IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-203
[2025] NZHC 519

BETWEEN	TE RINGAHUIA HATA and TE RUA ROGER RAKURAKU Applicants
AND	THE ATTORNEY-GENERAL First Respondent
AND	GRAEME RIESTERER, ANAU APANUI, JASON KUREI, ERIN MOORE, DAVE NGATAI, AUDREY GRACE RENATA, MURIWAI KAHAKI, BRUCE PUKEPUKE, KEITA HUDSON, MANA PIRIHI, TAHU TAIA, PAREHUIA MAFI and ROBERT EDWARDS as Trustees of the Whakatōhea Pre Settlement Claims Trust Second Respondents
AND	ROBERT EDWARDS, TAHU TAIA, BRUCE PUKEPUKE, KATE HUDSON, VAUGHAN PAYNE, GRAEME RIESTERER, ANAU APANUI and ERIN MOORE as Trustees of Te Tāwharau o Whakatōhea Trust Third Respondents

Hearing:	26–27 August 2024
Counsel:	J E Hodder KC, A T Sykes and S W H Fletcher for Applicants C R W Linkhorn and D W Hunt for First Respondent J M Pou for Second Respondents C R Carruthers KC for Third Respondents
Judgment:	14 March 2025

JUDGMENT OF ISAC J
[Application for declarations of tikanga as law]

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Introduction

[1] In 1914, representatives of Te Whakatōhea petitioned Parliament following the Crown's confiscation of their ancestral lands. Unsuccessful in their endeavour, the six hapū of Whakatōhea met later that same year at Waiaua marae to discuss what to do next. They resolved that each of them should continue to collect a "tax" of 2s 6d per person to support the collective effort to seek redress from the Crown. The individual contributions continued until 1946. A record was kept of the name and hapū affiliation of every person who contributed. The record became known as the "sacred book".

[2] The sacred book was an example of a shared purpose to obtain recognition for the injustice Te Whakatōhea had suffered at the hands of the colonial Government. When reading the history of Te Whakatōhea, the Waitangi Tribunal described the tribe's historical grievances as "among the worst Treaty breaches in this country's history".[1] The Crown engaged in extensive occupation and raupatu of Whakatōhea lands. Colonial troops adopted a scorched earth approach, looting, plundering, and destroying crops, animals, houses, equipment and taonga.[2] The Whakatōhea economy and its infrastructure were destroyed. And the hapū of Whakatōhea suffered significant loss of life and the destruction of their communities.

[3] As a united people, Whakatōhea subsequently made great strides toward the acknowledgment of the Crown's wrongs. This included the Sim Commission of Inquiry in 1927. The inquiry resulted in a £20,000 settlement for "excessive" confiscation. Whakatōhea used the funds to purchase a farm at Waioeka for the benefit

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1 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Priority Report on the Whakatōhea Settlement Process* (Wai 1750, 2021) [The Priority Report] at xii. One such breach was the false accusation that prominent Whakatōhea leader, Mokomoko, murdered Reverend Carl Völkner, which resulted in Mokomoko's execution and internment in Mount Eden Prison. A key piece of evidence the Crown relied on to convict Mokomoko was his possession of a piece of rope used to hang Rev Völkner. Te Ara Encyclopedia of New Zealand says that according to Te Whakatōhea, the rope had belonged to Mokomoko and was taken from him as he was catching his horse. He played no part in Völkner's death but found himself an accessory to the act through ownership of the rope. Subsequently the word taura (rope) entered the vocabulary of his people as a symbol of retributive justice. "Take the rope from my throat" became the "murmured prelude" to a waiata, sung by Mokomoko, and later Te Whakatōhea and neighbouring tribes. See Tairongo Amoamo "Dictionary of New Zealand Biography - Mokomoko" Te Ara Encyclopedia of New Zealand.

2 The Whakatōhea Claims Settlement Act 2024, s 8(5) (Summary of historical account).

of future generations. The inquiry also led to the establishment of the Whakatōhea Māori Trust Board.

[4] During Whakatōhea's most recent journey toward a Treaty settlement, relationships between the hapū began to fray. These rifts were exacerbated when the Crown told the iwi it had to start the entire settlement process afresh after a settlement negotiated in the 1990s fell apart. The current proceedings appear to have arisen out of conflicting ideas between the hapū about what they each considered the best course for settlement.

[5] Ngāti Irapuaia o Waioweka (Ngāti Ira), are one of the six hapū of Whakatōhea.[3] They first brought these proceedings in May 2023, at that time seeking interim orders intended to stop the Crown and the Whakatōhea Pre-Claims Settlement Trust (the Pre-settlement Trust) entering into a Treaty settlement. However, that application was ultimately unsuccessful, and since then a Deed of Settlement has been signed and the Whakatōhea Claims Settlement Act 2024 passed into law.[4]

[6] As a result, the proceedings have evolved significantly. By the time of hearing in August 2024, rather than challenging the validity of a proposed settlement, Ngāti Ira principally sought forward-looking declarations based on its tikanga. In effect, the applicants seek to regulate their future dealings with the Crown and Te Tāwharau, the post-settlement governance entity of Te Whakaōhea, by defining the obligations of them both in tikanga and under the Treaty of Waitangi. Ngāti Ira says declarations are necessary to avoid future breaches of its tikanga and co-option of its mana by the respondents. While the applicants accept they cannot now challenge the Treaty settlement, they say the conduct of the respondents during the settlement process illustrates a tendency to act contrary to tikanga, and therefore unlawfully.

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3 The other hapū of Te Whakaōhea are Ngāti Ngahere, Ngāti Patumoana, Ngāti Ruatakena, Ngāi Tamahaua and Te Ūpokorehe.

4 *Hata v The Attorney-General* [2023] NZHC 1255 [interim relief]. The Whakatōhea Claims Settlement Act 2024 came into force on 5 June 2024.

Background

[7] As these proceedings arise from disagreements that emerged during the settlement process, I begin with an outline of the recent history of Whakatōhea's efforts to settle their Treaty claims with the Crown.

Early Crown-Whakatōhea engagement in relation to settlement of historical claims

[8] In 1996, after considerable development of the Crown's Treaty settlement process, Cabinet agreed that the Government should place priority on negotiating and settling claims brought by iwi or iwi confederations as opposed to individual whānau and hapū.[5] This has been termed the "large natural groupings" policy and is reflected in the Crown's settlement guide *Ka Tika ā Muri, Ka Tika ā Mua — Healing the past, building a future* (commonly referred to as the *Red Book*).[6]

[9] In that same year, Treaty settlement negotiations were coming to an end between the Crown and 14 representatives of Whākatohea, with a Deed of Settlement eventually initialled.[7]

[10] Due to a number of different views within Whakatōhea, and objections about the conduct of the negotiators, the Deed of Settlement was withdrawn by the Crown on 31 March 1998. The then Minister of Treaty of Waitangi Negotiations, the Rt Hon Sir Douglas Graham, stated that in the circumstances it was best for the parties "to return to square one".[8] He noted he was not prepared to give Whakatōhea "any precedence over current or planned negotiations with other claimants". In other words, Whākatohea's Treaty settlement went to the back of the queue.

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5 Cabinet Strategy Committee "Treaty Settlement Policies: Report from Working Groups" (5 July 1996) CSC (96) M22/8.

6 Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua — Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018).

7 The 14 representatives were considered to be the most appropriate representatives for settlement purposes by the Māori Land Court. They represented six hapū of Whākatohea within the negotiations: see *The Whakatōhea Raupatu Claim* (1994) 69 Ōpōtiki MB 11 (69 OPO 11). The Treaty negotiations arose from a claim filed with the Waitangi Tribunal in 1989, and the subsequent decision of the iwi to halt the Tribunal inquiry and engage directly with the Crown in 1992.

8 Doug Graham "Whakatohea Deed of Settlement to be Terminated" (press release, 14 March 1998).

[11] The Waitangi Tribunal, in explaining this first attempt at settlement, said "the fallout from this period appears to have contributed further to a sense of grievance against the Crown and to 'suspicion, disunity and factionalism' within the iwi."[9]

A new beginning — Te Ara Tono

[12] Although the withdrawal of the settlement brought about a deep sense of disappointment for some, it also presented an opportunity for ngā hapū o Whakatōhea to resolve the tension that had been rising throughout the settlement process. Whakatōhea began discussing how to move forward together and settle their raupatu claims, ultimately leading to the establishment of the Whakatōhea Hapū Claims Process Working Party in October 2003. The working party was formed by hapū "[t]o investigate and develop options for resolving process issues to settle the Whakatōhea Raupatu Claims". Its focus was on the process of future Crown engagement, not on the terms of any future settlement.

[13] The group was again comprised of representatives of each hapū of Whakatōhea.[10] Mr Rua Rakuraku, a deponent for the applicants in the current proceeding, was one of the three members of Ngāti Ira on the working group. A draft report of recommendations was then sent to hapū and presented at a hui-ā-iwi on 27 June 2004. Following the feedback received from hapū and the hui-ā-iwi, a second draft was prepared and distributed to Whakatōhea whānui for consultation in October 2004. The final report, *Te Ara Tono Mo Ngā Kereme o Te Whakatōhea: Final Whakatōhea Raupatu Process Report* (*Te Ara Tono*), was adopted at a hui-ā-iwi in 2007 without controversy.

[14] *Te Ara Tono* recommended the adoption of guiding principles for the settlement process to ensure decision-making was tikanga-driven. In particular, the process was

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9 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018) [The Mandate Inquiry Report] at 15.

10 This included representatives of Ngāti Muriwai, although Ngāti Muriwai did not proceed to being a part of the Whakatōhea Treaty settlement.

to:

(a) be driven by hapū;

(b) be designed by Whakatōhea for Whakatōhea (not the Crown);

(c) achieve kotahitanga;[11]

(d) be inclusive and involve as many members of Whakatōhea in decision making as possible; and

(e) ensure that the settlement fits within a wider strategic plan for Whakatōhea.

[15] *Te Ara Tono* said it was imperative that Whakatōheatanga and tikanga were applied throughout the process. Whakatōheatanga is not explicitly defined within *Te Ara Tono*, nor was it directly defined in the submissions or evidence before me. However, when looking at the description of Whakatōheatanga within *Te Ara Tono*, the phrase speaks to the unique identity of Whakatōhea and concepts and values which are integral to that identity:

> Unlike some other iwi, Whakatōhea is not the name of an eponymous ancestor, but a name that portrays the characteristics, virtues and attributes of the tangata whenua that live in the area. The defining characteristic that is commonly spoken of is 'stubbornness'. The term stubbornness has both a positive and negative reality. In a positive context the term describes 'persistence', 'tenacity', perseverance, and doggedness. In a negative vein it describes, among others, 'inflexibility'. Other virtues that are commonly connected with stubbornness are stoical, and pragmatic.

[16] The report went on to note that Whakatōheatanga is underpinned by the concept of pou mana, the four sacred pillars of mana in te ao Māori — mana atua, mana tūpuna, mana whenua and mana tangata. It identified these pou as important to ensuring self-determination, empowerment, partnership, and inclusiveness. It also considered that the pou were fundamental to the application of Whakatōheatanga to the settlement process.

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[11] Kotahitanga includes unity, togetherness and solidarity. It encompasses collective action.

[17] Tikanga values, or "dimensions" as they are described in *Te Ara Tono*, were identified in the report alongside an explanation as to how each value was to be practically applied to the settlement process. The responsibility for the guardianship of Whakatōheatanga and the application of tikanga would lie with the kaumātua of Whakatōhea.[12] Engagement by and with kaumātua was therefore seen as essential to the settlement process. They were to play an advisory role to the working party and the Pre-Settlement Claims structure, guiding how tikanga was to be applied in the claims process.

[18] The tikanga identified in the report captures two main themes. First, Whakatōhea needed to stay united throughout the settlement process to ensure strength; this was emphasised by the focus on kotahitanga, especially when discussing issues that could arise throughout the process. Second, the process needed to be hapū driven; this was emphasised by the identification of kaumātua as key for ensuring hapū, whānau and marae participation within the settlement process, through processes of whanaungatanga, tino rangatiratanga, ngā tikanga and moemoeā o te whānau — the collective hopes or visions collectively held. It was also emphasised by the recommendation that any pre or post settlement body, including the mandated representatives, needed to be accountable to hapū.

