

CHAPTER 3

SUBMISSIONS AND EVIDENCE

3.1 SUBMISSIONS OF NGĀTI RANGITIHI

In his opening submissions on behalf of the Wai 996 claim, counsel emphasised that the urgency application was not merely about assets, but also mana and rangatiratanga. The Crown's settlement offer to Ngāti Tūwharetoa ki Kawerau not only disadvantaged Ngāti Rangitihī by narrowing the asset base from which redress could be made to that group in the future, but also the 'proposed settlement is damaging to Ngāti Rangitihī mana and rangatiratanga and the iwi's spiritual connections with its own rohe'.¹ Counsel stated that the claim principally concerns the Crown's ongoing duty of active protection, particularly of cultural sites and wāhi tapu. The issues raised, counsel continued, are 'quite different from the narrower issues of redress by means of Crown Forest assets, commercial redress and "substitutability" already traversed in the Tribunal's *Ngāti Awa [Settlement] Cross-Claims Report*'.²

Counsel said that the Crown's settlement offer to Ngāti Tūwharetoa ki Kawerau relates to assets and locations within the rohe of Ngāti Rangitihī, many of which are of particular traditional, historical, and cultural significance to that iwi. Yet the Crown has offered this redress to Ngāti Tūwharetoa ki Kawerau without sufficiently informing itself of Ngāti Rangitihī interests. By making the offer in the absence of a comprehensive Waitangi Tribunal inquiry in which all affected iwi and hapū could participate, the Crown was 'not in a position to conclude that any settlement with one group will not prejudice others who have interests in the areas covered by the proposed deed'.³ The area comprising the Crown's settlement offer to Ngāti Tūwharetoa ki Kawerau, counsel pointed out, is already partially included in the current Rotorua inquiry district. For the Crown to continue with the settlement, counsel asserted, 'is to prejudge the outcome of the [Rotorua] Inquiry and may also have the further effect of impacting on the Crown's ability to provide redress to claimants whose claims may be found by the Tribunal to be well-founded'.⁴

Counsel again emphasised that Ngāti Rangitihī had not been involved in the eastern Bay of Plenty hearings, and has not presented evidence of any kind to the Tribunal. Nevertheless,

1. Document A9, para 3.5

2. Ibid, para 3.2

3. Ibid, para 13.4

4. Ibid, para 12.1

the *Ngāti Awa Raupatu Report* was being used as the basis for entering into settlements which have a significant impact on Ngāti Rangitahi rights and interests.⁵ ‘If the research does not document the interests of an affected group comprehensively and reliably,’ counsel maintained, ‘then a settlement which affects that group should not proceed without their consent – or alternatively full research should be commissioned’.⁶ That this did not occur constitutes a failure by the Crown to act reasonably, honourably and in good faith.⁷

In closing, counsel for Wai 996 stressed ‘the highly disadvantageous state’ of Ngāti Rangitahi with regard to research.⁸ Until Dr Gilling had been commissioned by counsel, there had been no commissioned Ngāti Rangitahi research. Counsel contended that only one report relating to the Matahina blocks could be used by Ngāti Rangitahi to document its claims against the Crown in either the Rotorua or the Urewera inquiries, and even this contained only a few relevant pages. By comparison, the Crown Forestry Rental Trust had advanced to Ngāti Tūwharetoa ki Kawerau more than one million dollars since 1990 to research and prepare its claims.⁹ ‘This inequality is obviously and manifestly iniquitous and unfair, especially in view of the fact that the Crown appears to have expected Ngāti Rangitahi to somehow provide *it* with evidence of their entitlement to the area in which they now happen to live.’¹⁰ The disparity in funding left Ngāti Rangitahi in a remarkably vulnerable position and the Crown ‘should have *particular* regard to the interests of Ngāti Rangitahi’ so that it could ‘adequately discharge its fiduciary obligations to them under the Treaty of Waitangi’.¹¹

These proceedings occasioned the production of evidence about Ngāti Rangitahi’s customary associations. Prior to that, counsel argued, the Crown had nothing to go on. It could not have sufficiently informed itself about Ngāti Rangitahi’s interests in the area covered by the offer to Ngāti Tūwharetoa ki Kawerau. Ngāti Rangitahi were not asking the Tribunal to make a determination on customary interests in the eastern Bay of Plenty, but counsel believed that the evidence filed in support of the application demonstrated that ‘Ngāti Rangitahi do have serious customary interests that they are now trying to protect’.¹² These customary interests had not been adequately safeguarded in the cultural redress component of the proposed Ngāti Tūwharetoa ki Kawerau settlement.

Claimant counsel questioned what the Crown was actually redressing when it came to cultural redress: how specific do the associations between the settling group and the item of redress have to be? Counsel argued that there can only be cultural redress where the exact

5. Document A9, para 11

6. Ibid, para 15.2

7. Ibid, para 13.5

8. Document A26, para 1.7

9. Ibid

10. Ibid

11. Ibid, para 1.9

12. Ibid, para 3.5

circumstances of the various customary interests are reliably known. This was not the case with the Ngāti Tūwharetoa ki Kawerau settlement offer. Counsel submitted that cultural redress should involve ‘returning something to a group who has in some meaningful and verifiable way lost it through the actions/omissions of the Crown. It should not [be] a process of acknowledgement of ancestral associations in assets the Crown happens to have.’¹³ Counsel doubted that the Crown could ‘have made a fully informed decision here on the complex matter of competing customary rights within the settlement area. That required full and comprehensive research which has never been done.’¹⁴ That the Crown had not made a greater effort to disentangle the competing rights of groups but, rather, had simply granted interests to some parties while reserving land for others was not adequate.

These matters differed from those that were the focus of the recent Ngāti Awa settlement cross-claims inquiry. According to counsel, that inquiry has some relevance to the Wai 996 urgency in that both derived from the Tribunal’s *Ngāti Awa Raupatu Report*, and the Ngāti Awa and Ngāti Tūwharetoa ki Kawerau settlements were interconnected to some extent. But the major issue considered in the *Ngāti Awa Settlement Cross-Claims Report* was the utilisation of Crown forest licensed land in framing settlements. It addressed the Crown’s criteria for granting forest licensed land as commercial redress. In that context, the Crown determines first whether the settling group has a ‘threshold interest’ in any Crown forest licensed land. Secondly, the Crown ascertains whether ‘other groups who have threshold interests in that land also have threshold interests in *other* Crown forest licensed land’ so that these could be offered to them in future settlements if their claims are well-founded.¹⁵ This policy, which the Tribunal approved, ‘does not in all cases involve assessing the relative strength of customary interests in that land’.¹⁶ By contrast, counsel asserted:

The point of cultural redress is to return assets of particular cultural significance to the group being settled with. They will be, by definition, within a claimant group’s rohe, usually squarely within it, and will have known historical associations and links. In this context the ‘threshold’ criterion can have no place.¹⁷

Counsel felt that merely establishing that the settling party has at least some level of interest in a certain location or site should not be the basis for offering cultural redress when all relative interests have not yet been determined.

Claimant counsel contended that, despite the geographical and historical differences, the Tribunal’s *Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* had more relevance to this inquiry than the *Ngāti Awa Settlement Cross-Claims Report*. This was because the

13. Ibid, para 5.5

14. Ibid, para 6.3

15. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p 74

16. Ibid, p 77

17. Document A26, para 7.3

former focused more on issues of cultural redress and mana rather than the matter of Crown forest licensed land. Ngāti Maniapoto claimants contended that they were disadvantaged by the proposed settlement with Ngāti Tama because it concerned certain sites that were within their own rohe, and the Tribunal had not heard their claims. This situation was, counsel for Wai 996 argued, ‘exactly analogous’ with Ngāti Rangitahi and the Ngāti Tūwharetoa ki Kawerau settlement offer.¹⁸ He also pointed out how the Crown went to some lengths in that earlier inquiry to inform itself as to the cultural significance of the sites proposed for transfer. After mediation had failed to resolve the differences between Ngāti Maniapoto and Ngāti Tama, OTS notified the claimants that it intended to commission independent historical research into the customary associations of both groups in the contested sites. Counsel brought to the Tribunal’s attention the section from the *Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* that states:

ots official Andrew Hampton then met with Ngāti Maniapoto representatives, who agreed to participate in the proposed independent historical research. Comments were sought and received from all interested parties on the instructions to be given to the independent researchers and the instructions were altered to reflect some of these comments. In September 2000, OTS commissioned David Young to carry out the research. His brief was to investigate the customary associations of Ngāti Tama and Ngāti Maniapoto with the particular sites proposed to be transferred to Ngāti Tama, and to determine the significance of each site to Ngāti Tama and Ngāti Maniapoto. Mr Young (with the assistance of Tui Gilling) examined relevant written sources, and also spent a week in the area collecting oral evidence from Ngāti Maniapoto and Ngāti Tama. The report was completed in November 2000 and provided to the parties for comment.¹⁹

Counsel for Wai 996 questioned why an ‘equivalent process’ was not put in place to enable investigation of Ngāti Rangitahi cross-claims interests in the cultural redress offered to Ngāti Tūwharetoa ki Kawerau.²⁰ The Crown, counsel submitted, relied on two key internal documents prepared by OTS staff historian Maureen Hickey to detail Ngāti Rangitahi interests in the area of settlement. Dr Gilling, expert historical witness for the Wai 996 claimants, criticised Ms Hickey’s methodology and level of research. But moreover, counsel contended for the view that ‘the Crown should not be in the business of forming its own historical conclusions’.²¹ The Crown must commission an independent expert to investigate cross-claim issues, because ‘they are external and independent and seen to be independent’.²² Counsel also criticised the Crown for not making the Hickey memoranda available to claimants. He

18. Document A26, para 7.4

19. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2001), p 6

20. Document A26, para 7.6

21. *Ibid*, para 6.25

22. Document A29, para 13.2

argued that ‘making informed decisions involves full disclosure’.²³ The all-important memoranda by Ms Hickey were not disclosed to Ngāti Rangitihi. The Wai 996 claimants saw them only when they were annexed to the Crown’s evidence in these proceedings.

