

THE
PORT NICHOLSON BLOCK
URGENCY REPORT

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URGENCY REPORT
PRE-PUBLICATION VERSION

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PREFACE

This is a pre-publication version of the *Port Nicholson Block Urgency Report*. As such, parties should expect that, in the published version, headings and formatting may be adjusted, typographical errors rectified, footnotes checked (and corrected where necessary), and maps modified, added, or replaced.

The Honourable Dr Pita Sharples
Minister of Māori Affairs



The Waitangi Tribunal
141 The Terrace
WELLINGTON

and

The Honourable Christopher Finlayson
Minister for Treaty of Waitangi Negotiations
Parliament Buildings
WELLINGTON

31 July 2012

E ngā Minita, tēnā kōrua

Enclosed is the *Port Nicholson Block Urgency Report*, the outcome of an urgent Waitangi Tribunal hearing held in Wellington from 12 to 14 June 2012.

The claimants are the Port Nicholson Block Settlement Trust, which represents Taranaki Whānui interests in the Wellington region.

In May of 2008, the Crown was simultaneously involved in negotiating the Treaty of Waitangi claims of Taranaki Whānui and Ngāti Toa. At that time, Taranaki Whānui agreed to a request by the Crown to release the Wellington Central Police Station from their proposed settlement package so that it could in turn be offered to Ngāti Toa.

Taranaki Whānui claimed that, in return for the release of the police station, the Crown committed itself to recognise and uphold the 'mana whenua of Taranaki Whānui over the Port Nicholson block' by not offering any other properties in the block as commercial or cultural redress to Ngāti Toa.

The historical claims of Taranaki Whānui were subsequently settled by the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act 2009 ('the settlement Act').

Meanwhile, the Crown has for a number of years been in negotiations with Ngāti Toa. At the date of this report, Ngāti Toa were expected to initial their deed of settlement in the near future.

We have not upheld the claim by Taranaki Whānui that they agreed to the release of the Wellington Central Police Station from their settlement package on the Crown's express undertaking that no property, other than the police station, would be offered to Ngāti Toa anywhere in the entire Port Nicholson block.

However, we did find that the Crown gave Taranaki Whānui an undertaking that, in exchange for agreeing to the release of the police station from their settlement package,

no other property would be offered to Ngāti Toa in the Wellington central business district (CBD) as commercial or cultural redress. Furthermore, we went on to find that the Crown broke that undertaking and, in so acting, breached Treaty principles.

On the issue of no cultural redress for Ngāti Toa in the Wellington CBD, we stopped short of making a recommendation, since Taranaki Whānui knew before signing their deed of settlement that Ngāti Toa had been offered a plaque at Parliament and that this offer of cultural redress had been subsequently withdrawn.

On the issue of no commercial redress for Ngāti Toa in the Wellington CBD, we have recommended that the Crown:

- ▶ review the offer of rights of first refusal to Ngāti Toa over Crown properties and New Zealand Transport Agency administered properties in Wellington City; and
 - ▶ if necessary, amend the offer of rights of first refusal to ensure that no commercial properties are made available via that mechanism to Ngāti Toa in the Wellington CBD.
- If, as a result of implementing those recommendations, the commercial redress package currently on offer to Ngāti Toa is in any way diminished, the Crown should identify and offer alternative substitute commercial redress for Ngāti Toa.

Throughout, we were conscious that Taranaki Whānui's historical claims have been settled. Indeed, the Crown argued before us that we were prevented from making inquiry in this matter based upon ouster provisions in the settlement Act. Furthermore, the Crown argued that Taranaki Whānui's deed of settlement laid out the full terms of the settlement between themselves and Taranaki Whānui and that any pre-settlement representations no longer matter.

In carrying out this inquiry, we were required to interpret the meaning of an entire agreement clause contained in the deed of settlement. We have the jurisdiction to do so, it being expressly preserved by section 10(5) of the settlement Act. The entire agreement clause contains a reference to the Treaty of Waitangi. We consider that that reference is a reminder to all parties that throughout the negotiation process they were, and remain today, Treaty partners. The reference to the Treaty in the deed of settlement is a reminder to Taranaki Whānui and the Crown that they cannot contract out of the Treaty and the obligations that flow from it – the Treaty principles. Thus, we analysed the assurances and the actions taken in relation to them by the Crown for their consistency with the Treaty and with Treaty principles.

In the final chapter, we concluded by making some observations about the negotiation process, in particular concerns we have about the 'silo system' employed by the Office of Treaty Settlements when in negotiation with overlapping groups. We also go on to make observations concerning the vagueness of the language used at times by officials from the

Office of Treaty Settlements and the subsequent confusion that can arise if the meaning of the language used is not made clear.

Nāku noa,

A handwritten signature in black ink, appearing to be 'S. Clark', written in a cursive style.

Judge Stephen Clark
Presiding Officer

ABBREVIATIONS

app	appendix
CA	Court of Appeal
ch	chapter
comp	compiler
doc	document
DOC	Department of Conservation
ed	edition, editor
fn	footnote
fol	folio
ltd	limited
NIWA	National Institute of Water and Atmospheric Research
no	number
NZLR	<i>New Zealand Law Reports</i>
NZTA	New Zealand Transport Agency
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
pt	part
PNBCT	Port Nicholson Block Claims Team
PNBST	Port Nicholson Block Settlement Trust
RFR	right of first refusal
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
sec	section (of this report, a book, etc)
v	and
vol	volume

‘Wai’ is a prefix used with Waitangi Tribunal claim numbers.

Unless otherwise stated, footnote references to claims, documents, memoranda, and papers are to the Wai 2235 (Port Nicholson) record of inquiry, a select copy of which is reproduced in the appendix. A full copy is available on request from the Waitangi Tribunal.

CHAPTER 1

BACKGROUND TO THE URGENT INQUIRY

1.1 INTRODUCTION

This Waitangi Tribunal report is the outcome of an urgent inquiry into Crown actions during and after negotiations to settle the historical claims of Taranaki Whānui ki te Upoko o te Ika (Taranaki Whānui) in the Port Nicholson block. The historical claims concerning this area were examined in the Tribunal's *Te Whanganui a Tara* report, published in 2003.¹

Taranaki Whānui settled their historical claims with the Crown in 2009. The settlement with Ngāti Toa Rangatira (Ngāti Toa), on the other hand, is not yet completed. The negotiations to settle the historical claims of Taranaki Whānui were undertaken by the Port Nicholson Block Claims Team (PNBCT). In the course of the negotiations, the PNBCT agreed to release the Wellington Central Police Station from its proposed settlement package. This enabled the Crown to offer the police station to Ngāti Toa as commercial redress. The claimants allege that, in return for the release of the police station, the Crown 'committed itself to recognise and uphold the mana whenua of Taranaki Whānui over the Port Nicholson Block by not offering any other property within the Block to Ngāti Toa or any other iwi as commercial or cultural redress.'² The Crown responds that 'no such wide ranging undertaking was given to secure the release of the Police Station.'³ The Crown also submits that the Tribunal is, in any case, proscribed from inquiring into these matters by provisions in the Taranaki Whānui settlement legislation and deed of settlement.⁴ We discuss these arguments in chapters 4 and 5.

At the time of writing our report, Ngāti Toa were expected to initial a deed of settlement no sooner than 31 July 2012. Their settlement package will include a number of items of commercial and cultural redress in the Port Nicholson block. The claimants alleged that, in offering Ngāti Toa this redress, the Crown had broken the undertakings that it made to Taranaki Whānui to secure the release of the police station. They argued that this constituted a breach of Treaty principles that would be irreversible once the deed of settlement between the Crown and Ngāti Toa was finalised and the redress enacted.

1. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003)

2. Amended Statement of Claim 1.1.1(a), 27 March 2012, p 14

3. Crown Statement of Response, 27 April 2012, 1.3.1, p 9

4. Crown Statement of Response, 27 April 2012, 1.3.1, pp 1–3

PORT NICHOLSON BLOCK URGENCY REPORT: PRE-PUBLICATION

1.2

Judge Stephen Clark granted the application for urgency on 13 February 2012. He limited the scope of the inquiry to what commitments or undertakings, if any, were made by the Crown surrounding the release of the police station, as we set out in more detail in section 1.5.⁵

1.2 THE PARTIES IN THIS INQUIRY

1.2.1 The claimants

There are 10 named claimants in this inquiry: Sir Ralph Heberley Ngatata Love, Sir Paul Alfred Reeves, Rebecca Elizabeth Mellish, Kevin Hikaia Amohia, Neville McClutchie Baker, June Te Raumange Jackson, Catherine Maarie Amohia Love, Hinekehu Ngaki Dawn McConnell, Mahara Okeroa, and Hokipera Jean Ruakere.⁶ The claimants are the trustees of the Port Nicholson Block Settlement Trust (PNBST), which is the post-settlement governance entity for Taranaki Whānui.

In their first statement of claim, the claimants alleged that the Crown gave Taranaki Whānui undertakings not to offer any other properties to Ngāti Toa within a two-mile radius of Wellington Harbour.⁷ In their amended statement of claim, the claimants alleged that these undertakings extended to the entire Port Nicholson block, and they argued that, in giving these undertakings, the Crown ‘committed itself to recognise and uphold the mana whenua of Taranaki Whānui over the Port Nicholson Block by not offering any other property within the Block to Ngāti Toa or any other iwi as commercial or cultural redress.’⁸ The claimants alleged that, as a result of the Crown’s failure to negotiate in good faith, the Taranaki Whānui deed of settlement signed with the Crown was at risk of being undermined and that Taranaki Whānui would suffer ‘prejudice and loss as a result of this breach.’⁹ That prejudice and loss included the prevention of their ‘exercise of tino rangatiratanga and the rights otherwise protected and guaranteed to them under the Treaty’, the prevention of ‘their ahi ka status recognised in the manner that the Crown undertook to recognise it during the course of the Taranaki Whānui settlement negotiations’, and the subsequent undermining of their ahi kā status, deed of settlement, and mana.¹⁰

The PNBST suggested a number of possible forms of relief, including:

- ▶ a recommendation to the Crown not to proceed with the Ngāti Toa letter of agreement until ‘full and adequate consultation’ had been carried out with Taranaki Whānui on the proposed redress and any necessary amendments;

5. Memorandum 2.5.10, 13 February 2012, para 64

6. Sir Paul Reeves passed away in August 2011, some 20 months after the claim was lodged.

7. Statement of Claim 1.1.1, 17 December 2009, p 8

8. Amended Statement of Claim 1.1.1(a), 27 March 2012, p 14

9. Amended Statement of Claim 1.1.1(a), 27 March 2012, p 17

10. Amended Statement of Claim 1.1.1(a), 27 March 2012, p 18

- ▶ findings on the Crown's failure to adhere to its commitments and undertakings throughout negotiations with Taranaki Whānui and the resulting Treaty breaches; and
- ▶ directions to revise or cancel the Ngāti Toa settlement until those failures had been addressed.¹¹

1.2.2 Other parties

The Crown is the other main party to this inquiry. In addition, Ngāti Toa are an interested party to this inquiry because the outcome of this urgent hearing could affect their Treaty settlement negotiations. They are currently nearing the end of the process to settle their historical claims in the upper South Island and the lower North Island. Ngāti Toa are concerned that 'these proceedings are an unwarranted interference with the conclusion of [their] settlement negotiations and have been made without any foundation.'¹² They claim that there has been no breach of the principles of the Treaty of Waitangi, and they further submit that the delay caused to their settlement has caused them 'significant prejudice', which will be further added to should the Tribunal make recommendations to amend the Crown's offer of redress.¹³

1.3 EVENTS LEADING TO THE URGENT INQUIRY

In this section, we examine the events leading up to this inquiry in some detail. We keep in mind the following key dates:

- ▶ 13 December 2007: Taranaki Whānui signed an agreement in principle (AIP) with the Crown.
- ▶ 7 May 2008: The Associate Treaty Negotiations Minister, Shane Jones, sent a letter to Professor Sir Ngatata Love proposing the release of 'one commercial redress property in the Wellington CBD to Ngāti Toa Rangatira'.
- ▶ 15 May 2008: Aroha Thorpe, on behalf of the PNBCT, sent an email to Daran Ponter of the Office of Treaty Settlements (OTS) setting out four conditions for the release of the Wellington Central Police Station.
- ▶ 26 June 2008: Taranaki Whānui initialled their deed of settlement.
- ▶ 1 August 2008: Taranaki Whānui ratified their deed of settlement.
- ▶ 8 August 2008 (evening): Sir Ngatata Love and the PNBCT received a letter dated 9 August 2008 from Paul James, the director of OTS, informing them of the details of Ngāti Toa's commercial and cultural redress in the Port Nicholson block.

11. Amended Statement of Claim 1.1.1(a), 27 March 2012, p 19–20

12. Closing Submission on Behalf of Ngāti Toa, 29 June 2012, 3.3.6, p 3

13. Closing Submission on Behalf of Ngāti Toa, 29 June 2012, 3.3.6, p 5

- ▶ 19 August 2008: Taranaki Whānui signed a deed of settlement with the Crown.
- ▶ 11 February 2009: Ngāti Toa signed a letter of agreement with the Crown.

Between March 1991 and May 1999, the Waitangi Tribunal heard 13 claims relating to the area around Te Whanganui-ā-Tara (Wellington Harbour or Port Nicholson), including Heretaunga (the Hutt Valley) and the south-west coast. The district inquired into was defined by the boundaries of the New Zealand Company's deed of purchase for Port Nicholson, as extended in 1844 to the south-west coast. These boundaries define what is referred to as the Port Nicholson block. The Tribunal's 2003 report on the inquiry identified Crown Treaty breaches in the Port Nicholson block that affected Ngāti Toa, Te Ātiawa, Ngāti Tama, Ngāti Rangatahi, Taranaki, and Ngāti Ruanui.¹⁴ Excerpts of the Tribunal's findings and recommendations are provided at the end of this chapter (see pages 14 to 19). Noting 'the relative complexity of the issues and the interrelationships of Maori groups affected by a number of our Treaty breach findings', the Tribunal recommended parties enter into negotiations with the Crown.¹⁵

The first groups to enter into negotiations were Te Ātiawa, Ngāti Tama, Taranaki, Ngāti Ruanui, and other iwi from the Taranaki area, who combined to collectively negotiate their claims under the general banner of Taranaki Whānui ki te Upoko o te Ika. Taranaki Whānui gave the PNBCT a mandate to negotiate a settlement with the Crown in September 2003. The PNBCT entered into negotiations with the Crown in July 2004.¹⁶ The Crown recognised the mandate of Te Kaha, the Ngāti Toa Rangatira negotiating team, to negotiate a settlement in November 2005. Ngāti Toa entered into negotiations with the Crown in September 2007, more than three years after the PNBCT had entered negotiations.¹⁷ This difference in negotiation schedules assumes an important place in the current inquiry.

OTS established two teams to conduct negotiations on behalf of the Crown with the PNBCT and Ngāti Toa, employing what was referred to in evidence to this inquiry as a 'silo' approach. In practical terms, this meant that the two negotiation teams dealing with Taranaki Whānui and Ngāti Toa were kept largely separate. Each team was aware only of scant details of the negotiations that the other was conducting in order to maintain the confidentiality of the negotiations.

In the *Tāmaki Makaurau Settlement Process Report*, the Tribunal criticised such arrangements in the context of negotiations dealing with overlapping claims as arousing suspicion and providing 'the seeds of resentment, both towards the mandated group and the

14. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), p xxvi

15. *Te Whanganui a Tara* report, p xxvi, p 493

16. Taranaki Whānui Deed of Settlement of Historical Claims, 18 August 2008, document A11(b), p 6

17. Ngāti Toa, Submission on the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Bill, 17 February 2009, document A24(a), number 233, pp 1814

Crown.¹⁸ Daran Ponter, an OTS negotiator in the Taranaki Whānui negotiations, told the Tribunal during hearings that by mid-2007 OTS was transitioning to regionally based teams in response to the Tribunal's criticisms.¹⁹ He also claimed that these were some of the last negotiations to be conducted under a silo approach.²⁰ We will comment more on the operation of the silo approach in these negotiations in our concluding chapter.

Despite the silo approach, OTS was aware of the need to balance overlapping claims. Throughout the negotiation process, Taranaki Whānui consistently asserted that they had exclusive mana whenua in the entire Port Nicholson block and were therefore the only group entitled to receive redress within the block. The Crown consistently challenged this assertion. Dean Cowie (OTS's manager of policy–negotiations) outlined the Crown's position in a letter sent to Sir Ngatata Love in February 2007 stating its opinion that 'Taranaki Whānui had dominant customary rights around the rim of Te Whanganui-a-Tara, including the current Wellington City, Petone, Waiwhetu and Wainuiomata areas'. The Crown would be 'seeking to provide exclusive redress . . . in these districts.'²¹ He also warned that

My advice to Ministers . . . is that they should not agree with the PNBCT's belief that Taranaki Whānui has exclusive rights in the Port Nicholson Block. I consider that the findings of the Waitangi Tribunal Wellington District Report clearly support my view that the block is overlapped with other groups, particularly Ngāti Toa.²²

According to the claimants, the issue of exclusive mana whenua was placed on the backburner after a change in the Taranaki Whānui negotiation team in July 2007, when Mr Ponter and Brian Roche replaced Mr Cowie and Warren Wairau.²³ Attention instead focused on moving the negotiations through to the AIP.²⁴

The PNBCT and the Crown signed an AIP on 13 December 2007. The land on which the Wellington Central Police Station stands was included in this offer as a sale and leaseback property under a right-of-first-refusal (RFR) mechanism.²⁵ The continuing tension over Taranaki Whānui's claim of exclusive mana whenua in the block was evident in clause 10, which proposed that the deed of settlement, rather than include an agreed statement over the exclusive area of interest, simply record the differing views of each party.²⁶ However, the

18. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 88

19. Transcript 4.1.2, p 153

20. Transcript 4.1.2, p 158

21. The phrase 'exclusive redress' and what was meant by it is discussed in further detail in sections 3.41 and 6.4.

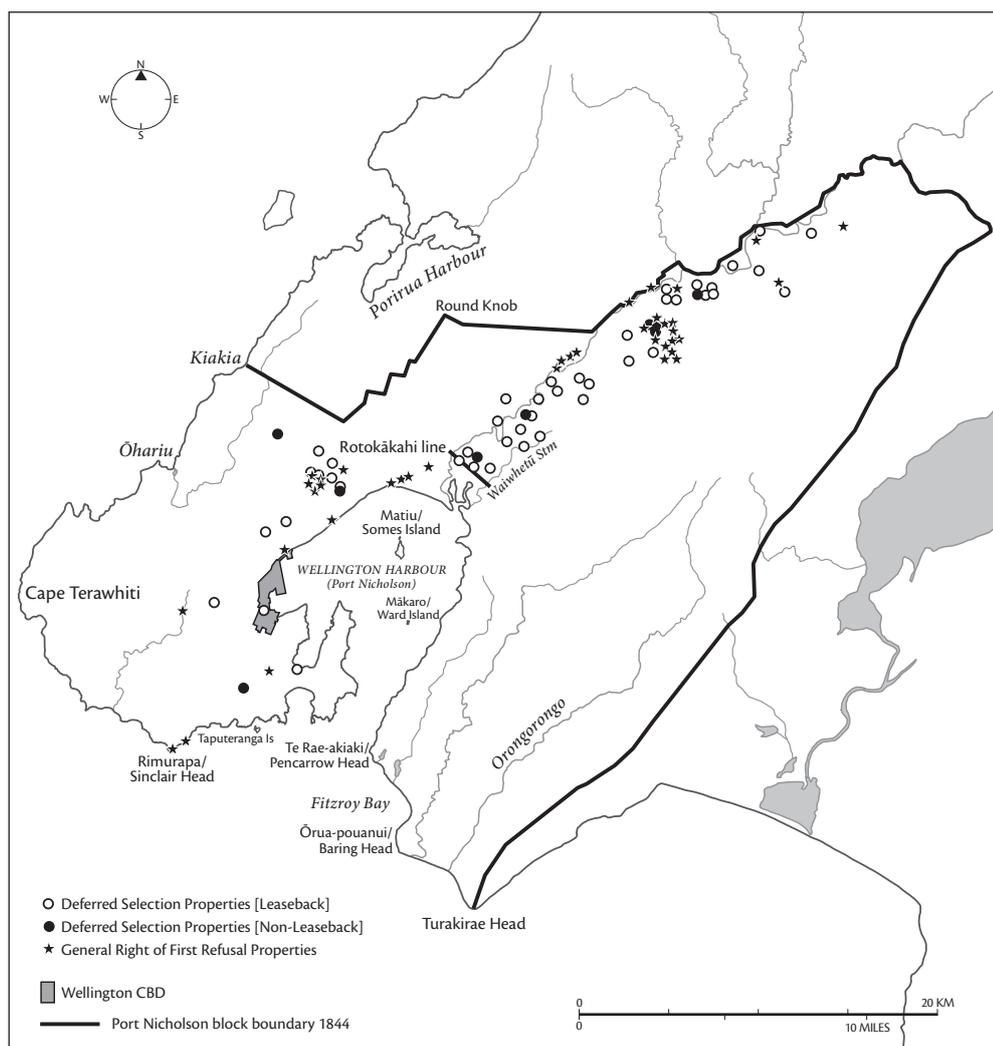
22. Dean Cowie to Sir Ngatata Love, 14 February 2007, document A24(a), number 39, p 149

23. Brief of Evidence of Sir Ngatata Love, 27 March 2012, document A11, p 4

24. Agreement in Principle for the Settlement of Historical Claims of Taranaki Whānui (Wellington) in relation to the Port Nicholson Block (Wellington District), document A24(a), number 52, pp 288–516

25. Agreement in Principle for the Settlement of Historical Claims of Taranaki Whānui (Wellington) in relation to the Port Nicholson Block (Wellington District), document A24(a), number 52, pp 374, 380

26. Agreement in Principle for the Settlement of Historical Claims of Taranaki Whānui (Wellington) in relation to the Port Nicholson Block (Wellington District), document A24(a), number 52, p 290



Map 1: Taranaki Whānui commercial settlement properties in the Port Nicholson block

Source: Documents A18; A18(b); Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp 2, 197

geographical spread of the proposed redress – largely confined to the Wellington CBD and the area between the Petone foreshore and the Rotokākahi line (see map 1) – suggested that the Crown’s view was prevailing.

Ngāti Toa, who were not informed of the details of Taranaki Whānui’s AIP until the day the agreement was signed, were concerned about several aspects of the agreement. They were particularly alarmed by Taranaki Whānui’s statement of exclusive mana whenua, so much so that they considered challenging the AIP in the Waitangi Tribunal if the statement were to remain.²⁷ Both the Crown and Taranaki Whānui were eager to avoid such litiga-

27. OTS, Aide memoire for Minister for Treaty of Waitangi Negotiations, 7 April 2008, document A24(a), number 99, pp 844–845

tion.²⁸ Ngāti Toa were also concerned by some of the proposed items of redress. While they received information about Taranaki Whānui's proposed redress later than they would have preferred, that information did allow Ngāti Toa to see what redress Taranaki Whānui were being offered in the Port Nicholson block, to object to those offers, and to see what items remained available for their own settlement. After objections from Ngāti Toa, Taranaki Whānui agreed to remove items listed in their AIP, including the placement of pouwhenua on culturally significant sites owned by the Crown and the renaming of Cook Strait to Raukawa Moana.²⁹ Nonetheless, Ngāti Toa continued to feel that there were very few valuable properties remaining in the Wellington area for their own settlement package. This was the context in which the deal over the Wellington Central Police Station was proposed and formulated, as will be set out in more detail in chapter 2.

After the Taranaki Whānui AIP was signed, there was a concerted effort to conclude the settlement in a much shorter timeframe than usual. In his evidence before the Tribunal, former OTS director Paul James stated that it typically took '18 months or two years to draft a Deed, and then another 12 months to prepare the legislation'.³⁰ In the case of the Taranaki Whānui settlement, it was proposed to prepare both the deed and the legislation in less than a year, as is evident in the timetable provided to the PNBCT at a 1 April 2008 meeting:

Cabinet approves of deed of settlement	23 June
Deed of settlement initialled	26 June
Ministers approve governance entity and deed ratification	11 August
Legislation available for introduction	29 August ³¹

There was some suggestion in evidence during hearings that this haste was motivated by Taranaki Whānui's desire to settle before the general election in November 2008.³² Irrespective of the motivations of either party, it is clear that both supported the timetable. It is also clear that this reduced timetable placed considerable strain on the parties and the settlement process. The Crown and Taranaki Whānui were still negotiating details of the deed of settlement up until 18 August 2008, the day before it was signed.

