may be undermined by allowing the Tribunal to retain its full jurisdiction needs to be appropriately balanced against the fact that the Tribunal's recommendations may not be inconsistent with the settlement, and also that there is no legal requirement for the Crown to act upon the recommendations of the Tribunal, except for binding recommendations which may potentially be made.[101]

Claimant counsel also submitted that the Crown's proposal would prevent them from obtaining specific recommendations on 'particular hapū or whānau grievances', which are usually made 'in addition to the major claims'.[102] In the claimants' view, the Crown has breached their right to justice by removing their access to a full Tribunal inquiry. In particular, the claimants argued they will lose the right to seek binding recommendations in respect of the Mangatū Forest for any claims that are adjudged to be well-founded.[103]

The claimants submitted that the Crown's decision to restrict the recommendatory powers of the Tribunal failed to adequately take account of the 2018 vote. The results of the vote, they said, demonstrated 'a high level of support for a full district inquiry, and it was not contemplated that the Tribunal would only be able to carry out 50% of its function.'[104] In their view, the decision to offer a parallel process is fundamentally flawed: 'Political expediency, balancing views and a flawed interpretation of the Whakatōhea vote appear to be the driving forces behind the decision to conduct a parallel process.'[105] The claimants want their claims heard before they are settled so that the reseach, hearings and Tribunal findings and recommendations can inform the settlement. In their view, this is what Whakatōhea voted for in 2018.[106]

Finally, claimant counsel argued that the Crown had consulted insufficiently – or not at all – about its decision to offer a parallel process, including a restriction of the Tribunal's recommendatory powers. In their view, the Crown's engagement with claimants was kept 'to a minimum' despite the impact this decision would have on them. The result, claimant counsel alleged, was a 'unilateral' decision made without the claimants' informed consent.[107]

100. Submission 3.3.18, p 20
101. Submission 3.3.18, p 20
102. Submission 3.3.9, p 6
103. Submission 3.3.20, pp 3–4; submission 3.3.21, pp 4–7; submission 3.3.28, p 2
104. Submission 3.3.3, p 5
105. Submission 3.3.7, p 21
106. Submission 3.3.9, p 6; submission 3.3.14, pp 4–5; submission 3.3.4, pp 6–9
107. Submission 3.3.5, p 5; submission 3.3.19, pp 6, 10; submission 3.3.7, p 21

2.3.2.2 *The Crown's case*

The Crown submitted that the proposed parallel process was a 'unique feature' of the Whakatōhea settlement.[108] The parallel process would give the claimants an opportunity to 'continue the progress of their claims before the Tribunal' and to obtain historical findings.[109] The Crown submitted that it had developed this proposal in good faith after considering the 'finely balanced' outcome of the 2018 vote. The parallel process, the Crown added, was a means of addressing the balanced support within Whakatōhea for both the settlement and inquiry processes.[110] Crown counsel rejected claimants' argument that the parallel process was not "parallel". In the Crown's view, the process would indeed be parallel but the district inquiry and the settlement negotiations had different 'rates of progression'.[111]

Further, the Crown argued that the Minister for Treaty of Waitangi Negotiations had announced an intention to explore the possibility of a parallel process in February 2019 and had also informed the claimants in correspondence. Whakatōhea had then been duly informed about the finished proposal and had the time to deliberate since the Minister announced it in his open letter to Whakatōhea in September 2019. Additionally, the Trust had 'engaged with Whakatōhea members on the proposal in its rounds of hui-ā-iwi and hui-ā-rohe held since negotiations commenced'. In the Crown's view, the purpose of announcing the decision in this way was to use this engagement process and the ratification process to 'ask Whakatōhea if they support the proposal'. 'Fundamentally', the Crown argued, 'the decision on whether to settle now, and to agree to the proposed settlement and its impact on this Tribunal's jurisdiction, is in the hands of the members of Whakatōhea to decide in ratification'. For these reasons, the Crown argued that 'the claimants' concern that the Crown did not engage with them on the proposal prior to its announcement have little merit'.[112]

On the issue of whether there is a sound policy rationale behind the proposal to remove the Tribunal's recommendatory power, the Crown submitted that protecting the finality of the settlement was a sufficient and legitimate policy rationale. The Crown argued that, on the other hand, there would be no justification for retaining the power to make recommendations on historical claims when those claims would have been settled by agreement, and the grievances redressed in a full and final manner.[113] The Crown submitted: 'No further remedy will be required for the claims.'[114] For these reasons, the Crown considered that the restriction on the Tribunal's ability to make recommendations on historical grievances was appropriate.[115] In respect of the two settlement Acts which preserved the Tribunal's ability to make recommendations, the Ngāti Tūwharetoa Claims Settlement Act

108. Submission 3.3.11, p 10
109. Submission 3.3.11, p 10
110. Submission 3.3.13, p 5
111. Submission 3.3.23, p 9
112. Submission 3.3.11, p 8
113. Submission 3.3.11, p 9; submission 3.3.23, pp 14–15
114. Submission 3.3.23, pp 7, 14
115. Submission 3.3.11, p 9

2018 and Ngatikahu ki Whangaroa Claims Settlement Act 2017, the Crown argued that the jurisdiction was only preserved for areas outside the core rohe, and that other settlement Acts with modified ouster clauses have restricted the power to made recommendations.[116] The Crown submitted that the 'approach being taken in the Whakatōhea settlement is reasonable and is consistent with past practice and with ouster clauses in other settlement legislation'.[117]

The Crown also denied that its proposal breaches the claimants' right to justice. In the Crown's view, there is no judicial authority for this proposition, and the Tribunal jurisprudence is in fact supportive of settling claims without a preceding Tribunal inquiry. The Crown also argued that settlements are essentially a negotiated agreement between the Treaty partners, they are not imposed by the Crown. In the case of Whakatōhea, the Crown and the Trust have negotiated a compromise in which Whakatōhea will be able to have both a settlement and an historical inquiry, and Whakatōhea will decide at ratification whether this compromise is acceptable to them.[118]

2.3.2.3 *The Whakatōhea Pre-Settlement Claims Trust's case*

The Trust submitted that the proposed parallel process 'is a win win situation whereby Whakatōhea are enabled to achieve an expeditious, if not long-overdue settlement, while also keeping the door open for a Tribunal inquiry'.[119] In the Trust's view, the outcome of the 2018 vote signalled a level of support for the negotiations that was too low to achieve ratification, and so the Trust 'advocated for, and secured the agreement from the Crown to ensure that the completion of settlement would not close off the ability for the claimants to have their claims inquired into'.[120] It would therefore be wrong to interpret the removal of the Tribunal's power to make recommendations as a 'negative' outcome. On the issue of the right to justice, the Trust submitted that the Tribunal is not a court and its recommendations do not determine rights, nor do they 'alter legal rights, as they are only expressions of opinion', and so the loss of access to Tribunal recommendations 'cannot be seen to prejudice any rights that claimants might have'.[121] The Trust emphasised that the Tribunal will still be able to make recommendations on contemporary grievances, and that there is no evidence that the settlement would be any 'greater following a Tribunal inquiry'.[122]

On the other hand, the Trust also submitted that 'given the nature of a recommendation, no prejudice would arise if the jurisdiction to recommend enures [remains available] beyond settlement'. We take it from this that the Trust did not accept that the power to make recommendations poses any risk to the finality of the settlement, although this was not stated in explicit terms. Rather, the Trust

116. Submission 3.3.23, pp 15–17
117. Submission 3.3.23, p 17
118. Submission 3.3.23, pp 13–14
119. Submission 3.3.13, p 9
120. Submission 3.3.13, p 9
121. Submission 3.3.13, p 10
122. Submission 3.3.13, p 10

submitted: 'For whatever reason, the requirement to remove the recommendations was not included in the settlement legislation of Ngati Tuwharetoa and Ngati Kahu ki Whangaroa' and, '[a]gainst that backdrop, the Pre-Settlement Trust does not oppose similar provision being made for the Whakatōhea claimants.'[123]

2.3.3 What did the Crown decide to do in response to the 2018 vote?

The Crown's offer of a parallel process had its origins in the 2018 vote (see chapter 1 for the details of the vote). This is important because the Wai 2662 Whakatōhea Mandate Tribunal found that the Crown's acceptance of the mandate in 2016 was in breach of Treaty principles. The Tribunal's primary recommendation was therefore that Whakatōhea vote on whether to continue negotiations through the Trust, redo the mandate process, or stop the negotiations while an historical inquiry was held.[124] The Crown and the Trust agreed to be 'bound by the outcome' of the vote.[125]

In respect of a range of possible outcomes, the Tribunal stated:

> If . . . a clear majority of all hapū support the Pre-settlement Trust continuing to negotiate a settlement, then those who appeared before us to oppose must respect the outcome and accept that an alternative mandate, or an alternative process such as a Tribunal inquiry, is not how Whakatōhea wish to proceed.
>
> If the outcome is more finely balanced and levels of support and opposition are close, the parties will then need to consider how best to proceed. This may include discussions about timeframes that would allow those claimants who seek an alternative process, or something more substantial than the mihi marino process, to do so before a settlement is finally concluded. If such additional dialogue is required, the use of mediators or facilitators may be helpful, and we encourage the Crown to adopt a generous and patient approach.
>
> These are matters for the parties to consider in light of the outcome of the vote.[126]

In light of both the Tribunal's recommendations and the Crown's wish for timely settlements, the Crown developed three principles for determining its response to the will of Whakatōhea as expressed in the 2018 vote:

(a) respect the outcome of the vote;
(b) support the Crown's interest in a timely and durable settlement; and
(c) respond to the Tribunal's recommendation that a finely balanced outcome such as this should lead to discussions about a Tribunal inquiry or alternative process, internal dialogue within Whakatōhea and amendments to the withdrawal mechanism in the deed of mandate.[127]

123. Submission 3.3.24, pp 3–4
124. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 85–89, 92–96
125. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 99
126. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 100
127. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [20]

We address the withdrawal mechanism issues in chapter 3. Here, we note that these principles guided the Crown's decision-making at the key decision points in December 2018 and July–August 2019.

The results of the 2018 vote have already been set out in chapter 1. The Crown's interpretation of the vote was summarised in December 2018 by the Office of Treaty Settlements (OTS) and Te Puni Kōkiri (TPK):

> The results show that levels of support and opposition are finely balanced. At an iwi level, a slight majority of 53% (or 1534 individuals) of those who participated in the vote support the WPCT [the Trust] continuing negotiations. A substantial minority of 48% (or 1382 individuals) voted to stop negotiations to enable the Tribunal to inquire into the historical claims. Of those that participated, 12% (or 337 individuals) supported starting the mandate process again from the start.
>
> At a hapū level, majorities in four of the six recognised hapū voted to continue negotiations (although the majority in one of those hapū was only 8 votes). A seventh group, Ngāti Muriwai, was included in the voting tally in line with Tribunal recommendations, although it is not one of the recognised hapū of Whakatōhea. A majority of those who identify as Ngāti Muriwai voted against continuing negotiations with the WPCT . . .
>
> The results of the vote are not straight forward to interpret. Because of the way the questions were drafted by the Tribunal some individuals did not vote on all of the questions, meaning the response rate to each question differs from the overall participation rate. Despite the difficulty in interpreting the results, the fact remains that there is a slight majority of support for direct negotiations and a substantial minority (including two of the six recognised hapū) show a clear preference for an historical Inquiry.[128]

As discussed in chapter 1, the information provided to voters advised that they could vote on all questions rather than treating the option to continue negotiations (question 1) and the option to stop and hold an historical inquiry (question 2(b)) as either/or questions.[129] The Crown assessed the support for each question against the overall participation rate, and counted each voter who did not vote on a particular question as an 'informal no' vote on that question.[130] The claimants disagreed and argued that the degree of support or opposition on each question should be assessed against the number who voted on that question. This is the core of the dispute between the Crown and claimants over how to interpret the vote.[131]

We note that if the vote on whether to hold a Tribunal inquiry is considered in its own right, all seven hapū voted in favour of stopping negotiations in order to hold a historical inquiry (see Table 2.1 below).

128. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [19]

129. Whakatōhea Pre-Settlement Claims Trust, 'Waitangi Tribunal [Vote] Explanatory Statement', September 2018 (doc B1(a)), p 9

130. Document B3, pp 3–6

131. Submission 3.3.4, pp 7–9

2(b) 'Do you wish to see the current Treaty negotiations stopped so that the Waitangi Tribunal can carry out an inquiry into the historical grievances of Whakatōhea?'

	Yes	No
Ngāi Tamahaua	327	118
Ngāti Ira	215	59
Ngāti Ngahere	112	81
Ngāti Patumoana	167	75
Ngāti Ruatakena	209	115
Te Ūpokorehe	213	71
Ngāti Muriwai	139	2

Table 2.1: Hapū responses to question 2(b) in the 2018 vote

Regardless of how the vote is interpreted, the Crown was faced with a divided result in which there was both significant support for and significant opposition to proceeding with negotiations, while there was also significant support for holding a Tribunal inquiry into historical claims. OTS and TPK advised Ministers that the Crown could not 'ignore the mixed results at hapū level, the slim nature of the overall majority in support of negotiations, and the fact that Whakatōhea have expressed a significant wish for an inquiry into the historical grievances of Whakatōhea.'[132]

On 4 December 2018, the Trust approached the Crown with its interpretation of the voting results, stating that 'most of the minority that opposed progressing negotiations did so because they want to take part in a Waitangi Tribunal process'. The Trust therefore advised the Crown that it would not be opposed to an historical inquiry so long as it was held 'parallel [with] or subsequent' to continued settlement negotiations.[133] This oblique proposal seemed a reasonable compromise to the Crown, which would allow it to meet the wishes of both those who voted to continue negotiations and those who voted to stop and hold a Tribunal inquiry. OTS recommended to Ministers that the Crown should clarify with Whakatōhea 'how the call for a Tribunal inquiry should be addressed'. As officials understood it, this call for an inquiry was 'underpinned by a desire to have claims independently researched and recorded' rather than a desire for Tribunal recommendations on how the claims should be settled. It is important that OTS arrived at this view without any consultation with Whakatōhea. Officials also advised that a standard historical inquiry would be incompatible with the Crown's settlement time frames (that is, it would take longer than the completion of a settlement). It could there-

132. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [19]

133. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), pp [20], [28]

fore 'present a risk to the durability of any Whakatōhea settlement' if 'the Tribunal reports post-settlement with findings and recommendations that undermine the settlement'.[134]

Although officials considered that the risk was low because of the Crown's acknowledgement of raupatu, they advised that the risk could be minimised if the settlement legislation stopped the Tribunal from making any recommendations on the historical claims. OTS and TPK pointed to the precedent of the Tūhoe settlement (discussed above), in which the Crown and Tūhoe agreed to include a clause in the settlement Bill that would preserve the Tribunal's power to report and make findings but remove the Tribunal's power to make recommendations. This option was supported by the Trust and could be 'explored in relation to Whakatōhea.'[135]

The Crown's agreement to consider a parallel inquiry and negotiations was a major innovation in the Crown's approach to settlements and its importance should not be under-estimated. Usually, the Crown did not allow claimants who were in negotiations to participate in a district inquiry at the same time. The 2018 version of the OTS guide to negotiations, known as the *Red Book*, stated:

> Once a claim is registered, claimant groups can seek negotiations with the Crown straight away, or may choose instead to have their claims heard by the Tribunal before entering negotiations. If a claimant group wants to enter into negotiations they must cease actively pursuing their claim or claims before the Tribunal. The Crown also requires claimant groups to forgo other avenues of redress such as a remedies hearing by the Tribunal or action in the High Court. This is to ensure that negotiations are conducted in good faith and both parties have a strong incentive to reach an agreement.[136]

Exceptions to this policy were rare but not entirely unprecedented. In 2010, for example, prior to the beginning of the Stage 2 Te Raki (Northland) hearings, the Crown agreed to a parallel process for Ngāpuhi, allowing Ngāpuhi to have hearings alongside their negotiations with the Crown. OTS observed in that case that the hearings would provide a 'valuable assessment of the Crown's historical actions and omissions towards Ngāpuhi' but 'the Crown's criteria for assessing the size of particular Treaty settlements are the same whether or not the relevant claims have been assessed'. Tribunal recommendations would not 'change the amount of redress the Crown would offer to Ngāpuhi' but Tribunal hearings were

134. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), pp [27]-[28]

135. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [28]

136. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna / Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 2018), p 32. We refer to this in further footnotes as *Red Book*.

'particularly important for identifying issues that need to be addressed in a Treaty settlement', which could then be brought to the negotiating table.[137]

Much of this reasoning is also applicable to the Crown's approach in the Whakatōhea situation, although the Crown is not prepared to wait for Tribunal hearings to identify specific Whakatōhea issues needing to be addressed in a settlement (over and above those that are already known to the Crown). The question of whether some leeway should be allowed on this point is discussed in section 2.3.6.

In sum, the Crown has undertaken a parallel process in the past with similar justifications but it was an exception, and the question remains: why was the Crown considering making another rare exception for Whakatōhea? One reason (as set out above) is that the Crown and the Trust had both agreed to abide by the results of the 2018 vote, which showed support for both processes. In other words, the Crown's Treaty partner had expressed its will and the Crown accepted it. We should also note, however, that this was a political decision. It is clear that the 2018 vote showed a different answer to that of the mandate vote. The earlier mandate vote in 2016 had a lower participation rate and showed much higher support for the Trust.[138] Although the Crown was careful to stress that the 2018 vote was not a formal vote on the mandate, both the Crown and the Trust had to face the fact that there was only a slim majority for continuing with negotiations, and that the results at the hapū level were divided. Two hapū had voted against continuing (three if Ngāti Muriwai is counted), one hapū was effectively deadlocked (with only 8 votes between the 'yes' and 'no' votes), and the other three hapū were clearly in support of completing negotiations. All seven hapū, however, voted in support of a Tribunal hearing of historical claims.

OTS and TPK therefore recommended that the Crown defer resumption of settlement negotiations until options for an historical inquiry, 'including [a] parallel or subsequent to settlement inquiry', had been considered. Also, the Trust needed to establish broader support. The withdrawal mechanism in the deed of mandate also had to be discussed and addressed (see chapter 3). The Minister for Treaty of Waitangi Negotiations approved these recommendations on 20 December 2018. The Minister for Māori Development also signified her approval on 13 February 2019.[139] The Crown's final decision on the option of a parallel process was not made until August–September 2019.

The Trust had already written to Te Arawhiti (which had replaced OTS) in January 2019, indicating that the desire for an inquiry was driven by the people's need to have their 'stories and history told'. This was considered a necessary part of the reconciliation process. Also, the Trust reported that a recent round of hui had

137. Wai 2490 ROI, doc A26, pp 14–15
138. Waitangi Tribunal, *Whakatōhea Mandate Inquiry Report*, p 33
139. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), pp [21]–[22]

delivered the same message, so the wish for an inquiry was not only coming from opponents of the settlement. The Trust added:

> The ability to provide the solution that all claimants have sought, could only be seen as conducive to creating conditions for an enduring settlement with Whakatōhea. Against this backdrop the WPSCT do not oppose any Whakatōhea claimants who may want to have their historic claims heard before the Tribunal in a parallel or subsequent process. We therefore consider, given the history around Whakatōhea settlement processes, the Crown shouldn't require that the settlement necessarily close this off as an option.[140]

The Trust was clearly interested in exploring this option with the Crown before a final decision was made on it. We turn next to consider whether the Crown was sufficiently informed of its Treaty partner's views before making a decision. In particular, did the Crown consult Whakatōhea, and what account did it take of Whakatōhea's views in making a decision about the parallel process?

2.3.4 Was the Crown sufficiently informed of its Treaty partner's views when it decided to offer a parallel process in August–September 2019?

The claimants in this inquiry argued that the option of settlement prior to a Tribunal report, and the possibility of a report without recommendations, was not put to Whakatōhea in the 2018 vote. It does not, therefore, reflect the outcomes of the vote. The claimants also argued that the Crown only engaged with the mandated entity over the option of a parallel process when deciding how to respond to the results of the vote, even though the Crown was not in negotiations with the Trust at that time. In the claimants' view, the Crown was not sufficiently informed of its Treaty partner's views when it decided on a parallel process in August 2019, and the Crown's conduct in the lead-up to its August 2019 decision fell well short of the duty to consult.[141]

The Crown argued that its decision to offer a parallel process 'reflects a considered response by the Crown to the finely balanced outcome of the 2018 vote'.[142] Crown counsel submitted that the Crown met its obligation of informed decision-making. The Crown was 'open and forthcoming about exploring options for a parallel process in early 2019', as evidenced by a press release from the Minister in February 2019 and subsequent correspondence between the Crown and claimants on the issue prior to its decision in August–September 2019.[143] The Crown accepted that the option of a limited inquiry without recommendations was not

140. Whakatōhea Pre-Settlement Claims Trust to Acting Chief Executive, Te Arawhiti, 22 January 2019 (doc B3(a)), p [41]
141. Submission 3.3.18, pp 15–16, 38; submission 3.3.4, pp 8–13
142. Submission 3.3.11, p 4
143. Submission 3.3.11, pp 4, 5–6

foreshadowed in the 2018 vote. Rather, the Crown's view is that the option was developed as a reasonable and good-faith response to the 'wishes of Whakatōhea as expressed in the vote'.[144] In addition, the Crown argued that the parallel process is only an *offer* at this point for Whakatōhea to consider. The Crown considered that '[u]sing the negotiations engagement and ratification processes' after the decision to make the offer so as to 'ask Whakatōhea if they support the proposal is a reasonable approach in the circumstances, and a reasonable means for the Crown to inform itself of that support overall'.[145]

We agree with the parties that the parallel process was not foreshadowed in the 2018 vote, and therefore was not an option on which Whakatōhea voted. Nonetheless, the Crown was informed as a result of the vote that there was support for both negotiations (a slim majority on an individual basis) and an historical inquiry. We accept that the option of offering Whakatōhea the ability to pursue both settlement pathways was therefore a reasonable response to the outcome of the vote so long as Whakatōhea agreed to it. The question was how best to do this: in July 2019, Te Arawhiti advised against either deferring the settlement until the Tribunal had reported or permitting the Tribunal to make recommendations after settlement (discussed below), which drew strong opposition from the claimants when they were informed of it. The Trust as the mandated entity advised in December 2018 that it would not oppose a 'parallel or subsequent' Tribunal inquiry but did not want to wait for an inquiry to finish before finalising the settlement.[146]

Even though the Crown was not in negotiations with the Trust at the time, the Crown did consult further with the Trust about this option before coming to a decision, as reflected in the Ministers' letter to the Trust in February 2019:

> The results [of the vote] highlight several issues that need to be considered. The majority in support of the Trust is not large, and the results at the hapū level are mixed. It is also clear that a significant minority of the iwi have expressed a wish for the Waitangi Tribunal to inquire into the historical grievances of Whakatōhea.
>
> In these circumstances, we consider the results show too much support for progressing the settlement for the Crown to exit negotiations, but not enough to simply resume negotiations.
>
> Like you, we have a strong interest in reaching a durable settlement of Whakatōhea's claims and believe the Agreement in Principle signed in 2017 provides a solid foundation for such a settlement to be reached.
>
> Nevertheless, we must respect the full picture that emerges from the results of the vote and are mindful of the guidance the Tribunal provided regarding next steps in the event of a finely balanced outcome.

144. Submission 3.3.11, p 7
145. Submission 3.3.11, p 6
146. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), pp [20], [28]; Whakatōhea Pre-Settlement Claims Trust to Acting Chief Executive, Te Arawhiti, 22 January 2019 (doc B3(a)), p [41]

> We wish to consider how a broader base of support for the settlement might be built before deciding whether to resume negotiations with the Trust. In particular, we want to clarify how the call for a historical Tribunal inquiry can be addressed. We are interested in your views on this and appreciate your suggestion that a way be found to enable the historical claims to be heard in a parallel or subsequent process. We see merit in this idea as a way to, as you say, create conditions conducive for an enduring settlement with Whakatōhea, and we intend to explore this option as a priority.
>
> . . . . .
>
> We acknowledge that you consider recommencing negotiations now would provide the most effective way to build support for the settlement. However, we believe that the initial steps we have proposed to address the central issues raised by the results of the vote give us the best opportunity of finding a way forward that has the widespread support of Whakatōhea. We intend to make a public statement outlining the approach we propose in this letter.[147]

Thus, the Crown wanted to discuss the specific option of a parallel process with the Trust 'as a priority' and to be open about the fact that it was considering the option, hence the Minister's press release on 22 February 2019 (two days after this letter to the Trust). In the press release, the Minister stated that the results of the 2018 vote were 'finely balanced', showing 'too much support for the Trust for the Crown to walk away, but clearly the results raise some important issues that need to be addressed before any decisions about resuming negotiations can be made'. The Minister added that he had 'asked officials to consider the Tribunal inquiry', stating that 'there could be an historical inquiry process parallel or subsequent to negotiations'. The Minister intended to 'explore this option and other options for building support before deciding whether to resume negotiations'.[148]

Discussions ensued between the Crown and the Trust about the best way of providing for both negotiations and an historical inquiry. The Crown was also aware of the claimants' views from correspondence received after the press release, although the Crown did not hold hui or discussions of any kind outside of its discussions with the Trust. The claimants disagreed with the idea of holding an inquiry and negotiations in parallel. Wackrow Williams and Davies, for example, wrote to the Minister in May 2019 on behalf of their Ngāi Tamahaua and Ngāti Rua clients, stating that there was 'no precedent for these two processes to occur in parallel and it makes no logical sense'. They added that the Crown's proposal would 'seriously prejudice our claimants' ability to engage in a Tribunal process which is intended to be comprehensive and independent of any negotiations with the Crown'. If the Crown continued to 'prioritise speed and political objectives over the desire of Whakatōhea for a fair, transparent and comprehensive inquiry into their claims, then the Claimants will be forced to consider their options which

147. Minister for Treaty of Waitangi Negotiations and Minister for Māori Development to the Trust, 15 February 2019 (doc B3(a)), pp [31]–[32]

148. 'Next Steps for Whakatōhea', press release, 22 February 2019 (doc B8(a)), p 131

can only serve to delay matters'.[149] The Minister's response was that he had not yet decided whether to resume negotiations, and he would take all views into account in his decision-making.[150]

It is important to note that the Minister's press release did not mention the possibility that the Tribunal's power to make recommendations on historical claims could be removed. On this point, officials believed in 2018 that the 'preference for an inquiry is underpinned by a desire to have claims independently researched and recorded'.[151] This could still be provided for, they said, in a parallel process. Officials pointed to how the Crown had 'previously overcome differing Tribunal and negotiations timeframes' in the Tūhoe settlement by inserting a modified ouster clause in the settlement legislation, preserving the Tribunal's ability to report but not to make recommendations on historical claims that had already been settled. Officials advised: 'This option could be explored in relation to Whakatōhea and is supported by the WPCT [the Trust]'.[152]

Thus, the Trust was aware of the full nature and consequences of the option that the Crown was considering and supported it, including that the Tribunal's power to make recommendations about the historical claims would be removed if the Crown decided to go ahead with the parallel process. The problem is that the claimants were not aware of this; the possibility of limiting the inquiry in this way was not mentioned in the Minister's press release or in any of the Crown's communications with claimants that have been filed in this inquiry. This includes the April 2019 letter to claimant lawyers that Crown counsel pointed to as evidence of the Crown's open and transparent approach.[153] In this letter, the Minister advised that 'Minister [Nanaia] Mahuta and I have asked officials to explore the possibility of an historical inquiry process parallel to, or subsequent to, negotiations'.[154] The implications of what would happen if the inquiry continued subsequent to negotiations were not spelled out. Presumably, the Crown considered it premature to disclose these details outside of its discussions with the Trust.

149. Wackrow Williams & Davies to Minister for Treaty of Waitangi Negotiations, 30 May 2019 (doc B8(a)), pp 132–133

150. Minister for Treaty of Waitangi Negotiations to Wackrow Williams & Davies, 20 June 2019 (doc B8(a)), p 134

151. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [27]

152. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [28]

153. 'Next Steps for Whakatōhea', press release, 22 February 2019 (doc B8(a)), pp 130–131; Minister for Treaty of Waitangi Negotiations to Annette Sykes & Co, 24 April 2019 (doc B3(a)), p [35]; Minister for Treaty of Waitangi Negotiations to Annette Sykes & Co, 5 June 2019 (doc B3(a)), p [36] Minister for Treaty of Waitangi Negotiations to Wackrow Williams & Davies, 20 June 2019 (doc B3(a)), p [37]; Minister for Treaty of Waitangi Negotiations to Te Rua Rakuraku and Te Ringahuia Hata, 20 June 2019 (doc B2(a)), p 32

154. Minister for Treaty of Waitangi Negotiations to Annette Sykes & Co, 24 April 2019 (doc B3(a)), p [35]

It is also important to note that the Crown did not know *why* Whakatōhea wanted an historical inquiry when Ministers made their decision in August–September 2019. Te Arawhiti advised Ministers in July 2019: 'It is not clear from the vote whether the primary driver for the call for an inquiry was improved settlement outcomes or a deeper recognition of Whakatōhea's history and grievances.'[155] Claimant counsel submitted on this point that 'it is remarkable that further engagement with the claimant community itself was not considered appropriate before the Crown committed' to the parallel process.[156]

We agree but we would also observe that the correspondence from claimants did indicate their wish for a comprehensive inquiry prior to settlement. Te Rua Rakuraku and Te Ringahuia Hata of Ngāti Ira wrote to the Minister on 5 June 2019, stating: 'The North-Eastern Bay of Plenty district inquiry (NEBOP) is an important moment in our history and should not be compromised by agendas to settle as fast as possible grievances that we still need to place before an independent Commission of Inquiry for their considered review.'[157] Other such letters were also sent to the Crown in support of an historical inquiry prior to settlement rather than a parallel process.[158] It would be fair to say, therefore, that even though the Crown had not revealed the full parameters of the option it was considering, it had clear information from the claimants that they did not support an inquiry running alongside and after negotiations instead of one that informed and shaped the settlement.

The next question becomes: what account did the Crown take of the feedback it had received from correspondence with the claimants? Te Arawhiti summarised this feedback as: '[M]any of the Tribunal claimants see the [2018] vote outcome as an endorsement for their position of a Tribunal inquiry only' rather than a parallel process, and were 'likely to make legal challenges against any move towards continuing settlement negotiations.'[159]

Te Arawhiti and TPK provided joint advice to Ministers in July 2019, which included discussion of three options. The option that officials recommended was to 'conditionally resume negotiations and signal support for an inquiry alongside or after settlement, to test iwi views at ratification.'[160] They advised that this option would be in keeping with the outcome of the 2018 vote, it would enable a timely settlement, it would allow the iwi to decide (through its ratification vote), and it

155. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [56]
156. Submission 3.3.4, p 12
157. Te Rua Rakuraku and Te Ringahuia Hata to Minister for Treaty of Waitangi Negotiations, 5 June 2019 (doc B2(a)), p 24
158. Annette Sykes to Minister for Treaty of Waitangi Negotiations, 26 April 2019 (doc B2(a)), p 17; Wackrow Williams & Davies to Minister for Treaty of Waitangi Negotiations, 30 May 2019 (doc B8(a)), pp 132–133
159. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [45]
160. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [56]

offered the best way to achieve both a settlement and an inquiry.[161] If Ministers agreed with this option, then it would 'need to be made clear to Whakatōhea' that the settlement would be full and final 'irrespective of the Tribunal's findings', and that 'the Tribunal's jurisdiction would be modified so it could not make recommendations'.[162]

The second option was to defer any decisions and wait for further engagement between the Trust and the claimant community. Officials acknowledged that this option would respect the outcome of the 2018 vote and allow for more dialogue within Whakatōhea but they did not recommend it. A further delay, they said, would not 'provide a reasonable opportunity of achieving a timely and durable settlement with Whakatōhea, something the Tribunal agrees is a legitimate objective'.[163] Te Arawhiti also reported the Trust's views on this option. The Trust was reportedly concerned that further engagement would be 'dominated by claimant voices that favour inquiry only'. The 'results of the engagement will therefore be uneven and make it difficult for Ministers to decide how to proceed without a further vote'.[164] It is difficult to say how far the Crown was influenced by the Trust's views on these points.

The third option considered by the Crown was to stop negotiations and wait for a Tribunal inquiry to be completed, which was what the claimants had sought from the Crown. Te Arawhiti noted the possibility that the 'main barrier to unity' in the negotiations was the need to stop and 'allow Whakatōhea time and space to bring forward their history of dealings with the Crown ahead of a future settlement attempt'. Officials dismissed this option on the basis that it did not respect the outcome of the 2018 vote; that is, those who voted in favour of continuing negotiations would consider themselves disregarded and prejudiced. An on-account payment could mitigate that prejudice but Te Arawhiti rejected this option also for policy reasons – such payments were only made after the post-settlement governance entity (PSGE) had been established – and because of the financial risk. Whakatōhea might emerge more united and more capable of settling after an historical inquiry but officials considered this 'far from certain'.[165]

The time that it would take for an inquiry to be completed was also raised as an issue by Te Arawhiti. Officials pointed to the possibility that this would 'take between five and seven years'. The Crown was not willing to wait; it wanted a 'timely' settlement.[166] At the same time, the Trust did not want to wait either, and this carried considerable weight with the Crown in deciding a way forward, as did the views of those who had voted to proceed with negotiations in 2018.

161. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), pp [50]–[51], [56]
162. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [44]
163. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), pp [47], [57]
164. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [57]
165. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [58]
166. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [50]

Thus, the claimants' wish for a full inquiry prior to settlement – which they understood to be the wish of Whakatōhea in the 2018 vote – was rejected because Te Arawhiti advised Ministers that this option was the 'least consistent with the principles Ministers adopted in response to the vote'.[167] As noted above, these principles were: to respect the vote's outcome; to 'support the Crown's interest in a timely and durable settlement'; and to respond to the Wai 2662 Tribunal's recommendation about what to do in the event the outcome of the vote was finely balanced.

The Crown's interest in a timely settlement was a key factor for the Crown but so too was the need for the settlement to be durable. A parallel process was seen as the answer that would satisfy all of Whakatōhea, both those who wanted to settle and those who wanted an historical inquiry. The Trust had advised Te Arawhiti that the claimants' wish for an inquiry before settlement was not 'representative of the views of the hapū and iwi overall', and it is clear that this was influential in officials' advice to Ministers.[168] It is difficult to see how Te Arawhiti could have tested this view since officials admitted in their advice to Ministers that they did not know why Whakatōhea voted for an historical inquiry in 2018, and the Crown had not consulted more widely than the Trust – even though not in negotiations with the Trust – to ascertain the answer before making a decision. It is in fact clear from the 2018 vote that there was significant support for the claimants' views, as a result of which the Crown was seeking a compromise that still allowed a 'timely' settlement.

In our view, the most important consideration ultimately is that the Crown decided to offer a parallel process as a compromise to meet the outcomes of the 2018 vote, but the final decision on whether this compromise was acceptable to Whakatōhea would be made *by Whakatōhea* at ratification. The whole iwi would have an opportunity to vote and decide the matter. In our view, this would be a cure for the Crown's failure to consult widely and make itself fully informed prior to its decision on the parallel process, so long as there was sufficient time, discussion, and quality information for the claimant community to consider the proposal before voting. We discuss the importance of the ratification vote further below. Here, we note our view that the Crown's failure to consult fully and properly inform itself prior to its decision was mitigated by the information that it received from claimants and the decision that Whakatōhea would have the final say on the matter. We also note that our view here is subject to the findings and recommendations that we have made in chapter 3 about how the ratification vote should be conducted.

The Ministers for Treaty of Waitangi Negotiations and Māori Development accepted the recommended option in August and September 2019 respectively. The Minister for Treaty of Waitangi Negotiations announced this decision in an open letter to Whakatōhea on 30 September 2019. It was not until this point that the claimants and the whole of Whakatōhea discovered that the parallel process

167. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [50]
168. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [57]

would require the complete removal of one of the Tribunal's core functions, its power to make any recommendations about the historical claims. This could not have been *assumed* since:

(a) Whakatōhea were in a unique situation at the very beginning of their historical inquiry, prior to the first hearing, and the historical evidence was in the process of being commissioned, which differed from other situations where an inquiry was permitted to continue after settlement; and
(b) the Crown had not required this limitation of the Tribunal's jurisdiction in all cases where an inquiry was permitted to complete after settlement.

We turn next to consider the question of whether the Crown's decision to limit the Tribunal's inquiry in this way – which it has maintained ever since August 2019 despite strong claimant opposition – was fair and reasonable in all the circumstances. We begin with the question of whether the Crown has breached the claimants' right to justice.

2.3.5 Has the Crown's decision breached the claimants' 'right to justice'?

The Crown's decision to offer a parallel process, which would limit the Tribunal's power to make recommendations, is 'part of a settlement package which has been negotiated and agreed by the Trust and the Crown'.[169] To that extent, it is 'no longer a mere possibility' because the Crown has 'committed to do it', so long as the deed of settlement is ratified by Whakatōhea.[170]

The claimants argued that this decision of the Crown breaches their right to justice because it will deny them a full inquiry with recommendations for relief, including the possibility of binding recommendations. Human rights norms, they said, 'underscore the significance of the right to justice, both domestically and internationally'. They pointed to section 27(3) of the New Zealand Bill of Rights Act 1990, which 'enshrines the right to bring civil proceedings against the Crown, and to have them heard "according to law"'. The claimants also raised the United Nations Declaration on the Rights of Indigenous People, which recognises the right of indigenous people to participate in fair, independent, and impartial processes to adjudicate their rights. The rule of law, the claimants said, is underpinned by the principle that 'justice must not only be done, it must be seen to be done'. If the Crown were to remove a core function of the Tribunal while the claims were being heard, the claimants argued that it would undermine the mana and legitimacy of the settlement and make the Crown the 'arbiter of its own justice'.[171] Further, in light of the Crown's decision not to remove the Tribunal's recommendatory powers in some other settlement Acts, and the deep divisions in Whakatōhea about which settlement path to take, the Crown is in effect planning to legislate away the claimants' rights to a 'fair trial'.[172]

The claimants also submitted:

169. Submission 3.3.23, p 7
170. Transcript 4.1.5, p 153
171. Submission 3.3.20, pp 3–4
172. Submission 3.3.21, pp 4–7

> The precedent being proposed as a policy preference by the Crown is not an approach that we say is Te Tiriti consistent nor one that should be encouraged if we are to give effect to Te Tiriti o Waitangi as a proper part of the New Zealand Constitution itself.
>
> The precedent proposed derives from a Crown determination to expedite the settlement of claims as part of its own policy preferences and deviates from courses that have been adopted in other cases where both Treaty Settlement negotiations and settlements were being proceeded with in parallel to a Waitangi Tribunal Inquiry proceeding. Given the noted divisions between and amongst hapū at the time the policy preference was made what is proposed must be seen as an overt effort by the Crown to bring hapū to heel with this constitutional threat to deny them access to justice.[173]

We consider policy imperatives and other settlement Acts in more detail in the next section. Here, we consider these allegations that the Crown's decision will deny the claimants their right of access to justice in circumstances which make this an unfair act, promoting the Crown's interest in fast settlements at the expense of the claimants' rights.

The Crown submitted that the claimants have provided no authority or Tribunal jurisprudence in support of their argument about the right to justice, noting that Tribunal jurisprudence 'approves of Crown settlement policy and the fact that, in some instances, settlement may proceed without a Tribunal inquiry'. Crown counsel pointed to the Tribunal's *East Coast Settlement Report*, in which the Tribunal agreed with the Court of Appeal in *Attorney-General v Mair* that 'it is important for the Crown to be able to settle Treaty claims, including in the absence of a preceding Tribunal inquiry'.[174] The Crown also argued that settlements are fundamentally agreements reached by negotiation between the Treaty partners, which inevitably involve compromises on both sides. The parallel process is just such a compromise, which the mandated entity has agreed to but the whole iwi will have to decide upon through a hapū vote at ratification – the Crown will not limit the Tribunal's power to make recommendations unless there is clear support from Whakatōhea for the settlement. The claimant community will reach a decision through the ratification process, and the Crown will then 'take the settlement to Parliament for scrutiny and to obtain the endorsement of the representatives of the people of Aotearoa New Zealand'. This is an important constitutional point which, the Crown argued, will involve 'the public scrutiny process that select committees provide'.[175]

On the first question, as to whether the claimants have a right of access to justice through access to the Waitangi Tribunal, the answer is clearly 'yes'. Under section 6(2) of the Treaty of Waitangi Act 1975, the claimants have a statutory right: the Tribunal must inquire into every claim submitted to it under section 6(1) unless an historical claim was submitted after 1 September 2008 or the Tribunal considers

173. Submission 3.3.21, p 7
174. Submission 3.3.23, p 13
175. Submission 3.3.23, pp 13–14

the claim trivial or frivolous and vexatious. The Tribunal has the power to defer hearing claims but that is not relevant here.[176] The importance of access to justice through access to the Tribunal was recognised in 1987 by an agreement negotiated between the Crown and the New Zealand Māori Council. This agreement settled the litigation brought in the landmark *Lands* case. It included a Crown commitment that legal aid would be provided so that financial constraints would not prevent Māori from having access to justice through the Waitangi Tribunal. The Treaty of Waitangi (State Enterprises) Act 1988 amended the Legal Aid Act 1969 accordingly.[177]

We agree with the Crown, however, that settlements are ultimately negotiated between the Treaty partners, and that Tribunal findings and recommendations do not always inform those negotiations. As stated in section 2.1.3(3), most hapū and iwi have chosen to have their claims heard by the Tribunal prior to settlement but there are notable exceptions, including Waikato-Tainui and Ngāti Porou. The key issue is one of choice. Claimant communities have two main options for resolving their grievances against the Crown and obtaining redress – a Tribunal inquiry followed by negotiations or direct negotiations – and it is up to the hapū and iwi concerned to exercise their rangatiratanga and decide which path to follow. The Crown cannot make that choice for them. The essential problem for the claimants is that the Crown *did* make that choice for them when it wrongly accepted the mandate in 2016 in breach of the principles of the Treaty, including the active protection of hapū rangatiratanga. The Crown and the hapū of Whakatōhea now have to decide how to fix that problem (which had prejudiced the hapū) in light of the outcomes of the 2018 vote, which was the primary remedy recommended by the Wai 2662 Tribunal. Respecting the outcome of the vote was also one of the Crown's three principles for decision-making following the issuing of the Wai 2662 report.

