

## CHAPTER 1

### CLAIMANTS, CLAIMS, AND ISSUES

#### 1.1 THE CLAIMANTS

##### 1.1.1 Ngā Hapū o Ngā Ruahine (Wai 796 claimants)

In July 1999, the Waitangi Tribunal registered (as Wai 796) the claim of Tohepakanga Ngatai on behalf of all descendants of Ngā Hapū o Ngā Ruahine. The claim relates to the petroleum resources, including natural gas and condensate, located within the rohe of Ngā Hapū o Ngā Ruahine. Their traditional lands, as described in evidence to the Taranaki raupatu Tribunal and mapped in that Tribunal's 1996 report, were bounded by the mouth of the Taungatara Stream to the tip of Mount Taranaki, then to Tariki and following the Whakaahurangi track to Araukuku, then following the Waihi Stream to its mouth, and from there northwards along the coast to the mouth of the Taungatara Stream.<sup>1</sup> For the purposes of the Wai 796 claim, the claimants describe the rohe of Ngā Hapū o Ngā Ruahine as also including 'the seabed and continental shelf adjacent to that [land] area without seaward boundary'.<sup>2</sup> Within those boundaries are two major gas-condensate fields: the onshore Kapuni field, discovered in 1959, and the offshore Kupe field, discovered in 1986.<sup>3</sup>

At the Tribunal hearing, the Wai 796 claimants were represented by Andrew Erueti, Deborah Edmunds, and Kim Bellingham.

##### 1.1.2 Ngāti Kahungunu (Wai 852 claimants)

A claim made on behalf of Ngāti Kahungunu by William Blake of Wairoa, Toro Waaka of Napier, Marei Apatu of Hastings, and Murray Hemi of Masterton was registered by the Waitangi Tribunal in June 2000 as Wai 852. It relates to petroleum resources within the Ngāti Kahungunu rohe, which is described as:

the area on the east coast of the North Island in New Zealand stretching from Mahia Peninsula in the north to Cape Palliser and Lakes Onoke and Wairarapa in the south and inland to the shores of Lake Waikaremoana and to the Kaiweka, Kaimanawa, Ruahine, Tararua

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1. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), fig 4

2. Claim 1.1(a), para 2.1

3. Document A13, para 11; doc A29, paras 10–11

and Rimataka Ranges to the west, including all riverbed, lakebed, foreshore and seabed areas within or adjacent to those areas.<sup>4</sup>

There is clear evidence of petroleum in the Ngāti Kahungunu rohe, and considerable exploration activity has taken place there since 1874. To date, the sole potentially commercial discovery in the area is the gas found in 1998 by the Kauhauroa 1 well, drilled onshore just north-east of Wairoa.<sup>5</sup>

At the Tribunal hearing, the Ngāti Kahungunu claimants were represented by Grant Powell and Sheena Te Pania.

### 1.1.3 Other claimants

The claims of a number of other claimant groups also raise issues relating to the Crown's ownership and management of petroleum. It was in June 2000, in the course of preparing for the urgent hearing of the Wai 796 claim, that the Tribunal gave leave for the Wai 852 claim to be joined and heard with the Wai 796 claim. At the same time, and in response to an indication from counsel for Wai 796 that other Taranaki whānui interests also wished to be joined and heard, the Tribunal directed that such interests would be heard as part of the Wai 796 case.<sup>6</sup> Those procedural steps were consistent both with the imminence and limited duration of the proposed urgent hearing and with the Tribunal's view that the various petroleum claims were 'best dealt with at a generic level' and raised 'a national issue rather than a claimant specific issue.'<sup>7</sup>

Before the urgent hearing took place in October 2000, several claimant groups, and one other interested party, sought leave to appear at the hearing. In each case, the Tribunal granted leave to appear with a watching brief only.<sup>8</sup> That limited the role of those parties in the hearing to that of observers with the ability to seek leave from the Tribunal to make oral or written submissions, or question witnesses, on particular points. The following parties attended the Tribunal hearing with a watching brief: Ngāti Rahiri (Wai 871), represented by Patrick O'Driscoll and Nigel Denny; Rongomaiwahine (Wai 716), represented by Leo Watson and Trina Dyll; Te Pakakohi (Wai 99), represented by Gerard Praat; Charles Cotter and Ngāti Kahungunu (Wai 201 and Wai 506), represented by Gerard Praat; and the Ngāti Ruanui me te Muru Raupatu Working Party, represented by David Tapsell and Damien Stone.

