

**Whakatōhea Māori Trust Board  
Investigation under Section 33 Māori Trust  
Boards Act**

**Report to the Minister**

Michael Heron QC

Final Report  
13 September 2018

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# Executive Summary

*Ehara taku toa, i te toa takitahi. Engari, he toa takitini.*

Success is not achieved by the efforts of one alone.  
But by the strong collective contributions of all.

## *Introduction*

On 12 June 2018, Te Minita Whanaketanga Māori (Minister for Māori Development) appointed me to undertake an investigation of the Whakatōhea Māori Trust Board (the Board) under section 33 of the Māori Trust Boards Act 1955 (the Act). The Terms of Reference (Appendix 1) concern issues relating to the triennial elections in 2017 and the governance and management of the Board.

The Board is based in the Ōpōtiki region. It was established under a Māori Purposes Act in 1949 and is governed under the Māori Trust Boards Act 1955. It represents six divisions of Te Whakatōhea. Two members from each division are elected to make up the Board's 12 members. Those divisions are: Ngāi Tamahaua, Ngāti Patu, Ngāti Rua, Ngāti Ngāhere, Ngāti Ira and Te Ūpokorehe.

The purpose of the Board is to administer its assets in accordance with the Act for the benefit of its members. The Board's asset base includes dairy farms, kiwifruit orchards, forestry shares, property investments, fisheries assets, aquaculture ventures, social, health and education services.

## *Complaints and context*

The Minister received a range of complaints from a number of beneficiaries, seeking an investigation into the Board. Over recent years, Te Whakatōhea iwi have come closer to a settlement with the Crown of its claims for breaches of the Treaty of Waitangi. The Board has resolved to provide support to those claims and to the bodies which are responsible for advancing them; currently the Whakatōhea Pre-Settlement Trust (WPSCT). More recently, the Board members have reduced in number to 10 (from 12). Five of the Board members are strongly opposed to the Board's support of the settlement. Five (including the Chair, who has a casting vote) are supportive.

There is a fundamental philosophical disagreement between these two factions of the Board. One supports the settlement proceeding in its current form and views the role of the Board as expansive, for the greater good of all iwi beneficiaries. The other faction regards both the settlement and the approach of the Board as overreaching their mandate and usurping the mana of the hapū. Each view is a genuine and honestly held one, supported by impressive and dedicated individuals.

Regrettably, the governance and/or management of the Board is coloured by this divide and suffers from a strong and mutual lack of trust. It is for the incoming Board members to repair this lack of trust and to operate transparently in the best interests of the beneficiaries.

In summary my conclusions on the key matters are as follows:

### **Elections**

- i. The elections were carried out in accordance with the principles of Part 3 of the Act and the Māori Trust Board Regulations 1985;
- ii. There were some irregularities or failures or mistakes that occurred in relation to the elections;

- iii. I do not believe the irregularities, failures or mistakes have affected the outcome of the elections;
- iv. The irregularities noted can now be validated under section 55 of the Act (the late nomination of Mr Reisterer and the late mail out of 732 voting packs to the correct addresses). The Board should not be required to hold fresh elections under section 55A of the Act;
- v. My report includes recommendations that I trust will assist in future election processes of the Board.

#### **Governance and Management**

- vi. The Board and its members and/or officers have not always complied with appropriate governance practices and/or obligations under the Act, although such non-compliance appears inadvertent and not of particular significance. Further investigation of some issues may be required;
- vii. The Board and/or all Board members have not received full disclosure of all relevant and specific information pertinent to key issues to make informed decisions on Board affairs;
- viii. Conflicts of interest and other governance matters should be handled in a more appropriate manner by the Board and/or Board members and/or officers;
- ix. My report includes recommendations that the Minister and/or the Board may wish to consider.

# Recommendations

As part of the Terms of Reference for this independent investigation into the allegations raised by the complainants and any other election irregularities, the following recommendations arise from my investigation:

## Elections Process

1. Future Boards should resolve to approve the Roll to be used in elections in accordance with Regulation 8(2)(a).<sup>1</sup>
2. Continued efforts should be made prior to elections to scrutinise the Roll (by either independent electoral officers, the Tribal Database Co-ordinator or Trust Board members who are representatives of that hapū) so that duplicates, errors, and 'Gone No Address' (GNAs) are minimised. This includes allowing for greater access to Trust Board members to scrutinise the Roll.
3. The Board should continue its efforts to ensure beneficiary details are correct (e.g. potentially greater advertising or education to ensure beneficiaries understand the need to take responsibility to update their details with the Board themselves). This effort would be in conjunction with the hapū to reach out to their respective beneficiaries.
4. The election process should be established prior to the electoral timeframe and clearly communicated to the Board and beneficiaries. There was confusion over the timetable schedule on the Board website as to a reference to a 'Special Voting' period. The Returning Officer should ensure public notifications or advertisements are in line with the policies approved by the Board.
5. Good election practice allows for special voting. This is to recognise the need for voters to vote outside of deadlines on the principle that all eligible and enrolled voters should be entitled to vote. The Board should agree and follow election procedures for special voting if it is decided special voting will occur in the future. As indicated above, a clear policy direction should be decided on by the Board.
6. The Board should consider whether to appoint an independent person to be in the role of Returning Officer for the elections, who is not also the Secretary. Under the Māori Trust Boards Act 1955, this person (who needs to be appointed for the purpose of the election by the Minister) may be either the Secretary of the Board or an officer of the Public Service (i.e. a public servant). An independent person would provide greater clarity around the independence of the roles and around the actions of each person during the elections process.<sup>2</sup>
7. The Board should ensure normal whakapapa processes are adhered to prior to registration. Greater education of hapū beneficiaries around the voting process and registration for one hapū only (even if they can whakapapa to other hapū) will help to create a more robust Roll.<sup>3</sup>
8. The Board should adhere to the requirement during the elections process for simultaneous nominations for Advisory Trustee positions on the Whakatōhea Fisheries Trust and Trustee positions on the Board.

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<sup>1</sup> Māori Trust Boards Regulations 1985, reg 8(2)(a).

<sup>2</sup> Māori Trust Boards Regulations 1985, reg 16.

<sup>3</sup> See for instance the WMTB response to Karen Mokomoko, who stood as a nominee for Ngāi Tamahaua but alleges membership to Ngāti Patu.

## Governance and Management

9. Both the Board and the Pre-Settlement Claims Trust should maintain a complete and accurate Conflict of Interests Register for both the Board and the Pre-Settlement Claims Trust. This should detail all relevant interests of Board members and officers and be kept current.
10. The Board should seek to improve how it manages conflicts of interest including those an outside observer might reasonably perceive to be a conflict of interest. What needs to be managed (and be seen to be managed) is the risk of the adverse public perception that could arise from the overlapping interests or dual roles of Board members. It is a question of risk management, quality decision-making and ensuring that the decisions made appear to be free of bias.
11. The Board should review and revise its current approach to managing conflicts of interest. Board members should refresh their understanding of conflicts and the management of them. Each Board member should reflect on and confirm that membership on the Board and on the Pre-Settlement Claims Trust is in the best interests of both those entities and their beneficiaries. Board members and Executive officers should ensure that private interests are clearly disclosed in the Conflicts Register and that care is taken to ensure that no such interest is allowed to influence a Board decision.
12. The Board should learn from the examples involving the Marine and Coastal Area Application (MACA) and the Service Agreement to ensure full disclosure to all Board members of relevant and sensitive matters and any follow up actions are resolved.
13. Where there are agreements such as the Service Agreement, care should be taken to stay within the scope of such an Agreement.
14. The Board should ensure all members are aware of the Board policies surrounding the Tribal Roll and the procedures between the Board and the Pre-Settlement Claims Trust regarding the use of the Tribal Roll in the future. Board members should be able to have access to the Roll for the purposes of ensuring it is accurate and complete.

# Introduction and Context

During 2017, the Whakatōhea Māori Trust Board conducted early elections for the 2018 members of its Trust Board. From December 2017 to May 2018 Te Minita Whanaketanga Māori received a number of requests to initiate a Māori Land Court investigation of the conduct and result of the Whakatōhea Māori Trust Board's (the Board) 2017 elections (the Elections) under section 53A of the Māori Trust Boards Act 1955 (the Act). Te Minita also received a request to conduct a Ministerial Investigation pursuant to section 33 of the Act into the governance and management of the Board.

On 12 June 2018, the Te Minita Whanaketanga Māori, Hon. Minister Mahuta, announced that I would conduct an independent review into the facts in relation to the governance, management and 2017 triennial elections of the Board.

## Investigation Process

The timeframe of the investigation was set from late June to mid-August as Minister Mahuta wished for a timely and efficient resolution for the people of Te Whakatōhea. An extension to 7 September 2018 and then 14 September 2018 was obtained to ensure I had considered feedback on the draft report.

## Hui

Initial introductory teleconferences with the complainants and the Board were held on 27 June 2018 and 28 June 2018 respectively. I detailed the process and requirements of the investigation. I also answered any logistical questions raised by the complainants.

I then held formal Hui with the complainants from Ngāi Tamahaua, Te Ūpokorehe, and Ngāti Ira on 2 July 2018 and 3 July 2018. The main purposes of the Hui were to further explain natural justice requirements, and to understand the substance of the complainants' allegations. I also heard further allegations and requested further evidence to support these allegations. The complainants were informed that they were required to provide any further documentary evidence within 10 working days of the Hui taking place.

After I reviewed the additional documentation provided to me by the complainants, I met with the non-complainant members of the Whakatōhea Māori Trust Board on 1 August 2018 to discuss the Board's responses to the allegations. The complainants were provided with the Board's response in the form of a summary of the Board's outline from this meeting on 1 August 2018.

## Report

A draft copy of this report dated 9 August 2018 was given to each Whakatōhea Māori Trust Board member and to the representatives of the complainants (also Board members) for comment. Te Puni Kōkiri (the Ministry of Māori Development) and the Minister were given the same draft version of the report. Comments were considered and incorporated where relevant and appropriate.

After a revision to the initial timeframes to allow for adequate time to review feedback and comments, the final report was provided to the Minister on 13 September 2018.

# Findings

## ISSUES IN THE 2017 ELECTIONS

Process, principles and rules which Māori Trust Boards must adhere to when conducting elections are found in the Act. Those principles include: a confidential postal ballot, one vote per beneficiary registered on a roll maintained by the Board, and the onus on beneficiaries to ensure their details are correct. The roll is divided into sections for each hapū and voting is for two members per hapū, corresponding with the two Trust Board membership seats from six hapū which make up the Board.

The Act provides under section 54 that any irregularity in the election process does not necessarily invalidate the results of the election.<sup>4</sup> Under the Act, section 55 allows the Governor-General (by Order in Council) to validate any irregular actions,<sup>5</sup> or extend the time within which a thing is required to be completed.<sup>6</sup> If the opinion of the Governor-General is that there have been irregularities that are improper or undesirable to validate, then the Governor-General (by Order in Council) may declare the election results to be invalid and hold a new election (pursuant to section 55A). These provisions of the Act are provided in full below:

### *Minor irregularities at elections*

#### **54 Election not invalid by reason of certain irregularities**

An election under this Part shall not be invalid by reason of any irregularity in any of the proceedings preliminary to the voting, or by reason of any failure to hold an election at any place appointed for holding an election, or to comply with the directions contained in this Act or in regulations under this Act as to the conduct of elections or the counting of the votes, or by reason of any mistake in the use of the forms used at any such elections, **if it appears that the election was conducted in accordance with the principles laid down in this Part, and that the irregularity, failure, or mistake did not affect the result of the election.**

#### **55 Validation of certain irregularities**

Where anything is omitted to be done or cannot be done at the time required by or under this Part, or is done before or after that time, or is otherwise irregularly done in matter of form, or sufficient provision is not made by or under this Part, the Governor-General may, by Order in Council published in the Gazette, at any time before or after the time within which the thing is required to be done, extend that time, or validate anything so done before or after the time required or so irregularly done in matter of form, or make other provision for the case as he thinks fit.

#### **55A Invalid elections**

Where in the opinion of the Governor-General irregularities have occurred in respect of any election under this Act which it would not be proper or desirable to validate under section 55, he may, by Order in Council, declare any such election to be invalid and make such provisions as he thinks fit for the holding of a fresh election.

Reading those three sections together suggests that:

1. The election results should stand unless the election was not conducted in accordance with the principles of the Act, or there was an irregularity, failure or mistake that affected the result of the election.

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<sup>4</sup> Māori Trust Boards Act 1955, section 54.

<sup>5</sup> Māori Trust Boards Act 1955, section 55A.

<sup>6</sup> Māori Trust Boards Act 1955, section 55.

2. Irregularities of form or timing can be validated by Order in Council under section 55.
3. Where an irregularity has occurred which it is not proper or desirable to validate under section 55, the Governor-General may declare the election to be invalid.
4. Irregularities which are not proper or desirable to validate under section 55A are likely to be those which are significant (i.e. the irregularity did affect the election result) and are not simply irregularities of form or timing.

The only relevant case law to assist me appears to be *Love & Ors v Wetere & Ors*, which concerned similar elections issues within the Taranaki Māori Trust Board.<sup>7</sup> The Court in this case dealt with the section 54 provision and interpreted the provision as I have stated.<sup>8</sup> In particular, the case dealt with allegations of the correctness of the Roll among other matters such as the advertising requirements under the Act. Justice Greig held that it was only substantial irregularities that will invalidate an election.<sup>9</sup>

Having considered all the information made available, I am satisfied that the elections were conducted in accordance with the principles laid down in the Act (as discussed above).

The key question, therefore, is whether any irregularity affected the result of the 2017 Elections and whether such an irregularity could be validated under section 55. In turn that will depend on the nature and magnitude of the irregularity.

My findings for each of the allegations of irregularities in the elections which were raised by the complainants are discussed below. For ease of reference, these can be grouped into the following issues:

- i. The integrity of the Tribal Roll
- ii. The provision for Special Votes
- iii. A conflict of interest concerning the Secretary also acting as the Returning Officer in conjunction with her role as CEO of the Board
- iv. The allegation that the Returning Officer withheld information from select Board Members
- v. The acceptance of registration transfers from an unauthorised person
- vi. The issue of a late nomination for one of the two Ngāti Patu vacancies
- vii. The reissuing of voting packs for affected Ngāi Tamahaua beneficiaries
- viii. The elections process was inconsistent with the elections process for the Whakatōhea Fisheries Trust
- ix. The voting process and the result of the Te Ūpokorehe election was invalid

Each issue will be dealt with accordingly.