In the midst of this activity, Taranaki Whānui continued to be unaware of the details of the negotiations between Ngāti Toa and the Crown and any possible settlement package being offered to Ngāti Toa. In a letter to Sir Ngatata Love in late June 2008, Dr Michael Cullen, the Minister for Treaty of Waitangi Negotiations, wrote that 'the Crown has only recently made its offer of redress to Ngāti Toa and still awaits their response'. As a result, he

28. OTS, Suggested Talking Points Meeting with Professor Ngatata Love, 3 April 2008, document A24(a), number 97, p 834

29. OTS, Report to Minister for Treaty of Waitangi Negotiations, 14 August 2008, document A24(a), number 214, p 1654

30. Transcript 4.1.2, p 252

31. PNBCT, Meeting minutes, 1 April 2008, document A24(a), number 91, p 798

32. Transcript 4.1.2, p 221

reported, relevant information about that redress could not be provided to the PNBCT until after the initialling of its deed of settlement on 26 June 2008.³³ The initialling occurred on schedule and, after consultation throughout New Zealand and Australia, the proposed deed of settlement was ratified on 1 August 2008.

Taranaki Whānui did not learn the details of Ngāti Toa's offer until the evening of 8 August 2008, just 11 days before they were scheduled to sign their deed of settlement with the Crown. We will consider the implications of this short time period in chapter 4. In a letter dated 9 August 2008, Mr James set out the commercial and cultural redress being offered to Ngāti Toa and proposed a process for a non-challenge agreement between Taranaki Whānui and Ngāti Toa. He acknowledged that 'the timeframes for this process are very tight'.³⁴ This was true. In addition to final negotiations regarding the settlement, Taranaki Whānui was in a state of transition, winding up the PNBCT and establishing the PNBST as its post-settlement governance entity on 11 August 2008. The same day, Sir Ngatata Love wrote a letter to OTS expressing his displeasure with the 'impossible position' that the PNBCT had been placed in by the proposed timetable. He complained that 'The goodwill that has been experienced in this negotiation and the fact that the Port Nicholson Block Agreement in Principle has been available for eight months clearly shows the imbalance and unfairness of what you are asking.'

Sir Ngatata Love went on to warn that the PNBST intended to decide that day whether it was necessary to cancel the proceedings on 19 August.³⁵ While ultimately deciding to continue with the settlement, Taranaki Whānui informed the Crown around 13 August 2008 that they would not provide an assurance of non-challenge until a formal AIP between Ngāti Toa and the Crown was signed.³⁶ On 19 August 2008, Taranaki Whānui and the trustees of the PNBST entered into a deed of settlement with the Crown. The enabling legislation was introduced into Parliament on 9 September and had its first reading on 23 September, after which it was referred to the Māori Affairs Select Committee.

Ngāti Toa and the Crown signed a letter of agreement on 11 February 2009, which included commercial redress in the Port Nicholson block, as shown in map 2. It also included cultural redress in the Port Nicholson block and payments made both in recognition of Ngāti Toa's former maritime empire and for capacity building.³⁷ The Crown sent the PNBST a copy of the agreement on 16 February 2009, and the trustees met on 11 March to consider the proposed settlement.³⁸ Sir Ngatata Love wrote to Mr James on 26 March expressing the trust's concerns at elements of the commercial and cultural redress on offer to Ngāti Toa in the Port Nicholson block. He also requested a meeting with Ngāti Toa and

33. Dr Michael Cullen to Sir Ngatata Love, mid-late June 2008 (undated), document A24(a), number 156, p 1191

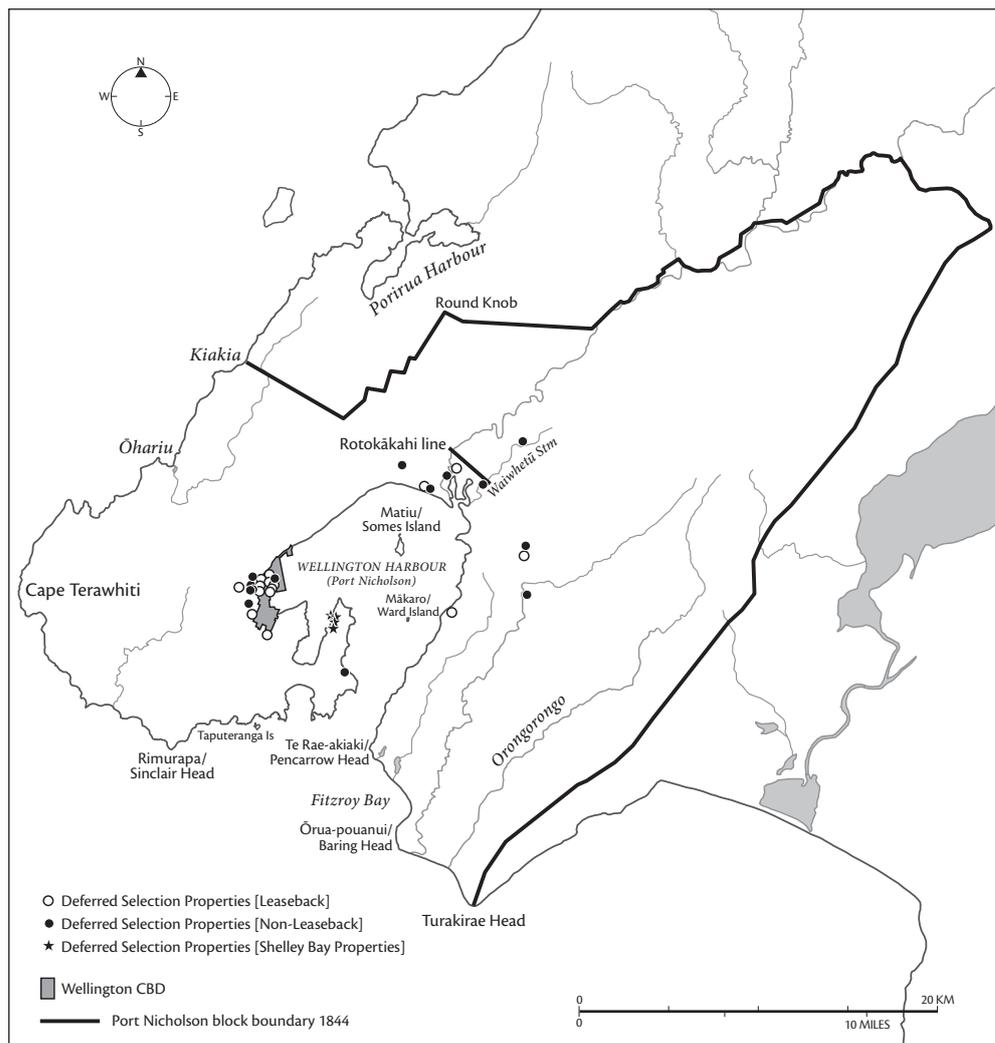
34. Paul James to Sir Ngatata Love, 9 August 2008, document A24(a), number 210, pp 1627–1633

35. Sir Ngatata Love to Paul James, 11 August 2008, document A24(a), number 211, pp 1635–1636

36. Ben White to Deborah Edmunds, email, 13 August 2008, document A24(a), number 213, p 1640

37. Ngāti Toa Rangatira letter of agreement, 11 February 2009, document A24(a), number 230, p 1756

38. PNBST, Trustees Papers, 11 March 2009, document A24(a), number 238, pp 1856–1858



Map 2: Ngāti Toa commercial settlement properties offered in the Port Nicholson Block

Source: Documents A19; A19(a); Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp 2, 197

the Crown negotiating teams for Ngāti Toa and Taranaki Whānui.³⁹ No such meeting was held, although a meeting without Ngāti Toa took place on 15 June 2009.⁴⁰

Meanwhile, the Māori affairs select committee reported back on the Port Nicholson settlement legislation on 10 June 2009, and just over two months later, on 5 August, it came into force as the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims

39. Sir Ngatata Love to Paul James, 26 March 2009, document A24(a), number 243, pp 1909–1913

40. PNBST, File Note from meeting with OTS’s Ngāti Toa negotiation team, 15 June 2009, document A24(a), number 246, p 1927

Settlement Act 2009. Ngāti Toa made a submission on the settlement Bill, but did not challenge the settlement.⁴¹

On 2 October 2009, Matiu Rei, Ngāti Toa's executive director, wrote to the PNBST seeking a consultation meeting on the letter of agreement signed in February.⁴² On 15 November, legal counsel for the PNBST sent a letter to the Treaty Negotiations Minister, Christopher Finlayson, requesting a halt in the settlement until their 'serious concerns about the proposed terms of settlement with Ngati Toa' were addressed. Such action was necessary as the trust's efforts to engage with OTS had been 'very unsatisfactory'.⁴³ Just over a month later, on 17 December 2009, the PNBST filed an application for urgency with the Waitangi Tribunal. On 22 December, an undated letter from Mr Rei was emailed to the PNBST noting the lack of response to his October letter. Mr Rei said that the PNBST's application for an urgent Tribunal hearing was the first time he had heard that Taranaki Whānui had concerns about Ngāti Toa's proposed settlement package.⁴⁴

In the final months of 2009, Ngāti Toa were also seeking to include in their settlement package properties owned by the New Zealand Transport Agency (NZTA) around the Wellington inner-city bypass.⁴⁵ Some of these properties had been turned down by Taranaki Whānui or were omitted from their settlement package due to technical issues relating to legal title. Properties in the latter category were included in the Taranaki Whānui settlement once the legal issues were resolved.⁴⁶ Ngāti Toa objected to this and considered that the only NZTA property they were offered was too expensive. In the end, the Crown agreed to offer Ngāti Toa an RFR over all NZTA properties acquired between 2 September 2009 and 2 September 2019 and all properties sold by the Crown in Wellington City within four years of the settlement date.⁴⁷ We deal with the circumstances surrounding this offer in further detail in chapter 5.

Throughout 2010, the Crown made attempts to appoint a facilitator to resolve the disagreement between Taranaki Whānui and Ngāti Toa.⁴⁸ The PNBST suggested that it was comfortable with such a process, provided that it was able to meet independently with Mr

41. Ngāti Toa, Submission on the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Bill, 17 February 2009, document A24(a), number 233, pp 1815

42. Matiu Rei to Sir Ngatata Love, 2 October 2009, document A24(a), number 255, p 1960

43. Ian Hay to Minister for Treaty of Waitangi Negotiations, 5 November 2009, document A24(a), number 260, pp 1974–1976

44. Matiu Rei to Sir Ngatata Love, 22 December 2009, document A24(a), number 268, pp 2017–2018

45. Baden Vertongen to Justine Smith, 3 November 2009, document A24(a), number 259, p 1971

46. OTS, Briefing paper to the Minister for Treaty of Waitangi Negotiations, 4 December 2009, document A24(a), number 264, pp 2000, 2004

47. OTS, Briefing paper to the Minister for Treaty of Waitangi Negotiations, 17 December 2009, document A24(a), number 266, pp 2011–2013

48. OTS, Report to Minister for Treaty of Waitangi Negotiations, 2 February 2010, document A24(a), number 271, p 2030; also Paul James to Sir Ngatata Love, 19 February 2010, doc A24(a), number 278, pp 2065–2066, and Paul James to Matiu Rei, 19 February 2010, doc A24(a), number 279, p 2068

James first.⁴⁹ Ngāti Toa, however, rejected the proposal outright on the basis that it was ‘difficult to see how a mediation process can be fair and equitable when one party’s position is protected by a Deed of Settlement and legislation.’⁵⁰ Pat Snedden was appointed as the Minister’s representative to facilitate a resolution of the issues on 14 June 2010. He held a meeting with the PNBST on 9 February 2011.⁵¹ By April 2011, Ms Thorpe, on behalf of the PNBST, was expressing concern that there had been no further contact since that meeting, despite the rumoured impending finalisation of Ngāti Toa’s deed of settlement.⁵² A further meeting was held on 16 June 2011, where Mr Snedden informed the PNBST that the offer of a parliamentary plaque as cultural redress for Ngāti Toa was ‘off the table’. The PNBST agreed that litigation might not be the best way forward but did not rule it out.⁵³ A series of meetings between Taranaki Whānui and OTS over the following months failed to make any headway. In response, the PNBST revived its urgency application in September 2011.

1.4 THE INQUIRY PROCESS

The application for urgency was initially filed with the Waitangi Tribunal on 17 December 2009. Judge Stephen Clark was appointed presiding officer on 21 December 2009.⁵⁴ After an initial telephone conference on 23 December, the application was deferred on the basis of indications from all parties that further consultation and engagement would be undertaken.⁵⁵ After the attempts at resolution described above failed, the application was revived on 21 September 2011. Judge Clark set down timetable directions for the filing of further evidence and submissions on 28 September.⁵⁶ Submissions were filed with the Tribunal on behalf of the PNBST on 7 October. Counsel for Ngāti Toa and the Crown filed memoranda opposing the application for urgency on 18 October. After a judicial telephone conference was held on 18 November, Judge Clark directed the Crown to file further evidence and documentation on the issue of whether or not it had made commitments and undertakings in return for the release of the Wellington Central Police Station.⁵⁷ The Crown filed further material in December 2011, and the parties were given the opportunity to respond

49. Tim Saunders to Pat Snedden, email, 16 February 2010, document A24(a), number 274, p 2038; Sir Ngatata Love to Paul James, 22 February 2010, doc A24(a), number 280, p 2070

50. Baden Vertongen to Paul James, 26 February 2010, document A24(a), number 281, p 2072

51. Aroha Thorpe to Paul James, email, 24 August 2010, document A24(a), number 290, p 2111; Aroha Thorpe to Peter Galvin, email, 17 May 2011, document A24(a), number 291, p 2113

52. Aroha Thorpe to Peter Galvin, email, 17 May 2011, document A24(a), number 291, p 2113

53. Pat Snedden to Peter Galvin, email, 16 June 2011, document A24(a), number 293, pp 2119–2120

54. Memorandum 2.5.1, 21 December 2009

55. Memorandum 2.5.2, 23 December 2009

56. Memorandum 2.5.3, 28 September 2011

57. Memorandum 2.5.6, 22 November 2011

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by January 2012.⁵⁸ The Crown filed additional documentation in late January, and the final response from the claimants was received on 2 February.⁵⁹

Judge Clark granted an urgent inquiry on 13 February 2012.⁶⁰ On 22 February, the chairperson of the Waitangi Tribunal, Chief Judge Wilson Isaac, appointed Judge Clark to be the presiding officer for the urgent inquiry, and appointed Sir Douglas Kidd, Basil Morrison, and Sir Tamati Reedy as members.⁶¹

Hearings took place at the Waitangi Tribunal, Wellington, from 12 to 14 June 2012. The claimants were represented by Philip Green, assisted by Michael Doogan. Witnesses for the claimants were Sir Ngatata Love, Rebecca Elizabeth Mellish, and Bruce Farquhar. The Crown was represented at the hearing by Paul Radich and Helen Carrad. Witnesses for the Crown were Daran Ponter, Paul James, and Peter Galvin. Ngāti Toa were represented by Hayden Wilson and Baden Vertongen. The sole Ngāti Toa witness, Matiu Rei, was questioned by the Tribunal but not by counsel.

1.5 THE SCOPE OF THIS INQUIRY

When granting the application for urgency, Judge Clark limited the inquiry to six key questions:

- ▶ At the time that the Wellington Central Police Station was released from the commercial redress package previously offered to the PNBCT what commitments or undertakings, if any, did the Crown provide to Taranaki Whānui and the PNBCT?⁶²
- ▶ If the Tribunal finds as a fact that certain commitments or undertakings were given to the PNBCT, has the Crown broken those commitments or undertakings?
- ▶ If it has, how has it done so and in what manner?
- ▶ Do any of those broken commitments or undertakings (which have yet to be established) breach Treaty principles?
- ▶ If they do, how do they do so and in what manner?
- ▶ If they do, what recommendations if any should be made in relation to this application?⁶³

In a memorandum of 1 June 2012, Judge Clark added three further questions to be considered:

58. Memorandum 2.5.8, 22 December 2011

59. Memorandum 2.5.9, 27 January 2012

60. Memorandum 2.5.10, 13 February 2012

61. Memorandum 2.5.11, 22 February 2012

62. In the context of this report and the discussions that follow we have used the word 'undertaking' to mean a promise made during the course of the settlement negotiations. For additional definitions see Butterworths New Zealand Law Dictionary (6th ed), p 318 and Black's Law Dictionary (9th ed), p 1665

63. Memorandum 2.5.10, 13 February 2012, para 64

- ▶ What prejudice do the claimants allege that they have suffered as a result of a breach of Treaty principles by the Crown?
- ▶ What prejudice, if any, are Ngāti Toa suffering as a result of this application?
- ▶ What prejudice, if any, would Ngāti Toa suffer if the Tribunal made recommendations that items of commercial and cultural redress currently on offer to Ngāti Toa within the Port Nicholson block should be withdrawn?⁶⁴

1.6 THE STRUCTURE OF THIS REPORT

In chapter 2, we provide a more detailed account of the events surrounding the release of Wellington Central Police Station by Taranaki Whānui. In chapter 3, we discuss what commitments or undertakings, if any, the Crown provided to the PNBCT to secure the release of the police station from the Taranaki Whānui commercial redress package. Chapter 4 covers issues around the Tribunal's jurisdiction and the 'entire agreement clause' in the Taranaki Whānui deed of settlement. In chapter 5, we consider the applicability of Treaty principles to the present inquiry. Chapter 6 concludes the report with an examination of both the 'silo' approach employed by OTS for the negotiations with Taranaki Whānui and Ngāti Toa and the vagueness of the language sometimes used by OTS in its negotiations.

64. Memorandum 2.5.23, 1 June 2012, para 25

Summary of *Te Whanganui a Tara* Report's Discussion and Findings on Customary Interests

One of the reasons that the Tribunal has found itself undertaking this urgent inquiry is because of disputes over rights of redress within the Port Nicholson block. Although it is not a core issue for our inquiry, the PNBST in particular sought to broaden the scope of the inquiry into relative rights of redress in the block. In support of their respective positions, the PNBST and Ngāti Toa presented evidence that drew on the Waitangi Tribunal's 2003 report *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District*.

We consider that the PNBST and Ngāti Toa, in presenting their evidence on their respective rights in the block, tended to quote selectively from the *Te Whanganui a Tara* report. We therefore quote extensively here from the discussion, conclusions, and recommendations of the Tribunal in its 2003 report.

In the introduction to its report, the Tribunal assessed the state of customary rights to land in Te Whanganui-ā-Tara and its environs:

The customary law situation at Te Whanganui a Tara and its environs was unique, and particularly complex. By 1840, the raupatu (conquest) of the area contained within the Port Nicholson block was complete, but ahi ka rights were still developing. Into this situation of developing rights came the New Zealand Company and its settlers, who claimed not on the basis of take raupatu or ahi ka but instead through a purported purchase. Because of the unique nature of the situation in Wellington, therefore, the Tribunal's findings in relation to customary law and tenure there should not be seen as applicable to other parts of the country. We find ourselves in the position 160 years later of having to adopt a pragmatic interpretation of customary law – law that has changed considerably in the intervening century and a half. The arrival of the New Zealand Company in 1839 disrupted recently established ahi ka rights, which were still developing. Consequently, take raupatu (right by conquest) is more important in the Port Nicholson block than it may be in other areas, since those with take raupatu at Port Nicholson could still develop ahi ka. The Tribunal must therefore consider who, in 1840, had take raupatu and was developing ahi ka at Port Nicholson.

In this report, we use 'ahi ka' to refer to those areas which a group resided on or cultivated, or where it enjoyed the continuing use of the surrounding resources, provided such occupation or use was not successfully challenged by other Maori groups. 'Take raupatu' will refer to a wider area in which a group had more general rights by virtue of having participated in the conquest of that area, provided the group had sufficient strength to sustain those rights. Where a group had take raupatu, it had the potential to develop ahi ka. Ahi ka is used here only in respect of those areas where a group had established non-contestable rights (albeit perhaps sometimes still developing), rights which were accepted by other Maori. A group could have contestable take raupatu in a shared area such as the Port Nicholson block, but it would have non-contestable ahi ka there only if it were in actual or seasonal occupation of an area, or made use of its resources, and if it were

accepted as having such rights by other Maori groups. In the case of the Port Nicholson block, the potential to develop ahi ka depended on the initial possession of take raupatu, or on a group's relationship to those who had take raupatu.¹

In chapter 2 of its report, the Tribunal examined the Māori occupation of Te Whanganui-ā-Tara and environs to 1840:

2.6.2 Ngati Toa

... Ngati Toa's residence lay outside the Port Nicholson block. However, they lived at Porirua, in close proximity to Wellington; they used resources within Heretaunga and Ohariu; and they controlled hinterland and coastal access from the northwest. For these reasons, the Tribunal considers that at 1840 Ngati Toa had ahi ka in the Porirua basin, parts of Ohariu (other parts of which were used or occupied by Ngati Tama), and parts of Heretaunga. We note that their ahi ka rights were not confined to the area of day-to-day living in the kainga or place of habitation, but extended to other areas of association or influence. Ngati Toa had access by way of a track from Porirua to Heretaunga, which enabled Ngati Rangatahi during the 1830s to convey their tribute of food of various kinds (including eels, and also wood or canoes) to Ngati Toa at Porirua. It also enabled Ngati Rangatahi to give early warning to Ngati Toa should there be any further incursion by Ngati Kahungunu into Heretaunga. In addition, Ngati Toa's take raupatu put them in a position to further establish ahi ka over those lands within the Port Nicholson block where no other group had ahi ka.²

2.6.4 Ngati Tama

... By 1840, Ngati Tama were established at Ohariu and other settlements on the south-west coast, and at Kaiwharawhara and nearby kainga on the western side of Te Whanganui a Tara. The Tribunal considers that Ngati Tama had ahi ka at Te Whanganui a Tara and the southwest coast at 1840, and also had take raupatu, having participated in the conquest of what became the Port Nicholson block.³

2.6.5 Te Atiawa

... The Tribunal considers that Te Atiawa's ahi ka rights are well-established. Te Atiawa created their own ahi ka rights once Ngati Mutunga had departed for the Chatham Islands in 1835 and such rights of Te Atiawa have been reinforced by their continued occupation ever since. Te Atiawa also participated in the general take raupatu as it existed at 1840 through participation in the conquest of Te Whanganui a Tara and environs. Te Atiawa were involved in the conquest of parts of the wider area of Te Upoko o te Ika, and also in parts of the Port Nicholson block.⁴

1. *Te Whanganui a Tara* report, pp 16–17

2. *Te Whanganui a Tara* report, p xxvi, p 41

3. *Te Whanganui a Tara* report, p xxvi, p 42

4. *Te Whanganui a Tara* report, p xxvi, pp 42–43

2.6.6 Taranaki and Ngati Ruanui

... Taranaki and Ngati Ruanui developed ahi ka in the area around Te Aro Pa, and also had take raupatu as participants in the conquest of the Port Nicholson block area.⁵

2.6.7 Take raupatu in Te Whanganui a Tara and environs at 1840

The Tribunal concludes that those with take raupatu to all lands within the Port Nicholson block that were not covered by ahi ka rights at 1840 were the independent groups who were members of the collective which conquered Te Whanganui a Tara and environs: Ngati Toa, Ngati Tama, Te Atiawa, Taranaki, and Ngati Ruanui. This take raupatu gave them the potential to further develop ahi ka within the Port Nicholson block. The extent of the lands covered by take raupatu is discussed in chapter 10. Ngati Rangatahi are not included in the take raupatu to Port Nicholson because, by their own admission, they acted on behalf of Ngati Toa and were not fully independent prior to the arrival of the Crown. Nor are Ngati Mutunga included, as they forfeited their take raupatu when they chose not to reoccupy Port Nicholson as a group after their departure in 1835, and could not re-establish it after the arrival of the Crown's peace in 1840.⁶

2.7 TRIBUNAL FINDING

The Tribunal finds that, at 1840, Maori groups with ahi ka rights within the Port Nicholson block (as extended in 1844 to the south-west coast) were:

- ▶ Te Atiawa at Te Whanganui a Tara and parts of the south-west coast.
- ▶ Taranaki and Ngati Ruanui at Te Aro.
- ▶ Ngati Tama at Kaiwharawhara and environs, and parts of the south-west coast.
- ▶ Ngati Toa at Heretaunga and parts of the south-west coast.

