

CHAPTER 1

BACKGROUND TO THE URGENT HEARING

1.1 THE NGĀTI AWA RAUPATU REPORT

The Waitangi Tribunal released its *Ngāti Awa Raupatu Report* in October 1999 after hearing the Ngāti Awa and other claims over almost a year and a half in 1994 and 1995. The report urged the settlement of all historical matters with Ngāti Awa and Ngāti Tūwharetoa ki Kawerau.¹ It focused on the raupatu or confiscation of some 245,000 acres of land from the hills beyond the original course of the Tarawera River to Ōhiwa Harbour, and the ensuing land reorganisation and relocations.

While concentrating on the claim by Dr Hirini Mead for 21 Ngāti Awa hapū – the largest claim in terms of land area and number of people involved – the report also considered a claim on behalf of Ngāti Tūwharetoa ki Kawerau. These people, as their name implies, are based in the Kawerau district. They alleged that if it was proper for the Crown to have confiscated any land at all, it should not have been from them, as they remained neutral in the events to which the confiscation pertained. They adamantly denied any involvement in rebellion, although the Tribunal regarded this point as having little bearing as confiscation of land on this basis was in any event unjustified: the confiscation was contrary to the Treaty of Waitangi. Ngāti Awa and Ngāti Tūwharetoa ki Kawerau had valid Treaty claims in respect of the confiscation of lands as far east as Ōhiwa Harbour.²

The Ngāti Awa people claimed that the Ngāti Tūwharetoa ki Kawerau hapū are part of Ngāti Awa and that these should be included in their settlement. The Tribunal found that, while Ngāti Tūwharetoa ki Kawerau ‘could stand with Ngāti Awa if they chose, they also have a separate identity’, and that ‘there should be a separate settlement with [Ngāti] Tūwharetoa ki Kawerau on account of their distinctive lines’.³ The Tribunal supported a separate settlement with Ngāti Tūwharetoa ki Kawerau not only on the basis of their distinct lineage, but also because of their different role in the relevant events.⁴

The *Ngāti Awa Raupatu Report* is not a full report on all aspects of the claims that were filed. Both Crown and claimant counsel considered that the main claims – relating to the

1. Waitangi Tribunal, *The Ngāti Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p ix

2. *Ibid*, pp 3–4

3. *Ibid*, pp ix, 3

4. *Ibid*, p 131

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raupatu and contemporary land allocations – were capable of settlement without the Crown concluding its evidence on these matters, and asked the Tribunal to complete a report on the main issues. The Tribunal did not investigate claims relating to the Native Land Court’s award of lands outside the confiscation boundary and the acquisition of some of these lands by the Crown. These claims related mainly to the districts of Rotoehu, Matahina and Tara-wera, yet the Tribunal considered that claims in respect of these lands should nevertheless be included within the settlement of the raupatu.⁵

The report noted that other iwi could establish legitimate customary links to some of the land affected by the Ngāti Awa claim. The Tribunal did not think it essential or desirable to define boundary lines on this matter, but did ‘think it necessary that each group acknowledge the customary associations of the others. We would be suspicious of claims that any particular area was held exclusively by one group throughout the whole of history.’⁶ Furthermore, for various reasons, the Tribunal was not able to report on the claims of other parties.⁷ The Tribunal reserved the rights of those other groups, stating that ‘the finalisation of their claims, if proven, will be proposed in other inquiries still to be undertaken’.⁸

The Tribunal stated, however, that ‘the complex pattern of overlapping claims and boundaries need not inhibit a settlement’.⁹ Such were the divisions resulting from the confiscations, the land returns and introduction of individual ownership through the Native Land Court, that the Tribunal considered that ‘agreements are probably not presently possible. The effect of requiring full agreements will only exacerbate the divisions caused by the wrongs already done.’¹⁰