[19] Guided by these pillars, *Te Ara Tono* recommended that four of the five major decisions that were to be made in relation to the settlement process were to be made by hui-ā-hapū.[13] A majority of each hapū would be necessary to indicate approval, and the decision would then be confirmed at an iwi level. The only decision that was not to be decided by hui-ā-hapū was the approval of the Deed of Mandate, which was to be resolved through online and postal voting. In describing *Te Ara Tono*, the Waitangi Tribunal commented:[14]

> In our view, 'Te Ara Tono' is a clear statement of hapū rangatiratanga in the particular circumstances of Whakatōhea. 'Te Ara Tono' highlights that Whakatōhea clearly envisaged that hapū decision-making would be central to

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12 The report uses the term "kaumātua" in a broad sense; encompassing Tauheke or Koroheke, Kuia, Tohunga, and "others who are commended by their own people to fulfil this role".

13 Those four decisions being approval of: the Whakatōhea Strategic Plan, Whakatōhea Settlement Policies, Whakatōhea Memorandum of Agreement; and the Trust Deed for the new Pre-Settlement Claims Structure.

14 The Mandate Inquiry Report, above n 9, at 28–29.

> the process of negotiating and settling with the Crown, including the process of establishing a mandate for negotiation.

The mandate process and subsequent Waitangi Tribunal inquiry

[20] Following the adoption of *Te Ara Tono*, a new group — the Whakatōhea Raupatu Working Party — was established to begin moving Whakatōhea towards the grant of a mandate. However, it was not able to finalise a mandating process before three hapū, Ngāti Ngahere, Ngāti Ira and Ngāi Tamahaua, withdrew.

[21] In 2010, Ngāti Ira, Ngāti Rua, Ngāti Ngāhere and Ngāti Patumoa came together as the Tū Ake Whakatōhea Collective (Tū Ake) to develop a mandating strategy. The Whakatōhea Māori Trust Board assisted Tū Ake to consult amongst Whakatōhea. A third working group was also established at this time, Te Ūpokorehe Treaty Claims Trust (Ūpokorehe Claims Trust), which began to develop a strategy for a parallel but non-competing mandate.

[22] Between 2010 and 2013, the working groups were largely unsuccessful in their attempts to work together. In late 2013, Tū Ake and the Raupatu Working Party both submitted mandate strategies to the Crown. The strategies had different focuses. Each had differences in the number of hapū they represented, and the Raupatu Working Party was only focused on settling the raupatu claims, whilst Tū Ake listed claims that went beyond this scope.

[23] In response, Crown officials encouraged the working groups to work together to develop a single mandating strategy. However, further attempts at a collective approach were unsuccessful, and by the end of 2015 the Crown began considering the Tū Ake strategy ahead of the others. In 2016, the Crown accepted that the Tū Ake mandate strategy was ready to call for submissions from Whakatōhea. There was strong opposition in the submissions received. The concerns expressed included the Crown's large natural groups policy and the perceived lack of hapū recognition and representation. Notwithstanding clear opposition, the Crown endorsed the Tū Ake mandate strategy in April 2016, approved pre-mandate funding, and allowed the strategy to be pursued.

[24] The second respondent, the Pre-settlement Trust, was formed as the mandated body for the purpose of Crown negotiations. The Pre-settlement Trust was to operate until settlement was reached, and a new Post-Settlement Governance Entity was to then be established. Fifteen trustees were to be appointed: one trustee from each of the six hapū; one trustee from each of the eight marae; and one trustee appointed by the Whakatōhea Māori Trust Board. The Pre-settlement Trust also had a Kaunihera Kaumātua (a kaumātua council), which could give non-binding advice to the trustees in exercising their functions under the Pre-settlement Trust Deed. The Kaunihera Kaumātua also played an important role in dispute resolution. Clause 16.2 of the Pre-settlement Trust Deed provided:

> Any dispute regarding membership of Whakatōhea or otherwise in connection with the tikanga, reo, kawa, whakapapa and kōrero of Whakatōhea shall be referred by the Trust to the Kaunihera Kaumātua. The Kaunihera Kaumātua may provide non-binding advice to the Trust on the manner in which the dispute should be resolved.

[25] There is no evidence before me to indicate whether this mechanism was ever used during the mandating process or in subsequent negotiations.

[26] Voting on the mandate took place between May and June 2016, through mandating hui and online and postal balloting. The Whakatōhea Māori Trust Board register was used, but adult members of Whakatōhea who were not registered with the Trust Board could still vote through a different process. A total of 1,571 votes were received from 6,662 eligible voters; 91.6% of votes supported the resolution appointing the Pre-settlement Trust as the iwi's mandated representative for settlement negotiations. A Deed of Mandate for Crown recognition was then prepared, and consultation on the Deed opened from October 2016.

[27] Again, groups within Whakatōhea opposed the proposed mandate. A day after the submissions closed, a petition was emailed to the Pre-settlement Trust from Te Ringahuia Hata, one of the applicants in these proceedings, on behalf of several hapū seeking to withdraw Waitangi Tribunal claims from the scope of the Trust's mandate. However, as the petition failed to meet the five per cent threshold required

to trigger an amendment to the Deed of Mandate, the Crown pushed on.[15] On 14 December 2016, the Crown formally recognised the Deed of Mandate and the Pre-settlement Trust's authority to negotiate on behalf of Te Whakatōhea.

[28] Urgent claims were then filed with the Waitangi Tribunal challenging the mandating process. Despite this, the negotiations between the Pre-settlement Trust and the Crown moved at considerable speed and an Agreement in Principle was entered into in August 2017.

[29] The Tribunal's Whakatōhea Mandate Inquiry Report, released on 12 April 2018, provided the following observation about the break-down within Whakatōhea over the mandating process:[16]

> During the hearing, we questioned a number of witnesses on why representatives of four hapū split from the Raupatu Working Party in 2010. We wanted to try to understand what had led to the breakdown following the consensus reached when 'Te Ara Tono' was adopted in 2007.
>
> There appears to be a complex range of factors that have prevented Whakatōhea coming together under an agreed structure for the purposes of settlement negotiations. These factors include residual division following the failed attempt at settlement in the 1990s, disagreement and mistrust over the appropriate role for the Trust Board, and differences in view about whether a Waitangi Tribunal historical inquiry should precede settlement negotiations.
>
> We would also observe that at least some of the opposition to attempts by Tū Ake to achieve a mandate appears to be largely political or personality driven rather than based upon genuine differences of view over principles such as hapū rangatiratanga or the merits of an alternative process such as a Tribunal inquiry.

[30] The Tribunal went on to conclude that the Crown had breached its obligation of active protection under the Treaty when advancing the Pre-settlement Trust's mandate:[17]

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

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15 The petition had 1,951 signatures but only 478 of the signatories were listed on the Whakatōhea Trust Board Register.

16 The Mandate Inquiry Report, above n 9, at 95–96.

17 At 92.

> We find that the Crown did not sufficiently inform itself of the true levels of support and opposition to the Pre-settlement Trust mandate prior to recognition and it thereby breached the Treaty principle of active protection.
>
> We find that the Crown failed to act reasonably to ensure an adequate means of voting on the mandate on a hapū basis. This was in contravention of what it knew was the tikanga endorsed by Whakatōhea in 2007. In failing to appropriately recognise hapū rangatiratanga in this way the Crown breached the principle of active protection.
>
> We find that the Crown failed to act reasonably when it approved a mandate that contains a withdrawal mechanism it acknowledges to be unfair. In failing to appropriately recognise hapū rangatiratanga in this way, the Crown breached the Treaty principle of active protection.

[31] The Tribunal recommended a pause in the negotiations and that Whakatōhea vote on how they wished to proceed with the negotiations.

Further settlement progress and a further Waitangi Tribunal inquiry

[32] In 2018 an iwi-wide vote was held on the future of the negotiations, voting on three separate questions. The votes were also broken down by hapū affiliation. There were a number of issues with the voting process, which made the result difficult to interpret. There was a modest majority of individual and hapū votes in favour of the Pre-settlement Trust continuing negotiations with the Crown.[18] There was also a clear majority of voters calling for the negotiations to stop so the Waitangi Tribunal inquiry into Whakatōhea's historical grievances could be completed. However, there was virtually no support for abandoning and repeating the mandating process.

[33] Following the vote, discussions occurred between the Crown and Pre-settlement Trust on how to proceed. In August and September 2019, the Crown decided to resume negotiations with the Pre-settlement Trust but also offered a parallel process in which the Waitangi Tribunal could begin an inquiry into Whakatōhea's claims while the negotiations proceeded in parallel.

[34] The Crown also required the Pre-settlement Trust to amend the withdrawal mechanism within the Deed of Mandate, to permit all Whakatōhea uri to use the mechanism, not just those registered with the Whakatōhea Māori Trust Board.

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[18] On an individual basis, 56 per cent of people voted in favour. On a hapū basis, four of the seven hapū voted in favour.

[35] In March 2021, a settlement package was approved by Cabinet, involving approximately $100 million in commercial and cultural redress, and an apology. The package also contemplated that the Waitangi Tribunal would be able to continue with its inquiry into historical Treaty breaches notwithstanding settlement, albeit without jurisdiction to make recommendations.

[36] In April 2021, the Crown approved a process for ratification of the settlement by members of Whakatōhea. Instead of ratification through hui-ā-hapū, as *Te Ara Tono* contemplated, the approach adopted was an uri vote alongside ratification information hui. The Crown considered this approach was consistent with its long-standing approach to ratification of Treaty settlements generally.

[37] The ratification process sparked a second urgent Waitangi Tribunal inquiry. On 10 December 2021, the Tribunal released *The Priority Report on the Whakatōhea Settlement Process* (the Priority Report).[19] The relevant findings were summarised by the Presiding Officer of the inquiry, Judge Doogan, in the report's covering letter:[20]

> 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
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> …
>
> On the role of hapū in the ratification process …
>
> … 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

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19 The Priority Report, above n 1.

20 At xv–xvi.

> 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 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.

[38] However, the Crown elected not make the recommended changes to the ratification process. The Crown and the Pre-settlement Trust initialled the Deed of Settlement on 23 December 2021. The Pre-settlement Trust then held a series of hui to discuss the settlement with members of Whakatōhea in 2022.

[39] During this period, four petitions were received by the Trust seeking an amendment to its mandate. Three of them did not meet the five per cent threshold of adult members of Whakatōhea, but one did. This was a petition by the Ūpokorehe Claims Trust, seeking to withdraw the mandate in respect of Te Ūpokorehe. However, the withdrawal of the hapū was not ratified by an iwi wide vote that took place in August 2022. As a result, under the terms of the Deed of Mandate, the petition was unsuccessful.

[40] In October 2022, Whakatōhea voted on the critical issues: approval of the Deed of Settlement, and on the proposed Post-Settlement Governance Entity, Te Tāwharau o te Whakatōhea. Two thirds of iwi members voted in favour of both the settlement and approval of Te Tāwharau as PSGE. Four of the six hapū clearly supported the proposals. The exceptions to the vote were Ngāti Ira, with 42 percent of its members voting in favour, and Te Ūpokorehe, with just over 50 per cent.

[41] The signing of the Deed of Settlement was set for 27 May 2023, the 183rd anniversary of Whakatōhea rangatira signing Te Tiriti o Waitangi.

Ngāti Ira brings proceedings to halt the settlement

[42] On 12 May 2023, the applicants, on behalf of Ngāti Ira, filed these proceedings. As initially filed, they sought judicial review of the decisions of the Crown and the

Pre-settlement Trust to enter into the Deed of Settlement. The applicants alleged the decision was unlawful as it breached tikanga Māori, relying on hapū rangatiratanga and hui-ā-hapū, and said it was also inconsistent with the Crown's obligations under the Treaty. The applicants also brought a claim against the Pre-settlement Trust, alleging the settlement process amounted to a breach of the Trust's duties to act in accordance with the terms of their Trust Deed and for a proper purpose.

