

THE  
NGĀTI TŪWHARETOA KI KAWERAU  
SETTLEMENT CROSS-CLAIM  
REPORT



THE  
NGĀTI TŪWHARETOA KI KAWERAU  
SETTLEMENT CROSS-CLAIM  
REPORT

WAI 996

WAITANGI TRIBUNAL REPORT 2003



The cover design by Cliff Whiting invokes the signing of the Treaty of Waitangi and the consequent interwoven development of Maori and Pakeha history in New Zealand as it continuously unfolds in a pattern not yet completely known

A Waitangi Tribunal report

ISBN 1-86956-270-4

[www.waitangi-tribunal.govt.nz](http://www.waitangi-tribunal.govt.nz)

Typeset by the Waitangi Tribunal

First published 2003 by Legislation Direct, Wellington, New Zealand

Printed by SecuraCopy, Wellington, New Zealand

This PDF edition incorporates minor stylistic and grammatical amendments to the original edition

Set in Adobe Minion and Cronos multiple master typefaces

## CONTENTS

Letter of transmittal. . . . .	ix
<b>CHAPTER 1: BACKGROUND TO THE URGENT HEARING . . . . .</b>	<b>1</b>
1.1 <i>The Ngāti Awa Raupatu Report</i> . . . . .	1
1.2 The redress offered to Ngāti Tūwharetoa ki Kawerau. . . . .	2
1.3 The Wai 524 Ngāti Rangitihi Tarawera lands claim . . . . .	4
1.4 The Wai 996 Ngāti Rangitihi Inland and coastal land blocks claim . . . . .	4
1.5 The application for urgency. . . . .	5
1.6 Further developments . . . . .	7
<b>CHAPTER 2: THE HEARING. . . . .</b>	<b>11</b>
<b>CHAPTER 3: SUBMISSIONS AND EVIDENCE . . . . .</b>	<b>13</b>
3.1 Submissions of Ngāti Rangitihi . . . . .	13
3.2 Evidence for Ngāti Rangitihi . . . . .	19
3.3 Submissions of the Crown. . . . .	26
3.4 Evidence for the Crown . . . . .	33
3.5 Submissions of Ngāti Tūwharetoa ki Kawerau . . . . .	38
3.6 Evidence for Ngāti Tūwharetoa ki Kawerau . . . . .	39
3.7 Submissions of Ngāti Awa . . . . .	41
3.8 Evidence for Ngāti Awa . . . . .	42
<b>CHAPTER 4: ANALYSIS, FINDINGS, AND RECOMMENDATIONS . . . . .</b>	<b>43</b>
4.1 The Crown's settlement offer to Ngāti Tūwharetoa ki Kawerau . . . . .	43
4.2 Our focus. . . . .	45
4.3 The issues . . . . .	48
4.4 The Crown's policy on cross-claims and cultural redress. . . . .	48
4.5 Communication and consultation with Ngāti Rangitihi . . . . .	55
4.6 Was the consultation adequate?. . . . .	57
4.7 Disunity . . . . .	61
4.8 Prejudice . . . . .	65
4.9 Findings . . . . .	66
4.10 Remedies. . . . .	68
4.11 Recommendations . . . . .	69

CONTENTS

**APPENDIX: RECORD OF INQUIRY.** . . . . . 71

Record of hearings . . . . . 71

Record of proceedings . . . . . 71

Record of documents. . . . . 75

TABLE OF ABBREVIATIONS

doc	document
DOC	Department of Conservation
ed	edition, editor
ha	hectare
ltd	limited
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
vol	volume
'Wai' is a prefix used with Waitangi Tribunal claim numbers	

The Honourable Parekura Horomia  
Minister of Māori Affairs



The Waitangi Tribunal  
110 Featherston Street  
WELLINGTON

and

The Honourable Margaret Wilson  
Minister in Charge of Treaty of Waitangi Negotiations

Parliament Buildings  
WELLINGTON

1 May 2003

Tēnā kōrua

We enclose the Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report. In it, we report on our urgent inquiry into the Wai 996 claim. That claim was the subject of a one-day hearing on 5 February 2003, and concerns challenges to the Crown's proposed settlement with Ngāti Tūwharetoa ki Kawerau brought on behalf of Ngāti Rangitihi, a neighbouring tribe.

The Wai 996 claimants say that their customary interests overlap with Ngāti Tūwharetoa ki Kawerau's, and that they are prejudiced by the provision of redress to Ngāti Tūwharetoa ki Kawerau in advance of any hearing of Ngāti Rangitihi's claims in the Waitangi Tribunal.

However, we accept that there is a proper basis for the Crown to settle with Ngāti Tūwharetoa ki Kawerau, and that for a fair and durable settlement with those people to be achieved, cultural redress needs to be included.

Accordingly, our focus in this inquiry is relatively narrow. Rather than the content of the settlement, we examine the Crown's policy and practice as it relates to cross-claims to cultural redress. The redress of particular concern here is various kinds of redress offered to Ngāti Tūwharetoa ki Kawerau in the vicinity of Matatā. Matatā is the modern-day centre of Ngāti Rangitihi's cultural identity. Ngāti Tūwharetoa ki Kawerau also have marae at Matatā, but the centre of their cultural identity today is Kawerau.

Examining the Crown's process of communication and consultation with Ngāti Rangitihi, we concluded that it fell short in several key ways:

- ▶ The Crown was too far along the track in its dealings with Ngāti Tūwharetoa ki Kawerau when consultations with Ngāti Rangitihi commenced. This meant that the agenda was already set, and room for manoeuvre was minimal.
- ▶ Given the constrained timeframe for the Crown's consultation with Ngāti Rangitihi, a high level of commitment to understanding and dealing with Ngāti Rangitihi's points

of view was required. The Crown did not devote the necessary resources to the Ngāti Rangitihi consultation.

- The focus of the Crown's information gathering about Ngāti Rangitihi was too narrow. It needed to encompass an understanding of the contemporary tribal landscape both surrounding and within Ngāti Rangitihi. We doubt that the officials concerned appreciated the importance of this understanding, nor conveyed it to their Minister.
- In this instance, the Crown departed from its usual policy for dealing with cross-claims. It did not require Ngāti Tūwharetoa ki Kawerau to address the cross-claimant issues with Ngāti Rangitihi, and nor did officials try to bring about agreement or understanding between the settling claimant and the cross-claimant. Instead, without providing any reasons for doing so, the Crown quickly moved to establish officials in the role of arbiters of whether Ngāti Rangitihi objections to items of redress were legitimate. In the first instance at least, the Crown's role is one of facilitation and consultation rather than arbitration. Only after conciliatory measures (such as facilitated hui, mediation, and use of a third party researcher) have been honestly tried and failed, should the Crown feel justified in standing back and simply making decisions on the merits of cross-claimants' objections to cultural redress.

The Crown's process was deficient, and breached the principles of the Treaty of Waitangi.

However, we are unable to make a clear finding as to prejudice to Ngāti Rangitihi arising from these breaches. This is because there is internal division in Ngāti Rangitihi, and we have been unable to ascertain the extent of support for this claim brought by Mr Potter and Mr Paterson. The claim purports to be on behalf of Ngāti Rangitihi, but we are not sure that it is.

In order to be prepared to recommend that the settlement with Ngāti Tūwharetoa ki Kawerau should now be halted in order for the procedural shortcomings we have identified to be remedied, we would need to be confident of a high level of support within Ngāti Rangitihi. As it is, it may be that many Ngāti Rangitihi people do not consider that they were prejudiced by the Crown's consultation process. Alternatively, they may not want the settlement with Ngāti Tūwharetoa ki Kawerau, with whom they have strong kin ties, to be halted.

Under these circumstances, we are prepared to find only that the claimants in Wai 996 have been prejudiced, and to recommend remedies that are at the lower end of the scale in terms of potential impact on tribal relations between Ngāti Rangitihi and Ngāti Tūwharetoa ki Kawerau.

Our key recommendation is that the door be left open to Ngāti Rangitihi, once its internal difficulties have been resolved, to take its place on the joint advisory committee with the Department of Conservation concerning key DOC lands near Matatā. We think that this



opportunity should be extended to Ngāti Rangitihi notwithstanding that its turn to settle with the Crown is still some years away. We think this is the least that can be done to ensure that contemporary understandings about tangata whenua status in and around Matatā are not jeopardised in a manner unfair to Ngāti Rangitihi.

‘He aute . . . He aute tāku manu tūārangī  
E rere . . . e rere atu  
I roto o te kōmurimuri  
A māna e whakaeke atu  
Ki runga ki ngā tūpari maunga  
Hui ee! Taiki ee!’

E whai ake nei ko ētahi atu kupu hei tāpiri atu ki te pūrongo whakatau a te Rōpū Whakamana i te Tiriti. E ai ki ngā tirohanga a te Rōpū Whakamana i te Tiriti e awangawanga ana i te mea kāore te rōpū i te tino mōhio mehemea kei te whai mana ngā māngai kōrero mō Ngāti Rangitihi.

Nā, ahakoa i hapa te Karauna i roto i ngā take e pā ana ki a Ngāti Rangitihi, kīhai te Rōpū Whakamana i te Tiriti i aukati i ngā whakatau a te Karauna me Ngāti Tūwharetoa ki Kawerau. Engari ko te whakahau kia maumahara te Karauna ki te āta whiriwhiri ki te tatari hoki i ngā take a ngā kaitono katoa.

Nāku noa.



Nā Judge Carrie Wainwright  
Presiding Officer



## CHAPTER 1

### BACKGROUND TO THE URGENT HEARING

#### 1.1 THE NGĀTI AWA RAUPATU REPORT

The Waitangi Tribunal released its *Ngāti Awa Raupatu Report* in October 1999 after hearing the Ngāti Awa and other claims over almost a year and a half in 1994 and 1995. The report urged the settlement of all historical matters with Ngāti Awa and Ngāti Tūwharetoa ki Kawerau.<sup>1</sup> It focused on the raupatu or confiscation of some 245,000 acres of land from the hills beyond the original course of the Tarawera River to Ōhiwa Harbour, and the ensuing land reorganisation and relocations.

While concentrating on the claim by Dr Hirini Mead for 21 Ngāti Awa hapū – the largest claim in terms of land area and number of people involved – the report also considered a claim on behalf of Ngāti Tūwharetoa ki Kawerau. These people, as their name implies, are based in the Kawerau district. They alleged that if it was proper for the Crown to have confiscated any land at all, it should not have been from them, as they remained neutral in the events to which the confiscation pertained. They adamantly denied any involvement in rebellion, although the Tribunal regarded this point as having little bearing as confiscation of land on this basis was in any event unjustified: the confiscation was contrary to the Treaty of Waitangi. Ngāti Awa and Ngāti Tūwharetoa ki Kawerau had valid Treaty claims in respect of the confiscation of lands as far east as Ōhiwa Harbour.<sup>2</sup>

The Ngāti Awa people claimed that the Ngāti Tūwharetoa ki Kawerau hapū are part of Ngāti Awa and that these should be included in their settlement. The Tribunal found that, while Ngāti Tūwharetoa ki Kawerau ‘could stand with Ngāti Awa if they chose, they also have a separate identity’, and that ‘there should be a separate settlement with [Ngāti] Tūwharetoa ki Kawerau on account of their distinctive lines’.<sup>3</sup> The Tribunal supported a separate settlement with Ngāti Tūwharetoa ki Kawerau not only on the basis of their distinct lineage, but also because of their different role in the relevant events.<sup>4</sup>

The *Ngāti Awa Raupatu Report* is not a full report on all aspects of the claims that were filed. Both Crown and claimant counsel considered that the main claims – relating to the

---

1. Waitangi Tribunal, *The Ngāti Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p ix

2. Ibid, pp 3–4

3. Ibid, pp ix, 3

4. Ibid, p 131

NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

1.2

raupatu and contemporary land allocations – were capable of settlement without the Crown concluding its evidence on these matters, and asked the Tribunal to complete a report on the main issues. The Tribunal did not investigate claims relating to the Native Land Court's award of lands outside the confiscation boundary and the acquisition of some of these lands by the Crown. These claims related mainly to the districts of Rotoehu, Matahina and Tarawera, yet the Tribunal considered that claims in respect of these lands should nevertheless be included within the settlement of the raupatu.<sup>5</sup>

The report noted that other iwi could establish legitimate customary links to some of the land affected by the Ngāti Awa claim. The Tribunal did not think it essential or desirable to define boundary lines on this matter, but did 'think it necessary that each group acknowledge the customary associations of the others. We would be suspicious of claims that any particular area was held exclusively by one group throughout the whole of history.'<sup>6</sup> Furthermore, for various reasons, the Tribunal was not able to report on the claims of other parties.<sup>7</sup> The Tribunal reserved the rights of those other groups, stating that 'the finalisation of their claims, if proven, will be proposed in other inquiries still to be undertaken'.<sup>8</sup>

The Tribunal stated, however, that 'the complex pattern of overlapping claims and boundaries need not inhibit a settlement'.<sup>9</sup> Such were the divisions resulting from the confiscations, the land returns and introduction of individual ownership through the Native Land Court, that the Tribunal considered that 'agreements are probably not presently possible. The effect of requiring full agreements will only exacerbate the divisions caused by the wrongs already done.'<sup>10</sup>

**1.2 THE REDRESS OFFERED TO NGĀTI TŪWHARETOA KI KAWERAU**

The Crown and Ngāti Tūwharetoa ki Kawerau entered into negotiations for the settlement of all Ngāti Tūwharetoa ki Kawerau historical claims in 1997. The parties decided not to enter into a heads of agreement but agreed to the scope of the redress package in December 2000. The Crown made a settlement offer in January 2001 that comprised a Crown apology, fiscal and commercial redress, cultural redress, and an overall settlement quantum. The Office of Treaty Settlements (OTS) defined the settlement as covering all Ngāti Tūwharetoa ki Kawerau claims 'arising out of the Treaty of Waitangi, the principles of the Treaty of Waitangi, statute, common law (including customary law and aboriginal title), fiduciary duty, or

---

5. Waitangi Tribunal, *The Ngāti Awa Raupatu Report*, p 8

6. Ibid, p 135

7. Ibid, p 4

8. Ibid, p 10

9. Ibid, p 131

10. Ibid, p 136

otherwise', from or relating to acts or omissions committed before 21 September 1992 by or on behalf of the Crown, or by or under legislation.<sup>11</sup>

The proposed package was subject to the 'Crown confirming that all overlapping claim issues in relation to any part of the settlement redress have been addressed to the satisfaction of the Crown'.<sup>12</sup> The mandated Ngāti Tūwharetoa ki Kawerau negotiators, Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee, agreed to the Crown's offer in February 2001 as a basis for a deed of settlement. On 2 October 2002, the Office of Treaty Settlements advised the Minister in Charge of Treaty of Waitangi Negotiations that all cross-claims issues regarding the proposed settlement had been 'satisfactorily addressed'.<sup>13</sup> The Minister informed cross-claimants the following day of her final decision that there was now 'no need to modify the redress package' and that the 'Crown will proceed with its settlement offer' to Ngāti Tūwharetoa ki Kawerau.<sup>14</sup> A deed of settlement was initialled between the Crown and the claims committee on 17 October 2002, and this was to be put to the Ngāti Tūwharetoa ki Kawerau people for the purpose of ratification in early 2003.

The offer includes the following categories and items of redress:

*Cultural redress:*

- ▶ Te Wahieroa, Te Kaukahiwi o Tirotirowhetū and Whakapaukōrero reserves: transfer of fee simple titles subject to existing reserve status and continued public access;
- ▶ Te Atua Reretahi: transfer of fee simple title subject to a conservation covenant;
- ▶ Otitapu Lookout: transfer of fee simple title subject to a protected private land agreement to protect conservation values;
- ▶ establishment of a joint advisory committee in respect to the Matatā scenic reserve and Te Awa a Te Atua (Matatā wildlife refuge reserve);
- ▶ statutory acknowledgements and deeds of recognition in relation to the Rotomā Forest conservation area, the Lake Rotomā scenic reserve, the Lake Tāmurenuī wildlife management reserve, and parts of the Tarawera and Rangitaiki Rivers;
- ▶ a geothermal statutory acknowledgement over the Kawerau geothermal system;
- ▶ establishment of protocols in the Ngāti Tūwharetoa ki Kawerau area of interest to promote effective working relationships on matters of cultural importance to that iwi with various Government departments;
- ▶ grant of a one-hectare renewable nohoanga (temporary camping) entitlement within the Matatā wildlife refuge reserve; and
- ▶ an ōwhakatihi (overlay classification) and acknowledgement of values and association in respect to the Parimahana scenic reserve.

---

11. Paper 2.17, annex 1, para 35

12. Ibid, annex 1, paras 3 (a), 20 (a)

13. Document A23(a), annex 41, para 49

14. Ibid, annex 42

NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

1.3

The Crown characterises some of the items of cultural redress offered to Ngāti Tūwharetoa ki Kawerau as exclusive redress (redress available to only one claimant group), whereas others are non-exclusive redress (redress that can be offered to more than one group).<sup>15</sup>

*Commercial redress:*

- ▶ an offer for purchase by Ngāti Tūwharetoa ki Kawerau of approximately 844 hectares of licensed Crown forest land within the Rotoehu West Crown forestry licence;
- ▶ a right of first refusal over a Crown-owned geothermal bore; and
- ▶ a right to purchase certain properties that were in the Crown's land bank.

A total redress quantum of \$10.5 million was established to settle all Ngāti Tūwharetoa ki Kawerau historical claims.

On 29 March 2001, OTS forwarded for comment the Crown's settlement offer to Ngāti Tūwharetoa ki Kawerau to those claimants it had identified as having overlapping interests. It sought to ascertain whether there were any cross-claims issues regarding particular items of redress in the settlement offer requiring further consideration. Cross-claimants were invited to make any comments by 30 April 2001.

**1.3 THE WAI 524 NGĀTI RANGITIHI TARAWERA LANDS CLAIM**

The Wai 524 claim was registered in July 1995. It is a claim made on behalf of certain prominent members of the tribe (Leith Pirika Comer; Nirai Raureti; William Savage; Marion Amai; Duke Keepa; and Arapeka Tuna) and the 'Ngāti Rangitihi people in general'.<sup>16</sup> The original claim was filed in 'the matter of the land blocks Rotomahana-Parekarangi, Ruawāhia and Rerewhakaaitu', which are land blocks located in the Tarawera basin.<sup>17</sup> Prior to the Tarawera eruption in 1886, Ngāti Rangitihi life and mana was centred on Tarawera Maunga and the surrounding lands. The acts and omissions alleged against the Crown, however, imply a potentially wider geographical ambit than the three blocks mentioned. An amendment of the claim in September 1996 specifically includes two further areas: the Tarawera forests to the west of the Rangitaiki River, and parts of the northern portion of the Kaingaroa State Forest north of State Highway 38.

**1.4 THE WAI 996 NGĀTI RANGITIHI INLAND AND COASTAL LAND BLOCKS CLAIM**

On 21 March 2002, David Potter and André Paterson filed a statement of claim with the Waitangi Tribunal on behalf of themselves and Ngāti Rangitihi relating to the confiscation

---

15. For a discussion on items of cultural redress in and around Matatā, and their characterisation as exclusive or non-exclusive redress, see section 4.1.

16. Wai 524 ROI, claim 1.1

17. Ibid

of both inland and coastal lands from Matatā to Ōtamarākau, the use and pollution of the Rangitaiki and Tarawera rivers, and the taking of various lands at Pikowai for the purposes of public works. A set of decisions made at a hui of Ngāti Rangitihi held at Rangiaohia Marae on 9 March 2002 was appended to the statement of claim. These included informing OTS that the lands that Ngāti Rangitihi 'lay claim to and have an interest in should not be included in the Ngāti Awa and [Ngāti] Tūwharetoa settlements', and that 'there will be a request to the Waitangi Tribunal for an urgent hearing'.<sup>18</sup> The claim was registered on 6 August 2002 as Wai 996. The claim area straddles the current boundaries of the Waitangi Tribunal's Rotorua, Urewera and Kaingaroa district inquiries.<sup>19</sup>

### 1.5 THE APPLICATION FOR URGENCY

On 11 November 2002, counsel for the Wai 996 claimants applied for an urgent hearing in respect of the proposed Crown settlement with Ngāti Tūwharetoa ki Kawerau on the basis that its implementation would cause 'significant and irreversible prejudice to Ngāti Rangitihi'.<sup>20</sup> The application, although stating that Ngāti Rangitihi did not wish to obstruct or impede the settlement between the Crown and Ngāti Tūwharetoa ki Kawerau, declared that the settlement offer related to assets and locations within the traditional rohe of Ngāti Rangitihi. The applicants felt concerned that areas of historical and cultural importance could be offered by the Crown to any persons other than Ngāti Rangitihi. Counsel for the Wai 996 claimants stated that his clients had attempted to indicate to the Crown how the proposed settlement would prejudice Ngāti Rangitihi. Yet the Crown, counsel asserted, had 'failed to have regard to these concerns and protests despite the fact that it does not have the benefit of Tribunal research, evidence, Inquiry or Report into the Ngāti Rangitihi lands and claims; nor has it had regard to the fact that an Inquiry into these matters is about to commence'.<sup>21</sup>

Claimant counsel stated that their clients had been advised that the Crown's settlement policies regarding the offer to Ngāti Tūwharetoa ki Kawerau had been guided by the Waitangi Tribunal's observations as set out in the *Ngāti Awa Raupatu Report*. This was of particular concern to the claimants as they 'took no part in this enquiry and thus have had no opportunity to give evidence to the Tribunal on their traditional boundaries or to influence the findings of the report in any manner'.<sup>22</sup> As the claimants understood that this report was now being used as the basis for entering into settlements that would have significant impact on their rights and interests, counsel felt that the Crown was not in a position to conclude that any settlement with Ngāti Tūwharetoa ki Kawerau would not prejudice any other group

---

18. Claim 1.1

19. Paper 2.1

20. Paper 2.4, para 5

21. Ibid, para 26

22. Ibid, para 33

with interests in the areas covered by the proposed deed. This amounted to not only a denial of natural justice, but also a breach of the Treaty of Waitangi. The claimants requested an urgent hearing to prove the prejudice which would result to Ngāti Rangitihi if the Crown proceeded with the settlement offer.

In a memorandum and directions dated 18 November 2002, the Acting Chairperson of the Waitangi Tribunal authorised Judge Carrie Wainwright to determine the application.<sup>23</sup> Three days later, Judge Wainwright directed counsel for the Wai 996 claimants, the Crown, and Ngāti Tūwharetoa ki Kawerau to file memoranda with the Tribunal by 4 December 2002 outlining their respective positions in relation to the request for urgency.<sup>24</sup>

In their memorandum in response to Judge Wainwright's directions, counsel for the applicants contested virtually every item of redress being offered to Ngāti Tūwharetoa ki Kawerau. Yet counsel emphasised that they did not want the 'inquiry to become fixated solely on the provisions of the [Ngāti] Tūwharetoa ki Kawerau deed of settlement or on the specific redress offered to [Ngāti] Tūwharetoa ki Kawerau or what might or might not be offered to Ngāti Rangitihi'.<sup>25</sup> The claimants, counsel stated, instead felt more concerned about the current developments in the Crown's Treaty settlements policy and the process by which it came to make the offer to Ngāti Tūwharetoa ki Kawerau. Those issues of process were, first, the Crown proposing a deed of settlement without a comprehensive Waitangi Tribunal district inquiry involving all affected iwi and hapū; and, secondly, that the offer was made with no significant consultation or discussion with Ngāti Rangitihi.<sup>26</sup> Counsel contended that the correspondence and material provided by the Crown to Ngāti Rangitihi did not sufficiently inform the claimants about the settlement offer. The inadequate consultation and the Crown's making a settlement offer without a Tribunal district inquiry had important implications not only for Ngāti Rangitihi but for all iwi and hapū throughout Aotearoa.

