

CHAPTER 2

TRONP'S MANDATING PROCESS AND THE CROWN'S RESPONSE

INTRODUCTION

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

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

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

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

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

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

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

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

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

THE MANDATING PROCESS

Exploratory discussions

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

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

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

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

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

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

TRONP's mandating strategy

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

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

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

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

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

8. Ibid, p 2 (p 997)

9. TRONP, mandate strategy, undated (TRONP, 'Ngāti Porou Deed of Mandate', 10 December 2007, attachment 4), p1 (doc A40(a), p 665)

10. Ibid, p 2 (p 666)

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

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

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

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

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

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

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

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

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

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

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

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

The Crown's response to TRONP's mandating strategy

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

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

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

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

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

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

19. Ibid

20. Ibid

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

22. Ibid, p 2 (p 511)

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

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

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

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

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

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

24. Ibid

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

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

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

Publicising Ngāti Porou's negotiations

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

TRONP's advertising campaign and information hui

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

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

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

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

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

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

TRONP's postal voting pack

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

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

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

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

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

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

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

Registering with TRONP

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

Results of TRONP's postal ballot

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

Presentation of the mandate to the Crown

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

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

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

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

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

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

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

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

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

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

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

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

39. Document A117(a)

40. Ibid

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

42. Paper 3.3.20, p 25

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

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

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

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

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

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

45. Ibid

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

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

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

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

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

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

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

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

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

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

51. Ibid, slides 1–39 (pp 1023–1061)

THE CROWN'S RECOGNITION OF TRONP'S MANDATE

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

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

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

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

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

55. Ibid, pp 1–2 (pp 1191–1192)

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

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

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

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

TRIBUNAL ANALYSIS OF THE PROCESS

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

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

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

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

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

Crown awareness of claimant concerns

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

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

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

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

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

60. Ibid, p 1 (p 68)

61. Ibid, pp 1–3 (pp 68–70)

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

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

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

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

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

65. Document A6, pp 4–5

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

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

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

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

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

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

He continued:

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

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

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

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

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

72. *Ibid*

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

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

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

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

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

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

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

76. Document A39, p10

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

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

79. Ibid, p2 (p542)

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

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

82. Ibid

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

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

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

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

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

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

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

84. Ibid, p 4 (p 581)

85. Ibid

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

87. Ibid

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

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

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

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

Crown proposals to meet claimant concerns

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

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

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

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

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

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

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

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

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

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

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

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

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

Assessment of claimant support

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

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

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

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

96. Ibid, pp 7–8 (pp 1169–1170)

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

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

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

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

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

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

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

99. Document A6, p 18

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

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

102. Ibid, p 116

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

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

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

103. Document A41, p15

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

105. Document A41, p15

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

107. Document A3(e)

108. Paper 3.3.28, pp 37–38

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

110. Document A107, p18

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

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

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

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

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

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

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

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

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

113. Ibid, p 4

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

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

Flaws in the Crown's process

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

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

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

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

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

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

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

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

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

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

119. Document A1, p 31

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

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

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

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

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

CONCLUSIONS

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

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

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

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

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

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

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