These groups also had take raupatu over the remainder lands of the Port Nicholson block, as to which, see chapter 10.⁷

Chapter 9 considered the interests of Ngāti Toa, Ngāti Rangatahi, and Ngāti Tama in Heretaunga, and the events in that area from 1839 to 1846:

9.2 HERETAUNGA TO 1840

As set out in chapter 2, by 1839 Ngati Tama were living at Kaiwharawhara and Ohariu and environs, and Te Atiawa were living around the shores of Te Whanganui a Tara. Te Atiawa had not established ahi ka in Heretaunga beyond a mile and a half inland from the Petone shore, although both Ngati Tama and Te Atiawa had take raupatu from which they could further develop ahi ka at Heretaunga.⁸

5. *Te Whanganui a Tara* report, p xxvi, p 43

6. *Te Whanganui a Tara* report, p xxvi, pp 43–44

7. *Te Whanganui a Tara* report, p xxvi, p 44

8. *Te Whanganui a Tara* report, p xxvi, p 189

9.7.3 Tribunal finding of Treaty breach in respect of tenths allocation

The Tribunal finds that the Crown failed adequately to recognise, investigate, or take into account the full scale and nature of the Ngati Toa interests in the Port Nicholson block area; that it failed adequately to compensate Ngati Toa for its loss of such interests; and that it failed to ensure that Ngati Toa gained an equitable interest in the rural and urban tenths reserves. As a consequence, the Crown failed to act reasonably and in good faith and failed to protect the customary interests of Ngati Toa in and over the Port Nicholson block and, in particular, Heretaunga, and Ngati Toa were prejudiced thereby.⁹

Chapter 10 examined the ‘McCleverty transactions’, whereby Māori cultivations on ‘settlers’ sections’ were exchanged for other reserve land, and the resulting Crown grant by Governor Grey to the New Zealand Company in 1848:

10.8.5 To whom did the remainder lands belong?

We need to determine who had rights in the 120,626 acres (the ‘remainder lands’) included in Grey’s Crown grant to the New Zealand Company of 27 January 1848 (see map 8). These lands were never sold by Maori, nor were they paid for them . . .

At this point in time, some 150 years after the 1844 deeds of release were signed, it is impossible to determine with any precision the lands in the Port Nicholson block over which Maori had ahi ka rights. The closest the Tribunal can get to resolving this question is to assume that Maori had ahi ka over those lands which were surrendered under the deeds of release as described in the schedule to such deeds, plus the pa, cultivations, urupa, and tenths reserves which were reserved to them.

In the case of Ngati Toa, we have used the same touchstone in section 9.5.1 in concluding that, when in 1845 Te Rangihaeata finally acceded to the November 1844 ‘agreement’, he surrendered Ngati Toa’s ahi ka rights to the lands allotted to the New Zealand Company under the schedule to the 1844 or later deeds of release, subject to the condition that land be reserved for Ngati Rangatahi in Heretaunga. But Ngati Toa retained their take raupatu over the remaining land in Heretaunga and elsewhere in the Port Nicholson block over which the other Maori in the Port Nicholson block also had take raupatu (see s 9.7.2).

10.8.6 Tribunal findings of Treaty breach

The Tribunal finds that:

- ▶ As at January 1848, when Grey issued his Crown grant to the New Zealand Company, Ngati Toa, Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama had customary take raupatu rights over the remainder lands of some 120,626 acres in the Port Nicholson block.

9. *Te Whanganui a Tara* report, p 220

Chapter 19 noted the Tribunal's key findings, summarised the Crown's breaches of the Treaty, and discussed the question of appropriate remedies:

19.2 TRIBUNAL FINDINGS ON EVENTS TO 1840

The Tribunal has found that:

- ▶ At 1840, Maori groups with ahi ka rights within the Port Nicholson block (as extended in 1844 to the south-west coast) were Te Atiawa at Te Whanganui a Tara and parts of the south-west coast; Taranaki and Ngati Ruanui at Te Aro; Ngati Tama at Kaiwharawhara and environs and at parts of the south-west coast; and Ngati Toa at Heretaunga and parts of the south-west coast. These groups also had take raupatu over the remainder lands of the Port Nicholson block (see s2.7; for the remainder lands, see ss 10.8.4–10.8.5).
- ▶ The 1839 Port Nicholson deed of purchase was invalid and conferred no rights under either English or Maori law on the New Zealand Company or those to whom the company subsequently purported to on-sell part of such land (s3.8.5).¹⁰

19.3.4 Ngati Toa

The Crown failed adequately to recognise, investigate, or take into account the full scale and nature of Ngati Toa's interests in the Port Nicholson block area and failed adequately to compensate Ngati Toa for their loss of such interests or to ensure that they gained an equitable interest in the rural and urban tenths reserves. As a consequence, the Crown failed to act reasonably and in good faith and failed to protect the customary interests of Ngati Toa in and over the Port Nicholson block and, in particular, Heretaunga (s9.7.3).

The Tribunal notes that the effect of this finding cannot result in Ngati Toa being included as beneficiaries in the Wellington tenths reserves, because the beneficiaries were determined by the Native Land Court in 1888. But it does entitle them to compensation for this exclusion from such reserves.¹¹

19.4 CLAIMANTS ENTITLED TO REMEDIES

As noted above, in 1840 ahi ka customary rights were held in the Port Nicholson block by Te Atiawa at Te Whanganui a Tara and parts of the south-west coast; by Taranaki and Ngati Ruanui at Te Aro; by Ngati Tama at Kaiwharawhara and environs and at parts of the southwest coast; and by Ngati Toa at Heretaunga and parts of the south-west coast. Take raupatu customary rights were also held by these groups over the remainder lands of the Port Nicholson block, which we have found amounted to some 120,626 acres at the time of Grey's 1848 Crown grant to the New Zealand Company. Such lands were never sold by Maori.¹²

10. *Te Whanganui a Tara* report, p 479

11. *Te Whanganui a Tara* report, p 481

12. *Te Whanganui a Tara* report, p 487

The Tribunal then made the following recommendations as to remedies:

Given our conclusion that the 1839 deed was invalid, we believe that it is the descendants of those Maori present in 1840 who should benefit from the settlement of Treaty claims relating to the tenths. It was in 1840, in clause 13 of the November agreement between the Crown and the New Zealand Company, that the Crown made clear that a tenth of all the land validly purchased by the company from Maori in the Port Nicholson block was to be set aside for the Maori vendors.

It was not until 1888 that the Native Land Court made a decision identifying those Maori who, in the court's opinion, were entitled to be beneficiaries of the Wellington tenths reserves. A significant number of the original tenths had been either alienated or vested in some only of the Maori as a result of the McCleverty 'exchanges'. It is not disputed by the Wellington Tenths Trust's proposed settlement trust that any tupuna who were left off the owners' lists had an entitlement to the land.

The Tribunal has found that the Crown acted in breach of Treaty principles by excluding Ngati Toa from participating in the Wellington tenths reserved under the deeds of release. We consider that it would be inappropriate for us to suggest that an attempt should be made retrospectively to deem Ngati Toa to have been beneficiaries of the Wellington tenths. The Tribunal considers that the appropriate remedy is for the Crown to compensate Ngati Toa for their exclusion from the beneficial ownership of the tenths reserves in the Port Nicholson block.

In relation to the unsold remainder land of some 120,626 acres, we recommend that Ngati Toa, along with Te Atiawa, Ngati Tama, Taranaki, and Ngati Ruanui, should be compensated by the Crown. . . .

. . . given the relative complexity of the issues and the interrelationships of Maori groups affected by a number of our Treaty breach findings, the parties (having settled the question of their representation) should enter into negotiations with the Crown. We recommend accordingly.

In considering the nature and scope of the remedies appropriate, given the many serious Treaty breaches by the Crown, regard should be had to the loss by the various claimants of almost all their land in the Port Nicholson block.

. . . [The] Treaty breaches set out in this report combine to entitle the various claimants to substantial compensation. The Tribunal considers that a significant element of such compensation should be the return of Crown land in Wellington city and its environs.¹³

13. *Te Whanganui a Tara* report, pp 489, 490, 493

CHAPTER 2

THE RELEASE OF THE POLICE STATION

2.1 INTRODUCTION

This chapter outlines in detail the facts as to how the Wellington Central Police Station came to be removed from the Taranaki Whānui settlement package so it could be offered to Ngāti Toa. The following chapter then proceeds to an examination of one of the central issues in our inquiry: namely, what commitments or undertakings, if any, the Crown made to Taranaki Whānui to secure this deal.

2.2 THE NGĀTI TOA NEGOTIATIONS

As was seen in chapter 1, the PNBCT signed an AIP with the Crown in December 2007. The AIP included the land on which the Wellington Central Police Station stands as a sale and leaseback property. It also included the police station under the right of first refusal (RFR) mechanism. This was presumably so that, if Taranaki Whānui decided not to take up the sale and leaseback opportunity, they would still have the option of buying the police station at a later date if the Crown chose to sell it.¹

The signing of the Taranaki Whānui AIP in December 2007, well ahead of other groups with overlapping interests in the Port Nicholson block, is important for what subsequently happened. It enabled groups such as Ngāti Toa, who were at an earlier stage in their negotiations, to see what redress Taranaki Whānui were being offered in the block. As a result, Ngāti Toa were able to object to proposed items of redress for Taranaki Whānui and to see what items of redress remained available. Indeed, at a negotiations meeting in February 2008, the OTS negotiators appeared to encourage their Ngāti Toa counterparts to look for properties in the Taranaki Whānui AIP that they might want to include in their own

1. Agreement in Principle for the Settlement of Historical Claims of Taranaki Whānui (Wellington) in relation to the Port Nicholson Block (Wellington District), document A24(a), number 52, Appendix D, p 374 and Appendix E, p 380

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settlement.² The Ngāti Toa negotiators noted that there were very few valuable Crown properties not included in the AIP.³

By March 2008, Ngāti Toa were signalling to the Crown their desire for key commercial properties either in the Wellington CBD or nearby.⁴ This was another key development. Ngāti Toa produced, for presentation to the Treaty Negotiations Minister, a document that outlined in detail their expectations in the Port Nicholson block.⁵ Among the concerns they raised was Ngāti Toa's exclusion from the Wellington tenths reserves, a matter that the Waitangi Tribunal had made findings on. Ngāti Toa argued that these reserves were now very valuable and that any compensation would have to be significant to restore relativeity with other iwi.⁶ They therefore demanded land in areas such as central Wellington, with an expectation that 'icon sites' would be included.⁷ When Ngāti Toa's counsel met with OTS staff on 18 March 2008, this demand became more explicit – a 'significant commercial property with a guaranteed rental income' in the Wellington CBD, possibly coming out of the Taranaki Whānui AIP.⁸ The matter was raised at a meeting between OTS and the PNBCT on 26 March 2008, at which Ngāti Toa's concerns about elements of the Taranaki Whānui AIP were also discussed.⁹ According to OTS officials, the PNBCT dismissed suggestions that Ngāti Toa should have buildings in the CBD.¹⁰

An email discussion between OTS staff on 1 April 2008 indicated that Ngāti Toa had suggested removing the Supreme Court and District Court from the list of RFR properties in the Taranaki Whānui AIP in order to enable them to be offered to Ngāti Toa. OTS negotiator Margot Fry suggested that these particular properties would be unsuitable to offer to Ngāti Toa for several reasons, including their proximity to Pipitea Marae.¹¹ Around the same time, OTS officials drew up a list of possible Crown properties to offer to Ngāti Toa, mainly on an RFR basis, in the Port Nicholson block.¹² The list included some reasonably significant properties in the Hutt Valley, namely the Lower Hutt Fire Station, the police training centre near Trentham, and the Central Institute of Technology building, also near Trentham.¹³ In

2. OTS, Record of Negotiations, 19 February 2008, document A24(a), number 67, p 686. These notes are stamped as 'draft', but no final version is on our record of inquiry

3. OTS, Record of Negotiations, 19 February 2008, document A24(a), number 67, p 688

4. Heather Baggott to Margot Fry et al, email, 6 March 2008, document A24(a), number 71, p 703

5. Ngāti Toa Rangatira, Settlement Expectations Presentation, 6 March 2008, document A24(a), number 72, pp 704–724

6. Ngāti Toa Rangatira, Settlement Expectations Presentation, 6 March 2008, document A24(a), number 72, pp 711, 713

7. Ngāti Toa Rangatira, Settlement Expectations Presentation, 6 March 2008, document A24(a), number 72, p 713

8. OTS, Meeting with Ngāti Toa counsel, 18 March 2008, document A24(a), number 78, p 746. See also OTS, File note of meeting with Ngāti Toa negotiating team, 18 March 2008, doc A24(a), number 79, p 750

9. PNBCT, File note of meeting with OTS, 26 March 2008, document A24(a), number 85, p 770

10. OTS, Notes from a meeting with PNBCT representatives, 26 March 2008, document A24(a), number 86, p 774

11. Fry to Phillipson et al, email, 1 April 2008, document A24(a), number 89, p 783

12. Marian Smith to Ross Phillipson et al, email and attachment, 2 April 2008, document A24(a), numbers 93–94, pp 808–810

13. OTS, Discussion note, 2 April 2008, document A24(a), number 95, p 812

Wellington City, the Meteorological Office building, two National Institute of Water and Atmospheric Research (NIWA) properties, and the Wellington Central Fire Station were also being considered for redress to Ngāti Toa.¹⁴ A table that included these buildings, along with properties elsewhere in the Port Nicholson block, was presented to Ngāti Toa on 8 April 2008.¹⁵ A later iteration of this list included a note that the Meteorological Office building was considered unsuitable for redress, apparently because of complexities relating to the ownership of the land on which it sits, namely a reserve within the Wellington Botanical Gardens.¹⁶

At a meeting with OTS on 15 April 2008, Ngāti Toa indicated that they felt that the Central Institute of Technology building would provide an insufficient income stream for the purposes of settlement. They also reiterated their desire for an ‘iconic high profile commercial property in the middle of Wellington.’¹⁷ A list of possible redress properties provided by OTS to Ngāti Toa on 22 April indicated that the Crown proposed to offer a ‘significant commercial property in Central Wellington,’ regardless of other redress.¹⁸ When Ngāti Toa representatives met with Ministers and OTS officials on 23 April, the Treaty Negotiations Minister indicated that the Ngāti Toa redress package would include ‘potential property in central Wellington.’¹⁹

In late April or early May 2008 – it is unclear exactly when – the thinking of the OTS negotiators shifted to the Wellington Central Police Station. The first indication of this on our record of inquiry is an internal email from the property manager of the New Zealand Police dated 6 May 2008. The email summarises a meeting with OTS officials that morning, at which the police station was discussed. It noted that, while Treaty settlements generally included land only, it was proposed to offer the property to Ngāti Toa with land and improvements.²⁰

2.3 THE APPROACH TO TARANAKI WHĀNUI

On 7 May 2008, OTS briefed the relevant Ministers on the police station proposal. Two separate briefing papers were provided. The team negotiating with Ngāti Toa briefed the

14. OTS, Ngāti Toa Negotiations Commercial Properties – North Island, 7 April – 12 April 2008, document A24(a), number 100, p 848

15. OTS, Ngāti Toa Negotiations Commercial Properties – North Island, 8 April 2008, document A24(a), number 101, pp 853–854

16. OTS, Ngāti Toa Negotiations Commercial Properties – North Island, 15 April 2008, document A24(a), number 104, p 864

17. OTS, File note, 15 April 2008, document A24(a), number 103, p 862

18. OTS, Draft Commercial Package Commercial Redress Ngāti Toa Rangatira, 22 April 2008, document A24(a), number 108, p 890

19. OTS, File note of meeting between Minister and Ngāti Toa negotiating team, 24 April 2008, document A24(a), number 110, p 901

20. New Zealand Police internal email, 6 May 2008, document A24(a), number 116, p 941

Treaty Negotiations Minister, Dr Michael Cullen, while the team negotiating with Taranaki Whānui briefed the Associate Treaty Negotiations Minister, Shane Jones.²¹ The message from both papers was essentially the same: they proposed that the Crown offer the PNBCT three additional Ontrack properties in exchange for the Wellington Central Police Station being removed from the Taranaki Whānui AIP.²² The police station could then be offered to Ngāti Toa as a sale and leaseback property. The Associate Minister was invited to sign a letter putting this proposal to Sir Ngatata Love, which he did, and the letter appears to have been faxed that day. Among other things, the letter informed Taranaki Whānui that the Crown proposed to offer ‘one commercial redress property in the Wellington CBD to Ngāti Toa Rangatira.’²³ This is a key document for our inquiry.

On 9 May 2008, OTS director Paul James wrote to Te Kaha (the Ngāti Toa negotiating team) with a revised property offer. The letter indicated that the Minister was seeking to secure ‘a central Wellington commercial asset’, including land and buildings, for sale and leaseback: ‘Given the commitment to secure an asset of this size, we have withdrawn the earlier properties contained in the Wellington City property package [eg, the Wellington fire station]; the acquisition of some of these properties was proving problematic.’²⁴

In mid-May, events began to move quickly. Ngāti Toa formally responded to the Crown with its concerns about the Taranaki Whānui AIP, and these concerns were in turn conveyed to the PNBCT for consideration.²⁵ Around the same time, OTS negotiator Daran Ponter contacted the PNBCT to set up a meeting with Sir Ngatata Love and Ms Thorpe to discuss the police station proposal outlined in the letter from the Associate Minister. The meeting was arranged for 14 May 2008. In advance of the meeting, Mr Ponter emailed Ms Thorpe on 13 May to outline the matters he and fellow negotiator Brian Roche proposed to discuss. Mr Ponter indicated that a decision on the police station would be needed by 15 May so that the Crown could inform Ngāti Toa whether the police station, or some alternative property, would be offered. Mr Ponter’s email stated that ‘there is no cultural redress for Ngāti Toa in the Wellington CBD area.’²⁶ This email is discussed in greater detail later in our report.

At the 14 May meeting, Sir Ngatata Love proposed that the Wellington Central Police Station could be released from the Taranaki Whānui AIP in exchange for two additional items of redress: the NIWA properties at Greta Point under the sale and leaseback mechanism; and the Kelburn local purpose reserve as cultural redress. After the meeting, Mr Ponter suggested that the full PNBCT membership should convene a teleconference to give

21. OTS, Briefing papers to Minister and Associate Minister for Treaty of Waitangi Negotiations, 7 May 2008, document A24(a), numbers 118 and 119, pp 948–973

22. The Crown company Ontrack was established to own and maintain the network of railway tracks purchased from Toll Holdings in 2004. In late 2008, Ontrack was absorbed into KiwiRail.

23. Hon Shane Jones to Sir Ngatata Love, undated (faxed 7 May 2008), document A24(a), number 117, pp 944–946

24. Paul James to Ngāti Toa, 9 May 2008, document A24(a), number 123, pp 987, 989

25. PNBCT, ‘Ngāti Toa Update’, 13 May 2008, document A24(a), number 127, p 1028

26. Daran Ponter to Aroha Thorpe, email, 13 May 2008, document A24(a), number 130, p 1049

their 'conditional agreement' to the police station proposal.²⁷ The PNBCT held the suggested teleconference on 15 May²⁸ and agreed to the proposed property swap, with two additional conditions:

- (3) The Crown and Ngāti Toa formally acknowledge that Taranaki Whānui ki Te Upoko o Te Ika will consent to the property being offered in the spirit of cooperation; and
- (4) Ngāti Toa immediately cease all cross-claimant actions relating to the Port Nicholson Block Claim.²⁹

The interpretation of condition 4 above was a central issue for our inquiry. OTS read that condition as requiring Ngāti Toa to cease challenging aspects of Taranaki Whānui's proposed settlement with the Crown with respect to the Port Nicholson block. Officials therefore approached Ngāti Toa to secure this agreement. In response, Ngāti Toa requested an exchange of letters with Taranaki Whānui agreeing to 'work reasonably with each other in relation to each others settlements.'³⁰ OTS characterised this proposal, in a 16 May report to the Treaty Negotiations Minister, as a mutual process of non-challenge.³¹

2.4 ATTEMPTS TO SECURE AGREEMENT

Mr Ponter met with members of the PNBCT on 18 May 2008. After the meeting, he emailed Ms Thorpe to suggest that the exchange of non-challenge letters be discussed at a meeting between Sir Ngatata Love and Ngāti Toa's executive director, Matiu Rei. It is clear from Mr Ponter's email that Taranaki Whānui were seeking information as to what redress was proposed for Ngāti Toa in the Port Nicholson block.³² We understand from evidence presented at our hearings that the PNBCT was in regular communication with OTS at this time to secure this information. Officials likewise planned and implemented a process of communication with both parties to try to secure a non-challenge agreement.³³

OTS also set about trying to secure the NIWA properties and the Kelburn reserve requested by Taranaki Whānui. The PNBCT suggested that the closed school at Waiwhetū might be substituted for the Kelburn reserve as cultural instead of commercial redress.³⁴ This latter proposal was agreed by 6 June, adding an estimated \$1.975 million to the value

27. Daran Ponter to Aroha Thorpe, email, 14 May 2008, document A24(a), number 131, p1052

28. PNBCT, Teleconference notes, 15 May 2008, document A24(a), number 136, pp1063-1066

29. Aroha Thorpe to Daran Ponter, email, 15 May 2008, document A24(a), number 138, p1073

30. OTS, Report to Minister for Treaty of Waitangi Negotiations, 16 May 2008, document A24(a), number 140, p1080

31. OTS, Report to Minister for Treaty of Waitangi Negotiations, 16 May 2008, document A24(a), number 141, p1116, 1126

32. Daran Ponter to Aroha Thorpe, email, 18 May 2008, document A24(a), number 142, p1139

33. Marian Smith to Maureen Hickey et al, email, 21 May 2008, document A24(a), number 145, pp1148-1149

34. Daran Ponter to Laura Cronin, email, 28 May 2008, document A24(a), number 149, p1162

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of the proposed Taranaki Whānui redress package.³⁵ The Department of Conservation had in any case been unwilling to provide the Kelburn reserve, and NIWA had refused to sell its Greta Point property, although it was willing to have it included in the RFR mechanism.³⁶

On 6 June 2008, Mr James wrote to Ngāti Toa outlining aspects of the agreement with Taranaki Whānui:

In response to your desire to be provided with a central Wellington commercial asset, which will provide a secure lease and attractive revenue flow, the Minister has secured the Wellington Central Police Station (land and improvements) with an estimated value of \$30 million. As you know, this was formerly in the Taranaki Whānui Agreement In Principle. Taranaki Whānui have released the property from their Agreement In Principle on condition that Ngāti Toa Rangatira would not challenge the Taranaki Whānui Deed of Settlement. You have requested a reciprocal arrangement. Officials will work with you on an arrangement to which both parties can agree.³⁷

On 11 June, the Treaty Negotiations Minister wrote to Mr Rei along similar lines. The Minister mentioned that the PNBCT was seeking an acknowledgement from Ngāti Toa regarding their release of the police station and said that officials would discuss this matter with him.³⁸ However, when Ngāti Toa's representatives met with officials that day, they denied that the Minister's letter had said anything about conditions being imposed for the release of the police station, and they dismissed suggestions that they should write to Taranaki Whānui to acknowledge the release.³⁹ Mr Rei gave evidence to this Tribunal that Ngāti Toa felt that an acknowledgement was a matter between Taranaki Whānui and the Crown, not between Taranaki Whānui and Ngāti Toa.⁴⁰