This was but one feature of the Crown’s inadequate consultation process with the cross-claimants. Counsel contended that the Crown’s duties are ‘stricter and more demanding’ than consultation and that the ‘key Crown responsibilities here are its duty of active protection, and its duty to make informed decisions’.²⁴ He said that ‘it was very doubtful that the Crown met its consultation duties’.²⁵ As the Crown did not provide the Wai 996 claimants with copies of its in-house historical analyses until December 2002, ‘Ngāti Rangitihi had no real appreciation of what was being proposed and how it would impact on them’.²⁶ The Wai 996 claimants could not make intelligent and useful responses to the Crown’s requests for information, and were also prejudiced by a lack of information in other ways. They were not informed as to the Ngāti Tūwharetoa ki Kawerau area of interest: they were given no detailed maps of the sites to be transferred or which were subject to special grants of right to Ngāti Tūwharetoa ki Kawerau. ‘It was not until 17 October 2002 when the full initialled Deed was released from the embargo (and a map of the ‘area of interest’ was requested from OTS) that the full scale of the settlement offer was understood.’²⁷ Despite the substantial correspondence between the Crown and Ngāti Rangitihi on record, counsel submitted that ‘it is clear that the level of disclosure of key documents and supply of useful information was limited’.²⁸

The Crown should have taken further proactive steps to inform both itself and Ngāti Rangitihi. Counsel thought it ‘surprising’ that, from the outset, OTS ‘relied almost solely on one point of contact for much of its communication’.²⁹ That point of contact was former counsel for Wai 524, David Rangitauira. It was not until 21 February 2002 that Crown officials attended a hui with Ngāti Rangitihi at Matatā. ‘Reading the minutes of the meeting,’ counsel declared, ‘it is hard to see how the Crown could not be put fully on notice of the extent of Ngāti Rangitihi concern’.³⁰ Despite Ngāti Rangitihi dissatisfaction expressed at the hui and in subsequent correspondence, the Crown took no further steps to address their concerns. Rather, ‘the onus of proof was very much thrown back on Ngāti Rangitihi’.³¹ Crown officials requested information from Ngāti Rangitihi claimants (even though they had received no funding for research) and placed on them evidential requirements that had not been imposed on Ngāti Tūwharetoa ki Kawerau. So, although it could not be said that the Crown had made no efforts to accommodate Ngāti Rangitihi’s concerns, ‘these efforts took

23. Document A26, para 6.3

24. Ibid, para 1.6

25. Document A29, para 3.6

26. Ibid, para 3.6

27. Ibid, para 4.5

28. Ibid, para 10.2

29. Ibid, para 9.6

30. Document A26, para 6.9

31. Ibid, para 6.10

place within a framework that had already been decided upon as policy, and against the background of decisions that the Crown had come to about the nature of Ngāti Rangitihī interests at Matatā'.³²

Although ORS officials were increasingly aware of Ngāti Rangitihī concerns after February 2002, there was still no 'effort to replicate the process or efforts adopted by the Crown in the Ngāti Tama/Ngāti Maniapoto cross-claim situation'.³³ The Crown did not undertake facilitated or mediated discussions aimed at providing appropriated protection mechanisms for non-settling claimants; did not commission independent historical research into the customary associations of the competing groups in the area of overlapping interests; did not propose that Ngāti Rangitihī participate in any historical research process, with the opportunity to have input into the terms of reference; did not give Ngāti Rangitihī any opportunity to comment on the Crown's in-house research; and did not offer to review the redress package in the light of information supplied to date, even though some information related specifically to wāhi tapu issues. Counsel noted that they had been instructed that Ngāti Rangitihī 'would be satisfied with an outcome from this hearing that the steps and measures taken by the Crown in the Ngāti Tama/Ngāti Maniapoto case (as noted above) are used as a template for the present case'.³⁴

The evidence filed by Mr Potter and other members of Ngāti Rangitihī showed that there existed within the iwi considerable knowledge of the tribe's traditional history, rohe, wāhi tapu, kāinga, associations with neighbouring iwi, and occupation of their lands. Counsel stated that this inquiry had demonstrated, despite its time constraints, that given expert assistance and support, at least some evidence could be produced:

Had the Crown allowed for some support and resourcing, perhaps the provision of advice about how to go about collation of the necessary information at an earlier time, the necessary responses [to its requests] would no doubt have been able to be provided.³⁵

The Tribunal questioned counsel for Wai 996 during the hearing as to how an iwi's lack of internal cohesion and traditional knowledge might affect the Crown's obligations. Counsel stated that he was not entirely certain that these comments would apply to Ngāti Rangitihī. Although there seemed to be no kaumātua available to provide oral traditional evidence, Mr Potter's evidence showed that knowledge had indeed been passed on. As to a lack of internal cohesion, however, counsel admitted that this was the case. He conceded that this made matters difficult for the Crown. Counsel qualified his remarks, though, by arguing that he did not think a lack of cohesion was particularly material in terms of the Crown complying with its Treaty duties in this situation, because the Crown's consultation had largely been limited

32. Document A26, para 6.13

33. Ibid, para 11.6

34. Ibid, para 11.8

35. Document A29, para 6.7

to communicating with one person, former Wai 524 lawyer, Mr Rangitauira. He felt that the Crown did not make much effort to go beyond this. Because the Crown had limited itself to engaging with this sole point of contact, lack of internal cohesion was not really a factor, at least up to early 2002.³⁶

3.2 EVIDENCE FOR NGĀTI RANGITIHI

The claimants filed a substantial body of supporting material, including a number of professional historical reports, several statements of evidence, and a document bank comprised of correspondence between Ngāti Rangitihī and the Crown, as well as other information relating to the Ngāti Tūwharetoa ki Kawerau and Ngāti Awa settlement offers.

3.2.1 Evidence of Dr Bryan Gilling

Dr Gilling was commissioned by counsel for Wai 996 to ‘review the existing research relevant to that claim, and then to form an opinion on the adequacy of that research as a basis for the Crown to enter into binding settlements with Māori groups in the region in and around Matatā’.³⁷ Dr Gilling stated in evidence that the focus on the Matatā area arose from OTS’s concentration on that location in its relevant memoranda, and also because previous counsel for Wai 524, Mr Rangitauira, had limited Ngāti Rangitihī’s concerns about the settlement to redress in and around Matatā.³⁸ Although time constraints prevented an investigation of other locations of potential overlap or conflict within the settlement area, Dr Gilling felt that ‘in the consideration of the general nature of the evidence available and its value in establishing tribal rohe, and use and occupation rights, many of the conclusions . . . will be applicable to those other areas also’.³⁹

Dr Gilling criticised the two historical memoranda prepared by OTS staff historian Maureen Hickey. The Crown said the purpose of the memoranda ‘was to assess whether there was any documentary support for the allegations made by Ngāti Rangitihī as to their interests, focusing primarily on the Matatā area’.⁴⁰ But both documents contained serious flaws, according to Dr Gilling. Firstly, there was the short timeframe in which the documents seemed to have been prepared. It appeared significant to Dr Gilling that ‘these two memoranda addressing the concerns in Mr Rangitauira’s letter of 12 March 2002 were prepared in no more than only 13 days, thus probably a maximum of 9 working days, from receipt of that

36. Oral submission of counsel for the Wai 996 claimants, 5 February 2003, tape 3, side A

37. Document A7, para 1.2

38. Document A23 (a), annex 19

39. Document A7, para 1.3

40. Document A24, para 44.2

letter'.⁴¹ Such a short period could not have allowed Ms Hickey to undertake sufficiently detailed research for the task required of her.

The first and more general memorandum, Dr Gilling argued, seemed entirely based, inasmuch as sources were cited, on Don Stafford's *Te Arawa* and an internal memorandum of 19 June 1998 by Crown Law Office historian Dr John Battersby. The Battersby memorandum had not been tested publicly by other claimants or the Waitangi Tribunal, and nor had it been supplied to Ngāti Rangitihi for comment or correction.⁴² Ms Hickey's memorandum dealt with the broad rohe of Ngāti Rangitihi, and she was not 'able to locate historical evidence of Ngāti Rangitihi interests at Matatā prior to the 1860s'.⁴³ Ms Hickey found that Ngāti Rangitihi, after fighting with the Crown in the 1860s, received a military award of 84 acres on the Matatā coast in 1869, and another 3834 acres known as lot 30, parish of Matatā. Ngāti Rangitihi had ancestral associations with at least part of the Tarawera River, but Ms Hickey pointed to Ngāti Rangitihi residence in the Matatā area only after the time that the grants for military service had been made.⁴⁴

Dr Gilling criticised Ms Hickey's findings, especially since 'she possessed information only on the post-1860 period'.⁴⁵ Ms Hickey's memorandum attempted to define the traditional interests and rights of Ngāti Rangitihi, yet, Dr Gilling argued, it did so 'with no research available specifically about Ngāti Rangitihi and with no effective consultation with the very people about whom [the memorandum was] providing an opinion, and who strongly disagree with that portrayal'.⁴⁶

Dr Gilling's assessment of Ms Hickey's second memorandum was equally negative. Although more substantial and having more historical detail, it too had serious deficiencies. Now Ms Hickey was saying that any pre-1860 Ngāti Rangitihi interests in the Matatā area were based on access to the coast via the Tarawera River, and that Ngāti Awa/Ngāti Tūwharetoa ki Kawerau hapū appeared to be the main groups in residence at Matatā prior to the 1860s.⁴⁷ Dr Gilling complained that the sources used by Ms Hickey were entirely one-sided, relying very heavily on Ngāti Awa and Ngāti Tūwharetoa ki Kawerau research reports. There was no Ngāti Rangitihi input, and nor could there be on a scale comparable to Ngāti Awa and Ngāti Tūwharetoa ki Kawerau, given that those groups had received funding for professional research.⁴⁸ The second Hickey memorandum implied, without directly stating, that the grants of land to Te Arawa in the Matatā region were solely for loyal military service. Again, such findings were based on sources substantially either Ngāti Awa or Ngāti