1.2 THE REDRESS OFFERED TO NGĀTI TŪWHARETOA KI KAWERAU

The Crown and Ngāti Tūwharetoa ki Kawerau entered into negotiations for the settlement of all Ngāti Tūwharetoa ki Kawerau historical claims in 1997. The parties decided not to enter into a heads of agreement but agreed to the scope of the redress package in December 2000. The Crown made a settlement offer in January 2001 that comprised a Crown apology, fiscal and commercial redress, cultural redress, and an overall settlement quantum. The Office of Treaty Settlements (OTS) defined the settlement as covering all Ngāti Tūwharetoa ki Kawerau claims ‘arising out of the Treaty of Waitangi, the principles of the Treaty of Waitangi, statute, common law (including customary law and aboriginal title), fiduciary duty, or

5. Waitangi Tribunal, *The Ngāti Awa Raupatu Report*, p 8

6. *Ibid*, p 135

7. *Ibid*, p 4

8. *Ibid*, p 10

9. *Ibid*, p 131

10. *Ibid*, p 136

otherwise', from or relating to acts or omissions committed before 21 September 1992 by or on behalf of the Crown, or by or under legislation.¹¹

The proposed package was subject to the 'Crown confirming that all overlapping claim issues in relation to any part of the settlement redress have been addressed to the satisfaction of the Crown'.¹² The mandated Ngāti Tūwharetoa ki Kawerau negotiators, Te Rūnanga o Tūwharetoa ki Kawerau Claims Committee, agreed to the Crown's offer in February 2001 as a basis for a deed of settlement. On 2 October 2002, the Office of Treaty Settlements advised the Minister in Charge of Treaty of Waitangi Negotiations that all cross-claims issues regarding the proposed settlement had been 'satisfactorily addressed'.¹³ The Minister informed cross-claimants the following day of her final decision that there was now 'no need to modify the redress package' and that the 'Crown will proceed with its settlement offer' to Ngāti Tūwharetoa ki Kawerau.¹⁴ A deed of settlement was initialled between the Crown and the claims committee on 17 October 2002, and this was to be put to the Ngāti Tūwharetoa ki Kawerau people for the purpose of ratification in early 2003.

The offer includes the following categories and items of redress:

Cultural redress:

- ▶ Te Wahieroa, Te Kaukahiwi o Tirotirowhetū and Whakapaukōrero reserves: transfer of fee simple titles subject to existing reserve status and continued public access;
- ▶ Te Atua Reretahi: transfer of fee simple title subject to a conservation covenant;
- ▶ Otitapu Lookout: transfer of fee simple title subject to a protected private land agreement to protect conservation values;
- ▶ establishment of a joint advisory committee in respect to the Matatā scenic reserve and Te Awa a Te Atua (Matatā wildlife refuge reserve);
- ▶ statutory acknowledgements and deeds of recognition in relation to the Rotomā Forest conservation area, the Lake Rotomā scenic reserve, the Lake Tāmurenui wildlife management reserve, and parts of the Tarawera and Rangitaiki Rivers;
- ▶ a geothermal statutory acknowledgement over the Kawerau geothermal system;
- ▶ establishment of protocols in the Ngāti Tūwharetoa ki Kawerau area of interest to promote effective working relationships on matters of cultural importance to that iwi with various Government departments;
- ▶ grant of a one-hectare renewable nohoanga (temporary camping) entitlement within the Matatā wildlife refuge reserve; and
- ▶ an ōwhakatihi (overlay classification) and acknowledgement of values and association in respect to the Parimahana scenic reserve.

11. Paper 2.17, annex 1, para 35

12. Ibid, annex 1, paras 3 (a), 20 (a)

13. Document A23(a), annex 41, para 49

14. Ibid, annex 42

The Crown characterises some of the items of cultural redress offered to Ngāti Tūwharetoa ki Kawerau as exclusive redress (redress available to only one claimant group), whereas others are non-exclusive redress (redress that can be offered to more than one group).¹⁵

Commercial redress:

- ▶ an offer for purchase by Ngāti Tūwharetoa ki Kawerau of approximately 844 hectares of licensed Crown forest land within the Rotoehu West Crown forestry licence;
- ▶ a right of first refusal over a Crown-owned geothermal bore; and
- ▶ a right to purchase certain properties that were in the Crown's land bank.

