

THE
EAST COAST
SETTLEMENT REPORT

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WAI 2190

WAITANGI TRIBUNAL REPORT 2010



The cover design by Cliff Whiting invokes the signing of the Treaty of Waitangi and the consequent interwoven development of Māori and Pākehā history in New Zealand as it continuously unfolds in a pattern not yet completely known

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CONTENTS

Chapter 1: Background to the Urgent Inquiry	1
Introduction	1
The Claimants	2
Wai 1301: Ruawaipu ethnic suppression claim	2
Wai 2185: Te Aitanga-a-Hauiti, Whānau-hapū a Ruawaipu, and Ngāti Uepohatu urgent settlement claim	2
Wai 976: Te Aitanga-a-Hauiti iwi claim and other claims represented by Tui Marino on behalf of Te Aitanga-a-Hauiti	3
Wai 1282: Te Hapuoneone claim	3
Wai 1272: Ruawaipu active protection claim	4
Events Leading to the Urgent Inquiry	4
The mandating process and settlement negotiations	4
Applications for urgent hearing	5
The Tribunal Hearing	8
The Structure of this Report	9
The Legal Context	9
Chapter 2: TRONP’s Mandating Process and the Crown’s Response	11
Introduction	11
The Mandating Process	12
Exploratory discussions	12
TRONP’s mandating strategy	13
The Crown’s response to TRONP’s mandating strategy	15
Publicising Ngāti Porou’s negotiations	17
TRONP’s advertising campaign and information hui	17
TRONP’s postal voting pack	18
Registering with TRONP	19
Results of TRONP’s postal ballot	19
Presentation of the mandate to the Crown	19
The Crown’s Recognition of TRONP’s Mandate	23
Tribunal Analysis of the Process	24
Crown awareness of claimant concerns	25
Crown proposals to meet claimant concerns	31
Assessment of claimant support	32
Flaws in the Crown’s process	36
Conclusions	38

Chapter 3: Crown Settlement Policy	41
Introduction	41
Crown Settlement Policy and the Legal Context	41
Previous Tribunal comment on general Crown settlement policy	44
The Ngāti Apa/Ngā Wairiki case	45
Judge Clark’s decision on the East Coast urgency	48
Tribunal Analysis	48
Has the Crown followed its own settlement policies?	50
Has the Crown followed the Tāmaki Makaurau and Te Arawa recommendations? ..	50
Suggested Improvements to Crown Mandating Policy	54
Recommendations on General Crown Settlement Policy	57
Chapter 4: Discussion and Recommendations	59
Discussion	59
Flaws in the process	59
Mitigation of prejudice	60
Support for the claimants	61
Limitations of a Tribunal hearing	64
Recommendations	64
Recommendations on the Ngāti Porou settlement	64
Recommendations to ensure the durability of future settlements	66
Appendix I: Results of TRONP Information Hui, 17–31 October 2007	71
Appendix II: Record of Inquiry	73



Waitangi Tribunal

Te Rōpū Whakamana i te Tiriti o Waitangi

Kia puta ki te whai ao, ki te mārāma

The Honourable Dr Pita Sharples
Minister of Māori Affairs

and

The Honourable Christopher Finlayson
Minister for Treaty of Waitangi Negotiations

Parliament Buildings
WELLINGTON

18 May 2010

E ngā Minita, tēnā kōrua

Enclosed is *The East Coast Settlement Report*, the outcome of an urgent Waitangi Tribunal hearing held in Wellington from 14 to 16 December 2009.

This hearing resulted from the Crown recognising the mandate of Te Rūnanga o Ngāti Porou (TRONP) to negotiate and settle historical Ngāti Porou Treaty of Waitangi claims. The three main claimants in our inquiry assert they represent Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti. All submit that they, and those they claim to represent, are not Ngāti Porou, and TRONP therefore has no valid mandate to represent them in settlement negotiations. These negotiations have progressed to a point that the Crown proposes introducing settlement legislation in September 2010. Once enacted, the proposed legislation would, *inter alia*, prevent the Waitangi Tribunal from inquiring into historical Ngāti Porou Treaty claims covered by the TRONP mandate, including those of the claimants in our inquiry. The claimants therefore successfully sought an urgent Tribunal hearing, with the aim of securing a recommendation that the Crown delays the Ngāti Porou settlement until their historical claims have been inquired into by the Waitangi Tribunal.

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TRONP, as a secondary party to these proceedings, asserts that those identifying as Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti are Ngāti Porou. The Crown has submitted that TRONP has a valid mandate to negotiate all Ngati Porou historical claims within the East Coast inquiry district. We did not inquire into matters of tribal identity, but instead focused on the actions of the Crown in recognising TRONP's mandate.

Having assessed the evidence and arguments of all parties, we have not recommended that the Crown delay settlement with TRONP as requested by the claimants. We concluded that the potential prejudice of delaying such a significant settlement would outweigh any possible prejudice to the claimants from having their claims settled without their specific consent. We were also not convinced that the claimants commanded significant support compared with the support demonstrated by TRONP. We were mindful of the fact that both the Crown and TRONP have suggested ways in which at least some of the claimant's concerns might be addressed.

However, we also noted flaws in the process followed by the Crown in recognising TRONP's mandate. While we did not consider that these flaws were so serious as to warrant recommending delaying settlement, we were concerned that they should not be repeated when the Crown seeks to negotiate and settle Treaty claims with other groups. With the goal for settling all historical Treaty claims having been brought forward to 2014, it is possible that further shortcuts will be taken and the durability of settlements put at risk. In such circumstances, new applications for urgency will almost inevitably be lodged with the Waitangi Tribunal. We have therefore recommended a number of changes to the Crown's mandate policies to enhance the durability of future settlements. We urge the Crown to adopt these recommended changes and ensure they are reflected in official documents outlining Crown settlement policy.

Heoi ano e ngā rangatira, anei rā ngā whakaaro o te Roopu Whakamana i te Tiriti o Waitangi hei āta titiro, hei whakarau kakai, hei wānanga mā kōrua.

Nāku noa

Judge Craig Coxhead
Presiding Officer

ABBREVIATIONS

CA	Court of Appeal
CFRT	Crown Forestry Rental Trust
ch	chapter
doc	document
ed	edition
J	justice (when used after a surname)
MICOTOWN	Minister in Charge of Treaty of Waitangi Negotiations
MFTOWN	Minister for Treaty of Waitangi Negotiations
no	number
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
ROI	record of inquiry
sess	session
TPK	Te Puni Kōkiri
TRONP	Te Rūnanga o Ngāti Porou
v	and
vol	volume

‘Wai’ is a prefix used with Waitangi Tribunal claim numbers.

Unless otherwise stated, footnote references to claims, papers, and documents are to the Wai 2190 record of inquiry, a copy of which is available on request from the Waitangi Tribunal.

CHAPTER 1

BACKGROUND TO THE URGENT INQUIRY

INTRODUCTION

This urgent Waitangi Tribunal inquiry results from negotiations currently under way between Te Rūnanga o Ngāti Porou (TRONP) and the Crown that aim to settle historical claims within the East Coast inquiry district. In an effort to stop a settlement between the Crown and TRONP proceeding through its final stages during 2010, a number of claimants successfully sought an urgent inquiry and hearings were held in December 2009. We discuss those urgent claims in this report.

Some of those who submitted claims for the Tribunal's East Coast district inquiry say they do not want those claims settled without a prior Waitangi Tribunal inquiry. They also deny that they, and the groups they claim to represent, are Ngāti Porou. The main applicants in this urgent inquiry claim to represent Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti. They allege that these groups are independent iwi in their own right and that TRONP has no mandate to represent them. Furthermore, when TRONP sought the Crown's recognition of its mandate to negotiate, the claimants allege that it was never made clear that their historical claims would be included in the negotiations and eventually extinguished by any resultant legislation. In addition, they argue that Crown officials only consulted with them after the mandating process was complete and did not take their concerns seriously. The claimants seek a Waitangi Tribunal recommendation that the Crown should delay settlement with TRONP until the Tribunal has heard and reported on their historical claims asserting their separate identity from Ngāti Porou.

In response, the Crown argues that the decision to recognise the mandate 'followed a robust and transparent mandate process undertaken by TRONP'.¹ TRONP and its supporters argue that Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti are part of Ngāti Porou, that the applicants participated in the mandating process and attempted to gain support for their position, but that in the end their view 'did not carry the day'.²

1. Paper 3.3.9, p 1

2. Paper 3.3.13, pp 1–2; paper 3.3.14, pp 2–3

THE CLAIMANTS

By the time hearings commenced in December 2009 there were five main claimants in the East Coast settlement inquiry, as outlined below.

Wai 1301: Ruawaipu ethnic suppression claim

Simon Koia is the named claimant for the Wai 1301 claim and is represented by Barney Tūpara. Mr Koia asserts that 'Ruawaipu is a traditional tribe of the northern East Coast region separate to Ngāti Porou.'³ In the claimant's view, the Crown and Ngāti Porou have attempted, since the East Coast civil war, to suppress and undermine Ruawaipu's existence. As a result, Wai 1301 is referred to by the claimants as the 'ethnic suppression claim.' Mr Koia alleges that the Crown's continued engagement in talks with TRONP after 15 November 2007 'was an act or omission done by or on behalf of the Crown that was inconsistent with Treaty principles of good faith dealing and active protection of Ruawaipu interests.'⁴ In addition, he alleges that by accepting TRONP's mandate, which included Ruawaipu claims within its scope, the Crown has prejudiced the claimant by failing to actively protect Ruawaipu interests. Furthermore, Mr Koia alleges that the Crown's introduction of legislation to remove the Waitangi Tribunal's jurisdiction to inquire into the Ruawaipu ethnic suppression claim would cause 'significant and irreversible prejudice' to the claimant.⁵

Mr Koia asserts a number of ways in which these concerns could be remedied. These include suggestions that the Crown could: 'review its policy of overseeing mandating hui so as to provide greater protection of the interests of those groups who are resisting a mandate'; halt further settlement negotiations with Ngāti Porou until after it has considered a Waitangi Tribunal report on the Ruawaipu ethnic suppression claim; and remove Ruawaipu from TRONP's mandate.⁶

Wai 2185: Te Aitanga-a-Hauiti, Whānau-hapū a Ruawaipu, and Ngāti Uepohatu urgent settlement claim

This collaborative claim encompasses several claims that are registered with the Tribunal. The claimants are represented by Darrell Naden and Linda Thornton. These claimants assert that their claims are being settled by the Crown and TRONP against their wishes. They say that their respective eponymous ancestors are Hauiti, Ruawaipu, and Uepohatu, which in their view makes them separate from Ngāti Porou. Having their claims settled by the Crown's recognition of TRONP's mandate means that they will be denied their right to

3. Claim 1.1.1, p 5

4. Ibid, p 2

5. Ibid, pp 3-4

6. Ibid

have their claims heard by the Waitangi Tribunal. Further, they assert that this will result in the ‘provision of an agreed historical account between the Crown and TRONP and/or TRONP’s affiliate’ that would not reflect the claimants’ own history.⁷ The claimants allege that the Crown approved TRONP’s mandate without full and proper consultation with the claimants, resulting in, among other things, non-recognition by the Crown of their traditional rohe, distinctive whakapapa, and historical Treaty claim settlement interests.⁸

Wai 976: Te Aitanga-a-Hauiti iwi claim and other claims represented by Tui Marino on behalf of Te Aitanga-a-Hauiti

Tui Marino is the named claimant for a number of Te Aitanga-a-Hauiti claims, made on behalf of all current and future shareholders, beneficiaries, and registered members of Te Aitanga-a-Hauiti iwi. The claimants are represented by Mike Doogan. These Te Aitanga-a-Hauiti claimants argue that Te Aitanga-a-Hauiti should be treated as an iwi in its own right rather than as a hapū of Ngāti Porou. However, as a result of the Crown recognising TRONP’s mandate, which incorporates the claims of Te Aitanga-a-Hauiti, their rights to be heard before the Tribunal are being denied them.⁹

These claimants also assert a number of procedural errors in the mandating process followed by the Crown and TRONP. In particular, the claimants allege that the Crown failed to apply its own procedures (as outlined in the Office of Treaty Settlements book *Ka Tika ā Muri, Ka Tika ā Mua – Healing the Past, Building a Future*) before accepting TRONP’s deed of mandate in April 2008.¹⁰ As a result, they assert that the Crown has not dealt with them in good faith and that their concerns have been marginalised; that Te Aitanga-a-Hauiti have not had the opportunity to address TRONP’s mandate in a way that ensures their views are meaningfully considered by the Crown; that the Crown has not effectively dealt with their concerns; and that Te Aitanga-a-Hauiti will potentially lose the opportunity of having their claims heard before the Waitangi Tribunal.¹¹

Wai 1282: Te Hapuoneone claim

The named claimant in Wai 1282 is Terence Rangihuna, and counsel for this claim is Mark McGhie. Te Hapuoneone supported the applications for urgency but did not file their own

7. Claim 1.1.2, p 4

8. Ibid, pp 13–17

9. Claim 1.1.3, p 78

10. Ibid, pp 80–83; OTS, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e Pā Ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karuna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: OTS, [2002])

11. Claim 1.1.3, p 84

application. Judge Stephen Clark granted leave for them to participate because their interests are not represented by Ruawaipu, Te Aitanga-a-Hauiti, or Uepohatu. Mr Rangihuna asserts that Te Hapuoneone are a separate and distinct pre-migration people on the East Coast, and not a hapū of Ngāti Porou.¹² Despite this, the interests of Te Hapuoneone were included in TRONP's mandate, which was approved by the Crown in April 2008. Mr Rangihuna asserts that he was not informed that the Crown and TRONP were in negotiations, and that the Crown has not recognised his concerns that his claim would be included in any settlement negotiated between the Crown and TRONP. As a result, Mr Rangihuna alleges that Te Hapuoneone will be prejudiced in a number of ways, including being marginalised or alienated from the settlement process and through the suppression of Te Hapuoneone mana. He states that Te Hapuoneone's way of life has been affected irreversibly, and alleges that their right to natural justice has been suppressed by the Crown's acceptance of the mandate. One remedy, Mr Rangihuna asserts, would be to remove Te Hapuoneone from the Crown's settlement negotiations with TRONP and for the Crown to open negotiations with 'overlapping claimants' as separate and distinct identities from Ngāti Porou.¹³

Wai 1272: Ruawaipu active protection claim

Rapata Kaa is the named claimant in Wai 1272, on behalf of Ruawaipu. Although originally represented by Darrell Naden and Linda Thornton, as part of Wai 2185, Wai 1272 is now separately represented by Jason Pou. Judge Clark granted leave to participate in the hearing because the claimants were part of the original urgency application, even though they now have different representation. Kathy Ertel represented these claimants during our December 2009 hearing.

EVENTS LEADING TO THE URGENT INQUIRY

The mandating process and settlement negotiations

In mid-2006, TRONP approached the Office of Treaty Settlements (OTS) with the aim of entering into negotiations to settle historical Ngāti Porou claims. During 2006 and 2007, TRONP and the Crown engaged in 'exploratory discussions', although TRONP at that time had no formal mandate to negotiate on behalf of claimants.¹⁴ In February 2007, TRONP

12. Document A2, pp 2-3

13. Ibid, p 10

14. MICOTOWN to TRONP, 18 December 2006, p 2 (doc A40(a), p 411)

submitted a draft mandating strategy to the Crown.¹⁵ The following month, the Crown endorsed TRONP's strategy.¹⁶

The mandating process took place in October and November 2007. It comprised a series of information hui and a postal ballot that endorsed TRONP's mandate to settle historical Ngāti Porou claims, and on 10 December 2007 TRONP submitted its deed of mandate to the Crown. The Crown publicly notified its receipt of this document in national and regional print media and called for submissions. Of the 35 submissions received, 33 opposed the deed of mandate.¹⁷ In January and February 2008, OTs met with submitters to discuss their concerns. On the recommendation of Crown officials, the Government recognised TRONP's deed of mandate in April 2008.¹⁸

A subcommittee of TRONP, Te Haeata, was appointed to negotiate with the Crown on behalf of Ngāti Porou claimants. The Crown and Te Haeata signed high-level agreements in October 2008 and June 2009, with the aim of proceeding to settlement in 2010 – a settlement which would extinguish all historical Ngāti Porou claims in the East Coast rohe.¹⁹

Applications for urgent hearing

On 18 April 2008, the Waitangi Tribunal received an application for an urgent hearing into the Crown's recently announced acceptance of the deed of mandate and its consequent intention to commence settlement negotiations with TRONP.²⁰ This application was brought by the Wai 63 Ruawaipu claimant Lou Tangaere, who had filed an application for urgency in 2005 relating to foreshore and seabed negotiations. On 10 June 2008, the presiding officer of the East Coast district inquiry, Judge Stephanie Milroy, declined to grant an urgent hearing on the grounds that 'the negotiations between the Crown and TRONP are still at a comparatively early stage.'²¹ A further urgency application was submitted on 20 October 2008 by Mr Tūpara, on behalf of Mr Koia.²² On 14 November 2008, Judge Milroy declined this urgency application, primarily on the grounds that negotiations still had some way to go. She cited a lack of evidence that the settlement provisions as negotiated at that time constituted 'significant and irreversible prejudice to the claimant.'²³

15. Document A13(b)), pp 26–27

16. Ibid

17. Document 107, pp 10–11

18. Ibid, p 13

19. Ibid, pp 25–26

20. Presiding officer, memorandum concerning urgency application, 24 April 2008 (Wai 900 ROI, paper 2.8.4); Lou Tangaere, application for urgent hearing, 25 February 2005 (Wai 63 ROI, claim 1.2)

21. Presiding officer, directions adjourning urgency application, 10 June 2008 (Wai 900 ROI, paper 2.8.6), p 1

22. Presiding officer, decision on application for urgency, 14 November 2008 (Wai 900 ROI, paper 2.8.9)

23. Ibid, p 4

Judge Milroy recused herself as presiding officer of the East Coast district inquiry in December 2008. On 3 December 2008, Mr Tūpara filed for a rehearing of his October application for an urgent inquiry.²⁴ Judge Clark was appointed the new presiding officer on 6 January 2009, and he scheduled an East Coast district inquiry judicial conference for 30 April 2009. At that conference, Mr Tūpara withdrew the urgency application and counsel agreed a timetable for filing fresh applications for urgency. Judge Clark set down that timetable in his directions of 5 May 2009.²⁵ Later that month, the Tribunal received three applications seeking an urgent inquiry into the proposed settlement between the Crown and TRONP. The applications were from:

- ▶ Wai 1301: Ruawaipu ethnic suppression claim (Mr Koia, represented by Mr Tūpara);²⁶
- ▶ Wai 2185: Te Aitanga-a-Hauiti, Whānau-hapū a Ruawaipu, and Ngāti Uepohatu urgent settlement claim (represented by Mr Naden and Ms Thornton);²⁷ and
- ▶ Wai 976: Te Aitanga-a-Hauiti iwi claim and other claims on behalf of Te Aitanga-a-Hauiti (Mr Marino, represented by Mr Doogan).²⁸

The Crown and TRONP opposed the applications, although the Crown made a commitment to review the oral and traditional reports being completed for the East Coast district inquiry, as they became available, and assess their impact on the mandate.²⁹ On 29 July 2009, Judge Clark convened a judicial conference to hear the three applications for urgency. Following the judicial conference, the judge issued directions indicating that a majority of grounds for urgency had been made out.³⁰ However, the ultimate decision on whether or not to grant hearing time was deferred to enable the Crown, TRONP, and the applicants to enter into Crown-facilitated discussions.

It was eventually agreed by the parties that Sir Wira Gardiner would facilitate. Progress was slowed by the unwillingness of all parties to participate in discussions. Delays caused by the death in October 2009 of Mate Kaiwai, the daughter of Sir Apirana Ngata, were also noted by counsel.³¹ Although some counsel reported progress in the discussions, the presiding officer was not convinced that facilitation was producing results. On 27 October 2009, Judge Clark issued directions granting the applications for urgency because it was apparent from memoranda submitted by the parties that ‘what discussions have occurred are embryonic only.’³² The direction set down the hearing dates, venue, and timetable for filing of evidence and submissions. Judge Clark also indicated which groups would be

24. Counsel for Wai 1301, application for hearing of application for urgent inquiry and report into Ruawaipu ‘Ngāti Porou Treaty claims settlement’ claim, 3 December 2008 (Wai 900 ROI, paper 3.5.35)

25. Paper 2.5.1

26. Claim 1.1.1

27. Claim 1.1.2

28. Claim 1.1.3

29. Paper 3.1.12, p13

30. Paper 2.5.5

31. Paper 3.1.75 and similar submissions

32. Paper 2.5.7, p 2

able to participate in the inquiry and identified the issues the Tribunal would inquire into at the hearing. He made it clear that traditional evidence relating to matters of tribal identity would be neither examined nor assessed at the hearing:

The Tribunal is proceeding from the starting point that at the time the Crown accepted a mandate from TRONP to enter into negotiations, it was aware that persons affiliated with Uepohatu, Ruawaipu and Te Aitanga-a-Hauiti were arguing that those groups had independent autonomous identity and should not be caught within the general rubric of Ngāti Porou. Thus the focus of the Tribunal will be on the Crown's level of awareness of that issue, the advice it took on that issue and its reaction to it.³³

As a result, the statement of issues outlined by Judge Clark concentrated on the actions the Crown took in making a decision to embark upon negotiations with TRONP, the mandating process, settlement policy, and the effect on overlapping claimants.³⁴ Judge Clark made it clear that, due to time constraints, 'the Tribunal is not particularly interested in receiving or hearing exhaustive traditional evidence'.³⁵

Judge Clark granted leave to participate to all the original urgency applicants who represented the following Waitangi Tribunal claims: Wai 1301, Wai 1089, Wai 1302, Wai 1082, Wai 1025, Wai 1300, Wai 1866, Wai 1265, Wai 1267, Wai 1268, Wai 1269, Wai 1270, Wai 1272, Wai 1337, Wai 1648, Wai 1859, Wai 1862, Wai 901, Wai 1171, Wai 1381, Wai 390, Wai 703, Wai 941, Wai 976, Wai 1266, Wai 1303, Wai 1304, and Wai 1331.³⁶ He also granted leave to participate, by way of opening and closing submissions only, to those East Coast claimants who did not file urgency applications but who indicated support for or opposition to the applicants.³⁷ The judge also granted leave to TRONP to file evidence. On 4 November 2009, Judge Clark issued further directions to allow applicants claiming to represent Hapuoneone (Wai 1282) to participate fully in the urgent inquiry, on the grounds that none of the other groups in the inquiry would be addressing the issues as they affected these applicants.³⁸ Hapuoneone were concerned that they were excluded altogether from the negotiations and the mandating process.³⁹ The four clusters of claimants to be heard in the inquiry were therefore those asserting that they represented Ruawaipu, Te Aitanga-a-Hauiti, Uepohatu, and Hapuoneone.

On 13 November 2009, the chairperson of the Waitangi Tribunal, Chief Judge Wilson Isaac, appointed Judge Clark as the presiding officer for the East Coast settlement inquiry (Wai 2190), and Kihī Ngatai, Basil Morrison, Tania Simpson, and the Honorable Sir

33. Paper 2.5.7, pp 3–4

34. Ibid, p 3

35. Ibid, p 4

36. Ibid, p 6

37. Ibid

38. Paper 2.5.8, p 2

39. Document A2, pp 6–8

Douglas Kidd as members.⁴⁰ On 4 December 2009, Chief Judge Isaac advised the parties that Judge Clark had identified a conflict of interest and therefore recused himself from his role of presiding officer. Chief Judge Isaac appointed Judge Craig Coxhead in his place.⁴¹

THE TRIBUNAL HEARING

The East Coast settlement inquiry hearings took place at the James Cook Hotel, Wellington, from 14 to 16 December 2009. There was a good attendance throughout the three-day hearing. At the outset, Judge Coxhead made it clear that the hearing would be limited to matters that focused on the Crown's actions and processes with regard to its decision to embark upon negotiations with TRONP, the mandating process, settlement policy, and the effect on overlapping claimants. As such, the Tribunal's focus for the hearing would not be on the actions of TRONP or issues of whakapapa and tribal identity.⁴²

Opening submissions on behalf of the applicants and their supporters were made by claimant counsel Mr Tūpara, Mr Naden, Ms Ertel, Mr Doogan, Mr McGhie, Mānia Hope, David Stone, Donna Hall, and Karen Feint. Alex Hope also submitted but did not present. Witnesses for the applicants included Henry Koia (Wai 1301, Ruawaipu ethic suppression claim), Jason Koia (Wai 2185, cluster coordinator for the Ruawaipu cluster), Kui McClutchie-Morrell (Wai 2185, chairperson of the Ngāti Uepohatu claimant cluster), Margrette Ryland-Daigle (Wai 2185), Rakapa Koia (Ruawaipu claimant), Rapata Kaa (Wai 1272), Tui Marino (Wai 976, Te Aitanga-a-Hauiti), Wayne Amaru (chairperson of the Hauiti Incorporation and the Mangaheia 2D Incorporation, and deputy chair of Pakarae A and Other Blocks Incorporated), and Terence Rangihuna (Wai 1282, Te Hapuoneone).

Opening submissions from those opposing the applicants came from Alan Knowsley, representing TRONP, and Matanuku Mahuika, representing Paitini Kupenga and others. Witnesses for TRONP who appeared were Dr Apirana Mahuika, the chairman of TRONP, Dr Monty Soutar, the chief executive of TRONP, and Dr Tamati Reedy.