[43] On the same day, the applicants sought interim orders preventing the Crown and Pre-settlement Trust from entering into the Deed of Settlement. Justice Cooke dismissed the application for three reasons:[21]

(a) the case advanced by the applicants was not strong because the way in which tikanga influenced the legal obligations of the Crown was more nuanced than that contended, as recognised by the findings of the Waitangi Tribunal;

(b) the orders sought went directly to preventing the legislature from proceeding with proposed legislation, making a grant of the orders inconsistent with the principle of non-interference; and

(c) the judicial review proceedings could have been advanced earlier, and granting the orders would be unfair to members of the iwi who supported the settlement.

[44] Following dismissal of the application for interim orders, the Deed of Settlement was signed on 27 May 2023. The relevant Bill was placed before the House, but Parliament was dissolved for the general election before it could be passed. The applicants wished to continue their proceedings, amending their pleading to seek declaratory rather than injunctive relief.

[45] In August 2023, Cooke J dealt with two interlocutory applications: one by the Crown to stay proceedings until the Bill was no longer before Parliament; and one by the applicants for orders that certain matters be determined as preliminary questions

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21 *Hata v Attorney-General* [interim relief] above n 4 at [27].

prior to trial.[22] The Judge declined both applications. In respect of the Crown application, he held that the general declarations sought about the legal rights of Ngāti Ira did not engage the principle of non-interference nor the Parliamentary Privileges Act 2014. There was therefore no need to stay the proceedings.[23] In respect of the Ngāti Ira's application, he held that having a separate questions hearing was likely to delay and further complicate the proceeding.[24] The questions the applicants sought to be determined were about the tikanga of Ngāti Ira. Cooke J did not accept Ngāti Ira's submission that the tikanga of other Whakatōhea hapū had no direct relevance to the question whether Ngāti Ira's tikanga was legally enforceable. That question could only be addressed if all the relevant circumstances, and the rights of other parties, were addressed.[25]

[46] On 4 April 2023, shortly before the Deed of Settlement was signed, Te Tāwharau was established and, subsequently, the Pre-settlement Trust dissolved. On 4 June 2024, the Whakatōhea Claims Settlement Act 2024 was given the Royal assent and the Act came into force on 5 June 2024.

Te Tāwharau and the terms of the Trust Deed

[47] When Te Tāwharau was first established in April 2023, "Establishment Trustees" were appointed. They had carefully circumscribed duties, and essentially acted as caretakers until the first election of trustees could be held. Clause 3.4(b) of the Trust Deed defined the Establishment Trustees' powers as follows:[26]

> …
>
> (b) Notwithstanding subclause (a) the Establishment Trustees' powers shall be limited to operational and core matters related to:
>
> a. signing the Deed of Settlement;
>
> b. supporting Whakatōhea settlement legislation through the legislative process;

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22 *Hata v Attorney-General (No 2)* [2023] NZHC 2919.
23 At [41].
24 At [58].
25 At [52].
26 The Te Tāwharau Trust Deed is referred to as the Trust Deed throughout this judgment.

c. preparing for and holding initial elections; and

d. convening the first Annual General Meeting.

[48] Following a general election at the first Annual General Meeting in November 2023, the first group of Trustees were appointed to Te Tāwharau in March 2024. At this point, the Establishment Trustees had resigned. The Trust Deed provides for a total of 16 trustees: two elected by each hapū, and up to four general Whakatōhea Trustees elected by all members of the iwi, with one of these general positions held for a Rangatahi Trustee.[27]

[49] It should also be noted that there is in fact no overlap between the current Trustees of Te Tāwharau and the Establishment Trustees. In accordance with sch 2 of the Trust Deed, Establishment Trustees were not eligible to stand in the election.

[50] The powers of the Elected Trustees are broader than those of the Establishment Trustees. As noted in cl 3.4(a) of the Trust Deed:

> (a) Subject to any requirements imposed by this Trust Deed, the Deed of Settlement, the Settlement Act and in accordance with law, the Trustees shall control and supervise the business and affairs of the Trust in such a manner as they, in their sole discretion, see fit …

[51] The duties of the Trustees are set out in cls 4.1 to 4.3 of the Deed. The guiding principle is that in exercising their powers and functions, each Trustee must have regard to "the context of the Trust and the Trust's purpose".[28] The context of the Trust is not defined. But it clearly arises from the Treaty settlement and the beneficiaries of the Trust. This would necessarily incorporate notions of tikanga to the extent tikanga is not inconsistent with the terms of the Trust.

[52] Clause 2.4 of the Trust Deed defines the "Trust's purpose" as:

> 2.4 Object and purpose of Trust
>
> The purpose for which the Trust is established is to receive, manage, hold and administer the Trust's Assets and liabilities on behalf of and for the benefit of the present and future members of Whakatōhea in accordance with this Trust Deed and for any purpose beneficial to Whakatōhea.

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27 These Trustees are referred to as the "Elected Trustees" throughout this judgment.
28 Trust Deed, cl 4.1.

[53] "Whakatōhea" is defined expansively to include all individuals who whakapapa to one or more "Whakatōhea Ancestor", and the six hapū of Whakatōhea: Ngāti Rua; Ngāti Tamahaua; Ngāti Patumoana; Ngāti Ngāhere; Ngāti Ira; and Te Upokorehe. The members of Whakatōhea are, therefore, the beneficiaries of the Te Tāwharau.

[54] As noted, most decisions about the Trust are made by the Trustees who represent each hapū of Whakatōhea. The Trustees are, however, accountable to the beneficiaries through the Annual General Meetings, or any other Special Meetings that are to be called. At the Annual General Meetings a number of matters are discussed, including the operations of the Trust during the Income Year, the Annual Report, the Annual Plan, and any other general business that is raised at the meeting. There may also be resolutions that require a vote, or that Trustees consider require a vote, by all members of Whakatōhea. Votes are undertaken at general meetings and are done on a majority basis.[29]

[55] The Trust Deed also allows for the establishment and facilitation of other committees. Two committees relevant to these proceedings are Te Tohearau and the Taumatua Kaumātua. Te Tohearau is an ad hoc tikanga committee that may be established by the Trustees. Clause 5 of the Trust Deed outlines the scope and role the tikanga committee as follows:

> **5.1 Appointment of Te Tohearau -Tikanga Committee:**
>
> The Trustees may from time to time establish Te Tohearau on such terms of appointment, and subject to such rules and regulations, meeting procedures and processes, as may be prescribed by the Trustees from time to time. The Trustees shall, when making appointments, take into consideration the desirability of Te Tohearau being broadly representative of Whakatōhea.
>
> **5.2 Role of Te Tohearau -Tikanga Committee:**
>
> Te Tohearau will make determinations and give guidance on any issue of Whakatōhea tikanga, reo, kōrero and/or whakapapa that is referred to it by the Trustees. These determinations will be definitive for the purposes of Whakatōhea, and the Trust will take them into account in the achievement of its objectives and purposes and where appropriate communicate to Whakatōhea at the Annual General Meeting

[29] Except special resolutions which require no less than 75 per cent of Whakatōhea to vote in favour.

…

5.4 Trustees not to be members:

A Trustees may not contemporaneously with his or her holding office as Trustee be appointed to or remain part of Te Tohearau.

[56] The members of the Taumatua Kaumātua, however, are not appointed by the Trustees with specific rules or restrictions. Rather, they are a collective of "Whakatōhea Elders" who meet from time to time to discuss and be informed on the matters important to Whakatōhea. The Deed provides that Te Tāwharau will facilitate and support the Taumatua Kaumātua "as is required".

[57] The establishment of these committees under the Trust Deed again suggests that tikanga plays a central role in the business of Te Tāwharau. Alongside a dispute resolution mechanism set out in the Trust Deed, Te Tohearau and the Taumatua Kaumātua are envisaged as playing an important role if there is a disagreement concerning tikanga.[30]

Ngāti Ira's claim and the respondents' position

Ngāti Ira's tikanga and its refined claims following the Treaty settlement

[58] Ngāti Ira's claim centres around five principal tikanga concepts. They are referred to in the statement of claim as the "Relevant Tikanga". The concepts are:

(a) hapū rangatiratanga;

(b) hui-ā-hapū;

(c) ahi kā or ahikāroa;

(d) mana i te whenua; and

(e) Te Whakatōhea hapū tikanga.

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[30] Clause 34 of the Trust Deed provides machinery for the referral of disputes between members of Whakatōhea, or between the Trustees and any members of the tribe, to a disputes committee.

[59] Ngāti Ira explain these values by relying on the evidence of Mr Te Rua Rakuraku, a pou tikanga for Ngāti Ira, and Dr Te Riaki Amoamo, who is a pou tikanga for Ngāti Rua. Pou tikanga are kaitiaki of knowledge, whakapapa, tikanga, and kawa, and help maintain the future wellbeing of their hapū. They are fluent in te reo Māori and are lifelong practitioners of tikanga. Their whakaaro and kōrero, accordingly, carry mana.

[60] The proceedings heavily focused on two aspects of the Relevant Tikanga — hapū rangatiratanga and hui-ā-hapū. The former concept refers to the substantial independence and autonomy of hapū within Whakatōhea, whilst the latter is one of the fundamental ways in which Ngāti Ira exercises its hapū rangatiratanga. Hui-ā-hapū involves holding hui on the marae of the hapū, called and led by pou tikanga, in order to make decisions on behalf of the hapū in accordance with their tikanga.

[61] The other principles forming part of the pleaded Relevant Tikanga are intertwined with hapū rangatiratanga and hui-ā-hapū. As Mr Rakuraku explained in his evidence:

> Hapū rangatiratanga is indivisible from te mana o te hapū. It is by our mana i te whenua and our exercise of ahī ka that we have maintained authority within our rohe. When we exercise our rangatiratanga we do so to support and respect our mana and tikanga. As our mana stems from our whakapapa to our tipuna, to the atua and to our rohe, we owe obligations to ensure that our mana and authority are not misused.
>
> This means that our hapū rangatiratanga includes the right to speak for ourselves and to decide who we tautoko and lend our mana to. That is what rangatiratanga means: the right to decide how our chiefly mana is utilised by ourselves and by others.

[62] Mr Rakuraku deposed that mana i te whenua is similar to hapū rangatiratanga, as it refers the determination of authority and obligations at a place. This authority at place is determined through ahikāroa, literally translated to "keeping the home fires lit", which is a process of maintaining connection to a place through occupation, use, and exercising tikanga at that place. It also brings in notions of whakapapa and mana.

[63] All of these concepts are captured within Te Whakatōhea tikanga. As both Mr Rakuraku and Dr Amoamo explain, the culmination of these concepts means that each hapū of Te Whakatōhea speaks for itself, and no hapū can tell another hapū what

to do or what its tikanga is. To do so would be an affront to the mana of the hapū and the mana of the pou tikanga of that hapū. This is why neither Mr Rakuraku nor Dr Amoamo accept there is a Whakatōhea "iwi" tikanga, as this would involve one hapū speaking for another. They accept the whakapapa links between each hapū place obligations on each hapū to exercise manaakitanga to one another, and thus do not exclude one another, but say this still needs to be exercised within the context of hapū rangatiratanga and mana i te hapū.

[64] Counsel for Ngāti Ira emphasised during the hearing that "iwi rangatiratanga" cannot override hapū rangatiratanga. As Dr Amoamo explained in his evidence, the iwi only exists when all six hapū are acting together — hence the name *ngā hapū* o Te Whakatōhea. Put another way, iwi rangatiratanga can only be exercised in Whakatōhea when all six hapū, in exercising their hapū rangatiratanga, have all chosen and agreed to support each other in a certain course of action. Accordingly, there can never be a situation where iwi rangatiratanga would outweigh hapū rangatiratanga. It is therefore wrong to characterise hapū rangatiratanga as a "veto right", as the respondents have done.

[65] In practical terms, this means decisions can only be made at a hapū level. Each hapū tries to reach consensus so as to support each other, but this does not mean that a hapū must support the work of other hapū if that is not what it decides in accordance with its tikanga. Whakatōhea kotahitanga (unity) does not override hapū rangatiratanga.

