

THE WAITANGI TRIBUNAL

Wai 2961
Wai 2983
Wai 2984
Wai 2985
Wai 2986

CONCERNING

the Treaty of Waitangi Act 1975

AND

an application for an urgent hearing by Tuariki Delamere and Te Ringahuia Hata on behalf of Ngāti Patumoana

AND

an application for an urgent hearing by Tracy Hillier on behalf of herself and Ngai Tamahaua hapū

AND

an application for an urgent hearing by Mandy Mereaira Hata Te Riaki Amoamo on behalf Ngāti Ruatakenga

AND

an application for an urgent hearing by the late Hone Kameta, Te Rua Rakuraku, John Terehita Pio, Paeone Goonan and Te Ringahuia Hata on behalf of Ngāti Ira o Waioweka

AND

an application for an urgent hearing by Kahukore Baker on behalf of Te Upokerehe

DECISION
ON APPLICATION FOR AN URGENT HEARING

20 October 2020

Introduction

1. This decision concerns five applications for an urgent inquiry into Crown policy, acts, and omissions in relation to the Crown's engagement with the individuals, hapū, and mandated entities of Whakatōhea during the settlement negotiation process following the October 2018 iwi wide vote that was recommended by the Wai 2662 Tribunal.
2. The five applications have been brought by the following parties:
 - a. Wai 2961, the Whakatōhea Settlement Negotiations Claim, brought by Tuariki Delamere and Te Ringahuaia Hata on behalf of Ngāti Patumoana (Wai 2961, #1.1.1 & #3.1.2);
 - b. Wai 2983, the Whakatōhea Settlement Negotiations (Ngāi Tamahaua) Claim, brought by Tracy Hillier for and on behalf of Ngāi Tamahaua hapū (Wai 2983, #1.1.1 & #3.1.1);
 - c. Wai 2984, the Whakatōhea Settlement Negotiations (Ngāti Ruatakenga) Claim, brought by Mandy Mereaira Hata and Te Riaki Amoamo on behalf of Ngāti Ruatakenga (Wai 2984, #1.1.1 & #3.1.1);
 - d. Wai 2985, the Whakatōhea Settlement Negotiations (Ngāti Ira) Claim, brought by the late Hone Kameta, Te Rua Rakuraku, John Terehita Pio, Paeone Goonan, and Te Ringahuaia Hata for and on behalf of Ngāti Ira o Waioweka (Wai 2985, #1.1.1 & #3.1.1); and
 - e. Wai 2986, the Whakatōhea Settlement Negotiations (Te Upokorehe) Claim, brought by Kahukore Baker, on behalf of themselves and others on behalf of Nga Uri o Te Upokorehe Iwi (Wai 2986, #1.1.1 & #3.1.1).
3. The applicant parties have generally adopted the submissions of Wai 2961, to the extent that they have knowledge of the matters the submissions concern.

The interested parties

4. There are ten parties who have sought and been granted interested party status in support of the Wai 2961 application. They are:
 - a) Wai 3002, the Whakatōhea Settlement Negotiations (Brown and others) Claim, brought by John Brown on behalf of the Wai 894 claimants for Moutohora Quarry, Sharon Campbell as named claimant for Wai 2728, on behalf of herself and her whānau, and for the benefit of ngā uri whakaheke a Rangihuatake rāua ko Haami Parehe, Patehepa Tāpono, Tipene Te Peha Tutaki Tamatea, rāua ko Hana Konewa, and Joseph Te Kahika as a named claimant of Wai 2510 on behalf of Te Whānau o Te Kahika, Kahika, Kahikatea, Kahikaroa and Wharekahika (Wai 2961, #3.1.5 & Wai 3002, #3.1.2);
 - b) Wai 203, the Mokomoko Claim, brought by Karen Mokomoko and Pita Biddle on behalf of themselves and members of the Mokomoko whānau of Whakatōhea iwi (Wai 2961, #3.1.8);
 - c) Dave Hawea as named claimant of Wai 892, the Patutahi, Muhunga and Other Lands and Resources (Te Whānau-A-Kai) Claim on behalf of Te Whānau-A-Kai, for and on behalf of himself, his whānau and the iwi Te Whānau a Kai (Wai 2961, #3.1.10);

- d) Lee Ann Martin as named claimant of Wai 2107, the Ngāti Ngāhere and Ngāti Ira Lands (Martin) Claim, on behalf of herself and on behalf of the Ngāti Ngāhere and Ngāti Ira hapū (Wai 2961, #3.1.10);
 - e) Ngarangi Naden as named claimant of Wai 2462, the Uri of Cy and Charlotte McLaughlin Claim, on behalf of the Uri of Cy and Charlotte McLaughlin, for and on behalf of the Uri of Cy and Charlotte McLaughlin (Wai 2961, #3.1.10);
 - f) Annette Hale as named claimant of Wai 2743, the Housing (Wikotu) Claim, for and on behalf of the late James Toopi Wikotu, for an on behalf of the Wikotu whānau of Te ūpokorehe (Wai 2961, #3.1.10);
 - g) Wai 78, the Torere Claim, on behalf of Ngai Tai hapū, brought by Joseph Maxwell, Muriwai Jones, and Te Aururangi Davis for the benefit of Ngai Tai iwi (Wai 2961, #3.1.12);
 - h) Wai 2257, the Te Whānau Apanui Mana Wahine (Stirling) Claim, brought by the late Maruhaeremuri Stirling, Ruiha Stirling, Parehuia Herewini-Kahika, and Haro Mcllroy on behalf of the Māori women of the whānau and hapū of Te Whānau o Maruhaeremuri and Te Ehutu and the iwi of Te Whānau Apanui, for and on behalf of the whānau, hapū and iwi of Te Whānau-a-Apanui (Wai 2961, #3.1.13);
 - i) Wai 2605, the Whakatōhea (Te Whānau a Apanui) Claim, brought by the late Maruhaeremuri Stirling, Ruiha Edna Stirling, and Parehuia Herewini on behalf of themselves and the whānau of the hapū Te Whānau a Apanui and Whakatōhea, for and on behalf of the whānau, hapū and iwi of Te Whānau-a-Apanui (Wai 2961, #3.1.13); and
 - j) Wai 1795, the Ngāti Ruatakena (Williams) Claim, brought by Tawhirimatea Te Auripo Rewita Williams on behalf of himself and Ngāti Ruatakena, on behalf of himself and his whānau and for the benefit of the hapū of Ngāti Ruatakena (Wai 2961, #3.1.14);
5. There are two parties who have sought and been granted interested party status in opposition to the Wai 2961 application. They are:
- k) Graeme Riesterer as the Chairman for, and on behalf of the Ngāti Patumoana Waiaua Marae Committee (Wai 2961, #3.1.15); and
 - l) Louisa Erickson, Julie Lux, Charleen Duff, Wallace Parkinson, Julia Williams, Tawhai Butler, Bobette Turetahi, Horianana Tai, Georgina Papuni, and Robert Edwards as members of Ngāti Ruatakena hapū (Wai 2961, #3.1.16).
6. There is one party who has sought and been granted interested party status in support of the Wai 2984 application, being:
- m) Wai 1789, the Descendants of Hineato Savage Claim, brought by Bella Savage on behalf of the descendants of Hineato Savage (Wai 2984, #3.1.4).

The interested party submissions

7. Broadly, the interested parties in support of the Wai 2961 application and the interested party in support of the Wai 2984 application submit that the Crown's decision to resume negotiations with the Whakatōhea Pre-Settlement Claims Trust Board's (WPSCT) and Crown's continued recognition of the WPSCT deed of mandate has breached the

principles of the Treaty of Waitangi and is likely to prejudicially impact the ability of Whakatōhea claimants to have their claims heard by the Wai 1750 Tribunal.

8. The Wai 1795 interested party to the Wai 2961 application submits that it is their fundamental and unwavering position that settlement negotiations should not be engaged in or progressed until the completion of a historical inquiry (Wai 2961, #3.1.14).
9. The Wai 203 interested party to the Wai 2961 application made extensive submissions in relation to the Crown's historical assertion that the Te Whānau a Mōkomoko (TWaM) tupuna Mōkomoko is to blame for raupatu. This assertion has created indifference towards TWaM from the wider Whakatōhea iwi and is still prominent today (Wai 2961, #3.1.8).
10. The Crown and TWaM entered into an agreement in 2011 whereby the Crown would engage with TWaM about how a separate and independent settlement could occur for the TWaM claims. Between 2013 and 2015 TWaM sought engagement with the Crown to advance a separate and independent settlement. While it is unclear from counsel's submissions whether the engagement sought occurred, a separate and independent settlement did not eventuate. Instead, TWaM's claims were "herded" into the WPSCT settlement. Following the release of the Wai 2662 report, the Crown has engaged with TWaM on how the Crown could work with TWaM to uphold and progress their commitment to discuss the TWaM aspirations for a separate settlement, as well as how a separate and independent settlement could be achieved and structured. Counsel submits that these discussions are ongoing and are being progressed with the Crown on a without prejudice and confidential basis (Wai 2961, #3.1.8).
11. TWaM are participating in the Wai 1750 inquiry and have concerns with the lack of ability for the Waitangi Tribunal to make recommendation, specifically as they relate to Wai 203 and the grievances suffered by TWaM for over 100 years (Wai 2961, #3.1.8).
12. The Wai 203 interested party submits that the Crown's possible preference to deal with the TWaM claims in conjunction or jointly with the WPSCT will exacerbate the grievances of TWaM, given the Crown understands and is fully aware that the WPSCT and some within Whakatōhea continue to marginalise and ostracise TWaM as a result of the wrongful blame for raupatu and with knowledge that a separate settlement is supported by WPSCT (Wai 2961, #3.1.8).
13. The TWaM claims will be settled without their consent or willing approval by the WPSCT who do not have the wider support or mandate from Whakatōhea hapū as a whole (Wai 2961, #3.1.8).
14. The interested party in opposition to the Wai 2961 application consisting of the group of Louisa Erickson, Julie Lux, Charleen Duff, Wallace Parkinson, Julia Williams, Tawhai Butler, Bobette Turetahi, Horiana Tai, Georgina Papuni, and Robert Edwards as members of Ngāti Ruatakena hapū oppose the Wai 2961 application for urgency and submit that a resolution has never been passed at a hapū hui to withdraw the claim or to withdraw support of settlement and the WPSCT. The further submit that Ngāti Ruatakena have supported the dual process (Wai 2961, #3.1.16).
15. Finally, they submit that the vote to "test the pulse of the people" in accordance with the Wai 2662 Tribunal's recommendation result showed 53.33% of the individual members of Whakatōhea support the WPSCT to negotiate with the Crown to reach settlement with the Crown of the historical Treaty claims of Whakatōhea. On a hapū level, Ngāti Ruatakena's vote results showed 67.45% of the hapū in favour, 22.99% opposed, and 9.56% no vote/blank (Wai 2961, #3.1.16).