The Crown was represented at the hearing by counsel David Soper and Merran Cooke of the Crown Law Office. The only Crown witness called was Paul James, the director of OTS. In cross-examination by counsel for several of the claimants, Mr James was asked to explain OTS's negotiation process with TRONP; the guidance it provided TRONP on its mandating strategy; the meetings it had with the applicants after submissions were received in January 2008; and the information OTS sought – in particular from Te Puni Kōkiri (TPK) – on the support base for the applicants before it recommended that Ministers

40. Paper 2.5.10

41. Paper 2.6.2

42. Judge C Coxhead, opening remarks, day 1, sess1 (transcript 4.1.1, p12)

accept TRONP's deed of mandate in April 2008. The Tribunal's cross-examination of Mr James focused on a number of issues including the Crown's risk mitigation structure; the information available to claimants who opposed the mandate; the Crown's communication with the applicants; general Crown policies on large natural groupings; and the extent to which the Crown investigated the grievances put forward by opposing claimants.

THE STRUCTURE OF THIS REPORT

In chapter 2 of this report we provide a summary of the key events in TRONP's mandating process and its discussions with Crown representatives. We then analyse, in some detail, the Crown's interaction with the claimants in this urgent inquiry, and assess the extent to which the mandating process was robust and pursued in a fair, open, and transparent manner, as required by the Crown's own guidelines. We identify some issues and concerns with the mandating process overseen by the Crown, and with the way in which the Crown responded to those who objected to a settlement mandated by TRONP.

Chapter 3 discusses general Crown settlement policy, including the legal background to this urgent inquiry (which is also briefly summarised below). We outline recent debates on the issue of whether having claims extinguished against their will leads to undue prejudice for Treaty claimants. We also discuss the extent to which the Crown followed its own processes in pursuing a settlement with Ngāti Porou, and the extent to which it incorporated recommendations from recent relevant Tribunal reports in those processes. Finally, the chapter describes the reforms to Crown settlement policy we consider are needed to help ensure a more robust process in future settlement negotiations.

The final chapter of this report contains our conclusions, findings, and recommendations.

THE LEGAL CONTEXT

In September 2009, the High Court ruled that the Waitangi Tribunal had unfairly dismissed an application from the Wai 655 claimants for an urgent hearing relating to the Ngāti Apa settlement. The facts of that case were similar to those now before us: a claimant, or group of claimants, faced having their claims to the Waitangi Tribunal extinguished by settlement legislation against their will. Justice MacKenzie ruled that the claimants risked potential prejudice by the extinguishment of their claims in this way. This was the leading authority, both when Judge Clark granted urgency to the claimants in the current inquiry and when our inquiry hearings were held in December 2009. However, the legal situation has now changed. In October 2009, the Crown appealed against the MacKenzie decision. In December 2009, the Court of Appeal overturned the MacKenzie decision,

ruling that the presiding officer of the Wai 655 application acted lawfully in turning down the urgency application. The Court of Appeal endorsed the Tribunal's approach in such circumstances, in which it takes into account the apparent level of support enjoyed by the applicants. The Court of Appeal decision sets the legal background for this report and is discussed in detail in chapter 3.

CHAPTER 2

TRONP'S MANDATING PROCESS AND THE CROWN'S RESPONSE

INTRODUCTION

This chapter examines events from the Crown's exploratory discussions with Te Rūnanga o Ngāti Porou (TRONP) in mid-2006 to the Crown's acceptance of TRONP's deed of mandate in April 2008. In the main, we focus on TRONP's mandating strategy – the process that TRONP, with the Crown's guidance, followed – and the opposition raised by the claimants before, during, and after the mandate was accepted. This chapter also focuses on an important aspect of the Crown's actions during the settlement negotiations, namely its interaction with the claimants. It establishes how well informed the Crown was about opposition to TRONP seeking a mandate on the East Coast; how diligent the Crown was in following up concerns raised by claimants and their counsel that their right to a Waitangi Tribunal hearing would be denied them if the Crown negotiated its settlement with TRONP; how the Crown dealt with the claimants' assertion that they were not Ngāti Porou; and how proactive the Crown was in determining how representative the claimants were of wider dissension on the East Coast to TRONP's settlement aspirations. The chapter concludes by summarising the flaws, as we see them, in the Crown's processes in this instance.

The Crown's requirements for achieving a mandate for negotiations are laid out clearly in its guide to Treaty negotiations, *Ka Tika ā Muri, Ka Tika ā Mua – Healing the Past, Building a Future*, commonly known as the 'Red Book'. It explains that:

mandated representatives need to demonstrate that they represent the claimant group, and the claimant group needs to feel assured that the representatives legitimately gained the right to represent them. This can only be achieved through a process that is fair and open.¹

The representatives are expected to host a series of information hui that allow as many members of the claimant community as possible to express their opinions and be fully informed not only of the representatives' role in negotiations with the Crown but also the

1. OTS, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e Pā Ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karuna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: OTS, [2002]), p 45

issues involved and the implications of a settlement. Various advertising campaigns, published well in advance of hui and stating the issues involved, will also assist the process. Crown guidelines indicate that such hui would preferably be supplemented by further information provided in newsletters. Finally, although not a requirement, a postal ballot would assist further in ensuring that the representatives held a firm mandate to pursue negotiations on behalf of their claimant community.²

The Crown's guidelines state that, once a group has submitted a deed of mandate to the Crown, the deed is to be reviewed by the Office of Treaty Settlements (OTS) with advice from Te Puni Kōkiri (TPK). The criteria used in the review are whether the deed:

- ▶ clearly defines the claimant group and the claims to be settled
- ▶ shows that the wider claimant group members have been consulted and that they support the representatives seeking the mandate to pursue negotiations with the Crown
- ▶ provides authorisation for the representatives to negotiate a comprehensive settlement of all the claimant group's historical claims
- ▶ shows that representatives are accountable to the wider claimant group
- ▶ acknowledges any opposition to the mandate and describes the extent of that opposition, and
- ▶ identifies overlapping claims.³

The claimants in this inquiry stated that, in their view, the Crown failed to adhere to these guidelines before recognising TRONP's deed of mandate in April 2008.⁴ To fully appreciate the claimants' concerns it is important to understand the timeline of key events, from the initial discussions in July 2006 through to the Crown's acknowledgement that TRONP had followed a robust mandating process in accordance with Crown policy.

THE MANDATING PROCESS

Exploratory discussions

In mid-2006, TRONP approached the Crown to discuss the possibility of direct negotiations on the settlement of Ngāti Porou's historical Treaty claims. In an OTS briefing document to Ministers on upcoming meetings with TRONP, Esther King, a manager of policy negotiations, noted that it would be 'desirable if Ngāti Porou were to elect to enter Treaty settlement negotiations in the near future.'⁵ TRONP and OTS met for the first

2. OTS, *Ka Tika ā Muri, Ka Tika ā Mua*, p 45

3. Ibid, p 49; document A107, p 6

4. See claim 1.1.1, claim 1.1.2, and claim 1.1.3

5. OTS to MICOTOWN, briefing on Ngāti Porou's entry into negotiations, 23 May 2006 (doc A40(a), p 85)

time on 30 June 2006 for what the Crown referred to as 'exploratory discussions'.⁶ On 18 December 2006, the Minister in Charge of Treaty of Waitangi Negotiations, Mark Burton, wrote to TRONP's chairman, Dr Apirana Mahuika, to confirm the Crown's desire to enter into direct negotiations.⁷ The Minister stated that, although exploratory discussions were a new approach for the Crown, he was comfortable holding them with TRONP because it was a recognised representative body for Ngāti Porou. He added that if Ngāti Porou chose to enter into direct negotiations the Crown was willing to accord them priority and 'commit the necessary resources to achieve a timely settlement'.⁸ However, if the iwi wanted a full Waitangi Tribunal hearing, a settlement would be unlikely until 2011 at the earliest and the amount of redress on offer from the Crown at that stage would not necessarily increase as a result of a full hearing.

TRONP's mandating strategy

TRONP's mandating strategy was submitted to OTS on 19 February 2007, following a series of exploratory discussions with Crown representatives and two meetings with the Treaty Negotiations Minister on 24 May and 7 November 2006. Reports of these meetings were given at TRONP's regular board meetings and at meetings held with Te Uru Karaka (a Ngāti Porou cluster of claimants for the purposes of the Waitangi Tribunal process), hapū representatives, and individual members of Ngāti Porou at TRONP's Gisborne office.⁹ The mandating strategy noted that TRONP's intention was to seek a mandate for negotiating a full settlement of Ngāti Porou historical claims, with the exception of Ngāti Porou ki Hauraki claims which were to be dealt with separately.¹⁰ The mandating strategy concentrated on three key areas: claimant definition of Ngāti Porou; who the mandating body would be; and the mandating process itself in terms of communication, a postal ballot, and information hui.

In defining the claimant community, the strategy identified 51 hapū and 47 marae involved in the claims to be covered by a comprehensive settlement for Ngāti Porou.¹¹ A map of the geographical area intended to be covered by the settlement was also included.

The strategy proposed that although TRONP would be the mandated body responsible for the conduct of negotiations, it would establish a subcommittee to deal with the day-to-day negotiations with the Crown. The subcommittee would be accountable to TRONP,

6. OTS, file note of meeting with TRONP, 4 July 2006, pp1–2 (doc A40(a), pp 87–88)

7. MICOTOWN TO TRONP, concerning settlement of Ngāti Porou's historical Treaty claims, 18 December 2006 (doc A40(a), pp 996–999)

8. *Ibid*, p 2 (p 997)

9. TRONP, mandate strategy, undated (TRONP, 'Ngāti Porou Deed of Mandate', 10 December 2007, attachment 4), p 1 (doc A40(a), p 665)

10. *Ibid*, p 2 (p 666)

11. *Ibid*, attachments A and B (pp 670–671)

which in turn would be accountable to the wider Ngāti Porou claimant community.¹² The subcommittee, Te Haeata, would comprise three TRONP representatives and one representative from each of the seven marae/hapū clusters ‘established for the purposes of appointing advisory trustees to the Porou Ariki Trust’, a mandated Ngāti Porou Trust which facilitates the receipt of the iwi’s share of fisheries assets.¹³

To gauge support for TRONP’s mandate, 10 information hui (this later became 14) were arranged in conjunction with a postal ballot. Registered members of TRONP aged 18 years and over would be sent a ballot form and asked to vote on three issues:

- ▶ whether to enter into direct negotiations with the Crown to settle the historical treaty claims of Ngāti Porou;
- ▶ whether to mandate TRONP and its proposed subcommittee to undertake negotiations; and
- ▶ whether to withdraw from or seek an adjournment to the Waitangi Tribunal’s East Coast district inquiry.

These three questions were conflated into one resolution: ‘That Te Rūnanga o Ngāti Porou is mandated to enter into direct negotiations with the Crown for the comprehensive settlement of all historical Treaty of Waitangi claims of Ngāti Porou through the proposed hapū subcommittee structure.’¹⁴

A period of six weeks – from 8 October to 19 November 2007 – would be set aside for voting. In that time, those not registered with TRONP would be given the opportunity to register and take part in the vote. An independent returning officer would be appointed to count the votes, and a subsequent report would be forwarded to TRONP. The strategy provided that, based on the results of the indicative and postal ballot voting, the Crown would then determine whether sufficient support existed to enter settlement negotiations.

As stated above, a series of information hui were planned in conjunction with the postal vote, in accordance with OTS’s requirement that the mandating process be carried out in an open, fair and transparent manner with ample opportunities to be informed and to participate. TRONP’s strategy proposed 10 hui in centres ‘where large numbers of Ngāti Porou are concentrated’: four within the Ngāti Porou rohe, and one each in Auckland, Hamilton, Rotorua, Hastings, Wellington, and Christchurch.¹⁵ Advertisements notifying an upcoming hui would be placed in newspapers at least three weeks before each hui. These would clearly state the purpose of the hui: that TRONP was seeking a mandate to ‘negotiate with

12. Counsel for TRONP to OTS, concerning Ngāti Porou mandate strategy, 22 March 2007 (TRONP, ‘Ngāti Porou Deed of Mandate’, attachment 9), p 1 (doc A40(a), p 682)

13. TRONP, mandate strategy, p 3 (doc A40(a), p 667). This was made clear by the PowerPoint presentations given at the information hui: see TRONP, ‘Mandate for Negotiations’, PowerPoint presentation, October 2007 (doc A40(a), p 573). Further information on the Porou Ariki Trust can be found on the Ngāti Porou website at: <http://www.ngatiporou.com/Whanaungatanga/Organisations>.

14. TRONP, ‘Mandate for Negotiations’ (doc A40(a), p 577)

15. TRONP, mandate strategy, p 4 (doc A40(a), p 668)

the Crown the comprehensive settlement of all Ngāti Porou historical Treaty of Waitangi claims.¹⁶ At each hui a consistent presentation would be delivered, minutes would be taken, and TRP observers would be invited to attend and observe proceedings.¹⁷

The Crown's response to TRONP's mandating strategy

On 1 March 2007, OTS staff met to discuss TRONP's mandating strategy. Concentrating on the three main areas highlighted by the strategy, OTS concluded that the strategy required further consideration and development. On claimant definition it required a clarification of founding ancestor/s, a comprehensive list of all Ngāti Porou claims, and a well-defined settlement area of interest.¹⁸ Trevor Himona, a policy analyst with the OTS Claims Development Team, noted that the accountability framework proposed by TRONP needed greater clarification. It needed to incorporate all Ngāti Porou stakeholders, from TRONP to hapū and marae clusters down to individual members. The framework also had to be clearer on the decision-making, reporting, and communication processes 'including the negotiators and a statement [of] their scope of authority for negotiations'. The strategy, he noted, should 'also state that it is prepared to seek a comprehensive settlement of all Ngāti Porou historical claims.'¹⁹ With regard to the mandating process itself, OTS stated that some issues would need clarification: whether there would be additional hui organised, whether voting would take place at the hui, and how the ballot would be conducted.²⁰

On 14 March 2007, OTS wrote to James Johnston, TRONP's legal representative, outlining its main concerns with the mandating strategy. In relaying this information to TRONP, OTS made it clear that in principle it considered the mandating strategy to be in line with the Crown's criteria for robust and transparent mandating processes. There remained the need, however, to clearly define the claimant group. This was important, OTS explained, because it not only defined those eligible to benefit from any eventual settlement but also served to 'exclude the claims of claimants not included in the negotiations.'²¹

Of particular importance in the context of our inquiry, the letter stated that the Crown would, in forthcoming weeks, 'prepare a list of Wai claims which are covered by the claimant definition for Ngāti Porou and which we propose are included in a Ngāti Porou settlement'. OTS requested that TRONP 'review this list and provide a comprehensive list of the agreed Wai numbers in your final mandate strategy'.²² The Tribunal has sighted no evidence to suggest that the Crown passed over to TRONP a list of individual claim numbers

16. TRONP, mandate strategy, p 4 (doc A40(a), p 668)

17. Ibid, pp 4–5 (pp 668–669); TRONP, 'Mandate for Negotiations' (doc A40(a), pp 561–577)

18. Trevor Himona to OTS staff, email, 1 March 2007 (doc A40(a), p 508)

19. Ibid

20. Ibid

21. OTS to counsel for TRONP, response to proposed mandate strategy, 14 March 2007, p 1 (doc A40(a), p 510)

22. Ibid, p 2 (p 511)

(Wai numbers) which would be included in a potential settlement. Further, from the information before us, it appears that the first public notification of individual claim numbers specific to this settlement did not take place until nine months later, when they were published in the national press.

Mr Johnston responded to the Crown's concerns on 22 March 2007, following a meeting two days earlier between OTS officials and TRONP representatives. He agreed, on behalf of TRONP, that OTS would be kept informed of developments regarding the mandating process, including information hui and the advertising and voting procedures, to ensure that the Crown was content with the overall method pursued by TRONP. In response to OTS's request for further information on claimant definition, Mr Johnston supplied the following information, which was later incorporated into TRONP's deed of mandate:

Our instructions are that the eponymous (or naming) ancestor of Ngāti Porou is the ancestor Porourangi, or to give his full name, Porou Ariki Te Matatara a Whare Te Tuhi Mareikura a Rauru. Porourangi was a descendent of the ancestors Toi (through his son Rauru and grandson Whatonga), Paikea, Ruatapu and Te Whironui (through Paikea's wife Hukurangi). The descendents of Porourangi, include many prominent ancestors such as Tuere, Mahaki-ewe-karoro, Hauiti, Tuwhakairiora, Te Aotaki, Hinemaurea, Hinerupe, Hunaara, Te Aotaihi, Takimoana, Umuariki, Rakaihoia, Putaanga, Huangā, Hinepare, Rakaimataura, Umuariki, Hinekehu, Materoa, Te Ataakura, Tawhipare and Ruataupare. Through inter-marriage the descent lines from Porourangi (including various of those listed in the previous sentence) merged with the descent lines of other ancestors, such as the Toi ancestors Uepohatu and Ruawaipu. As a result, the likes of Uepohatu and Ruawaipu are counted amongst the ancestors whose descent lines make up the wider Ngāti Porou iwi.²³

Mr Johnston's letter dismissed OTS concerns about apparent hapū listed as Ngāti Porou that appeared to be shared with other groups. He stated that TRONP had 'already supplied to the Crown sufficient information regarding the hapū, marae and general geographical area to which any negotiations will relate.'²⁴

The following day (23 March 2007), OTS informed Mr Johnston that the Crown was satisfied with the supporting material TRONP had supplied to clarify the matters the Crown had raised, and endorsed the mandating strategy. Though the letter made particular reference to the roles and responsibilities of TRONP, its negotiating subcommittee, and the hui and postal voting process, it made no mention of the claimant definition clarification sought in its letter of 14 March 2007.²⁵ The omission may have been a

23. Counsel for TRONP to OTS, concerning Ngāti Porou mandate strategy, 22 March 2007, p 4 (doc A40(a), p 516)

24. Ibid

25. OTS to counsel for TRONP, endorsement of mandate strategy, 23 March 2007 (TRONP, 'Ngāti Porou Deed of Mandate', attachment 9), pp 1–2 (doc A40(a), pp 687–688)

conscious one, because a file note from Trevor Himona at OTS drafted on 23 March 2007 states that:

At the meeting of 20 March, the Crown acknowledged that while it considered that more information about the definition of the claimant community was necessary, officials conceded that this component of the mandate could be fully developed once NP was in direct negotiations. For example, officials consider that the list of marae/hapu is comprehensive, but sought clarification on hapu listed that appeared to be shared with other iwi groups.²⁶

Publicising Ngāti Porou's negotiations

In September 2007, Dr Mahuika wrote to all adult beneficiaries on the TRONP register, informing them of TRONP's discussions with the Crown to that point. Accompanying this letter was correspondence from the Treaty Negotiations Minister establishing the nature and extent of the discussions. The Minister confirmed the Government's commitment to negotiate with TRONP to settle Ngāti Porou's historical Treaty claims, should TRONP gain a mandate from the Ngāti Porou claimant community for this purpose. In his letter to Ngāti Porou, Dr Mahuika outlined that the agreed mandating process would comprise a series of information hui followed by a postal vote 'conducted amongst the adult members of Ngāti Porou'. He continued: 'This is considered to be the most appropriate way to allow for the wider Ngāti Porou membership to participate in the mandating process.'²⁷

TRONP's advertising campaign and information hui

TRONP took out an advertisement in Wellington's *Dominion Post* on 3 October 2007 to publicise a series of information hui to be held over a two-week period. The advertisement made clear that the purpose of the hui was to seek support for TRONP's mandate resolution to 'enter into direct negotiations with the Crown for the comprehensive settlement of all historical Treaty of Waitangi claims of Ngāti Porou through the proposed hapū subcommittee structure'.²⁸ It stated that indicative voting would take place at the hui, but that the outcome would be determined by a postal ballot in which registered TRONP beneficiaries could participate. This was in response to Ralph Johnson, a senior analyst in the Treaty settlements/foreshore and seabed team at TPK, who, in September 2007, informed OTS that it was TPK's 'strong preference' that indicative voting take place given that postal

26. OTS, draft file note, 23 March 2007 (doc A40(a), p 519)

27. Apirana Mahuika to Ngāti Porou community, 'Mandate for Negotiations', September 2007, pp 1–2 (doc A40(a), pp 550–551)

28. TRONP, 'Panui', advertisement in *Dominion Post*, 3 October 2007 (TRONP, Ngāti Porou Deed of Mandate, attachment 12) (doc A40(a), p 699)

voting would be open only to those who were TRONP registered beneficiaries.²⁹ All Ngāti Porou were encouraged to attend the hui and opportunities were provided to enrol on the TRONP register. Advertisements appeared at the same time in the *Christchurch Press* and the *New Zealand Herald*, followed by advertisements in the *Gisborne Herald*, *Waikato Times*, *Southland Times*, and *Hawke's Bay Today* to publicise later hui.³⁰ In addition, TRONP publicised the hui and postal ballot on its website, in separate press releases, and in radio advertisements and interviews on Radio Ngāti Porou, Waatea News, Radio Waatea, and Radio New Zealand.³¹ Notification of the hui was also included with the postal voting packs, and emails were circulated via whānau networks.

The 14 information hui, four more than was proposed in the initial mandating strategy, were arranged at Hinerupe, Rahui, Hiruharama, Waiparapara, Puketewai, Gisborne, Hastings, Hamilton, South Auckland, Auckland central, Wellington central, Wainuiomata, Invercargill, and Christchurch. The results of indicative voting taken at the hui were 467 in favour of the mandate and 97 against, with 18 abstentions. A breakdown of the results can be found in the appendix to this report.

TRONP's postal voting pack

The postal ballot process commenced on 8 October 2007 and was concluded on 19 November 2007, the deadline for returning ballot papers. A total of 24,055 voting packs were distributed which, according to TRONP's calculation on the basis of figures from the 2006 census, equated to 56 per cent of all adult Ngāti Porou.³² The voting paper was clear in its intention. It asked voters to either accept or reject TRONP's mandate to enter into direct settlement negotiations with the Crown. However, the advertisements and postal packs did not specify that *all* claims within the East Coast inquiry district would be included, nor did they list individual claim numbers (Wai numbers).³³ An OTS file note dated 1 October 2007 stated that OTS had not had an opportunity to view TRONP's postal vote packs before they were distributed to TRONP beneficiaries. Likewise, the same note recorded that OTS had not sighted the initial advertisement publicising the information

29. Ralph Johnson to Lillian Anderson, email, 25 September 2007 (doc A40(a), p 401)

30. TRONP, advertising schedule, undated (TRONP, 'Ngāti Porou Deed of Mandate', attachment 16) (doc A40(a), p 705)

31. For further information see TRONP, 'Deed of Mandate', para 6.4.4 (doc A40(a), p 651)

32. See TRONP, 'Mandate for Negotiations – Voting Pack', 8 October 2007 (doc A40(a), pp 554–560). The information sheet accompanying the voting pack stated: 'if you are of Ngāti Porou descent and would like to participate in the process, we urge you to enroll onto the Ngāti Porou beneficiary register via the Rūnanga's website' (doc A40(a), p 558).

33. It should be noted this does not include the small number of claims lodged by Te Whānau-ā-Apanui and Tūranganui-a-Kiwa claimants that have limited overlap interests into the East Coast inquiry district.

hui before it appeared in the *Gisborne Herald* on 26 September 2007.³⁴ That advertisement had not included the wording of the resolution to be voted on, although this was remedied in time for the 3 October 2007 *Dominion Post* advertisement.

Registering with TRONP

People requiring a voting pack were informed that they needed to register with TRONP by 12 November 2007, seven days before the close of voting.³⁵ For those unwilling to participate in the postal ballot, the only forum available in which to voice their support for or dissent from the mandate was to attend and vote at the TRONP-organised information hui held at various locations around the country.

