

CHAPTER 11

CLAIM SETTLEMENT

To effect a settlement, we refer the Government to the following.

11.1 WITH WHOM TO SETTLE

Throughout the hearings at Wairaka and other marae, there was unanimous support for the prosecution and settlement of the claim through Te Runanga o Ngati Awa, save only to the extent that some chose to identify with the separate claim for Tuwharetoa ki Kawerau. By the time of the hearings, it was settled that Tuwharetoa ki Kawerau were represented through Te Runanga o Tuwharetoa ki Kawerau.

We are satisfied that the Government should endeavour to settle the claims through these two bodies and apportion relief. In our view, the supporters of the Tuwharetoa ki Kawerau claim are entitled to stand alone in any settlement. This is because Tuwharetoa have a distinct lineage and their claim is based upon their different role in the relevant events. Any necessary approval of settlement terms for Ngati Awa should be in accordance with the decision-making structure that the Ngati Awa runanga provides. We have not been shown and have not vetted the constitution of the Tuwharetoa runanga.

11.2 BOUNDARIES AND RELATIONSHIPS BETWEEN HAPU AND WITH OTHER MAJOR GROUPS

In our view, the complex pattern of overlapping claims and boundaries need not inhibit a settlement. The problem arises because of the perceived need to fit Maori life into a Western, or non-tribal, mould. It is a problem that can and should be circumvented. However, it is important that the issue be understood so that settlement requirements or terms do not expose traditional values to further risk than necessary by unwittingly imposing European norms. In brief, overlaps are a problem only when we insist that Maori fit the European conception of political boundaries. While cultivation and similar boundaries were important, political boundaries like those of Western states were not material to hapu operations, and their imposition tends to negative Maori values on connections and relationships.

We are reminded of Lord Haldane's 1921 warning in the Privy Council that:

in interpreting native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times increasingly, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.¹

We begin with the meaning of ‘tribe’, using a term of common parlance. The ‘tribe’, or the body that exercised daily corporate functions, was in our view the hapu, which was comprised of a single kainga or several kainga in relative proximity. Each hapu was autonomous. Though generally associated with a particular land area, they were in fact mobile, and some significantly changed location over time. For these and other reasons, hapu may maintain ancestral associations with distant places.

The point is that hapu were defined not by land boundaries but by whakapapa and allegiance. Though sometimes depicted as permanent, they in fact changed shape over time through amalgamation, incorporation, migration, or lateral division. They could also include persons of separate descent groups.

Further, the land itself was not seen to be dissected by lines on plans. It was viewed not as a combination of enclosed allotments but in terms of resource sites that the hapu, or particular families of the hapu, habitually used. The question was not where the boundary lay between hapu but which hapu could access a particular resource at what time and for what purpose. Resources could thus be shared and persons from distant hapu could have use rights in a particular resource, like a mussel-bearing rock in a harbour. Access was based simply upon respect for immemorial user and historical relationships with the users.

To complicate matters, individual Maori travelled and used resources for as far as their whakapapa lines would take them and were acknowledged by local people. Then, because of earlier migrations and wars, there were also sites of particular ancestral significance for some hapu in lands that stood clearly within the areas occupied by other hapu.

It is then apparent that the strength of a hapu rested not on the maintenance of exclusive boundaries but on the extent of their connections. For security, each hapu depended upon good neighbourly relations. These were maintained through whakapapa ties, arranged marriages, gift exchange, and punctilious protocols, which give rise to the essential characteristic of Maori people, at least in times of peace – the showing of respect for the mana of other groups. A modern indicator of this is the form of greetings at hui.

Through whakapapa, hapu generally aggregated according to bloodlines. In this case, the common aggregation was under the calling of Ngati Awa, the name of an ancient forebear symbolic of the common origin of all. There is no doubting from the historical record that, at all material times during the events that led to the raupatu, the generic name for the hapu of this district was Ngati Awa.

However, the acknowledgement of a bond to one descent group, Ngati Awa in this instance, was not a denial of valued connections to other descent groups in the

1. *Amodu Tijani v The Secretary of State for Southern Nigeria* [1921] 2 AC 399, 402

vicinity. Hapu of Ngati Awa also had connections with Te Arawa, for example, and could, for any particular purpose, associate with them if required. Similarly, hapu associated with Te Arawa today could also call themselves Ngati Awa if they chose. Other hapu of Ngati Awa could equally call themselves Tuhoe and often do to this day. It is customary to recognise and acknowledge a variety of ancestral connections.