Both the Crown and Ngāti Tūwharetoa ki Kawerau opposed the application. The Crown's opposition was on the grounds that the Tribunal had already heard similar challenges to the relevant Crown policies during the recent Ngāti Awa Settlement Cross-Claims Inquiry. That Tribunal concluded that the policy of the Crown of negotiating settlements in advance of the Tribunal having heard and reported on all cross-claims is not a breach of the Treaty or its principles.<sup>27</sup>

Crown counsel contended that the Crown had been engaged in a lengthy consultation process with Ngāti Rangitihi and the Wai 996 claimants. They had ample opportunity to inform the Crown of their concerns about the proposed Ngāti Tūwharetoa ki Kawerau settlement. The Crown had fully informed itself of all issues put forward by the Wai 996 claimants and had fairly weighed the respective interests of Ngāti Rangitihi and Ngāti Tūwharetoa ki

---

23. Paper 2.7

24. Paper 2.8

25. Paper 2.14, para 19

26. Ibid, paras 17–18

27. Paper 2.17, para 57



Kawerau, seeking, where possible, to structure a settlement package that minimises any negative impact on Ngāti Rangitihi. It would be inappropriate for the initialled deed of settlement to be made subject to further mediation and/or discussion, and no additional investigation was required.<sup>28</sup>

Counsel for Ngāti Tūwharetoa ki Kawerau concurred, opposing the application on the basis that ‘discussion or mediation on the settlement with Ngāti Rangitihi will disrupt and delay the ratification process and the settlement process generally, with no useful purpose’.<sup>29</sup> The Ngāti Tūwharetoa ki Kawerau Claims Committee was ‘surprised’ by the request for an urgent hearing as it considered there had ‘been plenty of opportunity’ for Ngāti Rangitihi to raise their concerns.<sup>30</sup> Counsel for Ngāti Tūwharetoa ki Kawerau also considered that the issues being raised by the Wai 996 claimants were similar to those already heard by the Ngāti Awa settlement cross-claims Tribunal, and that that ‘Tribunal’s finding applies equally to the Ngāti Tūwharetoa settlement’.<sup>31</sup> Moreover, the proposed settlement ‘does not preclude the interests of other iwi and hapū, including Ngāti Rangitihi, being recognised in future Treaty settlements negotiated with the Crown. In that sense, the Ngāti Tūwharetoa redress is “non-exclusive”’.<sup>32</sup> Each redress item was a key element in the overall package and any removal or alteration would result in a settlement of diminished value to Ngāti Tūwharetoa ki Kawerau. Counsel stated that her clients had already made ‘several concessions in relation to the redress’.<sup>33</sup> She thus concluded that the Wai 996 application for urgency should not affect the proposed settlement with the Crown in any way, and that a hearing was not necessary.<sup>34</sup>

In directions dated 20 December 2002, Judge Wainwright, having considered the filed memoranda that ‘helpfully amplified the respective positions of the parties’, granted to the applicants an urgent hearing of one day’s duration at the Tribunal’s office in Wellington.<sup>35</sup> The hearing date was 5 February 2003.<sup>36</sup>

## 1.6 FURTHER DEVELOPMENTS

Less than a week before the date appointed for the urgent hearing, the Tribunal received a letter from a new participant. In the letter (dated 30 January 2003), John Kahukiwa informed the Tribunal that he was about to be appointed counsel for the Wai 524 claim described above (see s1.3), lodged by Leith Comer and others on behalf of themselves and Ngāti

28. Ibid, paras 113, 120–121

29. Paper 2.15(a), para 13

30. Ibid, para 10

31. Ibid, para 18

32. Ibid, para 17

33. Ibid, para 47

34. Ibid, para 50

35. Paper 2.18

36. Paper 2.21

Rangitihi. Mr Kahukiwa stated that as his clients were Ngāti Rangitihi, they were also an ‘interested party in this urgent proceeding’, and he requested that he be provided with the memoranda filed in support of and in opposition to the Wai 996 application so as to assess whether or not he would seek leave to attend the urgent hearing.<sup>37</sup>

Counsel for the Wai 996 claimants, Ms Edmunds, then responded to Mr Kahukiwa’s letter in a letter of her own.<sup>38</sup> In it, she emphasised to the Tribunal the importance of the forthcoming hearing being allowed to proceed smoothly, and questioned the mandate of Mr Kahukiwa to act for Wai 524. She said the Ngāti Rangitihi Claims Committee had instructed her to act for Wai 524 as well,<sup>39</sup> and that some of the trustees of the Ruawāhia 2B Trust supported this instruction. In addition, no new legal counsel had been officially appointed since David (Rawiri) Rangitauira stood down as counsel for Wai 524 some time earlier. Counsel for Wai 996 doubted whether Mr Kahukiwa had proper authority to act for Wai 524. Given the confused state of internal mandate, ‘it would be questionable as to whether any proper instructions could be obtained’.<sup>40</sup>

Mr Kahukiwa responded by stating that he had been formally appointed counsel for Wai 524 by one of the named claimants, Mr Comer.<sup>41</sup> As the Wai 996 urgent hearing concerned the rangatiratanga of Ngāti Rangitihi, Mr Kahukiwa’s clients would be especially interested in the proceeding, and he again asked to be served with all documents filed in the Wai 996 urgent application so he could consider whether or not to seek leave to participate. Mr Kahukiwa believed that until a proper tribal hui had been convened to clarify matters of representation, it was probably best that the ‘two camps’ be permitted to continue to ensure representation of all of the Ngāti Rangitihi interests.<sup>42</sup>

The presiding officer sought to clarify who Mr Kahukiwa was actually representing, and what their position was in regard to the Wai 996 urgency. She convened a teleconference on the morning of 4 February 2003. The participants were counsel for the Crown, counsel for Ngāti Tūwharetoa ki Kawerau, counsel for the Wai 996 claimants, counsel for Ngāti Awa, and Mr Kahukiwa. Mr Kahukiwa stated that he was of the understanding that he was now acting counsel for Wai 524 after being appointed by Mr Comer on 30 January 2003 to act on his behalf and those wishing to be represented by that claim. This included Henare Pryor, Whaimutu Dewes, and their respective whānau. Mr Kahukiwa was unable to clarify the

---

37. Paper 2.27(a)

38. Paper 2.30. Ms Edmunds requested in her letter that it not be placed on the public record of the Tribunal because the content related to ‘internal Ngāti Rangitihi mandate’ and went ‘to issues of reputation of other counsel’. The letter was addressed to the registrar. It related to matters then under consideration by the presiding officer, so the registrar referred the letter to the presiding officer, and she read it. Accordingly, it is right that the letter be entered on the record. Counsel cannot divulge information to the Tribunal that is material to their work and then expect it to be kept secret (except where the information is tapu, which places it in a special category).

39. Paper 2.30

40. Ibid

41. Paper 2.31

42. Ibid

views of his clients regarding the urgency. Mr Kahukiwa had not seen the Wai 524 and Wai 996 statements of claim. Counsel for Wai 996, after voicing concern about the intervention of another party so late in the piece, stated that at least two trustees of the Ruawāhia 2B Trust (Reuben Perenara and André Paterson) wanted her to act for Wai 524. The Ruawāhia lands are among those specifically mentioned in the Wai 524 statement of claim. Ms Edmunds said that disagreement had arisen within the Ngāti Rangitihi Claims Committee in November 2002, eventually resulting in a schism. This committee was charged with overseeing the Wai 524 claim. The internal divisions meant that nobody could now claim to represent Wai 524 in its entirety.

Judge Wainwright told the parties that the urgency would proceed on the basis that the representation issues would not be resolved by the time of the hearing (the following day). She requested that Mr Kahukiwa fully inform himself of the various issues relating to the Wai 524 and Wai 996 claims, and ascertain the views of his clients regarding the Wai 996 claimants' contesting of the Ngāti Tūwharetoa ki Kawerau settlement offer. Judge Wainwright directed Mr Kahukiwa to file a memorandum on those views. The memorandum, filed on the day of the hearing, took the matter no further. Mr Kahukiwa maintained that he had had insufficient opportunity to consider the documents and obtain instructions.<sup>43</sup>

Ngāti Awa also sought to be involved at a late stage. In a memorandum dated 4 December 2002, counsel for Ngāti Awa (Wai 46 and 206) asked the Tribunal to note that Ngāti Awa had interests in the areas that were subject to the Wai 996 claim. It was not anticipated that Ngāti Awa would be an active participant in the hearing but counsel reserved Ngāti Awa's position in this regard.<sup>44</sup>

Then, after reviewing the evidence filed on behalf of the Wai 996 claimants, counsel for Ngāti Awa revised his position. At a pre-hearing teleconference on 29 January 2003, he said that he would be submitting a memorandum and supporting brief of evidence in response to evidence filed in support of the Wai 996 claimants. He expressed concern about 'a number of observations about the nature and extent of Ngāti Awa interests in the claim area', and especially of some comments that he considered were 'disparaging of Ngāti Awa'.<sup>45</sup> The presiding officer granted Ngāti Awa the leave sought.

---

43. Paper 2.35

44. Paper 2.16, para 3

45. Paper 2.29, para 4



## CHAPTER 1

### BACKGROUND TO THE URGENT HEARING

#### 1.1 THE NGĀTI AWA RAUPATU REPORT

The Waitangi Tribunal released its *Ngāti Awa Raupatu Report* in October 1999 after hearing the Ngāti Awa and other claims over almost a year and a half in 1994 and 1995. The report urged the settlement of all historical matters with Ngāti Awa and Ngāti Tūwharetoa ki Kawerau.<sup>1</sup> It focused on the raupatu or confiscation of some 245,000 acres of land from the hills beyond the original course of the Tarawera River to Ōhiwa Harbour, and the ensuing land reorganisation and relocations.

While concentrating on the claim by Dr Hirini Mead for 21 Ngāti Awa hapū – the largest claim in terms of land area and number of people involved – the report also considered a claim on behalf of Ngāti Tūwharetoa ki Kawerau. These people, as their name implies, are based in the Kawerau district. They alleged that if it was proper for the Crown to have confiscated any land at all, it should not have been from them, as they remained neutral in the events to which the confiscation pertained. They adamantly denied any involvement in rebellion, although the Tribunal regarded this point as having little bearing as confiscation of land on this basis was in any event unjustified: the confiscation was contrary to the Treaty of Waitangi. Ngāti Awa and Ngāti Tūwharetoa ki Kawerau had valid Treaty claims in respect of the confiscation of lands as far east as Ōhiwa Harbour.<sup>2</sup>

The Ngāti Awa people claimed that the Ngāti Tūwharetoa ki Kawerau hapū are part of Ngāti Awa and that these should be included in their settlement. The Tribunal found that, while Ngāti Tūwharetoa ki Kawerau ‘could stand with Ngāti Awa if they chose, they also have a separate identity’, and that ‘there should be a separate settlement with [Ngāti] Tūwharetoa ki Kawerau on account of their distinctive lines’.<sup>3</sup> The Tribunal supported a separate settlement with Ngāti Tūwharetoa ki Kawerau not only on the basis of their distinct lineage, but also because of their different role in the relevant events.<sup>4</sup>

The *Ngāti Awa Raupatu Report* is not a full report on all aspects of the claims that were filed. Both Crown and claimant counsel considered that the main claims – relating to the

---

1. Waitangi Tribunal, *The Ngāti Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p ix

2. Ibid, pp 3–4

3. Ibid, pp ix, 3

4. Ibid, p 131

## NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

1.2

raupatu and contemporary land allocations – were capable of settlement without the Crown concluding its evidence on these matters, and asked the Tribunal to complete a report on the main issues. The Tribunal did not investigate claims relating to the Native Land Court's award of lands outside the confiscation boundary and the acquisition of some of these lands by the Crown. These claims related mainly to the districts of Rotoehu, Matahina and Tarawera, yet the Tribunal considered that claims in respect of these lands should nevertheless be included within the settlement of the raupatu.<sup>5</sup>

The report noted that other iwi could establish legitimate customary links to some of the land affected by the Ngāti Awa claim. The Tribunal did not think it essential or desirable to define boundary lines on this matter, but did 'think it necessary that each group acknowledge the customary associations of the others. We would be suspicious of claims that any particular area was held exclusively by one group throughout the whole of history.'<sup>6</sup> Furthermore, for various reasons, the Tribunal was not able to report on the claims of other parties.<sup>7</sup> The Tribunal reserved the rights of those other groups, stating that 'the finalisation of their claims, if proven, will be proposed in other inquiries still to be undertaken'.<sup>8</sup>

The Tribunal stated, however, that 'the complex pattern of overlapping claims and boundaries need not inhibit a settlement'.<sup>9</sup> Such were the divisions resulting from the confiscations, the land returns and introduction of individual ownership through the Native Land Court, that the Tribunal considered that 'agreements are probably not presently possible. The effect of requiring full agreements will only exacerbate the divisions caused by the wrongs already done.'<sup>10</sup>

**1.2 THE REDRESS OFFERED TO NGĀTI TŪWHARETOA KI KAWERAU**

The Crown and Ngāti Tūwharetoa ki Kawerau entered into negotiations for the settlement of all Ngāti Tūwharetoa ki Kawerau historical claims in 1997. The parties decided not to enter into a heads of agreement but agreed to the scope of the redress package in December 2000. The Crown made a settlement offer in January 2001 that comprised a Crown apology, fiscal and commercial redress, cultural redress, and an overall settlement quantum. The Office of Treaty Settlements (OTS) defined the settlement as covering all Ngāti Tūwharetoa ki Kawerau claims 'arising out of the Treaty of Waitangi, the principles of the Treaty of Waitangi, statute, common law (including customary law and aboriginal title), fiduciary duty, or

---

5. Waitangi Tribunal, *The Ngāti Awa Raupatu Report*, p 8

6. Ibid, p 135

7. Ibid, p 4

8. Ibid, p 10

9. Ibid, p 131

10. Ibid, p 136

otherwise', from or relating to acts or omissions committed before 21 September 1992 by or on behalf of the Crown, or by or under legislation.<sup>11</sup>

The proposed package was subject to the 'Crown confirming that all overlapping claim issues in relation to any part of the settlement redress have been addressed to the satisfaction of the Crown'.<sup>12</sup> The mandated Ngāti Tūwharetoa ki Kawerau negotiators, Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee, agreed to the Crown's offer in February 2001 as a basis for a deed of settlement. On 2 October 2002, the Office of Treaty Settlements advised the Minister in Charge of Treaty of Waitangi Negotiations that all cross-claims issues regarding the proposed settlement had been 'satisfactorily addressed'.<sup>13</sup> The Minister informed cross-claimants the following day of her final decision that there was now 'no need to modify the redress package' and that the 'Crown will proceed with its settlement offer' to Ngāti Tūwharetoa ki Kawerau.<sup>14</sup> A deed of settlement was initialled between the Crown and the claims committee on 17 October 2002, and this was to be put to the Ngāti Tūwharetoa ki Kawerau people for the purpose of ratification in early 2003.

The offer includes the following categories and items of redress:

*Cultural redress:*

- ▶ Te Wahieroa, Te Kaukahiwi o Tirotirowhetū and Whakapaukōrero reserves: transfer of fee simple titles subject to existing reserve status and continued public access;
- ▶ Te Atua Reretahi: transfer of fee simple title subject to a conservation covenant;
- ▶ Otitapu Lookout: transfer of fee simple title subject to a protected private land agreement to protect conservation values;
- ▶ establishment of a joint advisory committee in respect to the Matatā scenic reserve and Te Awa a Te Atua (Matatā wildlife refuge reserve);
- ▶ statutory acknowledgements and deeds of recognition in relation to the Rotomā Forest conservation area, the Lake Rotomā scenic reserve, the Lake Tāmurenuī wildlife management reserve, and parts of the Tarawera and Rangitaiki Rivers;
- ▶ a geothermal statutory acknowledgement over the Kawerau geothermal system;
- ▶ establishment of protocols in the Ngāti Tūwharetoa ki Kawerau area of interest to promote effective working relationships on matters of cultural importance to that iwi with various Government departments;
- ▶ grant of a one-hectare renewable nohoanga (temporary camping) entitlement within the Matatā wildlife refuge reserve; and
- ▶ an ōwhakatihi (overlay classification) and acknowledgement of values and association in respect to the Parimahana scenic reserve.

---

11. Paper 2.17, annex 1, para 35

12. Ibid, annex 1, paras 3 (a), 20 (a)

13. Document A23(a), annex 41, para 49

14. Ibid, annex 42

NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

1.3

The Crown characterises some of the items of cultural redress offered to Ngāti Tūwharetoa ki Kawerau as exclusive redress (redress available to only one claimant group), whereas others are non-exclusive redress (redress that can be offered to more than one group).<sup>15</sup>

*Commercial redress:*

- ▶ an offer for purchase by Ngāti Tūwharetoa ki Kawerau of approximately 844 hectares of licensed Crown forest land within the Rotoehu West Crown forestry licence;
- ▶ a right of first refusal over a Crown-owned geothermal bore; and
- ▶ a right to purchase certain properties that were in the Crown's land bank.

A total redress quantum of \$10.5 million was established to settle all Ngāti Tūwharetoa ki Kawerau historical claims.

On 29 March 2001, OTS forwarded for comment the Crown's settlement offer to Ngāti Tūwharetoa ki Kawerau to those claimants it had identified as having overlapping interests. It sought to ascertain whether there were any cross-claims issues regarding particular items of redress in the settlement offer requiring further consideration. Cross-claimants were invited to make any comments by 30 April 2001.

**1.3 THE WAI 524 NGĀTI RANGITIHI TARAWERA LANDS CLAIM**

The Wai 524 claim was registered in July 1995. It is a claim made on behalf of certain prominent members of the tribe (Leith Pirika Comer; Nirai Raureti; William Savage; Marion Amai; Duke Keepa; and Arapeka Tuna) and the 'Ngāti Rangitihi people in general'.<sup>16</sup> The original claim was filed in 'the matter of the land blocks Rotomahana-Parekarangi, Ruawāhia and Rerewhakaaitu', which are land blocks located in the Tarawera basin.<sup>17</sup> Prior to the Tarawera eruption in 1886, Ngāti Rangitihi life and mana was centred on Tarawera Maunga and the surrounding lands. The acts and omissions alleged against the Crown, however, imply a potentially wider geographical ambit than the three blocks mentioned. An amendment of the claim in September 1996 specifically includes two further areas: the Tarawera forests to the west of the Rangitaiki River, and parts of the northern portion of the Kaingaroa State Forest north of State Highway 38.

**1.4 THE WAI 996 NGĀTI RANGITIHI INLAND AND COASTAL LAND BLOCKS CLAIM**

On 21 March 2002, David Potter and André Paterson filed a statement of claim with the Waitangi Tribunal on behalf of themselves and Ngāti Rangitihi relating to the confiscation

---

15. For a discussion on items of cultural redress in and around Matatā, and their characterisation as exclusive or non-exclusive redress, see section 4.1.

16. Wai 524 ROI, claim 1.1

17. Ibid



of both inland and coastal lands from Matatā to Ōtamarākau, the use and pollution of the Rangitaiki and Tarawera rivers, and the taking of various lands at Pikowai for the purposes of public works. A set of decisions made at a hui of Ngāti Rangitihi held at Rangiaohia Marae on 9 March 2002 was appended to the statement of claim. These included informing OTS that the lands that Ngāti Rangitihi 'lay claim to and have an interest in should not be included in the Ngāti Awa and [Ngāti] Tūwharetoa settlements', and that 'there will be a request to the Waitangi Tribunal for an urgent hearing'.<sup>18</sup> The claim was registered on 6 August 2002 as Wai 996. The claim area straddles the current boundaries of the Waitangi Tribunal's Rotorua, Urewera and Kaingaroa district inquiries.<sup>19</sup>

### 1.5 THE APPLICATION FOR URGENCY

On 11 November 2002, counsel for the Wai 996 claimants applied for an urgent hearing in respect of the proposed Crown settlement with Ngāti Tūwharetoa ki Kawerau on the basis that its implementation would cause 'significant and irreversible prejudice to Ngāti Rangitihi'.<sup>20</sup> The application, although stating that Ngāti Rangitihi did not wish to obstruct or impede the settlement between the Crown and Ngāti Tūwharetoa ki Kawerau, declared that the settlement offer related to assets and locations within the traditional rohe of Ngāti Rangitihi. The applicants felt concerned that areas of historical and cultural importance could be offered by the Crown to any persons other than Ngāti Rangitihi. Counsel for the Wai 996 claimants stated that his clients had attempted to indicate to the Crown how the proposed settlement would prejudice Ngāti Rangitihi. Yet the Crown, counsel asserted, had 'failed to have regard to these concerns and protests despite the fact that it does not have the benefit of Tribunal research, evidence, Inquiry or Report into the Ngāti Rangitihi lands and claims; nor has it had regard to the fact that an Inquiry into these matters is about to commence'.<sup>21</sup>

Claimant counsel stated that their clients had been advised that the Crown's settlement policies regarding the offer to Ngāti Tūwharetoa ki Kawerau had been guided by the Waitangi Tribunal's observations as set out in the *Ngāti Awa Raupatu Report*. This was of particular concern to the claimants as they 'took no part in this enquiry and thus have had no opportunity to give evidence to the Tribunal on their traditional boundaries or to influence the findings of the report in any manner'.<sup>22</sup> As the claimants understood that this report was now being used as the basis for entering into settlements that would have significant impact on their rights and interests, counsel felt that the Crown was not in a position to conclude that any settlement with Ngāti Tūwharetoa ki Kawerau would not prejudice any other group

---

18. Claim 1.1

19. Paper 2.1

20. Paper 2.4, para 5

21. Ibid, para 26

22. Ibid, para 33

with interests in the areas covered by the proposed deed. This amounted to not only a denial of natural justice, but also a breach of the Treaty of Waitangi. The claimants requested an urgent hearing to prove the prejudice which would result to Ngāti Rangitihi if the Crown proceeded with the settlement offer.

In a memorandum and directions dated 18 November 2002, the Acting Chairperson of the Waitangi Tribunal authorised Judge Carrie Wainwright to determine the application.<sup>23</sup> Three days later, Judge Wainwright directed counsel for the Wai 996 claimants, the Crown, and Ngāti Tūwharetoa ki Kawerau to file memoranda with the Tribunal by 4 December 2002 outlining their respective positions in relation to the request for urgency.<sup>24</sup>

In their memorandum in response to Judge Wainwright's directions, counsel for the applicants contested virtually every item of redress being offered to Ngāti Tūwharetoa ki Kawerau. Yet counsel emphasised that they did not want the 'inquiry to become fixated solely on the provisions of the [Ngāti] Tūwharetoa ki Kawerau deed of settlement or on the specific redress offered to [Ngāti] Tūwharetoa ki Kawerau or what might or might not be offered to Ngāti Rangitihi'.<sup>25</sup> The claimants, counsel stated, instead felt more concerned about the current developments in the Crown's Treaty settlements policy and the process by which it came to make the offer to Ngāti Tūwharetoa ki Kawerau. Those issues of process were, first, the Crown proposing a deed of settlement without a comprehensive Waitangi Tribunal district inquiry involving all affected iwi and hapū; and, secondly, that the offer was made with no significant consultation or discussion with Ngāti Rangitihi.<sup>26</sup> Counsel contended that the correspondence and material provided by the Crown to Ngāti Rangitihi did not sufficiently inform the claimants about the settlement offer. The inadequate consultation and the Crown's making a settlement offer without a Tribunal district inquiry had important implications not only for Ngāti Rangitihi but for all iwi and hapū throughout Aotearoa.

Both the Crown and Ngāti Tūwharetoa ki Kawerau opposed the application. The Crown's opposition was on the grounds that the Tribunal had already heard similar challenges to the relevant Crown policies during the recent Ngāti Awa Settlement Cross-Claims Inquiry. That Tribunal concluded that the policy of the Crown of negotiating settlements in advance of the Tribunal having heard and reported on all cross-claims is not a breach of the Treaty or its principles.<sup>27</sup>

Crown counsel contended that the Crown had been engaged in a lengthy consultation process with Ngāti Rangitihi and the Wai 996 claimants. They had ample opportunity to inform the Crown of their concerns about the proposed Ngāti Tūwharetoa ki Kawerau settlement. The Crown had fully informed itself of all issues put forward by the Wai 996 claimants and had fairly weighed the respective interests of Ngāti Rangitihi and Ngāti Tūwharetoa ki

---

23. Paper 2.7

24. Paper 2.8

25. Paper 2.14, para 19

26. Ibid, paras 17–18

27. Paper 2.17, para 57

Kawerau, seeking, where possible, to structure a settlement package that minimises any negative impact on Ngāti Rangitihi. It would be inappropriate for the initialled deed of settlement to be made subject to further mediation and/or discussion, and no additional investigation was required.<sup>28</sup>

Counsel for Ngāti Tūwharetoa ki Kawerau concurred, opposing the application on the basis that ‘discussion or mediation on the settlement with Ngāti Rangitihi will disrupt and delay the ratification process and the settlement process generally, with no useful purpose’.<sup>29</sup> The Ngāti Tūwharetoa ki Kawerau Claims Committee was ‘surprised’ by the request for an urgent hearing as it considered there had ‘been plenty of opportunity’ for Ngāti Rangitihi to raise their concerns.<sup>30</sup> Counsel for Ngāti Tūwharetoa ki Kawerau also considered that the issues being raised by the Wai 996 claimants were similar to those already heard by the Ngāti Awa settlement cross-claims Tribunal, and that that ‘Tribunal’s finding applies equally to the Ngāti Tūwharetoa settlement’.<sup>31</sup> Moreover, the proposed settlement ‘does not preclude the interests of other iwi and hapū, including Ngāti Rangitihi, being recognised in future Treaty settlements negotiated with the Crown. In that sense, the Ngāti Tūwharetoa redress is “non-exclusive”’.<sup>32</sup> Each redress item was a key element in the overall package and any removal or alteration would result in a settlement of diminished value to Ngāti Tūwharetoa ki Kawerau. Counsel stated that her clients had already made ‘several concessions in relation to the redress’.<sup>33</sup> She thus concluded that the Wai 996 application for urgency should not affect the proposed settlement with the Crown in any way, and that a hearing was not necessary.<sup>34</sup>

In directions dated 20 December 2002, Judge Wainwright, having considered the filed memoranda that ‘helpfully amplified the respective positions of the parties’, granted to the applicants an urgent hearing of one day’s duration at the Tribunal’s office in Wellington.<sup>35</sup> The hearing date was 5 February 2003.<sup>36</sup>

## 1.6 FURTHER DEVELOPMENTS

Less than a week before the date appointed for the urgent hearing, the Tribunal received a letter from a new participant. In the letter (dated 30 January 2003), John Kahukiwa informed the Tribunal that he was about to be appointed counsel for the Wai 524 claim described above (see s1.3), lodged by Leith Comer and others on behalf of themselves and Ngāti

28. Ibid, paras 113, 120–121

29. Paper 2.15(a), para 13

30. Ibid, para 10

31. Ibid, para 18

32. Ibid, para 17

33. Ibid, para 47

34. Ibid, para 50

35. Paper 2.18

36. Paper 2.21

Rangitihi. Mr Kahukiwa stated that as his clients were Ngāti Rangitihi, they were also an ‘interested party in this urgent proceeding’, and he requested that he be provided with the memoranda filed in support of and in opposition to the Wai 996 application so as to assess whether or not he would seek leave to attend the urgent hearing.<sup>37</sup>

Counsel for the Wai 996 claimants, Ms Edmunds, then responded to Mr Kahukiwa’s letter in a letter of her own.<sup>38</sup> In it, she emphasised to the Tribunal the importance of the forthcoming hearing being allowed to proceed smoothly, and questioned the mandate of Mr Kahukiwa to act for Wai 524. She said the Ngāti Rangitihi Claims Committee had instructed her to act for Wai 524 as well,<sup>39</sup> and that some of the trustees of the Ruawāhia 2B Trust supported this instruction. In addition, no new legal counsel had been officially appointed since David (Rawiri) Rangitauira stood down as counsel for Wai 524 some time earlier. Counsel for Wai 996 doubted whether Mr Kahukiwa had proper authority to act for Wai 524. Given the confused state of internal mandate, ‘it would be questionable as to whether any proper instructions could be obtained’.<sup>40</sup>

Mr Kahukiwa responded by stating that he had been formally appointed counsel for Wai 524 by one of the named claimants, Mr Comer.<sup>41</sup> As the Wai 996 urgent hearing concerned the rangatiratanga of Ngāti Rangitihi, Mr Kahukiwa’s clients would be especially interested in the proceeding, and he again asked to be served with all documents filed in the Wai 996 urgent application so he could consider whether or not to seek leave to participate. Mr Kahukiwa believed that until a proper tribal hui had been convened to clarify matters of representation, it was probably best that the ‘two camps’ be permitted to continue to ensure representation of all of the Ngāti Rangitihi interests.<sup>42</sup>

The presiding officer sought to clarify who Mr Kahukiwa was actually representing, and what their position was in regard to the Wai 996 urgency. She convened a teleconference on the morning of 4 February 2003. The participants were counsel for the Crown, counsel for Ngāti Tūwharetoa ki Kawerau, counsel for the Wai 996 claimants, counsel for Ngāti Awa, and Mr Kahukiwa. Mr Kahukiwa stated that he was of the understanding that he was now acting counsel for Wai 524 after being appointed by Mr Comer on 30 January 2003 to act on his behalf and those wishing to be represented by that claim. This included Henare Pryor, Whaimutu Dewes, and their respective whānau. Mr Kahukiwa was unable to clarify the

---

37. Paper 2.27(a)

38. Paper 2.30. Ms Edmunds requested in her letter that it not be placed on the public record of the Tribunal because the content related to ‘internal Ngāti Rangitihi mandate’ and went ‘to issues of reputation of other counsel’. The letter was addressed to the registrar. It related to matters then under consideration by the presiding officer, so the registrar referred the letter to the presiding officer, and she read it. Accordingly, it is right that the letter be entered on the record. Counsel cannot divulge information to the Tribunal that is material to their work and then expect it to be kept secret (except where the information is tapu, which places it in a special category).