16. Graeme Riesterer as chairman of the Ngāti Patumoana Waiaua Marae Committee on behalf of Ngāti Patumoana opposes the Wai 2961 application on the basis that Ngāti Patumoana have met at Waiaua Marae and resolved to oppose the Wai 2961 application.
17. Mr Reisterer further submits that neither of the Wai 2961 applicants have taken the opportunity to come to the hapū to discuss the application and that “we” are concerned that it is filed in “our” name (Wai 2961, #3.1.15).
18. In response to Mr Reistrerer’s submissions, the Wai 2961 applicants submit that rather than being “a couple of lone wolves”, as asserted by Mr Reisterer in his submission, the applicants have filed the claim on behalf of those of Ngāti Patumoana who have repeatedly demonstrated opposition to the WPSCT mandate and settlement process. The applicants further submit that Mr Reisterers submission in this respect fails to consider the significant numbers of Ngāti Patumoana who in fact do not support the current WPSCT mandate and settlement process (Wai 2961, #A7 & Wai 2961, #A7(a)).
19. The Wai 2961 applicants submit that the fact that Mr Reisterer is both chair of the WPSCT and chair of the Ngāti Patumoana Waiaua Marae Committee puts those of Ngāti Patumoana who oppose the WPSCT in a difficult position. They assert that the Wai 1775 and Wai 2593 claimantshave previously provided their position to the Waiaua Marae Committee and offered to attend hui to discuss matters further, but that this outreach has gone unanswered (Wai 2961, #A7).
20. The Wai 2961 applicants submit that it is of significant concern that Minister Little met with the WPSCT at Waiaua Marae on 14 July 2020 without notifying any of the claimants and groups opposed to the WPSCT. The applicants assert that it is clear that one-sided engagement is being progressed by the Crown. Mr Reisterer, as chair of both the WPSCT and Waiaua Marae Committee did not engage with the Ngāti Patumoana claimants of the Wai 1775 and Wai 2961 claims about this visit (Wai 2961, #A7).
21. Finally, the Wai 2961 applicants submit that Mr Reisterer’s 29 June 2020 press release does not represent a balanced or factual account of the parallel Waitangi Tribunal inquiry and settlement negotiation process, which the applicants submit will extinguish the ability of Whakatōhea to progress a settlement that is based on the findings and recommendations of a historical inquiry (Wai 2961, #A7).

Background

22. For the purposes of this decision, I will refer to the background of these applications for context.
23. In my 28 Hōngongoi 2017 decision, I granted an urgent inquiry into the Wai 2563, Wai 2589, Wai 2590, Wai 2591, Wai 2592, Wai 2593, Wai 2594, Wai 2595, Wai 2605, Wai 2606, Wai 2609, Wai 2610, and Wai 2657 applications regarding the Crown’s recognition of the WPSCT Deed of Mandate to negotiate a settlement of the historical Treaty claims of Whakatōhea (Wai 2662, #2.5.6). I will refer to parts of this decision where they are relevant to the present applications.
24. The Crown terminated a mid-1990s proposed \$40 million comprehensive settlement of Whakatōhea’s historical Treaty claims in March 1998, on the basis of a lack of sufficient support for the settlement among members of Te Whakatōhea (Wai 2589, #A1).
25. In August 2003 an interim working party prepared a report setting out a process for re-engaging with the Crown (Te Ara Tono mō te Raupatu). This was adopted at a Hui-a-

Iwi in August 2007, and a group known as the Whakatōhea Raupatu Working Party (Raupatu Working Party) was formed to prepare a mandating strategy. However, several hapū withdrew their support from the Party and formed the Tū Ake Whakatōhea Collective (the Collective) in 2010. The Collective was comprised of representatives from Ngāti Ira, Ngāti Ngāhere, Ngāti Rua and Ngāti Patumoana. Between 2011 and 2016, the Collective worked with the Whakatōhea Māori Trust Board (The Trust Board) to hold a series of consultative hui with hapū, marae, the Te Ūpokorehe Treaty Claims Trust, and the Whakatōhea Raupatu Working Party (Working Party) in order to gauge how Te Whakatōhea and its hapū wished to proceed to settle their historical claims (Wai 2662, #2.5.6).

26. The Whakatōhea Pre-settlement Claims Trust (WPSCT) was established in 2016. This came after a lengthy process within Whakatōhea that began in 2003. In that year, Whakatōhea began work on a process to negotiate and settle its raupatu claims with the Crown. This represented a concerted effort to overcome the divisive effects of the earlier failed attempt to settle in 1996 (Wai 2961, #1.1.1).
27. A group known as the Whakatōhea Hapū Claims Process Working Party (the Process Working Party) was formed to prepare a mandate strategy. It produced a report known as 'Te Ara Tono mo nga Kereme o te Whakatōhea', which was adopted by Whakatōhea at a hui-ā-iwi in August 2007. 'Te Ara Tono' recommended that a new working party be set up. However, it appears that little progress was made following the adoption of 'Te Ara Tono' (Waitangi Tribunal *The Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018) at 2).
28. By 2010, there were three groups developing mandate strategies to negotiate with the Crown. One group was called the Whakatōhea Raupatu Working Party (the Raupatu Working Party). Another group, which included individuals from several hapū, became known as the Tū Ake Whakatōhea Collective (Tū Ake). A third group, formed by members of Ūpokorehe, established the Te Ūpokorehe Treaty Claims Trust ("Ūpokorehe Claims Trust"). They went on to develop what they describe as a strategy for a parallel but non-competing mandate (Waitangi Tribunal *The Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018) at 2).
29. In 2013, the Raupatu Working Party and Tū Ake each submitted a mandate strategy to the Crown for consideration. Tū Ake's mandate strategy proposed establishing the WPSCT to seek a mandate from Whakatōhea members. Tū Ake's draft mandate strategy went through several iterations in response to consultation with Whakatōhea groups and the Crown. That mandate strategy was formally presented to Te Puni Kōkiri for consideration and submissions in November 2015 (Waitangi Tribunal *The Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018) at 2).
30. The Crown endorsed the Tū Ake mandate strategy in April 2016. Voting on the mandate took place between 6 May and 3 June 2016. The WPSCT Deed of Mandate was recognised by the Crown on 14 December 2016 (Waitangi Tribunal *The Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018) at 3).
31. In August 2017, the Crown and the WPSCT entered into an agreement in principle (the August 2017 AIP) (Wai 2691, #1.1.1).
32. In terms of the governance structure of the WPSCT, one trustee is elected from each of the six hapū, one trustee is appointed from each of the eight marae, and one trustee is appointed by the Whakatōhea Māori Trust Board (the WMTB) (Whakatōhea Pre-Settlement Claims Trust Deed of Mandate (September 2016) c 9.5.1).

33. The Waitangi Tribunal has previously inquired into the Crown's recognition of the WPSCT mandate in Wai 2662, the Whakatōhea Deed of Mandate urgent inquiry.
34. I am cognizant of the Crown's submissions that the Waitangi Tribunal should not inquire into the same matters twice. In response to that submission, I note that to the extent that the present applications concern matters since the release of the Wai 2662 report, they have not been considered by the Waitangi Tribunal.
35. One of the results of the Wai 2662 report was that the WPSCT held a vote-ā-iwi (the October 2018 vote) with the following questions (Wai 2961, #1.1.1):
 - a. 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)
 - b. 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)
 - c. 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? (Yes/No)
36. I have inserted an image of the voting paper below (Wai 2961, #1.1.1):

Voting Paper
Kārangaranga Te Muri Hei Rangaranga Te Mua – Vote on the Whakatōhea Settlement Process

Question	Āe/Yes	Kao/No
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?	☐	☐

37. The explanatory statement to the voting paper read “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)” (Wai 2961, #1.1.1).
38. I set out the voting questions at the outset of this decision, as differences in the interpretation of their results form a central part of the present dispute.
39. On 30 September 2019, the Crown set out a restricted Waitangi Tribunal historical claim inquiry process, stating that “this approach would mean 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” (Wai 2961, #A2(a), TH-15).
40. In terms of a timeline to settlement, Te Ringahuaia Hata in her affidavit points towards a Radio New Zealand article, where the WPSCT states that it “hopes to settle before the election.” Ms Hata states that “we presume this means the initialling of a deed of

settlement.” Ms Hata further points towards a screenshot of a power point presentation by WPSCT negotiator Maui Hudson, which states “Initial Deed of Settlement Nov 2020.” Further, Ms Hata states that the Crown’s 2016 ‘Broadening the Reach’ strategy aims to have all settlements completed by 2020. Ms Hata says, on the basis of this evidence, that the Crown intends to initial a Deed of Settlement by the end of 2020, and that to imply otherwise is dishonest and manipulative (Wai 2961, #A4).