Further, it is not unusual that persons of a distinct lineage could exist amongst the more numerous members of another descent group and, through intermarriage, could identify with that other group, or a further group, or could stand separately. This appears to be the case with Tuwharetoa, who may align with Ngati Awa or Te Arawa, or stand independently.

The historical record also shows that, from at least some 150 years ago, the hapu of the district associating with Ngati Awa operated collectively through runanga, a runanga being a meeting of the elders and rangatira of one or more hapu in the district. Just how many hapu could have participated, or chose to participate, in any large Ngati Awa meeting could vary, however. Moreover, as we see it, the essential power base remained with the autonomous hapu. Accordingly, the collective may be seen as a federation of independent bodies, even though some rangatira had close connections with several hapu and an influence over many others again.

The considerable authority of the rangatira, however, arose from their personal magnetism or mana. It did not arise from a settled constitutional structure. Accordingly, unity was expressed metaphorically by reference to one river, one mountain, and one person, but in reality a hapu could follow an independent course if the people of that hapu felt strong enough to do so.

The collective in turn depended upon maintaining good relationships with other major descent groups to the extent practicable. Relationships were assisted in this case by the fact that Tuhoe, a major group surrounding Ngati Awa, and Whakatohea, to the east, all traced descent from the crew of the Mataatua canoe.

Accordingly, the essence of Maori existence was founded not upon political boundaries, which serve to divide, but upon whakapapa or genealogical ties, which serve to unite or bind. The principle was not that of exclusivity but that of associations. Indeed, the formulation of dividing lines was usually a matter of last resort. Such lines were predominantly laid down, as aukati, when there was trouble in the area that could lead to war. Peaceful relationships depended significantly on creating and acknowledging ties, and most especially through acknowledging the independent mana of other groups, be they large descent groups like Tuhoe or Whakatohea or individual hapu within the Ngati Awa group.

It appears to us that the latter-day depiction of boundaries, and the modern adaptation of 'rohe' for that purpose, arises from colonial influence, especially as represented in the Native Land Court. The boundaries cut out by the latter were mainly based on actual occupancies of the day, which were often only snapshots in time. We are aware of the numerous ways in which boundaries were laid out for particular purposes, such as rahui, aukati, resource use areas, and the like. We are aware, too, of the recitation of ancestral associations with historical sites and resource use areas. However, in our view these do not describe political boundaries of the sort

carved out in Europe from the seventeenth century. The tendency to see them that way has merely given rise to exaggerated depictions with enormous overlaps and has led to large disputes.

No doubt it assists administration to see tribes as European states, but the concepts are not in fact the same. It may be necessary to create administrative boundaries today, but it is important to be conscious of the fact that this is done purely for the particular purpose required. The practice has already distorted important cultural values, in our view, and has undermined Maori skills in managing intertribal relations. It may also be helpful to remember that bodies established today to represent a tribe are not the tribe. They are only bodies to represent it. Constitutional structures need not impair traditional tribal dynamics, or the principle that tribes are defined not by boundaries and written constitutions but by descent, participation, and adherence to Maori norms.

11.3 THE OVERLAPS IN THIS CASE

We consider, then, the particular problems in this case. Taking a European view of matters, it is considered that the boundaries between Ngati Awa, Whakatohea, Tuhoe, and Te Arawa are indistinct. To insist that the groups should define the boundary lines between them is to ask them to do that which is culturally impossible, or that which is an affront to cultural values. The relationships between the groups have been such that each can point to sites of ancestral significance to it well within the territories of the others, and each can whakapapa to persons who lived in the kainga of another group.

Taking a broad view, however, it may be seen that, to the east of the Ngati Awa heartlands, Ngati Awa merged with Whakatohea and Tuhoe at Ohiwa Harbour, and that the harbour itself was shared by all three. It may also have been shared with other groups as well, Te Whanau-a-Apanui being mentioned in that context. Similarly, on a broad view, while the lands between the coast and the southern confiscation line were predominantly held by hapu of Ngati Awa, Tuhoe had substantial interests in places on either side of the border, just as Ngati Awa had interests beyond the border. This is not to deny that, in addition, Tuhoe can claim historical associations with sites much closer to the coast.