39. Paper 2.30

40. Ibid

41. Paper 2.31

42. Ibid

views of his clients regarding the urgency. Mr Kahukiwa had not seen the Wai 524 and Wai 996 statements of claim. Counsel for Wai 996, after voicing concern about the intervention of another party so late in the piece, stated that at least two trustees of the Ruawāhia 2B Trust (Reuben Perenara and André Paterson) wanted her to act for Wai 524. The Ruawāhia lands are among those specifically mentioned in the Wai 524 statement of claim. Ms Edmunds said that disagreement had arisen within the Ngāti Rangitihi Claims Committee in November 2002, eventually resulting in a schism. This committee was charged with overseeing the Wai 524 claim. The internal divisions meant that nobody could now claim to represent Wai 524 in its entirety.

Judge Wainwright told the parties that the urgency would proceed on the basis that the representation issues would not be resolved by the time of the hearing (the following day). She requested that Mr Kahukiwa fully inform himself of the various issues relating to the Wai 524 and Wai 996 claims, and ascertain the views of his clients regarding the Wai 996 claimants' contesting of the Ngāti Tūwharetoa ki Kawerau settlement offer. Judge Wainwright directed Mr Kahukiwa to file a memorandum on those views. The memorandum, filed on the day of the hearing, took the matter no further. Mr Kahukiwa maintained that he had had insufficient opportunity to consider the documents and obtain instructions.<sup>43</sup>

Ngāti Awa also sought to be involved at a late stage. In a memorandum dated 4 December 2002, counsel for Ngāti Awa (Wai 46 and 206) asked the Tribunal to note that Ngāti Awa had interests in the areas that were subject to the Wai 996 claim. It was not anticipated that Ngāti Awa would be an active participant in the hearing but counsel reserved Ngāti Awa's position in this regard.<sup>44</sup>

Then, after reviewing the evidence filed on behalf of the Wai 996 claimants, counsel for Ngāti Awa revised his position. At a pre-hearing teleconference on 29 January 2003, he said that he would be submitting a memorandum and supporting brief of evidence in response to evidence filed in support of the Wai 996 claimants. He expressed concern about 'a number of observations about the nature and extent of Ngāti Awa interests in the claim area', and especially of some comments that he considered were 'disparaging of Ngāti Awa'.<sup>45</sup> The presiding officer granted Ngāti Awa the leave sought.

---

43. Paper 2.35

44. Paper 2.16, para 3

45. Paper 2.29, para 4



## CHAPTER 2

### THE HEARING

The Wai 996 Ngāti Rangitihi urgent hearing was held at the Tribunal's office in Wellington on 5 February 2003.

The Wai 996 claimants were represented by Richard Boast with Deborah Edmunds; the Wai 62 Ngāti Tūwharetoa ki Kawerau claimants by Rachael Brown with Leanne Clarke; the Wai 46 and 206 Ngāti Awa claimants by Mātanuku Mahuika; and the Crown by Helen Carrad with Virginia Hardy. Those present from the Office of Treaty Settlements included Peter Hodge (senior policy analyst) and Maureen Hickey (historian).

Mr Kahukiwa informed the Tribunal by way of memorandum that he would not be seeking the Tribunal's leave for the Wai 524 claimants to be made a party to the inquiry, and he would not be attending the hearing.<sup>1</sup>

Counsel for the Wai 46 and 206 Ngāti Awa claimants stated prior to the hearing that he would be present to maintain a watching brief. He stressed, however, that Ngāti Awa would seek to file further evidence, and cross-examine Ngāti Rangitihi witnesses, in the context of the Tribunal's Rotorua district inquiry when the substance of the Ngāti Rangitihi claims is heard.<sup>2</sup>

The Wai 996 claimants' application for an urgent hearing was granted on the basis of its being a hearing of 'very limited compass'.<sup>3</sup> As the hearing was allocated only one day, all evidence would be taken as read. Submissions in reply, if required, were to be filed within three working days of the conclusion of the hearing. The three hours of the morning session were allocated to the applicants to present their case, while the Crown and Ngāti Tūwharetoa ki Kawerau had the three hours of the afternoon to divide between them. Leave was required for cross-examination.<sup>4</sup> The Crown sought leave for a brief cross-examination of Dr Bryan Gilling, who had been commissioned by counsel for Wai 996 to critique the Crown's research on Ngāti Rangitihi interests.<sup>5</sup> Counsel for Wai 996, on the basis that cross-examination of Dr Gilling could give rise to new evidence, requested that the Crown's witness, OTS official Peter Hodge, be available 'for short cross-examination on matters arising from Dr Gilling's

---

1. Paper 2.35

2. Paper 2.29

3. Paper 2.18

4. Paper 2.21

5. Paper 2.32

examination that relates to matters within Mr Hodge's knowledge'.<sup>6</sup> The Tribunal granted the leave sought.

The hearing was completed within the one-day timeframe allocated and, at its conclusion, counsel for Wai 996 informed the Tribunal that it would file submissions in reply within the agreed timeframe.

---

6. Paper 2.33



## CHAPTER 3

### SUBMISSIONS AND EVIDENCE

#### 3.1 SUBMISSIONS OF NGĀTI RANGITIHI

In his opening submissions on behalf of the Wai 996 claim, counsel emphasised that the urgency application was not merely about assets, but also mana and rangatiratanga. The Crown's settlement offer to Ngāti Tūwharetoa ki Kawerau not only disadvantaged Ngāti Rangitihi by narrowing the asset base from which redress could be made to that group in the future, but also the 'proposed settlement is damaging to Ngāti Rangitihi mana and rangatiratanga and the iwi's spiritual connections with its own rohe'.<sup>1</sup> Counsel stated that the claim principally concerns the Crown's ongoing duty of active protection, particularly of cultural sites and wāhi tapu. The issues raised, counsel continued, are 'quite different from the narrower issues of redress by means of Crown Forest assets, commercial redress and "substitutability" already traversed in the Tribunal's *Ngāti Awa [Settlement] Cross-Claims Report*'.<sup>2</sup>

Counsel said that the Crown's settlement offer to Ngāti Tūwharetoa ki Kawerau relates to assets and locations within the rohe of Ngāti Rangitihi, many of which are of particular traditional, historical, and cultural significance to that iwi. Yet the Crown has offered this redress to Ngāti Tūwharetoa ki Kawerau without sufficiently informing itself of Ngāti Rangitihi interests. By making the offer in the absence of a comprehensive Waitangi Tribunal inquiry in which all affected iwi and hapū could participate, the Crown was 'not in a position to conclude that any settlement with one group will not prejudice others who have interests in the areas covered by the proposed deed'.<sup>3</sup> The area comprising the Crown's settlement offer to Ngāti Tūwharetoa ki Kawerau, counsel pointed out, is already partially included in the current Rotorua inquiry district. For the Crown to continue with the settlement, counsel asserted, 'is to prejudge the outcome of the [Rotorua] Inquiry and may also have the further effect of impacting on the Crown's ability to provide redress to claimants whose claims may be found by the Tribunal to be well-founded'.<sup>4</sup>

Counsel again emphasised that Ngāti Rangitihi had not been involved in the eastern Bay of Plenty hearings, and has not presented evidence of any kind to the Tribunal. Nevertheless,

---

1. Document A9, para 3.5

2. Ibid, para 3.2

3. Ibid, para 13.4

4. Ibid, para 12.1

## NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

3.1

the *Ngāti Awa Raupatu Report* was being used as the basis for entering into settlements which have a significant impact on Ngāti Rangitihi rights and interests.<sup>5</sup> ‘If the research does not document the interests of an affected group comprehensively and reliably,’ counsel maintained, ‘then a settlement which affects that group should not proceed without their consent – or alternatively full research should be commissioned’.<sup>6</sup> That this did not occur constitutes a failure by the Crown to act reasonably, honourably and in good faith.<sup>7</sup>

In closing, counsel for Wai 996 stressed ‘the highly disadvantageous state’ of Ngāti Rangitihi with regard to research.<sup>8</sup> Until Dr Gilling had been commissioned by counsel, there had been no commissioned Ngāti Rangitihi research. Counsel contended that only one report relating to the Matahina blocks could be used by Ngāti Rangitihi to document its claims against the Crown in either the Rotorua or the Urewera inquiries, and even this contained only a few relevant pages. By comparison, the Crown Forestry Rental Trust had advanced to Ngāti Tūwharetoa ki Kawerau more than one million dollars since 1990 to research and prepare its claims.<sup>9</sup> ‘This inequality is obviously and manifestly iniquitous and unfair, especially in view of the fact that the Crown appears to have expected Ngāti Rangitihi to somehow provide *it* with evidence of their entitlement to the area in which they now happen to live.’<sup>10</sup> The disparity in funding left Ngāti Rangitihi in a remarkably vulnerable position and the Crown ‘should have *particular* regard to the interests of Ngāti Rangitihi’ so that it could ‘adequately discharge its fiduciary obligations to them under the Treaty of Waitangi’.<sup>11</sup>

These proceedings occasioned the production of evidence about Ngāti Rangitihi’s customary associations. Prior to that, counsel argued, the Crown had nothing to go on. It could not have sufficiently informed itself about Ngāti Rangitihi’s interests in the area covered by the offer to Ngāti Tūwharetoa ki Kawerau. Ngāti Rangitihi were not asking the Tribunal to make a determination on customary interests in the eastern Bay of Plenty, but counsel believed that the evidence filed in support of the application demonstrated that ‘Ngāti Rangitihi do have serious customary interests that they are now trying to protect’.<sup>12</sup> These customary interests had not been adequately safeguarded in the cultural redress component of the proposed Ngāti Tūwharetoa ki Kawerau settlement.

Claimant counsel questioned what the Crown was actually redressing when it came to cultural redress: how specific do the associations between the settling group and the item of redress have to be? Counsel argued that there can only be cultural redress where the exact

---

5. Document A9, para 11

6. Ibid, para 15.2

7. Ibid, para 13.5

8. Document A26, para 1.7

9. Ibid

10. Ibid

11. Ibid, para 1.9

12. Ibid, para 3.5

circumstances of the various customary interests are reliably known. This was not the case with the Ngāti Tūwharetoa ki Kawerau settlement offer. Counsel submitted that cultural redress should involve ‘returning something to a group who has in some meaningful and verifiable way lost it through the actions/omissions of the Crown. It should not [be] a process of acknowledgement of ancestral associations in assets the Crown happens to have.’<sup>13</sup> Counsel doubted that the Crown could ‘have made a fully informed decision here on the complex matter of competing customary rights within the settlement area. That required full and comprehensive research which has never been done.’<sup>14</sup> That the Crown had not made a greater effort to disentangle the competing rights of groups but, rather, had simply granted interests to some parties while reserving land for others was not adequate.

These matters differed from those that were the focus of the recent Ngāti Awa settlement cross-claims inquiry. According to counsel, that inquiry has some relevance to the Wai 996 urgency in that both derived from the Tribunal’s *Ngāti Awa Raupatu Report*, and the Ngāti Awa and Ngāti Tūwharetoa ki Kawerau settlements were interconnected to some extent. But the major issue considered in the *Ngāti Awa Settlement Cross-Claims Report* was the utilisation of Crown forest licensed land in framing settlements. It addressed the Crown’s criteria for granting forest licensed land as commercial redress. In that context, the Crown determines first whether the settling group has a ‘threshold interest’ in any Crown forest licensed land. Secondly, the Crown ascertains whether ‘other groups who have threshold interests in that land also have threshold interests in *other* Crown forest licensed land’ so that these could be offered to them in future settlements if their claims are well-founded.<sup>15</sup> This policy, which the Tribunal approved, ‘does not in all cases involve assessing the relative strength of customary interests in that land’.<sup>16</sup> By contrast, counsel asserted:

The point of cultural redress is to return assets of particular cultural significance to the group being settled with. They will be, by definition, within a claimant group’s rohe, usually squarely within it, and will have known historical associations and links. In this context the ‘threshold’ criterion can have no place.<sup>17</sup>

Counsel felt that merely establishing that the settling party has at least some level of interest in a certain location or site should not be the basis for offering cultural redress when all relative interests have not yet been determined.

Claimant counsel contended that, despite the geographical and historical differences, the Tribunal’s *Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* had more relevance to this inquiry than the *Ngāti Awa Settlement Cross-Claims Report*. This was because the

---

13. Ibid, para 5.5

14. Ibid, para 6.3

15. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p 74

16. Ibid, p 77

17. Document A26, para 7.3

## NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

3.1

former focused more on issues of cultural redress and mana rather than the matter of Crown forest licensed land. Ngāti Maniapoto claimants contended that they were disadvantaged by the proposed settlement with Ngāti Tama because it concerned certain sites that were within their own rohe, and the Tribunal had not heard their claims. This situation was, counsel for Wai 996 argued, ‘exactly analogous’ with Ngāti Rangitihi and the Ngāti Tūwharetoa ki Kawerau settlement offer.<sup>18</sup> He also pointed out how the Crown went to some lengths in that earlier inquiry to inform itself as to the cultural significance of the sites proposed for transfer. After mediation had failed to resolve the differences between Ngāti Maniapoto and Ngāti Tama, OTS notified the claimants that it intended to commission independent historical research into the customary associations of both groups in the contested sites. Counsel brought to the Tribunal’s attention the section from the *Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* that states:

OTS official Andrew Hampton then met with Ngāti Maniapoto representatives, who agreed to participate in the proposed independent historical research. Comments were sought and received from all interested parties on the instructions to be given to the independent researchers and the instructions were altered to reflect some of these comments. In September 2000, OTS commissioned David Young to carry out the research. His brief was to investigate the customary associations of Ngāti Tama and Ngāti Maniapoto with the particular sites proposed to be transferred to Ngāti Tama, and to determine the significance of each site to Ngāti Tama and Ngāti Maniapoto. Mr Young (with the assistance of Tui Gilling) examined relevant written sources, and also spent a week in the area collecting oral evidence from Ngāti Maniapoto and Ngāti Tama. The report was completed in November 2000 and provided to the parties for comment.<sup>19</sup>

Counsel for Wai 996 questioned why an ‘equivalent process’ was not put in place to enable investigation of Ngāti Rangitihi cross-claims interests in the cultural redress offered to Ngāti Tūwharetoa ki Kawerau.<sup>20</sup> The Crown, counsel submitted, relied on two key internal documents prepared by OTS staff historian Maureen Hickey to detail Ngāti Rangitihi interests in the area of settlement. Dr Gilling, expert historical witness for the Wai 996 claimants, criticised Ms Hickey’s methodology and level of research. But moreover, counsel contended for the view that ‘the Crown should not be in the business of forming its own historical conclusions’.<sup>21</sup> The Crown must commission an independent expert to investigate cross-claim issues, because ‘they are external and independent and seen to be independent’.<sup>22</sup> Counsel also criticised the Crown for not making the Hickey memoranda available to claimants. He

---

18. Document A26, para 7.4

19. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2001), p 6

20. Document A26, para 7.6

21. Ibid, para 6.25

22. Document A29, para 13.2

argued that ‘making informed decisions involves full disclosure’.<sup>23</sup> The all-important memoranda by Ms Hickey were not disclosed to Ngāti Rangitihi. The Wai 996 claimants saw them only when they were annexed to the Crown’s evidence in these proceedings.

This was but one feature of the Crown’s inadequate consultation process with the cross-claimants. Counsel contended that the Crown’s duties are ‘stricter and more demanding’ than consultation and that the ‘key Crown responsibilities here are its duty of active protection, and its duty to make informed decisions’.<sup>24</sup> He said that ‘it was very doubtful that the Crown met its consultation duties’.<sup>25</sup> As the Crown did not provide the Wai 996 claimants with copies of its in-house historical analyses until December 2002, ‘Ngāti Rangitihi had no real appreciation of what was being proposed and how it would impact on them’.<sup>26</sup> The Wai 996 claimants could not make intelligent and useful responses to the Crown’s requests for information, and were also prejudiced by a lack of information in other ways. They were not informed as to the Ngāti Tūwharetoa ki Kawerau area of interest: they were given no detailed maps of the sites to be transferred or which were subject to special grants of right to Ngāti Tūwharetoa ki Kawerau. ‘It was not until 17 October 2002 when the full initialled Deed was released from the embargo (and a map of the ‘area of interest’ was requested from ORS) that the full scale of the settlement offer was understood’.<sup>27</sup> Despite the substantial correspondence between the Crown and Ngāti Rangitihi on record, counsel submitted that ‘it is clear that the level of disclosure of key documents and supply of useful information was limited’.<sup>28</sup>

The Crown should have taken further proactive steps to inform both itself and Ngāti Rangitihi. Counsel thought it ‘surprising’ that, from the outset, ORS ‘relied almost solely on one point of contact for much of its communication’.<sup>29</sup> That point of contact was former counsel for Wai 524, David Rangitauira. It was not until 21 February 2002 that Crown officials attended a hui with Ngāti Rangitihi at Matatā. ‘Reading the minutes of the meeting,’ counsel declared, ‘it is hard to see how the Crown could not be put fully on notice of the extent of Ngāti Rangitihi concern’.<sup>30</sup> Despite Ngāti Rangitihi dissatisfaction expressed at the hui and in subsequent correspondence, the Crown took no further steps to address their concerns. Rather, ‘the onus of proof was very much thrown back on Ngāti Rangitihi’.<sup>31</sup> Crown officials requested information from Ngāti Rangitihi claimants (even though they had received no funding for research) and placed on them evidential requirements that had not been imposed on Ngāti Tūwharetoa ki Kawerau. So, although it could not be said that the Crown had made no efforts to accommodate Ngāti Rangitihi’s concerns, ‘these efforts took

---

23. Document A26, para 6.3

24. Ibid, para 1.6

25. Document A29, para 3.6

26. Ibid, para 3.6

27. Ibid, para 4.5

28. Ibid, para 10.2

29. Ibid, para 9.6

30. Document A26, para 6.9

31. Ibid, para 6.10

## NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

3.1

place within a framework that had already been decided upon as policy, and against the background of decisions that the Crown had come to about the nature of Ngāti Rangitihi interests at Matatā'.<sup>32</sup>

Although ORS officials were increasingly aware of Ngāti Rangitihi concerns after February 2002, there was still no 'effort to replicate the process or efforts adopted by the Crown in the Ngāti Tama/Ngāti Maniapoto cross-claim situation'.<sup>33</sup> The Crown did not undertake facilitated or mediated discussions aimed at providing appropriated protection mechanisms for non-settling claimants; did not commission independent historical research into the customary associations of the competing groups in the area of overlapping interests; did not propose that Ngāti Rangitihi participate in any historical research process, with the opportunity to have input into the terms of reference; did not give Ngāti Rangitihi any opportunity to comment on the Crown's in-house research; and did not offer to review the redress package in the light of information supplied to date, even though some information related specifically to wāhi tapu issues. Counsel noted that they had been instructed that Ngāti Rangitihi 'would be satisfied with an outcome from this hearing that the steps and measures taken by the Crown in the Ngāti Tama/Ngāti Maniapoto case (as noted above) are used as a template for the present case'.<sup>34</sup>

The evidence filed by Mr Potter and other members of Ngāti Rangitihi showed that there existed within the iwi considerable knowledge of the tribe's traditional history, rohe, wāhi tapu, kāinga, associations with neighbouring iwi, and occupation of their lands. Counsel stated that this inquiry had demonstrated, despite its time constraints, that given expert assistance and support, at least some evidence could be produced:

Had the Crown allowed for some support and resourcing, perhaps the provision of advice about how to go about collation of the necessary information at an earlier time, the necessary responses [to its requests] would no doubt have been able to be provided.<sup>35</sup>

The Tribunal questioned counsel for Wai 996 during the hearing as to how an iwi's lack of internal cohesion and traditional knowledge might affect the Crown's obligations. Counsel stated that he was not entirely certain that these comments would apply to Ngāti Rangitihi. Although there seemed to be no kaumātua available to provide oral traditional evidence, Mr Potter's evidence showed that knowledge had indeed been passed on. As to a lack of internal cohesion, however, counsel admitted that this was the case. He conceded that this made matters difficult for the Crown. Counsel qualified his remarks, though, by arguing that he did not think a lack of cohesion was particularly material in terms of the Crown complying with its Treaty duties in this situation, because the Crown's consultation had largely been limited

---

32. Document A26, para 6.13

33. Ibid, para 11.6

34. Ibid, para 11.8

35. Document A29, para 6.7

to communicating with one person, former Wai 524 lawyer, Mr Rangitauira. He felt that the Crown did not make much effort to go beyond this. Because the Crown had limited itself to engaging with this sole point of contact, lack of internal cohesion was not really a factor, at least up to early 2002.<sup>36</sup>

### 3.2 EVIDENCE FOR NGĀTI RANGITIHI

The claimants filed a substantial body of supporting material, including a number of professional historical reports, several statements of evidence, and a document bank comprised of correspondence between Ngāti Rangitihi and the Crown, as well as other information relating to the Ngāti Tūwharetoa ki Kawerau and Ngāti Awa settlement offers.

#### 3.2.1 Evidence of Dr Bryan Gilling

Dr Gilling was commissioned by counsel for Wai 996 to ‘review the existing research relevant to that claim, and then to form an opinion on the adequacy of that research as a basis for the Crown to enter into binding settlements with Māori groups in the region in and around Matatā’.<sup>37</sup> Dr Gilling stated in evidence that the focus on the Matatā area arose from OTS’s concentration on that location in its relevant memoranda, and also because previous counsel for Wai 524, Mr Rangitauira, had limited Ngāti Rangitihi’s concerns about the settlement to redress in and around Matatā.<sup>38</sup> Although time constraints prevented an investigation of other locations of potential overlap or conflict within the settlement area, Dr Gilling felt that ‘in the consideration of the general nature of the evidence available and its value in establishing tribal rohe, and use and occupation rights, many of the conclusions . . . will be applicable to those other areas also’.<sup>39</sup>

Dr Gilling criticised the two historical memoranda prepared by OTS staff historian Maureen Hickey. The Crown said the purpose of the memoranda ‘was to assess whether there was any documentary support for the allegations made by Ngāti Rangitihi as to their interests, focusing primarily on the Matatā area’.<sup>40</sup> But both documents contained serious flaws, according to Dr Gilling. Firstly, there was the short timeframe in which the documents seemed to have been prepared. It appeared significant to Dr Gilling that ‘these two memoranda addressing the concerns in Mr Rangitauira’s letter of 12 March 2002 were prepared in no more than only 13 days, thus probably a maximum of 9 working days, from receipt of that

---

36. Oral submission of counsel for the Wai 996 claimants, 5 February 2003, tape 3, side A

37. Document A7, para 1.2

38. Document A23 (a), annex 19

39. Document A7, para 1.3

40. Document A24, para 44.2



## NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

## 3.2.1

letter'.<sup>41</sup> Such a short period could not have allowed Ms Hickey to undertake sufficiently detailed research for the task required of her.

The first and more general memorandum, Dr Gilling argued, seemed entirely based, inasmuch as sources were cited, on Don Stafford's *Te Arawa* and an internal memorandum of 19 June 1998 by Crown Law Office historian Dr John Battersby. The Battersby memorandum had not been tested publicly by other claimants or the Waitangi Tribunal, and nor had it been supplied to Ngāti Rangitihi for comment or correction.<sup>42</sup> Ms Hickey's memorandum dealt with the broad rohe of Ngāti Rangitihi, and she was not 'able to locate historical evidence of Ngāti Rangitihi interests at Matatā prior to the 1860s'.<sup>43</sup> Ms Hickey found that Ngāti Rangitihi, after fighting with the Crown in the 1860s, received a military award of 84 acres on the Matatā coast in 1869, and another 3834 acres known as lot 30, parish of Matatā. Ngāti Rangitihi had ancestral associations with at least part of the Tarawera River, but Ms Hickey pointed to Ngāti Rangitihi residence in the Matatā area only after the time that the grants for military service had been made.<sup>44</sup>

Dr Gilling criticised Ms Hickey's findings, especially since 'she possessed information only on the post-1860 period'.<sup>45</sup> Ms Hickey's memorandum attempted to define the traditional interests and rights of Ngāti Rangitihi, yet, Dr Gilling argued, it did so 'with no research available specifically about Ngāti Rangitihi and with no effective consultation with the very people about whom [the memorandum was] providing an opinion, and who strongly disagree with that portrayal'.<sup>46</sup>

Dr Gilling's assessment of Ms Hickey's second memorandum was equally negative. Although more substantial and having more historical detail, it too had serious deficiencies. Now Ms Hickey was saying that any pre-1860 Ngāti Rangitihi interests in the Matatā area were based on access to the coast via the Tarawera River, and that Ngāti Awa/Ngāti Tūwharetoa ki Kawerau hapū appeared to be the main groups in residence at Matatā prior to the 1860s.<sup>47</sup> Dr Gilling complained that the sources used by Ms Hickey were entirely one-sided, relying very heavily on Ngāti Awa and Ngāti Tūwharetoa ki Kawerau research reports. There was no Ngāti Rangitihi input, and nor could there be on a scale comparable to Ngāti Awa and Ngāti Tūwharetoa ki Kawerau, given that those groups had received funding for professional research.<sup>48</sup> The second Hickey memorandum implied, without directly stating, that the grants of land to Te Arawa in the Matatā region were solely for loyal military service. Again, such findings were based on sources substantially either Ngāti Awa or Ngāti

---

41. Document A7, para 2.2

42. Ibid, para 2.3

43. Document A23 (a), annex 44, para 11

44. Ibid, annex 44, paras 9, 11

45. Document A7, para 2.7

46. Ibid, para 2.10

47. Document A23 (a), annex 45, paras 15, 19

48. Document A7, para 2.23



Tūwharetoa in origin. The intricacy of events of the relevant period were filtered out, ‘unsurprising in a summary memorandum’. There was ‘no discussion of any other possibility, . . . and no thought given to the fact that the language used at the time was frequently that of restoration and giving back [of lands]’.<sup>49</sup> Dr Gilling concluded his analysis of the second Hickey memorandum thus:

It is superficial in the level of research undertaken, it is methodologically deficient in failing to incorporate the opinions of the very group about whom it is written, and it is tendentious in presenting only one perspective and in failing to consider the pro-Rangitihi implications even of some of the information it does present. As such, it is, in my professional opinion, entirely inadequate as a foundation upon which to dismiss their claims to traditional rights in the area.<sup>50</sup>

During the hearing, Crown counsel cross-examined Dr Gilling on whether the purpose of his evidence was to demonstrate that the two reports prepared by Ms Hickey were biased and inadequate. Dr Gilling replied that it had not been his intention to characterise Ms Hickey as deliberately biased in any sense, but that the effect of her memoranda was that they were one-sided and clearly inadequate to serve the purpose for which they had been undertaken. Dr Gilling stated that he had been asked to analyse and evaluate the Hickey memoranda and methodology from the perspective of a professional independent historian. Crown counsel then tested Dr Gilling on his criticisms of Ms Hickey’s work. He conceded that his language might perhaps have been stronger than warranted. But in re-examination, he re-asserted the main points of his critique: there was no Ngāti Rangitihi input; the apparent time constraints precluded Ms Hickey from examining the necessary breadth of material to deal with the particular matters addressed; and a lack of funding would have prevented Ngāti Rangitihi from participating in any meaningful way in any case.<sup>51</sup>

Dr Gilling also questioned the Crown’s reliance on the *Ngāti Awa Raupatu Report* ‘as a basis for giving to [Ngāti] Tūwharetoa ki Kawerau lands also claimed by [Ngāti] Rangitihi’.<sup>52</sup> He claimed that that inquiry was not a fully regional one, but essentially focused on one iwi and one issue, that of raupatu. His major concern was that Ngāti Rangitihi had not presented any evidence before the Tribunal nor challenged that of others. The report did not deal with many of the issues raised in the Wai 996 statement of claim, nor did it investigate areas outside the raupatu boundary to which Ngāti Awa and Ngāti Tūwharetoa ki Kawerau laid claim. Dr Gilling stated that the ‘Tribunal’s report cannot be of substantial relevance to matters south of Mt Edgecumbe, which includes the large majority of lands claimed by [Ngāti] Tūwharetoa ki Kawerau and Ngāti Rangitihi’.<sup>53</sup>

---

49. Ibid, para 2.18

50. Ibid, para 2.25

51. Oral evidence of Dr Bryan Gilling, 5 February 2003, tape 1, side B

52. Document A7, para 3.1

53. Ibid, para 3.2

## NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

## 3.2.2

Counsel for the Crown questioned Dr Gilling on this point, contending that the greater part of the lands that both those iwi claim do lie within the raupatu boundary. Dr Gilling recognised this and requested that his statement be modified to state that the *Ngāti Awa Raupatu Report* could not be relied upon outside of the confiscation line.<sup>54</sup> (Claimant counsel still estimated in their submissions in reply that at least half of the lands in which Ngāti Tūwharetoa ki Kawerau now claim interests lie outside the raupatu line.<sup>55</sup>) Dr Gilling again pointed to the fact that Ngāti Rangitihi had not participated to any extent in the eastern Bay of Plenty hearings.

