

1. THE PARTIES AND THE PATH TO THE URGENT HEARING OF THE CLAIMS

1.1 INTRODUCTION

On 20 April 1998, Cabinet accepted the mandate of the Ngati Ruanui Muru me te Raupatu Working Party (the working party) to settle the historical claims of Ngati Ruanui. The working party represented and the Crown accepted that Ngati Ruanui include for the purposes of the settlement the traditional kin groups known as Tangahoe and Pakakohi. On 7 September 1999, the Crown and the working party entered into a heads of agreement on that basis. Within the next few weeks, the parties intend to initial a final deed of settlement giving effect to agreements in the heads of agreement. The two claims the subject of this report relate to the Crown's decision to accept the mandate of Ngati Ruanui to settle the claims of Pakakohi and Tangahoe. The claims are all located in south Taranaki in the vicinity of Hawera and Patea.

1.2 THE CLAIMANTS

The claims were made by:

- ▶ Rita Bublitz, Aroha Houston, and Waveney Stephens for and on behalf of Te Iwi o Tangahoe Incorporated; and
- ▶ Huia Rei Hayes for and on behalf of herself and Te Runanganui o Te Pakakohi Trust Incorporated.

The first of those claims was in fact filed with the Tribunal in mid-1990 and was allocated the Tribunal's claim number Wai 142. It was originally one of 21 claims that were the subject of the Tribunal's interim *Taranaki Report: Kaupapa Tuatahi*, issued in mid-1996 after five years of Tribunal hearings. In the decade since 1990, the Wai 142 claimants have amended their statement of claim several times. The most recent amendment, made on 18 April 2000, raised issues that are the subject of this report.

The second of the claims was filed with the Tribunal in November 1998 and was allocated the Tribunal's claim number Wai 758. Although it post-dates the *Taranaki Report*, there is a close relationship between this claim and one made in 1989 by Piki Parker for Te Pakakohi (Wai 99). The

Wai 99 claim was also one of the 21 claims that were the subject of the Tribunal's interim *Taranaki Report*.

It will be seen that these claims reflect a significant difference of opinion between the two claimant groups on the one hand, and the Crown and the working party on the other, as to who (or what modern legal entity) represents the traditional kin groups known as Pakakohi and Tangahoe. This raises a significant matter of terminology. It is necessary to distinguish between the claimant groups represented at the urgent hearing of their claims and the hapu groupings traditionally known as Tangahoe and Pakakohi. The terminology we have adopted is this. When we refer specifically to one or both of the claimant groups, we use phrases such as 'the Tangahoe claimants' and 'the Pakakohi claimants' or 'Tangahoe Inc' and 'Pakakohi Inc' – which highlight the groups' modern day structures and membership. By contrast, when we are referring to the traditional groups of hapu, we simply use the names Tangahoe and Pakakohi. It is essential to keep these distinctions in mind.

1.3 THE CROWN AND THE WORKING PARTY

The Crown decisions that are the subject of the present claims have been made by Cabinet on the advice of Cabinet Strategy (now Policy) Committee and, more particularly, the Minister in Charge of Treaty of Waitangi Negotiations. The Minister, in turn, is advised by the Office of Treaty Settlements (OTS). That office obtains input to its policy advice, and to its development of processes to implement Crown policy, from other Crown agencies (most notably Te Puni Kokiri (TPK) – the Ministry of Maori Development) as well as from Maori communities.

The Crown's decision to recognise the working party as having the mandate to settle the historical claims of Ngati Ruanui including Pakakohi and Tangahoe was made after lengthy consideration of the issues and risks involved. The nature of those issues and risks emerged during the five years of the Waitangi Tribunal's hearing of the Taranaki raupatu claims. In those proceedings, the arguments and evidence presented by the Pakakohi and Tangahoe claimants made it plain that they would very likely oppose later claims by an entity such as the working party to represent their interests. Further, in the interim *Taranaki Report*, the Tribunal stated its view that, in addition to the eight hapu aggregations

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(including Ngati Ruanui) which are represented on the Taranaki Maori Trust Board, Pakakohi and Tangahoe are 'distinctive and viable entities deserving separate consideration'.¹ The Crown had ample warning, therefore, when it publicised its intention to settle the Taranaki raupatu claims that the Pakakohi and Tangahoe claimant groups would very likely petition it to enter settlement negotiations with each of them, separate from any that might be conducted with Ngati Ruanui.

