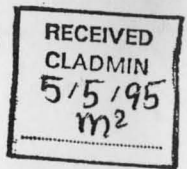


Wai 46 #2-88  
Wai 247 #2-5



WAI 46 AND OTHERS

**WAITANGI TRIBUNAL**

**DUPLICATE**

**CONCERNING**

Ngati Awa, Tuwharetoa ki Kawerau  
and other claims of the Eastern Bay of  
Plenty

**TO** Hon MJF Luxton, Minister of Maori Affairs

**AND TO** Hon DAM Graham, Minister in Charge of Treaty of Waitangi Negotiations

Hon P R Burdon, Minister for State-Owned Enterprises

Hon DWA Marshall, Minister of Lands, Survey & Land Information

**DISPOSAL OF CROWN LAND IN THE EASTERN BAY OF PLENTY**

In July 1994 the Tribunal began hearing the claims of Ngati Awa, Tuwharetoa ki Kawerau and other groups of the Eastern Bay of Plenty that centre on the Rangitaiki plains and the communities of Matata, Kawerau, Te Teko, Edgecumbe, Whakatane and Ohope. As the claims are distinctive, each is being heard separately before combined hearings on common issues are arranged.

The Tribunal has now part heard the Ngati Awa and Tuwharetoa ki Kawerau claims. Although Crown counsel have yet to reply, the Tribunal is satisfied that Ngati Awa and Tuwharetoa ki Kawerau have significant and compelling claims which, unless there is an equally compelling rejoinder, are likely to be well founded and to justify substantial compensation.

In anticipation of compensation, the claimants contend that the sale of local Crown assets prejudices their chances of securing future land returns. They have sought recommendations that Crown land be not sold pending the Tribunal's final report, and, if the report is favourable to them, a negotiated settlement.

The claims mainly concern the Eastern Bay of Plenty land confiscations last century and the subsequent imprisonments and enforced relocations on reserves. It is contended that Crown policies in these respects have severely limited the peoples' subsequent development and contribution to New Zealand society with negative impacts still apparent today.

It has been strongly argued by legal counsel that not only were the confiscations, imprisonments and relocations contrary to the principles of the Treaty of Waitangi, but

the steps taken with regard to confiscation in this district, were inconsistent with the governing legislation itself, and to that extent were illegal and unlawful.

On the evidence to date the claims appear to be unique amongst the raupatu claims as a whole in that:

- pro-rata, the confiscations were as large in this district as elsewhere, and yet the acts of warfare were less, and fewer of the Maori population were involved in fighting;
- some Ngati Awa hapu were marginally involved in the fighting or not involved at all and yet the lands of all were affected;
- there is no evidence (as yet) that Tuwharetoa ki Kawerau fought against the Crown. The evidence is rather that they fought on the Crown's side, yet their lands were taken too;
- the tribes of the other raupatu districts of Taranaki, Tainui, Tauranga and Whakatohea have all received some compensation for land confiscations but Ngati Awa and Tuwharetoa ki Kawerau have yet to receive any confiscation compensation at all; and
- in the result those other tribes, and the adjoining peoples of Tuhoe and Te Arawa who received lake compensation, have all had the benefit of tribal trust boards to represent their tribes on national issues and to advance the social and economic development of those tribes. Most of these trust boards have existed now for over 50 years, providing a competitive edge for their people in the process, while Ngati Awa and Tuwharetoa ki Kawerau have languished. It is claimed a priority of attention is now due to those who have had nothing and who have some catching up to do.

It is now well established in Treaty law, that compensation should be payable where serious past breaches of the Treaty are proven, that the return of land where practicable, is an important item of any relief package, and that the Crown should not divest itself of properties without a protective scheme for recovery, where claims justifying substantial compensation are likely to be proven. We report that this is a case where the claims are likely to be proven. This is also a case where the claims, if proven, are likely to justify substantial compensation.

Ngati Awa claimants have drawn our attention to advertisements and notices of July 1994 for the sale of five Crown properties in Edgecumbe on confiscated land, and of a property at Churchill Street in Whakatane. Ngati Awa notified the Crown of their interest in those properties and sought the establishment of the landbank as a hedge against further alienations. To date no arrangements have been made to defer the sales and no landbanking structure is in place. On the contrary we are advised of proposals to proceed with the sales.

In rejoinder Crown counsel advised that a landbanking arrangement has not been

settled as the Crown's conditions have yet to be agreed to. These conditions are, in paraphrase:

- (a) that the cost of acquiring and maintaining the properties shall be off-set against the claims settlements;
- (b) the land will be banked "as is, where is";
- (c) no land can be withdrawn from the bank without Crown consent;
- (d) the land will be the first Crown land assets used in any settlement;
- (e) a cap will be set on the value of the landbank "above which the value of the assets will not exceed"; and
- (f) the landbank will be reviewed every 12 months and the Crown reserves the right to cancel the landbank and free the properties for sale.