We agree with the Crown that there is judicial authority which supports direct negotiations without the need for prior historical inquiries. Crown counsel pointed to the case of *Attorney-General v Mair* in the Court of Appeal, in which Justice Baragwanath stated in his minority decision: 'There is much wisdom in the Executive's seeking more imaginative methods for approaching the complex and deep-seated problems resulting from our nation's past than waiting for claims to be processed through the Waitangi Tribunal.'[178] Although the issues in this inquiry differ from those considered in the *East Coast Settlement Report*, not least because the claimants in this inquiry have demonstrated significant support for their position through the 2018 vote, we agree with that Tribunal's statements that: 'it is important that the Crown is able to settle Treaty claims. We are thus cautious

176. Treaty of Waitangi Act 1975, ss 6AA(1), 7(1), 7(1A)

177. Treaty of Waitangi (State Enterprises) Act 1988, preamble, ss 13–17; Ministry of Justice, 'Granting Aid for Waitangi Tribunal Matters: Operational Policy', June 2016, p 1, https://justice.govt.nz/assets/Documents/Publications

178. *Attorney-General v Mair* [2009] NZCA 625 at [169]; submission 3.3.23, p 13

of making recommendations that, if implemented, may excessively inhibit future settlements.'[179]

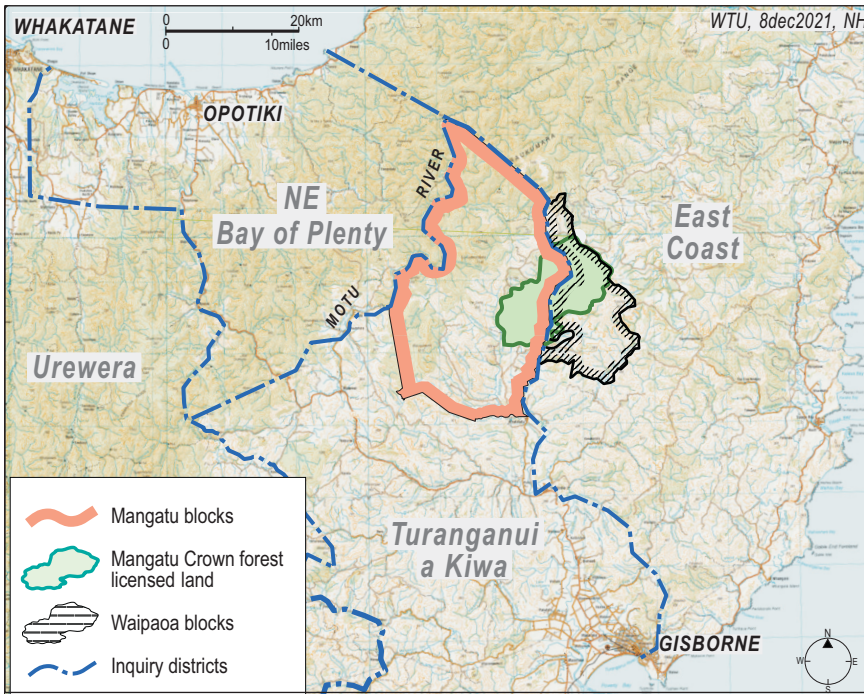
In that context, it is important to note that the claimants will not lose access to an historical inquiry or the research, hearings, report, and findings of the Tribunal. In the ordinary course of events, they would have lost that access once the settlement legislation was enacted. The claimants will, however, lose access to one of the Tribunal's core functions, the power to make general, specific, or binding recommendations for historical claim issues (see section 2.1.3). Of these, our view is that the loss of access to binding recommendations is equivalent to loss of access to the courts. Mr Pou, in his opening submissions for the Trust, argued that the Tribunal's recommendations do not determine or alter legal rights, they are 'only expressions of opinion', and therefore 'any restriction around the making of recommendations cannot be seen to prejudice any *rights* that the claimants might have (emphasis added)'.[180] The power to make binding recommendations is different. In *Attorney-General v Mair*, a case cited by both the Crown and claimants in this inquiry, Justice Baragwanath stated that the Court of Appeal would 'resist attempts to restrain access to judicial bodies to which there is a legal right of access. In this case the bodies are the Tribunal, at least in clawback cases, and the courts.'[181]

This view of matters is strengthened by the Court of Appeal's later decision in the *Haronga* case. In those proceedings, the Court of Appeal confirmed that if the statutory prerequisites for binding recommendations have been met, the Tribunal is bound to make an adjudicatory recommendation, either that land should be returned to Māori ownership or that such return is not required.[182]

The prospect of losing access to binding recommendations was especially troubling for the Ngāti Muriwai claimants, the Ngāti Ira claimants, and the Wai 87 claimants, who want to pursue binding recommendations for the return of land in the Mangatū forest once the Tribunal has made findings as to whether their claims are well-founded.[183] In their view, the Crown is 'effectively closing off a special remedy that was negotiated by NZMC [the New Zealand Māori Council] and FOMA [the Federation of Māori Authorities] and the Crown to be available for claimants to Crown Forest licensed lands to enable a partial process of privatisation of State Forests to proceed in 1989.'[184]

This forest covers parts of the Mangatū 1, Mangatū 2, and Waipaoa blocks. The Waipaoa blocks are to the east of the Tūranga (Gisborne) inquiry district, as illustrated in the map below. As noted in chapter 1, inquiry district boundaries are administrative in nature, and Whakatōhea may still seek binding recommendations for the return of land in respect of this forest, even though it lies outside of the North Eastern Bay of Plenty inquiry district.

179. Waitangi Tribunal, *East Coast Settlement Report* (Wellington: Legislation Direct, 2010), p 49
180. Submission 3.3.13, p 10
181. *Attorney-General v Mair* [2009] NZCA 625 at [171]
182. *Attorney-General v Haronga* [2016] NZCA 626, [2017] NZLR 394 at [92]
183. Submission 3.3.10, pp 21–22; submission 3.3.5, pp 1–2; submission 3.3.16, pp 12, 15
184. Submission 3.3.10, p 22



Map 2.2: Map showing inquiry districts, the Mangatū blocks and Waipaoa blocks, and the Mangatū Crown forest licensed land

Source: Waitangi Tribunal, *The Mangatū Remedies Report* (Wellington: Legislation Direct, 2014), p 5

The Tribunal's recent *Mangatū Remedies Report 2021* has made an interim recommendation for the return of the Mangatū Crown forest licensed land in the Tūranga district, which will take effect if the Crown and the claimants in that case do not negotiate an alternative arrangement within 90 days.[185] The Whakatōhea claimants are already too late to seek binding recommendations in respect of that land. The Tūranga Tribunal did receive applications from Adriana Edwards in 2017 and 2018 on behalf of Whakatōhea hapū to participate in the reconvened remedies inquiry. The Tribunal noted in the *Mangatū Remedies Report 2021*:

> Their requests were filed late in the Inquiry process and the Tribunal did not grant their request for urgent research into their claim and for full participation in the Inquiry. They were granted a 'watching brief' and leave to make submissions and file questions in writing to witnesses. The Whakatōhea claimants were required to adhere

185. Waitangi Tribunal, *The Mangatū Remedies Report 2021*, *Pre-publication Version* (Wellington: Waitangi Tribunal, 2021), pp 5, 396–398

to the existing timetable for the hearing programme, and did not participate in the 2018 remedies hearings.[186]

We have no current information as to the status of the Waipaoa parts of the forest but we understand, on the basis of the information before us, that binding recommendations could still potentially be made for the resumption of Crown forest licensed land. This is not to say that such recommendations *would* be made but the possibility exists for Whakatōhea to receive such recommendations until removed by a settlement enactment.

We accept in principle, therefore, that the claimants' legal right of access to justice will be infringed if the Tribunal's power to make binding recommendations is removed without consent. The question becomes: who can give that consent? In our view, the Crown rightly emphasised that clear and informed consent from Whakatōhea at ratification is the appropriate means for determining whether the claimant community accepts the parallel process and therefore waives the right to seek binding recommendations from the Tribunal. On this issue, the claimants argued that ratification is not a

> plausible or appropriate solution to testing support for a parallel process unless there is a specific question on the issue in the ratification document (which the Crown has said there will not be) and unless the claimants and hapū have been provided with all relevant information to be able to make a fully informed decision.[187]

We accept that there is risk that a decision on the parallel process could be obscured by the current resolutions that the Crown has approved in the ratification strategy. The first resolution to be voted on states: 'I agree that the proposed Whakatohea Deed of Settlement be accepted.' The second resolution relates to the PSGE and the third relates to the replacement of the trust board by the PSGE for certain purposes.[188] On this issue, Mr Pou submitted for the Trust at hearing: 'Because of what happened in the last vote and the confusion that too many questions created, and the arguments that we had over the interpretation of those things, I would err on the side of caution for the purposes of a ratification process and just stick to the three [resolutions] that have to occur.'[189] There is some force in this argument but, in our view, the problem is not insurmountable.

Further, the Crown needs to ensure that the information supplied to Whakatōhea for the ratification vote is both full and balanced. The draft ratification booklet, for example, states that the Tribunal will not be able to make recommendations on historical claims but does not mention that Whakatōhea will be waiving their right to seek binding recommendations.[190] In our view, this is an important omis-

186. Waitangi Tribunal, *The Mangatū Remedies Report 2021*, p 19
187. Submission 3.3.18, p 19
188. 'Ratification Strategy for Whakatōhea Pre-Settlement Claims Trust, undated (doc A10(a)), p 3
189. Transcript 4.1.5, p 282
190. 'Whakatōhea Ratification Information Booklet 2021' (doc B46), p 12

sion and Whakatōhea will need to be fully informed of the consequences of the parallel process before they vote. The draft booklet states that there are 'pros and cons' for both direct negotiations and the Tribunal process but does not elaborate on what these are. The current text does note that the Tribunal will still be able to make recommendations on contemporary (post-1992) claim issues.[191]

In sum, we accept that Whakatōhea are being given a rare opportunity to retain access to the Tribunal for an historical inquiry in parallel with (and subsequent to) settlement negotiations. To that extent, the Crown's decision respects and provides for the claimants' right to justice, namely their statutory right to have their claims heard and reported upon, while also providing for those who voted to continue negotiations in 2018. On the issue of access to the Tribunal for binding recommendations, which is akin to access to the courts' adjudicatory powers, we agree that it is appropriate for Whakatōhea to vote on this at ratification so long as the intent to do so and the consequences of doing so are made clear in the ratification information. Before the Crown approves the draft ratification booklet, Te Arawhiti will need to work with the Trust to ensure that this occurs.

We turn next to consider whether the Crown's decision to remove the recommendatory powers of the Tribunal for historical claims (as a condition of the settlement) is fair and reasonable in the circumstances.

2.3.6 Is the Crown's decision to limit the Tribunal's inquiry fair and reasonable in the circumstances?

2.3.6.1 *Introduction*

The Crown has offered Whakatōhea a process in which they can proceed to settlement and still have their claims heard by the Tribunal on two conditions: first, Whakatōhea has to give clear and informed consent to ratify the settlement; and secondly, the Tribunal will not be able to make any recommendations, whether general, specific, or binding, on the historical claims. The second condition comes from the Crown, not the Trust, which agreed to the Crown's condition in discussions prior to the resumption of negotiations and is prepared to accept it in the settlement,[192] although the Trust does not actually oppose provision for non-binding recommendations in the settlement legislation.[193]

The claimants argued that the Crown did not have a fair or reasonable basis for its decision to limit the Tribunal's recommendatory powers to contemporary claim issues.[194] Claimant counsel submitted:

> the Crown officials' advice assessed the risk of the Tribunal reporting post-settlement undermining the settlement as 'low risk' given the Crown's acknowledgements that Whakatohea experienced raupatu. If that assessment is to be accepted, then there is

191. 'Whakatōhea Ratification Information Booklet 2021' (doc B46), pp 12–13
192. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [28]
193. Submission 3.3.24, pp 3–4
194. Submission 3.3.17, p 5; submission 3.3.18, p 20; submission 3.3.21, p 12

no reasonable or substantive justification for removing the Tribunal's recommendatory powers.

Furthermore, the argument that settlement may be undermined by allowing the Tribunal to retain its full jurisdiction needs to be appropriately balanced against the fact that the Tribunal's recommendations may not be inconsistent with the settlement, and also that there is no legal requirement for the Crown to act upon the recommendations of the Tribunal, except for binding recommendations which may potentially be made.

There are some examples . . . where the Crown has left open the ability for the Tribunal to "complete all steps required [in] its inquiry" including to make recommendations. In light of the significant support for a Waitangi Tribunal that is the approach the Crown should adopt in respect of Whakatōhea claims.[195]

The Crown argued that there is a reasonable and sound policy foundation for its decision to make limiting the Tribunal's inquiry a condition of the settlement:

> [T]he policy purpose of ensuring the finality of a Whakatōhea Treaty settlement is appropriate and reasonable. Settlement will settle the historical claims of Whakatōhea and provide redress which the Treaty partners have negotiated and agreed to remedy those claims. No further remedy will be required. It is therefore appropriate to restrict the Tribunal's ability to make recommendations on historical claims it has found to be well founded.[196]

The Crown also argued that it is necessary to look beyond the nature of a Tribunal recommendation (that is, binding or non-binding) to the *purpose* of a recommendation in the statutory scheme, which is to:

- compensate for prejudice;
- remove prejudice; or
- prevent others being similarly prejudiced in the future.

The Crown submitted:

> Restricting the Tribunal's recommendatory powers through an agreed Treaty settlement is consistent with these purposes. The settlement redress is the relief which the Treaty partners have agreed on as appropriate to remedy the prejudice arising from the Crown's Treaty breaches and to provide a foundation to restore Whakatōhea rangatiratanga. So far as the claims here raise a concern that the settlement redress will be inappropriate or insufficient, the Tribunal has recognised that the exercises of both making recommendations and assessing appropriate relief through a Treaty settlement are subjective and can result in differences of opinion. As the Crown has noted, whether to proceed to settlement on the basis of the agreed settlement redress will be for members of Whakatōhea to decide.[197]

195. Submission 3.3.18, p 20
196. Submission 3.3.23, p 15
197. Submission 3.3.23, p 15

Further, the Crown argued that the decision to limit the Tribunal's recommendatory power was reasonable regardless of whether other settlement Acts have done so or not; what may have been appropriate in other cases is not appropriate for the Whakatōhea settlement.[198]

Mr Pou submitted for the Trust that the 'flipside' of the argument that Whakatōhea will not be prejudiced by the removal of the Tribunal's recommendatory power is that, 'given the nature of a recommendation, no prejudice would arise [to the settlement] if the jurisdiction of the Tribunal enures beyond settlement'.[199] Also, given that the recommendatory powers have not been limited in some other Treaty settlement legislation, 'the Pre-Settlement Trust does not oppose similar provision being made for the Whakatōhea claimants'.[200]

In light of these arguments, the first question to consider is: what value do the Crown and the Trust see in allowing the claims to be heard after settlement and without any ability to influence the settlement? We turn to that issue next.

2.3.6.2 *What is the value of having a Tribunal inquiry after settlement?*

It is evident from a number of settlements that Māori claimant groups have seen value in obtaining a Tribunal report, even after their claims have been settled. This was the case in the Te Urewera inquiry for Ngāti Manawa, Ngāti Whare, and Tūhoe, all of whom negotiated to have a modified ouster clause that enabled the Tribunal to complete its inquiry and report (but with no power to make recommendations on their historical claims). The same is also true for Tūwharetoa and Ngatikahu ki Whangaroa, although their ouster clauses had no limitation on the Tribunal's recommendatory power.[201]

On this issue, the Crown and the Trust have stated repeatedly that they see great value in having an historical inquiry alongside and after settlement negotiations. The Trust has presented the Crown's offer of a parallel process as a 'win-win' for Whakatōhea. In a July 2020 pānui, for example, the Trust stated that, as well as the benefits of settlement, 'we have the chance to uncover the depth of our Whakatōhea history and have our stories recorded through the Waitangi Tribunal District Inquiry'. The Tribunal's report would then 'provide a rich tapestry for Whakatōhea to share in our development initiatives going forward'.[202] Counsel for the Ngāti Rua claimants agreed that the Trust 'may have been genuinely motivated to obtain a "win-win" in securing the dual pathway'.[203]

198. Submission 3.3.23, pp 15–18
199. Submission 3.3.24, p 3. The word 'enure' is a legal term meaning that a right or advantage belongs to or is available to a party or parties.
200. Submission 3.3.24, p 4
201. Ngāti Manawa Claims Settlement Act 2012, ss 13(5), 13(7); Ngāti Whare Claims Settlement Act 2012, ss 13(5), 13(7); Tūhoe Claims Settlement Act 2014, ss 15(4), 15(6)–(7); Ngāti Tūwharetoa Claims Settlement Act 2018, ss 15(4), 15(6); Ngatikahu ki Whangaroa Claims Settlement Act 2017, ss 15(4), 15(6)
202. 'Pitopito Korero: Whakatōhea 2020 Settlement Information Panui', July 2020 (doc B22(a)), p [72]
203. Submission 3.3.20, p 4

In officials' advice to Ministers, in the Minister's correspondence with claimants (including in open letters to Whakatōhea), and in the Minister's February 2021 Cabinet paper, the Crown has indicated its views as follows:

- In December 2018, officials advised Ministers of their observation that the 'preference for an inquiry is underpinned by a desire to have claims independently researched and recorded'.[204]
- In their advice to Ministers in July 2019, officials advised that they were uncertain whether Whakatōhea voted in 2018 to have an historical inquiry so as to get 'improved settlement outcomes or a deeper recognition of Whakatōhea's history and grievances'.[205]
- In his open letter to Whakatōhea on 30 September 2019, the Minister stated that an 'historical inquiry plays an important role in the process of healing and reconciliation'. He noted that an 'important aspect of healing' their grievances was Whakatōhea 'having the ability to recount and record the experience of [their] whānau, hapū and iwi at the hands of the Crown'. An historical inquiry would 'provide the opportunity for people to present oral and written evidence and record the history of the relationship between Te Whakatōhea and the Crown and how that has impacted on ngā uri o Whakatōhea through to the present'.[206]
- In response to claimant objections that they wanted a full inquiry with recommendations as well as findings, the Minister replied in a letter to Wackrow Williams and Davies on 21 November 2019 that the proposal for a parallel process would allow 'a comprehensive inquiry and the production of a thorough report which will serve as a taonga for Whakatōhea without delaying the benefits of settlement'.[207]
- In the February 2021 Cabinet paper, in which the Minister sought agreement to the parallel process and the initialling of the deed of settlement, he noted that the Tribunal would 'produce a report that provides a rich history of the relationship between Whakatōhea and the Crown since 1840 and to make independent findings on the Crown's breaches of the Treaty and its principles'.[208] The Minister also advised Cabinet that the Tribunal would still be able to make recommendations about contemporary (post-1992) claim issues, which would then be considered by Whakatōhea and Crown agencies so as to 'develop a plan to address contemporary issues where appropriate'.[209]

204. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [27]

205. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [56]

206. Minister for Treaty of Waitangi Negotiations, open letter to Whakatōhea, 30 September 2019 (doc B2(a)), p 44

207. Minister for Treaty of Waitangi Negotiations to Wackrow Williams & Davies, 19 November 2019 (doc B8(a)), p 151

208. 'Whakatōhea: approval to initial a deed of settlement', Cabinet paper, February 2021 (memorandum 3.1.234(a)), p [168]

209. 'Whakatōhea: approval to initial a deed of settlement', Cabinet paper, February 2021 (memorandum 3.1.234(a)), p [168]

- In his open letter to Whakatōhea on 23 March 2021, the Minister stated that the settlement and the historical inquiry would 'together provide an opportunity to honour your tīpuna and create an enduring record of the history of the relationship between Whakatōhea and the Crown.'[210]

These kinds of messages have also been presented by the Crown at Trust negotiations hui. Following the Minister's open letter to Whakatōhea in September 2019, announcing the Crown's decision to resume negotiations on certain conditions, the Trust held hui around the country in October and November 2019. According to Dr Pollock, all the hui debated the 'value of a Tribunal report that didn't include recommendations because the settlement [would have] already happened'. Dr Pollock, who was present, said that 'we talked about . . . the catharsis, the rich and deep history that can sort of be drawn together through this inquiry process, and an independent view of the Crown's breaches of the Treaty, et cetera et cetera, which is what these reports generally produce alongside recommendations.'[211] The Trust has presented similar views on the value of a Tribunal inquiry in communications with Whakatōhea and the Crown.[212] In the draft ratification booklet, one iwi member was quoted as 'happy that the Waitangi Tribunal is happening simultaneously – allows us to have our voice, let go of things a bit more'.[213] This was a reference to the role of Tribunal inquiries in helping to achieve reconciliation and provide catharsis for the claimants involved.

The claimants' evidence suggests that all these aspects of a Tribunal district inquiry are important to them. Counsel for the Ngāi Tamahaua claimants cited the evidence of Tracy Hillier in the mandate inquiry:

> The position for us is that it will be fully researched, it will be fully resourced to protect and take the stories of the experience of Ngai Tamahaua to be heard in an open and honest and transparent forum. Also, to get accountability from the Crown for those breaches of the Treaty against Ngai Tamahaua Hapū. We don't think there is any other forum that would be possible to get that accountability from the Crown for their breaches. It is independent. We will get a report. There is some level of authenticity in the process.[214]

In saying this, however, Ms Hiller was envisaging an inquiry prior to settlement.[215] Counsel for the Ngāti Rua claimants submitted that Te Riaki Amoamo 'considers that the Tribunal inquiry is crucially important to tell the story of Ngāti

210. Minister for Treaty of Waitangi Negotiations to Whakatōhea, 23 March 2021 (doc B22(a)), pp [22]–[21]
211. Transcript 4.1.5, pp 205–206
212. Document B5, p [1]; Whakatōhea Pre-Settlement Claims Trust to Acting Chief Executive, Te Arawhiti, 22 January 2019 (doc B3(a)), p [41]; 'Pitopito Korero: Whakatōhea 2020 Settlement Information Panui', July 2020 (doc B22(a)), p [72]; 'Pitopito Korero: Whakatōhea 2020 Settlement Information Panui', August 2020 (doc B22(a)), p [86]
213. 'Whakatōhea Ratification Information Booklet 2021' (doc B46), p 13
214. Wai 2662 RO1, transcript 4.1.1(a), p 250 (submission 3.3.18, p 6)
215. Submission 3.3.18, p 6

Rua and Te Whakatōhea and have it recorded as a taonga for future generations'.[216] Claimant counsel also submitted:

> As a matter of fundamental justice, the hapū want to tell their story first before they settle. The importance of the hapū having being heard by the Tribunal, and findings having been made by an independent commission of inquiry ought not to be underestimated. On past experience, it will represent a catharsis in the intergenerational trauma that the raupatu has created. Justice must not only be done but be seen to be done, rather than being an afterthought . . .[217]

The key point here is that the claimants and those whom they represent can still have these things under the parallel process but it is also clear that it will not be as meaningful for them, it will not have the same mana as it would if done prior to settlement, and it will not shape the settlement in the way that they believe is essential. In response to the Minister's announcement in September 2019, Wackrow Williams and Davies wrote to the Minister in November 2019:

> Your announcement states that an historical inquiry plays an important role in the process of healing and reconciliation. This statement misses a crucial point: Tribunal inquiries form an important basis for the provision of *redress* for the Crown's past wrongs. To effectively say that the inquiry process is nothing more than a cathartic process for the claimants misses this crucial piece of the Treaty relationship – that to restore this relationship requires proper process, recognition of mana and rangatiratanga as well as an opportunity to obtain appropriate redress. The Crown cannot provide any of those matters if it doesn't have a clear understanding of what its past wrongs were, how it has affected the rangatiratanga of the whānau and hapū of Whakatōhea and therefore how to seek agreement to redress those matters. This is particularly concerning given that Whakatōhea suffered from some of the worst Treaty breaches including war and raupatu. Your failure to allow proper time and space to take account of the Waitangi Tribunal's process to inquire into these and other grievances is tantamount to the Crown choosing to turn a blind eye to, or glossing over, what actually occurred, or worse, providing a template resolution to what is not a template situation. [Emphasis in original.][218]

Similar views have been presented to the Crown through this kind of direct correspondence but also through the urgency proceedings in mid-2020 and in early 2021 (see chapter 1 for the details).[219] Te Ringahuia Hata, for example, said in an August 2020 affidavit that the emphasis on having stories told in the Tribunal was not a balanced view of the parallel process. Rather, it would 'extinguish the

216. Submission 3.3.7, p 5
217. Submission 3.3.7, p 6
218. Wackrow Williams & Davies to Minister for Treaty of Waitangi Negotiations, 4 November 2019 (doc B8(a)), p 148
219. See, for example, doc B28, p 4.

ability of Whakatōhea to progress a settlement that is based on the findings and recommendations of an historical inquiry'.[220] Te Riaki Amoamo stated that the parallel process was a Crown-driven strategy, not hapū-driven, and that the hapū wanted to have their claims fully researched and heard: 'we are in no hurry because we want to get this right. We deserve that right.'[221] Thus, the claimants wanted to settle after an inquiry and with the benefit of a comprehensive report and Tribunal recommendations. They also wanted their history fully researched and told; to that extent, there was some common ground between the Crown, the Trust, and the claimants. The Crown has not reconsidered its decision to offer the parallel process as a result of any of this opposition from the claimants.

Ultimately, the claimants 'question the utility of a Tribunal process that has been stripped of one of its core functions'.[222] We turn next, therefore, to consider whether there is a way to make the parallel process more consistent with what the claimants seek while also meeting the interests of those who voted in 2018 to continue with the negotiations.

2.3.6.3 *Is it fair and reasonable to prevent the Tribunal from making any recommendations at all on historical claims?*

On this issue, the claimants argued that the Crown has no sound policy or any legitimate reason to prevent the Tribunal from making recommendations after the settlement has been enacted. As noted above, the Crown submitted that it was appropriate and reasonable to 'protect the finality' of the settlement by restricting the Tribunal to findings only, at least on the historical claim issues. It is helpful at this point to consider the Crown's reasons for reaching this view, including the Crown's analysis of the nature of the risk to the settlement.

In December 2018, immediately following the outcome of the 2018 vote, OTS and TPK advised Ministers that an inquiry and settlement negotiations could occur in parallel but that the time required for an inquiry would be 'incompatible with the Crown's settlement negotiation timeframes'. Hence, there could be a 'risk to the durability of any Whakatōhea settlement' if 'the Tribunal reports post-settlement with findings and recommendations that undermine the settlement'. But this was seen as a low risk because the Crown had acknowledged raupatu as 'the worst type of grievance caused by the Crown'.[223]

The possibility of a risk to the settlement was explored again in July 2019, following discussions with the Trust about holding both a Tribunal inquiry and negotiations in parallel. The advice from Te Arawhiti underpinned the Ministers' decision in August and September 2019 to offer Whakatōhea a parallel process, on the condition that the Tribunal's power to make recommendations would be restricted. Officials suggested that the Tribunal may make findings 'that cast

220. Document B7, p 3
221. Document B11, p 7
222. Submission 3.3.4, pp 6–7
223. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), pp [27]–[28]

doubt on the sufficiency of the settlement', which could put the 'durability of the settlement at risk', and so the removal of the Tribunal's power to make recommendations would be necessary to 'protect the finality of the settlement'. Again, the risk was considered low 'given the Crown's comprehensive understanding, and acknowledgement of the significant grievances of Whakatōhea, [and] given the extent of existing research on invasion and raupatu'.[224]

The Minister presented a paper to Cabinet in February 2021 to seek approval to initial the deed of settlement, which at that time was planned for March 2021. In this paper, the Minister noted that the Tribunal would still be able to make both findings and recommendations on contemporary claim issues (Crown acts or omissions after September 1992), except for 'those arising from the settlement negotiations'.[225] In respect of contemporary claims, the settlement would provide a 'platform' for Whakatōhea to discuss the Tribunal's findings with Crown agencies. These agencies would enter into relationship agreements as a result of the settlement, and this would include 'commitments to meet with Whakatōhea to discuss the district inquiry findings on contemporary claims and develop a plan to address contemporary issues where appropriate'.[226]

The Cabinet paper stated that the usual ouster clause would need to be modified so that the Tribunal could still make findings but not recommendations on historical claims. The Minister noted that some previous settlement Acts had included such a modification, but in those cases 'hearings had concluded before settlement negotiations began'.[227] The risk in this situation was that the Tribunal's inquiry would 'go into greater detail than the settlement regarding historical issues'. This could result in findings that 'appear[ed] inconsistent with the historical account and the Crown acknowledgements included in the deed', which 'may present a risk to the durability of the settlement'. The Minister advised that this risk would be mitigated in two ways: removing the Tribunal's power to make recommendations; and ensuring the provision of clear information to Whakatōhea at ratification that the settlement would not 'alter based on the Tribunal's future findings'.[228] The risk of the Tribunal's findings undermining the settlement was still considered low because it was 'unlikely major inconsistencies will arise regarding the significant historical grievances of Whakatōhea relating to invasion and raupatu'.[229]

Crown counsel submitted in this inquiry that the Crown's policy purpose of ensuring finality in settlements is appropriate and reasonable. We agree in

224. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [53]
225. 'Whakatōhea: approval to initial a deed of settlement', Cabinet paper, February 2021 (memorandum 3.1.234(a)), p [167]
226. 'Whakatōhea: approval to initial a deed of settlement', Cabinet paper, February 2021 (memorandum 3.1.234(a)), p [168]
227. 'Whakatōhea: approval to initial a deed of settlement', Cabinet paper, February 2021 (memorandum 3.1.234(a)), p [167]
228. 'Whakatōhea: approval to initial a deed of settlement', Cabinet paper, February 2021 (memorandum 3.1.234(a)), p [167]
229. 'Whakatōhea: approval to initial a deed of settlement', Cabinet paper, February 2021 (memorandum 3.1.234(a)), p [167]

principle although we doubt that it is necessary to remove the Tribunal's recommendatory powers completely in respect of historical claims to achieve that finality. We do not accept the claimants' argument that the Crown's decision to 'inhibit the recommendatory function of the Tribunal into historical claims lacks any clear underpinning policy' and 'is rather based on the policy of Crown preference'.[230] It has been the Crown's policy in almost all Treaty settlements in the past 20 years to remove the power of any court or tribunal to inquire further into the settled historical claims. This is the standard ouster clause that features in most Treaty settlement legislation. Both the Crown and the Māori Treaty partners have a strong interest in the durability of settlements, and the New Zealand public shares that interest. Thus, there is a sound policy basis for protecting the finality of historical settlements.

The essential dilemma for the Crown is how to do this in circumstances where (a) Whakatōhea are divided on which settlement pathway to follow, (b) the 2018 vote showed support for both pathways, and (c) the Tribunal inquiry is in its early stages, with substantial research and claimant evidence yet to come. Counsel for the Ngāti Patumoana claimants stated:

> Significant historical research has since been commissioned for the inquiry. The implication is that the inquiry process as a whole, will likely result in new understandings of Whakatōhea history and claim issues of which the claimants wish to see reflected in any recommendations and settlement. Although there are significant secondary sources in relation to raupatu issues, it is clear that very little is known about non-raupatu land dealings and other non-raupatu issues.[231]

In these circumstances, and in light of the Crown's repeated statements that the risk to the durability of the settlement is low, the claimants argued that there was 'no reasonable or substantive justification for removing the Tribunal's recommendatory powers'.[232] In particular, the claimants argued that there have been 'many Tribunal inquiries where specific recommendations are made concerning particular hapū or whānau grievances, in addition to the major claims'.[233] What the Crown sees as a form of *risk*, the claimants see as an opportunity to add meaning and mana to the inquiry process.

In the circumstances of Whakatōhea, the Crown could reasonably be expected to consider modifying the proposed ouster clause so as to allow for recommendations to be made on specific grievances. Such grievances are usually local or circumscribed in nature but are strongly felt nonetheless. As discussed in section 2.1.3(2), the Tribunal's recommendations can be made 'in general terms or may indicate in specific terms the action which, in the option of the Tribunal, the

230. Submission 3.3.17, p 5
231. Submission 3.3.4, p 7
232. Submission 3.3.18, p 20
233. Submission 3.3.9, p 6

Crown should take'.[234] The Crown, however, has rejected the possibility of any recommendations, whether general, specific, or binding, arguing that the purpose of Tribunal recommendations is to recommend relief and the removal of prejudice, whereas the settlement will already have provided redress and settled all historical grievances.

In our view, it is important to reiterate the purpose behind the Crown's decision to offer a parallel process. The Wai 2662 Tribunal found that the Crown was in breach of Treaty principles for accepting the Trust's mandate in 2016. The Tribunal recommended that the Crown suspend negotiations with the Trust while a vote was held to accord Whakatōhea hapū 'an opportunity to decide now how they wish to proceed in a way that is more transparent'.[235] In that context, the objectives the Crown set for itself were to:

- respect the outcomes of the 2018 vote;
- support 'the Crown's interest in a timely and durable settlement'; and
- respond to the Wai 2662 Tribunal's recommendation that a 'finely balanced outcome' in the 2018 vote 'should lead to discussions about a Tribunal inquiry or alternative process.[236]

The parallel process was devised to meet all three of these objectives. The Crown's interest in a timely and durable settlement therefore means (in this particular context) that some recognition is needed for the specific grievances that will be identified in the post-settlement hearings, recalling also that the Crown offered those hearings as part of its reasonable and good-faith response to the 2018 vote. Rather than undermining the settlement, this could in fact enhance its durability.

We note further that there is no objection in principle to preserving the Tribunal's power to make recommendations, since this has been done for Tūwharetoa and for Ngatikahu ki Whangaroa.[237] It is a question of how to ensure that the specific Whakatōhea settlement remains durable in the light of the detailed research and claimant histories that will come after the settlement. As the claimants argued, it cannot be assumed that the Tribunal's recommendations would be inconsistent with or would undermine the settlement, and the Tribunal's specific recommendations are not binding on the Crown. Further, the Trust's view is that, '[f]or whatever reason, the requirement to remove the recommendatory powers of the Tribunal was not included in the settlement legislation of Ngati Tuwharetoa and Ngati Kahu ki Whangaroa', and the Trust does not 'oppose similar provision being made for the Whakatōhea claimants'.[238]

Given all these points, our view is that the Crown would best respect the will of Whakatōhea as expressed in the outcome of the vote, as well as the Crown's interest

234. Treaty of Waitangi Act 1975, s 6(4)

235. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 97

236. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [20]

237. Ngāti Tūwharetoa Claims Settlement Act 2018, ss 15(4), 15(6); Ngatikahu ki Whangaroa Claims Settlement Act 2017, ss 15(4), 15(6)

238. Submission 3.3.24, p 4

in a timely settlement, by preserving the Tribunal's ability to make some specific recommendations on historical grievances. As discussed in section 2.1.3(2), the Tribunal has power under the Treaty of Waitangi Act to made recommendations that 'indicate in specific terms what action in the opinion of the Tribunal the Crown should take'.[239] This kind of recommendation could be made in respect of the hapū-specific or whānau-specific grievances, often circumscribed or local in nature (as noted above), that will emerge from the research and hearings to come. This would make the post-settlement hearings more meaningful for the claimants and in so doing would enhance the durability of the settlement, while any risk to the *finality* of the settlement would be minimal given that the Tribunal's power to make specific recommendations is non-binding. The Tribunal's power to make general recommendations for compensation would have been removed by the settlement, as would the Tribunal's ability to make binding recommendations. We expect that the Crown would discuss any specific recommendations with its Treaty partner at the same time that any recommendations on contemporary claim issues are addressed, as currently anticipated following the release of the Tribunal's report.

It follows that, as the claimants argued, the Crown may have 'prioritised its interest in a "timely" settlement over any alternative historic inquiry options'.[240] The Crown, in ruling out the possibility of any recommendations on historical issues at such an early stage in the district inquiry, has not sufficiently taken into account the fact that the settlement will come before the research has been completed or any of the hearings have been held. The Minister was not interested in a truncated inquiry to get an early report on priority issues, as he informed Wackrow Williams and Davies in November 2019.[241] Earlier, Te Arawhiti had rejected the option of seeking unity among Whakatōhea through preserving baseline redress while the inquiry was held, so that the settlement could be fully informed by the Tribunal's findings and recommendations.[242]

Having made those decisions, the Crown – in respecting the outcome of the vote – is obliged to consider preserving its ability to act on *specific* recommendations without disturbing the finality of the settlement. Otherwise, the risk is that the Whakatōhea claimants will not see sufficient value in continuing with the historical inquiry, which would vitiate the parallel process that is to underpin the settlement and would undermine the settlement far more than any risk from specific, non-binding recommendations.

In sum, it may not be reasonable in the particular circumstances of Whakatōhea for the Crown to circumscribe the Tribunal's power to make specific recommendations, but we accept that the Crown has otherwise acted reasonably and fairly on the outcomes of the 2018 vote insofar as the issues addressed in this chapter

239. Treaty of Waitangi Act 1975, s 6(4)
240. Submission 3.3.4, p 26
241. Minister for Treaty of Waitangi Negotiations to Wackrow Williams & Davies, 19 November 2019 (doc B8(a)), p 151
242. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [58]

are concerned. Further, the final decision on whether to accept the Crown's offer of a parallel process will be made by Whakatōhea at the ratification stage, which again is fair and reasonable provided that Whakatōhea are fully informed on the consequences of the decision that they have to make, and the recommendations on the ratification vote in chapter 3 are carried out.

The Minister for Treaty of Waitangi Negotiations, in his open letter to Whakatōhea on 30 September 2019, stated:

> Despite the promise of te Tiriti o Waitangi, the Crown's historical actions created long-standing grievances for Whakatōhea. The pursuit of justice for these well-founded grievances has placed a heavy burden on the whanau and hapū of Te Whakatōhea. The implications of the Crown's actions are still keenly felt, and recognising and redressing these wrongs is long overdue.[243]

The Crown is required to fairly and reasonably balance the aspirations of those who wish to settle now and those who want the settlement to be informed by the Tribunal's inquiry. The parallel process has the potential to do just that.

We turn next to consider whether the Crown has acted consistently with the principles of the Treaty in the matters addressed in this and previous sections.

2.3.7 Conclusions and findings on the parallel process and the proposal to remove the Tribunal's recommendatory powers

The principle of partnership requires the Crown to act fairly, reasonably, and with the utmost good faith towards its Treaty partner. This requires the Crown to make informed decisions about matters where the interests of the Māori Treaty partner would be affected, and often requires consultation. On the issue of what to do in response to the 2018 vote, and on what to do about the call for a Tribunal inquiry, the obligation to consult was a minimum obligation given that the Crown was not in negotiations with the Trust at the time. As discussed in section 2.3.4, the Crown only consulted the Trust and did not consult more widely among Whakatōhea before making a decision. We accept that the Crown issued a press release, so as to inform the wider claimant community of the option that it was considering, and that, as a result, the Crown was informed by correspondence of the views of the claimants on the matter. Also, we note that the Crown was not making a final decision but rather developing a proposal on which Whakatōhea would have the final say at ratification. So long as our recommendations in respect of the ratification vote are carried out (see chapter 3), we accept that the Crown's failure to consult prior to making its decision in August 2019 was not a breach of the principles of the Treaty.

On the allegations that the Crown has breached the claimants' right to justice, we note that article 3 of the Treaty promised Māori the rights and privileges of British subjects. The Treaty principle of equity requires the Crown to apply this

243. Minister for Treaty of Waitangi Negotiations, open letter to Whakatōhea, 30 September 2019 (doc B2(a)), p 44

promise equally to all citizens, whether Māori or non-Māori, which includes the active protection of their rights as citizens to access to justice. This is usually interpreted as access to the courts for the determination of legal rights, and, on this basis, it also applies to access to the Tribunal to apply for binding recommendations for the return of certain classes of land. More broadly, in the context of why the Waitangi Tribunal was established and the 1987 agreement between the Crown and Māori on the provision of legal aid, we accept that the principle of equity extends to the right of access to the Tribunal. We also accept that Treaty settlements are ultimately negotiated between the Crown and Māori. Tribunal findings and recommendations inform such settlements but – ever since the Crown established the direct negotiations pathway – they are not a precondition of settlement. The key point here is that there is a choice. Hapū and iwi must make a free and informed choice as to which pathway they decide to pursue.

On this issue, there is division between and within hapū, and the Crown earlier breached the principles of the Treaty when it accepted the Trust's mandate, as found in the *Whakatōhea Mandate Inquiry Report* (see above). Following the release of that report, two decision-making points were established for Whakatōhea to resolve which path to follow: the 2018 vote; and the proposed ratification vote.

In our view, the Crown has not breached the principle of equity. This is because the Crown has proposed that Whakatōhea will make a free and informed choice at ratification as to whether or not to waive the right to seek binding recommendations. We note, however, that the nature and consequences of this choice are not fully explained in the ratification material to be placed before Whakatōhea, and this needs to be corrected before the Crown approves that material for use in the ratification process. Further, there is not a specific question to be voted upon, and we are not satisfied that the Crown's condition of the informed consent of Whakatōhea will be met through the ratification vote if such a question is not included. That is a matter for the Crown to take up with the Trust prior to approving the ratification materials, and will require the Crown to revisit its approval of the ratification strategy (which covers the questions to be voted upon). We do not make a finding of breach here as there is still time for the Crown to act. In circumstances where the Crown is not yet in breach but will be it if does not take appropriate action, the Tribunal makes suggestions rather than formal recommendations (see below).

As discussed in section 2.4, the Crown has imposed conditions on its offer of a parallel process. Those include the condition that the Tribunal's power to make any recommendations on historical breaches will be removed in the settlement legislation, so as to protect the finality and durability of the settlement. As set out in section 2.4.5, the Crown has made assurances to Whakatōhea that there is still value in holding the Tribunal inquiry after the settlement, which include:

- the healing and reconciliation effects of the process;
- the opportunity to present their histories and have their grievances heard in an open forum;
- a report that will be a taonga and will make independent findings and thus provide independent verification of the validity of their grievances.

We accept that these Crown assurances meet some of the aspirations of those who voted in 2018 for a Tribunal inquiry. Also, the principle of redress requires the Crown to provide timely redress for breaches of the Treaty, and the Crown's interest in a timely settlement is shared by the Trust and those who voted in 2018 to continue the negotiations. We accept that the offer of a parallel process is a fair and reasonable response to the 2018 vote, in the context of the Crown's interest in a timely settlement, with this exception: we do not accept that the Crown's condition on its offer (to remove the Tribunal's power entirely to make *specific* recommendations) is a fair and reasonable response to the wishes of those who voted to have an historical inquiry that would inform and shape the settlement.

The Crown has argued that there will be no need for recommendations because all prejudice from historical breaches will have been settled in a final manner. This is a powerful argument but it needs to be considered in the specific context of Whakatōhea and of the Crown's decision not to insist on removing the recommendatory power in the Tūwharetoa and Ngatikahu ki Whangaroa settlements. The Crown has acknowledged that any risk to the finality of the Whakatōhea settlement is low, the Tribunal's specific recommendations are not binding on the Crown, and the Crown is required to respect the outcome of the 2018 vote. In these circumstances, our view is that the Crown should allow for some specific Tribunal recommendations. Otherwise, the Crown runs the risk that the claimants will see no 'utility' in having their claims heard,[244] and the parallel process that was to underpin Whakatōhea's choice to settle will not happen. In our view, this is a risk to the *durability* of the settlement, and it also risks further entrenching rather than healing the divisions within Whakatōhea over which settlement path to take. For the parallel process to be a win-win for Whakatōhea, as the Trust has said it will be, it needs to fairly and reasonably meet the aspirations of both those who voted for settlement now and those who voted to have an historical inquiry. Otherwise, the Crown will have favoured one side over the other to the lasting benefit of neither.

We need to decide, however, whether the Crown's decision to offer a conditional parallel process is of such a nature that it is inconsistent with the principles of the Treaty. As we have said, we think that the Crown's condition is not reasonable in the circumstances of Whakatōhea and the 2018 vote, and it carries with it a risk to the durability of the settlement. Nonetheless, on balance, we do not consider that the Crown has breached the principles of partnership or active protection. This is because, ultimately, the Crown has made an *offer* that Whakatōhea will decide whether or not to accept. The final decision will be made by Whakatōhea through the ratification process and vote. We cannot substitute our judgement for that of Whakatōhea on the question of whether the offer is fair and acceptable to them, bound up as it is with the settlement redress that the Crown is also offering.

Our finding in this respect comes with two provisos.