Influential in the Crown's 1998 decision to recognise the mandate of the working party was the evidence presented to it by the working party itself about the basis and strength of its authority to represent Pakakohi and Tangahoe. Yet the Crown did not merely recognise that the working party as it was originally composed could properly represent Pakakohi and Tangahoe. Instead, it recognised the working party's mandate only on condition that there be introduced onto the working party an additional place for a further representative of Ngatiki Marae, which is closely affiliated to Tangahoe, and that the two places reserved for Te Takere Marae (known to the Pakakohi claimants as Manutahi, and hereafter referred to as such in this report), which is closely affiliated to Pakakohi, be kept available.

Once the working party's mandate was recognised on those conditions – and even though the conditional places were not taken up – the Crown's assessment of the mandate situation inevitably became highly dependent on the working party's own assessment of it. With the Crown's mandate conditions fulfilled by keeping available the places on the working party, and the working party's firm view that opposition to its mandate came only from dissenting groups within Pakakohi and Tangahoe, it remained confident of its authority to negotiate the settlement of the historical claims of Ngati Ruanui including Pakakohi and Tangahoe. As the negotiations progressed, and the working party kept the Crown informed about its efforts to alleviate the mandate problems, the views of the Crown and the working party on the mandate issue, at least in the eyes of the claimant groups, became very closely merged.

In the result, while the Crown is the party against whom the present claims are made (and must be in Tribunal proceedings), many of the claimants' allegations are equally targeted at the views and conduct of the working party. Accordingly, while Crown counsel represented the Crown to oppose the claims at the Tribunal's urgent hearing, the working party

1. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, p 315

also sought and obtained leave to be represented in the proceedings, and its counsel made submissions in support of the Crown's position.

1.4 BACKGROUND TO THE URGENT HEARING OF THE CLAIMS

It was as recently as 25 October 2000 that the Waitangi Tribunal granted an urgent hearing to the claims. The hearing then took place on 1, 2, and 3 November 2000. The speed with which the Tribunal proceeded to hear the claims reveals that the claimants and the Crown were prepared for that event – even if they did not welcome it.

The parties' preparedness for hearing reflects the fact that the issues raised by the claims have been pursued, and sought to be resolved, over a lengthy period of time. In the remainder of this chapter, we provide an outline of the events which, with the benefit of hindsight, can be seen to have been milestones along the present claims' path to their urgent hearing. The purpose of this outline is to alert readers very quickly to the recent history of the claims. Accordingly, the more significant of the matters mentioned here are explored in greater detail in later chapters.

1.5 THE TARANAKI REPORT

As has been noted, the Taranaki raupatu claims – including those of Ngati Ruanui, Tangahoe, and Pakakohi – were reported on by the Waitangi Tribunal in an interim report released in June 1996. It was because of the *Taranaki Report's* interim nature that the Tribunal recorded, in the preface, that leave was reserved to all parties to seek further hearing of their claims if the proposed settlement negotiations were unsuccessful or would benefit from further consideration of particular matters.² The present urgent hearing of the Wai 758 and Wai 142 claims has its origins in that reservation.

With a view to claim settlement, the Taranaki Tribunal noted that eight hapu aggregations are represented on the Taranaki Maori Trust Board, and that two others – Pakakohi and Tangahoe – had also demonstrated that 'they exist today as distinctive and viable entities deserving separate consideration'.³ The Tribunal clearly hoped that the matter of settlement apportionment among the 10 groups could be agreed without its further

2. *The Taranaki Report*, p xi

3. *Ibid*, p 315

input. With regard to the southern region, however, the Tribunal stated its view that Pakakohi and Tangahoe seemed not to be entitled to share equally with Nga Ruahine, Ngati Ruanui, and Nga Rauru, with whom they variously overlapped.⁴ We reproduce here figure 4 from the *Taranaki Report*, which was presented to that Tribunal as depicting the locations of the various tribal groupings as seen by those groups at that time. However, the reproduction of this map in the present report should not be taken to mean that we accept or confirm the accuracy of the boundaries depicted therein. We will return to the *Taranaki Report* in more detail in the following chapter.

1.6 THE CROWN'S RECOGNITION OF THE WORKING PARTY'S DEED OF MANDATE

In July 1997, as part of the claims settlement process, the working party submitted its deed of mandate to the Crown for recognition so that negotiations between the parties could commence. In the written submissions process that followed, 11 submissions were received opposing the working party's mandate – three from the Pakakohi claimants and eight from the Tangahoe claimants.