## The Tribal Roll

In the 2017 Elections, the complainants allege three main issues appeared to occur, relating to the use and access of the Roll.

First, that Election Services used a deficient Tribal Roll due to lack of resourcing and staffing.<sup>10</sup>

Second, that the Tribal Roll was not authorised by the Board as implicitly required by Regulation 8(2)(a) and that consequently, no scrutiny of the Roll was provided by Trust Board members.<sup>11</sup> Because there

<sup>7</sup> *Love & Ors v Wetere & Ors* HC Wellington CP 735-87, 23 March 1988.

<sup>8</sup> At 5.

<sup>9</sup> At 7.

<sup>10</sup> Document 30A, Waitangi Tribunal – Whakatōhea Mandate Inquiry Report (Appendix A) section excerpts:  
5.4.1 “Ms Farrar stated that at the time of the mandate vote, the Trust Board did not have accurate postal addresses for more than 3,000 registered adult beneficiaries”.

7.2.1 “There would need to be a level of comfort amongst Whakatōhea as to who was maintaining the register. These were valid points, but nothing was done...” “This raises serious questions as to the adequacy of the Trust Board register as a suitable database for the mandate vote in May 2016”.

<sup>11</sup> Document 32, Email from Tim Selwyn, 1 May 2018.

has been is no scrutiny of the Roll, there was no ability to check whether someone is registered in multiple hapū (which is contrary to the Act) and consequent lack of confidence in the Roll. It is submitted that there cannot be confidence in the use of a Roll which has not been scrutinised.

Third, that the Returning Officer has breached the privacy of beneficiaries by uploading a list of names onto the Board website of beneficiaries whose voting papers were deemed 'Gone No Address' (GNA) by Election Services.<sup>12</sup> This was without consultation and approval by the Board.

### The relevant legal requirements

Pursuant to section 42(1) of the Māori Trust Boards Act 1955, it is the Board's responsibility to maintain a roll containing the names and addresses of all adult beneficiaries for the purpose of Elections:<sup>13</sup>

#### Part 3 Elections

##### *Roll of beneficiaries*

#### **42 Boards to have rolls prepared**

- (1) Each Board shall cause to be prepared a roll containing the names and addresses of all adult beneficiaries of the Board, and shall, from time to time, make all such additions and corrections to the roll as may be necessary.
- (2) Where pursuant to this Act beneficiaries of a Board are divided into different sections or divisions for the purpose of elections, the roll shall also show the section or division to which each beneficiary belongs.
- (3) Where any Parliamentary roll of electors contains sufficient information to identify the beneficiaries of any Board that Board may, with the approval of the Minister, use for the purposes of its roll under this section the appropriate Parliamentary roll of electors for the last preceding general election.
- (4) Where beneficiaries of a Board are divided into different sections or divisions for the purposes of elections, the manner in which any such section or division is to be determined in cases where a Parliamentary roll is used shall be stated in all advertisements and notices relating to the elections issued by the Board.
- (5) Where the beneficiaries of any Board are divided into sections or divisions for the purposes of elections, no person shall, except so far as may be prescribed by regulations under this Act, be eligible to belong to more than 1 section or division.
- (6) Where a person is qualified to belong to more than 1 section or division, he shall, when applying for enrolment, elect the section or division in which he wishes to be enrolled.

Section 43 of the Act provides that it is the responsibility of each adult beneficiary (18 years and over) to ensure their name is included in the roll and to supply the Board with a full (and correct) postal address:<sup>14</sup>

#### **43 Inclusion in roll onus of beneficiaries**

It shall be the responsibility of each adult beneficiary to ensure that his name is included in the roll and to supply to the Board his full postal address for the time being.

The allegations also raise the issue of Regulation 8(2)(a) of the Māori Trust Boards Regulations 1985, which implies that the roll used must be approved by resolution of the Board:

#### **8 Copy of roll to be sent to Returning Officer**

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<sup>12</sup> Please also see Appendix B1, B3, and B4 'WMTB Draft minutes from EA - June 2018' from Ngāti Ira requesting audio recording of 30 June 2018 Board meeting.

<sup>13</sup> Māori Trust Boards Act 1955, section 42(1).

<sup>14</sup> Māori Trust Boards Act 1955, section 43.

(1) The secretary of each board shall, not later than 3 clear days before the last day fixed under section 52 of the Act for the receipt of ballot papers by the Returning Officer in any case where an election is required under section 48 of the Act, forward to the Returning Officer the document or the various documents constituting the roll of the board's beneficiaries, showing clearly, in any case where a parliamentary roll of electors is used, the manner in which the board's beneficiaries are identified on that roll.

(2) At the same time, the secretary of the board shall also forward to the Returning Officer—  
(a) **a copy of the resolution of the board approving the roll for the purposes of the election**; and  
(b) the total number of ballot papers printed, issued, and not issued; and  
(c) the total number of beneficiaries on the roll; and  
(d) if there are specific sections or divisions of the beneficiaries, the total number in each section or division.

(3) If there are no specific sections or divisions of beneficiaries, the beneficiaries shall be numbered consecutively on the roll.

(4) If there are specific sections or divisions of the beneficiaries, those in each section or division shall be given a consecutive number preceded by the section or division number and a hyphen.  
[Emphasis added].

### Process and response by the Board<sup>15</sup>

The Board described the election process undertaken in 2017. Ms Farrar, as the Returning Officer, requested an election proposal by Election Services Limited. She met with key elections staff to start the election planning process. Public notice of elections occurred between 23 and 26 August 2017 using local newspapers and an advertisement in the NZ Herald as required. Nominations for the Board positions opened on 23 August 2017.<sup>16</sup>

Registrations by beneficiaries for the Roll closed on 21 September 2017. The process for approving individuals who wish to be on the Roll or Tribal Register, was as follows:

- (i) When a prospective member wishes to enrol, they complete the registration enrolment form, and this is sent to the Tribal Database Coordinator.
- (ii) The Co-ordinator then seeks approval from the respective hapū elected Trust Board member to approve.
- (iii) If the Trust Board member is not sure of the whakapapa, this is referred to the relevant hapū kaumātua who validates the whakapapa.<sup>17</sup>

Once the roll has closed, Election Services undertook responsibility for the electoral process. The Tribal Database Coordinator prepared the roll and sent this to Election Services on 26 September 2017. Election Services mailed out voting papers from 16 October 2017. The voting period closed at 4:30pm on 23 November 2017. The counting of votes occurred on 30 November 2017. The votes were counted by Election Services Deputy Returning Officer Dale Ofoske as Ms Farrar was not present on the day.<sup>18</sup>

In response to allegations of a lack of resourcing contributing to deficiencies in the Roll, the Board submitted there was no significant issue which impacted on the integrity of the Roll given:

- (i) The Board has 1 FTE assigned to the Tribal Database Coordinator role and a .25 FTE receptionist assigned to support where required;
- (ii) The Board Tribal Database has recently had a computer upgrade, and

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<sup>15</sup> References to the Board are to the response on behalf of the Board supplied by the Returning Officer.

<sup>16</sup> Elections Folder from WMTB, '20170824 WMTB Notice of beneficiaries inviting nominations Ōpōtiki news', '20170824 Notice of beneficiaries inviting nominations NZ Herald', '20170824 Notice of beneficiaries inviting nominations Ōpōtiki news', '20170823 Notice of beneficiaries inviting nominations Whakatāne beacon', '20170822 Notice of beneficiaries inviting nominations Ōpōtiki news', '20170822 Ōpōtiki news notice of beneficiaries inviting nominations'.

<sup>17</sup> Document 38A, Whakatōhea Māori Trust Board Report 3, section 2.

<sup>18</sup> Elections Folder from WMTB, 'Election Services Final Report'.

- (iii) The Tribal Database Coordinator has the support of an external independent party who monitors the back engine of the database.

The Board processes and policies around correcting errors on the Tribal Roll were provided for in the investigation.<sup>19</sup> The Register is able to quickly identify duplications, by matching whakapapa, birth dates, and secondary information. The Roll was scrutinised by external legal counsel, Holland Beckett.

In response to the allegation of non-compliance with Regulation 8(2)(a), the Board did not pass a resolution approving the Roll. The Board was not aware of Regulation 8(2)(a).<sup>20</sup> The Board was not aware of this requirement, as this has not been done historically.

The Board submitted that a regulation approving the Roll would have made no difference. The Roll would have remained as it was. In addition, the hapū representatives on the Board do not have access to their own hapū Roll and would not have contributed to the process. The Board has experienced issues with hapū members obtaining access to the Roll for their own purposes so current procedure to access information is guided by the consent of the beneficiaries and/or the Board.

In response to the issue that requests to scrutinise the roll were denied, the Board submitted there is an obligation and a legal responsibility to protect individuals' personal information and ensure that it is only used for the purpose it was collected for. Access to the Roll is password protected and only the administrator has full access to update information. As at 31 May 2018, there were 15,727 members enrolled. The Board note that each one of these members' names can easily be searched back to ten generations, thus confirming their hapū and Whakatōhea identity.<sup>21</sup>

The registration enrolment form is specific regarding information provided by an individual to the Board. The current form states:

“Any information received will be held by the Whakatōhea Māori Trust Board and you have certain rights under the Privacy Act 1993 to see and correct personal information which the Trust Board holds for you.”

Disclosure of information is guided according to the Privacy Act 1993, Part 2, Information Privacy Principles 1 to 12 (discussed further below), which is taken into consideration when considering requests to access private information.<sup>22</sup> For example, one request to check the roll was denied based on the purpose to check for duplicates. For that to be allowed, access would have to have been given to birth dates, addresses, and other data (married, maiden or previous names). It was on this basis that the Board denied the request for access to scrutinise the Roll.

In relation to the issue of uploading GNAs onto the Board website, the Returning Officer explained the upload of first and last names was for the purpose of requesting those beneficiaries update their information in order to vote in the elections. She sought legal advice and was advised that no breach of privacy would take place if she was to do this, because no personal contact details would be uploaded.<sup>23</sup> The purpose of the upload onto the website was to inform any intending voters that their current contact details meant that they were not able to be sent the physical voting papers. This was in the interest of full participation of beneficiaries in the 2017 elections.

### Conclusion on the allegations relating to the Tribal Roll

The issues raised by the complainants are that ultimately the Roll was not adequately maintained, so that the election results can be called into question.

I conclude that the Board made adequate efforts to maintain the Roll and any errors were not sufficiently significant for me to conclude they could have affected the election outcome. The Board devoted significant resource to the issue and engaged external parties to assist. The evidence suggests that the

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<sup>19</sup> Elections Folder from WMTB, 'Whakatōhea Tribal database & Election Policy' and 'WMTB Tribal database manual V1'.

<sup>20</sup> Whakatōhea Māori Trust Board Report List of Documents Report at [32].

<sup>21</sup> Whakatōhea Māori Trust Board List of Documents Report.

<sup>22</sup> Document 38A, Whakatōhea Māori Trust Board Report 3.

<sup>23</sup> Document 38A, Whakatōhea Māori Trust Board Report 3.

returns were better than in 2014. The Tribal Database Coordinator and the Election Services Final Report confirm that 1,118 (out of 5233) returned their voting paper. This represents a 21.4% return and compares to a 17.9% return from the 2014 election.

Regulation 8(2)(a) allows for the Returning Officer to receive confirmation that the Roll, in the state in which the Returning Officer would be granted access to it, is fit to be used for elections, and other matters are confirmed by the Secretary at the same time such as total ballot papers or number of beneficiaries on the Roll.<sup>24</sup> In this case, none of this was done as the Returning Officer and the Secretary were the same person and the Board was not aware of the requirement. The requirement makes little sense in this situation. As Secretary and Returning Officer, Ms Farrar was in a position to access and confirm this information herself.

Assuming Regulation 8(2)(a) imposed a mandatory procedural requirement under the Māori Trust Board Regulations, I need to consider whether such a breach could (as a matter of law) result in the invalidity of the election results. The case law where a mandatory procedural requirement is breached, suggests this depends on a range of factors including the seriousness of the breach, the nature of the protection, the broader public interest, and the impact on the decision for the individual affected.<sup>25</sup>

Regulation 8(2)(a) is designed to ensure that a record of the Roll was handed to the Returning Officer, and that Roll was agreed by the Board to be appropriate for elections. The nature of the breach of this regulation does not mean the Roll might have been materially different had the Board approved it, as opposed to a situation where the Board have not. Regulation 8(2)(a) does not expressly mandate checks or scrutiny by the Board, rather it is aimed at ensuring the Returning Officer has the correct version of the Roll to use. Where the Secretary is also the Returning Officer, the Roll will naturally be that which is maintained by the Board and approved by it (by virtue of the system it has in place to maintain it). The requirement of Regulation 8(2)(a) appears to be more a matter of form, so that the Returning Officer has confidence in the Roll provided. For those reasons, I do not regard the reference to the resolution as being a critical feature.

I am persuaded the Roll would have remained the same whether or not there was a Board resolution accompanying it. For those reasons, even if Regulation 8(2)(a) imposed a mandatory requirement, I do not believe the absence of the resolution had any effect on the election results. I do not believe that a Court, following the authorities cited, would invalidate the result.

## Special Votes

Special voting was advertised on the Board website and there was a standard special votes column on the return voting slip.<sup>26</sup>

The issue of whether to accept late enrolments, and therefore allow for special votes, was later tabled and discussed by the Board.<sup>27</sup> Trust Board members decided not to accept late enrolments or any special vote after the close of the Roll on the 21 September 2017, but new enrolments could update the Register for purposes other than the 2017 elections.

However, the complainants allege there was no assurance from the Returning Officer that special votes were not counted. Trust Board members were provided with a letter confirming a special voting period,<sup>28</sup>

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<sup>24</sup> Māori Trust Boards Regulations 1985, reg 8(2)(b), 8(2)(c) and 8(2)(d).

<sup>25</sup> The Court in *Burr v Blenheim Borough Council* [1980] 2 NZLR 1, cited the principle by Justice Cooke in *New Zealand Institute of Agricultural Science v Ellesmere Country* [1976] 1 NZLR 630, 636 that “[w]hether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance.”

<sup>26</sup> Elections Folder from WMTB, ‘Picture from website – special votes JPG’.

<sup>27</sup> Elections Folder from WMTB, ‘20171111 MINUTES WMTB’.