He questioned the value of a number of the historical reports relied on for information about Ngāti Rangitihi's interests. The research had been undertaken for the eastern Bay of Plenty inquiry, and was focused on establishing that Ngāti Tūwharetoa had grievances against the Crown in respect to raupatu.<sup>56</sup> Little of the evidence pertained to the matters or places of relevance in the present case; namely rohe, occupation, and use rights in the Matatā area.

Dr Gilling concluded by stating that, of the documentary evidence examined, he could find no clear support for a Ngāti Tūwharetoa ki Kawerau claim to the lands in the Matatā area, nor in the southern area towards Lake Tārawera. If there was evidence to support this, he was uncertain as to what that evidence was, and he was sure that Ngāti Rangitihi had not been given the opportunity to assess and critique it. Dr Gilling argued that, on the material surveyed, any claim by Ngāti Tūwharetoa ki Kawerau to lands in the Matatā area 'rests almost entirely on [Jane] Luiten's report and its assumption that the coastal hapū of Ngāti Rangihouhiri, Ngāti Hikakino and then Te Tawera, were in fact hapū of [Ngāti] Tūwharetoa'.<sup>57</sup> (This report, Dr Gilling noted, had been commissioned by Ngāti Tūwharetoa ki Kawerau.) Yet, he pointed out, Ngāti Awa strongly claim these hapū as their own. Furthermore, Dr Gilling continued, Ngāti Rangitihi claim that 'the common ancestry shared by groups with some connection to the person Tūwharetoa some 700 years ago means that they have as good a genealogical claim through precisely the same ancestry'.<sup>58</sup> Dr Gilling stated that he had 'seen no documents informing the present Crown stance that even address[es] this issue, let alone resolves it'.<sup>59</sup>

**3.2.2 Evidence of David Potter**

Further material filed in support of the Wai 996 claim included a number of statements of evidence presented by Ngāti Rangitihi members, including two from Mr Potter.

---

54. Oral evidence of Dr Bryan Gilling, 5 February 2003, tape 1, side B

55. Document A29, para 18.3

56. Document A7, para 6.3

57. Ibid, para 6.4

58. Ibid, para 6.4

59. Ibid, para 6.4

The first of Mr Potter's briefs outlined the traditional history of Ngāti Rangitihi and its rohe. The ancestors of Ngāti Rangitihi, Mr Potter stated, arrived in Aotearoa on the Te Arawa waka, landing at Matatā where Ngāti Rangitihi is still resident today. Mr Potter claimed that the area Ngāti Rangitihi has always occupied is from where the Rangitaiki River flows into the sea, running westwards up the coast to Ōtamarākau, inland southwards from Ōtamarākau to Lake Rotoehu, taking in the whole of Lake Rotomā across to Lake Tarawera south as far as Rainbow Mountain, then eastwards including the western third of the Matahina block, and running northwards following the course of the Rangitaiki River to the sea.<sup>60</sup> According to Mr Potter, this rohe never changed throughout history, despite challenges by Ngāti Awa from the east and Ngāi Tūhoe further inland. Ngāti Rangitihi had an agreement with the Ngāti Tūwharetoa people which allowed Ngāti Tūwharetoa access to the sea through Ngāti Rangitihi's rohe. Ngāti Rangitihi had shared specific areas of its rohe with small numbers of Ngāti Tūwharetoa at Matatā and Onepu since 1865, and he was 'prepared to accept that they have some claim' to Ngāti Rangitihi land in these areas due to inter-marriage.<sup>61</sup>

Mr Potter commented that Ngāti Rangitihi had historically been a prosperous tribe, capable of defending its own rohe, particularly against Ngāti Awa which had attempted to gain ownership of Matatā through conquest. There was an agreement between Ngāti Rangitihi and Ngāti Awa providing for access to food gathering areas, but Ngāti Awa tried continually to assume ownership of these areas, including Matatā. Yet it was not until the early nineteenth century, Mr Potter stated, when Ngāti Rangitihi had been devastated by European illness and raids by Ngā Puhī, that Ngāti Awa actually moved into Matatā. Consequently, Ngāti Rangitihi felt relieved at the signing of the Treaty of Waitangi as it hoped that this would bring an end to fighting, and the Crown would protect the tribe's lands. However, this did not prove to be the case, and Ngāti Awa insisted on claiming the rohe of Ngāti Rangitihi as its own, as it does to this day.<sup>62</sup>

This explains why, Mr Potter claimed, Ngāti Rangitihi and other Te Arawa groups provided military assistance to the Crown during the 1860s, so that Ngāti Awa could be permanently driven off Te Arawa land.<sup>63</sup> Mr Potter said that the Crown recognised that the Te Arawa contingent was fighting with the Crown in order to eject Ngāti Awa from its own lands, and so refused to pay the Te Arawa forces for their service. The Crown confiscated some 87,000 acres of Ngāti Rangitihi land on the assumption that it belonged to Ngāti Awa. But then the Crown proceeded to grant the land Ngāti Rangitihi had fought to win back to other tribes, and also kept large tracts for itself.<sup>64</sup> These and other Crown actions left Ngāti Rangitihi without an economic base. Its chance to obtain one was further diminished by both the Ngāti Awa and Ngāti Tūwharetoa ki Kawerau settlement offers 'in which the Crown

---

60. Document A2, para 4.1

61. Ibid, para 4.2

62. Ibid, paras 5.3, 46.6–46.7, 47.1–47.2

63. Ibid, para 47.4

64. Ibid, para 49.1

## NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

## 3.2.2

is offering outside tribes valuable forest and geothermal assets from within' Ngāti Rangitihī's rohe.<sup>65</sup>

Mr Potter's statement of evidence also outlined sites of vital importance to Ngāti Rangitihī, and in particular 13 wāhi tapu burial grounds within the claim area.<sup>66</sup> Mr Potter felt particularly concerned that these sites may lie within the claimed rohe of Ngāti Tūwharetoa ki Kawerau.

In his second brief of evidence, Mr Potter stated his concern that the cultural redress comprised within the offer of settlement to Ngāti Tūwharetoa ki Kawerau would directly undermine the rangatiratanga of Ngāti Rangitihī and its traditional relationship with its land and resources. He said that the map of the Ngāti Tūwharetoa area of interest attached to the deed 'covers virtually the entire rohe of Ngāti Rangitihī' and 'gives the impression that the rohe of [Ngāti] Tūwharetoa ki Kawerau supplants that of Ngāti Rangitihī'.<sup>67</sup>

Mr Potter opposed nearly every item of redress offered to Ngāti Tūwharetoa ki Kawerau. Of the items in and around Matatā, the location of the sole Ngāti Rangitihī marae and centre of its community, Mr Potter claimed that the transfer of the 30-hectare Whakapaukōrero site (within the Matatā scenic reserve) was 'strongly opposed' as it contains 'well-known Ngāti Rangitihī pā sites'.<sup>68</sup> The Whakapaukōrero site is to be vested fee simple in the Ngāti Tūwharetoa ki Kawerau governance entity as a historic reserve subject to section 18 of the Reserves Act 1977. Mr Potter described the site as 'culturally extremely important' to Ngāti Rangitihī, and in close proximity to the tribe's historic marae.<sup>69</sup>

The transfer of the 10-hectare Te Wahiora site (within the western Whakatāne recreation reserve) was also opposed on the basis that this was Ngāti Rangitihī ancestral land 'and not shared with any other iwi or hapū'.<sup>70</sup> This site is to be vested in the Ngāti Tūwharetoa ki Kawerau governance entity as a recreation reserve subject to section 17 of the Reserves Act 1977. This area is 'a beach camping place used for food gathering' and owned exclusively by Ngāti Rangitihī.<sup>71</sup>

Mr Potter also objected to the offer of a one-hectare nohoanga entitlement within Te Awa a Te Atua (Matatā wildlife refuge reserve). The entitlement allows Ngāti Tūwharetoa ki Kawerau to occupy the site exclusively for a period of up to 210 days within a calendar year to provide access to the Tarawera River for lawful fishing, and for the legal gathering of other natural resources in the vicinity.<sup>72</sup> Any rights Ngāti Tūwharetoa ki Kawerau had to this area were 'solely at the discretion of Ngāti Rangitihī'; this part of the coast belongs to his iwi.<sup>73</sup>

---

65. Document A2, para 51.7

66. Ibid, para 15

67. Document A3, para 2.3

68. Ibid, para 11

69. Ibid

70. Document A3, para 7

71. Ibid

72. Document A23, para 87

73. Document A3, para 38

The Wai 996 claimants also oppose the establishment of a joint advisory committee for the Matatā scenic reserve and Matatā wildlife refuge reserve. The committee will advise the Minister and Director-General of Conservation on conservation matters affecting the Matatā wildlife refuge reserve and the balance of the Matatā scenic reserve not transferred to Ngāti Tūwharetoa ki Kawerau or Ngāti Awa or both.<sup>74</sup> It will comprise two individuals nominated by Ngāti Tūwharetoa ki Kawerau, and two by the Director-General of Conservation. As Ngāti Awa has been offered the same redress, the committee will also have on it two individuals nominated by that iwi. These arrangements were absolutely unacceptable to Mr Potter. Taonga were hidden in the lands of the wildlife refuge reserve, and the ‘bones of Ngāti Rangitihī ancestors were washed in the waters of the lagoon’.<sup>75</sup> Moreover, much of ‘the Matatā Scenic Reserve is wāhi tapu in the eyes of Ngāti Rangitihī’ and there were a number of burial places in the reserve area.<sup>76</sup> Ngāti Rangitihī would not accept any other iwi or hapū having consultative rights over the management of these areas.

Mr Potter also addressed the Crown’s consultation process with Ngāti Rangitihī. He acknowledged that the Crown had communicated with counsel for Wai 524, Mr Rangitauira, since early 2001. But Mr Potter had become so concerned about how matters were progressing by March 2002 that he decided to lodge his own claim with the Tribunal and communicate his objections to OTS directly.<sup>77</sup> Mr Potter and other members of Ngāti Rangitihī felt distraught at the Crown’s request in early May 2002 for comments on the Ngāti Tūwharetoa ki Kawerau offer so that these could be considered in advising the Minister of her provisional decision on overlapping claims. That OTS had reached such a stage ‘horrified’ Mr Potter, who proceeded to write to the Minister informing her that Ngāti Rangitihī ‘was not in a position to put forward any research to counter what it seemed the Crown had already decided’.<sup>78</sup> He alleged that the predicament of Ngāti Rangitihī was partially due to the Crown failing to recognise that Mr Rangitauira ‘was not passing on information’ so that the iwi as a whole remained unaware of the extent of the Ngāti Awa and Ngāti Tūwharetoa settlements.<sup>79</sup> He wrote to the Crown many times over the next six months indicating the concerns of Ngāti Rangitihī, but the Crown was not ‘prepared to give Ngāti Rangitihī a real opportunity (or resources) to put their case’.<sup>80</sup>

Mr Potter felt particularly concerned by Crown requests in June 2002 to offer assistance in determining where the alleged Ngāti Rangitihī burial sites were located in relation to the Matatā scenic reserve. He believed such a request was culturally insensitive and he did not

---

74. Document A23, para 85

75. Document A3, para 18

76. Ibid, para 20

77. Ibid, para 51.2

78. Ibid, para 51.3

79. Document A23(a), annex 26

80. Document A3, para 51.3

know of any other tribes having to escort Crown officials to burial sites to prove the existence of wāhi tapu.<sup>81</sup>

Mr Potter stated that he had been informed in early August 2002 that the Minister had made her provisional decision concerning overlapping claims to the Ngāti Tūwharetoa ki Kawerau settlement and that any responses had to be made by the end of the month. Given such a short timeframe, and the fact that Ngāti Rangitihi had no funding to prepare and research its claims, Mr Potter believed that his iwi was not given a proper opportunity to respond. It was especially unfair that Ngāti Rangitihi had to comply with these requests in only a few weeks and with no funding, when parties involved in the eastern Bay of Plenty hearings had received funding for several years.<sup>82</sup>

### 3.3 SUBMISSIONS OF THE CROWN

The Crown's arguments are outlined in the opening submissions of Crown counsel, dated 3 February 2003.<sup>83</sup> Counsel stated that the focus of this inquiry was not the relative and competing interests of claimants in the eastern Bay of Plenty, but the application of the Crown's cross-claim policy to the items of redress contained in the settlement offer to Ngāti Tūwharetoa ki Kawerau. Counsel claimed that the process and approach to contested redress in the Ngāti Awa settlement – which the Tribunal found did not breach the principles of the Treaty – was followed in the Ngāti Tūwharetoa ki Kawerau settlement. These two processes, counsel maintained, essentially progressed in parallel. Counsel also submitted that the Tribunal's approach to considering settlements is 'similar to that of a court on review', and that it was 'not the role of the Tribunal to substitute its views on the redress or policy for those of the Crown'.<sup>84</sup>

Counsel addressed the Treaty principles relevant to this case, stating that the fundamental principle of mutual obligation to act in good faith requires the Crown, when negotiating settlements, to balance the competing interests. No perfect solution is likely, and the process inevitably requires compromise by all interested parties.<sup>85</sup> Counsel pointed to the relevant findings in the *Ngāti Awa Settlement Cross-Claims Report*, quoting this passage:

There really is no solution that the Crown could come to here that would be universally applauded. . . . Pragmatism and fairness are principles that have led the Crown to the solution they propose, and this Tribunal can see no Treaty basis for differing from the Crown as

---

81. Document A23(a), annex 30

82. Document A3, para 53.3

83. Document A24

84. Ibid, paras 6, 9

85. Ibid, para 20

to the substance of its policy. While the implementation of the policy produces negative effects for some groups, we consider that those negative effects are, on balance, less than those that would arise from the alternatives.<sup>86</sup>

In negotiating the settlement with Ngāti Tūwharetoa ki Kawerau, the Crown has had to weigh the competing imperatives of providing suitable redress while retaining the capacity to provide similar and sufficient redress to other parties should that be appropriate. Counsel submitted that this involves the Crown undertaking what the *Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* described as a ‘delicate balancing exercise’.<sup>87</sup> The Crown must inform itself of the competing interests; take those matters of which it has been informed into account in reaching decisions about contested redress; and conscientiously endeavour to minimise any potential negative impact of settlement on cross-claimants, while achieving an acceptable and durable settlement with Ngāti Tūwharetoa ki Kawerau.<sup>88</sup> Counsel argued that the Crown has fulfilled these requirements here. The consultation process ‘demonstrates a good-faith engagement by the Crown with Ngāti Rangitihi to identify and seek to protect any Ngāti Rangitihi interests that may be affected by the Ngāti Tūwharetoa settlement’.<sup>89</sup>

Regarding Ngāti Rangitihi opposition to the Crown proceeding with the settlement prior to their claims being heard, Crown counsel pointed out that the Tribunal has reported that the Crown’s approach in this respect does not breach Treaty principles. ‘Rather’, counsel submitted, ‘the focus of the Tribunal is on considering whether the process of negotiating the settlement is Treaty compliant’.<sup>90</sup> Counsel stated that, for the Tribunal to make a recommendation to the Crown, section 6 of the Treaty of Waitangi Act 1975 requires that there must be prejudice to the claimants.<sup>91</sup> Consideration of this prejudice must take into account the nature of the ‘delicate balancing exercise’ to be undertaken by the Crown, including the principle of pragmatism. Counsel contended:

That a site within the Ngāti Rangitihi claimed rohe may be transferred to Ngāti Tūwharetoa does not of itself cause prejudice. It is submitted that prejudice is caused only if the nature of the Ngāti Rangitihi interest in that site is so great that the transfer would be inappropriate and/or there are insufficient resources retained by the Crown to provide fair redress to Ngāti Rangitihi (if considered appropriate in the future). A negative effect does not of itself create ‘prejudice’ in this context . . .<sup>92</sup>

---

86. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report*, p 76

87. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report*, p 18

88. Document A24, para 21

89. *Ibid*, para 40

90. *Ibid*, para 23

91. *Ibid*, para 30

92. *Ibid*, para 31



The Tribunal must also take into account the prejudice that may be caused to Ngāti Tūwharetoa ki Kawerau if the relief sought by the Wai 996 claimants is granted.

The Crown, counsel submitted, was well informed of Ngāti Rangitihi objections to the settlement offer at the time of the Minister's decisions, and Ngāti Rangitihi interests had been adequately identified in the research undertaken. The Crown took account of those interests and, based on the further research undertaken by Ms Hickey, considered whether modification of the settlement package was needed in order to minimise the negative effects of the settlement on Ngāti Rangitihi, but still offer a fair and durable redress package to Ngāti Tūwharetoa ki Kawerau. Counsel stated that given 'the present circumstances, although two additional protection mechanisms were included, the Crown concluded that it was not necessary to modify the settlement package'.<sup>93</sup> Those two additional measures that Ots recommended to the Minister were:

i. the [Ngāti Tūwharetoa ki Kawerau] Deed of Settlement to expressly provide that the granting of non-exclusive redress to [Ngāti Tūwharetoa ki Kawerau] does not prejudice the Crown's ability to provide similar redress to other groups with proven claims, or do anything else (including disposing of land to other groups) provided that is consistent with the terms of any specified redress;

ii. you write to relevant Ministers and regional and local bodies in those parts of the [Ngāti Tūwharetoa ki Kawerau] area of interest where cultural redress has been provided stating that the Crown recognises that other groups have overlapping claims that have yet to be addressed.<sup>94</sup>

Crown counsel contended that the Crown did not have opportunity to consider the Wai 996 objections made subsequent to the Minister's decisions, and 'that this information cannot be taken into account in assessing the Crown's process but could be considered in assessing whether the new evidence would demonstrate prejudice to Ngāti Rangitihi'.<sup>95</sup> With the possible exception of two of the wāhi tapu sites listed by Mr Potter as being within the Ngāti Tūwharetoa ki Kawerau area of interest, the remaining eleven wāhi tapu sites are located within non-exclusive redress areas. The 'Crown submits such location would not cause prejudice to Ngāti Rangitihi'.<sup>96</sup> The Crown was not able to determine the precise locations of the wāhi tapu sites in relation to the Matatā scenic reserve and the Lake Rotomā scenic reserve because the information provided was not sufficiently detailed.

Counsel explained that the Crown remained unclear as to the claimants' objections to the non-exclusive redress items of the settlement package. The Crown could not see how

---

93. Document A24, para 118

94. Document A23(a), annex 41, para 48

95. Document A24, para 119

96. Ibid, para 119



this form of redress, which preserves the Crown's capacity to offer similar redress to other parties, could be deemed a breach of Treaty principles. This could only be so 'if it is established that Ngāti Tūwharetoa are without interests in the areas in which non-exclusive redress is offered'.<sup>97</sup> Some of the evidence filed by the claimants seems to allege this, but counsel contended that it could not seriously be argued that Ngāti Tūwharetoa ki Kawerau are without interests in these areas. This was especially so considering that some of the evidence filed by the claimants did admit to various levels of Ngāti Tūwharetoa interest in the Matatā/Kawerau area, and given the Tribunal's findings in the *Ngāti Awa Raupatu Report*. That report noted that Ngāti Tūwharetoa ki Kawerau claimed to have nine hapū remaining in the Matatā-Kawerau area (Ngāti Peehi, Umutahi, Te Tawera, Ngāi Tamarangi, Ngāti Hikakino, Ngāi Te Rangihouhiri, Ngāti Pou, Ngāti Iramoko, and Ngāti Manuwhare), and there are two Ngāti Tūwharetoa marae in Matatā, Umutahi and Oniao.<sup>98</sup>

Although counsel realised that Ngāti Rangitihi had not participated in the eastern Bay of Plenty hearings, the Crown was not relying on the *Ngāti Awa Raupatu Report* as an authority for dealing with Ngāti Rangitihi interests. Rather, the Crown was relying on the conclusions reached in the report that Ngāti Tūwharetoa ki Kawerau had interests in the eastern Bay of Plenty (including Matatā and Kawerau), either through the affiliations of hapū or otherwise, and that this entitled the group to stand alone in their own settlement.

Comparing the issue of cultural redress to earlier cross-claims inquiries, the recent hearing into the Ngāti Awa settlement was more relevant to the Wai 996 urgency than counsel for the claimants had indicated. Claimant counsel emphasised the issues of Crown forest licensed land, commercial redress and 'substitutability', but the *Ngāti Awa Settlement Cross-Claims Report* also considered cross-claims to cultural redress sites such as Matahina A4 and A5, and Kaputerangi historic reserve. The report is therefore 'directly relevant, particularly in establishing the proper focus of the Tribunal's inquiry in this context'.<sup>99</sup>

Counsel submitted that the concerns raised by the Wai 996 claimants during the Crown's consideration of cross-claims prompted it to undertake further research to establish whether there was any evidence to support the claims made by Ngāti Rangitihi. The Crown would usually seek information from the cross-claimants themselves on such matters. But the Crown had been advised at the hui of 21 February 2002 that there was no Ngāti Rangitihi kaumātua remaining to provide oral evidence to ascertain the iwi's interests in relation to the Matatā area.<sup>100</sup> The Crown decided to conduct its own in-house research. Given the focus of the Ngāti Rangitihi cross-claims, this research was primarily directed at investigating interests in the Matatā area.<sup>101</sup> The research indicated that Ngāti Tūwharetoa/Ngāti Awa had

97. Ibid, para 55

98. Waitangi Tribunal, *The Ngāti Awa Raupatu Report*, pp 20–21

99. Document A24, para 25

100. Ibid, para 44.3

101. Document A23, para 68

occupied the Matatā area up to 1865; that Ngāti Rangitihi had not occupied the Matatā area prior to 1865, but may have had relationships with the hapū in the area and were likely to have access to the coast via the Tarawera River; and that the Ngāti Rangitihi people lived in the Tarawera area. Their land interests at Matatā date from 1865 when they and other Te Arawa hapū received grants there following military service with the Crown.<sup>102</sup> While the Crown recognises Ngāti Rangitihi interests at Matatā from the 1860s, the Crown did not discount the possibility that Ngāti Rangitihi, or any other group, could establish earlier presence there. Counsel stressed that the settlement offer to Ngāti Tūwharetoa ki Kawerau did not seek to recognise that group as having exclusive interests in the Matatā area. Rather, in attempting to perform its ‘delicate balancing exercise’, the Crown sought to recognise the claims of Ngāti Tūwharetoa ki Kawerau without causing prejudice to the claims of Ngāti Rangitihi: ‘These objectives are not mutually exclusive’.<sup>103</sup>

On the basis of the findings reached, therefore, counsel argued that ‘the research does not demonstrate any interest of Ngāti Rangitihi that justifies the withdrawal of the offers of redress to Ngāti Tūwharetoa’.<sup>104</sup> In negotiating its settlements involving redress in the Matatā area, the Crown has sought to ‘recognise the customary associations of Ngāti Tūwharetoa and Ngāti Awa with small pockets of Crown-owned land that was taken from them through confiscation’.<sup>105</sup>

With respect to the transfer to Ngāti Tūwharetoa ki Kawerau of land within the Matatā scenic reserve, the Crown submitted that the ‘exclusive redress is justified by the fact that Whakapaukōrero is a sacred maunga of Ngāti Tūwharetoa and that there are three Ngāti Tūwharetoa pā sites within the site’.<sup>106</sup> Ngāti Tūwharetoa ki Kawerau consider the Compensation Court awards of this land to other iwi to be a significant grievance. It was the Crown’s understanding that the Ngāti Rangitihi pā site said by the Wai 996 claimants to be within the Matatā scenic reserve was not inside the Whakapaukōrero site to be transferred to Ngāti Tūwharetoa ki Kawerau. The position of the urupā claimed by Mr Potter to be in the scenic reserve had not been ascertained, however. The Crown’s offers of assistance to Ngāti Rangitihi to identify these sites were rejected.

On balance, given the lack of Ngāti Rangitihi information and the findings of the Crown’s research, withdrawal of this redress could not be justified. Even after the proposed transfer of two 30-hectare sites to both Ngāti Tūwharetoa ki Kawerau and Ngāti Awa, the Crown retained significant amounts of land within the Matatā scenic reserve that could be offered as redress in future settlements if other groups had proven interests there.

The Crown submitted that the transfer of the Te Wahieroa reserve to Ngāti Tūwharetoa ki Kawerau is also justified. The reserve is located in the western Whakatāne recreation reserve,

---

102. Document A23, para 69

103. Document A24, para 44.4

104. Ibid, para 44.6

105. Ibid, para 52

106. Ibid, para 58

east of Matatā. Te Wahieroa is a significant landing place for many waka; it was an ancient canoe-building and marae site; and important Ngāti Tūwharetoa ki Kawerau ancestors had mahinga kai there.<sup>107</sup> The Wai 996 claimants objected to this redress on the basis that the site contains food gathering sites of significance to Ngāti Rangitihi, but Crown counsel said it was unclear whether these campsites relate specifically to the redress area or to the wider western Whakatāne recreation reserve. Again, ‘the conclusions as to relative historical and contemporary interests indicated by the historical research’ did not justify the withdrawal of this offer of exclusive redress.<sup>108</sup> The transfer to Ngāti Tūwharetoa ki Kawerau of a 10-hectare site, and the transfer of another 10-hectare site to Ngāti Awa, still left the Crown with sufficient land in the western Whakatāne recreation reserve to offer to any other group should that be considered appropriate in the future.