[66] Counsel for Ngāti Ira submit the existence of the Relevant Tikanga is not in issue in these proceedings. The Pre-settlement Trust and Te Tāwharau accept that Ngāti Ira has hapū rangatiratanga within its rohe and that hapū rangatiratanga must be respected. While the Pre-settlement Trust and Te Tāwharau have pleaded other tikanga concepts, such as hui-ā-iwi and iwi rangatiratanga, and claim that hapū rangatiratanga must be exercised so that all six hapū of Whakatōhea adopt decision-making processes which promote the wider interests of Whakatōhea iwi, Mr Hodder KC argued the second and third respondents have not provided any evidence to contradict or undermine Ngāti Ira's evidence on its own tikanga, as pleaded.

[67] Ngāti Ira argues that to the extent the Attorney-General disagrees with, or denies the existence of, the Relevant Tikanga, there is no evidential foundation for the pleading or submission. The Attorney-General has not provided any expert evidence on tikanga, nor could the Attorney claim any knowledge or expertise of ngā tikanga a ngā hapū o Te Whakatōhea.

[68] At the hearing, counsel for Ngāti Ira also addressed me on *Te Ara Tono* and the tikanga principles and processes contained within it. Mr Hodder submitted that the approach adopted in the document did not bind Ngāti Ira to a specific articulation of tikanga either at the time it was made, or subsequently. In accordance with hapū rangatiratanga, the hapū is entitled to change its mind. Further, as Mr Rakuraku highlighted in his evidence, a single document cannot "freeze" tikanga. As such, the document cannot be treated as decisive, in terms of Ngāti Ira's previous acceptance of the process set out within it.

[69] Accordingly, Ngāti Ira has established it holds hapū rangatiratanga and mana within its rohe, and on the evidence and pleadings the Court is bound to find the Relevant Tikanga established.

[70] Ngāti Ira says there is an ongoing risk of "co-option and usurpation" of its mana and rangatiratanga by the Crown and Te Tāwharau because of the past actions of the Crown, the Whakatōhea Māori Trust Board, the Pre-settlement Trust and Te Tāwharau. The applicants rely on what they say are historical infringements of their tikanga by the respondents throughout the Treaty settlement process to show there is a foundation for future concern, and that declarations are necessary.

[71] To illustrate the existence of a future risk of a breach of its tikanga, Ngāti Ira say that despite their constant opposition to settlement, which was a position confirmed at a number of hui-ā-hapū, the respondents pushed on with the settlement process and eventually signed a Deed of Settlement.

[72] Counsel also point to the actions of the Crown, arguing that it not only breached the Relevant Tikanga by ignoring assertions of hapū rangatiratanga, but it also consistently breached the Treaty throughout the process. The Crown ignored the

findings of the Waitangi Tribunal in the Priority Report by conducting a wider iwi vote for ratification, prioritising the individual voice over collective hapū voices, and did not hold hui-ā-hapū. Accordingly, the Crown continued to breach the Treaty principles of rangatiratanga and active protection.

[73] The Pre-settlement Trust also infringed hapū rangatiratanga by rejecting petitions from Ngāti Ira attempting to withdraw under the withdrawal mechanism. In doing so, the Pre-settlement Trust said there were fictitious names on the petition and that several voters were not Māori—undermining the mana of the pou tikanga of Ngāti Ira, who had verified the signatures.

[74] There have been instances beyond the settlement context where the Whakatōhea Māori Trust Board has also purported to represent Ngāti Ira despite Ngāti Ira's rejection of a position adopted by the Board. The evidence points to two examples. First, the Whakatōhea Māori Trust Board filed a claim on behalf of all Whakatōhea for customary marine title, and related orders, under the Marine and Coastal Area (Takutai Moana) Act 2011. This was brought without the support of Ngāti Ira. Second, the Trust Board claimed to support a marina development on behalf of all Whakatōhea in the face of opposition from Ngāti Ira.

[75] As a result of these previous breaches of tikanga and obligations under Te Tiriti, Ngāti Ira contends there is a risk breaches will occur again in the future in the absence of declarations by the High Court. As there is an ongoing relationship between the Crown and Te Tāwharau, and Te Tāwharau has now taken on the functions of the Whakatōhea Māori Trust Board and the Pre-settlement Trust, there are opportunities for continuous breaches to occur. Ngāti Ira also points to the refusal of Te Tāwharau to agree to declarations to resolve these proceedings as the Trust considers such declarations would be inconsistent with the Trust Deed. In Ngāti Ira's submission, Te Tāwharau's view of the requirements of the Trust Deed indicate a clear intention to deny its hapū rangatiratanga in the future.

[76] In its first two causes of action, Ngāti Ira seeks declarations against the first and third respondents in broad terms. The declarations are:

(a) It would be a breach of the Relevant Tikanga as law, and the Crown's obligations under the Treaty of Waitangi and its principles, for the Crown to permit the "inclusion of Ngāti Ira in any agreement or compact when the hapū does not consent to being so included"; and/or

(b) Ngāti Ira continues to have existing rights to create, guard and exercise its Relevant Tikanga and to have that Relevant Tikanga recognised and protected by the Crown, including in all dealings by the Crown with Ngāti Ira and in its rohe; and/or

(c) The Crown must not, in any dealing with third-parties or Crown-related agencies and organisations, represent that any other body or group has authority to represent or speak for Ngāti Ira, in relation to activities in its rohe; and

(d) As against Te Tāwharau, that it "has no basis in tikanga to purport to represent Ngāti Ira".

[77] Ngāti Ira's third cause of action is a claim in breach of trust by Te Tāwharau. Counsel for Ngāti Ira argues that the Trust Deed, and trust law generally, requires the Trustees to comply with tikanga. Given what it says are historical failures to comply with its tikanga (as required under the Deed of Trust), Ngāti Ira seeks a direction under s 127 of the Trusts Act 2019 restraining Te Tāwharau from making "any further decisions" which "purport to represent or bind Ngāti Ira as a hapū without the consent of the hapū obtained in accordance with the Relevant Tikanga".

The position of Pre-settlement Trust and Te Tāwharau in response

[78] The overlap in submissions between the second and third respondents in the proceedings was substantial. As such, it is appropriate to outline their joint position and highlight only specific points of difference.

[79] Both parties oppose the declarations for two reasons. The first is that the Relevant Tikanga, as asserted by the applicants, is not a true reflection of the tikanga of Te Whakatōhea. Mr Pou, for the Trustees of the Pre-settlement Trust, submitted that

the way in which Ngāti Ira seeks to assert its hapū rangatiratanga against the will of the iwi and all other hapū distorts the tikanga of Te Whakatōhea. He urges the Court to consider *Te Ara Tono*, which is a document that Mr Rakuraku had a direct role in preparing and promoting. *Te Ara Tono* reveals the vision of hapū rangatiratanga in a Whakatōhea context. It focuses on kotahitanga and the applicant's description of hapū rangatiratanga seeks to fragment this. Mr Pou argued both of the Trusts have followed the processes and upheld the values set out in *Te Ara Tono*. As such, they have not breached any relevant tikanga.

[80] Mr Pou also argued the applicants' asserted definition of hapū rangatiratanga is contrary to the position Dr Amoamo adopted before the Waitangi Tribunal during its inquiry into the Whakatōhea mandate process. Dr Amoamo gave evidence that the best way for Whakatōhea to move forward was united as an iwi, looking at the collective future of Whakatōhea. He spoke against hapū wanting to go their own way. Mr Pou says the positions now adopted by Mr Rakuraku and Dr Amoamo would mean they are effectively claiming to have breached tikanga themselves.

[81] Second, both parties warned of the dangers of this Court making abstract declarations about tikanga. Mr Pou in his submissions highlighted the importance of tikanga and its recognition in our legal framework. While he acknowledges that tikanga was important to the way in which the Trustees of the Pre-settlement Trust discharged their duties, he says that discerning the existence and requirements of tikanga involves a factual context. That assessment requires an evaluation of what is asserted and how certain tikanga principles apply to that situation, which is missing in the present case. And, importantly, the impact on others who might assert tikanga in a different way also needs to be considered. He highlighted that no other hapū from Whakatōhea have been able to have their say in these proceedings. They are not joined as parties, and their positions are unknown. The declarations sought would, however, affect their interests, given those who whakapapa to the other hāpu are all beneficiaries of Te Tāwharau.

[82] Without this context and the voices of others within Whakatōhea, the Court would be asserting ad hoc rules about tikanga when making the declarations sought. As such, any declaration would be disconnected from tikanga.

[83] Both parties relied on the evidence of Dr Te Kahautu Maxwell, from Ngāti Ngahere, in support of these submissions. Dr Maxwell, in his evidence, expressed concern as to how this Court could be asked to make decisions on the way Te Whakatōhea organises itself. He went on to say:

> You cannot learn what you would need within any hearing process which seems to be an effort to substitute for our own Whare Wānanga and our own way of talking to each other. I therefore hold reservations about the utility of a process that has our internal issues raised in a forum where we publicly criticise each other in [Pākehā] processes outside of our rohe so that someone with no whakapapa can tell us what our tikanga is.

[84] He says he does not mean any disrespect to the kaumātua who have given evidence in support of this application, nor does he mean to diminish their mana, but he is concerned their kōrero has been manipulated for this claim.

[85] Dr Maxwell was one of the people who tried to halt the settlement in 1996 and he has seen the opportunities missed because of that decision. He said this has changed his focus to ensuring that the future generations of Whakatōhea can flourish. This does not mean hapū cannot exercise their independence, or hold representative bodies to account, but all hapū need to remind themselves of the strength in unity to ensure the benefits for future generations. Dealing with different issues individually as hapū goes against the way Te Whakatōhea tīpuna have dealt with issues historically.

[86] As a separate procedural point, Mr Carruthers KC, for the Establishment Trustees of Te Tāwharau, notes there is no basis to make declarations against them because of their limited role under the Deed of Trust, and the fact they are no longer in office. Under the Trust Deed, the Establishment Trustees did not have the same powers as the current Elected Trustees. They could only engage in core operational and planning matters. Their role has come to an end following elections last year, and they will, therefore, not engage in any future conduct that could support a declaration. Accordingly, the declarations have no utility against the second respondents. Mr Carruthers also opposed an order the applicants seek substituting the Establishment Trustees for the Elected Trustees.

Position of the Attorney-General

[87] The Attorney-General, on behalf of the Crown, also opposes the grant of relief. Mr Linkhorn expressed concern about declarations of this kind being made in the abstract.[31] Ngāti Ira is asking for primacy of certain tikanga values ahead of others without identifying a live controversy. Declarations of this kind would be inappropriate in the current circumstances, especially as other hapū who would be affected by such a decision are not present and there remains a controversy in the present case about the scope and content of the relevant tikanga, and the relationship between Ngāti Ira's pleaded rights in tikanga, and those of Te Whakatōhea and the other hāpu, which cannot be reconciled on the current evidence. This would not prevent this Court's intervention in the future if a live dispute, likely involving a nuanced and specific factual background, was to occur.

[88] Mr Linkhorn adds that there is also no legal basis for declarations that seek to enforce tikanga or the Treaty of Waitangi directly against the Crown absent statutory incorporation. In a similar vein, he argues there is no legal basis for a standalone cause of action under the Treaty of Waitangi.

[89] Although Mr Linkhorn seemed to accept that the Tribunal had made adverse findings against the Crown in respect of some of its conduct throughout the settlement process, he argued that the Tribunal reports do not necessarily support the position Ngāti Ira now adopts. At no point did the Tribunal express a view that the Whakatōhea settlement required consent by each hapū reached through hui-ā-hapū. Nor did it express any view which supports the claim that Whakatōhea tikanga does not provide for instances in which the iwi may move together despite the opposition of one hapū. The position revealed in the Tribunal reports are a far more nuanced view of the relationships between hāpu than the simplistic claim now advanced by the applicants, and included an acknowledgement of the potentially damaging consequences of one hapū withdrawing from the settlement.[32]

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31 See *Kamo v Minister of Conservation* [2020] NZCA 1 at [25] and [27]; *Pouwhare v Kruger* HC Wellington CIV-2009-485-976, 12 June 2009 at [26]–[27]; *Ambrose v Attorney-General* [2012] NZAR 23 (HC) at [51]], and discussed in *Shark Experience Ltd v PauaMAC5 Inc* [2019] NZSC 111, [2019] 1 NZLR 791 at [115].