It remains only to mention that, in October 2000, during the week that the Tribunal conducted its urgent hearing of the Wai 796 and 852 claims, another Taranaki group, Ngāti Te

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4. Claim 1.2(a), para 2

5. Document A29, paras 47–61

6. Paper 2.19, paras 4–5

7. Ibid, para 6

8. Papers 2.25, 2.29, 2.38

Whiri, filed its claim to petroleum with the Tribunal. Then in December 2000, Taranaki groups Ngā Mahanga and Ngāti Tairi filed their petroleum claim. These claims were registered by the Tribunal in March 2001 as Wai 890 and Wai 891 on the stated expectation that the petroleum issues they raised would be resolved by this Tribunal's inquiry into and report on the Wai 796 and Wai 852 claims.<sup>9</sup>

## 1.2 URGENT HEARING GRANTED

In December 1999, Ngā Hapū o Ngā Ruahine applied for an urgent hearing of their Wai 796 claim.<sup>10</sup> At a judicial conference to hear the application on 1 May 2000, Mr Erueti submitted that an urgent hearing was needed for two main reasons. First, he highlighted the conflict between Māori Treaty claims to petroleum, which the Taranaki Tribunal had left open for future consideration, and the Crown's Treaty settlements policy, which excludes petroleum resources as a means of redress. That conflict was now in need of urgent attention from the Tribunal, it was said. This was because some Taranaki claimant groups had recently accepted the Crown's position by signing settlement heads of agreement which, if concluded, would create an adverse precedent for Māori groups that wished to proceed with their Treaty-based petroleum claims and, if successful, negotiate settlements involving petroleum resources. Secondly, Mr Erueti submitted that there had been suggestions that the Crown was about to divest itself of its 11 per cent non-contributory interest in the Kupe field offshore from Taranaki, which, if correct, would remove any chance that claimant groups could negotiate for that interest's use in Treaty settlements.<sup>11</sup>

The Crown opposed the application for an urgent Tribunal hearing. In brief, Crown counsel Helen Carrad submitted that the Crown's longstanding policy concerning petroleum resources was consistent with its Treaty responsibilities and did not cause significant prejudice to claimant groups. With regard to the Kupe licence, Ms Carrad advised that the Government of the day had not considered selling the Crown's interest and that no sale was imminent. Further, it was argued, the Crown interest in that licence was a particularly unsuitable asset for use as redress for Treaty grievances.<sup>12</sup>

The Waitangi Tribunal member who heard the application, Joanne Morris, granted urgency to the petroleum claims on the grounds that the claimants 'are, or are likely to be, prejudicially affected to a significant extent by current or pending Crown actions or policies' and that the claimants 'are ready to proceed with an urgent hearing'.<sup>13</sup> While finding no merit in the claimants' concerns about the Crown selling its Kupe interest, Ms Morris

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9. Papers 2.42, 2.44

10. Paper 2.4

11. Paper 2.7

12. Paper 2.8

13. Paper 2.9, p 6

concluded that four elements of the situation combined to pose the risk of significant prejudice to the claimants. These were the undetermined Treaty issues concerning petroleum; the Wai 796 claimants' position on those issues; the Crown's settlement policy regarding petroleum; and the existence of heads of agreement with other Taranaki claimant groups. The resulting situation, it was said, 'is such as to preclude Ngā Hapū o Ngā Ruahine from concluding a settlement with the Crown on terms that will effect a reconciliation between the parties and . . . this constitutes a significant prejudice to the claimants'.<sup>14</sup>

At the time urgency was granted, Ms Morris advised that the Tribunal would conduct the urgent hearing and report its findings and any recommendations 'as soon as is reasonably practicable', which, it was estimated, would be a period of six months. We sincerely regret that, as a result of numerous competing demands for Tribunal resources since late 2000, the estimation of the reporting time for the petroleum claims has proven to be inaccurate.

