

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.