A total redress quantum of \$10.5 million was established to settle all Ngāti Tūwharetoa ki Kawerau historical claims.

On 29 March 2001, OTS forwarded for comment the Crown's settlement offer to Ngāti Tūwharetoa ki Kawerau to those claimants it had identified as having overlapping interests. It sought to ascertain whether there were any cross-claims issues regarding particular items of redress in the settlement offer requiring further consideration. Cross-claimants were invited to make any comments by 30 April 2001.

1.3 THE WAI 524 NGĀTI RANGITIHI TARAWERA LANDS CLAIM

The Wai 524 claim was registered in July 1995. It is a claim made on behalf of certain prominent members of the tribe (Leith Pirika Comer; Nirai Raureti; William Savage; Marion Amai; Duke Keepa; and Arapeka Tuna) and the 'Ngāti Rangitihi people in general'.¹⁶ The original claim was filed in 'the matter of the land blocks Rotomahana–Parekarangi, Ruawāhia and Rerewhakaaitu', which are land blocks located in the Tarawera basin.¹⁷ Prior to the Tarawera eruption in 1886, Ngāti Rangitihi life and mana was centred on Tarawera Maunga and the surrounding lands. The acts and omissions alleged against the Crown, however, imply a potentially wider geographical ambit than the three blocks mentioned. An amendment of the claim in September 1996 specifically includes two further areas: the Tarawera forests to the west of the Rangitaiki River, and parts of the northern portion of the Kaingaroa State Forest north of State Highway 38.

1.4 THE WAI 996 NGĀTI RANGITIHI INLAND AND COASTAL LAND BLOCKS CLAIM

On 21 March 2002, David Potter and André Paterson filed a statement of claim with the Waitangi Tribunal on behalf of themselves and Ngāti Rangitihi relating to the confiscation

15. For a discussion on items of cultural redress in and around Matatā, and their characterisation as exclusive or non-exclusive redress, see section 4.1.

16. Wai 524 ROI, claim 1.1

17. Ibid

of both inland and coastal lands from Matatā to Ōtamarākau, the use and pollution of the Rangitaiki and Tarawera rivers, and the taking of various lands at Pikowai for the purposes of public works. A set of decisions made at a hui of Ngāti Rangitihi held at Rangiaohia Marae on 9 March 2002 was appended to the statement of claim. These included informing OTS that the lands that Ngāti Rangitihi 'lay claim to and have an interest in should not be included in the Ngāti Awa and [Ngāti] Tūwharetoa settlements', and that 'there will be a request to the Waitangi Tribunal for an urgent hearing'.¹⁸ The claim was registered on 6 August 2002 as Wai 996. The claim area straddles the current boundaries of the Waitangi Tribunal's Rotorua, Urewera and Kaingaroa district inquiries.¹⁹

1.5 THE APPLICATION FOR URGENCY

On 11 November 2002, counsel for the Wai 996 claimants applied for an urgent hearing in respect of the proposed Crown settlement with Ngāti Tūwharetoa ki Kawerau on the basis that its implementation would cause 'significant and irreversible prejudice to Ngāti Rangitihi'.²⁰ The application, although stating that Ngāti Rangitihi did not wish to obstruct or impede the settlement between the Crown and Ngāti Tūwharetoa ki Kawerau, declared that the settlement offer related to assets and locations within the traditional rohe of Ngāti Rangitihi. The applicants felt concerned that areas of historical and cultural importance could be offered by the Crown to any persons other than Ngāti Rangitihi. Counsel for the Wai 996 claimants stated that his clients had attempted to indicate to the Crown how the proposed settlement would prejudice Ngāti Rangitihi. Yet the Crown, counsel asserted, had 'failed to have regard to these concerns and protests despite the fact that it does not have the benefit of Tribunal research, evidence, Inquiry or Report into the Ngāti Rangitihi lands and claims; nor has it had regard to the fact that an Inquiry into these matters is about to commence'.²¹