Were the Government to pay compensation for every acre lost, based on the value at the time of taking with compound interest to the date of settlement, we could understand the need to mediate for some more specific agreement as to how lines might be drawn for that particular purpose. However, there are too many variables to treat historical claims in the same way as current disputes in civil litigation, and we support the Government's approach to treat more globally for a lump-sum figure.

That being so, we see no reason to insist upon a precise boundary definition for the purpose of determining comparative quanta. It seems enough to conclude, as we do, that Ngati Awa had by far the predominant interest in the confiscated lands as far as Ohiwa Harbour. It is sufficient to note that the Government is treating separately with

Ngati Awa and Whakatohea in respect of their areas, and will need to do the same for Tuhoë in due course.

Much the same applies to the relationship between Ngati Awa and Te Arawa. The Ngati Awa land interests clearly extended beyond the western confiscation boundary, but just how far is incapable of precise definition. In the usual Maori way, hapu in this area have connections to both Te Arawa and Ngati Awa and, for certain purposes, could associate with either. Utilising whakapapa and history, it is possible for Ngati Awa to claim even to Maketu and, equally, for Te Arawa to claim to Matata.

What is clear, however, is that Ngati Awa had interests in the lands beyond the western confiscation line, that the Native Land Court awarded those lands to persons of Te Arawa to the exclusion of Ngati Awa, and that the exclusion of Ngati Awa was an additional retribution for their perceived rebellion. But it is not necessary to define the exact extent of their interest. It is sufficient that, in settling upon a lump-sum figure, the loss of lands beyond the confiscation boundary is a further item to consider.

The relationship between Tuwharetoa and Ngati Awa has also to be considered. Here again, the depiction of boundaries is unhelpful. It is inevitable that Tuwharetoa will have ancestral associations throughout a wide area where others also have interests, and may even predominate, but linking these places by lines from one place to the next does not establish a legitimate boundary and provides for enormous overlaps. In this case, the better course is to consider the comparative number of associated hapu and currently functioning marae. Using that as a test, and bearing in mind that Tuwharetoa suffered proportionately less from confiscation and enforced relocations but relatively more from subsequent alienations, their claim is approximately one-tenth the size of Ngati Awa's.

Were compensation to be settled in cash, there might be no further problem. The difficulty arises when groups seek particular lands on account of their share. Whose land is it? Invariably, more than one group can claim a legitimate interest in the same area and it will become necessary to consider a range of factors. Does one group already have a reasonable land base? Has any particular site more significance for one group than another? Are there other lands from which one group can be compensated? Is joint ownership feasible?

Rotoehu Forest is a case in point. We are satisfied that Ngati Awa, Tuwharetoa, Ngati Makino, and other hapu of Ngati Pikiao of Te Arawa can all claim legitimate customary interests in the forest by reference to ancestral associations. We are also satisfied that Ngati Awa, Tuwharetoa, and Ngati Makino each have prima facie valid claims for recompense that may well be satisfied, at least as to part, from out of the forest. The same is also likely to apply to Ngati Pikiao, but in this case their claims have not been fully heard.

In managing these arguments, we 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. It may be appropriate that whoever takes a particular asset that is the subject of conflicting ancestral claims should do so on a clear understanding that the ancestral

associations of others will be also be acknowledged and respected. We require no less of Europeans in resource use planning. The owner of land that has passed from Maori hands may still be required to consider Maori ancestral associations in proposing developments. In the same way, the privilege of title may need to carry the burden that the holder will acknowledge cultural obligations to others.

For example, were Mount Putauaki available for return, it would be wrong in our view if it went to Ngati Awa or Tuwharetoa without an acknowledgement that both have customary interests, and that the mountain has particular significance for all the marae in proximity to its feet. That is a case where title might well be taken in the name of an ancestor and administering trustees be chosen by the marae of the vicinity. It seems to us singularly unfortunate that control of the mountain has come to depend on the accident of European titles and comparative shareholdings in the Tarawera Forest. No matter that today some marae may adhere to the calling of Tuwharetoa and others to Ngati Awa, since it cannot be denied that all have significant customary associations with Putauaki.

In Rotoehu, the most important criterion may be the extent to which it can in practice be divided. Again, however, those taking a share may need to acknowledge that others have customary interests in any part taken by them. They may need to reserve particular sacred sites for separate administration.