41. In his affidavit, Jacob Pollock of Te Arawhiti states that the Crown does not anticipate a deed of settlement with Whakatōhea and settlement legislation will be finalised for introduction until, at the earliest, 2021 (Wai 2961, #A3).
42. I now turn to the current matters before me for determination.

The claims and applications for urgency

43. Five statements of claim accompanied by applications for urgency have now been filed with the Waitangi Tribunal in relation to Crown policy, acts, and omissions in relation to Crown engagement with the individuals, hapū, and mandated entities of Whakatōhea during the settlement negotiation process following the October 2018 iwi wide vote that was recommended by the Wai 2662 Tribunal. As is shown above, I have received submissions and evidence from the applicants, the Crown, and a number of interested parties including Ngāti Patumoana and Ngāti Ruatakenga hapū members.
44. The applicants allege that, in breach of the principles of the Treaty of Waitangi, the Crown has failed to appropriately engage with ngā hapū o Whakatōhea and that this is creating and furthering divisions within te Whakatōhea. The applicants have applied for an urgent inquiry on the basis that first, they are likely to suffer significant and irreversible prejudice if the Crown continues to engage predominately with the WPSCT in the face of consistent, demonstrated, and growing opposition to the Crown and the WPSCT’s proposed restricted Waitangi Tribunal historical inquiry and second, that there are no alternative remedies available to them because, among other things, the WPSCT Deed of Mandate withdrawal mechanism is unworkable.
45. The applicants point to a number of Crown actions that breach the principles of the Treaty, being the Crown’s:
 - a. Biased and unbalanced approach to engagement with WPSCT 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; and
 - e. Continuation of negotiations with the WPSCT during the national state of emergency occasioned by COVID-19.
46. The applicants further point to a number of pending Crown actions that breach the principles of the Treaty of Waitangi, being the:
 - f. Finalisation of the Whakatōhea deed of settlement;
 - g. Intervention in the Waitangi Tribunal’s historical inquiry; and

- h. Crown allowing the claimants claim to be negotiated and settled by the WPSCT when the WPSCT has not maintained its mandate to do so.
47. Te Ūpokorehe's application stands apart from the other applications received, in that Te Ūpokorehe do not want to have their claims settled under the mantle of Whakatōhea as it denies their rangatiratanga as an iwi in their own right (Wai 2986, #1.1.1).
48. The Crown opposes the applications for urgency in respect of all issues (Wai 2961, #3.1.3, Wai 2983, #3.1.3, Wai 2984, #3.1.3, Wai 2985, #3.1.3, Wai 2986, #3.1.2).

Urgency criteria

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

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

- the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies
- there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- the claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

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

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

50. The Waitangi Tribunal has stated on multiple occasions that it will only grant an urgent hearing in exceptional cases and where it is satisfied that adequate grounds for urgency have been made out. The applicant must establish that there is an exceptional case that warrants the diversion of the Waitangi Tribunal's resources from other inquiries and priorities to conduct an urgent inquiry into their claim.
51. I acknowledge the applicants' submissions that the claims relate to Crown current and pending omissions that have occurred since the outcome of the October 2018 vote, and as such, the current issues for determination fall outside of those heard by the Wai 2662 Tribunal. Therefore, the Waitangi Tribunal is not functus officio.

Discussion

52. In determining these applications, the question for me is whether the applicants have prima facie made out a case that warrants the Waitangi Tribunal's urgent attention.
53. My consideration will focus on the core issues identified in the applicants' submissions. I address them in the following order, being the Crown's:

- a. Biased and unbalanced approach to engagement with WPSCT 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; and
- h. Allowance of the claimants’ claims being negotiated and settled by the WPSCT when the WPSCT has not maintained its mandate to do so.

Biased and unbalanced approach to engagement with WPSCT and those who do not support the WPSCT following the 2018 vote

The applicants’ position

54. The applicants raise a number of issues in regard to the Crown’s engagement with Whakatōhea since the October 2018 vote:
 - a. The applicants submit that following the October 2018 vote, the Crown failed to adopt the “generous and patient approach” to engaging with Whakatōhea that was directed by the Wai 2662 Tribunal.
 - b. The Crown failed to engage with those who do not support the WPSCT on the significant issues that remain outstanding and the divided outcome of the October 2018 vote. The Crown instead reassured the WPSCT of their willingness to re-engage in negotiations. On 30 September 2019 the Crown resumed negotiations with WPSCT, despite significant evidence that there was not “strong support for settlement negotiations to continue.”
 - c. The applicants submit that those who oppose the WPSCT were not consulted on the restricted Waitangi Tribunal approach, or the decision to resume negotiations with WPSCT.
 - d. The applicants submit that there were significant concerns repeatedly raised at WPSCT information hui, but that these were not addressed by the Crown or WPSCT.
55. The applicants submit that the Crown has sought at every stage to prioritise its interest in timely settlement by:

- a. Resolving as early as 20 December 2018 to “work with the WPSCT on steps to establish a broader base of support” and to explore the option of a parallel or separate Waitangi Tribunal inquiry process as suggested by the WPSCT;
 - b. Making the 20 December 2018 resolution and failing to afford the same generosity to the claimants;
 - c. Making the 20 December 2018 resolution and then, in response to numerous letters sent in relation to October 2018 vote outcome and seeking to be informed of the next steps, telling the claimants that the issues were complex and still being considered;
 - d. Preferring the 22 September 2019 decision to reengage with the WPSCT over a more comprehensive approach involving comprehensive engagement with all of Whakatōhea prior to the resumption of negotiations on the basis that doing so would not “provide a reasonable opportunity of achieving a timely and durable settlement with Whakatōhea”;
 - e. Rejecting outright the option of stopping negotiations until the Wai 1750 inquiry was concluded, despite acknowledging that 48% of Whakatōhea voted in favour of doing so;
 - f. Rejecting a number of key recommendations made by the Wai 2662 Tribunal in relation to the withdrawal mechanism amendments; and
 - g. Failing to commit to maintaining the baseline redress offered to Whakatōhea under the August 2017 AIP and interest at commercial rates on the cash component of that base line as recommended by the Wai 2662 Tribunal.
56. The applicants refer to a number of Waitangi Tribunal reports in support of their submissions that the Crown’s actions since the October 2018 vote are in breach of the principles of the Treaty of Waitangi (Wai 2961, #1.1.1). They submit that the:
- a. Tribunal in the *Pakakohi and Tangahoe Settlement Claims Report* (2000) found that settlement of historical claims should not create fresh grievances;
 - b. *Maniapoto Mandate Inquiry Report* (2019) confirmed that the ultimate aim of the settlement of Treaty claims is to restore the Treaty relationship between the Crown and Māori;
 - c. Tribunal in the *Te Arawa Mandate Report* (2007) recommended that the Crown allow for and actively protect the exercise of rangatiratanga of Māori groups involved in settlement processes. This is to ensure the application of tikanga by those groups, allowing sustainable settlements. The Crown’s duty is to enter into a process of genuine engagement with claimants in accordance with their tikanga;
 - d. Tribunal in the *Ngāpuhi Mandate Inquiry Report* (2015) and the *Ngatiwai Mandate Inquiry Report* (2017) commented on the centrality of hapū rangatiratanga where hapū play a central role in their communities. This leads to obligations on the Crown to ensure hapū can determine how and by whom they are represented and make decisions according to their tikanga;
 - e. *Ngāpuhi Mandate Inquiry Report* (2015) confirmed that the Crown must also protect the rangatiratanga of those who stand outside the mandated entity,

providing they have hapū support and do not undermine the rights of others to proceed to settlement under their chosen leadership;

- f. *Tāmaki Makaurau Settlement Process Report* (2007) highlighted that rangatiratanga includes maintaining relationships between Māori;
 - g. Tribunal in the *Ngāpuhi Mandate Inquiry Report* (2015) said that its expectation is that a minimum of 65% of the total number of hapū named in the amended deed of mandate would need to continue their support of the Tūhoronuku Independent Mandated Authority; and
 - h. *Ngāpuhi Mandate Inquiry Report* (2015) set the minimum standards for settlement processes, being that the Crown:
 - i. Ensure that it is dealing with the right Māori or groups, protecting its intratribal relations with regard to the circumstances;
 - ii. Practically and flexibly apply the large natural groups policy according to the rangatiratanga and tikanga of affected groups;
 - iii. Allow for an appropriate weighing of interests of groups in any recognised mandated entity, one that takes into account factors, including the number and size of hapū, the strength of affected hapū, and the size and location of the population;
 - iv. Recognise that the structure of the mandated entity must allow for hapū interests be tested and heard; and
 - v. On the basis of this assessment, actively protect the rangatiratanga and tikanga of those hapū that are opposed to their claims being negotiated by the mandated entity and weigh this protection of hapū with that of non-hapū interests in the modern context.
57. The applicants submit that the Crown has not met the standards imposed by the Waitangi Tribunal on the Crown in the reports discussed at paragraph 56 above. Further, the applicants submit that the reports cited are authority for the proposition that the Crown must actively protect the rangatiratanga of hapū, provide for the application of tikanga, and also understand and preserve tribal relations and whanaungatanga, which has not happened in this case.
58. The applicants submit that those who oppose the WPSCT were not consulted on the curtailed Waitangi Tribunal approach, or the decision to resume negotiations with WPSCT. That the diminished approach was to be an option was not foreshadowed in relation to the October 2018 vote. The applicants submit that Crown engagement with themselves and others subsequent to the decision to proceed with a curtailed Waitangi Tribunal inquiry, and to resume negotiations with the WPSCT breaches the principles of good faith and partnership.
59. The applicants submit that the Crown's decision, made on 20 December 2018, to work "with the WPSCT on next steps to establish a broader base of support" was made less than 6 weeks after the 2018 voting results were declared and that this decision precluded any subsequent engagement with the claimants, as the Crown had already committed to assisting the WPSCT to establish its base of support.
60. The applicants submit that there were significant concerns repeatedly raised at WPSCT information hui, but that these were not addressed by the Crown or WPSCT.