<sup>28</sup> Letter to Board, dated 30 October 2017, “[t]rustees have approved these tribal registrations and they will be entered onto the tribal register and entitled to receive a voting form through a special voting process...Based on this consultation and in the capacity of my role as Returning Officer, I have made a decision to accept these registrations as good electoral practice”. A request of the Board to approve 60 new registrations.

a request from the Board to accept new registrations after the Roll closed,<sup>29</sup> and one Trust Board member was asked to approve new enrolments, again after the Roll closed.<sup>30</sup> The Trust Board members opposed the acceptance of these new enrolments, and it was agreed by the Board that special votes would therefore not be counted.<sup>31</sup> Although the legal opinion of Potts & Hodgson was discussed at the 11 November 2017 Board meeting,<sup>32</sup> the complainants are unable to confirm whether special votes were not counted.<sup>33</sup>

### The relevant legal requirements

Special voting is not expressly provided for under the Act or Regulations. It is an internal matter for the Board to decide upon.

### Process and Response by the Board

At the 24 June 2017 Board Meeting, Trust Board members approved the Election Services Timetable, which allowed for a special voting period to end on 23 November 2017.<sup>34</sup> The Returning Officer's initial understanding was that late enrolments were allowed as part of the special voting process so that voters who registered late still had the opportunity to vote, despite the closing of the Roll on 21 September 2017.

The requirements referred to in the elections timetable gave rise to uncertainty as against the regulation requirements, so the Returning Officer sought advice from Election Services.<sup>35</sup> Ms Farrar also sought legal advice as to the issue. The advice recommended that the Board not accept these late enrolments under special voting, mainly for the reason that there needs to be consistent processes and advance notice to beneficiaries should be given if special voting were to occur.

At the close of voting on 23 November 2017, the Returning Officer received an email from Election Services Deputy Returning Officer seeking a final decision on the special votes.<sup>36</sup> The Deputy Returning Officer noted that the special votes breakdown was a total of four votes, 2 from Ngāti Rua, 1 from Ngāti Tama, and 1 from Ngāti Ira. The Returning Officer advised that special votes would not be counted. The 2017 Elections results were witnessed by a Justice of the Peace, the Deputy Returning Officer, and four scrutineers. Election Services reported confirmed receipt of the 4 special votes which were not counted.<sup>37</sup>

The Board explained that although new enrolments were received from beneficiaries, these beneficiaries were informed that since the Roll had closed, they would not be eligible to vote, but their enrolments would go into the Tribal Register to be recorded (for later elections).<sup>38</sup>

The Election Services Report records a total of 1118 valid returned voting papers out of a total of 5233 voting papers issued.<sup>39</sup> The Election Services Report was shared with each Board member.

### Conclusion on the allegations relating to Special Votes

As the complainants note, it appears that the confusion around the special voting period has occurred due to the adoption of a standard election timetable by Election Services where special voting in local elections is provided.

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<sup>29</sup> Document 30B, Attachment to Email: Appendix B.

<sup>30</sup> Document 36A, Whakatōhea Māori Trust Board Report 2.

<sup>31</sup> Document 10A, Documents attached to Email in Document 10.

<sup>32</sup> Document 5A, Letter from Board's solicitors, Potts & Hodgson, to Board regarding late nominations/special voting.

<sup>33</sup> Document 30 – Further evidence letter dated 26 April 2017, Section 2.

<sup>34</sup> Document 5B, Election timetable by the Board dated 23 November 2017.

<sup>35</sup> Document 5A, Letter from Board's solicitors, Potts & Hodgson, to Board regarding late nominations/special voting.

<sup>36</sup> Document 36A, Whakatōhea Māori Trust Board Report 2, Appendix E of Report 2.

<sup>37</sup> Elections Folder from WMTB, 'WMTB Special Votes' email.

<sup>38</sup> Document 36A, Whakatōhea Māori Trust Board Report 2, Appendix C, Affidavit of Report 2.

<sup>39</sup> Full Report from Election Services, Appendix 3 and Appendix 4 'Declaration of Results'.

I am satisfied that no irregularities occurred here as Election Services adhered to the decision by the Board not to accept or count any late enrolments or special votes. I separately checked and followed up with Election Services to confirm they held evidence that no late enrolments or special votes occurred.

## Conflict of Interest due to the Board Secretary acting as the Returning Officer

The complainants alleged that the appointment of Ms Farrar as Returning Officer has given rise to a conflict of interest.<sup>40</sup> There was criticism that Ms Farrar should not have dealt with Mr Riesterer's late nomination, given Ms Farrar and Mr Riesterer were both actively engaged in the Waitangi Tribunal Inquiry, Wai 2662.<sup>41</sup>

### The relevant legal requirements

Section 52 of the Act on the role of the Returning Officer allows for the Board to appoint Ms Farrar as the Returning Officer:

#### **52 Returning Officer**

Ballot papers shall, not later than 1 month before the date on which the term of office of the members for the time being in office expires, be posted to or lodged with the Returning Officer appointed for the purpose of the election by the Minister. The person appointed as Returning Officer may be the Secretary of the Board or an officer of the Public Service.

Te Puni Kōkiri Guidelines note that the Returning Officer can be the Secretary of the Board, appointed by the Minister on request of the Board.<sup>42</sup>

### Process and Response by the Board

The Board agreed for Ms Farrar to be appointed as the Returning Officer.<sup>43</sup> The appointment process was also confirmed by the Minister.<sup>44</sup> The Board engaged Election Services to be used for the elections, which added an element of independence.

## Conclusion on the allegations relating to the Board Secretary acting as the Returning Officer

The complainants provided the 'Decision on the Review of Election of Trustees of Ngāti Manuhiri Settlement Trust' by Electoral Review Officer Coral Shaw in support of their position that the election results were invalid due to the irregularities. This decision regarded the perceived conflict of interest of the CEO, who was also a candidate for the Trust, but the CEO also administered the Roll. It was deemed not to be a mere technicality as the conflict of interest did materially affect the results of the election.

This situation can be distinguished here as Ms Farrar was not a candidate for the elections. Ms Farrar and support staff appeared to have made genuine efforts to improve the accuracy of the Roll so that it would be fit for purpose for the 2017 elections.

In my view, Ms Farrar was able to be appointed and the appropriate process was followed to approve that appointment. There remains a question as to whether, in such a contentious environment, it made sense for her to accept such appointment. Given her position as longstanding CEO, it could be said

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<sup>40</sup> Document 30C, Attachment to Email: Appendix C.

<sup>41</sup> Document 32, Email from Tim Selwyn dated 1 May 2018, section 7.

<sup>42</sup> Te Puni Kōkiri, The Māori Trust Boards Act 1955 Practical Guide, paragraph 6.

<sup>43</sup> Elections Folder from WMTB, 'Resolution from Trust Board Hui to CEO on 15 June 2018 and 22 April 2017 Minutes WMTB'.

<sup>44</sup> Document 3, Letter from Minister to Board approving Ms Farrar's appointment as Secretary and Returning Officer, dated 4 July 2017.

that she may benefit from the election of certain board members as against others. This perception could be avoided by the appointment of an independent person as Returning Officer.

## The Returning Officer withholding information from Board Members

The complainants allege a general lack of access to information and assert that although the voting process was overseen by an independent contractor, they could not verify the truth of the matters raised during the election. For instance, there was an issue with a late nomination. The complainants allege that not all Trust Board members have been provided with a copy of the letter supporting the late nomination nor confirmation of Te Puni Kōkiri's position on this matter, nor confirmation that the candidate received support from five registered members of the relevant hapū.<sup>45</sup>

### The relevant legal requirements

Section 52 of the Act on the role of the Returning Officer is silent as to the scope of the Returning Officer's role. In particular, it is unclear whether the Returning Officer must disclose certain information around the elections process such as advice sought or received. The Regulations are also silent as to any procedural requirements of the Returning Officer in their role overseeing the elections.

### Response by the Board:

The Board denied that any relevant information regarding the elections was withheld from certain Board members. The process of providing information to the Board regarding the election process was the provision of the Trust Board's Election Policy at the 22 April 2017 Trust Board meeting.<sup>46</sup>

At the 11 November 2017 Board meeting, the Trust Board members were provided with the letter from Te Puni Kōkiri regarding whether to accept Mr Riesterer's late nomination and the response was that this was an internal matter for the Board and suggested that the Board seek independent legal advice on this matter.

The Board also discussed the late nomination letter from Ngāti Patu, the advertisement that this nomination was pending confirmation from Te Puni Kōkiri, and that the late nomination was not accepted. The Board noted that the Tribal Database Co-ordinator was present as each nomination (including the late nomination) was checked to ensure it complied with the requirement that nominees have support from five registered members of the relevant hapū.<sup>47</sup> I also sighted the late nomination.

## Conclusion on the allegations relating to the withholding of information by the Returning Officer

In my view, this complaint arises again from the lack of trust between Board members and the subsequent perceptions of a conflict of interest. I agree with the legal opinion provided by Potts & Hodgson that the Returning Officer should have control over how the election process is carried out, subject to the requirement for any such officer to act lawfully (in accordance with the Act and Regulations) and reasonably (in an administrative law sense).

I do not conclude that there was an irregularity here, and I am satisfied that any information which the Returning Officer acted upon without consulting all members did not affect the outcome of the elections. Where Trust Board members are requesting access to Board matters such as elections, there are pathways open to the Trust Board members to request this directly from the Board. For the purposes of this investigation, the issue does not bear on the 2017 Election results.

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<sup>45</sup> Document 30, Further evidence from Amber Rakuraku-Rosieur letter dated 26 April 2017, Section 1.

<sup>46</sup> Document 36A, Whakatōhea Māori Trust Board Report 2, section 3.

<sup>47</sup> Document 36A, Whakatōhea Māori Trust Board Report 2, Appendix H of Report 2, Affidavit of the Tribal Database Co-Ordinator.

## Registration Transfers

The complainants allege that Mr Maxwell (one of the Trust Board members representing Ngāti Ngāhere) advised the Board on 11 November 2017 that he had transferred registered beneficiaries from Ngāti Ngāhere across to Ngāi Tamahaua and Te Ūpokorehe. It is purported that this was not notified to the Ngāi Tamahaua and Te Ūpokorehe representatives on the Board, nor was the opportunity provided to confirm the whakapapa of the transferred registration with these representatives which is standard procedure.<sup>48</sup>

Ngāi Tamahaua raised the issue of interference by other Board members signing off member registrations, and transfers from Ngāti Ngāhere to the Ngāi Tamahaua hapū register, which is a responsibility of the Ngāi Tamahaua Trust Board member only.<sup>49</sup>

Another Te Ūpokorehe beneficiary received a Ngāti Ira voting pack but stated she has never voted for Ngāti Ira and she had registered with Te Ūpokorehe as her primary hapū. She requested a copy of her original registration form, and she was advised by the Board that they could not find her registration form.<sup>50</sup>

The complainants allege this was an attempt to manipulate voting in favour of certain nominees.<sup>51</sup>

### The relevant legal requirements

Under section 42(5) of the Māori Trust Boards Act 1955, a person cannot belong to more than one section or division for the purposes of elections (unless allowed by Regulations):<sup>52</sup>

#### **42 Boards to have rolls prepared**

...

(5) Where the beneficiaries of any Board are divided into sections or divisions for the purposes of elections, no person shall, except so far as may be prescribed by regulations under this Act, be eligible to belong to more than 1 section or division.

If the beneficiaries are divided into different sections or divisions for election purposes, the roll needs to show that. Pursuant to section 45, the Board decides whether a person is qualified to be enrolled and determines (if necessary) which section or division he or she should be included in:<sup>53</sup>

#### **45 Inclusion in roll**

Each Board shall have jurisdiction to determine whether any person applying for inclusion in its roll of beneficiaries is qualified for inclusion, and to determine (where applicable) the section or division of beneficiaries in which he is entitled to be included.

In my view, it is the Board's decision, under section 45, to determine what scrutiny the roll should be subject to, and how this is to be achieved.

### Process and Response by the Board:

The Board responded that no inter-hapū registration transfers occurred which affected the 2017 Elections. The Board confirmed that 22 new enrolments were received from Te Kahautu Maxwell and this was explained in Report 1.<sup>54</sup> Out of the 22 registrations, 16 of these were for Ngāti Ngāhere of which Mr Maxwell is the elected Trust Board member to approve these enrolments. The remaining 6 were from other hapū, of which Mr Maxwell knew their whakapapa but was not the authorised Trust

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<sup>48</sup> Document 6, Letter dated 11 December 2017.

<sup>49</sup> See Allegations of the re-issue of Voting Packs (Ngāi Tamahaua).

<sup>50</sup> Appendix E, Letter from Jessie Tuari-Hape dated 2 July 2018 of Te Ūpokorehe Summary List of Allegations.

<sup>51</sup> Document 6, Letter dated 12 December 2017, Section 2.

<sup>52</sup> Māori Trust Boards Act 1955, section 42(5).

<sup>53</sup> Māori Trust Boards Act 1955, section 45.

<sup>54</sup> Document 15A, Exhibit 12i and 12ii of Report 1.

Board member. The Board accepted that these 6 new enrolments were incorrectly authorised by Te Kahautu Maxwell.<sup>55</sup> However, the Board clarified that these 6 enrolments were later counter-signed by the correct kaumātua.

No transfers occurred into or out of the database by way of action of an external third party during the 2017 Elections.

During the 2017 Elections, the Board noted that 3 inter-hapū transfers were requested from individuals to go from one hapū to another. These 3 transfers did not occur until the election process was completed.<sup>56</sup> There were no improper or mistaken removals undertaken on this database.<sup>57</sup> Access to the Roll is restricted only to the tribal database administrator and the back-engine provider.

### Conclusion on the allegations relating to registration transfers

It was explained to me by both the complainants and the Board that the standard procedure if beneficiaries chose to sit with a particular hapū, is their whakapapa would have to be verified by a Trust Board member. If hapū members already registered chose to change to another hapū that they are qualified to be enrolled under, then they must fill in an amendment to the beneficiary register form and have their whakapapa validated by the relevant Trust Board member, or a recognised kaumātua in each hapū, in the alternative.

It appeared to me that these transfers could not have any effect on the outcome of the elections as they were received by the Board a day after the Roll closed and they were not processed for the 2017 elections.

### Late Election Nomination (Ngāti Patu)

The complainants allege that on 11 November 2017, the Trust Board members were also informed by the Returning Officer that one of the two Ngāti Patu nominations, was submitted approximately 15 to 20 minutes late. The Returning Officer advised that the matter was referred to Te Puni Kōkiri for addressing. Te Puni Kōkiri subsequently advised that this was a matter for the Board's discretion. The Returning Officer confirmed that Ngāti Patu hapū subsequently provided a letter of support for Mr Riesterer as their representative.

