

THE
TE ARAWA
MANDATE REPORT

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TE WAHANGA TUARUA

WAI 1150

WAITANGI TRIBUNAL REPORT 2005



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 1-86956-258-X

www.waitangi-tribunal.govt.nz

Typeset by the Waitangi Tribunal

Published 2005 by Legislation Direct, Wellington, New Zealand

Printed by SecuraCopy, Wellington, New Zealand

Set in Adobe Minion and Cronos multiple master typefaces

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ABBREVIATIONS

app	appendix
c	circa
CA	Court of Appeal
ch	chapter
CNI	central North Island
doc	document
ed	edition, editor
J	justice (when used after a surname)
ltd	limited
MICOTOWN	Minister in Charge of Treaty of Waitangi Negotiations
MOMA	Minister of Maori Affairs
NZLR	<i>New Zealand Law Reports</i>
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
pt	part
roi	record of inquiry
s, ss	section, sections (of an Act)
sec	section (of this report, a book, etc)
SOC	statement of claim
TPK	Te Puni Kokiri
VIP	volcanic interior plateau
vol	volume
Wai	Waitangi Tribunal claim (when used with a number)

Unless otherwise stated, footnote references to claims, papers, transcripts, and documents are to the record of inquiry, which is reproduced in the appendix.

The Honourable Parekura Horomia
Minister of Māori Affairs



The Waitangi Tribunal
141 The Terrace
WELLINGTON

and

The Honourable Mark Burton
Minister in Charge of Treaty of Waitangi Negotiations
Parliament Buildings
WELLINGTON

29 March 2005

E ngā Minita o te Karauna, tēnā korua

Otira, ki a koe te Minita Māori, tēnā koe e tu ana i te tihi o tōu maunga tāpu a Hikurangi. Tēnā hoki koe e whai ake ana i ngā tapuwae o te hunga rongonui i mai atu i a koe.

He mihi he tangi anō hoki ki te hunga kua mene atu ki te po otirā kua huri atu ki tua o te arai. Haere atu rā, haere atu rā, e moe i te moenga roa. Kati kā hoki mai ki a tātou o te ao tangata, tēnā tātou katoa.

Enclosed is our report entitled the Te Arawa Mandate Report: Te Wahanga Tuarua. It has been prepared following the resumption of the Tribunal's inquiry into claims relating to the Crown's recognition of the mandate of Nga Kaihautu o Te Arawa Executive Council to negotiate Te Arawa's historical Treaty claims.

You will recall that the first Te Arawa Mandate Report was released on 10 August 2004. In that report, we found that there had been flaws in the process by which the Crown reached its decision to recognise the executive council's mandate, but that those flaws did not constitute a breach of the Treaty. We suggested that a hui of all Te Arawa kaihautu members be held to reconfirm the executive council's mandate. We also made a number of other suggestions by which outstanding mandate issues such as the proportionality of the executive council, and the rules governing its accountability to the kaihautu, might be addressed. We gave the claimants the opportunity to return to the Tribunal without further application for urgency should the Crown fail to respond adequately to our suggestions.

Following our report, the executive council, in consultation with Office of Treaty Settlements and Te Puni Kokiri officials, developed and implemented a mandate reconfirmation process. Dissatisfied with the approach taken by the Crown and the executive council, the Te Arawa taumata applied on several occasions to have the Tribunal resume its inquiry. It was

not until December 2004 that we agreed to hold a further hearing. At that hearing, in order to assess whether the Crown's response to our August 2004 suggestions had been adequate, we focused on two key issues:

- ▶ whether the substantive recommendations of the August 2004 Te Arawa Mandate Report had been addressed; and
- ▶ recent developments in the Te Arawa mandating process.

I advised the claimants and the Crown that, while broader issues such as the consistency of the Crown's negotiation and settlement policies with Treaty principles were beyond the scope of the inquiry, the Tribunal would hear claims regarding the particular application of those Crown policies. Evidence and submissions were heard at a one-day hearing on 12 January 2005. Closing and reply submissions were later received in writing.

We heard claims from members of the following iwi/hapu and groups: Te Arawa taumata, Ngati Whakaue, Ngati Rangiwewehi, Ngati Wahiao, Ngati Rangiteaorere, Ngati Rangitihi, Ngati Makino, Waitaha, Ngati Tamakari, Ngati Hinekura, Ngati Rongomai, Ngati Tutaki a Koti, Ngati Tutaki a Hane, Ngati Rangiunuora, Te Takere o Nga Wai, Ngati Whaoa, and Ngati Tuteniu. The Crown and the executive council were also represented before us.

Although the claims were different in emphasis, all concerned alleged flaws with the reconfirmation process. Many of the claimants before us maintained that, despite the reconfirmation, the executive council did not have a mandate to represent them in negotiations with the Crown.