Results of TRONP's postal ballot

Martin Jarvie PKF, accountants and business advisers based in Wellington, were engaged to count the votes and produce a report of the results, which was forwarded to the Ngāti Porou mandate project coordinator on 23 November 2007. The report stated that 24,055 voting packs had been distributed. Of these voting packs, 4437 were 'returned to sender' or had been mistakenly sent to those under 18 years of age. This left a total of 19,618 possible votes. The total number of votes received was 4527, or 23.1 per cent of the total possible votes. Of these, 333 were considered invalid, leaving 4194 votes to be counted. The final tally showed 3863 in favour of the mandate and 331 against. In sum, 92.1 per cent of the valid votes cast were in favour of TRONP's mandate to negotiate a settlement and 7.9 per cent were against – a clear indication of support for the mandate among those who voted.³⁶

Presentation of the mandate to the Crown

TRONP representatives signed off on the deed of mandate on 10 December 2007. The deed stated that Uepohatu and Ruawaipu were among the ancestors whose descent lines made up the wider Ngāti Porou iwi, and that marae and hapū which were claimed as Ruawaipu were therefore Ngāti Porou marae and hapū.³⁷ OTS's initial assessment of the deed indicated that it met the Crown's mandating criteria. Five days later, OTS advertised a 'Notification of Mandate for Treaty Negotiations: Ngāti Porou' in Wellington's

34. OTS, file note, 1 October 2007 (doc A40(a), p 403); TRONP, 'Information Hui', advertisement in *Gisborne Herald*, 26 September 2007 (TRONP, 'Ngāti Porou Deed of Mandate', attachment 17) (doc A40(a), p 706)

35. TRONP, 'Mandate for Negotiations' (doc A40(a), p 574)

36. Martin Jarvie PKF to Ngāti Porou mandate project coordinator, Ngāti Porou mandate project report, 23 November 2007 (TRONP, 'Ngāti Porou Deed of Mandate', attachment 17) (doc A40(a), p 1008)

37. TRONP, 'Deed of Mandate', para 3 (doc A40(a), p 639)

Dominion Post newspaper. In cross-examination, OTS director Paul James noted that the advertisement was also published widely in other local and national newspapers.³⁸ The notice listed the hapū, marae, and individual claim (Wai) numbers that were deemed to be included in the mandate. In addition, the Ngāti Porou 'area of interest' was defined and the following statement was included:

The Crown understands that Ngāti Porou includes any person who can affiliate to and/or is descended from:

- ▶ One or more of the hapū of Ngāti Porou and tipuna that exercised customary rights in the Ngāti Porou area on or after 6 February 1840; and/or
- ▶ Can trace descent from Porourangi or his full name Porou Ariki Mataratara-a-whare Te Tuhimareikura-a-Rauru; and/or
- ▶ Can trace descent from the other founding ancestors of Ngāti Porou.³⁹

Important in the context of this inquiry is that the advertisement stated that the claim numbers of those asserting they represented Ruawaipu, Uepohatu, Te Aitanga-a-Hauiti, and Hapuoneone were included among those earmarked for settlement by the Crown and TRONP. Also included were OTS's contact telephone and email details, with an invitation for submissions, views, or inquiries concerning the deed of mandate to be received by OTS no later than 21 January 2008.⁴⁰ In the event, OTS accepted late submissions until the end of January.⁴¹ As Kathy Ertel, counsel for Wai 1272, noted, this was the first time that specific claim numbers had appeared in print.⁴²

Of the 35 submissions received, 33 opposed the mandate. Crown officials met with opposing submitters in late January and February 2008 to discuss their concerns, as follows:

- ▶ Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti claimants (24 January 2008);
- ▶ one Ruawaipu claimant (29 January);
- ▶ Waiapu River claimants (8 February);
- ▶ Wai 940 claimants (15 February);
- ▶ Ruawaipu claimants (16 February);
- ▶ Te Aitanga-a-Hauiti claimants (21 February); and
- ▶ Uepohatu claimants (21 February).⁴³

38. Paul James in cross-examination by Mark McGhie, transcript 4.1.1, day 2, sess 4, p144

39. Document A117(a)

40. Ibid

41. OTS to MICOTOWN, aide-memoire on mandate options, 29 February 2008, p1 (doc A40(a), p1066)

42. Paper 3.3.20, p 25

43. Chief executive, TRK, to Minister of Māori Affairs, update on progress with TRONP mandate, 6 March 2008 (doc A40(a), pp 1145-1146)

Officials noted that claimants requested that their claims be withdrawn from TRONP's settlement negotiation package.⁴⁴ Those present who claimed to represent Ruawaipu challenged TRONP's assertion that Ruawaipu were of Ngāti Porou descent. They also stated that the mandating process was flawed; that 'most of the claimant community doesn't understand the mandate'; and that Ruawaipu claimants wanted to proceed to a full Waitangi Tribunal hearing.⁴⁵ The officials were of the view that, of the three kin groups Ruawaipu, Te Aitanga-a-Hauiti, and Uepohatu, 'the position of Ruawaipu may present the most significant impediment to recognising the Mandate.'⁴⁶ It seems that this assessment was based on the strength of the submitters' presentations at the meetings with officials, their level of organisation in opposing the mandate, and the total number of Ruawaipu people opposed to the mandate. However, the Crown was also aware that others of Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti descent were registered beneficiaries of TRONP and supported the mandating process.

The opposing submitters also expressed concern that the Minister of Māori Affairs, Parekura Horomia, as a descendant of Ngāti Porou and Te Aitanga-a-Hauiti, might have 'a perceived conflict of interest which may preclude him from exercising the ministerial role of recognising (or otherwise) the mandate of TRONP'.⁴⁷ Darrell Naden and Linda Thornton, counsel for a number of East Coast claimants asserting they represented Ruawaipu and Te Aitanga-a-Hauiti, placed this concern on a more formal footing by contacting Dr Michael Cullen, who had replaced Mark Burton as Minister in Charge of Treaty of Waitangi Negotiations on 31 October 2007. They objected to the Minister for Māori Affairs' participation in the deed of mandate process and pointed to his long-term involvement with TRONP dating back to its establishment in 1987:

This same Minister who was actively involved in the development and support of the Rūnanga will be passing judgment on its fitness to represent the interest of others – many of whom are vehemently opposed to it. This cannot be seen to meet natural justice and common law prohibitions against bias and predetermination. Accordingly, we respectfully demand that Hon Parekura Horomia be disqualified from the review of the Rūnanga's Deed of Mandate.⁴⁸

On 7 April 2008, the Minister for Māori Affairs wrote to Mita Ririnui, Associate Minister in Charge of Treaty of Waitangi Negotiations, explaining that his ministerial role in approving a claimant group's deed of mandate could potentially represent a conflict of interest given his past involvement with TRONP. As a result, he would not receive

44. TPK, file note on meetings with submitters about deed of mandate in Gisborne on 15–16 February 2008, 17 February 2008 (doc A40(a), pp 1062–1063)

45. Ibid

46. OTS to MICOTOWN, 29 February 2008, p 4 (doc A40(a), p 1069)

47. Chief executive, TPK, to Minister of Māori Affairs, 6 March 2008, p 3 (doc A40(a), p 1147)

48. Tamaki Legal to MICOTOWN, 21 February 2008, p 2 (doc A40(a), p 1065)

any Cabinet papers or briefings and, if the matter arose in a Cabinet meeting, he would withdraw himself.⁴⁹

In early 2008, the Crown arranged seven meetings in Gisborne, Ruatoria, and Tauranga at which OTS and TRK officials were present to discuss the opposing submitters' concerns. Those concerns related to five particular matters:

- ▶ *Whakapapa*: While many submitters acknowledged their whakapapa connections to the ancestor Porourangi, they stressed that in their view mana and rights over land descended from earlier ancestors such as Ruawaipu, Hauiti, and Uepohatu.
- ▶ *The mandating process*: Some submitters felt that TRONP had failed to make clear which Wai numbers were included in the mandate put forward to the Crown. A list was not provided at any time during the mandating process, and the information only came to light when advertisements appeared in the press after the deed of mandate was accepted.
- ▶ *TRONP as a body*: There was concern that TRONP did not have sufficient structures in place to allow for adequate representation of hapū and marae interests. Concerns were also raised about individual personalities within the TRONP leadership.
- ▶ *The postal voting process*: The submitters expressed concern that the postal ballot process was open only to registered beneficiaries of TRONP.
- ▶ *Waitangi Tribunal East Coast district inquiry*: Some were desirous of proceeding with the Tribunal hearing process before entering into direct negotiations. Submitters also expressed their desire to have historical research reports completed as part of the Tribunal process. It was envisaged that this would be completed by December 2008.

Mr Naden compiled a presentation, outlining the concerns of claimants who did not consider themselves Ngāti Porou but whose claims would be subsumed within TRONP's settlement negotiations. He considered the deed of mandate to be 'riddled with defects', including the postal ballot, which 'lacked legal and political credibility'.⁵⁰ Mr Naden considered the postal ballot was unfair in its operation for the following reasons:

- ▶ The mailer referred only to Ngāti Porou claims being settled.
- ▶ Many who did not consider themselves Ngāti Porou were not registered, and would not register, to take part in the vote.
- ▶ Direct questions at the information hui did not receive direct responses, leading some to believe that their claims would not be included in the settlement negotiations and therefore that the ballot was not relevant to them.⁵¹

49. Minister of Māori Affairs to Associate MICOTOWN, 7 April 2008 (doc A40(a), p1193)

50. Tamaki Legal, 'East Coast Claimants' Opposition to TRONP Deed of Mandate', presentation at Cosmopolitan Club, Gisborne, 16 February 2008, slide 2 (doc A40(a), p1024)

51. Ibid, slides 1–39 (pp 1023–1061)

THE CROWN'S RECOGNITION OF TRONP'S MANDATE

On 1 April 2008, OTS put its assessment of the mandating process before Ministers Cullen and Horomia. It highlighted two key judgements to be made before the mandate could be recognised. The first concerned the nature of the opposition to the mandate, which, despite being well organised and vocal, was of undetermined strength in terms of size. An absence of registers, and the fact that opposition was not organised around marae and hapū, made it difficult to ascertain the strength of opposition. Conservative estimates were that approximately 100 individuals were represented by the opposing submitters. In contrast, the size of Ngāti Porou in general, and the substantial beneficiary register in particular, had allowed TRONP to claim considerable support. Secondly, the summary concluded that TRONP had carried out a thorough and comprehensive process to gain a mandate. In light of the opposition's inability to establish a significant level of support, there was little reason why TRONP's mandate should not be agreed to.⁵² Of particular interest in the context of this inquiry was the summary's acknowledgement that one option would be to remove the three dissenting groups from the mandate. OTS concluded, however, that this would be 'akin to not recognising the mandate at all, as these groups are key within the mandate and cannot be easily extracted. Te Rūnanga would also strongly dispute this approach.'⁵³

The following day, 2 April 2008, OTS produced an aide-memoire for the Treaty Negotiations Minister, providing additional information relating to those groups opposed to the mandate. It concluded that, although there was opposition to TRONP and its mandate, it was difficult to clearly distinguish those involved as separate entities. The document stated that those claiming to represent Ruawaipu had no separate established structure and that it was unclear whether one could attribute specific marae or hapū solely to Ruawaipu. Of the 35 submissions OTS received, just six came from those claiming to represent Uepohatu. With regard to Te Aitanga-a-Hauiti, the aide-memoire noted that just 20 people attended the meetings with the Crown.⁵⁴ In short, the aide-memoire reconfirmed the Crown's earlier assessment that the true size of opposition to the mandate coming from Ruawaipu, Te Aitanga-a-Hauiti, and Uepohatu had not been established. At the same time, the aide-memoire reconfirmed that TRONP 'through the Porou Ariki Trust is the entity most recently recognised by Government as representing Ngāti Porou for the purposes of fisheries allocation and includes these three groups.'⁵⁵

52. OTS to MICOTOWN and Minister of Māori Affairs, report recommending recognition of TRONP mandate, 1 April 2008, p 2 (doc A40(a), p 1164). In his closing submissions on behalf of the Wai 1301 Ruawaipu ethnic suppression claim, Barney Tūpara noted that the Crown was interested only in assessing Ruawaipu support for the mandate rather than seeking further information regarding Ruawaipu whakapapa and tradition: see paper 3.3.18, p 14.

53. OTS to MICOTOWN and Minister of Māori Affairs, 1 April 2008, p 3 (doc A40(a), p 1165)

54. OTS to MICOTOWN, aide-memoire concerning recognition of TRONP mandate, 2 April 2008, p 2 (doc A40(a), p 1192)

55. Ibid, pp 1–2 (pp 1191–1192)

The Treaty Negotiations Minister met with TRONP representatives on 3 April 2008 to inform them that the Crown had recognised the deed of mandate. With regard to opponents of the mandate, the Minister noted that ‘the Crown has a duty to ensure that those who made submissions are made aware of the decision through a letter from me, rather than through the media.’ Given the likelihood that opponents would lodge urgency applications with the Waitangi Tribunal on hearing that the deed of mandate had been agreed to, he had been advised by OTS that a public announcement should be delayed until the week commencing 14 April 2008, allowing him time to inform submitters of the Crown’s decision.⁵⁶

During the 3 April 2008 meeting with TRONP representatives, the Minister emphasised TRONP’s ‘clear, robust’ mandating process. He commented that issues had been raised by OTS, but noted that these had been addressed by TRONP’s letter of 27 March 2008 to the satisfaction of the Crown, describing the letter as ‘helpful in our decision.’⁵⁷ On the issue of historical research, the Minister noted that TRONP was:

willing to allow the research being undertaken for the Waitangi Tribunal process to be completed with some provisos around the nature of this research. This is helpful but we may have to look at doing a bit more here if we are to address the key concern raised by the submitters. What we are probably looking at is allowing the research programme to be completed as unaltered as possible. We could perhaps suggest options to ensure quality of the research and manage some of your [TRONP’s] concerns.⁵⁸

The Crown’s recognition of TRONP’s mandate was the culmination of considerable effort by both parties to reach a point where settlement negotiations could commence. TRONP had, according to Crown officials, undertaken a robust process in pursuit of achieving a mandate from its supporters, and this was acknowledged by the Crown’s agreement to it. However, it is important to remember that, as the Treaty Negotiations Minister noted, the key concerns raised by those opposed to the mandate required consideration by the Crown. It is to precisely that matter – the extent to which the Crown, to that point, had addressed the concerns of claimants in this inquiry – that our report now turns.

TRIBUNAL ANALYSIS OF THE PROCESS

In the second half of this chapter, we describe and analyse Crown actions with respect to its approval of TRONP’s mandate. This is done under four main headings, corresponding

56. OTS to MICOTOWN, briefing on recognition of TRONP mandate, 1 April 2008, p 11 (doc A40(a), p 1173)

57. Mr Johnston’s letter concentrated on four areas: subcommittee structure, communications strategy, post-settlement governance entity, and research programme: see counsel for TRONP to OTS, 27 March 2008 (doc A40(a), pp 1186–1190).

58. OTS to MICOTOWN, 1 April 2008, p 11 (doc A40(a), p 1173)

with significant issues we identified in the course of our inquiry. The first section outlines the information that was available to the Crown relating to concerns held by claimants in our inquiry about the TRONP mandate. In the second section we discuss the Crown's attempts to address these concerns. The third section discusses the Crown's assessment of claimant support and whether or not we consider that assessment to have been adequate. As we point out in chapters 3 and 4, we consider this to be an important issue for our inquiry. Finally, we discuss any flaws identified in the process followed by the Crown. Our main conclusions on the process then follow.

Crown awareness of claimant concerns

In this section we examine in detail what information the Crown had before it regarding claimant concerns, particularly from mid-2006 to mid-2008. In our view, the more the Crown was aware of the claimants' concerns – particularly prior to TRONP's mandate vote – the more one would expect the Crown to have made efforts to engage constructively with those concerns.

When OTS and TRONP first met to discuss possible negotiations in July 2006, there was already a range of information available to the Crown which made it clear that there were some groups on the East Coast who considered themselves separate from Ngāti Porou and who were likely to object to being included within TRONP's mandate. OTS had access to information supplied by the applicants, its own officials, TRONP, TPK, and the Crown Law Office (which provided OTS's legal representation in the Waitangi Tribunal's East Coast district inquiry process).

Some of this information was admittedly indirect and not definitive. For example, in June 2005 TPK produced a short draft report titled 'Comment on the tribal landscape of Ngāti Porou', on the relationship between TRONP and various groups on the East Coast.⁵⁹ This stated that TRONP 'is presently the only body that stands as an entity to represent all the hapū and whānau of the area', adding that it 'also appears to have broad (but not complete) support of the people of the area'.⁶⁰ The report noted that other groups had recently emerged, such as the Ruawaiipu, Te Aitanga-a-Hauiti, and Uepohatu tribal authorities (although it did not go into the specifics of these authorities), but that it was uncertain whether any of these organisations had the support of the hapū or iwi they claimed to represent. It also stated that some Te Aitanga-a-Hauiti people preferred to identify as Te Aitanga-a-Hauiti rather than Ngāti Porou, but nevertheless acknowledged that they were Ngāti Porou and appreciated TRONP's work.⁶¹

Preparatory work for the Waitangi Tribunal's East Coast district inquiry also provided hints as to the existence of potential opposition groups. As part of this work, the Waitangi

59. TPK, draft comment on the tribal landscape of Ngāti Porou, 29 June 2005 (doc A40(a), pp 68–70)

60. Ibid, p 1 (p 68)

61. Ibid, pp 1–3 (pp 68–70)

Tribunal looked at whether there were separate, non-Ngāti Porou iwi within the district, particularly as this related to the East Coast wars of the 1860s. In September 2004, the Tribunal's chief historian, Dr Grant Phillipson, recommended reports on Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti's involvement in the wars, and a scoping report on Terence Rangihuna and Richard Kiri's Hapuoneone claims.⁶² The Tribunal did not necessarily accept that these claimant groups were separate from Ngāti Porou, but it noted that there was very little information on the subject and that more research was needed.⁶³

Other information about opposition to TRONP was less equivocal. During TRONP's negotiations with the Crown over the foreshore and seabed in 2005, groups claiming to represent Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti informed the Crown and the Waitangi Tribunal that they were not Ngāti Porou and objected to TRONP negotiating on their behalf.⁶⁴ Members of these three claimant groups met with representatives of OTS and TPK in May 2005, where they reiterated this position.⁶⁵ There was also opposition to TRONP's authority as an entity recognised by the Crown for fisheries settlement purposes, which led, in May 2006, to members of the three claimant groups picketing a fisheries hui in protest against TRONP.⁶⁶ In October 2005, the Ruawaipu ethnic suppression claim (later Wai 1301) was lodged with the Tribunal.⁶⁷ This claimed that the Ruawaipu iwi had been suppressed by the Crown and Ngāti Porou. Jason Koia wrote to Minister Mark Burton in July 2006, stating that TRONP did not have any mandate to negotiate on behalf of Ruawaipu.⁶⁸ Although Mr Koia was writing to the Minister in the latter's capacity as Minister responsible for the Law Commission rather than as Treaty Negotiations Minister, and on the subject of the Law Commission's *Waka Umanga* report, this should have alerted the Minister and his staff to likely issues with TRONP's Treaty negotiation proposals. Further, in November 2006 Ruawaipu claimants participated in an unsuccessful urgency application objecting to OTS's policy 'of negotiating only with large natural groupings but without a clear definition of what constituted a large natural grouping.'⁶⁹ There was thus, by the end of 2006, a range of information available that could have alerted the Crown to dissent on the East Coast. We note that this was before OTS approved TRONP's mandating strategy, so the information was available to inform OTS input into the drawing up of that strategy.

62. Grant Phillipson, 'East Coast Casebook Research: Chief Historian's Final Recommendations', September 2004, pp 2, 6 (doc A40(a), pp 54, 58)

63. Grant Phillipson, 'East Coast Casebook Research: Discussion Paper', June 2004, pp 9–11 (doc A40(a), pp 22–24)

64. Document A3(b), pp 16–18; document A6, pp 4–5

65. Document A6, pp 4–5

66. TPK, 'Claimant Community Profile: East Coast district inquiry area', March 2007, p 65 (doc A40(a), p 480)

67. Simon Koia, statement of claim, 9 October 2005 (doc A40(a), pp 71–81)

68. Jason Koia to Minister Responsible for the Law Commission, 24 July 2006 (doc A40(a), pp 120–124)

69. TPK, 'Claimant Community Profile', p 67 (doc A40(a), p 482)

TPK also provided relevant advice. In September 2006, Dr John Tamahori, the chief adviser at TPK, wrote to the Minister of Māori Affairs Parekura Horomia.⁷⁰ Dr Tamahori made it clear that opposition to TRONP existed on the East Coast:

Officials are aware that there is some resistance to TRONP within Ngāti Porou – this was evident in the foreshore and seabed mandate reconfirmation process . . . and also in the number of claims to the Waitangi Tribunal alleging ethnic suppression . . .

He continued:

Much of the resistance is led by the three 'traditional tribes' of the East Coast – Uepohatu, Ruawaipu and Te Aitanga a Hauiti. Three individuals who regularly comment on this matter (in the media and at various hui within Ngāti Porou) are: Jason Koia, Luke Donnelly and Tui Marino.⁷¹

The memo went on to say that many claimants wanted a full hearing of their claims and that it was therefore difficult to know how much support direct negotiations would have.⁷² The timing of this advice is important. A Minister of the Crown was provided with information about potential opposition to TRONP's mandate just as exploratory discussions about a possible Ngāti Porou settlement got under way.

In March 2007, TPK produced a claimant community profile for the East Coast inquiry district area. Its purpose was to inform TPK on the wider context of issues on the East Coast that related to the Treaty settlement process. It provided information on the traditional history of the East Coast, claimant groups, the political geography of the area, and Treaty settlement policy implications.⁷³ The profile noted that there were a number of claimants who challenged the view that East Coast Māori were all Ngāti Porou. Of the 107 claims then listed for inclusion in the East Coast district inquiry, 93 had formed into six clusters while the remaining 14, at that stage, remained outside. The profile stated that these claimants, identified as members of Ruawaipu, Uepohatu, Te Aitanga-a-Hauiti, Ngāti Onenone, and Ngāti Konohi, would accept being considered 'Ngāti Porou whanui' for some purposes but that when it came to their Treaty claims within the East Coast they asserted a more distinct identity linked to their own whakapapa and ahi kaa.⁷⁴ In cross-examination before us in December 2009, Mr James stated that as far as he was aware his office did not receive TPK's claimant community profile. That said, he concluded that, as TPK were joint advisers on the mandate, its findings would have 'come into the process in that way'.⁷⁵ We note that OTS had already approved TRONP's mandating strategy by then.

70. John Tamahori, TPK, to Minister of Māori Affairs, 19 September 2006 (doc A40(a), pp 397–400)

71. *Ibid*, p 2 (p 398)

72. *Ibid*

73. TPK, 'Claimant Community Profile' (doc A40(a), pp 416–507)

74. *Ibid*, p 7 (p 422)

75. Paul James in cross-examination, transcript 4.1.1, day 3, sess 1, p 191

However, the actual mandate vote was still several months off, so officials still had the opportunity to use this information as part of their input into the process.

By mid-2007, the claimants in this urgent inquiry had become aware that TRONP was holding discussions with the Crown. Ruawaipu claimant Jason Koia stated that he heard about this through ‘word of mouth’ in June of that year.⁷⁶ Subsequently, several of the applicants and their counsel wrote to the Treaty Negotiations Minister stating their opposition to TRONP’s plans.⁷⁷ In response, the Minister confirmed to Jason Koia that TRONP intended to include Ruawaipu within the list of iwi, hapū, and whānau it was seeking to represent.⁷⁸ In that correspondence, the Minister stressed that TRONP would need to show that it had a mandate before any settlement negotiations were entered into. Since the Minister was aware by that stage that Mr Koia was opposed to TRONP claiming mandate on his behalf, he advised Mr Koia to attend the information hui shortly to commence throughout the country and, should a deed of mandate be submitted to the Crown, to enter a submission opposing it. Further information, the Minister said, could be obtained from Dr Mahuika, the chair of TRONP.⁷⁹ We consider that, given the Crown’s awareness of tensions on the East Coast and Mr Koia’s likely reluctance to approach Dr Mahuika, the latter suggestion was unhelpful and Mr Koia could perhaps have been directed elsewhere for advice and information. That said, we note that this letter would have alerted Mr Koia and those he claimed to represent to the fact that TRONP intended to include their historical Treaty claims in its settlement with the Crown.

In September 2007, a memorandum was submitted to the Waitangi Tribunal stating Simon Koia’s opposition to the mandating process, particularly regarding the Wai 1301 ethnic suppression claim.⁸⁰ Around the same time, Mr Naden wrote to the Treaty Negotiations Minister, stating his objection to the proposed inclusion of 12 particular claims in the negotiations and settlement.⁸¹ He noted that direct negotiations would prevent his claimants from having their story heard before the Tribunal, which, in his opinion, would deny them their rights to natural justice.⁸²

In a similar fashion, Hemi Te Nahu, counsel for a number of claims including the Wai 1332 Uepohatu ethnic suppression claim, wrote to the Minister on 9 October 2007 requesting clarification of whether the Crown and TRONP intended to include Uepohatu

76. Document A39, p10

77. Hemi Te Nahu to MICOTOWN, 9 October 2007, pp1-2 (doc A40 (a), pp578-579); Darrell Naden to MICOTOWN, 9 October 2007 (doc A40(a), pp589-593)

78. MICOTOWN to Jason Koia, 25 September 2007 (doc A40(a), pp541-542)

79. Ibid, p2 (p542)

80. Counsel for Wai 1301, submission on direct negotiations, 10 September 2007 (doc A40(a), pp524-540)

81. Tamaki Legal to MICOTOWN, 9 October 2007 (doc A40(a), pp589-593). The claim numbers were: Wai 1025, 1082, 1089, 1265, 1267, 1268, 1269, 1270, 1272, 1300, and 1337, and one pending (Ruawaipu Crown settlement policy).

82. Ibid

claims in the list of claims to be settled.⁸³ Furthermore, Mr Te Nahu asked the Minister to confirm that it was the negotiating parties' intention to settle 'all historical Treaty claims awaiting hearing by the Tribunal's East Coast district inquiry, including the claims of the separate and independent Ruawaipu and Uepohatu tribes'. Mr Te Nahu also emphasised his belief that the Crown's mandating process was flawed: the Crown's policy of mandating for negotiations required it to be assured that the mandate was secure before commencing negotiations. In his view, 'the Crown can never be assured that a Ngāti Porou mandate is secure before the Tribunal has released its report on the East Coast district inquiry'.⁸⁴ A primary reason for this, he stated, was that through indoctrination since the 1860s both Ruawaipu and Uepohatu hapū had been led to believe they were Ngāti Porou and had even enrolled on the TRONP beneficiary register. Until a full Tribunal inquiry had taken place, he continued:

there is always the prospect that many Ngāti Porou mandate respondents could be the ignorant and unintentional authors of injuries to themselves by entering into a settlement contract that in essence serves to alienate their settlement assets to a foreign tribe/entity.⁸⁵

Dr Cullen, who had now replaced Mark Burton as Treaty Negotiations Minister, responded to Mr Te Nahu's letter. He confirmed that TRONP had approached the Crown in order to settle its historical Treaty claims, which included the claims of Ruawaipu and Uepohatu. 'The Crown considers', he continued:

that negotiations with large natural groupings are more likely to be lasting and allow the parties to develop a settlement package that covers a wide range of redress. Further, the interests of particular iwi, hapu groups or individuals need not be subsumed during the negotiations process. The negotiations framework can allow for these various interests to be addressed.⁸⁶

In conclusion, and mirroring the advice Minister Burton had previously given Jason Koia, Dr Cullen stated that:

it is for the Ngāti Porou claimant community to determine whether to pursue a Waitangi Tribunal inquiry or enter into direct negotiations. Te Rūnanga is currently undertaking a process to determine this matter. I encourage you to participate in this process.⁸⁷

83. Hemi Te Nahu to MICOTOWN, 9 October 2007 (doc A40(a), pp 578–588)

84. Ibid, p 4 (p 581)

85. Ibid

86. MICOTOWN to Hemi Te Nahu, 15 November 2007 (doc A40(a), p 626)

87. Ibid

We note that most of the correspondence between TRONP opponents and Government Ministers took place while the mandating process was under way. Indeed, voting was about to commence by the time the Minister replied to Mr Te Nahu. In our view, engagement with the claimants about what claims were to be included in the settlement should have come much earlier than it did.