41. Document A7, para 2.2

42. Ibid, para 2.3

43. Document A23 (a), annex 44, para 11

44. Ibid, annex 44, paras 9, 11

45. Document A7, para 2.7

46. Ibid, para 2.10

47. Document A23 (a), annex 45, paras 15, 19

48. Document A7, para 2.23

Tūwharetoa in origin. The intricacy of events of the relevant period were filtered out, ‘unsurprising in a summary memorandum’. There was ‘no discussion of any other possibility, . . . and no thought given to the fact that the language used at the time was frequently that of restoration and giving back [of lands]’.⁴⁹ Dr Gilling concluded his analysis of the second Hickey memorandum thus:

It is superficial in the level of research undertaken, it is methodologically deficient in failing to incorporate the opinions of the very group about whom it is written, and it is tendentious in presenting only one perspective and in failing to consider the pro-Rangitahi implications even of some of the information it does present. As such, it is, in my professional opinion, entirely inadequate as a foundation upon which to dismiss their claims to traditional rights in the area.⁵⁰

During the hearing, Crown counsel cross-examined Dr Gilling on whether the purpose of his evidence was to demonstrate that the two reports prepared by Ms Hickey were biased and inadequate. Dr Gilling replied that it had not been his intention to characterise Ms Hickey as deliberately biased in any sense, but that the effect of her memoranda was that they were one-sided and clearly inadequate to serve the purpose for which they had been undertaken. Dr Gilling stated that he had been asked to analyse and evaluate the Hickey memoranda and methodology from the perspective of a professional independent historian. Crown counsel then tested Dr Gilling on his criticisms of Ms Hickey’s work. He conceded that his language might perhaps have been stronger than warranted. But in re-examination, he re-asserted the main points of his critique: there was no Ngāti Rangitahi input; the apparent time constraints precluded Ms Hickey from examining the necessary breadth of material to deal with the particular matters addressed; and a lack of funding would have prevented Ngāti Rangitahi from participating in any meaningful way in any case.⁵¹

Dr Gilling also questioned the Crown’s reliance on the *Ngati Awa Raupatu Report* ‘as a basis for giving to [Ngāti] Tūwharetoa ki Kawerau lands also claimed by [Ngāti] Rangitahi’.⁵² He claimed that that inquiry was not a fully regional one, but essentially focused on one iwi and one issue, that of raupatu. His major concern was that Ngāti Rangitahi had not presented any evidence before the Tribunal nor challenged that of others. The report did not deal with many of the issues raised in the Wai 996 statement of claim, nor did it investigate areas outside the raupatu boundary to which Ngāti Awa and Ngāti Tūwharetoa ki Kawerau laid claim. Dr Gilling stated that the ‘Tribunal’s report cannot be of substantial relevance to matters south of Mt Edgecumbe, which includes the large majority of lands claimed by [Ngāti] Tūwharetoa ki Kawerau and Ngāti Rangitahi’.⁵³

49. Ibid, para 2.18

50. Ibid, para 2.25

51. Oral evidence of Dr Bryan Gilling, 5 February 2003, tape 1, side B

52. Document A7, para 3.1

53. Ibid, para 3.2

NGĀTI TŪWHARETOA KI KAWERAU SETTLEMENT CROSS-CLAIM REPORT

3.2.2

Counsel for the Crown questioned Dr Gilling on this point, contending that the greater part of the lands that both those iwi claim do lie within the raupatu boundary. Dr Gilling recognised this and requested that his statement be modified to state that the *Ngāti Awa Raupatu Report* could not be relied upon outside of the confiscation line.⁵⁴ (Claimant counsel still estimated in their submissions in reply that at least half of the lands in which Ngāti Tūwharetoa ki Kawerau now claim interests lie outside the raupatu line.⁵⁵) Dr Gilling again pointed to the fact that Ngāti Rangitihi had not participated to any extent in the eastern Bay of Plenty hearings.

He questioned the value of a number of the historical reports relied on for information about Ngāti Rangitihi's interests. The research had been undertaken for the eastern Bay of Plenty inquiry, and was focused on establishing that Ngāti Tūwharetoa had grievances against the Crown in respect to raupatu.⁵⁶ Little of the evidence pertained to the matters or places of relevance in the present case; namely rohe, occupation, and use rights in the Matatā area.

Dr Gilling concluded by stating that, of the documentary evidence examined, he could find no clear support for a Ngāti Tūwharetoa ki Kawerau claim to the lands in the Matatā area, nor in the southern area towards Lake Tarawera. If there was evidence to support this, he was uncertain as to what that evidence was, and he was sure that Ngāti Rangitihi had not been given the opportunity to assess and critique it. Dr Gilling argued that, on the material surveyed, any claim by Ngāti Tūwharetoa ki Kawerau to lands in the Matatā area 'rests almost entirely on [Jane] Luiten's report and its assumption that the coastal hapū of Ngāti Rangihouhiri, Ngāti Hikakino and then Te Tawera, were in fact hapū of [Ngāti] Tūwharetoa'.⁵⁷ (This report, Dr Gilling noted, had been commissioned by Ngāti Tūwharetoa ki Kawerau.) Yet, he pointed out, Ngāti Awa strongly claim these hapū as their own. Furthermore, Dr Gilling continued, Ngāti Rangitihi claim that 'the common ancestry shared by groups with some connection to the person Tūwharetoa some 700 years ago means that they have as good a genealogical claim through precisely the same ancestry'.⁵⁸ Dr Gilling stated that he had 'seen no documents informing the present Crown stance that even address[es] this issue, let alone resolves it'.⁵⁹

3.2.2 Evidence of David Potter

Further material filed in support of the Wai 996 claim included a number of statements of evidence presented by Ngāti Rangitihi members, including two from Mr Potter.

54. Oral evidence of Dr Bryan Gilling, 5 February 2003, tape 1, side B

55. Document A29, para 18.3

56. Document A7, para 6.3

57. Ibid, para 6.4

58. Ibid, para 6.4

59. Ibid, para 6.4

The first of Mr Potter's briefs outlined the traditional history of Ngāti Rangitihi and its rohe. The ancestors of Ngāti Rangitihi, Mr Potter stated, arrived in Aotearoa on the Te Arawa waka, landing at Matatā where Ngāti Rangitihi is still resident today. Mr Potter claimed that the area Ngāti Rangitihi has always occupied is from where the Rangitaiki River flows into the sea, running westwards up the coast to Ōtamarākau, inland southwards from Ōtamarākau to Lake Rotoehu, taking in the whole of Lake Rotomā across to Lake Tarawera south as far as Rainbow Mountain, then eastwards including the western third of the Matahina block, and running northwards following the course of the Rangitaiki River to the sea.⁶⁰ According to Mr Potter, this rohe never changed throughout history, despite challenges by Ngāti Awa from the east and Ngāi Tūhoe further inland. Ngāti Rangitihi had an agreement with the Ngāti Tūwharetoa people which allowed Ngāti Tūwharetoa access to the sea through Ngāti Rangitihi's rohe. Ngāti Rangitihi had shared specific areas of its rohe with small numbers of Ngāti Tūwharetoa at Matatā and Onepu since 1865, and he was 'prepared to accept that they have some claim' to Ngāti Rangitihi land in these areas due to inter-marriage.⁶¹

Mr Potter commented that Ngāti Rangitihi had historically been a prosperous tribe, capable of defending its own rohe, particularly against Ngāti Awa which had attempted to gain ownership of Matatā through conquest. There was an agreement between Ngāti Rangitihi and Ngāti Awa providing for access to food gathering areas, but Ngāti Awa tried continually to assume ownership of these areas, including Matatā. Yet it was not until the early nineteenth century, Mr Potter stated, when Ngāti Rangitihi had been devastated by European illness and raids by Ngā Puhī, that Ngāti Awa actually moved into Matatā. Consequently, Ngāti Rangitihi felt relieved at the signing of the Treaty of Waitangi as it hoped that this would bring an end to fighting, and the Crown would protect the tribe's lands. However, this did not prove to be the case, and Ngāti Awa insisted on claiming the rohe of Ngāti Rangitihi as its own, as it does to this day.⁶²

This explains why, Mr Potter claimed, Ngāti Rangitihi and other Te Arawa groups provided military assistance to the Crown during the 1860s, so that Ngāti Awa could be permanently driven off Te Arawa land.⁶³ Mr Potter said that the Crown recognised that the Te Arawa contingent was fighting with the Crown in order to eject Ngāti Awa from its own lands, and so refused to pay the Te Arawa forces for their service. The Crown confiscated some 87,000 acres of Ngāti Rangitihi land on the assumption that it belonged to Ngāti Awa. But then the Crown proceeded to grant the land Ngāti Rangitihi had fought to win back to other tribes, and also kept large tracts for itself.⁶⁴ These and other Crown actions left Ngāti Rangitihi without an economic base. Its chance to obtain one was further diminished by both the Ngāti Awa and Ngāti Tūwharetoa ki Kawerau settlement offers 'in which the Crown

60. Document A2, para 4.1

61. Ibid, para 4.2

62. Ibid, paras 5.3, 46.6–46.7, 47.1–47.2

63. Ibid, para 47.4

64. Ibid, para 49.1

is offering outside tribes valuable forest and geothermal assets from within Ngāti Rangitihī's rohe.⁶⁵

Mr Potter's statement of evidence also outlined sites of vital importance to Ngāti Rangitihī, and in particular 13 wāhi tapu burial grounds within the claim area.⁶⁶ Mr Potter felt particularly concerned that these sites may lie within the claimed rohe of Ngāti Tūwharetoa ki Kawerau.