244. Submission 3.3.4, pp 6–7

First, the recommendations we make in chapter 3 should be implemented, so that the Crown will have provided for hapū rangatiratanga in the decisions to be made at ratification.

Secondly, Whakatōhea must be enabled to make an informed decision on an explicit proposal or the Crown will be in breach of the principle of partnership, and Whakatōhea will be prejudiced thereby. The onus is on the Crown to ensure that the information available to Whakatōhea on its proposal for a parallel process will be as full and balanced as possible. We suggest that the Crown and Trust prepare a joint booklet on the proposal to accompany the Trust's ratification booklet. This is a suggestion rather than a formal recommendation because the Crown is not yet in breach of Treaty principles; there is still time and opportunity to put this matter right. We also suggest that the Crown require the inclusion of a specific resolution in the ratification vote, along the lines that Te Arawhiti said would be necessary back in July 2019. Officials advised Ministers at that time that the results of the ratification vote, and of comprehensive engagement with Whakatōhea, would give the necessary information for Ministers to decide whether to 'defer settlement date until after the Tribunal has concluded its district inquiry'.[245] Thus, for both the Crown and Whakatōhea to make the choice on the matter of the parallel process, there needs to be a specific resolution on this point, formatted so as to match the other resolutions to be voted upon.

Again, this is a suggestion, not a formal recommendation, because we have found that the Crown is not yet in breach of the principles of the Treaty but will be in breach if appropriate action is not taken. A possible wording (to match the 'yes' votes sought by the Trust to the other resolutions) would be for the second question to be: 'I agree that the settlement be completed now before the Waitangi Tribunal's district inquiry is completed'. The two questions would then read in order:

- 'I agree that the proposed Whakatōhea deed of settlement be accepted.'[246]
- I agree that the settlement be completed now before the Waitangi Tribunal's district inquiry is completed.

2.3.8 A final comment on the issue of specific recommendations

In respect of specific recommendations, we think the Crown should reconsider its condition on the offer of a parallel process for the reasons set out above and in section 2.4.5. We have pointed out the risks and it is now up to the Treaty partners to make their respective decisions.

This final comment does not have the status of a finding or recommendation but we offer it for the consideration of the parties.

245. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [56]
246. 'Ratification Strategy for Whakatōhea Pre-Settlement Claims Trust, undated (doc A10(a)), p 3

CHAPTER 3

HAPŪ RANGATIRATANGA, THE WITHDRAWAL MECHANISM, AND RATIFICATION

3.1 Introduction

3.1.1 What this chapter is about

In this chapter we consider whether, in light of the findings and recommendations of the Wai 2662 Tribunal, the Crown has ensured the Whakatōhea Pre-Settlement Claims Trust's withdrawal mechanism is fair, reasonable, workable, and reflective of hapū rangatiratanga. We also consider whether the Crown has accepted a ratification strategy that appropriately recognises the role of hapū in the ratification process. All parties agree that decision-making in Whakatōhea is hapū driven, although they differed as to how exactly that applied to the circumstances of the withdrawal mechanism and the ratification process.

The issues as defined for the priority hearing are:

> Issues associated with the mechanism for hapū to withdraw from the settlement negotiations and the amendments made to that mechanism following the Tribunal's 2018 *Whakatōhea Mandate Inquiry Report*, and the role (if any) of hapū in the process to ratify the deed of settlement.[1]

The significance of these issues for Whakatōhea is high as the Crown and the Trust prepare to initial the deed of settlement and begin the ratification process. Those hapū who oppose the Trust as the mandated body or who wish to have their claims heard prior to the settlement now have a stark choice: to attempt to trigger the withdrawal mechanism; or to muster support to vote against the ratification of the settlement. The potential consequences of either path are fraught, involving as they do the possibility of entrenching the current divisions or delaying settlement of the Whakatōhea raupatu and other claims for a second time. As noted in previous chapters, the negotiations in the 1990s failed at the ratification stage, and it has taken until now for the second attempt to be made.

Issues of tikanga and hapū rangatiratanga lie at the heart of both issues to be discussed in this chapter. The Crown's acceptance of the withdrawal mechanism in the deed of mandate was found to be in breach of Treaty principles in the *Whakatōhea Mandate Inquiry Report* for a number of reasons, including that it was not a hapū withdrawal mechanism, the threshold for triggering the mechanism excluded members of the hapū who were not registered with the Whakatōhea

1. Memorandum 2.5.32, p 6

Māori Trust Board, and because it was too onerous and therefore unworkable. The claimants argued in this inquiry that the Crown had failed to address these matters in a Treaty-consistent manner. They claimed that the 2020 amendment to the threshold did not resolve the problems, that the mechanism was still unworkable, and that the mechanism still did not allow for hapū to withdraw their mandate from the Trust. The Crown denied these claims. In the Crown's view, the 2020 amendment sufficiently addressed the findings and recommendations of the *Whakatōhea Mandate Inquiry Report*. Also, the Crown argued that it has offered funding to the claimants, which means that the mechanism is no longer too onerous, and that hapū could use the mechanism to achieve withdrawal. The Trust, however, argued that it would be contrary to tikanga for hapū to withdraw from the joint settlement negotiations; the claimants denied that this is the case.

The Crown's acceptance of the ratification strategy was not addressed in the earlier report because the negotiations had not reached that point. Initially, the Crown accepted a ratification strategy in which no role was provided for hapū, even though all parties agreed that Whakatōhea decision-making is hapū driven. The proposed ratification voting method was later amended, however, to include the recording of hapū affiliation in the postal vote, so that the wishes of the hapū will be known when the Crown evaluates the degree of support for the settlement. The claimants argued that this change was insufficient to provide for hapū rangatiratanga, and that hapū decision-making properly occurs at hui-ā-hapū on the marae, not by way of a postal vote. The Crown argued that the claimants' proposed method of hapū decision-making was not inclusive enough for the Crown to assess the degree of support, and that the hapū postal vote was a sufficient provision for tikanga and hapū rangatiratanga. The Trust's submissions agreed with the Crown on this issue.

Although we did not receive any specific claimant evidence for the hearing due to the extremely tight timeframes that had to be met, it is important to note that we have had available to us and have considered the affidavits filed by the claimants in the 2020 and 2021 urgency processes. We have also considered the evidence filed by Dr Pollock for the Crown in the urgency proceedings and the brief of evidence filed for the hearing.

Our assessment of the claim issues in this chapter begins with the withdrawal mechanism. The withdrawal mechanism sections consist of:

- a brief description of the decision-making models in the Whakatōhea guide to settlement negotiations, 'Te Ara Tono';
- a summary of the parties' arguments;
- an analysis of the relevant clauses in the deed of mandate, the claimants' proposed alternative model, and the question of whether tikanga prevents one or more hapū to withdraw from representation by a particular entity such as the Trust;
- a summary of the findings and recommendations of the *Whakatōhea Mandate Inquiry Report*;

- an analysis of the Crown's decision-making on withdrawal mechanism issues since December 2018, the 2020 amendment, the claimants' repeated efforts to get the mechanism amended, and the Crown's responses to those efforts;
- our conclusions and Treaty findings; and
- our recommendations for relief.

We then turn to analysis of the issues in respect of the role of hapū in the ratification process, beginning with a summary of the parties' arguments. We then analyse the Crown's decision-making on this issue, including the claimants' attempts to get a different model for ratification voting, and an assessment of whether a postal vote with hapū affiliation recorded is an appropriate compromise. We then set out our conclusions and Treaty findings on this issue, followed by our recommendations.

Before we begin with the substantive analysis of the claim issues, however, it is first necessary to discuss the relevant Treaty principles for this chapter, which we turn to next.

3.1.2 Relevant Treaty principles

In this section, we provide a brief introduction to the principles of the Treaty of Waitangi that are relevant to the issues covered in this chapter. We make our Treaty findings on the withdrawal mechanism in section 3.8 and the ratification process in section 3.11.

3.1.2.1 *Partnership*

The Crown and Whakatōhea have been trying to restore their Treaty relationship through a settlement since the mid-1990s. The basis for their interactions in undertaking this difficult and protracted task is the principle of partnership. As has often been stated by the Waitangi Tribunal and the courts, the Treaty of Waitangi established a relationship akin to a partnership between the Crown and Māori. The Treaty partners must act towards one another reasonably and with the utmost good faith. The Crown's partnership obligations include the obligation to make well-informed decisions where Māori interests are concerned, which will sometimes require consultation.

The Crown must also respect the tikanga and whanaungatanga of the group(s) with which the Crown is dealing, especially in Treaty settlement negotiations, where the object is to restore the Treaty relationship on a sound partnership footing. As the Tribunal found in the *Ngati Awa Settlement Cross-Claims Report*, the Crown has an active 'honest broker' role to play in Treaty negotiations, so as to 'effect reconciliation, and to build bridges' if negotiations cause 'fall-out in the form of deteriorating relationships' within tribes.[2] The Wai 2662 Tribunal emphasised the Crown's obligation to play this role, and to minimise the damage that settlement negotiations can cause to whanaungatanga within a tribal claimant

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

community.[3] This role remains crucial in this inquiry in the context of the drive to get the settlement deed initialled and ratified, amid the division evident in the 2016 withdrawal petition, the 2017 mandate inquiry, the 2018 vote, and still evident in the present inquiry.

The Mana Ahuriri Mandate Tribunal found that the partnership principle also 'carries with it a duty of active protection' (which is discussed in the next section) and an 'obligation to respect and protect the tino rangatiratanga or autonomy of Māori groups'.[4] The Crown's obligation to respect and protect tino rangatiratanga is especially strong for the decisions which claimant communities have to make during the Treaty settlement process. This is because a settlement must be 'supported and ratified by the claimant community, and the Crown has a Treaty obligation to ensure that it is settling the claims and restoring the partnership on a sound foundation of consent'.[5] The measurement of consent is a challenging process in any Treaty settlement negotiations. It must be measured according to the tikanga and customary decision-making processes of the claimant community, while also satisfying the Crown's obligation to ensure that consent is well-informed and arrived at through inclusive and transparent processes. These are essential elements for both the Crown and Māori to make a settlement durable.

3.1.2.2 *Active protection*

The Wai 2662 Whakatōhea Mandate Tribunal found the principle of active protection relevant to the Whakatōhea negotiations. The Tribunal noted the Crown's duty to actively protect hapū interests and hapū rangatiratanga in the negotiations, including when 'considering voting procedures and their outcomes'.[6] The Ngātiwai Mandate Tribunal stated:

> At the heart of the Treaty relationship is a partnership between kāwanatanga and tino rangatiratanga. Tino rangatiratanga is guaranteed to Māori by article 2 of the Treaty and has been expressed as 'the highest chieftainship' and as 'full authority'. This guarantee imposes upon the Crown a duty of protection, which – in the words of the Court of Appeal – is 'not merely passive but extends to the active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.
>
> As we have seen, Tribunals that have inquired into mandate issues have emphasised the importance of protecting actively the tino rangatiratanga of hapū. To do this requires the Crown to understand and provide for the application of tikanga, and to understand and preserve tribal relations where possible.[7]

3. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2018), pp 22–23
4. Waitangi Tribunal, *The Mana Ahuriri Mandate Report* (Lower Hutt: Legislation Direct, 2020), p 15
5. Waitangi Tribunal, *The Mana Ahuriri Mandate Report*, p 15
6. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 23–25, 30
7. Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2017), p 26

According to the evidence in this inquiry, 'hapū rangatiratanga was always paramount' in Whakatōhea. Decision-making is 'driven by Hapu', strives to achieve Whakatōhea kotahitanga, and is inclusive so as to involve as many members as possible.[8] The Crown's active protection of hapū rangatiratanga, therefore, must strive to ensure that hapū-driven decision-making is provided for and protected when decisions have to be made by Whakatōhea, such as the decision whether or not to ratify the draft deed of settlement. How exactly that is to be done was a matter for debate in our inquiry. The claimants stressed hui-ā-hapū and the autonomy of hapū, the Pre-Settlement Trust stressed Whakatōheatanga, hapū acting collectively as Whakatōhea, and iwi-wide postal voting. In section 3.2, we discuss 'Te Ara Tono', the Whakatōhea plan for settlement which set out how decisions would be made during the different stages of the settlement negotiations, and which assists with some guidance on these points.

The Crown's Treaty duty, as previous Tribunals have found, is to actively protect hapū rangatiratanga in whatever form the particular claimant community requires, according to its tikanga. The Crown must ensure that the structure of the mandated entity, including its withdrawal mechanism, allows for hapū interests to be tested and heard.[9] Once that *is* ensured, the Crown, having decided in 2019 to continue negotiating with the Trust, must protect the Trust's ability to exercise authority in the settlement process as a mandated entity.[10] The Ngāpuhi Mandate Tribunal found that the Crown is also required to actively protect the rangatiratanga and tikanga of 'those hapū that are opposed to their claims being negotiated by the mandated entity, and weigh this protection of hapū with that of non-hapū interests in the modern context'.[11] If these points seem contradictory, it is only because hapū representation is complex, especially in a situation where some 90 per cent of the people live outside the ancestral rohe,[12] and because the Crown has an honest broker role to ensure that settlement negotiations do not damage intra-tribal relationships. The exercise of rangatiratanga by hapū is central to Whakatōhea tikanga, and the Crown must patiently, carefully, and actively protect it inside and outside of the mandated entity, especially when key milestone decisions are to be made in the negotiations.

Finally, it must be remembered that flaws in the Crown's conduct do not necessarily amount to a breach of the Treaty.[13] Also, the Tribunal sometimes finds that the Crown has not breached the Treaty because there is still time for it to take appropriate action, but that the Crown *will* be in breach if it does not act. In those circumstances, the Tribunal makes suggestions for avoiding breach rather

8. Document B36, p 2
9. Waitangi Tribunal, *Whakatōhea Mandate Inquiry Report*, p 53
10. Waitangi Tribunal, *The Mana Ahuriri Mandate Report*, p 17
11. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2015), p 74
12. Transcript 4.1.5, p 200
13. Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report*, p 26

than formal recommendations. In the case of the Te Arawa mandate inquiry, for example, the Tribunal found:

> The Crown has not yet breached the Treaty of Waitangi because there remains an opportunity for review and reconfirmation. If the Crown does not make an adequate response to our suggested course of action, however, we believe that it will be in breach of the Treaty.[14]

We discuss the relevant findings and recommendations of the Wai 2662 *Whakatōhea Mandate Inquiry Report* in section 3.4.3 below. We turn next to consider hapū rangatiratanga and what 'Te Ara Tono' said about it before continuing to assess issues in relation to the withdrawal mechanism.

3.2 Hapū Rangatiratanga and 'Te Ara Tono'

3.2.1 'Te Ara Tono'

All parties in this inquiry agreed that Whakatōhea decision-making is hapū driven, although they differed over the balance between the role of hapū and uri (all Whakatōhea members, including those who live outside the rohe). From 2003–2007, Whakatōhea hapū and marae representatives worked on 'the development of a report to guide the internal processes of Whakatohea' so that hapū-driven decision-making could occur in the context of Treaty settlement negotiations. The result was 'Te Ara Tono', a report which set out 'guiding principles for Whakatōhea to move forward as hapu toward a settlement'.[15] Barry Kiwara, who chaired the working group which produced 'Te Ara Tono', described its key principles:

> the process for Whakatohea claim(s) needs to: Be driven by Hapu; Be designed by Whakatohea for Whakatohea (not the crown); Achieve Kotahitanga; Be inclusive and involve as many of Whakatohea in decision making as possible; Ensure that the settlement fits within a wider strategic plan for Whakatohea. . . . The purpose was to ensure that Hapu Rangatiratanga was always paramount.[16]

Mr Kiwara stated that 'Te Ara Tono' was the Whakatōhea equivalent to the '*Red Book*', the Crown's guide to settlement negotiations.[17] The Wai 2662 Tribunal discussed 'Te Ara Tono' in its 2018 report.[18] Here, we focus on its models of decision-making for major steps in the negotiations process; steps which would commit 'all of Whakatohea to a particular course of action that is difficult to reverse'.[19]

14. Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p 119
15. Document B36, pp 1–2
16. Document B36, p 2
17. Document B36, p 3
18. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 27–29
19. 'Te Ara Tono' (Wai 2662 RO1, doc A73), pp 34–35

3.2.2 Hapū-driven decision-making model for ratification

'Te Ara Tono' identified six options for decision-making, each of which would have to be supported by 'comprehensive communication' with the claimant community, that is by public notices, newsletters, and other forms of communication. The group which developed the report accepted that there may need to be a balance between decisions at the hapū level and decisions at an iwi level. They also accepted that the Crown's criteria, the standards the Crown would apply to assess whether a major decision was sufficiently robust for the Crown to rely on it, would also need to be taken account of in their models. The decision-making options therefore set out a range of ways in which decisions could be made, and each option was then assessed against Whakatōhea standards and Crown standards. The options they considered were:

- Hui-ā-hapū – each hapū would hold a hui-ā-hapū at which the hapū would reach a resolution on the decision to be made. A majority of more than 50 per cent of hapū would be necessary to indicate approval, after which the decision would need to be confirmed at the iwi level, possibly by a hui-ā-iwi.
- Hui-ā-iwi – those present at the single hui-ā-iwi would vote as individuals, with a majority of over 50 per cent necessary to pass a resolution.
- Hapū regional presentations – decision-making hui would occur in Ōpōtiki, nationwide, and possibly overseas, with voting at each hui to be recorded on a hapū basis. A majority would be if more than 50 per cent of these hui passed the resolution.
- Iwi regional presentations – decision-making hui would occur in Ōpōtiki, nationwide, and possibly overseas, with votes recorded as individual votes. A majority would be if more than 50 per cent of these hui passed the resolution.
- Hapū postal and electronic voting – the votes of individuals would be counted according to their hapū. A majority would be if more than 50 per cent of hapū voted for the proposed resolution.
- Iwi postal and website voting – the votes of individuals would decide the proposed resolution, with a majority of more than 50 per cent of individuals approving the resolution.[20]

For the decision whether to ratify the deed of settlement, the six options were evaluated against three Whakatōhea standards and four Crown standards. The three Whakatōhea standards for assessment were:

- whether the option was hapū driven;
- whether the option provided for kanohi ki te kanohi; and
- the relative expense of the option.

The Crown standards were:

- how inclusive the option was;
- how accurate the option would be in terms of authenticating the results;
- whether the option would ensure well-informed voting; and

20. 'Te Ara Tono' (Wai 2662 ROI, doc A73), p 36

- whether the process was transparent.[21]

According to the guidance from 'Te Ara Tono', the ratification option which best met all of these standards was for the settlement to be ratified at hui-ā-hapū. This option scored high in terms of being hapū driven and enabling a kanohi ki te kanohi process. Its score in terms of expense was moderate, with each hui-ā-hapū estimated at about $8,000, not including catering and other costs (which would depend on attendance numbers). In terms of the Crown's criteria, decision-making at hui-ā-hapū scored low for inclusiveness (due to the smaller number of people who would be able to attend). The hui-ā-hapū option scored high in respect of a well-informed vote, because impacts of the settlement could be fully explained and debated in person at hui. The option scored moderate for its transparency and authentication, the latter of which would depended on accurate recording of votes at each hui. Overall, the option of using hui-ā-hapū to ratify the settlement scored 'moderate-high'.[22]

All other decision-making options scored lower save one: the option of having a hapū postal and electronic vote, which scored first equal as 'moderate-high' overall, but was not the first choice for the authors of 'Te Ara Tono'. This option was assessed as moderately hapū driven but low in respect of a kanohi ki te kanohi process. The option scored high in terms of expense, estimated at a minimum of $8,000 for the whole process (compared to at least $8,000 for each hui-ā-hapū). The option of a hapū ballot scored high on three of the Crown's criteria: it would be inclusive (in terms of involving as many hapū members as possible), well authenticated (so long as the votes were recorded accurately), and transparent. The only Crown criterion on which this option scored low was a well-informed vote; inevitably, the written material supplied with the voting pack would not inform members to the same degree as kanohi ki te kanohi discussion at a hui-ā-hapū.[23]

The next best scoring option was to ratify the settlement through hapū regional presentations at hui around the country (and possibly overseas), with a majority of 50 per cent of these hui voting to accept the proposed resolutions. The usual ratification process, an iwi postal vote, scored low on the criteria of hapū-driven decision-making and kanohi ki te kanohi processes. It scored high, however, in terms of cost, although the assumption seems to have been made that it would not be preceded by hui around the country, which would have lowered that score. The iwi postal vote scored high against three Crown standards: it would be inclusive, transparent, and well authenticated (so long as the voting was recorded accurately). This option was assessed as low for a well-informed decision-making process.[24]

Overall, the process recommended in 'Te Ara Tono' was for ratification to be decided by hui-ā-hapū. In comparing the two processes that scored equally – hui-ā-hapū and a hapū postal/electronic vote – the former scored highest in the

21. 'Te Ara Tono' (Wai 2662 ROI, doc A73), p 41
22. 'Te Ara Tono' (Wai 2662 ROI, doc A73), p 41
23. 'Te Ara Tono' (Wai 2662 ROI, doc A73), p 41
24. 'Te Ara Tono' (Wai 2662 ROI, doc A73), p 41

criterion of hapū-driven decision-making, and this was considered the most important criterion for Whakatōhea.[25] This was not, however, the decision-making model agreed for ratification by the Crown and the Pre-Settlement Trust (see section 3.10.4).

3.2.3 A hapū-driven decision-making model for withdrawing the mandate?

The authors of 'Te Ara Tono' did not consider the possibility of withdrawing the mandate as one of the decisions that Whakatōhea hapū might need to make.[26] Barry Kiwara explained that the authors thought all issues could be resolved through dispute resolution, and the rangatiratanga of hapū and the rangatiratanga of iwi would come together for the benefit of all Whakatōhea.[27] There is a potential model, however, in the preferred option in 'Te Ara Tono' for voting on whether to accept a deed of mandate. This is because the Crown and Trust require the withdrawal of the mandate (or the mandate of one or more hapū) to follow an equivalent process to the one used for conferring the mandate – 'a reverse mandating process' as claimant counsel described it.[28] For approving the mandate, 'Te Ara Tono' recommended that the decision be made by a hapū postal and electronic vote, which scored high or moderate on all criteria except for the degree to which voters would be well informed.[29] Logically, this would also be the process for withdrawing a mandate under the 'Te Ara Tono' model of hapū-driven decision-making.

We will consider the 'Te Ara Tono' model for ratification further below. We turn next to discuss the key issues in respect of the deed of mandate's withdrawal mechanism.

3.3 The Parties' Arguments: The Withdrawal Mechanism

3.3.1 The claimants' case

The claimants argued that the Crown did not act appropriately on the Wai 2662 Tribunal's findings and recommendations about the withdrawal mechanism. As a result, the withdrawal process remains too onerous for claimants to attempt it without sufficient funding and adequate time to run the process (estimated by the Crown at about six months).[30] In respect of the necessary funding, the claimants submitted that:

- the Crown did not decide that funding could potentially be made available for withdrawal processes, or establish a framework for that funding, until as late as December 2020;
- the Crown only informed some claimant groups about the new funding framework;

25. 'Te Ara Tono' (Wai 2662 ROI, doc A73), p 41
26. Transcript 4.1.5, p 122
27. Document B36(b)
28. Submission 3.3.14, pp 9–10
29. 'Te Ara Tono' (Wai 2662 ROI, doc A73), p 39
30. Submission 3.3.14, pp 9–10

- no funding would be available to the claimants until they had carried out the work of obtaining signatures for a withdrawal petition (the first step in the mechanism);
- the Crown's funding policy is 'vague and there remains uncertainty about whether Crown funding will be made available, and if so, how much'; and
- it appears that most of the funding that is potentially available would be for the Trust, which is out of sync with the deed of mandate because the deed requires the hui process to be run by the group seeking to withdraw, not by the Trust.[31]

The claimants also argued that the withdrawal mechanism is still 'unfair as it fail[s] to appropriately recognise hapū rangatiratanga'.[32] Rather, they said, the mechanism prescribes the same process that was used by the Trust to obtain the mandate, with a series of publicly notified hui and an iwi-wide postal vote at the end, after which the Trust, not the hapū, will decide whether the mandate can be amended to allow one or more hapū to withdraw their part of it. According to the claimants, the withdrawal mechanism will not be Treaty-compliant until it allows hapū to decide for themselves whether they will withdraw their mandate.[33]

Counsel for the Wai 2961 Ngāti Patumoana claimants submitted that the primary Treaty breach in respect of the withdrawal mechanism is a breach of the Crown's Treaty duty to actively protect hapū rangatiratanga:

> Importantly, the duty to actively protect hapū rangatiratanga must be heightened in the current circumstances, given the Waitangi Tribunal's 2018 findings that the Crown failed to act reasonably to ensure an adequate means of voting on the mandate on a hapū basis. In other words, hapū decision making processes have largely been absent from the settlement process to date and the October 2018 vote returned mixed hapū results (as record[ed] on an individual hapū affiliation basis). The withdrawal mechanism and ratification processes must then ensure that hapū can finally exercise their right to decide whether to be included in the current settlement proposal in accordance with Whakatōhea tikanga.[34]

In order to determine whether the Crown has actively protected hapū rangatiratanga, the claimants argued that the Tribunal must apply Whakatōhea tikanga, a guide for which is set out in the 2007 Whakatōhea report 'Te Ara Tono'.[35] Claimant counsel also suggested that the Tribunal has no discretion to depart from tikanga in its recommendations, relying on the High Court decision *Mercury Energy New Zealand v Waitangi Tribunal*,[36] which is currently being appealed.[37]

31. Submission 3.3.15, pp [9]–[10]; submission 3.3.18, pp 33–35; submission 3.3.9, pp 10–11; submission 3.3.27, pp 19–20
32. Submission 3.3.18, p 10
33. Submission 3.3.14, pp 9–10; submission 3.3.18, pp 31–32
34. Submission 3.3.14, p 2
35. Submission 3.3.18, p 12
36. *Mercury Energy NZ v Waitangi Tribunal* [2021] NZHC 654
37. Submission 3.3.14, p 2; submission 3.3.18, p 12

In the claimants' view, the Crown, too, has a responsibility to ensure that 'tikanga based decision-making permeates in the withdrawal mechanism and ratification processes'.[38]

The claimants submitted that the one amendment that has been made to the withdrawal mechanism in February 2020 has made 'an already unworkable process even more onerous'.[39] The Crown, they said, made the resumption of negotiations in 2019 conditional on the Trust making the particular amendment that the Crown thought appropriate. The Crown, therefore, ought not to argue now that amending the mechanism is the sole responsibility and decision of the Trust, since the Crown in fact decided what the amendment would be and worked exclusively with the Trust to ensure that it was made.[40] Also, the claimants argued that the Crown failed to play an 'honest broker' role, since it only dealt with the Trust over the 2020 amendment, and the Crown has since referred them to the Trust to discuss any further amendments, even though the Trust signalled that it did not want to 'relitigate' issues in respect of the mechanism.[41]

The February 2020 amendment changed the step that triggers the withdrawal process, which was a petition from 5 per cent of registered adult members of Whakatōhea, to a new threshold of 5 per cent of all adult members of Whakatōhea. This amendment was supposed to fix one of the flaws identified by the Wai 2662 Tribunal but, the claimants argued, the new wording has created a threshold that cannot be used because the number of adult members is too uncertain – the '5% of what' conundrum. In addition, the claimants submitted that the Crown did not ask the Trust to clarify the meaning of the amendment until quite late (April 2021), and the Trust did not provide an explanation until even later, at the judicial conference in July 2021; in the meantime, the claimants were not in a position to use the mechanism. Even after an explanation was given, the claimants argued that the Trust's view is not determinative because the matter is a legal one, and the meaning of the 5 per cent threshold in the deed of mandate cannot be clarified until the deed itself is amended to provide clarity. Until that is done, the claimants said that they cannot begin the work of obtaining the right number of signatures for a withdrawal petition. The claimants also submitted that they had raised this issue in their applications for urgency but the Crown had still not acted to ensure that the problem is remedied.[42]

In sum, the claimants argued that the Crown insisted on one amendment, which has made the withdrawal mechanism even more difficult to use, but it has not insisted on the other necessary amendments to make the mechanism less onerous or to make it a hapū withdrawal mechanism. In addition, the claimants argued that the effects of a withdrawal are unclear in a number of ways, making it

38. Submission 3.3.21, p 21
39. Submission 3.3.14, p 10
40. Submission 3.3.21, pp 18–19; submission 3.3.14, p 9; submission 3.3.18, pp 27–28, 29
41. Submission 3.3.14, pp 5–6, 8–9; submission 3.3.4, pp 3–4, 21–22; submission 3.3.7, pp 10–12
42. Submission 3.3.4, pp 3–4, 18–21; submission 3.3.9, pp 9–10; submission 3.3.15, pp [9]–[10]

more difficult for them to use the mechanism or be certain of what will happen if they do:

- the Crown has made it clear that it does not want to settle with individual Whakatōhea hapū;
- the Crown would have to decide whether to continue negotiations with the Trust;
- it is unclear whether the claimant definitions in the deed of mandate and the trust deed can be amended to remove hapū; and
- it is unclear how the registered Wai claims covered by the deed of mandate would be dealt with in the event of one or more hapū withdrawing from the mandate, especially since the deed of mandate may not provide for individual claims to be withdrawn.[43]

There were other, particular claimant concerns about the mechanism. First, the Ngāti Muriwai claimants submitted that it is unclear whether they can use the withdrawal mechanism with its current wording. In their view, the mechanism appears to be restricted because it requires the identification upfront of which hapū seeks to amend the deed of mandate, but the deed does not recognise Ngāti Muriwai as a hapū of Whakatōhea. Ngāti Muriwai, they said, 'will not, under any circumstances, identify themselves differently for the purpose of fitting the parameters of the withdrawal mechanism'.[44]

Secondly, Te Ūpokorehe claimants submitted that it is unclear whether those parts of Te Ūpokorehe which do not whakapapa to Whakatōhea would be able to withdraw claims that nonetheless will be settled by the Crown and the Whakatōhea Pre-Settlement Claims Trust. In their view, only a mechanism that allows hapū or sections of the claimant community to decide to withdraw would truly safeguard the option for Te Ūpokorehe to withdraw.[45] Counsel for Te Ūpokorehe claimants submitted, in respect of both the withdrawal mechanism and ratification:

> Crown witness Dr Pollock stated that Ūpokorehe votes and/or signatures would be counted because it is anyone who is having their claims settled that would be counted.
>
> However, this would require Te Ūpokorehe to effectively 'park' their primary whakapapa and identity to the side and identify as Te Whakatōhea to have a vote in the future of their own lands. If they don't, they risk not having their signatures or votes counted.
>
> This does not assure the Claimants, instead it raises more issues.[46]

3.3.2 The Crown's case

The Crown argued that issues about the withdrawal mechanism were 'fully ventilated' in the Wai 2662 urgent mandate inquiry, and that the 'subsequent decisions by the Trust and by the Crown have been taken in the knowledge of the Tribunal's

43. Submission 3.3.18, pp 31–32; submission 3.3.17, pp 7–8; submission 3.3.9, pp 11–12
44. Submission 3.3.16, pp 13–14
45. Submission 3.3.15, pp [8]–[10]
46. Submission 3.3.15, p [8]

views'.[47] The Crown summarised the Wai 2662 Tribunal's findings and recommendations as:

- the 5 per cent threshold for written notice was unfair because it was tied to the Trust Board's register;
- the requirement to hold an iwi-wide postal vote was a major financial and logistical challenge to groups without funding; and
- the withdrawal mechanism lacked a clear process for hapū to withdraw from the mandate.[48]

Crown counsel submitted, '[f]unctionally, the amendment to the withdrawal mechanism made by the Trust in early 2020 achieves what the Tribunal recommended in its 2018 report'.[49] There were a number of reasons advanced in support of this position.

First, the Crown argued that the 2020 amendment was sufficient because it addressed the issue that non-registered members of Whakatōhea could not be counted as signatories to a withdrawal petition.[50]

Secondly, the Crown submitted that the financial and logistical issue has also been addressed because the 'claimants have been on notice for some time now that they can apply for Crown funding for steps to participate in the withdrawal mechanism'.[51] On the funding issue, the Crown's position was that it was appropriate not to provide funding until after the first step of gathering signatures for a successful withdrawal petition had triggered the mechanism. The Crown also denied that 'it has an obligation to pro-actively provide information about funding to all groups that might have expressed some opposition to the settlement'. In the Crown's view, groups seeking to activate the mechanism ought to have applied to the Crown or the Trust for information about funding, as part of a dialogue once the withdrawal process had been invoked.[52]

On the third issue of a hapū withdrawal mechanism, the Crown submitted that the existing withdrawal mechanism already 'appropriately provides for the interests of Whakatōhea hapū and the possibility of "hapū withdrawal" from the settlement negotiations'.[53] A specific hapū withdrawal mechanism was not necessary, the Crown stated, because 'the Trust mandate could be amended to remove a hapū from the claimant definition'.[54] According to the Crown, the current mechanism appropriately balanced hapū rangatiratanga and Whakatōheatanga, in line with 'Te Ara Tono', which envisaged a single settlement and collective decision-making, and did not 'envisage a mechanism for individual hapū to unilaterally remove themselves from the scope of a settlement'.[55] Thus, in the Crown's view, the existing

47. Submission 3.3.23, p 24
48. Submission 3.3.11, p 19
49. Submission 3.3.23, p 24
50. Submission 3.3.23, p 24
51. Submission 3.3.23, p 25
52. Submission 3.3.23, p 27
53. Submission 3.3.11, p 22
54. Submission 3.3.11, p 22
55. Submission 3.3.23, p 24

withdrawal mechanism 'allows for hapū collectively to amend the deed of mandate as they see fit', which 'seems appropriate in these circumstances'.[56] Crown counsel also submitted that it would not be appropriate to transpose some other withdrawal mechanism on the existing one, as that would impact all of Whakatōhea, including those who support the current negotiations.[57]

On the issue of what would happen if a majority of a hapū voted to withdraw (at the end of the withdrawal process), the Crown submitted that this would not be enough to 'lead to a withdrawal of the mandate itself'. Rather, the 'effect of a vote such as this on the Trust's overall mandate would be carefully considered and discussed by the Trust and the Crown'.[58]

On the issue of the February 2020 amendment and the '5% of what?' question, the Crown submitted:

> The Crown repeats its submission that the '5% of what?' issue is, in practice, overstated. Since July 2020 the Crown, in its evidence and submissions, has noted that no one has taken steps to invoke the withdrawal mechanism in the Trust deed of mandate – that is, to collect signatures for a withdrawal petition – since it was amended. In these circumstances the Crown's position is the claimants' claims that the amended withdrawal mechanism is unclear, and even more onerous, are undermined by the fact that steps have not been taken to use the mechanism.[59]

Essentially, the Crown argued that the claimants have sat on their hands and taken no steps to collect signatures for a petition, which they could have done at any time.[60] The claimants' failure to act means that their claims and submissions about the withdrawal mechanism are 'abstract and unable to be tested'.[61] In the Crown's submission, the exact meaning of the amended threshold is a matter for 'the Trust to address in the first instance in light of the circumstances in which they arise and subject to trust law'.[62] The claimants have 'made much of the process surrounding the amendment to the mechanism' and the Crown's alleged failure to engage with them about the amendment (among other things), but, in the Crown's submission, this 'obscure[s] the key point that no party has taken the first step in the withdrawal mechanism, and the lack of evidence as to what, in practical terms, prevents that from being done'.[63]

On the specific issue of whether a group that is not a recognised hapū could file a withdrawal petition, the Crown submitted that the mechanism cannot be used to withdraw 'individual Wai claims' or 'individuals (including claimants) from the ambit of settlement negotiations'. Rather, if an amendment was made

56. Submission 3.3.11, p 23
57. Submission 3.3.23, p 29
58. Submission 3.3.23, p 30
59. Submission 3.3.11, p 21
60. Submission 3.3.11, p 22
61. Submission 3.3.23, p 25
62. Submission 3.3.23, p 26
63. Submission 3.3.23, p 26

to the mandate after use of the mechanism, it would then need to be worked out what effect this would have on the settlement of claims made in the name of Whakatōhea or 'its constituent parts'.[64] But, the Crown submitted, if a significant number of Whakatōhea were able to put together a petition and trigger the mechanism, then a 'pragmatic approach' would be taken to a group such as Ngāti Muriwai if they had sufficient support to reach the threshold, even though they were not a recognised hapū.[65]

3.3.3 The Whakatōhea Pre-Settlement Claims Trust's case

In respect of the 2020 amendment, the Whakatōhea Pre-Settlement Claims Trust submitted that the nature of the amendment was such as to make the mechanism more inclusive, and therefore it did not 'substantially alter the nature and tenor of the mandate that was conferred on the trust by the iwi and a resolution was passed unanimously by the Trust to effect this change'.[66] On the '5% of what?' issue, the Trust argued that the interpretation of the 2020 amendment was a question of fact, not law, and that a simple, pragmatic answer has been found that avoids the confusion that the claimants allege. Jason Pou submitted for the Trust: 'As stated at the Judicial Conference, where those who are proved to be Whakatōhea participate in the petition, are not on the Trust Board register, the number of non-registered participants can just be added to the Trust Board tally and an assessment of the 5% made.'[67]

On the question of whether the withdrawal mechanism was unworkable, the Trust submitted that the claimants had not attempted to use the mechanism, engage with the Trust about it, or seek an amendment to the deed to resolve their issues. Rather, Mr Pou said, the claimants are a minority who have sought to use the Tribunal to assert their will rather than 'meaningfully engag[ing] with the Trust or the rest of the iwi'.[68] In the Trust's view, the issue of funding for the withdrawal process is a 'red herring' because 'throughout the process, it is notable that the Crown remained open to funding those who might have wanted to go down this path'. Also, new technology such as Zoom has meant that the costs of the hui required by the mechanism are now more manageable.[69]

On the issue of hapū rangatiratanga, the Trust submitted that decisions about withdrawal were appropriately made by Whakatōhea, not individual hapū. According to the Trust:

> Calling it a withdrawal clause is perhaps a misdescription. Technically, though it could provide a process that allows for the mandate to be amended to potentially allow for the withdrawal of particular groups covered by the mandate, when the term withdrawal is referred to in the mandate, it means withdrawal of the entire mandate.

64. Submission 3.3.23, p 29
65. Submission 3.3.23, p 30
66. Submission 3.3.13, p 4
67. Submission 3.3.13, p 4
68. Submission 3.3.13, pp 5–6
69. Submission 3.3.13, p 6

> It should be noted that a withdrawal mechanism cannot be utilised to change the mandate to one that was inconsistent with the mandate that was conferred. For this reason, decisions around mandate withdrawal are matters for the whole iwi to discuss.[70]

In addition, the Trust submitted that hapū rangatiratanga is 'integral to the way Whakatōhea progress through the settlement process'. But hapū rangatiratanga does not 'reside singularly within a withdrawal clause'. Mr Pou pointed to hapū representation on the Trust as the key expression of hapū rangatiratanga, submitting that this distinguished the Trust from the Ngāpuhi and Ngātiwai case, where hapū were not properly represented on the mandated entity.[71] Hapū interests are tested and heard through their representation, the Trust submitted, not through withdrawal. Whakatōhea must remain united, and 'nowhere in Te Ara Tono or in the mandate was it envisaged that the settlement process would provide for a fragmentation of Whakatōhea'.[72]

In the Trust's view, the mandate is a 'hapū driven iwi mandate with provision for hapū representation', and therefore the Trust did not amend the withdrawal mechanism in such a way as to 'change the mandate to be inconsistent with what was conferred by the iwi'. A change to the withdrawal mechanism that 'could facilitate the fragmentation of the iwi purely for the purposes of settlement' would require discussion among the iwi because it departs from the spirit of 'Te Ara Tono'.[73]

For these various reasons, the Trust submitted that a majority iwi vote in favour of withdrawal would indicate that ratification would fail, but a majority vote of one or more hapū would not necessarily mean that the deed of mandate would be amended to withdraw them from the negotiations. Given the 'underlying desire to maintain kotahitanga', Mr Pou submitted, 'further discussion would be required'.[74]

3.4 The Withdrawal Mechanism

3.4.1 The withdrawal mechanism in the Whakatōhea deed of mandate

3.4.1.1 *What kind of mechanism does the Whakatōhea deed of mandate provide for withdrawal?*

In Treaty settlement negotiations, a mandate is not conferred permanently on a mandated entity. The entity – a trust, a board, an incorporation, or some other form of body – must remain accountable to the claimant community. This includes mandate maintenance and an ability for the claimant community (or some subset thereof) to amend or withdraw the mandate. Withdrawal mechanisms are common features of deeds of mandate. Crown counsel provided us with a comparative analysis of withdrawal mechanisms in the Maniapoto Māori Trust

70. Submission 3.3.13, p 3
71. Submission 3.3.13, pp 6–7
72. Submission 3.3.13, p 8
73. Submission 3.3.13, p 8
74. Submission 3.3.24, p 12

Board, the Waikato-Tainui Remaining Claims, and the Te Whānau ā Apanui deeds of mandate.[75] According to the Crown, withdrawal mechanisms are designed by the groups themselves according to their own tikanga: 'The Crown receives mandates that contain withdrawal mechanisms that have been developed by groups in accordance with the tikanga and traditions of the particular iwi and hapū, and considers them against the requirements of the particular group in the context of the mandated entity structure.'[76]

The basic theory behind the Whakatōhea withdrawal mechanism is: Whakatōhea as a whole decided to confer a mandate on the Trust, therefore Whakatōhea as a whole must decide whether to amend or withdraw the mandate. Further, the withdrawal process must be commensurate with the process to obtain the mandate, which involved publicly notified hui and an iwi-wide postal vote. The Crown considered this approach as consistent with Whakatōhea tikanga, hapū rangatiratanga, and 'Te Ara Tono' when it approved the mandate:

> In the case of Whakatōhea, the Crown considers the mechanism to amend or withdraw the mandate appropriately balances hapū rangatiratanga with Whakatōheatanga. The process set out in *Te Ara Tono* envisages a single Whakatōhea settlement and collective decision-making, and does not envisage a mechanism for hapū to remove themselves from the scope of a settlement. On balance, a mechanism that allows for hapū collectively to amend the deed of mandate as they see fit seems appropriate in these circumstances.[77]

We note that the theoretical basis of the withdrawal mechanism is the same in the Ngātiwai deed of mandate. The Ngātiwai Mandate Tribunal observed:

> The view of the Crown and the Ngātiwai Trust Board is that a withdrawal mechanism is a means to ensure that, if the trust board loses the confidence of Ngātiwai, there is a process by which the members of Ngātiwai as a whole can vote to change the terms of the mandate or withdraw their support for the mandate. This is done broadly in the same manner that the mandate was given, by public notice, nationwide hui, and a vote of individual members of Ngātiwai.[78]

The Whakatōhea mechanism is not a hapū withdrawal mechanism. In the examples submitted by the Crown, the Waikato-Tainui Remaining Claims deed of mandate has a hapū withdrawal mechanism. Waikato hapū may 'choose to withdraw their claims' from the mandate. The mandated representatives of the hapū can submit written notice (no particular number of signatures is required) which identifies the claims to be withdrawn and seeks a meeting to resolve issues. If the meeting fails to resolve concerns, the hapū must hold at least one hui-ā-hapū

75. Memorandum 3.1.209, pp 2–5
76. Memorandum 3.1.209, p 2
77. Memorandum 3.1.209, p 2
78. Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report*, p 55

with the hapū members – if they cannot agree, more hui may be required. These hui must be publicly notified, have a Crown observer present, and ensure that the consequences of withdrawal (and alternatives to withdrawal) are discussed. Once a hapū has made a decision, the hapū-mandated representatives must present a report to the Waikato-Tainui Negotiator and Te Arawhiti, explaining the process followed, how the decision was reached, and the ways in which the process complied with the requirements in the deed of mandate. The Waikato-Tainui Negotiator and Te Arawhiti then review the report against the withdrawal mechanism requirements and 'provide written acknowledgement of the outcome'; that is, so long as the process has been followed correctly, the hapū makes the decision, not the Waikato-Tainui Negotiator and Te Arawhiti.[79] A key point, however, is that only the mandated representatives can start the withdrawal process, no other hapū member can do so.