Around the time of TRONP's mandate vote in October and November 2007, the historical reports commissioned by the Waitangi Tribunal and the Crown Forestry Rental Trust (as outlined earlier) were nearing completion. Dr Grant Young and Professor Michael Belgrave produced a scoping report on Ruawaipu and Tony Walzl produced a scoping report on Uepohatu. In addition, the scoping report on Hapuoneone was completed in October 2007.⁸⁸ The Crown Law Office was on the distribution list for the East Coast district inquiry and would have received these three reports. We acknowledge that there are major differences in these reports, and we have made no assessment of their content or conclusions. Nor have their authors been subject to cross-examination. However, the reports on Ruawaipu and Hapuoneone would have been available to Crown officials when they met with those opposed to the TRONP mandate in February 2008. We have no evidence about the extent to which these reports informed either the Crown's perspective during these discussions or officials' subsequent advice to Ministers.

By the time OTS approved TRONP's mandating strategy in March 2007, the Crown already had information available to it which indicated likely opposition to TRONP negotiating a settlement. The most obvious evidence was the opposition to TRONP's role in relation to the foreshore and seabed and fisheries settlements. By the time TRONP's mandate vote began in October 2007, further information was available, including correspondence from claimants. The fact that these claimants were, at this late stage, still asking whether or not their claims would be covered by the proposed Ngāti Porou settlement should have alerted the Crown that further clarification would need to be provided. Further, given the evidence of the existence of opposition to a settlement, it was in the Crown's own interest for OTS to be particularly vigilant about the process it followed. In the event, the information provided to claimants before the vote lacked certain facts, such as the precise claims that would be included in the settlement and an unambiguous definition of the claimant community. That was, in our view, a failing in the process.

88. Grant Young and Michael Belgrave, 'Ruawaipu: Tangata Whenua: Scoping Report for an Oral and Traditional History Project', November 2007 (Wai 900 ROI, doc A17); Tony Walzl, 'Scoping Report for Uepohatu Cluster Area Oral and Traditional History Project', report commissioned by CFRT, March 2008 (doc A40(a), pp1071-1144); Andrew Ivory, 'Te Hapū Oneone: A Scoping Report on the Te Hapū Oneone claims (Wai 1020, 1282) in the East Coast (Wai 900) District Inquiry', report commissioned by the Waitangi Tribunal, October 2007 (Wai 900 ROI, doc A12)

Crown proposals to meet claimant concerns

In the previous section we outlined the information the Crown had available to it about opposition to the TRONP mandate. We concluded that, at certain key points in the process, the extent of the information was reasonably significant. We now turn to proposals made by the Crown to try and address the concerns of those opposed to the mandate. We note, before we do so, that addressing these concerns to the satisfaction of all the claimants in this inquiry would be no small matter. After the series of meetings in early 2008 between the Crown and those who made submissions opposing TRONP's deed of mandate, Leith Comer, TPK's chief executive, wrote to the Minister of Māori Affairs stating that a majority of those who made submissions in opposition to TRONP:

did not consider that the perceived difficulties could be remedied. In one or two cases, however, submitters noted that they might remove their objections to the Deed of Mandate if changes could be made to enhance the level of representation on the mandated body.⁸⁹

During the Tribunal's urgent hearing, claimants Rakapa Koia and Tui Marino suggested that some of their concerns could be addressed if their groups had better representation within TRONP and if their interests were more clearly protected.⁹⁰ However, Jason Koia said that the only way for his concerns to be properly addressed would be for his and similar claims to be excluded from TRONP's mandate and allowed to proceed through a Waitangi Tribunal hearing.⁹¹

Immediately following the series of meetings with submitters in February 2008, an OTS aide-memoire to the Treaty Negotiations Minister outlined four options with regard to TRONP's mandate:

- ▶ simply recognise it;
- ▶ recognise it but have TRONP ensure that the interests of the submitters were represented in negotiations;
- ▶ recognise the mandate on condition that hui were held in the submitters' claimed rohe to determine TRONP's level of support there; or
- ▶ decline to recognise TRONP's mandate in respect of Ruawaipu, who, in the Crown's consideration, presented the 'most significant impediment to recognising the mandate.'⁹²

The fourth option would have suited those Ruawaipu claimants who insisted that their claims be withdrawn from the negotiation process, while the concerns of non-Ruawaipu identified applicants could potentially have been addressed through the second option.

89. Chief executive, TPK, to Minister of Māori Affairs, 6 March 2008, p3 (doc A40(a), p1147)

90. Rakapa Koia questioned by Alan Knowsley, transcript 4.1.1, day 1, sess 4, p 61; Tui Marino questioned by Tania Simpson, transcript 4.1.1, day 2, sess 1, p 88

91. Jason Koia questioned by The Honourable Sir Douglas Kidd, transcript 4.1.1, day 1, sess 3, pp 48–49

92. OTS to MICOTOWN, 29 February 2008, pp 2–4 (doc A40(a), pp1067–1069)

However, the aide-memoire stated that problems would be likely with this fourth option: it would be difficult to separate Ruawaipu from Ngāti Porou; it was unclear as to the levels of opposition that existed among Ruawaipu; and TRONP was unlikely to accept that it did not have a mandate with respect to Ruawaipu.⁹³ A report on the degree of opposition to the mandate within Ruawaipu, Te Aitanga-a-Hauiti, and Uepohatu was prepared. That report has not been filed on the record of this inquiry, but Mr James stated that its content was reflected in the OTS report dated 1 April 2008, which recommended that the Crown recognise TRONP's deed of mandate.⁹⁴

Outside of the four options put to the Minister, OTS proposed alternative ways in which some of the applicants' concerns could be addressed within TRONP's mandate. These included continuing the casebook research taking place as part of the East Coast district inquiry, and gaining assurance from TRONP that it 'would better communicate how its proposed negotiating structure would provide for the interests of hapū and local communities to be represented'. OTS also suggested that TRONP's extant structure and Te Haeata, the negotiating subcommittee, 'provides an adequate and transparent process for representation for those people that wish to participate'.⁹⁵ Officials were concerned, however, about Ngāti Porou plans to commission its own history, 'because there is a strong perception that such an account will be narrowed to only reflect a particular view of history'. OTS felt that 'this is one area where Te Rūnanga will have to make some concessions', possibly by allowing 'a "truth and reconciliation" type process' in which the Governor-General would visit East Coast marae and listen to whoever wished to speak on historical Treaty breaches.⁹⁶

The Crown did, then, outline a number of ways in which claimant concerns might be addressed. From our perspective, the main problem lies not the proposals themselves – which in general seem constructive – but in the timeliness with which they were put forward. TRONP's mandate had already been publicly notified and submissions taken on it before Crown officials even met with the claimants to discuss their objections to the mandate. It is for this reason that we recommend, in future settlements, that the Crown engage with potential opponents of a negotiating mandate far earlier in the process. At the end of this report we make several practical recommendations as to how that might happen.

Assessment of claimant support

In chapters 3 and 4 of this report we outline the importance we place in this inquiry on assessing the applicants' support base. We argue that the extent of support is relevant both to the issue of prejudice and to assessing the amount of attention it is reasonable to expect

93. OTS to MICOTOWN, 29 February 2008, p 4 (doc A40(a), p 1069)

94. Paul James questioned by Kathy Ertel, transcript 4.1.1, day 2, sess 4, p 152

95. OTS to MICOTOWN, 1 April 2008, p 2 (doc A40(a), p 1164)

96. Ibid, pp 7–8 (pp 1169–1170)

OTS to have given to those opposed to the TRONP mandate. In this section, we outline the information on which OTS based its assessment of the level of support for the claimants in this inquiry, and we make our own judgement as to how reasonable this assessment was.

The February 2008 OTS aide-memoire summarising the meetings with submitters stated that:

Officials suggest that given the number of submissions received and the numbers of people who attended the submitters' meetings, the level of dissent may be strongly held but it may not be widespread.⁹⁷

In cross-examination, Mr James stated that his officials estimated that the submitters represented approximately 100 people, basing this figure on the number of signatures on their submissions and the number of people at the meetings.⁹⁸ Jason Koia stated that many Ruawaipu people did not meet with the Crown, as they felt that 'by engaging with the Crown they would somehow end up endorsing the settlement of their claims' when they wanted instead to continue with the Waitangi Tribunal inquiry process.⁹⁹ That said, the applicants did make efforts to demonstrate the support they held. On 30 October 2008, claimants asserting they represented Ruawaipu submitted a petition to the Tribunal signed by 118 people, stating that their iwi was Ruawaipu and that they did not support TRONP's mandate.¹⁰⁰ Those opposed to TRONP's mandate wrote to Ministers, attended a number of the information hui, were vocal in their opposition, and voted against the mandate. They also made 33 submissions to the Crown opposing the mandate and met with Crown officials in early 2008 where they reiterated their opposition. As we discuss further below, Mr Marino ran his own 'mandate' vote opposing a TRONP-negotiated settlement. However, the Crown was not convinced that the opponents enjoyed significant support.

As well as the post-mandate meetings, OTS relied on other sources for its assessment of the applicants' support. TRK provided reports from the mandating information hui, historical reports were prepared for the Tribunal's East Coast district inquiry, and OTS and Crown Law historians undertook some analysis of material provided by the submitters. Although this analysis is not on the record, Mr James stated that it contributed to the advice provided by OTS to its Minister.¹⁰¹ Crown officials also spoke to the submitters about their levels of support, although they considered the information they received to be unreliable.¹⁰²

97. OTS to MICOTOWN, 29 February 2008, p 5 (doc A40(a), p 1067)

98. Paul James questioned by Mike Doogan, transcript 4.1.1, day 2, sess 2-3, pp 115-116

99. Document A6, p 18

100. List of descendants of Ruawaipu opposed to TRONP's mandate (doc A40(a), pp 1275-1282); claim 1.1.1, pp 38-39

101. Paul James questioned by Mike Doogan, transcript 4.1.1, day 2, sess 3, pp 117-118

102. Ibid, p 116

OTS was aware that most opposition from within Te Aitanga-a-Hauiti was initiated by Mr Marino, who attended six mandate information hui. As noted, he also organised a mandate survey for Te Aitanga-a-Hauiti Incorporated and Te Aitanga-a-Hauiti Iwi Cluster, and claimed 99 per cent support for the iwi to pursue its own claims in the Waitangi Tribunal independently of TRONP.¹⁰³ There was just one dissenting vote among the 182 people who participated.¹⁰⁴ Mr Marino also organised one hui at Hauiti Marae, two in Wainuiomata, two in Manukau, and one in Gisborne, where resolutions were passed in favour of proceeding separately from TRONP with respect to Treaty claims.¹⁰⁵ On 8 December 2008, he wrote to the incoming Treaty Negotiations Minister, Christopher Finlayson, on behalf of a number of claimants, seeking to convince him that Te Aitanga-a-Hauiti met the criteria to be recognised as a large natural grouping in accordance with Crown settlement policy. The Minister, in his response dated 12 February 2009, stated that Mr Marino had failed to demonstrate that he held the authority to speak on behalf of Te Aitanga-a-Hauiti.¹⁰⁶ The Minister's reply was blunt:

Your letter and the electronic documents you attached do not demonstrate authority for you to act or speak for the group of hapu that identifies as Te Aitanga-a-Hauiti. As you know, trustees of several marae within the Uawa area have published, sent to the Crown, and filed with the Waitangi Tribunal, a statement that you do not act for or represent them.¹⁰⁷

At our hearings, Mr James commented that OTS had doubts, due to the lack of information, about the methodology adopted in the 'mandate' vote organised by Mr Marino. We tend to agree with this assessment: the documents submitted to this inquiry to back up Mr Marino's claims of support are unconvincing. The Crown submitted that there is a considerable overlap in the signatures of support provided in evidence, and that only 19 individuals in total signed these documents.¹⁰⁸ The Crown's assessment was not challenged in our hearings and is backed up by our own scrutiny of the documents.¹⁰⁹ We note that during the submissions stage of the process the Crown received submissions from the trustees of five Te Aitanga-a-Hauiti marae (referred to in the Minister's letter above) which disputed Mr Marino's authority to speak on their behalf. A public notice to this effect was also placed in the *Gisborne Herald* on 22 January 2008.¹¹⁰ We commend Mr

103. Document A41, p15

104. Te Aitanga-a-Hauiti ballot vote returning officer's declaration (doc A42, p36)

105. Document A41, p15

106. Ibid. See also document A107, pp17–18 and document A3(e). The Minister's letter records that Mr Marino's letter was dated 15 December 2008, not 8 December 2008.

107. Document A3(e)

108. Paper 3.3.28, pp 37–38

109. The documents submitted in support of Te Aitanga-a-Hauiti being considered a 'large natural grouping' are collected on the record of this inquiry as document A42.

110. Document A107, p18

Marino's efforts to demonstrate his level of support, but in light of the evidence we share the Crown's doubt about his authority to speak for the whole of Te Aitanga-a-Hauiti.

Overall, we conclude that the Crown did have some good indicators to assist in assessing the apparent level of support for those opposing TRONP's proposed negotiations. There is no evidence to suggest that any one marae was in support of the applicants; there was no one hapū in complete support of the applicants; the applicants could not point to a large mandate in support of their stance; and there was no conclusive demonstration of the support the applicants claimed they commanded. In addition, at two information hui held at Te Araroa and Tikitiki, within what Ruawaipu described as their traditional rohe, TRONP received majority support in the indicative vote.¹¹¹

Over recent years, the claimants have had a number of opportunities to demonstrate their support. Those claiming to represent Ruawaipu and Uepohatu were put on notice after Judge Stephanie Milroy's direction in July 2006 that evidence of support for claimants was an important issue. In that direction, Judge Milroy identified that:

Many East Coast claims are made by individual Māori on behalf of their whānau, hapū, multiple hapū or iwi. In future, the Tribunal will require evidence in the form of hui decisions/minutes, and/or signed representation lists, before accepting that claims represent anyone other than the named applicant(s).¹¹²

The judge concluded by stating that the Tribunal held concerns that:

the progress of this inquiry is being impeded by the filing of multiple claims and by the alleging of very generic issues, often without any apparent impacts specific to the East Coast inquiry district. Similar comments apply to claimants who are closely related and who are filing separate claims on issues that could, with greater efficiency and effectiveness, be grouped together.¹¹³

Even with the benefit of the evidence presented in our urgent hearing, it has been difficult to determine that the applicants have strong support. For example, some people who affiliate to Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti clearly voted in support of TRONP's mandate. Furthermore, the applicants provided no substantive evidence that suggested they had the support of particular marae, and although Mr Marino claimed support through his mandate vote the Crown received submissions disputing his authority to speak on behalf of Te Aitanga-a-Hauiti. TRONP opponents did not gain a majority of votes at any of the information hui, and the evidence we were presented with demonstrated that some individuals cast dissenting votes at more than one hui. TRONP's deed of mandate notes that one attendee who claimed to represent Ruawaipu interests voted against the resolution at five hui; five persons voted against the resolution at both the

111. OTS, aide-memoire, 2 April 2008, p 2 (doc A40(a), p 1192)

112. Presiding officer, directions concerning recent claims, 14 July 2006 (Wai 900 ROI, paper 2.5.19), p 3

113. Ibid, p 4

Hinerupe and Rahui marae hui; and a claimant counsel attended three hui and voted in opposition at each.¹¹⁴ We know from our hearing in December 2009 that Mr Marino attended six information hui and voted against the mandate at each one.¹¹⁵ The conclusion we reach is that the level of opposition may have been exaggerated by multiple voting. Furthermore, given the divisions within the East Coast, we surmise that some of those who voted against the mandate were not necessarily supporters of the claimants in this inquiry. On balance, we do not consider that the indicative vote against the mandate provides substantive evidence of support for the applicants' position.

Support for TRONP is considerable by comparison. The indicative voting taken at the 14 information hui held nationwide demonstrated a significant support base for TRONP. A total of 467 votes, 80 per cent of those who voted, were cast in favour. When compared with 97 votes, or 17 per cent against, this suggests strong support. In addition, the results of the postal ballot recorded that 92 per cent of those who voted were in favour of TRONP negotiating on their behalf. While we are of the view that elements of the voting procedure could have been strengthened, we believe that the results demonstrate widespread support.

Flaws in the Crown's process

In the course of the Tribunal's hearings, it became clear that there were a number of flaws in the process followed by the Crown in recognising TRONP's mandate. The most obvious of these was the failure of OTS to follow up promptly on a commitment to provide TRONP with a list of Wai numbers for the historical claims that would be settled with Ngāti Porou.

TRONP stated at the October 2007 information hui that Ngāti Porou historical claims (filed with the Waitangi Tribunal, as required by law, by individuals on behalf of Ngāti Porou whānau and hapū) would be affected by settlement. However, there was a lack of clarity about the specific claims likely to be expunged once the Crown's settlement with Ngāti Porou was agreed.¹¹⁶ As stated earlier, newspaper advertisements publicising the information hui made no reference to specific Wai numbers. In our view, if a list of Wai numbers likely to be extinguished as a result of a settlement had been available before the information hui, then the debates between Jason Koia and TRONP's legal counsel James Johnston over which claims would be settled would have been avoided.¹¹⁷ At the hui, Mr Koia sought confirmation of whether the 40 claims he said he represented on behalf of Ruawaipu were considered separate from the claims TRONP hoped to settle with the

114. TRONP, 'Deed of Mandate', p 11 (doc A40(a), p 646)

115. Tui Marino questioned by Alan Knowsley, transcript 4.1.1, day 2, sess 1, p 86

116. The TRONP mandate presentation slide stated 'Ngāti Porou historical claims': see TRONP, 'Mandate for Negotiations', slide 3 (doc A40(a), p 563)

117. TRONP, minutes of mandate information hui no 2, Rahui Marae, Tikitiki, 18 October 2007 (doc A40(a), pp 594–615). In particular, see pp 4–5 (pp 597–598).

Crown. It could be inferred from Mr Johnston's response – that TRONP sought to settle all Ngāti Porou historical claims – that he considered Ruawaipu as falling under the umbrella of Ngāti Porou and, as such, included in any negotiated settlement.¹¹⁸ However, as this was not explicitly stated, claimants who considered they were *not* Ngāti Porou may have construed it to mean that their claims were not included.

Reading the Crown's public notice of December 2007 about the Crown's receipt of a mandate from TRONP was, said Henry Koia, when 'I first found out for sure, although I had had my earlier suspicions, that the Wai 1301 claim was included in the TRONP mandate.'¹¹⁹ As mentioned earlier, the December 2007 advertisement appears to be the first explicit statement from either the Crown or TRONP about which claims were included in the mandate. We do note, however, that almost three months before the advertisement appeared in the press Henry Koia had been alerted to the fact that Ruawaipu would likely be included in any settlement. The source was the letter from the Treaty Negotiations Minister to Mr Koia's brother Jason, stating as much.¹²⁰ That said, we consider that the Crown's delay in making public the specific Wai numbers potentially included in the settlement allowed applicants to state that they were unaware if their claims would be included. We believe that earlier action would have been better all round.

In our view, the Crown should have insisted that a list of Wai numbers to be included in the proposed negotiations be made public at the start of the mandating process, shown at the information hui, and distributed along with the mandate ballot packs. It would also have been desirable for OTS to have insisted on a more detailed definition of the proposed claimant community. In fact, we consider that the Crown should have gone further than this. It was clearly evident to the Crown that the mandating strategy was intent on dealing with *all* East Coast district inquiry claims.¹²¹ In our view, in the spirit of maintaining, in the Crown's words, a 'fair, open and transparent process,' all East Coast claimants with a vested interest had a right to be fully informed at the earliest opportunity. Although the Crown was not necessarily obliged to inform claimants of its discussions with TRONP before these became more widely known, it did, once the mandating strategy was accepted, have a responsibility to inform claimants *before* the mandating process began that TRONP was seeking a mandate to settle their claims. We acknowledge that having a Wai number does not grant a claimant any particular rights regarding settlement, but we strongly believe that claimants have a right to be informed about matters directly affecting their claim. The Crown could have improved its process by contacting all East Coast claimants whose claims would be affected at the point it received notification of TRONP's mandating strategy, rather than waiting until after the mandating process had been completed. In this

118. TRONP, minutes of mandate information hui no 2, pp 4-5 (doc A40(a), pp 597-598)

119. Document A1, p 31

120. MICOTOWN to Jason Koia, 25 September 2007 (doc A40(a) pp 541-542)

121. It should be noted this does not include the small number of claims lodged by Te Whānau-ā-Apanui and Tūranganui-a-Kiwa claimants that have limited overlap interests into the East Coast inquiry district.

context, we note that the Crown's landbanking policy requires OTS to maintain a database of all Treaty of Waitangi claimants and to notify them when any surplus Crown properties become available for possible landbanking (for use in Treaty settlements).¹²² Other Māori groups and individuals may also apply to be on OTS's mailing list.¹²³ Thus, it should have been perfectly possible for OTS to contact all East Coast claimants directly.

In its 14 March 2007 letter to TRONP, OTS made a number of recommendations on the mandating strategy. We consider that at this relatively early stage of the proceedings OTS could have requested that TRONP keep all claimants fully informed of the milestones being reached. We note Dr Tamahori's assessment that, given the nature of the opposition to TRONP on the East Coast, possible urgency applications to the Waitangi Tribunal could be mitigated 'by officials and TRONP ensuring that the exploratory discussions are conducted in an open and transparent manner, and that information about the preliminary discussions is made available.'¹²⁴

In sum, we consider that there were a number of flaws in the process followed by the Crown in pursuing a settlement with Ngāti Porou. We do not consider them to be so serious as to warrant a recommendation that the settlement be delayed – particularly given our assessment about the apparent level of support for the claimants. However, we do consider these flaws to be serious enough to warrant recommending several changes to the Crown's standard procedures and expectations as outlined in *Ka Tika ā Muri, Ka Tika ā Mua*.

CONCLUSIONS

The Crown had ample information, particularly between 2006 and 2008, about the concerns that claimants in this inquiry had about the TRONP mandate and related issues. The Crown eventually made some proposals to address these concerns, although the applications for urgency that led to this inquiry are evidence that these proposals did not satisfy those opposing a settlement. That said, this is clearly a situation involving more than one party, and a failure to resolve matters should not be taken to reflect solely on the Crown.

The Crown also attempted to assess the level of support for those who objected to the TRONP mandate. While there are valid criticisms to make about its methods in making this appraisal, we recognise that making such assessments is no easy matter. The issue of support was also important in our inquiry and this reinforced our view of the difficulty of

122. OTS, *Protection of Māori Interests in Surplus Crown-Owned Land: Information for Crown Agencies* (Wellington: OTS, 2006), p 6

123. OTS, 'Protection of Māori Interests in Surplus Crown-Owned Land: Information for Applicants' (Wellington: OTS, 2005), http://nz01.terabyte.co.nz/OTS/DocumentLibrary/Protection_booklet3.htm (accessed 11 March 2010)

124. John Tamahori, TPK, to Minister of Māori Affairs, p 3 (doc A40(a), p 399)

the exercise. Overall, we cannot conclude that the level of support for the claimants, even among those they claim to represent, is significant. On the other hand, TRONP has been able to demonstrate that it has substantial support for its mandate. We discuss these matters further in chapters 3 and 4.

As stated above, we consider that there were a number of flaws in the process followed by the Crown in approving the TRONP mandate. The most obvious was the Crown's failure to ensure that the Wai numbers of claims to be extinguished by a settlement and the description of the claimant community were publicised in advance of the mandate vote. Overall, we do not think these flaws cast enough doubt on the reliability of the TRONP mandate for us to recommend that the settlement process be delayed. However, we think that the Crown should make a number of changes to its standard mandating policies, as outlined in *Ka Tika ā Muri*, *Ka Tika ā Mua*, to help ensure the integrity of mandates in future settlement negotiations. It is in the interests of the Crown and iwi/hapū alike to try and defuse the sort of conflicts that, in recent times, have led with increasing frequency to urgent inquiries by the Waitangi Tribunal. Our main recommendations for policy changes are included at the end of this report.

CHAPTER 3

CROWN SETTLEMENT POLICY

INTRODUCTION

In chapter 2, we outlined the process that led the Crown into negotiations with Te Rūnanga o Ngāti Porou (TRONP) and pointed to what we consider were flaws in that process. In this chapter we look at general Crown settlement policy. A number of questions in the statement of issues for this inquiry addressed overall Crown policy and the way in which it was applied in this particular inquiry. This chapter first addresses the question of whether general Crown settlement policy is fundamentally flawed in some respects. This discussion includes the legal context for our report that was touched on in the introduction. We then examine whether the Crown has fully applied its own policies and guidelines in this instance. In addition, we discuss whether or not the Crown has followed the recommendations of the Tribunal's *Tāmaki Makaurau Settlement Process Report* and *Te Arawa Settlement Process Reports*. Finally, we pick up on some of the weaknesses in the Crown's policies and guidelines revealed in chapter 2, and suggest policy revisions that could help prevent similar problems arising again.

