

3. THE CASE FOR WAI 758 AND WAI 142

3.1 INTRODUCTION

In the first instance, counsel for both the Wai 758 claimants and the Wai 142 claimants filed a précis of issues on 27 October 2000. This summarised the main arguments to be adduced at the urgent hearing. To the extent that the précis reiterated the claimants' well-established position, we need not record its detail here, other than to note that counsel sought the following recommendations from the Tribunal:

1. That any settlement purporting to apply to the claimants cease immediately.
2. That the Crown consider Deeds of Mandate from the claimants.
3. In the event that such Deeds are approved:
 - 3.1 then the Crown enter into direct negotiations with Pakakohi and Tangahoe;
 - 3.2.1 (Alternatively) that the Crown recognise the independent status of the claimants and ensure that that status and position of the claimants is properly reflected in any settlement of their claims.¹

From this point forward, Pakakohi Inc and Tangahoe Inc reverted to separate legal representation. We consider first the case put for Wai 758.

3.2 THE CASE FOR PAKAKOHI INC

Legal submissions were made for the Pakakohi claimants by John Upton QC. In his absence, James Johnston led submissions in reply.

Mr Upton began by describing the course of events during the last few years as having 'all the makings of a Greek tragedy'. He saw the process as having led inexorably to the obvious result, which was the urgent hearing itself.

We identified a number of key points in Messrs Upton and Johnston's case, which we list and then expand on below:

- ▶ the Pakakohi Inc mandating hui of 1997 gave unanimous support;
- ▶ Pakakohi Inc was prepared for 'side-by-side' negotiations;
- ▶ Pakakohi Inc had received no funding from the Crown;

1. Paper 2.39, pp 5-6

- ▶ the Pakakohi Inc register of names was a further indicator of support;
- ▶ a marae-based system of representation was inappropriate for Pakakohi;
- ▶ Pakakohi Inc was willing to put arguments about Ngati Ruanui's origins to one side;
- ▶ the territorial overlap with Nga Rauru meant that the settlement would split Pakakohi's rohe in two; and
- ▶ the Crown was wrong not to adopt the option suggested by officials in August 1997 of assessing claimant community responses to a Pakakohi Inc deed of mandate.

3.2.1 The Pakakohi Inc mandating hui of 1997

Mr Upton stated that Pakakohi had never been polled as part of the wider Ngati Ruanui group. In fact, he did not believe that Ngati Ruanui had ever had a poll at all. However, he did note that Pakakohi Inc had held three mandating hui in March, May, and November 1997 (both before and after the working party had submitted its own deed of mandate) in Levin, Gisborne, and Patea respectively. Mr Upton produced the minute book from those meetings, and copies were made available to the Tribunal.² As we have related in chapter 2, this book revealed that 12 persons had been present in Levin and 42 in Gisborne, and a separate list showed that 34 people had attended in Patea.³

Mr Upton explained that the Patea meeting – indeed, the only one held within the local vicinity – had been held at the Patea Old Folks Hall rather than at Manutahi Marae for purely practical reasons (namely, that the marae had a limited spring-fed water supply and could not accommodate a large hui). He pointed out that, for the same reason, the Taranaki Tribunal had been unable to sit at Manutahi during the course of the Taranaki hearings in the early 1990s. The point was important, said Mr Upton, because TPK had criticised Pakakohi Inc for not developing any of its submissions on the working party's deed of mandate from meetings held on marae. Mr Johnston later queried why TPK had not simply asked Pakakohi Inc why the meeting was not held at Manutahi.

2. Document A18

3. Document A27

3.2.2 Pakakohi Inc's preparedness for 'side-by-side' negotiations

Mr Upton explained, again in response to the TPK risk analysis, that Pakakohi Inc was not saying necessarily that it wished to negotiate exclusively of Ngati Ruanui but rather that it had a right to negotiate alongside its neighbours. We queried him as to whether this signaled a desire for 'togetherness', but Mr Upton preferred to describe it as 'separateness', which he felt did not preclude negotiating 'side by side'. He highlighted the fact that the chair of the working party had written in May 1998 offering the Pakakohi runanga a place on the working party – rather than simply a place for an elected representative of Manutahi Marae – but that this offer had later been withdrawn. In response to a question from the Tribunal, he confirmed that Pakakohi Inc was still open to such an offer being made.

We heard later from counsel for the working party that this offer was held open for the best part of a year before Pakakohi Inc made a counter-proposal for two places. At that point, the original offer was withdrawn (see s 4.2).

