

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'.<sup>1</sup> 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'.<sup>2</sup>

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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.'<sup>3</sup> 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.'<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

#### **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

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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.<sup>7</sup> 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.<sup>8</sup>

### **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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

### **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

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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.<sup>12</sup> 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.<sup>13</sup>

### **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.<sup>14</sup> In February 2007, TRONP

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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.<sup>15</sup> The following month, the Crown endorsed TRONP's strategy.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup>

### **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.<sup>20</sup> 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.'<sup>21</sup> A further urgency application was submitted on 20 October 2008 by Mr Tūpara, on behalf of Mr Koia.<sup>22</sup> 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.'<sup>23</sup>

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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.<sup>24</sup> 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.<sup>25</sup> 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);<sup>26</sup>
- ▶ Wai 2185: Te Aitanga-a-Hauiti, Whānau-hapū a Ruawaipu, and Ngāti Uepohatu urgent settlement claim (represented by Mr Naden and Ms Thornton);<sup>27</sup> 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).<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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.’<sup>32</sup> The direction set down the hearing dates, venue, and timetable for filing of evidence and submissions. Judge Clark also indicated which groups would be

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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.<sup>33</sup>

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.<sup>34</sup> Judge Clark made it clear that, due to time constraints, 'the Tribunal is not particularly interested in receiving or hearing exhaustive traditional evidence'.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> Hapuoneone were concerned that they were excluded altogether from the negotiations and the mandating process.<sup>39</sup> 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

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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.<sup>40</sup> 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.<sup>41</sup>

### 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.<sup>42</sup>

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

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40. Paper 2.5.10

41. Paper 2.6.2

42. Judge C Coxhead, opening remarks, day 1, sess1 (transcript 4.1.1, p 12)

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.