CROWN SETTLEMENT POLICY AND THE LEGAL CONTEXT

Cabinet agreed on general principles for settling Treaty claims at its meeting of 21 September 1992. The Crown's general principles have since been refined and expanded, and are outlined in *Ka Tika ā Muri, Ka Tika ā Mua – Healing the Past, Building a Future*, described by OTS as 'a practical guide to the negotiation and settlement of historical grievances under the Treaty of Waitangi'.¹ Historical grievances are defined as those arising from Crown actions and omissions prior to the 1992 Cabinet meeting that agreed on general principles.²

The following paragraphs outline the main general Crown settlement policies as they relate to this inquiry. (Chapter 2 discussed the more specific operational policies as they applied to the TRONP mandate.)

1. OTS, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e Pā Ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karuna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: OTS, [2002]), p1

2. *Ibid*, p27

First, a claim needs to be registered with the Waitangi Tribunal before the Crown can begin negotiating with a claimant group.³

Secondly, the Crown ‘strongly prefers’ to negotiate claims with ‘large natural groupings’ rather than with individual whānau and hapū. OTS director Paul James outlined the main reasons for this approach in his 17 June 2009 brief of evidence:

Such an approach helps to reduce overlapping claim issues and fragmentation. It is more likely to enable groups to achieve an effective economic base and so attempt to remedy the prejudice caused by Treaty breaches. It also allows a settlement package to cover a wider range of redress than might otherwise be possible. This in turn means that the settlement is more likely to meet a greater number of the claimants’ objectives. Consequently the durability of the settlement will be strengthened.⁴

Mr James went on to note that, regardless of the large natural groups policy, it is still possible to recognise ‘distinct hapū or whānau interests within a wider settlement.’⁵

Thirdly, the Crown seeks a comprehensive settlement of all claims of a claimant group. The reasons for this approach are outlined in *Ka Tika ā Muri, Ka Tika ā Mua*:

A key objective of negotiations for Treaty settlements is to help set right the grievances that claimant groups have about historical Crown actions. It is in the interests of both the Crown and claimant groups for this to be done as effectively and efficiently as possible. It therefore makes sense for settlements to be comprehensive, providing redress for all the wrongs done to a claimant group. Settlements made “bit by bit” over a long time-span would risk leaving the sense of wrong to linger, and might never achieve a sense of final resolution. Comprehensive settlements also reduce the costs and time involved in negotiations and implementation for both the Crown and claimant groups.⁶

Fourthly, the Crown has a policy that settlements are final. In practice, this means that in exchange for settlement redress ‘the settlement legislation will prevent the courts, Waitangi Tribunal or any other judicial body or tribunal from re-opening the historical claims.’⁷ In particular, the Waitangi Tribunal is invariably prevented, by legislation, from inquiring into historical claims of groups covered by a settlement.

These four policies, taken together, to some extent conflict with provisions in the Treaty of Waitangi Act 1975. Under section 6 of the Act only individual Māori may make a claim to the Tribunal. Such claims may be lodged on behalf of a group of claimants, although no mandate is required from this group, many of whose members may be unaware a claim

3. OTS, *Ka Tika ā Muri, Ka Tika ā Mua*, p 38

4. Document A107, pp 2–3

5. Ibid, p 3

6. OTS, *Ka Tika ā Muri, Ka Tika ā Mua*, p 44

7. Ibid, p 32

has been lodged on their behalf. In other words, there is no check, in the short term at least, as to whether or not the individual lodging a claim has support from the wider claimant community. The extent of such support may, however, become apparent during the course of the Waitangi Tribunal's inquiry process.

In settling claims, on the other hand, the Crown always settles with groups, usually defined by a shared whakapapa and/or a defined geographical area. The Crown does not settle with the specific individual claimants in whose name particular claims were lodged with the Waitangi Tribunal. As was discussed in chapter 2, the body negotiating a settlement on behalf of a wider claimant community requires a mandate from that community, this being a part of Crown settlement policy as outlined in *Ka Tika ā Muri, Ka Tika ā Mua*. But, regardless of this requirement, there may be a minority who are unhappy with the settlement or with the body mandated to negotiate on their behalf. This discontented group may include individuals who have lodged claims with the Waitangi Tribunal. These individuals, and any wider group they represent, will in effect find their claims being settled against their will. A similar situation applies in this inquiry. Some individuals who lodged claims in the East Coast district inquiry are having the settlement of their historical claims negotiated by TRONP, a body whose mandate they do not support. Indeed, the claimants in the present inquiry do not support the settlement of their historical claims at all without a prior Waitangi Tribunal inquiry. Yet the current negotiation and settlement process will ultimately remove their right to have these claims inquired into by the Tribunal. This is a major reason why the claimants in the current inquiry approached the Tribunal for an urgent hearing.

This general problem is exacerbated by an additional Crown settlement policy that post-dates *Ka Tika ā Muri, Ka Tika ā Mua*. This is the policy of settling all historical Treaty claims by 2014. Such a policy is likely to increase the pace with which settlements are concluded. Indeed, it has already had this effect, as evidenced by the rapid progress of negotiations in the East Coast inquiry district since the imposition of a 2014 settlement date shortly after the November 2008 general election. If claims are to be settled rapidly, there is an increased risk that the concerns of dissenting groups may be overlooked. This factor, along with the increased number of settlements, may in turn result in more applications to the Tribunal for urgent hearings. We note that the number of urgency applications has increased in the past year.

One of the tasks for us is to address the tensions between the Treaty of Waitangi Act 1975 and Crown settlement policy. The relevant questions in the statement of issues for this inquiry are as follows:

Should the Crown be able to include claims into settlement negotiations and legislation without the consent of named claimants? Does the Crown's desire for

comprehensive settlements in a particular rohe override the rights of individual claimants to decide on how to progress their claim? Is this consistent with the principles of the Treaty of Waitangi?⁸

Previous Tribunal comment on general Crown settlement policy

The differences between the criteria for lodging claims with the Waitangi Tribunal and the process of settling claims with the Crown have resulted in regular litigation over Treaty settlements.⁹ As the settlement process accelerates, it is becoming increasingly common for dissatisfied groups to dispute the credentials of mandated bodies. The Tribunal has, in the past, indicated that it is uncomfortable inquiring into claims of this sort. *The Pakakohi and Tangahoe Settlement Claims Report* had this to say about a similar situation to that we now consider:

Although the claims are technically aimed at the Crown, they mask what is essentially an internal dispute between closely related kin groups as to which organisation at which level speaks for them. The Tribunal was not established to deal with these categories of dispute.¹⁰

The Tribunal went on to note that, because its jurisdiction relates to matters regarding Crown actions and omissions, claims relating to identity are therefore understandably couched in terms that focus on Crown actions. An example from the present case is the claim that the Crown has colluded with others to suppress the identity of the claimants. The Pakakohi and Tangahoe settlement claims Tribunal concluded that it had jurisdiction to inquire into such claims, but noted that there is ‘an air of artificiality about claims of this nature being advanced in this Tribunal.’¹¹ Furthermore, the constraints on the Tribunal’s jurisdiction, requiring it to focus on Crown action, ‘mean that we should tread very carefully.’¹² The caution advised by that Tribunal is relevant to the present inquiry, where we find ourselves to some extent cast as arbiters in a dispute between TRONP and some of its opponents.

At least five Tribunal reports have endorsed the Crown’s policy of settling with large natural groups, including *The Mohaka Ki Ahuriri Report*, *The Tāmaki Makaurau Settlement Process Report*, *The Te Arawa Mandate Report*, *The Pakakohi and Tangahoe*

8. Paper 2.5.7, p10

9. OTS, *Ka Tika ā Muri, Ka Tika ā Mua*, pp38, 44

10. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p55

11. *Ibid*, p56

12. *Ibid*

Settlement Claims Report, and *The Whanganui River Report*.¹³ The issues the Mohaka Ki Ahuriri Tribunal dealt with included ongoing litigation that resulted from a 1995 Crown settlement with a single whānau group. The Tribunal noted that such a small-scale settlement would not have been possible by 2004: “The Crown’s policy is to settle with large natural groupings, and we support this.”¹⁴ Later in its report the Tribunal addressed the definition of a large natural group, concluding that it did not necessarily have to constitute a single iwi. The Tribunal outlined a variety of factors it considered were used by OTS to determine whether a claimant community constituted a large natural group, including descent from a common ancestor or ancestors; the number of functioning marae; the size of the rohe; the population; whether the community was separately defined in the census; and whether the community was recognised by other groups.¹⁵

The Ngāti Apa/Ngā Wairiki case

The Ngāti Apa/Ngā Wairiki case is relevant to the questions addressed in this chapter. In September 2009, a High Court decision on this case brought general Crown settlement policy into question. But, in December 2009, the Court of Appeal overturned the High Court decision. The Court of Appeal’s decision supported current Crown settlement policy.

The case involves the Wai 655 urgency application, which has also been the subject of two Waitangi Tribunal decisions. The facts are in some respects similar to those in the present inquiry.¹⁶ The Wai 655 claim, alleging historical Treaty breaches, was filed by Mr Te Ngāhina Matthews in 1996, although management of the claim later passed to his son, Mr George Matthews. The claim included an assertion that Ngā Wairiki did not come under the umbrella of Ngāti Apa. In November 2004, the Crown recognised the mandate of Te Rūnanga o Ngāti Apa Society Incorporated to negotiate, on behalf of Ngāti Apa, to settle their historical claims. A deed of settlement was signed between the rūnanga and the Crown in October 2008. The deed defined Ngāti Apa as including Ngā Wairiki ki Uta. The settlement, once enacted, would extinguish all historical Ngāti Apa claims,

13. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, pp 606–607, 697–698; Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 87; Waitangi Tribunal, *The Te Arawa Mandate Report*, (Wellington: Legislation Direct, 2004), p 111; Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report*, p 65; Waitangi Tribunal, *The Whanganui River Report*, (Wellington: Legislation Direct, 1999), p 13

14. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 2, p 607

15. *Ibid*, p 698

16. The following outline of facts is derived from *Attorney-General v Te Kenehi Mair* unreported, 22 December 2009, Court of Appeal, CA644/2009, and *Mair v Waitangi Tribunal* unreported, 2 October 2009, MacKenzie J, High Court, Wellington, CIV-2009-485-1499.

including those of Ngā Wairiki.¹⁷ In an attempt to prevent this historical claim from being extinguished, Mr Matthews sought an urgent Tribunal hearing. In May 2009, Judge Stephanie Milroy dismissed the application for urgency:

The prejudice to the Wai 655 claimants is that they will be unable to pursue their claim against the Crown in the manner that they choose – that is through a Waitangi Tribunal inquiry. That avenue to confirm Ngā Wairiki as a separate and distinct entity from Ngāti Apa will therefore be closed to them. However, others claiming Ngā Wairiki whakapapa have chosen to mandate the Rūnanga to settle Ngā Wairiki grievances. I consider that in a material sense the Wai 655 claimants will not suffer significant or irreversible prejudice, as redress for their claim is available through the Ngāti Apa settlement.¹⁸

Mr Matthews sought a judicial review of the Tribunal's decision by the High Court. The September 2009 judgment of Justice Alan MacKenzie was in favour of the plaintiffs. He concluded that:

the extinguishment of the Wai 655 claim does potentially cause prejudice to the Wai 655 claimants. That prejudice arises from the extinguishment of the claim and from the possible loss of mana or mana whenua.¹⁹

He therefore directed the Tribunal to reconsider the application for urgency. A three-member Tribunal panel, consisting of Judge Pat Savage, Professor Sir Hirini Mead, and Joanne Morris, was convened to re-hear the urgency application. The panel reported on 16 December 2009.

The Tribunal again rejected the Wai 655 application, on two main grounds. The first was continued uncertainty about the actual level of support enjoyed by the Wai 655 claimants within the alleged claimant community of Ngā Wairiki. The Tribunal referred to 'a continuing coyness as to who the Wai 655 group actually comprises' and noted that the group's mana was not entirely dependent on settlement legislation – implying that its level of support within the community was also a relevant factor in this regard. The second and related reason for rejecting the urgency application was that there was nothing 'extraordinary' about the circumstances of the case that justified putting the consideration of other claims before the Tribunal on hold. The Tribunal characterised the Wai 655 claimants as

17. The Whanganui Tribunal heard evidence on historical aspects of the Wai 655 claim and reported on these in July 2009. However, the Tribunal (quite deliberately) did not report on the claim relating to the alleged separate identity of Ngā Wairiki and Ngāti Apa: see Waitangi Tribunal, *Report on Aspects of the Wai 655 Claim* (Wellington: Legislation Direct, 2009), p 2.

18. Presiding officer, memorandum declining application for urgency, 15 May 2009 (Wai 655 RO1, paper 2.6.6), para 28 (as quoted in *Mair v Waitangi Tribunal*, para 8)

19. *Mair v Waitangi Tribunal*, para 27

‘quite a small group who do not accept the authority of the Rūnanga’ this being ‘quite a usual feature of the settlement arena in Aotearoa.’²⁰ The Tribunal noted that:

the calling into question of negotiations and settlements of claims is by no means exceptional. It is almost the norm in settlement proceedings and has been the subject of a number of reports of this Tribunal. More recently there has been a steep rise in such applications to the Tribunal.²¹

Other remarks by that Tribunal are also relevant to the current case:

Any settlement of any claim or series of claims involves substantial give and take. This is difficult when the Māori world and its politics are complicated and competitive in nature. There will inevitably be those who are dissatisfied with the deal. They will believe that it was prejudicial to them and that they should receive the settlement rather than somebody else. Unanimity on Treaty settlements is a rare beast indeed.

Given all of this, there is always potential for the actions of senior and sensible tribal leaders to be called directly into question by one or more individuals who mount a challenge in the guise of a contemporary claim that the Crown negotiation policy or settlement is inconsistent with the principles of the Treaty.²²

On 22 December 2009, just a week after the Tribunal again turned down the Wai 655 urgency application, the Court of Appeal overturned the MacKenzie decision in *Attorney-General v Te Kenehi Mair*. The court ruled that Judge Milroy acted lawfully in refusing an urgent hearing.²³ The Court of Appeal Justices Mark O’Regan and Robert Chambers formed similar conclusions to the Tribunal about the Wai 655 claimants. Their conclusions are relevant to the claims we are considering here:

In this case, it is abundantly clear from the evidence before the Tribunal and now before us that the overwhelming majority of Māori who affiliate with Ngā Wairiki do not support the Matthews. On the contrary, they have supported a mandating process by which Te Rūnanga has acted on behalf of not only Ngāti Apa but also Ngā Wairiki and others. This process was monitored by Te Puni Kōkiri, which described it as ‘open, transparent and fair’. Of course, no mandating decision could ever realistically expect unanimous support, but the mandate Te Rūnanga acquired, and which the Crown subsequently accepted, was overwhelming and as near to unanimous as could be expected.²⁴

20. Waitangi Tribunal, decision on urgency applications, 16 December 2009 (Wai 655 ROI, paper 2.84), p 6

21. Ibid, p 5

22. Ibid

23. *Attorney-General v Te Kenehi Mair*, para 70

24. Ibid, para 59

The Court of Appeal thus rejected Justice MacKenzie's view that the Wai 655 claim was mounted 'for and on behalf of Ngā Wairiki'. The court instead gave credence to the evidence of Te Rūnanga o Ngāti Apa that it had conducted a sound mandating process and had the support of most of those who affiliated with Ngā Wairiki.²⁵

Judge Clark's decision on the East Coast urgency

In the current East Coast settlement inquiry, the Tribunal has followed a different course from that taken in relation to the Ngā Wairiki urgency application. We are considering these claims because, as was outlined in the introduction, Judge Stephen Clark granted an urgent hearing to the applicants. Although Judge Clark did not specifically refer to earlier Tribunal support for the large natural groups policy with regard to Treaty settlements, by implication his decision on the urgency applications called this support into question:

All the applicants say that Ruawaipu, Uepohatu and Te Aitanga-a-Hauiti are autonomous tribal entities, independent of Ngāti Porou. Whether that is in fact correct or not, the point is that the applicants do not want to be involved in a negotiation process under the umbrella of the Rūnanga, as they believe that subsumes their tribal identity under the general rubric of Ngāti Porou.

Furthermore they highlight that the Rūnanga have assumed a mandate to negotiate on their behalf without their express consent.

The applicants point to the fact that they have lost the ability to control and shape the immediate future of their own claims. In a very real sense their rangatiratanga has been compromised.²⁶

Judge Clark's decision was made in the context of Justice MacKenzie's judgment in the High Court. His decision thus gave priority to claimants rather than to those seeking to settle claims on behalf of 'large natural groups'. The MacKenzie judgment was the prevailing legal opinion at the time urgency was granted. However, that is no longer the case now that the Court of Appeal has overturned the MacKenzie decision.

TRIBUNAL ANALYSIS

The December 2009 Court of Appeal decision in *Attorney-General v Te Kenehi Mair* is relevant to the question of whether or not it is reasonable to extinguish claims against the will of those who submitted them. As outlined, the Wai 655 claimants alleged that Ngā Wairiki should not come under the umbrella of Ngāti Apa and that they should instead

25. *Attorney-General v Te Kenehi Mair*, paras 60–63

26. Paper 2.5.5, p 5

be able to pursue their claims through the Waitangi Tribunal rather than having them negotiated by Te Rūnanga o Ngāti Apa and extinguished by the Crown. This parallels the situation in the current inquiry, in which the claimants allege that particular groups, namely Ruawaipu, Uepohatu, Te Aitanga-a-Hauiti, and Hapuoneone, should not come under the umbrella of Ngāti Porou, and that TRONP should not be allowed to settle their claims without their express consent.

The Court of Appeal placed considerable weight on the amount of support that lay behind the Wai 655 claim. The court concluded that the claimants had not demonstrated a mandate to represent Ngā Wairiki, and indeed considered them to have minimal support from any source. In contrast, Te Rūnanga o Ngāti Apa had demonstrated a substantial mandate to settle Ngā Wairiki's claims, regardless of who had originally submitted those claims. The court therefore expressed the view that Judge Milroy was quite entitled to give little weight to an alleged loss of mana for the claimants when determining the application for urgency.²⁷ Nowhere in its 54-page judgment does the court express any general concern that extinguishing an historical claim against a claimant's will might violate their legal rights (such as those protected by the New Zealand Bill of Rights Act 1990) or be in contravention of the principles of the Treaty of Waitangi.

Any individual may submit a claim on behalf of a wider group without their knowledge or support. The Court of Appeal ruling implies that, if such a claim appears to have minimal support, there would be little loss of mana were it to be extinguished against the claimant's wishes to enable a settlement benefiting the wider group to go ahead. On the other hand, if such a claim enjoyed major support (however defined) within the wider claimant community, then the prejudice would potentially be significant. The level of support enjoyed by respondents in the present inquiry is discussed elsewhere in this report. The questions we now consider are about Crown settlement policy in general. We agree with the Court of Appeal that it is important that the Crown is able to settle Treaty claims.²⁸ We are thus cautious of making recommendations that, if implemented, may excessively inhibit future settlements. We recognise that placing too much emphasis on the rights of individual claimants, as opposed to the rights of groups who may stand to benefit from a settlement, may well have this effect.

Overall, we cannot support the view that, as a general rule, those submitting claims should be able to prevent settlements. The Crown is acting within its rights when on some occasions it extinguishes a claim without the consent of individual claimants if there is clear evidence that the Crown is following the wishes of a majority of the collective that has been mandated for negotiations. However, this is a power that needs to be exercised with considerable caution if Treaty settlements are to be durable and in accordance with

²⁷ *Attorney-General v Te Kenehi Mair*, paras 58–65

²⁸ *Ibid*, paras 100, 169. Although these paragraphs are part of Justice Baragwanath's minority decision, they are consistent with the joint judgment issued by the court.

Treaty principles. This Tribunal does not intend to give a blanket endorsement for the Crown to extinguish historical claims against claimants' will. Indeed, the Tribunal has in the past made it clear that in such situations claimants are 'entitled to be consulted regarding the negotiation and settlement of their claims.'²⁹ We might add to this that such consultation should take place as early as practically possible – something we are not convinced happened with respect to the East Coast settlement negotiations. In addition, the Court of Appeal decision makes it clear that the Crown will need to be mindful of how much support lies behind a particular claim if those who submitted it are unwilling to have it extinguished. The requisite caution will obviously include, at the very least, the Crown following its own settlement policies.

Has the Crown followed its own settlement policies?

One of the questions in the statement of issues for this inquiry is: 'Has the Crown applied its own policies and guidelines fully in its settlement negotiations in the East Coast rohe?' Chapter 2 of our report did not reveal significant failure on the part of the Crown to follow its own policies and guidelines as outlined in *Ka Tika ā Muri, Ka Tika ā Mua*. Our concern is rather that in some areas these policies and guidelines could be improved. Suggestions for improvement have already been made in earlier Tribunal reports and we now look at the Crown's response to these.

Has the Crown followed the Tāmaki Makaurau and Te Arawa recommendations?

The statement of issues for this inquiry included the following question: 'Has the Crown sought to follow the recommendations of both the Tribunal's *Te Arawa Settlement* and *Tāmaki Makaurau* reports, regarding mandating and overlapping claims, when conducting its settlement negotiations process in the East Coast district inquiry area?'

The Crown has submitted that the recommendations of the Tāmaki Makaurau and Te Arawa settlement process Tribunals are not strictly applicable in the situation addressed by this inquiry.³⁰ We accept the Crown's submissions that there are important differences between the circumstances behind the current inquiry and those pertaining to the Tāmaki Makaurau and Te Arawa settlement process inquiries. In Tāmaki Makaurau, for example, it was acknowledged by all parties that there were several iwi with interests the rohe in which a settlement was being sought. The Crown was attempting to settle with one iwi, Ngāti Whātua o Ōrākei, before starting discussions with other tangata whenua groups. One concern of these groups was that the Crown was proposing to transfer particular assets to Ngāti Whātua o Ōrākei, a transfer that would obviously exclude others from a

29. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 111

30. Paper 3.3.28, pp 12, 41

share in those assets. The shorthand terms ‘cross claimants’ and ‘overlapping claimants’ are commonly used to describe this sort of situation. In the current inquiry, the actual identity of various groups is in dispute. None of the claimants in this inquiry has alleged that they will be excluded from the final settlement. Their concerns are rather that their claims will be included in the settlement and therefore extinguished against their express wishes.

We therefore agree, as the Crown suggests, that the issues in this inquiry relate primarily to mandate rather than to overlapping claims. That said, the Crown still acknowledges the relevance of recommendations in *The Tāmaki Makaurau Settlement Process Report* and *The Te Arawa Settlement Process Reports*, and we shall proceed on that basis. The *Tāmaki Makaurau Report* recommended that to help understand the customary underpinning of tangata whenua groups’ positions ‘officials will need to engage with Māori sources of knowledge, both written and oral. Sometimes it may be necessary to seek external advice on customary interests.’³¹ The Tāmaki Makaurau Tribunal considered such actions were necessary to comply with Treaty standards. It further noted:

While it would not be expected that officials would be expert in whakapapa, they need to have engaged with enough of the Māori knowledge inherent in customary interests to really understand where people are coming from, and why the perceptions of the various groups differ.³²

OTS has, in some respects, fallen short of these standards in pursuing an East Coast settlement. As stated in chapter 2, Mr James told our inquiry that OTS did not appear to have received a copy of the claimant community profile prepared by Te Puni Kōkiri (TPK).³³ We would expect better communication between two government departments dealing with the same settlement process. His response when asked to provide supplementary information on a related issue is revealing:

I was asked whether there had been any assessment of the tribal identity of the groups the applicants claim to represent during the mandate process. During oral evidence I advised that there had been and that this was contained in the various briefings to Ministers, but that the files would be reviewed to determine whether there were any specific documents showing this assessment. *The files do not disclose any such specific documents.* [Emphasis added.]³⁴

OTS advice to Ministers on the issue of tribal identity would therefore seem to have been based on minimal information, and it is not clear how and when (or even if) TPK’s

31. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report*, p 109

32. Ibid, p 93

33. Paul James questioned by Judge Coxhead, transcript 4.1.1, day 3, sess 1, p 191. The TPK claimant community profile is on the record of this inquiry as part of document A40(a): pp 416–507.

34. Document A131(c), pp 2–3

advice was incorporated into Crown thinking. In this regard the Crown appears to have fallen short of Treaty standards. OTS appears to have neither ‘engaged with Māori sources of knowledge’ nor sought additional advice about customary interests. In our view, the claimants are entitled to consider that, in general, information provided to one Government agency in the context of Treaty claims will be shared with another.

One of the recommendations from the *Tāmaki Makaurau Report* was that OTS amend *Ka Tika ā Muri, Ka Tika ā Mua* to better reflect the multiplicity of groups within a proposed settlement district. OTS has conceded that no amendments were made as a result of the *Te Arawa Settlement Process Reports* and *Tāmaki Makaurau Report*. The only specific review of OTS policy following the release of the latter report has focused on how to settle all historical Treaty claims by 2020 (now 2014).³⁵ Mr James was questioned about this review by claimant counsel Linda Thornton:

Thornton: Was that review meant to be compliant to the recommendations of the Tāmaki Makaurau report to amend the red book?

James: No, it was not a parameter of the review to amend the red book. The review was undertaken to assess essentially OTS capacity and capability to meet the government’s target of settling all claims and as part of that there was an assessment of our direction with the recommendations set out by the Tribunal.

Thornton: Did you – other than since this review was not that – did OTS undertake an effort to amend the red book in compliance with the Tāmaki Makaurau report?

James: Look, what we have focused on is working with our staff and the way that they work and our approach and practice and strategy to be compliant with the directions set out by the tribunal in that report. We have not focused on amending a publication.

Thornton: Would it be correct to say that this review that you are describing in paragraphs 25 and 26 [of Mr James’ brief of evidence of 2 December] was an effort to figure out how you were going to do by 2014 what you were already having trouble doing by 2020 – settling all treaty claims?

James: Yes.

Thornton: Okay. Is there any written down instructions or directions to staff that are meant to enhance compliance with the Tāmaki Makaurau report?