### 1.3 THE PRE-HEARING PROCESS

Shortly after urgency was granted to the petroleum claims, a Tribunal panel was constituted to hear them. It comprised Chief Judge Joseph V Williams (the deputy chairperson of the Tribunal), John Baird, John Clarke, and Joanne Morris.<sup>15</sup> On 14 June 2000, Judge Williams and Ms Morris convened a conference of counsel and various Crown officials where an accelerated process was devised to move the claims to hearing. These were its salient features:

- ▶ Immediately after the conference, the Tribunal circulated a draft list of issues to be heard, which, after counsel's comments had been considered, were finalised by the Tribunal on 22 June 2000.
- ▶ All parties agreed to disclose their cases in their entirety, both evidence and legal submissions, prior to the commencement of the hearing, which was scheduled for mid-October 2000.
- ▶ To that end, a strictly timetabled 'discovery' process was set in place by which the full range of documents relevant to the issues would be made available to the Tribunal and parties by the end of September 2000. (A list of the large number of documents filed with the Tribunal as a result of this process is to be found in the record of documents, which is reproduced in the appendix to this report.)
- ▶ The Tribunal undertook to commission an independent expert witness to provide a report by late September 2000 (the scope of which was to be the subject of consultation with the parties) on the 'science' of the petroleum resource and an 'industry view' of the regulatory regime governing the resource.<sup>16</sup>

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14. Paper 2.9, p 6

15. Paper 2.12

16. Paper 2.19

Early in September 2000, the Tribunal invited counsel to list their witnesses and estimate the amount of hearing time they needed for the presentation of their evidence and legal submissions. As a result of cooperation among counsel, and a teleconference involving the Tribunal, a clear timetable was established for the hearing.<sup>17</sup>

#### 1.4 THE ISSUES

To aid readers' comprehension of the issues identified by the Tribunal as needing to be heard and determined, we first provide a general overview of both the broadly similar claims made by Ngā Hapū o Ngā Ruahine (Wai 796) and Ngāti Kahungunu (Wai 852) concerning a range of Crown conduct and legislation regarding the petroleum resource and the Crown's response to those claims.

In brief, both claimant groups assert that, in terms of customary law, Māori, as part of the natural world, have proprietary rights in the resources of their universe, including the petroleum within their lands. Those rights, they say, would have endured for as long as Māori retained ownership of their lands and would have entitled Māori to profit from any commercial exploitation of the resource beneath their lands. In fact, however, by 1937 – and indeed long before then for many hapū and iwi – Māori lost ownership of much of their traditional lands, often as a result of Crown acts and policies that have since been found to have been inconsistent with the principles of the Treaty of Waitangi. The result, the claimants say, is that, where Māori lost land by means that were in breach of Treaty principles, the accompanying loss of any petroleum within that land occurred by the same Treaty-breaching means. That situation, it is claimed, creates for the former Māori landowners a continuing Treaty-based interest in the petroleum resource.

The significance of 1937 is that it was the year in which petroleum in New Zealand was nationalised by the Petroleum Act. That Act extinguished all private landowners' pre-existing interests in petroleum and vested the ownership of the resource in the Crown. The claimants assert that the Petroleum Act was itself inconsistent with Treaty principles for extinguishing Māori ownership of petroleum beneath what little remained of their customary land base. The Crown's ownership of petroleum in New Zealand is now secured by the Crown Minerals Act 1991, another focus of the present claims. The claimants' additional concerns about the 1991 Act centre on its provision of a petroleum permitting and exploration regime that has, they say, too little regard for Māori interests in sites of traditional importance and, more generally, in environmental protection.

In broad terms, the Crown's response to the claims is to deny that any of its conduct or legislation that directly affects petroleum has been or is inconsistent with Treaty principles.

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17. Paper 2.34; memorandum of consent, 10 October 2000

While the Crown acknowledges that Māori had a customary right to petroleum where the resource was part of their land and that, before 1937, there were Treaty-breaching acquisitions of Māori land, it submits that the Petroleum Act 1937 extinguished all Māori rights in petroleum in a manner that was consistent with the principles of the Treaty. Further, the Crown submits, the Crown Minerals Act 1991 is also consistent with Treaty principles.