In his second brief of evidence, Mr Potter stated his concern that the cultural redress comprised within the offer of settlement to Ngāti Tūwharetoa ki Kawerau would directly undermine the rangatiratanga of Ngāti Rangitihī and its traditional relationship with its land and resources. He said that the map of the Ngāti Tūwharetoa area of interest attached to the deed 'covers virtually the entire rohe of Ngāti Rangitihī' and 'gives the impression that the rohe of [Ngāti] Tūwharetoa ki Kawerau supplants that of Ngāti Rangitihī'.⁶⁷

Mr Potter opposed nearly every item of redress offered to Ngāti Tūwharetoa ki Kawerau. Of the items in and around Matatā, the location of the sole Ngāti Rangitihī marae and centre of its community, Mr Potter claimed that the transfer of the 30-hectare Whakapaukōrero site (within the Matatā scenic reserve) was 'strongly opposed' as it contains 'well-known Ngāti Rangitihī pā sites'.⁶⁸ The Whakapaukōrero site is to be vested fee simple in the Ngāti Tūwharetoa ki Kawerau governance entity as a historic reserve subject to section 18 of the Reserves Act 1977. Mr Potter described the site as 'culturally extremely important' to Ngāti Rangitihī, and in close proximity to the tribe's historic marae.⁶⁹

The transfer of the 10-hectare Te Waheroa site (within the western Whakatāne recreation reserve) was also opposed on the basis that this was Ngāti Rangitihī ancestral land 'and not shared with any other iwi or hapū'.⁷⁰ This site is to be vested in the Ngāti Tūwharetoa ki Kawerau governance entity as a recreation reserve subject to section 17 of the Reserves Act 1977. This area is 'a beach camping place used for food gathering' and owned exclusively by Ngāti Rangitihī.⁷¹

Mr Potter also objected to the offer of a one-hectare nohoanga entitlement within Te Awa a Te Atua (Matatā wildlife refuge reserve). The entitlement allows Ngāti Tūwharetoa ki Kawerau to occupy the site exclusively for a period of up to 210 days within a calendar year to provide access to the Tarawera River for lawful fishing, and for the legal gathering of other natural resources in the vicinity.⁷² Any rights Ngāti Tūwharetoa ki Kawerau had to this area were 'solely at the discretion of Ngāti Rangitihī'; this part of the coast belongs to his iwi.⁷³

65. Document A2, para 51.7

66. Ibid, para 15

67. Document A3, para 2.3

68. Ibid, para 11

69. Ibid

70. Document A3, para 7

71. Ibid

72. Document A23, para 87

73. Document A3, para 38

The Wai 996 claimants also oppose the establishment of a joint advisory committee for the Matatā scenic reserve and Matatā wildlife refuge reserve. The committee will advise the Minister and Director-General of Conservation on conservation matters affecting the Matatā wildlife refuge reserve and the balance of the Matatā scenic reserve not transferred to Ngāti Tūwharetoa ki Kawerau or Ngāti Awa or both.⁷⁴ It will comprise two individuals nominated by Ngāti Tūwharetoa ki Kawerau, and two by the Director-General of Conservation. As Ngāti Awa has been offered the same redress, the committee will also have on it two individuals nominated by that iwi. These arrangements were absolutely unacceptable to Mr Potter. Taonga were hidden in the lands of the wildlife refuge reserve, and the ‘bones of Ngāti Rangitahi ancestors were washed in the waters of the lagoon’.⁷⁵ Moreover, much of ‘the Matatā Scenic Reserve is wāhi tapu in the eyes of Ngāti Rangitahi’ and there were a number of burial places in the reserve area.⁷⁶ Ngāti Rangitahi would not accept any other iwi or hapū having consultative rights over the management of these areas.

Mr Potter also addressed the Crown’s consultation process with Ngāti Rangitahi. He acknowledged that the Crown had communicated with counsel for Wai 524, Mr Rangitauira, since early 2001. But Mr Potter had become so concerned about how matters were progressing by March 2002 that he decided to lodge his own claim with the Tribunal and communicate his objections to OTS directly.⁷⁷ Mr Potter and other members of Ngāti Rangitahi felt distraught at the Crown’s request in early May 2002 for comments on the Ngāti Tūwharetoa ki Kawerau offer so that these could be considered in advising the Minister of her provisional decision on overlapping claims. That OTS had reached such a stage ‘horrified’ Mr Potter, who proceeded to write to the Minister informing her that Ngāti Rangitahi ‘was not in a position to put forward any research to counter what it seemed the Crown had already decided’.⁷⁸ He alleged that the predicament of Ngāti Rangitahi was partially due to the Crown failing to recognise that Mr Rangitauira ‘was not passing on information’ so that the iwi as a whole remained unaware of the extent of the Ngāti Awa and Ngāti Tūwharetoa settlements.⁷⁹ He wrote to the Crown many times over the next six months indicating the concerns of Ngāti Rangitahi, but the Crown was not ‘prepared to give Ngāti Rangitahi a real opportunity (or resources) to put their case’.⁸⁰

Mr Potter felt particularly concerned by Crown requests in June 2002 to offer assistance in determining where the alleged Ngāti Rangitahi burial sites were located in relation to the Matatā scenic reserve. He believed such a request was culturally insensitive and he did not

74. Document A23, para 85

75. Document A3, para 18

76. Ibid, para 20

77. Ibid, para 51.2

78. Ibid, para 51.3

79. Document A23(a), annex 26

80. Document A3, para 51.3

know of any other tribes having to escort Crown officials to burial sites to prove the existence of wāhi tapu.⁸¹

Mr Potter stated that he had been informed in early August 2002 that the Minister had made her provisional decision concerning overlapping claims to the Ngāti Tūwharetoa ki Kawerau settlement and that any responses had to be made by the end of the month. Given such a short timeframe, and the fact that Ngāti Rangitihi had no funding to prepare and research its claims, Mr Potter believed that his iwi was not given a proper opportunity to respond. It was especially unfair that Ngāti Rangitihi had to comply with these requests in only a few weeks and with no funding, when parties involved in the eastern Bay of Plenty hearings had received funding for several years.⁸²

3.3 SUBMISSIONS OF THE CROWN

The Crown's arguments are outlined in the opening submissions of Crown counsel, dated 3 February 2003.⁸³ Counsel stated that the focus of this inquiry was not the relative and competing interests of claimants in the eastern Bay of Plenty, but the application of the Crown's cross-claim policy to the items of redress contained in the settlement offer to Ngāti Tūwharetoa ki Kawerau. Counsel claimed that the process and approach to contested redress in the Ngāti Awa settlement – which the Tribunal found did not breach the principles of the Treaty – was followed in the Ngāti Tūwharetoa ki Kawerau settlement. These two processes, counsel maintained, essentially progressed in parallel. Counsel also submitted that the Tribunal's approach to considering settlements is 'similar to that of a court on review', and that it was 'not the role of the Tribunal to substitute its views on the redress or policy for those of the Crown'.⁸⁴

Counsel addressed the Treaty principles relevant to this case, stating that the fundamental principle of mutual obligation to act in good faith requires the Crown, when negotiating settlements, to balance the competing interests. No perfect solution is likely, and the process inevitably requires compromise by all interested parties.⁸⁵ Counsel pointed to the relevant findings in the *Ngāti Awa Settlement Cross-Claims Report*, quoting this passage:

There really is no solution that the Crown could come to here that would be universally applauded. . . . Pragmatism and fairness are principles that have led the Crown to the solution they propose, and this Tribunal can see no Treaty basis for differing from the Crown as

81. Document A23(a), annex 30

82. Document A3, para 53.3

83. Document A24

84. Ibid, paras 6, 9

85. Ibid, para 20

to the substance of its policy. While the implementation of the policy produces negative effects for some groups, we consider that those negative effects are, on balance, less than those that would arise from the alternatives.⁸⁶

In negotiating the settlement with Ngāti Tūwharetoa ki Kawerau, the Crown has had to weigh the competing imperatives of providing suitable redress while retaining the capacity to provide similar and sufficient redress to other parties should that be appropriate. Counsel submitted that this involves the Crown undertaking what the *Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* described as a ‘delicate balancing exercise’.⁸⁷ The Crown must inform itself of the competing interests; take those matters of which it has been informed into account in reaching decisions about contested redress; and conscientiously endeavour to minimise any potential negative impact of settlement on cross-claimants, while achieving an acceptable and durable settlement with Ngāti Tūwharetoa ki Kawerau.⁸⁸ Counsel argued that the Crown has fulfilled these requirements here. The consultation process ‘demonstrates a good-faith engagement by the Crown with Ngāti Rangitīhi to identify and seek to protect any Ngāti Rangitīhi interests that may be affected by the Ngāti Tūwharetoa settlement’.⁸⁹

Regarding Ngāti Rangitīhi opposition to the Crown proceeding with the settlement prior to their claims being heard, Crown counsel pointed out that the Tribunal has reported that the Crown’s approach in this respect does not breach Treaty principles. ‘Rather’, counsel submitted, ‘the focus of the Tribunal is on considering whether the process of negotiating the settlement is Treaty compliant’.⁹⁰ Counsel stated that, for the Tribunal to make a recommendation to the Crown, section 6 of the Treaty of Waitangi Act 1975 requires that there must be prejudice to the claimants.⁹¹ Consideration of this prejudice must take into account the nature of the ‘delicate balancing exercise’ to be undertaken by the Crown, including the principle of pragmatism. Counsel contended:

That a site within the Ngāti Rangitīhi claimed rohe may be transferred to Ngāti Tūwharetoa does not of itself cause prejudice. It is submitted that prejudice is caused only if the nature of the Ngāti Rangitīhi interest in that site is so great that the transfer would be inappropriate and/or there are insufficient resources retained by the Crown to provide fair redress to Ngāti Rangitīhi (if considered appropriate in the future). A negative effect does not of itself create ‘prejudice’ in this context . . .⁹²

86. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report*, p 76

87. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report*, p 18

88. Document A24, para 21

89. *Ibid*, para 40

90. *Ibid*, para 23

91. *Ibid*, para 30

92. *Ibid*, para 31

The Tribunal must also take into account the prejudice that may be caused to Ngāti Tūwharetoa ki Kawerau if the relief sought by the Wai 996 claimants is granted.