Claimant counsel stated that their clients had been advised that the Crown's settlement policies regarding the offer to Ngāti Tūwharetoa ki Kawerau had been guided by the Waitangi Tribunal's observations as set out in the *Ngāti Awa Raupatu Report*. This was of particular concern to the claimants as they 'took no part in this enquiry and thus have had no opportunity to give evidence to the Tribunal on their traditional boundaries or to influence the findings of the report in any manner'.²² As the claimants understood that this report was now being used as the basis for entering into settlements that would have significant impact on their rights and interests, counsel felt that the Crown was not in a position to conclude that any settlement with Ngāti Tūwharetoa ki Kawerau would not prejudice any other group

18. Claim 1.1

19. Paper 2.1

20. Paper 2.4, para 5

21. Ibid, para 26

22. Ibid, para 33

with interests in the areas covered by the proposed deed. This amounted to not only a denial of natural justice, but also a breach of the Treaty of Waitangi. The claimants requested an urgent hearing to prove the prejudice which would result to Ngāti Rangitahi if the Crown proceeded with the settlement offer.

In a memorandum and directions dated 18 November 2002, the Acting Chairperson of the Waitangi Tribunal authorised Judge Carrie Wainwright to determine the application.²³ Three days later, Judge Wainwright directed counsel for the Wai 996 claimants, the Crown, and Ngāti Tūwharetoa ki Kawerau to file memoranda with the Tribunal by 4 December 2002 outlining their respective positions in relation to the request for urgency.²⁴

In their memorandum in response to Judge Wainwright's directions, counsel for the applicants contested virtually every item of redress being offered to Ngāti Tūwharetoa ki Kawerau. Yet counsel emphasised that they did not want the 'inquiry to become fixated solely on the provisions of the [Ngāti] Tūwharetoa ki Kawerau deed of settlement or on the specific redress offered to [Ngāti] Tūwharetoa ki Kawerau or what might or might not be offered to Ngāti Rangitahi'.²⁵ The claimants, counsel stated, instead felt more concerned about the current developments in the Crown's Treaty settlements policy and the process by which it came to make the offer to Ngāti Tūwharetoa ki Kawerau. Those issues of process were, first, the Crown proposing a deed of settlement without a comprehensive Waitangi Tribunal district inquiry involving all affected iwi and hapū; and, secondly, that the offer was made with no significant consultation or discussion with Ngāti Rangitahi.²⁶ Counsel contended that the correspondence and material provided by the Crown to Ngāti Rangitahi did not sufficiently inform the claimants about the settlement offer. The inadequate consultation and the Crown's making a settlement offer without a Tribunal district inquiry had important implications not only for Ngāti Rangitahi but for all iwi and hapū throughout Aotearoa.

Both the Crown and Ngāti Tūwharetoa ki Kawerau opposed the application. The Crown's opposition was on the grounds that the Tribunal had already heard similar challenges to the relevant Crown policies during the recent Ngāti Awa Settlement Cross-Claims Inquiry. That Tribunal concluded that the policy of the Crown of negotiating settlements in advance of the Tribunal having heard and reported on all cross-claims is not a breach of the Treaty or its principles.²⁷

Crown counsel contended that the Crown had been engaged in a lengthy consultation process with Ngāti Rangitahi and the Wai 996 claimants. They had ample opportunity to inform the Crown of their concerns about the proposed Ngāti Tūwharetoa ki Kawerau settlement. The Crown had fully informed itself of all issues put forward by the Wai 996 claimants and had fairly weighed the respective interests of Ngāti Rangitahi and Ngāti Tūwharetoa ki

23. Paper 2.7

24. Paper 2.8

25. Paper 2.14, para 19

26. *Ibid*, paras 17–18

27. Paper 2.17, para 57

Kawerau, seeking, where possible, to structure a settlement package that minimises any negative impact on Ngāti Rangitihi. It would be inappropriate for the initialled deed of settlement to be made subject to further mediation and/or discussion, and no additional investigation was required.²⁸