The PNBCT met on 13 June 2008 to discuss matters relating to its settlement, and Ms Thorpe emailed the resulting decisions to OTS officials. In exchange for the police station, the PNBCT agreed to accept the three Ontrack properties offered into its sale and leaseback schedule, and the two NIWA properties into its RFR schedule. It also accepted the Waiwhetū school site as cultural redress. The property aspects of the deal (conditions 1 and 2) had therefore been satisfied, albeit after some negotiation. Ms Thorpe then sought from OTS an 'urgent update on the current status of the two remaining conditions relating to the release of the Wellington Central Police Station – these being the formal acknowledgement by the

35. OTS, Report to Minister for Treaty of Waitangi Negotiations, 6 June 2008, document A24(a), number 162, p1207

36. OTS, Report to Minister for Treaty of Waitangi Negotiations, 6 June 2008, document A24(a), number 162, p1212; Daran Ponter to Aroha Thorpe, email, 10 June 2008, document A24(a), number 167, p1284

37. Paul James to Te Kaha, 6 June 2008, document A24(a), number 165, p1229

38. Hon Michael Cullen to Matiu Rei, 11 June 2008, document A24(a), number 169, p1289

39. OTS, Notes of a meeting between OTS and Ngāti Toa, 11 June 2008, document A24(a), number 170, p1297

40. Transcript 4.1.2, p334

Crown and Ngāti Toa of the release of the Wellington Central Police Station *and* the withdrawal of any cross claim issues with Taranaki Whānui’ (emphasis in original).⁴¹

In relation to the last condition, OTS was still pursuing a mutual non-challenge agreement, as reported to the Treaty Negotiations Minister on 19 June 2008.⁴² However, these and other matters remained unsettled when the Taranaki Whānui deed of settlement was initialled on 26 June so that it could proceed to the ratification stage. In addition, the PNBCT had yet to be informed of the redress to be offered to Ngāti Toa in the Port Nicholson block. The PNBCT met with OTS officials on 16 July. Bruce Farquhar, the PNBCT’s legal adviser, recorded part of the discussions in a file note:

Anaru Mill [from OTS] confirmed that the Central Police Station has now been included in the list of properties for Ngati Toa, however it has not been removed from the RFR list for Taranaki Whānui Deed of Settlement. Aroha advised that this is the case and until Ngati Toa acknowledge the four conditions in the proposed acceptance, the property would not be removed from the list. The four conditions comprise an acknowledgement by Ngati Toa and the Crown that Taranaki Whānui have provided access to Ngati Toa to the property, and that no challenge will come from Ngai Toa in relation to the Taranaki Whānui Deed of Settlement. OTS did not believe there would be a problem with the acknowledgements and were going to come back to us.⁴³

On 23 July, Ms Thorpe emailed OTS officials seeking an update on ‘the two remaining conditions set by us for the release of the Wellington Central Police Station’. She outlined these conditions as:

- (1) A letter from the Crown and Ngati Toa acknowledging that the property will be released for the purpose of Ngati Toa negotiations; and
- (2) A further letter from Ngati Toa confirming that they will not take any cross claimant action against PNBC/Taranaki Whānui.⁴⁴

When members of the PNBCT met with OTS the following day, officials agreed to prepare a report to the Minister to further these last two conditions.⁴⁵ This report went to the Treaty Negotiations Minister on 6 August 2008. It stated that, in order for the police station to be removed from Taranaki Whānui’s RFR mechanism, the Crown would need to acknowledge Taranaki Whānui’s offer and Ngāti Toa would have to agree not to challenge the Taranaki

41. Aroha Thorpe to Ponter et al, email, 13 June 2008, document A24(a), number 175, pp 1329–1330, emphasis in original.

42. OTS, Report to Minister for Treaty of Waitangi Negotiations, 19 June 2008, document A24(a), number 181, pp 1398–1440

43. Bruce Farquhar, File Note of a meeting between Taranaki Whānui and OTS, 16 July 2008, document A24(a), number 203, p 1591

44. Aroha Thorpe to Fry et al, email, 23 July 2008, document A24(a), number 204, p 1594

45. OTS, Notes of a meeting with PNBCT, 24 July 2008, document A24(a), number 205, p 1596

Whānui settlement. The report also noted that, although Ministers had never agreed to the four conditions, the first two conditions requiring the offer of additional properties had been 'largely satisfied'.⁴⁶ A letter of acknowledgement in partial fulfilment of condition 3 was attached for the Minister to sign, and it was then sent to Sir Ngatata Love on 8 August.⁴⁷

2.5 TARANAKI WHĀNUI LEARN OF NGĀTI TOA REDRESS PROPOSALS

On the evening of 8 August 2008, Mr Ponter hand-delivered to the PNBCT a letter (dated 9 August) from OTS director Mr James.⁴⁸ The letter stated:

When the Port Nicholson Block Claims Team agreed to release the Wellington Central Police Station from the Taranaki Whānui ki Te Upoko o Te Ika settlement package, you informed officials that Ngāti Toa Rangatira should provide an assurance that they will not challenge the redress provided by the Crown to settle the historical claims of Taranaki Whānui ki Te Upoko o Te Ika in the Port Nicholson Block.

Te Runanga o Toa Rangatira proposed in return that they should also be provided an assurance that Taranaki Whānui ki Te Upoko o Te Ika would not challenge the redress in their settlement package that relates to the Port Nicholson Block. To facilitate this process, I propose the following process of non-challenge . . .⁴⁹

The letter also outlined the commercial and cultural redress proposed for Ngāti Toa in the Port Nicholson block, subject to Cabinet approval. The commercial redress properties, excluding RFR properties owned by Housing New Zealand Corporation, are outlined in map 2.

Sir Ngatata Love responded to Mr James in a letter dated 11 August, complaining, among other things, about the incomplete information provided and the lack of time to respond. He threatened a possible cancellation of the signing of the deed of settlement. The letter referred to 'changes to the terms of the Wellington Central Police Station which was agreed between us' but did not elaborate further.⁵⁰ OTS negotiators met with Sir Ngatata Love on 12 August, and the outcome of this meeting was reported to the Treaty Negotiations Minister on 14 August 2008.⁵¹

Officials advised the Minister that the PNBCT 'did not react well' to the information it was provided regarding the proposed Ngāti Toa settlement. Their report noted that three

46. OTS, Report to Minister for Treaty of Waitangi Negotiations, 6 August 2008, document A24(a), number 207, pp1602, 1606

47. Hon Michael Cullen to Sir Ngatata Love, 8 August 2008, document A24(a), number 209, p1625

48. Paul James to Sir Ngatata Love, 9 August 2008, document A24(a), number 210, p1627

49. Paul James to Sir Ngatata Love, 9 August 2008, document A24(a), number 210, p1627 and A11(d)

50. Sir Ngatata Love to Paul James, 11 August 2008, document A24(a), number 211, p1635

51. Daran Ponter to Laura Cronin, email, 11 August 2008, document A24(a), number 212, p1638

specific issues were raised. One was that the police station was to be offered to Ngāti Toa with both land and improvements, whereas Taranaki Whānui had been informed that improvements could not be provided under the sale and leaseback mechanism. The other two issues related to the proposed provision of a Ngāti Toa plaque in Parliament grounds and the provision of Taputeranga Island (off Wellington's south coast) as cultural redress. OTS informed the Minister that the proposed exchange of letters of non-challenge would be unable to proceed, and it warned him of a possible adverse reaction from Ngāti Toa.⁵²

On 18 August 2008, the day before the signing of the deed of settlement, last-minute negotiations were still underway. The PNBCT wanted the Wellington Central Police Station to remain in its list of RFR properties, so that Taranaki Whānui would have the opportunity to buy it should Ngāti Toa turn down the sale and leaseback option. OTS refused, saying among other things that it could not offer the same redress property in two separate settlements. In the end, Ms Thorpe emailed OTS officials agreeing that the police station could be removed from the list of RFR properties appended to the Taranaki Whānui deed.⁵³ The deed was signed on 19 August, and the settlement proceeded, as outlined in chapter 1, without challenge from Ngāti Toa.

52. OTS, Report to Minister for Treaty of Waitangi Negotiations, 14 August 2008, document A24(a), number 214, p1654

53. Aroha Thorpe and Daran Ponter et al, email thread, 18 August 2008, document A24(a), number 219, p1718

CHAPTER 3

**COMMITMENTS AND UNDERTAKINGS GIVEN FOR
THE RELEASE OF THE POLICE STATION**

3.1 INTRODUCTION

Chapter 2 outlined the facts as to how the Wellington Central Police Station came to be removed from the Taranaki Whānui commercial redress package so that it could be offered to Ngāti Toa. We now turn to the question as to what commitments or undertakings the Crown provided to Taranaki Whānui and the PNBCT to secure the release of the police station from the Taranaki Whānui commercial redress package. This chapter first discusses the specific arguments made by the claimants in this inquiry before turning to other possible commitments or undertakings that the Crown may have made.

Before we turn to our analysis, we would like to comment on a letter that the Treaty Negotiations Minister, Dr Michael Cullen, wrote to Sir Ngatata Love, the chair of the PNBCT, in August 2008. The Minister's letter stated:

Negotiations between the Crown and both the Port Nicholson Block Claims Team and Te Runanga o Toa Rangatira over [the police station] have been intense. The decision of your team to assist the Crown [to] remove what was a significant obstacle to the successful progression of both these settlements was extremely generous. I wish to personally acknowledge the step you took and to acknowledge that this was not an easy step for your team to take.¹

The value of the police station was variously represented in documents provided to our inquiry as \$30 million and \$41 million. In either case, it is clearly a valuable asset with the potential for a significant commercial return. The Tribunal therefore agrees with the Treaty Negotiations Minister that the PNBCT's decision was indeed 'extremely generous'.

1. Hon Michael Cullen to Sir Ngatata Love, 8 August 2008, document A24(a), number 209, p1625

3.2 THE CLAIMANTS' CASE

The claimants' amended statement of claim asserts that 'Taranaki Whānui understood the Crown to have made an undertaking or commitment that the Wellington Central Police Station would be the only property offered to Ngāti Toa from within the Port Nicholson Block (as either commercial or cultural redress).'² In other words, the release of the police station was secured on the express understanding that no property, other than the police station, would be offered to Ngāti Toa anywhere in the entire block. The implication was that Crown offers of commercial or cultural redress in the Port Nicholson block already made to Ngāti Toa would have to be withdrawn and that no further offers would be made. The Crown responded that 'no such wide ranging undertaking was given to secure the release of the Police Station.'³ The opposing positions on this matter were thus clearly delineated.

The claimants' case appears to this Tribunal to rely heavily on a single document, namely an email outlining the four conditions that Taranaki Whānui imposed when they initially agreed to allow the police station to be taken out of their list of sale and leaseback properties.

As was outlined in chapter 2, Sir Ngatata Love and Aroha Thorpe discussed the police station proposal with OTS staff on 14 May 2008, and the PNBCT then convened by way of teleconference the following morning. The meeting passed a resolution agreeing that the Crown could offer Ngāti Toa the opportunity to purchase the Wellington Central Police Station under the commercial sale and leaseback mechanism. However, this agreement was contingent on four conditions, which were conveyed to OTS staff in an email from Ms Thorpe on 15 May as follows:

- (1) Taranaki Whānui ki Te Upoko o Te Ika are formally offered the commercial sale and leaseback opportunity to purchase two NIWA properties at Greta Point – legally described as Sec A SO 34240 (WN46C/852) and Sec B SO 34240 (WN 42A/164);
- (2) Taranaki Whānui ki Te Upoko o Te Ika are formally offered the Kelburn Local Purpose Reserve as cultural redress;
- (3) The Crown and Ngāti Toa formally acknowledge that Taranaki Whānui ki Te Upoko o Te Ika will consent to the property being offered in the spirit of cooperation; and
- (4) Ngāti Toa immediately cease all cross-claimant actions relating to the Port Nicholson Block Claim.⁴

The claimants say that the Crown implicitly accepted all four conditions when it took the police station out of the Taranaki Whānui settlement in order to offer it to Ngāti Toa. The claimants' pleadings made it clear that the fourth of these conditions, and their interpretation of it, is central to their case. According to the claimants, condition 4 meant that Ngāti

2. Amended Statement of Claim 1.1.1(a), 22 March 2012, p 15

3. Crown Statement of Response, 27 April 2012, 1.3.1, p 9

4. Aroha Thorpe to Daran Ponter, email, 15 May 2008, document A24(a), number 138, p1073

COMMITMENTS AND UNDERTAKINGS GIVEN FOR THE POLICE STATION 3.2

Toa would cease seeking any redress within the Port Nicholson block. The PNBST's legal adviser, Bruce Farquhar, explained this in his 11 May 2012 brief of evidence:

Bullet point four represented a very carefully considered condition that Ngati Toa immediately cease all cross-claimant action. What was meant by this was to establish a catch all phrase that encompassed not just the passage of the Taranaki Whānui Settlement and legislation but to cease all consideration of offering any more land to Ngati Toa than just the agreed Police Station in the Port Nicholson Block. This was made very clear to the Crown in the conditions proposed and I believe that the language is unambiguous.⁵

This interpretation is reflected in Sir Ngatata Love's briefs of evidence:

This fourth condition, and again a condition required of the Crown, was for it to negotiate with Ngati Toa that there were to be no cross claim issues brought by Ngati Toa in relation to the Port Nicholson Block. This meant that the Crown could not then negotiate further land deals with Ngati Toa as part of a Treaty Settlement within the Block.⁶

The Crown rejects this interpretation. Mr Ponter stated in his brief of evidence that the Port Nicholson Block Claims Team set out four conditions for their agreement to the release of the Police Station from their settlement package, none of which included not offering properties to Ngāti Toa Rangatira anywhere in the Port Nicholson Block area.⁷

Instead, the Crown interpreted condition 4 as a requirement that Ngāti Toa desist from its challenges to the Taranaki Whānui settlement agreement, as also outlined in Mr Ponter's evidence:

The fourth condition 'Ngāti Toa immediately cease all cross-claimant actions relating to the Port Nicholson Block claim' was not viewed by the Crown as a suggestion that Ngāti Toa cease its own claims in the Port Nicholson Block. It is not expressed in these terms. It was interpreted as a request that Ngāti Toa cease challenging the redress being offered as part of the Taranaki Whānui settlement.⁸

Sir Ngatata Love disagreed with the Crown's interpretation in his 11 May 2012 brief of evidence:

The wording had absolutely nothing to do with the 'non-challenge' letter requests. From our perspective condition 4, namely that 'Ngati Toa immediately cease all cross-claimant actions relating to the Port Nicholson Block claim' was much bigger than the non-challenge issue. What it was saying was that Ngati Toa itself would make no further claims relating to

5. Brief of Evidence of Bruce Farquhar, 11 May 2012, document A22, para 9, p 5

6. Brief of Evidence of Sir Ngatata Love, 27 March 2012, document A11, p 9

7. Brief of Evidence of Daran Ponter, 27 April 2012, document A14, p 12

8. Brief of Evidence of Daran Ponter, 27 April 2012, document A14, p 9

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the Port Nicholson Block, and clearly, that if it did, the Crown as a party to the condition could never entertain such a request. That is why we avoided the ‘non-challenge’ language.

Condition 4 expressed in the email from Aroha Thorpe to Daran Ponter dated 15 May 2008 . . . was intended to be absolute in relation to any land offerings. It was intended to continue to speak and have voice until such time as Ngati Toa’s negotiations with the Crown had concluded in all respects. We never intended that its effect cease once we had settled with the Crown.⁹

3.2.1 Tribunal discussion of ‘condition 4’

Claimant counsel Philip Green stated in his closing submissions that ‘the language of condition 4 is unambiguous.’¹⁰ He submitted at our hearings that the language used reflects that used by OTS itself in a 2002 guide, commonly known as the *Red Book*. (The guide’s actual title is *Ka Tika a Muri, Ka Tika a Mua – Healing the Past, Building a Future*.¹¹) Mr Green quoted from the *Red Book* several times in our hearings, in particular the following passage from a section titled ‘Overlapping Claims or Shared Interests’: ‘An overlapping claim exists where two or more claimant groups make claims over the same area of land that is the subject of historical Treaty claims. Such situations are also known as “cross claims”.’¹²

Mr Green stated in his opening submissions that ‘the very language used in the *Red Book* is echoed in condition 4 addressing the cross claimant issue as between Taranaki Whanui and Ngati Toa.’¹³ He was drawing attention to similarities in the definition of ‘cross claims’ above and the condition that Ngati Toa ‘immediately cease all cross-claimant actions relating to the Port Nicholson Block Claim’. By the *Red Book* definition, a ‘cross-claimant’ is a group that makes historical Treaty claims over an area of land that is also subject to claims from another group. A ‘cross-claimant action’ could, therefore, reasonably be seen to include the seeking of redress within that area of land. In the context of our inquiry, this would refer to Ngati Toa seeking redress within the Port Nicholson block, and an injunction to ‘cease all cross-claimant actions’ would include an end to the seeking of such redress.

We believe that the attempt to attribute this meaning to condition 4 was somewhat strained. There appears to us to be a more obvious alternative interpretation. The term ‘actions’, in the potentially litigious environment of Treaty settlements involving overlapping

9. Brief of Evidence of Sir Ngatata Love, 11 May 2012, document A23, p 15

10. Closing Submission on Behalf of Claimants for Port Nicholson Block Settlement Trust, 22 June 2012, 3.3.4, p 72

11. Office of Treaty Settlements, *Ka Tika a Muri, Ka Tika a Mua: He Tohutohu Whakamarama i nga Whakataunga Kereme e pa ana ki te Tiriti o Waitangi me nga Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: Office of Treaty Settlements, 2002)

12. *Ibid*, p 58

13. Opening Submission on Behalf of Claimants for Port Nicholson Block Settlement Trust, 11 June 2012, 3.3.3, p 5

claimants, could reasonably be understood in the commonly used legal sense of taking or threatening legal proceedings or otherwise issuing legal challenges.¹⁴ This is certainly the way in which the Crown appears to have interpreted the term. As was seen in chapter 2, upon receiving the email communicating the four conditions, OTS officials immediately approached Ngāti Toa to discourage them from further challenging aspects of the Taranaki Whānui AIP. Ngāti Toa rejected the suggestion that they make a unilateral commitment to Taranaki Whānui and instead proposed a mutual non-challenge agreement. The Crown appears to have raised this proposal with the PNBCT at a meeting on 18 May 2008, just three days after the four conditions were proposed.¹⁵

The Crown's interpretation can be seen in the context of the challenges being mounted by Ngāti Toa to the Taranaki Whānui AIP in March and April 2008. Some of these challenges were discussed at a meeting on 26 March 2008 between Sir Ngatata Love and Ms Thorpe on one side, and Messrs Ponter and Roche on the other. Matters raised included concerns about proposed pouwhenua and the reference to 'exclusive mana whenua'.¹⁶ A few days later, on 1 April, a Crown paper on the objections raised by overlapping claimants was tabled at a meeting of the PNBCT.¹⁷ Just two days later, on 3 April, these objections were further discussed at a meeting between Ministers and Sir Ngatata Love. Suggested talking points prepared by officials for this meeting included the need to avoid legal challenges and Tribunal claims from other groups, particularly Ngāti Toa.¹⁸ An aide memoire for the Minister on 7 April 2008 indicated that such a challenge looked likely, as Ngāti Toa had notified officials that they would file an urgency application with the Tribunal to try to halt the scheduled initialling ceremony for the Taranaki Whānui deed of settlement.¹⁹ We consider it likely that, by May 2008, the PNBCT would have been aware of this threat.

Mr Ponter's evidence to the Tribunal was that this environment, in which overlapping claimant groups (particularly Ngāti Toa) were objecting to aspects of the Taranaki Whānui settlement package, provided the context for OTS's interpretation of condition 4:

Mr Green: Well, what do you take as an action?

14. See for example the definition of 'action' in the Limitation Act 1950 (now repealed). Section 2 provided that 'action' meant any proceeding in a court of law other than a criminal proceeding. See also the definition in the Judicature Act 1908. This Act previously defined 'action' as 'a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court'. The Act was amended in 1986 and the word 'action' was removed and replaced with the term 'civil proceedings'. See also the definition of 'action' in the *New Zealand Law Dictionary*, 6th ed, which reads 'a judicial proceeding brought by one party against another'. For a case involving the interpretation of the word 'action' as defined in the Judicature Act 1908, see *Kaye v Auckland Farmers Freezing Co Ltd* [1959] NZLR 262 (SC), 264–265.

15. Daran Ponter to Aroha Thorpe, email, 18 May 2008, document A24(a), number 142, p1139

16. PNBCT, Notes of a meeting between Chief Negotiators, 26 March 2008, document A24(a), number 85, p770

17. PNBCT, Minutes of PNBCT meeting, 1 April 2008, document A24(a), number 91, p799

18. OTS, Suggested talking points, 3 April 2008, document A24(a), number 97, p834–835, 839

19. OTS, Aide memoire for Minister for Treaty of Waitangi Negotiations, 7 April 2008, document A24(a), number 99, p844

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Mr Ponter: An action was . . . the response that Ngāti Toa gave to the Taranaki Whānui AIP when they asked for the removal of the Pouwhenua sites, and for the removal of a number of the place name changes, and our view was that Taranaki Whānui did not want to see that continue.²⁰

OTS's initiative to seek a mutual non-challenge arrangement should have made it apparent to Taranaki Whānui that the Crown was placing a particular interpretation on condition 4 – namely a request that Ngāti Toa cease challenging the redress being offered to Taranaki Whānui. Mr Ponter stated in his brief of evidence that 'at no time in the Crown's negotiations with the Port Nicholson Block Claims Team did the Team communicate, either orally or in writing, to the Crown that in its view the Wellington Central Police Station was conditional on no properties being offered to Ngāti Toa in the Port Nicholson block.'²¹ We heard no evidence in our inquiry to indicate that the PNBCT took any action to correct an apparent misunderstanding by the Crown.

Condition 4 was communicated to OTS officials on two further occasions after the original email of 15 May 2008. An email from Ms Thorpe on 13 June 2008 summarised the condition as requiring the withdrawal by Ngāti Toa of 'any cross claim issues with Taranaki Whānui.'²² The reference to the Port Nicholson block was gone. A further email from Ms Thorpe on 23 July summarised condition 4 as requiring a letter from Ngāti Toa 'confirming that they will not take any cross claimant action against PNBC/Taranaki Whānui.'²³ The inclusion of the word 'against' in this sentence would, to our mind, have further reinforced the interpretation that the Crown had already placed on condition 4.

We note that, with respect to other requested changes to its settlement package, the PNBCT expressed its conditions in clear and unambiguous language. For example, Ms Thorpe's 13 June 2008 email stated: 'PNBCT agreed to the removal of all Pouwhenua sites *subject to no other iwi being offered this provision*' (emphasis added).²⁴ It is not clear to us why similar language could not have been used in relation to the police station to convey the intention asserted by the claimants in this inquiry.

On 16 July 2008, the PNBCT's legal adviser, Bruce Farquhar, wrote a file note which, in the Tribunal's view, does not assist the claimants' case. That note, which we quoted at length in chapter 2, summarised condition 4 as requiring 'that no challenge will come from Ngai Toa in relation to the Taranaki Whānui Deed of Settlement.'²⁵ This wording, of course, exactly mirrors the Crown's understanding.

20. Transcript 4.1.2, p 208

21. Brief of Evidence of Daran Ponter, 27 April 2012, document A14, p 12

22. Aroha Thorpe to Ponter et al, email, 13 June 2008, document A24(a), number 175, pp 1329–1330

23. Aroha Thorpe to Margot Fry et al, email, 23 July 2008, document A24(a), number 204, p 1594

24. Aroha Thorpe to Daran Ponter et al, 13 June 2008, document A24(a), number 175, p 1329

25. Bruce Farquhar, File Note of a meeting between Taranaki Whānui and OTS, 16 July 2008, document A24(a), number 203, p 1591

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In his evidence to the Tribunal, Mr Farquhar said that he made an error when he wrote the file note and that he therefore badly misrepresented the PNBCT's position.²⁶ Our view is that his interpretation of the meaning of condition 4 at the time he wrote the file note – just two months after the conditions were originally communicated to OTS – is likely to be more accurate than his recollection four years later. At the very least, it would seem to contradict the claimants' assertion that the language of condition 4 was 'unambiguous'.