The Crown, counsel submitted, was well informed of Ngāti Rangitihi objections to the settlement offer at the time of the Minister's decisions, and Ngāti Rangitihi interests had been adequately identified in the research undertaken. The Crown took account of those interests and, based on the further research undertaken by Ms Hickey, considered whether modification of the settlement package was needed in order to minimise the negative effects of the settlement on Ngāti Rangitihi, but still offer a fair and durable redress package to Ngāti Tūwharetoa ki Kawerau. Counsel stated that given 'the present circumstances, although two additional protection mechanisms were included, the Crown concluded that it was not necessary to modify the settlement package'.⁹³ Those two additional measures that ORS recommended to the Minister were:

- i. the [Ngāti Tūwharetoa ki Kawerau] Deed of Settlement to expressly provide that the granting of non-exclusive redress to [Ngāti Tūwharetoa ki Kawerau] does not prejudice the Crown's ability to provide similar redress to other groups with proven claims, or do anything else (including disposing of land to other groups) provided that is consistent with the terms of any specified redress;
- ii. you write to relevant Ministers and regional and local bodies in those parts of the [Ngāti Tūwharetoa ki Kawerau] area of interest where cultural redress has been provided stating that the Crown recognises that other groups have overlapping claims that have yet to be addressed.⁹⁴

Crown counsel contended that the Crown did not have opportunity to consider the Wai 996 objections made subsequent to the Minister's decisions, and 'that this information cannot be taken into account in assessing the Crown's process but could be considered in assessing whether the new evidence would demonstrate prejudice to Ngāti Rangitihi'.⁹⁵ With the possible exception of two of the wāhi tapu sites listed by Mr Potter as being within the Ngāti Tūwharetoa ki Kawerau area of interest, the remaining eleven wāhi tapu sites are located within non-exclusive redress areas. The 'Crown submits such location would not cause prejudice to Ngāti Rangitihi'.⁹⁶ The Crown was not able to determine the precise locations of the wāhi tapu sites in relation to the Matatā scenic reserve and the Lake Rotomā scenic reserve because the information provided was not sufficiently detailed.

Counsel explained that the Crown remained unclear as to the claimants' objections to the non-exclusive redress items of the settlement package. The Crown could not see how

93. Document A24, para 118

94. Document A23(a), annex 41, para 48

95. Document A24, para 119

96. Ibid, para 119

this form of redress, which preserves the Crown's capacity to offer similar redress to other parties, could be deemed a breach of Treaty principles. This could only be so 'if it is established that Ngāti Tūwharetoa are without interests in the areas in which non-exclusive redress is offered'.⁹⁷ Some of the evidence filed by the claimants seems to allege this, but counsel contended that it could not seriously be argued that Ngāti Tūwharetoa ki Kawerau are without interests in these areas. This was especially so considering that some of the evidence filed by the claimants did admit to various levels of Ngāti Tūwharetoa interest in the Matatā/Kawerau area, and given the Tribunal's findings in the *Ngāti Awa Raupatu Report*. That report noted that Ngāti Tūwharetoa ki Kawerau claimed to have nine hapū remaining in the Matatā-Kawerau area (Ngāti Peehi, Umutahi, Te Tawera, Ngāi Tamarangi, Ngāti Hikakino, Ngāi Te Rangihouhiri, Ngāti Pou, Ngāti Iramoko, and Ngāti Manuwhare), and there are two Ngāti Tūwharetoa marae in Matatā, Umutahi and Oniao.⁹⁸

Although counsel realised that Ngāti Rangitihi had not participated in the eastern Bay of Plenty hearings, the Crown was not relying on the *Ngāti Awa Raupatu Report* as an authority for dealing with Ngāti Rangitihi interests. Rather, the Crown was relying on the conclusions reached in the report that Ngāti Tūwharetoa ki Kawerau had interests in the eastern Bay of Plenty (including Matatā and Kawerau), either through the affiliations of hapū or otherwise, and that this entitled the group to stand alone in their own settlement.

Comparing the issue of cultural redress to earlier cross-claims inquiries, the recent hearing into the Ngāti Awa settlement was more relevant to the Wai 996 urgency than counsel for the claimants had indicated. Claimant counsel emphasised the issues of Crown forest licensed land, commercial redress and 'substitutability', but the *Ngāti Awa Settlement Cross-Claims Report* also considered cross-claims to cultural redress sites such as Matahina A4 and A5, and Kaputerangi historic reserve. The report is therefore 'directly relevant, particularly in establishing the proper focus of the Tribunal's inquiry in this context'.⁹⁹

Counsel submitted that the concerns raised by the Wai 996 claimants during the Crown's consideration of cross-claims prompted it to undertake further research to establish whether there was any evidence to support the claims made by Ngāti Rangitihi. The Crown would usually seek information from the cross-claimants themselves on such matters. But the Crown had been advised at the hui of 21 February 2002 that there was no Ngāti Rangitihi kaumātua remaining to provide oral evidence to ascertain the iwi's interests in relation to the Matatā area.¹⁰⁰ The Crown decided to conduct its own in-house research. Given the focus of the Ngāti Rangitihi cross-claims, this research was primarily directed at investigating interests in the Matatā area.¹⁰¹ The research indicated that Ngāti Tūwharetoa/Ngāti Awa had

97. Ibid, para 55

98. Waitangi Tribunal, *The Ngāti Awa Raupatu Report*, pp 20–21

99. Document A24, para 25

100. Ibid, para 44.3

101. Document A23, para 68

occupied the Matatā area up to 1865; that Ngāti Rangitihi had not occupied the Matatā area prior to 1865, but may have had relationships with the hapū in the area and were likely to have access to the coast via the Tarawera River; and that the Ngāti Rangitihi people lived in the Tarawera area. Their land interests at Matatā date from 1865 when they and other Te Arawa hapū received grants there following military service with the Crown.¹⁰² While the Crown recognises Ngāti Rangitihi interests at Matatā from the 1860s, the Crown did not discount the possibility that Ngāti Rangitihi, or any other group, could establish earlier presence there. Counsel stressed that the settlement offer to Ngāti Tūwharetoa ki Kawerau did not seek to recognise that group as having exclusive interests in the Matatā area. Rather, in attempting to perform its ‘delicate balancing exercise’, the Crown sought to recognise the claims of Ngāti Tūwharetoa ki Kawerau without causing prejudice to the claims of Ngāti Rangitihi: ‘These objectives are not mutually exclusive’.¹⁰³

On the basis of the findings reached, therefore, counsel argued that ‘the research does not demonstrate any interest of Ngāti Rangitihi that justifies the withdrawal of the offers of redress to Ngāti Tūwharetoa’.¹⁰⁴ In negotiating its settlements involving redress in the Matatā area, the Crown has sought to ‘recognise the customary associations of Ngāti Tūwharetoa and Ngāti Awa with small pockets of Crown-owned land that was taken from them through confiscation’.¹⁰⁵

With respect to the transfer to Ngāti Tūwharetoa ki Kawerau of land within the Matatā scenic reserve, the Crown submitted that the ‘exclusive redress is justified by the fact that Whakapaukōrero is a sacred maunga of Ngāti Tūwharetoa and that there are three Ngāti Tūwharetoa pā sites within the site’.¹⁰⁶ Ngāti Tūwharetoa ki Kawerau consider the Compensation Court awards of this land to other iwi to be a significant grievance. It was the Crown’s understanding that the Ngāti Rangitihi pā site said by the Wai 996 claimants to be within the Matatā scenic reserve was not inside the Whakapaukōrero site to be transferred to Ngāti Tūwharetoa ki Kawerau. The position of the urupā claimed by Mr Potter to be in the scenic reserve had not been ascertained, however. The Crown’s offers of assistance to Ngāti Rangitihi to identify these sites were rejected.

On balance, given the lack of Ngāti Rangitihi information and the findings of the Crown’s research, withdrawal of this redress could not be justified. Even after the proposed transfer of two 30-hectare sites to both Ngāti Tūwharetoa ki Kawerau and Ngāti Awa, the Crown retained significant amounts of land within the Matatā scenic reserve that could be offered as redress in future settlements if other groups had proven interests there.

The Crown submitted that the transfer of the Te Wahieroa reserve to Ngāti Tūwharetoa ki Kawerau is also justified. The reserve is located in the western Whakatāne recreation reserve,

102. Document A23, para 69

103. Document A24, para 44.4

104. Ibid, para 44.6

105. Ibid, para 52

106. Ibid, para 58

east of Matatā. Te Wahieroa is a significant landing place for many waka; it was an ancient canoe-building and marae site; and important Ngāti Tūwharetoa ki Kawerau ancestors had mahinga kai there.¹⁰⁷ The Wai 996 claimants objected to this redress on the basis that the site contains food gathering sites of significance to Ngāti Rangitahi, but Crown counsel said it was unclear whether these campsites relate specifically to the redress area or to the wider western Whakatāne recreation reserve. Again, ‘the conclusions as to relative historical and contemporary interests indicated by the historical research’ did not justify the withdrawal of this offer of exclusive redress.¹⁰⁸ The transfer to Ngāti Tūwharetoa ki Kawerau of a 10-hectare site, and the transfer of another 10-hectare site to Ngāti Awa, still left the Crown with sufficient land in the western Whakatāne recreation reserve to offer to any other group should that be considered appropriate in the future.