The complainants allege that because Mr Riesterer is the Chairman of Waialua Marae being the Ngāti Patu hapū representative presents a conflict of interest with respect to the source of the support letter in favour of his nomination.<sup>58</sup> The complaints submit there is no evidence of any Ngāti Patu hapū Hui being notified for the purposes of securing support for Mr Riesterer's late nomination. They allege they have not been provided with a copy of the letter supporting the late nomination nor Te Puni Kōkiri's letter. Furthermore, the complainants do not have the ability to scrutinise whether the Ngāti Patu candidate met the criteria of obtaining support from 5 registered members of Ngāti Patu hapū.<sup>59</sup> Therefore the complainants argued that the nomination of Mr Riesterer is irregular, and his nomination should be discounted.<sup>60</sup>

### The relevant legal requirements

Under section 46(1) of the Act, at least four months before the expiry of the term of office of existing members the Secretary must give public notice to beneficiaries calling for nominations to be lodged:<sup>61</sup>

#### *Nomination of members*

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<sup>55</sup> Elections Folder from WMTB, 'Report Dickie & Te Kahautu Maxwell 2 July 2018', 'Te Kahautu 6 authorised Te Kahautu', '16 Ngahere Registrations received 22 September 2017'.

<sup>56</sup> Elections Folder from WMTB, 'Hapū change'.

<sup>57</sup> Elections Folder from WMTB, 'Holland Beckett Report'.

<sup>58</sup> Document 30, Further evidence dated 26 April 2017.

<sup>59</sup> Document 30, Letter dated 26 April 2017.

<sup>60</sup> Document 32, Email from Tim Selwyn dated 1 May 2018, section 6.

<sup>61</sup> Māori Trust Boards Act 1955, section 46(1).

#### 46 Invitation of nominations

- (1) Not later than 4 months before the date on which the term of office of the members of a Board for the time being in office expires, the Secretary of the Board shall cause public notice to be given to beneficiaries of the Board of the fact that nominations are called for election to membership of the Board for the ensuing term, the method of lodging nominations, and the latest date, as fixed by section 47, by which nominations must be lodged with the Secretary of the Board.
- (2) Any such public notice shall be given in the following manner:
  - (a) by newspaper advertisement published on at least 2 consecutive days in a daily newspaper or newspapers circulating in the district or districts where the majority of the beneficiaries reside or in such daily news-papers as may be prescribed, in the case of any particular Board, by regulations under this Act; ...

Under section 47(1), nominations should be in writing, signed by at least five beneficiaries entitled to vote for that candidate and endorsed by the candidate:<sup>62</sup>

#### 47 Making of nominations

- (1) The nomination of a candidate for election to membership of a Board shall be in writing signed by not less than 5 beneficiaries shown in the roll of beneficiaries as entitled to vote in respect of the election of that candidate.
- (2) The consent of each candidate to his nomination shall be endorsed on the nomination paper.
- (3) Nominations shall be lodged with the Secretary of the Board not later than 3 months before the day on which the term of office of the members for the time being in office expires.
- (4) [Repealed]
- (5) A candidate may at any time, by notice to the Board, withdraw his nomination.

If the elections are for a specific division, the nomination needs to be in form set out in Schedule 6 of the Māori Trust Board Regulations.<sup>63</sup>

The nominations for Trust Board positions closed on 21 September 2017 at 4:30pm (the normal close of business hours for the Board). This date is set by the Returning Officer and conformed with the requirement under section 46 that nominations be received by the Secretary at least three months prior to the day of the term of existing members expiring (that date being 18 March 2018).

#### Process and Response by the Board:

The Board confirmed that there were only two nominations for Ngāti Patu hapū (including the late nomination of Mr Riesterer). On the night of nominations closing, the Tribal Database Co-ordinator and the Returning Officer were present when checking the late nomination details against the tribal database to ensure the five members nominating were correctly registered.<sup>64</sup> The Returning Officer informed Mr Riesterer that his nomination was not accepted as it was late. However, Mr Riesterer's nomination form was otherwise valid.<sup>65</sup>

The Returning Officer then clarified with Te Puni Kōkiri whether it was appropriate to accept Mr Riesterer's late nomination.<sup>66</sup> Te Puni Kōkiri's response was that it was an internal matter for the Board and any irregularities would be assessed afterwards.<sup>67</sup> Other Board members were then informed of the late nomination of Mr Riesterer at the 11 November 2017 Board meeting. The minutes noted it was Mr Riesterer who was the late nominee. Trust Board Members were also presented with the written legal advice from Potts and Hodgson.<sup>68</sup>

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<sup>62</sup> Te Puni Kōkiri, The Māori Trust Boards Act 1955 Practical Guide, paragraph 3.

<sup>63</sup> Māori Trust Boards Regulations 1985, Schedule 6.

<sup>64</sup> Document 36A, Appendix H & J of Report 2.

<sup>65</sup> Document 19A.

<sup>66</sup> Document 4.

<sup>67</sup> Document 4A.

<sup>68</sup> Document 15A, Exhibit 12vi of Report 1.

While awaiting confirmation from Te Puni Kōkiri, Ms Farrar discussed this issue with Election Services, who informed her that there was a requirement to notify the public of all the nominations received.<sup>69</sup> In the public advertisement, Mr Riesterer's nomination was included, but stated subject to "Te Puni Kōkiri confirmation".<sup>70</sup>

The Board responded to the complainant's allegations surrounding the hapū Hui that it is not the role of the Returning Officer to check when a hapū has a Hui, or to validate what a hapū decides regarding their nominee. The letter from Ngāti Patu hapū reconfirming Mr Riesterer as their nominated hapū delegate was given and accepted.<sup>71</sup> The Board later discussed this late nomination and provided information of this to the Minister requesting that "if the Minister felt that the nomination shouldn't be accepted then that would trigger a process for the hapū to elect the other member".<sup>72</sup> This was passed through a resolution of the Board.<sup>73</sup>

It was Election Services advice to the Returning Officer that where a vacancy occurs, one of two things could happen. The Deputy Returning Officer indicated that usually in his experience (following the Local Electoral Act 2001) either the vacancy is filled by appointment (of a suitably qualified person) or a by-election is held following the election.

Rather than conduct a by-election following the main election, it was the Deputy Returning Officer's view that perhaps the best option was to fill the vacancy by appointing a suitably qualified person. Such an appointment and process should be undertaken by the Ngāti Patu hapū and not the Board. The Deputy Returning Officer pointed out that guidance for this appointment process could be found in sections 117A and 118 of the Local Electoral Act 2001, but that it could also simply be a case of calling for expressions of interest to fill the vacancy from members from Ngāti Patu hapū, and then working through a selection process to appoint the most suitably qualified.

The name of the appointed person could then be given to the Returning Officer, who would then advise Te Puni Kōkiri of the process and name of appointed Trust Board member (as per section 49 of the Act).

Ngāti Patu hapū conducted their own process of selection and sent a letter of their nomination of Mr Riesterer to represent Ngāti Patu hapū.

Mr Riesterer was declared to be elected unopposed for one of the two Ngāti Patu positions.

### Conclusion on the allegations relating to the late nomination

The issue is whether the acceptance of the late nomination of Mr Riesterer is an irregularity. And if so, whether this irregularity affected the outcome of the elections and can be validated under section 55 of the Act. Potts and Hodgson suggest that it is "only" Te Puni Kōkiri which must approve the late nomination. In my view Te Puni Kōkiri can give guidance but ultimately cannot make the decision for the Board, whether to accept Mr Riesterer's late nomination. I agree with Te Puni Kōkiri that this was an internal decision for the Board to decide.

The letter of nomination by the Chair of Ngāti Patu hapū meant the nomination was effectively accepted. Despite the helpful advice of the Deputy Returning Officer, there was no other way for him to be elected (as the vacancy process described was not available in these circumstances under the Act). The Deputy Returning Officer later declared Mr Riesterer was elected unopposed.<sup>74</sup> Although the late nomination was not initially accepted by the Returning Officer, the effect of the process followed was that it was later accepted and Mr Riesterer was elected. The acceptance of a nomination some 30 minutes after the close of nominations can be described as an irregularity, in particular one of timing.

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<sup>69</sup> Document 15A, Exhibit 9 of Report 1.

<sup>70</sup> Elections Folder from WMTB, 'Posted to Whakatōhea website – 4 October 2017, 'Posted to Whakatōhea Facebook page - 4 October 2017', and emails regarding Ngāti Patu dated 4 October 2017 and 18 October 2017.

<sup>71</sup> Document 15A, Exhibit 15 IV of Report 1.

<sup>72</sup> Elections Folder from WMTB, 'Minutes Ngāti Patu resolution' and 'Resolution re Ngāti Patu'.

<sup>73</sup> Document 32A, Email from Maui Hudson, in response to email from Timothy Selwyn, defending the actions of the WMTB.

<sup>74</sup> Election Services Report, 'Election Results', at 6.

The irregularity arguably did affect the result of the election. If Mr Riesterer's nomination was never accepted, there would have been only one candidate elected and a vacancy.

The irregularity was purely one of timing and only a matter of half an hour. The timing requirements in the Act are expressed in days (without hours specified). Mr Riesterer's nomination form complied with the requirements under the Act and Regulations. Given the endorsement of Mr Riesterer by his hapū and the apparent inevitability that he would have been re-nominated if a further election had been held, this irregularity in my view can be validated by the Governor General, by Order-in-Council, under section 55. It is the kind of irregularity that is suited to validation under that section.

### Allegations by Ngāi Tamahaua of reissuing of voting packs

The complainants allege that a number of Ngāi Tamahaua whānau contacted their Board representative complaining of various issues including not receiving voting papers, and if they later received voting papers, not having sufficient time to post them.<sup>75</sup>

In the 2017 Elections, 732 voting packs had to be re-issued due to data issues when received from the Board for Ngāi Tamahaua hapū being incorrectly transferred to Election Services. Ngāi Tamahaua allege the reissuing of voting packs disadvantaged those beneficiaries because they had less time to vote. They allege these beneficiaries had their voting papers returned to them, and their votes would not have been part of the count.<sup>76</sup> Ngāi Tamahaua also allege there was no evidence produced by the Board to show registrations received after the closing of the Roll did not receive a voting paper.

### The relevant legal requirements

The Act and Regulations are silent as to how to deal with the reissuing of voting packs in an election.

### Process and Response by the Board:

The Board's response was that once the nomination forms and tribal database were sent to the Election Services, the Returning Officer had no further involvement in the voting process.<sup>77</sup> Following the close of nominations, only four hapū required physical elections.

The Board received two phone calls which alerted the Tribal Database Co-ordinator and Election Services to the error. In total, 7 people either contacted the Board, the Returning Officer or the Tribal Database Co-ordinator.<sup>78</sup>

At the time of sending through the tribal database of 5230 names to Election Services, the database inadvertently moved resulting in 732 names and addresses being shifted out of alignment.<sup>79</sup> The reason this issue occurred was due to an excel spreadsheet error resulting in misalignment of names and addresses. Election Services and the Tribal Database Co-ordinator (TDC) moved quickly to resolve this situation. 732 Voting packs were re-issued by Election Services.<sup>80</sup> After Election Services identified the persons affected, they tagged each one of the re-issued voting packs to ensure they would not be counted twice.<sup>81</sup> Election Services ensured that any original voting papers issued were invalidated in their election management software.<sup>82</sup> Election Services reissued 732 voting packs on 24 October 2017, leaving just under a month for those beneficiaries affected to vote.

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<sup>75</sup> Ngāi Tamahaua Beneficiary Letters dated 29 June 2018 and Document titled 'A Collective Impacts from WMTB Elections for and on behalf of descendants of Tapae and Toritori Biddle'.

<sup>76</sup> Document 9.

<sup>77</sup> Full Report from Election Services.

<sup>78</sup> Elections Folder from WMTB, 'No 29 Ngāi Tamahaua Affected'.

<sup>79</sup> The Board sent through a list of 5230. However, GNA corrections by Election Services resulted in the final 5233 eligible voters.

<sup>80</sup> Exhibit 18 of Report 1 accessible under Document 15A.

<sup>81</sup> Conversation with the Deputy Returning Officer at Election Services.

<sup>82</sup> Full Report from Election Services.

Election Services completed this task within 24 hours which still left about a month to be able to vote. This is the first time that information has moved in transit while being emailed to Election Services.<sup>83</sup> The voting turnout for Ngāi Tamahaua was 23.72% and compared favourably to the voter turnout for Ngāti Rua (the largest hapū) of 19.03%, and Ngāti Ira of 22.39%.<sup>84</sup> Of the 5233 registered members issued a voting pack, 1118 were received, completed and returned. This represents a 21.4% voter turnout and compares to turnout of 17.9% in 2014.<sup>85</sup>

Election Services received all returned voting envelopes of which are classed as GNA. There was a total of 1,467 voting packs issued for Ngāi Tamahaua hapū. The accurate GNA number for Ngāi Tamahaua was established in the second mail-out with the 732 voting packs, which resulted in 80 GNA envelopes being returned of the total 1,467 votes issued.<sup>86</sup>

The Trust Board emphasised it cannot be held responsible for adult voting members not informing the Board of changes in circumstances or address.<sup>87</sup> The Board submits it has improved on the process of transiting the Roll and information to Election Services so that it is password protected, and they should not experience a similar technical issue in future elections.

### Conclusion on the allegations relating to the reissuing of voting packs

Section 51 requires the Secretary to send out a ballot paper to each beneficiary on the Roll not later than 1 month after the latest date for lodging nominations. That date was 21 September 2017. One month after that is 21 October 2017. The Ngāi Tamahaua error was not corrected until 24 October 2017.

It is at least arguable that this amounted to a failure to comply with the directions conferred in the Act, because the ballot papers were sent to the wrong addresses (not those of the Ngāi Tamahaua beneficiaries as per the Roll). It may also amount to an irregularity in the proceedings preliminary to the voting.

Such a failure or irregularity is a matter which falls for consideration under section 54. In summary, in my view, this irregularity or failure did not affect the result of the election. My reasoning is:

- (i) Election Services reissued the voting packs quickly meaning the affected beneficiaries were still easily able to vote;
- (ii) There was a relatively good vote turnout for Ngāi Tamahaua despite the mistake; and
- (iii) There was very few contemporaneous complaints.