61. The applicants submit that because the claim relates to Crown current and pending acts and omissions that have occurred since the outcome of the October 2018 vote, it concerns issues outside of those heard by the Wai 2662 Whakatōhea deed of mandate inquiry. Therefore, the Waitangi Tribunal is not functus officio.
62. The applicants point to the advice provided to the Minister for Treaty of Waitangi Negotiations and the Minister for Māori Development by Te Arawhiti staff on 10 December 2018 (10 December 2018 advice) which sets out the Crown's analysis of the October 2018 vote results (Wai 2961, #A3(a) – JFP-5). The advice noted that:
- a. The results are not straightforward to interpret;
 - b. 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;
 - c. 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 2 of 6 recognised hapū) show a clear preference for a historical inquiry;
 - d. The Crown's response to the vote is that the outcome is not easy to determine, but that the Crown's response must meet three major criteria, being:
 - i. Respect the outcome of the vote;
 - ii. Support the Crown's interest in a timely and durable settlement with Whakatōhea; and
 - iii. Respond to the Tribunal's recommendations 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.
63. The applicants submit that the criteria that the Crown's response must support the Crown's interest in a timely and durable settlement with Whakatōhea is particularly concerning given that the Wai 2662 Tribunal's primary finding was that "the Crown prioritised its political objective of concluding settlements by mid-2020 over a process that was fair to Whakatōhea" (Wai 2961, #3.1.11). Further, Crown officials also noted that a "standard Tribunal inquiry is incompatible with the Crown's negotiation timeframes." The 10 December 2018 ministerial therefore shows that the Crown's interest in speed was again adopted as a key consideration when assessing the results of the vote and its next steps.
64. The 10 December 2018 advice then went on to set out the next steps in line with established principles, being that the Crown (Wai 2961, #A3(a) – JFP-5):
- a. Not make an immediate decision on whether to re-enter negotiations with WPSCT but to first consider how a broader base of support for the settlement might be built. In particular clarifying how the call for a historical Tribunal inquiry can be addressed, including through potentially enabling the Tribunal to conduct an inquiry in parallel with or subsequent to the settlement negotiations;
 - b. Work with the WPSCT on steps to establish a broader base of support; and

- c. Discuss with WPSCT amendments to their deed of mandate, and particularly the withdrawal mechanism, in light of the Tribunal's findings and outcome of the vote.
65. In the 10 December 2018 advice, Crown officials also reflect on the 4 December 2018 letter from the WPSCT to the Crown. That letter outlines the WPSCT's desire to resume negotiations and suggested a parallel or subsequent Waitangi Tribunal inquiry process. The applicants submit that the fact that the proposal for a parallel or subsequent Waitangi Tribunal inquiry process is reflected in the Crown's next steps shows that while the Crown did not immediately resume negotiations with the WPSCT, it did quickly resolve to work "with the WPSCT on next steps to establish a broader base of support", and explore the WPSCT's suggested parallel or subsequent inquiry process.
 66. The applicants submit that this decision came at the expense of any subsequent genuine engagement with the claimants about the outcome of the October 2018 vote and any alternative processes and further that the Crown's commitment to the WPSCT effectively precluded any genuine engagement with the claimants as the Crown had already committed to assisting the WPSCT to establish its base of support at the expense of exploring alternative pathways with the claimants (Wai 2961, #3.1.11).
 67. The course of action proposed in the 10 December 2018 advice was approved by Ministers Little and Mahuta on 20 December 2018, six weeks after the declaration of the October 2018 vote results (Wai 2961, #A3(a) – JFP-5). The applicants submit that this shows a failure on the part of the Crown to adopt the generous and patient approach that was recommended by the Wai 2662 Tribunal (Wai 2961, #3.1.11).
 68. The 10 December 2018 advice also recognised that three hapū demonstrated clear majorities in opposition to continuing settlement negotiations, and on the iwi level, the results showed that there was a fine balance of support and opposition among individual members of Whakatōhea to continuing negotiations (Wai 2961, #A3(a) – JFP-5).
 69. The applicants submit that the 10 December 2018 advice incorrectly states that "what we have observed during the Whakatōhea urgency hearings and voting process is that the preference for an inquiry is underpinned by a desire to have claims independently researched and recorded" (Wai 2961, #3.1.11). The applicants submit that this conclusion was drawn without further engagement with the claimants themselves and that contrary to the Crown's assertion, the claimants have consistently sought a historical inquiry and a settlement process based on the claims, findings and recommendations of the historic inquiry process. The applicants submit that the strong support demonstrated for a historical inquiry is of course interconnected with the strong desire for a well-informed settlement process, negotiated by an entity that can demonstrate strong support for their mandate from the people and hapū of Whakatōhea (Wai 2961, #3.1.11).
 70. In the 10 December 2018 advice, the Crown recognised that resuming negotiations with WPSCT would be "likely to entrench divisions and limit the ability of the WPSCT to build support" and that this would be inconsistent with the Waitangi Tribunal's guidance about what should happen if the outcome is 'finely balanced' and will increase litigation risk. Further, the Crown recognised that "the Tribunal recommended 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 mandate” and that “it is important to allow time for Whakatōhea to engage internally and with the Crown on different options before any decisions are made” (Wai 2961, #A3(a) – JFP-5).

71. In essence, the applicants submit that given the analysis contained in the 10 December 2018 advice, it was incumbent on the Crown itself to proactively engage with ngā hapū and ngā uri o Whakatōhea, rather than relying on the WPSCT to fill this role. Instead, the Crown quickly resolved to work with the WPSCT, and relied heavily on the claimants to engage with the settlement process via the WPSCT in order to resolve their issues, despite the fact that the WPSCT is the very entity the claimants oppose (Wai 2961, #3.1.11).
72. In advice provided to the Minister for Treaty of Waitangi Negotiations and the Minister for Māori Development by Te Arawhiti staff dated 25 July 2019 (25 July 2019 advice), Crown officials advised the Ministers to ‘conditionally’ resume negotiations with the WPSCT in order to agree on a deed of settlement to put to Whakatōhea for ratification (Wai 2961, #A3(a) – JFP-14). The applicants submit that the conditional aspect of this reengagement was not communicated to them (Wai 2961, #3.1.11).
73. While not worded as such, the ‘conditions’ referred to in the 25 July 2019 advice were set out in the letter of 30 September 2019 as being that “in response to issues raised in the Whakatōhea Mandate inquiry, the Crown and WPSCT will (Wai 1750, #3.1.32(a)):
 - a. undertake comprehensive engagement with nga uri o te Whakatōhea to continue to work to understand the aspirations of the hapū and the iwi with regard to the settlement on offer, and to design post-settlement governance arrangements appropriate for the hapū and iwi;
 - b. increase mandate maintenance reporting requirements to ensure the aspirations of the hapū and iwi are actively considered as negotiations progress; and
 - c. amend the withdrawal mechanism in the Whakatōhea Pre-Settlement Claims Trust Deed of Mandate so it can be used by all members of Whakatōhea, not just those registered with the WMTB.
74. The applicants submit that the conditions imposed by the Crown do little to address (Wai 2961, #3.1.11):
 - a. the concerns of the claimants in relation to the current mandate and settlement process;
 - b. the desire of the claimants to explore alternative processes including the well supported position that the current settlement negotiations be stopped so that the Tribunal can carry out its historical inquiry; and
 - c. significant issues which remain in relation to the amendment of the withdrawal mechanism that followed.
75. The applicants submit that the advice and course of action in the 25 July 2019 advice also explicitly departs from an approach that would have seen more comprehensive engagement with Whakatōhea prior to the resumption of negotiations as this option did not “provide a reasonable opportunity of achieving a timely and durable settlement with Whakatōhea” (Wai 2961, #3.1.11).