32 The Priority Report, above n 1, at 137–138 and 148.

[90] On the point of breach of trust, and the general action taken against the Pre-settlement Trust and Te Tāwharau, Mr Linkhorn submitted that if Trustees vote in line with their hapū, rather than in line with the interests of Whakatōhea, they act in breach of the Trust Deed. The Trust Deed provides that Trustees have a duty to all Whakatōhea beneficiaries, and not one group or subset over the other. Counsel also drew the Court's attention to the mechanisms under the Trust Deed for resolving disputes at tikanga and noted that these mechanisms have not yet been used. These tell against a grant of relief.

The applicant's substitution application

[91] As I have noted, Ngāti Ira originally commenced this proceeding in May 2023, as a challenge to the proposed settlement of Whakatōhea's historical Treaty claims. At that time, the only respondents named as parties were the Attorney-General and the then Trustees of Pre-settlement Trust.[33] Shortly after, the Establishment Trustees of Te Tāwharau were also joined as the third respondents.

[92] Under Te Tāwharau's Deed of Trust, the Establishment Trustees were merely caretaker trustees pending an election of the first set of Trustees of Te Tāwharau. That election occurred in 2023, with the results being declared by the returning officer on 28 November of that year. Subsequently, the annual general meeting at which the Elected Trustees were formally appointed was held on 9 March 2024. At the same time, the Establishment Trustees resigned their office. I was advised that as at the date of the hearing, the trust assets had not yet vested in the Elected Trustees.

[93] Shortly before the hearing, the applicants advised the Court they would seek an order substituting the named Establishment Trustees as the third respondents with the Elected Trustees who had succeeded them, under r 4.56 of the High Court Rules 2016.

[94] Mr Carruthers, on behalf of Te Tāwharau, opposed the order for substitution. First, he submitted that as the Establishment Trustees had ceased to hold office, there

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[33] Being the mandated authority which had conducted the relevant negotiations with the Crown and with whom the Deed of Settlement was to be signed.

was no utility in granting a declaration or orders against them. Their role had come to an end and there was no utility in the grant of relief. Second, Mr Carruthers argued that as the Elected Trustees had only recently succeeded to their office, none of the alleged and historical breaches of tikanga on which Ngāti Ira's claim rests could be sheeted home to them. As the applicants had also abandoned their claim for relief against the third respondents for breach of trust, Mr Carruthers invited the Court to dismiss both the application for substitution and the claim as a whole.

[95] Related to these issues is an obvious natural justice concern, given the applicants seek relief against the recently elected Trustees relating to alleged conduct they were not a party to and have not had an opportunity to respond to in evidence.

[96] In response to a question from me, Mr Carruthers refined his clients' position. I took him to accept that they did not contend the proceeding should be dismissed simply because there were new Trustees who had not been named as the relevant parties (apparently due simply to oversight). Rather, the accession of the Elected Trustees meant the Court should not exercise its discretion to grant relief against the Elected Trustees, if substitution were granted. As I noted at the hearing, the former position is unattractive, because it would not address the underlying issues between the parties and would invite a fresh round of litigation about the same underlying concerns. Because of this, and because the grant of substitution will not create unfairness to the Elected Trustees given the way I have approached the issues, it is appropriate to grant Ngāti Ira's application for substitution and I do so accordingly, having regard to the relevant principles.[34]

Tikanga as law in Aotearoa

[97] Tikanga as a set of binding principles, values, and traditions has regulated Māori society since time immemorial. It is a system of law in its own right, but it is more than simply that. As Tā Hirini Moko Mead wrote, tikanga can be considered in different ways: as a means of social control; a consequence and source of Māori

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[34] Formally, I grant the applicants leave to strike out the named third respondents and to add the Elected Trustees as the third respondents. For the relevant principles, see Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at HR4.56.04 and HR4.56.05.

identity; a connection to the atua; a normative system; an ethical system; a form of economic activity, and the practice of mātauranga Māori and Māori philosophy.[35]

[98] The core elements or "principles" of tikanga — including whakapapa, whanaungatanga and manaakitanga — were considered by the Supreme Court in *Ellis v R (continuance)*, and the Law Commission's important paper, *He Poutama*.[36] I do not repeat them here but deal with the specific tikanga principles to the extent they are relevant in this proceeding.

[99] Elements of tikanga Māori have also formed part of the common law of Aotearoa since the earliest days of European interaction with Māori. *Ellis v R (continuance)* recognised the developing place of tikanga, but also identified the risks presented by greater dialogue with the common law.[37] While judges must increasingly work with tikanga, "they have neither the mandate nor the expertise to develop or authoritatively declare the content of tikanga".[38] Williams J said, "as with legislation, those roles belong in another place".[39]

[100] Natalie Coates, writing shortly before the release of the Supreme Court's judgment, also sounded a note of caution. For Coates, the revitalisation of tikanga raises a question of forum, and the need to consider whether a court is the appropriate place for determining questions of tikanga:[40]

> Given this revitalisation I think that one of the matters that will need to be grappled with over time is a delineation of what is appropriately dealt with by the Courts and what is (or should be) the preserve of tikanga. Although Courts have a role of determining existing rights under law—not every matter will be something that the Courts should deal with. It would be a tragedy if Courts became a primary mechanism through which tikanga is expressed and determined and Māori disputes are resolved. As Māori redevelop, rebuild and regain confidence in their own institutions and processes, these will hopefully be seen as preferable forums for dispute resolution.

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35 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 5–8.

36 Te Aka Matua o te Ture New Zealand Law Commission, *He Poutama* NZLC SP24, September 2023 at [3.16]; *Ellis v R* (continuance) [2022] NZSC 114, [2022] 1 NZLR 239 at [85] and *Statement of Tikanga of Sir Hirini Moko Mead and Professor Pou Temara* (SC 49/2019, 31 January 2020) at [29]-[37] and [57]–[104].

37 *Ellis v R (continuance)*, above n 36, at [270] per Williams J. See also Glazebrook J at [120].

38 At [270].

39 At [270].

40 Natalie Coates "How can we Protect the Integrity of Tikanga in the Lex Aotearoa Endeavour" (2022) 17 OLR 223 at 236.

> Further, there may be instances where even if issues come before Courts where it is appropriate for them to defer to tikanga or tikanga processes. …

[101] However, there are also clear limits on the extent to which tikanga will be relevant to matters before the courts, and indeed the extent to which tikanga is law. The Law Commission considered one of the principles informing engagement with tikanga is that the common law cannot give effect to tikanga where it is contrary to statute, "or to fundamental principles and policies of the law."[41]

[102] Four further emergent themes from recent authority have particular relevance to this case:

(a) The proper application of tikanga is context dependent.

(b) The principles of tikanga form a connected weave of values and customs. In a given situation, several principles will usually be relevant, and may be in tension. Each principle needs to be weighed. This is one reason why context is so important.

(c) Tikanga informs not only the substance of a decision but is also the process by which it is made. Resort to the court to determine issues of tikanga may itself be inconsistent with tikanga.

(d) The courts need to take care not to impair the operation of tikanga as a system of law and custom in its own right.

[103] I turn to consider these themes in greater detail.

The application of tikanga is context dependant

[104] In their judgments in *Ellis v R (continuance)*, both Glazebrook and Williams JJ acknowledged the importance of context to the consideration of tikanga in any given case. For Glazebrook J, tikanga needs to be considered "where it is relevant to the circumstances of the case".[42] In those cases, the common law method of incremental

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41 *He Poutama*, above n 36, at [8.39(f)].
42 *Ellis v R (continuance)*, above n 36, at [117].

law making will address questions such as the compatibility of tikanga and common law principles.[43] And the significance of tikanga will also depend on context:[44]

> In some cases, tikanga and its principles may be controlling: for example, where Treaty principles and/or tikanga have been incorporated into statute in a manner that makes them so, or where the factual context justifies it. In other cases, tikanga principles or values may be relevant considerations alongside other relevant factors. Tikanga may be relevant to explain the social and cultural framework for the actions of Māori parties. In still other cases, tikanga principles and values may have an influence on the development of the common law. They can also provide a new vocabulary or new way of thinking about new concepts of law or a new intellectual framework for those concepts.

[105] Justice Williams also addressed the important question of the weight to be accorded to a relevant tikanga principle where it is relevant to the disposition of the matter between the parties. In his view, context will be the best guide:[45]

> The more difficult task is in determining the weight the relevant tikanga principle should carry in the determination. Should it be the controlling rule or principle, or merely an ingredient in a more multi-layered analysis? Again, the best guide will be context. A dispute taking place entirely within Te Ao Māori or one in which the disputants' expectations are that tikanga should be the controlling law is likely to be resolved according to tikanga, whether it is resolved by the community or by the courts. This is, for example, how the Native (and later Māori) Land Court awarded customary title between competing hapū. On the other hand, a dispute taking place at the point of intersection between Te Ao Māori and the wider community is likely to require careful weighing of common law and tikanga principles according to facts and the needs of the case. This is the kind of controversy that is more likely to come to the courts. Here, tikanga will be an ingredient in a broader analysis in which the common law has already developed relevant rules or principles that must be taken into account. The significance of any contest between these competing considerations (if in fact they are in competition) will depend on the case. This considering and weighing of sometimes incommensurable principles will be familiar to environmental and family lawyers, among others.

[106] The Supreme Court returned to consider the centrality of context to the proper application of tikanga itself in *Wairarapa Moana Ki Pouākani v Mercury NZ*.[46] When considering competing claims by hapū and iwi to resumption of land, and the significance of mana whenua to the exercise of the Waitangi Tribunal's powers, the

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43 At [116].
44 At [118]. Footnotes omitted.
45 At [267]. Footnotes omitted.
46 *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767.

majority observed that "in tikanga, as in law, context is everything". The Court went on to say that:[47]

> It is dangerous to apply tikanga principles, even important ones, as if they are rules that exclude regard to context.
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> …
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> [E]ven within its own tikanga framework, mana whenua is neither immutable nor incapable of adaptation to new circumstances. Every system of law recognises that core principles, applied to real life, will have exceptions and adaptations. Indeed, as the matanga (experts) noted in the course of the tikanga wananga held by the Tribunal prior to completion of its preliminary report, tikanga is a principles-based system of law that is highly sensitive to context and sceptical of unbending rules. *This is not a matter of compromising tikanga, but of applying it to context*.

[107] The Supreme Court considered the Tribunal had not refused to apply tikanga, but rather, it had concluded that mana whenua need not be "the controlling tikanga" because other tikanga principles were "also in play".[48]

[108] A similar conclusion was reached in *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*.[49] There, Palmer J said that "tikanga is inherently contextual", and "[t]he principles that are relevant will depend on the context of the particular issue that arises, holistically".[50]

[109] In *Pokere v Bodger*, a case that considered the influence of tikanga on the duties of trustees, the Māori Land Court drew a comparison between the requirements of tikanga and the relational nature of fiduciary law.[51] In doing so, the Court also emphasised the context specific nature of tikanga:[52]

> Similar to fiduciary law, where the duties and remedies arise based on the nature of trustee/beneficiary relationship, as opposed to prescription, tikanga is also relational and context specific.

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47 At [74] and [76]. Emphasis added.

48 At [77].

49 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2023] 3 NZLR 601 [*Ngāti Whātua Ōrākei*].

50 At [311].

51 *Pokere v Bodger – Ōuri 1A3* (2022) 459 Aotea MB 210.

52 At [103]. At [111] of the decision, the Court observed: "For completeness, we find that tikanga did not give Ms Warren a right of veto over decisions about the Whare. Veto is not a concept that sits comfortably within this context of tikanga."