I am of the view that such a mistake, quickly rectified, cannot have produced any significant effect. There is no evidence of such an effect. In effect, this also would be an error of timing, in that the voting packs were not sent to the correct addresses until just after the 21 October 2017 date required by the Act. Again, like Mr Riesterer's late nomination, I am of the view that this failure or irregularity should be validated under section 55. I do not think it could have affected the result of the election.

### Te Ūpokorehe Voting Results

Te Ūpokorehe allege that not all Te Ūpokorehe beneficiaries registered on the Roll received voting papers.<sup>88</sup> The complainant representative notes that due to short notice in gathering information, the evidence provided is not a true reflection of the overall impact to Te Ūpokorehe beneficiaries. Te Ūpokorehe were aware of registrations received by the Returning Officer but could not confirm whether they did or did not receive a vote.

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<sup>83</sup> Elections Folder from WMTB, 'Election Services Ngai Tama Error' and 'Tamahaua\_error\_fix message'.

<sup>84</sup> Document 38A, Whakatōhea Māori Trust Board Report 3, section 1.

<sup>85</sup> Document 36A, Whakatōhea Māori Trust Board Report 2, section 4(c).

<sup>86</sup> Elections Folder from WMTB, 'WMTB Election Services Final Report 2017 – declaration of results (Appendix 3 and 4) records the delivery of voting papers to members of each of the hapū'.

<sup>87</sup> Document 36A, Whakatōhea Māori Trust Board Report 2, section 4(d).

<sup>88</sup> Appendix B including letters from Ūpokorehe beneficiaries: Memory Wikotu, Jordan Wikotu, Zeb Wikotu and Jessie Tuari-Hape of Te Ūpokorehe Summary List of Allegations.

## The relevant legal requirements

The Act and the Regulations do not prescribe the validation process of beneficiaries eligible to enrol for each hapū. This is an internal policy for the Board to approve and follow and is discussed above in relation to the issues of the Tribal Roll.

### Process and Response by the Board:

The Board's response to the allegation that not all beneficiaries of Te Ūpokorehe registered on the Roll received voting papers, is that the Board has followed the same elections roll-updating process and that it was open for beneficiaries to contact the Board to be sent a voting pack if they did not receive one. The Board note there were two instances where late enrolment forms were received by the Board and these were not sent to Election Services.<sup>89</sup>

### Conclusion on the allegations relating to Te Ūpokorehe results

My view is that these issues have been covered under the allegations of the reissuing of voting papers and the allegations relating to registration transfers. It is the responsibility of each adult beneficiary to ensure that his or her name is included on the Roll and to supply to the Board his or her full postal address.<sup>90</sup> I do not consider there to have been a significant failure of error here.

## Whakatōhea Fisheries Trust

The Board is custodian trustee of the Whakatōhea Fisheries Trust under a Trust Deed. The complainants allege that the Board administers the Whakatōhea Fisheries Trust for its own benefit rather than the benefit of uri and "uses it as their ATM".<sup>91</sup>

The complainants raise that the nomination and election of Whakatōhea Fisheries Trust Advisory Trustees were not held in parallel with the Board elections as stipulated in the Whakatōhea Fisheries Trust Deed. This omission, it is argued, has defeated the purposes of the alignment which was to group the political appointments together and, in the process, save costs on elections.<sup>92</sup>

## The relevant legal requirements

The Deed of Trust to the Whakatōhea Fisheries Trust means the Board comprises the members elected or appointed to the Whakatōhea Māori Trust Board in accordance with the provisions of the Māori Trust Board Act 1955.<sup>93</sup>

Section 4.1 of the Trust Deed states that the Board shall be the trustee of the Whakatōhea Fisheries Trust because the Board is the approved Mandated Iwi Organisation to the Fisheries Trust.<sup>94</sup> In addition, the Deed states that the Board shall appoint up to 6 persons as Advisory Trustees to the Whakatōhea Fisheries Trust.<sup>95</sup>

The persons appointed shall be those nominated by each of the hapū in accordance with the process set out in clause 3 of Schedule 1 of the Trust Deed. Under Schedule 1, clause 3.1 notes that it is the Board who is to appoint the Advisory Trustees as set out in the Schedule. Clause 3.2 states that Board "shall cause nominations to be called for "at the same time as nominations are sought for the election of the Board Members." However, it also states that, "[n]othing in this clause shall limit the discretion of

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<sup>89</sup> Document 36A, Whakatōhea Māori Trust Board Report 2.

<sup>90</sup> Māori Trust Boards Act 1955, Part 3 Elections, section 43.

<sup>91</sup> Document 32, Email from Tim Selwyn dated 1 May 2018, section 8.

<sup>92</sup> Ibid.

<sup>93</sup> Governance and Management folder, 'Reference to Fisheries constitution'.

<sup>94</sup> Governance and Management folder, 'Whakatōhea Fisheries Trust Deed'.

<sup>95</sup> Whakatōhea Fisheries Trust Deed, Clause 3.7.

the Trust in providing for notice to be given of the impending appointment process. The Trustee may, in its discretion, use the same time for receipt of nominations as apply to election of Board Members".<sup>96</sup>

### Process and Response by the Board:

The Board submitted there was a need to separate the timeframe of the elections of the Board members and the Advisory Trustees due to confusion among beneficiaries of Whakatōhea regarding the two entities.

First, the Trust Board members were to be confirmed by the Governor General and Minister of Māori Development, by which they also become the trustees of the Whakatōhea Fisheries Trust.<sup>97</sup> Following this, the Board then sought to appoint six Advisory Trustees. The process undertaken by the Board was by giving notice to hapū to invite nominations.<sup>98</sup>

The Board received the following nominations for the Whakatōhea Fisheries Trustee positions:

- 1 representative from Ngāi Tamahaua
- 2 from Ngāti Patu
- 3 from Te Ūpokorehe
- 1 from Ngāti Ira
- 1 yet to be appointed from each of Ngāti Rua and Ngāti Ngāhere.

The Board advised it brought forward the 2017 Elections and advertised weeks later for the Advisory Trustee positions. The Board submitted this election process still complied with the timeframes required under the Act.

The Board responded to allegations about the use of Fisheries Trust funds by stating that advances from the Fisheries Trust were needed to progress aquaculture development. The Board does not have finances available so requires funds to be sourced from the Fisheries Trust which it does so by a legitimate process. The Board explained the background of the Advisory Trustees to the Fisheries Trust supplementing the Trust Board members who are trustees by virtue of their election.

### Conclusion on the allegations relating to the Whakatōhea Fisheries Trust

It is clear there is a philosophical divide in the views between the complainants and the Board regarding the settlement of the fisheries to the iwi rather than hapū. The fisheries settlement derived from a litigation process in 2005 to 2006.

What appears to be in dispute is the timing of the nominations for the Advisory Trustee positions on the Fisheries Trust. Nominations for the Board positions opened on 23 August 2017 and were due by 21 September 2017. Nominations for the Advisory Trustee positions opened on the 18 December 2017 and were due by 9 February 2018. The requirements for calling for nominations at the same time do not seem to be substantive and the question of whether it is within the discretion of trustees or mandatory is not clear (as noted above). I do not find this to be a relevant error or irregularity.

Although the issue of simultaneous calls for nominations is not strictly within the Terms of Reference in regard to the 2017 Elections of Trust Board members, the Board may wish to reconsider whether there are policy reasons for having the elections nomination process for the Advisory Trustees at the same time as the Trust Board members.

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<sup>96</sup> Governance and Management folder, 'Whakatōhea Fisheries Trust Deed', Schedule 1, page 32 – 36.

<sup>97</sup> Governance and Management folder, 'Whakatōhea MTB confirmation of MIO status 29112006', 'Whakatōhea Fisheries Trust Charitable Certificate', 'Statement of Intent'.

<sup>98</sup> Governance and Management folder, 'Reference to Fisheries constitution', 'Notice to hapū inviting nomination', 'Letter to Opeke Marae Trust', 'Fisheries Trust hapū nomination', 'Fisheries Trust notice', 'WFT advisory trust appointment form'.

## Te Ūpokorehe election results disputable

There have been evidential difficulties in gathering information from beneficiaries within the timeframe, for this report, but the complainants generally allege that there has been a significant impact to Te Ūpokorehe beneficiaries.<sup>99</sup>

The allegations in relation to Te Ūpokorehe are in summary:

- a. Not all Te Ūpokorehe beneficiaries registered on the Roll received voting papers.<sup>100</sup>
- b. Late Te Ūpokorehe registrations were received by the Returning Officer and there is no evidence to support the fact that these late registrations did or did not receive voting papers.<sup>101</sup>
- c. Similar issues have had an impact on Te Ūpokorehe, which also brings the election result into disrepute.<sup>102</sup>

### Process and Response by the Board:

The Board responded that voting packs were sent out by Election Services. Election Services reported that Te Ūpokorehe had 12 GNA from the list of 37.<sup>103</sup> The Board has responded to allegations relating to late registrations above. In short, late registrations did not receive voting packs.

I have checked specific examples given by Te Ūpokorehe (the late registrations made by Mr Maxwell). No voting packs were issued to them.

### Conclusion on the allegations relating to Te Ūpokorehe's voting results

Again, the question is whether the voting issues reviewed amount to a failure or irregularity of the Elections. If so, whether this affected the outcome of the elections, and whether this irregularity can be validated under sections 54 or 55.

There were three candidates for Te Ūpokorehe. Ms Mortensen received 94 votes, Ms Tuari-Kohunui received 72 and Ms Edwards received 70. Given the closeness of the votes between Ms Tuari-Kohunui and Ms Edwards, if there were a number of registered beneficiaries who did not receive a voting pack, this could have affected the outcome of these results.

Te Ūpokorehe provided two signed letters from beneficiaries (one of which was on behalf of a family of four individuals). These letters alleged that individuals received any voting papers. One letter alleged the return address on the voting form was for the Board, rather than Election Services.

Whilst the evidential difficulties raised by the complainants are noted, there is no indication from the evidence provided by Te Ūpokorehe that the above voting results would have differed. Te Ūpokorehe's situation differs from that of the 732 affected beneficiaries of Ngāi Tamahaua. My finding that there was an irregularity there was because of the sizeable numbers of affected beneficiaries. In addition, there is an obligation under the Act on beneficiaries to ensure their address is correct on the Roll, before the Roll had closed. In practice, there will always be situations where individuals do not receive voting papers through error or failure in whatever system is used. It cannot be the intention under the Act that where this occurs for some individuals, that an electoral process is invalidated for such a reason. Without evidence that there was a systemic or broader failure, or that such a failure did impact on the election, I cannot be satisfied that there is a significant irregularity or failure here.

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<sup>99</sup> Te Ūpokorehe Final Submission dated 16 July 2018.

<sup>100</sup> Te Ūpokorehe Summary List of Allegations, Appendix B including letters from Ūpokorehe beneficiaries: Memory Wikotu, Jordan Wikotu, Zeb Wikotu and Jessie Tuari-Hape.

<sup>101</sup> Document 30B, Email Communications dated 2 November 2017 and Appendix D, Letter from Gaylene Kohunui re: Breach of Election Processes dated 9 April 2018 of Te Ūpokorehe Summary List of Allegations.

<sup>102</sup> Appendix C and D of Ūpokorehe Summary List of Allegations.

<sup>103</sup> Elections Folder from WMTB, '12 GNA 2017'.

## ISSUES IN GOVERNANCE AND MANAGEMENT

The applicable conflicts and governance regime is derived from the Act, the Regulations, the Board Governance Manual and general principles.

Broadly, the issues raised by the complainants, who also include Trust Board members, are:

- a) Conflicts of Interest between Trust Board Members holding dual roles on the Board and WPSCT (or other commercial entities) without appropriate disclosure or management;
- b) A lack of, or no consultation with hapū regarding the Board's Marine and Coastal Area Act application;
- c) Trust Board members were not informed of the Service Agreement with WPSCT and such an agreement is inappropriate;
- d) Alleged misuse of the Tribal Roll and/or Register; and
- e) General allegations of inappropriate conduct and improper processes

The allegations in summary are that conflicts of interest (i) exist, (ii) are not properly disclosed, and (iii) are not properly managed. It is alleged that decisions are influenced by such conflicting interests, such that the decisions are not legitimate.

The context is relevant in that the allegedly conflicted Trust Board members are supportive of the Treaty settlement process whereas the complainant Trust Board members hold strong views that the actions of the Board to support the settlement are improper. The complainants also allege that they do not receive the same level of disclosure as Board members who are supportive of the Treaty settlement process and therefore excluded from certain matters.

Each allegation will be dealt with in turn.

### Conflict of Interest due to Trust Board Members holding dual roles on the WMTB and WPSCT

The complainants allege that certain Board members involved with the Board are conflicted. Mr Edwards, Mr Taia, Mr Hudson and Mr Reisterer currently serve as Whakatōhea Māori Trust Board Members in addition to holding positions as Advisory Trustees or, in Mr Hudson's case, Negotiator for the WPSCT.

It is alleged that directorships and shareholdings of Trust Board members in commercial investments and companies are not properly disclosed.<sup>104</sup> The complainants allege that Trust Board members (as shareholders in subsidiary companies of the Board) will benefit either directly or indirectly if a treaty settlement is achieved. The allegation is that conflicted Trust Board members will benefit personally either directly and indirectly from their actions.<sup>105</sup>

Te Ūpokorehe allege the interests giving rise to conflicts on the part of Board members are:

- Ngāti Patu representative Mr Riesterer who is also the Chairman of the WPSCT
- Ngāti Rua representative Mr Edwards who is Chair of the WMTB and WMTB rep on the WPSCT
- Ngāti Ngāhere representative Mr Taia, who is a trustee of the WPSCT representing Ngāti Ngāhere
- Ngāi Tamahaua representative Mr Hudson, who is one of the Whakatōhea Settlement negotiators and will benefit personally from an achieved Whakatōhea Settlement.
- Ngāti Ngāhere representative Mr Maxwell, who provides cultural support to the WPSCT.
- Ms Tuoro who was a past WMTB representative for Ngāti Ngāhere in 2010, is now the project manager of the WPSCT Whakatōhea Settlement, a paid position.

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<sup>104</sup> Ngāti Ira, Appendix 1, List of companies and shareholders.

<sup>105</sup> Te Ūpokorehe Summary List of Allegations, Appendix L.