In April 1998, after analysing the situation and imposing conditions to promote better representation of Pakakohi and Tangahoe, the Crown recognised the working party's deed of mandate to represent Ngati Ruanui, including Pakakohi and Tangahoe, in the negotiations for the settlement of their historical grievances. The Minister in Charge of Treaty of Waitangi Negotiations subsequently informed the claimant groups that the Crown would not enter into separate negotiations with them. In August 1998, the Crown and the working party signed the terms of their negotiations.

1.7 THE FIRST APPLICATION FOR AN URGENT TRIBUNAL HEARING

The Wai 758 claim, filed on 3 November 1998 by Huia Rei Hayes, challenged two matters:

- ▶ the Crown's recognition of the working party's deed of mandate;
- and

4. *Ibid*, p316

- ▶ the Crown's decision not to enter into separate negotiations with Pakakohi.⁵

The claimants requested an urgent hearing of the claim by the Tribunal and filed an affidavit by Piki Parker in support of the request.⁶

1.8 THE CROWN'S OPPOSITION

On 25 February 1999, Crown counsel filed submissions opposing the Pakakohi claimants' request for urgency and affirming the Crown's views that the working party could represent Pakakohi (and Tangahoe) in the settlement negotiations. Emphasis was placed upon the careful steps that had been taken by the Crown before recognising the working party's mandate. These included the public submissions process and two analyses of the situation by TPK and OTS.

Crown counsel explained that the opposition to the working party's mandate caused Cabinet approval to be given only on the basis that additional provision be made for Tangahoe representation (through an extra place on the working party for Ngatiki Marae) and that continued provision be made for Pakakohi through the representatives of Manutahi Marae. Cabinet hoped, however, that its recognition of the working party's deed of mandate would 'send a clear signal to those individuals who identify exclusively as Tangahoe and Pakakohi that the Crown intends to address their claims under a Ngati Ruanui umbrella'.⁷

1.9 THE CLAIMANTS' RESPONSE

At that stage, at the request of counsel for the Wai 758 claimants, a conference to consider the application for urgency was adjourned several times. In March 1999, claimant counsel advised the Tribunal that 'significant developments' had occurred which might 'obviate the need for urgency'.⁸ Nothing came of discussions between the parties, however, and on 21 April 1999 counsel filed a substantive reply to the Crown's submissions.

Claimant counsel asserted in that reply that, in May 1998, Pakakohi Inc had been offered a place on the working party but, having now decided to take it up, the claimant group had been informed that the offer had been withdrawn. The current representation of the Pakakohi claimants on the

5. Claim 1.1

6. Paper 2.4, p3

7. Paper 2.5, pp 8–11

8. Paper 2.8(a)

working party was objected to, as was the fact that TPK and OTS had formed their views on the working party's deed of mandate without consulting the claimants. Counsel concluded that Pakakohi were in danger of either being 'swamped by Ngati Ruanui' or being 'shut out' of the negotiation process entirely.⁹

1.10 THE TRIBUNAL'S FIRST DECISION ON URGENCY

After a judicial conference on 21 April 1999, the Tribunal declined the application for an urgent hearing. The presiding officer, Deputy Chief Judge Norman Smith, did not accept that a refusal to grant urgency would lead to irreparable loss to the claimants – which is one of the criteria the Tribunal has regard to in deciding urgency applications. The judge reasoned that the measure of Pakakohi's loss would not be known until the negotiations were concluded and, at that point, there were still safeguards that the claimants could rely on, both in the settlement ratification process and in the Tribunal's reservation of leave to seek a further hearing.¹⁰

1.11 THE SECOND APPLICATION FOR URGENCY

On 7 September 1999, the Crown and the working party signed a heads of agreement which stated that the parties would settle the Wai 99 Pakakohi raupatu claim. Piki Parker then filed her second affidavit with the Tribunal, dated 26 October 1999, asserting that Pakakohi would suffer significant prejudice if the heads of agreement became binding. For example, she asserted, land returns in the Pakakohi rohe were to be made specifically to Ngati Ruanui and the draft apology was for incidents which happened directly to Pakakohi, not Ngati Ruanui. In sum, Mrs Parker argued that Pakakohi were in danger of suffering 'irreparable loss' and that the Crown was creating new grievances in settling old ones.¹¹

1.12 THE TRIBUNAL'S DIRECTION

On 2 December 1999, the Tribunal's chairperson, the Honourable Justice ETJDurie, sought confirmation from the Crown as to whether it

9. Paper 2.12, pp 3, 6, 9, 10, 19

10. Paper 2.15, p 3

11. Paper 2.16

intended to settle Wai 758 at the same time as settling Wai 99. He also sought an assurance that the Wai 99 and Wai 758 claimants were being represented in the negotiations to settle those two claims. He invited a quick response from the Crown and noted that the Tribunal would consider an application for an urgent hearing in the event that parties could not agree to a negotiations process to settle Wai 99 and Wai 758.¹²