3.2.2 Exclusive interests

The above discussion relating to condition 4 has omitted an important part of the claimants' argument, namely that Taranaki Whānui believed that they had exclusive mana whenua, and therefore exclusive right of redress, in the Port Nicholson block. They further argued that the Crown appeared to accept and understand their position. The claimants' closing submissions, for example, stated that the Crown 'always knew what Taranaki Whānui meant by its exclusive area of interest. That was the premise on which the Police Station deal and the one property understanding was reached.'²⁷ The implication is that OTS officials should have interpreted condition 4 in this 'exclusive mana whenua' context, and it should have been obvious to the Crown negotiators that 'cease all cross-claimant actions' meant an end to all Ngāti Toa claims in the block.

It is certainly true that, throughout their negotiations and in this inquiry, Taranaki Whānui asserted that they had exclusive mana whenua in the entire Port Nicholson block and that they therefore saw the block as an exclusive area of interest. This was made clear by Sir Ngatata Love in his briefs of evidence. For example, his 27 March 2012 brief stated that Taranaki Whānui were 'at pains to always define to the Crown negotiators that for us our "exclusive area of interest" meant the entire Port Nicholson block as mapped in the Waitangi Tribunal's report.'²⁸ Similar assertions were made in the PNBST's amended statement of claim.²⁹

We do not dispute that the PNBCT had a consistently held view in relation to its assertions of exclusive mana whenua and that these assertions reflected a sincerely held belief. However, this Tribunal cannot agree that Taranaki Whānui had exclusive mana whenua in the Port Nicholson block. The Tribunal found in its *Tē Whanganui a Tara* report that other groups, particularly Ngāti Toa, also had interests in the block. We do not intend to revisit those findings and, furthermore, we see no need to do so. The Tribunal recognised that groups such as Te Ātiawa and Ngāti Tama had well-established ahi kā rights in the block by

26. Transcript 4.1.2, pp 124–126 and p 132

27. Closing Submission on Behalf of Claimants for Port Nicholson Block Settlement Trust, 22 June 2012, 3.3.4, p 3

28. Brief of Evidence of Sir Ngatata Love, 27 March 2012, document A11, p 3

29. See, for example, Amended Statement of Claim 1.1.1(a), 27 March 2012, p 6

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the 1840s.³⁰ However, the Tribunal also recognised the rights of Ngāti Toa. We quoted from the *Te Whanganui a Tara* report at length on pages 14 to 19. The Tribunal noted that Ngāti Toa had ahi kā in parts of Ōhariu and Heretaunga and that Ngāti Toa's take raupatu 'put them in a position to further establish ahi ka over those lands within the Port Nicholson block where no other group had ahi ka.'³¹ The Tribunal found the Crown in breach of the Treaty by failing to provide Ngāti Toa with a share in the Wellington tenths reserves.³² It stated that

the Crown failed adequately to recognise, investigate, or take into account the full scale and nature of the Ngāti Toa interests in the Port Nicholson block area; that it failed adequately to compensate Ngāti Toa for its loss of such interests; and that it failed to ensure that Ngāti Toa gained an equitable interest in the rural and urban tenths reserves.³³

The findings of the Tribunal in its *Te Whanganui a Tara* report are clearly inconsistent with an assertion of Taranaki Whānui exclusive mana whenua.

The claimants also alleged that the Crown appeared to agree with their assertion of exclusive mana whenua. We do not consider that the PNBCT had good reason to hold such a belief. In February 2007, the year the PNBCT signed its AIP, Dean Cowie (the then OTS manager of policy–negotiations) wrote a letter to Sir Ngatata Love headed 'Officials Assessment of Overlapping Interests in the Port Nicholson Block.'³⁴ The letter acknowledged that Taranaki Whānui had 'dominant customary rights' in parts of the block, including 'Wellington City' and proposed 'exclusive redress' in those specific areas. However, the letter also made it clear that the Crown intended to provide for possible redress to other groups, including Ngāti Toa, within the Port Nicholson block:

My advice to Ministers . . . is that they should not agree with the PNBCT's belief that Taranaki Whānui has exclusive rights in the Port Nicholson Block. I consider that the findings of the Waitangi Tribunal Wellington District Report clearly support my view that the block is overlapped with other groups, particularly Ngāti Toa. Officials believe that Ngāti Toa had customary rights to the Port Nicholson Block as at 1840, and that Ngāti Toa has well-founded claims against the Crown. Officials consider, then, that the Crown has a clear Treaty obligation to maintain its capability to provide appropriate redress to Ngāti Toa within the block . . .³⁵

30. *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Waitangi Tribunal, 2003), pp 42–43

31. *Te Whanganui a Tara* report, p 41

32. *Te Whanganui a Tara* report, pp 219–220

33. *Te Whanganui a Tara* report, p 220

34. Dean Cowie to Sir Ngatata Love, 14 February 2007, document A24(a), number 39, pp 147–150

35. Dean Cowie to Sir Ngatata Love, 14 February 2007, document A24(a), number 39, p 149

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Sir Ngatata Love's evidence is that OTS subsequently changed its position. 'By the end of 2007 when the AIP was signed (on 13 December 2007) we all understood that the Crown and its negotiators had understood and accepted our point of view about our definition of the exclusive area of interest.'³⁶ Certainly, Taranaki Whānui's position was recognised in the AIP, but the Crown explicitly distanced itself from that position. The AIP at clause 10 states:

Subject to further discussion following the signing of this Agreement in principle, the Crown proposes that the following statement be recorded in the Deed of Settlement:

For their part, Taranaki Whānui assert exclusive mana whenua over the area in Map 1.

For its part, the Crown understands that, from their first permanent occupation of Wellington, Taranaki Whānui (Wellington) have continuously maintained ahi kaa roa in the Taranaki Whānui (Wellington) area of interest.

Mr Green submitted in reply that the contrasting statements in clause 10, quoted above, are essentially saying the same thing.³⁷ The Tribunal does not agree. One statement refers to 'exclusive mana whenua' over a precisely defined area. The other statement refers to ahi kaa roa in an area ambiguously described as 'the Taranaki Whānui (Wellington) area of interest'. We consider the statements to be saying quite different things, otherwise there would have been no need for separate Crown and Taranaki Whānui statements. This is a classic instance of parties agreeing to disagree. The wording signals a clear intention that clause 10 will be renegotiated before the deed of settlement is signed.

This compromise wording was unsatisfactory to overlapping claimant groups such as Ngāti Toa, who strongly objected to any use of the expression 'exclusive mana whenua'.³⁸ In June 2008, while trying to negotiate with the PNBCT in order to remove the 'exclusive' reference, OTS negotiator Margot Fry stated that 'the Crown has always indicated that it does not accept the statement'.³⁹ This was part of an exchange of emails in which the Crown attempted to change the wording in the AIP to reflect a view that other groups also had interests in the Port Nicholson block.⁴⁰ The PNBCT agreed to new wording, omitting the word 'exclusive', shortly before its deed of settlement was initialled on 26 June 2008. The Crown's part of the statement was consequently removed.⁴¹ In the end, substantially new wording was incorporated in the deed of settlement in a two-page section headed 'Background: Taranaki Whānui ki Te Upoko o Te Ika Statements of Occupation'.⁴² This section was prefaced with

36. Brief of Evidence of Sir Ngatata Love, 27 March 2012, document A11, p 5

37. Reply Submission on Behalf of Claimants for the Port Nicholson Block Settlement Trust, 4 July 2012, 3.3.7, pp 6-7

38. See, for example, OTS, Notes from a meeting between OTS and Ngāti Toa, 11 June 2008, document A24(a), number 170, pp 1294-1295

39. Margot Fry to Aroha Thorpe, email, 15 June 2008, document A24(a), number 173, p 1319

40. Margot Fry to Aroha Thorpe et al, email thread, 12-15 June 2008, document A24(a), number 173, pp 1319-1322

41. Hon Michael Cullen, Minister for Treaty of Waitangi Negotiations, to Matiu Rei, Te Runanga o Toa Rangatira, 25 June 2008, document A24(a), number 193, pp 1544

42. Taranaki Whānui Deed of Settlement of Historical Claims, 18 August 2008, document A11(b), pp 4-5

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the disclaimer that ‘The following text has been provided by Taranaki Whānui ki Te Upoko o Te Ika and describes their view of their association with the Port Nicholson Block prior to 1839 [*sic*].’ In other words, the Crown dissociated itself from this section of the deed.

We accept the claimants’ evidence that for significant periods the Crown negotiators did not raise the issue of ‘exclusive mana whenua.’ However, we do not agree that this silence implied consent. Rather, OTS officials appear to have set to one side an apparently fruitless argument in order to further what they considered more substantive issues such as the overall quantum and specific items of cultural and commercial redress. The wording of the AIP, which made clause 10 ‘subject to further discussion’, made it clear that the matter would be revisited at a later date – which indeed it was.

We wish to make a further point in relation to this issue. It relates to the Crown’s argument that Taranaki Whānui raised little protest when informed, shortly before the signing of their deed of settlement, of the extent of proposed redress for Ngāti Toa within the Port Nicholson block. We disagree that little protest was made. When Sir Ngatata Love wrote to OTS director Paul James on 11 August 2008, his letter expressed considerable dissatisfaction. Taranaki Whānui had been presented with an incomplete list of proposed redress and were expected to respond to it within a few days with a letter to the Treaty Negotiations Minister agreeing not to challenge the Ngāti Toa settlement. Sir Ngatata Love considered the minimal time allowed for response to be unacceptable and threatened to cancel the signing of the deed of settlement.⁴³ When officials met with him on the morning of 12 August, they reported to Ministers that the PNBCT ‘did not react well’ to the information provided.⁴⁴ This is not a lack of protest and, furthermore, Taranaki Whānui’s dissatisfaction was amply justified.

However, we note that the matters protested about were fairly specific. No concern was expressed that Ngāti Toa were being offered significant redress in the Port Nicholson block. Instead, the issues raised were that the list of redress provided was ‘complex partial information’ that would take some time to review and that insufficient time was allowed to respond. At the meeting of 12 August 2008, three specific issues were raised, namely the offering of the Wellington Central Police Station to Ngāti Toa with both land and improvements, despite Taranaki Whānui having been informed that improvements could not be provided under the sale and leaseback mechanism; the provision of a Ngāti Toa plaque in Parliament grounds; and the provision of Taputeranga Island to Ngāti Toa as cultural redress.⁴⁵ Yet, the OTS letter dated 9 August, which officially informed the PNBCT of the proposed redress for Ngāti Toa in the Port Nicholson block, listed over 50 items of commercial and cultural redress in the block. Tables attached to the letter apparently included a large number of

43. Sir Ngatata Love to Paul James, 11 August 2008, document A24(a), number 211, pp1635–1636

44. OTS, Report to Minister for Treaty of Waitangi Negotiations, 14 August 2008, document A24(a), number 214, p1654

45. OTS, Report to Minister for Treaty of Waitangi Negotiations, 14 August 2008, document A24(a), number 214, p1654

Housing Corporation New Zealand properties to be offered on an RFR basis. These tables were not attached to the copy of the letter provided to our inquiry, but the figure of 2,189 Housing Corporation New Zealand properties was suggested by Mr Green in our hearing and was not challenged by the Crown.⁴⁶

Although the information provided to the PNBCT was incomplete, if Taranaki Whānui were expecting no redress to be offered in the block at all, the 9 August letter would surely have raised alarm bells and incited protest about this specific issue. What they desired to know was what this redress consisted of. It is the Crown's failure to provide this information in a timely manner that appeared to be central to their protest.

3.3 FINDINGS ON THE CLAIMANTS' CASE

The claimants in this inquiry argue that Taranaki Whānui agreed to release the Wellington Central Police Station from their settlement package on the express undertaking that no property, other than the police station, would be offered to Ngāti Toa anywhere in the entire Port Nicholson block. The Crown asserted in response that 'no such wide ranging undertaking was given to secure the release of the Police Station.'⁴⁷ After an examination of the claimants' main arguments, we have concluded that the Crown's position is broadly correct. We do not believe that condition 4 – the condition that 'Ngāti Toa immediately cease all cross-claimant actions relating to the Port Nicholson Block Claim' – can reasonably be interpreted, in the context, as requiring an end to any Ngāti Toa redress in the block. The Crown never interpreted this condition in such a general way, and the PNBCT did nothing to try to clarify its intentions in its communications with OTS.

We also do not agree that the Taranaki Whānui assertion of exclusive mana whenua in the Port Nicholson block gave the PNBCT reason to think the Crown would immediately understand its interpretation of condition 4. First, we consider an assertion of exclusive mana whenua by Taranaki Whānui to be at odds with the findings of the Tribunal in its *Tē Whanganui a Tara* report. Secondly, we do not consider that the Crown ever accepted Taranaki Whānui's assertion of exclusive mana whenua in the block or that it gave the PNBCT reason to believe that it did. It would have been extraordinary for the Crown to have accepted the Taranaki Whānui position, as this would have required it to ignore the Tribunal's findings, particularly in relation to Ngāti Toa's rights in the block. Clearly, it did not do so.

46. Transcript 4.1.2, pp 249–250

47. Crown Statement of Response, 27 April 2012, 1.3.1, p 9

3.4 OTHER POSSIBLE COMMITMENTS OR UNDERTAKINGS

As outlined above, we have not accepted the claimants' argument that Taranaki Whānui agreed to release the Wellington Central Police Station from their settlement package on the express undertaking that no property, other than the police station, would be offered to Ngāti Toa anywhere in the entire Port Nicholson block. However, this does not mean that the Crown made no commitments or undertakings in relation to the release of the building. But, if it did, they were of a different nature than the very broad ones alleged by the claimants in this inquiry. The remainder of this chapter therefore examines other possibilities for commitments or undertakings that the Crown gave to Taranaki Whānui to secure the release of the police station.

3.4.1 An exclusive area around the harbour?

The Tribunal went on to consider whether the Crown gave Taranaki Whānui an undertaking that Ngāti Toa would not be offered redress within a certain radius of Wellington Harbour, the distance being variously described as 1.5 or two miles. The first statement of claim submitted in November 2009 stated:

The Crown has acted in bad faith by proposing to go against their undertaking to Taranaki Whānui not to include settlement properties within the two mile radius of the Wellington Harbour, by the inclusion of settlement properties for Ngāti Toa within that two mile radius.⁴⁸

The idea of a Taranaki Whānui exclusive zone around the harbour emerged relatively early in the settlement negotiations. It appears on our record of inquiry in the form of a letter from Mr Cowie to Sir Ngatata Love in February 2007 entitled 'Officials Assessment of Overlapping Interests in the Port Nicholson Block':

Based on our approach above and interpretation of the evidence, particularly the findings of the Wellington District Report, the Crown considers therefore that Taranaki Whānui had dominant customary rights around the rim of Te Whanganui-a-Tara, including the current Wellington City, Petone, Waiwhetu and Wainuiomata areas. As noted above, the Crown considers the extent of the area that Taranaki Whānui exercised dominant customary rights in Heretaunga is approximately a mile and a half from the Petone foreshore. The Crown is currently seeking to provide exclusive redress to Taranaki Whānui in these districts, as demonstrated in the current list of Right of First Refusal (RFR) properties.⁴⁹

Discussion elsewhere in the Cowie letter indicates that the reference to 'a mile and a half from the Petone foreshore' is based on an OTS interpretation of the Waitangi Tribunal's 2003

48. Statement of Claim 1.1.1, 17 December 2009, p 8

49. Dean Cowie to Sir Ngatata Love, 14 February 2007, document A24(a), number 39, p149

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report. It states that ‘the Crown also accepts the Tribunal’s view that the lands over which Taranaki Whānui had established ahi ka rights in Heretaunga was restricted to a strip (the Rotokakahi line) approximately a mile and a half from the Petone foreshore’. It also appears from the letter that the reference to ‘Wellington City’ is really meant to refer to those parts of the city around the harbour where the Tribunal found that Taranaki Whānui had ahi kā rights – such as Kaiwharawhara, Pipitea, and Te Aro – rather than the entire Wellington City local authority area.⁵⁰

We note in the conclusion to our report that the term ‘exclusive redress’ as used by OTS appears to have two possible meanings. It can encompass the idea that redress will be provided to one group, and one group only, in a particular area. But it is also commonly used, in the Treaty settlement context, to refer to the transfer of property in fee simple title, a type of redress that cannot be shared between groups. This is in contrast to shared forms of redress, such as kaitiaki over areas or resources, which can be shared by multiple groups. Mr Cowie’s letter was therefore not entirely clear what it was saying when it used this expression.

In later discussions between OTS officials, the 1.5-mile line from the Petone foreshore was extended around the entire harbour and was sometimes referred to as a ‘two mile line’. This resulted in a misconception among OTS staff that the notion of a line around the harbour came directly from the Tribunal’s report. For example, the December 2007 paper seeking Cabinet approval for the Taranaki AIP stated that the Tribunal had found that ‘those groups who now comprise Taranaki Whānui (Wellington) had, by 1840, established ahi ka rights of occupation in a 1.5-mile strip of land around Wellington Harbour’.⁵¹ OTS historian (later negotiator) Margot Fry attempted to correct this misconception in a February 2008 internal email:

To my knowledge, the Waitangi Tribunal identified a 1.5 mile strip from the Petone foreshore inland. It was not a general observation applied to the whole of Wellington Harbour. OTS then used this, plus the finding of occupation around Wellington Harbour, to construct the RFR area for Taranaki Whānui (Wellington). Any properties that were not identified as being within this area were set aside for negotiations with Ngāti Toa Rangatira.⁵²

Over two years later, on 31 March 2010, Mr Ponter attended a meeting between the PNBS and OTS. Although his role in the settlement negotiations had ended, his input was sought over Taranaki Whānui’s dissatisfaction with the Crown’s offer to Ngāti Toa. Mr Ponter made several observations in an email to OTS officials, including suggesting the removal of around five properties from the offer to Ngāti Toa in Berhampore, Kilbirnie, and Kaiwharawhara, which he considered to be within the Taranaki Whānui exclusive area of interest. ‘The deal

50. Dean Cowie to Sir Ngatata Love, 14 February 2007, document A24(a), number 39, p 148

51. Cabinet Policy Committee, Taranaki Whānui (Wellington) Historical Treaty Claims: Approval of Crown Offer, 4 December 2007, document A24(a), number 46, p 205

52. Margot Fry to Winnie Matahaere and Daran Ponter, email, 28 February 2008, document A24(a), number 68, p 692

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over the police station was intended as the only commercial redress in the exclusive area of interest.⁵³ Mr Ponter did not define what he meant by ‘exclusive area of interest’, aside from ruling out its application to the entire Port Nicholson block, but it appears from his reference to properties in Berhampore, Kilbirnie, and Kaiwharawhara that he meant more than just the CBD. Mr Ponter confirmed this in the Tribunal’s hearings, when Judge Clark asked him to clarify what he meant by ‘exclusive area of interest’ in relation to the deal over the Wellington Central Police Station:

Judge Clark: Now, the deal, are you saying the deal was wider than just the CBD?

Mr Ponter: No, the deal is effectively the property swap for the police station meant, was related specifically to the Wellington CBD area, but equally I had formed an understanding from the previous work that had been undertaken by Mr Cowie and Mr Wairau that the area south of the Rotokakahi line and around the margins of the harbour was also being excluded, so in total that meant that the police station would be the only property to Ngāti Toa within that excluded area.⁵⁴

In this exchange, although he begins his response with a ‘No’, Mr Ponter ultimately confirms that he understood the ‘excluded’ area to be more than just the CBD – although he makes no reference to a 1.5- or two-mile line around Wellington Harbour.

So, was the Wellington Central Police Station released from Taranaki Whānui’s settlement package on the understanding that no other properties would be offered to Ngāti Toa within 1.5 or two miles of the harbour, or some similar area? The evidence provided to our inquiry does not, in our view, support this conclusion. Certainly, the evidence indicates that OTS used a line around Wellington Harbour as a guide to its redress proposals. But this can hardly be seen as a commitment relating to the police station, unless the parties raised this matter in their discussions in May 2008. The evidence provided to the Tribunal indicates that Mr Cowie’s letter of February 2007 was one of the last OTS communications to the PNBCT on this issue. Sir Ngatata Love referred, in his brief of evidence of 27 March 2012, to the replacement during 2007 of Crown negotiators Messrs Cowie and Wairau by Messrs Ponter and Roche:

By late 2007, reference to trying to contain Taranaki Whānui’s area of exclusive interest to a two mile or one and a half mile ring around the harbour fell away. Its only reference in correspondence was historic and it was never pressed as a matter for negotiation by either Daran Ponter or Brian Roche. Similarly, whereas the Rotokakahi Line had held some prominence with Messrs Cowie and Wairau I do not recall it ever being mentioned by Brian

53. Daran Ponter to Teressa Buchanan et al, email, 31 March 2010, document A24(a), number 284, p 2086

54. Transcript 4.1.2, pp 238–239

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Roche or Daran Ponter when negotiating with them. It and the two mile line simply never became points of negotiation – not ever.⁵⁵

Thus, according to Sir Ngatata Love, the notion of a 1.5- or two-mile ring around Wellington Harbour never came up in negotiations after mid-2007. Mr Ponter confirmed this in his evidence in our hearings:

Mr Green: It's true, isn't it, that once you took over there wasn't further discussion or negotiation about whether or not the Rotokakahi line applied or this one and a half to two mile line, that didn't happen.

Mr Ponter: That's absolutely correct, and Sir Ngatata raises that in his affidavit, and that is my recollection as well, yes.⁵⁶

So, regardless of what Mr Ponter may have understood by an exclusive area, he does not appear to have communicated his understanding to the PNBCT. It therefore follows that the 1.5- or two-mile area was never a feature of negotiations over the release of the police station in mid-2008.

3.4.2 An exclusive area in the Wellington CBD?

The Tribunal then went on to consider whether the Crown gave Taranaki Whānui any commitment or undertaking that Ngāti Toa would not be offered redress within the Wellington CBD. As was outlined in the previous chapters, around 7 May 2008 the associate Treaty Negotiations Minister, Shane Jones, wrote to Sir Ngatata Love with a proposal that the Wellington Central Police Station be removed from the Taranaki Whānui AIP in exchange for other properties. The reason for this proposal became clear towards the end of his letter:

Ngāti Toa Rangatira has requested the inclusion of a Wellington CBD property in their commercial redress package. The need for this has become more apparent to the Crown as it has become clear that the Crown does not hold sufficient significant commercial properties in the Porirua area and the wider Port Nicholson Block.

As a consequence, I propose to offer one commercial redress property in the Wellington CBD to Ngāti Toa Rangatira.⁵⁷

We consider that the use of the words 'a Wellington CBD property' and 'one commercial redress property in the Wellington CBD' refer to the offer of one property, and one property only, to Ngāti Toa in the CBD. A subsequent email from Mr Ponter on 13 May muddied the waters a little, but only slightly:

55. Brief of Evidence of Sir Ngatata Love, 27 March 2012, document A11, p 4

56. Transcript 4.1.2, p 163

57. Shane Jones to Sir Ngatata Love, undated (faxed 7 May 2008), document A24(a), number 117, pp 944–946

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1. Ngati Toa have now been advised that the Crown will provide a sale and leaseback property in the Wellington CBD. The Crown intends to advise them of which property this will be, on Thursday morning. This is as part of commercial redress (there is no cultural redress for Ngati Toa in the Wellington CBD area).
2. Which property(ies) is/are offered to Ngati Toa hinges on our 7.30am meeting.
3. The proposal from Minister Jones was that the Ontrack properties be provided in return for Taranaki Whanui relinquishing a significant inner-city property.
4. The primary reason for proposing that Taranaki Whanui give up a Wellington CBD property is that:
 - a. significant Ontrack properties may be able to be provided (commercial transfer) as a swap;
 - b. the Crown now has very few properties to offer Ngati Toa in the Wellington CBD and what is left appeared to the Crown to likely to be more unpalatable to PNBCT for us to offer to Ngati Toa (ie, MetService and NIWA);
5. The letter from Minister Jones proposes the Wellington Central Police Station as it is a reasonably significant property in the CBD which is on reclaimed land and is more removed from the 'Pipitea precinct'. However, the District Court site may be equally worth considering. We can explore options in the morning.⁵⁸

The email generally refers to a single property, with the exception of point 2, which refers to 'property(ies)'. Mr Ponter also refers to a 7.30am meeting to be held on 14 May. From the evidence provided in our hearings, only one property was discussed for Ngāti Toa in the CBD at that meeting:

Judge Clark: So, during the course of that discussion, that meeting on that morning, do you recall saying then that there would, that the request for release of property would be simply limited to the police station, or were other properties identified?