Dr Pollock in his evidence for the Crown, stated that, although the Trust's withdrawal mechanism is not specifically a hapū withdrawal mechanism, it does enable the mandate to be amended to withdraw a hapū from the claimant definition (and therefore from the mandate).[80] The Trust, however, submitted that the withdrawal mechanism only 'technically' allows for a process to amend the mandate so that particular hapū or groups could withdraw. In fact, the Trust submitted, 'the withdrawal mechanism cannot be utilised to change the mandate to one that was inconsistent with the mandate that was conferred', and therefore only the entire mandate can be withdrawn.[81] This submission appears to reflect more on what kind of decision the Trust might make at the end of the withdrawal process rather than what the mechanism provides. As will be clear in the next section, the wording in the withdrawal clause is that 'all or part' of the mandate can be withdrawn so long as the Trust, which is the final decision maker, permits it.

3.4.1.2 *The first procedural steps: triggering the withdrawal process*

The withdrawal mechanism in the Whakatōhea deed of mandate sets out a number of procedural steps.

Clause 19.1.1 of the deed states that, in order to 'amend or withdraw the Pre-Settlement Trust's mandate in respect of *all or part* of the claimant community' (emphasis added), a set procedure must be followed.

Clause 19.1.2 provides that the first step in the process is to give written notice to the Trust. This notice, which has also been called a petition, must identify whether the proposal seeks to 'amend or withdraw' the mandate in respect of 'all or part' of the claimant community. This raised the issue of what was meant by 'part' of the claimant community. The deed of mandate clarified that, if the proposal is to amend or withdraw the mandate in terms of part of the community, then the

79. Memorandum 3.1.209, pp 4–5; Waikato-Tainui Remaining Claims Deed of Mandate, March 2020, pp 22–23
80. Document B3, p 18
81. Submission 3.3.13, p 3

written notice must specify 'which part of the community ie which hapū', and set out the concerns of 'the party' seeking to withdraw.[82]

This part of clause 19.1.2 was of concern to Ngāti Muriwai in our inquiry. In their view, the phrase 'ie which hapū' means that the only groups within Whakatōhea that can use the mechanism are the six hapū recognised in the deed of mandate.[83] At hearing, Crown counsel submitted that the wording 'all or part' and the reference to hapū certainly allows hapū to withdraw from the mandate. On the question of the language '*ie* which hapū – that is – rather than *eg* – for example which hapū', Crown counsel was unsure whether the wording was an 'unequivocal restriction', and that no other part of the claimant community could seek to withdraw.[84] Having considered the matter further, Crown counsel argued in closing submissions that 'the Crown anticipates a pragmatic approach would be taken to any proposal to amend or withdraw the mandate which concerned a group that was not a recognised hapū (such as Ngāti Muriwai)'. If a group achieved the 5 per cent threshold (discussed next) to trigger the next steps in the withdrawal mechanism, it would not be appropriate to take an 'overly legalistic interpretation' of clause 19.1.2.[85] In our view, it is unlikely that Ngāti Muriwai would be able to trigger the mechanism alone (being a relatively small group), and the more likely scenario is that they would band together with others in a withdrawal petition, although they have recently submitted that they intend to make the attempt.[86]

The threshold for filing written notice was another controversial aspect of clause 19.1.2 in our inquiry. Prior to 2020, the written notice had to be signed by 5 per cent of the adult members of Whakatōhea registered with the Whakatōhea Māori Trust Board.[87] Following the findings and recommendations of the Wai 2662 Tribunal, this part of the clause was amended in 2020. We will discuss this issue in later sections (see sections 3.4.3.1 and 3.5.5).

3.4.1.3 *Procedural steps after the mechanism has been triggered*

Clause 19.1.3 provides that, after the amending party has passed the 5 per cent hurdle and given written notice, the Trust must arrange a meeting within two weeks. The meeting between trustees and the 'party seeking to amend or withdraw the mandate' is to try to resolve issues before matters go any further. If the meeting is unsuccessful, then 'the party seeking to amend or withdraw the mandate' *may* organise five or more hui 'to discuss, withdraw or amend the mandate'.[88]

The meaning of clause 19.1.3 was debated in our inquiry. The use of the word 'may' could mean that the holding of five publicly notified hui was left to the

82. Whakatōhea Pre-Settlement Claims Trust Deed of Mandate, September 2016 (doc B40(a)), p 37
83. Submission 3.3.16, pp 13–14
84. Transcript 4.1.5, pp 157–158
85. Submission 3.3.23, p 30
86. Submission 3.3.28(a)
87. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 37
88. Whakatōhea Pre-Settlement Claims Trust Deed of Mandate, cl 19.1.3 (doc B40(a)), p 37

discretion of the party seeking to amend or withdraw the mandate. That was certainly the interpretation of Crown counsel in this inquiry, who submitted:

> As indicated by the use of 'may' in the Whakatōhea mechanism, in relation to the holding of five or more public hui, these public hui are not a requirement under the mechanism. This is contrary to the characterisation of the hui in recent claimant submissions. However, public hui would be useful for members of Whakatōhea to discuss the proposal and ensure a robust process is followed.[89]

On the other hand, we note that the amending party is not actually able to proceed to the next step in the withdrawal process without holding the hui. The Wai 2662 Tribunal concluded: 'It appears from the wording of subsequent provisions that the word "may" is intended to indicate that it is for the group seeking amendment or withdrawal to decide at this point whether to pursue its concerns.'[90]

Clause 19.1.3 is also ambiguous because it states that the hui would 'discuss, withdraw, or amend the mandate'. This suggests that the withdrawal or amendment of the mandate would happen at the hui (after discussion), but this is not actually the case. It may be that the original intention of the drafters was to have the matter decided at hui-ā-hapū or hui-ā-iwi, as provided for in the Waikato-Tainui Remaining Claims mandate or the Te Whānau a Apanui mandate,[91] rather than proceeding to an iwi postal vote. Otherwise, it is difficult to account for the wording in this clause.

Clause 19.1.4 states that all of the hui must be publicly notified and 'follow the same process and procedures that conferred mandate on the Pre-Settlement Trust'. These requirements include (but are not limited to) public notice, the provision of information about the likely effects of the proposal to withdraw, and 'the ability for as many Whakatōhea uri as possible to participate in the process (including postal voting)'.[92] Crown counsel submitted at hearing that this vote would be carried out on a hapū basis; that is, hapū affiliation would be recorded in the voting and thus the views of all hapū, including the one or more hapū that seek to withdraw, will be known. This is not an explicit requirement in the deed although the Crown submitted that Whakatōhea usually votes by hapū. Mr Pou, in his submissions for the Trust, did not confirm that the vote in clause 19.1.4 would be held with hapū affiliation recorded, although he did confirm that Whakatōhea have been voting on a hapū basis in elections for the Whakatōhea Māori Trust Board for the last 70 years.[93] This is a very important point because it goes to the heart of how decisions will be made in the withdrawal mechanism, and we are concerned that it is currently unclear whether the vote is to be on an uri (individual members) or hapū basis. We return to this point when we draw our conclusions (see section 3.8.3).

89. Memorandum 3.1.209, p 3
90. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 49
91. Memorandum 3.1.209, pp 4–5
92. Whakatōhea Pre-Settlement Claims Trust Deed of Mandate (doc B40(a)), p 38
93. Transcript 4.1.5, pp 165–166, 275; submission 3.3.13(b)

Although the iwi-wide postal vote has been put in parentheses in clause 19.1.4, it is in fact the last crucial decision point before the process can proceed to the next step. Clause 19.1.5 begins: 'Once the publicly notified hui have been completed and the outcome of the relevant voting process has been determined'. This clarifies that the use of the word 'may' in clause 19.1.3 does not in fact confer a discretion. At least five hui must be held, and they must be followed by (or occur at the same time as) an iwi postal vote.

Once the outcome of the postal vote is known, clause 19.1.5 requires the amending/withdrawing party to provide the Trust and the Crown with a written report, copies of public notices for the hui, attendance registers, and 'minutes etc'. Again, this step cannot occur unless at least five hui have been held. After receipt of this report, clause 19.1.6 states that the Trust will discuss the proposed amendment or withdrawal with the Crown. The clause ends with the words: '*If required*, the Deed of Mandate may be amended to conform with the results of the voting' (emphasis added).[94] There is nothing in the deed to explain the circumstances or criteria under which an amendment would be 'required'. At the end of a lengthy and expensive process, therefore, the Trust appears to have sole discretion to decide whether or not the deed of mandate should be amended so as to allow part or all of Whakatōhea to withdraw. We discuss this point further when we draw our conclusions and make Treaty findings (see section 3.8.3). The only qualifier on the Trust's discretion is that the matter must first be discussed with Te Arawhiti. Crown counsel suggested at hearing, however, that there could be 'tripartite' discussions between the Crown, the Trust, and the 'party' seeking to amend the mandate.[95] In reality, the Crown would likely have a significant say in whether there was sufficient support for the mandate to be amended, allowing a hapū or other section of the claimant community to withdraw their part of the mandate.

3.4.1.4 *What the Crown would do after withdrawal*

A further step would occur next, although it is not specified in the deed. The Crown would need to decide whether it accepted that there was still a mandate to negotiate with a 'large natural grouping', following a withdrawal of part of the claimant community. The Crown would also need to decide whether separate negotiations could occur for the group that had withdrawn.

Separate negotiations have happened in the past. The Crown negotiated separate settlements with a number of Te Arawa hapū following their withdrawal from the Te Arawa mandated body, the Kaihautu Executive Council. But separate negotiations are not a foregone conclusion. In his open letter to Whakatōhea on 30 September 2019, the Minister for Treaty of Waitangi Negotiations stated:

> I note that the amendment to the withdrawal mechanism means groups may seek to amend or remove the mandate of the Whakatōhea Pre-Settlement Claims Trust. I must be clear that, if a group were to seek a separate settlement with the Crown,

94. Whakatōhea Pre-Settlement Claims Trust Deed of Mandate (doc B40(a)), p 38
95. Transcript 4.1.5, p 165

there is no certainty as to how or when that would occur. Should groups within Whakatōhea seek separate settlements, that may also have an impact on the currently agreed settlement package.[96]

In July 2020, officials advised the Minister for Treaty of Waitangi Negotiations to confirm at an upcoming hui: 'the Crown wants to negotiate with Whakatōhea as an iwi and you are not contemplating hapū level settlements'.[97] Suggested talking points for this hui included the emphatic statement '*Hapū settlements are not on the table*' (emphasis in original).[98] This message was repeated by the Crown in correspondence with a number of claimant groups. Te Arawhiti, for example, wrote to Amber Rakuraku-Rosieur, Hemoana Gage, Roger Rakuraku, and Donald Kurei on 15 December 2020, stating:

> The Crown's preference, and established approach to the settlement of historical claims, is to negotiate with large natural groups or iwi, rather than with individual hapū. The Crown does not negotiate the settlement of individual claims. In the case of Whakatōhea, the Crown considers it appropriate to settle with the iwi as a whole and does not intend to negotiate separate settlements with Whakatōhea hapū.[99]

On 22 March 2021, letters with the same text were sent to Christina Peters, to Te Rua Rakuraku, Donald Kurei, and Carlo Gage, and to Mereaira Hata.[100] This must have confronted the recipients with the question: what would be the consequences if their hapū used the withdrawal mechanism and succeeded in obtaining the Trust's agreement to amend the deed of mandate to exclude them? This in itself has discouraged an attempt to use the withdrawal mechanism, and for good reason.

3.4.1.5 *The claimants' proposed withdrawal process*

The claimants proposed an alternative model for a withdrawal mechanism which, they said, 'upholds hapū rangatiratanga'.[101] The proposed steps were:

- Written notice to the Trust signed by 5 per cent of the adult members of the hapū seeking to withdraw, with the 5 per cent to be calculated against the total number of registered adult hapū members, but allowing unregistered members to count towards the 5 per cent threshold. Hapū verification committees would verify the hapū affiliation of unregistered signatories.

96. Minister for Treaty of Waitangi Negotiations, open letter to Whakatōhea, 30 September 2019 (doc B2(a)), p 45
97. Joana Johnston to Minister for Treaty of Waitangi Negotiations, aide memoire, 14 July 2020 (submission 3.1.234(a)), p [6]; submission 3.1.234, pp 3–4
98. Joana Johnston to Minister for Treaty of Waitangi Negotiations, aide memoire, 14 July 2020, appendix 1 (submission 3.1.234(a)), p [12]
99. Rosie Batt to Amber Rakuraku-Rosier, Hemoana Gage, Roger Rakuraku, and Donald Kurei, 15 December 2020 (doc B22(b)), p [207]
100. Document B22(a), pp [8], [16], [19]
101. Submission 3.3.4, p 22

- Two weeks after receipt of notice, a facilitated hui is held between the Trust and the group(s) seeking to withdraw.
- If this meeting fails to resolve issues, a hui-ā-hapū of the hapū seeking to withdraw is held to decide whether the hapū supports the proposal. If the hapū is in support, then hui-ā-rohe would be held in Auckland, Hamilton, and Tauranga.
- These hui would be followed by a postal and online vote of the adult members of the hapū concerned, with funding provided to run these processes.
- If more than 50 per cent of hapū members vote in favour, then withdrawal becomes effective immediately.[102]

3.4.1.6 *Does the tikanga of Whakatōhea prevent one or more hapū from withdrawing from the Trust and seeking separate negotiations?*

The claimants argued that tikanga does not require hapū to be imprisoned in a hīnaki (net) from which they cannot escape; rather, they said, the hapū of Whakatōhea choose to work collectively on many matters but can also operate independently on various kaupapa if they choose to do so.[103] The Crown's position, stated emphatically by Dr Pollock, was based on a particular reading of 'Te Ara Tono' (discussed above), in which a majority of hapū would be able to bind all the hapū in particular settlement decisions, even if one or two hapū dissented.[104] The Trust stressed the importance of kotahitanga and of Whakatōhea staying together, which drives a settlement for the whole iwi, but denied that the mandate was a hīnaki: 'There was a doorway out, and the doorway out was of course the amendment and withdrawal process.'[105] Nonetheless, Mr Pou submitted that 'the way in which Whakatōhea have organised for this settlement is merely a reflection of the way in which Whakatōhea have engaged with the Crown for over a century and a half', and 'a balance needs to be seen that recognises the hapū voice without the creation of a particular veto right to one hapū that would override the mana of the others or destroys the cohesion'. The Trust fears the fragmentation of Whakatōhea could occur if separation rather than unity is the result of the settlement process.[106]

Apart from the members of Te Ūpokorehe represented by Ms Zwaan in this inquiry, who say that Ūpokorehe is an iwi in its own right, it does appear that the ideal wish of the Whakatōhea hapū is to settle their claims collectively. This aspiration is clearly shown in the contents of, and the process to develop, 'Te Ara Tono'. The question remains, however, as to whether Whakatōhea tikanga requires all six (or seven) hapū to settle their claims through a single mandated entity once the mandate has been conferred. In our view, this interpretation of Whakatōhea tikanga is not supported by the evidence. The affidavit filed by kaumātua Te Riaki Amoamo helps to clarify this point. Mr Amoamo stated that Ngāti Rua withdrew

102. Submission 3.3.4, pp 22–23
103. Transcript 4.1.5, p 92; submission 3.3.18, pp 11–12, 29
104. Transcript 4.1.5, p 188; submission 3.3.23, pp 28–29
105. Transcript 4.1.5, pp 272, 277
106. Submission 3.3.24, pp 5–6

its representatives from the Trust at a hui-ā-hapū held at Omarumutu Marae, where tikanga required decisions to be endorsed by the hapū. 'Ngāti Rua made a decision that day', he said, 'in the way that we have always made decisions, at the ancestral gathering place of our people, at Omarumutu Marae'. So long as the decision was made according to tikanga, Mr Amoamo did not see any reason why Ngāti Rua could not pursue a different settlement path from other hapū still represented on the Trust.[107] This is not motivated by separatism, but rather by a sincere wish to have the claims of Ngāti Rua heard and reported on prior to negotiating a settlement.

Whakatōhea are divided on the best way to proceed with a settlement, and this is reflected in the present focus of some hapū on the option of withdrawal. The Crown's strategy appears to be to push forward with ratification and hope to achieve a sufficient majority to ratify the settlement. As noted in the decision to hold this priority inquiry, the Crown has already made this decision and will proceed with ratification, and so the

> options for the claimants and those whom they represent are now threefold: first, to continue with a Tribunal inquiry but, if the settlement is enacted, a more limited inquiry than was envisaged in 2018; secondly, to exercise the right of hapū to withdraw their mandate from the pre-settlement trust and enter into settlement negotiations at some later date; and, thirdly, to vote against ratification in the vote to approve the deed of settlement.[108]

Here, we note that we accept Whakatōhea act collectively on matters of common interest but we do not accept that Whakatōhea tikanga requires all the constituent hapū to remain a part of a particular mandated entity against their wishes.

3.4.2 Issues raised by the 2016 attempt to use the withdrawal mechanism

The first attempt to use the withdrawal mechanism began in late 2016, just before the Crown confirmed its acceptance of the Whakatōhea Pre-Settlement Claims Trust's mandate. In brief, this attempt failed at the first hurdle. The Whakatōhea Māori Trust Board carried out a process to verify that signatories to the withdrawal petition were registered adult members on the Trust Board's register. The result was 478 valid signatures, a shortfall of 106 from the required 584 signatures required to reach 5 per cent of 11,680 registered adults.[109]

This exercise raised issues about the adequacy of the Trust Board's register and the iwi-wide basis for calculating the threshold percentage. Those who opposed the mandate had filed applications for urgency and, as part of that process, had alleged that the trust board register was incomplete and out of date. Also, the question of how to define the threshold was raised: did a hapū seeking to withdraw need to obtain 5 per cent of its own adult membership or 5 per cent of the entire adult iwi

107. Document B47, pp 2–3
108. Memorandum 2.5.29, p 6
109. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 38

membership? Ngāi Tamahaua and Ngāti Ira would have reached the threshold if calculated as 5 per cent of the hapū concerned, and Te Ūpokorehe almost reached that target (it missed by just three signatures).[110] The Trust's response on this issue at the time was that the individual hapū results were 'not important as the clause requires that 5% is obtained from the whole of Whakatōhea', reflecting 'the fact that the mandate was sought from all of Whakatōhea and not individual hapū'.[111]

These remain live issues in our inquiry, especially two matters: (a) the question of how the withdrawal process is reflective of hapū rangatiratanga; and (b) the issue of whether hapū affiliation is used in measuring support, whether at the threshold stage or at the final, iwi-wide vote. As noted above, the Crown argued at hearing that hapū affiliation would be used in the iwi postal vote to determine whether a hapū wanted to withdraw, but this is not stated explicitly in the deed of mandate.[112]

3.4.3 The findings of the Wai 2662 report on the withdrawal mechanism

As discussed in chapter 1, the Waitangi Tribunal's Whakatōhea mandate inquiry (Wai 2662) was held in 2017–2018. The Tribunal's analysis of the withdrawal mechanism focused on three issue questions:

- Is there a fair process for determining whether the 5 per cent threshold has been met?
- Are the requirements for amending or withdrawing the mandate workable?
- Does the withdrawal mechanism adequately provide for the interests of hapū?

We summarise the Tribunal's discussion of each of these in turn.

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

On this issue, the Tribunal relied on the Crown's concession that one aspect of the 5 per cent threshold was flawed. The requirement for signatories to be registered with the Whakatōhea Māori Trust Board was, it was conceded, 'to some degree procedurally unfair'. This was because the mandate vote had included a procedure for non-registered iwi members to vote but the withdrawal mechanism did not; all who had the opportunity to vote on the mandate should also have the opportunity to vote on its withdrawal.[113] Crown officials advised the Trust of this view in June 2017 and proposed two possible remedies: first, the threshold required in the deed of mandate could be amended; or, secondly, the Trust could waive the threshold requirement 'by moving the process to the next step'.[114]

110. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 38
111. Wai 2662 ROI, memorandum 2.5.6, p 20
112. Transcript 4.1.5, pp 165–166
113. Wai 2662 ROI, doc A69, p 44 (Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 48)
114. Wai 2662 ROI, doc A69, pp 44–45 (Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 48)

No further discussions appear to have occurred between the Crown and the Trust on these two possible remedies because of the urgent hearing. In submissions to the Tribunal, the Crown and the Trust had differing views. The Crown argued that it could not dictate any particular modification to the withdrawal mechanism, which was a matter for the Trust to decide internally, but that the Crown could work with the Trust to resolve the unfairness in the mechanism.[115] The Trust, while willing to talk to the Crown about the matter, questioned whether there was a practical solution to the perceived flaw:

> it is very difficult to see how, realistically, provision can be made for including those who are not registered with the Trust Board. The fundamental problem is what should the denominator be – ie, the total number against which the 5% threshold is to be assessed – 5% of which figure?[116]

This issue of '5% of what' has remained a live issue in our inquiry and is discussed further below.

3.4.3.2 *Are the requirements for amending or withdrawing the mandate workable?*

The claimants argued in the urgency inquiry that the withdrawal mechanism was unworkable and therefore the Crown's acceptance of it was in breach of Treaty principles. First, the claimants maintained that it was not possible for a group to carry out a process equivalent to mandating, including publicly notified hui and a postal vote, without equivalent funding and logistical support. Secondly, the claimants argued that the mechanism was unworkable because the withdrawal process itself decided nothing; the final decision would be made by the Crown and the Trust.[117] The Tribunal did not address the second aspect of these claims under this heading (it was more a matter of hapū rangatiratanga). On the first issue, the Tribunal commented that the arrangements in respect of hui were less onerous than the mandate process, which had required 12 (compared to five) publicly notified hui. Nonetheless, the Tribunal agreed that the requirement to hold an iwi-wide vote was a 'major financial and logistical challenge for groups that lack funding from the Crown or another body such as the Trust Board'. The Tribunal also noted similar findings in the Ngāpuhi and Ngātiwai mandate inquiries, where both panels concluded that withdrawal mechanisms were unworkable and therefore meaningless if funding was not available to make them a realistic prospect.[118]

115. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 48–49
116. Wai 2662 ROI, submission 3.3.23, p [12] (Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 49)
117. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 49–50
118. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 50

3.4.3.3 *Does the withdrawal mechanism adequately provide for the interests of hapū?*

The third major issue for the Tribunal was whether 'hapū or other sub-groups within the mandated entity can withdraw their support or their claims from the Pre-Settlement Trust mandate.'[119] The Tribunal started its analysis with the wording of clause 19.1.2 (discussed above), which specified that those wishing to withdraw must specify whether in respect of all or part of the claimant community, and, if part, which part – 'ie which hapū.'[120] This clause suggested that 'when the provision was drafted, a situation was envisaged in which individual hapū might seek to withdraw.'[121] Nonetheless, the Trust's submissions in the Wai 2662 inquiry argued that the key question to be decided in the withdrawal process was not whether a group could withdraw. Rather, the questions posed by the Trust were:

- What would be the impact of any withdrawal on Whakatōhea's collective decision to negotiate their claims together through a single entity?
- Was it likely that the Crown would continue to negotiate a less comprehensive settlement with only part of the iwi?
- Should a minority therefore be allowed to withdraw and effectively veto a settlement sought by the majority of the iwi?[122]

The Tribunal noted that the Crown's evidence on the question of whether individual hapū *could* actually withdraw from the Whakatōhea mandate was 'ambiguous.'[123] A Crown witness at the 2017 hearings, Dr Benedict Taylor, dismissed the possibility of calculating the 5 per cent threshold on a hapū basis (rather than as a percentage of all registered adults). He advised the Tribunal that the threshold was not set at a hapū level because the withdrawal mechanism 'does not provide for the withdrawal specifically of a single hapū.'[124] Other Crown evidence, however, suggested that a hapū could use the mechanism by giving written notice, proposing to amend the mandate so as to exclude the hapū from its coverage.[125]

In addressing these issues, the Tribunal relied on the findings of the Ngāpuhi and Ngātiwai mandate inquiries, both of which emphasised the importance of hapū rangatiratanga for the iwi concerned. In those inquiries, the Tribunal panels found that there must be a workable mechanism that enabled hapū to withdraw. The Wai 2662 Tribunal agreed, stating:

> Our view is that the withdrawal mechanism fails to clearly set out a process by which individual hapū can withdraw support from the Pre-settlement Trust Deed of

119. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 50
120. Whakatōhea Pre-Settlement Claims Trust Deed of Mandate (doc B40(a)), p 37
121. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 51
122. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 51
123. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 52
124. Wai 2662 R01, transcript 4.1.1, p 649 (Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 52)
125. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 52

> Mandate. This serves to compound the problems created by the lack of information about which hapū agreed to the Deed of Mandate in the first place.[126]

3.4.3.4 *The Wai 2662 Tribunal's conclusions and recommendations*

The Wai 2662 Tribunal's overall conclusions on the withdrawal mechanism were:

> We have identified several problems with the Pre-settlement Trust withdrawal mechanism which in our view make it unfair and unworkable. The Crown has conceded that there is some unfairness in the withdrawal provisions. However, this limited concession relates only to the way that the 5 per cent threshold is calculated. Our view is that all the issues need to be addressed.
>
> We acknowledge that several of the issues we have identified are matters for the Pre-settlement Trust to address. However, both the Crown and the Pre-settlement Trust have committed to working together to resolve the unfairness in the withdrawal provisions.
>
> The Ngāpuhi Mandate Tribunal determined that the duty of active protection required the Crown to 'recognise that the structure of the mandated entity must allow for hapū interests to be tested and heard'. The problems that we have identified with the withdrawal mechanism inhibit this and need to be rectified.[127]

The Tribunal found that the Crown breached the principle of active protection when it approved a mandate with a withdrawal mechanism which the Crown acknowledged was unfair, and which failed to appropriately recognise hapū rangatiratanga. The Tribunal also noted that the Crown's 'limited concession relates only to the way that the 5 per cent threshold is calculated', but, '[i]n due course, all of the issues will need to be addressed'.[128] As discussed in chapter 1, the Wai 2662 Tribunal recommended a vote to determine whether the negotiations should continue, with voting to be 'through hapū, postal, and online voting, with votes recorded on a hapū basis (consistent with the recommendations of "Te Ara Tono")'. The Tribunal also emphasised the importance of addressing the problems with the withdrawal mechanism, as identified above, stating: 'If one of the outcomes of the vote is that clear majorities in one or more of the hapū reject the prospect of the Pre-settlement Trust continuing to negotiate a settlement, this would suggest the need for further dialogue within Whakatōhea and would also highlight the need to rectify the withdrawal mechanism.'[129]

In his urgency decision of 20 October 2020, Judge Savage noted that the 2018 'vote appears to show that there are three hapū for and against and one deadlocked'.[130] This being the case, it highlighted the need to rectify the problems identified with the withdrawal mechanism, as the Wai 2662 Tribunal had found

126. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 52
127. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 53
128. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 91
129. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 97, 99
130. Memorandum 2.5.34, p 31

in its 2018 report. We turn next, therefore, to consider the following question: To what extent did the Crown address the problems identified with the withdrawal mechanism?

3.5 To What Extent Did the Crown Address the Problems Identified with the Withdrawal Mechanism after the Wai 2662 Report?

3.5.1 Resumption of negotiations is made conditional on amendment of the withdrawal mechanism, December 2018–February 2019

As discussed in previous chapters, negotiations were suspended while the Crown considered the results of the 2018 vote and decided what action to take as a result of the outcome of the vote and the findings and recommendations of the Wai 2662 report. The Crown came to the view that, at a hapū level, 'a majority of members of four hapū' voted in favour of resuming negotiations with the Pre-Settlement Trust, no hapū voted for rerunning the mandate process, and a majority of members of all hapū who voted favoured stopping the negotiations to hold a Tribunal inquiry. Dr Pollock, the Crown's witness in this inquiry, argued that there were, however, 'informal no' votes to the question of whether negotiations should stop to hold a Tribunal inquiry. These 'informal no' votes were iwi members who voted on the first question but did not vote on the other questions. Counting the 'silent no' votes as 'no' votes, the Crown came to the view that, at an individual iwi member level, a 'slim majority of Whakatōhea supported the continuing negotiations and a large minority supported a Tribunal inquiry. In other words, the result was finely balanced.'[131]

The Crown did not resume negotiations with the Whakatōhea Pre-Settlement Claims Trust until a year after the 2018 vote. During that year, the Crown developed its approach to resuming negotiations on the basis of three principles: respecting the vote's outcome; responding 'to the Tribunal's guidance about what should happen if the outcome was "finely balanced"'; and ensuring that any settlement with Whakatōhea would be durable.[132]

The Office of Treaty Settlements (OTS) and Te Puni Kōkiri (TPK) noted the Tribunal's finding that if one or more hapū voted against settlement negotiations, then this would highlight the need for both further dialogue within Whakatōhea and 'the need to rectify the withdrawal mechanism.'[133] They advised Ministers in December 2018 that the Crown's response to the vote should 'respond to the Tribunal's recommendation that a finely balanced outcome such as this should lead to discussions about a Tribunal inquiry or alternative process, internal dialogue within Whakatōhea and amendments to the withdrawal mechanism in the deed of

131. Document B3, pp 3–5
132. Document B3, p 6
133. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [27]; Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 99

mandate'.[134] Crown officials considered the possibility of treating the 2018 vote as a form of withdrawal, and only resuming negotiations with 'those hapū with majority support for the WPCT', but decided that further discussions were required with the Trust first. Thus, OTS and TPK advised Ministers to postpone any decision on re-entering negotiations with the Trust. In the meantime, the Crown would clarify how the 'call for a historical Tribunal inquiry can be addressed' (see chapter 2). The Crown would also work with the Trust on steps to build a 'broader base of support' for the Trust, and 'discuss with the WPCT amendments to their deed of mandate, and particularly the withdrawal mechanism, in light of the Tribunal's findings and the outcome of the vote'.[135] The Ministers for Treaty of Waitangi Negotiations and Māori Development agreed with the officials' recommendations on 10 December 2018 and 13 February 2019 respectively. The recommendations included that Ministers would defer a decision on resuming negotiations until 'amendments to the deed of mandate (including the withdrawal mechanism) have been discussed and addressed with the WPCT'.[136]

This was the genesis of the Crown's decision that negotiations would not resume until (among other things) the withdrawal mechanism had been amended. On 15 February 2019, the Ministers wrote to the Trust advising of the Crown's decision not to resume negotiations: 'In these circumstances [the outcome of the 2018 vote], we consider the results show too much support for progressing the settlement for the Crown to exit negotiations, but not enough to simply resume negotiations.' It was necessary to 'respect the full picture that emerges from the results of the vote and [we] are mindful of the guidance the Tribunal provided regarding next steps in the event of a finely balanced outcome'. Among the other things which the Crown wanted to address, the Ministers stated: 'One further thing to note is that, we consider before any decision can be made on resuming negotiations, progress is necessary on amending the withdrawal mechanism contained in the Deed of Mandate.'[137]

3.5.2 The Crown's decision on what amendments it would require before resuming negotiations, July–September 2019

The crucial decision on what amendments the Crown would require of the Trust before resuming negotiations was made by Ministers in August and September 2019, following substantive advice from Te Arawhiti in July 2019.

Following meetings with the Trust in the first half of 2019, at which there was 'ongoing discussion' between the Crown and the Trust 'about what the amendment

134. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [20]

135. Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [20]

136. Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), pp [21]–[22]

137. Minister for Treaty of Waitangi Negotiations and Minister for Māori Development to chairperson, Whakatōhea Pre-Settlement Claims Trust, 15 February 2019 (doc B3(a)), pp [31]–[32]

would look like',[138] officials advised Ministers in July 2019 as to what the Crown's position should be on the amendments required before negotiations could resume. In sum, officials advised that only one of the issues addressed by the Tribunal in the Wai 2662 report required an amendment to the withdrawal mechanism: the 5 per cent threshold should be amended so that the mechanism could be 'triggered by any member of Whakatōhea, not just those registered with the Whakatōhea Māori Trust Board'.[139] This was the problem with the withdrawal mechanism that the Crown had conceded during the Wai 2662 mandate inquiry.

Te Arawhiti noted that the Tribunal's report had addressed this flaw in the mechanism as well as issues about the logistical problems and costs of using the mechanism, hapū rangatiratanga and 'Te Ara Tono', and the question of whether a hapū withdrawal mechanism was required. Officials discussed the full range of issues in their advice to Ministers:

> The current mandate withdrawal mechanism can only be triggered by members of Whakatōhea who are registered with the Whakatōhea Māori Trust Board (WMTB). In the mandate inquiry the Crown conceded that this is procedurally unfair and committed to working with WPCT to address this.
>
> The Tribunal recommended that the withdrawal mechanism be available to non-registered members of the iwi. Building on its reports in the Ngāpuhi and Ngāti Wai mandate inquiries, it found the mechanism was financially and logistically challenging and failed to set out a process by which individual hapū could withdraw. As this did not, in the Tribunal's view, appropriately recognise hapū rangatiratanga, the Tribunal found this to be a breach of the Treaty.
>
> The Tribunal highlighted a document 'Te Ara Tono' agreed by Whakatōhea hapū in 2007, as evidence of how Whakatōhea intended to provide for hapū rangatiratanga in a settlement process, by providing for a hapū vote on key matters. It is not clear why the mandate strategy put forward by Tū Ake did not ultimately provide for a hapū vote as contemplated by Te Ara Tono. However, through the 92% vote in favour of the WPCT mandate, Whakatōhea decided to progress negotiations as an iwi and established an entity that reflected this decision. Hapū rangatiratanga was provided for by having hapū appointed representatives on the WPCT board. The decision to negotiate with hapū representatives and move as an iwi reflected how Whakatōhea has traditionally made decisions about significant kaupapa.[140]

Having set out the range of matters addressed by the Wai 2662 Tribunal, officials advised: '*It is appropriate to amend [the] withdrawal mechanism so it can be used by all Whakatōhea, but not other changes suggested by the Tribunal*' (emphasis in original).[141] This advice was crucial because, if accepted by the Ministers, it would

138. Transcript 4.1.5, p 191
139. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [53]
140. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), pp [53]–[54]
141. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [54]

commit the Crown to limited action on the withdrawal mechanism at a time when the Crown had the opportunity to require that all issues be addressed.

As noted, the Crown had discussed amendments with the Trust. The position adopted by the Trust was that '[t]he WPCT is willing to amend the withdrawal mechanism in its deed of mandate to enable it to be used by members of Whakatōhea not registered with the WMTB (in line with the Crown's concession in the mandate inquiry)'. Officials noted that the Trust's position 'does not fully address the Tribunal's recommendations concerning the mechanism (with regard to hapū withdrawal in particular)'.[142]

In respect of the Wai 2662 Tribunal's report, Te Arawhiti was mostly concerned about hapū rangatiratanga and the question of a hapū withdrawal mechanism. On these matters, officials advised Ministers that '[w]e think it is sufficient for the amendment to be limited to extending its use to all members of Whakatōhea' for four reasons:

(a) the form of the mandate is for Whakatōhea to determine and the original mandate approved by 92% of participants did not provide for unilateral hapū withdrawal;
(b) Whakatōhea tikanga, as we understand it, seeks to balance a strong role for hapū with their tradition of acting as one for the benefit of all Whakatōhea;
(c) hapū members are able to invoke the withdrawal mechanism and would likely reach the 5% threshold to trigger the clause. This would be an assertion of hapū rangatiratanga as envisaged by the Tribunal; and
(d) WPCT will be required to undertake its plan for building support which would also include further dialogue on the withdrawal mechanism.[143]

The advice in points (b) and (c) was partly informed by 'Te Ara Tono' and partly by the Crown's discussions with the Trust. The issue of Whakatōhea and hapū rangatiratanga will be discussed further below. It is difficult to see, however, that the ability of 5 per cent of adult members of Whakatōhea to sign a petition, thereby triggering the withdrawal process, would somehow be an 'assertion of hapū rangatiratanga as envisaged by the [Wai 2662] Tribunal'.

The advice in point (a) was based on the fundamental concept that Whakatōhea, not the Crown, should decide the form of the withdrawal mechanism. Broadly speaking, we agree with that concept. However, the circumstances of Whakatōhea and the Crown in 2019, following the mandate inquiry, the suspension of negotiations, and the 2018 vote, meant that the decision would have to have broad support among Whakatōhea and would need to be made in partnership with the Crown.

Te Arawhiti's view of the appropriate scope of amendments was informed by discussions with the Trust and by reference to the original mandate vote in 2016 (which is not an issue for this inquiry). The officials' report did not refer to the

142. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [54]
143. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [54]

2018 vote, which was more relevant to the situation in 2019 and had informed the Crown's earlier approach to what was necessary before negotiations could resume. Back in December 2018, Te Arawhiti had accepted the Wai 2662 report's finding that if one or more hapū voted against settlement negotiations, then this would highlight the need for both dialogue within Whakatōhea and 'the need to rectify the withdrawal mechanism'.[144] Te Ūpokorehe and Ngāti Ira voted against continuing negotiations with the Trust.[145] Ngāi Tamahaua was 'deadlocked',[146] with a majority of only eight votes in favour of continuing negotiations.[147]

In point (d), officials went beyond their discussions with the Trust. The whole of Whakatōhea would be given an opportunity to debate amendments to the withdrawal mechanism. This was because the Crown required the Trust to build its support among Whakatōhea. Officials said that this 'must' include 'further dialogue on the withdrawal mechanism'. Officials underlined this point to Ministers:

> We have informed the WPCT that the amendment must be publicly notified in advance to enable the iwi to debate it. Once WPCT publicly advertise its intention to amend the withdrawal mechanism, claimants will likely seek to have further amendments made to align with the Tribunal's recommendations.
>
> We would consider the status of the Crown's recognition of the mandate when amendments are made and brief you [the Ministers] as required.[148]

Thus, the Crown required the proposed amendment to be publicly notified and debated by discussion among Whakatōhea, giving space for the claimants to seek further amendments, and then officials would brief Ministers about resuming negotiations once that process was completed and the deed of mandate had been amended. The Crown appeared to recognise that the decision was not one for the Trust alone but for all of Whakatōhea, especially since negotiations with the Trust had been suspended.

In reality, however, the Crown *was* prepared to rely solely on the Trust's view. Dr Pollock explained at hearing that the Crown's concern about public notification and iwi debate arose solely because of a legal concern: there was no clause in the Whakatōhea deed of mandate that allowed the trustees to make 'minor changes', hence the need for a public process. Once the Trust obtained legal advice that the trustees could simply amend the withdrawal mechanism at one of their ordinary meetings, the Crown no longer insisted on public notification, iwi debate, and consideration of claimant concerns about other amendments.[149]

Mr Pou provided this advice to the Trust on 29 July 2019, four days after officials submitted their report to the Ministers. Mr Pou advised the Trust that the need

144. 'Whakatōhea: results of voting process recommended by the Waitangi Tribunal', report to Ministers, 10 December 2018 (doc B3(a)), p [27]
145. 'Whakatōhea Settlement Process: Declaration of Voting Results' (doc B3(a)), pp [13], [16]
146. Memorandum 2.5.34, p 31
147. 'Whakatōhea Settlement Process: Declaration of Voting Results' (doc B3(a)), p [13]
148. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [54]
149. Transcript 4.1.5, pp 194–195

for the change to the withdrawal mechanism arose because of the Crown's concession to the Wai 2662 Tribunal. The Crown had conceded a 'disparity between the ability of non-members to participate at mandate conferral versus the limitation against their participation in any withdrawal process'. Mr Pou noted that there was no provision in the deed of mandate for amendments (other than the withdrawal clause) but the change being made was, he said,

> not substantive, and non-controversial. This is said notwithstanding the recommendation from the Tribunal for a different mechanism, however, the amendment itself is still representative of a change sought by claimants and does not create additional rights for the trustees. On the contrary, it increases accountability.[150]

On these grounds, Mr Pou recommended that the Trust could use the powers in clause 17 of its own trust deed (rather than the deed of mandate) to amend the deed of mandate. This clause empowered the trustees to amend their trust deed by a resolution of 75 per cent of the trustees, although certain clauses required a members' resolution to approve their amendment.[151] Mr Pou suggested that the withdrawal clause in the mandate was 'similar in nature and type' to the kinds of changes that trustees could make with the approval of a members' resolution, and therefore 'the amendment would be made to effectively carry out the trust and its obligation'. Mr Pou further concluded: 'As the amendment does not alter the structure of the Pre-Settlement Trust, or the way in which it conducts business or deals with assets, it would be appropriate for the amendment to be dealt with at a trustee level, requiring the approval of 75% of the trustees'.[152]

The trustees accepted this advice, which Dr Pollock said was also provided to the Crown, and the Crown therefore waived its previous requirement that the amendment be publicly notified and debated by the iwi before any change was made to the withdrawal mechanism.[153]

Dr Pollock's oral evidence on that point is supported by the Ministers' decisions, which were announced in September 2019. On 15 August, the Minister for Treaty of Waitangi Negotiations agreed to 'conditionally resume negotiations with the Trust subject to the Trust implementing its plan to broaden its support, and its agreement to heightened [mandate] maintenance requirements'. The Minister for Māori Affairs, however, wanted more information on how hapū would be represented in the post-settlement governance entity (PSGE). Following the provision of that information, the Minister 'agreed to the conditional resumption of negotiations with the Trust' on 22 September 2019.[154]

The Ministers' decision was announced a week or so later in an open letter from the Minister for Treaty of Waitangi Negotiations to Whakatōhea. The letter

150. Jason Pou to Whakatōhea Pre-Settlement Claims Trust, 29 July 2019 (doc B8(a)), p 191
151. 'Whakatōhea Pre-Settlement Claims Trust, Trust Deed', April 2016, cls 17.2–17.3 (submission 3.3.14(c)), p 24
152. Jason Pou to Whakatōhea Pre-Settlement Claims Trust, 29 July 2019 (doc B8(a)), pp 191–192
153. Transcript 4.1.5, pp 195–196
154. Document B3, p 11

stated that, in response to issues raised in the mandate inquiry, the Crown and Whakatōhea would undertake comprehensive engagement on the settlement and PSGE, increase mandate maintenance requirements, and amend the withdrawal mechanism. This was announced effectively as a partnership decision by the Crown and the Pre-Settlement Trust; there had been no public notification or iwi debate before this decision was made. In the letter, the Minister specified that 'the Crown and the Whakatōhea Pre-Settlement Claims Trust will . . . amend the withdrawal mechanism in the Whakatōhea Pre-Settlement Claims Trust Deed of Mandate so it can be used by all members of Te Whakatōhea, not just those registered with the Whakatōhea Māori Trust Board'.[155]

3.5.3 The Crown and the Pre-Settlement Trust discuss amendments, February–July 2019

Following the Ministers' letter to the Trust in mid-February, Crown and Trust representatives met on 25 February 2019. At this meeting, officials advised the Trust that there was an opportunity to re-engage, to co-design, and to 'build momentum' according to the Ministers' advice to the Trust. The withdrawal mechanism was one of the matters that could be co-designed. There were 'a number of things that WPCT will need to do before officials are able to report back to the Minister to seek a decision on re-entering negotiations or not, including amending the withdrawal mechanism, exploring inquiry options and ways in which the WPCT can broaden its base of support'.[156] Following discussion, it was agreed at the meeting that 'the Crown would have a position on what the amendment to the withdrawal [mechanism] could look like, and provide some potential wording, at the next meeting'.[157]

3.5.4 Te Arawhiti's advice on making the withdrawal mechanism workable

In addition to amending the mechanism itself, the Crown had to consider what could be done to make the withdrawal process less onerous and therefore genuinely workable. In their advice to Ministers on 25 July 2019, officials noted that the Wai 2662 Tribunal had 'found the mechanism was financially and logistically challenging'.[158] Not only would the process of holding hui and a postal vote be expensive, officials estimated that the withdrawal process would take about six months. The Crown therefore needed to ensure that sufficient time was allowed to use the mechanism prior to initialling a deed of settlement. Te Arawhiti advised Ministers:

> The process of withdrawal could take up to six months. Should withdrawal progress beyond the initial hui that seek to resolve the issue(s) that led to the petition, *the*

155. Minister for Treaty of Waitangi Negotiations, open letter to Whakatōhea', 30 September 2019 (doc B2(a)), p 45

156. Minutes of meeting between Whakatōhea Pre-Settlement Claims Trust and the Crown, 25 February 2019 (doc B9(a)), p [6]

157. Minutes of meeting between Whakatōhea Pre-Settlement Claims Trust and the Crown, 25 February 2019 (doc B9(a)), p [7]

158. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [53]

Crown may need to consider whether it will contribute towards the costs of the remaining steps, as funding would not otherwise be available.