Counsel for Ngāti Tūwharetoa ki Kawerau concurred, opposing the application on the basis that ‘discussion or mediation on the settlement with Ngāti Rangitihi will disrupt and delay the ratification process and the settlement process generally, with no useful purpose’.²⁹ The Ngāti Tūwharetoa ki Kawerau Claims Committee was ‘surprised’ by the request for an urgent hearing as it considered there had ‘been plenty of opportunity’ for Ngāti Rangitihi to raise their concerns.³⁰ Counsel for Ngāti Tūwharetoa ki Kawerau also considered that the issues being raised by the Wai 996 claimants were similar to those already heard by the Ngāti Awa settlement cross-claims Tribunal, and that that ‘Tribunal’s finding applies equally to the Ngāti Tūwharetoa settlement’.³¹ Moreover, the proposed settlement ‘does not preclude the interests of other iwi and hapū, including Ngāti Rangitihi, being recognised in future Treaty settlements negotiated with the Crown. In that sense, the Ngāti Tūwharetoa redress is “non-exclusive”’.³² Each redress item was a key element in the overall package and any removal or alteration would result in a settlement of diminished value to Ngāti Tūwharetoa ki Kawerau. Counsel stated that her clients had already made ‘several concessions in relation to the redress’.³³ She thus concluded that the Wai 996 application for urgency should not affect the proposed settlement with the Crown in any way, and that a hearing was not necessary.³⁴

In directions dated 20 December 2002, Judge Wainwright, having considered the filed memoranda that ‘helpfully amplified the respective positions of the parties’, granted to the applicants an urgent hearing of one day’s duration at the Tribunal’s office in Wellington.³⁵ The hearing date was 5 February 2003.³⁶

1.6 FURTHER DEVELOPMENTS

Less than a week before the date appointed for the urgent hearing, the Tribunal received a letter from a new participant. In the letter (dated 30 January 2003), John Kahukiwa informed the Tribunal that he was about to be appointed counsel for the Wai 524 claim described above (see s1.3), lodged by Leith Comer and others on behalf of themselves and Ngāti

28. Ibid, paras 113, 120–121

29. Paper 2.15(a), para 13

30. Ibid, para 10

31. Ibid, para 18

32. Ibid, para 17

33. Ibid, para 47

34. Ibid, para 50

35. Paper 2.18

36. Paper 2.21

Rangitihī. Mr Kahukiwa stated that as his clients were Ngāti Rangitihī, they were also an ‘interested party in this urgent proceeding’, and he requested that he be provided with the memoranda filed in support of and in opposition to the Wai 996 application so as to assess whether or not he would seek leave to attend the urgent hearing.³⁷

Counsel for the Wai 996 claimants, Ms Edmunds, then responded to Mr Kahukiwa’s letter in a letter of her own.³⁸ In it, she emphasised to the Tribunal the importance of the forthcoming hearing being allowed to proceed smoothly, and questioned the mandate of Mr Kahukiwa to act for Wai 524. She said the Ngāti Rangitihī Claims Committee had instructed her to act for Wai 524 as well,³⁹ and that some of the trustees of the Ruawāhia 2B Trust supported this instruction. In addition, no new legal counsel had been officially appointed since David (Rawiri) Rangitauira stood down as counsel for Wai 524 some time earlier. Counsel for Wai 996 doubted whether Mr Kahukiwa had proper authority to act for Wai 524. Given the confused state of internal mandate, ‘it would be questionable as to whether any proper instructions could be obtained’.⁴⁰

Mr Kahukiwa responded by stating that he had been formally appointed counsel for Wai 524 by one of the named claimants, Mr Comer.⁴¹ As the Wai 996 urgent hearing concerned the rangatiratanga of Ngāti Rangitihī, Mr Kahukiwa’s clients would be especially interested in the proceeding, and he again asked to be served with all documents filed in the Wai 996 urgent application so he could consider whether or not to seek leave to participate. Mr Kahukiwa believed that until a proper tribal hui had been convened to clarify matters of representation, it was probably best that the ‘two camps’ be permitted to continue to ensure representation of all of the Ngāti Rangitihī interests.⁴²