In seeking solutions, it is important to bear in mind that Maori society is fundamentally about relationships. It is not enough to resolve the immediate problem. The people must continue to live together, and the more important task is to rebuild relationships based upon whakapapa and respect for the mana of each group. To that end, mediation is helpful, but it would be wrong in our view if the return of particular lands had to depend upon the agreement of all contenders. Ever since the confiscation, the land returns, and the introduction of individual ownership through the Native Land Court, people have become so divided that agreements are probably not presently possible. The effect of requiring full agreements will only exacerbate the divisions caused by the wrongs already done. We propose that, where particular lands are sought and there is no agreement, the matter should be referred back to the Tribunal for a recommendation, after such further hearing of those interested as may be necessary.

11.4 PRIOR COMPENSATION

Ngati Awa is one of the few tribal collectives to have suffered the confiscation of the greater part of its land without some compensatory adjustment for that confiscation. They have some catching up to do. Compensation was paid in the 1940s in respect of Taranaki, Waikato, and Whakatohea, and in 1981 in respect of Tauranga. Compensation was also paid in the 1940s for land losses affecting Ngai Tahu. In each case, trust boards were established to administer the funds, and income has been applied for a variety of marae and land development purposes and generally for the social and economic advancement of the general class of beneficiaries. Most especially, each of

those boards has provided money for education, especially at a tertiary level, and generations of youngsters in those places have received some benefit.

The provision of a tribal structure for Ngati Awa did not happen until the Runanga o Ngati Awa was established by statute in 1988 to receive lands in settlement of legal proceedings and political claims relating to the Ngati Awa land development scheme. That land was not returned until 1990, and the settlement had nothing to do with the confiscations.

Accordingly, Ngati Awa were without the benefit of the infrastructure provided for others similarly affected. Their comparative poverty has been apparent when iwi, or the hapu of major descent groups, have contributed moneys or federated for Maori purposes. The youth of Ngati Awa have not had the same educational opportunities. For many years, the tribe has been without a collective resource base. This should be brought into account, in our view, and provided for in any future settlement.

11.5 PUTAUAKI

The disposal of Putauaki, or Mount Edgecumbe, should be reserved from the settlement. Its ancestral significance and physical prominence as a reminder of confiscation wrongs are such that the grievance may not be quieted for so long as a better arrangement for its management is outstanding. Our preliminary view is that the mountain should be held for an ancestor common to the hapu and administered for all with customary interests by guardians chosen from nearby marae. But, in view of the current proprietorship of Tarawera Forests Limited, nothing is likely to be achieved now without Government assistance.

11.6 NGAI TE RANGIHOHIRI AND NGATI HIKAKINO

Ngai Te Rangihouhiri and Ngati Hikakino suffered more than other hapu from the confiscation. This may be seen as just, in view of the more prominent role of some from these hapu in the killing of Fulloon. But here two points must be borne in mind.

First, those responsible for Fulloon's death paid with their lives or their freedom. There is no basis on which the crime could be visited on other than those convicted of it.

Secondly, the land was confiscated for a subsequent rebellion, but on the facts, the hapu were not in rebellion; they were reacting to an invasion by their former enemies. There was no basis for confiscating the land of any of the hapu, so imagined degrees of culpability are irrelevant.

Then, during the drainage of the Rangitaiki Swamp, a further 187 of the mere 278 acres returned to them was taken under the Public Works Act 1908. While the Sim commission thought that Ngai Te Rangihouhiri and Ngati Hikakino were deserving of some further compensation, that recommendation was not implemented.