A further item of exclusive redress to be offered to Ngāti Tūwharetoa ki Kawerau in the Matatā area is a one-hectare nohoanga entitlement at Te Awa a Te Atua. This exclusive redress was justified on the basis that Ngāti Tūwharetoa hapū had pā in the area, and that it was used for food- and medicine-gathering purposes. Again, given the significant customary interests of Ngāti Tūwharetoa ki Kawerau at Te Awa a Te Atua, the offer of exclusive redress should not be withdrawn, even if Ngāti Rangitahi had interests there too. The Crown retained land within the Matatā wildlife refuge reserve where nohoanga entitlements could be granted to other iwi able to establish interests justifying this redress.¹⁰⁹

The Crown also defended the establishment of a joint advisory committee for the Matatā scenic reserve and Matatā wildlife refuge reserve. Counsel acknowledged that Ngāti Rangitahi claimed wāhi tapu interests in the Matatā scenic reserve (even though these could not be located with any precision at the time of the Minister’s decisions). Nevertheless, the strength of Ngāti Tūwharetoa ki Kawerau’s interests was such that the redress should not be withdrawn. This was ‘non-exclusive redress and the Crown could appoint representatives from other iwi (including Ngāti Rangitahi) to the joint advisory committee as part of future settlements if appropriate’.¹¹⁰ In advising Mr Potter of the Minister’s provisional decision on overlapping claims relating to the Ngāti Tūwharetoa ki Kawerau settlement offer, OTS informed him that the ‘Crown retains the discretion to appoint other groups to the Joint Advisory Committee’.¹¹¹

Counsel also referred to the statutory acknowledgements, deeds of recognition and protocols for Ngāti Tūwharetoa ki Kawerau with respect to certain sites throughout its area of interest. Although most of this redress focused on the Kawerau rather than Matatā area, the Wai 996 claimants maintained that this redress infringed on their own mana and rangatiratanga as it related to locations within their own rohe. The Crown pointed to the special

107. Ibid, para 69

108. Ibid, para 71

109. Ibid, paras 66–67

110. Ibid, para 63

111. Document A23(a), annex 36, para 24

associations of Ngāti Tūwharetoa ki Kawerau with the particular sites and areas concerned. This form of redress is non-exclusive, and is available to other groups in the future if appropriate. Moreover, 'other groups may be offered exclusive redress in relation to areas covered by these redress instruments to the extent that such redress is not inconsistent with the redress offered to Ngāti Tūwharetoa'.¹¹² Counsel stated that the statutory acknowledgements and deeds of recognition did not alter the obligations of local authorities to cross-claimants, nor the standing of cross-claimants under the Resource Management Act 1991. The Minister wrote to relevant local authorities and Government departments on 30 January 2003, advising that the Crown recognises that other groups may also have interests in the Ngāti Tūwharetoa area of interest that are still to be addressed.¹¹³ Counsel noted that this issue had already been traversed by the Tribunal in the Ngāti Maniapoto/Ngāti Tama cross-claims inquiry, where it was found:

The statutory acknowledgements and deeds of recognition to be provided in the Ngāti Tama settlement are certainly no basis for a local authority to neglect its obligations in respect of notice to, or consultation with, Ngāti Maniapoto.¹¹⁴

Regarding the Crown's communication and consultation process with cross-claimants, counsel stated in an earlier memorandum that the Crown had actively consulted all claimants that it was aware may be affected by the redress package to Ngāti Tūwharetoa ki Kawerau.¹¹⁵ Counsel pointed to a chronology of interactions between the Crown and Ngāti Rangitahi. The consultation process spanned 18 months before the Minister made her final decision. At the outset of the consultation, Ngāti Rangitahi were told of the full extent of the settlement offer; Mr Paterson should have been aware of the offer by at least 29 May 2001; Ngāti Rangitahi were advised at the hui of 21 February 2002; Mr Potter became personally involved for the first time after informing OTS on 14 March 2002 of his objections to the settlement, providing him with at least six months in which to articulate his concerns; Mr Paterson had at least 16 months to do likewise, and Ngāti Rangitahi 18 months.¹¹⁶ The Crown had acted in good faith over this period to consult with Ngāti Rangitahi claimants, to identify their interests that might be affected by the settlement, and to protect those interests.

At the hearing, Crown counsel said that Mr Rangitauira had advised Mr Paterson and other members of the Ngāti Rangitahi Claims Committee on 29 May 2001 of the letters from OTS. It was inaccurate to say that certain persons were not aware of the settlement offer to the extent that it had been portrayed because, at the very least, Mr Rangitauira had advised the members of the claims committee that he had been sent the settlement offer.¹¹⁷ Counsel also

112. Document A24, para 101

113. Ibid, para 103

114. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report*, p 22

115. Paper 2.17, para 22

116. Document A24, paras 38–39

117. Oral submission of Crown counsel, 5 February 2003, tape 3, side B

argued that the Crown could not be criticised for waiting to consult with Ngāti Rangitihī until the tribe was ready to hold a hui-ā-iwi. Counsel indicated that OTS had signalled its availability to discuss preliminary issues with Ngāti Rangitihī before any proposed hui.¹¹⁸

Thus, the Crown had fulfilled its Treaty obligation to act in good faith in Treaty negotiations, and in the consideration of cross-claims. In endeavouring to achieve a fair and appropriate settlement with Ngāti Tūwharetoa ki Kawerau, the Crown had informed itself of competing interests and had taken these matters into account in reaching decisions about contested redress. The Crown considered that the historical sources and information provided to date (both before and after the Minister's decision) did not indicate any Ngāti Rangitihī interest justifying the withdrawal of any of the redress offered to Ngāti Tūwharetoa ki Kawerau. In closing, counsel stated that the 'Crown retains the capacity, through the retention of land, to offer fair redress to other groups, including Ngāti Rangitihī, who are able to establish claims in the Kawerau/Matatā area'.¹¹⁹

3.4 EVIDENCE FOR THE CROWN

The Crown's evidence was a comprehensive written brief and accompanying document bank from Peter Hodge, senior policy analyst, OTS. Mr Hodge's brief addressed the background to the settlement negotiations with Ngāti Tūwharetoa; the Crown's consultation process with Ngāti Rangitihī, including the Wai 996 claimants; an overview of the Wai 996 claimants' objections to the Ngāti Tūwharetoa redress package; the Crown's decisions in respects to the cross-claims issues raised by the Wai 996 claimants prior to, and after, the Minister's provisional and final decisions; and the protection of wāhi tapu.

Mr Hodge provided a detailed chronology of the Crown's consultation process with those claimants it had identified as having overlapping interests with the Ngāti Tūwharetoa ki Kawerau claim area. According to Mr Hodge's evidence, this process commenced on 29 March 2001 when cross-claimants were advised that the offer to Ngāti Tūwharetoa ki Kawerau was subject to the Crown's confirming that cross-claims issues had been addressed to its satisfaction. As part of this process, OTS wrote to counsel for Wai 524, Mr Rangitauira, who was at that time the contact person for that claim and for the Ngāti Rangitihī Claims Committee. Wai 524 was the only Ngāti Rangitihī claim that the Crown was aware of then. A copy of the Crown's full settlement offer was provided to counsel for any comments.¹²⁰ These were sought by 30 April 2001. The time period allowed for comment was extended to 25 May 2001 after the settlement offer had been amended. Receiving no reply, the Crown sent a

118. Document A23(a), annex 6

119. Document A24, para 121

120. Document A23, para 22

follow-up letter to counsel on 22 May 2001 seeking urgent comment on any concerns Ngāti Rangitihī might have with the settlement offer.¹²¹

Mr Rangitauira informed OTS on 29 May 2001 that he had received its recent letters and confirmed that Ngāti Rangitihī was a cross-claimant. He stated, however, that the iwi had been unable to hold a meeting to discuss the proposed settlement package but that he intended to call one during July or August 2001 and would provide a response after that.¹²²

OTS sent further letters throughout 2001 updating Ngāti Rangitihī on the progress of the Ngāti Tūwharetoa ki Kawerau (and Ngāti Awa) settlements. Mr Rangitauira indicated that Ngāti Rangitihī would have some comments on the settlement offer to Ngāti Tūwharetoa, but no specific comments were sent.¹²³ He advised the Crown that it would not be until early February 2002 that Ngāti Rangitihī could meet to consider the Ngāti Tūwharetoa ki Kawerau offer. In a phone call between officials from the Office of Treaty Settlements and Mr Rangitauira on 29 January 2002, he indicated that redress offered in the Matatā scenic reserve was of particular concern to Ngāti Rangitihī. On 8 February 2002, Mr Rangitauira requested that officials meet with Ngāti Rangitihī to discuss aspects of the Ngāti Awa and Ngāti Tūwharetoa settlements. Mr Hodge met with two senior Ngāti Rangitihī representatives on 14 February at Matatā, and, a week later, along with other Crown officials, discussed the settlement offer at a hui-ā-iwi at Rangiaohia Marae.¹²⁴ The Crown took it from the correspondence and the meetings that Ngāti Rangitihī were principally concerned with redress offered to Ngāti Awa and Ngāti Tūwharetoa in the Matahina and Matatā areas.

Mr Hodge said that it was not until 12 March 2002, almost a year after OTS had first requested comments, that the Crown received a letter written by Mr Rangitauira on behalf of Ngāti Rangitihī outlining the iwi's position on the proposed Ngāti Awa and Ngāti Tūwharetoa settlements. Mr Rangitauira stated that Ngāti Rangitihī would not consent to the settlement offers where they affected lands covered by the Ngāti Rangitihī claim. Particular concern attached to the redress offered in and around Matatā. There was a burial site within the Matatā scenic reserve.¹²⁵ Two days later, Mr Potter wrote to OTS for the first time, objecting to the proposed settlements.¹²⁶

As a result of Mr Rangitauira's letter of 12 March 2002, the Crown wrote seeking clarification from him of the boundaries and extent of the Ngāti Rangitihī claim.¹²⁷ The Crown reassured him that it retained the ability to provide similar redress to Ngāti Rangitihī should that be considered appropriate in the future. The Crown had sufficient land in the Matatā area, and could provide non-exclusive redress to other settling parties. The letter also offered

121. Document A23, paras 12–14

122. Document A23(a), annex 5

123. Document A23, para 16

124. *Ibid*, paras 18–22

125. *Ibid*, para 25

126. Document A23(a), annex 20

127. *Ibid*, annex 21

for officials (together with a surveyor and/or archaeologist) to accompany Ngāti Rangitīhi on a site visit to identify the burial site in the Matatā scenic reserve.¹²⁸ Counsel submitted that this request for specific information, together with the hui on 21 February 2002, demonstrated that the Crown was at this stage still genuinely interested in resolving wāhi tapu issues and seeking input from the claimants.

Mr Potter wrote to the Minister on 27 March 2002 explaining the recent filing of his statement of claim in the Waitangi Tribunal, and that he and other members of Ngāti Rangitīhi were unaware of the extent of the Ngāti Tūwharetoa and Ngāti Awa settlement offers. Crown counsel stated during the hearing that, as soon as the Crown became aware of Mr Potter's unregistered claim, the Crown began corresponding with Mr Potter as well as Mr Rangitūira.¹²⁹ OTS advised Mr Potter on 9 May 2002 that a copy of the Crown's settlement offer had been sent to Mr Rangitūira as representative of Ngāti Rangitīhi and the Ngāti Rangitīhi Claims Committee.¹³⁰ On 31 May 2002, OTS officials briefed the Minister on the progress of cross-claims issues in relation to the Ngāti Tūwharetoa settlement. They recommended that she make a provisional decision that the Crown proceed with the settlement, but that two further measures, as outlined above in section 3.3, should be taken to address cross-claimant concerns.¹³¹ The Minister agreed to these measures.