1.13 THE CROWN'S RESPONSE

On 11 January 2000, after the new Minister in Charge of Treaty of Waitangi Negotiations had been briefed on the matter, Crown counsel confirmed that it was the Crown's intention that Wai 758 would be brought to an end by the implementation of the settlement of Ngati Ruanui's historical claims. On the second matter, it was stated that Pakakohi representation had been provided for through the ongoing availability on the working party for representation from Manutahi Marae. Crown counsel submitted that, although that marae had not taken up the position, Pakakohi representation remained provided for by the fact that a number of the working party members affiliated with Pakakohi.¹³ Counsel also observed that the Pakakohi claimants would have the opportunity to participate in both the deed of settlement ratification process and the legislative (select committee) process that would be needed to make the settlement binding.¹⁴

1.14 THE CLAIMANTS' RESPONSE

In a response of 3 February 2000, claimant counsel argued that it would be a dangerous precedent, and contrary to the principles of natural justice and the Treaty of Waitangi, for the Crown to include Wai 758 in any settlement with Ngati Ruanui. Counsel took strong issue with what he perceived as the Crown's position that 'the mere provision of this *opportunity* for representation [through Manutahi Marae] is sufficient' (emphasis in original).¹⁵

12. Paper 2.17

13. Note that the record is inconsistent as to how many places were to be reserved for Manutahi Marae: see p 63, n 8.

14. Paper 2.21

15. Paper 2.22, para 9.2

1.15 TANGAHOE AMENDED STATEMENT OF CLAIM

As noted above, the Wai 142 Tangahoe raupatu claim was originally filed in 1990 and amended in 1995. In January 2000, the Tangahoe claimants applied for an urgent hearing of their claim. Then, on 18 April 2000, their statement of claim was further amended to cover the same issues as were raised in Wai 758.

1.16 JUDICIAL CONFERENCE TO CONSIDER APPLICATIONS FOR URGENCY

At a judicial conference on 22 May 2000, counsel for the Pakakohi claimants reiterated his earlier arguments and raised the concern that there was no stipulation in the heads of agreement as to how the \$41 million settlement moneys were to be spent. Counsel felt that there was no guarantee that any of the amount would go to Pakakohi, despite the fact that a reasonable proportion of the sum would be going towards settling Pakakohi grievances.

Counsel also objected to the way the heads of agreement provided for Ngati Ruanui, and not Pakakohi, to be consulted over such things as natural resources and place name changes. In sum, he asserted that the Crown settling Wai 758 without dealing with his clients would breach the natural justice requirements of section 27(1) of the New Zealand Bill of Rights Act 1990, as well as the principles of the Treaty of Waitangi.¹⁶

The Crown opposed the applications, reiterating its position on the propriety of the mandating process and the adequacy of the safeguards protecting Pakakohi and Tangahoe interests. Also reiterated was the Crown's submission that an 'undesirable precedent' would be established should the Tribunal grant urgency to the claims, because objectors to mandating decisions could be encouraged to challenge them in the Tribunal rather than working with the mandated negotiators.¹⁷

1.17 JUDICIAL CONFERENCE LEADS TO MEDIATION

At the judicial conference, the Tribunal invited the Crown to suspend its negotiations with the working party for 21 days to allow a Tribunal-facilitated mediation between the parties to proceed. The Crown did not agree

16. Paper 2.24

17. Paper 2.25

to suspend the negotiations but confirmed that no deed of settlement would be initialled during the 21-day process and that it had no objection to the mediation taking place.¹⁸

The mediation period was subsequently extended until 23 June 2000, and discussions continued between the parties after that date. On 26 July 2000, in response to a request from Wai 758 counsel (assented to by the other parties), the Tribunal agreed to suspend the application for urgency *sine die*, on the proviso that it could be revived at three days' notice.¹⁹

1.18 THE THIRD APPLICATION FOR URGENCY

On 16 October 2000, claimant counsel (now acting for the Wai 758, Wai 99, and Wai 142 claimant groups) requested that the urgency application be revived. Counsel explained that the mediation had not been successful but that the parties had continued their discussions thereafter. He submitted that the Crown had agreed not to initial a deed of settlement or to expedite progress towards one while the discussions were ongoing. However, the discussions had not led to any agreement and the claimants had just learned that the Crown and the working party intended to initial a deed of settlement in mid-November. This was asserted to be in breach of the Crown's earlier undertaking and so, once more, an urgent hearing was sought.²⁰