Mr Ponter: No, if it was the police station it would be limited to the police station in the CBD area, and I was quite explicit about that, I think, for the PNBCT it was one of the attractions potentially of the arrangement.⁵⁹

From this discussion, it can be seen, first, that Mr Ponter assured the PNBCT that Ngāti Toa would be offered only one commercial property in the CBD if Taranaki Whānui agreed to release the police station from their settlement package and, secondly, that he was aware that this assurance made the proposed deal attractive to Taranaki Whānui.

In addition, from the discussions he had with Sir Ngatata Love the following day, it seems that his assurances went further than commercial redress. Mr Ponter's email states that

58. Daran Ponter to Aroha Thorpe, email, 13 May 2008, document A24(a), number 130, p 1049

59. Transcript 4.1.2, p 234

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‘there is no cultural redress for Ngāti Toa in the Wellington CBD area.’ He confirmed in our hearings that he repeated this assurance during his 14 May meeting with the PNBCT:

Judge Clark: During the course of that meeting, do you recall what you might have conveyed to Taranaki Whānui in terms of cultural redress for Ngāti Toa in the CBD?

Mr Ponter: Well I will have reiterated the fact that there was not going to be any cultural redress to Ngāti Toa . . .⁶⁰

We note that two letters in August 2008 also made reference to the CBD. One was the letter from Mr James, then the director of OTS, to Sir Ngatata Love which was delivered on the evening of 8 August 2008.⁶¹ That letter sought to inform Taranaki Whānui of the commercial and cultural redress then on offer to Ngāti Toa. On the issue of the police station, Mr James had this to say:

As you will see, the list includes both cultural and commercial redress. Other than the provision of the Wellington Central Police Station, however, the exclusive redress offered to Ngāti Toa rangatira (that is the transfer of land in fee simple title) relates to land that is outside the Wellington Central Business District.

On the eve of settlement, 18 August 2008, Sir Ngatata Love wrote to the Treaty Negotiations Minister saying, among other things, ‘We have demonstrated our positive approach by agreeing to release the Wellington Central Police Station so Ngāti Toa can be offered a sale and lease back opportunity of the land only of this property in the CBD area.’⁶² While neither of these letters makes reference to a deal over the police station per se, they demonstrate that both parties saw a connection between the police station and the CBD.

In their closing submissions, Crown counsel submitted that officials made no more than a factual statement in May 2008 that the police station was the only commercial property for Ngāti Toa in the Wellington CBD.⁶³ However, a 2009 ministerial briefing covering the possible offer of an inner-Wellington property to Ngāti Toa seems to contradict this claim. The paper, which we discuss again later, stated that

PNBST are likely to react negatively when they learn that Ngāti Toa are being offered 276 Willis Street. Although the PNBST Deed of Settlement is silent on the matter, PNBST have proceeded on the understanding that no further inner city Wellington properties will be made available to Ngāti Toa.⁶⁴

60. Transcript 4.1.2, p 233

61. Paul James to Sir Ngatata Love, 9 August 2008, document A24(a), number 210, pp 1627 – 1633.

62. Sir Ngatata Love to Minister for Treaty of Waitangi Negotiations, 18 August 2008, document A24(a), number 217, p 1714.

63. Crown Closing Submissions, 29 June 2012, 3.3.5, pp 3–4

64. OTS, Briefing paper to the Minister for Treaty of Waitangi Negotiations, 7 November 2009, document A24(a), number 261, pp 1983–1984

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Map 3: The location of the central police station in the Wellington CBD
Source: Document A23(c); Wellington City Council, District Plan, vol 3, map 32

These sentences make it apparent that officials saw the assurance as more than a factual statement: it was also an assurance about future action. This is reinforced by Mr Ponter's email of March 2010 referred to earlier in our report: 'The deal over the police station was intended as the only commercial redress in the exclusive area of interest.'⁶⁵ While we note that Mr Ponter appeared to intend the expression 'exclusive area of interest' to refer to more than just the Wellington CBD, he clearly meant to include the CBD in this area. This is further evidence that he, at least, considered that a forward-looking deal was intended.

We therefore find that Taranaki Whānui were given an undertaking that, in exchange for agreeing to release the Wellington Central Police Station from their settlement package, no property other than the police station would be offered to Ngāti Toa in the Wellington CBD as commercial or cultural redress.

We have no evidence in our record of inquiry that either the PNBST or OTS attempted to define the Wellington CBD until fairly recently. We discuss this failure by the Crown to define just what it meant by the Wellington CBD in our concluding chapter. The PNBST provided the Tribunal with a map showing the CBD as defined by the Wellington City Council for district planning purposes (see map 3).⁶⁶

3.5 CONCLUSION

The Tribunal does not agree with the claimants' argument that Taranaki Whānui agreed to release the Wellington Central Police Station from their settlement package on the express undertaking that no property, other than the police station, would be offered to Ngāti Toa anywhere in the entire Port Nicholson block.

We also considered an allegation that the Crown gave Taranaki Whānui an undertaking that Ngāti Toa would not be offered redress within a certain radius of Wellington Harbour. This distance was variously described in our evidence as 1.5 or two miles. We rejected this argument on the basis that the claimants and the Crown alike agreed in their evidence that Mr Ponter never mentioned a 1.5- or two-mile demarcation line during negotiations with respect to the police station.

We also examined whether Taranaki Whānui were given an undertaking that no property other than the police station would be offered to Ngāti Toa in the Wellington CBD as commercial or cultural redress. We found that they were, indeed, given such an undertaking, and the evidence for this is outlined in the previous section. We note, however, that the Crown argued that, owing to the presence of ouster clauses in Taranaki Whānui settlement legislation, the Tribunal is precluded from making further inquiry. It also argued that the

65. Daran Ponter to Teresa Buchanan et al, email, 31 March 2010, document A24(a), number 284, p 2086

66. PNBST, Map of Wellington CBD showing Ngāti Toa Settlement offerings to Taranaki Whānui cultural sites, pa sites and reserves, May 2012, document A23(c)

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entire agreement clause in the Taranaki Whānui deed of settlement rendered any pre-settlement statements that it may have given in negotiations null and void. These arguments are addressed in chapters 4 and 5.

CHAPTER 4

JURISDICTION AND THE 'ENTIRE AGREEMENT' CLAUSE

4.1 INTRODUCTION

In chapter 3, we found that the claimants' argument that Taranaki Whānui agreed to release the Wellington Central Police Station from their settlement package on the express undertaking that no property, other than the police station, would be offered to Ngāti Toa anywhere in the entire Port Nicholson block, was not supported by the evidence presented to our inquiry.

However, we did find that the Crown gave an undertaking to Taranaki Whānui that, in exchange for agreeing to release the police station from their settlement package, no property other than the station would be offered to Ngāti Toa in the Wellington CBD as commercial or cultural redress.

The Crown has developed two lines of argument which they submit prevent the Tribunal from making further inquiry. The first is a jurisdictional argument. The Crown argued that this inquiry necessarily requires the Tribunal to inquire into the Taranaki Whānui redress package. They submit that such an inquiry is precluded by ouster provisions contained in the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act 2009 (the settlement Act).¹

The second line of Crown argument is that the deed of settlement and settlement documents set out the full terms of the settlement between themselves and Taranaki Whānui. They point to an 'entire agreement' clause at clause 7.4 of the deed of settlement and say that it is a complete answer to the Taranaki Whānui claims. In essence their submission is that any pre-settlement representations no longer matter; the deed of settlement is the start and end point for determining the terms of settlement.²

In the discussion that follows shortly, we discuss the interpretation and meaning of clause 7.4 of the deed of settlement. We have the jurisdiction to do so. It is expressly preserved by section 10(5) of the settlement Act, which states that the Act 'does not exclude the jurisdiction of a court, tribunal, or other judicial body in respect of the interpretation or implementation of the deed of settlement or this Act'.

1. Crown Closing Submissions, 29 June 2012, 3.3.5, p 4

2. Crown Closing Submissions, 29 June 2012, 3.3.5, pp 52–53

We interpret the meaning of the entire agreement clause and references in that clause to the Treaty. We do so first, in this chapter, by considering arguments put to us through the lens of the Contractual Remedies Act 1979 and contract law. Then, in chapter 5, we analyse the undertaking given to Taranaki Whānui in relation to cultural and commercial redress in the Wellington CBD viewed through the lens of Treaty principles.

4.2 JURISDICTION

Section 10 of the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act 2009 reads:

10. Settlement of historical claims final—(1) The historical claims are settled.

(2) The settlement of the historical claims is final and, on and from the settlement date, the Crown is released and discharged from all obligations and liabilities in respect of those claims.

(3) Subsections (1) and (2) do not limit the acknowledgements expressed in, or the provisions of, the deed of settlement.

(4) Despite any other enactment or rule of law, on and from the settlement date, no court, tribunal, or other judicial body has jurisdiction (including, without limitation, the jurisdiction to inquire or further inquire into, or to make a finding or recommendation) in respect of—

(a) the historical claims; or

(b) the deed of settlement; or

(c) this Act; or

(d) the redress provided under the deed of settlement or this Act.

(5) Subsection (4) does not exclude the jurisdiction of a court, tribunal, or other judicial body in respect of the interpretation or implementation of the deed of settlement or this Act.³

The Crown submitted that the settlement framework is designed to provide the parties, being a claimant community and the Crown, with certainty and finality. The parties negotiate a settlement and a redress package, which is then reduced in writing to a deed of settlement. That deed is given effect through the settlement legislation.⁴

The Crown said that this inquiry embarked upon an investigation of the Taranaki Whānui redress package but that such an inquiry was precluded by section 10(4) of the settlement Act.⁵

3. For the definition of 'historical claims', see section 9 of the settlement Act

4. Crown Closing Submissions, 29 June 2012, 3.3-5, p 60

5. Crown Closing Submissions, 29 June 2012, 3.3-5, p 60

The Crown was also concerned that the present claim and relief sought run contrary to the settlement framework – in particular, that a settling group has in this instance sought to revisit and reactivate pre-deed negotiations, regardless of whether those matters are part of the deed of settlement. It is concerned at the novel aspect of this claim and the potential precedent effect.⁶

Taranaki Whānui submitted that this inquiry concerned in part a proposed settlement with Ngāti Toa. The negotiations between the Crown and Ngāti Toa are not yet at the stage whereby a deed of settlement has been initialled, nor has any settlement legislation been introduced into Parliament. On that analysis, any focus upon what is proposed to be offered to Ngāti Toa in settlement is not captured by the ouster provisions of the Taranaki Whānui Settlement Act. Secondly, they submit that the issues before the Tribunal directly concern the interpretation and implementation of the deed of settlement. The police station 'agreement', the defining of an exclusive area, and the managing of the offerings to Ngāti Toa within it are interpretation and implementation issues.⁷

When granting urgency, the Tribunal was cognisant of the ouster provisions of the settlement Act.⁸ At paragraphs 61 to 63 of the memorandum granting urgency, there was a discussion of that section and an express acknowledgement that the Tribunal's jurisdiction was precluded from inquiring into the historical claims as defined, the deed of settlement, the settlement Act, and the redress provided under the deed of settlement or the Act. Accordingly, the Tribunal deliberately focused the issues on the release of the Wellington Central Police Station and, in doing so, sought to limit the inquiry so as not to fall foul of the ouster provisions.⁹

We wanted to understand what discussions took place concerning the release of the Wellington Central Police Station; what assurances were given by the Crown; what was understood by Taranaki Whānui; why the release of the police station was necessary; what, if any were the commitments or undertakings relating to the release of the police station; and whether any of those commitments or undertakings were broken.

All arguments concerning the pre-settlement statements necessarily required us to analyse the meaning and effect of clause 7.4 of the deed of settlement, which is the entire agreement clause. That exercise involved an interpretation of the meaning and effect of the entire agreement clause.

In chapter 5, we go on to interpret what is meant by a reference in the entire agreement clause to 'the Treaty of Waitangi'. In so doing, we are interpreting a clause in the deed of settlement, and our ability to do so is expressly preserved by section 10(5) of the settlement Act, which states that the Act 'does not exclude the jurisdiction of a court, tribunal, or other

6. Crown Closing Submissions, 29 June 2012, 3.3.5, p 60

7. Closing Submission on Behalf of Claimants for Port Nicholson Block Settlement Trust, 22 June 2012, 3.3.4, p 12

8. Memorandum 2.5.10, 13 February 2012

9. The nine key questions are set out at section 1.5 of this report.

4.3

judicial body in respect of the interpretation or implementation of the deed of settlement or this Act.

4.3 THE ENTIRE AGREEMENT CLAUSE

The deed of settlement contains an entire agreement clause. It reads as follows:

Entire Agreement

7.4 This deed and the settlement documents:

7.4.1 Constitute the entire agreement in relation to the matters in each of them; and

7.4.2 Supersede all earlier negotiations, representations, warranties, understandings and agreements in relation to the matters in each of them including the terms of the negotiation and the agreement in principle;

7.4.3 Do not supersede the Treaty of Waitangi.¹⁰

The Crown relied upon the entire agreement clause. It argued that it is a complete answer to the claimants' case and that the deed of settlement is the start and end point for determining the terms of settlement. The Crown submitted that the ordinary courts give effect to entire agreement clauses as conclusive between the parties so as to exclude any alleged misrepresentations where it is fair and reasonable to do so in the circumstances. The Crown argued that it cannot be the case that an entire agreement clause has no effect simply because it appears in a deed of settlement where the 'contracting parties' are Treaty partners, as that would be to deprive the clause of any effect. The Crown submitted that Taranaki Whānui were not relying upon any alleged pre-contractual representations when entering into the deed, as they were on notice of the very facts about which they claim to have been misled. In their closing submissions, Crown counsel referred the Tribunal to section 4(1) of the Contractual Remedies Act 1979 and case law which has developed pursuant to that section.¹¹

The PNBS T for its part argued that the entire agreement clause was not a complete answer to the claimants' case. It also referred to section 4(1) of the Contractual Remedies Act 1979 and case law to highlight those circumstances in which a court is not precluded from inquiring into and determining whether pre-contractual statements were made, whether they constituted a representation or term of the contract, and whether that representation was relied upon.¹²

Section 4(1) of the Contractual Remedies Act 1979 reads as follows:

10. Taranaki Whānui Deed of Settlement of Historical Claims, 18 August 2008, document A11(b), p 92

11. Crown Closing Submissions, 29 June 2012, 3.3.5, pp 53-54

12. Reply Submission on Behalf of Claimants for the Port Nicholson Block Settlement Trust, 4 July 2012, 3.3.7, pp 17-29

4. Statements during negotiations for a contract—(1) If a contract, or any other document, contains a provision purporting to preclude a Court from inquiring into or determining the question—

- (a) Whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or
- (b) Whether, if it was so made or given, it constituted a representation or a term of the contract; or
- (c) Whether, if it was a representation, it was relied on—

the Court shall not, in any proceedings in relation to the contract, be precluded by that provision from inquiring into and determining any such question unless the Court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances of the case, including the subject-matter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time.

Entire agreement clauses are often included in contracts as a measure to provide certainty to contracting parties. The rationale is to preclude a party to a contract from 'threshing through the undergrowth of pre-contractual negotiations and seeking to elevate some pre-contractual statement or conduct, never recorded in the ultimate agreement, to the status of an enforceable obligation'.¹³

The New Zealand courts have held that there is nothing inherently unfair in an entire agreement clause, and it is highly desirable that written contracts should be drawn as to state all the terms, and so avoid uncertainty.¹⁴

In *PAE (New Zealand) Ltd v Brosnahan*, the Court of Appeal examined an entire agreement clause and section 4(1) of the Contractual Remedies Act 1979.¹⁵ In delivering the decision of the Court of Appeal, Justice Harrison said:

An entire agreement clause, however, is not absolute or conclusive. Section 4(1) recognises a wide judicial discretion to determine whether it is 'fair and reasonable that the provisions should be conclusive'. While the issue is to be determined 'having regard to the all the circumstances of the case', the specified criteria focus the inquiry on an assessment of the relative positions of the parties and their access to independent legal advice. Its apparent purpose is to protect one party's relative vulnerability from another party's power to impose an exemption from liability which is contrary to the factual reality or an existing

13. *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611, 614

14. *Brownlie v Shotover Mining Ltd* unreported, 21 February 1992, Court of Appeal, CA181/87; *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611

15. *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611

legal obligation and is thus unreasonable and unfair. Section 4(1) is a mechanism for striking balances, both individually between parties and conceptually between freedom of contract and unfair or unreasonable commercial conduct. (See also Dawson and McLauchlan, *The Contractual Remedies Act 1979* (1981) at 36 – 40.)¹⁶

The Court of Appeal emphasised that there was a judicial reluctance to go behind entire agreement clauses in commercial transactions without a finding of fraud.¹⁷

In practice, the courts have regarded such entire agreement clauses as prima facie inconclusive and have investigated the making of the statement before deciding whether the exclusion clause should be conclusive. The initial evidential burden is on the party relying on the contractual provision.¹⁸

An examination of section 4(1) of the Contractual Remedies Act 1979 and the relevant case law makes it clear that entire agreement clauses, whilst they should be respected, are not a complete answer. New Zealand courts have a wide judicial discretion to determine whether an entire agreement clause is ‘fair and reasonable that the provision should be conclusive.’

In their closing and reply submissions, counsel for the PNBST argued that the circumstances here are such that the Tribunal is not precluded from inquiring into and determining questions relating to the pre-settlement commitments and undertakings made by the Crown in relation to the Wellington Central Police Station. They submitted that the commitments and undertakings given in relation to the police station could be fairly said to represent a collateral or separate contract standing outside the deed of settlement or, alternatively, could be treated as representations or terms of the deed.¹⁹ They stressed that the Court of Appeal in the *PAE* case noted that the High Court decision was determined solely on its facts. Counsel for the PNBST then went on to outline matters in relation to the release of the Wellington Central Police Station which they said were exactly the type of circumstance where the legislation envisaged that a discretion be exercised to set aside the entire agreement clause.²⁰

In the balance of this chapter, we address and respond to the arguments put to us by the PNBST. However, we remind ourselves at the outset that we are not a court and have no jurisdiction to determine issues of law or fact conclusively.²¹ Our jurisdiction, which we discuss in chapter 5, is focused on the Treaty and whether Crown acts or omissions are in breach of ‘the principles of the Treaty’.

16. *Ibid*, para 15

17. *Ibid*, para 16. In that context, fraud is used to mean ‘civil fraud’. For a discussion on the use of the word ‘fraud’ in the context of criminal and civil law: see *Gemini Personnel Ltd v Morgan & Banks Ltd* [2001] 1 NZLR 14, 22.

18. *Ellmers v Brown* (1990) 1 NZ ConvC 190

19. Reply Submission on Behalf of Claimants for the Port Nicholson Block Settlement Trust, 4 July 2012, 3.3.7, p28

20. *Ibid*, pp 27–29

21. *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 651

4.3.1 OTS misrepresented the reasons for the police station agreement

The claimants alleged that the Crown misrepresented to the PNBCT the reasons why it was seeking to remove the police station from the Taranaki Whānui redress package in order to offer it to Ngāti Toa. This allegation was put specifically in the claimants' closing submissions: 'Mr Ponter and others obfuscated the truth to the PNBCT when justifying to them why they should release the Police Station to the Crown to include in the Ngati Toa settlement.'²²

The Tribunal would certainly agree that the letter from the Associate Minister to Sir Ngatata Love initially broaching the subject of the Wellington Central Police Station was disingenuous in the way that it represented the proposed deal. A section of the letter, which was sent on 7 May 2008, was quoted earlier in our report. It outlined the reasons for the Crown seeking a Wellington CBD property for Ngāti Toa in the following terms: 'The need for this has become more apparent to the Crown as it has become clear that the Crown does not hold sufficient significant commercial properties in the Porirua area and the wider Port Nicholson Block.' Yet, it had by then been obvious to the Crown for some time that Ngāti Toa were not interested in more commercial properties in Porirua and the Hutt Valley. What they wanted, as was made clear to OTS by Ngāti Toa's counsel on 18 March 2008, was 'a significant commercial property with a guaranteed rental income'. That property was being sought in the Wellington CBD and nowhere else. The reference to 'the Porirua area and the wider Port Nicholson Block' in the letter from the Associate Minister could at that point in time be described as misleading.²³

We understand from our hearings that the Associate Minister's letter was drafted largely by Mr Ponter. However, the email from Mr Ponter six days later mentioned nothing about a lack of suitable properties in Porirua and the Hutt Valley. Furthermore, to the extent that can be expected in the context of a negotiation, it was reasonably up front about the Crown's reasons for seeking a deal over the police station. Mr Ponter stated that 'the Crown now has very few properties to offer Ngati Toa in the Wellington CBD and what is left appeared to the Crown to likely to be more unpalatable to PNBCT for us to offer to Ngati Toa'. This seems a reasonable summary of the state of play at the time. Mr Ponter also made it clear that not just any commercial property was being sought – it needed to be 'a significant inner-city property', and the police station was seen as fitting the bill.²⁴ If the PNBCT was initially misled by the Associate Minister's letter, its misconceptions should not have lasted long.

We have no evidence that the Crown disclosed the specific reasons why Ngāti Toa were seeking a central Wellington property for their settlement package or that the PNBCT ever asked about Ngāti Toa's motivation. We do know, however, that the Crown disclosed that

22. Closing Submission on Behalf of Claimants for Port Nicholson Block Settlement Trust, 22 June 2012, 3.3.4, p10

23. Associate Minister for Treaty Negotiations to Sir Ngatata Love, undated (faxed 7 May 2008), document A24(a), number 117, pp 944–946

24. Daran Ponter to Aroha Thorpe, email, 13 May 2008, document A24(a), number 130, p 1049

Ngāti Toa were seeking a 'significant inner city property'. This, would, in our view, have sent a signal that Ngāti Toa's motivations were more than just commercial.

4.3.2 OTS withheld mapping information

Another matter of deliberate Crown deceit alleged by the claimants was the withholding of the information on which it based its redress offers in the Port Nicholson block. In particular, OTS did not disclose to the PNBCT the maps on which it based its decisions. This misled the PNBCT in two ways: first, it was led to believe that the Crown had abandoned the notion of a 1.5- or two-mile line around Wellington Harbour in which to offer redress; and, secondly, it was led to believe that the Crown had come to accept Taranaki Whānui's assertion of exclusive mana whenua in the Port Nicholson block.

These arguments are laid out explicitly in the claimants' closing submissions. These allege that 'OTS deliberately gave of the impression to the PNBCT from about mid 2007 onward that the Crown had abandoned the 1.5 mile – 2 mile line around the harbour and were not using it'. As a result, 'OTS allowed, and knowingly, the PNBCT to believe that the Crown was no longer pursuing such a constrained area – in the context of any relief for them or others.'²⁵ The lack of mapping information contributed to this misapprehension. 'While the Crown was using maps internally to help it understand the negotiations it applied a deliberate policy of not mapping anything for the benefit of Taranaki Whānui.' The failure to mention the 1.5-mile line, along with the lack of mapping information 'misled Taranaki Whānui into believing that the Crown was accepting an exclusive mana whenua position right down almost to the day of settlement concluding.'²⁶

The evidence presented to our inquiry shows that the OTS negotiators never provided the PNBCT with maps showing where they considered a boundary might be drawn denoting exclusive or dominant Taranaki Whānui interests. At most, they provided imprecise descriptions as to where they considered such interests might lie. The February 2007 letter from Mr Cowie to Sir Ngatata Love, quoted earlier, refers to dominant customary rights 'around the rim of Te Whanganui-a-Tara' and 'approximately a mile and a half from the Petone foreshore.'²⁷ Things became even less specific later on, as was shown in our hearings:

Mr Green: Now, just from my reading, it seems to me that sometimes people are referring to a one and a half mile line and sometimes to a two mile line, but exactly what it was seems a bit uncertain, is that fair?

Mr Ponter: I've seen several of those references, correct.

Mr Green: To put it another way, it's a bit of a fuzzy line?