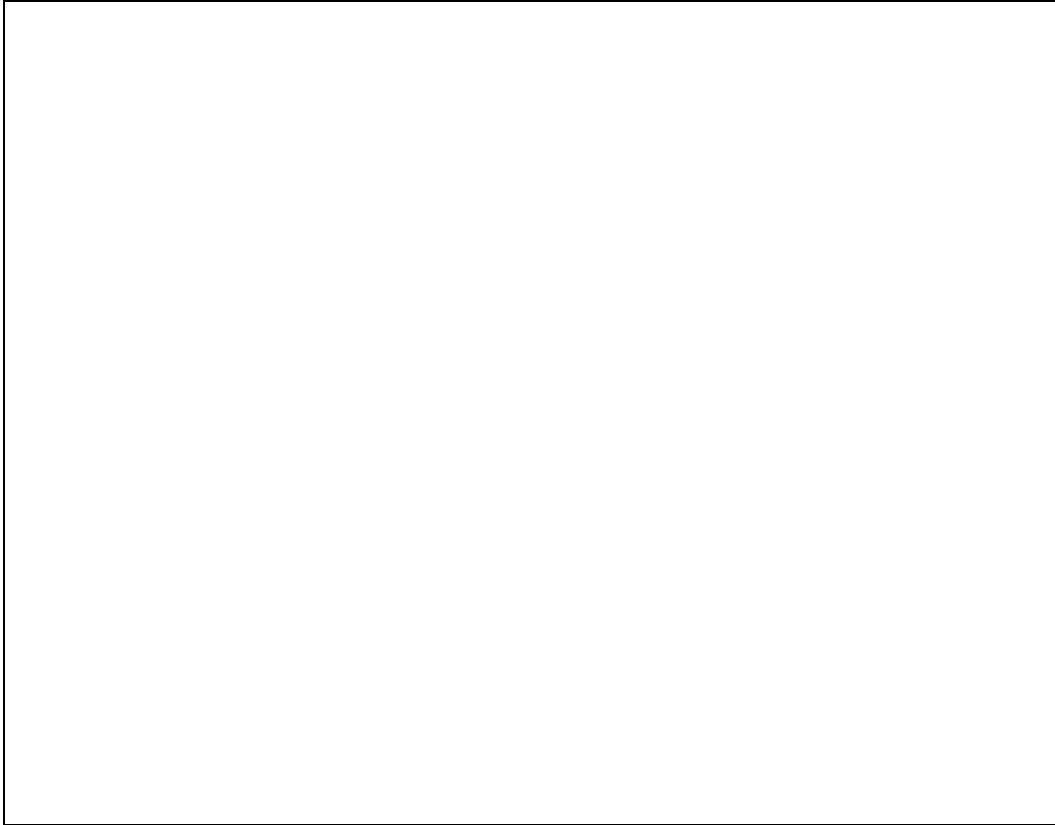


Photo 10: The Mataatua whareniui. Photo courtesy Otago Museum.

More than any other section of Ngati Awa, the people of these hapu were deprived of their sacred sites and that necessary for their future wellbeing. The settlement must be such as will guarantee to them a land base for their future identity and economic development.

11.7 SCENIC RESERVES

Most of the scenic reserves described in section 9.9 incorporate various wahi tapu. Most are also on lands unlawfully confiscated. In terms of the New Zealand Settlements Act 1863, by which they were confiscated, land that was not reasonably required for military settlements could not have been taken. In these cases, the land could not have been intended for military settlements at the time, and most has never been used for that purpose since.

The claimants ask that these be settled as Maori reservations and be administered under joint arrangements between Maori and the Crown (or the relevant local authority). The claimants are entitled to ask for the return of the land without restrictions. Given that circumstance, their claim to joint administration is more than reasonable.