In addition Crown counsel has drawn attention to two further conditions:

- (g) that the correct claimants and claimant representatives must be identified; and
- (h) that the claim area is sufficiently clear.

We have doubts that (a)-(f) of the Crown's imposed conditions are fair and reasonable or consistent with the principles of the Treaty of Waitangi. The billing of holding costs to claimants for example, appears to assume that the sole benefit of landbanking is for the claimant when in reality, landbanking is also to enable the Crown to meet the Crown's obligations to remedy Treaty breaches. In any event the conditions as a whole, when coupled with continuing sales, creates impossible situations for the claimants. A studied selection of properties is required under these conditions, especially when holding costs are to be charged against the settlement and may be considerable if the lands are held for some time. No studied selection is feasible however when the menu of properties with information as to likely availability for settlement is unknown to claimants, or when claimants are forced to deal with properties on an ad hoc basis as and when they are advertised for sale.

Whether or not the Crown's conditions are fair and reasonable or consistent with the principles of the Treaty of Waitangi is not an issue for the moment. It is a matter on which separate submissions may be made later, but for now, the pertinent point is that sales are proceeding, or seem likely to proceed, before a fair protective scheme has been agreed.

Conditions (g) and (h) do not appear to present any major or insurmountable problem.

There is no difficulty concerning representation for Ngati Awa and Tuwharetoa. After five hearings that began in July 1994, no-one has challenged that Ngati Awa is properly and exclusively represented by those from whom solicitors A G McDonald

and S P Bryers have instructions, or that Tuwharetoa ki Kawerau is represented by other than those who have instructed Dr R E Harrison QC. Similarly the claim areas are those identified in submissions put in through counsel in the course of the proceedings. We are satisfied that on the evidence to date, Ngati Awa and Tuwharetoa ki Kawerau can establish customary interests or ancestral associations throughout the areas described, either exclusively, or in joint or several association with others over time.

This leads to the point that some difficulty may be seen on account of the several overlapping tribal interests. Such overlaps are usual in customary Maori society. In the Tribunal's view these do not present insoluble problems of any great magnitude and should not present a problem in establishing a protective arrangement in this case. We refer to the following:

- (a) The Ngati Awa claim area includes the area in which Tuwharetoa ki Kawerau claims the predominant interest. In brief Ngati Awa contends that Tuwharetoa ki Kawerau is in fact part of Ngati Awa. We need not determine that issue at this point, but see no reason why the representatives for both groups cannot join, as they have done on this motion, for the purposes of maintaining a landbank, leaving appropriations until the Tribunal has finally reported.
- (b) The Ngati Awa claim area, which incorporates that of Tuwharetoa ki Kawerau, overlaps on the perimeters with areas claimed by other groups - Ngati Makino and Tuhourangi (of Te Arawa), Ikawhenua, Tuhoe and Whakatohea. These need not prevent the establishment of a Ngati Awa, Tuwharetoa landbank however, provided the perimeter groups have the opportunity at a later stage to make submissions on the ultimate disposal of any properties in the perimeter areas concerned. We do not think it impracticable to devise an appropriate arrangement. The properties immediately in question are not affected.

We point out in this latter respect, that at the opening hearing the adjoining tribes, while protesting their perimeter interests, were unanimous in their support of their relations of the coastal hapu (of Ngati Awa and Tuwharetoa) who clearly suffered the most from the Crown's confiscations in this district.

We add for completeness that counsel for Ngati Makino also sought to be involved in the landbanking arrangements. At this stage we are unable to so recommend for the reason that Ngati Makino has yet to be heard, and the strength of the Ngati Makino claim has yet to be demonstrated.

For these reasons we do not consider there exists any major impediment to the early establishment of an appropriate protective mechanism that has proper regard for the current position of the Ngati Awa and Tuwharetoa ki Kawerau claimants. Nor do we consider that the overlapping tribal interests are likely to frustrate any final resolution. It appears to us that reasonable compensation for affected tribes is practicable without the imposition of western concepts of boundaries, and that while claim boundaries may be necessary to determine the Crown assets likely to be affected, they are not necessary or conclusive for other purposes.

The Tribunal does not envisage a protracted inquiry on the Eastern Bay of Plenty claims, or that the Crown assets will need to be frozen for an undue time. The Tribunal should report on this matter within a year, sufficient to enable earnest negotiations for an agreed settlement to begin.

For now we report our finding that the disposal of Crown assets in this area, without an adequate or agreed protective arrangement being first in place, is contrary to the principles of the Treaty of Waitangi. We formally recommend that no asset sales proceed at this stage.

DATED at Wellington this 5<sup>th</sup> day of May 1995



Chief Judge ETJ Durie for Waitangi Tribunal members in the Ngati Awa, Tuwharetoa ki Kawerau and other claims of the Eastern Bay of Plenty



Copy to all counsel on the record