25. Closing Submission on Behalf of Claimants for Port Nicholson Block Settlement Trust, 22 June 2012, 3.3.4, p 9

26. Closing Submission on Behalf of Claimants for Port Nicholson Block Settlement Trust, 22 June 2012, 3.3.4, p 7

27. Dean Cowie to Sir Ngatata Love, 14 February 2007, document A24(a), number 39, p 149

Mr Ponter: I suspect it's a bit of a fuzzy line for both parties, yes.²⁸

It appears from the evidence of Crown witnesses in our hearings that such vagueness, and the avoidance of maps, is a general OTS policy. Former OTS director Paul James told the Tribunal that, from his experience, 'maps are a very dangerous thing in Treaty settlements' because they 'tend to involve lines on the ground and they are contentious and inflammatory'.²⁹ Current OTS director Peter Galvin also stated that 'we don't like lines on maps', for the reason that they 'cut off your options' and give you 'no room to move'.³⁰ The stance taken by these two witnesses seems quite consistent with the Crown's stated negotiating policy. OTS's *Red Book*, referred to earlier in our report, is quite explicit on this point:

The settlement process is not intended to establish or recognise claimant group boundaries. Such matters can only be decided between claimant groups themselves. For example, any maps used during the settlement process or in subsequent communications are used only for specific purposes, such as determining the area where protocols with government departments might apply.³¹

The *Red Book* goes on to say that the Crown does not intend to 'resolve the question of which claimant group has the predominant interest in a general area. That is a matter that can only be resolved by those groups themselves.' OTS's position seems slightly contradictory, for in the process of settling with different groups with overlapping interests, the Crown is surely to some extent making a call on which claimant groups have predominant interests in different areas. However, we can also understand the Crown's unwillingness to produce maps with clearly defined boundary lines when dealing with groups with overlapping claims, for the reasons outlined by Messrs James and Galvin; they can be inflammatory and can potentially cut off Crown options when negotiating in a cross-claim situation. We can also understand how negotiators did not wish to become bogged down by arguments over lines on maps. Mr James outlined this pragmatic approach in his evidence to the Tribunal. He spoke of negotiations moving on to a point where 'you start talking about the redress that will come through the settlement as opposed to maybe an area of focus where the parties aren't going to be able to agree but isn't necessarily critical to agreeing the redress in the settlement'.³² A downside of this approach is that the resulting vagueness can cause confusion, even to Crown negotiators. We have seen earlier how some OTS staff mistakenly attributed the 1.5-mile line around Wellington Harbour to the Tribunal's *Te Whanganui a Tara* report when it was, in reality, largely an OTS construct loosely based on that report.

28. Transcript 4.1.2, p 167

29. Transcript 4.1.2, p 262

30. Transcript 4.1.2, p 292

31. Office of Treaty Settlements, *Ka Tika a Muri, Ka Tika a Mua: Healing the past, building a future – A Guide to Treaty of Waitangi Claims and Negotiations With the Crown* (Wellington: 2002 edition), p 58

32. Transcript 4.1.2, p 263

4.3.3

An additional point we would like to make is that we believe it would have been inconsistent with the findings of the *Te Whanganui a Tara* report for OTs to have produced maps with clearly defined boundary lines (other than those of the Port Nicholson block). The only boundary line within the block specified by the Tribunal in its report was the Rotokākahi line, which was referred to several times in this inquiry.

The claimants argued that the failure to mention the 1.5-mile line, along with the lack of mapping information, 'misled Taranaki Whānui into believing that the Crown was accepting an exclusive mana whenua position right down almost to the day of settlement concluding'.³³ We have already addressed this argument in chapter 3 and do not agree with it. We concluded that it was always clear that the Crown did not accept the exclusive mana whenua position, regardless of whether or not it continued to discuss it with the PNBCT. The issue was merely parked to one side for a while.

The claimants also alleged that the PNBCT was misled into believing that the Crown had abandoned the notion of a 1.5- or two-mile line around Wellington Harbour in which to offer redress. We disagree on this point as well. Map 1 shows the approximate location of properties offered to Taranaki Whānui as commercial redress (the map excludes large numbers of Housing New Zealand Corporation properties offered on an RFR basis). Although the property list changed as negotiations progressed during 2008, we do not understand the changes to have been significant. The map shows quite clearly that the commercial redress provided to Taranaki Whānui is almost entirely confined to land bordering Wellington Harbour. Little redress (aside from the Housing New Zealand properties) is provided in large parts of the block, including most of the Hutt Valley. The PNBCT would have known that the Crown owned property in these areas, and that this property was potentially available for redress for other groups. It appears from the evidence presented to our hearings that the redress offer was presented to Taranaki Whānui in map form on at least one occasion.³⁴ Even if this was not the case, the location of the properties on offer was not, in our view, especially difficult to determine. We cannot see how Taranaki Whānui were deceived into thinking that the Crown had abandoned its stated position that redress would be provided largely within a specific geographical area.

4.3.3 Delay in providing relevant information

Another allegation made by the claimants was that the Crown deliberately withheld from the PNBCT information about its proposed offer to Ngāti Toa with respect to the Port Nicholson block until it was too late to halt the signing of the Taranaki Whānui agreement:

33. Closing Submission on Behalf of Claimants for Port Nicholson Block Settlement Trust, 22 June 2012, 3.3.4, p7

34. Transcript 4.1.2, pp 164–165

Mr Ponter and OTS officials either deliberately or otherwise allowed the PNBCT to be manoeuvred into a position whereby when it finally learned of the Ngati Toa offer, they themselves had passed the point of no return for their own settlement negotiation. . . . For the Crown the timing was critical, for if they disclosed their hand too soon both the PNBCT and Ngati Toa negotiations would collapse. And so the Crown deliberately withheld key, vital information from the PNBCT so that it would, as it did, commit to settlement terms in the mistaken belief that the Ngati Toa settlement package in the Block had now been appropriately managed.³⁵

The reference here is to the fact that it was not until the evening of 8 August 2008, less than 11 days before the scheduled signing of the Taranaki Whānui deed of settlement, that information was provided to the PNBCT on the proposed offer to Ngāti Toa. This was despite that fact that the PNBCT had been requesting this information for some time, as indicated by the PNBCT's legal adviser, Bruce Farquhar, in his brief of evidence:

During the period March to May 2008 I was engaged in tasks that covered a multiplicity of issues but recall that the release of the Police Station was an issue that raised great consternation amongst the PNBCT. Up until this time it was not known what redress would be offered to Ngati Toa and the Taranaki Whanui Crown Negotiators were reluctant to discuss any aspect of the Ngati Toa redress package despite almost daily informal requests for indications of what the Crown/Ngati Toa aspirations might be within the Port Nicholson Block.³⁶

Mr Ponter confirmed this at our hearings, although we note that he was on annual leave from 21 June until 5 August 2008.³⁷ He said:

I was in no position to provide any of that information before this point [8 August 2008]. Ngatata pressed me, Aroha pressed me, time and time again for the information on the Ngati Toa settlement, I think Paul James was probably sick of hearing from me about where is this redress and why can I not give it to Taranaki Whanui.³⁸

It does, however, seem that OTS had an intention to provide the requested information in a reasonably timely way. It is our understanding that the specifics of redress are not generally provided to overlapping claimants until after an AIP or equivalent is signed. OTS was trying to provide the information earlier than this. An OTS internal email of 21 May 2008 laid out a proposed timetable for the Ngāti Toa negotiations that would enable

35. Closing Submission on Behalf of Claimants for Port Nicholson Block Settlement Trust, 22 June 2012, 3.3.4, p10

36. Brief of Evidence of Bruce Farquhar, 27 March 2012, document A8, p3

37. Transcript 4.1.2, p150

38. Transcript 4.1.2, p 236

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4.3.3

information on their proposed redress to be provided to Taranaki Whānui in early June.³⁹ It appears, however, that negotiations with Ngāti Toa stalled. In a briefing paper to the Treaty Negotiations Minister dated 6 June 2008, OTS indicated an intention to provide the requested information on 16 June.⁴⁰ However, an offer of commercial and cultural redress in the Port Nicholson block was not made to Ngāti Toa until that date.⁴¹ Furthermore, a lengthy meeting between Ngāti Toa and OTS officials on 16 June indicated that there were still a considerable number of issues to be sorted out, including ongoing Ngāti Toa concerns about the impending settlement with Taranaki Whānui.⁴² On 18 June 2008, a new timetable was proposed, with Taranaki Whānui to be provided with information on Ngāti Toa's redress on 24 June.⁴³ But this date also proved untenable, for on 26 June, the day of the initialling of the Taranaki Whānui deed of settlement, the Treaty Negotiations Minister's office faxed an undated letter to Sir Ngatata Love informing him that

the Crown has only recently made its offer of redress to Ngati Toa and still awaits their response. For this reason, subject to Ngati Toa's agreement, it will not be possible to share information about the parts of their offer that might be relevant to the PNBCT settlement, until after the initialling of your Deed.⁴⁴

On 8 July 2008, an OTS briefing paper to the Minister indicated that the Crown was still in negotiations with Ngāti Toa in relation to aspects of its proposed cultural redress, meaning information could still not be provided to Taranaki Whānui. The report informed the Minister that Ngāti Toa had successfully sought redress over Taputeranga Island in exchange for halting litigation over the south coast marine reserve.⁴⁵ At the weekly meeting on 10 July with the PNBCT, OTS officials said that the Crown wanted to confirm the main elements of the Ngāti Toa redress package 'ASAP'.⁴⁶ However, the matter of Ngāti Toa's redress does not appear to have been raised at the weekly meeting between the PNBCT and OTS on 16 July.⁴⁷ On 23 July, Ms Thorpe pointedly asked 'when we will be afforded the courtesy of receiving

39. Marian Smith to Maureen Hickey et al, email, 21 May 2008, document A24(a), number 145, pp 1148–1149

40. OTS, Briefing paper to Minister for Treaty of Waitangi Negotiations, 6 June 2008, document A24(a), number 162, p 1213

41. OTS, Briefing paper to Minister for Treaty of Waitangi Negotiations, 16 June 2008, document A24(a), number 181, p 1399

42. See, for example, OTS, notes of an OTS officials meeting with Ngāti Toa, 16 June 2008, document A24(a), number 170, p 1294–1304

43. Margot Fry to Paul James et al, email, 18 June 2008, document A24(a), number 180, p 1395

44. Hon Michael Cullen to Sir Ngatata Love, mid-late June 2008 (undated), document A24(a), number 156, p 1191. See also OTS, Aide memoire to Minister for Treaty of Waitangi Negotiations, 26 June 2008, doc A24(a), number 197, p 1568 and Ben White to Deborah Edmunds, email, 26 June 2008, doc A24(a), number 198, p 1572

45. OTS, Briefing paper to Minister for Treaty of Waitangi Negotiations, 8 July 2008, document A24(a), number 199, p 1579–1580

46. OTS, Notes on weekly meeting, 10 July 2008, document A24(a), number 201, p 1586

47. Bruce Farquhar, File Note of a meeting between Taranaki Whānui and OTS, 16 July 2008, document A24(a), number 203, pp 1591–1592 and OTS, Notes on weekly meeting, doc A24(a), number 202, pp 1588–1589

details pertaining to the Ngāti Toa settlement package.⁴⁸ The matter was raised again at the weekly meeting between OTS and the PNBCT the following day.⁴⁹

On 1 August 2008, the Taranaki Whānui deed of settlement was ratified, with nearly 99 per cent voting in favour.⁵⁰ There seems to have been no further communication with Taranaki Whānui about the provision of information on the Ngāti Toa settlement until Paul James's letter, which was dated 9 August but was delivered by Mr Ponter on 8 August. As previously outlined, that letter laid out a very tight timeline for the exchange of letters of mutual non-challenge before the signing of the deed of settlement on 19 August. In the event, Taranaki Whānui refused to participate in this process.

Mr James's letter included a list of commercial and cultural redress that had 'to date' been offered to Ngāti Toa in the Port Nicholson block. It indicated that no property other than the Wellington Central Police Station was being offered in the CBD. The items of commercial redress included some 50 properties, mainly on an RFR basis. As previously noted, tables attached to the letter included a large number of Housing New Zealand Corporation properties to be offered on an RFR basis (see section 3.3.2).

The Tribunal considers that the provision of this information fewer than 11 days before the planned signing of the deed of settlement gave Taranaki Whānui minimal time in which to react. Calling off the signing at such short notice after so much planning and organisation would have been an extraordinarily drastic act. We understand that arrangements for the signing included flying people in from around the country and from Australia. However, we saw no clear evidence to indicate that the Crown deliberately withheld key information until the last minute. The sequence of events outlined above generally shows that the Crown wished to provide information as soon as it could but was regularly thwarted by delays in agreeing a settlement package with Ngāti Toa. A very tight timetable for settlement with Taranaki Whānui had been agreed in early April 2008, and it is hardly surprising that last-minute hitches arose. The evidence presented to the Tribunal indicated that this tight timetable was supported by both parties in the negotiations.

4.3.4 OTS did not present the four conditions to Ngāti Toa

A final allegation made by the claimants is that 'OTS misrepresented the basis of the Police Station release to Ngāti Toa and failed to disclose that there were four conditions'. In particular, the Crown 'never put condition 3 or 4 to Ngāti Toa as required under the Police Station agreement.'⁵¹

48. Aroha Thorpe to Margot Fry et al, email, 23 July 2008, document A24(a), number 204, p 1594

49. OTS, Notes of weekly meeting between PNBCT and OTS, 26 July 2008, document A24(a), number 205, p 1596

50. Paper to Cabinet Business Committee, 7 August 2008, document A24(a), number 208, p 1620

51. Closing Submission on Behalf of Claimants for Port Nicholson Block Settlement Trust, 22 June 2012, 3.3.4, p 9

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The evidence provided to us in our hearings on this matter is contradictory. Mr Ponter told us that ‘those four conditions were translated to Ngati Toa within 48 hours of them having been received. We would not have been able to proceed without Ngati Toa understanding fully what those conditions were.’⁵² However, Te Runanga o Toa Rangatira executive director Matiu Rei cast doubt on this assertion:

Judge Clark: We’ve heard discussions about the four conditions which Aroha Thorpe outlined on behalf of the Taranaki negotiators back to the Crown. Do you recall those conditions being raised with yourself?

Mr Rei: No. No, I don’t specifically remember them. They did come up, I mean I would never have accepted them because they were conditions that were between OTS and Taranaki Whānui and really nothing to do [with Ngati Toa] and [I] couldn’t see how anybody could compel us on an arrangement between two other parties. Surely it would have to include us in the discussion.⁵³

Given the contradictory evidence, we now move to the documentation provided to our hearing. It may be useful first to recap what the four conditions were, as relayed to OTS by Ms Thorpe on 15 May 2008:

- (1) Taranaki Whānui ki Te Upoko o Te Ika are formally offered the commercial sale and leaseback opportunity to purchase two NIWA properties at Greta Point – legally described as Sec A SO 34240 (WN46C/852) and Sec B SO 34240 (WN 42A/164);
- (2) Taranaki Whānui ki Te Upoko o Te Ika are formally offered the Kelburn Local Purpose Reserve as cultural redress;
- (3) The Crown and Ngati Toa formally acknowledge that Taranaki Whānui ki Te Upoko o Te Ika will consent to the property being offered in the spirit of cooperation; and
- (4) Ngati Toa immediately cease all cross-claimant actions relating to the Port Nicholson Block Claim.⁵⁴

A briefing paper to the Treaty Negotiations Minister on 18 May 2008 outlined the four conditions in abbreviated form and stated:

We now understand that Ngati Toa have accepted the offer of the Wellington Central Police Station, on the basis that letters are exchanged between the two groups that state that Ngāti Toa Rangatira and Taranaki Whānui ki Te Upoko o Te Ika will agree to work reasonably with each other in relation to each other’s settlements.⁵⁵

52. Transcript 4.1.2, p 211

53. Transcript 4.1.2, p 334

54. Aroha Thorpe to Daran Ponter et al, email, 15 May 2008, document A24(a), number 138, p 1073

55. OTS, Briefing paper to Minister for Treaty of Waitangi Negotiations, 16 May 2008, document A24(a), number 140, p 1086

A further briefing paper two days later outlined the four conditions exactly as originally put and stated that the police station proposal was presented to Ngāti Toa's legal counsel on 15 May. 'Ngāti Toa were initially upset at the offer because the redress was made contingent on two central Wellington properties being made available to Taranaki Whānui that were previously available to Ngāti Toa.'⁵⁶ Elsewhere, the paper stated that 'Ngāti Toa also seek a mutual process of "non challenge" with Taranaki Whānui and an assurance that the Crown will not be enhancing the Taranaki Whānui Agreement in Principle.'⁵⁷

The 18 May briefing paper gives the impression that all four conditions were presented to Ngāti Toa's legal counsel. It records only their reaction with respect to condition 1 regarding the two NIWA properties, but it appears that officials raised the notion of a unilateral non-challenge with Ngāti Toa, and a mutual process of non-challenge was their response. The notion of unilateral non-challenge had been raised with Ngāti Toa some six weeks earlier, and there seems to have been no response at that time.⁵⁸ But, with the Wellington Central Police Station now at stake, Ngāti Toa had an incentive to engage in the process. On 6 June 2008, OTS director Mr James wrote to Ngāti Toa about a number of matters, including the police station: 'Taranaki Whānui have released the property from their Agreement in Principle on condition that Ngāti Toa Rangatira would not challenge the Taranaki Whānui deed of settlement. You have requested a reciprocal arrangement.'⁵⁹ This was, of course, a direct reference to condition 4 as the Crown understood it.

On 11 June 2008, the Treaty Negotiations Minister wrote to Mr Rei. A section of the letter was headed 'A Commercial Property for Ngāti Toa Rangatira':

I would like to inform you that the Port Nicholson Block Claims Team have agreed that the Wellington Central Police Station be removed from the Taranaki Whānui ki Te Upoko o Te Iki settlement package in order that it can be provided to Ngāti Toa Rangatira. I understand that Te Runanga o Toa Rangatira and the Port Nicholson Block Claims Team are to exchange letters in which you both agree not to challenge each other's settlements. I congratulate you on this innovative approach and understand that my officials are working with both you and the Port Nicholson Block Claims Team to draft the letters. As you are aware, the Port Nicholson Block Claims Team also seek an acknowledgement from Ngāti Toa Rangatira regarding the freeing up of this property to facilitate the settlement of both Ngāti Toa Rangatira's and Taranaki Whānui ki Te Upoko o Te Ika historical claims. My officials can discuss this matter further with you.⁶⁰

56. OTS, Briefing paper to Minister for Treaty of Waitangi Negotiations, 16 May 2008, document A24(a), number 141, p 1120

57. OTS, Briefing paper to Minister for Treaty of Waitangi Negotiations, 16 May 2008, document A24(a), number 141, p 1126

58. OTS, Aide memoire for Minister for Treaty of Waitangi Negotiations, 7 April 2008, document A24(a), number 99, p 844

59. Paul James to Te Kaha, 6 June 2008, document A24(a), number 165, p 1229

60. Hon Michael Cullen to Matiu Rei, 11 June 2008, document A24(a), number 169, p 1289

The Minister's letter makes no reference to conditions being placed on the release of the police station. It does no more than state that a process of mutual non-challenge is underway and that the PNBCT 'seek an acknowledgement from Ngāti Toa Rangatira regarding the freeing up of this property'. Indeed, Ngāti Toa's representatives stated at a meeting with OTS officials that same day that the Minister's letter had not mentioned conditions. They were under the impression that OTS officials were then trying to relitigate the police station deal by imposing conditions, although officials stated that 'conditions' was a strong word.⁶¹ Ngāti Toa's representatives stated that they had not agreed to the exchange of letters described by the Minister and that they resisted this proposal.⁶² They also strongly objected to the suggestion that they should provide a letter of acknowledgement to the PNBCT.⁶³ In the end, no such letter was ever sent, although a Crown acknowledgement was eventually provided by the Minister in partial fulfilment of condition 3.⁶⁴

In the end, the proposed exchange of letters of non-challenge never took place. However, it is hard to see how this disadvantaged Taranaki Whānui. Ngāti Toa never did challenge the Taranaki Whānui settlement, and Ngāti Toa's counsel stated in their closing submission that, as a result, condition 4 was therefore met.⁶⁵ The Tribunal agrees. With respect to condition 3, relating to Crown and Ngāti Toa acknowledgements, Ngāti Toa's closing submissions state: 'While Ngāti Toa did not make such an acknowledgement, this cannot be seen to be a Crown undertaking as it relates to the actions of a third party.'⁶⁶ It seems from the evidence that the Crown did put condition 3 to Ngāti Toa. It did so with little enthusiasm, and indeed its status as an actual condition was never made entirely clear. However, the Crown did provide the acknowledgement required, and we would agree that the Crown cannot ultimately be held responsible for the cooperation or otherwise of third parties in such situations.

4.4 CONCLUSION

In this chapter, we discussed two lines of argument put forward by the Crown which it submitted prevented the Tribunal from making further inquiry. The first was a jurisdictional argument. The Crown argued that this inquiry necessarily required the Tribunal to inquire into the Taranaki Whānui redress package. It submitted that such an inquiry was precluded by ouster provisions contained in the settlement Act. We concluded that the arguments concerning the pre-deed statements necessarily required us to analyse the meaning and effect of clause 7.4 of the deed of settlement, which is an entire agreement clause. That exercise

61. OTS, Notes of an officials meeting with Ngāti Toa, 11 June 2008, document A24(a), number 170, p 1297

62. OTS, Notes of an officials meeting with Ngāti Toa, 11 June 2008, document A24(a), number 170, pp 1295–1297

63. OTS, Notes of an officials meeting with Ngāti Toa, 11 June 2008, document A24(a), number 170, p 1297

64. This was the letter quoted at the start of Chapter 3.

65. Closing Submission on Behalf of Ngāti Toa, 29 June 2012, 3.3.6, pp 40, 53

66. Closing Submission on Behalf of Ngāti Toa, 29 June 2012, 3.3.6, p 54

involves an interpretation of the meaning and effect of the clause. We have the jurisdiction to do so, because it is expressly preserved by section 10(5) of the settlement Act. In analysing the pre-settlement negotiations in this way, we are not inquiring into the redress package which Taranaki Whānui received pursuant to the deed of settlement and the settlement Act.

The Crown's second line argument was that the deed of settlement and settlement documents set out the full terms of the settlement between itself and Taranaki Whānui. It said that the 'entire agreement' clause at clause 7.4 of the deed of settlement meant that any pre-settlement representations no longer mattered – the deed of settlement was the start and end point for determining the terms of settlement. The Crown referred the Tribunal to the Contractual Remedies Act 1979, in particular section 4(1) and the case law that has developed in New Zealand in relation to this issue.

In response, the claimants argued that the entire agreement clause was not a complete answer. They, too, referred to the Contractual Remedies Act 1979 and case law to highlight those circumstances in which a court is not precluded from inquiring into and determining whether pre-contractual statements were made, whether they constituted a representation or term of the contract, and whether that representation was relied upon. Furthermore, they submitted that the facts of this case and the behaviour of the Crown in its negotiations with Taranaki Whānui were the exact type of circumstances where the legislation envisaged that a discretion be exercised to set aside an entire agreement clause.

We have examined at some length the allegations made by the claimants with respect to the Crown's behaviour in negotiating the release of the Wellington Central Police Station from the Taranaki Whānui settlement package. Our analysis is that those arguments could not be sustained on the evidence. However, we remind ourselves that we are not a court of law required to apply principles of contract law.

As can be seen in the discussion that follows, we, consistent with our jurisdiction, move on to consider the pre-settlement negotiations, the effect of the entire agreement clause, and the subsequent actions and omissions of the Crown for compliance with the Treaty and Treaty principles.

CHAPTER 5

THE ENTIRE AGREEMENT CLAUSE – REFERENCE TO THE TREATY

5.1 INTRODUCTION

As discussed in chapter 4, counsel for the PNBS T and the Crown referred us to the rationale for entire agreement clauses, section 4(1) of the Contractual Remedies Act 1979, and relevant case law. The context for those discussions is contract law.

What is missing from that discussion are the Treaty and Treaty principles. They are the focus of this chapter.

5.2 TREATY PRINCIPLES

Crown counsel in their closing submissions referred to the fact that the ‘contracting parties are Treaty partners’.¹ Although, in a sense, Taranaki Whānui and the Crown were ‘contracting parties’, it would be a mistake to simply consider the relationship they had from that perspective.