A further item of exclusive redress to be offered to Ngāti Tūwharetoa ki Kawerau in the Matatā area is a one-hectare nohoanga entitlement at Te Awa a Te Atua. This exclusive redress was justified on the basis that Ngāti Tūwharetoa hapū had pā in the area, and that it was used for food- and medicine-gathering purposes. Again, given the significant customary interests of Ngāti Tūwharetoa ki Kawerau at Te Awa a Te Atua, the offer of exclusive redress should not be withdrawn, even if Ngāti Rangitihi had interests there too. The Crown retained land within the Matatā wildlife refuge reserve where nohoanga entitlements could be granted to other iwi able to establish interests justifying this redress.<sup>109</sup>

The Crown also defended the establishment of a joint advisory committee for the Matatā scenic reserve and Matatā wildlife refuge reserve. Counsel acknowledged that Ngāti Rangitihi claimed wāhi tapu interests in the Matatā scenic reserve (even though these could not be located with any precision at the time of the Minister’s decisions). Nevertheless, the strength of Ngāti Tūwharetoa ki Kawerau’s interests was such that the redress should not be withdrawn. This was ‘non-exclusive redress and the Crown could appoint representatives from other iwi (including Ngāti Rangitihi) to the joint advisory committee as part of future settlements if appropriate’.<sup>110</sup> In advising Mr Potter of the Minister’s provisional decision on overlapping claims relating to the Ngāti Tūwharetoa ki Kawerau settlement offer, OTS informed him that the ‘Crown retains the discretion to appoint other groups to the Joint Advisory Committee’.<sup>111</sup>

Counsel also referred to the statutory acknowledgements, deeds of recognition and protocols for Ngāti Tūwharetoa ki Kawerau with respect to certain sites throughout its area of interest. Although most of this redress focused on the Kawerau rather than Matatā area, the Wai 996 claimants maintained that this redress infringed on their own mana and rangatiratanga as it related to locations within their own rohe. The Crown pointed to the special

107. Ibid, para 69

108. Ibid, para 71

109. Ibid, paras 66–67

110. Ibid, para 63

111. Document A23(a), annex 36, para 24

associations of Ngāti Tūwharetoa ki Kawerau with the particular sites and areas concerned. This form of redress is non-exclusive, and is available to other groups in the future if appropriate. Moreover, 'other groups may be offered exclusive redress in relation to areas covered by these redress instruments to the extent that such redress is not inconsistent with the redress offered to Ngāti Tūwharetoa'.<sup>112</sup> Counsel stated that the statutory acknowledgements and deeds of recognition did not alter the obligations of local authorities to cross-claimants, nor the standing of cross-claimants under the Resource Management Act 1991. The Minister wrote to relevant local authorities and Government departments on 30 January 2003, advising that the Crown recognises that other groups may also have interests in the Ngāti Tūwharetoa area of interest that are still to be addressed.<sup>113</sup> Counsel noted that this issue had already been traversed by the Tribunal in the Ngāti Maniapoto/Ngāti Tama cross-claims inquiry, where it was found:

The statutory acknowledgements and deeds of recognition to be provided in the Ngāti Tama settlement are certainly no basis for a local authority to neglect its obligations in respect of notice to, or consultation with, Ngāti Maniapoto.<sup>114</sup>

Regarding the Crown's communication and consultation process with cross-claimants, counsel stated in an earlier memorandum that the Crown had actively consulted all claimants that it was aware may be affected by the redress package to Ngāti Tūwharetoa ki Kawerau.<sup>115</sup> Counsel pointed to a chronology of interactions between the Crown and Ngāti Rangitihi. The consultation process spanned 18 months before the Minister made her final decision. At the outset of the consultation, Ngāti Rangitihi were told of the full extent of the settlement offer; Mr Paterson should have been aware of the offer by at least 29 May 2001; Ngāti Rangitihi were advised at the hui of 21 February 2002; Mr Potter became personally involved for the first time after informing OTS on 14 March 2002 of his objections to the settlement, providing him with at least six months in which to articulate his concerns; Mr Paterson had at least 16 months to do likewise, and Ngāti Rangitihi 18 months.<sup>116</sup> The Crown had acted in good faith over this period to consult with Ngāti Rangitihi claimants, to identify their interests that might be affected by the settlement, and to protect those interests.

At the hearing, Crown counsel said that Mr Rangitauira had advised Mr Paterson and other members of the Ngāti Rangitihi Claims Committee on 29 May 2001 of the letters from OTS. It was inaccurate to say that certain persons were not aware of the settlement offer to the extent that it had been portrayed because, at the very least, Mr Rangitauira had advised the members of the claims committee that he had been sent the settlement offer.<sup>117</sup> Counsel also

---

112. Document A24, para 101

113. Ibid, para 103

114. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report*, p 22

115. Paper 2.17, para 22

116. Document A24, paras 38–39

117. Oral submission of Crown counsel, 5 February 2003, tape 3, side B

argued that the Crown could not be criticised for waiting to consult with Ngāti Rangitihi until the tribe was ready to hold a hui-ā-iwi. Counsel indicated that OTS had signalled its availability to discuss preliminary issues with Ngāti Rangitihi before any proposed hui.<sup>118</sup>

Thus, the Crown had fulfilled its Treaty obligation to act in good faith in Treaty negotiations, and in the consideration of cross-claims. In endeavouring to achieve a fair and appropriate settlement with Ngāti Tūwharetoa ki Kawerau, the Crown had informed itself of competing interests and had taken these matters into account in reaching decisions about contested redress. The Crown considered that the historical sources and information provided to date (both before and after the Minister's decision) did not indicate any Ngāti Rangitihi interest justifying the withdrawal of any of the redress offered to Ngāti Tūwharetoa ki Kawerau. In closing, counsel stated that the 'Crown retains the capacity, through the retention of land, to offer fair redress to other groups, including Ngāti Rangitihi, who are able to establish claims in the Kawerau/Matatā area'.<sup>119</sup>

### 3.4 EVIDENCE FOR THE CROWN

The Crown's evidence was a comprehensive written brief and accompanying document bank from Peter Hodge, senior policy analyst, OTS. Mr Hodge's brief addressed the background to the settlement negotiations with Ngāti Tūwharetoa; the Crown's consultation process with Ngāti Rangitihi, including the Wai 996 claimants; an overview of the Wai 996 claimants' objections to the Ngāti Tūwharetoa redress package; the Crown's decisions in respects to the cross-claims issues raised by the Wai 996 claimants prior to, and after, the Minister's provisional and final decisions; and the protection of wāhi tapu.

Mr Hodge provided a detailed chronology of the Crown's consultation process with those claimants it had identified as having overlapping interests with the Ngāti Tūwharetoa ki Kawerau claim area. According to Mr Hodge's evidence, this process commenced on 29 March 2001 when cross-claimants were advised that the offer to Ngāti Tūwharetoa ki Kawerau was subject to the Crown's confirming that cross-claims issues had been addressed to its satisfaction. As part of this process, OTS wrote to counsel for Wai 524, Mr Rangitauira, who was at that time the contact person for that claim and for the Ngāti Rangitihi Claims Committee. Wai 524 was the only Ngāti Rangitihi claim that the Crown was aware of then. A copy of the Crown's full settlement offer was provided to counsel for any comments.<sup>120</sup> These were sought by 30 April 2001. The time period allowed for comment was extended to 25 May 2001 after the settlement offer had been amended. Receiving no reply, the Crown sent a

118. Document A23(a), annex 6

119. Document A24, para 121

120. Document A23, para 22

## NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

3.4

follow-up letter to counsel on 22 May 2001 seeking urgent comment on any concerns Ngāti Rangitihi might have with the settlement offer.<sup>121</sup>

Mr Rangitauira informed OTS on 29 May 2001 that he had received its recent letters and confirmed that Ngāti Rangitihi was a cross-claimant. He stated, however, that the iwi had been unable to hold a meeting to discuss the proposed settlement package but that he intended to call one during July or August 2001 and would provide a response after that.<sup>122</sup>

OTS sent further letters throughout 2001 updating Ngāti Rangitihi on the progress of the Ngāti Tūwharetoa ki Kawerau (and Ngāti Awa) settlements. Mr Rangitauira indicated that Ngāti Rangitihi would have some comments on the settlement offer to Ngāti Tūwharetoa, but no specific comments were sent.<sup>123</sup> He advised the Crown that it would not be until early February 2002 that Ngāti Rangitihi could meet to consider the Ngāti Tūwharetoa ki Kawerau offer. In a phone call between officials from the Office of Treaty Settlements and Mr Rangitauira on 29 January 2002, he indicated that redress offered in the Matatā scenic reserve was of particular concern to Ngāti Rangitihi. On 8 February 2002, Mr Rangitauira requested that officials meet with Ngāti Rangitihi to discuss aspects of the Ngāti Awa and Ngāti Tūwharetoa settlements. Mr Hodge met with two senior Ngāti Rangitihi representatives on 14 February at Matatā, and, a week later, along with other Crown officials, discussed the settlement offer at a hui-ā-iwi at Rangiaohia Marae.<sup>124</sup> The Crown took it from the correspondence and the meetings that Ngāti Rangitihi were principally concerned with redress offered to Ngāti Awa and Ngāti Tūwharetoa in the Matahina and Matatā areas.

Mr Hodge said that it was not until 12 March 2002, almost a year after OTS had first requested comments, that the Crown received a letter written by Mr Rangitauira on behalf of Ngāti Rangitihi outlining the iwi's position on the proposed Ngāti Awa and Ngāti Tūwharetoa settlements. Mr Rangitauira stated that Ngāti Rangitihi would not consent to the settlement offers where they affected lands covered by the Ngāti Rangitihi claim. Particular concern attached to the redress offered in and around Matatā. There was a burial site within the Matatā scenic reserve.<sup>125</sup> Two days later, Mr Potter wrote to OTS for the first time, objecting to the proposed settlements.<sup>126</sup>

As a result of Mr Rangitauira's letter of 12 March 2002, the Crown wrote seeking clarification from him of the boundaries and extent of the Ngāti Rangitihi claim.<sup>127</sup> The Crown reassured him that it retained the ability to provide similar redress to Ngāti Rangitihi should that be considered appropriate in the future. The Crown had sufficient land in the Matatā area, and could provide non-exclusive redress to other settling parties. The letter also offered

---

121. Document A23, paras 12–14

122. Document A23(a), annex 5

123. Document A23, para 16

124. Ibid, paras 18–22

125. Ibid, para 25

126. Document A23(a), annex 20

127. Ibid, annex 21



for officials (together with a surveyor and/or archaeologist) to accompany Ngāti Rangitihi on a site visit to identify the burial site in the Matatā scenic reserve.<sup>128</sup> Counsel submitted that this request for specific information, together with the hui on 21 February 2002, demonstrated that the Crown was at this stage still genuinely interested in resolving wāhi tapu issues and seeking input from the claimants.

Mr Potter wrote to the Minister on 27 March 2002 explaining the recent filing of his statement of claim in the Waitangi Tribunal, and that he and other members of Ngāti Rangitihi were unaware of the extent of the Ngāti Tūwharetoa and Ngāti Awa settlement offers. Crown counsel stated during the hearing that, as soon as the Crown became aware of Mr Potter's unregistered claim, the Crown began corresponding with Mr Potter as well as Mr Rangitauira.<sup>129</sup> OTS advised Mr Potter on 9 May 2002 that a copy of the Crown's settlement offer had been sent to Mr Rangitauira as representative of Ngāti Rangitihi and the Ngāti Rangitihi Claims Committee.<sup>130</sup> On 31 May 2002, OTS officials briefed the Minister on the progress of cross-claims issues in relation to the Ngāti Tūwharetoa settlement. They recommended that she make a provisional decision that the Crown proceed with the settlement, but that two further measures, as outlined above in section 3.3, should be taken to address cross-claimant concerns.<sup>131</sup> The Minister agreed to these measures.

In relation to the claims made by Mr Potter and Mr Rangitauira that there may be Ngāti Rangitihi urupā in the Matatā scenic reserve, and the claim by Mr Potter that there was a pā within the 30-hectare Whakapaukōrero site, Mr Hodge pointed out that OTS invited Ngāti Rangitihi to clarify the location of any such sites. The Crown wanted to understand the full significance of these areas to Ngāti Rangitihi. Mr Potter rejected this offer, and other offers, including one to pay for the cost of a surveyor, to assist in identifying the urupā and pā site.<sup>132</sup>

The Minister wrote to Mr Potter on 1 July 2002 responding to issues raised by him in his correspondence with the Crown. Mr Hodge stated that the Minister 'encouraged Mr Potter to meet and discuss concerns with Ngāti Tūwharetoa and noted that Mr Potter had declined the invitations from the Office of Treaty Settlements to identify wāhi tapu within the Matatā Scenic Reserve'.<sup>133</sup> It could not be determined, then, whether these sites were located in the redress areas offered to Ngāti Awa and Ngāti Tūwharetoa. The Minister advised that the Crown would proceed with the transfer of sites within the reserve, but there would be ongoing protection of cultural and historic values within these areas: they would remain subject to their existing reserve status, and Ngāti Rangitihi could apply to the Historic Places Trust to have their wāhi tapu registered under the Historic Places Act 1993.

---

128. Document A23, para 27

129. Oral submission of Crown counsel, 5 February 2003, tape 3, side B

130. Document A23, para 32

131. Document A23, para 37

132. Ibid, para 40

133. Ibid, para 42

Mr Hodge's brief outlined the course of events leading up to the Minister's final decision in early October 2002 to proceed notwithstanding cross-claimants' objections to the Ngāti Tūwharetoa settlement.

On 12 August 2002, OTS wrote to all cross-claimants setting out the Minister's provisional decision on cross-claims. The letters set out the relevant policy considerations, a response to the objections raised by cross-claimants, and the Minister's provisional decision in relation to contested redress. OTS asked for final comments on the Minister's provisional decision to be made by 28 August 2002, and invited comments from both Mr Potter, now a named claimant for the recently-registered Wai 996 claim, and Mr Rangitauira.<sup>134</sup>

Mr Potter wrote to the Minister on 26 August 2002, arguing that Ngāti Rangitahi had not been fully informed of the Crown settlement offer to Ngāti Tūwharetoa ki Kawerau, and rejected the Crown's view that there was sufficient redress available to satisfy Ngāti Rangitahi claims. Mr Potter had now retained legal counsel. Two days later, counsel for the Wai 996 claimants, Deborah Edmunds, wrote to OTS providing an interim response on two points of law, and seeking an extension to the deadline for providing comments to the Minister's provisional decision. The extension was granted, as were two further extensions, prolonging the period for final comments to 9 September 2002. The Crown received no final response from counsel, however.<sup>135</sup> On 2 October 2002, OTS again briefed the Minister on cross-claims to the Ngāti Tūwharetoa settlement. Officials recommended that the Crown proceed with the settlement, and the Minister agreed. Letters were sent the following day to all cross-claimants advising them of the Minister's final decision.

Mr Hodge stated in his brief of evidence that this process had demonstrated that the Crown had 'actively consulted' with all claimants it had identified as having cross-claims issues with the Ngāti Tūwharetoa settlement.<sup>136</sup>

In response to the objections made by Ngāti Rangitahi in early 2002, the Crown undertook further research to ensure that it was fully informed of the competing interests. This not only included Ms Hickey's work, but also the Crown's attempts to accompany Ngāti Rangitahi on site visits (which were rejected). The documentary research undertaken was summarised in Ms Hickey's memoranda and filed in Mr Hodge's document bank. Ms Hickey's first memorandum was actually prepared as an 'aide memoire' for the hui with Ngāti Rangitahi on 21 February 2002.<sup>137</sup> According to Mr Hodge, the date of the version filed in his document bank had been updated automatically recording the date on which that copy was printed out. Thus the research summarised in the memorandum had not been undertaken in the short timeframe criticised by Dr Gilling. Mr Hodge stated that the memorandum drew on research and information gathered throughout the negotiations with Ngāti Tūwharetoa ki

---

134. Document A23, paras 44–45

135. Ibid, paras 46–47

136. Ibid, para 11

137. Ibid, para 69



Kawerau, but particularly over the previous year as the Crown informed itself of the competing interests in the Matatā area. It was necessary, he continued, that OTS historians familiarise themselves with all relevant research reports and primary historical sources in consideration of cross-claims issues relating to settlements.

Mr Hodge also pointed out that the Ngāti Tūwharetoa area of interest as outlined in the deed was 'not intended to establish or recognise claimant group boundaries. Where maps are used in the settlement process, it is for specific administrative purposes, such as determining the area where protocols with government departments might apply.'<sup>138</sup> The area of interest did not indicate any exclusive area for Ngāti Tūwharetoa ki Kawerau. This was apparent from the fact that the Ngāti Tūwharetoa area of interest lies almost entirely within the Ngāti Awa area of interest. In cross-examination, counsel for Wai 996 queried whether the Crown was aware that third parties, particularly members of Māori communities, might see the area of interest set out in the deed as amounting to a tribal rohe. Mr Hodge conceded that maps outlining areas of interest could be subject to different interpretations. He believed this was something for the Crown to consider in the future.<sup>139</sup>

Mr Hodge's brief of evidence discussed the policy considerations guiding the Crown in granting redress, and provided an overview of the proposed specific redress.

Mr Hodge said that, where cross-claims cannot be resolved by the claimant groups themselves, the Crown decides whether or not it is appropriate to continue with the offers of redress that are the subject of the cross-claims. The cross-claimants are given the opportunity to provide information relating to their overlapping claims. The Crown considers this information and, if deemed necessary, seeks further information either through site visits, land and archaeological surveys, further research, or facilitating meetings between claimants.<sup>140</sup> In making any decision on cross-claims, the Crown is guided by two general principles: the Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations; and the Crown's wish to provide appropriate redress to other claimant groups and achieve a fair settlement of their claims.<sup>141</sup> Mr Hodge explained that the redress fell into two broad categories: fiscal/commercial redress, and cultural redress. Cultural redress was 'intended to meet the cultural rather than economic interests of a claimant group by recognising customary and traditional interests of the claimant group within their area of interest. This can be achieved through a variety of different instruments.'<sup>142</sup>

Mr Hodge's brief outlined the items of redress offered to Ngāti Tūwharetoa ki Kawerau and contested by Ngāti Rangitihi. He explained why the Crown considered the various items of redress were necessary to the settlement, and should not be withdrawn. The effect on

---

<sup>138.</sup> Ibid, para 164

<sup>139.</sup> Oral evidence of Peter Hodge, 5 February 2003, tape 3, side A

<sup>140.</sup> Document A23, paras 60–61

<sup>141.</sup> Ibid, para 63

<sup>142.</sup> Ibid, para 57

## NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

3.5

Ngāti Rangitihi was minimised because where exclusive interests in land were to be transferred, more land was available for transfer to other deserving groups. Where non-exclusive redress was concerned, such as involvement on advisory committees and various protocols and statutory acknowledgements, these were available to other groups too when they came to settle.

**3.5 SUBMISSIONS OF NGĀTI TŪWHARETOA KI KAWERAU**

Submissions filed by counsel on behalf of Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee were supplementary to the Crown's submissions. Counsel wished to focus on those issues identified by the Tribunal as its main concerns, yet also wanted to respond to some of the allegations made by, or on behalf of, Ngāti Rangitihi relating to Ngāti Tūwharetoa ki Kawerau interests. In particular, it was not clear from the evidence filed by the Wai 996 claimants whether or not they acknowledge that Ngāti Tūwharetoa ki Kawerau has any interests within its area of interest as defined in the initialled deed of settlement. Counsel submitted that 'Ngāti Tūwharetoa rejects the allegation that it does not have interests in all of the land contained in the Ngāti Tūwharetoa Area of Interest'.<sup>143</sup> Counsel pointed out that this has been acknowledged in at least some of the evidence filed by Ngāti Rangitihi, has been recognised by the Tribunal in the *Ngāti Awa Raupatu Report*, and subsequently by the Crown.

Counsel also disputed the allegation made by the Wai 996 claimants that Ngāti Rangitihi would suffer significant and irreversible prejudice if the proposed settlement is implemented. Counsel argued that the settlement package reached between the Crown and Ngāti Tūwharetoa ki Kawerau did not preclude recognition of the interests of other iwi and hapū, including Ngāti Rangitihi, in future Treaty settlements. The cultural redress to be provided under the deed has been framed so as to recognise Ngāti Tūwharetoa ki Kawerau interests, but leave a large amount of land available for other groups' settlements if this was found appropriate. The non-exclusive redress offered to Ngāti Tūwharetoa ki Kawerau 'provides for protection of the interests of other hapū or iwi who have associations with those areas if the Crown and the other relevant groups wish to negotiate a settlement in relation to those areas at a later stage'.<sup>144</sup> Counsel drew the Tribunal's attention to the passage in the *Ngāti Awa Settlement Cross-Claims Report* where the Tribunal commented that 'the cultural redress seems to us to be structured in a way that appropriately recognises Ngāti Awa's mana, but leaves room for other groups to be recognised in future settlements'.<sup>145</sup> Counsel urged on the Tribunal the view that the same could be said in this case, and that Ngāti Rangitihi concerns

---

143. Document A20, para 2.8

144. Ibid, para 3.11

145. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report*, p 83

about the protection of their mana and narrowing of the asset base for subsequent settlement were misplaced.

Counsel disputed the claim by Ngāti Rangitihi that it is a denial of natural justice to proceed with a settlement involving assets within an inquiry district that is subject to pending inquiries by the Tribunal. Similar arguments, counsel noted, were raised and rejected in other cross-claims inquiries.

The main issue of this hearing was whether, in entering into the Ngāti Tūwharetoa ki Kawerau settlement, the Crown's process to protect Ngāti Rangitihi wāhi tapu sites was robust in Treaty terms, and whether suitable redress is available for Ngāti Rangitihi for future settlement if this is considered appropriate. Counsel submitted that sufficient redress was available and that none of the wāhi tapu sites listed by Mr Potter appeared to be in the areas of exclusive redress offered to Ngāti Tūwharetoa ki Kawerau.<sup>146</sup> Where land was to be vested in the Ngāti Tūwharetoa ki Kawerau Governance Entity, provision had been made for the protection of wāhi tapu.

Counsel concluded her submissions by stating that Ngāti Rangitihi had not demonstrated that their wāhi tapu would go unprotected as a result of the settlement between Ngāti Tūwharetoa ki Kawerau and the Crown, and that suitable redress is available to Ngāti Rangitihi in the event that their claims are proven. The Tribunal should therefore not make any recommendation that would impact on the Ngāti Tūwharetoa ki Kawerau settlement.<sup>147</sup>

### 3.6 EVIDENCE FOR NGĀTI TŪWHARETOA KI KAWERAU

Two statements of evidence were filed in support of counsel's submissions, one by Graham Kahu Te Rire, and the other by Rae Beverley Adlam.

#### 3.6.1 Evidence of Graham Te Rire

Mr Te Rire is the chairman of Te Rūnanga o Tūwharetoa ki Kawerau and member of the Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee. Mr Te Rire outlined the negotiation process between the Crown and Ngāti Tūwharetoa ki Kawerau, and the traditional rohe of his iwi, as set out in the Ngāti Tūwharetoa area of interest in the initialled deed of settlement.<sup>148</sup>

He asserted that the Ngāti Tūwharetoa people have historically had a significant association with the Matatā area and links with many early hapū there. The present day Oniao Marae at Matatā pre-dated the Ngāti Rangitihi Marae.<sup>149</sup> Mr Te Rire disputed that Ngāti

<sup>146.</sup> Document A20, para 4.3

<sup>147.</sup> Ibid, para 5.1

<sup>148.</sup> Document A22, para 3.1–3.2

<sup>149.</sup> Ibid, para 3.3

## NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

## 3.6.2

Rangitihi has a historical association to many of the areas that the Wai 996 claimants argue used to belong solely to that iwi. Rather, ‘Ngāti Rangitihi only arrived in the Matatā district as a consequence of Crown grants in the 1860s for Military Service. The only links that members of Ngāti Rangitihi would have to these areas is through their genealogy links with [Ngāti] Tūwharetoa.’<sup>150</sup>

Mr Te Rire then outlined the association between Ngāti Tūwharetoa ki Kawerau and the various sites to which redress in the initialled deed of settlement relates. Of the cultural redress items in and around Matatā, Mr Te Rire stated that Whakapaukōrero was a sacred maunga for Ngāti Tūwharetoa ki Kawerau, containing several pā sites. This included the pā site belonging to Te Rangihouhiri II, a direct descendant of Rakei-Uekaha, who was a son of Tūwharetoa. According to Mr Te Rire, the area was used extensively as a direct communication path between Ngāti Tūwharetoa whanaunga in ancient times.<sup>151</sup> This validated the transfer of the fee simple title to Whakapaukōrero. Its location, with other culturally significant sites, in the Matatā scenic reserve, also justified the provision of two appointments to the joint advisory committee over the balance of the reserve.

Mr Te Rire claimed that Te Wahiora ‘is the point where the Ngāti Tūwharetoa raupatu boundary line meets Te Moana-nui-a-kiwa before heading out to the Rurima rocks’.<sup>152</sup> This site was significant to Ngāti Tūwharetoa ki Kawerau as it was the landing place for many waka when Ngāti Tūwharetoa ancestors came to the mahinga kai in the area. The proposed vesting of the 10-hectare Te Wahiora site in the Ngāti Tūwharetoa ki Kawerau Governance Entity acknowledged these links.

Mr Te Rire also drew attention to the associations between Ngāti Tūwharetoa ki Kawerau and Te Awa a Te Atua. This area was especially significant to Ngāti Tūwharetoa tāngata, being the landing place of the ancestral Tūwharetoa waka, Te Arawa and Te Paepae-ki-Rarotonga. According to the history told by the elders of Ngāti Tūwharetoa tāngata, when the Te Arawa waka arrived at Aotearoa, it entered the outlet of Te Awa a Te Atua at Te Mihi-marino Matatā. It then travelled up the river to a place called Kopuakuku, where the canoe was beached. The tohunga on the waka, Ngatoroirangi, was the first person off that waka to touch land. Tūwharetoa descends from Ngatoroirangi.<sup>153</sup> The provision in the initialled deed of settlement of a one-hectare nohoanga entitlement at Te Awa a Te Atua, and the establishment of a joint advisory committee in relation to the area, recognised these associations.

**3.6.2 Evidence of Rae Beverley Adlam**

This evidence comments on the overall negotiation process between the Crown and Ngāti Tūwharetoa ki Kawerau. Ms Adlam is chief negotiator for the Wai 62 claim. With regard to

---

150. Document A22, para 3.6

151. Ibid, para 3.13

152. Ibid, para 3.8

153. Ibid, paras 3.24–3.25

the term ‘Ngāti Tūwharetoa (Bay of Plenty)’ being used in the initialled deed, she pointed out that this came about because OTS required her claimant group to be clearly distinct from the Ngāti Tūwharetoa iwi in the Taupō region. Additionally, the Wai 62 claimants wanted to avoid the perception that the settlement would only relate to those people living in the Kawerau township rather than the wider, traditional Kawerau district.<sup>154</sup> The iwi and its claim, she contended, extends beyond the Kawerau township boundaries and into the Bay of Plenty generally, and that the term used to define her iwi in the initialled deed of settlement makes this distinction.