In relation to the claims made by Mr Potter and Mr Rangitūira that there may be Ngāti Rangitīhi urupā in the Matatā scenic reserve, and the claim by Mr Potter that there was a pā within the 30-hectare Whakapaukōrero site, Mr Hodge pointed out that OTS invited Ngāti Rangitīhi to clarify the location of any such sites. The Crown wanted to understand the full significance of these areas to Ngāti Rangitīhi. Mr Potter rejected this offer, and other offers, including one to pay for the cost of a surveyor, to assist in identifying the urupā and pā site.¹³²

The Minister wrote to Mr Potter on 1 July 2002 responding to issues raised by him in his correspondence with the Crown. Mr Hodge stated that the Minister 'encouraged Mr Potter to meet and discuss concerns with Ngāti Tūwharetoa and noted that Mr Potter had declined the invitations from the Office of Treaty Settlements to identify wāhi tapu within the Matatā Scenic Reserve'.¹³³ It could not be determined, then, whether these sites were located in the redress areas offered to Ngāti Awa and Ngāti Tūwharetoa. The Minister advised that the Crown would proceed with the transfer of sites within the reserve, but there would be ongoing protection of cultural and historic values within these areas: they would remain subject to their existing reserve status, and Ngāti Rangitīhi could apply to the Historic Places Trust to have their wāhi tapu registered under the Historic Places Act 1993.

128. Document A23, para 27

129. Oral submission of Crown counsel, 5 February 2003, tape 3, side B

130. Document A23, para 32

131. Document A23, para 37

132. *Ibid*, para 40

133. *Ibid*, para 42

Mr Hodge's brief outlined the course of events leading up to the Minister's final decision in early October 2002 to proceed notwithstanding cross-claimants' objections to the Ngāti Tūwharetoa settlement.

On 12 August 2002, OTS wrote to all cross-claimants setting out the Minister's provisional decision on cross-claims. The letters set out the relevant policy considerations, a response to the objections raised by cross-claimants, and the Minister's provisional decision in relation to contested redress. OTS asked for final comments on the Minister's provisional decision to be made by 28 August 2002, and invited comments from both Mr Potter, now a named claimant for the recently-registered Wai 996 claim, and Mr Rangitauira.¹³⁴

Mr Potter wrote to the Minister on 26 August 2002, arguing that Ngāti Rangitahi had not been fully informed of the Crown settlement offer to Ngāti Tūwharetoa ki Kawerau, and rejected the Crown's view that there was sufficient redress available to satisfy Ngāti Rangitahi claims. Mr Potter had now retained legal counsel. Two days later, counsel for the Wai 996 claimants, Deborah Edmunds, wrote to OTS providing an interim response on two points of law, and seeking an extension to the deadline for providing comments to the Minister's provisional decision. The extension was granted, as were two further extensions, prolonging the period for final comments to 9 September 2002. The Crown received no final response from counsel, however.¹³⁵ On 2 October 2002, OTS again briefed the Minister on cross-claims to the Ngāti Tūwharetoa settlement. Officials recommended that the Crown proceed with the settlement, and the Minister agreed. Letters were sent the following day to all cross-claimants advising them of the Minister's final decision.

Mr Hodge stated in his brief of evidence that this process had demonstrated that the Crown had 'actively consulted' with all claimants it had identified as having cross-claims issues with the Ngāti Tūwharetoa settlement.¹³⁶

In response to the objections made by Ngāti Rangitahi in early 2002, the Crown undertook further research to ensure that it was fully informed of the competing interests. This not only included Ms Hickey's work, but also the Crown's attempts to accompany Ngāti Rangitahi on site visits (which were rejected). The documentary research undertaken was summarised in Ms Hickey's memoranda and filed in Mr Hodge's document bank. Ms Hickey's first memorandum was actually prepared as an 'aide memoire' for the hui with Ngāti Rangitahi on 21 February 2002.¹³⁷ According to Mr Hodge, the date of the version filed in his document bank had been updated automatically recording the date on which that copy was printed out. Thus the research summarised in the memorandum had not been undertaken in the short timeframe criticised by Dr Gilling. Mr Hodge stated that the memorandum drew on research and information gathered throughout the negotiations with Ngāti Tūwharetoa ki

134. Document A23, paras 44-45

135. Ibid, paras 46-47

136. Ibid, para 11

137. Ibid, para 69

Kawerau, but particularly over the previous year as the Crown informed itself of the competing interests in the Matatā area. It was necessary, he continued, that OTS historians familiarise themselves with all relevant research reports and primary historical sources in consideration of cross-claims issues relating to settlements.

Mr Hodge also pointed out that the Ngāti Tūwharetoa area of interest as outlined in the deed was 'not intended to establish or recognise claimant group boundaries. Where maps are used in the settlement process, it is for specific administrative purposes, such as determining the area where protocols with government departments might apply.'¹³⁸ The area of interest did not indicate any exclusive area for Ngāti Tūwharetoa ki Kawerau. This was apparent from the fact that the Ngāti Tūwharetoa area of interest lies almost entirely within the Ngāti Awa area of interest. In cross-examination, counsel for Wai 996 queried whether the Crown was aware that third parties, particularly members of Māori communities, might see the area of interest set out in the deed as amounting to a tribal rohe. Mr Hodge conceded that maps outlining areas of interest could be subject to different interpretations. He believed this was something for the Crown to consider in the future.¹³⁹

Mr Hodge's brief of evidence discussed the policy considerations guiding the Crown in granting redress, and provided an overview of the proposed specific redress.

Mr Hodge said that, where cross-claims cannot be resolved by the claimant groups themselves, the Crown decides whether or not it is appropriate to continue with the offers of redress that are the subject of the cross-claims. The cross-claimants are given the opportunity to provide information relating to their overlapping claims. The Crown considers this information and, if deemed necessary, seeks further information either through site visits, land and archaeological surveys, further research, or facilitating meetings between claimants.¹⁴⁰ In making any decision on cross-claims, the Crown is guided by two general principles: the Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations; and the Crown's wish to provide appropriate redress to other claimant groups and achieve a fair settlement of their claims.¹⁴¹ Mr Hodge explained that the redress fell into two broad categories: fiscal/commercial redress, and cultural redress. Cultural redress was 'intended to meet the cultural rather than economic interests of a claimant group by recognising customary and traditional interests of the claimant group within their area of interest. This can be achieved through a variety of different instruments.'¹⁴²

Mr Hodge's brief outlined the items of redress offered to Ngāti Tūwharetoa ki Kawerau and contested by Ngāti Rangitahi. He explained why the Crown considered the various items of redress were necessary to the settlement, and should not be withdrawn. The effect on

138. Ibid, para 164

139. Oral evidence of Peter Hodge, 5 February 2003, tape 3, side A

140. Document A23, paras 60–61

141. Ibid, para 63

142. Ibid, para 57

Ngāti Rangitahi was minimised because where exclusive interests in land were to be transferred, more land was available for transfer to other deserving groups. Where non-exclusive redress was concerned, such as involvement on advisory committees and various protocols and statutory acknowledgements, these were available to other groups too when they came to settle.

3.5 SUBMISSIONS OF NGĀTI TŪWHARETOA KI KAWERAU

Submissions filed by counsel on behalf of Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee were supplementary to the Crown's submissions. Counsel wished to focus on those issues identified by the Tribunal as its main concerns, yet also wanted to respond to some of the allegations made by, or on behalf of, Ngāti Rangitahi relating to Ngāti Tūwharetoa ki Kawerau interests. In particular, it was not clear from the evidence filed by the Wai 996 claimants whether or not they acknowledge that Ngāti Tūwharetoa ki Kawerau has any interests within its area of interest as defined in the initialled deed of settlement. Counsel submitted that 'Ngāti Tūwharetoa rejects the allegation that it does not have interests in all of the land contained in the Ngāti Tūwharetoa Area of Interest'.¹⁴³ Counsel pointed out that this has been acknowledged in at least some of the evidence filed by Ngāti Rangitahi, has been recognised by the Tribunal in the *Ngāti Awa Raupatu Report*, and subsequently by the Crown.

Counsel also disputed the allegation made by the Wai 996 claimants that Ngāti Rangitahi would suffer significant and irreversible prejudice if the proposed settlement is implemented. Counsel argued that the settlement package reached between the Crown and Ngāti Tūwharetoa ki Kawerau did not preclude recognition of the interests of other iwi and hapū, including Ngāti Rangitahi, in future Treaty settlements. The cultural redress to be provided under the deed has been framed so as to recognise Ngāti Tūwharetoa ki Kawerau interests, but leave a large amount of land available for other groups' settlements if this was found appropriate. The non-exclusive redress offered to Ngāti Tūwharetoa ki Kawerau 'provides for protection of the interests of other hapū or iwi who have associations with those areas if the Crown and the other relevant groups wish to negotiate a settlement in relation to those areas at a later stage'.¹⁴⁴ Counsel drew the Tribunal's attention to the passage in the *Ngāti Awa Settlement Cross-Claims Report* where the Tribunal commented that 'the cultural redress seems to us to be structured in a way that appropriately recognises Ngāti Awa's mana, but leaves room for other groups to be recognised in future settlements'.¹⁴⁵ Counsel urged on the Tribunal the view that the same could be said in this case, and that Ngāti Rangitahi concerns

143. Document A20, para 2.8

144. Ibid, para 3.11

145. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report*, p 83

about the protection of their mana and narrowing of the asset base for subsequent settlement were misplaced.

Counsel disputed the claim by Ngāti Rangitahi that it is a denial of natural justice to proceed with a settlement involving assets within an inquiry district that is subject to pending inquiries by the Tribunal. Similar arguments, counsel noted, were raised and rejected in other cross-claims inquiries.