3.2.3 The lack of Crown funding for Pakakohi Inc

Mr Upton went on to explain the ongoing problem of funding for Pakakohi Inc. He contrasted this situation with that of the working party, whose negotiating costs, he said, had been funded by the Crown to the tune of hundreds of thousands of dollars. He noted that the Crown had eventually released \$5000 in September of this year to allow the discussions between the parties to continue, and had offered an additional \$10,000 on condition that both the application for an urgent Tribunal hearing and Wai 758 itself were withdrawn. His clients had refused to agree to these conditions, seeing their claims to the Tribunal as a necessary safeguard. However, no sooner had the \$5000 funding been used to prepare an options paper, Mr Upton said, than his clients received indirect confirmation that the Crown and the working party were aiming to initial a deed of settlement within little more than a month. At that point, the discussions broke down and the further application for urgency was made.

Both Crown counsel and counsel for the working party later rejected Mr Upton's implications concerning the Crown's funding of the working party.

3.2.4 The Pakakohi Inc register of names

Mr Upton adverted to a Pakakohi Inc register of supporters, which had been typed out and included within the bundle of supporting documents.⁴ He stated that a registration form had been filled out personally by each registrant and that it was his understanding that those affixing their names must have been under the impression that they were ‘throwing their lot in’ with Pakakohi Inc in terms of representation in the settlement negotiations.

Mr Upton explained that all 306 names on the register had been gathered in preparation for submitting the Pakakohi Inc mandate to the Crown for consideration. He said that, once his clients learnt that the Crown was not prepared to enter into separate negotiations with them, they put their mandate preparations on hold and ceased to gather names for the register. Mr Upton considered that the register had equated to the mandate that the Crown in fact required, but he pointed out that this matter had not been debated since the Crown had refused to take the matter any further once the working party’s mandate had been recognised.

The status of the register was later called into question by counsel for the working party (see s4.2). In submissions in reply for Wai 758, Mr Johnston acknowledged that the register of names was more in the nature of a list of people supporting ‘Pakakohi Inc’ than those supporting separate negotiations for Pakakohi. He explained that he was not so much claiming a mandate for his clients as claiming that the Crown’s mandate assessment process had been flawed.

3.2.5 The inappropriateness of a marae-based system of representation for Pakakohi

Mr Upton argued that the marae-based system of representation employed by the working party was disadvantageous to Pakakohi. Over 40 Pakakohi marae and pa sites had been destroyed by General Chute during his bush-scouring campaign of the wars of the 1860s, he said, and Manutahi was the only one left. He later conceded that not all the destroyed sites were in fact permanently inhabited, because some had been built by those fleeing the troops as Chute pursued Pakakohi across their land. He also acknowledged that the exact number was probably not

4. Document A13, vol2(67); see also doc A28

known, since there had not been sufficient research into the matter. However, he felt the point was still valid that Pakakohi had been dispersed among the marae of neighbouring hapu, and were thus more favourable to hapu-based rather than marae-based representation.

On a related point, Mrs Parker rejected the working party's claim that two Pakakohi marae (Meremere and Pariroa) supported its mandate. These marae, she stated, were not actually marae of the two named Pakakohi hapu but simply marae within the territory of those hapu.

3.2.6 The willingness to put to one side arguments about Ngati Ruanui's origins

In their submissions on the working party's deed of mandate, the Pakakohi claimants stressed that Ngati Ruanui were a missionary-created people originating from liberated slaves returning to Taranaki in the 1840s. While Mr Upton said that his clients did not resile entirely from this position, he did add that they were now more 'commonsense' about it and had come to realise that the matter was really little more than a distraction. He agreed that the presence of this argument must have played a large part in the Crown's assessment of the submissions, as well as the working party's attitudes to his clients after that point. He felt, however, that there was now some 'room for movement' on the matter. Mr Johnston also stressed that Ngati Ruanui's status had been recognised by his clients for a considerable period of time and was not an issue.

3.2.7 The territorial overlap

Mr Upton did not agree that the fact that Pakakohi and Ngati Ruanui shared territory meant they should be dealt with together in the same settlement. He observed that overlapping territorial interests were usual in traditional Maori society and gave the northern South Island as an example where eight groups shared a complex and completely overlapping tenure of land. Mr Upton felt a process had evolved which would settle Pakakohi Inc's claims without their consent and sever the Pakakohi rohe in two, leaving all Pakakohi claims settled but half their grievances undefined in the deed of settlement because of their overlap with Nga Rauru.

3.2.8 The Crown's rejection of the option suggested by officials in August 1997 of assessing claimant community responses to a Pakakohi deed of mandate

Mr Upton had recently received copies from the Crown of two documents mentioned in chapter 2. These were the 21 August 1997 OTS memorandum to the Minister in Charge of Treaty of Waitangi Negotiations, and the letter from the Minister to the coordinator of the working party, Mr Waikerepuru, which was also copied to Piki Parker and Waveney Stephens.⁵

Mr Upton noted the memorandum's comment that 'the claimant mandating process may serve as a catalyst for resolving the issue, or will at least allow the Crown to assess the support base of each group'. He stressed that such a comment was predicated on the basis that all deeds of mandate would be made available for analysis, and reiterated that the process had not been allowed to take place because his clients' mandate had never been assessed.