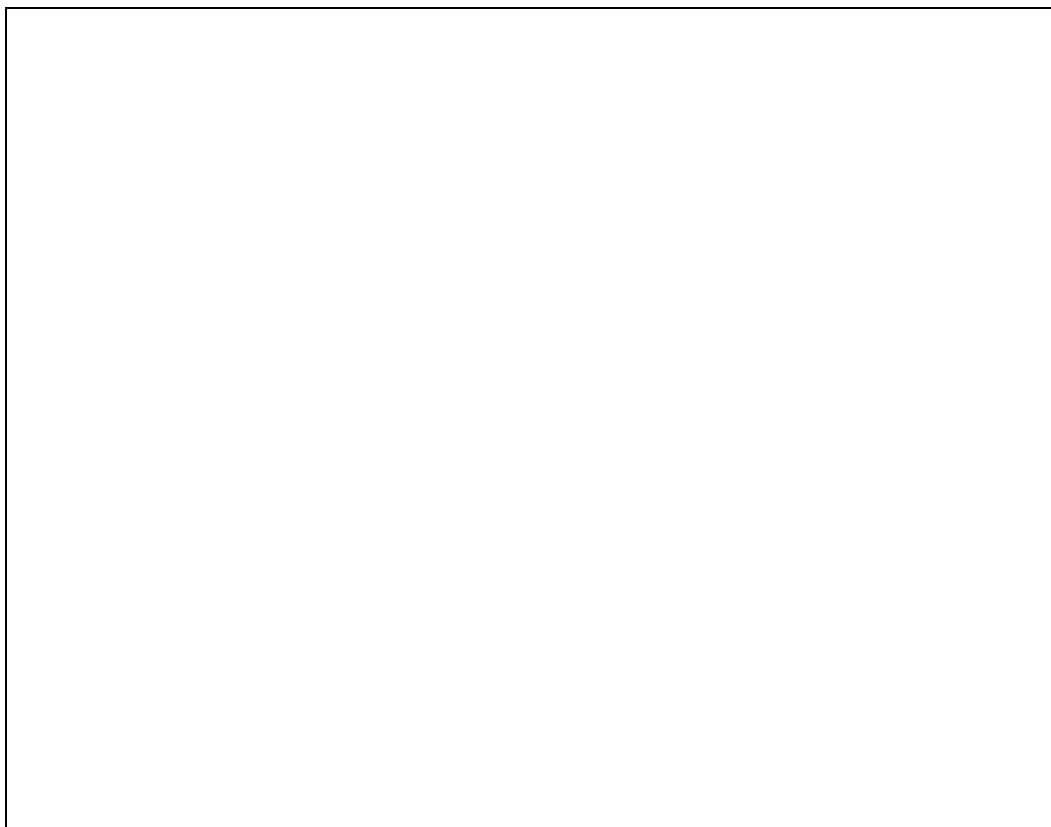


Photo 11: The interior of the Mataatua whareniui. Photo courtesy Otago Museum.

11.8 THE SETTLEMENT AND RESERVATION OF CLAIMS

A global settlement should be sought, in our view, in respect of all matters arising from other than, say, the last 75 years. This should include all matters relating to the confiscation, land returns, and Native Land Court awards within and outside the confiscation boundary, even though we have not fully investigated the Native Land Court awards outside the confiscation line.

In our view, some claims should not form part of a lump-sum settlement and should instead be separately provided for. We would distinguish historical claims and those within living memory or within, say, the 75 years prior to the claim being filed. While major compromises have been obvious in the settlement of historical claims by tribes, we think it would be contrary to sound principle and patently unjust, both for the Ngati Awa hapu and for the particular persons concerned, if the same were expected of individuals unjustly deprived of specific blocks through more recent Crown actions, or if they were made as competitors with the tribe as a whole for a share of compensation proceeds.

These cases must be dealt with on their own, independent of the tribal claim. We refer to four.

- *Tarawera Forest*: The Tarawera Forest claim relates to the incorporation of Maori lands in the Tarawera valley into a joint Crown–Tasman–Maori forestry scheme

in the late 1960s. Subject to the inclusion in the proposed global settlement of certain claims from the 1860s that lands in the Tarawera valley were wrongly awarded in the first instance, the Tarawera Forest claim affects prescribed individuals and not a general tribal class. We doubt that the claim could be settled without a prior hearing and report; it needs to be dealt with separately. No part of the claim has been heard so far, though some submissions have been filed.

The remaining three cases, now to be referred to, have been partly heard. We consider that each is capable of independent settlement without further hearings. To assist that, we express some preliminary views, although these views are tentative, the Crown having yet to respond to the claimants' submissions.

- *Waiohau c26*: Waiohau c26 was Maori freehold land compulsorily acquired in 1961 under the Public Works Act 1928 as a source of aggregate for the construction of the Matahina Dam.² In fact, it appears obvious that the freehold was not required, just the aggregate, but the whole of the land was taken and compensation of £460 was paid. The land, less the aggregate, was offered back to the owners for \$20,000 in 1984. This being Maori land in multiple ownership, it is unlikely that the former owners could gather the descendants to contribute according to their shares. The Tribunal heard some of the family, but the Crown has yet to reply. Mediation was suggested but has not happened.

We thought that this matter should be capable of prompt settlement. Under its terms, the Treaty does not permit of the compulsory acquisition of Maori land. Possibly, the strict terms of the Treaty could be set aside for some pressing national purpose. But here there is no need to argue the point, except to say that which is perfectly obvious: that, if the Treaty is to be departed from, it should be departed from only to the minimum extent required. If only the aggregate was needed, there was no need to take anything more.

Unless the Crown has some compelling argument for doing otherwise, this is a case where compensation should be paid for the aggregate actually taken (no doubt many times more than the amount that was paid for the land), with compensation for loss of use and, of course, the return of the land, back-filled so as to be suitable for continuing agriculture. No less would have been required had the Crown been a private person, and having regard to the Treaty of Waitangi and the principle that the Crown should act honourably in treating with Maori land, no less can be required of the Crown. The claimants contended that the Crown did in fact do just that for the owners of lands with aggregate in the South Island, where dams were being constructed at about the same time.