Ms Adlam maintained that the Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee has had a ‘good, amicable relationship with Ngāti Rangitihi’.<sup>155</sup> She stated that, during the negotiation process, Ngāti Tūwharetoa ki Kawerau has had several hui-ā-iwi at Matatā concerning the settlement and its contents, and Ngāti Rangitihi members could have attended.<sup>156</sup> She also claimed that Ngāti Rangitihi had generally supported Ngāti Tūwharetoa in seeking to resolve its grievances against the Crown. She was surprised that these proceedings had eventuated.

### 3.7 SUBMISSIONS OF NGĀTI AWA

As discussed earlier, counsel for Ngāti Awa had stated in a memorandum that Ngāti Awa had interests in areas claimed in Wai 996.<sup>157</sup> He attended the hearing in order to maintain a watching brief, and did not seek to make submissions or cross-examine witnesses. During the hearing, however, counsel pointed out that any comments or recommendations made by the Tribunal in relation to the redress offered to Ngāti Tūwharetoa ki Kawerau could potentially affect the Ngāti Awa settlement.<sup>158</sup> He expressed concern at some of the assumptions being made by the Tribunal in relation to the association between Ngāti Rangitihi and Matatā, as Ngāti Awa had very strong opinions regarding its relationship with Matatā and with lands as far west as Ōtamarākau. Ngāti Awa would have firm views on any possible Tribunal observation that Matatā was a core area of interest of Ngāti Rangitihi. This was especially so, counsel argued, considering that Ngāti Awa still has a presence there today. Ngāti Awa’s presence there would be stronger were it not for the Crown’s actions, from which Ngāti Rangitihi has directly benefited. Ngāti Awa would possibly file evidence in the context of the Rotorua district inquiry, where the substance of these issues would be heard. Judge Wainwright reassured counsel that the Tribunal would not make any direct recommendations on items of redress in the Ngāti Awa settlement, but that she could not guarantee that there would not be

154. Document A21, paras 3.3–3.6

155. Ibid, para 4.1

156. Ibid, para 4.3

157. Paper 2.29, para 2

158. Oral submission of counsel for the Wai 46 and 206 claimants, 5 February 2003, tape 5, side A

reverberations for Ngāti Awa from any comments the Tribunal might make regarding the present case.

### 3.8 EVIDENCE FOR NGĀTI AWA

Evidence filed on behalf of Ngāti Awa came in the form of a statement by Professor Hirini Moko Mead, chief negotiator for the settlement of the Ngāti Awa historical claims. The purpose of his evidence, he said, was to respond to that filed on behalf of Ngāti Rangitihi, and particularly Mr Potter's evidence, as it sought 'to cast doubt over the mana whenua of Ngāti Awa in the area to the west of the Rangitaiki River (an area sometimes referred to by Ngāti Awa as the "Western lands")'.<sup>159</sup> Professor Mead outlined in his statement the rohe of Ngāti Awa; the history of occupation of the Western lands; the northern raids and relocations that followed; the post-raupatu settlement of the Western lands; and Ngāti Awa marae and other places of significance in the Western lands.

Professor Mead said that by the late 1700s, the different hapū of Ngāti Awa were well established west of the Rangitaiki River: Ngāi Te Rangihouhiri, Ngāti Tarawaia, Ngā Potiki and Te Tawera were based at Te Awa a Te Atua; Ngāti Hikakino occupied the land along the coast from Te Kaokaoroa to Ōtamarākau; and Ngāti Whakahemo were at Pukehina.<sup>160</sup> Ngāti Awa had no knowledge of Ngāti Rangitihi ever occupying the Western lands, particularly the coastal areas around Matatā and Ōtamarākau, at any time prior to the raupatu. Rather, Ngāti Rangitihi are thought of as having their principal kāinga in the Tarawera region.<sup>161</sup>

One of the results of the raupatu and the Compensation Court process that followed, Professor Mead contended, was the award of Ngāti Awa lands to the tribes that had assisted the Crown in its actions against Ngāti Awa. Thus, the ownership of lands around Matatā and Ōtamarākau ended up being shared by Ngāti Rangitihi and other tribes. This ownership, he strongly believed, was based not on traditional associations with these lands, but were in recognition of the military assistance provided to the Crown.<sup>162</sup> Professor Mead pointed to many places of cultural significance to Ngāti Awa west of the Rangitaiki River and concluded his statement by rejecting the proposition that Ngāti Rangitihi had any traditional interests in the coastal areas of Matatā and Ōtamarākau. These were part of the traditional rohe of Ngāti Awa through its various hapū, only lost to Ngāti Awa as a result of the raupatu.<sup>163</sup>

---

159. Document A25, para 5

160. Ibid, para 15

161. Ibid, para 16

162. Ibid, paras 23, 25

163. Ibid, para 55

## CHAPTER 4

### ANALYSIS, FINDINGS, AND RECOMMENDATIONS

#### 4.1 THE CROWN'S SETTLEMENT OFFER TO NGĀTI TŪWHARETOA KI KAWERAU

The initialled deed of settlement between the Crown and Ngāti Tūwharetoa ki Kawerau is the culmination of more than four years of negotiations between OTS and Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee.

The settlement comprises a Crown apology, fiscal and commercial redress, cultural redress, and an overall settlement quantum. The Crown's model is that those claimants negotiating the settlement of their Treaty grievances ('settling claimants') effectively purchase their commercial redress from the settlement quantum at a value agreed with the Crown. A key element of the settlement is that the Crown has offered for transfer to Ngāti Tūwharetoa ki Kawerau 844.5 hectares of the Rotoehu West forest licensed land at a mutually acceptable price. The Crown has also offered to transfer title to certain landbanked properties at an agreed price. As well, the commercial redress includes a right to purchase Crown geothermal assets associated with the supply of geothermal steam to the Tasman Pulp and Paper Mill at Kawerau.

Included in the cultural redress offered to Ngāti Tūwharetoa ki Kawerau are several items of redress in and around Matatā. Matatā is the center of Ngāti Rangitihi community and identity today. This category of redress is the particular focus of this urgent inquiry. The particular items of redress offered to Ngāti Tūwharetoa ki Kawerau in the Matatā area are:

- Te Wahieroa and Whakapaukōrero reserves: transfer of fee simple titles to areas of land lying within the western Whakatāne recreation reserve (Te Wahieroa – 10-hectare site) and the Matatā scenic reserve (Whakapaukōrero – 30-hectare site) to Ngāti Tūwharetoa ki Kawerau, subject to existing reserve status and continued public access.

The Crown characterises this as exclusive redress. That is, the particular fee simple interests to be transferred to Ngāti Tūwharetoa ki Kawerau are available only to them.

The western Whakatāne recreation reserve is located on the coast to the east of the Tarawera River. The Matatā scenic reserve lies just inland of the township of Matatā. The Crown emphasised that although the transfers to Ngāti Tūwharetoa ki Kawerau are exclusive redress, similar offers of transfer could be made to Ngāti Rangitihi in the future. Mr Hodge, of OTS, said in evidence 'there was still land available within the Matatā Scenic Reserve that would allow the Crown to recognise any proven Ngāti



## NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

4.1

Rangitihi interest in any future settlement . . . approximately 430 ha would remain available within the Matatā Scenic Reserve'.<sup>1</sup> Likewise, the Crown retains 25 hectares within the western Whakatāne recreation reserve.<sup>2</sup>

- The establishment of a joint advisory committee for the Matatā scenic reserve and Te Awa a Te Atua (Matatā wildlife refuge reserve).

Ngāti Tūwharetoa ki Kawerau are to have two representatives on this committee. It will advise the Minister and Director-General of Conservation on conservation matters affecting Te Awa a Te Atua and those parts of the Matatā scenic reserve not comprised in the transfers of fee simple interests to Ngāti Awa and Ngāti Tūwharetoa ki Kawerau. The joint advisory committee will also comprise two persons nominated by the Director-General of Conservation. Ngāti Awa have been offered the same redress and the committee will also include two persons nominated by Ngāti Awa.<sup>3</sup>

This item of redress is characterised by the Crown as non-exclusive redress, as the Minister retains the ability to appoint other persons, such as representatives of other iwi, to the committee.<sup>4</sup>

- The grant of a one-hectare renewable nohoanga (temporary camping) entitlement located at Te Awa a Te Atua (Matatā wildlife refuge reserve).

Te Awa a Te Atua is located near the mouth of the Tarawera River. It is in the same general vicinity as the Matatā scenic reserve. The nohoanga entitlement allows Ngāti Tūwharetoa ki Kawerau to occupy exclusively the one-hectare site for a period of up to 210 days within a calendar year. The occupation is for the sole purpose of providing access to the Tarawera River for lawful fishing, and for the lawful gathering of other natural resources in the vicinity.<sup>5</sup>

This is characterised as exclusive redress, although the Crown considers that there is other land available within the Matatā wildlife refuge reserve over which a nohoanga could be granted for Ngāti Rangitihi, should that be considered appropriate in any future settlement.<sup>6</sup>

- The establishment of protocols in the Ngāti Tūwharetoa ki Kawerau area of interest, to promote effective working relationships on matters of cultural importance to that iwi with various Government departments.

The Crown characterises this redress as non-exclusive, and 'the respective government departments are aware that the provision of Protocols do not [*sic*] discharge them of any obligations that may be owed to other Māori'.<sup>7</sup>

---

1. Document A23, para 83

2. Ibid, para 96

3. Ibid, paras 84–85

4. Ibid, para 85

5. Ibid, paras 86–88

6. Ibid, paras 88–89

7. Ibid, para 161



In respect of each of these items of redress, the Crown assured the Tribunal that its inclusion in the settlement with Ngāti Tūwharetoa ki Kawerau was not prejudicial to Ngāti Rangitihi because similar provision could be made in future for Ngāti Rangitihi, if warranted. Moreover, the Crown had properly satisfied itself that the ancestral connections of Ngāti Tūwharetoa ki Kawerau with the areas in question justified the offer of the redress.

#### 4.2 OUR FOCUS

The applicants, in this urgent inquiry, have traversed a lot of ground. We do not propose to cover all of it in this report. Here, our primary concern, as signaled in earlier directions of the presiding officer in this inquiry, is on cultural redress. We focus particularly on the cultural redress offered to Ngāti Tūwharetoa ki Kawerau in and around Matatā. Matatā is now, and has been at least since the Tarawera eruption, the tūrangawaewae of Ngāti Rangitihi. The association of other tribes with Matatā is also strong, and this has been recognised by the Crown in its settlements with both Ngāti Awa and Ngāti Tūwharetoa ki Kawerau.

As in previous inquiries of the Tribunal into cross-claims to assets comprised in proposed settlements of the Crown, we have endeavoured to keep our focus narrow. Previous Tribunal reports have confirmed that it is the province of the Crown to decide the content of Treaty settlements with Māori.<sup>8</sup> We agree. It is, however, the province of the Tribunal, when called upon, to ascertain whether the process followed by the Crown in coming to a settlement has been in accordance with the principles of the Treaty. Where it has not, the Tribunal must determine whether the shortcomings in process have prejudiced the applicant, and whether that prejudice is of an order that dictates that steps be taken to ameliorate the situation.

In the end, the applicants' claim amounted to a wholesale challenge to both the types and location of settlement redress offered to Ngāti Tūwharetoa ki Kawerau by the Crown. The claimants in Wai 996 pressed on us the view that the rohe now claimed by Ngāti Tūwharetoa ki Kawerau covers all of the area that the Wai 996 claimants say comprises Ngāti Rangitihi's rohe. Within this area, the Crown proposes, in its deed of settlement with Ngāti Tūwharetoa ki Kawerau, to confer on Ngāti Tūwharetoa ki Kawerau certain ownership and other interests in land assets of the Crown. The Crown errs, say the claimants, in recognising and confirming in those places the mana of Ngāti Tūwharetoa ki Kawerau, because in fact the mana is properly Ngāti Rangitihi's.

While the Wai 996 claimants are entitled to hold this view, we are persuaded by the findings of the Waitangi Tribunal in the *Ngāti Awa Raupatu Report* that the Crown has a proper basis upon which to settle with Ngāti Tūwharetoa ki Kawerau. We accept that in order to

---

8. See, for example, Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p 86

reach such a settlement, it is necessary for the Crown to offer to Ngāti Tūwharetoa ki Kawerau interests in land of the kind offered.

While the Crown's settlements with Ngāti Tūwharetoa ki Kawerau and, before them, with Ngāti Awa, inevitably affect Ngāti Rangitihi, we have accepted the legitimacy of the Crown's desire to settle with those parties. Those settlements have proceeded, and are proceeding, notwithstanding that all overlapping interests remain to be investigated fully. That is an unfortunate but inevitable consequence of the sequential settlement of claims. As other Tribunals have said before us, it is preferable for settlements to proceed in this way than to await the investigation, hearing and reporting on all claims as a precondition to settling any of them. Of course, it would be better to have more information about the nature and extent of the interests of cross-claimants, but waiting until all of the investigative work has been completed is not an alternative we support.

Our task, in this less-than-optimal situation, is to ensure that the Crown has done all that it could, and should, in order to act in good faith to protect the interests of Ngāti Rangitihi. Although we accept that claimants ready to settle should be able to get on and settle even where cross-claims are not fully articulated or researched, we will scrutinise the process very carefully to ensure that cross-claimants' interests are not unfairly prejudiced. It is the old story: in righting one wrong, the Crown must be scrupulous to ensure that it is not creating another. This is vital not only for the honour of the Crown but also for the integrity and durability of settlements.

Here, Ngāti Rangitihi is in the unenviable situation of an iwi whose claims are un-researched and unheard, and indeed not even yet fully formulated. Their situation is not unique. Others before them, such as Ngāti Maniapoto in relation to the Ngāti Tama settlement, and Ngāi Tūhoe in relation to the Ngāti Awa settlement, were similarly placed.

None of these claimants' situations is, however, quite the same. We think that the situation as regards Ngāti Rangitihi and its tribal neighbours, and the cultural redress offered in the Ngāti Tūwharetoa ki Kawerau settlement, throws up particular – and particularly difficult – issues. It is very important that the Crown's thinking keeps pace with the challenges that arise from each new context. The views offered by the Tribunal in one context will not necessarily be directly applicable to another context: these situations are not 'one size fits all'.

In recent cross-claimant cases before the Tribunal, the Crown (in the person of the Office of Treaty Settlements) has demonstrated a growing understanding of the plight of groups with claims overlapping those of parties engaged in settling with the Crown. In these previous cases, the Tribunal found, on balance, that the Crown did enough to protect cross-claimants' interests.

The policies being developed by OTS have inevitably had weaknesses, because the circumstances to which they apply are difficult, and understanding of them within the Crown new.<sup>9</sup>

9. The Tribunal has pointed out the weaknesses in previous reports: see, for example, *The Ngāti Awa Settlement Cross-Claims Report*, pp 76–80.

However, it is fair to say that the Tribunal has seen, in the advice of officials to Ministers, and in the content and presentation of officials' evidence to the Tribunal, an encouraging trend towards a sound appreciation of the issues, and a satisfactory handling of them.

We are concerned that the present case may represent a step backward in Crown settlement process.

The Ngāti Rangitihi/Ngāti Tūwharetoa ki Kawerau situation has features that we consider demanded especially sensitive handling by the Crown. The nub of the matter is cultural redress, which lies squarely within the cultural domain and goes to mana, kaitiakitanga and tapu. It is, we think, different from commercial redress, which was the main focus of the Tribunal's *Ngāti Awa Settlement Cross-Claims Report*. There, the policy primarily at issue was the Crown's basis for settling claims to Crown forest licensed land. This land is characterised as a commercial asset to which a monetary value is attached. The Crown requires claimants seeking to have Crown forest land in their settlement to demonstrate only a threshold customary interest in the land in question. The Crown then effectively shares out the available asset between the groups whose claims are proven, who can demonstrate the threshold customary interest, and whose settlement quantum is sufficiently high to permit the inclusion of Crown forest land. The key issue becomes whether the Crown has the capacity to award the same kind of redress to those who settle later.

We think that cultural redress is another matter. Especially where, as here, the items of redress in question are located near to marae, and which are, or may be, central to cultural identity, for the Crown simply to retain the capacity to give the same kind of redress to a range of groups may not be an answer at all.

In handling cross-claims to cultural redress, the Crown must be alert to the difference in context from other categories of redress, and the need to respond explicitly to that difference.

Here, the cultural redress to be offered to Ngāti Tūwharetoa ki Kawerau, and the potential impact of that redress on Ngāti Rangitihi, required the Crown to bring to bear a sophisticated understanding not only of the historical context, but also of the Māori political context. When two tribes (Ngāti Awa and Ngāti Tūwharetoa ki Kawerau) are acknowledged as tangata whenua of Matatā in special ways, and another tribe (Ngāti Rangitihi) is not, and will remain unacknowledged for several years to come even though Matatā is their tūranga-waewae, there are likely to be consequences. Those consequences will be political in nature, and will resound not only in the Māori world, but also, possibly, more generally. Officials needed to apprise their Minister of this dimension of the settlement, and advise her on it – especially given the Crown's duty to preserve amicable tribal relations, articulated by the Tribunal as recently as 2002.<sup>10</sup>

---

10. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report*, pp 87–88

**4.3 THE ISSUES**

In the present case, we were, and are, concerned to ensure that the Crown's policies and practices with respect to the cultural redress offered to Ngāti Tūwharetoa ki Kawerau are sound in Treaty terms.

The key questions before us are these:

Are (1) the Crown's policies, as expressed in the content of the settlement offer; and (2) the Crown's practices, as expressed in its communication and consultation with Ngāti Rangitihī, in accordance with Treaty principles?

In order to answer these questions, we consider:

- ▶ What is the Crown's policy with respect to dealing with cross-claims and cultural redress?
- ▶ What level of communication and consultation took place with Ngāti Rangitihī?
- ▶ Was the consultation adequate?
- ▶ What is the significance of the disunity within Ngāti Rangitihī?
- ▶ If the Crown's conduct was not compliant with Treaty principles, to what extent did prejudice result?

**4.4 THE CROWN'S POLICY ON CROSS-CLAIMS AND CULTURAL REDRESS**

Whereas in relation to commercial redress, and specifically Crown Forest assets, the Crown has now developed a relatively sophisticated policy for dealing with cross-claims, it was our impression that the position with respect to cultural redress in cross-claim situations has been less well thought out. Certainly, the approach of the Crown to the Ngāti Rangitihī situation was not well mapped out in policy terms. It appears that ORS departed from its usual path in dealing with cross-claims, but nowhere signaled that, nor why it decided to do so.

In the Ngāti Awa offer of settlement, the Crown had initially required Ngāti Awa to resolve cross-claim issues. It became apparent that this was too much to ask. The Crown heeded the view of the Ngāti Awa Tribunal that 'it would be wrong . . . if the return of particular lands had to depend on the agreement of all contenders'.<sup>11</sup> This led to a different requirement in settlement offers. Settlements would be subject to cross-claims both to commercial and cultural redress being addressed to the satisfaction of the Crown. This was the formulation used in the Ngāti Tūwharetoa ki Kawerau offer.<sup>12</sup> The offer is silent on what needs to be done in respect of cross-claims in order for the Crown to be satisfied, and on who needs to do it.

However, the Crown's policies on settling Treaty claims were recently articulated in ORS's publication *Ka Tika ā Muri, Ka Tika ā Mua/Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown*. Usefully, for present

11. Waitangi Tribunal, *The Ngāti Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p 136

12. Paper 2.17, para 20. See the relevant clauses in paper 2.17, annex 1, paras 3(a), 20(a).

purposes, this document sets out the aims of cultural redress in settlements, and also talks about handling cross-claims. Through cultural redress, the Crown aims to protect wāhi tapu, give claimant groups greater ability to participate in management of areas with which they have a special relationship, and provide visible recognition of the claimant group within their area of interest.<sup>13</sup>

As is its practice with other categories of redress, the Crown looks to settling claimants in the first instance to sort out competition between groups over potential items of cultural redress. The handbook says it is important for claimant groups in negotiation with the Crown about cultural redress ‘to consult other iwi or claimant groups to identify and resolve (if necessary) any overlapping interests’. Later, it is noted that one of the important principles guiding the Crown’s approach to cultural redress is that the ‘overlapping claims must be addressed to the satisfaction of the Crown’.<sup>14</sup>

In the present case, the Crown does not appear to have required much of Ngāti Tūwharetoa ki Kawerau with respect to the resolution of differences about the proposed cultural redress.

On 21 November 2002, when considering whether to grant urgency to the claimants in Wai 996, Judge Wainwright directed the parties to file memoranda setting out the kōrero that had taken place between Ngāti Tūwharetoa ki Kawerau and Ngāti Rangitihi about the proposed settlement, and whether a mediation about the matters of concern to Ngāti Rangitihi might help.

In response, counsel for Ngāti Tūwharetoa ki Kawerau informed the Tribunal that there had traditionally been a good relationship between Ngāti Rangitihi and Ngāti Tūwharetoa. This was unchanged by the advent of the proposed settlement: ‘The general understanding of the [Ngāti Tūwharetoa ki Kawerau] Claims Committee is that Ngāti Rangitihi supported Ngāti Tūwharetoa in the resolution of its grievances against the Crown’ and ‘commends the progress Ngāti Tūwharetoa has made on their settlement’.<sup>15</sup>

We heard nothing from Ngāti Tūwharetoa ki Kawerau of meetings set up for the purpose of discussing the settlement and any issues arising between the two tribal groups. The Ngāti Tūwharetoa ki Kawerau Claims Committee ‘has had an open door for people, including people from Ngāti Rangitihi, wanting to discuss the progress and contents of the Ngāti Tūwharetoa settlement with the Crown’.<sup>16</sup> There have been Ngāti Tūwharetoa ki Kawerau hui that Ngāti Rangitihi would have been welcome to attend.<sup>17</sup> Ngāti Tūwharetoa ki Kawerau were taken by surprise by the application for an urgent hearing: ‘The [Ngāti Tūwharetoa

13. The Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua/Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown*, 2nd ed (Wellington: Office of Treaty Settlements, 2002), p 96

14. Ibid, pp 97, 98

15. Paper 2.15A, paras 7, 9

16. Ibid, para 8

17. Ibid

## NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

4.4

ki Kawerau] Claims Committee believes that there has previously been plenty of opportunity for the claimants to discuss the settlement with the Claims Committee and to raise any concerns.<sup>18</sup>

The picture thus conveyed is that Ngāti Tūwharetoa ki Kawerau and Ngāti Rangitahi have always had amicable relations; that Ngāti Tūwharetoa ki Kawerau were unaware of negativity within Ngāti Rangitahi to redress offered to Ngāti Tūwharetoa ki Kawerau by the Crown; and that Ngāti Rangitahi could have come along and told them about their concerns if they had wanted to.

We have difficulty with this account. The Crown was in correspondence with Ngāti Rangitahi from 29 March 2001, when a copy of the proposed offer to Ngāti Tūwharetoa ki Kawerau was sent to Ngāti Rangitahi's then lawyer, David (Rawiri) Rangitauira.<sup>19</sup> On 9 November 2001, Mr Rangitauira indicated to the Crown that although Ngāti Rangitahi had not yet communicated to the Crown its concerns about the proposed settlement, their failure to do so should not be taken as acquiescence.<sup>20</sup> The first concrete notification of Ngāti Rangitahi's specific concerns appears to have taken place in a phone conversation between Mr Rangitauira and OTS official Deborah Collins on 29 January 2002.<sup>21</sup> On 14 February 2002, Mr Hodge of OTS met with two Ngāti Rangitahi kaumātua at Matatā to learn their views, and on 21 February 2002, a meeting took place at Matatā between OTS officials and Ngāti Rangitahi people to discuss their concerns about the settlement with Ngāti Tūwharetoa ki Kawerau.<sup>22</sup>

Could it really be the case that the Crown did not communicate to Ngāti Tūwharetoa ki Kawerau the fact that Ngāti Rangitahi opposed certain items of settlement redress? This seems very unlikely, especially since OTS recounted to its Minister in policy papers dated 31 May 2002 and 2 October 2002 the basis of others' opposition to the proposed settlement redress for Ngāti Tūwharetoa ki Kawerau. It would be most surprising if Ngāti Tūwharetoa were completely excluded from this important aspect of the settlement process.

We note also that the 'they could have talked to us if they'd had a problem' approach outlined by counsel for Ngāti Tūwharetoa ki Kawerau seems a long way from the Crown's expectation outlined in *Ka Tika ā Muri*, *Ka Tika ā Mua*. There, it seems clear that the Crown looks to claimants seeking to settle with the Crown to sort out their issues with their neighbours, in the event of dissent. It would be surprising if the level of engagement outlined by Ngāti Tūwharetoa ki Kawerau would satisfy the Crown that overlapping claims had been addressed – especially where, as here, the concerns of the overlapping claimant had not been met.<sup>23</sup> We read in the policy an implicit requirement that claimants in settlement

---

18. Paper 2.15A, para 10

19. The 21-page 'full offer' is included in Mr Hodge's document bank: doc A23(a), annex 1. The 29 March 2001 OTS letter to Mr Rangitauira is at document A23(a), annex 2.

20. Document A23(a), annex 10

21. File note taken by Ms Collins (doc A23(a), annex 13)

22. OTS internal memorandum concerning the visit (doc A23(a), annex 17); OTS to Mr Rangitauira concerning 21 February 2002 meeting (doc A23(a), annex 18)

23. Office of Treaty Settlements, *Ka Tika ā Muri*, *Ka Tika ā Mua*, p 98, second column, third bullet point



negotiations with the Crown should hui with cross-claimants and potential cross-claimants, and should flush out the issues and resolve them, in so far as possible, according to Māori cultural norms. The Tribunal has gained this impression of the Crown's expectations not only from *Ka Tika ā Muri*, *Ka Tika ā Mua*, but also from previous Tribunal claims where cross-claimants' interests were at issue.<sup>24</sup>

In short, therefore, it seems to us that in this case the Crown did not follow its usual approach to overlapping claims: it did not require Ngāti Tūwharetoa ki Kawerau to deal with the issues raised by Ngāti Rangitihi, and Ngāti Tūwharetoa ki Kawerau did not. Indeed, going from counsel's memorandum of 4 December 2002, the preferred approach of Ngāti Tūwharetoa ki Kawerau was to proceed as though the dissent from within Ngāti Rangitihi was not happening, and instead to maintain its focus on the Crown. While understandable from Ngāti Tūwharetoa ki Kawerau's point of view, it does not explain why the Crown did not require adherence to the usual policy.

At the hearing, the Crown did not refer to any expectation on its part that Ngāti Tūwharetoa ki Kawerau would take a role in working with Ngāti Rangitihi to resolve their differences over the redress to be offered to Ngāti Tūwharetoa ki Kawerau. So far as we can gather, OTS itself made no effort to mediate those differences, nor even to consider as a possibility that the differences between the groups should be addressed in this way.