Mr Upton went on to note that the memorandum had set out for the Minister three alternatives for progressing the matter (see s 2.3.3). Importantly, stressed Mr Upton, OTS commented at paragraph 16 that negotiating with Ngati Ruanui alone 'could be justified . . . if the mandate evaluation process found that there was wide support for a Ngati Ruanui Deed of Mandate and little support for Deeds of Mandates submitted by Tangahoe and Pakakohi'. Mr Upton reminded the Tribunal that it was this mandate testing process that the Crown had eventually refused to undertake.

Finally, Mr Upton noted that OTS had advised at paragraph 24 of the memorandum that the Crown should wait to consider how to deal with Tangahoe and Pakakohi until after submissions had been received on the working party's deed of mandate. These submissions, it was felt, would allow the Crown to assess the three groups' relative strengths. The accompanying letter to Mr Waikerepuru advised the working party that public submissions on its deed of mandate would be called for, which would 'allow the Crown to assess the size of the Tangahoe and Pakakohi interests and the extent to which they can be represented within the Working Party's Deed of Mandate'. Mr Upton considered that, despite this letter being copied to Mrs Parker, Pakakohi Inc was preoccupied with its own mandating process at the time and did not see it as relevant to divert its attention to making submissions on the working party's mandate. As well, he said that

5. Document A16(a), (b)

the fact that it made only three submissions reflected its lack of organisation and funding, but he stressed that the quality of the submissions was more important than their quantity.

Mr Johnston argued that the momentum that was building for separate negotiations with Pakakohi Inc had been stopped in its tracks by the Crown's blunt refusal to entertain this prospect. He also made the point that the mere copying of the letter to Mrs Parker was an insufficient means of stressing to Pakakohi Inc the importance of submissions on the working party's mandate.

3.2.9 Conclusion

In sum, Mr Upton suggested that it would be better to stop the settlement process now, despite the inconvenience, and completely reconsider how matters should progress. Otherwise, he argued, the Crown would be rushing into a big mistake. While it would be a drastic step to halt the settlement process, he argued that there would have been no need to resolve matters under such eleventh-hour urgency if the Crown had been more deliberate in 1998. He confirmed that his clients were interested in advice to help them back into constructive discussions.

Mr Johnston stressed that the crucial matter for his clients was one of time. He said that he did not wish to hold up the settlement of the Ngati Ruanui claim but did wish to ensure that the Crown got matters right. The real issue was separateness, and to that end he cited what he saw as the separate history, grievances, traditions, whakapapa, place names, rohe, culture, and identity of Pakakohi. He denied that Pakakohi Inc's interests were adequately represented by the working party, noting his clients' lack of knowledge of the settlement process. They had not even seen the draft deed of settlement, he added. Neither did he feel they could have been adequately represented by a place at the table for Manutahi Marae. Overall, he felt that the Crown's system had been flawed and was manifestly unsafe. He asked only that the settlement be held up as it affected Pakakohi, and that his clients be allowed to submit their own deed of mandate for consideration.

Mr Johnston asked that the Tribunal be careful in considering the issue of relief, for if the matter were not adequately resolved, Pakakohi would end up arguing the same case in another legal forum in the future.

3.3 THE EVIDENCE FOR PAKAKOHI INC

Counsel for the Pakakohi claimants filed three affidavits and two bundles of supporting papers.

3.3.1 Affidavit of Piki Parker

Mrs Parker noted that this was the fourth affidavit that she had filed with the Tribunal on this matter.⁶ She explained that she had grown up believing herself to be Nga Rauru, but during a ‘personal voyage of discovery’ during the 1980s she had discovered that she in fact belonged to Pakakohi. This culminated in her filing of the Wai 99 claim on behalf of Pakakohi in 1989. She noted that Pakakohi had attended all 12 Tribunal hearings into the Taranaki claims between 1990 and 1995 and highlighted once again the Tribunal’s description of Pakakohi as a distinct and viable entity. After the release of the Tribunal’s report, Mrs Parker explained, Pakakohi Inc had attempted to gain wider recognition of the independent status that it felt the Tribunal had acknowledged. She and others of Pakakohi Inc met with OTS officials in August 1996 to discuss a mandating and negotiating process but were informed that there were matters to resolve before the properly mandated group in the ‘Ruanui districts’ could be identified.⁷

Undeterred, Mrs Parker then related how she and others of Pakakohi Inc had embarked upon the mandating process required by OTS but had been hampered by a lack of funding, which OTS told them was not available until a mandate had been recognised. Pakakohi Inc had been conscious, she said, that the working party was holding its own mandating hui in late 1996 and 1997, but she said that Pakakohi Inc had deliberately not attended these hui ‘as we were clear in our minds that these hui were not for us they were for Ngati Ruanui’. However, she said, on 25 June 1997 the working party submitted its deed of mandate to the Minister in Charge of Treaty of Waitangi Negotiations and claimed to represent Pakakohi, even though it noted that there were ‘matters to resolve’ with groups claiming Pakakohi and Tangahoe status.⁸

Mrs Parker said that submissions were called for on the working party’s deed of mandate but implied that Pakakohi Inc did not fully grasp the extent to which it encompassed them as well. On 4 November 1997, she advised the Minister in Charge of Treaty of Waitangi Negotiations that Pakakohi Inc was intending to submit its own mandate for assessment.