James: Look, we are focused on a number of things. I mean for instance that report now has been out for quite a while obviously, but we have had Crown counsel appear in front of our staff to brief them on it, the material is referred to, we clearly have copies of that report in our libraries and in use for our staff, but the way I would best describe it is that we have really tried to change the perspective, approach and attitude of the organisation to respond to those reports.

Thornton: So I guess that means you did not really write it down, you are just trying to change the culture of your office. Would that be right?

35. Document A131(c), p 1

James: Yes, I can point to a number of things that are written down that focus on that objective.³⁶

Mr James further elaborated on his responses in a supplementary submission to the Tribunal:

As I advised in oral evidence, there is no single document that sets out a Crown response to, for example, the Tāmaki Makaurau Report. OTS has, however, taken on board the recommendations of these reports. Staff are aware of the recommendations and seek to apply them in practice. The new regional approach to negotiations (which seeks to negotiate or communicate with all groups in a region at the same time) reflects many of the recommendations in the *Tāmaki Makaurau Report*, as do some of the ideas discussed at the Kokiri Ngatahi hui. Further, ensuring that the same negotiating team deals with all negotiations in a region allows for better awareness of the range of issues and interests across that region.³⁷

Ms Thornton went on to ask whether OTS had done anything in the TRONP mandate and negotiation process to make it compliant with the *Tāmaki Makaurau Report*. Mr James responded in the affirmative:

We certainly made sure that we were aware of who we see as overlapping claimants to both the south and north of the Ngāti Porou rohe and talked to those groups, which is a key finding in that report.³⁸

The Crown's closing submissions note that the Crown settlement plan for the East Coast includes separate settlements with Te Whānau ā Apanui and Turanga groups in addition to Ngāti Porou.³⁹ We agree that this approach seems compatible with recommendations in the *Tāmaki Makaurau Report*, which dealt with a situation where OTS was planning to settle with a single group within a district before starting settlement discussions with any other groups within the same district. With regard to the East Coast rohe, OTS appears to have taken a different approach by dealing with all groups the Crown considers to be potential 'cross claimants' at once, to the extent that this is practical.

Mr James also indicated in his evidence that OTS had attempted to follow the recommendations in the *Tāmaki Makaurau Report* and *Te Arawa Settlement Process Reports* by holding hui with those who made submissions opposing the TRONP mandate:

The meetings we held with submitters was the first time we really did that, and that was a direct consequence of those inquiries and those reports. So that was an

36. Paul James questioned by Linda Thornton, day 2, sess 3 (transcript 4.1.1, p140)

37. Document A131(c), pp1-2

38. Paul James questioned by Linda Thornton, day 2, sess 3 (transcript 4.1.1, p140)

39. Paper 3.3.28, p 42

obvious step that we had to go and meet face to face with those groups and talk to them directly.⁴⁰

Members of this Tribunal were surprised to hear that this was a recent innovation, and we hope it will now become standard practice. It is clear from *Ka Tika ā Muri, Ka Tika ā Mua* that the Crown is well aware of the importance of making sure it is negotiating with the right people:

Mandating claimant representatives to negotiate is one of the most important stages in the Treaty settlement process. Many of the grievances of the past relate to agreements made between Māori and the Crown, where the Crown dealt with people who did not have the authority to make agreements on behalf of the affected community. A strong mandate protects all the parties to the settlement process: the Crown, the mandated representatives and the claimant group that is represented.⁴¹

For these reasons, the Crown has in place a process for recognising mandates to negotiate. TPK observers witness mandating processes to ensure they are open and fair. *Ka Tika ā Muri, Ka Tika ā Mua* contains a detailed checklist of what is required of a deed of mandate before it can be recognised by the Crown.⁴² Submissions must be taken on the mandate before it can be recognised. We have heard no evidence to convince us that the Crown has failed to follow its policies and processes in recognising the TRONP mandate. However, we have noted a number of apparent weaknesses in these processes. Given that settlements will inevitably become more frequent over the next few years, and the use of postal ballots will likewise doubtless become more common, we therefore recommend a number of improvements the Crown could make to its processes for assessing negotiating mandates. For the Crown, a possible benefit would be a reduced risk of further legal challenges or Tribunal intervention by improving the likelihood of a robust mandate and reaching a sound outcome. This will likely involve the Crown taking a more proactive approach towards mandates.

SUGGESTED IMPROVEMENTS TO CROWN MANDATING POLICY

There are inherent risks in a mandating process that is determined by the organisation that is seeking the mandate. Systems and processes are likely (even if not deliberately) to be tailored to produce the desired positive outcome. The question to be voted on may be formulated so it is more likely to achieve this end. Information will be able to be provided

40. Paul James questioned by Judge Coxhead, day 3, sess 1 (transcript 4.1.1, p179)

41. OTS, *Ka Tika ā Muri, Ka Tika ā Mua*, p 44

42. Ibid, pp 50–51

to the mandating body's main supporters to ensure they are on board at an early stage. The information provided to the claimant community to assist them in making a decision is likely to be biased towards the desired outcome. In the present case, these circumstances were exacerbated by the particular mandating process approved for TRONP. The running of information hui simultaneously with the postal vote gave little warning to those opposed to the mandate. The lack of information, until after the mandating process, about the actual claims it was proposed to include, the definition of the claimant community, and the geographical area to be covered by a settlement, hampered, intentionally or not, those wanting to rally opposition to the mandate.

We consider that mandating processes will be more robust if potential opponents are provided with an opportunity to have their say as early as possible. In relation to the TRONP negotiations, there was no opportunity for submissions by objectors until after the mandating process had been completed; only then were the claimant community description and the claims to be affected publicly notified. This would appear to be acting, to a significant extent, after the horse had bolted. We therefore recommend that OTS calls for submissions on the proposed mandating strategy as well as on the outcome of the process. This would give those opposed to the mandate an opportunity to comment on the question to be posed to the claimant community, the system of voting to be used in seeking a mandate, and the inclusion or exclusion of particular groups in the mandate.

If this provision had been in place in relation to the TRONP mandate, some submitters might, for example, have objected to the requirement that those wishing to vote on the mandate must first register as TRONP beneficiaries. In response to such submissions, a separate voting roll might have been requested by OTS, independent of the TRONP beneficiary register. This roll could have included all TRONP registered beneficiaries but also allowed others who would be affected by the settlement to register to vote without having to 'sign up' as TRONP members. With benefit of hindsight we consider that such a process might have dealt with some of the objections raised by the claimants in this inquiry. The main point is that, in circumstances in which some of those affected feel they may be excluded from the mandating process, that process could potentially be amended to ensure their inclusion. This example illustrates the potential advantages of taking submissions on the mandating strategy early in the process.

A second and related change we would recommend is that the claimant community should be provided with maximum information as early as possible in the process. At the very least this should include providing a description of the claimant community, the claims to be covered, and the geographical areas to be covered by a mandate in advance of any voting process. Under current policy as laid out in *Ka Tika ā Muri, Ka Tika ā Mua*, this sort of information is provided only once a deed of mandate has been submitted to OTS and submissions on it are being sought. We consider this to be far too late in the process.

We note that Mr James appeared to advocate changes similar to those we are proposing when questioned at the inquiry hearings. His suggestions came in the following exchange with Judge Craig Coxhead, which we quote here at length:

Judge Coxhead: It seems to me that when the series of hui took place and indicative votes were taken, there seems to be some argument as to the clarity given in terms of who this mandate was for and what it would affect. Then when the postal ballots went out there seems to be some suggestions being made by people that once again it wasn't clear as to who the mandate would – the entirety of the coverage of the mandate. Do you think it would have helped if those postal ballots, which I understand your office didn't get an opportunity to see before they were sent out, do you think it would have helped if those postal ballots had, like the mandate that was advertised, noted marae, hapū, Wai numbers?

James: Yes. I think the more and better accessed information for people through the process the better quality of process there's going to be. I haven't gone back and looked at the specific postal ballot papers recently, but would be desirable for them to be clear about what was being sought and what was being sought to be settled as well.

Judge Coxhead: And I know that postal ballots, you indicated yesterday that they aren't the norm when seeking a mandate. But if it is to continue in the future would it be OTRs advice that those sort of specifics should be included in a postal ballot?

James: Yes . . . I think one of the tensions we've grappled with here is that Te Rūnanga was seeking a mandate for Ngāti Porou and from Ngāti Porou in their view. Exactly how you describe that body, there are different views on that and that's been something that we have had to grapple with throughout the last couple of years about how you describe that and when and where you describe that.

Judge Coxhead: But the lack of specifics seems to have created some of the argument and tensions here. I was wondering is it Crown policy now to – in your advice – in terms of mandate strategy and the like say 'people, you need to be clear in terms of what marae, what hapū and what Wai claims are going to be included in the coverage of this mandate'?

James: Yes, that is, I think, a lesson we particularly learnt from this, but also in other settlements, and we seek to be clearer now.⁴³

Mr James made important concessions in this exchange. In particular, he conceded that with respect to future postal ballots the claimant community description and the specific claims to be affected should be notified in advance. He appeared to acknowledge that such a change in approach will become more important as postal mandating processes become more common.

43. Paul James questioned by Judge Coxhead, day 3, sess1 (transcript 4.1.1, pp 177–178)

The durability of a settlement will generally be enhanced rather than diminished if those who have concerns about it or are steadfastly opposed to it are engaged at an early stage. There will be more opportunity for compromise and reconciliation and less chance that disaffected groups will be able to claim (with any justification) that their voices have been ignored. It seems also to be in the interests of the mandating body that they are alerted relatively early to the size and strength of opposition to the mandate. If submissions had been required on the TRONP mandating strategy, rather than solely on the result of the mandate, then those within the organisation may have been more aware of the challenge to that mandate and more motivated to engage with opponents at an early stage. In addition, we consider that OTS should write to all those with Treaty of Waitangi claims likely to be affected by a proposed settlement. This would inform them that a group was seeking a mandate to settle their claims and that these claims were likely to be extinguished if the proposed settlement went ahead. We are aware that OTS already does something similar when consulting Māori about their interests in surplus Crown land for possible landbanking and use in settlement redress.⁴⁴

RECOMMENDATIONS ON GENERAL CROWN SETTLEMENT POLICY

We endorse previous Tribunal support for the Crown settling with large natural groups. However, our support for the large natural groupings policy is not unqualified. As was noted in the *Te Arawa Settlement Process Reports*, consultation with affected claimants should be a minimum requisite. The December 2009 Court of Appeal decision in *Attorney-General v Te Kenehi Mair* makes it clear that the amount of wider support for a claim is a material factor in determining the significance of any prejudice caused by extinguishing claims in these circumstances. Some of the policy changes we recommend may help in this regard in future settlements, by getting the engagement of opponents at an early stage.

We have seen evidence that OTS has attempted to take on board some of the relevant recommendations from the *Te Arawa Settlement Process Reports* and *Tāmaki Makaurau Report*, although it has done so in an uneven manner. None of the recommendations, for example, have been incorporated into *Ka Tika ā Muri*, *Ka Tika ā Mua*, and OTS could sometimes make greater efforts to understand and engage with claimant communities. Better communication across Crown agencies would help in this regard.

Our main recommendations about Crown settlement policy relate to the mandating strategy and subsequent process. These recommendations were made in chapter 2 and so we summarise them only briefly here. We support the policy of taking submissions on the

44. OTS, *Protection of Māori Interests in Surplus Crown-Owned Land: Information for Crown Agencies* (Wellington: OTS, 2006), p 6

mandate and meeting with opposing groups. However, we recommend that submissions be taken on the proposed mandating strategy before the process is implemented, and not just on the deed of mandate once the process has been completed. If submissions on the proposed mandating strategy reveal that a dissenting minority finds it will be excluded from participation in the mandate vote, it may be appropriate to revise the process to allow for their participation.

In addition, those whose mandate is being sought should be provided with as much relevant information as possible, well in advance of the mandate vote. At a minimum this should include the actual claims (including Wai numbers) that will be included in the proposed settlement, the definition of the claimant community, and the geographical area to be covered by the settlement. There would then be more certainty as to exactly who, and what claims, would be covered by the proposed settlement.

We note that the director of OTS has already indicated that this second recommendation is likely to be incorporated into policy in the near future. If so, we would urge him to initiate a process whereby *Ka Tika ā Muri*, *Ka Tika ā Mua* will be amended to incorporate this recommendation, along with other relevant recommendations from this and other Tribunal reports plus other policy changes made since *Ka Tika ā Muri*, *Ka Tika ā Mua* was last revised. Amending the main OTS public policy document in this way would potentially have two advantages. First, it would help ensure that new practices become the norm, without having to rely on briefings to staff and institutional memory. Secondly, it would provide some assurance to claimant groups (and to the Tribunal) that policy changes have actually taken place.

CHAPTER 4

DISCUSSION AND RECOMMENDATIONS

DISCUSSION

Section 6 of the Treaty of Waitangi Act sets out the Waitangi Tribunal's jurisdiction. We must determine not only whether the acts or omissions complained of were inconsistent with the principles of the Treaty but also whether those acts or omissions caused, or will cause, prejudice.

The claimants in this inquiry all propose that the settlement with Ngāti Porou be delayed. The Wai 1301 claimants call for the Crown to 'halt further Treaty settlement negotiations with Ngāti Porou until after the Crown has considered a Tribunal report on the Ruawaiipu ethnic suppression claim'.¹ The applicants represented by Darrell Naden and Linda Thornton seek a delay pending 'an early Tribunal report on the mana whenua issues'.² The group of claimants that includes Tui Marino seek that 'the Crown immediately cease further negotiation with TRONP until a satisfactory resolution of the concerns of Te Aitanga-a-Hauiti is achieved'.³

We are unwilling to recommend a delay in the East Coast settlement, for four main reasons. First, this panel did not consider that the flaws in the process followed by the Crown were so serious as to warrant such a recommendation. Secondly, we think that there are factors that would mitigate against the prejudice potentially suffered by the claimants. Among those mitigating factors is their ability to participate in the final settlement. Thirdly, we were not convinced that the claimants have sufficient support to justify a recommendation that will be prejudicial to others. Finally, we are not convinced that a Tribunal hearing would necessarily be a solution to what is, to some extent, an internal dispute over representation. We now discuss each of these factors in turn.

Flaws in the process

In chapter 2, we identified a number of flaws in the process followed by the Crown, particularly leading to the recognition of the Te Rūnanga o Ngāti Porou (TRONP) mandate. The panel carefully considered the implications of these flaws but we were not convinced that they were severe enough to warrant calling negotiations to a halt. We have pointed

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1. Paper 1.1.1, p 48
 2. Paper 1.1.2, p 29
 3. Paper 1.1.3, p 95

out where we think the Crown could have done things differently. However, as another Tribunal has noted:

It is not enough that we, or some of us, might ourselves have chosen to deal with the matter differently. Our focus is not on whether we like or approve the Crown's policy. It is on the Treaty, and whether or not the Crown has fallen foul of it.⁴

The mandating process approved by the Crown should, in our view, have provided greater opportunity for opponents who did not want to register with TRONP to express their views. In particular, individuals whose claims might be affected should have been informed of this before the mandate vote. But that said, the Crown did consult with the claimants, even if that consultation could have been more timely. Overall, we cannot conclude that in the present case the Crown's errors in process were of a sufficient magnitude for it to have fallen foul of Treaty principles.

Mitigation of prejudice

Any prejudice to the claimants will be mitigated to some extent by their benefiting from a settlement. As far as we are aware from the evidence presented to this Tribunal, all the claimants in this inquiry would be entitled to benefit from a Ngāti Porou settlement to largely the same extent as those who identify as Ngāti Porou. In the Ngā Wairiki case discussed in chapter 3, both the Waitangi Tribunal and the Court of Appeal saw it as significant that any prejudice would be mitigated by the fact that the applicants stood to benefit from the settlement they were opposing. Admittedly, there may be particular benefits whose criteria may require people to sign up to the post-settlement governance entity in order to access them. We sympathise with those claimants in this inquiry who would see such a step as undermining their position vis-à-vis Ngāti Porou. However, we note that there is the potential to develop a post-settlement entity that provides for the interests of all those with relevant whakapapa, including those who opposed the mandate.

Other mitigating factors are also relevant. In its closing submissions, the Crown noted that:

- ▶ opportunities remain for the claimants to seek to participate in the negotiating process through the Te Haeata structure;
- ▶ the claimants' concerns can be addressed in the post-settlement governance structure;
- ▶ the offer letter has matters which may mitigate claimant concerns, such as the proposed opportunity to air Treaty grievances before the Crown over a two-week period; and

4. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p79

- ▶ the Crown has made a commitment to review the traditional history reports.⁵

TRONP also made a number of suggestions in its closing submissions about how the claimants can participate in the next stages of the settlement and how some of their concerns can be mitigated, including:

- ▶ the reconciliation offered by the Crown, which comprises an acknowledgment, historical account, and apology;
- ▶ the opportunity for claimants to be heard and voice their concerns and air their historical claims in the two-week recorded hearing before the Crown;
- ▶ the opportunity for claimants to contribute to the development of a process for the two-week hearing before the Crown by attending cluster hui or providing feedback to Te Haeata;
- ▶ addressing claimants' concerns about representation in the post-settlement governance entity; and
- ▶ addressing claimants' concerns in the ratification stage of the settlement.⁶

Support for the claimants

Given that delaying the proposed settlement with Ngāti Porou is a central remedy requested by all the claimants, any prejudice to the claimants from the settlement must be weighed up against prejudice caused to others by delaying it. Groups seek settlement of their claims for a wide variety of reasons, including the economic, social, and political benefits that may result. It is no easy matter to weigh up, on the one hand, the prejudice caused by the failure to have a claim inquired into against, on the other, a delay in settlement.

The Court of Appeal decision of 23 December 2009 in *Attorney-General v Te Kenehi Mair* is directly relevant to the question of prejudice. As discussed in chapter 3, the court placed considerable emphasis on the extent of support behind a claim. Do the claimants represent a small dissident minority, or do they have substantial support behind them? To put it simply, numbers matter. In chapter 3 we discussed the Ngāti Apa/Ngā Wairiki urgency application and its similarities with this inquiry. With respect to that application, both the Court of Appeal and the Waitangi Tribunal concluded, on the evidence they had available to them, that the Wai 655 applicants had minimal support and no mandate to speak on behalf of Ngā Wairiki.

We find ourselves unable to make such a definitive judgement in terms of support in the current case. All the same, the Court of Appeal's decision leaves us with little choice but to try and make some assessment of the level of support for the claimants, compared with the support for TRONP. All the claimants have been well aware that such matters are

5. Paper 3.3.28, pp 49–50

6. Paper 3.3.27, pp 150–152

relevant. Indeed, all the claimants in the East Coast district inquiry were put on notice by Judge Stephanie Milroy back in 2006 that it was important for them to demonstrate support for their claims. In a memorandum to all East Coast claimants, she outlined her concerns about the proliferation of claims submitted to the Tribunal, many of which repeated the same grievances. She was concerned the number of claims would inhibit the efficient conduct of the inquiry and therefore put out a warning to claimants. We have already discussed Judge Milroy's direction in chapter 2, but we repeat aspects of it here:

The fact that a claim has been registered and issued with a Wai number does not necessarily mean that the Tribunal accepts that all or any of the issues alleged in the claim are well founded, or that the people who have submitted the claim are the appropriate representatives of the people on whose behalf the claim is made.⁷

Judge Milroy went on to say:

Many East Coast claims are made by individual Māori on behalf of their whānau, hapū, multiple hapū or iwi. In future, the Tribunal will require evidence in the form of hui decisions/minutes, and/or signed representation lists, before accepting that claims represent anyone other than the named claimant(s).⁸

The claimants were thus put on notice nearly four years ago that numbers matter. The claims process (be it foreshore and seabed, Tribunal, settlements, or High Court action) has been in operation for more than six years on the East Coast, providing ample opportunity for the claimants in this inquiry to provide some evidence of their level of support. In the main they have not, to date, been particularly forthcoming with that evidence. In chapter 2 we outlined the assessment by the Office of Treaty Settlements (OTS) of the extent of claimant support. To a large extent we agree with that assessment.

We emphasise that in assessing the level of support for the claimants we are not making any judgements about tribal identity. As indicated in the statement of issues for this inquiry, the Tribunal does not, in general, make judgements on matters of identity. Making an assessment of support is of course highly problematic. There is no one way to do this. In the case of the claimants in this inquiry, the evidence is sketchy. We have already outlined much of this evidence in chapter 2, but we repeat some of it here.

Positive evidence of support for the claimants can be seen in the number of people who voted against the TRONP mandate at the information hui, put in or supported submissions against the mandate, and attended OTS consultation meetings with others who opposed the mandate. To look at the first of these, a total of 97 votes were cast at the information hui against the TRONP mandate. This represents some 17 per cent of the total votes cast, a small but still significant minority. Most of the votes against the mandate came from the

7. Presiding officer, directions concerning recent claims, 14 July 2006 (Wai 900 ROI, paper 2.5.19), p 2

8. Ibid, p 3

Gisborne hui or from marae within the inquiry district. In several cases the margin was relatively close: at Hiruharama the vote was 21 to 11 in favour, at Puketewai it was 27 to 16, and at Gisborne 49 to 25.⁹

On the other hand, TRONP opponents were unable to carry the day at any of the individual marae votes. The evidence presented to this inquiry showed that some individuals cast dissenting votes at more than one hui and that counsel who attended meetings in opposition to the mandate also cast votes. The extent of opposition was thus exaggerated by multiple voting. Further, it could be argued that at least some of the 80 to 90 people who voted against the mandate were not supporters of the claimants in this inquiry. On balance, we do not consider that the indicative vote provided strong evidence of support for the claimants' position.

Some may question the use of the votes at the information hui as a source of evidence. After all, it was made clear that these were indicative votes only and that the main emphasis in assessing support would be placed on the postal vote. We would respond that the indicative votes provided opponents who objected to being classified as Ngāti Porou with an opportunity to oppose the mandate without signing up to the TRONP register. Some, it is true, may not have realised that their claims might be affected by the Ngāti Porou settlement. However, we have no way of estimating how many might have been in this position.

After the mandate deed was notified and submissions called for, 33 submissions opposing the mandate were filed with OTS. A great majority of these submissions appeared to come from those affiliated with Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti. Most of the submissions were made on behalf of a limited number of people, but it is hard to estimate just how many in total.¹⁰ OTS arranged seven meetings with those who made submissions, to hear their concerns. Some 80 people in total attended these meetings.¹¹ OTS later used attendance at these meetings as evidence of the extent of support for the claimants. The claimants, for their part, protested that they were not advised that these meetings would be used to assess their support base. While we have some sympathy with this view, we also note that the claimants had long been on notice about the importance of demonstrating their support. As outlined in chapter 2, one claimant, Tui Marino, has attempted to do so. We repeat here our conclusion that we were not convinced by his evidence that he and his supporters constitute a 'large natural grouping' as he contends.

TRONP, for its part, has been a representative body for more than 20 years and had the resources to run an extensive mandating process. For all the criticisms that have been levelled at this process, we still consider it provides reliable evidence that TRONP commands considerable support to settle claims in the East Coast inquiry district. A portion of that support, as we heard in evidence, comes from those with whakapapa links to

9. TRONP, 'Deed of Mandate', 10 December 2007, p 10 (doc A40(a), p 645)

10. Document A107, pp 11–12

11. *Ibid*, p 12

Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti. To delay a settlement would be a blow to the expectations of those who support a prompt settlement of claims. We have come to the conclusion, based on the evidence available to us, that the numbers thus prejudiced would be far greater than the small minority represented by the claimants in this inquiry.

Limitations of a Tribunal hearing

All of the claimants seek a Waitangi Tribunal hearing for their claims. At the heart of these claims are assertions of identity – that Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti are all iwi independent of Ngāti Porou. In our hearings we heard submissions and evidence from TRONP and its supporters. They were granted leave to appear because all the claimants' submissions were critical of TRONP as well as the Crown. That said, under the Treaty of Waitangi Act 1975 claims are clearly intended to focus on acts and omissions of the Crown, and accordingly it is those matters that are the focus of Tribunal inquiries. The Tribunal's intended role is not as an arbiter of disputes between claimants over matters of identity. While a hearing would give claimants the opportunity to lay out their traditional evidence as a backdrop against which to judge the impact of Crown acts and omissions, any ensuing Tribunal report would be most unlikely to make findings that involved resolving differences between claimant groups. The Tribunal's recommendations would thus be unlikely to satisfy the claimants in the present case. Of course, a Tribunal hearing might of itself provide the claimants with sufficient satisfaction, but in the meantime a Ngāti Porou settlement would have been delayed, with likely prejudice to those large numbers who support it.

RECOMMENDATIONS

Our recommendations fall under two headings. The first relates to the Ngāti Porou settlement, and we discuss how the concerns of the claimants in this inquiry might be addressed in the context of that settlement. The second looks to the future, and how the Crown might ensure the durability of future settlements. In particular, we recommend a number of changes to Crown settlement policy on the basis of the flaws we have commented on in chapters 2 and 3.

Recommendations on the Ngāti Porou settlement

The Tribunal has considered a number of options available to us in terms of recommendations relating specifically to the claimants. One option we considered was that proposed by the claimants: namely, delaying the settlement. We considered that to make such a recommendation we would need to find substantial fault with the mandating process

overseen by OTS. As outlined above, we do not consider that the flaws we have described in chapter 2 are sufficient to justify such a recommendation. Neither, in our view, is the potential prejudice to those claimants seeking a hearing sufficient to warrant such a recommendation.