1.19 THE CROWN'S POSITION

By submission of 20 October 2000, Crown counsel opposed the application for urgency. It was said that claimant counsel's statement that discussions had broken down over 'fundamental issues' was correct in so far as it meant that the Crown was not prepared to recognise separate iwi status for Tangahoe or Pakakohi. It was disputed that the Crown had agreed, after the mediation period had expired, to continue its undertaking that a deed of settlement would not be initialled. Further, Crown counsel confirmed that Cabinet approval of the deed of settlement was being sought on 6 November 2000.²¹

18. Paper 2.26

19. Paper 2.29

20. Paper 2.34

21. Paper 2.35

1.20 EVIDENCE OF EVENTS SINCE MEDIATION

With Crown counsel's submissions was filed a statement from Andrew Hampton (a manager at OTS with responsibility for settling Taranaki claims) summarising developments since the mediation.²² Mr Hampton referred to a Crown offer to fund the Tangahoe and Pakakohi claimants to enter discussions with the working party aimed at accommodating the claimants' concerns about the settlement and the tight timeframe planned for its initialling and ratification. He said the amount of \$5000 had been released to each claimant group in late August and early September 2000 and some progress was made early in October, which was after the Crown had informed the Tangahoe and Pakakohi claimants that the working party and the Crown were working towards initialling a deed of settlement within two months. In particular, a 'constructive' meeting had been held on 9 October 2000 between OTS, counsel for the Wai 758 claimants, and counsel for the working party. However, on 13 and 17 October, Pakakohi and then Tangahoe withdrew from discussions and notified their intention to reapply for urgency.

Mr Hampton expressed surprise at recent comments by the claimants that the discussions failed because the fundamental matters of their status as iwi and their wish to enter into separate negotiations with the Crown could not be addressed. His own understanding was that the discussions agreed to after the mediation did not include those matters. In his view, the Crown had been willing to explore practical ways of accommodating the claimants' concerns. Indeed, OTS had already agreed, subject to the working party's confirmation, to certain changes in the settlement document, even though the claimants had now withdrawn from discussions.

The changes agreed to by OTS related to:

- ▶ direct reference to the Waitangi Tribunal's findings regarding the status of Tangahoe, Pakakohi, and Ngati Ruanui;
- ▶ greater prominence to Tangahoe and Pakakohi in the claimant group definition; and
- ▶ specific reference to Pakakohi prisoners in the Crown's apology.

Mr Hampton also noted other areas in which OTS and the working party were prepared to consider specific proposals from the claimants, including place name changes and the acknowledgement of traditional taonga species. Further, the working party had agreed to seek the wider

22. Paper 2.35(a)

claimant community's view on a proposal for 'direct Tangahoe and Pakakohi representation on the proposed post-settlement governance entity'.²³

Finally, Mr Hampton confirmed that the Crown was aiming to initial a deed of settlement by mid-November and have the deed ratified by the end of the year. He pointed out that any delay would prejudice those members of Pakakohi and Tangahoe who supported the working party.

1.21 THE TRIBUNAL'S SECOND DECISION ON URGENCY

The Tribunal considered the revived application for urgency at a judicial conference on 25 October 2000. In an oral decision, Chief Judge Joseph Williams summed up the issue as involving the essential question of whether Pakakohi and Tangahoe were sufficiently viable and functioning communities in their own right to deserve to be negotiated with separately over the raupatu grievance. Two matters required consideration, he said, before a decision on the application could be made:

- ▶ whether there was a genuine argument about that question; and
- ▶ if so, whether the opportunity to argue it would be lost if the Crown and the working party went ahead as planned and signed a deed of settlement.

Judge Williams considered that the answer to the first question was 'yes' because the case for the application had been both firmly put and firmly rejected. Since the answer to the second question was also 'yes', the application for urgency was granted – but on two conditions. The first was that the hearing concern only Wai 758 and the equivalent aspects of Wai 142. The second was that the Tribunal's hearing and reporting process not disrupt the tight timeframe for Cabinet to consider the deed of settlement on 6 November.

Accordingly, the hearing of the urgent claim was set down for 1 and 2 November, with the intention that the Tribunal would issue its report on Friday 3 November. As it transpired, however, the hearing continued into 3 November, and Crown counsel advised that day that Cabinet's consideration of the deed of settlement was to be slightly delayed to allow the Tribunal further time to consider and write its report.

23. Paper 2.35(a), para 9