The complainant board members submit they do not have dual roles on the WPSCT and the WMTB and have lost trust and faith in the allegedly conflicted board members (and the CEO) for failing to disclose and seek approval from the Board with regard to progressing treaty settlement matters.<sup>106</sup> The complainants also allege that the Board's involvement with the WPSCT exceeded the Board's authority in their facilitative capacity under the Service Agreement.<sup>107</sup> They allege that the privacy and confidentiality of their hapū beneficiaries was breached through the signing of a Service Level Agreement between the WMTB and the WPSCT.

### The relevant legal requirements

Trust Board member positions are elected and there is no prohibition under the Act or the WPSCT Trust Deed on holding dual positions. There is no express policy regarding this under the WMTB Governance Manual.

A more detailed discussion of the relevant principles regarding conflicts of interests is attached at Appendix 2.

In summary, the principles are that interests should be clearly disclosed in a timely fashion and a process followed to ensure interests are managed and relevant decisions are made free of improper influence. As stated in the Board's Conflict of Interest Policy in the Governance Manual, every Board member when performing their duties must exercise care, diligence and skill and lay aside all private and personal interests through their collective decision-making processes.<sup>108</sup> The use of a conflicts register is an orthodox approach to governance, such that all members make complete and timely disclosure of all their interests. In addition, members are obliged to raise conflicts as they identify them or as a relevant issue arises.

### Process and Response by the Board:

The Board contends that the individuals with dual roles understand how to manage conflicts of interest. At the start of each year, the Board approved the Governance Manual which details governance policies including the Election of Board of Trustees Process and the Conflicts of Interest policies.<sup>109</sup>

There does not appear to be meeting minutes approving the Service Agreement between the Board and the WPSCT. The Service Agreement was not circulated to the Board. Ms Farrar explained this was a management decision based on the prior Board resolutions supporting the progress of Treaty settlements. Ms Farrar saw the resolutions of the Board as allowing her to move forward with progressing Whakatōhea treaty settlement.<sup>110</sup>

The Conflicts of interest policy and processes for the Pre-Settlement Trust includes similar provisions for a Register to be kept to ensure all conflicts are identified.<sup>111</sup> The conflicted Trustee may participate in the deliberations affecting the matter, but he or she shall not vote on such a matter and shall leave the meeting for any such vote, unless there is a unanimous resolution of the other non-conflicted Trustee approving the vote by the conflicted Trustee.<sup>112</sup>

The Board also provided Policies and processes for Board representation on the Pre-Settlement Trust.<sup>113</sup> The WPSCT Trust Deed provides that the Whakatōhea Māori Trust Board is entitled to appoint (1) Trustee to the Trust, in accordance with clause 6.4(c).<sup>114</sup> A resolution of the Trust Board was passed appointing Mr Edwards to the WPSCT.<sup>115</sup> The Chair, Mr Edwards, had disclosed his conflict of interest

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<sup>106</sup> Te Ūpokorehe Summary List of Allegations, Appendix K.

<sup>107</sup> WMTB Minutes of 30 June 2018 – Application to OTS for funding on behalf of WPSCT.

<sup>108</sup> Governance and Management folder, '250817 Governance Manual V10', page 9.

<sup>109</sup> Governance and Management folder, '250817 Governance Manual V10'.

<sup>110</sup> Governance and Management folder, 'Resolutions from Trust Board Hui to CEO'.

<sup>111</sup> Governance and Management folder, '2016 0413 Mandate Strategy'.

<sup>112</sup> Governance and Management folder, 'Whakatōhea Pre-settlement Claims Trust Deed' i.e. '2016 0415 Tu Ake Draft Trust Deed'.

<sup>113</sup> Governance and Management folder, '2016 0415 Tu Ake Draft Trust Deed Final'.

<sup>114</sup> Refer to the resolution at question 38 of '20161015 Minutes WMTB' in Governance and Management folder.

<sup>115</sup> Governance and Management folder, 'Resolution from Trust Board hui' - Treaty/Raupatu at Question 53.

on both the Trust Board and the Pre-Settlement Claims Trust Registers as required by the Governance Manual.<sup>116</sup>

A full discussion on conflict of interest occurred at the August 2017 Board meeting.<sup>117</sup> This was followed with a “For information” paper from the CEO outlining the Trustee and CEO role. The purpose of this paper was to outline that the Māori Trust Board Act allowed for the Trust Board to support the treaty settlement process as well as provide administrative and secretarial services to the Pre-settlement Claims Trust and that it was not a conflict of interest.<sup>118</sup> In simple terms the Board and the WPSCT are substantially aligned with (in substance) the same beneficiaries.

The Board submits that the nature of relationships and decision-making processes at Board and hapū meetings have been misunderstood by the complainant Board members. The Board submits resolutions passed by the Board over a number of years still stand and have not been rescinded. There have been attempts to revoke resolutions to prevent the Board supporting Whakatōhea settlement, but no such resolution has passed. The facilitative role of the Board was approved along with fully supporting the treaty settlement.<sup>119</sup>

The Board also explained that because Mr Hudson and Ms Farrar are not WPSCT Trustees, they do not need to declare interests under the WPSCT Conflicts Register. Mr Edwards is in a different position because he is the nominated representative for Whakatōhea Māori Trust Board.

The core issue is that the WPSCT is part of the mandated settlement process which the complainants are philosophically opposed to. The divide has become more acute since the passing of one Trust Board member and the resignation of another on the Board. The previous 7-5 majority on the Board has become a majority only with the Chair’s casting vote.

The Board expects that once the settlement process is achieved, a new entity will be created combining assets of the Board and WPSCT, continuing to represent the same beneficiaries.

## Conclusion on the allegations relating to Conflicts of Interest

### *On the issue of the Service Agreement:*

It is open to the Board to enter into a Service Agreement with the WPSCT under section 24F of the Act. The governance issues identified do not impact on the legality of the agreement.

The Board’s provision for the administrative and secretarial services to the WPSCT was conducted without consultation or approval of the full Board (which would have allowed for debate on the issue given it was contentious). The Service Agreement, and Board’s application for funding should have been raised to the board much like other Board affairs. The Service Agreement included contentious matters such as access to beneficiaries’ details on the tribal register for election and voting purposes.

The Board responded that Mr Riesterer looked at the range of options available for similar service providers to the WPSCT and saw that such services were best provided by the Board. The primary reason being that the Board are best placed to understand the needs of the WPSCT rather than third-party providers. This may well be so, but the failure to notify the Board has inflamed matters with the complainant Board members and was not good practice in the circumstances.

The Institute of Directors NZ, Four Pillars of Governance Best Practice lists attributes of a healthy, constructive board culture as including:

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<sup>116</sup> Governance and Management folder, ‘August 2017 Board report conflicts of interest register’.

<sup>117</sup> Governance and Management folder, ‘August 2017 Board report’ pages 19 to 23.

<sup>118</sup> Governance and Management folder, ‘August 2017 Board report’ pages 27 and 28.

<sup>119</sup> Governance and Management folder, ‘Resolution from Trust Board hui – Treaty/Raupatu at question 53’ and ‘Resolution of: 20170826/7 all failed’.

- dissent is not viewed negatively but managed with professional respect between board members
- trust is engendered to disclose and discuss freely and frankly
- the board expects full information disclosure and an effective CEO provides timely, accurate and complete information to the board<sup>120</sup>

Perfect information flows will be very difficult to achieve and the balance will be a judgement for the CEO and Board members to make over time. In my view the non-disclosure in this area was clearly not good practice.

*On the issue of the Whakatōhea Pre-settlement Claims Trust conflicts:*

Mr Hudson is a paid negotiator for the Whakatōhea Settlement but is not a Trustee of the WPSCT. He is however, a Trust Board Member. That the WPSCT Conflict of Interest Register does not detail Mr Hudson's conflict of interest was explained by the Board.<sup>121</sup> Mr Hudson is a negotiator for the WPSCT but not a Trustee of WPSCT. He is a Trust Board member, however, and similar concerns about conflict management arise.

There is a risk of the perception of conflict in the holding of multiple appointments. Although these conflicts of interest were tabled at the 26 August 2017 Board meeting,<sup>122</sup> the management of such conflicts requires care, in this particular context.

*On the issue of Trust Board members' conflict of interest:*

The complainants allege "trustees are shareholders in subsidiary companies of the Board and will benefit if a treaty settlement is achieved, either directly or indirectly". Again, the conflicts process is intended to ensure this does not occur or is expressly considered and approved.

The complainants allege the list of interests of Board members or the CEO include:<sup>123</sup>

- Mr Edwards on Hukuwai Mussels Limited.
- Ms Tuoro (former Board member) on Hukuwai Mussels Limited.
- Kuku Gold Limited is registered at Ms Farrar's address.
- Mr Hudson is a Director of Pakihi Trading Company. Pakihi Trading Company is owned entirely by the Whakatōhea Māori Trust Board.
- Mr Edwards on Whakatōhea Aquaculture (Opotiki) Limited.
- Hukuwai Mussels Limited is a shareholder of Whakatōhea Aquaculture (Ōpōtiki) Limited.
- In turn, Hukuwai Mussels Limited and Kuku Gold Limited are also shareholders of Whakatōhea Mussels (Ōpōtiki) Limited.

In addition, Morrison Kent, solicitors for Ngāti Muriwai and their beneficiaries, wrote to me alleging that their clients were not given the opportunity to buy shares when members of the Board were.<sup>124</sup>

The Board has informed me that some interests are the Board's, while others are personal interests. In particular Eastern Seafarms Limited, Whakatōhea Aquaculture Ōpōtiki Limited and Whakatōhea Mussels Ōpōtiki Limited are Board investments and the interests noted relate to those. In respect to Hukuwai Mussels and Kuku Gold, those interests are personal and not related to membership of the Board.

The Board provided also provided clarification regarding capital raising for Whakatōhea Mussels Ōpōtiki Limited. In summary, initial capital raising was not an open process as it involved a particular type of investment vehicle limited to sophisticated investors. The Board explained that the most recent capital raising exercise had an information memorandum and product disclosure statement that guided the

<sup>120</sup> Institute of Directors NZ, Four Pillars of Governance Best Practice, at 57.

<sup>121</sup> Governance and Management folder, 'WPCT Conflict of Interest 2018'.

<sup>122</sup> Governance and Management folder, 'August 2017 Board report conflicts of interest', at 19.

<sup>123</sup> Ngāti Ira, Appendix 1 List of companies and shareholders.

<sup>124</sup> Letter from Dr Bryan Gilling, CC Nanaia Mahuta, dated 25 June 2018.

investment and was open to parties beyond the initial shareholders. A public offering is planned for the future.”<sup>125</sup>

A complainant further provided me with information on Eastern Seafarms suggesting other shareholders may have a connection to the Chair of the Board.<sup>126</sup>

The Board insisted that personal interests of any Board member were legitimate and explicable. By way of example, Mr Edward’s personal interest in Hukuwai Mussels Limited, while not on the Register, was due to his being willing and able to invest in a higher risk venture which was not otherwise able to attract capital. He suggested that he and others, through Hukuwai Mussels Limited, invested in Whakatōhea Mussels Ōpōtiki Limited to enable the its project to get underway.

The most up to date Conflict of Interests Register does not detail all of the Trust Board members’ or officers’ interests (for example Hukuwai Mussels Limited is not listed). It records “internal” and “external” interests, presumably to record those interests which are internal to the Board (such as committees or Board investments) as opposed to external entities.

In the timeframe of the investigation it was not possible for me to confirm the circumstances behind the purchase of shares in each of the companies or undertake a detailed review of all the potential interests and their management. I was not able to fully investigate whether investments were available to Board members, in their board capacity, which were not available to others on equal terms. The individual circumstances are likely to turn on the specific securities legislative regime as well as personal circumstances.

It is clear to me, however, that the Board are aware of the need to declare and manage conflicts of interest. That said, I am left with the impression that the conflicts register and the declaration and management of conflicts fell short of good practice. In particular, the register was not complete, nor was it clear where interests were personal or as a Board member. The inter-relationship of personal interests and Board interests creates another difficulty, with the potential for mixed motives in decision making. In my view, the Board must do better in this area to ensure that it obtains or maintains the trust of its beneficiaries.

## Allegations relating to the Marine and Coastal Area Application (MACA)

It is alleged that a MACA application was made by the Board on behalf of all hapū without the knowledge and consent of Ngāti Ira or any of the other hapū of Whakatōhea.<sup>127</sup> When this activity was challenged at a Board meeting on 24 June 2017,<sup>128</sup> Trust Board members were advised that “the Board” has endorsed and approved the application – specifically Mr Edwards (the Chair) who then instructed the CEO. There was never any consultation or engagement with Board representatives from Ngāti Ira, Ngāi Tamahaua or Te Ūpokorehe nor did they agree to or support that application. Te Ūpokorehe board representatives allege they were not consulted or advised that the Board would be submitting a MACA application. Te Ūpokorehe, Ngāi Tamahaua and Ngāti Ira have submitted their own MACA applications. The complainants allege that the Chair and CEO have misused their position of authority by progressing this application without first seeking the approval of the WMTB.<sup>129</sup>

Te Ūpokorehe are also concerned that the WMTB resources are being used to fund the WMTB MACA application.<sup>130</sup> Furthermore, Te Ūpokorehe do not support the engagement of Tu Pono Legal Services to represent the WMTB in respect of its MACA application due to a conflict of interest given the owner of Tu Pono Legal Services is also a negotiator of the Whakatōhea Settlement.

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<sup>125</sup> WMTB Feedback and Response submitted prior to 30 August 2018.

<sup>126</sup> Feedback submission from Mr Selwyn; WMTB Fisheries Assets Review document attached on 29 August 2018.

<sup>127</sup> WMTB MACA Application prepared by Mr Pou (WPSCT Negotiator), executed by WMTB CEO and witnessed by Mr Hudson (WMTB Trustee / WPSCT Negotiator).

<sup>128</sup> WMTB Minutes, dated 24 June 2017.

<sup>129</sup> Appendix O of Te Ūpokorehe Summary List of Allegations, ‘WMTB Minutes of challenge to MACA Application’ and Appendix P.

<sup>130</sup> Te Ūpokorehe Report to Whakatōhea Māori Trust Board Trustees Hui, 30 June 2018.

## The relevant legal requirements

The Board has the powers of a body corporate and may use its funding for the general benefit of a group or class of persons.<sup>131</sup> For example, it may incur legal fees for the High Court application for a MACA for general or specific benefit.