We considered whether we could recommend that the Crown simply leave those claimants who do not want to be part of the Ngāti Porou settlement out of the settlement. Such a recommendation would be at odds with the Crown's understandable desire for comprehensive rather than piecemeal settlements. There are also practical barriers to such an approach. Some of the claimants note that for them this is not an option. The Wai 298 claimants claim Whangaokena Island. If Wai 298 were taken out of the TRONP mandate and the settlement was allowed to proceed, the island would be given to those who, in their eyes, are the wrong people.¹² We also saw that such a recommendation, if implemented, could have the practical effect of stopping the settlement going ahead altogether: those left out would almost inevitably take court action to stop the settlement, on the basis that any assets they say they can claim should not be included in the Ngāti Porou settlement. We are mindful, too, of the recent Court of Appeal decision in *Attorney-General v Te Kenehi Mair*, which overturned Justice Alan MacKenzie's ruling that the Wai 655 claimants may be prejudiced by having their claims extinguished against their will. Further, a recommendation to leave out dissenting claimants might have implications for the future settlement process by potentially allowing individual claimants to hold iwi to ransom until their views are accepted.

We also considered recommending that the Crown seek to better provide for the claimants within the settlement. We recognise there are difficulties with making such a recommendation, in that it could be seen to give those who opposed the mandate priority over those who supported it. The Tribunal needs to be cautious in considering whether any greater entitlement is warranted and whether those who dissent should be given a greater voice than others.

Having rejected the other options, we therefore recommend that the Crown ensure, as far as possible, that the settlement will benefit all those for whom TRONP claims a mandate. To that end we would expect, for example, that the Crown will ensure that the post-settlement governance entity is inclusive of all those for whom TRONP has obtained a mandate. This includes those who opposed the mandate as well as all those who supported it. A further example is provided by the proposed two-week recorded hearing of historical claims before the Crown. We would urge the Crown to ensure that it is open to all those for whom TRONP is mandated.

We note that the Crown has already acknowledged that the negotiation framework can cater for small groups and individuals. In November 2007, in response to an inquiry from Hemi Te Nahu, the then Minister in Charge of Treaty of Waitangi Negotiations,

12. Paper 3.3.18, p 33

Dr Michael Cullen, confirmed that TRONP had approached the Crown in order to settle their historical Treaty claims, including the claims of Ruawaipu and Uepohatu. ‘The Crown considers’, he continued:

that negotiations with large natural groupings are more likely to be lasting and allow the parties to develop a settlement package that covers a wide range of redress. Further, the interests of particular iwi, hapu groups or individuals need not be subsumed during the negotiations process. The negotiations framework can allow for these various interests to be addressed.¹³

We would urge the Crown to ensure that the actions it (and TRONP) proposes to mitigate prejudice are put into effect. These actions include:

- ▶ maintaining opportunities for the claimants to participate in the negotiating process through the Te Haeata and post-settlement governance structures;
- ▶ the Crown’s commitment to reviewing the traditional history reports;
- ▶ ensuring that claimants have the opportunity to be heard and voice their concerns, and air their historical claims, in the two-week recorded hearing before the Crown; and
- ▶ ensuring that claimants can contribute to the development of a process for the two-week hearing before the Crown by attending cluster hui or providing feedback to Te Haeata.

The Crown and TRONP seem genuine in their proposals to mitigate the claimants’ concerns. We are hopeful that these are more than just words, and understand that OTS has already begun a review of the traditional history reports.

Recommendations to ensure the durability of future settlements

As we have set out in this report, our hearings revealed a number of flaws in the process by which the Crown entered into negotiations with TRONP. We have made it clear that we do not see these flaws as being significant enough, taking into account potential prejudice, to justify recommending delaying the settlement. However, these flaws, if replicated in future settlements, may well put at risk the durability of those settlements. We note that the Crown has set an ambitious target for settling claims by 2014. The process is quickening and the timeframes to 2014 are tight. In such a climate there is a need for increased vigilance on the part of the Crown to ensure that its processes are fair, just, and robust. We are sure both the Crown and iwi/hapū wish to avoid inadequate and unfair processes on their way to settlement.

This report has identified a number of instances where the Crown’s mandating and settlement processes require reconsideration if it is to consistently achieve durable

13. MICOTOWN to Hemi Te Nahu, 15 November 2007 (doc A40(a), p 626)

settlements with claimants. The Tribunal therefore makes the following recommendations to assist both the Crown and iwi/hapū in future as they navigate their paths towards settlements:

- ▶ OTS should call for submissions at the point that a proposed mandating strategy is submitted, as well as after a deed of mandate is received. This will allow claimants who have a vested interest in a settlement ample time to comment upon, oppose, or make recommendations on the strategy, as well as informing the Crown of interested parties and allowing it the opportunity to engage with them at an early stage in the process.
- ▶ The information provided as part of any mandating strategy must include:
 - the specific claims (Wai numbers) to be included in a proposed settlement;
 - a clear definition of the claimant community on an iwi, hapū, marae, and whakapapa basis; and
 - the specific geographical area to be covered by a proposed settlement.This will negate the possibility of claimants insisting that they were unaware their claims were being negotiated on their behalf without their consent.
- ▶ OTS should, at an early stage, write to all Wai number claimants whose claims might be extinguished if a proposed settlement goes ahead, informing them of this fact. The earlier in the process claimants know what is being proposed, the earlier they can support or oppose negotiations. Furthermore, the Crown could insist that the negotiating committee formed after the mandating process inform all those affected by the proposed settlement on a regular basis when milestones are reached in its negotiations with Crown officials.
- ▶ The Crown should adopt a more proactive role in monitoring developments during the mandating strategy process. While we understand and acknowledge the Crown's reluctance to intervene in disputes over which claims are to be included in a mandating strategy, it also has a responsibility towards claimants who may feel marginalised as a result of the process.
- ▶ The Crown has a responsibility to ensure that all interested parties in a negotiated settlement have access to unhindered participation at every stage of the mandating process. This will lessen the likelihood of claimants seeking recourse to urgency proceedings with the Tribunal, and ensure that settlements are conducted in a fair and open manner.
- ▶ OTS should update its policy guide, *Ka Tika ā Muri, Ka Tika ā Mua*, to reflect changes that have arisen out of the recommendations of the *Te Arawa Settlement Process Reports* and the *Tāmaki Makaurau Report*, as well as the recommendations of the present inquiry.

Dated at *Wellington* this *18th* day of *May* 20 *10*



Judge Craig Coxhead, presiding officer



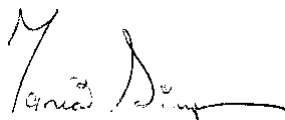
The Honourable Sir Douglas Lorimer Kidd KNZM, member



Basil Morrison CNZM, member



Kihī Ngatai QSM, member



Tania Simpson, member



APPENDIX I

**RESULTS OF TRONP INFORMATION HUI,
17–31 OCTOBER 2007**

Venue	Votes in favour	Votes against	Abstentions	Result
Hinerupe	18	9	0	Carried
Rahui	78	15	1	Carried
Hiruharama	21	11	0	Carried
Waiparapara	21	1	0	Carried
Puketewai	27	16	0	Carried
Gisborne	49	25	2	Carried
Hastings	33	3	0	Carried
Hamilton	20	5	4	Carried
South Auckland	55	2	1	Carried
Auckland Central	35	5	0	Carried
Wellington Central	31	0	2	Carried
Wainuiomata	32	4	7	Carried
Invercargill	16	0	0	Carried
Christchurch	31	1	1	Carried
Total	467	97	18	

Results of TRONP information hui, 17–31 October 2007

Source: TRONP, 'Deed of Mandate', 10 December 2007, p 10 (doc A40(a), p 645)

APPENDIX II

RECORD OF INQUIRY

RECORD OF HEARINGS

Tribunal members

The Tribunal constituted to hear the East Coast settlement claims comprised Judge Craig Coxhead (presiding), the Honourable Sir Douglas Lorimer Kidd KNZM, Basil Morrison CNZM, Kihī Ngatai QSM, and Tania Simpson.

The hearing

The hearing was held on 14, 15, and 16 December at the James Cook Hotel, Wellington

RECORD OF PROCEEDINGS

1. STATEMENTS

1.1 Statements of claim

1.1.1 Wai 1301

A claim by Simon James Koia, representing himself, David Rangikatia and Koiauruterangi and Te Kauruoterangi Chiefs, descendants of Ruawaipu and others, concerning the Crown's settlement with Te Rūnanga o Ngāti Porou, 21 May 2009

1.1.2 Wai 2185

A claim by Peter Cross, Anthony Naden, Virginia Pere, Nanette Kernohan and others, representing Te Aitanga-a-Hauiti, Whānau-hapū a Ruawaipu and Ngāti Uepohatu, concerning the Crown's settlement with Te Rūnanga o Ngāti Porou, 22 May 2009

1.1.3 Wai 976

A claim by Tui Tuakana Makea Marino, representing Te Aitanga-a-Hauiti, relating to Te Rūnanga o Ngāti Porou Act 1987. The claimant alleges that the Act breaches article 2 of the Treaty of Waitangi as it does not recognise 'Te Aitanga-a-Hauiti as a separate tribal identity' to Ngāti Porou, 8 December 2009.

1.2 Final statements of claim

There were no final statements of claim

1.3 Statements of response

There were no statements of response

1.4 Statements of issues

1.4.1 Final statement of issues, 27 October 2009

2. PAPERS IN PROCEEDINGS: TRIBUNAL MEMORANDA, DIRECTIONS, AND DECISIONS

2.1 Registering new claims

2.1.1 Presiding officer, memorandum adding amended statement of claim to Wai 1301, 21 October 2005

2.1.2 Presiding officer, memorandum registering Wai 2185, 6 November 2009

2.1.3 Deputy chairperson, memorandum adding amended statement of claim to Wai 976, 11 December 2009

2.2 Amending statements of claim

There were no papers concerning the amending of statements of claim

2.3 Waitangi Tribunal research commissions

There were no Waitangi Tribunal research commissions

2.4 Section 8D applications

There were no papers concerning section 8D applications

2.5 Pre-hearing stage

2.5.1 Presiding officer, memorandum responding to issues raised at 30 April 2009 judicial conference, 5 May 2009

RECORD OF INQUIRY

- 2.5.2 Presiding officer, memorandum setting changes in filing dates, 11 June 2009
- 2.5.3 Presiding officer, memorandum concerning applications for urgency, 6 July 2009
- 2.5.4 Presiding officer, memorandum concerning 29 July 2009 judicial conference, 30 July 2009
- 2.5.5 Presiding officer, directions concerning applications for urgency, 5 August 2009
- 2.5.6 Presiding officer, memorandum concerning the status of current applications for urgency, 6 October 2009
- 2.5.7 Presiding officer, decision granting urgency, setting out statement of issues and timetable for inquiry and hearing, 27 October 2009
- 2.5.8 Presiding officer, memorandum granting leave for Hapuoneone participation and responding to claimants' memoranda, 4 November 2009
- 2.5.9 Presiding officer, memorandum establishing new claim number and record of inquiry, 6 November 2009
- 2.5.10 Chairperson, memorandum appointing presiding officer and Tribunal members, 13 November 2009
- 2.6 Hearing stage**
- 2.6.1 Presiding officer, memorandum setting out inquiry timetable and deciding other matters regarding the hearing, 18 November 2009
- 2.6.2 Chairperson, memorandum on recusal of Judge Clark and appointment of new presiding officer, 4 December 2009
- 2.6.3 Presiding officer, memorandum concerning transfer of documents to record of inquiry, oral and traditional reports, and other matters, 4 December 2009
- 2.6.4 Presiding officer, memorandum responding to extension and cross-examination requests, and questions about Tribunal panel and simultaneous interpretation, 7 December 2009

2.6.5 Presiding officer, memorandum setting out inquiry timetable and responding to memoranda of counsel, 10 December 2009

2.6.6 Presiding officer, memorandum responding to issues raised in memoranda of counsel, 11 December 2009

2.7 Post-hearing stage

2.7.1 Presiding officer, memorandum setting out reasons for refusal of leave to be heard in urgent hearing, 18 December 2009

2.7.2 Presiding officer, memorandum directing parties to file additional material from hearing, 18 December 2009

2.7.3 Presiding officer, memorandum concerning review of oral and traditional reports, 23 December 2009

3. SUBMISSIONS AND MEMORANDA OF PARTIES

3.1 Pre-hearing stage

3.1.1 Simon Koia, application for urgent inquiry and report into the (first amended) Ruawaipu 'Ngāti Porou Treaty Claims Settlement' claim, 21 May 2009

(a) Counsel for Wai 1301, submission in support of application for urgent inquiry, 21 May 2009

(b) Entry vacated

3.1.2 Counsel for Wai 1089, 1302, 1082, 1025, 1300, 1866, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, 1862, 901, 1171, and 1381, application for urgent inquiry, 22 May 2009

(a) Counsel for Wai 1089, 1302, 1082, 1025, 1300, 1866, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, 1862, 901, 1171, and 1381, submission seeking ruling on shifting onus of proof, 22 May 2009

(b) Entry vacated

(c) Tamati Reid, brief of evidence, 22 May 2009

(d) Laura Thompson, brief of evidence, 22 May 2009

(e) Entry vacated

3.1.3 Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, application for urgent hearing and/or preliminary hearing, 22 May 2009

RECORD OF INQUIRY

(a) Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, submission supporting application for urgency, 22 May 2009

(b) Entry vacated

(c) Entry vacated

3.1.4 Counsel for Wai 1285, 1291, 1287, 1323, 1284, 1290, 1325, and 1289, submission supporting applications for urgency, 22 May 2009

3.1.5 Counsel for Wai 1322, 1554, and 1555, submission supporting applications for urgency, 22 May 2009

3.1.6 Counsel for Wai 1020 and 1282, submission supporting applications for urgency, 24 May 2009

3.1.7 Kaitiaki for Wai 1318, 1319, 1320, 1321, 1322, 1335, and 1336, submission supporting applications for urgency, 29 May 2009

3.1.8 Counsel for Wai 931, 1074, 1080, 1083, 1124, and 1305, submission requesting extension to filing date in response to urgency applications, 10 June 2009

3.1.9 Counsel for TRONB, submission requesting extension to filing date in response to urgency applications, 11 June 2009

3.1.10 Counsel for Wai 1089, 1302, 1082, 1025, 1300, 1866, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, 1862, 901, and 1171, submission opposing request for extension of filing date, 11 June 2009

3.1.11 Crown counsel, submission seeking leave for extension to filing date, 11 June 2009

3.1.12 Crown counsel, submission responding to East Coast urgency applications, 17 June 2009

(a) Entry vacated

3.1.13 Counsel for TRONB, submission responding to applications for urgent hearing, 19 June 2009

3.1.14 Counsel for Wai 1074, 1080, 1124, and 1305, submission opposing applications for urgency, 19 June 2009

- 3.1.15** Counsel for Wai 1083, submission opposing application for urgency made by Wai 1301, 19 June 2009
- 3.1.16** Counsel for Wai 931, 1074, 1080, 1083, 1124, and 1305, submission opposing applications for urgency, 19 June 2009
- 3.1.17** Counsel for Wai 1301, submission responding to arguments opposing urgent hearing, 3 July 2009
(a) Entry vacated
- 3.1.18** Counsel for Wai 1089, 1302, 1082, 1025, 1300, 1866, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, 1862, 901, and 1171, submission responding to arguments opposing urgent hearing, 3 July 2009
(a) Entry vacated
- 3.1.19** Kaitiaki for Wai 1318, 1319, 1320, 1321, 1322, 1335, and 1336, submission responding to arguments opposing urgent hearing, 3 July 2009
- 3.1.20** Counsel for Wai 1322, 1554, and 1555, submission responding to arguments opposing urgent hearing, 3 July 2009
- 3.1.21** Counsel for Wai 1284, 1285, 1287, 1289, 1290, 1291, 1323, and 1325, submission responding to arguments opposing urgent hearing, 6 July 2009
- 3.1.22** Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, submission seeking leave to file submissions late, 6 July 2009
- 3.1.23** Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, submission responding to arguments opposing urgent hearing, 7 July 2009
- 3.1.24** Counsel for Wai 1089, 1302, 1082, 1025, 1300, 1866, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, 1862, 901, and 1171, submission concerning modified settlement policy, 16 July 2009
- 3.1.25** Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, submission filing additional documentation referred to in paper 3.1.23, 24 July 2009
(a) Entry vacated
- 3.1.26** Counsel for Wai 1301, synopsis of argument in support of urgency application, 27 July 2009

- 3.1.27** Crown counsel, submission responding to paper 3.1.24, 28 July 2009
- 3.1.28** Counsel for Wai 1272, submission supporting applications for urgency, 28 July 2009
(a) Entry vacated
- 3.1.29** Counsel for Wai 63, submission seeking extension for filing synopsis of oral submissions, 31 July 2009
- 3.1.30** Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, memorandum concerning brief of evidence of Tui Marino (doc A41), 31 July 2009
- 3.1.31** Counsel for Wai 1272, submission responding to paper 2.5.4, 31 July 2009
- 3.1.32** Counsel for Wai 1088 and 1275, memorandum notifying changes in claimant representation, 31 July 2009
- 3.1.33** Counsel for Wai 1172, submission responding to paper 2.5.4, 31 July 2009
- 3.1.34** Crown counsel, submission responding to paper 2.5.4, 3 August 2009
(a) Entry vacated
- 3.1.35** Counsel for Wai 39, 63, 129, 222, 973, 1093, 1179, 1183, 1185, 1187, 1277, 1316, 1317, 1446, and 1459, synopsis of oral submissions, 3 August 2009
- 3.1.36** Crown and TRONP counsel, joint memorandum setting out revised negotiations timetable, 13 August 2009
- 3.1.37** Crown counsel, memorandum responding to paper 2.5.5 setting out proposed facilitation, 19 August 2009
- 3.1.38** Counsel for Wai 1301, submission responding to Crown's proposal for facilitated discussions, 20 August 2009
(a) Counsel for Wai 1301, letter to the Crown setting out urgency issues, 20 August 2009
- 3.1.39** Counsel for Wai 858, 940, 1123, 1279, 1280, 1281, 1700, 1921, 1922, and 1923, submission responding to the Crown's acceptance of TRONP mandate, 18 August 2009
- 3.1.40** Counsel for Wai 1280, submission responding to the Crown's acceptance of TRONP mandate, 20 August 2009

3.1.40—*continued*

(a) Counsel for Wai 1279, 1280, and 1281, letter to MICOTOWN, 20 August 2009

(b) MICOTOWN, letter to counsel for Wai 1279, 1280, and 1281, 20 August 2009

3.1.41 Counsel for Wai 1281, submission responding to the Crown's acceptance of TRONP mandate, 20 August 2009 (attachments filed separately as 3.1.40(a) and 3.1.40(b))

3.1.42 Counsel for Wai 1279, submission responding to the Crown's acceptance of TRONP mandate, 20 August 2009 (attachments filed separately as 3.1.40(a) and 3.1.40(b))

3.1.43 Counsel for Wai 1020 and 1282, submission supporting urgency applications and facilitated discussions, 2 September 2009

3.1.44 Kaitiaki for Wai 1318, 1319, 1321, 1322, 1335, 1336 and 2154), submission responding to paper 2.5.5, 2 September 2009

3.1.45 Crown counsel, memorandum updating progress on facilitation process, 2 September 2009

(a) Crown counsel, letter to parties concerning proposal for facilitation, 2 September 2009

3.1.46 Counsel for Wai 931, 1074, 1080, 1083, 1124, and 1305, memorandum concerning proposed facilitation process, 2 September 2009

3.1.47 Counsel for Wai 1434, memorandum concerning proposed facilitation process, 2 September 2009

3.1.48 Counsel for Wai 1089, 1302, 1082, 1025, 1300, 1866, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, 1862, 901, 1088, 1171, 1276, and 1381, submission concerning proposed facilitation process, 2 September 2009

3.1.49 Counsel for Wai 98, 526, and 971, memorandum concerning proposed facilitation process, 2 September 2009

3.1.50 Counsel for Wai 499 and 1272, submission concerning proposed facilitation process, 2 September 2009

3.1.51 Counsel for Wai 1301, submission concerning proposed facilitation process, 3 September 2009

RECORD OF INQUIRY

3.1.52 Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, submission concerning proposed facilitation process, 3 September 2009

3.1.53 Counsel for TRONP, memorandum concerning proposed facilitation process, 4 September 2009

3.1.54 Counsel for Wai 1172, submission concerning proposed facilitation process, 9 September 2009

3.1.55 Counsel for Wai 1249, memorandum concerning proposed facilitation process and supporting urgency applications, 10 September 2009

3.1.56 Counsel for Wai 940, 1700, and 1922, submission concerning proposed Crown-facilitated discussions, 17 September 2009

3.1.57 Counsel for TRONP, submission concerning proposed facilitation process, 29 September 2009

(a) TRONP chairman, letter to MFTOWN, 29 September 2009

3.1.58 Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, submission concerning progress with facilitated discussions, 30 September 2009

(a) Entry vacated

3.1.59 Counsel for Wai 1089, 1302, 1082, 1025, 1300, 1866, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, 1862, 901, 1088, 1171, 1276, and 1381, submission concerning proposed facilitation process, 1 October 2009

3.1.60 Counsel for Wai 1020 and 1282, submission concerning progress with facilitated discussions, 1 October 2009

3.1.61 Counsel for Wai 1272, submission concerning progress with facilitated discussions, 1 October 2009

3.1.62 Crown counsel, submission concerning progress with facilitated discussions, 1 October 2009

(a) Crown counsel, letter to parties proposing facilitator for discussions, 29 September 2009

3.1.63 Counsel for Wai 1323, 1284, 1290, 1291, and 1325, submission supporting application for urgent hearing, 2 October 2009

3.1.64 Kaitiaki for Wai 1318, 1319, 1321, 1322, 1335, 1336 and 2154, submission responding to paper 3.1.57 and supporting application for urgent hearing, 2 October 2009

3.1.65 Counsel for Wai 1301, memorandum concerning facilitated discussions, 2 October 2009

(a) Henry Koia, letter to Prime Minister regarding Ngāti Porou treaty claims settlement, 30 September 2009

3.1.66 Crown counsel, submission providing update on position set out in paper 3.1.62, 2 October 2009

3.1.67 Counsel for TRONB, submission responding to Tribunal directions in paper 2.8.16, 2 October 2009

3.1.68 Counsel for Wai 1301, submission seeking decision on application for urgency, 2 October 2009

(a) *Mair v Waitangi Tribunal* unreported, 2 October 2009, MacKenzie J, High Court, Wellington, CIV-2009-485-1499

3.1.69 Counsel for Wai 900, submission seeking extension to filing date, 6 October 2009

3.1.70 Counsel for Wai 390, 703, 941, 976, 1303, 1304, and 1331, memorandum noting incorrect date on letter (on ROI as doc A45), 9 October 2009

(a) Entry vacated

3.1.71 Counsel for TRONB, submission responding to Tribunal memorandum (paper 2.5.6), 12 October 2009

3.1.72 Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, submission responding to Tribunal memorandum (paper 2.5.6), 21 October 2009

3.1.73 Counsel for TRONB, submission requesting extension to filing date of memoranda, 21 October 2009

3.1.74 Jason Koia, submission concerning facilitated discussions, 21 October 2009

3.1.75 Crown counsel, submission concerning further facilitated discussions, 21 October 2009, 21 October 2009

RECORD OF INQUIRY

3.1.76 Counsel for Wai 1301, submission responding to Tribunal memorandum (paper 2.5.6), 21 October 2009

3.1.77 Counsel for Wai 1089, 1302, 1082, 1025, 1300, 1866, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, 1862, 901, 1088, 1171, 1276, and 1381, submission updating progress of facilitated discussions, 21 October 2009

3.1.78 Counsel for Wai 129, 1446, 1560, 1566, 1646, and 1860, submission concerning facilitated discussion process, 22 October 2009

3.1.79 Counsel for Wai 129, 1446, 1560, 1566, 1646, and 1860, submission requesting extension of time for facilitation process, 22 October 2009

3.1.80 Counsel for Ngāti Uepohatu Ahi Kaa and others, submission supporting extension of time for facilitation process, 22 October 2009

3.1.81 Counsel for Wai 1301, submission opposing extension of time for facilitation process, 22 October 2009

3.1.82 Counsel for Wai 940, 1740, and 1922, submission opposing extension of time for facilitation process, 22 October 2009

3.1.83 Counsel for Wai 1301, submission responding to Tribunal directions granting urgent hearing, 28 October 2009

3.1.84 Counsel for Wai 1020, and 1282, submission seeking permission to participate in urgent hearing, 2 November 2009

3.1.85 Counsel for Wai 1301, submission regarding ethnic suppression claim, 5 November 2009

3.2 Hearing stage

3.2.1 Counsel for Wai 1301, memorandum concerning evidence of Henry Koia, 13 November 2009

3.2.2 Counsel for Wai 1020, and 1282, memorandum concerning evidence of Terence Rangihuna, 13 November 2009

- 3.2.3** Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, memorandum concerning additional evidence, 13 November 2009
- (a)** Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, ‘Te-Aitanga-a-Hauiti – chronology of key events’, 13 November 2009
- 3.2.4** Counsel for Wai 39, 63, 129, 1185, 1187, 1277, 1316, and 1317, memorandum advising participation in hearings, 12 November 2009
- 3.2.5** Counsel for Wai 2190 and 2172, memorandum regarding briefs of evidence of Rakapa Koia and Rapata Kaa, 13 November 2009
- 3.2.6** Counsel for TRONB, memorandum advising end to facilitated discussions, 16 November 2009
- 3.2.7** Counsel for Wai 173, 447, 1172, 1186, and 1276, submission seeking to participate in hearing and setting out proposed submission, 16 November 2009
- 3.2.8** Counsel for Wai 1282, submission seeking approval to file amended brief of evidence, 16 November 2009
- 3.2.9** Gisborne District Council, submission seeking approval to attend hearing by way of watching brief, 11 November 2009
- 3.2.10** Counsel for Wai 1323, 1291, 1325, 1290, and 1284, submission in support of filing Ngāti Ruawaipu oral and traditional history report, 17 November 2009
- 3.2.11** Counsel for Wai 858, 973, 1123, 1279, 1280, 1281, 940, 1700, 1922, 1921, and 1923, submission seeking leave to file submissions and attend hearing by way of watching brief, 18 November 2009
- 3.2.12** Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, submission requesting transfer of evidence to Record of Inquiry, 26 November 2009
- 3.2.13** Counsel for TRONB, submission requesting transfer of evidence to ROI, 26 November 2009
- 3.2.14** Counsel for Wai 1301, submission supporting request to file affidavits, 27 November 2009