6. Document A10

7. Ibid, pp 2–5

8. Ibid, pp 5–6

She added that Rongo Kahukuranui also made a submission on 12 November 1997 objecting to the working party's mandate. Not long afterwards, on 28 March 1998, Mrs Parker said that she had written again to the Minister advising him that Pakakohi Inc wished to meet him to present its mandate. However, she discovered later that OTS and TPK had prepared their risk assessments by this time and that, on 6 April 1998, Cabinet had decided to recognise the working party's deed of mandate and not enter into separate negotiations with Pakakohi Inc. She said that the Pakakohi Inc deed of mandate had been completed by 4 June 1998 but was not sent to the Minister since at that stage there no longer seemed any point. That mandate, she said, had been gained by the unanimous support expressed at the hui held in 1997 in Levin, Gisborne, and Patea.⁹

Mrs Parker then related how the Wai 758 claim had been filed in November 1998 by Huia Hayes, Mrs Parker's mother, and that an urgent hearing of the claim had been requested.¹⁰

Mrs Parker noted that the Crown's recognition of the working party's deed of mandate had been conditional upon representation being made available to Manutahi Marae. She explained that the chair of the working party had later written to OTS in January 1999 to list the 'highlights' of the year in encouraging Pakakohi's participation, but dismissed the matters cited as little more than 'unsubstantiated statements'. While the Tribunal's consideration of the Pakakohi claimants' application for urgency was being adjourned in early March 1999, she said that Pakakohi Inc met with the working party and the Crown to try to reach an agreement. Pakakohi Inc asked to have two representatives on the working party, both to be chosen by Pakakohi Inc (one such place having been offered in May 1998). However, the working party refused this request, arguing that such representation of Pakakohi would be 'inappropriate' and that ongoing provision existed for Manutahi Marae to participate.¹¹

Mrs Parker referred next to the Tribunal's declining of the request for urgency in April 1999 and the heads of agreement being signed between the Crown and the working party in September. She then explained that urgency was reapplied for, and related the process that led to the mediation in June 2000 and the discussions that followed it. Mrs Parker noted that progress had been made in these discussions up to a point, but argued that the Crown and the working party had pressed ahead furtively with plans to initial a deed of settlement in November. She added that it was

9. *Ibid*, pp 7–11

10. *Ibid*, p 11

11. *Ibid*, pp 12–13

also clear that ‘the Crown would only support limited changes to the Heads of Agreement’. For these reasons, it had been necessary to reapply for an urgent hearing.¹²

3.3.2 Affidavit of Rongo Kahukuranui

Rongo Kahukuranui, a kaumatua of Pakakohi, asserted Pakakohi’s distinct identity from Ngati Ruanui.¹³ He described Pakakohi as an ancient people, who had lived in Aotearoa since before the time of the ‘so-called great migration’. He recited a Pakakohi pepeha and told of the unique Pakakohi place names for features such as Taranaki maunga and the Whenuakura River. He related some of the details of the ‘atrocities’ committed specifically against Pakakohi during the muru and the raupatu, including the incarceration of more than 70 Pakakohi men. He cited these events as having severely affected Pakakohi’s ability to maintain its oral traditions and local pre-eminence. However, he asserted that today Pakakohi have ‘re-grouped and regenerated’, noting that Wai 99 was filed with the Tribunal some eight months before the Ngati Ruanui claim Wai 140.

3.3.3 Affidavit of Dr Bryan Gilling

The affidavit of Dr Bryan Gilling was of a fundamentally different nature.¹⁴ Dr Gilling is an experienced historian based in Wellington and has presented evidence on several claims to the Waitangi Tribunal. In the past, he has been commissioned by the Tribunal, the Crown Law Office, OTS, and a number of claimant groups. His evidence on behalf of Pakakohi Inc in this claim brought some specialised knowledge to the inquiry by virtue of his having held the position of senior historian and historical team manager at OTS from 1995 to 1996, at a time when Taranaki tribal mandating issues first began to be canvassed. Dr Gilling also informed us that he had been the Crown’s principal negotiator for the historical recitals and Crown apology in both the Waikato raupatu settlement legislation and the Ngai Tahu deed of settlement and had dealt with historical and mandating issues from the Crown’s perspective for a number of claimant groups. He gave evidence on the quality of the Crown’s assessment of the working party’s deed of mandate and the Crown’s decision not to enter into separate negotiations with Pakakohi Inc and Tangahoe Inc.