We have reviewed the process by which the executive council reconfirmed its mandate, and the submissions of the claimants, the Crown, and the executive council. The final chapter of this report contains our analysis, findings, and recommendations regarding the reconfirmation process and the wider Te Arawa mandating process. We consider the Crown's application of its negotiation and settlement policy (including its 'large natural groupings' policy) with respect to Ngati Makino and Waitaha. We also discuss, in light of the withdrawal of a number of iwi/hapu from the executive council's mandate, the Crown's proposal for managing the overlapping claims of iwi/hapu outside the executive council's negotiations.

We have found that, for the most part, the Crown and the executive council have responded adequately to our suggestion that a hui be held to reconfirm the executive council's mandate. While we are critical of aspects of the Crown's response, we acknowledge that for the 10 iwi/hapu that have reconfirmed the mandate of the executive council, their decision was a proper expression of their tino rangatiratanga. Consequently, we have found that there has been no breach of the Treaty of Waitangi with respect to the reconfirmation process.

However, we do have concerns for those Te Arawa groups remaining outside the executive council's mandate.

In relation to the Wai 996 claimants of Ngati Rangitahi, we have found that the Crown did not breach the principles of the Treaty by failing to require the executive council to conduct a further mandating hui for Ngati Rangitahi. The Tribunal is now hearing the generic aspects of the Wai 996 claim as part of its central North Island stage 1 inquiry. No prejudice as yet arises, nor is likely to arise in the near future, from the hearing of that claim while the Ngati Rangitahi representatives on the kaihautu pursue direct negotiations. However, we find that the Crown has a Treaty obligation to ensure that the Ngati Rangitahi kaihautu members consult with and report to the Wai 996 claimants, if that is the claimants' wish.

We have found that the Crown has acted in a manner inconsistent with the principles of the Treaty in relation to Ngati Makino and Waitaha. We therefore recommend that the Crown should now commence negotiations with Ngati Makino. Ngati Makino having agreed, these negotiations should also include Waitaha. In our August 2004 report, we suggested that Waitaha should be accorded priority in negotiations, even if the exact same priority as accorded to the executive council was impossible under current Office of Treaty Settlements resourcing. We continue to be of this view and believe that, unless appropriate priority is accorded to Waitaha, the Crown will be acting in a manner inconsistent with the principles of the Treaty.

We agree with many of the concerns of the other claimants before us. However, we note that their concerns relate to possible future Treaty breaches by the Crown.

We note that the executive council currently commands the support of only 'just over half' of the Te Arawa population. That leaves almost half of Te Arawa unrepresented in the Crown's 'Te Arawa' negotiation and settlement process. We do not believe that the Crown's proposed process for dealing with the overlapping claims of those Te Arawa groups outside the executive council's mandate, as outlined in the terms of negotiation, will be effective in protecting their interests.

We note that Crown officials have accepted the necessity of at least two additional Te Arawa settlements. We note also that Ngati Makino and Waitaha have agreed to work together towards negotiating and settling their claims. The Ngati Whakaue cluster, representing approximately a quarter of the population of Te Arawa, would on the face of it appear to constitute a 'large natural grouping' that could be used as the basis for another set of negotiations. We think that priority should be accorded to these additional negotiations, both as a matter of intrinsic fairness and to avoid disadvantaging the overlapping core Arawa claimants now outside the executive council's mandate.

With the exception of Ngati Makino and Waitaha, we have not upheld the claims of any of the hapu or iwi or individual claimants that appeared before us. Rather, we have recognised that the reconfirmation process for those who have agreed to it must continue for their benefit. That said, we have signalled that the Crown must now deal properly with the interests of those who have remained outside the executive council's mandate.

Furthermore, we agree with the claimants that, given the current state of the mandate, it is inappropriate to describe the Crown's negotiations with the executive council as a 'Te Arawa' settlement negotiation, regardless of how narrowly Te Arawa is defined in the terms of negotiation. In fact, it is a negotiation involving some iwi/hapu of the Te Arawa confederation, and it should be honestly and transparently presented as such. Should the Crown proceed to negotiate with just over half of Te Arawa, continue to refer to it as a comprehensive settlement of Te Arawa historical claims, and not properly safeguard the overlapping core claims of other Arawa groups, we believe that Treaty breaches and prejudice will inevitably arise. We also believe that it is within the power and capacity of the Crown to prevent such an outcome.

Finally, we note that our inquiry into the mandate of the executive council is now at an end. There is still the prospect of fresh claims being filed throughout the negotiation process. Whether or not the chairperson of the Tribunal will grant urgency depends on the circumstances of any future claim. To avoid the need for a future hearing, we have attempted to provide some direction to the Crown on how to advance the interests of all of Te Arawa. We believe that the Crown should act upon our advice. In that limited sense, the case as put by the taumata has been vindicated.



Na Judge Caren Wickliffe
Presiding Officer