RECORD OF INQUIRY

- 3.2.15** Counsel for TRONB, submission seeking leave to cross-examine witnesses, 27 November 2009
- 3.2.16** Counsel for Wai 1434, submission seeking leave to participate in hearing, 30 November 2009
- 3.2.17** Counsel for Wai 1301, submission opposing participation of Wai 1434 claimants in hearing, 1 December 2009
- 3.2.18** Counsel for Wai 2185, submission concerning evidentiary issues, 1 December 2009
- 3.2.19** Counsel for TRONB, submission advising filing of affidavits, 2 December 2009
- 3.2.20** Crown counsel, submission on evidentiary issues and setting out position on onus of proof, 2 December 2009
- 3.2.21** Counsel for Wai 1089, 1300, 1082, 1866, 1025, 1302, 901, 1171, 1381, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, and 1862, submission extension of time to file rebuttal evidence, 7 December 2009
- 3.2.22** Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, submission seeking clarification of reasons for recusal of presiding officer, 7 December 2009
- 3.2.23** Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, 1331) submission seeking leave to cross-examine witnesses and an extension of time to file rebuttal evidence, 7 December 2009
- 3.2.24** Counsel for TRONB, submission seeking simultaneous translation and leave to cross-examine witness, 7 December 2009
- 3.2.25** Counsel for Wai 1301, submission seeking leave to cross-examine witnesses, 7 December 2009
- 3.2.26** Counsel for Wai 1089, 1300, 1082, 1866, 1025, 1302, 901, 1171, 1381, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, and 1862, submission requesting striking of affidavits, 8 December 2009
- 3.2.27** Counsel for Wai 1089, 1300, 1082, 1866, 1025, 1302, 901, 1171, 1381, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, and 1862, submission seeking leave to cross-examine witnesses, 8 December 2009

- 3.2.28** Counsel for Wai 1020 and 1282, submission seeking leave to cross-examine witnesses, 7 December 2009
- 3.2.29** Counsel for Wai 1020 and 1282, submission requesting transfer of evidence to ROI, 26 November 2009
- 3.2.30** Counsel for Wai 1089, 1300, 1082, 1866, 1025, 1302, 901, 1171, 1381, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, and 1862, submission amending request to cross-examine witnesses, 9 December 2009
- 3.2.31** Counsel for TRONB, submission seeking leave to cross-examine witness, 9 December 2009
- 3.2.32** Counsel for Wai 1301, submission presenting draft hearing timetable, 9 December 2009
(a) Counsel for Wai 1301, draft hearing timetable, 9 December 2009
- 3.2.33** Crown counsel, memorandum advising signing of agreement between Crown and Te Haeta, 9 December 2009
- 3.2.34** Counsel for Wai 1301, submission seeking transfer of evidence to ROI, 9 December 2009
- 3.2.35** Counsel for Wai 1089, 1300, 1082, 1866, 1025, 1302, 901, 1171, 1381, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, and 1862, submission seeking direction from Tribunal to Crown to file evidence, 10 December 2009
- 3.2.36** Counsel for TRONB, submission requesting leave to file affidavit, 10 December 2009
- 3.2.37** Counsel for Wai 1089, 1300, 1082, 1866, 1025, 1302, 901, 1171, 1381, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, and 1862, submission opposing request for leave to file affidavit, 10 December 2009
- 3.2.38** Counsel for Wai 1301, submission seeking leave to file evidence in rebuttal, 10 December 2009
- 3.2.39** Counsel for Wai 1301, submission on evidentiary issues, 7 December 2009

RECORD OF INQUIRY

3.2.40 Crown counsel, submission responding to request for further documentation, 10 December 2009 (filed as documents A120–A25)

3.2.41 Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, submission advising amendments to Wai 976 statement of claim, 10 December 2009

3.2.42 Counsel for Wai 63, submission opposing request for leave to file affidavit, 11 December 2009

3.2.43 Counsel for Wai 272, submission seeking leave to cross-examine witness, 8 December 2009

3.2.44 Counsel for Wai 173, 447, 1172, 1186, and 1276, submission seeking clarification of reasons for evidence not being placed on Record of Inquiry, 15 December 2009

3.2.45 Counsel for Wai 1285, notice of intention to speak Te Reo Māori, 2 December 2009

3.2.46 Counsel for Wai 1322, notice of intention to speak Te Reo Māori, 2 December 2009

3.3 Opening, closing, and in reply

3.3.1 Counsel for Wai 39, 63, 129, 222, 1093, 1179, 1183, 1187, 1277, 1316, 1317, and 1446, opening submissions, 14 December 2009

3.3.2 Counsel for Wai 1272, opening submissions, 14 December 2009

3.3.3 Counsel for Wai 1089, 1300, 1082, 1866, 1025, 1302, 901, 1171, 1381, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, and 1862, opening submissions, 14 December 2009

3.3.4 Counsel for Wai 976, opening submissions, 14 December 2009

3.3.5 Counsel for Wai 173, 447, 1172, 1186, and 1276, opening submissions, 14 December 2009

3.3.6 Counsel for Wai 1301, opening submissions, 14 December 2009

3.3.7 Counsel for Wai 1020 and 1282, opening submissions, 14 December 2009

- 3.3.8 Counsel for Wai 1434, opening submissions, 14 December 2009
- 3.3.9 Crown counsel, opening submissions, 15 December 2009
- 3.3.10 Counsel for Wai 1322, opening submissions, 15 December 2009
- 3.3.11 Counsel for Wai 1285, opening submissions, 15 December 2009
- 3.3.12 Counsel for Wai 1554 and 1555, opening submissions, 15 December 2009
- 3.3.13 Counsel for TRONB, opening submissions, 16 December 2009
- 3.3.14 Counsel for Wai 931, 1074, 1080, 1083, 1124, and 1305, opening submissions, 16 December 2009
- 3.3.15 Counsel for Wai 1322, closing submissions, 22 December 2009
- 3.3.16 Counsel for Wai 1285, closing submissions, 22 December 2009
- 3.3.17 Counsel for Wai 63 and others, closing submissions, 22 December 2009
- 3.3.18 Counsel for Wai 1301, closing submissions, 22 December 2009
- 3.3.19 Counsel for Wai 1284, 1287, 1289, 1290, 1291, 1323, and 1325, closing submissions, 22 December 2009
- 3.3.20 Counsel for Wai 1272, closing submissions, 22 December 2009
- 3.3.21 Counsel for Wai 1020 and 1282, closing submissions, 22 December 2009
- 3.3.22 Counsel for Wai 1434, closing submissions, 22 December 2009
- 3.3.23 Counsel for Wai 976, closing submissions, 22 December 2009
- 3.3.24 Counsel for Wai 1089, 1300, 1082, 1866, 1025, 1302, 901, 1171, 1381, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, and 1862, closing submissions, 22 December 2009
- 3.3.25 Counsel for Wai 1554 and 1555, closing submissions, 22 December 2009

RECORD OF INQUIRY

3.3.26 Counsel for Wai 173, 447, 1172, 1186, and 1276, closing submissions, 23 December 2009

3.3.27 Counsel for TRONB, closing submissions, 23 December 2009

3.3.28 Crown counsel, closing submissions, 23 December 2009

3.3.29 Counsel for Wai 931, 1074, 1080, 1083, 1124, and 1305, closing submissions, 23 December 2009

3.3.30 Counsel for Wai 1284, 1287, 1289, 1290, 1291, 1323, and 1325, submissions in reply, 8 January 2010

3.3.31 Counsel for Wai 1301, submissions in reply, 8 January 2010

3.3.32 Counsel for Wai 1089, 1300, 1082, 1866, 1025, 1302, 901, 1171, 1381, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, and 1862, submissions in reply, 8 January 2010

3.3.33 Counsel for Wai 1020 and 1282, submissions in reply, 8 January 2010

3.3.34 Counsel for Wai 1272, submissions in reply, 8 January 2010

3.4 Post-hearing stage

3.4.1 Crown counsel, submission regarding supplementary briefs of evidence of Paul James (evidence and attachments filed as documents A131(d)–A31(k)), 18 December 2009

3.4.2 Counsel for Wai 1282, memorandum attaching whakapapa record (filed as document A131(k)), 18 December 2009

3.4.3 Counsel for Wai 1301, submission concerning Crown's assessment of document A46, 21 December 2009

3.4.4 Crown counsel, submission in response to request for further information (attachment filed as document A40(c)), 8 January 2010

3.4.5 Counsel for TRONB, submission responding to paper 2.7.2, 11 January 2010

3.4.6 Crown counsel, submission clarifying statements in papers 3.3.24 and 3.3.32, 14 January 2010

3.4.7 Crown counsel, submission responding to directions in paper 2.7.3, 2 February 2010

3.4.8 Counsel for Wai 1301, submission responding to paper 3.4.7, 4 February 2010

3.4.9 Counsel for Wai 1089, 1300, 1082, 1866, 1025, 1302, 901, 1171, 1381, 1265, 1267, 1268, 1269, 1270, 1272, 1337, 1648, 1859, and 1862, submission responding to paper 3.4.7, 4 February 2010

3.4.10 Counsel for Wai 390, 703, 941, 976, 1266, 133, 1304, and 1331, submission responding to paper 3.4.7, 9 February 2010

3.4.11 Counsel for TRONB, submission responding to paper 2.7.2 (attachments filed as documents A4(b) and A4(c)), 11 February 2010

4. TRANSCRIPTS AND TRANSLATIONS

4.1 Transcripts

4.1.1 Transcript of hearing, James Cook Hotel, Wellington, 14–16 December 2009

4.2 Translations

There were no translations.

4.3 Audio recordings

4.3.1 Judicial conference, Waitangi Tribunal, Wellington, CD, 30 April 2009

4.3.2 Judicial conference, Waitangi Tribunal, Wellington, CD, 29 July 2009

4.3.3 Urgent hearing, James Cook Hotel, Wellington (floor), CD, 14–16 December 2009
(a) Urgent hearing, at James Cook Hotel, Wellington (English), CD, 14–16 December 2009

5. PUBLIC NOTICES

5.1 Judicial conferences

5.1.1 Registrar, notice of judicial conference, 20 April 2009

RECORD OF INQUIRY

5.1.2 Registrar, notice of judicial conference, 8 July 2009

5.2 Hearings

5.2.1 Registrar, notice of hearing, 30 November 2009

5.3 Agenda for conferences and hearings

5.3.1 Waitangi Tribunal, timetable for Wai 2190 East Coast settlement hearings, undated

RECORD OF DOCUMENTS

A DOCUMENTS RECEIVED UP TO COMPLETION OF CASEBOOK

A1 Allan Koia, statement of evidence, undated

A2 Terence Rangihuna, brief of evidence, 13 November 2009

(a) Terence Rangihuna, letter to OTS, 12 February 2008

A3 Tui Marino, brief of evidence, 13 November 2009

(a) Documents concerning foreshore and seabed negotiations, various dates

(b) Documents relating to 2005 application for urgency, various dates

(c) Documents concerning Te Rūnanga o Ngāti Porou Bill, various dates

(d) Tui Marino to MFTOWN, letter seeking recognition of Te Aitanga-a-Hauiti as large natural grouping, 8 December 2008

(e) MFTOWN to Tui Marino, response of Minister, 12 February 2009

(f) Statistics New Zealand to Tui Marino, response to application of Te Aitanga-a-Hauiti to be included as iwi, 25 June 2009

(g) Deborah Edmunds to Statistics New Zealand, Official Information Act request, 6 October 2009

A4 Wayne Amaru, brief of evidence, 13 November 2009

(a) Map outlining Te Aitanga-a-Hauiti land incorporations, undated

(b) TPk, report of Te Puni Kōkiri observer on rescheduled Hauiti Marae hui, 28 October 2008

(c) Ngā Hapū o Ngāti Porou foreshore and seabed deed of agreement hapū ratification hui minutes, 28 October 2008

A5 Margrette Ryland-Daigle, brief of evidence, 13 November 2009

A6 Jason Koia, brief of evidence, 13 November 2009

A7 Te Rarua McClutchie-Morrell, brief of evidence, 13 November 2009

A8 Rapata Kaa, brief of evidence, 13 November 2009

A9 Rakapa Koia, brief of evidence, 28 July 2009

(a) Rongowhakaata (R W) Halbert, *Horouta: The History of the Horouta Canoe, Gisborne and East Coast* (Auckland: Reed, c1999), pp 173–4

A10 Counsel for Te Whānau ā Apanui, memorandum responding to Wai 900 ROI, paper 2.14, 17 May 2004

A11 Counsel for Wai 390, 976, 1266, 1302, 1303, 1304, 1331, and 941, submissions concerning judicial conference, direct negotiations, and other matters, 28 September 2007

A12 Counsel for TRONP, memorandum providing update on TRONP mandate process, 2 November 2007

A13 Counsel for TRONP, memorandum providing update on TRONP mandate process and responding to Tribunal directions of 13 December 2007, 17 December 2007

(a) TRONP, 'Deed of Mandate; for Direct Negotiations with the Crown for the Comprehensive Settlement of All Ngati Porou Historical Treaty of Waitangi Claims', 10 December 2007

(b) TRONP, 'Attachments to the Ngati Porou Deed of Mandate; Attachments 1–28', undated

(c) TRONP, 'Attachments to the Ngati Porou Deed of Mandate; Attachments 29–66', 17 December 2007

A14 Counsel for Wai 390, 941, 976, 1266, 1302, 1303, 1304, and 1331, memorandum responding to document A13 and Wai 900 ROI, paper 2.5.29, 20 December 2007

A15 Counsel for Wai 390, 941, 976, 1266, 1302, 1303, 1304, 1331, and 703, submissions responding to Wai 900 ROI, paper 2.5.28, 23 January 2008

A16 Counsel for Wai 390, 941, 976, 1266, 1302, 1303, 1304, and 1331, memorandum enclosing submission to OTS on TRONP deed of mandate, 4 February 2008

A17 Counsel for TRONP, submission and appendices responding to other claimants, 3 April 2008

RECORD OF INQUIRY

- A18** Crown counsel, memorandum and attachment concerning Crown's recognition of TRONP deed of mandate, 17 April 2008
- A19** Counsel for TRONP, memorandum and supporting documents concerning TRONP mandate and settlement negotiations, 17 April 2008
- A20** Counsel for TRONP, submission responding to request from Wai 63 claimants for urgent hearing, 24 April 2008
- A21** Counsel for Wai 976, 390, 941, 1266, 1302, 1303, 1304, and 1331, memorandum seeking leave to participate in Wai 63 urgency application, 14 May 2008
- A22** Crown counsel, submission responding to Wai 63 urgency application, 28 May 2008
- A23** Counsel for TRONP, memorandum providing update on mandate negotiations and responding to Wai 63 urgency application, 29 May 2008
- A24** Counsel for Wai 976, 390, 941, 1266, 1302, 1303, 1304, and 1331, submission concerning East Coast inquiry research co-ordinating committee, 28 July 2008
- A25** Counsel for TRONP, submission asking that East Coast inquiry research co-ordinating committee be reconvened, 29 July 2008
- A26** Tui Marino, memorandum responding to Wai 900 ROI, paper 3.5.19, 13 August 2008
- A27** Crown counsel, memorandum providing update on negotiations with TRONP, 15 September 2008
- A28** Counsel for TRONP, memorandum noting disagreement with documents filed regarding foreshore and seabed deed of agreement, 16 September 2008
- A29** Crown counsel, submission opposing application for urgent hearing, 4 November 2008
- A30** Counsel for TRONP, submission opposing application for urgent hearing, 5 November 2008
- A31** Counsel for TRONP, memorandum and supporting documents concerning ratification of foreshore and seabed deed of agreement, 6 November 2008

- A32** Tui Marino, submission responding to document A31, 19 November 2008
- A33** Crown counsel, memorandum providing update on ratification of foreshore and seabed agreement, 26 November 2008
- A34** Counsel for TRONB, submission providing update on mandate negotiations, and responding to requests for judicial conference and rehearing of application for urgency, 19 February 2009
- A35** Counsel for Wai 931, 1074, 1080, 1083, 1124, and 1305, memorandum attaching submissions opposing application for rehearing of request for urgency, 24 April 2009
- A36** Crown counsel, submission for 30 April 2009 judicial conference, 24 April 2009
- A37** Counsel for Wai 931, 1074, 1080, 1083, 1124, and 1305, submission opposing application for rehearing of urgency application, 24 April 2009
- A38** Counsel for Wai 390, 703, 941, 976, 1266, 1303, 1304, and 1331, submissions concerning foreshore and seabed issues, 5 June 2009
- A39** Jason Koia, brief of evidence, 22 May 2009
- A40** Counsel for Te Whānau-hapū o Ruawaipu and others, index to consolidated exhibits, 22 May 2009
- (a) supporting documents 1–80, various dates
 - (b) supporting documents 80(a)–100, various dates
 - (c) OTS, letter to MICOTOWN regarding exploratory discussions with TRONB, 7 September 2006
- A41** Tui Marino, brief of evidence, 22 May 2009
- (a) Supporting documents, various dates
- A42** Documents referred to in paper 3.1.23, various dates
- A43** Te Puni Kōkiri, observers' reports on mandate information hui, 18–29 October 2007
- A44** Crown counsel and counsel for Te Aitanga-a-Hauiti applicants, letters discussing proposed facilitation, September 2009

RECORD OF INQUIRY

A45 Tui Marino to MFTOWN, letter discussing facilitation process and other matters, 9 October 2009

A46 Grant Young and Michael Belgrave, 'Te Papatipu o Ruawaipu – Traditional History Report', report commissioned by CFRT, September 2009

A47 Taukiri Totoro, affidavit, 24 November 2009

A48 Kahutia Houkamau, affidavit, 24 November 2009

A49 Tauriri Houkamau, affidavit, 24 November 2009

A50 Daddy Kingi Houkamau, affidavit, 24 November 2009

A51 Len Walker, affidavit, 24 November 2009

A52 Natana Ihaka, affidavit, 24 November 2009

(a) Natana Ihaka, letter to the *Gisborne Herald*, 5 March 2008

A53 Nehe Tibble, affidavit, 24 November 2009

A54 Hori Houkamau, affidavit, 24 November 2009

A55 Hikitai Green, affidavit, 24 November 2009

A56 Parekura Kaa, affidavit, 24 November 2009

A57 Ngarongotoa Raroa, affidavit, 24 November 2009

A58 Paitini Kupenga, affidavit, 24 November 2009

A59 Mereharanga Green, affidavit, 24 November 2009

A60 Edward Keelan, affidavit, 24 November 2009

A61 Robert Reedy, affidavit, 25 November 2009

A62 Gilbert Henare, affidavit, 25 November 2009

A63 Tieki Papuni, affidavit, 30 November 2009

A63—*continued*

(a) Statement on behalf of descendants of Hauti, Ruawaipu, and Uepohatu,
24 November 2009

A64 Jock Walker, affidavit, 26 November 2009

(a) Public notice concerning representation of Uawa marae and hapū, *Gisborne Herald*,
22 January 2008

A65 Morehu Te Maro, affidavit, 26 November 2009

A66 Tate Pewhairangi, affidavit, 26 November 2009

A67 Taina Ngarimu, affidavit, 26 November 2009

A68 Rawiri Wanoa, affidavit, 26 November 2009

A69 Stanley Hovell, affidavit, 26 November 2009

A70 Henare Kirikiri, affidavit, 27 November 2009

A71 William Gray, affidavit, 27 November 2009

A72 April Papuni, affidavit, 27 November 2009

A73 Maria Whitehead, affidavit, 27 November 2009

A74 Dinah Matenga, affidavit, 27 November 2009

A75 Ben Tahata, affidavit, 27 November 2009

A76 Rei Kohere, affidavit, 27 November 2009

A77 Moki Raroa, affidavit, 27 November 2009

A78 Dr Te Kapunga Dewes, affidavit, 28 November 2009

A79 Harata Gibson, affidavit, 2 December 2009

(a) Tokorua Te Kani, affidavit, 2 December 2009

(b) Agenda for foreshore and seabed hui, Te Poho o Rawiri marae, 26 November 2009

RECORD OF INQUIRY

- A80** John Tuari, affidavit, 26 November 2009
- A81** William Hindmarsh, affidavit, 30 November 2009
- A82** John Coleman, affidavit, 26 November 2009
- A83** Te Raumawhitu Kupenga, affidavit, 1 December 2009
- A84** Dr Tamati Reedy, affidavit, 1 December 2009
- A85** Mahanga Maru, affidavit, 1 December 2009
- A86** Campbell Dewes, affidavit, 1 December 2009
- A87** Linda Smith, affidavit, 1 December 2009
- (a) Te Haeata, 'Mai i Tātahi Ki Te Ao Parauri', cluster 4 newsletters, nos 1–4, June – August 2008
- (b) Linda Smith, letter to marae chairpersons about negotiation progress, 2 December 2009
- (c) Heni Tawhiwhirangi, letter to the *Gisborne Herald*, 5 March 2008
- (d) Natana Ihaka, letter to the *Gisborne Herald*, 5 March 2008
- A88** Whi Wanoa, affidavit, 1 December 2009
- A89** Koroumatai Pewhairangi, affidavit, 3 December 2009
- (a) Whakapapa chart, undated
- (b) Te Haeata, 'Mataahu Ki Kokoronui', cluster 6 newsletters, nos 1–3, August 2008
- (c) Statement on behalf of descendants of Hauiti, Ruawaipu, and Uepohatu, 24 November 2009
- A90** Monty Soutar, affidavit, 2 December 2009
- (a) TRONP, *Annual Report 2009* (Gisborne: Ngāti Porou, 2009), p 12
- (b) TRONP, 'Marae Hapu Affiliations', 2009, printout from <http://www.ngatiporou.com/Whanaungatanga/Affiliations>
- (c) TRONP, registration form, undated
- (d) TRONP, list of marae grants since 2000, 7 September 2009
- (e) Example of tribal attestation form
- (f) Monty Soutar, 'Ngati Porou Leadership: Rapata Wahawaha and the Politics of Conflict', PhD thesis, Massey University, 2000, pp iii–xviii, 1–8, 27–33

A90—*continued*

(g) Henare Ngata, foreword to Monty Soutar, *Nga Tama Toa: The Price of Citizenship, C Company 28 (Maori) Battalion, 1939–1945* (Auckland: David Bateman, 2008)

A91 Selwyn Parata, affidavit, 2 December 2009

- (a) Whakapapa chart, undated
- (b) Whakapapa chart, undated
- (c) Whakapapa chart, undated

A92 Amohaere Houkamau, affidavit, 2 December 2009

- (a) Whakapapa chart, undated
- (b) Whakapapa chart, undated
- (c) Whakapapa chart, undated

A93 Teepa Wawatai, affidavit, 2 December 2009

- (a) Statement in support from Mere Matekino, 30 November 2009
- (b) Statement in support from Kura Walker, 1 December 2009
- (c) Statement in support from Murray Henare, 1 December 2009
- (d) Statement in support from Pierre Henare, 1 December 2009
- (e) Statement in support from T Pahuru, 1 December 2009
- (f) Statement in support from Daphne Poi, 1 December 2009
- (g) Statement in support from T Tuhaka, 2 December 2009
- (h) ‘Te Aitanga-a-Hauiti excited by settlement opportunity’, media statement, undated
- (i) Teepa Wawatai, supplementary affidavit, 3 December 2009; Tukoroirangi Morgan, letter to Apirana Mahuika, 2 December 2009

A94 Apirana Mahuika, affidavit, 2 December 2009

- (a) Supporting documents, various dates
- (b) Apirana Mahuika, letter to MFTOWN, 29 September 2009
- (c) Sir Tipene O’Regan, letter to Apirana Mahuika, 26 November 2009
- (d) Sir Archie Tairoa, letter to Apirana Mahuika, 26 November 2009

A95 Charles Collier, affidavit, 22 April 2009

- (a) Statement supporting mandating process, 16 January 2008

A96 Morehu Te Maro, affidavit, 22 April 2009

- (a) Statement supporting mandating process, 16 January 2007
- (b) Statement supporting mandating process, 16 January 2008
- (c) Statement supporting mandating process, 16 January 2007

RECORD OF INQUIRY

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- A98** William Pepere, affidavit, 7 April 2009
(a) Statement supporting mandating process, 16 January 2007
- A99** Chuck Atkins, affidavit, 7 April 2009
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- A100** Quentin Walker, affidavit, 7 April 2009
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- A103** Ngarongotoa Raroa, affidavit, 7 April 2009
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- A105** Kura Tibble, affidavit, 7 April 2009
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(b) Extract from minutes of Te Riu o Waiapu cluster hui, 3 February 2009
(c) Extract from minutes of Te Riu o Waiapu cluster hui, 3 February 2009
- A106** Paul James, brief of evidence, 2 December 2009
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- A108** Allan Henry Koia, brief of evidence, 3 July 2009
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(k) Te Aitanga-a-Hauiti oral interviews project, extracts, DVD 2, 9 December 2009

(l) Te Aitanga-a-Hauiti oral interviews project, extracts, DVD 3, 9 December 2009

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(a) 'Appendix 1: Crown offer to Ngati Porou', attachment to document A115, undated

(b) 'Appendix 2: Definitions, terms and conditions', attachment to document A115, undated

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RECORD OF INQUIRY

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A131—*continued*

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