It was in June 2000, after the Tribunal had studied the claimants' statements of claim, the arguments of claimant and Crown counsel about urgency, and their comments on a draft statement of issues, that it finalised the issues to be determined in the hearing of the petroleum claims. The Tribunal stated those issues as follows:

1. With regard to land that Maori owned at any time before 1937, what was the nature of the Maori interest in petroleum? In particular:
  - (a) did the interest extend to the right to economic benefit from the exploitation of the petroleum resource?
  - (b) what was/were the source/sources of the interest?
  - (c) were there any circumstances in which the interest could exist independently of surface ownership?
  - (d) how could that interest be alienated in accordance with Treaty principle?
2. With regard to the 1937 Petroleum Act:
  - (a) what effect did it have on the Maori interest referred to in 1. above?
  - (b) was there an overriding national interest rendering that effect reasonably necessary?
  - (c) was the effect consistent with Treaty principle?
3. (a) How has the Crown dealt with any Maori interests in petroleum since 1937:
  - (i) when developing and implementing the modern regulatory framework governing the resource (including provision of access to Maori land for petroleum prospecting, exploration and production purposes)?
  - (ii) when developing and implementing its modern Treaty settlements policy?
  - (iii) when developing and implementing its policies with regard to the Crown's participation in petroleum licences?
  - (iv) when entering into and proposing to exit from its non participatory interest in the Kupe licence?
 (b) Have those dealings since 1937 been consistent with Treaty principle?
4. If the Crown has acted inconsistently with the principles of the Treaty of Waitangi and prejudice to the claimants is established, what can now be done to remedy the situation (in light of the nature of the petroleum resource, the regulatory regime, the petroleum industry and the Crown's remaining interest in that industry)?<sup>18</sup>

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18. Paper 2.19, app A

### 1.5 THE HEARING

The hearing was held at the Novotel Hotel in Wellington over the four days from 16 to 19 October 2000. In addition to lengthy legal submissions made by claimant and Crown counsel on the issues, the following witnesses presented evidence: Richard Boast and Marylinda (Mere) Brooks for the Wai 796 claimants; Sue Wolff for the Wai 852 claimants; Evelyn Cole, Dr John Yeabsley, Professor Gary Hawke, and Andrew Hampton for the Crown; and Geoffrey Logan for the Tribunal.

### 1.6 THIS REPORT

This is the first part of the Tribunal's report on the petroleum issues identified in section 1.4 above. It deals with the majority of those issues but puts to one side for now those that focus on:

- ▶ the nature of the regulatory framework for petroleum since 1937, including, in particular, the opportunities it provides for Māori participation in the management of the resource; and
- ▶ the process by which the Crown has devised that regulatory framework.

We will address those issues in the second part of our petroleum report, which will be issued as soon as the Tribunal can complete it.

The reason for dividing our report into two parts is that, at the start of May 2003, the Crown advised the Tribunal and Ngā Hapū o Ngā Ruahine of its decision to sell its interest in the Kupe petroleum mining licence.<sup>19</sup> Should the decision be carried into effect, that Crown asset would be unavailable for use in any Treaty settlement, contrary to the claim made by Ngā Hapū o Ngā Ruahine. The Tribunal is aware that its report on the petroleum claims was expected before this time and that, by now, neither the Crown nor the claimants can be expected to refrain from activity relevant to those claims while awaiting our report. Therefore, we resolved to make available as quickly as possible that part of our report on the petroleum claims that deals with the issues relevant to the Crown's interests in the Kupe licence.

In chapters 2 to 4, we provide contextual information about the development and regulation of petroleum exploration and extraction in New Zealand.

Chapter 2 presents an overview of the petroleum industry in New Zealand, with particular focus on the Taranaki and East Coast districts of the North Island. Chapter 3 explains the common law that regulated rights in petroleum in New Zealand before 1937. Chapter 4 describes the circumstances surrounding the Petroleum Act 1937, which nationalised petroleum. Reference is made to the debates that occurred during its passage through Parliament;

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19. Associate Minister of Energy to director, Waitangi Tribunal, 28 April 2003

in particular, the expressions of opposition voiced by Sir Apirana Ngata and others for reasons that were based on the guarantees made to Māori in the Treaty of Waitangi.

In chapter 5, we embark upon our analysis of these claims and set out our approach to the relevant principles and law.

Chapter 5 examines both the legal interest of Māori in the petroleum resource prior to 1937 and how that interest was affected by land loss. We examine the various means by which Māori land was typically alienated and the assessments of the Waitangi Tribunal and the Crown as to whether those means of alienation were compliant with the principles of the Treaty. We then assess the Petroleum Act 1937 for its consistency with Treaty principles.

Chapter 6 considers whether there are circumstances in which Māori now have a 'Treaty interest' in petroleum supporting their claims to receive separate redress for the loss of legal rights in the resource. We answer 'yes', and we conclude by considering what the recognition of that Treaty interest might mean for the claimants.