Ultimately Ministers may need to decide whether to modify or withdraw recognition of the mandate if one or more groups withdraw from the mandate's coverage.

The mechanism should be amended as soon as possible, so there is a reasonable opportunity for the amended mechanism to be utilised before the deed of settlement is initialled. We recommend that as a condition of continued Crown recognition of the WPCT mandate, you require the WPCT to amend its mandate withdrawal mechanism within six months. [Emphasis added.][159]

The official advice in mid-2019, therefore, was that the Crown might need to 'consider whether it will contribute to the costs of the remaining steps' but only after the mechanism was triggered. This ruled out any funding for a group or groups to gather signatures and put together a petition, for verification of non-registered signatures, and for the dispute resolution hui. According to Te Arawhiti, filing a withdrawal petition would be an exercise of hapū rangatiratanga (see above), but the hapū would not know – and the Crown would not decide – whether any funding would be available to assist them until they were already two steps along the process. Nor was funding guaranteed even then. In the Ngātiwai mandate inquiry, the Tribunal was told that the Crown's policy was not to fund withdrawal processes, and a Cabinet directive would be needed before this could change.[160] In 2019, the *Maniapoto Mandate Inquiry Report* noted that the Crown's approach to funding for withdrawal processes was unclear:

> Even though the Crown has indicated that it would be willing to be helpful 'at all stages', whether that includes funding was not explicit. The Crown told the Ngātiwai Tribunal that it was not Crown policy (at that time) to fund mandate withdrawal processes and that a directive from Cabinet would be necessary for any funding to be made available. We have not been advised that this position has changed, but we note that in his evidence Mr Mitchell said,[161] in contrast to the Whakatōhea mandate inquiry, 'the Crown clarified its position that it would consider funding those parts of the withdrawal process where funding could be an impediment'. We are unsure to whom that clarification was provided; whether it was given to the [Maniapoto Māori] trust board or to other parties is unclear from the evidence. In any event, the Crown's position on funding mandate removal or amendment processes in the current mandate inquiry is vague and ambiguous, and the claimants would benefit from clarification around exactly what funding might be available to them and when.[162]

159. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [55]
160. Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report*, p 56
161. James Mitchell, a Negotiation and Settlement Manager at Te Arawhiti.
162. Waitangi Tribunal, *Maniapoto Mandate Inquiry Report*, pp 90–91. This report was released in pre-publication form in 2019.

3.5.5 The Pre-Settlement Trust acts on the requirement to amend the withdrawal mechanism, February 2020

The Minister's open letter to Whakatōhea in September 2019 set out the Crown's proposal to resume negotiations on the basis that there would be a Tribunal inquiry as well as a settlement (see chapter 2), the Trust would undertake 'comprehensive engagement' on the settlement and PSGE, the Trust would have higher mandate maintenance requirements, and the withdrawal mechanism would be amended.[163] The Crown made funding available to the Trust in December 2019 so that the Minister's requirements could be met. The funding was tagged to milestones, one of which was the amendment of the withdrawal mechanism.[164]

The Crown did not provide the actual wording for the amendment, as had originally been proposed in February 2019 (see above). Nonetheless, the Crown prescribed the content and parameters of the amendment. Dr Pollock stated:

> [F]ollowing the February 2019 meeting, officials came to the view that it was appropriate for the Trust to decide how to word the amendment because the deed of mandate is the Trust's instrument. Officials had communicated to the Trust that any amendment should have the effect of ensuring that all adult members of Whakatōhea would be able to participate in the withdrawal process. But the detail of the wording did not engage afresh key Crown policy requirements as to mandate documentation, so the particular wording of the amendment was within the discretion of the Trust. Officials were subsequently satisfied that the amendment made by the Trust achieved the purpose they had communicated to the Trust.[165]

The Trust duly amended the mechanism at a trustees' meeting on 3 February 2020. A paper presented to the meeting stated that the amendment would be an 'ordinary' one, and therefore not requiring a members' resolution (at an AGM), and that this process for amending the deed had been 'agreed with the Crown'.[166] Two of the 14 trustees were absent but the other 12 voted to amend clause 19.1.2 of the deed of mandate.[167] The motion was:

> That Clause 19.1.2.c of the Deed of Mandate be amended to change the requirement for any written notice to remove or amend the mandate to
>
> *be signed by at least 5% of the adult registered members of Whakatohea on the register maintained by the Trust Board*

163. Minister for Treaty of Waitangi Negotiations, open letter to Whakatōhea, 30 September 2019 (memo 3.1.34(a))
164. Rhiannon Beartaud-Gander to Maui Hudson, 23 December 2019 (doc B9(a)), p 10
165. Document B49, pp 1–2
166. Graeme Riesterer to Te Ringahuia Hata, 24 June 2020; paper to trustees' meeting, 3 February 2020 (doc B8(a)), pp 190, 193
167. Arihia Tuoro to Jason Pou and Maui Hudson, 4 February 2020 (doc B4(a)), p 4

> To be changed to
> *be signed by at least 5% of the adult members of Whakatohea[.]*[168]

We accept that the trustees made the amendment, but this was an amendment that they were required to make by the Crown, and through a process to which the Crown had agreed.

On 21 April 2020, the Crown notified the Tribunal that the withdrawal mechanism had been amended. Crown counsel advised that the trustees' resolution on 3 February 2020 had 'subsequently been notified to the iwi at the Trust's Annual General Meeting and in Whakatōhea hui-a-rohe'.[169] As noted above, the Trust had decided not to put the matter to a members' resolution at the AGM. The minutes of the AGM on 29 February 2020 do not mention the amendment.[170]

According to Dr Pollock's evidence, the hui of February and March 2020 were focused on the PSGE: 'In February and March 2020 the Trust held a series of hui with Whakatōhea members to discuss their views on what a Whakatōhea post-settlement governance entity should look like. Those hui were followed by an online survey on the same matter.'[171]

3.5.6 Claimant reaction to the February 2020 amendment

The claimants found out about the amendment when the Crown notified the Tribunal in April 2020. Many claimants were distressed at the discovery. In their view, the Crown ought to have engaged with or consulted them in the circumstances, especially the hapū that had voted against continuing negotiations in 2018. The Crown was well aware, they said, of their 2016 withdrawal petition, their claims in the Wai 2662 inquiry, and the Wai 2662 Tribunal's findings and recommendations.[172] In evidence filed with the Tribunal in July 2020, Tracy Hillier stated:

> I do not accept that this change is a non-controversial amendment. It is of crucial importance to hapū whose interests have simply been ignored. It is also in the interests of any claimant who may wish to activate it that they have a workable mechanism to do so. I do not think they intended to create a genuine and accessible withdrawal mechanism, as we can see no evidence of the consideration of this. There is no indication that the Crown and the WPSCT worked together to resolve the unfairness of the withdrawal mechanism. In fact the File note clearly states this is a different mechanism than that recommended by the Tribunal. . . .

168. Whakatōhea Pre-Settlement Claims Trust, minutes of trustee meeting, 3 February 2020 (doc B8(a)), p 195
169. Memorandum 3.1.94
170. AGM minutes, 29 February 2020 (doc B8(a)), pp 197–198
171. Document B3, p 16
172. Document B2, pp 12–18; doc B4, pp 10–14; doc B8, pp 17–19, doc B15, pp 2–5; memo 2.5.34, pp 19–21

> There is no mention of the Tribunal's requirement of a mechanism for hapū withdrawal, which was an essential part of the Tribunal's discussion and recommendations around the issue of the withdrawal mechanism in Wai 2662.[173]

In addition to the question of hapū rangatiratanga and a hapū withdrawal mechanism, some claimants argued that the February 2020 amendment had made the mechanism *less* workable, not more. As Ms Hillier put it, 'the amendment leaves everyone asking the question "*5% of what*"?' (emphasis in original).[174] Claimant Te Ringahuia Hata explained her view of this issue:

> [T]he recent amendment makes the withdrawal mechanism even less clear and unworkable. The only way that I understand 'adult members of Whakatōhea' may be defined is by reference to the census but this does not involve any verification of iwi affiliation.
>
> The 2018 census, which itself is known to be a seriously flawed process, identified 12,177 people who affiliated with Whakatōhea, but this includes children and there is no way to analyse the census results to determine the number who are 18 years of age or older. . . .
>
> If the new 5% threshold is tagged to this 12,177 number, this is in fact worse than the previous withdrawal mechanism.[175]

The claimants' concerns echoed a submission from counsel for the Trust in the urgent mandate hearing in 2017, part of which was quoted in the Wai 2662 report:

> The position of the WPSCT is that it is very difficult to see how, realistically, provision can be made for including those who are not registered with the Trust Board. The fundamental problem is what should the denominator be – ie, the total number against which the 5% threshold is to be assessed – 5% of which figure? The total census count is not helpful given the Trust Board roll now exceeds the census figures.[176]

A number of claimant groups applied to the Tribunal for an urgent hearing in July 2020, raising (among other things) their concerns about the withdrawal mechanism and the February 2020 amendment. We turn to that next.

3.6 Second Urgency Proceedings: Withdrawal Mechanism Issues

3.6.1 Withdrawal mechanism issues raised in the second urgency proceedings

Judge Patrick Savage, deputy chairperson of the Waitangi Tribunal, adjourned the urgency proceedings on 20 October 2020.[177] It is not necessary to discuss

173. Document B8, p 18
174. Document B8, p 19
175. Document B2, p 15
176. Wai 2662 ROI, submission 3.3.23, p [12]; Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 49
177. Memorandum 2.5.34, pp 30–31

the parties' arguments or evidence in those proceedings in detail. The Crown and claimant positions have been refined since then. But it is important to note the broad outlines of claimant concern that were put to the Crown at that time, in order to assess what action the Crown took (or did not take) following the adjournment in October 2020.

Judge Savage summarised the applicants' key concerns in respect of the February 2020 amendment as:

- the withdrawal mechanism was amended without any notification or Crown consultation on what kind of amendments should be made;
- the February 2020 amendment made the withdrawal mechanism more onerous than before because there was no clarity on how 5 per cent of the adult population of Whakatōhea would be calculated; and
- the Crown's comparison with the Maniapoto mandate withdrawal mechanism was 'untenable' because the Maniapoto withdrawal process required the signatures of 350 members out of 35,000, which was much less onerous and a clear target to meet.[178]

In addition, the applicants were concerned that the other steps of the withdrawal mechanism remained virtually impossible for the claimants to undertake without funding, yet the Crown had not developed a funding process to make the mechanism workable. Hapū rangatiratanga was also a major concern for the applicants. They argued that the Crown had perpetuated the Treaty breach found by the Wai 2662 Tribunal because the Crown continued to accept a mechanism that did not provide adequately for hapū to withdraw from the mandate.[179]

The Crown, on the other hand, did not accept that any valid criticisms remained about the withdrawal mechanism since the 2020 amendment, including

> the criticism that changes made to the Trust's withdrawal mechanism, made since the Tribunal's report, do not go far enough. The issues were fully ventilated during the Wai 2662 inquiry and findings and a recommendation resulted. That recommendation has been considered and acted on. As Mr Pollock said in his affidavit in response to the Wai 2961 claim, it is not necessary for the withdrawal mechanism to provide for every permutation of withdrawal in order for the Trust mandate to be able to be modified so the claims of a hapū are no longer covered. The Crown submits that the concerns raised by the claimants as to the unworkability of the mechanism are overstated and notes that the policy that there should be a threshold before the processes under the mechanism are commenced is one that has been endorsed by the Tribunal.[180]

Judge Savage adjourned the proceedings because there was no imminent Crown action likely to result in irreversible prejudice. He also advised the parties that 'there may be real problems which require urgency', including the '5% of what' issue, and adjourned (rather than dismissed) the applications. 'It is now the

178. Memorandum 2.5.34, pp 19–20
179. Memorandum 2.5.34, pp 19–22
180. Memorandum 3.1.216, p 6

obligation of the parties', he said, 'to settle the issues in good faith.'[181] We turn next to consider what actions the Crown took in respect of the withdrawal mechanism following the adjournment.

3.6.2 What actions did the Crown take in respect of amending the withdrawal mechanism, following the adjournment in October 2020?

As a result of the urgency process, the Crown was informed of the claimants' concerns and put on notice that the 5 per cent threshold issue might lead to a grant of urgency further along the track. The Crown therefore needed to decide whether to take action in respect of the withdrawal mechanism or to maintain its position that no further action was required.

Essentially, the Crown declined to ask the Trust for further amendments to the withdrawal mechanism. In its view, the form of the withdrawal mechanism was for the Trust to decide, and any discussions about the mechanism were internal matters for the Trust and members of Whakatōhea. If clarification of the 5 per cent threshold was necessary, then the claimants must ask the Trust about it. In terms of hapū rangatiratanga, the Crown considered that the mechanism provided a path for hapū to withdraw, by going through the prescribed steps for seeking an amendment to the mandate.[182] This approach to the withdrawal mechanism was agreed between the Crown and the Trust, although the Trust preferred not to engage with claimants on the withdrawal mechanism. Dr Pollock explained:

> Officials have discussed with the Trust the issues that the claimants say remain outstanding, including in relation to the withdrawal mechanism, and understand the Trust wants to work with the claimants through positive, and forward looking, engagement so that the different views among Whakatōhea uri can be addressed. On 24 January 2021 the Trust wrote to the claimants, reiterating its ongoing openness to engaging with them to create, together, the best outcomes for Whakatōhea in the settlement negotiations and inquiry processes. The letter also expressed the Trust's view that there was limited value in relitigating the withdrawal mechanism issues which had been covered by the Tribunal.[183]

Between November 2020 and March 2021, the claimants, the Crown, and the Trust made no progress on the issues because:

- the Crown referred the claimants to the Trust to discuss concerns about the withdrawal mechanism (among other things), with the possibility of facilitation if all parties agreed to it;
- the claimants sought facilitated discussions with the Trust; and

181. Memorandum 2.5.34, p 31
182. Document B22, pp 12–13, 17–18; doc B40, pp 8–11
183. Document B40, pp 9–10; chair of the Whakatōhea Pre-Settlement Claims Trust to [claimants], 24 February 2021 (doc B22(b)), p [77]

- the Trust declined to enter into facilitation and signalled that it wanted meetings to focus on the settlement and did not want to 'relitigate' the withdrawal mechanism.[184]

The Trust's view was that whanaunga should be able to talk to each other without a facilitator; the claimants' view was that facilitation was essential for any progress to be made.[185] The claimants argued that, '[g]iven the entrenched division on this issue, an already difficult task was made more challenging without the provision of independent facilitation, and near on impossible once the decision to initial a DOS [deed of settlement] had been made'.[186] We agree with the claimants that the Crown could have done more to encourage the Trust to use facilitators in the context of the difficult situation and the evident divisions.

The claimants found out about the Crown's decision to initial the deed of settlement on 26 February 2021, when the Crown wrote to various groups to advise that the deed would be initialled in late March 2021, followed by a ratification process with voting to begin in mid-April.[187] These letters resulted in applications in March 2021 from the Wai 2961 claimants (Te Ringahuia Hata and Tuariki Delamere) and others, seeking to reopen the urgency proceedings.[188]

3.6.3 The issue of funding to make the withdrawal mechanism workable, November–December 2020 and March 2021

The issue of funding was crucial to whether or not the withdrawal mechanism was genuinely workable, as the Wai 2662 Whakatōhea Mandate Tribunal stated in 2018.[189] The Crown was wary of funding withdrawal processes in settlement negotiations, but over time had begun to consider it might be necessary once a threshold had been met (see section 3.5.4).

On 7 November 2020, Te Arawhiti officials met with members of Ngāti Ira at Ōpeke Marae in Waioweka. Views differ as to what happened at that hui, and what undertakings the Crown might have made.[190] Wai 558 claimant representatives attended the hui and made a presentation. Among other issues, the claimants raised problems with the withdrawal mechanism, including: significant problems had not been rectified; the mechanism did not provide for hapū withdrawal; and the 'withdrawal steps are a major financial and logistical challenge for Wai Claimants'.[191] Carlo Hemoana Gage, chairperson of the Ōpeke Marae trustees, stated that funding was sought to enable them to actually use the withdrawal mechanism: 'Ngāti Ira also sought financial and other resources to commence the process of withdrawal of our claim from within the WPSCT rubric and certainty

184. Submission 3.3.14(b)
185. Submission 3.3.14, p 9
186. Submission 3.3.14, p 9
187. See, for example, Rosie Batt to Te Ringahuia Hata and Antoinette Hata, 26 February 2021 (doc B20(a)), p 11; counsel for Wai 2961 to Jacob Pollock, 12 April 2021 (doc B40(a)), p 44.
188. Memorandum 3.1.222; memo 2.5.35
189. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 50
190. Submission 3.3.21, pp 10, 18–20
191. Wai 558 powerpoint display for hui on 7 November 2021 (doc B28(a)), p [6]

of how the process of withdrawal was to occur. This clarification has not been provided by the Crown.'[192]

According to Dr Pollock, who attended the hui, officials responded that 'the Crown would look into the funding available for the mandate withdrawal mechanism for the mandated body in the Maniapoto settlement negotiations and provide the same in the Whakatōhea negotiations.'[193] As noted above, the Crown had agreed to consider funding for withdrawal processes in the case of Maniapoto, which was a significant change of policy for the Crown. As far as we are aware, this hui in November 2020 was the first time that the Crown mentioned the same possibility of funding in the case of Whakatōhea. This was clearly a new development, since the officials present at the hui were unsure what kind of funding had been provided in the Maniapoto case.[194] Back in July 2019, officials had advised Ministers that, if a group or groups were able to pass the first two steps in the Whakatōhea withdrawal mechanism, the 5 per cent threshold and the dispute resolution hui, the Crown might at that stage 'need to consider whether it will contribute towards the costs of the remaining steps, as funding would not otherwise be available.'[195] It was not until December 2020, however, that the Crown moved away from that position and worked out the beginnings of an approach to funding for the use of the Whakatōhea withdrawal process. This development sits in obvious tension with the Crown's objective of timely settlements but was necessary for a good-faith process which requires a workable, functioning withdrawal mechanism.

On 15 December 2020, Te Arawhiti followed up the November hui with a letter to Amber Rakuraku-Rosieur, Hemoana Gage, Roger Rakuraku, and Donald Kurei. This letter provided the first indication of what kind of funding could be made available:

> *Funding for mandate removal or amendment process*
> You have sought information about funding for the process for removing or amending the WPCT mandate, as set out in section 19 of the deed of mandate. The Crown will consider funding applications for activities set out in section 19, such as giving public notice of meetings, holding hui, associated administration and travel costs, and conducting any ballot.
>
> Te Arawhiti expects WPCT would incur most of the costs of the process and would be eligible for funding for that. This would include commissioning third parties to assist with dispute resolution, validating signatures on any petition needed to call a Special General Meeting (SGM), as well as advertising and organising the SGM.
>
> Sub-groups included within the Whakatōhea mandate are also eligible to apply for funding. Funding for such groups would likely be considered only for steps to be taken after the dispute resolution process has happened and a petition calling for an

192. Document B29, p 6
193. Document B22, pp 11–12
194. Transcript 4.1.5, p 268
195. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [55]

> SGM has been presented to WPCT, as specified in the deed of mandate. I have attached the relevant claimant funding guidelines to this letter for your information.
>
> The mechanism set out in section 19 of the deed of mandate pertains to removing or amending the mandate with respect to part or all of the claimant community, rather than particular claims.
>
> In the Crown's view, the issues surrounding the Whakatōhea mandate are fundamentally about different views within Whakatōhea on the best way forward to seek redress for your very real historical grievances against the Crown. The most appropriate way to address these differences is for parties within Whakatōhea to discuss them directly in good faith. I would therefore encourage you to contact WPCT to discuss your concerns. The Crown can support these discussions if parties wish.[196]

Unfortunately, there was a mistake in this letter, which referred to a special general meeting (SGM). This is not a requirement in the Whakatōhea withdrawal mechanism but is required in the Maniapoto withdrawal mechanism. The mixing up of the two processes misled the claimants, who understood from it that an SGM would also be required so as to amend the Whakatōhea Pre-Settlement Claims Trust deed.[197] Ms Sykes, who represents the Wai 558 claimants, submitted:

> Unrealistically the letter of the 15 December 2020 also sought Ngāti Ira to engage with WPSCT to access funding and resources to meet the required prerequisites of withdrawal including commissioning third parties to assist with dispute resolution validating signatures on any petition needed for the calling of an SGM in accordance with the WPSCT Trust Deed as well as advertising and organising of the SGM.[198]

This point of confusion made the withdrawal mechanism seem more unworkable to the claimants.[199] Clause 17 of the trust deed allows aspects of the deed to be amended by a members' resolution (at an AGM or SGM) but *not* the definition of Whakatōhea so as to exclude anyone who affiliates by whakapapa to Whakatōhea.[200] Other claimant counsel also submitted that the trust deed would have to be amended as well as the deed of mandate, yet the trust deed could not be amended so as to effect a withdrawal, making the withdrawal mechanism 'illusory'.[201] In addition to confusion about what processes had to be undertaken to withdraw, this letter mostly talked about funding that could be made available to the Trust. The guidelines for 'sub-groups', and what they would be eligible to apply for, were accidentally omitted from the attachments to the letter sent by email.[202]

196. Rosie Batt to Amber Rakuraku-Rosieur, Hemoana Gage, Roger Rakuraku, and Donald Kurei, 15 December 2020 (doc B22(b)), p [103]
197. Transcript 4.1.5, p 98
198. Submission 3.3.10, pp 26–27
199. Submission 3.3.10, pp 26–27
200. 'Whakatōhea Pre-Settlement Claims Trust, Trust Deed', April 2016, cl 17.1 (submission 3.3.14(c)), p 24
201. Submission 3.3.4, pp 19–20; submission 3.3.9, p 12
202. Document B49, p 4

The possibility of funding for the withdrawal mechanism was not mentioned to any other claimant groups until 22 March 2021, after the applications to resume the urgency proceedings had been filed. On 5 March 2021, the Wai 2961 claimants, represented by Tom Bennion and Genevieve Davidson, wrote to the Crown asking whether there would be financial support for the withdrawal process. The response from Te Arawhiti was again confusing, referring to an SGM (mixing up the deeds) and providing an incorrect account of the withdrawal process:

> Te Arawhiti will consider providing funding for the process of removing or amending the Claims Trust mandate. The mechanism set out in section 19 of the Claims Trust's deed of mandate allows for removing or amending the mandate with respect to part or all of the claimant community, rather than removing particular claims.
>
> Sub-groups included within the Whakatōhea mandate are eligible to apply for funding. Funding for such groups would likely be considered for steps taken after the dispute resolution process has happened and a petition calling for a Special General Meeting has been presented to the Claims Trust, as specified in the deed of mandate.
>
> Te Arawhiti expects the Claims Trust would incur most of the costs associated with the mechanism set out in section 19 of the deed of mandate, including giving public notice of meetings, holding hui, conducting a ballot, commissioning third parties to assist with dispute resolution, and costs associated with holding a Special General Meeting.[203]

On the same day, 22 March 2021, Te Arawhiti also wrote to Te Rua Rakuraku, Donald Kurei, and Carlo Gage of Ngāti Ira, providing similar information (and reiterating information provided on 15 December 2020). The key points were:

- funding could potentially be provided for withdrawal processes;
- the Crown expected that the Trust would 'incur most of the costs' because the Trust would have to give public notice of meetings, hold hui, conduct a (postal) ballot, commission 'third parties to assist with dispute resolution', and hold an SGM; and
- 'Sub-groups' included within the mandate were eligible to apply for funding, which would likely be 'considered' by the Crown for steps 'after the dispute resolution process has happened and a petition calling for a Special General Meeting has been presented to the Claims Trust'.[204]

Dr Pollock provided evidence after the hearing to clarify the Crown's approach to funding for the Whakatōhea withdrawal process. Funding would not be available for groups seeking to put together a petition of 5 per cent of adult members to trigger the withdrawal process. This is 'so that the Crown can be confident there is sufficient support for a proposal to amend or withdraw the Trust's mandate before

203. Rosie Batt to counsel for Wai 2961, Tuariki Delamere, Te Ringahuia Hata, 22 March 2021 (doc B22(a)), p [11]

204. Rosie Batt to Te Rua Rakuraku, Donald Kurei, and Carlo Gage, 22 March 2021 (doc B22(a)), pp [16]–[17]

committing public funds to the process.'[205] Once a withdrawal petition has been submitted, the Trust would be able to file an application to the Crown for funding: 'Te Arawhiti expects the Trust would incur most of the costs of the process and would be eligible for funding for those costs. We would ask the Trust to submit a budget and seek approval before providing such funding.'[206]

Legitimate costs could include

> the dispute resolution hui with the Trust (for which the Trust would also be eligible to apply for funding for the costs it would incur), holding of publicly notified hui, the preparation of public notices for those hui, administration and travel costs associated with holding the hui, and conducting any ballot on the proposal to withdraw or amend the Trust's mandate.[207]

The Trust would receive most of the funding (if granted) 'because the steps are required by the Trust's deed of mandate upon receipt of a written notice under clause 19.1.2, it would be for the Trust to run these steps and funding would be provided to the Trust for those purposes.'[208]

Te Arawhiti's reasoning is interesting because the deed of mandate requires the party seeking an amendment to organise the five hui and (by implication) the postal ballot.[209] If, however, Te Arawhiti is correct and the Trust (rather than a group seeking withdrawal) has to organise the hui and the postal ballot, then that could make the withdrawal mechanism a more feasible option for hapū or other sections of the claimant community. On the other hand, funding for the Trust to run these processes would require claimants to access funding through the entity from which they seek to withdraw, which the claimants viewed as unrealistic.[210] The Crown has clearly anticipated this point, and Dr Pollock stated in his post-hearing evidence: 'Te Arawhiti expects the Trust would nevertheless work constructively with the group that submitted the written proposal in organising these further steps in the process.'[211]

For groups seeking to withdraw, the December and March letters did not explain what kind of funding could potentially be available at the Crown's discretion, and the sub-group funding guidelines had not been supplied to either the Wai 2961 claimants or the Ngāti Ira claimants. The nature of this funding is explained in Dr Pollock's post-hearing evidence. Te Arawhiti makes funding available to 'sub-groups' within a group covered by a mandate for 'activities relating to settlement negotiations for which they cannot access other funding'.[212] The Crown decided in

205. Document B49, p 3
206. Document B49, p 3
207. Document B49, p 2
208. Document B49, p 2
209. Whakatōhea Pre-Settlement Claims Trust Deed of Mandate, cl 19.1.3–19.1.4 (doc B40(a)), pp 37–38
210. Submission 3.3.10, pp 26–27
211. Document B49, p 24
212. Document B49, p 4

late 2020, after the hui at Ōpeke Marae, that this kind of funding could be made available to groups within Whakatōhea whose 'activities' were the steps in the withdrawal process (subsequent to the first step of filing a withdrawal petition). According to Dr Pollock:

> So, a group could apply to Te Arawhiti for funding to take part in the dispute resolution hui (under clause 19.1.3), once they have submitted the written notice to the Trust under clause 19.1.2. That application could also apply for funding for the group to take part in the subsequent steps in the process, should the dispute resolution hui not resolve their concerns.
>
> Te Arawhiti considers applications on a case-by-case basis. We would engage with the group to discuss any further information required to assess the application and to discuss the funding process. Approved funding would then be provided to the group by way of reimbursement following receipt by Te Arawhiti of itemised invoices or other evidence of the expenditure in relation to each step (as also set out in the guidelines).[213]

Part of this information is contradicted by the sub-group funding guidelines. Dr Pollock's evidence was that groups could obtain funding to participate in the steps of the withdrawal process but the guidelines state that sub-group claimant funding is very specific in nature; it can only be used for 'specific legal or specialist advice'. Applicants for this funding must show how 'funding for legal or specialist advice would resolve issues and advance the progression of their settlement negotiations'. No funding is provided in advance but only after the specialist services have been provided to the group. Also, any 'previous legal aid funding' or Crown Forestry Rental Trust funding must be detailed in the application and will be taken into account when the Crown considers the funding request. Applicants also have to consult the 'mandated representatives of the relevant Large Natural Grouping(s)' (that is, the Pre-Settlement Trust) about the need for the funding, and provide details about that consultation in the application form.[214]

The situation is still unclear, therefore, as to funding. It is clear that funding is at least potentially available, but it would still be necessary to clarify whether the Trust will be funded to conduct steps which the deed of mandate states will be conducted by the group seeking to amend the mandate. Also, it would be necessary to clarify whether the group seeking to withdraw is only eligible for funding of legal and specialist advice, as the sub-group funding guidelines state, and not for participation in withdrawal steps (as Dr Pollock has suggested).

213. Document B49, pp 3–4
214. 'Sub Group Claimant Funding Guidelines' and application form (doc B49(a)), pp 1–5

3.7 Applications to Resume the Urgency Proceedings: Unresolved Withdrawal Mechanism Issues Raised Again

3.7.1 The claimants reiterate their unresolved concerns

The Wai 2961 Ngāti Patumoana claimants, Tuariki Delamere and Te Ringahuia Hata, filed an application to resume the urgency proceedings on 8 March 2021. The trigger for this was the Crown's notification that it was about to initial the deed of settlement. The applicants argued that engagement after Judge Savage's October 2020 decision had failed to get results. In their view, the withdrawal mechanism 'remains unworkable and still does not include any process by which hapū can withdraw'. Also, 'the "5% of what" issue remains despite attempts to engage with both the Crown and the WPCT on this matter'. Any attempts at further engagement would be useless, given that the Crown and Trust were about to proceed to initial the deed and begin the ratification process.[215]

Other applications to revive the urgency proceedings were filed soon after, raising the same points about the withdrawal mechanism, and noting that the Crown had not acted on the findings and recommendations of the Wai 2662 Tribunal. Claimant counsel argued:

> The applicants submit that because the Crown specifically rejected a number of key Wai 2662 recommendations in relation to amendments required to the mechanism, the mechanism remains unworkable and still does not include any process by which hapū can withdraw.
>
> The applicants submit that the Crown cannot then point to the non-use of an unworkable withdrawal mechanism, which remains in breach of the Treaty, as a viable alternative remedy.
>
> The applicants have not used the amended mechanism because of the significant uncertainty that remains with the amended withdrawal clause.
>
> Therefore, there is no alternative remedy that, in the circumstances, will be reasonable for the Claimants to exercise.[216]

The Crown did not accept that the claimants' unresolved issues about the withdrawal mechanism were valid, arguing that the situation had changed since 2018 and the Crown had taken appropriate action. In particular, the Crown relied on the letter of 15 December to Ngāti Ira claimants and letters sent to the Ngāti Ira claimants and the Wai 2961 claimants on 22 March 2021, providing information about funding (see above). The Crown relied on this correspondence to submit in April 2021:

> The claimants have had, and continue to have, alternative remedies that are available for them to exercise, especially in light of the finely balanced results of the October 2018 vote by Whakatōhea. The Crown has provided information to the claimants about available funding for the mandate amendment or withdrawal process. The

215. Memorandum 3.1.222, pp 3–4
216. Memorandum 3.1.224, pp 8–9

> Crown understands no one has taken steps to invoke the withdrawal mechanism or to discuss its possible use with the Trust. In addition, the ratification process will allow for all Whakatōhea to express their views, support or concerns, regarding the proposed settlement. The claimants continue to have opportunities to engage constructively with the Trust and the Crown in respect of the proposed settlement and the Crown continues to promote those discussions.[217]

The Crown also argued that the problem with defining 5 per cent of the adult population of Whakatōhea was 'in practice overstated', and 'no one has taken steps to invoke the withdrawal mechanism, nor to discuss with the Trust what would constitute a reasonable interpretation of the 5 per cent requirement to trigger the sequence of steps that the mechanism contains'.[218] Further, the Crown considered that it had in fact 'acted on the Tribunal's 2018 recommendation that the withdrawal mechanism in the Trust deed of mandate be amended'.[219]

The Wai 2961 claimants denied that the 2020 amendment and the provision of information about possible funding were in any way a sufficient response to their concerns about the withdrawal mechanism. They argued that the Crown had tried to discourage groups from using the withdrawal mechanism by advising that, if any group did withdraw, they would face an 'unknown settlement future' with separate negotiations unlikely for such groups.[220] Also, the claimants argued that the withdrawal mechanism remained unworkable, despite possible funding, because the 5 per cent threshold (which had to be met before any funding could be granted) was uncertain. In response to the Crown's submission that the claimants could have asked the Trust for clarification, counsel for Wai 2961 argued that '[l]egal uncertainty cannot be cured by the WPCT saying what it thinks the clause means'.[221] Rather, 'the issue is that it is practically impossible to prove the threshold has been met, because there is no realistic way of identifying precisely how many adult Whakatōhea members there are'. In addition, the claimants raised the concern – which was influenced by Te Arawhiti's incorrect information that an SGM would have to be held – that it was impossible to amend the trust deed in such a way that groups could withdraw, even if the deed of mandate was successfully amended.[222] Finally, the claimants raised the issue of how withdrawal and ratification processes could occur at the same time, pointing to Te Arawhiti's advice in 2019 that the withdrawal process would likely take six months to complete.[223]

Thus, the issues in respect of the withdrawal mechanism remained largely the same as in the July 2020 urgency applications but with some additional matters. These included the questions of:

217. Memorandum 3.1.230, p 4
218. Memorandum 3.1.230, p 12
219. Memorandum 3.1.230, p 12
220. Memorandum 3.1.231, pp 3–4
221. Memorandum 3.1.231, p 7
222. Memorandum 3.1.231, pp 7–8
223. Memorandum 3.1.231, p 8

- whether an explanation from the Trust would be sufficient to cure the uncertainty about the meaning of the 5 per cent threshold;
- whether a six-month withdrawal process could reasonably occur simultaneously with ratification and, if so, what would be the effect on the Whakatōhea settlement; and
- whether the withdrawal mechanism was still too onerous if some kind of funding was now potentially available (unlike earlier), but only after the 5 per cent threshold had been met.

3.7.2 What actions did the Crown take following the renewal of applications for urgency?

On 22 March 2021, the Crown informed the Wai 2961 claimants (and some others) that the initialling of the deed that month would have to be postponed. This was due to 'some outstanding details associated with valuation processes and overlapping interests'.[224] The Crown advised that the deed would likely be initialled some time before June 2021, which gave less than three months to run the withdrawal process.[225] The initialling was later postponed again but the claimants did not know, of course, that this would occur.

The Wai 2961 claimants wrote to the Crown on 12 April 2021, once again setting out the issues with the withdrawal mechanism but pointing to the added complication of trying to run the mechanism and ratification processes at the same time.[226] With the Crown's intention to initial the deed, the claimants were wrestling with the practicalities of how to use the mechanism as it stood. Counsel for Wai 2961 wrote in their letter to the Crown that, if funding could potentially be provided, two crucial problems would still remain:

> These are the overlapping timeframe to complete the withdrawal process running parallel to the ratification process and we continue to seek clarity on clause 19 of the deed of mandate.
>
> As set out in detail in our previous correspondence and Wai 2961 urgency documents, on 3 February 2020, the WPCT without engaging with the claimant community, amended clause 19.1.2.c of the deed of mandate from:
>
> > . . . be signed by at least 5% of the adult registered members of Whakatōhea on the register maintained by the Trust Board.
>
> to
>
> > . . . be signed by at least 5% of adult members of Whakatōhea.

224. Rosie Batt to counsel for Wai 2961, Tuariki Delamere, Te Ringahuia Hata, 22 March 2021 (doc B22(a)), p [10]
225. Rosie Batt to counsel for Wai 2961, Tuariki Delamere, Te Ringahuia Hata, 22 March 2021 (doc B22(a)), p [10]
226. Document B40, p 10

> It remains unclear what the number of 'adult members of Whakatōhea' relates to. The February 2020 amendment potentially increases the number of signatories required to meet the 5% threshold to trigger clause 19. We are considering alternative legal avenues better suited to address this.[227]

The Crown once again referred the claimants to the Trust for answers, although Te Arawhiti offered its interpretation of the deed: 'The amendment means at least 5% of adult members of Whakatōhea must sign a petition to trigger the next step in the mechanism, being a meeting to resolve the identified concerns.'[228] Since this was just a repetition of the problematic wording, it would of course have been of no assistance to the claimants. As previously, Te Arawhiti referred the claimants back to the Trust, although by now it must have been very evident to the Crown that the Trust and claimants had reached an impasse: the Trust had rejected facilitation and the claimants considered that talking to the Trust would not be effective without it. The letter, which was written by Dr Pollock, stated:

> As the Trust is responsible for their deed of mandate, questions for clarification of the deed should be directed to them. I understand the Trust remains open to meeting with your clients to discuss matters concerning the proposed Treaty settlement, including this one, If, however, your clients remain reluctant to meet with the Trust, this question could be put to them in writing. Te Arawhiti has written to the Trust, noting you may seek a response to this question directly from them.[229]

Importantly, as a result of this correspondence and the renewed urgency process, the Crown finally asked the Trust to clarify the meaning of the amendment on the same day that the above letter was sent to counsel for Wai 2961. It is difficult to understand why it took the Crown so long to take even this much action, given that this had been a controversial issue for over a year, leaving hapū and any other group unsure of what was required for them to trigger the withdrawal process. The Crown disclaimed any responsibility for the February 2020 amendment, throwing all the responsibility for justifying it on the Trust, despite the Crown's actions in 2019 (see section 3.5). Also, the Crown made no attempt to play 'honest broker' to try to help the parties resolve differences over the withdrawal mechanism. The 19 April 2021 letter from the Crown to the Trust was therefore very belated. Te Arawhiti stated in the letter:

> Since the amendment was made, some members of Whakatōhea have raised concerns that the number of signatures required is unclear.
>
> As this issue has been raised with us through the Waitangi Tribunal (reflected in a minute of Judge Savage of October 2020), as well as written correspondence, it would be helpful for the Trust to formally clarify this matter with Whakatōhea. Most

227. Counsel for Wai 2961 to Jacob Pollock, 12 April 2021 (doc B40(a)), p 45
228. Jacob Pollock to counsel for Wai 2961, 19 April 2021 (doc B40(a)), p 46
229. Jacob Pollock to counsel for Wai 2961, 19 April 2021 (doc B40(a)), p 46

recently, the issue was raised [by] a letter from Bennion Law, who may write to you to seek clarity on this matter.

Te Arawhiti would be grateful if you could copy us on any formal communication with Whakatōhea in this respect.[230]

The Trust did not respond to the Crown or claimants with a clarification. Dr Pollock confirmed that, as far as the Crown was aware, the first indication of a trust view came from Jason Pou about three months later, at the judicial conference of 9 July 2021.[231]

At the conference, Mr Pou stated that the total number of adult members of Whakatōhea would be calculated by using the number of adult members on the Whakatōhea Māori Trust Board's register plus the number of non-registered members who signed a withdrawal petition. Thus, if the Trust Board's register contained 10,000 adults and 500 non-registered adults signed the petition, then the total number of adults against which to measure 5 per cent would become 10,500. In other words, the denominator would be the sum of registered adults plus any non-registered adults who signed the petition.[232] Mr Pou confirmed the Trust's view in his opening submissions for this inquiry: 'As stated at the Judicial Conference, where those who are proved to be Whakatōhea participate in the petition, [and] are not on the Trust Board register, the number of non-registered participants can just be added to the Trust Board tally and an assessment of the 5% made.'[233] According to Mr Pou's submission, this way of determining the 5 per cent threshold was a pragmatic solution and did not require any legal remedy.[234] The claimants did not agree. Counsel for Wai 2961 claimants submitted that any group which seeks to file a withdrawal petition will still not know the number of signatures they need before filing it, and this makes it an unworkable option for them.[235]

3.8 Conclusions and Findings on the Withdrawal Mechanism

3.8.1 Introduction

In this section, we set out our conclusions and Treaty findings on the issues in respect of the withdrawal mechanism. For the most part, we find that the Crown is not in breach of Treaty principles *yet*, because there are still actions which the Crown could reasonably be expected to take, which would enable the Crown to meet its Treaty obligations to Whakatōhea. There is no question that the Crown has actively protected the interests of those hapū that want to continue negotiating through the Trust. For those hapū, the Crown has conducted negotiations with the

230. Rosie Batt to Graeme Riesterer, chair, Whakatōhea Pre-Settlement Claims Trust, 19 April 2021 (doc B40(a)), p 47
231. Transcript 4.1.5, p 199
232. Transcript 4.1.4, pp 34–35
233. Submission 3.3.13, p 4
234. Submission 3.3.13, p 4
235. Submission 3.3.14, pp 8–9

Trust and has now agreed a settlement package for ratification. The question for us is whether the Crown has actively protected the interests of those hapū or sections of the claimant community that do not want to continue with the current negotiations. In 2018, three of seven hapū voted against continuing, and one was effectively deadlocked (as Judge Savage stated). It is not possible, therefore, to say that the claimants are not representative of significant opinion within Whakatōhea. The Ngāti Rua claimants in this inquiry argued that Ngāti Rua has changed its mind since 2018 and now wishes to stop the negotiations.[236] The Crown argued, on the other hand, that the only reliable test of opinion now is for Whakatōhea to vote in the ratification process.[237]

In this part of the chapter, we deal with the issues associated with the withdrawal mechanism. Before ratification occurs, has the Crown acted to ensure that there is a withdrawal mechanism available that is fair, workable, reasonable, and reflective of hapū rangatiratanga?