12. Document A10, p 23

13. Document A11

14. Document A12

In short, Dr Gilling was highly critical of what he saw as the Crown's lack of thoroughness in assessing the working party's mandate. He understood the Crown's position to be based on a number of sources, namely:

- ▶ the Tribunal's *Taranaki Report*;
- ▶ the May 1996 OTS Crocker report;
- ▶ a number of papers produced by the working party on the status of Pakakohi and Tangahoe and forwarded to the Tribunal in September 1997;
- ▶ the December 1997 TPK risk analysis;
- ▶ the March 1998 OTS risk assessment; and
- ▶ a background paper submitted by the Minister in Charge of Treaty of Waitangi Negotiations to the Cabinet Strategy Committee, undated but presumably dating from around April 1998, which appeared to be based on the TPK and OTS risk analyses.¹⁵

Dr Gilling also noted that he had not seen the 21 August 1997 OTS memorandum to the Minister in Charge of Treaty of Waitangi Negotiations prior to the hearing. However, he read it during the course of the proceedings and through counsel stated that nothing in it altered his views at all.

(1) *The Tribunal's report*

Dr Gilling made the following points. First, he stated that the Taranaki Tribunal had been unambiguous in acknowledging Pakakohi and Tangahoe as 'functioning entities of distinctive tradition' and 'distinctive and viable entities deserving separate consideration'. He noted also that the Tribunal had commented that the two groups might not be entitled to receive as large a quantum in settlement as their neighbours (Nga Rauru, Nga Ruahine, and Ngati Ruanui). Dr Gilling then addressed the reference to the lack of exclusive territorial possession by Pakakohi and Tangahoe, and asserted his understanding that Maori land ownership was usually characterised by overlapping interests. Thus, he said, 'although there might well have been more than one group claiming ownership and/or use rights, this did not require that one of the competing groups was in some way inferior to or part of the other'.¹⁶

(2) *The 1996 OTS historical report*

Dr Gilling explained that the 1996 OTS historical report had been completed by a junior historian (Therese Crocker), who had reached tentative findings only and had correctly recommended that further research into

15. *Ibid*, pp 4–5

16. *Ibid*, p 11

the relationships between Pakakohi, Tangahoe, and Ngati Ruanui be undertaken. The purpose of this report had been to acquaint ORS policy officials with issues they would face in the negotiation process and was 'never intended to be a definitive statement'. Crocker had refused to be drawn absolutely on the independent status of Pakakohi and Tangahoe, confirming instead that they had been definitely identifiable groups at the time of the wars and the raupatu in the 1860s. She argued that a proper analysis should go well beyond the available (Pakeha-oriented) written sources.¹⁷ Dr Gilling considered that Crocker 'left the question open; she did not close it in favour of the dismissal of [Pakakohi Inc's and Tangahoe Inc's] claims to independence from Ngati Ruanui'.¹⁸

(3) The 1997 working party papers

Dr Gilling then observed that the working party papers of September 1997 successfully demonstrated Ngati Ruanui's existence prior to the 1860s but did not shed any more light on the status of Pakakohi and Tangahoe. He noted that the authors of those papers had cited historical material without any assessment of the writers' credibility. By contrast, he himself would not have credited the writings of Dieffenbach in 1842 and 1843 as a 'reliable authority'. Dr Gilling felt that all that the papers showed with respect to Pakakohi and Tangahoe was that the historical record was silent about them, which of itself proved nothing. He felt that the Tauranga example was instructive, where the almost exclusive mention in the European documentary record was of Ngai Te Rangi alone, because of their dominant position. This did not detract from Ngati Ranginui's unquestioned existence, with separate waka affiliations and whakapapa.¹⁹

(4) The TRK risk analysis

Dr Gilling was particularly scathing about the TRK risk analysis, which he described as 'trite, superficial and of no historical analytical value'. He pointed out that it was not based on any original research into tribal claims and interests and had 'used – and misused – a very limited and sometimes potentially biased range of sources'. The 'historical documents' used seemed to consist of a series of 'extracts' from sources which ORS had already identified in 1996 as being of questionable reliability. Moreover, these 'historical documents' seemed to consist of typescripts presented by the working party – in other words, they were not 'historical documents' at all 'but a collection of extracts selected, edited and typed by