Indeed, in the letter dispatched from the Minister's office to Mr Potter on 1 July 2002, the Minister for Treaty Negotiations, Margaret Wilson, refers to a desire on Mr Potter's part to initiate meetings between Ngāti Rangitihi, Ngāti Awa and Ngāti Tūwharetoa ki Kawerau.<sup>25</sup> In her letter, the Minister puts issues pertaining to the Ngāti Awa settlement to one side, and then moves on to the settlement with Ngāti Tūwharetoa ki Kawerau. The Minister says:

I would encourage you to discuss any concerns you have about the Crown's offer to [Ngāti] Tūwharetoa Te Atua Reretahi ki Kawerau. The Chief Negotiator for [Ngāti] Tūwharetoa Te Atua Reretahi ki Kawerau is Beverley Adlam. . . . You will be aware that officials from the Office of Treaty Settlements have consulted overlapping claimant groups, including Ngāti Rangitihi, on the Crown's settlement offer to [Ngāti] Tūwharetoa Te Atua Reretahi ki Kawerau. I have carefully considered the points that overlapping claimants have made and will communicate my provisional decision on overlapping claims and the [Ngāti] Tūwharetoa Te Atua ki Kawerau settlement soon. I look forward to receiving any comments Ngāti Rangitihi may have on that provisional decision, and will again carefully consider any comments received before reaching a final decision.

In your e-mail you request funding in order for any meetings between Ngāti Rangitihi, [Ngāti] Tūwharetoa Te Atua Reretahi ki Kawerau, and Ngāti Awa to proceed. . . . I would

24. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2001), pp 2–4, 20; Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report*, pp 46–47, 68

25. Document A23(a), annex 34

NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

4.4

like to reiterate that the Crown only provides funding to groups that are mandated for the purpose of negotiations, and that this funding is a contribution to the expenses incurred in negotiations. I have no doubt that you and Mr Paterson would bring valuable experience to any discussions with [Ngāti] Tūwharetoa ki Kawerau. However, the Crown does not provide funding for the purpose you have identified.

Here the Crown appears to be putting the onus for resolving cross-claim issues upon the cross-claimant rather than the settling claimant. There is no indication that the Crown regards Ngāti Tūwharetoa ki Kawerau as being required to be pro-active. And neither do officials have any role to play in effecting any resolution of the issues arising between the two groups. Neither funding nor any other assistance is available to Mr Potter, although the Minister does encourage him to go forth and do it on his own.

It is apparent that the role the Crown saw for itself in this situation was that of arbiter rather than facilitator. The Crown would decide whether Ngāti Rangitihi's opposition to the redress offered to Ngāti Tūwharetoa ki Kawerau was legitimate, and therefore whether the Crown should deviate from its proposed path in offering it. There is no focus at all on the relationship between Ngāti Tūwharetoa ki Kawerau and Ngāti Rangitihi, nor any acceptance on the Crown's part of a responsibility to maintain or enhance that relationship, which was of course under threat as a result of the Crown's settlement offer to Ngāti Tūwharetoa ki Kawerau.

Thus, *Ka Tika ā Muri, Ka Tika ā Mua* puts the onus on the settling claimant group for resolving cross-claims to cultural redress, and the Crown referred in its first offer to Ngāti Tūwharetoa ki Kawerau in January 2001 to the requirement that the Crown is satisfied that cross-claims have been addressed.<sup>26</sup> Mr Hodge's evidence also indicates that the onus for addressing differences between claimant groups as to items of redress is on the settling claimant in the first instance:

Where cross-claims cannot be resolved by the claimant groups through agreement it is necessary for the Crown to make a decision as to whether or not it is appropriate to continue with the offers of redress that are the subject of the cross-claims.<sup>27</sup>

We were not pointed to any stage at which it became apparent that Ngāti Tūwharetoa ki Kawerau was unable to resolve these issues with Ngāti Rangitihi, and that therefore the Crown was obliged to step in. Possibly there was an early recognition by the Crown that Ngāti Tūwharetoa ki Kawerau would not be able to reach agreement with Ngāti Rangitihi over such difficult questions as wāhi tapu. But little effort seems to have been put into ascertaining whether Ngāti Tūwharetoa ki Kawerau and Ngāti Rangitihi might be able to agree on

---

26. Paper 2.17, annex 1, paras 3(a), 20(a)

27. Document A23, para 60



the matters of difference. Indeed, as discussed above, Ngāti Tūwharetoa ki Kawerau were suggesting even up to the hearing that they had not really understood that Ngāti Rangitihi did object to the redress offered to them.

For whatever reason, it is plain that officials decided that it was up to them to determine whether or not to continue with the offers of redress subject to cross-claim, and advise the Minister accordingly.

It is not clear to us why the possibility of bringing the groups together for kōrero over the issue was never on the Crown's agenda. When Judge Wainwright raised the possibility of mediation in November of 2002, both Ngāti Tūwharetoa ki Kawerau and the Crown were adamant that this was not appropriate.<sup>28</sup> In the light of what we now know about how little was done to arrange for these parties to engage on the matters of difference between them, this is disappointing. Perhaps it is unsurprising that Ngāti Tūwharetoa ki Kawerau should just want to get on with its settlement, but the Crown's focus should be broader. After all, these are issues upon which groups' agreement will always be infinitely preferable to any solution imposed from outside. We should be able to rely on the Crown, with its concern for the durability of settlements, and its duty to avoid harming intertribal relationships, to take an altogether more expansive approach.

This was a finding of the Waitangi Tribunal in an earlier case. In the *Ngāti Awa Settlement Cross-Claims Report*, the Tribunal identified related shortcomings in the Crown's process when dealing with cultural redress. There too, the Crown did not see it as part of its role to work with the groups in dissent about the content of the proposed settlement to see whether any agreement or reconciliation of views could be achieved. The Tribunal enjoined the Crown to be 'pro-active in doing all it can to ensure that the cost of arriving at settlements is not a deterioration of inter-tribal relations. The Crown must also be careful not to exacerbate the situations where there are fragile relationships within tribes.'<sup>29</sup> The message was unequivocal:

The simple point is that where the process of working towards settlement causes fall-out in the form of deteriorating relationships either within or between tribes, the Crown cannot be passive. It must exercise an 'honest broker' role as best it can to effect reconciliation, and to build bridges wherever and whenever the opportunity arises. Officials must be constantly vigilant to ensure that the cost of settlement in the form of damage to tribal relations is kept to the absolute minimum.<sup>30</sup>

Looking at the dealings between the Crown and Ngāti Rangitihi, we do not believe that this counsel was heeded.

---

28. Paper 2.15A, paras 7–10; paper 2.17, paras 111–118.

29. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report*, p 87

30. Ibid, p 88

NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

4.4

We therefore arrive at a point of conclusion about the Crown's policy for dealing with cross-claims to cultural redress.

We have no problem with the Crown's articulated policy that settling claimants should assume responsibility for dealing with cross-claimants, at least in the first instance. This approach has the practical appeal of placing the onus on a party that is funded by the Crown, and which has an understanding of the tribal landscape better than the Crown's. Moreover, where possible it is obviously preferable that matters raised by cultural redress – matters of tribal mana and tapu – are addressed by the Māori parties concerned, and where possible in a Māori forum.

Nor do we have a problem with a recognition that sometimes the issues raised by settlement redress are extremely difficult ones, and Māori groups using Māori processes will end up meeting a brick wall. We think OTS officials recognise the challenges for tribal structures posed by the requirement for tribal neighbours to agree about settlement redress. But they need to take a step past recognition to action. They need to work with the groups concerned to explore other options.

These options include:

- ▶ the Crown sponsoring facilitated hui involving settling claimants and cross-claimants, and paying for a facilitator; and
- ▶ the Crown assisting in arranging and paying for a mediation of the matters in dispute; and, as a last resort, where it is evident that attempts to reconcile the competing views have failed:
  - ▶ the Crown itself simply coming to a decision about the matters in dispute, having assembled as much information as practically possible about the competing interests and the circumstances (political and historical) from which they arise.

The problem is that in this case officials departed from the Crown's articulated policy that the onus for dealing with settling claimants lies with the settling claimant in the first instance. We can see no sign that Ngāti Tūwharetoa ki Kawerau were asked at any stage to address these issues. There is even some doubt as to whether they were aware of them. Officials:

- ▶ did not acknowledge that they were departing from the usual policy;
- ▶ gave no reasons for doing so;
- ▶ did not explore any of the facilitating and mediating options outlined above; and
- ▶ conducted the consultation with Ngāti Rangitihi from the point of the view of the arbiter on the question of whether Ngāti Rangitihi's cross-claims would stand up to scrutiny.

As we shall explain below, we think the Crown erred in not exploring other options, and proceeded on the basis of too little information.

**4.5 COMMUNICATION AND CONSULTATION WITH NGĀTI RANGITIHI**

Our focus turns now to the consultation and communication between the Crown, and Ngāti Rangitihī, the cross-claimant.

In its memorandum of 5 December 2002, the Crown summarised its position in relation to ‘the particular items of redress challenged by the Wai 996 claimants’ as follows:

120.1 The Crown has been engaged in a lengthy consultation process with the Ngāti Rangitihī and the Wai 996 claimants;

120.2 Ngāti Rangitihī and the Wai 996 claimants have had ample opportunity to inform the Crown of their concerns with the proposed Ngāti Tūwharetoa (Bay of Plenty) settlement;

120.3 The Crown has reviewed each item of redress challenged, and has undertaken further research as a result of issues raised by Ngāti Rangitihī and the Wai 996 claimants;

120.4 The Crown is fully informed of all issues put forward by Ngāti Rangitihī and the Wai 996 claimants;

120.5 The Crown has fairly weighed the respective interests of Ngāti Rangitihī/the Wai 996 claimants and Ngāti Tūwharetoa (Bay of Plenty), taking account of the concerns of Ngāti Rangitihī and the Wai 996 claimants; and

120.6 The Crown has sought, where possible, to structure a settlement package that minimises any negative impact on Ngāti Rangitihī and the Wai 996 claimants . . .<sup>31</sup>

We think that this is a fair summation of the Crown’s position put forward at the hearing.

For their part, the Wai 996 claimants criticised many aspects of the Crown’s dealings with Ngāti Rangitihī. The key points were these:

- ▶ The consultation between the Crown and Ngāti Rangitihī was inadequate because:
  - There was inadequate information: ‘full disclosure [to Ngāti Rangitihī] did not take place until December 2002 when part of the Crown’s in-house foundation historical report was released.’<sup>32</sup> It was not until 31 January 2003 that Ngāti Rangitihī saw the detailed maps of many of the sites of cultural redress to be offered to Ngāti Tūwharetoa ki Kawerau.<sup>33</sup>
  - There was insufficient time: ‘The period of time from the release of the first details of the “full offer” (the without prejudice Proposed Package dated January 2001<sup>34</sup>) may have been several months but since they were not aware of many of the key aspects of the settlement proposal and the basis of the Crown’s decision it cannot be said that this elapse of time really benefited them or allowed them to respond to the case the Crown had already formulated.’<sup>35</sup>

31. Paper 2.17, para 120

32. Document A29, para 3.6

33. Ibid, para 5.1

34. Document A23(a), annex 1

35. Document A29, para 3.6

NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

4.5

- The Crown did not have an open mind, but instead took the approach that it was up to Ngāti Rangitihi to disprove the position it had already taken: ‘This was certainly the case by early 2002 and arguably was the position after the “full offer” – the product of some 5 years of negotiation since 1997 – was released to cross claimants in March 2001.’<sup>36</sup>
- The Crown made too much of an alleged lack of internal knowledge within Ngāti Rangitihi. Many elderly kaumātua have passed away, but much of their knowledge was passed on to others. Mr Potter’s evidence to the Tribunal is an example of how information has been transferred to a younger generation. The Crown made no real effort to tap this information.<sup>37</sup>
- Rather than engage with the claimants in a joint effort to ascertain what information could be readily assembled about relevant Ngāti Rangitihi history, the Crown relied upon in-house reports. These were written by Dr John Battersby (1998) and Maureen Hickey (2002). The existence of these reports was only made known to the claimants in the context of the present proceeding. The work undertaken by Dr Battersby has not been made available to the claimants, and nor to the Tribunal. The work undertaken by Ms Hickey was referred to and relied upon by the Crown in the Minister’s letter of 12 August 2002, and the Crown says that this was sufficient disclosure to enable Ngāti Rangitihi to respond.<sup>38</sup> The cross-claimants disagree. They were given only a fortnight to respond, and in any event the material was not presented in a way that made it possible for the cross-claimants to put together a proper rebuttal.<sup>39</sup>
- The Crown is not entitled to rely on disunity within Ngāti Rangitihi as a reason for not consulting with them properly. This is because:
  - the disunity didn’t materialise until fairly late in the piece, by which time the Crown ought to have carried out its consultation anyway;
  - the pressure put on Ngāti Rangitihi by the Crown may have contributed to the stress within the group that caused the split between factions to occur; and
  - the Crown ought to have, and did not, take any steps to move past the disunity to seek further information from the iwi. For the most part, the Crown was content not to go beyond legal counsel for Wai 524 in its dealings with Ngāti Rangitihi. The Crown attended only one hui with the tribe, and it did not take place until February 2002. Another alternative not explored by the Crown was to approach Ngāti Rangitihi via the Ngāti Rangitihi marae trustees. There is only one Ngāti Rangitihi marae at Matatā, the Crown knew about the importance of that marae, and the details of the trustees were available through the Māori Land Court.

36. Document A29, paras 3.6, 8.1–8.3

37. Ibid, paras 6.1–6.7

38. Oral submission of Crown counsel, 5 February 2003, tape 4, side B

39. Document A29, paras 7.1–7.12

- The Crown erred in not appointing an independent and external consultant to investigate and inform it on cross-claims. The Crown, in questioning from the Tribunal, contended that OTS's in-house investigations were tantamount to the kind of independent inquiry carried out at the Crown's behest in the Ngāti Maniapoto/Ngāti Tama cross-claim situation. The Wai 996 claimants reject this, saying:
  - the Crown's in-house historical work was not available to anyone until after the final decision was made;
  - no mediation was attempted;
  - the Crown did not exhaust the readily available sources of oral evidence; and
  - according to Dr Gilling, the claimants' expert historical witness, the sources relied upon by Ms Hickey for the Crown's conclusions on the extent of Ngāti Rangitihi's traditional interests were inadequate. In particular, further primary research into customary interests through sources such as Native Land Court minute books was required, as the secondary sources typically treated Ngāti Rangitihi interests as only peripheral to other matters that were their true focus.

#### 4.6 WAS THE CONSULTATION ADEQUATE?

We have set out the criticisms made by the Wai 996 claimants in some detail because, substantially, we agree with them.

We think that the Crown's consultation with Ngāti Rangitihi was too little, too late. The approach used in other areas of commissioning an external person to research the cross-claimant's position was, we think, a much better one than that followed here. It had the considerable benefits of being independent, transparent, and accessible to the cross-claimants themselves. In addition to making it a better process, we think that this had benefits in terms of substance. It meant that the Crown gained access to information otherwise unavailable to it, and was therefore able to make better decisions. Also, the ability of cross-claimants to make a constructive contribution to assembling a coherent report on their interests defused their animosity towards the process.

At the hearing, Mr Hodge agreed that the Crown had been negotiating with Ngāti Tūwharetoa ki Kawerau for a long time (since 1997), and that Ngāti Rangitihi had been brought in only after the Crown had formulated its offer to Ngāti Tūwharetoa ki Kawerau. He said that the Crown now considered that the better way to deal with cross-claimants was to begin establishing a relationship with them much earlier in the piece. We hope that that the Crown has indeed recognised that it will be safer for all concerned if cross-claimant issues are addressed from a much earlier stage. We are not certain that this recognition expressed by Mr Hodge has any official sanction. Certainly, it is not captured in *Ka Tika ā*

*Muri, Ka Tika ā Mua*, which is only a recent publication. We will recommend that this be addressed.

We believe that it is very difficult to deal with cross-claimants fairly if they are brought into the settlement process only as it nears its conclusion. Inevitably, the Crown ends up defending a position already arrived at with the settling claimant, rather than approaching the whole situation with an open mind and crafting an offer with one group that properly addresses the interests of others with a legitimate interest.

This was the situation, we think, with Ngāti Rangitihi. From the first letter to Ngāti Rangitihi on 29 March 2001, the Crown made clear the very limited timeframe within which Ngāti Rangitihi could 'comment on any issues Ngāti Rangitihi may have about particular items of redress in the settlement offer'.<sup>40</sup> The very first paragraph set the context:

As you will be aware, the Crown and [Ngāti] Tūwharetoa ki Kawerau have been in negotiations since 1997. The Crown and [Ngāti] Tūwharetoa ki Kawerau recently agreed to a settlement offer, and intend to complete a draft Deed of Settlement as soon as possible for ratification by the wider [Ngāti] Tūwharetoa ki Kawerau community.<sup>41</sup>

Similarly explicit from the beginning was the Crown's role as arbiter. The letter reads as though the Crown would be receiving submissions in a quasi-judicial way:

The Crown is committed to achieving a settlement with [Ngāti] Tūwharetoa ki Kawerau. The Crown is also mindful that some claims, including Wai 524 may overlap with parts of the [Ngāti] Tūwharetoa ki Kawerau claim. In satisfying itself that overlapping issues have been addressed the Crown will take into account relevant historical evidence, the Waitangi Tribunal's findings, and any issues that Ngāti Rangitihi may have about any particular items of redress in which [*sic*] Ngāti Rangitihi considers may affect their interests.<sup>42</sup>

This is not the Crown in a consulting, facilitating role. This is the Crown as judge and jury. To be frank, we think that the tone, and the message it conveys, is not appropriate to initiate communications with a cross-claimant like Ngāti Rangitihi. Read as a body, the Crown's letters to Ngāti Rangitihi's lawyer, and officials' file notes on the interactions with Ngāti Rangitihi, make it apparent that the Crown was looking to deal with Ngāti Rangitihi as simply and quickly as possible. We are not surprised that Mr Potter, who entered the scene a little later to protest the content of the proposed settlement, felt alienated by the Crown's approach. Too often, it seems to us to have been reductive and subtly dismissive.

We are conscious of the dangers of our considering, in hindsight, a period of negotiations, and then saddling the Crown with a counsel of perfection as to how they should have done it. We do realise that it is hard for the Crown to get everything right all the time; that many

40. Document A23(a), annex 2, para 2

41. Ibid, para 1

42. Ibid, para 4

situations are new and testing; and that policy is effectively being developed, or at least refined, while implementation is underway. But we are aware too that we must not sanction ad hocery as a pragmatic inevitability where to do so jeopardises the basic right of cross-claimants to fair treatment. That is our concern in the present case.

Where the period of dealings between the Crown and a cross-claimant is perforce short because the Crown and the settling claimant are ready to conclude their dealings imminently, we think that the Crown must take all the more care to ensure that the interaction is of a high quality. In addition to the facilitating and mediating avenues that the Crown should actively explore (see s 4.4), it should also consider funding a researcher to assist the cross-claimant to assemble its information for presentation to the Crown. We think that would have been especially appropriate in the present case, where the Crown made it clear from early on in its dealings with Ngāti Rangitihi that it had assumed the role of arbiter. As arbiter, it required cogent evidence from Ngāti Rangitihi before it would consider amending the proposed offer to Ngāti Tūwharetoa ki Kawerau. If nothing else, had an independent researcher been commissioned, we think it very likely that the information assembled by Mr Potter and his lawyers for this urgent inquiry would have been available to inform the process much earlier. Other information too might have come to light.

We think that the shortcuts taken by OTS officials in their desire to press on to a conclusion about the legitimacy of Ngāti Rangitihi's complaints had another negative consequence. We think that officials put too little emphasis on understanding the modern-day tribal landscape within which they were operating, and the potential effect on that landscape of the proposed mechanisms for redress. In particular, officials failed to understand that issues surrounding cultural redress go well beyond ensuring that redress of the same kind is available to others. This is a key difference, in our view, between cultural redress and commercial redress.

Here, the focus of the Crown's information gathering was too narrow. Officials concentrated on ascertaining whether Ngāti Rangitihi had a tribal presence in and around Matatā, the core area of their present-day occupation, prior to 1865. The reason for this focus was to identify the take (as in, source of right) of Ngāti Rangitihi to the land in this area: do their interests derive only from the Crown's military grants of land, or was there a pre-existing occupation? This was a legitimate inquiry. But to put answers in context, it was equally important for the Crown to understand the tribal landscape today. This would include developing a sound knowledge of the present-day relationships between Ngāti Rangitihi and the parties with whom the Crown is settling, Ngāti Awa and Ngāti Tūwharetoa ki Kawerau. It would also include – as we will explain in the next section – arriving at an understanding of the political and other forces within Ngāti Rangitihi.

It is so important for the Crown to have a firm grasp on all these elements when embarking upon cultural redress.



Although intertribal competition for the commercial resources comprised within Crown forest assets can be very intense, typically those forests are located in areas where Māori communities are no longer based.

The Crown's policies relating to these contested areas of commercial redress proceed on a rational basis that the Tribunal found responded appropriately to three principal drivers: the need to be fair, the need to acknowledge traditional interests, and the need to avoid the arbitrary outcome that could result from the random geographical availability of forest lands for settlements.<sup>43</sup>

When it comes to cultural redress, and the relationship of communities to culturally significant and sometimes tapu areas close to their tūrangawaewae, we think that the Crown's approach to awarding interests in contested areas must be even more scrupulous. It must respond to the particular circumstances that apply in each situation. As we have said, this is not a context where a 'one size fits all' approach will work well. Although the Tribunal in the *Ngāti Awa Settlement Cross-Claims Report* approved the rationale for the Crown's policy with respect to cross-claims to commercial redress, it should not be inferred that the same or similar approach to cultural redress will be found to be compliant with Treaty principles. The two contexts have different features, and differing responses are required for each. It is true that cultural redress formed part of the Tribunal's inquiry into cross-claims to the Ngāti Awa settlement, but it was a relatively minor part. Furthermore, the process of consultation and information-gathering engaged in by the Crown had some important different elements. It seems to us that the Crown's greater level of engagement with cross-claimants' concerns in that situation may explain why the Crown there agreed to modify its cultural redress package to take account of those concerns.

The situation here as regards cultural redress is also more complex politically, and the potential for contemporary understandings as to tangata whenua status and areas of tribal influence to be unbalanced is very real. Acknowledgements of mana and status, in the context of cultural redress, might seem relatively insignificant to the Crown. But in te ao Māori – and again, depending on the circumstances – they can increase the appearance of mana in one group and correspondingly diminish the ostensible mana of another. It is high-risk territory, and frankly we were not persuaded that the Crown officials concerned did enough to ensure that they adequately appreciated the political nuances.

The absence of reference to the Māori political situation in officials' advice to their Minister confirmed our view that they did not apprehend the potential consequences of acknowledging Ngāti Awa and Ngāti Tūwharetoa ki Kawerau in ways that would not be available to Ngāti Rangitihi for many years. The Minister needed to understand this modern-day tribal context, and be briefed on the Crown's duty to preserve amicable tribal relations.<sup>44</sup> If she was

---

43. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report*, pp 74–80

44. Ibid, pp 87–88



reliant on her officials' analysis for her understanding of this dimension of the proposed settlement, we doubt that she would have had a sufficiently firm grasp.

It follows from the foregoing that we expect of OTS officials a sophisticated understanding of the many dimensions of the Māori world within which they are operating when they negotiate settlements. We think such a high standard is appropriate. It is not enough for the Crown to act in good faith, if that means half-informed good intentions. In order to act fairly, and protect the interests of all the groups with which they deal in the context of a settlement, the OTS officials must be highly skilled. They must have a sophisticated understanding of how Māori communities operate in general, and how the ones in question operate in particular. If they do not have these understandings, how will they appreciate how much there is to know, or develop an instinct for when they do not know enough? It is a hard job, and a demanding one, because the honour of the Crown is on the line, and the durability of these settlements, and the quality of the relationships that spring from them, will depend in large measure on how well these officials perform. It is, as they say, a big ask. But it is one underpinned by Treaty principle and the imperative of fairness. We should not hesitate to insist on high standards when lower ones can have such serious, and long-lasting, consequences.

However, having substantially agreed with the Wai 996 claimants about the inadequacy of the Crown's consultation, there remains the difficult question of the disunity within Ngāti Rangitihi. While we agree with most of the points made by counsel for the Wai 996 claimants on the issue of disunity, we take a different view as to its ultimate significance.<sup>45</sup>

#### 4.7 DISUNITY

Ngāti Rangitihi are having difficulties internally.

As originally presented to us, Wai 996 was a case where Mr Potter and Mr Paterson were fronting a claim supported by Ngāti Rangitihi whānui. There were some questions about this in our minds, in that Mr Potter and Mr Paterson, although clearly representing ahi kā interests of Ngāti Rangitihi, are not the men usually recognised as legitimate Ngāti Rangitihi leaders. Nevertheless, we inferred that, for some reason unknown to us, the leadership had chosen to take a back seat.

Then, in the days immediately before the hearing, lawyer John Kahukiwa came forward to inform the Tribunal that he had received instructions from Leith Comer on behalf of the claimants in Wai 524. Earlier, Mr Boast and Ms Edmunds, counsel for the claimants in Wai 996, had informed us that they acted for the Ruawāhia 2B trustees, and had instructions from Mr Reuben Perenara, the chair of that trust. The claim relating to the Ruawāhia (and other) lands, Wai 524, purported to be on behalf of Ngāti Rangitihi.

---

45. Document A29, paras 9.1–9.6

The situation thus presented to the Tribunal was both confused and confusing. A couple of days before the urgent hearing, a telephone conference was convened with all counsel. The concern was that those whom Mr Kahukiwa represented would seek to derail the urgent hearing at the last minute. The presiding officer gave leave for all relevant documents to be sent to Mr Kahukiwa to enable him to formulate his and his clients' position. He was directed to provide a memorandum to the Tribunal to inform us as to these matters.

In the event, Mr Kahukiwa did not seek leave to appear. The information contained in his memorandum amounted to this: he had not had time to properly consider the material sent, and had not been able to take instructions.<sup>46</sup>

At the hearing on 5 February 2003 in Wellington, Ngāti Rangitihi did not appear in force to support the Wai 996 claim. This might be explained by the fact that the hearing was in Wellington and Ngāti Rangitihi are based in the Bay of Plenty. However, cross-claimants in other cases have overcome the obstacle of distance, although similarly lacking funding. In the Ngāti Maniapoto cross-claim to the Ngāti Tama settlement, for instance, a broad-based ope of Ngāti Maniapoto people attended the hearing in Wellington. When that happens, the Tribunal is left in no doubt as to where the cross-claimant community stands.

That was not the case with Ngāti Rangitihi. Apart from the claimants Messrs Potter and Paterson, the only prominent member of Ngāti Rangitihi in attendance at the hearing was Mr Whaimutu Dewes, who gave the whaikōrero for Ngāti Rangitihi at the pōwhiri held at the Tribunal on the day of the hearing. Mr Kahukiwa had earlier identified Mr Dewes as one of those involved in instructing him. Mr Dewes's whaikōrero did not mention the level of Ngāti Rangitihi support for the Wai 996 claim, and nor did he make any statement later in the Tribunal's proceedings. In short, then, Mr Dewes was present, and spoke in his whaikōrero of his support for the concept of kōtahitanga earlier alluded to in whaikōrero by Professor Hirini Mead (spokesperson for Ngāti Awa). But Mr Dewes intimated in no other way whether he himself, or others within Ngāti Rangitihi, supported the Wai 996 claim. At morning tea, after the first session, he left.