3.8.2 Has the Crown acted so as to ensure that the withdrawal mechanism is fair and workable?

3.8.2.1 *The withdrawal petition threshold: '5% of what?'*

As set out in section 3.4.1, the first step in the withdrawal mechanism is that written notice (a withdrawal petition) must be filed with the Trust. To trigger the remaining steps in the mechanism, the written notice must be supported by the signatures of 5 per cent of the adult members of Whakatōhea. Prior to the mandate inquiry, the threshold for a successful petition was set at 5 per cent of the registered adult members, which the Whakatōhea Māori Trust Board would be responsible for assessing and then confirming whether the threshold had been met. The Crown conceded at the mandate hearings that the threshold requirement was flawed because it meant that members of Whakatōhea who were not registered with the Trust Board could not participate. The Wai 2662 Whakatōhea Mandate Tribunal agreed that this aspect of the withdrawal mechanism was in breach of Treaty principles (see section 3.4.3).

As set out in section 3.5, the Crown decided in 2019 that the mechanism would have to be amended, in accordance with the Wai 2662 Tribunal's findings. The Crown used its leverage over the Trust by insisting that negotiations could not resume until the amendment the Crown wanted had been made. The Crown and the Trust discussed the nature and scope of the amendment but, essentially, the Crown decided what the amendment must be and the Trust carried it out. In our view, therefore, the Crown cannot excuse itself from responsibility for this amendment, nor can the Crown legitimately claim that amendments to the deed are solely an internal matter for the Trust and Whakatōhea. We accept that the Crown cannot dictate to the Trust (nor should it). But the Trust must maintain its mandate, and the Crown is responsible for monitoring whether the Trust has

236. Submission 3.3.9, pp 2–3
237. Submission 3.3.11, p 8

done so, and for deciding whether it will continue to recognise the mandate or will insist on amendments (as the Crown did in 2019).

After the 2020 amendment, the claimants were concerned that the number of adult members of Whakatōhea is not known, and therefore the 5 per cent threshold is also not known. In their view, the amendment has created confusion and legal uncertainty that can only be cured by a further amendment.

Have the claimant groups 'sat on their hands' in respect of this issue, as the Crown suggested?[238] The claimants have raised their concerns about the amended threshold repeatedly, both directly with the Crown in correspondence and at hui. The claimants also made their concerns known to the Crown through their submissions and evidence in the July 2020 applications for urgency as well as the March 2021 applications to resume the urgency proceedings (see sections 3.6–3.7 for the details). The claimants were less successful in raising their concerns directly with the Trust, however, partly due to entrenched divisions but also partly because the Crown did not play the part of an honest broker very effectively. Te Arawhiti was passive in its approach to providing facilitation, leaving it up to all groups to decide whether they wanted facilitation, and did not actively try to help resolve the issue until April 2021, 14 months after the amendment was made.

Why was the Crown so slow to take action on the claimants' express reservations about trying to use the first step in the withdrawal mechanism? Essentially, the Crown considered that the claimants' concerns were 'in practice overstated', and would be solved (in a pragmatic sense) by simply filing a withdrawal petition, which the Crown said they could have done at any point since the amendment in February 2020.[239] Te Arawhiti finally wrote to the Trust in April 2021 with a request not for another amendment but for an explanation: Crown officials asked the Trust to formally clarify the meaning of the new threshold with Whakatōhea (see section 3.7.2).

There was no response. The Trust's clarification came three months later at the judicial conference on 9 July 2021. According to the Trust's representative, Mr Pou, calculating the number of adult members of Whakatōhea is a factual matter, not a legal one. The Trust's formula for doing so will be to add any non-registered signatories on the petition to the final tally of registered members. This would supply the total number of members against which the 5 per cent threshold would be measured. Thus, the Trust has set out how it will interpret this part of the mechanism and calculate the denominator for the threshold. This is not the only way that the denominator could be calculated, however, given the ambiguity in the amended clause, and we are concerned that this methodology has been communicated without any formal amendment of the deed of mandate.

For the avoidance of doubt, and in order to prevent disputes and likely legal action, we think 'adult members of Whakatōhea' must be defined in the deed of mandate for the purposes of the withdrawal mechanism. We also accept the claimants' argument that they could not reasonably have been expected to file a

238. Submission 3.3.11, pp 21–22
239. Submission 3.3.11, pp 21–22

withdrawal petition before the Trust provided clarification in July 2021. We agree with the Crown that such a petition could now in theory be developed, given the Trust's stated interpretation, but that the safest and Treaty-consistent course would be for the deed to be properly amended before any written notice of withdrawal is submitted.

We find that the Crown has not acted in accordance with the principles of partnership and active protection. The Crown took no action at all on this matter until April 2021, despite repeated expression of the claimants' concerns (as above), and the action that the Crown has taken is insufficient to meet the standard of active protection. We do not think it sufficient for the Crown to rely on the Trust's statement of how it intends to interpret the revised clause.

In our view, there is still time for the Crown to remove the prejudice and require a further amendment of this clause in the deed of mandate before agreeing to initial the deed of settlement.

Any group which might feel that they have no choice but to use the withdrawal mechanism has been prejudiced by the Treaty breach, since it has not been safe to make the attempt without a further amendment clarifying the petition threshold.

Two further questions arise as to the fairness of the mechanism in light of the 2020 amendment, which we consider next.

First, the claimants have posed the question as to whether the Trust's interpretation of the 2020 amendment is fair. According to claimant counsel, not only would petitioners not know in advance how many signatures were required to meet the threshold (because it changes depending on the number of non-registered signatories), they would actually be 'undermining their preferred petition outcome by signing up large numbers of persons not on the trust register'.[240] In other words, the Trust's interpretation means that the more non-registered signatures, the larger the target becomes, because each of those signatures increases the target rather than helping to meet a fixed target.

We understand their concern and have to wonder whether there is a fairer way of determining the threshold denominator. We agree with the claimants that the 5 per cent should be 'measured against adult hapū members registered with the WMTB [Whakatōhea Māori Trust Board] but allow unregistered adult hapū members to count towards this 5%'.[241] This would provide a fairer, more certain process and is also consistent with how special votes are treated in the ratification process. The Crown needs to be especially vigilant to ensure that the withdrawal process that it has endorsed in the deed is fair because officials 'downplayed indications of opposition' in 2016, characterised it as coming from a 'minority', and 'advised against waiting for the outcome of the petition lodged in November 2016 to withdraw from the mandate'.[242] The Wai 2662 Tribunal concluded that 'due care and

240. Submission 3.3.4, p 20
241. Submission 3.3.4, p 23
242. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 88

attention' was not paid to 'expressions of opposition'.[243] The Crown needs to avoid this mistake in 2021 and ensure that the withdrawal process is scrupulously fair.

Secondly, the Trust has indicated its view that the imminent initialling of the deed would not prevent anyone from using the withdrawal mechanism at any time during the ratification process.[244] Te Arawhiti officials advised Ministers in July 2019 that the withdrawal process would take about six months, and that there would need to be a 'reasonable opportunity for the amended mechanism to be utilised before the deed of settlement is initialled'.[245] In our view, it would compound the breach and the prejudice if the Crown does not allow a reasonable amount of time for the amendments we recommend to be made (see section 3.8.5) and for the process to be run before initialling the deed. As stated above, the claimants (and those they represent) have not sat on their hands. Rather, they have made repeated representations of their concerns to the Crown (including through submissions and evidence in the urgency proceedings), as set out in sections 3.6–3.7. It would not be fair to penalise them for the ambiguous amendment adopted by the Trust in February 2020 with the full knowledge and agreement of the Crown – indeed, as required by the Crown.

3.8.2.2 *Does the Crown's new approach to funding make the mechanism a workable option for groups seeking to withdraw?*

Even if the threshold problem is fixed so that a group can file a withdrawal petition and – if they pass the threshold – proceed to the subsequent steps in the process (set out in section 3.4.1), there is still the issue of whether the remainder of the withdrawal process is too onerous for such a group and therefore unworkable in practice. The Maniapoto Mandate Tribunal found that, for the Crown to accept a deed of mandate, the withdrawal mechanism must be 'fair, workable, reasonable, and reflective of hapū rangatiratanga'.[246] As discussed in section 3.4.3, the Wai 2662 Whakatōhea Mandate Tribunal said that the withdrawal process was less onerous than the mandate process (which required 12 hui rather than five). Nonetheless, the Tribunal found that the withdrawal process posed a 'major financial and logistical challenge for groups that lack funding from the Crown or another body such as the Trust Board'.[247] This finding agreed with similar findings in the Ngāpuhi and Ngātiwai mandate inquiries, where both panels concluded that withdrawal mechanisms were unworkable and therefore meaningless if funding was not available to make them a realistic prospect.[248]

According to the Crown's evidence, funding could be needed to assist with:

- validating signatures on the withdrawal petition;
- holding and participating in the dispute resolution meeting;
- commissioning third parties to assist with the dispute resolution meeting;

243. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 88
244. Transcript 4.1.4, pp 17–18
245. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [55]
246. Waitangi Tribunal, *The Maniapoto Mandate Inquiry Report*, p 101
247. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 50
248. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 50

- administration and travel costs;
- giving public notice of hui;
- holding hui;
- participating in hui; and
- conducting a postal (and online) ballot.[249]

The Crown has acted on the funding issue but did not develop an approach to funding for the Whakatōhea withdrawal process until December 2020. Also, as the claimants argued, information about funding was not provided to all groups; one group (Ngāti Ira claimants) was informed in December 2020 (and again in March 2021), and one other group (Wai 2961 claimants) in March 2021. Others were not informed.

From our perspective, the most important issue is the confusing nature of the information that has been provided (see section 3.6.3 for the detailed discussion on this issue). The first problem in this respect was the confusion in the letters that Te Arawhiti sent in December 2020 and March 2021, where the Whakatōhea withdrawal process was mixed up with another (probably Maniapoto), with the result that the claimant groups were advised that an SGM would be required. As discussed in section 3.6.3, this led to confusion about whether an SGM would also be required for a members' resolution to amend the Trust's deed of trust as well as needing to amend the deed of mandate.

The second problem is the Crown's indication to claimants that 'Te Arawhiti expects WPCT would incur most of the costs of the process and would be eligible for funding for that'.[250] This position was confirmed by Dr Pollock in his post-hearing evidence. Dr Pollock stated that 'sub-groups' could apply for funding 'to take part in' the steps following the petition, including participation in the hui, but the Trust would be the one eligible to apply for funding to hold the hui and conduct the ballot. This is because, he said, 'the steps are required by the Trust's deed of mandate upon receipt of a written notice under clause 19.1.2, it would be for the Trust to run these steps and funding would be provided to the Trust for those purposes'.[251] Clause 19.1.3 of the deed of mandate, however, states that 'the party seeking to amend or withdraw the mandate may organise five (or greater) publicly notified hui to discuss, withdraw or amend the mandate'.[252] Also, because the postal ballot is one of the requirements stated in parentheses in clause 19.1.4 as part of the process of holding the hui, it appears that the party may be technically responsible for that as well. If the Crown is correct, and the Trust must organise and run both the hui and the postal ballot, then the withdrawal process will be far less onerous than originally thought, and triggering the process becomes a fairer

249. Document B49, pp 3–4; Rosie Batt to Amber Rakuraku-Rosieur, Hemoana Gage, Roger Rakuraku, and Donald Kurei, 15 December 2020 (doc B22(b)), p [103]; Rosie Batt to counsel for Wai 2961, Tuariki Delamere, Te Ringahuia Hata, 22 March 2021 (doc B22(a)), p [11]

250. Rosie Batt to Amber Rakuraku-Rosieur, Hemoana Gage, Roger Rakuraku, and Donald Kurei, 15 December 2020 (doc B22(b)), p [103]

251. Document B49, p 2

252. Whakatōhea Pre-Settlement Claims Trust Deed of Mandate (doc B40(a)), p 37

and more reasonable step for the claimants to take, although cooperation would be essential between the Trust (with the funding) and the group seeking to withdraw.

The third problem is the Crown's indication that funding will potentially be available for the party seeking to withdraw so that they can participate in the steps following the withdrawal petition. The 'sub-group' funding guidelines provided by Dr Pollock are not specific to withdrawal processes but rather are pre-existing guidelines for 'sub-groups' to seek funding independently of mandated entities for settlement negotiation purposes. The funding available is restricted to payment for legal and specialist advice. On the face of it, it is difficult to see how such funding would assist groups to participate in the withdrawal processes, other than through the provision of specialist advice. All funding is at the discretion of the Crown, and the funding for legal and specialist advice in this category is capped at $150,000, and will also be assessed against a number of criteria. These include whether the applicant has already received legal aid and whether the applicant has consulted with the Trust about the need for the funding.

The claimants are also concerned that the Crown's recent funding policy does not provide assistance for the first step in the process, the gathering of sufficient signatures from hapū who live all around the country. The Crown's view was that funding should not be committed until it is clear that a group has sufficient support to trigger the withdrawal mechanism.

We agree that funding should not necessarily be made available until after a withdrawal petition has been submitted to the Trust. While we accept that this could potentially disadvantage some, we note that the claimants successfully gathered signatures and submitted a petition in 2016 (see section 3.4.2). This was followed by the gathering of more signatures in 2017. It is therefore clearly feasible for the claimants to conduct this step of the withdrawal mechanism without external funding. Claimant counsel accepted at hearing that the 2016 petition was now out of date, given the passage of time and the recent developments in the Whakatōhea settlement negotiations, and a new petition would need to be filed.[253]

For the Crown to be sure that the Treaty relationship is restored through a durable settlement, the withdrawal mechanism must be a fair and workable option for mandate withdrawal. Funding assistance is essential for that purpose. We find that the Crown has acted consistently with the principles of partnership and active protection by developing a funding policy for the Whakatōhea withdrawal process in December 2020.

But is the funding policy sufficient or (in current parlance) fit for purpose? The development of an approach to funding came relatively late in the negotiations, and the information that has been provided is confusing (as set out above) and may not be consistent with the requirements in the deed of mandate.

If the Crown's information is correct that (a) the Trust would organise and run the hui and postal ballot, (b) that funding is available for that purpose, and (c) that funding would also be available for the petitioning group *to participate* (rather than just for legal and specialist advice), then the Crown has now made

253. Transcript 4.1.5, p 47

its acceptance of the withdrawal mechanism fair in the sense that the mechanism would now be workable and not too onerous for groups seeking withdrawal to use. The problem is that the Crown's information has been too unclear for us to make a finding on this point.

The most we can say is that funding is potentially available, and the Crown is not in breach of the Treaty *yet* because there is still time for the Crown to act and fix the problems in its approach to funding. The Crown therefore needs to ensure that sufficient resource is available to the petitioning group if – as the deed of mandate states – they must organise and run the hui and (by implication) the postal ballot. On the other hand, sufficient funding needs to be available for them to participate and for the Trust to run the process, if the Crown's interpretation of the deed is correct. Thus, if the Crown is prepared to make any necessary adjustments of this kind, there will be no Treaty breach on this head.

In our view, the Crown would also need to play honest broker if, as the claimants submitted could happen, the Trust were to drag its feet or disputes arose about the implementation of the process. Facilitation assistance will likely be required.

One final point needs to be addressed here. The Crown argued that the holding of a minimum of five hui is discretionary, not compulsory.[254] We disagree. It is only discretionary if a party decides not to continue with the process. For withdrawal to be effected through completing the steps in the mechanism, a minimum of five hui must be held.

3.8.2.3 *Can those who affiliate as Ngāti Muriwai trigger the withdrawal mechanism?*

The Ngāti Muriwai claimants argued that they might not be able to use the withdrawal mechanism because the wording of clause 19.1.2 requires the group submitting a petition to identify 'which part of the claimant community ie which hapū' is seeking to amend the deed and withdraw. We discussed this issue briefly in section 3.4.1.2. At hearing, Crown counsel was unsure whether this clause was broad enough to enable part of the claimant community, which was not one of the recognised hapū in the deed of mandate, to trigger the withdrawal mechanism.[255] In closing submissions, the Crown's view was that, if a group managed to trigger the mechanism by obtaining the support of 5 per cent of adult iwi members, then it would not be appropriate to take an 'overly legalistic' view of the wording in clause 19.1.2. We agree, although we doubt that Ngāti Muriwai alone has the numbers to reach the threshold. Nonetheless, counsel for Ngāti Muriwai has recently indicated that they intend to try, though with some trepidation as to the result, as have counsel for Te Ūpokorehe claimants.[256]

254. Memorandum 3.1.209, p 3
255. Transcript 4.1.5, pp 158–159
256. Submission 3.3.16, p 14; submission 3.3.28(a); memorandum 3.1.306

3.8.2.4 *Are the consequences of using the mechanism clear?*

One of the major factors inhibiting use of the withdrawal mechanism is the uncertainty about what would happen after the process was completed. First, the decision about whether a party can withdraw is made by the Trust alone under the deed of mandate, after consultation with the Crown. We address that point further below. Secondly, the claimants are unsure as to what the effect of a withdrawal would be in practice. Their questions may be characterised under three broad headings. Substantive issues about the effect on the settlement include:

- Would the Crown continue to negotiate with the Trust if it no longer represented the whole iwi?
- Would the Crown negotiate a separate settlement with only part of Whakatōhea (one or more hapū)?

Procedural uncertainties include:

- Does the withdrawal process allow individual claims to be withdrawn from the coverage of the deed of mandate (in consequence of one or more hapū having withdrawn)?
- Does the deed of trust have to be amended, requiring the amendment process in that deed to be conducted as well as mandate withdrawal?

There are also uncertainties about the effect of withdrawing – or not withdrawing – on intra-tribal relationships within Whakatōhea. Would the current divisions become further entrenched or would the Whakatōhea hapū be able to mend the breach? Withdrawal from representation on the Trust does not equate to withdrawal from Whakatōhea but it may exacerbate the divisions which are clearly evident in this inquiry and were also evident in the previous mandate inquiry.

In terms of the effect on the settlement, the Crown advised on several occasions that it wanted to negotiate with Whakatōhea, and did not intend to negotiate separate settlements with Whakatōhea hapū. Te Arawhiti, for example, told one group in December 2020, when the withdrawal mechanism was under active debate:

> The Crown's preference, and established approach to the settlement of historical claims, is to negotiate with large natural groups, or iwi, rather than with individual hapū. The Crown does not negotiate the settlement of individual claims. In the case of Whakatōhea, the Crown considers it appropriate to settle with the iwi as a whole and does not intend to negotiate separate settlements with Whakatōhea hapū.[257]

This was an emphatic message.

There was also the question of what effect withdrawal would have on the negotiations of their whanaunga. In September 2019, the Minister's open letter to Whakatōhea, stated: 'Should groups within Whakatōhea seek separate settlements, that may also have an impact on the currently agreed settlement package.'[258]

257. Rosie Batts to Amber Rakuraku-Rosieur, Hemoana Gage, Roger Rakuraku, and Donald Kurei, 15 December 2020 (doc B22(b)), p [102]

258. Minister for Treaty of Waitangi Negotiations, open letter to Whakatōhea, 30 September 2019 (doc B2(a)), p 45

The consequences of withdrawal are therefore risky and potentially very damaging, especially in the context of Whakatōhea's previously failed settlement in 1996. It may well be that the withdrawal of one or more hapū stops the settlement for everyone else while not gaining even the possibility of separate negotiations for the withdrawn group(s). The impact on already strained intra-tribal relationships would be significant. The impact on the relationship between the Crown and Whakatōhea would also be significant. Another generation might go by before Whakatōhea was ready to try again. As we see it, withdrawal is a lose-lose option for everyone, a remedy of last resort. It is therefore very unfortunate that it seems to be the only remedy left for some, as the Crown and the Whakatōhea Pre-Settlement Claims Trust prepare to initial the deed of settlement in mid-November 2021.

The procedural uncertainties seem less daunting in comparison. Appendix 2 of the deed of mandate sets out the 24 claims that will be settled by the negotiations. Some claimants, referring to advice from the chair of the Trust, expressed doubt as to whether there is provision to withdraw any of these claims from the deed of mandate.[259] The Crown's position is that the mechanism does not allow any 'individual Wai claims' to be withdrawn, and that, if there was a withdrawal, 'it then falls to be determined what impact this has on the settlement of claims made in the name of the group or its constituent parts'.[260]

In our view, it is clear that the claimant definition in clause 5.1 and the list of claims in appendix 2 of the deed of mandate would need to be amended in consequence of part of the claimant community withdrawing, but that would be a matter for the Trust to sort out subsequent to the withdrawal process. It need not concern the claimants, except insofar as there is a statutory ban on the filing of new historical claims. In order for the claimants to seek to negotiate a settlement or to have their claims fully heard in the Tribunal, therefore, some at least of the claims in appendix 2 would need to be withdrawn or not wholly settled under the mandate of the Trust. There does not appear to be a process for arranging the removal of claims from appendix 2, although the solution adopted for amending the withdrawal mechanism (a trustee vote at an ordinary meeting) could potentially be used for this purpose too.

The other question is whether the Trust's deed of trust will need to be amended. Counsel for the Wai 2961 claimants even suggested that the Trust may need to be dissolved if one or more hapū withdraw their mandate. Clause 17 of the trust deed does not allow the deed to be amended so as to change the definition of Whakatōhea by excluding any 'persons who affiliate, by whakapapa, to the iwi of Whakatōhea'.[261] Our view is that this concern is easily resolved. The Trust would have a mandate to settle for those covered in the deed of mandate, and the definition of Whakatōhea need not change in the deed of trust. After all, the Trust

259. Submission 3.3.9, pp 11–12; submission 3.3.17, pp 7–8
260. Submission 3.3.23, p 29
261. Submission 3.3.4, pp 19–20

existed before it obtained the mandate and could continue to exist after part of the mandate was withdrawn.

In sum, the consequences of withdrawal for the current settlement are unclear, and the Crown has indicated that it will not negotiate a separate settlement with one or more Whakatōhea hapū. The results of a withdrawal could further entrench current divisions. In our view, the consequences make withdrawal a lose-lose option for everyone involved, and should only be contemplated as a last resort. It appears that the claimants may now have little choice, as we noted in the memorandum granting a priority hearing: they either have to choose to 'exercise their right to withdraw' or participate in the imminent ratification of the settlement negotiated by the Crown and the Trust.[262] But we do not accept that the procedural uncertainties are such that they form an impediment to withdrawal. The main question there is what will happen in respect of the registered claims currently included in appendix 2 of the deed of mandate.

3.8.3 Has the Crown acted to ensure that the withdrawal mechanism adequately provides for the interests of hapū?

3.8.3.1 *Conclusions*

The Crown decided in July to September 2019 that the only amendment required to the withdrawal mechanism was to fix the defect conceded by the Crown in the Wai 2662 inquiry: that is, the trigger threshold of 5 per cent of registered adult members. The Crown specifically rejected further amendments to address the other issues identified by the Wai 2662 Tribunal, which reported that 'all the issues need to be addressed', and not just the one matter covered by the Crown's 'limited concession'.[263] As discussed in section 3.5.1, the Crown had made the resumption of negotiations conditional on the amendment it wanted being made by the Trust. Te Arawhiti advised Ministers on 25 July 2019: '*It is appropriate to amend [the] withdrawal mechanism so it can be used by all Whakatōhea, but not other changes suggested by the Tribunal*' (emphasis in original). This advice was crucial because it limited Crown action on the withdrawal mechanism at a time when the Crown had the opportunity to require that all issues be addressed. Officials noted at the time that this would not 'fully address the Tribunal's recommendations concerning the mechanism (with regard to hapū withdrawal in particular)'.[264]

In explaining their recommendation, Te Arawhiti officials concentrated on the issue of hapū rangatiratanga because they perceived (rightly) that fixing the petition threshold and the provision of funding would go far to making the mechanism fairer and more workable (as discussed in section 3.5). Te Arawhiti's reasons in July 2019 for not addressing the Tribunal's recommendations in full were (in brief):

262. Memorandum 2.5.29, p 6
263. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 53; 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), pp [53]–[54]
264. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [54]

- Whakatōhea voted to approve the mandate without a 'unilateral' hapū withdrawal mechanism in it;
- hapū could exercise rangatiratanga in choosing whether or not to file a withdrawal petition;
- Whakatōhea tikanga balances 'a strong role for hapū with their tradition of acting as one for the benefit of all'; and
- it would not just be up to the Crown and the Trust – there would be 'further dialogue' within Whakatōhea about the mechanism before it was amended.[265]

Of these reasons, the last two require fuller discussion here.

First, we noted in section 3.5 that there was no dialogue within Whakatōhea before the amendment in February 2020 and the reasons for this – the legal advice that the trustees could and should simply amend the mechanism at an ordinary meeting without prior notification or discussion. Thus, the decision about what should be amended was made solely by the Crown in conjunction with the Trust. Given the context at that time, especially the 'finely balanced' results of the 2018 vote, our view is it was incumbent on the Crown to ensure that there was wide debate and (if possible) agreement within Whakatōhea as to what changes should be made. Originally, Te Arawhiti's advice was that the Crown would *require* that the iwi debate amendments, giving space for the claimants to seek 'further amendments made to align with the Tribunal's recommendations',[266] but when Mr Pou advised that the trustees could simply amend the mandate at an ordinary meeting, the Crown agreed to this approach and thus, in our view, sacrificed principle to expediency.

Secondly, on the issue of hapū rangatiratanga and Whakatōhea tikanga, the Crown submitted:

> A specific 'hapū withdrawal mechanism' is unnecessary. The current mechanism provides for the interests of Whakatōhea hapū and the possibility of 'hapū withdrawal' from the mechanism. The mechanism provides for all members of Whakatōhea to participate in, and express a view on, any proposal to amend or withdraw the Trust mandate. This is consistent with and appropriately balances hapū rangatiratanga and Whakatōheatanga as expressed in *Te Ara Tono*, which does not envisage a mechanism for individual hapū to unilaterally remove themselves from the scope of a settlement.[267]

Crown counsel also cautioned that it is not for the Tribunal to decide the 'appropriate content and application of Whakatōhea tikanga', which risks the Tribunal becoming an arbiter of tikanga, but rather to judge 'the Crown's actions in responding to that tikanga and Whakatōheatanga as articulated by the mandated

265. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [54]
266. 'Te Whakatōhea: proposal for next steps', report to Ministers, 25 July 2019 (doc B3(a)), p [54]
267. Submission 3.3.23, p 24

body, ie, the Trust, and other groups in the Whakatōhea community including claimants now before the Tribunal'.[268]

The claimants, on the other hand, submitted:

> It is accepted that tikanga Māori is part of the common law of Aotearoa. In some contexts, 'tikanga will *be* the law'. This is one such situation. The High Court has recently held [in *Mercury Energy v Waitangi Tribunal*] that as a matter of interpretation of the Treaty of Waitangi Act 1975, the Waitangi Tribunal 'does not have a discretion to make decisions that are inconsistent with tikanga'.
>
> It follows that the Tribunal has an obligation to ensure that the tikanga of Whakatōhea is upheld in relation to its findings and recommendations. In this respect, it is submitted that in inquiring into the priority issues, the key question the Tribunal must ask itself is whether the mana and rangatiratanga of the hapū of Whakatōhea are being recognised and provided for in the settlement process.[269]

In our view, this question is easily resolved because there is a statement of Whakatōhea tikanga specific to the context of settlement negotiations in 'Te Ara Tono', on which we can rely as a guide.

It is important to note that 'Te Ara Tono' interprets how Whakatōhea tikanga should be applied alongside Crown standards for Treaty settlement negotiations; that is, both matter and both are used in 'Te Ara Tono', because it was recognised that Whakatōhea decision-making in the context of negotiations would need to reflect hapū rangatiratanga while also satisfying the Crown that a durable settlement was being reached through transparent, well-informed, and inclusive decision-making processes. This is important because 'Te Ara Tono' should not be read as a statement of how Whakatōhea makes internal decisions; rather, it provides models of decision-making that best fit Whakatōhea tikanga and Crown requirements for a durable settlement (see section 3.2 for the details). The authors of 'Te Ara Tono' saw that a hapū decision made by hapū on the marae, for example, might not be sufficiently inclusive to satisfy the Crown's requirements in some (not all) of the decisions to be made in the negotiations, and therefore Whakatōhea tikanga would have to adapt in its application to those negotiations. This is not surprising, perhaps, and the decision-making models in 'Te Ara Tono' were arrived at through a process of years-long debate and consultation among Whakatōhea hapū before being adopted formally at a hui-ā-iwi in 2007. We discuss this further in the ratification section below.

The question we must consider, therefore, is: did the Crown in 2019 (or afterwards) require the Trust to amend its withdrawal mechanism to ensure that it appropriately reflects hapū rangatiratanga, as a condition of resuming or continuing with negotiations? The short answer is 'no'. The Wai 2662 Tribunal considered in 2018 that 'the withdrawal mechanism fails to clearly set out a process by which individual hapū can withdraw support from the Pre-settlement Trust Deed of

268. Submission 3.3.23, p 5
269. Submission 3.3.9, pp 4–5

Mandate'.[270] Further, the Tribunal found that the withdrawal mechanism did not allow hapū interests to be properly tested and heard, and that the Crown breached the principle of active protection when it approved a mechanism that does not 'appropriately recognise hapū rangatiratanga.'[271]

The February 2020 amendment did go some way towards addressing this issue, to the extent that it enabled the views of hapū members who were not on the Trust Board's register to be tested and heard in the withdrawal process. To examine whether the situation has changed in other ways since 2018, we must consider the fundamental purpose of the withdrawal mechanism, and the three key decision-making points in the withdrawal process.

First, what is the purpose of the withdrawal mechanism? It is helpful to look at this because it sheds light on why Treaty settlement mandates contain a mechanism that acknowledges hapū may sometimes withdraw from wider iwi negotiations. Crown counsel explained the purpose of a withdrawal mechanism in the context of settlement negotiations as:

> [I]t's a recognition, isn't it, that groups may have decided to travel together on something as significant as Treaty settlement kaupapa but until they are partway through that journey, they won't know whether they are all going to stay the course for that method of resolving claims. What comes to mind is the Kaihautu Executive Council mandate where some groups decided that continuing on like that at that point in time wasn't for them. And, the way it was designed which, this is a design group by group by group, each group designs what suits it. As long as there is a withdrawal mechanism, the Crown says 'you design it in ways that makes sense to your group', but the way that that one [the Kaihautu Executive Council] was designed meant that the building blocks of it, as it were, were hapū by hapū, and so a hapū could choose to withdraw.[272]

The example given by the Crown, the Kaihautu Executive Council, was the mandated body for Te Arawa, from which about half of Te Arawa decided to withdraw, and – after a long contest – they eventually did so and negotiated their own settlements with the Crown.

In the case of Whakatōhea, both the Trust mandate and the Whakatōhea Raupatu Working Party draft mandate contained withdrawal mechanisms. Both mechanisms envisaged that individual hapū would be able to go through a process that could result in the withdrawal of their part of the mandate.[273] Only one of those deeds was eventually voted on by Whakatōhea, but it is clear that the possibility of hapū withdrawal was acknowledged by both, and provision made for that in their respective deeds. Those who voted in the 2016 mandate vote accepted a

270. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 52
271. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 53, 92
272. Transcript 4.1.5, p 158
273. For the Whakatōhea Raupatu Working Party draft deed of mandate hapū withdrawal mechanism, see Wai 2662 ROI, doc A69(a), pp 135–136.

deed of mandate with a mechanism for withdrawal. As Dr Pollock explained it, the mechanism is 'designed to withdraw or amend the Trust mandate'. According to Dr Pollock, it is 'not necessary to have a specific "hapū withdrawal mechanism"' because the current mechanism means that the 'mandate *could* be amended to remove a hapū from the claimant definition' (emphasis added).[274]

Mr Pou submitted for the Trust that the mechanism could not be amended so as to 'facilitate' what he called 'the fragmentation of the iwi' without 'discussion amongst the iwi'.[275] That is precisely what the mechanism is designed to do: widespread discussion within the iwi at the (minimum of) five hui followed by a postal vote, so that the Crown and the Trust can be fully informed of what the hapū seeking to withdraw has decided and what the rest of the iwi thinks about it.

No party in this inquiry has suggested that there should not be such a mechanism in the deed of mandate. It is difficult to maintain a position, therefore, that Whakatōhea tikanga would never allow one or more hapū to leave the negotiations and forge their own pathway to settlement. According to the evidence of kaumātua Te Riaki Amoamo, so long as a hapū makes a decision according to tikanga on the appropriate marae, a hapū *can* legitimately withdraw from the Trust and pursue an alternative settlement strategy (see section 3.4.1.6). That is not to say that Whakatōhea consider this an *ideal* or *desirable* outcome; as we stated above, the withdrawal of one or more hapū is potentially a lose-lose scenario for Whakatōhea, and one that should only be considered as a last resort.

Having made that point, we note that there are four major decision points in the withdrawal process. First, one or more hapū may decide to collect signatures and seek to trigger the mechanism by submitting a petition to the Trust. Secondly, the hapū which filed the petition may be satisfied as a result of the mandatory meeting to discuss and resolve issues. If not, they may decide to carry on with the remaining steps of the withdrawal process. The third major decision point is the postal vote; the way in which individual members of Whakatōhea decide to vote will indicate whether they support or oppose the proposed withdrawal. The fourth and final decision point lies with the Crown and Trust, which discuss the outcome of the process, after which the Trust decides whether it is required to amend the deed of mandate (to remove one or more hapū from the claimant definition). Although the Crown is not formally a decision maker in that fourth decision, we expect that its views would carry significant weight with the Trust.

Thus, the first two steps are decided by the hapū seeking to withdraw, the third step is decided by a postal vote of the iwi as a whole, and the fourth is decided by the Trust in consultation with the Crown. In what ways, therefore, does the mechanism as at 2021 enable hapū interests to be 'tested and heard', as the Wai 2662 Tribunal found it should?

The first two steps are obviously hapū decisions (so long as the '5% of what?' threshold is met).

274. Document B3, p 18
275. Submission 3.3.13, p 8

The third decision is less obvious. At the hearing, Crown counsel and the Tribunal discussed what would happen if there was a 'clear wish to withdraw' on the part of a hapū. But how would the Crown and Trust know through an iwi postal vote that 'it was unambiguous and clear that the group's will was to leave'? Crown counsel submitted that the will of the hapū concerned would be known as a result of the postal vote, because 'the hapū affiliation of the voters will be known because this is the way that Whakatōhea typically votes'.[276] Although it is not explicit in the deed of mandate that the postal vote would be conducted in that way, Crown counsel submitted that it was reasonable to assume since that is 'how they vote for the Trust Board, it is how they voted in response to the Tribunal directed vote [in 2018] and it is how they are now proposing to vote for the ratification vote'.[277] If this is correct, the third decision-making point would thus indicate to the Crown and the Trust the will of the hapū which filed the withdrawal petition as well as the views of the other hapū on the matter. We agree this would enable the wishes of the hapū to be tested and heard.

The fourth decision is made by the Trust in consultation with the Crown, although Crown counsel suggested that it would not be quite so stark; the Crown expected that there would be

> intense discussions between the group who have proposed a modification of the mandate and the Trust and those might also be tripartite discussions that involve the Crown to some extent. The tino rangatiratanga is principally exercised in this situation by the Trust and the group promoting a modification of the mandate because they are operating in their customary sphere surely, albeit with the overlay of these trust law obligations from state law. But they are principally operating in their own customary sphere in a matter of their own internal self-government.[278]

Crown counsel also suggested at hearing that if the postal vote showed that a hapū clearly wished to withdraw, then the words 'if required' in clause 19.1.6 would be operative. The clause says: 'If required, the Deed of Mandate may be amended to conform with the results of the voting.' The problem is that the deed of mandate does not define in what circumstances it would be 'required' that the deed be amended. According to the Crown, in response to a question from the presiding officer at the hearing: '[W]here it was unambiguous and clear that the group's will was to leave, then the words "if required" arise. It would be required. There's not a huge discretion in there, is there?' The reason for this, according to the Crown, is that, if there was a 'clear and unambiguous situation' that a group wanted to withdraw, then the trustees would be 'so required' to give effect to that, taking into account the trustees' obligations. We take this to mean that trustees have fiduciary obligations to all beneficiaries. One important aspect of this duty is that trustees must not favour one class of beneficiaries over another.

276. Transcript 4.1.5, pp 161, 166
277. Transcript 4.1.5, p 166
278. Transcript 4.1.5, p 165

If the Crown's reasoning at hearing is correct, then the wishes of a hapū seeking to withdraw will be made clear in the postal vote (in which hapū affiliation will be recorded), and the wording 'if required' will apply to a hapū which has clearly voted to withdraw; their wishes would be given effect by the Trust. In final closing submissions, however, the Crown submitted:

> The Crown's understanding is that a majority vote by a hapū to withdraw would not in itself be enough to lead to a withdrawal of the mandate itself. But, as has been outlined above and during the priority hearing, the effect of a vote such as this on the Trust's overall mandate would be carefully considered and discussed by the Trust and the Crown.[279]

Our view is as follows. First, we note that we are not sure enough to accept that the vote would necessarily be conducted on the basis of recording hapū affiliation so that the views of individual hapū can be tested and heard. We note that the Trust objected to interpreting the 2016 petition on a hapū basis because individual hapū results were 'not important as the clause requires that 5% is obtained from the whole of Whakatōhea', reflecting 'the fact that the mandate was sought from all of Whakatōhea and not individual hapū' (see section 3.4.2).[280] We also note that the mandate vote was not conducted on a hapū basis, contrary to expectations, as the Wai 2662 Tribunal found. We also observe that the Trust did not originally want the ratification vote to be conducted on a hapū basis either (as discussed further in section 3.10). So we are not convinced that the third step in the mechanism would be conducted on a hapū basis, although we agree with the Crown that this would be consistent with the tikanga of Whakatōhea and would allow the hapū that filed the withdrawal petition the opportunity to express its will through voting. We note also that 'Te Ara Tono' envisaged that the mandate vote should be decided by a postal vote of that kind in which hapū affiliation was recorded (see section 3.2.3 above).[281]

Secondly, our view is that it is not at all clear whether, if a majority of a petitioning hapū voters wanted to amend the deed so that they could withdraw, the Trust would therefore consider itself required to give effect to that wish under clause 19.1.6 of the deed of mandate. Clause 19.1.6, on the face of it, gives the Trust a broad discretion, and it will also be obliged to consider the vote of the other hapū in the postal ballot. This point is underlined in the Crown's closing submissions, that the Crown and the Trust would discuss the vote and consider its effect on the 'overall mandate'.[282] In the Trust's closing submissions, Mr Pou stated: 'It is difficult to forecast what the outcome would be if a hapū seeking to withdraw the coverage of the mandate over them voted in favour of withdrawal but the vote of the iwi as a whole was not supportive.' There would need to be 'further discussion as to

279. Submission 3.3.23, p 30
280. Wai 2662 ROI, memorandum 2.5.6, p 20
281. 'Te Ara Tono' (Wai 2662 doc A73), p 39
282. Submission 3.3.23, p 30

the reasons' and Mr Pou could not 'confirm that the Deed of Mandate would be amended in such an event, and it is suggested that given the underlying desire to maintain kotahitanga, further discussion would be required'.[283]

We are therefore not satisfied that the withdrawal mechanism in its current state allows hapū interests to be tested and heard or is sufficiently reflective of the hapū rangatiratanga in the context of Whakatōhea tikanga and settlement negotiations. As a result, we must decide whether the Crown breached the principles of the Treaty in its 2019 decision not to insist on further amendments.

3.8.3.2 *Treaty findings*

The Crown did not require more amendments to the withdrawal mechanism in 2019 so as to ensure that the mechanism was more reflective of hapū rangatiratanga, and that the wishes of hapū could be appropriately tested and heard through the mechanism. This was a deliberate choice by the Crown because the Crown was satisfied at the time that the withdrawal mechanism appropriately balanced hapū rangatiratanga and Whakatōheatanga. We find that this decision by the Crown was a breach of the Crown's Treaty duty to actively protect hapū rangatiratanga. This is because the third decision point in the mechanism does not allow hapū interests to be appropriately heard and tested. The will of the hapū on behalf of which a withdrawal petition has been submitted will not be known unless hapū affiliation is recorded in the vote and hapū results are then calculated. We agree that the postal and online vote on that basis would be consistent with Whakatōhea tikanga as set out in 'Te Ara Tono'.

On balance, we do not consider that the Crown's continued acceptance of the fourth decision point in the withdrawal mechanism is a breach of Treaty principles. There is still time and opportunity for the Crown to act in a Treaty-consistent manner without requiring an amendment to the deed itself. This is because the Crown made a deliberate choice in 2019 not to require such an amendment before resuming negotiations, so the Crown is now obliged in its discussions with the Trust under clause 19.1.6 to do what it can to ensure that this part of the withdrawal process reflects hapū rangatiratanga and the will of the hapū that wishes to withdraw as expressed in the postal vote. We accept the Crown's assurance at hearing that these would likely be tripartite discussions involving the hapū seeking to withdraw should that prove necessary, and that 'the pattern of Crown behaviour . . . where that has happened [is that] the Crown has respected it. A group has left, the mandate has been modified accordingly.'[284]

It follows that we do not accept the claimants' argument that the whole withdrawal mechanism needs to be replaced by the model put forward in the claimants' submissions (see section 3.4.1.5) in order to properly reflect Whakatōhea tikanga and hapū rangatiratanga.

Those who might wish to use the withdrawal mechanism are prejudiced by the breach because they cannot be sure that their votes will be recorded on a hapū

283. Submission 3.3.24, p 12
284. Transcript 4.1.5, p 161

basis, thereby allowing the will of their hapū on the matter of withdrawal to be tested and heard. A withdrawal mechanism is pointless if it cannot be determined whether the hapū on behalf of which a petition has been filed does indeed wish to withdraw from the mandate. This, among other issues such as the threshold problem and the uncertainty surrounding funding, has inhibited hapū from attempting to use the mechanism.

3.8.4 Summary of findings

We are conscious that the Crown and those within Whakatōhea who support the settlement are almost ready to initial the deed of settlement and begin the ratification process. In those circumstances, we do not consider it constructive or necessary to suggest that the Crown and Trust should go back to the drawing board and redesign the withdrawal mechanism from scratch. That option was available to the Crown following the 2018 Tribunal report and vote, and the Crown decided not to take that course. It is now the eleventh hour in the negotiations and we do not expect – nor does the Treaty require – that the clock should be turned back to the beginning. Rather, a series of short Crown actions and a period of time for the mechanism to be used is what the Treaty requires of the Crown at this point in the negotiations.

On the February 2020 amendment and the ambiguity that has led to the '5% of what?' debate, we find that the Crown was directly responsible for the content and extent of the amendment, if not the exact wording. We also find that the Crown has not acted in accordance with the principles of partnership and active protection. The Crown took no action at all on this matter until April 2021, despite repeated expression of the claimants' concerns both directly to the Crown and the Trust as well as through the Tribunal urgency proceedings taken in July 2020 and March 2021. The Crown took no action on this matter until April 2021, apart from advising the claimants to talk to the Trust. As discussed above, that advice was insufficient because facilitation was refused and the Trust did not want to 'relitigate' withdrawal mechanism issues. The Crown's belated action in April 2021 was simply to ask the Trust to formally notify Whakatōhea as to the meaning of the amended 5 per cent threshold, and the Crown took no action when a response was not forthcoming until July 2021. We find the action that the Crown has taken on this issue is insufficient to meet its Treaty duty of active protection.

Those in Whakatōhea who might wish to use the mechanism have been prejudiced by this Treaty breach. They are unable to use the mechanism while the threshold for triggering it is unclear, and we do not accept the Crown's argument that they could simply have tried to use it at any time since early 2020.