76. The applicants submit that the 25 July 2019 advice also shows that the option of stopping negotiations until a Tribunal inquiry was concluded was outright rejected despite the Crown acknowledging that 48% of Whakatōhea voted in favour of such a pause (Wai 2961, #3.1.11).
77. The applicants further submit that the 25 July 2019 advice shows that the Crown improperly took into account a number of factors, being (Wai 2961, #3.1.11):
- a. “That the WPSCT considers a timely decision by Ministers will provide a much-needed boost to support for its mandate ahead of the elections”;
 - b. The WPSCT view that “the engagement process will be dominated by claimant voices that favour inquiry only and which are not representative of the views of the hapū and iwi overall.” Crown officials concluded that this “would not be conducive to finding a way forward that respects the outcome of the October 2018 vote”; and
 - c. That the WPSCT agreed that if negotiations were resumed, that the WPSCT would not seek new redress;
78. In relation to paragraph 77(b) above, the applicants submit that this demonstrates a biased approach towards the position of the WPSCT when in fact the results of the October 2018 vote at best demonstrated a divided iwi and at worst failed to return a comprehensible result (Wai 2961, #3.1.11).
79. In relation to paragraph 77(c) above, the applicants submit that it is unclear why this piece of information was included in official advice and that its inclusion raises key concerns about the Crown’s own interests in resuming negotiations with the WPSCT (Wai 2961, #3.1.11).
80. The applicants submit that despite Crown officials stating in their advice that 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”, further engagement by the Crown with those seeking the historic inquiry was not conducted in order to clarify this (Wai 2961, #3.1.11).
81. Before Ministers Little and Mahuta agreed to reengage with the WPSCT on the basis of the information provided in the 25 July 2019 advice, Minister Mahuta sought further information. That information was provided to Minister Mahuta by way of ministerial advice dated 10 September 2019 (10 September 2019 advice), which further justified the decision to reengage on the basis that “resuming negotiations will likely bolster the WPSCT’s credibility” (Wai 2961, #A3(a) – JFP-15). The applicants submit that actively choosing to bolster the credibility of the WPSCT at the expense of the claimants shows a clear bias and lack of good faith on the part of the Crown (Wai 2961, #3.1.11).
82. The Wai 2983 applicants add that that the Crown acted in bad faith in the lead up to the October 2018 vote by demonstrating a clear preference for the WPSCT to the detriment of the applicants and hapū of Whakatōhea (Wai 2983, #1.1.1). The applicants submit that this is evidenced by the fact that on or about 1 June 2018, the Crown advised that while a decision had been made to pause substantive negotiations, some “technical work within the scope of the Agreement in Principle ... could continue” (Wai 2983, #A1(a) – TFH-15). The applicants submit that in continuing to take steps, “technical” or otherwise, the Crown failed to sufficiently separate itself from the situation and groups involved in order that good faith engagement could occur with all

hapū and claimants of Whakatōhea. The applicants submit that the Crown continuing to take these steps amounted to the Crown continuing to advance settlement negotiations (Wai 2983, #1.1.1).

83. Further, in her brief of evidence, Tracy Hillier points to invoices for negotiation services provided by WPSCT negotiators, Maui Hudson and Jason Pou, between May 2018 and April 2019 as evidence for the assertion that the Crown did not suspend or pause its engagement with the WPSCT during this period (Wai 2983, #A1(a) – TFH-10 & TFH – 11).
84. The Wai 2983 applicants submit that because of the financial and other resourcing support provided by the Crown to the WPSCT, the WPSCT was at an advantage going into the October 2018 vote (Wai 2983, #1.1.1). The applicants were initially offered retrospective financial support by the Crown “until about August 2018”. In “about September 2018”, a few weeks out from the vote, the Crown removed the stipulation that the support was retrospective only. The applicants submit that by then, a number of steps had already been implemented by the WPSCT with the support of the Crown in preparation for the vote. This included the WPSCT hosting a number of hui and advertising its position (Wai 2983, #1.1.1).
85. Further, the applicants submit that the WPSCT drove the voting process, including implementing a voting timeline, an explanatory note, pānui, and vote questions (Wai 2983, #1.1.1).
86. In addition, the applicants submit that voting materials were “circulated under cover of the WPSCT”, that there were issues around privacy and voting registers, and that the final vote questions were criticised for being unclear and different to the questions which the Tribunal had recommended (Wai 2983, #1.1.1).
87. Finally, the applicants submit that the October 2018 vote took place just six months following the release of the Wai 2662 Tribunal’s report (Wai 2983, #1.1.1).
88. The applicants submit that two months after the release of the October 2018 vote results, Minister Little released statements in a press release that included “the Whakatōhea vote resulted in a narrow majority supporting the Whakatōhea Pre-Settlement Claim Trust continuing to negotiate a settlement with the Crown and a significant minority voting for a Waitangi Tribunal inquiry into the historical claims of Whakatōhea” (Wai 2983, #1.1.1). Minister Little then went on to say, “the results show too much support for the Trust for the Crown to walk away” (Wai 2983, #A1(a) – TFH – 16).
89. The applicants submit that the two statements, in the same press release, are contradictory and fail to address how the applicants “significant minority” (on the Crown’s interpretation) would be engaged with (Wai 2983, #1.1.1). The applicants, on behalf of Ngai Tamahaua, have written to Minister Little on multiple occasions to express their continued opposition and to invite the Crown to reconsider its proposal to continue to engage with the WPSCT (Wai 2983, #1.1.1).
90. The applicants submit that no invitation has ever been made by Minister Little to meet with Ngai Tamahaua or to address their concerns (Wai 2983, #1.1.1). The applicants submit that instead, an open letter was released on 30 September 2019 advising that the Crown had decided to “continue negotiations” with the WPSCT and “to finalise the deed of settlement for ratification by Te Whakatōhea” (Wai 2983, #A1(a) – TFH -27).

91. The Wai 2984 applicants add that at an iwi level, 53% of those who participated in the vote supported the WPSCT continuing negotiations. 48% voted to stop negotiations to enable the Waitangi Tribunal to inquire into the historical claims. Of those who participated, 12% supported starting the mandate process again from the start. They further submit that at a Ngāti Ruatakena hapū level, 596 Ngāti Ruatakena voted from 2,876 returned votes and 3,191 Ngāti Rua registered on the WMTB roll (Wai 2984, #1.1.1).
92. The Wai 2984 applicants further submit that since the October 2018 vote, Ngāti Ruatakena's support for the WPSCT mandate has now decreased and the applicants have chosen to withdraw the Wai claim they hold and their support from the WPSCT and focus solely on Wai 1750, the North-Eastern Bay of Plenty inquiry to prosecute their claim (Wai 2984, #1.1.1).

The Crown's position

93. The Crown submit that the applicants have an alternative remedy available, as the applicants have had and continue to have opportunities to engage with the Trust and Crown in respect of negotiations and that the applicants have had and continue to have opportunities to engage with the Trust and Crown in respect of post-settlement arrangements should the settlement be ratified by Whakatōhea and become final. Further, participation in a future ratification process, and campaigning to persuade adult members of Whakatōhea on these issues, is a reasonable alternative available to the claimants (Wai 2961, #3.1.3).
94. The Crown points to the *East Coast Settlement Report* (2010) as authority for the proposition that the Crown is acting within its rights when on some occasions it extinguishes a claim without the consent of individual claimants if there is clear evidence that the Crown is following the wishes of the majority of the collective that has been mandated for negotiations (Wai 2961, #3.1.3).
95. The Crown submits that there is no Treaty principle which requires unanimity to be reached with all interested Māori when settling historical claims and further, that the Crown has not dismissed dissent or disagreement lightly in this case (Wai 2961, #3.1.3).
96. The Crown's decision to resume negotiations with the WPSCT is conditional. Those conditions are that (Wai 2961, #3.1.3):
 - a. The WPSCT must work to understand Whakatōhea settlement aspirations;
 - b. The WPSCT must engage with Whakatōhea on post-settlement arrangements; and
 - c. The WPSCT must meet much more stringent than usual mandate maintenance requirements
97. The Crown considers that the WPSCT has been meeting these conditions and must be satisfied that these requirements are met before it decides to finalise a settlement with Whakatōhea (Wai 2961, #3.1.3).
98. The Crown submits that both the Waitangi Tribunal in its Wai 1750 district inquiry and the applicants in these applications have acknowledged that the outcome of the October 2018 vote was finely balanced and showed support for both negotiations with

the Trust and a historical inquiry. The Crown submits that the Crown's proposal to resume negotiations with the WPSCT and to support the Wai 1750 inquiry provides the opportunity for Whakatōhea to see the benefits of settlement and a district inquiry. The Crown further submits that the Crown's decisions since the vote recommended by the Wai 2662 Tribunal have been taken with the careful consideration recommended by the Wai 2662 Tribunal and in light of the findings and recommendations of the Wai 2662 Tribunal's report. The Crown submits that the Crown approach respects the outcome of the vote and supports Whakatōhea in both Waitangi Tribunal inquiry and settlement negotiations (Wai 2961, #3.1.3).

99. The Crown has not made any decision to finalise and initial, or to sign a deed of settlement with Whakatōhea. The Crown submits that a decision as to signing a deed of settlement will only be considered in the future if and when a settlement is ratified with sufficient support by Whakatōhea. The Crown submits that the only way to test the true levels of support for the settlement is through a ratification process that all adult members of Whakatōhea can participate in. The Crown further submits that the ratification process will include informed consideration by Whakatōhea of what impact a settlement will have on the Tribunal's Wai 1750 district inquiry (Wai 2961, #3.1.3).

