

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



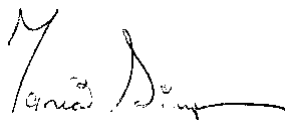
The Honourable Sir Douglas Lorimer Kidd KNZM, member



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Kihī Ngatai QSM, member



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