17. Document A12, pp 6, 16

18. Ibid, p 19

19. Ibid, pp 6–7, 21–22

a modern author'. Dr Gilling also argued that TPK had misread the Taranaki Tribunal's report by arguing that the comments about apportionment indicated 'that the groups do not have the right to negotiate exclusively with the Crown to settle historical grievances'. Dr Gilling ventured that 'The Ministry therefore has founded its clear and definitive statement on an irrelevant basis and ignored the Tribunal's other clear opinion that the group[s] merited separate treatment'. He also found no justification for TPK's emphasis, without any analysis or questioning, on the non-recognition of Pakakohi and Tangahoe as iwi by their neighbouring Taranaki iwi and the Treaty of Waitangi Fisheries Commission.²⁰

Overall, Dr Gilling felt that TPK's assessment of the historical evidence:

appears to be procedurally unfair in dismissing the claims of Tangahoe and Pakakohi on the basis of this limited and prejudicially selective group of sources, gleaned according to its own account from the very bodies against whom the two groups are contending.²¹

(5) *The OTS risk assessment*

Dr Gilling then went on to consider the OTS risk assessment of March 1998. He observed that, while OTS noted that the historical research upon which it relied was 'preliminary' (the 1996 report), it then went on to exclude Pakakohi and Tangahoe from separate negotiations. He described OTS's movement from uncertainty about the two groups' status to making a decision about that status as 'without logic'. He felt that OTS's reaching of a firm conclusion 'seems presumptuous and without firm foundation', and he could ascribe 'such carelessness or presumption' only to the Crown's openly stated desire to negotiate solely with 'iwi'.²² He suggested that the Crown was 'visibly searching for the smallest number of pan-Maori groups with which it needs to devote time and resources to negotiating'. The Crown's own documents, he said, indicated 'a predisposition to downplay issues and inconveniences that cut across this preference', and he argued that the Crown's favoured policy pre-empted a 'full investigation and accommodation of alternative paradigms or tribal realities'.²³

(6) *The 1998 Cabinet paper*

Dr Gilling noted that the Cabinet paper relied on the OTS assessment and thus suffered the same flaws and was open to similar criticisms, although

20. *Ibid*, pp 7, 22, 23, 24

21. *Ibid*, p 7

22. *Ibid*, pp 7, 8

23. *Ibid*, pp 27, 28

he added that the paper compounded matters in places by ‘abbreviating and removing the qualifications from the earlier statements so that they appear more definite and unquestionable than is in fact the case’. He expressed his concern, too, that the differences of opinion in the TPK and OTS analyses were apparently resolved by discussions amongst officials. This was a ‘nonsense when historical facts and issues are concerned’, he argued, and would not ‘produce a correct result or determine “the truth”’. Dr Gilling stated that, as with other considerations of the issue by the Crown, the Cabinet paper relied on the Taranaki Tribunal’s observation that Pakakohi and Tangahoe had not held exclusive territorial possession to imply that they must work conjointly with Ngati Ruanui. By contrast, he said, the paper remained relatively silent on the Tribunal’s remark that the two groups deserve separate consideration.²⁴ Dr Gilling also rhetorically asked whether Moriori and Ngati Mutunga on the Chathams were to be required to negotiate a settlement conjointly since they shared a territory. He argued that such an idea ‘seems prima facie to be an unsound and imposed straitjacket on the potential irregularities naturally present within Maori society’.²⁵

(7) Conclusion

Dr Gilling summed up the position thus:

Overall, one finds this process of Crown decision-making, at least as regards historical issues, to be something like a pyramid standing on its point. The Waitangi Tribunal’s report suggests the two groups being given separate consideration, but the official reading of the ‘unequal shares’ comment has been to consider that ‘unequal’ means no separate share at all, a clear misreading. Then the historical evidence available to the Crown has been weak at least, especially considering the potential gravity of this decision. The tribunal’s report is repeatedly characterised by its authors as preliminary. On the OTS side, the Crocker memorandum has been all that is available and the author of that made abundantly clear how initial and preliminary her work was. On the TPK side, no research seems to have been done and the Ministry has merely relied on some documents generated by the Working Party, the very body complained against by the claimants. It is apparent that in concluding that Tangahoe and Pakakohi have no traditional rights to separate negotiations, the Crown has made a historical decision based on little historical

24. Document A12, p 8

25. *Ibid*, p 31

evidence, and indeed largely on the historical record being silent or ambiguous. Historians have remained uncertain; the Crown has rushed in where professionals have feared to tread.²⁶

3.4 THE CASE FOR TANGAHOE INC

Mr Horner for Tangahoe Inc essentially made the following main points:

- ▶ the Tangahoe Inc deed of mandate had been submitted to OTS but had never been assessed;
- ▶ his clients were now willing to set aside their denial of Ngati Ruanui's existence and work cooperatively to reach an agreement; and
- ▶ a recommendation that more time be set aside before the deed of settlement was signed would allow for compromise to be reached.