Continued recognition of a mandate with a wholly deficient withdrawal mechanism

The applicant's position

100. In essence, all the applicant parties argue that the WPSCT withdrawal mechanism is so onerous as to be unworkable, leaving the applicants, their hapū, and their Wai claims unable to withdraw from the WPSCT Deed of Mandate.
101. The withdrawal mechanism was a key issue for the Wai 2662 Tribunal, which found that the Crown failed to act reasonably when it approved a mandate that contained a withdrawal mechanism that the Crown recognised was unfair. The Wai 2662 Tribunal found that if one of the outcomes of the vote-a-iwi was that one or more of the hapū rejected the prospect WPSCT continuing to negotiate a settlement, this would highlight the need to address the withdrawal mechanism.
102. The withdrawal mechanism was amended at a WPSCT trustees meeting on 3 February 2020 (Wai 2983, #A1(a) – TFH – 32). A number of the applicant parties have noted that the fact the mechanism was going to be amended at the meeting was not notified. The applicants further submit that they only found out that in fact the mechanism had been amended through a Crown memorandum submitted to the Wai 1750 inquiry.
103. It is significant that given the WPSCT knew of the issues the hapū of Whakatōhea had with the withdrawal mechanism, they did not seek to consult with the hapū about the fact or form of the amendment to the mechanism (Wai 2983, #A1(a) – TFH – 29). It is also significant that the Crown, who also knew of the issues, did not seek to inform Whakatōhea that the amendment was being contemplated, nor consult with the parties who had identified the withdrawal mechanism as an issue in the first instance (Wai 2961 #A3(a) – JFP-14).
104. The applicants submit that the 3 February 2020 amendment to the withdrawal mechanism actually made the process of withdrawal more onerous. This is because it

remains unclear what the 5% number of “adult members of Whakatōhea” in fact relates to (Wai 2961, #A1). Census figures provide a total iwi population of 12,177 people, but do not provide a breakdown of those aged 18 years and older and there is no iwi registration or verification process associated with census data. The applicants submit that the Crown submissions and evidence have failed to provide any clarity on this point (Wai 2961, #3.1.11).

105. The applicants submit that the Crown’s position that the mechanism is the same mechanism as has been endorsed in the *Maniapoto Mandate Inquiry Report* (2019) is also untenable because the Maniapoto mandate withdrawal process requires that 350 registered members out of approximately 35,000 sign the relevant withdrawal or amendment petition. The applicants submit that by contrast, at the time of the November 2016 petition, the adult registered members on the register maintained by the WMTB stood at 9,895. The 5% threshold therefore required 495 signatures, significantly more than what is required for the Maniapoto process, for an iwi nearly a third the size of Maniapoto (Wai 2961, #3.1.11).
106. Further, the applicants submit that the Whakatōhea mandate then requires significantly onerous steps to progress the withdrawal process, including 5 (or greater) publicly notified hui that follow the same process and procedures that conferred mandate on the WPSCT, including nationwide hui and the availability of postal voting (Wai 2961, #3.1.11).
107. The applicants submit that the *Maniapoto Mandate Inquiry Report* (2019) specifically observed that requirements such as nationwide hui are costly and difficult, if not virtually impossible, for a claimant group to run without financial assistance. On this issue, Crown officials in the *Maniapoto Mandate Report* (2019) provided evidence that “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” (Wai 2961, #3.1.11).
108. Further, the applicants submit that while the claimant funding process has been developed further in respect of Maniapoto and is available to those seeking withdrawal or amendment to the deed of mandate, no equivalent process has been developed for Whakatōhea (Wai 2961, #3.1.11).
109. The applicants submit that with the amendment of 3 February 2020, it is now unclear how many signatures would be required to meet the 5% threshold (Wai 2961, #3.1.11).
110. The applicants submit that the 25 July 2019 advice recognised the lengthy and onerous processes of withdrawal that “could take up to six months” and advised that 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” (Wai 2961, #3.1.11).
111. The 25 July 2019 advice also emphasised the importance of publicly notifying the amendment when it stated that “we have informed the WPSCT that the amendment must be publicly notified in advance to enable the iwi to debate it. Once the WPSCT publicly advertises its intention to amend the withdrawal mechanism, claimants will likely seek to have further amendments made to align with the Tribunal’s recommendations” (Wai 2961, #A3(a) – JFP – 14).
112. The applicants submit that in light of the 25 July 2019 advice it is significant that (Wai 2961, #3.1.11):

- a. The applicants did not receive notice that amendments to the mechanism were being made. Instead the applicants found out about the 3 February 2020 amendments by way of Crown memoranda dated 21 April 2020 in the Wai 1750 inquiry (Wai 2961, #A2(a) – TH – 18);
 - b. No evidence has been provided that the amendment process was in fact publicly notified;
 - c. The Crown's 27 March 2020 response to the applicant's 20 March 2020 letter did not provide any answers to the clarification requested about the amendments to the withdrawal mechanism sought by the claimants; and
 - d. The applicants 14 May 2020 request to the WPSCT for information about the amendments and process of amendment went unanswered until 24 June 2020.
113. The Wai 2983 applicants stand apart from the other groups in respect of the withdrawal mechanism, as they submit that Ngai Tamahaua are one of two hapū found to have met the 5% withdrawal threshold set out in the WPSCT deed of mandate (Wai 2983, #3.1.1). The applicants submit that in spite of this, no meeting was ever conducted to address the hapū concerns and further, that in these circumstances the Crown continued to support the WPSCT (Wai 2983, #1.1.1).
114. The Wai 2983 applicants submit that once the Crown was aware of the applicant's and hapū's position of opposition to the WPSCT, the Crown was obliged under their duty of partnership to act in good faith towards Ngai Tamahaua to assess the hapū concerns and test the hapū level of support for the mandate that the Crown purported to recognise (Wai 2983, #1.1.1).
115. The Wai 2983 applicants submit that the Crown has not approached Ngai Tamahaua to date. Instead, the applicants have taken steps to contact Crown ministers to register their opposition to the WPSCT and to request that the Crown withdraw from recognition of the mandate for lack of support. The applicants submit that in response to this, the Crown replied that the Minister was making up his own mind and would respond with an answer when a decision had been made. The applicants submit that this approach is unacceptable and not conducive to appropriate Treaty relations between partners (Wai 2983, #1.1.1).
116. The Wai 2983 applicants submit that the Wai 2662 Tribunal made significant findings regarding the fact that the withdrawal mechanism failed to meet the standards required under the Treaty and that the withdrawal mechanism was flawed in many respects. One of the key issues identified by the Wai 2662 Tribunal being that the withdrawal mechanism failed to take into account the hapū viewpoint. The applicants further submit that the Crown has blatantly failed to address the hapū aspects of the Wai 2662 Tribunal's findings on the flaws that arise with respect to the withdrawal mechanism. The applicants submit that therefore, the amended withdrawal mechanism continues to perpetuate the Treaty breaches found by the Wai 2662 Tribunal and goes a step further by making the process even more difficult for hapū to have their position considered (Wai 2983, #1.1.1).
117. The Wai 2984 applicants add that that Ngāti Ruatakena claimants have never been notified directly by the Crown that any amendments have been made to the withdrawal mechanism in the WPSCT Deed of Mandate. The applicants further submit that they notified the WMTB, the WPSCT, and the Crown by way of a letter, that they wished to

withdraw their support and their claim and as at 8 July 2020, they have not received a response from the WPSCT or the Crown (Wai 2984, #1.1.1).

The Crown's position

118. The Crown submits that the concerns raised by the applicants as to the unworkability of the mechanism are overstated. The Crown 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 Waitangi Tribunal (Wai 2983, #3.1.3, Wai 2984 #3.1.3, Wai 2985, #3.1.3 & Wai 2986, #3.1.2).

The restricted Waitangi Tribunal approach

The applicants' position

119. The applicants submit that those who oppose the WPSCT were not consulted on the restricted Waitangi Tribunal approach. That the diminished approach was to be an option was not foreshadowed in relation to the October 2018 vote. The applicants submit that Crown engagement with themselves and others subsequent to the decision to proceed with a restricted Waitangi Tribunal inquiry breaches the principles of good faith and partnership (Wai 2961, #1.1.1).
120. The Wai 2983 applicants note that the Wai 2662 Tribunal observed that there is a tension between the legal rights of claimants to pursue their claims and the rights of a mandated group to negotiate a settlement. However, while the Wai 2662 Tribunal recognised named claimants may not have an "effective right of veto over the settlement of their claims" the Wai 2662 Tribunal also noted that in the case of Whakatōhea, there was a clear majority of claimants asking for their claims to be heard in the Waitangi Tribunal pathway. The applicants submit that this fact has been ignored by the Crown (Wai 2983, #1.1.1).
121. The applicants submit that the Crown and the WPSCT have failed to detail the list of claims that actually support the mandate which the Crown continues to recognise (Wai 2983, #1.1.1).
122. The Wai 2985 applicants submit that the Crown has continued to rely on the WPSCT Mandate Maintenance Reports to ensure that the WPSCT has maintained support to continue with settlement negotiations. The applicants further submit that the Mandate Maintenance Reports are inadequate as they do not include all correspondence that falls within the relevant mandate maintenance, including information regarding the sustained level of opposition to the WPSCT Mandate. The applicants further submit that the Crown has made no effort to adequately assess the veracity of the Mandate Maintenance Reports to ensure that the WPSCT has maintained its mandate (Wai 2985, #1.1.1).
123. The Wai 2984 applicants add that the opportunity to appear in front of the Waitangi Tribunal is not merely to tell stories or to put the raupatu grievances of Ngāti Ruatakenga on the public record, but also to ascertain whether there is a well-founded claim against the breaches of the Treaty (Wai 2984, #3.1.8).