Subsequently, in the reply filed on behalf of Wai 996, Mr Boast addressed the importance of the uncertainties of representation and support within Ngāti Rangitihi. He submitted that the Crown was not entitled to rely on any disunity within Ngāti Rangitihi as an excuse for not consulting with them properly. We agree with this proposition, but actually the Crown's position before us was that its consultation was adequate, and counsel did not raise Ngāti Rangitihi disunity as an exculpatory factor.

We agree that the Crown should have gone beyond Mr Rangitauira, erstwhile counsel for Ngāti Rangitihi claimants, much earlier. In our view, it was – or should have been – evident early on that Mr Rangitauira was not a very effective conduit for the Crown's consultation with Ngāti Rangitihi. We think that the Crown should have taken steps to ascertain what was

---

46. Paper 2.35

going on within the group. Then Mr Potter came on the scene, expressing much more strenuous opposition to the settlement on behalf of Ngāti Rangitihi. Once the interactions between the Crown and Mr Potter became unproductive, there were real incentives for the Crown to try other avenues. Apart from anything else, the Crown needed to know whether what they were hearing from Mr Potter was, or was not, the ‘real oil’ on Ngāti Rangitihi’s approach to the settlement with Ngāti Tūwharetoa ki Kawerau. We think that Ots officials knew that there were representation issues within Ngāti Rangitihi, but did not want to engage with the problem. Certainly, they did nothing about it.

In its documents filed in the Tribunal, the Crown distinguishes between the Wai 996 claimants and ‘Ngāti Rangitihi’.<sup>47</sup> In expressing herself thus, Crown counsel obliquely revealed the Crown’s doubt as to whether the Wai 996 claimants could really be said to represent Ngāti Rangitihi. But why did the Crown only skirt around this issue, which was potentially central to the claim and the Crown’s response to it? It seems clear to us that if the claimants in Wai 996 do not represent Ngāti Rangitihi, but are instead better characterised as a few people on a lonely crusade, that will be central to the exercise of the Tribunal’s discretion in assessing prejudice and making recommendations.

Frankly, if the Crown officials had been able to demonstrate to us how they met the representation issues within Ngāti Rangitihi head-on, strenuously sought to understand and address them, but were ultimately defeated, they would have had our sympathy. We know how intractable such situations can be. Sometimes, despite everybody’s best intentions and efforts, no progress is possible.

But as between the Crown and Ngāti Rangitihi, it was not like that. Rather, we were left with the impression that the Crown endeavoured to keep its interactions with Ngāti Rangitihi to a minimum. A cynical view would be that the Crown wanted to know only as much about Ngāti Rangitihi as necessary to enable it to say that Ngāti Rangitihi’s concerns about the Ngāti Tūwharetoa ki Kawerau settlement had been understood and could safely be dismissed. Certainly, it seems to us that there was insufficient regard for building a positive relationship between Crown and iwi.

As it was, the Crown did not divulge to us its views on the representation issues within Ngāti Rangitihi, other than the oblique commentary mentioned. Clearly, discretion can sometimes be the better part of valour. But at other times, it really is necessary for the Crown to engage with the difficult and potentially unpleasant aspects of what makes Māori communities tick, in order to be able to come up with a position that is properly informed and persuasive.

Counsel for the claimants in Wai 996 were unable to reassure us about the internal confusion within Ngāti Rangitihi. In a letter sent just before the urgent hearing, and out of a concern that ‘the forthcoming hearing proceeds smoothly and with due process’, counsel

---

47. See, for example, paper 2.17, para 120; doc A23, para 3; doc A31, para 11

for Wai 996, Deborah Edmunds, set out her understanding of representation and mandate within Ngāti Rangitihi.<sup>48</sup> Suffice to say that Ms Edmunds's letter confirmed our impression, formed before and during the hearing, that the situation within Ngāti Rangitihi was confused. It is apparent that, whereas at one stage Ms Edmunds felt able to assert that she acted for the claimants in both Wai 996 and Wai 524, that was no longer the case in the days leading up to the hearing. While her instructions to act for the Wai 996 claimants did not appear to have been questioned, Mr Kahukiwa's arrival on the scene, as well as an earlier defection from the claims committee for Wai 524, raised doubts. Both Wai 996 and Wai 524 purport to be claims on behalf of Ngāti Rangitihi, but they are fronted by different people. Mr Potter and Mr Paterson are to the fore in Wai 996, whereas Wai 524 was filed by a body of persons who at some stage took the form of the 'Wai 524 Claims Committee'. We are not certain how, or by whom, that claim is now being progressed.

A letter from Mr Reuben Perenara to Mr Potter and Mr Paterson dated 3 February 2003 was attached to Ms Edmunds's letter to the Tribunal. Mr Perenara's letter referred to the earlier resignation of Mr Rangitauira as counsel for the Wai 524 claim. Mr Perenara said that he was a trustee for Ruawāhia 2B, one of the blocks cited in the Wai 524 claim, and to his knowledge no decision had been made as to who should succeed Mr Rangitauira. Mr Boast admitted that they were not sure what was going on, and said that probably no one at present could be said to speak for Ngāti Rangitihi whānui.

Ms Edmunds said in her letter:

Because of the confused state of internal mandate I have advised the Tribunal that matters were in discussion between the claimants as to this issue and I have not actively sought to hold myself out as having instructions until matters could be resolved. It was my view that it would not be helpful to resolving issues of mandate for any legal counsel to appear for Wai 524, and in any case it would be questionable as to whether any proper instructions could be obtained.

As it turned out, no one did appear for the claimants in Wai 524, and Ms Edmunds's and Mr Boast's instructions to appear for the claimants in Wai 996 were not questioned.

Real uncertainty therefore attends the question of who sits behind those who instructed Mr Kahukiwa. They may be many or few. Mr Kahukiwa gave us some names, but in at least one case (Reuben Perenara), both Mr Kahukiwa and Mr Boast/Ms Edmunds believed he was instructing them. Nor was it at all clear why Mr Kahukiwa's last-minute intervention ultimately came to nothing. Mr Kahukiwa said that he did not have time to go through the papers and get instructions. But it was difficult to avoid the conclusion that his clients, for reasons unknown, thought better of whatever they might have been going to say or do.

---

48. Paper 2.30

We were told that a hui-ā-iwi is planned for Ngāti Rangitihi. Hopefully that will set in train a process by which the questions of representation will be answered.

However, that will be too late for us.

#### 4.8 PREJUDICE

Our situation is this. We are of the view that the Crown's consultation with Ngāti Rangitihi was wanting in significant ways. That flawed consultation breached the principles of the Treaty. However, section 6 of the Treaty of Waitangi Act requires us to go further: if the Treaty principles were breached, who was prejudicially affected by the breach or breaches?

Mr Potter and Mr Paterson would have us believe that Ngāti Rangitihi was prejudicially affected, and that they speak for Ngāti Rangitihi. But do they?

It is not at all evident to us whether many Ngāti Rangitihi people share the concerns underlying the Wai 996 claim. They may. They may not. We do not know, and no one has been able to tell us.

Counsel for Ngāti Tūwharetoa ki Kawerau told us essentially that her clients were not aware until recently that Ngāti Rangitihi had a problem with the proposed settlement. This seems strange, given the close ties between Ngāti Tūwharetoa ki Kawerau and Ngāti Rangitihi. Could an explanation be that the Ngāti Tūwharetoa ki Kawerau leadership did not know about the concerns because the Ngāti Rangitihi leadership did not share them? Possibly. We are only speculating. We do not know.

The Ngāti Rangitihi leadership, and indeed the people generally, may have other pressing reasons for not wishing to come out in support of the Wai 996 claim. They may take a different view of the matters raised by Mr Potter and Mr Paterson. Or alternatively, they may wish to approach the issues in another way. In whaikōrero at the pōwhiri, and in the submissions of counsel for Ngāti Tūwharetoa ki Kawerau, there was emphasis on the whanaungatanga between these iwi. Do the bulk of Ngāti Rangitihi people value the maintenance of positive relationships with their Ngāti Tūwharetoa neighbours and kin over taking the Crown to task about the shortcomings in the consultation process? Well, they may. We do not know.

We have referred already to the suggestion, just before the hearing, when Mr Kahukiwa became involved, that certain key figures within Ngāti Rangitihi did not support the Wai 996 claim. After a brief flurry, however, nothing came of it. Those key figures, who according to Mr Kahukiwa included Henry Prior, Whaimutu Dewes, and Leith Comer, elected not to reveal their stance to the Tribunal. What does that mean? Did they want the Wai 996 claim to proceed, but not put their names to it? Did they agree with the message, but not with the messengers? Or did they want to divorce themselves from it altogether, but made no direct challenge because they sought to avoid a public airing of internal dissent? The situation

seems to us have been further blurred by Mr Dewes' attending the pōwhiri and speaking for Ngāti Rangitihi. Was he there in support or in a neutral capacity? We have no clear answers. We do not know.

For the Tribunal to recommend to the Crown that it should now halt the process of settling with Ngāti Tūwharetoa ki Kawerau in order to rectify the process of consulting with Ngāti Rangitihi is a serious step to take. We are prepared to take it only where we can identify clear prejudice to Ngāti Rangitihi arising from the flaws in the Crown's process. Here, it is wholly unclear that Ngāti Rangitihi themselves, or a good proportion of them, consider that they have been prejudiced by the Crown's process and the proposed settlement. Nor is there any clear indication that they would want the Tribunal to step in.

The potential consequences for the relationship between Ngāti Tūwharetoa ki Kawerau and Ngāti Rangitihi of the settlement being stopped in its tracks now as a result of action by Ngāti Rangitihi are obvious. Ngāti Rangitihi may simply not want that relationship to be jeopardised in such a way. Ultimately it is the Ngāti Rangitihi view of the prejudice to them arising from the settlement process that would persuade the Tribunal to weigh in on their behalf. We do not know the Ngāti Rangitihi view.

Thus, our approach to prejudice and remedy in this claim is greatly influenced by our fundamental uncertainty about the stance in this matter of the iwi Ngāti Rangitihi. Put simply, confidence about where the iwi stands is a necessary precondition to recommending a remedy of the magnitude of halting the Crown's proposed settlement with Ngāti Tūwharetoa ki Kawerau. We have a real doubt about whether the Wai 996 claimants have a mandate from the iwi to seek such a remedy on their behalf. In this situation, where there is such a lack of clarity about the level of support for the claim, we cannot gauge the level of prejudice. It follows, in our view, that we must be cautious about remedy. The result is that we will recommend only remedies that are low-risk in terms of possible harm to the relationship between Ngāti Rangitihi and Ngāti Tūwharetoa ki Kawerau. We do, however, want to provide scope for Ngāti Rangitihi to address the situation, should they wish to, once they have agreed on a way forward for their iwi and its claims.

#### 4.9 FINDINGS

We find that that the Crown's consultation process with Ngāti Rangitihi breached the principles of the Treaty. The shortcomings of the process are summarised above (see s 4.6). The key ways in which the process fell short were these:

- The Crown was too far along the track in its dealings with Ngāti Tūwharetoa ki Kawerau when consultations with Ngāti Rangitihi commenced. This meant that the agenda was already set, and room for manoeuvre was minimal.



- Given the constrained timeframe for the Crown's consultation with Ngāti Rangitihi, a high level of commitment to understanding and dealing with Ngāti Rangitihi's points of view was required. The Crown did not devote the necessary resources to the Ngāti Rangitihi consultation.
- The focus of the Crown's information gathering about Ngāti Rangitihi was too narrow. It needed to encompass an understanding of the contemporary tribal landscape both surrounding and within Ngāti Rangitihi. We doubt that the officials concerned appreciated the importance of this understanding, nor conveyed it to their Minister.
- The Crown did not require Ngāti Tūwharetoa ki Kawerau to address the cross-claimant issues with Ngāti Rangitihi, and nor did officials try to bring about agreement or understanding between the settling claimant and the cross-claimant. Instead, without providing any reasons for doing so, the Crown quickly moved to establish officials in the role of arbiters of whether Ngāti Rangitihi objections to items of redress were legitimate. In the first instance at least, the Crown's role is one of facilitation and consultation rather than arbitration. Only after conciliatory measures (such as facilitated hui, mediation, and use of a third party researcher) have been honestly tried and failed, should the Crown feel justified in standing back and simply making decisions on the merits of cross-claimants' objections to cultural redress.

On the question of prejudice, we have already signalled our position. Notwithstanding our findings on failures of process, we have insufficient information before us to ascertain to what extent Ngāti Rangitihi whānui consider that they were prejudicially affected by the actions of the Crown. We require information as to consensus around the question of prejudice, because only wide support would justify the Tribunal in recommending to the Crown that it halt the settlement with Ngāti Tūwharetoa ki Kawerau, or remove from it certain items of cultural redress, in order to engage more fully with Ngāti Rangitihi's position as cross-claimant.

Ngāti Tūwharetoa ki Kawerau are now very close to settling with the Crown. Their road to this point in time has been a long one, and no doubt at times arduous. The potential negative consequences for Ngāti Tūwharetoa ki Kawerau of their settlement now being delayed, or of the withdrawal of items of cultural redress, are considerable. In order to go to those lengths, we need to be confident that the applicant cross-claimant indeed represents Ngāti Rangitihi te iwi, and that the Tribunal's intervention is sought by that iwi. We lack that confidence.

We are, however, satisfied that the interests of the claimants in Wai 996 have been adversely affected. These include Mr Potter and Mr Paterson, and at least some others within Ngāti Rangitihi, although we are not sure how many. The group may be limited to the two named claimants and their whānau. Although a limited group, the threat to their interests was legitimately brought before us, and because we agree that the Crown's process was inadequate, we are minded to recommend that some steps be taken.

**4.10 REMEDIES**

The area that particularly concerns us is this. In and around Matatā, the Crown has recognised the mana of Ngāti Awa and Ngāti Tūwharetoa ki Kawerau in several items of cultural redress. They include:

- ▶ the transfer to Ngāti Awa and Ngāti Tūwharetoa of the fee simple of areas within scenic and recreation reserves near Matatā;
- ▶ nohoanga (camping entitlements) at Te Awa a Te Atua, the Matatā wildlife refuge reserve on the coast adjacent to Matatā; and
- ▶ representation on a newly-established joint advisory committee with the Department of Conservation about the management of the Matatā scenic reserve and Te Awa a Te Atua (Matatā wildlife refuge reserve).

Under the circumstances, we do not question the Crown's judgement in deciding that the history and circumstances of Ngāti Awa and Ngāti Tūwharetoa ki Kawerau call for those groups to be recognised in these ways. But we are concerned about the inevitable comparison in today's world with Ngāti Rangitihi. The Crown says that Ngāti Rangitihi will have the chance to be granted just the same kind of recognition when their turn comes to settle. But that will not be for several years on current estimates, and meanwhile Ngāti Rangitihi must continue to live at Matatā, and maintain its position there as tangata whenua. We are concerned that over this time, Ngāti Awa and Ngāti Tūwharetoa ki Kawerau may come to be seen as the ones with the rights and recognition in and around Matatā. Ngāti Rangitihi may be left looking like the poor cousin in the one place that is their tūrangawaewae and the site of their only marae. Notwithstanding their ancestral ties with Matatā and its surrounds, it should not be forgotten that Ngāti Awa and Ngāti Tūwharetoa ki Kawerau iwi are today primarily identified with other places – Whakatāne in the case of Ngāti Awa, and Kawerau in the case of Ngāti Tūwharetoa ki Kawerau.

It may be that Ngāti Rangitihi whānui are not concerned about this situation, in which case it should be left to lie as it is.

But Ngāti Rangitihi may be able to unify their people and their thoughts, and it may become clear that they agree with the claimants in Wai 996 that these are matters of concern.

Should this occur, we think the door should be left open for Ngāti Rangitihi to be recognised as tangata whenua in and around Matatā alongside Ngāti Tūwharetoa ki Kawerau and Ngāti Awa. We think there is scope for that recognition to occur, in a limited way at least, before the time comes for them to settle with the Crown. By doing so, the Crown can minimise the likelihood of these settlements destabilising the understandings as to mana and rohe shared by the Māori communities of the Bay of Plenty. Affording Ngāti Rangitihi limited recognition through participation in the newly created joint management structures may be enough for them to maintain their position in te ao Māori until their turn comes to settle.



#### 4.11 RECOMMENDATIONS

We recommend:

- ▶ that the Crown puts in place a policy to ensure that it commences consultation with cross-claimants and potential cross-claimants at an early stage in negotiation.
- ▶ that the Crown leaves it open to the people of Ngāti Rangitihi, before their turn comes to settle, but after their representation difficulties have been addressed and resolved, to present their credentials to the Department of Conservation for the purposes of being represented alongside Ngāti Tūwharetoa ki Kawerau and Ngāti Awa on the joint advisory committee for Matatā scenic reserve and Te Awa a Te Atua.
- ▶ that the Crown notifies all relevant local authorities that the recognition of the mana-whenua of Ngāti Awa and Ngāti Tūwharetoa ki Kawerau in and around Matatā should not be taken as precluding the ongoing role of Ngāti Rangitihi people as tangata whenua there. It should make explicit its intention that, in the future, Ngāti Rangitihi will receive cultural redress of the same or similar kind as part of a Treaty settlement in the event that Ngāti Rangitihi's claims are proven and accepted by the Crown. We have read the letter already sent out by the Crown, but we think that as regards local authorities as least, the reference to Ngāti Rangitihi and its role in and around Matatā needs to be more specific.<sup>49</sup>

---

49. Document A23(a), annex 57

Dated at *Wellington* this *1st* day of *May* 20*03*

*CM Wainwright*  
CM Wainwright, presiding officer

*MC Bazley*  
MC Bazley, member

*JT Northover*  
JT Northover, member



## APPENDIX

### RECORD OF INQUIRY

#### RECORD OF HEARINGS

##### THE TRIBUNAL

The Tribunal constituted to hear Wai 996, concerning the inclusion of certain lands and interests within the initialled deed of settlement between the Crown and Ngāti Tūwharetoa ki Kawerau for the settlement of the latter's historical claims, comprised Judge Wainwright (presiding), Dame Margaret Bazley, and Joseph Northover.

##### THE COUNSEL

Counsel appearing were Richard Boast with Deborah Edmunds for the Wai 996 claimants; Rachael Brown and Leanne Clarke for the Wai 62 claimants; Mātanuku Mahuika for the Wai 46 and 206 claimants; and Helen Carrad with Virginia Hardy for the Crown.

##### THE HEARING

The claim was heard at the Waitangi Tribunal's Wellington office on 5 February 2003. The Tribunal granted leave for the cross-examinations of Dr Bryan Gilling, and Peter Hodge, a senior policy analyst for the Office of Treaty Settlements.

#### RECORD OF PROCEEDINGS

##### 1. CLAIMS

###### 1.1 Wai 996

A claim by David Potter and André Paterson on behalf of themselves and Ngāti Rangitihi concerning the inclusion of certain lands in the Crown's proposed settlement offers to both Ngāti Awa and Ngāti Tūwharetoa ki Kawerau, 21 March 2002.

APP NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

**2. PAPERS IN PROCEEDINGS**

- 2.1 Direction to register Wai 996 claim, 6 August 2002
- 2.2 Notice of Wai 996 statement of claim, 15 August 2002
- 2.3 Memorandum–directions consolidating and aggregating further statements of claim for Urewera inquiry district, 30 October 2002
- 2.4 Memorandum from Wai 996 claimant counsel to Tribunal requesting urgent hearing concerning the Crown’s proposed settlement with Ngāti Tūwharetoa ki Kawerau, 11 November 2002
- 2.5 Letter of response from Office of Treaty Settlements to claimants’ application for urgency, 14 November 2002
- 2.6 Memorandum of counsel for Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee opposing application for urgency, 14 November 2002
- 2.7 Memorandum–directions from acting chairperson authorising Judge Carrie Wainwright to determine Wai 996 application for urgency, 18 November 2002
- 2.8 Directions by presiding officer to parties to file memoranda outlining their positions in respects to the application for urgency, 21 November 2002
- 2.9 Memorandum of Crown counsel requesting further information from claimant counsel concerning objections to the proposed Ngāti Tūwharetoa ki Kawerau redress package, 22 November 2002
- 2.10 Letter from registrar, Waitangi Tribunal, acknowledging memorandum of Crown counsel, 27 November 2002
- 2.11 Memorandum of Crown counsel recognising Judge Wainwright’s previous legal representation of Mr Paterson, 29 November 2002
- 2.12 Memorandum of Crown counsel requesting further information from claimant counsel concerning objections to the proposed Ngāti Tūwharetoa ki Kawerau redress package, 22 November 2002
- 2.13 Memorandum of counsel for Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee recognising Judge Wainwright’s previous legal representation of Mr Paterson, 29 November 2002

RECORD OF INQUIRY

APP

- 2.14** Memorandum from Wai 996 claimant counsel to parties responding to directions of presiding officer of 21 November 2002, 4 December 2002
- 2.15** Memorandum from Wai 996 claimant counsel to parties responding to 22 November 2002 memorandum from Crown counsel, 4 December 2002
- 2.16** Memorandum from counsel for Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee to parties responding to 21 November 2002 directions of presiding officer, 4 December 2002
- 2.17** Memorandum from Wai 46 and Wai 206 claimant counsel to parties reserving position of Ngāti Awa to participate in proceedings, 4 December 2002
- 2.18** Memorandum from Crown counsel to parties responding to 21 November 2002 directions of presiding officer, 5 December 2002.
- 2.19** Directions of presiding officer to parties granting request for an urgent hearing, 20 December 2002
- 2.20** Memorandum from Crown counsel to parties responding to 20 December 2002 directions of presiding officer, 23 December 2002
- 2.21** Memorandum from Wai 996 claimant counsel to parties responding to 20 December 2002 directions of presiding officer, 6 January 2003
- 2.22** Memorandum from presiding officer to parties concerning filing of evidence and time-tabling of urgent hearing, 9 January 2003
- 2.23** Certificate of notice for Wai 996 urgent hearing to be held at Waitangi Tribunal offices, Wellington, on 5 February 2003, 8 January 2003
- 2.24** Notice for Wai 996 urgent hearing to be held at Waitangi Tribunal offices, Wellington, on 5 February 2003, 10 January 2003
- 2.25** Memorandum from Wai 996 claimant counsel to parties concerning transfer of evidence, 24 January 2003
- 2.26** Memorandum from Wai 996 claimant counsel to parties concerning protection of sensitive evidence, 27 January 2003

APP NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

- 2.27 Letter from counsel for Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee concerning late filing of documents, 28 January 2003
- 2.28 Memorandum from Wai 996 claimant counsel to parties concerning supporting research reports, 31 January 2003
- 2.29 Facsimile from Wai 524 claimant counsel to Tribunal requesting documents and notifying possibility of attending proceedings, 30 January 2003
- 2.30 Memorandum of counsel for Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee concerning protection of sensitive evidence, 31 January 2003
- 2.31 Memorandum from Wai 46 and Wai 206 claimant counsel to parties notifying that counsel would be present to maintain a watching brief at the hearing, 3 February 2003
- 2.32 Letter from Wai 996 claimant counsel to Tribunal concerning Ngāti Rangitihi representation issues, 3 February 2003
- 2.33 Letter from Wai 524 claimant counsel to Tribunal concerning legal representation, 3 February 2003
- 2.34 Memorandum of Crown counsel seeking leave to cross-examine Dr Bryan Gilling, 4 February, 2003
- 2.35 Memorandum from Wai 996 claimant counsel to Tribunal seeking leave to cross-examine Peter Hodge, 4 February 2003
- 2.36 Unused
- 2.37 Memorandum from Wai 524 claimant counsel to parties expressing interest in inquiry, 4 February 2003
- 2.38 Letter from Wai 996 claimant counsel to Tribunal requesting extension for filing of submissions in reply, 11 February 2003
- 2.39 Memorandum of counsel for Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee seeking leave to file submissions in response, 18 February 2003

**RECORD OF DOCUMENTS**

**A DOCUMENTS RECEIVED FOR URGENT HEARING**

- A1** Brief of evidence of Reuben Perenara, 18 April 2002
- A2** Brief of evidence of David Potter, 24 January 2003
- A3** Brief of evidence of David Potter, 24 January 2003
- A4** Brief of evidence of Andre Paterson, 24 January 2003
- A5** Brief of evidence of Anaru Rondon, 24 January 2003
- A6** Brief of evidence of Keri Tawhio, 24 January 2003
- A7** Brief of evidence of Dr Bryan Gilling, 24 January 2003
- A8**
- (a) Document bank, 3 vols, vol 1
  - (b) Document bank, 3 vols, vol 2
  - (c) Document bank, 3 vols, vol 3
- A9** Opening submissions of Wai 996 claimant counsel, undated
- A10** Cathy Marr, report on the background to the Tūwharetoa ki Kawerau raupatu claim, June 1991
- A11** William Savage, 'Manawhenua Report for the Tūwharetoa Te Atua Reretahi ki Kawerau Raupatu Claim', September 1992
- A12** Jane Luiten, 'Historical Research Report for Te Rūnanga o Tūwharetoa ki Kawerau', August 1995
- A13** David Armstrong, 'Ngāti Makino and the Crown, 1880–1960', undated
- A14** David Armstrong, 'Te Arawa Land and Politics', November 2002
- A15** Alan Ward, 'Ngāti Pūkiao Lands: Loss of Tribal Control', October 2001

APP NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

A16 Phillip Cleaver, 'Matahina Block', scoping report, undated

A17 Submissions of Wai 996 claimant counsel concerning Crown's proposed settlement with Ngāti Awa, 17 June 2002

A18 Brief of evidence of David Potter, undated

A19 Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: Healing the Past, Building the Future – A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 1999), pp 23, 61

A20 Submissions of counsel for Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee, 31 January 2003

A21 Brief of evidence of Rae Adlam, 31 January 2003

A22 Brief of evidence of Graham Kahu Te Rire, 31 January 2003

A23 Brief of evidence of Peter Hodge, 31 January 2003

(a) Attachment to document A23

A24 Opening submissions of Crown counsel, 3 February 2003

A25 Brief of evidence of Dr Hirini Mead, 3 February 2003

(a) Memorandum from Wai 46 and 206 claimant counsel to Tribunal amending evidence of Dr Hirini Mead, 12 February 2003

A26 Closing submissions of Wai 996 claimant counsel, 5 February 2003

A27 Map of Rotoehu Forest and Compensation Court awards to Te Arawa hapū in the eastern Bay of Plenty, Ngāti Awa research, November 1994

A28 Map and land information report on Matatā scenic reserve

A29 Submissions of Wai 996 claimant counsel in reply, 12 February 2003

A30 Memorandum of counsel for Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee in response to submissions in reply of Wai 996 claimant counsel, 18 February 2003



RECORD OF INQUIRY

APP

**A31** Memorandum of Crown counsel in response to submissions in reply of Wai 996 claimant counsel, 17 February 2003