The presiding officer sought to clarify who Mr Kahukiwa was actually representing, and what their position was in regard to the Wai 996 urgency. She convened a teleconference on the morning of 4 February 2003. The participants were counsel for the Crown, counsel for Ngāti Tūwharetoa ki Kawerau, counsel for the Wai 996 claimants, counsel for Ngāti Awa, and Mr Kahukiwa. Mr Kahukiwa stated that he was of the understanding that he was now acting counsel for Wai 524 after being appointed by Mr Comer on 30 January 2003 to act on his behalf and those wishing to be represented by that claim. This included Henare Pryor, Whaimutu Dewes, and their respective whānau. Mr Kahukiwa was unable to clarify the

37. Paper 2.27(a)

38. Paper 2.30. Ms Edmunds requested in her letter that it not be placed on the public record of the Tribunal because the content related to ‘internal Ngāti Rangitihī mandate’ and went ‘to issues of reputation of other counsel’. The letter was addressed to the registrar. It related to matters then under consideration by the presiding officer, so the registrar referred the letter to the presiding officer, and she read it. Accordingly, it is right that the letter be entered on the record. Counsel cannot divulge information to the Tribunal that is material to their work and then expect it to be kept secret (except where the information is tapu, which places it in a special category).

39. Paper 2.30

40. Ibid

41. Paper 2.31

42. Ibid

views of his clients regarding the urgency. Mr Kahukiwa had not seen the Wai 524 and Wai 996 statements of claim. Counsel for Wai 996, after voicing concern about the intervention of another party so late in the piece, stated that at least two trustees of the Ruawāhia 2B Trust (Reuben Perenara and André Paterson) wanted her to act for Wai 524. The Ruawāhia lands are among those specifically mentioned in the Wai 524 statement of claim. Ms Edmunds said that disagreement had arisen within the Ngāti Rangitīhi Claims Committee in November 2002, eventually resulting in a schism. This committee was charged with overseeing the Wai 524 claim. The internal divisions meant that nobody could now claim to represent Wai 524 in its entirety.

Judge Wainwright told the parties that the urgency would proceed on the basis that the representation issues would not be resolved by the time of the hearing (the following day). She requested that Mr Kahukiwa fully inform himself of the various issues relating to the Wai 524 and Wai 996 claims, and ascertain the views of his clients regarding the Wai 996 claimants' contesting of the Ngāti Tūwharetoa ki Kawerau settlement offer. Judge Wainwright directed Mr Kahukiwa to file a memorandum on those views. The memorandum, filed on the day of the hearing, took the matter no further. Mr Kahukiwa maintained that he had had insufficient opportunity to consider the documents and obtain instructions.⁴³

Ngāti Awa also sought to be involved at a late stage. In a memorandum dated 4 December 2002, counsel for Ngāti Awa (Wai 46 and 206) asked the Tribunal to note that Ngāti Awa had interests in the areas that were subject to the Wai 996 claim. It was not anticipated that Ngāti Awa would be an active participant in the hearing but counsel reserved Ngāti Awa's position in this regard.⁴⁴

Then, after reviewing the evidence filed on behalf of the Wai 996 claimants, counsel for Ngāti Awa revised his position. At a pre-hearing teleconference on 29 January 2003, he said that he would be submitting a memorandum and supporting brief of evidence in response to evidence filed in support of the Wai 996 claimants. He expressed concern about 'a number of observations about the nature and extent of Ngāti Awa interests in the claim area', and especially of some comments that he considered were 'disparaging of Ngāti Awa'.⁴⁵ The presiding officer granted Ngāti Awa the leave sought.

43. Paper 2.35

44. Paper 2.16, para 3

45. Paper 2.29, para 4