Continuing negotiations with the WPSCT during the national state of emergency occasioned by COVID-19

The applicants' position

124. The Wai 2984 and 2985 applicant parties raise a further issue, that in the Crown's pursuit of full and final settlement, the Crown failed to take into account the impact of the Covid-19 pandemic on Te Whakatōhea and the isolation of the pakeke, kuia, and kaumatua whom reside there (Wai 2984, #1.1.1 & Wai 2985, #1.1.1).
125. The applicants submit that prior to the lockdown, the Ngāti Ira claimants requested that the Crown halt settlement negotiations given the pandemic and precautions occurring in rural communities such as Ōpōtiki (Wai 2985, #1.1.1). The applicants submit that the Crown declined this request in a letter dated 27 March 2020 (alert level 4 began on 26 March 2020), which stated that "at this stage Minister Little is not contemplating suspending negotiations with Whakatōhea. Te Arawhiti will update the Whakatōhea Pre-settlement Claims Trust on how the Covid-19 response will affect negotiations in due course" (Wai 2961, #A2(a) – TH – 17).
126. The applicants submit that, consequently, the pandemic prevented any meaningful engagement between and amongst the claimant community, the Crown, and the WPSCT. The applicants further submit that it is unreasonable for the Crown to rely on this period for extensive engagement to occur to ensure that the WPSCT has maintained its mandate (Wai 2985, #1.1.1).
127. The applicants submit that the Wai 215, Tauranga Moana Tribunal found that under the Treaty, the Crown has a duty to consult with the applicants, that consultation must be open and meaningful, and the Crown should be willing to change its mind on the basis of information received (Wai 2985, #1.1.1).
128. The applicants submit that the Wai 1071, *Crown Foreshore and Seabed Policy Report* (2004) adopted the test for consultation set out in *Wellington International Airport Ltd v Air New Zealand*. The applicants further submit that the Court in *Wellington International Airport Ltd. (CA)* [1993] relied on *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111 as the leading case on the requirement of consultation. Lord Morris of Borth-y-Gest, delivering the judgement of the Privy Council, said at page 1124 of that case that "the requirement of consultation is never to be treated perfunctorily or as a mere formality. The local authority must know what is proposed: they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems or difficulties: they must be free to say what they think" (Wai 2985, #1.1.1).
129. The applicants submit that the Waitangi Tribunal in the *Trans-Pacific Partnership Agreement Report* (2016) summarised the principles of consultation as "consultation must be allowed sufficient time, and genuine effort must be made ... to 'consult' is not merely to tell or present. Nor, at the other extreme is it to agree. Consultation does not necessarily involve negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate situation involving meaningful discussion. Consultation involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.

Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses" (Wai 2985, #1.1.1).

130. The applicants submit that the Crown's decision to continue negotiations with the WPSCT is a significant departure from the above principles and in breach of the Treaty and the Crown's duty to consult (Wai 2984, #1.1.1). The applicants further submit that the Crown has failed to take into account the impact of Covid-19 on rural and isolated Māori communities such as Ngāti Ruatakena and that the Crown has also failed to allow sufficient time or to make a genuine effort to ensure that extensive engagement or meaningful discussion occurred with the applicants and their hapū. Further, the Crown failed to meet the requirement that the Crown understand and provide for the application of tikanga in the way that process of engagement occurs. The applicants submit that instead, the Crown has continued negotiations with the WPSCT under a national state of emergency, without consultation being practically available by them to engage by them in a Treaty compliant way with the applicants, and no achievable withdrawal mechanism being in place (Wai 2984, #1.1.1).

131. The applicants submit that the aforementioned facts make it clear that the Crown is determined at all costs to achieve its priorities, even proceeding with engagement with respect to the process of negotiation during the State of Emergency occasioned by the Covid-19 pandemic (Wai 2984, #1.1.1).

132. The Wai 2984 applicants add that to ensure the Crown had a clear understanding of what was occurring for Te Whakatōhea, the Crown needed to develop a process that was more sensitive to the challenges of resuming normal hapū business for the applicants and their hapū (Wai 2984, #3.1.8).

The Crown's position

133. The Crown did not respond to this allegation of breach.

No alternative remedy

The applicants' position

134. The Wai 2961 applicants submit that there is no alternative remedy available to them, and that this is shown by the fact that (Wai 2961, #3.1.2):

- a) The issues raised have not been adequately addressed by the Crown or WPSCT despite repeated efforts at engagement;
- b) The Crown persists with an uneven and imbalanced approach towards the WPSCT and those who do not support the WPSCT;
- c) Serious issues remain with the withdrawal mechanism;
- d) The Crown has refused to adequately engage with claimants about alternative pathways available; and
- e) The claimants are left effectively locked into a process that does not have sufficient support from Whakatōhea.

135. The Wai 2961 applicants submit that the Court in *Tūrāhui v Waitangi Tribunal* [2015] NZHC 1624 held that the more extensive the steps taken by the applicant to avoid suffering significant and irreversible prejudice, the more powerful the applicant's case for an urgent inquiry will be. They submit that those who oppose the WPSCT have repeatedly raised their claim issues with the Crown, the WPSCT, and in the Wai 1750, North Eastern Bay of Plenty inquiry. Despite this, the Crown and WPSCT have not adequately engaged with these concerns and the Wai 2961 claimant, Ms Hata, has been shut out of the WPSCT processes (Wai 2961, #3.1.2).
136. The applicants submit that while Crown submissions state that the Crown has not made any decisions with respect to finalising or signing a deed of settlement, it is clear that there is significant momentum towards the finalisation of a deed of settlement (Wai 2961, #3.1.11). The applicants submit that this is evidenced by the fact that in Crown correspondence dated 27 March 2020, Te Arawhiti Regional Director, Ms Johnston specifically states that "the Crown is committed to finalising the deed of settlement so that it can be put to Whakatōhea for ratification" (Wai 2961, #A2(a) – TH – 17).
137. Further, the applicants submit that in response to the Wai 2961 application, the WPSCT have stated that they hope to initial a deed of settlement before the elections this year (Wai 2961, #3.1.11). The position of the WPSCT in this respect is in line with Crown documents that note "work required to complete the drafting of the deed of settlement is limited and could be completed for initialling by June 2020" (Wai 2961, #A3(a) – JFP-5).
138. The applicants submit that initialling a deed of settlement is a significant step in the ratification process as it concludes the negotiations phase of the process (Wai 2961, #3.1.11). A deed of settlement, initialled or not, represents a final Crown position for the settlement. An initialled deed of settlement by the mandated representatives indicates that they believe that the Crown's final offer should be accepted (Office of Treaty Settlements "Healing the past, building a future" (June 2018) at 30). Further, the WPSCT have stated that they are trying to complete ratification this year (Wai 2985, #A2(a) – A).
139. In response to the Crown's submission that ratification will "test Whakatōhea support for a deed of settlement and parallel modified Tribunal inquiry", the applicants submit that it is hard to see why a further test of Whakatōhea's support is required when the October 2018 vote provided evidence of unprecedentedly low and declining support for continuing with the current settlement process (Wai 2961, #3.1.11).
140. In response to the Crown assertion that the ratification process will provide a sufficient safeguard for the applicant's interests, the applicants submit that ratification processes do not provide sufficient protections to safeguard the interests of the applicants as they do not rectify the serious issues with the mandate as identified by the Wai 2662 Tribunal (Wai 2961, #3.1.11).
141. Further, the Wai 2983 applicants submit that there is no policy or specific threshold for what the Crown considers to be an acceptable voting result for the ratification of settlements. The applicants add that given the Crown actions since outcome of October 2018 vote, the applicants have very little confidence that the Crown would in fact heed to similarly divided ratification results (Wai 2983, #3.1.4).
142. The applicants submit that past ratification processes show that iwi members who vote, overwhelmingly accept the deed of settlement and post-settlement governance entity, because (Wai 2961, #3.1.11):

- a. The mandated entity is supported by the Crown, financially, logistically, legally, and strategically, to seek support for the deed of settlement, while those who are not in support do not have access to such resources; and
- b. By ratification stage, voters receive an overview of the redress on offer, without any other alternative settlement pathways.

143. In relation to paragraph 142(b) above, the applicants submit that the lack of alternative options is heightened for Whakatōhea because the Crown:

- a. failed to adequately engage with and explore alternative approaches with the claimants following the outcome of the October 2018 vote;
- b. has actively discouraged those who do not support the WPSCT from utilising the withdrawal mechanism and exploring alternative pathways, as evidenced by Minister Little stating: "I must be clear that, if a group were to seek a separate settlement with the Crown, there is no certainty as to how or when that would occur. Should groups within Whakatōhea, that may also have an impact on the currently agreed settlement package" (Wai 2961, #A2(a) – TH – 15); and
- c. has failed to commit to maintaining its baseline redress offered to Whakatōhea under the August 2017 AIP and interest at commercial rates on the cash component of that base line.

144. The applicants submit that during ratification, voters are being asked to confirm support for a known settlement quantum and package or to risk an uncertain future (Wai 2961, #3.1.11). Further, the applicants submit that the WPSCT has sought to capitalise on this, by saying publicly, and as recently as 3 June 2020, that if the deed of settlement is not accepted, "it could be another 10 to 15 years before the process can start again" (Wai 2961, #A2(a) – A).