3.4.1 The Tangahoe Inc mandate

Mr Horner stated that Tangahoe had submitted a mandate to OTS for assessment in April 1998 but had never received any consideration of it. He argued that steps towards signing a working party deed of settlement should now cease, and that the Tangahoe Inc deed of mandate should be assessed by the Crown. If approved, negotiations should be entered into with Tangahoe Inc. However, Mr Horner could not produce the mandate for our perusal and was unaware of its exact details. He had not prepared a case specifically on it, believing instead that our inquiry was focused solely on the working party's deed of mandate. He accepted the point, however, that a fundamental part of a challenge to the working party's mandate would be the credibility of Tangahoe Inc's own mandate.

We were assisted by Crown officials from OTS who were able to produce a copy of the Tangahoe mandate papers from their files. The papers included a list of some 800 names. Mr Horner believed that this register had been assembled for mandating purposes and currently contained some 1300 or 1500 names. However, he could not tell us when the list had been initiated. Amongst the papers, we noted in the May 1997 minutes of the Te Iwi o Tangahoe Inc annual general meeting a reference to another list of 91 supporters, which was not attached. In response to questions from the Tribunal as to how this list should be reconciled with the 805 names on the register, Mr Horner told us that he did not know. He also could not

26. Ibid, p9

explain to us whether any relationship existed between the register and a sample Tangahoe Inc mandate registration form, which also formed part of the Tangahoe Inc mandate documents.

Mr Horner acknowledged that the register of names might be a list solely of people who could affiliate with Tangahoe rather than of those who support the Tangahoe Inc mandate. He explained, however, that he and his clients had simply not had sufficient time to make an adequate case on the extent of support for Tangahoe. He returned to the point that the register had never been tested by the Crown and that, since his clients' application for mandate recognition had 'languished' in Wellington for some two years, Tangahoe had not had the opportunity that they should have had to develop their support.

Mr Horner argued that the working party's mandate was in no way solid. He made the point that none of the working party's mandating hui statements was supported by any minutes. He felt that the working party delegates were marae representatives, rather than those of hapu. He also pointed to some confusion attached to the document filed by counsel for the working party giving details of the hapu affiliations of the working party's members.²⁷ Counsel for the working party had stated that there were 18 working party members representing nine hapu and selected by 10 marae (excluding Manutahi). However, Mr Horner noted that there were 21 members on the list affiliating variously to 16 different hapu.

3.4.2 The denial of Ngati Ruanui's existence

In response to the Tribunal's observation that a strong theme running through the Tangahoe Inc papers was that Ngati Ruanui were a kind of bogus and legislated people, Mr Horner said that essentially that was still Tangahoe Inc's position. However, he added that his clients realised that it was no longer sustainable or practical to continue to deny Ngati Ruanui's existence, and that their preference was now to find a way to work together.

3.4.3 The requirement for more time

Mr Horner believed that a recommendation from the Tribunal for more time to be taken over the settlement would allow a compromise to be

27. See doc A26

reached, although he feared that the Crown's political imperative was to finalise a settlement before Christmas. He felt, in essence, that the Crown had simply got its settlement process wrong in south Taranaki. Tangahoe Inc had, he said, demonstrated a right to be dealt with separately. That said, he was prepared to find a way to come together at this late stage in the process. His compromise suggestion was either a pan-tribal south Taranaki runanga to administer settlement moneys or, at least, greater Tangahoe representation on the Ngati Ruanui settlement governance body.

3.4.4 Conclusion

In conclusion, Mr Horner noted that the Tangahoe Tribal Trust had been formed in 1959, that his clients had filed a claim with the Tribunal in 1990, and that they had attended or taken part in all the Taranaki Tribunal hearings. He stressed that a lack of research funding had meant that his clients had had to undertake the historical research into their claims themselves, despite being 'amateurs' with no expert historical training. He reiterated that in 1996 the Taranaki Tribunal had recognised Tangahoe as a functioning entity of distinct tradition, and he expressed his clients' dismay that they could be simply 'swept away'.

3.5 THE EVIDENCE FOR TANGAHOE INC

Briefs of evidence were filed on behalf of Tangahoe Inc by Rita Bublitz, Waveney Stephens, Aroha Houston, Martin Edwards, and Te Huirangi Waikerepuru. In addition, with the Tribunal's leave some papers were filed by counsel after the conclusion of the hearing, including a further affidavit of Mrs Bublitz's explaining the Tangahoe Inc register and mandate application.

3.5.1 Rita Bublitz

Mrs Bublitz outlined how Tangahoe Inc had never shared in the research funding that had been made available to the Taranaki claimant groups to present their claims to the Tribunal, in large part because of their

non-recognition by the Taranaki Maori Trust Board. However, Tangahoe Inc had carried on and researched and prepared its claim itself, and had attended all 12 Tribunal hearings. Mrs Bublitz emphasised the Taranaki Tribunal's impression that Tangahoe was a group deserving of separate consideration, and expressed a frustration that Tangahoe and Pakakohi had not had the proper opportunity to demonstrate to the Tribunal that they had indeed enjoyed a pre-eminence within their territory.