[110] These judgments recognise a core feature of tikanga. As a set of rules, principles and norms that are practiced, it loses something when explained "in the abstract".[53] And the weight to be attached to the relevant principles is very much dependent on the circumstances in which the issue arises for determination. For that reason, abstract pronouncements by a court of something as "tikanga" or not are unlikely to provide a practical answer to the question: what is tika *in this situation*? These aspects of tikanga have significance at the point of intersection with judicial process. It is not enough to simply identify a relevant tikanga principle or principles and apply it to the facts as found. The correct answer in tikanga will require all the nuance and subtlety with which it is applied in practice by Māori, recognising its inherent adaptability.

Tikanga as an interconnected set of principles

[111] Tikanga is an interconnected set of principles where more than one principle is likely to be relevant to a specific issue or problem.[54] This interconnection is significant for two reasons. First, it explains why context is so important. Second, because a number of tikanga principles are likely to be engaged by a specific context, it is necessary to consider those principles together, weighing each to arrive at a correct outcome.

[112] In *Ngāti Whātua Ōrākei*, Palmer J described tikanga principles as an interlocking set of reinforcing norms, with more than one principle commonly determining what is correct:[55]

> …There may not be only one principle of tikanga which determines what is tika in a given situation. Rather, there is likely to be a set of principles which reinforce each other in pointing the way. As Ms Coates submits, for Te Ākitai Waiohua, "[t]ikanga is therefore a system comprised of interwoven principles that guides action and relationships". As the Law Commission said in 2001, in a passage it quoted again in two of its 2021 reports:
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> > As always in tikanga Māori, the values are closely interwoven. None stands alone. They do not represent a hierarchy of ethics but rather a koru, or a spiral, of ethics. They are all part of a continuum yet contain an identifiable core.

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53 *Ngāti Whātua Ōrākei*, above n 49, at [317].
54 Statement of Tikanga, *Ellis (continuance)* above n 36 at [30].
55 At [306]. Footnotes omitted.

[113] Justice Palmer also referred to the evidence given in that case by Dr Te Kahautu Maxwell, that the core values of tikanga are "like a whāriki; a woven mat, they must go together for tikanga to stand up".[56]

[114] In *He Poutama*, the Law Commission observed that an understanding of the interconnected nature of tikanga should protect against its use as a "grab bag" from which isolated concepts might be taken:[57]

> We agree with Tomas that "there is a need for a better understanding of how [tikanga] fits together as a coherent, principle-based system of law". In this Study Paper, we are deliberately setting out a framework for understanding tikanga principles that reaches beyond the common description of tikanga as values-based and context-dependent. Tikanga is sensitive to context and evolves according to circumstance. However, more can be said about how its concepts work together to govern and guide behaviour. Showing how core concepts are connected both explains tikanga as a normative system and safeguards tikanga by recognising that it functions as an integrated, comprehensive whole.
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> …
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> Perceiving the component parts of tikanga as integrated can safeguard tikanga by ensuring that it is not treated as simply a "grab bag" from which to extract isolated values.

Tikanga informs process as well as outcomes

[115] A further emerging theme is the growing recognition by the courts that tikanga informs not only substantive outcomes, but also process. The eminent panel of experts in *Ellis v R (continuance)* said tikanga is comprised of both practice and principle.[58] It includes both the rules (what you should and should not do) as well as the principles that inform the practical operation and manifestation of the rule.[59] This means recognizing that in some cases the use of certain judicial procedures for resolving differences may be contrary to tikanga.

[116] In *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board*, Palmer J set aside a mediated settlement agreement involving the use of arbitration to determine

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56 At [325].
57 *He Poutama*, above n 36, at [3.9]–[3.10].
58 Statement of Tikanga, *Ellis (continuance)* above n 36 at [27].
59 At [27].

whakapapa.[60] In doing so, he concluded that determining whakapapa by "external arbitration" was inconsistent with the tikanga of Ngāti Rehua-Ngātiwai ki Aotea.[61] In reaching that view, the Judge noted that a tikanga process—involving kaumātua to engage with the issue—had not yet reached an impasse, because the kaumātua had not "fully deliberated on the issue", and that "tikanga is not to be hurried".[62]

[117] Justice Palmer returned again to the question of tikanga influencing court process in *Ngāti Whātua Ōrākei*. He went on to expand on the views he expressed in *Ngawaka*:[63]

> [362] Tikanga governs matters of process as well as substance. There are ways of resolving disputes about tikanga which are consistent with tikanga and ways which are not. Full discussion by kaumātua on a marae, abiding by the kawa of the marae and resulting in consensus, can be consistent with tikanga. Recourse to courts without agreement between the parties is not obviously tikanga-consistent. Only one of the tikanga experts who gave evidence here says that it is. Some say recourse to courts is inconsistent with their tikanga. Others say that recourse to courts is far less appropriate or preferable than tikanga-consistent processes.
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> [363] As a matter of tikanga, of course, tikanga-consistent dispute resolution process must be preferred to non-tikanga-consistent court resolution of disputes about tikanga. Indeed, resolution of a dispute about tikanga by tikanga-consistent processes may be more enduring than a ruling by a court, as Tāmati Kruger's evidence about resolution of the *Takamore* dispute illustrates.
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> [364] Tikanga-consistent dispute resolution may involve several or many discussions on marae over a long period. Tikanga may require a discussion of a dispute over a long period of time compared to Pākehā dispute resolution. Those involved will determine how long that is, depending on the circumstances. As Mr Mahuika submits, the time that it takes depends on the context. A court must be wary of claims by one group or another that resolution is not possible in the time taken so far. Tāmati Kruger, the eminent pūkenga from Tūhoe, says that a tikanga-consistent process "cannot be exhausted". He said "we live in a different time zone to Pākehā culture … We think and operate in generations. That's how long these things take." On the other hand, Ngarimu Blair's evidence is that the risk involved in a Court determining mana whenua is "a risk that we, as great as it is, have determined as an iwi to undertake". Seeking a determination before the Court is a "last resort" in the absence of resolution of the dispute by a tikanga-consistent process.

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60 *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board* [2022] NZHC 843, [2022] 3 NZLR 601.
61 At [64]–[65].
62 At [61].
63 *Ngāti Whātua Ōrākei*, above n 49, at [362]–[364]. Footnotes omitted.

[118] Subsequently, the Judge concluded that if a tikanga consistent resolution of a dispute about tikanga is not feasible, "then recourse to a court may be appropriate as a matter of law".[64]

[119] In *Doney v Adlam (No 2)*, Harvey J considered tikanga dispute resolution procedures. The Māori Land Court had entered judgment for $15 million against Mrs Adlam in 2014. She had only partially repaid the debt. The judgment creditor, a trust, applied for leave to enforce the judgment. Mrs Adlam opposed their application on the basis, amongst other things, that the Trustees had failed to follow a tikanga dispute resolution process with her, and the failure to do so would cause further damage to the relationships between the beneficiaries, who were connected by whakapapa, including Mrs Adlam.

[120] Justice Harvey observed that in cases involving Māori with interests in a land-owning trust, tikanga processes outside of the court will commonly be utilised in an effort to resolve differences before resort is made to litigation:[65]

> [84] …[T]ikanga is relevant in terms of how the owners might seek to resolve differences that can arise from time to time. As a general observation, it is trite that conflicts can occur between owners of Māori freehold land, and between trustees and between subsets of each, as the records of the Māori Land and Appellate Courts and their predecessors confirm. Over time, Māori landowners, their whānau and hapū, where appropriate, have engaged in attempts at the resolution of those conflicts in accordance with their tikanga. Some of those dispute resolution processes have become formally incorporated into the trust order, as mentioned previously. Others will be accessed more informally and can form part of the oral traditions of the group.
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> [85] In either case, this will involve taking the issue back to marae (or some neutral venue if the dispute concerns the marae) through a process of hui, wānanga and noho (either individual or combined) in an effort to undercover pathways to resolution, wholly or in part. Inevitably, this takes time. The results are not always conclusive, and several attempts can be made. Where success remains elusive then invariably one or more parties will, often reluctantly, seek the assistance of the courts. Yet before that occurs, or even part way through a legal process, owners and their trustees will often convene hui to seek a resolution without the need to continue with litigation.

[121] A tikanga process is also reflected in customs or rituals such as kawa. Tamati Kruger has said that kawa are the practical expression of tikanga, which may be

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64 At [368].

65 *Doney v Adlam (No 2)* [2023] NZHC 363, [2023] 2 NZLR 521. Footnotes omitted.

distinguished from the guiding principles of tikanga itself.[66] While these protocols — including pōwhiri and rāhui — are referred to as kawa, they are always grounded in the principles of tikanga.[67]

The courts must take care not to impair the operation of tikanga as a system of law

[122] While tikanga remains an "independent system", the Law Commission recognised that incorporating tikanga concepts into the common law "has the potential to shift the location for the development of tikanga to state law institutions".[68] The Commission went on to warn:

> This carries a real risk of undermining the mana of tikanga institutions. There is a risk of tikanga being misunderstood, misapplied and assimilated unless engagement between state law and tikanga is undertaken carefully. There is a need above all to be mindful of tikanga as an integrated system of concepts sourced from and practised within Māori communities…

[123] These risks had already been identified by the Supreme Court in *Ellis v R (continuance)*. The Statement of Tikanga provided to the Court expressed concern that unintended consequences could arise if courts are able to draw on tikanga in making decisions, and the potential for tikanga to be distorted when applied by courts insufficiently familiar with the subject matter.[69] Glazebrook J went on to note that the experts:[70]

> …were confident that tikanga has survived to date and will always continue to inform and regulate Māori behaviour. But they stressed that the courts must use processes and practices that help preserve the integrity of tikanga as a cohesive system of substantive law and legal process. I acknowledge the importance of these concerns.

[124] Justice Glazebrook concluded that tikanga must inform and "in appropriate cases, control, how decisions about tikanga in the common law are made and how tikanga may develop to meet new circumstances".[71]

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66 *He Poutama,* above n 36 at [3.129].
67 At [3.129].
68 *He Poutama*, "Part Three, Future Engagement" above n 36, at [2].
69 *Ellis v R (Continuance)* above n 36, at [120].
70 At [120]. Footnotes omitted.
71 At [122].

[125] The Law Commission observed that courts must not impair the operation of tikanga as a system of law in its own right, and that this requirement "has its strongest application" with respect to proceedings involving tikanga as law (or in other words, those cases where tikanga is controlling).[72] To manage these concerns, *He Poutama* recommended three strategies for the common law courts: commencing the judicial enquiry with a "tikanga lens"; using manaakitanga as a guiding principle (meaning an obligation on the courts to "take care of the mana of tikanga"); and enhancing processes for tikanga dispute resolution. The latter included the appointment of pūkenga as commissioners of the High Court, and adopting customised arbitration that uses tikanga as the governing law "[to] facilitate a more tikanga consistent procedure".[73]

[126] Acknowledging the common law's flexibility in dealing with other legal systems, the Commission noted conflict of law rules had developed as part of the common law, and represent a minimum commitment to pluralism, designed to "allow legal systems to sensibly co-exist".[74] This was a reflection of the common law method that was helpful to the continuation of a bi-jural development of the law of Aotearoa, with the common law operating alongside tikanga, "and engaging with it in appropriate contexts". [75]

Consideration

[127] Ngāti Ira seeks forward looking declarations designed to shape the future decision-making and conduct of the first and third respondents based on its tikanga as law.[76] The prayer for relief in the applicants' fourth amended statement of claim seeks a declaration against the Crown that "it would be a breach" of Ngāti Ira's tikanga and Te Tiriti "to permit" the inclusion of the hapū in "any agreement or compact", if the

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72 *Ellis v R (Continuance)*above n 36, at [120] and [122] per Glazebrook J, [181] per Winkelmann CJ and [270]–[271] per Williams J; *He Poutama*, above n 36 at [8.60].

73 *He Poutama*, above n 36, at [8.4] and [8.69]–[8.149].