### *Functions and powers of Boards*

#### **24 Functions of Board**

- (1) The functions of each Board shall be to administer its assets in accordance with the provisions of this Act for the general benefit of its beneficiaries, and, for that purpose, a Board may, in its discretion, provide money for the benefit or advancement in life of any specific beneficiary, or of any class or classes of beneficiaries.
- (2) Without limiting the general provisions hereinbefore contained, it is hereby declared that each Board may, from time to time, subject to the provisions of this Act, apply money towards all or any of the following purposes:
  - ....
  - (d) such other or additional purposes as the Board from time to time determines.
  - ...
- (3) Nothing in this section shall be deemed to preclude any Board from applying money for the general benefit of a group or class of persons, notwithstanding that the group or class of persons includes persons other than beneficiaries; but no grant or loan shall be made to any individual for his exclusive benefit unless he is a beneficiary.

## Response by the Board

The deadline for applications for recognition of customary interests under the Marine and Coastal Area Act (MACA) was 3 April 2017. There are two pathways for iwi, hapū or whānau to have their customary interests recognised at law (either directly engaging with Crown or in the High Court). The Board confirmed that the Chair instructed the CEO to present an application to the High Court as he did not want any of the hapū to miss the deadline. At the date of the deadline, it was not clear if each hapū had applied. The CEO then completed an application to the High Court. This was disclosed at a Trust Board meeting, where members from Te Ūpokorehe, Ngāti Ira, Ngāi Tamahaua, and Ngāti Rua disclosed they had made applications. Ngāti Ngāhere and Ngāti Patu had not. These hapū asked for the Trust Board to support them.<sup>132</sup>

The complainants consider the MACA should not be a Board matter but a hapū matter. The Board (through the Chair and CEO) considered not all hapū were aware of the deadline and therefore applied to ensure the Board application would cover their interests. With time, the Board ought to have consulted with hapū, but the matter was one of urgency given the tight timeframe. In addition, the Board submitted that a joint application was more likely to be successful and cover a greater area. Strategically there was a benefit in applying together it submitted.

## Conclusion on the allegations relating to the Marine and Coastal Area Application

The Board were entitled under the Act to apply to the High Court for the MACA. Again the question is whether all Board members have received full disclosure of all information pertinent to all Board affairs. It is clear from the Meeting Minutes dated 24<sup>th</sup> of June 2017 that not all Board members were given full

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<sup>131</sup> Māori Trust Boards Act 1955, sections 13 and 24(3).

<sup>132</sup> Governance and Management folder, '20180421 Minutes WMTB', '20180224 Minutes WMTB', '20171111 Minutes WMTB', '20170624 Minutes WMTB'.

disclosure of the application on behalf of Whakatōhea, and there was some confusion as to whether hapū would apply individually or Whakatōhea would apply on behalf of all.

At the 24 June 2017 Board meeting, Ngāi Tamahaua and Te Ūpokorehe indicated they were not aware of any MACA submitted by the Board. Ngāti Ira informed the Board that they had already submitted a MACA. Although it is understood that the Board acted under urgency, this lack of informed process and awareness further exacerbated the perception of Board overreach and/or exclusion.

## Service Agreement

It was contended by the complainants that, as early as 2010, some members of the Board had initiated unauthorised actions to initiate and implement a Whakatōhea Settlement Strategy, without disclosing their intentions and actions or seeking approval from the Board.<sup>133</sup>

The complainants allege that Ms Farrar and Mr Reisterer executed a Service Agreement between the Board and Whakatōhea Pre-Settlement Claims Trust (dated 21 November 2016) without the knowledge or consent of all Trust Board members.<sup>134</sup>

The complainants also allege that the Submission of the Whakatōhea Māori Trust Board MACA and the engagement of Potts & Hodson to provide an independent review are outside the service scope of the Service Agreement. The complainants submit the Service Agreement enables the WPSCT to use board resources and staff to achieve their objectives.<sup>135</sup> They submit the Board applied for and received funds from Te Puni Kōkiri to progress the Whakatōhea Settlement in 2017, without the knowledge or approval of the WMTB.

The complainants say they were made aware of this at the most recent WMTB meeting held on 30 June 2018, whereby it was disclosed by the Board's Finance Manager that the Board had received funds from Te Puni Kōkiri to develop a Whakatōhea Treaty Settlement Communications Strategy. This was challenged by complainants whereby Mr Hudson, a WMTB trustee and also one of the Whakatōhea Settlement negotiators, advised that the application for funds was a management matter.<sup>136</sup>

The complainants allege conflicted board members and management have actively obstructed access to governance documents and recordings to be used as evidence in this investigation.<sup>137</sup>

## The relevant legal requirements

The Board has the powers of a body corporate and may do all such other acts and things as bodies corporate may lawfully do and suffer.<sup>138</sup> The Service Agreement is one such thing and section 24F provides specific ability to enter into such an agreement.

Schedule A of the Service Agreement provides that its primary purpose is for the WMTB to provide administrative and financial services to the Whakatōhea Pre-settlement Claims Trust. Under it the Board would provide Administrative and Financial Services to WPSCT as set out in Clause 1.2 of Schedule A.

I note that the services detailed under Clause 1.2 of Schedule A of the Service Agreement do not appear to include an application to Te Puni Kōkiri to develop a Whakatōhea Treaty Settlement Communications Strategy. It is of course available to the parties to the agreement to vary it in writing (as per the Service Agreement).

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<sup>133</sup> Document 8B, Appendix C, Affidavit of Ms Rakuraku-Rosieur [41] to [48].

<sup>134</sup> Document 29 and 30.

<sup>135</sup> Service Level Agreement attached in Ngāti Ira Summary List of Allegations as Appendix 2.

<sup>136</sup> Te Ūpokorehe Summary List of Allegations, Appendix Q.

<sup>137</sup> Te Ūpokorehe Summary List of Allegations, Appendix N including emails from Upokorehe and Ngāti Ira representatives to WMTB CEO and Trust Board members to access governance documents for ministerial inquiry.

<sup>138</sup> Māori Trust Boards Act 1955, section 13.

## Response by the Board

In response to the Board's allegations, the Board replied that the execution of a Service agreement between the Trust Board and the Pre-settlement claims trust by the CEO was considered to be a management decision given the Trust Board had passed several resolutions of the Board supporting the treaty settlement process.<sup>139</sup> There was therefore no need to table and resolve this at a Board meeting. The CEO understood that the Act allowed her to do so and it was argued that the Service Agreement also brings in additional funding to the WMTB.

This was explained by the Board as a routine management matter which is permitted under section 24F of the Act.

Section 24F states "[a] Board may contract to provide administrative, secretarial, accounting, or other services to any Māori incorporation, trust, or other body if the shareholders, beneficiaries, or members of the incorporation, trust, or other body, or a majority of them, are beneficiaries of the Board."<sup>140</sup>

Trust Board members explained that the WMTB was best placed to provide these services and that to do so was in the best interests of both sets of beneficiaries who were substantially the same. That was the view of Mr Reisterer on behalf of the WPSCT.

## Conclusion on the allegations relating to the Service Agreement

Again the issue is not the legality of such an arrangement, but whether all Board members have received full disclosure of all information pertinent to all Board affairs. The CEO of the Board, and Mr Reisterer, as Chair of WPSCT, signed the agreement without the approval (or knowledge it seems) of all of the Board. Both of them would have known the issue was likely to be contentious with some of the Board members, particularly given the issues of access to the Roll and support for the treaty settlement.

Despite previous resolutions and the perception by the Board that all Trust Board members were aware of the fact that the Board would enter into such agreement with the WPSCT, the lack of disclosure of its execution gave rise to a legitimate complaint.

This appears to be an area which the WMTB needs to manage better, given that the complainants disagree that the Service Agreement was a management issue. Again, the commentary of the Institute of Directors (above) is relevant. Best practice is for such information to be provided to the Board (if only for information rather than decision). Whether the Agreement itself, or the application for funding, were appropriate or not, is not the issue here. The Board was entitled to enter into such an agreement and (if it wished) to make an application for funding for the WPSCT. But it needed to follow better process to avoid causing the complaints which have arisen.

## Use of Tribal Roll/ Register by WPSCT

It is alleged that the use of the Tribal Register by the Pre-Settlement Trust has not been discussed by the Trust Board members and that third-party access was permitted by the CEO without the implicit informed consent of those beneficiaries whose information is held on the Register. The complainants allege that this is a breach of the Privacy Act 1993.<sup>141</sup> The complainants allege changes to the old registration forms were also made, without consultation or approval from the Board for treaty settlement

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<sup>139</sup> Governance and Management folder, 'Cross reference to question 53 regarding the WPSCT service level agreement.'

<sup>140</sup> Māori Trust Board Act 1955, section 24F.

<sup>141</sup> Ngāti Ira Appendix 7, WMTB Non-Disclosure e-letter confirming third party access since 2011.

purposes, without the informed consent of the beneficiaries. As a result, beneficiaries might not be aware that their information was being shared with the WPSCT.<sup>142</sup>

Te Ūpokorehe provided a total of 56 individual statements of breach from Ūpokorehe beneficiaries registered on the Whakatōhea Māori Trust Board. Further evidence of signed registrations from Ūpokorehe beneficiaries from 1995, which do not give the WMTB their implicit permission for Tu Ake Whakatōhea Collective or Whakatōhea Pre-Settlement Claims Trust to access their information was also provided.<sup>143</sup>

## The relevant legal requirements

The Act and Regulations are silent as to restrictions on the use of a Tribal Roll or Register other than making it clear the Board must prepare and maintain the Roll for election purposes<sup>144</sup>. The Privacy Act 1993 and the relevant Privacy Principles apply. Relevant principles are set out below.

### **Principle 6: Access to personal information**

Where personal information is held in a way that it can readily be retrieved, the individual concerned is entitled to:

- obtain confirmation of whether the information is held; and
- have access to information about them.

An agency may refuse to disclose personal information for a range of reasons, including that it would:

- involve an unwarranted breach of another individual's privacy;

### **Principle 8: Accuracy of personal information to be checked before use**

An agency must not use or disclose personal information without taking reasonable steps to check it is accurate, complete, relevant, up to date, and not misleading.

### **Principle 10: Limits on use of personal information**

Personal information obtained in connection with one purpose must not be used for another.

The exceptions include situations when the agency holding personal information believes on reasonable grounds that:

- the use is one of the purposes for which the information was collected; or
- the use is directly related to the purpose the information was obtained for; or
- the individual concerned has authorised the use; or
- the individual concerned is not identified; or

### **Principle 11: Limits on disclosure of personal information**

Personal information must not be disclosed unless the agency reasonably believes that:

- the disclosure is in connection with, or directly related to, one of the purposes for which it was obtained; or

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<sup>142</sup> Appendix G including Te Ūpokorehe hapū request Roll and Letter from Mr Edwards to beneficiary confirming WMTB has given Tu Ake Whakatōhea Collective access to the board beneficiary roll of Te Ūpokorehe Summary List of Allegations.

<sup>143</sup> Te Ūpokorehe Summary List of Allegations, Appendix R.

<sup>144</sup> Māori Trust Boards Act 1955, sections 42 to 45.

- disclosure is to the individual concerned; or
- disclosure is authorised by the individual concerned; or
- the information is to be used in a form in which the individual concerned is not identified;

### Response by the Board

The Board argued that there have been a number of requests from individuals to have full access to the Trust Board's tribal register. The policy of the Board has been to abide the privacy advice provided from Potts and Hodgson in 2005, 2007, and 2018 regarding access to the Roll.

There appears to be no documentation of Board discussion regarding the use of the Roll for the voting purposes of the Pre-settlement Claims treaty settlement process. Again, the direction from the Board was to resource and support the Claim. For eight years, the Board has supported the process.

The Board denied that the Roll was used or went to the Pre-settlement Claims Trust. It was used for the purposes of elections and the Roll was sent directly to Election Services. The registration form has a clause on the back page which states "[T]he information obtained in this enrolment form may be used in any electoral process relating to the Whakatōhea Māori Trust Board and in future in a Treaty of Waitangi settlement with the Crown and become beneficiaries of any new post-settlement governance entity" and that beneficiaries "acknowledge the above and consent for [their] details to be used for any new post-settlement governance entity".

There are historical application forms, however, that do not have this statement on it. The Board responded to the complainant's allegation that Trust Board members were not made aware that the privacy and confidentiality of their hapū beneficiaries would be breached, saying that the Roll has only been used to advance WPST activities through sending mail-out updates and being available for the mandate voting processes.

The Board submits this occurs via the WMTB and at no time is the Roll physically transferred to the WPST. The Board submits custody, control and access to the Roll is confined to the WMTB.

During the submission period for the treaty mandate, there were members that signed submissions asking to have their names removed from the Tribal Register. This was completed at their request. There were a total number of 218 names removed from the roll for the purposes of voting for the treaty mandate process. These names were not removed for the purposes of the 2017 Trust Board elections.

### Conclusion on the allegations relating to the Use of Tribal Roll/ Register by WPST

Under Principle 6, the Board must provide beneficiaries with confirmation that personal information is held by them and should the beneficiary wish to access this information, they are able to do so. Equally, where access may be requested by persons other than the beneficiary themselves, the Board is able to refuse this access. Ultimately it is a Board decision as to whether to refuse access or to grant it, subject to the requirements of the Privacy Act. Those aggrieved by such a decision can complain to the Privacy Commissioner.

The Returning Officer and the Board declined requests for access by non-beneficiaries for privacy reasons and in accordance with legal advice. That is a matter for the Board, however, I am concerned about one aspect of the approach of the Board in this regard.

The Trust Board member(s), who were representative of the hapū for which they were requesting the Roll, were one imagines requesting access to ensure the Roll was accurate in respect of their hapū. This would appear to be one of the purposes for which the information was obtained or (if not) directly related to that purpose. As noted earlier, Regulation 8(2)(a) suggests that there ought to be a Board resolution approving the Roll. That in turn would seem to require or permit Board members to view the Roll before voting on such a resolution. It seems unusual at least that Board members would not be able to consider the Roll at some stage in the lead up to the election process (if not at any time). I question whether the privacy principles were intended to prevent Board members themselves having

access to the Roll (or part of it) for the purposes of being able to ensure that it was able to be approved by them as accurate and up to date.

Under Principle 11, the complainants rely on the fact that beneficiaries concerned needed to have authorised the use of their personal information for the Board to use it in the way envisaged by the Service Agreement. The consenting provisions in earlier enrolment forms stated that the Board would not disclose the beneficiary's personal information for purposes other than stated such as for Board elections or information relating to those purposes. There was a subsequent change to these forms which included provision for other related purposes (already permitted if they were directly related to the original purposes).