She then explained that relations between the south Taranaki tribes had become 'strained' since the release of the Taranaki Tribunal's report and the commencement of mandating procedures. Tangahoe Inc had presented its own mandate to OTS for consideration in April 1998, but it had never been acknowledged and the Crown had instead recognised the working party's mandate. She said that OTS had explained this in a letter of August 1999 as being, amongst other things, on account of the 'in-depth mandate assessments' carried out by OTS and TPK. She added that there currently existed an 'atmosphere of hostility' between Tangahoe Inc and the working party, 'which the process since May of this year had done nothing to ameliorate'.

With the Tribunal's leave, after the hearing's completion Mr Horner filed additional evidence from Mrs Bublitz on the Tangahoe Inc register and application for mandate recognition.²⁸ Mrs Bublitz explained that the register had been started in 1991 as a list of those who identified as Tangahoe, and that there were currently 1378 names on it. She attached the registration forms used in compiling the list, which, we noted, asked for personal details rather than expressions of support for separate negotiations for Tangahoe.²⁹ Mrs Bublitz confirmed that 'The register is not itself confirmation of a Treaty of Waitangi claim mandate for Tangahoe'.

However, Mrs Bublitz did include a registration form that she said was posted to 1000 members of Tangahoe seeking expressions of support for 'Te Iwi o Tangahoe' having the mandate 'in all future negotiations and development'.³⁰ Mrs Bublitz said that 91 people had filled in these forms, and this was the list of names referred to in the minutes of the May 1997 annual general meeting of Te Iwi o Tangahoe Inc (see s 3.4.1). She felt that this had been 'a good response'.

She also disputed the claim of counsel for the working party that the register contained the name of someone who had been dead for some time. She said that the person named by counsel was still alive.

28. Documents B3; A20, A20(a)

29. Document B3(a), (b)

30. Document B3(c)

3.5.2 Waveney Stephens

Waveney Stephens stated that, after she and others of Ngati Hawe and the Hamua hapu of Tangahoe had established a hapu 'mandate' at Ngatiki Marae in September 1995, members of the working party had begun actively trying to destabilise the process, holding their own meetings and selecting new 'mandate speakers' for Ngati Hawe.³¹

3.5.3 Aroha Houston

Aroha Houston stated that she and another had been elected as the 'mandated' Ngati Tanewai representatives at Wharepuni Marae in 1995, but that, through undemocratic means, they had been removed from these positions by marae trustees.³²

She also stated that whakapapa showed that the five Tangahoe hapu do not link to the ancestor Ruanui. She further asserted that Tangahoe representatives had been displaced by persons of Ngati Ruanui in local arrangements with the Ministry of Education and the South Taranaki District Council.

3.5.4 Martin Edwards

Martin Edwards explained that he was the mandated representative of the Hamua hapu on the Ngati Ruanui working party.³³ Despite this, he was writing his submission in support of Tangahoe Inc's request for 'a Waitangi Tribunal inquiry into the Ngati Ruanui Mandate'. He raised the concerns of his hapu about the validity of the working party's deed of mandate, stating that the working party's integrity had been 'destroyed'. This was because 'unjust' heads of agreement had been accepted and six members of the working party had been selected by meetings of marae trustees rather than having been mandated at full hapu hui. He also criticised the Crown for relying on the OTS and TRK risk analyses, which he felt were 'almost identical word for word', and in places presented 'a distorted picture'.

Mr Edwards appended (but did not comment on) a written answer provided in the House on 15 July 1998 by the then Minister in Charge of Treaty of Waitangi Negotiations, the Right Honourable Douglas Graham, in response to a question from Sandra Lee. Ms Lee had asked whether all

31. Document A6
32. Document A7
33. Document A17

internal issues of hapu representation would be resolved before the working party established a legal identity and received claimant funding. The Minister replied that Cabinet had approved the working party's mandate after a 'rigorous assessment process', which had involved 'substantial historical and contemporary research, and advice from Te Puni Kokiri'.

3.5.5 Te Huirangi Waikerepuru

Te Huirangi Waikerepuru (Mr Edwards's father) was the coordinator of the Ngati Ruanui working party from 1995 until November 1997, when, he said, he withdrew as one of the Hapotiki representatives because of what he saw as 'hidden agendas', 'irregularities', 'anomalies', and 'manipulations'. In short, Mr Waikerepuru seems to have felt that the Ngati Ruanui Tahua was imposing its will upon the working party and 'Taking over the mana of hapu representatives whose responsibility it is, to represent the interests of Hapu in matters relating to Muru/Raupatu Negotiations & Settlement with government'.³⁴

34. Document A8