74 At [8.30].

75 At [8.30]–[8.31].

76 In a memorandum of counsel of 24 July 2024, counsel for the applicants confirmed they no longer sought relief against the "now wound down" second respondents, the Pre-settlement Trust. And in a memorandum of counsel of 15 August 2024, the applicants confirmed that the prayer for relief in the fourth cause of action seeking a declaration as to breaches of trust was no longer pursued, "consistently with the applicants' refined focus on forward looking relief in relation to Te Tāwharau Trust".

hapū does not consent. A declaration sought against Te Tāwharau under the third cause of action is that it "has no basis in tikanga to purport to represent Ngāti Ira". The prayer for relief in the fourth cause of action against Te Tāwharau seeks the same declaration together with a direction under s 127 of the Trusts Act "restraining Te Tāwharau from making further decisions which purport to represent or bind Ngāti Ira…".

[128] As there is at present no live disagreement or controversy between the parties, the relief sought by Ngāti Ira in all three causes of action is necessarily framed in abstract terms. Although declarations can be made where there is no existing dispute or lis,[77] the Court should be slow to grant relief where it is asked to provide what amounts to an advisory opinion lacking in practical consequences to the parties or the public.[78] In *Department of Internal Affairs v Whitehouse Tavern Trust Board*, the Court of Appeal said that the requirement that a declaration have utility "means that it should be fact-specific, efficacious and capable of practical application".[79]

[129] As a principles-based system of law, tikanga is highly sensitive to context and sceptical of unbending rules.[80] One reason context is so important to the application of tikanga is that as a system of interwoven principles they should be in balance. Seldom will only one principle ever be relevant, or paramount. The principles that are relevant, and the weight attached to each, will necessarily depend on the circumstances in which an issue arises for determination.[81]

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77 *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [9] per Elias CJ and at [82] per Blanchard, Tipping, McGrath and William Young JJ.

78 See *Gordon v Attorney-General* [2023] NZHC 2332, (2023) 34 FRNZ 95 at [137], applying *Electoral* Commission *v Tate* [1999] 3 NZLR 174 (CA) at [30]. See also *Moveme Health Ltd v New Zealand Artificial Limb Service* [2023] NZCA 621 at [91]; and *Earthquake Commission Earthquake Commission v Insurance Council of New Zealand Inc* [2015] 2 NZLR 381 (HC) at [133].

79 *Department of Internal Affairs v Whitehouse Tavern Trust Board* [2015] NZCA 398, [2015] NZAR 1708 at [80]. This general principle must however be seen in light of the Supreme Court's view of the permissible forms of declarations sought in *Ngāti Whātua Ōrākei* [2018] NZSC 84, [2019] 1 NZLR 116 at [46]–[47]; and Cooke J's observations in *Hata (No 2)* above n 22 at [28] and [32]–[34]. Cooke J suggested that focussing on the relief sought and its impact on parliamentary proceedings is a constitutionally sounder approach than inviting claimants to introduce abstract declarations, or as he put it, "ambiguity into their pleadings", to avoid the non-interference principle. I agree with his views.

80 *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* above n 46, at [76].

81 At [311].

[130] Here, there is insufficient context to allow for abstract declarations on a matter of such significance to Ngāti Ira and Te Whakatōhea. The Court is being asked to provide what amounts to a broad statement of Ngāti Ira's tikanga as law when the consistency of such declarations with the respondents' lawful functions is unknown. Nor is it possible to ascertain the impact on the other hapū of Whakatōhea, and their tikanga.

[131] The relief Ngāti Ira seeks would also give primacy to the claimant's pleaded tikanga—specifically hapū rangatiratanga and hui-a-hapū — over other potentially important elements of tikanga that may be applicable in a specific context. These values might include whanaungatanga and kotahitanga. I therefore agree with the observation of Cooke J at an earlier stage of this proceeding that:[82]

> …[I]t is not simply a matter of identifying the relevant tikanga, contending that that tikanga must be accepted if the rangatiratanga of the hapū is to be respected, and saying that anything inconsistent with it is unlawful. The way that tikanga influences legality in this context is ultimately through the balancing of considerations, including the balancing of rangatiratanga and kawanatanga that emerges from the Treaty principles.

[132] I am reinforced in this conclusion by the following considerations.

Abstract declarations invite conflict between the terms of the Trust Deed and Ngāti Ira's tikanga

[133] Mr Hodder was correct to suggest that the starting point in this case should not be to assume that the terms of Te Tāwharau's Trust Deed, and in particular Trustee majority decisions, are necessarily in conflict with Ngāti Ira's tikanga.

[134] However, the lack of an existing dispute concerning Trustee actions invites precisely that conflict. The relief Ngāti Ira seeks against Te Tāwharau includes a direction under s 127 of the Trusts Act. However, the duties of the Trustees are owed to all beneficiaries of Te Tāwharau, not merely some of them. Clause 2.4 of the Trust Deed (set out above at [52]) records that the object and purpose of the Trust is to hold and manage the Trust assets "on behalf of and for the benefit of the present and future members of Whakatōhea" and "for any purpose beneficial to Whakatōhea." The Deed

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82 *Hata v Attorney-General* [interim relief], above n 4, at [38].

contains a separate definition of "Whakatōhea" in cl 1.1, which emphasises the collective nature of the beneficiaries. This duty is also reflected in s 26(a) of the Trusts Act 2019, which provides that a trustee must hold or deal with trust property, and otherwise act "for the benefit of the beneficiaries, in accordance with the terms of the trust". It also reflects the general position in equity.[83]

[135] Given the Trustees are by law required to make decisions on behalf of all members of Te Whakatōhea, rather than individual hapū, the abstract declarations and direction sought by the applicants cannot be reconciled with the Trust Deed, or the obligations of the Trustees in equity.

[136] I would expect that in most cases the Trustees will reach decisions which are tika both in terms of process and substance. There are mechanisms within the Trust Deed designed to facilitate such an approach.

[137] However, some Trust decisions may not involve a significant element of tikanga, such as one involving a purely commercial investment decision. Should the Court make the declarations sought, the Trustees would appear to lack the power to invest trust capital on behalf of Whakatōhea where Ngāti Ira disagrees with the investment choice. That outcome in turn raises an obvious conflict with the terms of the Trust Deed that enable majority decisions by the Trustees. Contrary to Mr Hodder's submission, it would effectively amount to a right of veto. In some situations, the lawful exercise of the Trustees' power of decision may not be compatible with Ngāti Ira's pleaded tikanga. Regardless, if such tensions arise, they should be determined by a court in the specific context in which they arise.

[138] Equally, some Trust decisions may not involve an action or step that "purports to represent" Ngāti Ira. However, many important decisions will in some sense inevitably have that effect, given the hapū is an important and integral part of Whakatōhea, and the Trust Deed requires the Trustees to make decisions on behalf of

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83 Lynton Tucker and others, *Lewin on Trusts* (20th ed, Thomson Reuters, London, 2020) at [1-061] and [29-062] (beneficiaries of discretionary trusts have a right to be considered and trustees must act impartially, that is, they must hold an even hand among all the beneficiaries); and Geraint Thomas and Alastair Hudson *The Law of Trusts* (2nd ed, Oxford University Press, 2010) at [10.14] and [11.03]; Paul Matthews and others, *Underhill and Hayton Law of Trusts and Trustees* (20th ed, LexisNexis Butterworths, Bath, 2022) at art 47.1(1).

the beneficiaries. To this extent, it seems any tension between Ngāti Ira's pleaded tikanga and the lawful process of Trust decision making is a function of the Crown's large natural grouping policy, and the structure of the settlement itself, rather than any insensitivity of the Trustees, past or present, to the requirements of tikanga.

[139] It follows from this that I do not accept Ngāti Ira's characterisation of Ms Tuoro's email on behalf of the Trustees of Te Tāwharau, of 27 June 2024, as a rejection of tikanga. In the email exchange, the applicants proposed draft declarations that the Elected Trustees could have formalised by way of consent orders, in an effort to resolve the proceeding. Ms Tuoro on behalf of the Elected Trustees declined the applicant's invitation. She said the Trustees were disappointed the applicants had "elected not to withdraw the challenge through the court processes and refused to allow this matter to be dealt with on our Marae".

[140] I agree with Ms Tuoro's view that the declarations Ngāti Ira seeks are generally inconsistent with the roles, responsibilities and representation required of the Trustees set out in the Trust Deed. That is not to say there must be a tension between the requirements of tikanga and the process and substance of trustee decisions. But I consider there is such a tension between the abstract relief sought in this proceeding and the terms of the Deed absent an identified exercise of Trustee powers.[84]

[141] Apart from the inconsistency between the pleaded relief sought and the requirements of Te Tāwharau's Trust Deed, the absence of a present controversy means the context essential to consideration of a tikanga consistent outcome is missing. The missing context makes it impossible to properly assess the influence of tikanga as law on the actions of the Trustees. Nor is it possible to determine whether the declarations are, or are not, consistent with all the relevant requirements of tikanga—including Ngāti Ira's.

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[84] I also understood Mr Fletcher to argue on behalf of the applicants that trustees appointed by hapū are required to prioritise the interests of their hapū ahead of the interests of Te Whakatōhea. While I do not need to decide the point, given the views I have expressed I doubt this position can be correct.

Resort to the Court at this point is unnecessary and inconsistent with tikanga

[142] As noted above at [55]–[57], there are mechanisms under the Trust Deed which allow for questions of tikanga to be resolved by Ngāti Ira and Whakatōhea in a way that is consistent with a tikanga process. First, the Trustees may establish Te Tohearau, the tikanga committee. According to cl 5.2 of the Deed of Trust, Te Tohearau's role is to make determinations and give guidance "on any issue of Whakatōhea tikanga, reo, korero and/or whakapapa" referred to it by the Trustees. And Te Tohearau's determinations are "definitive for the purposes of Whakatōhea". The Trust "will take them into account" in the achievement of its objectives and purposes.

[143] In addition, the Taumata Kaumātua is the collective of "Whakatōhea Elders" that meet from time to time to discuss "matters important to Whakatōhea. The Trust is required to "facilitate and support the Taumata Kaumātua as is required".

[144] Mr Fletcher for Ngāti Ira highlighted the Trustee's failure to convene Te Tohearau in response to the matters raised by Ngāti Ira in this proceeding, and Te Tohearau's lack of independent standing under the Trust Deed, given it requires a decision of the Trustees to convene it. However, as Ngāti Ira had sought declarations from the High Court concerning tikanga binding on the Trustees, it is not surprising the Trustees have not sought to utilise alternative pathways under the Trust Deed. Associate Professor Maxwell put his concerns about the use of the Court process thus:

> I would have preferred to have these matters dealt with at home on our marae, in our Whare-Tupuna however, as we are being sued, we have no option but to respond.

[145] Given this, and the availability of tikanga processes in the event of disagreement, I am reinforced in my conclusion that the grant of relief is inappropriate. A tikanga based dispute resolution process is to be preferred to a non-tikanga proceeding before the High Court.[85] Only once it has become clear the tikanga process will not be capable of resolving any future differences between Te Tāwharau and Ngāti Ira would it be appropriate for a court to make a determination of something so important. Granting relief before existing internal processes have been utilised would

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85 See *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board* above n 60, at [64]–[65].

undermine those institutions and set an unhappy precedent for the future. It would invite the hapū of Whakatōhea to bring their differences to the Court before the marae. That is not an approach that would speak to enduring decisions or kotahitanga.

Ngāti Ira's allegations of past breach of tikanga cannot be attributed to the elected Trustees of Te Tāwharau

[146] The applicants plead that Te Tāwharau has made decisions affecting Ngāti Ira and its tikanga in two ways. First, it did so by "adopting the conduct" of the Pre-Settlement Claims Trust, including the promotion of the Deed of Settlement, and seeking that the Crown sign the Deed. Second, it is said that Te Tāwharau advocated "to the Crown and third parties" a view of Te Whakatōhea tikanga inconsistent with Ngāti Ira's pleaded tikanga.

[147] In framing their claim in this way, the applicants seek to attribute to the newly elected Trustees the previous actions of others. They have done so to establish a risk of future behaviour to support the contention that the forward-looking declarations they seek are necessary. However, the reality is that the operation of tikanga in the post-settlement world, both within the Trust and in terms of future Crown engagement, remains to be seen. The current Trustees are the first elected by the hapū of Whakatōhea and the iwi. Two of those Trustees, in keeping with the requirements of the Trust Deed, are representatives of Ngāti Ira. The new Trustees only succeeded to their office with the resignation of the Establishment Trustees at an annual general meeting on 9 March 2024. At the date of hearing the trust capital had not yet settled on them.