This is a further reason that the Board process of allowing access to the WPSCT under the Service Agreement does not appear to be optimal.

The scope of the Agreement allows access to the Tribal register in the following terms: 'Access to beneficiaries' details on the Whakatōhea Maori Trust Board [includes the] Tribal Register, for election and voting purposes; provision and co-ordination of postal elections; and co-ordination of bulk mailouts/panui.

In respect to those who had not provided consent for "other purposes", there would seem to be an issue worthy of Board discussion and debate, about the terms of the Service Agreement and how the privacy principles could be complied with. Whilst the access may have made sense to many, it was also not accepted by a significant number. Again the issue was a contentious one.

In addition, the Board appeared to permit names of certain beneficiaries (those who were Gone No Address) to be put on the website. This no doubt was an attempt to ensure the Roll was accurate and up to date. That appears sensible to me but is inconsistent with the approach of not allowing Board members to view the Roll or a relevant part of it, at least for the same purpose.

As stated above, ultimate control over the Register and the Roll is for the Board. Compliance with the Act and the Privacy Act is required. A failure to comply with the Privacy Act could give rise to a complaint by a person affected.

The broader issue of Trust Board members not being provided complete information or a seeming inconsistency in treatment is relevant again here to a need to improve the standard of governance.

## General allegations of inappropriate conduct and improper process

It is alleged that there have been persistent attempts by the CEO and Board members holding dual positions to influence and or manipulate initiatives, projects, processes and procedures in order to progress the Treaty Settlement. This has compounded the feelings of contempt, mistrust and perceptions of corruption.<sup>145</sup> The complainants consider, given the overlap in roles between the WPSCT and the Board membership, that members of the Board are manipulating Board processes in order to achieve the goals of the WPSCT, rather than the Board acting in accordance with the interests of its beneficiaries.<sup>146</sup>

The allegation is that the CEO has fully participated in the initiation, development and implementation of the Whakatōhea Treaty Settlement, without the knowledge and approval of her employer the Board.

The CEO responds in summary that her involvement in advancing the settlement has been open, reasonable and sensible.

She describes in detail the level of her involvement in the Whakatōhea Treaty Settlement on page 24 & 25 of her Job Description Key Results which she provided at her performance review in February

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<sup>145</sup> Ngāti Ira Appendix 4 OHIF WPSCT comms, Appendix 5 OHIF Minutes, Appendix 6 Pakihi Trading Ltd resource consent.

<sup>146</sup> One example was Maui Hudson's research grant without tender process as discussed in Hui with Ngāti Ira.

2018.<sup>147</sup> This included writing the mandate strategy on behalf of the Tu Ake Whakatōhea Collective. Given the Board (or at least a majority as described) is openly and actively in support of the settlement, it would seem unusual for the CEO not to be acting accordingly.

I cannot see an issue with this provided that ultimately the Board determines that these actions are in the best interests of beneficiaries.

For completeness, some of the complainants seek the following:

- The Board should cease participation in all Treaty Settlement matters effective immediately if breaches have been found.
- The Service Agreement should be cancelled effective immediately.
- Officials are made accountable for supporting the unauthorised participation of the Board in breaching the Trust Boards Act 1955, by taking a claim against the Crown.
- All conflicted board members and trust board staff breaches investigated thoroughly and the appropriate actions, processes and solutions are put in place to address breaches, ensuring minimal impact on the day to day operations of the business of the Board.
- That a forensic investigation/audit of the Board and all subsidiary companies be undertaken.
- That an accountability process for board members to their respective hapū is incorporated in the Board governance documents and underpins all activities of the board. Te Ūpokorehe allege that currently there are no accountability mechanisms in place for Trust Board members to be accountable to their hapū.
- Te Puni Kōkiri and the Office of Treaty Settlements fund a Whakatōhea iwi and Upokorehe iwi tikanga wananga to re-establish the mana of both iwi and their respective hapū and heal the mamae that the breaches have inflicted on their people.

Some of these matters and submissions are not for me to express a view on or are outside the terms of reference. In particular, it is not within my scope to suggest such matters nor are some of the suggestions practicable or possible. I note them for completeness and have considered these in making my recommendations.

## The relevant legal requirements

In respect to specific benefits, the Act allows a member to obtain a benefit from the use of Board funds, subject to express limits where money is applied for the exclusive benefit of a member. In particular, Ministerial authorisation is required and the particular member must not take part in any discussion or vote on any such resolution.

## Response by the Board

The Board respond that the complainant Board Members are not properly fulfilling their responsibilities to the WMTB because of their interests in opposing the settlement. They submit the complainant Board members should be considering the Board issues independently of the settlement activities and making decisions in the best interests of the Board (and its beneficiaries).

The Board denied any allegations of personal pecuniary gain.

The Board's guidelines are that a member who is conflicted on a matter before the board:

- must not vote or take part in any discussion or decision of the board or any committee relating to the matter, or otherwise participate in activity that relates to the matter;

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<sup>147</sup> Te Ūpokorehe Summary List of Allegations, Appendix S.

- may excuse themselves from a meeting during discussions on an issue where they have a conflict of interest;
- must not sign any document relating to entry into a transaction or the initiation of the matter; and
- is to be disregarded for the purpose of forming a quorum for that part of a meeting during which a discussion or decision relating to the matter occurs or is made.

#### Conclusion on the general allegations relating to inappropriate conduct and improper process

These allegations and the response by the Board sum up the breakdown of trust in the relationship between Board members. They are largely a reframing of the conflict of interests' matter discussed above. The primary obligation of the Board is to ensure there is appropriate disclosure and management of conflicts. In my view, any new Board should refresh and improve its approach in this regard.

# Appendices

## Appendix 1

### Terms of Reference

#### Elections

- I. Whether the election were carried out in accordance with Part 3 of the Act and the Māori Trust Board Regulations 1985;
- II. Whether there were any irregularities that occurred in relation to the elections;
- III. If there were any irregularities, whether these have affected the outcome of the elections;
- IV. An assessment of whether these irregularities can now be validated under section 54 or 55 of the Act or whether the Board should be required to hold fresh elections under section 55A of the Act;
- V. Any recommendations that will assist in future election processes of the Board.

#### Governance and Management

- VI. Whether the Board and/or all Board members and/or officers have complied with appropriate governance practices and/or obligations under the Act;
- VII. Whether the Board and/or all Board members have received full disclosure of all information pertinent to all Board affairs;
- VIII. Whether any conflicts of interest have been handled appropriately by the Board and/or Board members and/or officers;
- IX. Any recommendations that will assist in the proper governance and management of the Board.

## Appendix 2

### Conflict of Interest Discussion

The Act has some indication of the principles to be followed when dealing with conflicts of interest. In particular, section 37 provides:

#### Section 37

##### **37 Members of Board not personally liable, and not debarred from benefits**

- (1) No member of a Board shall be personally liable for any act or default done or made by the Board or by any member thereof in good faith in the course of the operations of the Board.
- (2) Notwithstanding any rule of law or equity to the contrary, no member of a Board shall be debarred by virtue of his membership from receiving any benefit from the Board's funds:

provided that no money shall be applied by a Board, whether by way of grant or loan or in any other manner, for the exclusive benefit of any member, without the prior written approval of the Minister:

provided also that no member of a Board shall take part in any discussion or vote on any resolution of the Board concerning the application of any such money for his exclusive benefit.

The Act also provides that the Board may contract to provide services to other bodies if the shareholders, beneficiaries, or members of the incorporation, trust, or other body, or a majority of them, are beneficiaries of the Board:<sup>148</sup>

##### **24F Board may contract to provide services to other bodies**

A Board may contract to provide administrative, secretarial, accounting, or other services to any Māori incorporation, trust, or other body if the shareholders, beneficiaries, or members of the incorporation, trust, or other body, or a majority of them, are beneficiaries of the Board.

The Regulations do not provide additional guidance as to conflicts of interest. Guidance from other statutes on conflicts of interests is that directors have a legal duty to "act in good faith and in the best interests of the company".<sup>149</sup> Under the Crown Entities Act 2004, a member who is "interested in a matter" relating to the entity must disclose the nature and value (or extent) of the interest.<sup>150</sup>

Whakatōhea Māori Trust Board do not have a Trust Deed but there is a Governance Manual, approved at the start of each term of the Board, detailing how the Board manages conflicts of interest. This is provided in full below:<sup>151</sup>

#### CONFLICT OF INTEREST

Trustees are required to disclose their nature and extent of interests to the Board. These will be recorded in the Board's Interest Register. Trustees are expected to notify the Board Secretary of any new or change to their interests.

The Interest Register is to be available at all Board meetings.

##### How to determine if there is a conflict

In deciding whether a conflict of interest exists the following questions will assist:

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<sup>148</sup> Māori Trust Boards Act 1955, section 24F.

<sup>149</sup> Companies Act 1993, section 131.

<sup>150</sup> Crown Entities Act 2004, section 60 – 66.

<sup>151</sup> Governance and Management folder, '250817 Governance Manual V10', 'Conflict of Interest'.

Does the Interest create an incentive for the trustee member to act in a way which may not be in the best interests of the Board?

Is the Trustees of the Board likely to be influenced and thus act in a way that is detrimental to the Board?

If the answer is yes, a conflict of interest exists. The existence of the incentive is sufficient to create a conflict. Whether or not the Trustees of the Board would actually act on the incentive is irrelevant.

Examples of Conflict of Interest include;

- The use by a trustee of confidential information received in their capacity as trustee.
- When a trustee or his or her immediate family, whānau or business interest stands to gain financially from any business dealings, programs or services of the Board.
- When the Trustee of the Board offers a professional service to the Board.
- Any company, trust, partnership etc for which the member or their spouse/partner is a director, partner trustee or beneficiary.
- When a trustee for the Boards stands to gain personally or professionally from any organizational knowledge if that knowledge is used to his or her personal or professional advantage.
- Any other matters which the beneficiaries might regard as likely to influence the member's actions during the course of their duties as a trustee.
- If a trustee to the Board is unsure a conflict of interest exists they should discuss it with the Chair in the first instance. If it cannot be determined by the Chair the Trustees of the Board will decide.
- If in any circumstance doubt remains, then the matter should be treated as a conflict situation A trustee should be vigilant in looking for conflicts of interest.

Even the appearance of conflict is to be avoided.

#### How to manage the conflict of interest

##### *Right to receive Notice of Meeting*

Conflicted trustees of the Board will be given notice of any Board meeting at which the "conflict matter" is to be considered.

##### *Right of attendance at meeting*

The Trustees of the Board will determine if the conflict is such that the conflicted member should attend the part of the meeting when the conflicted matter is to be discussed. "It is best practice for the conflicted Trustee member to volunteer to withdraw from at least part of the meeting to allow full and frank discussion on the conflict matter."

#### Institute of Directors of New Zealand Best Practice

##### *Right to participate in discussions*

The Trustees of the Board will determine if the conflict is such that the conflicted member should attend the part of the meeting when the conflicted matter is to be discussed  
"It is best practice for the conflicted Trustees to volunteer to withdraw from at least part of the meeting to allow full and frank discussion on the conflict matter"

#### Institute of Directors of New Zealand Best Practice

##### *Right to vote*

If a vote is required with respect to the conflicted matter the Board will determine if the conflicted member can vote.

Right to be included in the quorum. The conflicted trustee of the Board will be included in the quorum of the Board meetings at which the conflicted matter is to be considered.

##### *Good Meeting processes*

Good meeting processes will provide the transparency and robustness to manage conflicts to ensure Trustees are not brought into disrepute. This will include a predetermined agenda.

Directors with a continuing material conflict of interest either at Board or committee level should consider resigning from office. (Institute of Directors Principles of Best Practice)

##### *Ethics*

The Whakatōhea Māori Trust Trustees seek to promote the highest standards of ethical conduct amongst its elected members. Accordingly, elected members will:

- claim only for legitimate expenses as laid down in policy
- not influence, or attempt to influence, any Board employee to take actions that may

- benefit the member, or the member's family or business interests
- not use Board resources for personal business (including campaigning)
- not solicit, demand, or request any gift, reward or benefit by virtue of their position

I note also the Trust Board is a Body Corporate. Bodies corporate ought to be guided by similar principles underpinning conflict management as those which apply to a company (being a type of body corporate).

The rules relating to directors are found in Part 8 of the Companies Act 1993. There are detailed rules regarding disclosure of interests, potential avoidance of transactions and voting (see ss139 to 149). Whilst the regime is not the same, one would expect similar caution to apply, so as to ensure the integrity of decision-making and to ameliorate perceptions of self-interest.

The Incorporated Societies Act does not provide more specific guidance but again has similar principles (see for example section 20).

In *Diagnostic Medlab v Auckland District Health Board* [2007] 2 NZLR 832, conflicts of interest were regarded as a standalone aspect of the general requirement of procedural fairness in decision-making.<sup>152</sup> Whether a conflict of interest may exist requires one to ask: 'does the member's other interest create an incentive for them to act in a way that may not be in the best interests of the entity?' The most obvious conflicts exist in the area of financial benefits or personal interests. These may include a shareholding or directorship in a company that stands to gain directly or indirectly from the outcome of the work of, or a remunerative relationship, for example employment, consulting with a business or other organisation. But the existence of a private interest, on its own, is not what causes a conflict. The test for this seems to be expressed informally as: What would a reasonable person think? What would this look like as headline news? Would you be willing to stake the company's (and your personal) brand and reputation on the impartiality and good faith of your decision?<sup>153</sup> These considerations are clear in the Board's Governance Manual.

It is better to err on the side of openness when deciding whether something should be disclosed. If a member or official is uncertain about whether or not something constitutes a conflict of interest, it is safer and more transparent to disclose the interest. Disclosure promotes transparency and is always better than the member or official silently trying to manage the situation by themselves.

Once the conflict of interest has been identified and disclosed, the Board may need to take further steps to remove any possibility – or perception – of the Trustee role being used for private benefit. If no relevant legal requirement or policy applies (or after any such rule has been complied with), then the Board should also consider whether anything more needs to be done. This is where there may be scope for a range of options. The Board needs to assess the seriousness of the conflict of interest and the range of possible mitigation options.

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<sup>152</sup> *Diagnostic Medlab v Auckland District Health Board* [2007] 2 NZLR 832.

<sup>153</sup> NZ Institute of Directors, Governance Principles.