On the issue of whether the next steps in the withdrawal mechanism are still so onerous as to make it unworkable, we accept that Crown funding assistance is essential if the withdrawal mechanism is to be a genuine, fair, and workable option for mandate amendment and withdrawal. We find that the Crown has acted consistently with the principles of partnership and active protection by agreeing in principle to provide funding for the Whakatōhea withdrawal process, although this was somewhat belated – not until December 2020, shortly before the Crown

said it was ready in February 2021 to move to initialling and ratification. We welcome the Crown's change of approach, and accept that there are tensions between the Crown's interest in a timely settlement and the provision of funding to assist with withdrawal mechanisms. The Crown's offer of funding, however, has been confused, inconsistent, and problematic in a number of ways. It does not appear to direct funding to where it is needed to conduct the steps in the withdrawal process, and funding for the group seeking to withdraw is limited to assistance with legal and specialist advice. The details of the problems with the Crown's approach to funding are set out in sections 3.5.2.2 and 3.6.3. The most we can say is that funding is potentially available, and the Crown is not in breach of the Treaty *yet* because there is still time for the Crown to act and fix the problems in its funding policy. We find that if the Crown is prepared to make any necessary adjustments to resolve the confusion and fix the funding policy, there will be no Treaty breach on this head.

Also, we note that if – as the Crown suggested – most funding would go to the Trust because it would run the process, then the Crown would need to play honest broker if, as the claimants submitted could happen, the Trust were to drag its feet or disputes arose about the implementation of the process. Facilitation assistance will likely be required.

On the issue of whether the withdrawal mechanism as it currently stands provides appropriately for hapū rangatiratanga and for hapū interests to be properly tested and heard in the withdrawal process, we find that the Crown breached the principles of active protection when it decided in 2019 not to require further amendments so as to make the mechanism more reflective of hapū rangatiratanga. The third decision point in the mechanism – the iwi postal vote – does not allow hapū interest to be tested and heard unless the vote is conducted on a hapū basis, which would be consistent with Whakatōhea tikanga as per 'Te Ara Tono' but is by no means certain without an appropriate amendment to the deed of mandate to require voting on that basis. On balance, however, we decided that the Crown's actions in 2019 (and thereafter) have not breached Treaty principles in respect of the fourth decision point (the Trust's power to decide whether to amend the mandate after mandatory discussions with the Crown). This is because there is still time for the Crown to act in a Treaty-consistent manner by ensuring in its discussions with the Trust that the wish of the hapū seeking withdrawal is properly weighed and respected. Also, on balance, we accept that it is appropriate for the Trust to make this decision, so long as the Crown ensures that tripartite discussions are held and the wish of the hapū that seeks to withdraw is appropriately addressed.

On the question of whether the withdrawal process could reasonably be expected to coincide with the ratification process, we find that, if the Crown proceeds to initialling and ratification without giving adequate time for an amended withdrawal process to be used, it would be a breach of the principle of active protection. It would not be fair to penalise any group that wants to use the mechanism for the delay caused by the ambiguous amendment adopted by the Trust in

February 2020 with the full knowledge and agreement of the Crown – indeed, as required by the Crown.

Finally, we reiterate our concern that for one or more hapū to withdraw would be a lose-lose scenario for Whakatōhea, and would need to be a last resort. If, as we suspect, matters have reached the point of last resort with initialling and ratification imminent, then the choices have narrowed to filing a withdrawal petition or voting in the ratification process (discussed next). In those circumstances the Crown needs to consider carefully its obligations to all of Whakatōhea before moving to the stage of initialling and ratifying the proposed settlement.

The consequences of withdrawal are not at all clear in terms of the current negotiations or the prospect of separate hapū negotiations, and the harm to Whakatōhea could be considerable. The Crown's honest broker role is significant here.

3.8.5 Recommendations

We recommend that, in order to remove the prejudice, the Crown should (as it did in 2019) make amendments to the withdrawal mechanism conditional on proceeding to the next step, in this case initialling and ratification. The honour of the Crown requires it. The two amendments we recommend are relatively limited and, in that sense, out of all proportion to the degree to which they will help make the mechanism fairer, workable, and more reflective of hapū rangatiratanga. We also expect that these amendments are so minor and non-controversial that they could be made at an ordinary trustees' meeting, as the February 2020 amendment was made.

The amendments we recommend the Crown make conditional on initialling are:

- an amendment of clause 19.1.2 to clarify the meaning of the 5 per cent threshold so as to provide certainty (and we have indicated in section 3.8.2.1 what we consider the fairest interpretation); and
- an amendment of clause 19.1.4 to specify that the postal vote may also be an online vote (to make it as inclusive as possible), and that hapū affiliation will be recorded in the vote, with a process to verify hapū affiliation for non-registered voters, and that hapū results will be published.

We do not consider that these amendments would be controversial because (a) the Trust has already announced its interpretation of the February 2020 amendment, and (b) the amendment to require hapū voting is consistent with Whakatōhea tikanga and with how Whakatōhea usually votes. In addition, we recommend that adequate time is given after these new amendments to allow the mechanism to be run prior to initialling, and that the Crown considers ways in which it can act as an honest broker so as to ensure that any further damage to whanaungatanga is minimised as far as possible in the circumstances.

- We also suggest (though we do not formally recommend) that the Crown do two things to avoid further Treaty breach:

- the Crown should amend its funding policy and ensure appropriate funding is available to the correct parties as needed; and
- the Crown should do what it can in its discussions under clause 19.1.6 to ensure that hapū rangatiratanga is actively protected.

We turn next to consider the second issue covered in this chapter, that of the role of hapū in ratification decision-making, beginning with a summary of the parties' arguments on this issue.

3.9 The Parties' Arguments: The Role of Hapū in Ratification Decision-Making

3.9.1 The claimants' case

The claimants argued that the proposed ratification process, including the voting method favoured by the Crown and the Trust, is inconsistent with Whakatōhea tikanga and with the active protection of hapū rangatiratanga.[285] In their view, the Trust was at first unwilling to even include hapū affiliation in the ratification vote, and the Crown had therefore agreed to the usual process of an iwi-wide vote. These decisions, it was argued, did not take account of tikanga or the ratification decision-making model in 'Te Ara Tono', which specified hui-ā-hapū as the best method for deciding support for the deed of settlement and PSGE. The claimants noted that the Trust and the Crown had only recently agreed to a voting method in which hapū affiliation will be recorded, but submitted that this did not go far enough to provide for hapū rangatiratanga and to allow the views of hapū to be properly tested and heard.[286] In the claimants' view, one of two options was more appropriate: either a ratification decision made by hui-ā-hapū according to traditional processes on the marae; or a preliminary decision by hui-ā-hapū as to whether ratification could proceed to the next stage of hui-ā-rohe and a postal vote. Although the claimants accepted that as many whānau should be able to participate as possible, they argued that this could be provided for by the use of livestreaming and other technology to assist uri outside the rohe to participate in hui.[287]

Counsel for the Ngāti Rua claimants, for example, submitted:

> Ngāti Rua oppose the WPSCT's proposed ratification process of individual voting on the basis that it does not provide for the mana and rangatiratanga of the hapū. As submitted at the hearing, hapū decision-making is qualitatively different from recording the votes of individuals by hapū affiliation. Hapū decision-making follows the time-honoured tradition of making collective decisions at the marae, kanohi ki te kanohi, with issues being debated by all in attendance under the guidance of kaumātua and

285. Submission 3.3.20, pp 12, 15–16
286. Submission 3.3.14, p 11; submission 3.3.20, p 12; submission 3.3.18, p 40
287. Submission 3.3.18, pp 36–37; submission 3.3.14, p 11; submission 3.3.20, pp 12–15

> kuia. By contrast, the Crown's Western-style 'democratic' processes of one person, one vote, accord the same priority to individual hapū members, irrespective of their knowledge concerning hapū affairs, as to the kaumātua and ahi kā who are intimately involved with upholding the mana and tikanga of Ngāti Rua.[288]

The claimants argued that both the Treaty and the common law require the Crown to respect tikanga in settlement processes, and so the Crown's 'emphasis on the importance of "universal participation" by individual voting misses the point entirely'.[289] On the other hand, claimant counsel submitted that hui-ā-hapū and an iwi vote 'are not mutually exclusive' and that both could be held, as in the process adopted recently by Tūwharetoa in their ratification process. Tūwharetoa convened hui-ā-hapū to determine whether there was enough support to proceed to ratification, after which an iwi-wide postal vote was held. In the claimants' view, this model provides a tikanga-based approach which also meets the Crown's requirement for universal participation.[290] But to disregard tikanga by using the current voting method alone would undermine and marginalise tikanga, in breach of the principles of the Treaty.[291]

In respect of how the final vote should be assessed, the claimants submitted that the Crown and Trust had only committed to 'considering' the hapū results as part of the ratification process.[292] In the claimants' view, if the results show low support or opposition from one or two hapū, it would be difficult for the Crown to approve the settlement because of the small number of hapū in Whakatōhea. The Crown ought not to proceed on the basis of an individual majority vote but, rather, must pause and engage with those hapū so that their concerns can be addressed. The Crown would also need to recognise whanaungatanga and facilitate discussion on how the decision of one or more hapū might affect the other hapū. This would require the Crown to take a 'patient and generous approach'. Ultimately, it was argued, the Crown might need to agree to separate settlement negotiations.[293]

On the issue of Ngāti Muriwai participation in the ratification vote, counsel for Ngāti Muriwai submitted:

> Ngāti Muriwai Hapū was invited to submit their register for the ratification voting process. However, there was no clarification of how the register would be used or any reassurance whatsoever that Ngāti Muriwai Hapū would be properly described as a hapū. Ngāti Muriwai Hapū opted not to submit their roll until such details were clear and in writing.[294]

288. Submission 3.3.20, p 12
289. Submission 3.3.20, p 13; submission 3.3.21, pp 10–11
290. Submission 3.3.20, pp 13–15
291. Submission 3.3.27, p 27
292. Submission 3.3.27, p 28
293. Submission 3.3.15, p [13]; submission 3.3.18, pp 37–38, 41; submission 3.3.14, p 12
294. Submission 3.3.16, p 7

3.9.2 The Crown's case

Crown counsel emphasised that the Trust (not the Crown) chose the method for the ratification vote, and that the method is the same as that used for the 2018 vote. The Crown submitted: 'It is reasonable, Treaty consistent and meets the Crown's duty to actively protect hapū rangatiratanga for the Crown to now accept the use of the same method for ratification.'[295] In the Crown's view, the voting method is consistent with 'Te Ara Tono' while 'also incorporating the Crown's requirement that the ratification provide practically for universal participation by adult members of Whakatōhea in light of modern circumstances where the vast majority of people live outside the rohe'.[296] The Crown did not accept that online attendance at hui-ā-hapū would make them sufficiently inclusive for ratification. '[T]here can be no objection in principle', the Crown argued, 'to what has been proposed by the Trust being augmented by hui-a-hapū to ensure there is robust debate on the settlement under consideration.' But, in the Crown's submission, not all marae have the necessary technical capacity, and online attendance is not suitable for the specific hui-ā-hapū voting method, which requires attendance in person and a show of hands.[297]

In respect of 'Te Ara Tono', the Crown argued that the Tribunal recommended the form of vote in 2018 because it was consistent with 'Te Ara Tono'.[298] The Crown also submitted that 'Te Ara Tono' has two decision-making options for ratification which 'scored equally in terms of their suitability for the decision by Whakatōhea as to whether to approve the deed of settlement': a decision by hui-ā-hapū or a decision by postal vote with hapū affiliation recorded in the vote.[299] According to the Crown, both options are hapū driven and accord with Whakatōhea tikanga, but 'Te Ara Tono' assessed the hui-ā-hapū method as low in terms of inclusiveness.[300] The Crown's position, therefore, was:

> The Crown has accepted that the pre-settlement Trust has taken a decision reasonably open to it as to how best to apply applicable tikanga here. (The Tribunal also has evidence that in response to discussions involving the Crown the Trust further developed its proposal to include hapū affiliation after initially proposing an uri only voting method.)
>
> The Crown submits that it can, consistent with its duty to actively protect Whakatōhea hapū rangatiratanga, accept the Trust ratification method as appropriate for the deed of settlement ratification by Whakatōhea. The Trust method is similar to the hapū postal and website voting method which *Te Ara Tono* ranked equally with the recommended hui ā hapū voting method. The key difference will be that the Crown requires significantly higher levels of support from Whakatōhea to proceed with signing a deed of settlement than is provided for by the hapū postal and website

295. Submission 3.3.23, p 31
296. Submission 3.3.23, p 33
297. Submission 3.3.23, p 35
298. Submission 3.3.23, pp 32–33
299. Submission 3.3.23, p 33
300. Submission 3.3.23, pp 34–35

voting method in *Te Ara Tono*. As submitted above, this will be in addition to the Crown's requirement that there is evidence Whakatōhea members were appropriately informed of the settlement and its impact on this Tribunal's district inquiry.[301]

In the Crown's view, the claimants' preference for the Tūwharetoa model is 'problematic' because a decision on whether or not to proceed further has already been made in the 2018 vote. Crown counsel submitted that there is no need to relitigate the 2018 decision by holding pre-ratification hui-ā-hapū, and the Tribunal has 'acknowledged the significant support within Whakatōhea for the Trust and the current settlement negotiations'.[302] The Crown also submitted that the Tūwharetoa model was designed for that iwi by the mandated Tūwharetoa Hapū Forum. If the Trust were now to suggest such a process, then the Crown would accept it so long as the requirement for universal participation was still met in the ratification process. Crown counsel noted that a number of Tūwharetoa hapū opposed proceeding to ratification but this did not stop the majority from moving forward so that the whole iwi could consider the proposed settlement.[303]

If one or two hapū voted against settlement, 'Te Ara Tono' would allow settlement to conclude on a majority of 4–2, without consideration of how many participated in the voting. Under the Trust's proposed voting method, however, the Crown submitted that if two or three hapū did not support the settlement, near-unanimous support would be necessary from the other hapū in the postal vote to produce 'sufficiently high levels of support for the Crown to proceed to settle'.[304]

3.9.3 The Whakatōhea Pre-Settlement Claims Trust's case

The Whakatōhea Pre-Settlement Claims Trust submitted that hui-ā-hapū can be included in the ratification process where requested, with provision to cast votes (overseen by a returning officer), but the 'key aspiration of the Trust is to increase the ability of all of its members to vote. The more that vote, the greater the integrity of the process.'[305] Hapū affiliation will be recorded in the voting, and information will be included about this in the ratification material provided to the claimant community.[306] But the next step, according to the Trust, is to 'take the settlement to the Whakatōhea people'; it is 'Whakatōhea's settlement, and it is for them to have their say'.[307] In the Trust's view, the claimants should not be 'fearful of Whakatōhea expressing a view'. The real purpose of the claims, according to the Trust, is 'stopping the ratification process which is simply about giving voice to the people to ask them their views.'[308] Further, the Trust submitted that the claimants

301. Submission 3.3.23, p 34
302. Submission 3.3.23, p 36
303. Submission 3.3.23, p 37
304. Submission 3.3.23, p 38
305. Submission 3.3.24, pp 13–14
306. Submission 3.3.24, p 14
307. Submission 3.3.24, pp 14–15
308. Submission 3.3.24, p 14

have undertaken no process to show that their views are representative, whereas the ratification – using the proposed method – is the appropriate way to show the degree of support for the Trust and the proposed settlement.[309]

On the issue of Ngāti Muriwai participation in the ratification vote, the Trust submitted that Ngāti Muriwai will not be able to vote under that hapū identity, because that would require an amendment to the deed of mandate to recognise Ngāti Muriwai as a hapū of Whakatōhea. According to the Trust, adequate time has been given for such an amendment to be initiated, and no one will be excluded as a result, since they will be able to vote under 'their recognised hapu affiliation.'[310]

3.10 Did the Crown Take Sufficient and Appropriate Action in respect of Ratification Decision-Making?

3.10.1 'Te Ara Tono' model for ratification decision-making

As discussed above in section 3.2, the iwi adopted 'Te Ara Tono' in 2007 as its guide for decision-making in settlement negotiations. The decision-making options for the ratification process are described in section 3.2.2. Here, we provide a brief summary. The preferred decision-making model for ratification was hui-ā-hapū.[311] Under this model, each hapū would decide whether or not it wanted to ratify the deed of settlement and PSGE at a publicly notified hui on the appropriate marae. A majority of hapū would need to indicate approval for the resolution to pass, after which the decision would need to be confirmed at the iwi level, possibly by a hui-ā-iwi.[312] All decision-making models were assessed in 'Te Ara Tono' against tikanga criteria and Crown criteria for settlement ratification. The hui-ā-hapū model was ranked highly under the Whakatōhea criteria – that the decision be hapū driven, that the decision be made kanohi ki te kanohi (on the marae), and that the decision-making process be relatively inexpensive. This model scored low in terms of the Crown's requirement for an inclusive decision-making process. It scored 'moderate' on the Crown's criteria of an authenticated vote and a transparent process but high on the Crown's criterion of a well-informed vote.[313]

Only one of the alternative models had an equal overall score against all the criteria: the option of an iwi-wide postal and online vote with hapū affiliation recorded in the vote. This option still allowed hapū to decide: 'People's votes would be recorded according to the hapu that they are enrolled with. A majority would mean more than 50% of hapu voted in the same manner.'[314] This was not the preferred option, however, because it scored 'moderate' against the hapū-driven criterion. The conclusion in 'Te Ara Tono' was: 'Given the direction from Whakatohea that the process needs to be "Hapu driven" and that the Hapu Postal/

309. Submission 3.3.24, pp 14–15
310. Submission 3.3.24, p 14
311. 'Te Ara Tono' (Wai 2662 ROI, doc A73), p 41
312. 'Te Ara Tono' (Wai 2662 ROI, doc A73), p 36
313. 'Te Ara Tono' (Wai 2662 ROI, doc A73), p 41
314. 'Te Ara Tono' (Wai 2662 ROI, doc A73), p 36

Web Voting scored less on this criteria, Hui-a-Hapu is the recommended method of decision making.'[315]

The option of an iwi postal vote, in which members' votes would be recorded as individuals, scored 'moderate' overall and 'low' against the iwi criteria of hapū-driven and kanohi ki te kanohi decision-making.[316]

3.10.2 The Crown's ratification requirements

The Crown's objective for ratification is that the settlement be durable and based on a sound foundation of consent. Te Arawhiti's requirements for ratification are set out in its handbook (previously published by the Office of Treaty Settlements), which is commonly known as the *Red Book*. According to the *Red Book*, the key part of any ratification is a compulsory postal ballot:

> The key part of the ratification process is a postal ballot in which all members of the claimant group over the age of 18 are eligible to vote. Because many members of the claimant group will live outside their rohe, a postal ballot is an essential and not an optional part of the ratification process.[317]

Apart from this compulsory component, the ratification process is designed by the mandated entity, although the Crown's ratification requirements must still be met. In practice, the Crown has a large say through its power to approve a proposed ratification process and the settlement:

> Like mandating, the ratification process is for the claimant group to work through, but the Crown will not sign a settlement if the process used was inadequate, or if the claimant group does not clearly support the proposed settlement. OTS [now Te Arawhiti] therefore keeps in close contact with the mandated representatives to help them ensure that the ratification process will be acceptable to the Crown. The basic principle is that all adult members of the claimant group must have the opportunity to have a say. The most effective way of doing this is through a postal ballot.[318]

The Crown's expectation in terms of communication is that effective information will be disseminated as widely as possible in written form, accompanied by ample opportunity for the claimant community to discuss and debate the proposed settlement. Communication must be 'open enough to make sure that all members of the claimant group, including those who live outside their rohe, can

315. 'Te Ara Tono' (Wai 2662 RO1, doc A73), p 41
316. 'Te Ara Tono' (Wai 2662 RO1, doc A73), pp 36, 41
317. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna / Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 2018), p 65. We refer to this in further footnotes as *Red Book*.
318. *Red Book*, p 65

take a full part in the discussion that is part of this final decision-making stage.'[319] This communication usually combines a written summary of the settlement (often a ratification booklet) with hui, which are attended by independent Crown observers to ensure that a 'fair and open process' was followed.[320] Importantly, the mandated entity must also consider the 'tikanga of those affected' along with the other Crown requirements in designing the process:

> To help make this final decision on ratification, claimant groups may use a combination of postal voting, communicating directly through hui held inside and outside their rohe, and written material sent directly to members of the claimant group. In designing a ratification process, claimant groups will obviously need to consider the views of hapū and the tikanga of those affected. They also need to make sure that as many members of the claimant group as possible may take part in the decision. Postal ballots in particular are very important for gathering views if claimant group members are scattered throughout the country – as many claimant groups are today. For this reason, it is important that the claimant group register is as up to date as possible and everyone on the register has been verified as a member of the claimant group. Whakapapa is the basis for verification.[321]

The standard ratification process as outlined in the *Red Book* therefore consists of a ratification strategy and information booklet, hui in the rohe and around the country, and a postal ballot at the end. After this, the Crown evaluates the process and the results of the vote to determine whether the process met the Crown's requirements and the voting results indicate 'enough' support for the deed of settlement to be signed.[322] Although it is not stated specifically in the *Red Book*, the Crown has to approve the mandated entity's ratification strategy and the written content for the ratification hui.[323] Nor does the *Red Book* explain how much support is necessary for the Crown to approve the voting results; no standards or requirements are specified on that matter, other than the requirement that a postal ballot be held to ensure that as many members of the claimant community as possible have the opportunity to vote.

The Tribunal has considered the Crown's approach to 'sufficiency' for accepting a result in *The Mana Ahuriri Mandate Report*, where it was established that the Crown considers the number of registered voters (and special voters), the proportion of registered voters that actually participated in the vote, and whether there was a 'clear majority' of those who did vote in support of the settlement. The rule of thumb is: the lower the participation rate, the higher the percentage in support needs to be. But there is no set percentage threshold that a ratification vote has to meet, either for the participation rate or the majority in support. A bare majority,

319. *Red Book*, p 65
320. *Red Book*, pp 65–66
321. *Red Book*, p 65
322. *Red Book*, pp 65–66
323. Waitangi Tribunal, *The Mana Ahuriri Mandate Report*, p 65

however, would not be considered sufficient. The Crown also considers whether the ratification process was fair, transparent, and inclusive in its decision to proceed and sign the deed of settlement.[324] In the Mana Ahuriri case, the voting result accepted by the Crown was at the lower end of the scale, as the Office of Treaty Settlements had advised Ministers at the time:

> There is no specific threshold for acceptance of ratification results but they must signify broad support for the settlement to proceed. If you approve the ratification results of 76% [deed of settlement] and 71% [PSGE], this would be the third lowest approval rate of a deed of settlement and PSGE accepted by the Crown.[325]

Thus, the Crown requires a ratification process that is fair, transparent, and inclusive, and which obtains the support of as many individual voters as possible on the mandated entity's register. These are the requirements and outcomes that the Whakatōhea Pre-Settlement Claims Trust had to meet and plan for in its ratification strategy.

3.10.3 How did the Whakatōhea Pre-Settlement Claims Trust plan to meet the Crown's requirements in its ratification strategy?

Following the Wai 2662 report and the 2018 vote, the Minister for Treaty of Waitangi Negotiations decided to resume negotiations in September 2019 (see section 3.5.2). The Crown's intention was to use 'the deed of settlement ratification process (which may include a hapū vote), should negotiations be completed, to ask Whakatōhea whether they support an inquiry alongside or after settlement'.[326] On 15 January 2021, however, the possibility of a hapū vote in the ratification process was rejected by the Crown. At a meeting of Crown, Trust, and Ngāti Muriwai representatives, the minutes recorded: 'Ngāti Muriwai asked for clarification on whether the ratification vote would record hapū affiliation along with individual votes. The Crown confirmed it would take place on an uri basis in line with the deed of mandate.'[327]

This represented an agreed position that had been reached between the Crown and the Trust at the time as both prepared to initial the deed of settlement. On 23 March 2021, Te Arawhiti sought the Ministers' agreement to the Trust's proposed ratification strategy. Officials advised:

> WPCT has proposed a ratification strategy that meets the Crown's requirements and includes extensive engagement and communication with Whakatōhea. There will be information hui in key locations where Whakatōhea uri live as well as online hui

324. Waitangi Tribunal, *The Mana Ahuriri Mandate Report*, pp 65, 69–72, 74–75, 116, 121–123
325. Juliet Robinson and Jaclyn Williams to Minister for Treaty of Waitangi Negotiations and Minister for Māori Development, report, 7 September 2016, p 7 (Waitangi Tribunal, *The Mana Ahuriri Mandate Report*, p 122)
326. Document B3, p 11
327. Jacob Pollock, file note on hui, 15 January 2021 (doc B22(b)), p [113]. Dr Pollock identified himself as the author of this file note: doc B22, p 16.

for any member of Whakatōhea to participate in. Voting can take place in person at information hui, online and through postal ballot.

The WPCT's proposed ratification strategy requires an uri vote, rather than a hapū vote. This approach is consistent with the Crown's long-standing approach to ratification.[328]

The ratification strategy was designed to meet all the Crown's requirements, as set out in the *Red Book*. The purpose of the strategy was to ensure that all members of Whakatōhea were fully informed as to the ratification process and the contents of the deed and PSGE, and that they would have 'sufficient opportunity to vote'.[329] The strategy outlined a standard process for ratification:

- the register would be updated;
- voting packs with a ratification booklet would be sent to all eligible adult members;
- provision would be made for special votes and verification of the membership of special voters;
- four weeks would be given for postal and online voting, which would be managed by an independent returning officer;
- ratification information hui would be held, at which votes could be cast;
- there would be 10 ratification information hui (one in the rohe and nine in urban centres such as Auckland, where the majority of Whakatōhea members now live); and
- a Crown observer would attend all ratification information hui.[330]

In February 2021, a Trust pānui advised members of the claimant community that any adult aged 18 years or older would be able to vote in a postal ballot, online, or at a ratification hui. Unregistered members could cast a special vote so long as they filled in a whakapapa form to confirm their Whakatōhea descent.[331]

3.10.4 What action did the Crown take when it received the Trust's proposed ratification strategy?

3.10.4.1 *Te Arawhiti advises Ministers to accept an 'uri vote'*

Ministers approved the Trust's ratification strategy in April 2021. Officials had discussed the strategy with the Trust and noted that the Trust had deliberately decided not to include hapū affiliation in the voting method:

> WPCT propose a vote where individual adult member votes are recorded, and hapū affiliation is not recorded (the uri vote). WPCT consider it is appropriate to hold an uri vote because:

328. 'Whakatōhea: approval of ratification strategy and post-settlement governance entity', report to Ministers, 31 March 2021 (doc B40(a)), p 50
329. 'Ratification Strategy for Whakatohea Pre-Settlement Claims Trust', no date (doc A10(a)), p 3
330. 'Ratification Strategy for Whakatohea Pre-Settlement Claims Trust', no date (doc A10(a)), pp 3–12
331. 'Pitopito Kōrero: Whakatōhea 2021 Settlement Information Pānui', February 2021 (doc B23(a)), p 4

a. the settlement is iwi-wide and was not negotiated at hapū level;
b. the mandate was sought from and confirmed by uri, not hapū; and
c. the WPCT deed of mandate states it will seek approval to sign the deed of settlement from Whakatōhea uri, not hapū.[332]

Officials also noted that there would be opposition to this form of voting, although they argued that the objections would arise from opposition to the settlement:

> Opponents of the settlement are likely to use this as grounds for an urgent Tribunal inquiry. They will argue that the ratification process does not allow for hapū voice to be represented and is inconsistent with *Te Ara Tono*, a 2007 report by a working group setting out a framework for Whakatōhea to settle their historical claims in the context of the failed 1996 negotiations.[333]

Te Arawhiti concluded, however, that regardless of 'Te Ara Tono' and any opposition based on allowing the hapū voice to be tested and heard, the ratification strategy was consistent with the Crown's requirements for ratification processes:

> WPCT's proposed approach – although not consistent with *Te Ara Tono* – is consistent with long-standing practice in Treaty settlement ratification, where support is sought through individual voting. This approach allows individuals to have their say on the acceptability of the settlement and the PSGE. Because a Treaty settlement removes individual rights to access courts and tribunals for redress of historical claims, the Crown requires high levels of support from individual iwi members in order to proceed to signing a deed of settlement.[334]

3.10.4.2 *Te Arawhiti's analysis of 'Te Ara Tono' and the Wai 2662 report in rejecting hapū voting*

Te Arawhiti advised Ministers that the voting method for ratification preferred in 'Te Ara Tono' set a threshold that was too low for the Crown to accept. We described the hui-ā-hapū and hapū postal/web vote options above. Officials noted that the Wai 2662 Tribunal relied on 'Te Ara Tono' in its assessment of the voting method to confirm the mandate, for which 'Te Ara Tono' had recommended the hapū postal vote. The Tribunal found that the Crown had 'failed to sufficiently provide for the exercise of hapū rangatiratanga and recommended that primary hapū affiliation be recorded in the 2018 vote'. The Tribunal had 'criticised the Crown for not paying more attention to *Te Ara Tono*'s recommendation that the mandate vote be on a hapū basis'. The Tribunal had therefore relied on the voting

332. 'Whakatōhea: approval of ratification strategy and post-settlement governance entity', report to Ministers, 31 March 2021 (doc B40(a)), p 58
333. 'Whakatōhea: approval of ratification strategy and post-settlement governance entity', report to Ministers, 31 March 2021 (doc B40(a)), p 58
334. 'Whakatōhea: approval of ratification strategy and post-settlement governance entity', report to Ministers, 31 March 2021 (doc B40(a)), p 58

method of recording hapū affiliation to 'provide a better understanding of the levels of support for the mandate' in its recommended 2018 vote.[335]

The problem for ratification, as officials understood it, was that the hui-ā-hapū option allowed four out of six hapū, by a simple majority vote of each hapū at hui, to ratify the settlement. This meant that the results of the 2018 vote, in which 53 per cent of voters (and four out of six hapū) had voted to continue negotiations by a slim majority, would be sufficient for ratification. Te Arawhiti concluded:

> The thresholds set out in *Te Ara Tono* mean that the Whakatōhea settlement could be ratified with as few as 38 per cent of voters voting in favour. Signing the settlement based on such results would leave serious questions about the durability of the settlement. In accepting the WPCT's proposed ratification process the Crown is requiring a significantly higher bar than *Te Ara Tono* sets for ratification.[336]

Officials also argued that the Trust's 'uri-based ratification vote' would be balanced by the PSGE model, which had been designed to protect hapū rangatiratanga and had been 'widely consulted on within Whakatōhea'. Te Arawhiti advised Ministers:

> The PSGE allows for the exercise of hapū rangatiratanga through the appointment of hapū trustees, in a manner consistent with WMTB and WPCT. Whakatōhea is not the only iwi for whom hapū and marae are strong components of their tribal identity and where hapū rangatiratanga is exercised through PSGE representation, rather than through the ratification of a deed of settlement. Ngāi Tahu, Ngāti Awa, Ngāi Tuhoe and Ngāti Porou are all examples of this.[337]

3.10.5 Claimant responses to the Crown's decision to accept an 'uri vote' for ratification

On 23 March 2021, the Minister for Treaty of Waitangi Negotiations sent an update on the negotiations to Whakatōhea, advising that the ratification would give Whakatōhea an opportunity to vote on the settlement, and that the Crown 'will only proceed to sign the deed if ratification demonstrates strong support amongst Whakatōhea for the settlement'.[338] The claimants were quickly aware of the plan to ratify the settlement through nationwide hui and an iwi-wide vote on an individual basis, without any role for hapū. As Te Arawhiti predicted in advice to Ministers, the claimants were opposed to this kind of ratification process, which they felt was inconsistent with Whakatōhea tikanga. As discussed above, the Crown indicated to various claimant groups on 26 February that it planned

335. 'Whakatōhea: approval of ratification strategy and post-settlement governance entity', report to Ministers, 31 March 2021 (doc B40(a)), p 59
336. 'Whakatōhea: approval of ratification strategy and post-settlement governance entity', report to Ministers, 31 March 2021 (doc B40(a)), p 59
337. 'Whakatōhea: approval of ratification strategy and post-settlement governance entity', report to Ministers, 31 March 2021 (doc B40(a)), p 59
338. Document B22, p 3

to initial the deed in March, with the ratification vote to begin in April 2021.[339] This imminent development led to applications to resume the urgency proceedings (see section 3.6), although the Crown informed claimants later that valuation issues had caused a delay.

Te Ringahuia Hata stated in her evidence of 21 April 2021:

> [T]he ratification process also does not acknowledge hapū mana and rangatiratanga in voting processes, even though Whakatōhea have always organised themselves through the hapū. Voting processes have always been on a hapū basis and any departure from that tikanga has a significant impact on those who make decisions *for* Whakatōhea, as opposed to those who make decisions *by* hapū *of* Whakatōhea.
>
> The February 2021 panui of the WPSCT outlines the ratification process as an individual vote, and not by way of hapū. This ratification process is a breach of Te Mana me Te Tikanga o nga Hapū o Te Whakatōhea, and therefore cannot be Tiriti compliant. . . .
>
> This is a clear departure from Whakatōhea tikanga. These are matters that should be dealt with at the hapū level at hui in a clear and transparent process that is Whakatōhea tikanga-based with the presence of Pou Tikanga of Ngāti Patumoana, such as Te Riaki Amoamo. [Emphasis in original.][340]

On 28 April 2021, the kaumātua Te Riaki Amoamo (referred to by Ms Hata) also filed an affidavit, stating that tikanga-based decisions are made by the hapū on the day, when the kōrero is '"hot" and in debate' kanohi ki te kanohi at the 'ancestral gathering place of our people', the hapū marae.[341] Mereaira Hata also provided evidence at that time:

> I ask, when did the uri of Whakatōhea take over the rights of the hapū? Since when did the uri of Whakatōhea gain more rights over the hapū? To read that the ratification process and the debates will be addressed by the uri of Whakatōhea and not the hapū is absurd. Our rights as a hapū were recognised on 27 and 28 May 1840 when our two rangatira, Te Aporotanga and Te Rangimatanuku signed the Tiriti on behalf of Ngāti Rua hapū. The Crown is now overlooking and disregarding the rights of the hapū to make decisions, despite its guarantees being made '*ki ngā Rangatira ki ngā hapū ki ngā Tangata Katoa*' in Te Tiriti. The Crown is not listening to the voices of our rangatira and our hapū . . .
>
> I disagree that the Crown has acted in good faith with regards to the hapū of Ngāti Ruatakenga. Its preference to put a vote to the people of Whakatōhea and give 'one person one vote' seems to be given preference over a vote by the hapū according to tikanga. Whakatōhea has always been strongly hapū-centric, for instance our Trust Board has always been appointed by hapū vote. The Crown needs to acknowledge that

339. See, for example, Rosie Batt to Te Ringahuia Hata and Antoinette Hata, 26 February 2021 (doc B20(a)), p 11; counsel for Wai 2961 to Jacob Pollock, 12 April 2021 (doc B40(a)), p 44.
340. Document B23, p 2
341. Document B47, p 3

> the hapū voted in 2018 when they 'tested the pulse of the people' and it is for the hapū to vote again when the time is ready. [Emphasis in original.][342]

Other claimants also stressed the need for all of the settlement decisions to be hapū driven and to not rely on uri voting.[343]

3.10.6 What further action did the Crown take on the proposed ratification voting method?

On 12 May 2021, the deputy chairperson declined to grant an urgent hearing and transferred the matter to this Tribunal for consideration (see chapter 1). Claimant counsel sought a priority hearing and submitted on 4 June 2021 in a joint submission:

> The ratification process is inconsistent with Whakatōhea tikanga. On the information available, the ratification will be based on an individual rather than hapū vote without traditional decision-making processes at their marae under the guidance of kaumatua. The Crown has not responded on this point, which appears to amount to implicit confirmation that this assumption is correct.[344]

This submission was based on the information contained in the February 2021 pānui, which Ms Hata had filed with the Tribunal (see above), and it appeared to be confirmed by the absence of any mention of a hapū role in the Trust's ratification strategy.[345] It was certainly the case that the Trust had intended an uri vote with no role for hapū, and that the Crown had approved this approach in April 2021.[346]

At some time between April and July 2021, however, the Crown held meetings with Trust representatives at which the Crown persuaded the Trust to change the ratification vote to a vote in which hapū affiliation would be recorded. This action taken by the Crown was not covered in detail in Dr Pollock's briefs or supporting documents. He noted in his brief for the hearing: 'Te Arawhiti officials subsequently discussed the proposed voting method for ratification with the trustees.'[347] In response to questions from the presiding officer at hearing, Dr Pollock told the Tribunal that there had been 'numerous discussions with the Trust' at which the Crown had recommended amending the ratification strategy so as to include hapū affiliation in the vote.[348] He added:

342. Document B48, pp 3–4
343. Document B33(a), pp [31]–[32]; doc B35, p 5; doc B36, p 2; doc B37, p 5
344. Memorandum 3.1.184, p 3
345. 'Ratification Strategy for Whakatohea Pre-Settlement Claims Trust', no date (doc A10(a))
346. 'Whakatōhea: approval of ratification strategy and post-settlement governance entity', report to Ministers, 31 March 2021 (doc B40(a)), pp 58–59; doc B40, p 12
347. Document B40, p 14
348. Transcript 4.1.5, pp 220–221

> They [the Trust] had a view that they felt that there were a number of risks associated with a hapū vote. We had a view that the information would be available anyway [in the Trust Board's register] and it would be something that we could take into account and eventually we reached an agreement on that.[349]

According to Dr Pollock, the Trust's concerns in those discussions were:

- there was a risk that a hapū which voted against the settlement would believe that it should therefore leave the settlement;
- there was a risk that recording hapū affiliation in the ratification vote would cause resentment between hapū if the information 'showed that one hapū was being forced into something', and that this would continue or exacerbate internal divisions;
- there was a view that the settlement was an iwi settlement and that Whakatōhea should be concentrating on their vision for all of Whakatōhea rather than hapū considerations; and
- there was a view that both the Trust and the proposed PSGE provide adequately for the hapū voice in their representational structures.[350]

Mr Pou added at the hearing that, because hapū affiliation is already recorded in the register, it would have been 'rather mean spirited or a lack of good faith to not share it' or take it into account. He also stated that the Trust's concerns about fragmentation as noted by Dr Pollock are important, and that it is also important that the views of all of Whakatōhea are heard in the decision whether to settle their claims.[351] In particular, Mr Pou defended the right of all iwi members to vote on ratification:

> To suggest that tikanga would exclude particular voices is – I think it is antithetical to tikanga. I took the issues around tikanga, in particular as the submissions were being made by Ms Feint, was the importance of coming and engaging with the ahikā and doing those sorts of things but conversely it's also important to engage with those who might be displaced in terms of where they live but who still engage with the iwi as a whole . . .[352]

The Trust agreed to amend the ratification voting method on 5 July 2021.[353] This was three days before the judicial conference to consider the submissions asking for a priority inquiry on the issues raised in urgency proceedings. On 6 July 2021, Crown counsel advised the Tribunal in pre-conference submissions that the postal vote would include the voter's hapū affiliation (as recorded on the register) and that 'hapū affiliation will also be recorded with special votes'.[354] This was the first indication to the claimants and the Tribunal that there had been a change of

349. Transcript 4.1.5, p 220
350. Transcript 4.1.5, p 220
351. Transcript 4.1.5, pp 286–287
352. Transcript 4.1.5, p 287
353. Document B40, p 14
354. Memorandum 3.1.196, p 7

approach to the ratification vote. According to Dr Pollock, this new process would allow Ministers to 'take into account hapū support, as well as the overall level of support for ratification'. Fundamentally, 'the Crown requires sufficiently high levels of support from the iwi in order to proceed to signing a deed of settlement'.[355] Crown counsel also added in the pre-conference submissions that the Crown was aware of the preference in 'Te Ara Tono' for hui-ā-hapū to make the ratification decision.[356]

At the judicial conference on 9 July 2021, Jason Pou confirmed on behalf of the Trust that hapū affiliation would be recorded as part of the ratification vote. We are not in a position, however, to evaluate exactly how the process will work from the draft ratification booklet which has been provided by the Trust.[357] Mr Pou explained in a covering submission: 'Wording relating to particular matters, such as the recording of hapu affiliation alongside the vote, has not been settled on and therefore is not yet included in the material.'[358]

Te Arawhiti advised the Minister of the Trust's decision in the weekly status report on 12 July 2021:

> In the March 2021 ratification strategy and post-settlement governance entities (PSGE) report, we advised you and the Minister for Māori Development that the Whakatōhea ratification vote would not record hapū affiliation alongside individual votes. . . . Since then, WPCT has reconsidered their position. While they consider the settlement is an iwi settlement and therefore the vote should be iwi-wide, they have decided to record hapū affiliation alongside uri votes.[359]

In sum, the Crown accepted the Trust's ratification strategy in March–April 2021, including an 'uri vote' and only one ratification hui in the rohe. Dr Pollock clarified at hearing: 'We would have gone ahead with the model that they proposed.'[360] The Crown was aware that this decision-making model differed from that used in the 2018 vote, from that proposed in 'Te Ara Tono', and from the findings of the Wai 2662 report in respect of the flawed mandate vote. But the Crown was satisfied that the strategy met the Crown's requirements as set out in the *Red Book*, and did not see sufficient reason to depart from the standard ratification model. This likely would have remained the position if the ratification had proceeded as planned in April 2021. Te Arawhiti warned Ministers that there would be opposition based on the grounds that 'the ratification process does not allow for hapū voice to be represented and is inconsistent with *Te Ara Tono*'.[361] This opposition was clearly

355. Document B40, pp 15–16
356. Memorandum 3.1.196, pp 7–8
357. Document B46, pp 40–41
358. Memorandum 3.1.284, p 2
359. Weekly Status Report to Minister for Treaty of Waitangi Negotiations, 12 July 2021 (doc B40(a)), p 74
360. Transcript 4.1.5, p 219
361. 'Whakatōhea: approval of ratification strategy and post-settlement governance entity', report to Ministers, 31 March 2021 (doc B40(a)), p 58

evident when the claimants sought to renew the urgency proceedings, after which the Crown met with the Trust to seek agreement to including hapū affiliation in the vote, so that the degree of support for the settlement could be measured within each hapū.

The question then arises: is a postal vote with the recording of hapū affiliation a sufficient compromise in respect of hapū-driven decision-making in the context of ratifying the settlement? We turn to address this question next.