It remains to add that, on the evidence, this block, had it not been taken, would have formed part of the adjoining Maori afforestation scheme and been a key block in providing access and roading material. The owners have lost the benefit of joining their relatives in that scheme.

2. For some background on this matter, see document c2

- *Omataroa–Rangitaiki c60*: Omataroa–Rangitaiki c60 refers to a further block of some 5000 acres with over 2000 owners.³ Here, part of the land was taken for aggregate for the Matahina Dam and part for the construction village. Other parts were flooded or taken for roads, but on that no claim is made.

With regard to the land taken for aggregate, the same principles as in the previous case apply, save for the fact that the land has been returned, though it has yet to be restored to how it should have been. The construction village site is no longer needed, the houses have been removed, and the Crown proposes to return this site for \$40,000. Again, the principle is that no more should have been taken than was absolutely necessary, and in this case it was not necessary to take anything more than a compulsory lease for the life of the works. Without having heard the Crown, we can make no specific finding, but at this stage we do not see why any payment should be required when there should never have been a compulsory acquisition of the freehold in the first instance. At the very least, the capital gain should not have been with the Crown. Allowance should also be made for the fact that the acquisition and return of lands has involved owners in costs to which they should not have been exposed for resurveys and title amalgamations.

- *Rangitaiki 12*: Rangitaiki 12 refers to 300 acres awarded to two ‘loyal’ Ngati Awa persons by the Compensation Court in 1879.⁴ Included on the land were certain geothermal springs, now known as the Awakeri hot springs or Pukaahu Domain. These were used by Ngati Awa hapu both before and after the individual awards, presumably with the consent of the owners or their descendants. In 1914, one acre was taken under public works legislation for the purposes of a quarry. It is still owned by the Whakatane District Council but is no longer used as a quarry, the claimants adding, if indeed it ever was. Some eight acres were also taken for roads at different times after 1917, but the main concerns are the quarry and the eventual taking of the springs. In 1918, a 10-acre block containing the springs was taken for public use under the Public Works Act 1908 and the Scenery Preservation Amendment Act 1910. In 1939 and 1940, a further 27 acres were taken and added to the springs area as recreation ground. Then, in 1978, about 100 acres were proposed for a rubbish dump, but after objections by the owners, an 80-year lease was agreed to. The owners object to this relentless acquisition of their land after so little had been left to the Ngati Awa people following the confiscations.

The springs today are managed by a commercial enterprise under lease from the Whakatane District Council. The balance of the land is in multiple Maori ownership. The matter is known to have been the subject of a long outstanding complaint. Most recently, representations were made to the Government by the late Stanley Newton, the distinguished former chairman of the Te Arawa Maori Trust Board, who brought the claim in 1988 but died before our hearings commenced.

3. For some background on this matter, see document C1

4. For an account of the Crown’s actions concerning this land, see document H7.

The Crown has not been heard on this claim. We understand that it was obtaining research, but this has not been presented.

This is a private matter affecting first and foremost the private owners of Maori freehold land. It would be wrong in our view if the claim were subsumed by the general tribal claim of Ngati Awa. We urge that a negotiated settlement be sought, but we give leave to those who have taken over the claim for the owners of the balance land to reinstate the matter for a separate hearing if need be. Any negotiations would need to involve private interests, but it is obvious that the land was taken initially as a result of the Crown's legislation, and the Crown may need to consider the steps it ought now to take for recovery.

On the face of the claim, it would appear that the takings, except perhaps those for the roads, were not the sort of necessary works for pressing national purposes that could justify a departure from the Treaty, even assuming that any departure at all could be contemplated.

As to these matters generally, we can find no proper basis for incorporating the claims of particular persons into general tribal settlements. One should not be compromised by the other. The broad principle of law must apply: where plaintiffs are not the same and the causes of action and the subject-matters are distinct or severable, the cases must be handled separately. We reserve leave for the claimants and the Crown to seek further hearings or particular recommendations on any matter.

Dated at Wellington this 8th day of *October* 1999



E T Durie, presiding officer



B P N Corban, member



G S Orr, member



M P K Sorrenson, member



K W Walker, member