[148] A trust has no legal existence beyond that of its trustees for the time being. Generally, a new trustee is not liable for breaches of trust committed by a previous trustee and is not required to hunt for breaches of trust committed by them.[86] Absent some independent wrong, I am unable to accept that conduct of the Pre-Settlement Claims Trustees personally, or the Establishment Trustees, may in law be attributed to

[86] Te Aka Matua o te Ture New Zealand Law Commission, *The Duties, Office and Powers of a Trustee,* NZCLC IP 26, June 2011 at [1.28], citing Matthews and others, *Underhill and Hayton Law of Trusts and Trustees*, above n 182 at [44.29].

the Elected Trustees of Te Tāwharau. One reason suggesting it would be inappropriate to do is the lack of commonality between the relevant Trustees.

[149] Beyond the difficulties of attribution Ngāti Ira's claim faces, s 15(4)(b) and (c) of the Settlement Act has removed the Court's jurisdiction to inquire into or make findings in respect of the Act, or the Deed of Settlement. The Deed confirmed a settlement of Whakatōhea's historical claims between the Crown, Whakatōhea, and Te Tāwharau. To the extent the applicants seek in this proceeding findings of past breaches of tikanga and Te Tiriti arising from the process leading to the Deed of Settlement, I consider the Act bars the enquiry.[87] Similarly, to the extent the claim against the Elected Trustees is based on the conduct of the Establishment Trustees promoting the Deed of Settlement and the settlement legislation, that conduct is simply consistent with the Establishment Trustees' obligations under cl 3.4(a) and (b) of the Trust Deed.[88]

The relief sought will affect the interests of parties who are not before the Court

[150] The declarations are not limited in their effect to Te Tāwharau, and will touch the interests of the five other hapū of Te Whakatōhea, who are not parties to the proceeding. Therefore, as Mr Linkhorn submitted, the respondents are not the natural contradictors to the action.

[151] The declarations sought emphasise the weight and primacy of Ngāti Ira's hapū rangatiratanga. However, if due to the primacy of Ngāti Ira's hapū rangatiratanga the Trust cannot take a certain action because it is not approved by Ngāti Ira, the result may adversely affect the hapū rangatiratanga of the other hapū of Te Whakatōhea. In *Hata (No 2)*, Cooke J acknowledged the need to hear the perspectives of other hapū on the effect of Ngāti Ira's claim of tikanga as law.[89] Given the absence of their voices, the declarations sought could only reflect Ngāti Ira's tikanga. But as this Court

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87 This may not be an answer to all of the alleged breaches of tikanga asserted by Ngāti Ira, but it does appear to foreclose all those arising from "historical facts" (as their submissions put it) connected to the Treaty settlement process.

88 Which provide that the Establishment Trustees' powers are limited to "operational and core planning matters relating to…signing the Deed of Settlement…[and] supporting Whakatōhea settlement legislation through the legislation process...".

89 *Hata (No 2)*, above n 22 at [48]–[49].

acknowledged previously, Ngāti Ira does not need a court to tell it what its tikanga is.[90] The only utility in seeking a determination from the Court is to determine the effect of Ngāti Ira's tikanga on the operation of Te Tāwharau, and more fundamentally, on the other hapū of Whakatōhea.

[152] It is not a sufficient answer to this problem for Ngāti Ira to say the other hapū have been served and had the opportunity to involve themselves in the proceeding had they wished to. And given Ngāti Ira's position is that within Whakatōhea only a hapū may speak for the hapū, it would seem inconsistent with that tikanga for Te Tāwharau to act as the proxy for those who are not before the Court. It is possible other hapū have chosen not to become a party to the proceeding because they do not consider it would be tika to involve themselves in a case concerning declarations of Ngāti Ira's tikanga. Or, they may consider the proceeding itself is not an appropriate forum in which Whakatōhea should resolve their disagreements.

The claim against the Crown is also unsustainable

[153] Separately, I am not persuaded the applicants' claim for declarations against the Crown is tenable for three reasons.

[154] First, there is no present controversy between the Crown and Ngāti Ira, and for the reasons already set out, the Court is being asked to provide an advisory opinion in the absence of an adequate context. As Mr Linkhorn submitted, there is no evidence to establish that the Crown, or local government, will not engage with Ngāti Ira directly in the future where appropriate; for example, in relation to decisions which affect its rohe. So once again, I am not persuaded that Ngāti Ira's claims of past breaches of tikanga form a proper basis on which to conclude that the declarations sought against the Crown are likely to be of practical benefit to the parties.

[155] Second, to the extent the claims against the Crown depend on an enquiry into the circumstances leading to the Deed of Settlement and the Settlement Act, s 15(4) removes the Court's jurisdiction to hear the claim.

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90 At [49].

[156] Finally, I accept the Attorney's submission that the declarations sought against the Crown go beyond the legal status of tikanga and towards the direct use of the Treaty as a source of obligation enforceable against the Crown. As the Supreme Court noted in *Ellis v R (continuance)*, tikanga and the Treaty may be controlling where they have been "incorporated in a statute that makes them so".[91] That element is missing from the present case. Similarly, this Court has previously held the Crown is not bound to follow tikanga in and of itself, although tikanga may have influence the lawful exercise of a power of decision.[92] But this is not a case involving a challenge to an identified Crown action or decision (or at least one that remains justiciable), on the basis of inconsistency with tikanga as law. That is a function of the applicant's election to focus on future conduct as the target of relief.

Declining relief at this juncture does not prevent future recourse to the Court

[157] As the Supreme Court recognised in *Ngāti Whātua*, a court can withhold discretionary relief when there are reasons to think it is inappropriate.[93] However, the Court went on to observe that the court should not be quick to see inappropriateness where there are claims of right to be determined, "especially if the parties will otherwise not be able to have them resolved".[94]

[158] As I have found, there is a more appropriate course open to Ngāti Ira in the first instance to resolve any future concerns they may have about the application of tikanga which does not involve recourse to the court. If and when those avenues have been explored, and found incapable of providing an answer, the conclusion I have reached does not preclude Ngāti Ira seeking assistance from the courts to resolve the impasse.

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91 *Ellis v R (continuance)*, above n 36, at [118]: "In some cases, tikanga and its principles may be controlling: for example, where Treaty principles and/or tikanga have been incorporated into statute in a manner that makes them so, or where the factual context justifies it. In other cases, tikanga principles or values may be relevant considerations alongside other relevant factors".

92 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*, above n 49, at [570], [576] and [582].

93 At [126].

94 At [126].

Should a court stay proceedings where a more appropriate forum is available?

[159] While there is an understandable reluctance to view tikanga as something like foreign law, there is also no denying that an alternative legal system is alive and well in Aotearoa—based on marae and within hapori Māori —in which tikanga is practised daily, as it has been for hundreds of years. It would therefore be wrong to assume that in every case where tikanga is the controlling body of law the courts should assume jurisdiction without first considering whether there is a more appropriate forum available to the parties. Part of the common law's engagement with tikanga may require the development of rules determining not only how the courts should engage, but also when they should not do so. I have not received submissions on this issue, and I have determined the proceedings on their merits. However, I set out some preliminary views hoping they may be of assistance to the parties and in future cases.

[160] Two points can be made. First, in private international law, the question whether a court should exercise jurisdiction over a dispute with a substantial connection to another legal system is informed by the rules of *forum non conveniens*.[95] These rules, an inheritance from English common law, are based on principles of comity, restraint and reciprocity. The former value describes the courts' respect for foreign institutions and legal systems, and the exercise of authority by those entities within their legitimate sphere of operation.[96] In other words, the common law recognises that the exercise of jurisdiction by a court is an exercise of sovereignty by the Crown which may affect another legal system.[97] The latter values—reciprocity and respect—also seem to be relevant when considering the courts' approach to disputes governed by tikanga.

[161] This is all the more so in light of the second article of the Treaty of Waitangi, guaranteeing te tino rangitiratanga of all Māori. A court ought to consider the impact

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95 As the Supreme Court in *Ellis v R (continuance)* observed (see above n 36 at [273] (Williams J) and [123] fn 151 (Glazebrook J)), it is inappropriate to consider tikanga as "foreign" law, but the recognition of the legitimate sphere of operation of other legal systems in private international law is equally applicable to the development of rules governing the boundaries between different legal systems operating within a single jurisdiction. In countries with a federal system of government, for instance, conflict of law rules are commonly applied to determine jurisdiction and choice of law questions within a single sovereign state.

96 Maria Hook and Jack Wass, *The Conflict of Laws in New Zealand*, 2020 LexisNexis NZ Ltd, at [1.29].

97 At [1.29].

of exercising jurisdiction over matters governed by tikanga on Te Tiriti's guarantees, and whether the exercise of jurisdiction over a case governed by tikanga is consistent with it.

[162] The need for caution in this developing area has also been noted by commentators. As Coates argues, it would be a shame if the post-*Ellis* world involved a rush to bring disagreements resolved by tikanga to a courthouse. Others have expressed reservations about the damage that could be done to tikanga through appropriation by a system of justice intimately connected with a history of colonisation.[98] My own recent experience suggests that in their enthusiasm to embrace tikanga, some parties have overlooked the need to consider the degree of connection between the issues before the court and tikanga Māori, and the possible impacts of raising the issue on tikanga itself.

[163] Second, principles governing the point at which it will be appropriate for a court to exercise jurisdiction over a matter wholly or substantially governed by tikanga must also acknowledge access to justice is an entitlement of all New Zealanders. Ensuring access is a central function of the courts. The balance between access and support for tikanga may not always be an easy one to strike.

[164] With these points in mind, I would consider that in cases controlled by tikanga as law, a court ought to consider staying the proceeding where it is satisfied there is an alternative forum available to the parties in which the dispute may be resolved more suitably for the interests of the parties and the ends of justice.[99] Equally, if tikanga is relevant to the issue before the court, but ultimately indirectly so, questions of forum are unlikely to arise, and the court might readily conclude it should exercise jurisdiction without preliminary consideration. A stay is unlikely to be appropriate

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98 Annette Sykes "The Myth of Tikanga in the Pākehā Law" (2021) 8 Te Tai Haruru Journal of Māori and Indigenous Issues at 3.

99 Adapting the test in *Spiliada Maritime Corp. v Cansulex Ltd* [1986] 3 All ER 843 4 at 855. The High Court Rules 2016 currently provide for questions of forum non conveniens to be addressed through the procedures in subpart 4 of Pt 6. Rule 15.1 provides the court may stay a proceeding but it is unlikely the grounds in r 15(1)(a)–(d) would be applicable to the grant of a stay based on the availability of an alternative tikanga based forum. That leaves open the courts inherent power to stay in appropriate cases, and whether it might or might not permit the grant of a stay. See, for instance, *Siemer v Stiassny* [2011] NZCA 1 at [15]; *Crane Accessories Ltd v Lim Swee Hee* [1989] 1 NZLR 221, (1988) 1 PRNZ 593 (HC); *Ghose v Ghose* (1997) 12 PRNZ 149 (HC).

where there is genuine urgency, or where the evidence establishes there is no realistic prospect a tikanga process will resolve the matter.

[165] Where a party refuses to engage in an available tikanga process, or the evidence establishes they have not engaged in it earnestly, the court might consider taking the failure to do so into account when exercising a discretion to grant relief.

Conclusion

[166] For the foregoing reasons, Ngāti Ira's application for declarations and related orders against the first and third respondents is dismissed. It is clear the settlement process has been a difficult one. It has created rifts rather than resolved them. But I hope nga hapū te Whakatōhea, and Whakatōhea itself, can put those differences aside and focus on the new future that awaits.

[167] If the respondents seek costs they may file memoranda. But without expressing a concluded view, it would be unfortunate if the issue of costs became a new issue between the parties. A new beginning calls for a clean slate.

Isac J

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