3.10.7 Is a postal vote with the recording of hapū affiliation a sufficient compromise?

In the claimants' view, ratification decision-making must be made in accordance with Whakatōhea tikanga, which requires a decision of such importance to be made at hui-ā-hapū on the marae with the guidance of kaumātua and kuia (with provision for livestreaming and online attendance). According to the Crown, the hui-ā-hapū as designed in 'Te Ara Tono' would allow a minority to decide the question of whether the settlement should be ratified, whereas the postal/online vote would allow the whole of Whakatōhea the opportunity to participate while still allowing the views of hapū to be heard and tested. The Trust's 'key aspiration' is to 'increase the ability of all of its members to vote', on the basis that '[t]he more that vote, the greater the integrity of the process.'[362]

The *Red Book* requires a postal ballot for the Crown to be satisfied that an iwi decision to ratify the settlement is durable. This is a compulsory requirement for ratification in all cases. Otherwise, the key passage in the *Red Book* states:

> To help make this final decision on ratification, claimant groups may use a combination of postal voting, communicating directly through hui held inside and outside their rohe, and written material sent directly to members of the claimant group. In designing a ratification process, claimant groups will obviously need to consider the views of hapū and the tikanga of those affected.[363]

Given the statement in the *Red Book* that tikanga and the views of hapū should be considered in designing the process, as well as the statement about the need for hui, the question must be asked as to why the ratification strategy only has one hui in the rohe (at Ōpōtiki) and nine hui outside the rohe? According to the Crown's closing submissions, this reflects the way in which the strategy meets the Crown's standards for ratification, and the Crown is comfortable with it:

> The Trust ratification method also meets the Crown's universal participation requirement. It will ensure that all adult members of Whakatōhea are given the opportunity to express a view on the agreed settlement, and parallel process, and to vote during the ratification. The hui-ā-hapū method recommended by *Te Ara Tono* is assessed as low for inclusiveness because it would exclude many adult members of

362. Submission 3.3.24, pp 13–14
363. *Red Book*, p 65

> Whakatōhea who live outside the rohe and are not able to travel to attend hui in the rohe. Dr Pollock noted in evidence that approximately 90 per cent of adult members of Whakatōhea live outside the rohe. *For the same reason, Dr Pollock said the Crown was satisfied with the geographical locations of the ten ratification hui.* [Emphasis added.][364]

The Crown was clearly aware when approving the strategy that 'Te Ara Tono' called for hui-ā-hapū to make resolutions on the settlement.[365] The total exclusion of any hui-ā-hapū from the strategy, and the Crown's acceptance of this, is difficult to understand in that context. Following the judicial conference, claimant counsel pointed this out, submitting:

> There is a critical distinction in tikanga between hapū decision-making by the ahi kā at the marae, and recording the votes of individuals according to their hapū affiliations – currently, the proposed ratification process is only obtaining information about the latter, even though the Crown has previously agreed to ratification processes that include hui a hapū for each hapū, in addition to a postal vote for individuals . . .[366]

The Crown's response to this was that hapū could always hold hui if they wanted to but any such hui during the ratification process would be limited to discussion only:

> Claimants have submitted that the Crown has previously agreed to ratification process that include hui-a-hapū for each hapū, in addition to postal voting. In relation to this submission the Crown respectfully suggests there is nothing to prevent Whakatōhea hapū holding hui during the ratification process period to discuss and debate the proposed Whakatōhea settlement.[367]

Dr Pollock repeated this position in his evidence for the hearing.[368] Crown counsel elaborated on the point in closing submissions, accepting that hui-ā-hapū could 'augment' the Trust's ratification process by ensuring that 'there is robust debate on the settlement under consideration', and stating that the Crown would have no objection in principle to such hui being held during the ratification. Nonetheless, the Crown reiterated that a 'show of hands' at such hui, even with additional attendance through the use of technology, would not be sufficient to show a durable basis of consent to ratify the settlement.[369]

As noted, the Crown's compromise is to hold a postal vote in which hapū affiliation will be recorded, which the Crown considers is a sufficient protection of

364. Submission 3.3.23, pp 34–35
365. 'Whakatōhea: approval of ratification strategy and post-settlement governance entity', report to Ministers, 31 March 2021 (doc B40(a)), p 59
366. Memorandum 3.1.206, pp 3–4
367. Memorandum 3.1.209, p 9
368. Document B40, p 15
369. Submission 3.3.23, p 35

hapū rangatiratanga in the ratification process. The claimants, however, have proposed an alternative compromise that would include both hui-ā-hapū and a postal vote (see section 3.9.1). We now consider the details of the claimants' proposed compromise position.

As far as we are aware, the claimants' proposal was first made in the opening submissions of counsel for Ngāti Rua claimants on 13 August 2021. Claimant counsel stated:

> In Ngāti Rua's submission, in order to comply with Whakatōhea tikanga and Tiriti principle, any decision by the Crown on whether there is sufficient support for the settlement must be focused on whether the hapū collectively support the settlement (accepting that, in accordance with Crown policy, a Western-style majority vote would also take place).[370]

They pointed to precedent in terms of the Tūwharetoa ratification process, which included both a postal vote and 'hui a hapū for every single hapū held at their marae, with each hapū collectively deciding according to tikanga whether they supported the settlement'.[371]

Counsel filed evidence from Te Ngaehe o Te Rangi Ranginui Wanikau, one of the negotiators in the Tūwharetoa settlement, who described the compromise reached with the Crown and the process followed as a result. According to Mr Wanikau, the Crown had initially objected because of the need to have a 'Pākehā-style process with a postal vote by individual members of Ngāti Tūwharetoa'. But that process was not 'consistent with our tikanga because it does not accord mana to the hapū'. As a result, a compromise was ultimately reached that 'both processes would be run'. But, because they 'regarded the hapū vote as the most important', respect was accorded to the ahi kā by giving them the ability to have their say prior to the iwi vote. The mandated entity, the Tūwharetoa Hapū Forum, 'held hui with each of the 26 hapū to seek their approval for initialling the deed of settlement and having it ratified by Ngati Tūwharetoa', after which the postal ballot was held.[372] Mr Wanikau also noted that the hui were held by each hapū according to the tikanga and kawa of the hapū concerned, and the hapū were therefore responsible for 'determining how they would decide whether to support the settlement'.[373]

Dr Pollock's evidence in response noted that this process occurred prior to the initialling of the deed and was therefore not part of the ratification itself. Rather, the hapū hui were 'an exercise to seek approval to initial the deed of settlement and to move to ratification'. Also, the additional process was 'undertaken by the Tūwharetoa Hapū Forum – the Ngāti Tūwharetoa mandated negotiating body – at its discretion'.[374] The ratification process itself consisted of hui around the country

370. Submission 3.3.9, p 15
371. Submission 3.3.9, p 14
372. Document B43, pp 2–3
373. Document B43, p 3
374. Document B44, p 2

and an individual postal vote. The Crown, therefore, had approved the Tūwharetoa strategy on the basis that it was proposed by the mandated entity and appropriately reflected how Tūwharetoa makes decisions. The Crown's requirements for universal participation and the provision of sufficient information (at the ratification hui) for well-informed voting were also met. Dr Pollock emphasised this point and the fact that it was the mandated entity which designed the process.[375] He stated that 'the Crown takes the position that it is up to the body that has been mandated to represent a particular group to determine the most appropriate decision-making process.'[376]

In the Whakatōhea case, however, the Crown ultimately *did not* accept the process as designed by the mandated entity, and obtained the Trust's agreement to the use of hapū affiliation in the ratification vote, as discussed above. Dr Pollock stated at hearing that the Crown would agree to a process of pre-ratification hui-ā-hapū prior to initialling the deed but only if this was sought by the Trust.[377] The Trust's position, as outlined in Mr Pou's closing submissions, is that 'ratification hui a hapū will take place if they are requested and where ever hui take place, provision for voting will be made, overseen by an independent returning officer'.[378] Thus, both the Crown and the Trust have rejected the claimants' request for a process that includes hui-ā-hapū prior to ratification.

Crown counsel submitted that the proposed 'Tūwharetoa model' is problematic for two reasons. First, it seeks to relitigate the 2018 vote; that is, Whakatōhea have already voted to proceed with negotiations, so there would be no point in repeating a process to decide a second time whether or not to proceed. Secondly, the application of the 'Tūwharetoa model' to Whakatōhea is problematic because there would be no clear threshold for deciding whether to proceed, and because the proposal 'discounts the significant support among members of Whakatōhea for the Trust and settlement, who would clearly be prejudiced by adoption of such a process as a gateway or threshold question before ratification involving all persons who will benefit from the proposed settlement'.[379] The Crown also argued that the decision is up to the Trust (as in the Tūwharetoa case), and that

> there is debate within Whakatōhea – and between the Trust on one hand, and the claimants on the other – as to the appropriate way to apply Whakatōhea tikanga in the settlement negotiations. It is submitted the Tribunal should be cautious in assessing claimant submissions which rely on evidence of how Ngāti Tūwharetoa chose to approach their ratification process and seek recommendations that the 'Tūwharetoa model' be adapted to the Whakatōhea ratification process.[380]

375. Document B44, pp 2–4
376. Document B44, p 4
377. Transcript 4.1.5, p 227; submission 3.3.21(a), p 17
378. Submission 3.3.24, p 13
379. Submission 3.3.23, pp 36–37
380. Submission 3.3.23, p 37

The claimants rejected the Crown's arguments. They submitted that the 2018 vote and the ratification vote are different in scale and in terms of consequences; the 2018 vote was to test the pulse of Whakatōhea whereas the ratification vote will settle all the claims for all time. The claimants also argued that the ratification decision is such an important one for Whakatōhea that 'it is important for hapū members and particularly hapū leadership such as kaumatua and kuia a number of whom their first language is Te Reo Rangatira to be able to participate fully in decision-making using their traditional methods such as kōrerorero ā kānohi ki te marae.'[381]

In our view, both parties are correct. For many decades, Whakatōhea have voted as hapū in the kind of voting now proposed by the Trust, for example, in electing the members of the Whakatōhea Māori Trust Board and the advisory trustees for the Whakatōhea Fisheries Trust.[382] This is an application of tikanga to modern circumstances and the particular requirements of those two bodies. On the other hand, as Te Riaki Amoamo and others stated in their affidavits in the urgency proceedings, hapū decision-making involves a kanohi ki te kanohi process on the hapū marae (see above). Claimant counsel cited the evidence of Tawhirimatea Williams, for example, who stated:

> I acknowledge that many of us are living away from our marae, but that does not have any bearing on our whakapapa to the whenua, or our connection to our whenua and rohe. Nor does it diminish our hapū rangatiratanga and mana motuhake which is exercised within our whare tīpuna on our marae and which is maintained by those who are maintaining our ahi kā for the benefit of everyone, including myself, who whakapapa to our hapū. While engaging our whānau is important, it is no substitute for returning to your ukaipō to have your say about important take or kaupapa affecting our hapū. The observance of those forms of traditional decision-making is what sets us apart as Māori and which should be respected.[383]

'Te Ara Tono' applied hapū decision-making of this kind to the specific requirements of Treaty settlement processes. Six decision-making models were evaluated and, for making a decision on ratification, hui-ā-hapū were considered the best method. Hapū postal/online voting scored equally in the evaluation, however, and cannot be discounted.

In our view, both hui-ā-hapū and a hapū postal vote are required to meet the particular tikanga of how Whakatōhea makes decisions while also meeting the ratification requirements of the Crown. We turn next to make our findings on this issue.

381. Submission 3.3.27, pp 25–26
382. Submission 3.3.13(b)
383. Document B34, pp 2–3; submission 3.3.18, p 11

3.11 Conclusions, Findings, and Recommendations on the Ratification Process

It is important first to consider the fundamental purpose of a Treaty settlement, which is to resolve more than a century of well-justified grievances and to restore the relationship between Whakatōhea and the Crown on a Treaty partnership footing. Settlements have to be seen as durable by both Treaty partners, and be founded on a broad base of consent. This means that the Crown's requirements for a durable settlement, such as 'universal participation' in the ratification vote, must be accorded due respect by the Māori Treaty partner. Conversely, the tikanga and traditional decision-making processes of the Māori Treaty partner must be respected by the Crown. This is especially so when the Crown's Treaty obligation to actively protect hapū rangatiratanga is taken into account. Historical and modern applications of tikanga include the election of hapū representatives by hapū to various tribal entities.

In the context of the failed negotiations in 1996, 'Te Ara Tono' was developed over four years (2003–2007) so that Whakatōhea would have guidance on how to apply tikanga to the key decision-making steps in the settlement process. A hapū postal vote was considered appropriate for the mandate decision. This did not actually occur, as found in the Wai 2662 report.[384] The option of hui-ā-hapū followed by iwi confirmation was the preferred model for ratification. As noted above, a hapū postal vote scored equally but was not considered sufficiently 'hapū driven'.

We agree with claimant counsel that 'the really important point is that the two methods are not mutually exclusive'; that is, a decision-making process at hui-ā-hapū can be followed by a hapū postal vote.[385] We agree with the Crown, however, that a preliminary process for deciding whether to initial the deed is not required. The Crown and the Trust have already decided to proceed with negotiations following the outcome of the 2018 vote, and they have indicated their clear decision that they wish to initial the deed of settlement and begin the ratification process. We also agree with the Crown that the late change made to the ratification postal vote so as to include hapū affiliation is an appropriate one. As Mereaira Hata stated in evidence, prior to the change of approach:

> I disagree that the Crown has acted in good faith with regards to the hapū of Ngāti Ruatakenga. Its preference to put a vote to the people of Whakatōhea and give 'one person one vote' seems to be given preference over a vote by the hapū according to tikanga. Whakatōhea has always been strongly hapū-centric, for instance our Trust Board has always been appointed by hapū vote. The Crown needs to acknowledge that the hapū voted in 2018 when they 'tested the pulse of the people' and it is for the hapū to vote again when the time is ready.[386]

384. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 91
385. Submission 3.3.20, p 13
386. Document B48, pp 3–4

The question is whether the action taken by the Crown since April 2021 – obtaining the Trust's agreement to include hapū affiliation in the postal vote – is sufficient to meet the Crown's obligation to actively protect hapū rangatiratanga. It is certainly the case that if the Crown had continued to accept the Trust's proposed ratification strategy without this change, it would have been in breach of the principles of partnership and active protection. The change is a meaningful one, it reflects the way that Whakatōhea votes, and it will give the Crown the decision of each hapū as to whether it supports the settlement. This solution is not, however, sufficiently reflective of hapū rangatiratanga to comply entirely with the principles of the Treaty. It lacks the traditional process by which decisions on the marae were discussed with and guided by kaumātua and kuia. As the claimants argued, the 'role of the Ahi Kaa in relation to the decision-making processes of the hapū' is absent.[387] We agree that this role must be respected and provided for in the ratification process but without excluding the 90 per cent of Whakatōhea that live outside the rohe.

On balance, we find that the Crown's acceptance of the modified ratification voting method is insufficient to meet its Treaty obligations, and the principle of active protection of hapū rangatiratanga has been breached. We accept that a hapū postal/online vote would be appropriate for Whakatōhea but the ratification process as approved by the Crown does not currently provide sufficiently for Whakatōhea tikanga because it is missing the crucial element of hapū decision-making on the marae, and the Crown has deliberately decided that this is not necessary for the ratification of the Whakatōhea settlement.

For the avoidance of prejudice to Whakatōhea, we therefore recommend that the Crown require a further amendment to the ratification strategy to provide for hui-ā-hapū after the initialling of the deed and prior to the ratification information hui and the hapū postal vote. This will allow the resolutions of the hui-ā-hapū, made in accordance with the tikanga of the hapū, to be circulated among all members of Whakatōhea, who will then have the guidance of the ahi kā before they vote. The Crown will also have the benefit of the resolutions of these hui as well as the hapū vote to consider when it decides whether or not to sign the deed of settlement. As in the case of the Tūwharetoa hui, the Trust would make a presentation on the settlement so that the hui-ā-hapū attendees are fully informed in their decision-making processes.

3.12 Specific Issues: Te Ūpokorehe and Ngāti Muriwai

3.12.1 Introduction

Te Ūpokorehe and Ngāti Muriwai raised specific issues with us about the withdrawal mechanism and the ratification vote which require some specific comments. The parties' arguments have already been set out above (sections 3.3 and 3.9). In brief, Ngāti Muriwai were concerned as to whether they will be able to use the withdrawal mechanism, which we have addressed in sections 3.4.1.2 and

387. Submission 3.3.27, p 26

3.8.2.3, and which needs no further discussion here. The other issue raised by Ngāti Muriwai claimants is the question of whether they will be able to vote as Ngāti Muriwai in the hapū ratification vote. Because this is a very specific issue and not relevant to the discussion in sections 3.10 and 3.11, we discuss this here.

Te Ūpokorehe's concern was outlined in section 3.3.1. Essentially, counsel for Te Ūpokorehe argued that many of their members do not affiliate to Whakatōhea and therefore will not be able to use the withdrawal mechanism or have their votes counted in the hapū ratification vote. Again, this is a very specific issue so we address it separately from the main discussion of the withdrawal mechanism and ratification issues.

3.12.2 Will Ngāti Muriwai be able to vote as Ngāti Muriwai in the hapū postal vote?

The situation of Ngāti Muriwai was addressed in the Wai 2662 report. The question of whether Ngāti Muriwai is an independent hapū or a part of Ngāti Rua is a matter for Whakatōhea to resolve. The Whakatōhea Pre-Settlement Claims Trust and the Crown, however, must also address this question as part of the settlement process. For ratification especially, the hapū-driven nature of Whakatōhea decision-making and the requirement for a hapū vote is highly relevant.

In the Wai 2662 report, the Tribunal noted that there are processes for recognising additional hapū in the deed of mandate and in the mandated entity's trust deed, which provide potential remedies for Ngāti Muriwai.[388] The Tribunal found, however, that Ngāti Muriwai as a hapū were originally included in early mandate documents but were later omitted for reasons that have not been established:

> The fact that Ngāti Muriwai had representatives on the Process Working Party that produced 'Te Ara Tono' and were initially included in the first Tū Ake mandate strategy submitted to the Crown gives rise to a question as to why they were ultimately excluded. We think that there is a reasonable prima facie argument that Ngāti Muriwai have been prejudiced by exclusion from the Pre-settlement Trust at the point of its establishment.[389]

The Tribunal also stated that the requirements for obtaining recognition now through the mechanisms in the deed of mandate or the trust deed mean that Ngāti Muriwai have 'the burden of proof to establish their identity through the production of historical evidence'. They must 'win the support of four of six hapū committees, 12 of 15 Pre-settlement Trust trustees, or 75 per cent of those Whakatōhea uri who might choose to vote on a members' resolution'.[390] The Tribunal found that these requirements are 'onerous and place considerable power back with the six hapū recognised under the Trust Board structure, particularly the larger of those hapū, which could potentially outvote a majority in smaller hapū on any

388. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, pp 46–47
389. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 47
390. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 47

iwi-wide vote'.[391] The Tribunal did not recommend any specific remedies to relieve Ngāti Muriwai of this burden but it did recommend their inclusion as a hapū in the 2018 vote, stating that 'those who whakapapa to Whakatōhea and who are over 18 years of age should be able to vote in accordance with their primary hapū affiliation to any of the following hapū: Ngāti Ira, Ngāti Muriwai, Ngāti Ngāhere, Ngāti Patumoana, Ngāti Ruatakena, Ngāi Tamahaua, and Ūpokorehe'.[392]

Having made these findings and this recommendation, the onus was on the Crown to address the matter. Ngāti Muriwai were duly included as a hapū in the 2018 vote but no other action has been taken to lessen the onerous process that must be followed to add a hapū to the deed of mandate or the trust deed, or to ascertain why Ngāti Muriwai were included at first but excluded in later iterations of the mandate strategy.

We can take these matters no further in this priority inquiry, as the consideration of issues in respect of Ngāti Muriwai has been limited to matters of withdrawal and ratification (see chapter 1), but it is important to note these issues as context. In terms of the specific issue about the ratification vote, counsel for the Ngāti Muriwai claimants submitted that their clients were currently deciding whether to make their register available for use in the ratification vote, but were awaiting clear and written clarification as to whether Ngāti Muriwai would be 'properly described as a hapū' in the hapū vote.[393]

Mr Pou has stated clearly in his closing submissions that anyone who affiliates to Ngāti Muriwai will not be able to vote as Ngāti Muriwai, unlike the situation with the 2018 vote, because only the hapū recognised in the deed of mandate can participate in formal settlement processes:

> There will be no provision for the ability to vote in the ratification process as Ngati Muriwai. To do so would require an amendment to the mandate which has not taken place, notwithstanding the fact that the matter has been an issue for some 5 years.
>
> This position does not exclude Ngati Muriwai or any of its members. The question of who would be excluded if any has been put to those representing Ngati Muriwai for some time now and no one has been identified. Those that consider themselves to be Ngati Muriwai will have to vote in accordance with their recognised hapu affiliation.[394]

Counsel for Ngāti Muriwai claimants did not respond to these statements in their reply submissions, presumably because Ngāti Muriwai have decided to use the withdrawal mechanism rather than participate under another hapū identity in the ratification process.[395]

The question must be posed: is there a Crown act or omission here that might be assessed for its consistency with Treaty principles? In this respect, claimant

391. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 91
392. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 98
393. Submission 3.3.16, p 7
394. Submission 3.3.24, p 14
395. Submission 3.3.26, p 7

counsel submitted that the Crown is well aware of the divisions within Whakatōhea and the opposition among some hapū to recognition of Ngāti Muriwai. The recent High Court case over customary marine title (which is under appeal) was cited as an example by both the claimants and the Trust. Counsel for Ngāti Muriwai claimants submitted:

> The Crown is aware of these divisions and continues to perpetuate them. The Crown is aware of the opposition to Ngāti Muriwai, and has done nothing to protect Ngāti Muriwai from the prejudicial actions of others. The mechanisms that the WPSCT have provided and the Crown have approved are used to continually suppress Ngāti Muriwai's identity as a hapū.[396]

The Crown submitted that general issues about the recognition of Ngāti Muriwai in the negotiations process 'go to issues which the Tribunal, in deciding to hold this priority hearing, acknowledged have already been the subject of inquiry and reporting'.[397] In post-hearing directions, the presiding officer directed the Crown to 'also address the issue of how those who identify as Ngāti Muriwai will be dealt with in terms of ascertaining the degree of support for the settlement'. The use of the word 'also' was in the context of the hapū ratification vote, which the Trust was directed to file submissions on in closing.[398] Crown counsel did not, however, address this issue, presumably on the basis that its earlier submission on Ngāti Muriwai issues covered all matters.

We have not inquired into what the Crown has done generally about the issues facing those who identify as Ngāti Muriwai, and we are unable to make any specific findings of Treaty breach about the exclusion of Ngāti Muriwai affiliation from the hapū vote. We note the findings in the Wai 2662 report about the onerous nature of the mechanisms to recognise additional hapū, the power imbalance created by the mechanisms, the Crown's acceptance of these mechanisms, and the earlier inclusion of Ngāti Muriwai in 'Te Ara Tono' and the mandate strategy. These findings remain relevant.

3.12.3 Is Te Ūpokorehe able to use the withdrawal mechanism and participate fully in the hapū ratification vote?

In the Wai 2662 inquiry, the Tribunal stated that it did not 'see a difficulty' in the inclusion of Te Ūpokorehe in the mandate 'if it could be shown that this was their collective wish'.[399] The 2018 vote recommended by the Tribunal showed that Te Ūpokorehe did not wish to continue with the Trust's negotiations and also voted in favour of stopping to hold a Tribunal inquiry.[400]

396. Submission 3.3.26, p 5
397. Submission 3.3.23, pp 2–3
398. Memorandum 2.5.44, p 4
399. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 91
400. 'Whakatōhea Settlement Process: Declaration of Voting Results' (doc B3(a)), pp [16], [20]

In this priority inquiry, counsel for Te Ūpokorehe claimants raised the issue of whether Te Ūpokorehe can participate fully in either the withdrawal process or the ratification vote, due to a number of Te Ūpokorehe not having whakapapa to Whakatōhea.[401] Crown counsel did not address this specific Te Ūpokorehe issue in either opening or closing submissions. In reply submissions, counsel for Te Ūpokorehe advised that her clients have begun gathering signatures for a withdrawal petition,[402] so we take it that the issue so far as the withdrawal mechanism is concerned is no longer current. For the avoidance of doubt, we note that all our findings in respect of the withdrawal mechanism in section 3.8 apply to Te Ūpokorehe.

On the issue of the ability of Te Ūpokorehe members to be counted in the ratification vote if they do not whakapapa to Whakatōhea, Dr Pollock stated at hearing that any and all members of Te Ūpokorehe will be counted because Te Ūpokorehe is included in the mandate.[403] We take it, therefore, that all registered members of Te Ūpokorehe will be counted as such in the hapū postal vote. In respect of unregistered members of Te Ūpokorehe who cast a special vote, Mr Pou stated in closing submissions that the same verification process would be used as for the 2018 vote: 'Whakapapa verification will be carried out by recognised whakapapa experts of the 6 hapu'. He added: 'For the purposes of verification, the Pre-Settlement Trust would have no objection to the claimants putting forward experts to ensure the integrity of the process.'[404] Given the assurances of both Mr Pou (for the Trust) and Dr Pollock (for the Crown) that all members of Te Ūpokorehe can participate because the mandate is structured to include all Te Ūpokorehe claims, we accept that the Te Ūpokorehe voice will be heard in the ratification vote.

Also, as we have recommended, Te Ūpokorehe should be able to hold their own hui, at which resolutions may be passed on the settlement and PSGE for the information and guidance of all members of Te Ūpokorehe who participate in the postal vote.

401. Submission 3.3.15, p [8]
402. Submission 3.3.25, p [5]
403. Transcript 4.1.5, pp 257–258
404. Submission 3.3.24, p 13

Dated at Wellington this 10th day of December 2021

Judge Michael Doogan, presiding officer

Dr Robyn Anderson, member

Prue Kapua, member

Basil Morrison CNZM, JP, member

Dr Grant Phillipson, member

Associate Professor Tom Roa, member

APPENDIX I

LIST OF CLAIMS, CLAIMANTS, AND INTERESTED PARTIES

Claims and Claimants

The Whakatōhea Settlement Negotiations (Wai 2961) claim
The Whakatōhea Settlement Negotiations (Ngāi Tamahaua) (Wai 2983) claim
The Whakatōhea Settlement Negotiations (Ngāti Ruatakenga) (Wai 2984) claim
The Whakatōhea Settlement Negotiations (Ngāti Ira) (Wai 2985) claim
The Whakatōhea Settlement Negotiations (Te Ūpokorehe) (Wai 2986) claim
The Whakatōhea Settlement Negotiations (Williams) (Wai 3020) claim
The Whakatōhea Settlement Negotiations (Edwards & Smith) (Wai 3021) claim
The Whakatōhea Settlement Negotiations (Ngāti Muriwai) (Wai 3022) claim

Interested parties

The Whakatōhea Pre-Settlement Claims Trust
The Torere (Wai 78) claim
The Patutahi, Muhunga and Other Lands and Resources (Te Whānau-A-Kai) (Wai 892) claim
The Descendants of Hineato Savage (Wai 1789) claim, in support of Wai 2984
The Ngāti Ruatakena (Williams) (Wai 1795) claim
The Ngāti Ngāhere and Ngāti Ira Lands (Martin) (Wai 2107) claim
The Uri of Cy and Charlotte McLaughlin (Wai 2462) claim
The Whakatōhea (Te Whānau a Apanui) (2605) claim
The Housing (Wikotu) (Wai 2743) claim
The Whakatōhea Settlement Negotiations (Brown and others) (Wai 3002) claim
The Moutohora Quarry (Wai 864) claim
The Land Confiscation (Te Kahika) (Wai 2510) claim
The Mental Health Services (Campbell) (Wai 2728) claim
The Mokomoko (Wai 203) claim
Te Whānau Apanui Mana Wahine (Stirling) (Wai 2257) claim
Graeme Riesterer on behalf of Ngāti Puatumoana
Louisa Erickson & others of Ngāti Ruatakena
The Whakatōhea Raupatu (Wai 87) claim
The Hiwarau Block (Wai 339) claim
The Ngāti Ira O Waioeka Rohe (Wai 558) claim
The Ūpokorehe (Wai 1092) claim
Descendants of Romio Wi Repa and Mary Gundry Wi Repa (Wai 1553) claim
The Ūpokorehe Hapū Ngāti Raumoa Roimata Marae Trust (Wai 1758) claim
The Ngāti Patumoana (Hata) (Wai 1775) claim
The Ngāi Tama Haua (Biddle) (Wai 1781) claim
The Ngāti Ruatakena (Wai 1782) claim

The Rongopopoia Hapū (Wai 1787) claim
The Turangapikitoi Hapū (Wai 1794) claim
The Descendants of Rangihaerepo (Wai 1827) claim
The Ngāti Ngāhere (Carrington) (Wai 1884) claim
The Ngāi Tama Lands (Naden) (Wai 2055) claim
Ngāti Ruatakena Lands and Resources (Papuni) (Wai 2066) claim
The Whakatōhea and Ngāti Muriwai of Omaramutu Lands and Resources (McMurtie) (Wai 2160) claim
Micah Tawhara (trustee of Ōpeke Marae and one of the representatives for Ngāti Ira on the Whakatōhea Māori Trust Board)
Anau Apanui and Jason Kurei (trustees on the Whakatōhea Pre-Settlement Claims Trust)

APPENDIX II

SELECT INDEX TO THE RECORD OF INQUIRY

RECORD OF HEARINGS

Tribunal Members

The Tribunal members were Judge Michael Doogan (presiding), Dr Robyn Anderson, Prue Kapua, Basil Morrison, Dr Grant Phillipson, and Associate Professor Tom Roa.

Hearings

The first hearing was held remotely via Zoom in the Waitangi Tribunal offices on 10 and 13 September 2021.

RECORD OF PROCEEDINGS

1 Statements

1.1 Statements of claim

1.1.1 ***Wai 2961***

Tom Bennion, Emma Whiley, and Genevieve Davidson, statement of claim on behalf of Tuariki Delamere and Te Ringahuia Hata (Ngāti Patumoana), 18 June 2020

1.1.2 ***Wai 2983***

Coral Linstead-Panoho and Raewyn Clark, statement of claim on behalf of Tracy Hillier (Ngai Tamahaua hapū), 7 July 2020

1.1.3 ***Wai 2984***

Annette Sykes, Jordan Chaney, and Camille Dougherty Ware, statement of claim on behalf of Mereaira Hata and Te Riaki Amoamo (Ngāti Ruatakenga), 8 July 2020

1.1.4 ***Wai 2985***

Annette Sykes, Jordan Chaney, and Camille Dougherty Ware, statement of claim on behalf of Hone Kameta, Te Rua Rakuraku, John Pio, Paeone Goonan, and Te Ringahuia Hata (Ngāti Ira o Waioweka), 30 June 2020

1.1.5 ***Wai 2986***

Robyn Zwan, statement of claim on behalf of Kahukore Baker (Te Ūpokorehe), 8 July 2020

1.1.6 ***Wai 3020***
Te Kani Williams, Coral Linstead-Panoho, and Rachel Brown, statement of claim on behalf of Tawhirimatea Williams (Ngāti Ruatakena), 12 March 2021

1.1.7 ***Wai 3021***
Tony Sinclair, statement of claim on behalf of Claude Edwards, Adriana Edwards, and others (Whakatohea hapū) (Wai 87) and Will Smith and others (Turangapikitoi hapū) (Wai 1794), 26 March 2021

1.1.8 ***Wai 3022***
Chris Beaumont, statement of claim on behalf of Christina Davis, Christina Rolleston, Adriana Edwards, Theresa McMurtrie, John Edwards, Ruth Gage, Glenis Fleet, Georgina Fleet, Alexander Edwards, Frank Porter, Eva Edwards, Tony Rolleston, Glenis Reeve, Stephen Fleet, Bronwyn Fleet, Geoffrey Fleet, Dawn Tuhakaraina, Margaret Tuhakaraina, Paku Edwards, Raymond Fleet, and Adriana Gerrard (Ngāti Muriwai), 26 March 2021

2 Tribunal Memoranda, Directions, and Decisions

2.5 Pre-hearing stage

2.5.1 Chief Judge Wilson Isaac, decision on commencing inquiry into Whakatōhea historical claims, 4 June 2019

2.5.6 Chief Judge Wilson Isaac, memorandum concerning panel appointments, 14 October 2019

2.5.28 Judge Michael Doogan, memorandum on arrangements for judicial conference, 20 June 2021

2.5.29 Judge Michael Doogan, memorandum concerning request for priority hearing, 13 July 2021

2.5.32 Judge Michael Doogan, memorandum concerning priority inquiry timetable and related planning matters, 29 July 2021

2.5.33 Judge Michael Doogan, memorandum confirming list of claims and interested parties able to participate in priority hearing, 29 July 2021

2.5.34 Judge Patrick Savage, decision on application for urgent hearing, 20 October 2020

2.5.35 Judge Patrick Savage, decision on application for urgent hearing, 12 May 2021

2.5.42 Judge Michael Doogan, memorandum confirming rescheduling of priority hearing, 2 September 2021

2.5.44 Judge Michael Doogan, memorandum following priority hearing of 10 and 13 September, 16 September 2021

3 Submissions and Memoranda of Parties

3.1 Pre-hearing stage

3.1.25 Janet Mason and Sophia Collinson (Wai 1475, Wai 2147, and Wai 1791), memorandum concerning 13 August 2019 memorandum, 23 August 2019

3.1.32 Craig Linkhorn and Daniel Hunt (Crown), memorandum concerning negotiations with Whakatōhea Pre-Settlement Trust, 1 October 2019
(a) Andrew Little to Ngā Uri o Te Whakatōhea, 'Proposed Next Steps for Settlement of Whakatōhea Treaty Claims', 30 September 2019

3.1.34 Annette Sykes, Rebekah Jordan, and Jordan Bartlett (Wai 558), memorandum, 9 October 2019

3.1.94 Craig Linkhorn and Daniel Hunt (Crown), memorandum concerning Whakatōhea Pre-Settlement Trust amendment to deed of mandate withdrawal mechanism, 21 April 2020

3.1.174 Karen Feint, Emma Whiley, Genevieve Davidson, Annette Sykes, Katei Oelamere-Ririnui, Te Kani Williams, Coral Linstead-Panoho, Bryce Lyall, and Robyn Zwaan (Wai 2961, Wai 2984, Wai 2985, Wai 2983, Wai 3020, and Wai 2986), joint memorandum, 17 May 2021

3.1.184 Karen Feint, Emma Whiley, Genevieve Davidson, Annette Sykes, Kalel Delamere-Ririnui, Te Kani Williams, and Coral Linstead-Panoho (Wai 2961, Wai 2984, Wai 2985, Wai 3002, Wai 2983, Wai 3020, and Wai 2986), submissions in reply to Crown, 4 June 2021

3.1.196 Craig Linkhorn and Daniel Hunt (Crown), memorandum concerning 9 July 2021 judicial conference, 6 July 2021

3.1.206 Karen Feint and Kalei Delamere-Ririnui (Wai 2984), memorandum, 16 July 2021

3.1.209 Craig Linkhorn and Daniel Hunt (Crown), memorandum concerning priority hearing, 22 July 2021

3.1.216 Craig Linkhorn and Daniel Hunt (Crown), memorandum concerning application for urgency, 23 July 2021

3.1.222 Tom Bennion, Emma Whiley, and Genevieve Davidson (Wai 2961), memorandum concerning application for urgency, 8 March 2021

3.1.224 Annette Sykes, Kalei Delamere-Ririnui, Tumanako Silveira, and Camille Houia (Wai 2984), memorandum concerning application for urgency, 9 March 2021

3.1.230 Craig Linkhorn and Daniel Hunt (Crown), submissions opposing renewed applications for urgent inquiry, 7 April 2021

3.1.231 Karen Feint, Tom Bennion, Emma Whiley, and Genevieve Davidson (Wai 2961), submissions in reply to Crown and interested parties, 21 April 2021

3.1.284 Jason Pou (Whakatōhea Pre-Settlement Claims Trust), memorandum filing ratification material, 20 September 2021

3.1.234 Te Kani Williams, Coral Linstead-Panoho, and Raewyn Clark (Wai 2983 and Wai 3020), further submissions to Crown following receipt of OIA documents, 5 May 2021
(a) Appendices to submissions, 5 May 2021

3.1.301 Craig Linkhorn and Daniel Hunt (Crown), memorandum concerning settlement negotiations, 15 October 2021

3.1.306 Bryce Lyall and Robyn Zwaan (Wai 1787, Wai 1092, and Wai 1758), joint memorandum of counsel, 15 November 2021

3.3 Opening, closing, and in reply
3.3.1 Bryce Lyall (Wai 1787), opening submissions, 12 August 2021

3.3.4 Karen Feint, Tom Bennion and Emma Whiley (Wai 2961), opening submissions, 12 August 2021

3.3.5 Tony Sinclair (Wai 87), opening submissions, 12 August 2021

3.3.6 David Stone, Azania Watene, Dylan Lafaele, and Matthew Kennelly (Wai 1789), opening submissions, 12 August 2021

3.3.7 Te Kani Williams, Coral Linstead-Panoho, and Raewyn Clark (Wai 2983 and Wai 3020), joint opening submissions, 12 August 2021

3.3.9 Karen Feint (Wai 2984), opening submissions, 13 August 2021

3.3.10 Annette Sykes, Kalei Delamere-Ririnui, Tumanako Silveira (Wai 2985), opening submissions, 16 August 2021

3.3.11 Craig Linkhorn and Daniel Hunt (Crown), opening submissions, 16 August 2021

3.3.13 Jason Pou (Whakatōhea Pre-Settlement Claims Trust), opening submissions, 7 September 2021
(b) Whakatōhea Māori Trust Board, 'Notice of Day of Election and Nominations Received', *Ōpōtiki News*, 9 September 2021

3.3.14 Karen Feint, Tom Bennion, and Emma Whiley (Wai 2961), closing submissions, 20 September 2021
(b) 'Withdrawal Mechanism Timeline', table, [2021]
(c) Whakatōhea Pre-Settlement Claims Trust, *Trust Deed* (Ōpōtiki: Whakatōhea Pre-Settlement Claims Trust, 2016)

3.3.15 Robyn Zwaan (Wai 2986), closing submissions, 20 September 2021

3.3.16 Chris Beaumont (Wai 2160), closing submissions, 20 September 2021

3.3.17 David Stone, Azania Watene, Dylan Lafaele, and Matthew Kennelly (Wai 1789), closing submissions, 20 September 2021

3.3.18 Te Kani Williams, Coral Linstead-Panoho, and Raewyn Clark (Wai 2983 and Wai 3020), joint closing submissions, 20 September 2021

3.3.20 Karen Feint (Wai 2984), closing submissions, 22 September 2021

3.3.21 Annette Sykes, Kalei Delamere-Ririnui, and Tumanako Silveira (Wai 2985), closing submissions, 22 September 2021
(a) Suporting documents to submission 3.3.21

3.3.23 Craig Linkhorn and Daniel Hunt (Crown), closing submissions, 20 September 2021

3.3.24 Jason Pou (Whakatōhea Pre-Settlement Claims Trust), closing submissions, 4 October 2021

3.3.26 Chris Beaumont (Wai 2160), closing submissions, 6 October 2021

3.3.27 Karen Feint, Tom Bennion, Emma Whiley, Annette Sykes, Kalei Delamere-Ririnui, Coral Linstead-Panoho, and Raewyn Clark (Wai 2961, Wai 2984, Wai 2985, Wai 2983, Wai 3020, and Wai 3002), joint submissions in reply, 6 October 2021

3.3.28 Tony Sinclair (Wai 87), submissions in reply, 6 October 2021
(a) Adriana Edwards, Christina Davis, Larry Delamere, Dean Flavell, Barry Kiwara, Nepia Tipene, Tuwhakairiora Williams, Ngāti Muriwai hapū notice of withdrawal, 6 October 2021

4 Transcripts and Translations

4.1 Transcripts

4.1.4 National Transcription Service, transcript of Wai 1750 judicial conference, Waitangi Tribunal offices, Wellington, 9 July 2021
pp 17–18: Judge Doogan, questioning Craig Linkhorn, 9 July 2021

4.1.5 National Transcription Service, transcript of Wai 1750 priority hearing, via zoom, 10, 13 September 2021
pp 34–35: Karen Feint, submission, 10 September 2021
p 47: Prue Kapua, questioning Karen Feint, 10 September 2021
p 92: Annette Sykes, submission, 10 September 2021
p 98: Dr Grant Phillipson, questioning Annette Sykes, 10 September 2021
p 122: Dr Grant Phillipson, questioning Tony Sinclair, 13 September 2021
pp 152–162: Judge Doogan, questioning Craig Linkhorn, 13 September 2021
pp 165–166: Dr Grant Phillipson, questioning Craig Linkhorn, 13 September 2021
p 188: Craig Linkhorn, questioning Dr Jacob Pollock, 13 September 2021
pp 190–201: Dr Grant Phillipson, questioning Dr Jacob Pollock, 13 September 2021
pp 205-206: Dr Robyn Anderson, questioning Dr Jacob Pollock, 13 September 2021
pp 211–221: Judge Doogan, questioning Dr Jacob Pollock, 13 September 2021

pp 257–258: Robyn Zwann, questioning Dr Jacob Pollock, 13 September 2021
p 268: Annette Sykes, questioning Dr Jacob Pollock, 13 September 2021
pp 272, 277: Jason Pou, submission, 13 September 2021
pp 286–287: Dr Robyn Anderson, questioning Jason Pou, 13 September 2021

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A3 John McLellan, 'Raupatu and Compensation in the North-Eastern Bay of Plenty, 1865–1874' (commissioned research report, Wellington: Waitangi Tribunal, 2020)

A10 Jacob Pollock, affadavit, 6 July 2021
(a) Supporting documents to document A10
pp [2]–[13] No author, 'Ratification Strategy for Whakatohea Presettlement Claims Trust', word processor document, no date
pp [14]–[16] Whakatōhea Māori Trust Board, 'Whakatohea Maori Trust Board Tribal Register Report as at 30/06/2021', [2021]

A11 Dr Therese Crocker, 'An Overview of Māori Political Engagement in the North-Eastern Bay of Plenty, 1871–2017' (commissioned research report, Wellington: Waitangi Tribunal, 2021)

B. Inquiry Documents

B1 Tuariki Delamere, affidavit, 16 June 2020
(a) Supporting documents to document B1

B2 Te Ringahuia Hata, affidavit, 16 June 2020
(a) Supporting documents to document B2

B3 Jacob Pollock, affidavit, 8 July 2020
(a) Supporting documents to document B3

B4 Te Ringahuia Hata, affidavit, 22 July 2020
(a) Supporting documents to document B4

B5 Graeme Riesterer, 'Ngāti Patumoana Slam False Claim', media release, 29 June 2020

B7 Te Ringahuia Hata, affidavit, 7 August 2020

B8 Tracy Hillier, brief of evidence, 7 July 2020
(a) Supporting documents to document B8

B9 Tracy Hillier, brief of evidence, 6 August 2020
(a) Supporting documents to document B9

B11 Te Riaki Amoamo, affidavit, 8 July 2020

B15 Amber Rakuraku-Rosieur, affidavit, 6 August 2020

B22 Jacob Pollock, affidavit, 31 March 2021
(a) Supporting documents to document B22

B28 Robyn Hata-Gage, affidavit, 15 March 2021
(a) Supporting documents to document B28

B29 Carlo Gage, affidavit, 15 March 2021

B33 Tawhirimatea Williams, brief of evidence, 12 March 2021
(a) Supporting documents to document B33

B34 Tawhirimatea Williams, brief of evidence, 21 April 2021

B35 Adriana Edwards, brief of evidence, 26 March 2021

B36 Barry Kiwara, brief of evidence, 29 March 2021
(b) Barry Kiwara to Waitangi Tribunal, letter, 16 September 2021

B37 Tuwhakairiora Williams, brief of evidence, 29 March 2021

B40 Jacob Pollock, affidavit, 5 August 2021
(a) Supporting documents to document B40

B43 Te Ngaehe o Te Rangi Ranginui Wanikau, affidavit, 8 September 2021

B44 Jacob Pollock, affidavit, 9 September 2021

B46 *Whakatōhea Ratification: Information Booklet, 2021* (Ōpōtiki: Whakatōhea Pre Settlement Claims Trust, 2021)

B47 Te Riaki Amoamo, affidavit, 28 April 2021

B48 Mereaira Hata, affidavit, 28 April 2021

B49 Jacob Pollock, affidavit, 22 September 2021
(a) Supporting documents to document B49

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