The main issue of this hearing was whether, in entering into the Ngāti Tūwharetoa ki Kawerau settlement, the Crown's process to protect Ngāti Rangitahi wāhi tapu sites was robust in Treaty terms, and whether suitable redress is available for Ngāti Rangitahi for future settlement if this is considered appropriate. Counsel submitted that sufficient redress was available and that none of the wāhi tapu sites listed by Mr Potter appeared to be in the areas of exclusive redress offered to Ngāti Tūwharetoa ki Kawerau.¹⁴⁶ Where land was to be vested in the Ngāti Tūwharetoa ki Kawerau Governance Entity, provision had been made for the protection of wāhi tapu.

Counsel concluded her submissions by stating that Ngāti Rangitahi had not demonstrated that their wāhi tapu would go unprotected as a result of the settlement between Ngāti Tūwharetoa ki Kawerau and the Crown, and that suitable redress is available to Ngāti Rangitahi in the event that their claims are proven. The Tribunal should therefore not make any recommendation that would impact on the Ngāti Tūwharetoa ki Kawerau settlement.¹⁴⁷

3.6 EVIDENCE FOR NGĀTI TŪWHARETOA KI KAWERAU

Two statements of evidence were filed in support of counsel's submissions, one by Graham Kahu Te Rire, and the other by Rae Beverley Adlam.

3.6.1 Evidence of Graham Te Rire

Mr Te Rire is the chairman of Te Rūnanga o Tūwharetoa ki Kawerau and member of the Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee. Mr Te Rire outlined the negotiation process between the Crown and Ngāti Tūwharetoa ki Kawerau, and the traditional rohe of his iwi, as set out in the Ngāti Tūwharetoa area of interest in the initialled deed of settlement.¹⁴⁸

He asserted that the Ngāti Tūwharetoa people have historically had a significant association with the Matatā area and links with many early hapū there. The present day Oniao Marae at Matatā pre-dated the Ngāti Rangitahi Marae.¹⁴⁹ Mr Te Rire disputed that Ngāti

146. Document A20, para 4.3

147. Ibid, para 5.1

148. Document A22, para 3.1–3.2

149. Ibid, para 3.3

3.6.2

Rangitihī has a historical association to many of the areas that the Wai 996 claimants argue used to belong solely to that iwi. Rather, ‘Ngāti Rangitihī only arrived in the Matatā district as a consequence of Crown grants in the 1860s for Military Service. The only links that members of Ngāti Rangitihī would have to these areas is through their genealogy links with [Ngāti] Tūwharetoa.’¹⁵⁰

Mr Te Rire then outlined the association between Ngāti Tūwharetoa ki Kawerau and the various sites to which redress in the initialled deed of settlement relates. Of the cultural redress items in and around Matatā, Mr Te Rire stated that Whakapaukōrero was a sacred maunga for Ngāti Tūwharetoa ki Kawerau, containing several pā sites. This included the pā site belonging to Te Rangihouhiri II, a direct descendant of Rakei-Uekaha, who was a son of Tūwharetoa. According to Mr Te Rire, the area was used extensively as a direct communication path between Ngāti Tūwharetoa whanaunga in ancient times.¹⁵¹ This validated the transfer of the fee simple title to Whakapaukōrero. Its location, with other culturally significant sites, in the Matatā scenic reserve, also justified the provision of two appointments to the joint advisory committee over the balance of the reserve.

Mr Te Rire claimed that Te Wahieroa ‘is the point where the Ngāti Tūwharetoa raupatu boundary line meets Te Moana-nui-a-kiwa before heading out to the Rurima rocks’.¹⁵² This site was significant to Ngāti Tūwharetoa ki Kawerau as it was the landing place for many waka when Ngāti Tūwharetoa ancestors came to the mahinga kai in the area. The proposed vesting of the 10-hectare Te Wahieroa site in the Ngāti Tūwharetoa ki Kawerau Governance Entity acknowledged these links.

Mr Te Rire also drew attention to the associations between Ngāti Tūwharetoa ki Kawerau and Te Awa a Te Atua. This area was especially significant to Ngāti Tūwharetoa tāngata, being the landing place of the ancestral Tūwharetoa waka, Te Arawa and Te Paepae-ki-Rarotonga. According to the history told by the elders of Ngāti Tūwharetoa tāngata, when the Te Arawa waka arrived at Aotearoa, it entered the outlet of Te Awa a Te Atua at Te Mihi-marino Matatā. It then travelled up the river to a place called Kopuakuku, where the canoe was beached. The tohunga on the waka, Ngatoroirangi, was the first person off that waka to touch land. Tūwharetoa descends from Ngatoroirangi.¹⁵³ The provision in the initialled deed of settlement of a one-hectare nohoanga entitlement at Te Awa a Te Atua, and the establishment of a joint advisory committee in relation to the area, recognised these associations.

3.6.2 Evidence of Rae Beverley Adlam

This evidence comments on the overall negotiation process between the Crown and Ngāti Tūwharetoa ki Kawerau. Ms Adlam is chief negotiator for the Wai 62 claim. With regard to

150. Document A22, para 3.6

151. Ibid, para 3.13

152. Ibid, para 3.8

153. Ibid, paras 3.24–3.25

the term ‘Ngāti Tūwharetoa (Bay of Plenty)’ being used in the initialled deed, she pointed out that this came about because OTS required her claimant group to be clearly distinct from the Ngāti Tūwharetoa iwi in the Taupō region. Additionally, the Wai 62 claimants wanted to avoid the perception that the settlement would only relate to those people living in the Kawerau township rather than the wider, traditional Kawerau district.¹⁵⁴ The iwi and its claim, she contended, extends beyond the Kawerau township boundaries and into the Bay of Plenty generally, and that the term used to define her iwi in the initialled deed of settlement makes this distinction.

Ms Adlam maintained that the Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee has had a ‘good, amicable relationship with Ngāti Rangitahi’.¹⁵⁵ She stated that, during the negotiation process, Ngāti Tūwharetoa ki Kawerau has had several hui-ā-iwi at Matatā concerning the settlement and its contents, and Ngāti Rangitahi members could have attended.¹⁵⁶ She also claimed that Ngāti Rangitahi had generally supported Ngāti Tūwharetoa in seeking to resolve its grievances against the Crown. She was surprised that these proceedings had eventuated.

3.7 SUBMISSIONS OF NGĀTI AWA

As discussed earlier, counsel for Ngāti Awa had stated in a memorandum that Ngāti Awa had interests in areas claimed in Wai 996.¹⁵⁷ He attended the hearing in order to maintain a watching brief, and did not seek to make submissions or cross-examine witnesses. During the hearing, however, counsel pointed out that any comments or recommendations made by the Tribunal in relation to the redress offered to Ngāti Tūwharetoa ki Kawerau could potentially affect the Ngāti Awa settlement.¹⁵⁸ He expressed concern at some of the assumptions being made by the Tribunal in relation to the association between Ngāti Rangitahi and Matatā, as Ngāti Awa had very strong opinions regarding its relationship with Matatā and with lands as far west as Ōtamarākau. Ngāti Awa would have firm views on any possible Tribunal observation that Matatā was a core area of interest of Ngāti Rangitahi. This was especially so, counsel argued, considering that Ngāti Awa still has a presence there today. Ngāti Awa’s presence there would be stronger were it not for the Crown’s actions, from which Ngāti Rangitahi has directly benefited. Ngāti Awa would possibly file evidence in the context of the Rotorua district inquiry, where the substance of these issues would be heard. Judge Wainwright reassured counsel that the Tribunal would not make any direct recommendations on items of redress in the Ngāti Awa settlement, but that she could not guarantee that there would not be

154. Document A21, paras 3.3–3.6

155. Ibid, para 4.1

156. Ibid, para 4.3

157. Paper 2.29, para 2

158. Oral submission of counsel for the Wai 46 and 206 claimants, 5 February 2003, tape 5, side A

reverberations for Ngāti Awa from any comments the Tribunal might make regarding the present case.

3.8 EVIDENCE FOR NGĀTI AWA

Evidence filed on behalf of Ngāti Awa came in the form of a statement by Professor Hirini Moko Mead, chief negotiator for the settlement of the Ngāti Awa historical claims. The purpose of his evidence, he said, was to respond to that filed on behalf of Ngāti Rangitīhi, and particularly Mr Potter's evidence, as it sought 'to cast doubt over the mana whenua of Ngāti Awa in the area to the west of the Rangitaiki River (an area sometimes referred to by Ngāti Awa as the "Western lands")'.¹⁵⁹ Professor Mead outlined in his statement the rohe of Ngāti Awa; the history of occupation of the Western lands; the northern raids and relocations that followed; the post-raupatu settlement of the Western lands; and Ngāti Awa marae and other places of significance in the Western lands.

Professor Mead said that by the late 1700s, the different hapū of Ngāti Awa were well established west of the Rangitaiki River: Ngāi Te Rangihouhiri, Ngāti Tarawaia, Ngā Potiki and Te Tawera were based at Te Awa a Te Atua; Ngāti Hikakino occupied the land along the coast from Te Kaokaoroa to Ōtamarākau; and Ngāti Whakahemo were at Pukehina.¹⁶⁰ Ngāti Awa had no knowledge of Ngāti Rangitīhi ever occupying the Western lands, particularly the coastal areas around Matatā and Ōtamarākau, at any time prior to the raupatu. Rather, Ngāti Rangitīhi are thought of as having their principal kāinga in the Tarawera region.¹⁶¹

One of the results of the raupatu and the Compensation Court process that followed, Professor Mead contended, was the award of Ngāti Awa lands to the tribes that had assisted the Crown in its actions against Ngāti Awa. Thus, the ownership of lands around Matatā and Ōtamarākau ended up being shared by Ngāti Rangitīhi and other tribes. This ownership, he strongly believed, was based not on traditional associations with these lands, but were in recognition of the military assistance provided to the Crown.¹⁶² Professor Mead pointed to many places of cultural significance to Ngāti Awa west of the Rangitaiki River and concluded his statement by rejecting the proposition that Ngāti Rangitīhi had any traditional interests in the coastal areas of Matatā and Ōtamarākau. These were part of the traditional rohe of Ngāti Awa through its various hapū, only lost to Ngāti Awa as a result of the raupatu.¹⁶³

159. Document A25, para 5

160. Ibid, para 15

161. Ibid, para 16

162. Ibid, paras 23, 25

163. Ibid, para 55