145. The applicants submit that while the 25 July 2019 advice states that the proposed ratification vote will include a vote on whether to proceed to settlement or defer settlement until after the inquiry is concluded and could include a hapū vote, this does not provide sufficient protection for the interests of the applicants because (Wai 2961, #3.1.11):

- a. Initialling a deed of settlement is a significant step in the settlement process. While the ratification process may include an option to defer settlement until after the inquiry is concluded, this option does not include a renegotiation of the concluded deed of settlement to take into account the findings and recommendations of the historical inquiry;
- b. The Crown has recently failed to respect the outcome of significant hapū opposition as demonstrated by the October 2018 vote, therefore the applicants have little confidence that the Crown would heed to hapū opposition demonstrated again via the ratification process; and
- c. The Crown has failed to address the issue of the WMTB register for the purposes of the ratification vote.

146. In relation to paragraph 145(c) above, the applicants submit that the beneficiary registers attached to Jacob Pollock's affidavit are inflated as they include Whakatōhea adults the WMTB does not have current contact details for (also known as GNA, got no address). Therefore, from these numbers, it is difficult to conclude who is in fact

being provided information or who will be sent ratification voting information (Wai 2961, #3.1.11).

147. Further, the applicants submit that a key finding of the Wai 2662 Tribunal was that “it was not reasonable for the Crown to rely on the Trust Board register for the purposes of the mandate vote in May 2016” and that the “Crown 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”. The applicants submit that the Crown has failed to provide evidence that outlines the work that has since been done in relation to the issues associated with the Trust Board’s register (Wai 2961, #3.1.11).
148. In response to the Crown’s assertion that the applicants can rely on the use of the withdrawal mechanism as a viable alternative remedy to Waitangi Tribunal inquiry, the applicants submit that in its submissions, the Crown relies on the position that the withdrawal mechanism has been rectified and has not been used, and the Crown says that “the same mechanism has been endorsed recently in the *Maniapoto Mandate Inquiry Report*”. 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 (Wai 2961, #3.1.11).
149. 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 (Wai 2961, #3.1.11).
150. The Wai 2983 applicants add that after the application for urgency was filed, the Crown indicated to the Wai 1750 Tribunal that it was intent on proceeding to a ratification process by January 2021. The applicants submit that this would require initialling the Deed of Settlement sometime prior to that date. Further, the applicants note that the Red Book, which contains Crown policy on settlements, sets the ratification process as the fourth and final stage of the negotiation process. The applicants further submit that it is difficult to see how substantive allegations against the Crown can be rectified without intervention by the Crown (Wai 2983, #3.1.4).
151. In response to the Crown’s assertion that the Crown has not made any decisions with respect to finalising or signing a Whakatōhea deed of settlement, or in respect of introduction to the House of Representatives of related settlement legislation, the applicants submit that the affidavit of Mr Pollock contradicts the Crown’s assertion where it states that the Crown anticipates the introduction of settlement legislation in 2021 (Wai 2983, #3.1.4).
152. In response to the Crown’s assertion that the Crown will only consider whether to finalise and sign a deed of settlement if and when a settlement is ratified by Whakatōhea following appropriately comprehensive engagement, the applicants submit that they have no faith that the Crown will be able to appropriately and comprehensively engage prior to ratification in January 2021. The applicants further submit that Covid-19 has occasioned a significant interruption to the ability of the claimant community to meet (Wai 2983, #3.1.4).

The Crown's position

153. The Crown has not made any decision to finalise and initial, or to sign a deed of settlement with Whakatōhea. The Crown submits that a decision as to signing a deed of settlement will only be considered in the future if and when a settlement is ratified with sufficient support by Whakatōhea. The Crown submits that the only way to test the true levels of support for the settlement is through a ratification process that all adult members of Whakatōhea can participate in. The Crown further submits that that ratification process will include informed consideration by Whakatōhea of what impact a settlement will have on the Tribunal's Wai 1750 district inquiry (Wai 2983, #3.1.3, Wai 2984, #3.1.3, Wai 2985, #3.1.3 & Wai 2986, #3.1.2).

Readiness to Proceed to Urgency

The applicants' position

154. The applicants submit that they are ready to proceed to hearing.

The Crown's position

155. The Crown disputes the applicants position and claims that the applicants are not ready to proceed as they are involved in the parallel process of the Marine and Coastal Area (Takutai Moana) Act 2011 applications in the High Court (Wai 2983, #3.1.3, Wai 2984, #3.1.3, Wai 2985, #3.1.3 & Wai 2986, #3.1.2).

Demonstrated degree of support for the applications

The applicants position

156. The Wai 2983 applicants submit that in contrast to the WPSCT, the applicants can and have shown quite clearly their levels of support. The applicants submit that in particular, Ms Hillier does not act as an "individual" in the context of her claims. The applicants submit that the Wai 1781 claim, of which Ms Hillier is the named claimant, is supported and endorsed by Ngai Tamahaua hapū. The applicants further submit that the number of Ngai Tamahaua signatures Ms Hillier was able to gather in support of the withdrawal petition was significant in comparison to the poor voter turnout that the WPSCT has been able to demonstrate through nationwide hui and mandate maintenance reports. Further, Ms Hillier gathered those signatures while operating on a voluntary basis, without financial or other support (Wai 2983, #3.1.4).

157. The Wai 2961 applicants submit that their application is supported by a wider group, inclusive of the applicants, referred to in their submissions as "the claimants", who have consistently demonstrated opposition to the Crown and WPSCT mandate by (Wai 2961, #3.1.11):

- a. Providing a submission or support for a submission in opposition to the final Tū Ake mandate strategy between November 2015 and January 2016;
- b. Providing a submission or support for a submission in opposition to the WPSCT deed of mandate between 1 October 2016 and 21 November 2016;
- c. Participating in the Wai 2662 inquiry;
- d. Participating in the withdrawal petition submitted to WPSCT in November 2016;

- e. Participating in the further withdrawal petition submitted to Crown in December 2017;
- f. Participating on behalf of Whakatōhea hapū and historic Wai claims in the Wai 1750 inquiry and seeking a full historical inquiry in relation to their claims;
- g. Voting against the current Crown and WPSCT mandate and settlement process;
- h. Voting for the current Crown and WPSCT mandate and settlement process being stopped so that the NEBOP historic inquiry can take place as part of the October 2018 vote;
- i. Continued engagement with the Crown and WPSCT; and
- j. Filing fresh urgency proceedings or seeking to be an interested party in support of the Wai 2961 claim and application.

158. In her affidavit, Te Ringahua Hata sets out the following table, showing Wai claims which she says support the application (Wai 2961, #A4):

Wai claims that oppose the WPSCT as at 17 July 2020		
	Wai No.	Filed in Wai 2961 inquiry
Ngāti Patumoana	Wai 1775 Wai 864	Wai 2961, 3.1.1 Filed 3 July 20
Ngāti Ira	Wai 558	Wai 2985, 3.1.1 Filed 30 June 20
Ngāi Tamahaua	Wai 1781	Wai 2983, 3.1.1 Filed 7 July 20
Ngāti Ruatakenga	Wai 1782 Wai 2728 Wai 1795	Wai 2984, 3.1.1 Filed 3 July 20 Filed 7 July 20
Upokorehe (all hapū and marae)	Wai 1092 Wai 1758 Wai 1787	Wai 2986, 3.1.1 Wai 2986, 3.1.1 Wai 2986, 3.1.1 Filed 8 July 20
Ngāti Ngahere	Wai 2107	Filed 10 July 20

Other Whakatōhea-related claims	Wai 2510	Filed 3 July 20
	Wai 203	Filed 7 July 20
	Wai 87	Filed 7 July 20
	Wai 339	Filed 7 July 20
	Wai 1794	Filed 7 July 20
	Wai 2160	Filed 7 July 20
	Wai 2257	Filed 7 July 20
	Wai 2605	Filed 7 July 20
	Wai 892	Filed 10 July 20
	Wai 2055	Filed 10 July 20
	Wai 2462	Filed 10 July 20
	Wai 2743	Filed 10 July 20
	Wai 1789	TBC
Total	24 Wai claims	

159. Ms Hata says that under her assessment, of 23 Whakatōhea Wai claims, 20 have filed in opposition to the WPSCT and in support of the Wai 2961 application (Wai 2961, #A4).

Graeme Riesterer, as Chairman of the Ngāti Patumoana Waiaua Marae Committee's position

160. Mr Riesterer states that “Ngāti Patumoana have met at Waiaua Marae and resolved to oppose the application made by Tuariki Delamere and Te Ringahuaia Hata. Neither Tuariki or Te Ringahuaia have taken the opportunity to come to the hapu to discuss the application and we are concerned that it is filed in our name” (Wai 2961, #3.1.15).

Julie Lux and others position

161. Ms Lux states that “Ngāti Ruatakena hapū refute that they have withdrawn their raupatu claim and mandate from the Whakatōhea District Inquiry – as detailed in a recent media statement issued by Tuariki Delamere on 18th June 2020. Nine kuia of Ngāti Ruatakena say they were blindsided by the media release and that pānui does not have the support of the hapū and is inaccurate” (Wai 2961, #A6).

Decision

162. I have decided that at this stage I will not grant urgency to these applications.

163. 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.

164. Urgency may well be required at some time in the future. I note the Crown has said that it has not made a decision as to final settlement nor to seek ratification.

165. Having reached that point, 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, 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.

166. It is now the obligation of the parties to settle the issues in good faith.

167. Urgency is not granted at this stage and the applications are adjourned until parties have moved further in the process and seek to have the issue reconsidered.

DATED at Rotorua this 20th day of October 2020

A handwritten signature in black ink, consisting of a large, stylized capital 'P' followed by a horizontal line that tapers off to the right.

Judge P J Savage
Deputy Chairperson

WAITANGI TRIBUNAL