At all times during the negotiation process, Taranaki Whānui and the Crown were also Treaty partners. That fact imposed upon them the obligation to act in accordance with Treaty principles during and after the negotiation process. We are entitled to analyse any undertaking given in relation to the police station from a Treaty compliance perspective.

We are supported in that view by the entire agreement clause itself, which in full reads:

Entire Agreement

- 7.4 This deed and the settlement documents:
 - 7.4.1 Constitute the entire agreement in relation to the matters in each of them; and
 - 7.4.2 Supersede all earlier negotiations, representations, warranties, understandings and agreements in relation to the matters in each of them including the terms of the negotiation and the agreement in principle;
 - 7.4.3 *Do not supersede the Treaty of Waitangi.* [Emphasis added.]²

1. Crown Closing Submissions, 29 June 2012, 3.3.5, p 53

2. Taranaki Whānui Deed of Settlement of Historical Claims, 18 August 2008, document A11(b), p 92

The first question we have to ask is, What is meant by the reference to ‘the Treaty of Waitangi’? Is it to mean the actual words of the Treaty and, if so, which version – the Māori or the English? Is the reference intended to refer to the principles of the Treaty of Waitangi?

The Treaty of Waitangi Act 1975 defines the Treaty at section 2 as meaning ‘the Treaty of Waitangi as set out in English and Māori in Schedule 1 to this Act’. The orthodox legal position is that the Treaty of Waitangi is a treaty of cession at international law and does not confer directly enforceable rights at domestic law, except to the extent that it is incorporated into law by statute.³

In the seminal decision of *New Zealand Maori Council v Attorney-General* the Court of Appeal needed to examine and give expression to the phrase ‘inconsistent with the principles of the Treaty of Waitangi’ as set out in section 9 of the State-Owned Enterprises Act 1986.⁴ As is well known, in that case the Court of Appeal referred to the fact that the English and Māori texts in the first schedule to the Treaty of Waitangi Act are not translations the one of the other and do not necessarily convey precisely the same meaning.

Justice Richardson discussed a number of issues and questions surrounding the Treaty and its application.⁵ He referred among other things to matters of interpretation; the fact there is not one agreed text; the differing views as to the extent of differences between the English and the Māori texts; whether the court should seek to reconcile the differences and harmonise the texts so as to achieve a consensus as far as possible; and the historically differing attitudes of the Treaty partners to the Treaty. He noted: ‘Against that background it is readily understandable that much of the contemporary focus is on the spirit rather than the letter of the Treaty, and on adherence to the principles rather than the terms of the Treaty.’⁶

In giving fulfilment to the phrase ‘the principles of the Treaty of Waitangi’, the Court of Appeal held that the Treaty signified a partnership between Pākehā and Māori requiring each to act towards the other reasonably and with the utmost good faith. The relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. The duty of the Crown is not merely passive but extends to the active protection of Māori people in the use of their lands and their waters to the fullest extent practicable.⁷

In a later case, the Court of Appeal again had cause to examine what was meant by ‘the principles of the Treaty’. In *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*, the court said:

The present case takes its place in a history. Some of its antecedents should be stated. *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641, the *Lands* case, came before this Court under s 9 of the State-Owned Enterprises Act 1986, whereby it is provided that

3. *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC)

4. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA)

5. *Ibid*, pp 670–672

6. *Ibid*, pp 672–673

7. *Ibid*, pp 662, 673, 693, 703, 714

nothing in that Act shall permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi. That provision made it incumbent on the Court to determine what are the principles of the Treaty of 1840 as applied to circumstances a century and a half later. It was held unanimously by a Court of five Judges, each delivering a separate judgment, that the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other. The words of the reasons for the judgment of the five Judges differed only slightly; the foregoing is a summary of their collective tenor.⁸

Recently, the Court of Appeal discussed the relevance of the Treaty of Waitangi to customary law in the case of *Takamore v Clarke*.⁹ In response to a question as to whether the Treaty modified the common law or obliged judges to apply and develop the common law, as far as possible, consistently with its terms, the court said:

The answer must depend ultimately on the legal status and force of the Treaty. But, as Dr Matthew Palmer discusses in his recent work, despite the fact that recently that question has not directly confronted the courts, the courts have none the less enforced the Treaty indirectly in a number of ways. First, the Treaty has been held to be an extrinsic aid to statutory interpretation, even where it is not itself mentioned in the text of the legislation. Secondly, it may have ‘direct impact’ in judicial review – whether, for example, as a mandatory consideration, or potentially as providing the basis for a legitimate expectation. Lastly, although the scope for their judicial enforcement remains doubtful, the obligations of good faith, reasonableness, trust, openness and consultation arising from the nature of the relationship between Māori and the Crown are now accepted.

It requires no leap of faith therefore to suggest that in general the common law of New Zealand should as far as is reasonably possible be applied and developed consistently with the Treaty of Waitangi.¹⁰

Taranaki Whānui were and remain Treaty partners. Clause 7.4.3 of the deed of settlement reinforces that fact and is a reminder to Taranaki Whānui and the Crown that neither party can contract out of the Treaty and the obligations that flow from it.

We consider that the reference to the Treaty should be interpreted as broadly as possible to mean not only the words of the Treaty itself but also the principles of the Treaty.

The jurisdiction of the Waitangi Tribunal is to be found at section 6(1) of the Treaty of Waitangi Act 1975. In summary, our jurisdiction requires us to consider whether acts or omissions of the Crown were or are inconsistent with ‘the principles of the Treaty’.

8. *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA), 304

9. *Takamore v Clarke* [2012] 1 NZLR 573 (CA). We note that this decision has been appealed to the Supreme Court and was heard earlier this month. However, as at the date of this report a decision has yet to be released by the Supreme Court

10. *Takamore v Clarke* [2012] 1 NZLR 573 (CA), 624

5.2.1

In the context of this case, what that means is that we are entitled to examine the pre-settlement negotiations and the subsequent actions and omissions of the Crown to assess whether they were consistent with the Treaty and Treaty principles.

5.2.1 No cultural redress in the CBD

In chapter 3, we found that, in agreeing to release the Wellington Central Police Station from their settlement package, Taranaki Whānui were given an undertaking that there would be no cultural redress for Ngāti Toa in the Wellington CBD. Two key items of evidence supporting that finding are the email from Mr Ponter to Ms Thorpe on 13 May 2008 and Mr Ponter's assurances to Taranaki Whānui on 14 May 2008.¹¹

The context is important. Although Mr Ponter was not the chief Crown negotiator in the Taranaki Whānui negotiations, he was the manager of the OTS team responsible for the negotiations with Taranaki Whānui. He was not a junior official. There was no reason on the part of Taranaki Whānui to look behind what he told them, both in writing and orally. Put another way, Taranaki Whānui could be confident that Mr Ponter was sufficiently senior to give the assurances that he gave.

The fact that Mr Ponter made those statements should not be a surprise. The Whanganui a Tara Tribunal said on more than one occasion that Taranaki Whānui (Te Atiawa, Taranaki, and Ngāti Ruanui) had ahi kā at Te Whanganui-ā-Tara and Te Aro.¹² Mr Ponter's predecessor, Dean Cowie, had expressly said in a letter to Sir Ngatata Love on 14 February 2007 that the Crown accepted that Taranaki Whānui had dominant customary rights around the rim of Whanganui-ā-Tara, including the current Wellington City, Petone, Waiwhetū, and Wainuiomata areas.¹³ What Mr Ponter said in relation to cultural redress in the CBD was based upon what the Tribunal had found, and it reflected the basis upon which the Crown had conducted the negotiations to that point.

After receiving the email from Mr Ponter on 13 May 2008 and meeting with him on 14 May, the PNBCT held a telephone conference on the morning of 15 May. Notwithstanding that discussions were difficult, Taranaki Whānui agreed that the Crown could offer Ngāti Toa the opportunity to purchase the Wellington Central Police Station.

5.2.2 Was the undertaking broken?

We now know that, just over a month prior to Mr Ponter making his assurances to Taranaki Whānui about cultural redress, a different OTS negotiating team had been discussing the

11. Daran Ponter to Aroha Thorpe, email, 13 May 2008, document A24(a), number 130, p1049; transcript 4.1.2, p233

12. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp 479, 487, 43, 44

13. Dean Cowie to Sir Ngatata Love, 14 February 2007, document A24(a), number 39, p149

possibility of cultural redress for Ngāti Toa within the Wellington CBD, in particular the possibility of a plaque at Parliament.¹⁴

An OTS file note of 16 May 2008 indicates that, by that stage, the Treaty Negotiations Minister had commenced discussions with the Speaker of the House about erecting a plaque in Parliament grounds for Ngāti Toa.¹⁵

On 8 August 2008, Mr Ponter hand delivered a letter from the then OTS director, Paul James, to Taranaki Whānui. The letter outlined the commercial and cultural redress being proposed for Ngāti Toa in the Port Nicholson block.¹⁶ It contains as an item of cultural redress the offer to Ngāti Toa of a plaque to be placed in Parliament grounds.¹⁷

Mr Ponter was asked questions about that item of redress. He indicated that, although he was on leave between 21 June and 6 August 2008, he had a hand in drafting the letter in the two days before it was signed and delivered to Taranaki Whānui. When referred specifically to the issue of the plaque, Mr Ponter agreed that that was an item of cultural redress on offer to Ngāti Toa. He was obviously uncomfortable with having been put in a position of having to communicate to Taranaki Whānui that an undertaking he had given them on behalf of the Crown was being unilaterally changed.

Judge Clark: Now, if you can turn over to page 1630? Just picking up the point of the plaque, for example, that's quite clearly cultural redress within the CBD isn't it?

Mr Ponter: Whereabouts are you looking at on this?

Judge Clark: Page 1630, there's a table there, headed up 'Cultural Redress'?

Mr Ponter: Sure.

Judge Clark: Seventh item down, 'Plaque'.

Mr Ponter: Yep, indeed.

Judge Clark: So, do you agree that's cultural redress on offer for Ngāti Toa within the CBD?

Mr Ponter: Sure, yes.

Judge Clark: Okay. Well, what happened to the agreement about Taranaki Whānui about no cultural redress within the CBD?

Mr Ponter: Well, at the time that I was negotiating that that wasn't included. When I saw the plaque redress in here I raised it with the Ngāti Toa team and we had a rather difficult discussion about it. My understanding is that that redress may have been removed, but I stand corrected on that.

Judge Clark: Yes, but we, you, headed up an agreement with Taranaki Whānui about no cultural redress in the CBD.

Mr Ponter: I did.

14. OTS, File note of meeting with Ngāti Toa, 15 April 2008, document A24(a), number 103, p 861

15. OTS, Briefing paper to Minister for Treaty of Waitangi Negotiations, document A24(a), number 141, p 1122

16. Paul James to Sir Ngatata Love, 9 August 2008, p 1 (doc A24(a), number 210, p 1627)

17. Ibid, p 4 (p 1631)

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5.2.2

Judge Clark: You then hand delivered a letter to one of their employees indicating there is cultural redress in the CBD, why wasn't that raised earlier with Taranaki Whanui?

Mr Ponter: This was the juncture at which the, most of the redress to be included in the Ngati Toa settlement was provided, I was under, I was in no position to provide any of that information before this point. Ngatata pressed me, Aroha pressed me, time and time again for the information on the Ngāti Toa settlement, I think Paul James was probably sick of hearing from me about where is this redress and why can I not give it to Taranaki Whanui? But it's only in the two days or so before this that I became aware that this information was in here.

Judge Clark: Well, I will put it this way, it appears that there is a situation in which you as the, a key negotiating figure in relation to the Taranaki Whanui negotiations, are making arrangements, providing commitments to Taranaki Whanui about cultural redress in the CBD . . .

Mr Ponter: Yes.

Judge Clark: Those arrangements are changed on the eve of Taranaki Whanui deed of settlement being finally signed.

Mr Ponter: They weren't changed as part of this settlement negotiations, this is a reflection of what is in the Ngati Toa settlement, which I didn't have any involvement with – I was disappointed.

Judge Clark: Yes, but when you said no cultural redress for Ngati Toa in the CBD . . .

Mr Ponter: Yes, that was . . .

Judge Clark: That is pretty clear, isn't it?

Mr Ponter: And that was communicated to the Ngati Toa team, clearly we, there was tension between the Office of Treaty Settlements and the Ngati Toa team and the Taranaki Whanui team on some of these issues.

Judge Clark: Well, did you raise it with your colleagues, because where is the good faith on the part of the Crown officials?

Mr Ponter: Yes, I did raise it with my colleagues, along with Taputeranga and those three properties in the southern area of Wellington, and to no avail, they had made their settlement and . . .

Judge Clark: Yes, because I presume they knew the arrangement you had reached with Taranaki Whanui about cultural redress in the CBD?

Mr Ponter: Yes.

Judge Clark: So, despite that, they pressed ahead with this?

Mr Ponter: Yes, and despite my concerns over Taputeranga and a number of other things, they pressed ahead.

Judge Clark: Did you feel a little bit let down when you saw this?

Mr Ponter: Yes, clearly, disappointed. I had given a . . .

Judge Clark: Because it undercut what you had agreed on.

Mr Ponter: I had given an understanding, I had negotiated in good faith, and that means good faith within the office as well . . .

Judge Clark: It has to be.

Mr Ponter: And I felt that I was undercut as a consequence of that, yes.¹⁸

We have no reason to doubt Mr Ponter's version of events. No evidence was given by OTS officials from the Ngāti Toa negotiating team that contradicts his version of events. In chapter 3, we found that, in agreeing to release the Wellington Central Police Station from their settlement package, Taranaki Whānui were given an undertaking that there would be no cultural redress for Ngāti Toa in the Wellington CBD. In addition, we find that:

- ▶ Taranaki Whānui agreed to the release of the Wellington Central Police Station from their commercial redress package.
- ▶ Simultaneously, a different OTS team and the Treaty Negotiations Minister were negotiating cultural redress for Ngāti Toa within the Wellington CBD.
- ▶ The OTS team negotiating with Ngāti Toa knew that Taranaki Whānui had been assured that there would be no cultural redress for Ngāti Toa in the Wellington CBD.
- ▶ In spite of that, OTS pressed ahead with the offer to Ngāti Toa of cultural redress in the CBD. OTS did so knowing full well that Mr Ponter had negotiated the release of the Wellington Central Police Station in good faith and that they were undercutting an undertaking that had been given to Taranaki Whānui.

At the time that Mr Ponter made his assurances that no cultural redress in the CBD would be given to Ngāti Toa, there is no evidence to suggest that he knew that his colleagues in the Ngāti Toa negotiating team and the Minister were making just such an offer. Thus, he inadvertently misled Taranaki Whānui. However, his colleagues in the Ngāti Toa negotiating team had no such excuse. They knew full well that Mr Ponter had given an undertaking in relation to cultural redress in the CBD to Taranaki Whānui. Despite that, they were quite happy to engineer the breaking of that undertaking.

5.2.3 Were Treaty principles breached?

The fact that the Crown broke the undertaking not to provide cultural redress in the CBD to Ngāti Toa speaks directly to the Treaty obligations upon it to at all times act reasonably, honourably, and in good faith.

The Crown cannot be said to have been acting reasonably, honourably, and in good faith when, having given an undertaking to Taranaki Whānui that there would be no cultural

18. Transcript 4.1.2, pp 235–237

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5.2.4

redress for Ngāti Toa in the Wellington CBD, they simultaneously negotiated the exact opposite.

The situation was exacerbated when one of the lead negotiators for Taranaki Whānui learnt internally that the Crown was proposing to offer cultural redress to Ngāti Toa in the Wellington CBD. Notwithstanding concerns being raised, the Crown decided to press on regardless. In acting in that manner, we consider that the Crown did not act honourably and in good faith when those decisions were made.

The breaking of this undertaking also speaks to a failure on the part of the Crown to actively protect the interests of Taranaki Whānui. The undertaking that there would be no cultural redress for Ngāti Toa within the Wellington CBD meant precisely that. At the same time, however, we know that Crown officials were prepared to ignore that undertaking by simultaneously negotiating cultural redress for Ngāti Toa in the CBD. The officials were also prepared to permit the Minister to conduct negotiations in relation to cultural redress in the Wellington CBD when they knew full well that Taranaki Whānui had been promised that that would not happen.

5.2.4 Prejudice and recommendation

The PNBCT learnt for the first time on 8 August 2008 that the Crown was proposing to offer Ngāti Toa a plaque at Parliament as cultural redress. OTS negotiators subsequently met with Sir Ngatata Love on 12 August. The officials advised the Minister that the PNBCT 'did not react well' to the proposed Ngāti Toa settlement. One of the issues specifically raised by the PNBCT was the offer of the plaque to Ngāti Toa, because the proposed location was 'a site to which Taranaki Whānui ki Te Upoko have strong cultural attachment (it is near the historic Pipitea Pā site and is marked by two pouwhenua).'¹⁹ This was clearly an issue of great concern to Taranaki Whānui. At a meeting with Mr Galvin in July 2011, Sir Ngatata Love described even the contemplation of such an offer by the Crown as 'anathema to Taranaki Whānui' and a 'blatant betrayal'. Taranaki Whānui had requested 'several forms' of redress at Parliament, all of which the Crown had rejected.²⁰

Having said that, for the reasons that follow, we have decided not to make any recommendation on this issue.

First, we understand that the offer of the plaque in Parliament grounds to Ngāti Toa has been withdrawn. An alternative form of redress is now being discussed involving the long-term display of taonga at Parliament with a written explanation concerning those taonga.

19. OTS, Report to Minister for Treaty of Waitangi Negotiations, 14 August 2008, document A24(a), number 214, p1654

20. PNBST, Notes for Meeting with Office of Treaty Settlements Mr Peter Galvin, 27 July 2011, document A24(a), number 296, p 2133

The Crown, Te Papa Tongarewa, and the Speaker of the House (as parliamentary landlord) are in discussions concerning those issues.²¹

Sir Ngatata Love, in his evidence to the Tribunal, said the PNBST agreed that a taonga, in the form of a mere, could be displayed in Parliament in place of a Ngāti Toa plaque. He stated that it was ‘a decision for Parliament’ whether or not to accept such a gift.²²

Secondly, notwithstanding the criticisms that we have made of the Crown, prior to signing their deed of settlement Taranaki Whānui did become aware that the Crown was prepared to break the undertaking of no cultural redress to Ngāti Toa in the CBD when they received Mr James’s letter on 8 August 2009.

We accept that the timeframe between that date and the date of the eventual signing of the deed of settlement – 19 August 2008 – was very tight. We understand that the PNBCT had wound up business on Friday 8 August 2008 and the PNBST was due to commence work on Monday 11 August 2008. Undoubtedly, there was a flurry of activity in the lead up to the settlement signing which meant that Taranaki Whānui’s ability to properly respond to what was on offer to Ngāti Toa was extremely limited.

Nevertheless, Taranaki Whānui were aware, prior to signing the deed of settlement, that the Crown had broken the undertaking to them, and indeed they expressed their concern about that at a meeting with OTS officials on 12 August 2008. They had options available to them, the most drastic of which was not to sign the deed.

Viewed objectively, Taranaki Whānui were aware of an issue prior to signing their deed of settlement, which they now claim they were misled about. With knowledge of the fact the Crown was prepared to break the undertaking of no cultural redress in the CBD, they nevertheless elected to sign the deed. For that reason and for the fact that the offer of a plaque at Parliament has been withdrawn, we stop short of making any recommendation.

Nevertheless, we do add these final comments. The actions of the Crown in offering cultural redress to Ngāti Toa in the Wellington CBD while at the same time promising Taranaki Whānui that would not happen reflects poorly on the Crown. This situation should not have been permitted to occur by the Crown. It led both to a negative reaction on the part of Taranaki Whānui²³ and to a deterioration of relationships between the Crown and Taranaki Whānui and between Taranaki Whānui and Ngāti Toa.

21. Memorandum for Treaty of Waitangi Cabinet Committee, document A24(a), number 298, pp 2159 and 2160

22. Transcript 4.1.2, p 93

23. OTS, Briefing paper to Minister for Treaty of Waitangi Negotiations, 14 August 2008, document A24(a), number 214, p 1654

5.2.5 No further commercial redress for Ngāti Toa in the CBD

In chapter 3, we found that Taranaki Whānui were given an undertaking that, in agreeing to release the Wellington Central Police Station from their redress package, no other properties would be offered as commercial redress to Ngāti Toa within the Wellington CBD.

To recap, the evidence in support of that is:

- ▶ The letter from the Associate Minister for Treaty of Waitangi Negotiations to Sir Ngatata Love on or about 7 May 2008.²⁴
- ▶ Mr Ponter's email of 13 May 2008.²⁵
- ▶ The subsequent meeting between Mr Ponter and Taranaki Whānui on 14 May 2008. Mr Ponter gave evidence that he was explicit that any commercial redress would be limited to the Wellington Central Police Station in the CBD. His impression was that the offer of a single property was one of the attractions of the deal.²⁶
- ▶ The letter from Paul James, the then director of OTS, to Sir Ngatata Love which was delivered on the evening of 8 August 2009.²⁷ That letter sought to inform Taranaki Whānui of the commercial and cultural redress then on offer to Ngāti Toa. On the issue of the police station, Mr James had this to say:

As you will see, the list includes both cultural and commercial redress. Other than the provision of the Wellington Central Police Station, however, the exclusive redress offered to Ngāti Toa rangatira (that is the transfer of land in fee simple title) relates to land that is outside the Wellington Central Business District.

- ▶ On 18 August 2008, on the eve of settlement, Sir Ngatata Love wrote to the then Minister for Treaty of Waitangi Negotiations, Dr Michael Cullen. This letter said, amongst other things:

We have demonstrated our positive approach by agreeing to release the Wellington Central Police Station so Ngāti Toa can be offered a sale and lease back opportunity of the land only of this property in the CBD area.²⁸

- ▶ In a ministerial paper dated 17 November 2009, OTS officials summarised their understanding of the basis upon which the PNBS T had proceeded to sign the deed of settlement, that understanding being that, other than the Wellington Central Police Station, no further inner city Wellington properties would be made available to Ngāti Toa.²⁹

24. Associate Minister for Treaty of Waitangi Negotiations to Sir Ngatata Love, undated (faxed 7 May 2008), document A24(a), number 117, pp 944–946

25. Daran Ponter to Aroha Thorpe, email, 13 May 2008, document A24(a), number 130, p 1049

26. Transcript 4.1.2, p 234

27. Paul James to Sir Ngatata Love, 9 August 2008, document A24(a), number 210, pp 1627 – 1633

28. Sir Ngatata Love to Minister for Treaty of Waitangi Negotiations, 18 August 2008, document A24(a), number 217, p 1714

29. OTS, Briefing paper to the Minister for Treaty of Waitangi Negotiations, 17 November 2009, document A24(a), number 261, p 1983

- ▶ On 31 March 2010, Mr Ponter, who had by that stage left OTS, sent an email to OTS officials. In it, he said that the ‘deal over the Police Station was intended as the only commercial redress in the exclusive area of redress.’³⁰

As at the date of signing of the deed of settlement, what was then on offer to Ngāti Toa reflected the undertaking given to Taranaki Whānui. Mr James’s letter of 9 August 2008 expressly said that the only offer of exclusive commercial redress to Ngāti Toa within the Wellington CBD was the Wellington Central Police Station.

We now know that the Crown has offered Ngāti Toa an RFR over properties that it had acquired in Wellington City in the four years after the signing of the deed of settlement, as well as properties that had been acquired by the NZTA in the period between 2 September 2009 and 2 September 2019. It appears to us that the first time Taranaki Whānui became aware of this was when the issue was disclosed in an affidavit filed in the proceedings by OTS’s director, Mr Galvin.³¹

On the face of it, the offer of the RFRs as a form of commercial redress to Ngāti Toa breaches the undertaking given to Taranaki Whānui about no further commercial redress in the Wellington CBD for Ngāti Toa and warrants further examination.

5.2.6 Offer of further commercial redress to Ngāti Toa in the Wellington CBD – RFR properties

Ngāti Toa are now being offered an RFR over Crown- and NZTA-owned properties in Wellington City (defined by the jurisdiction of Wellington City Council).³²

Ngāti Toa’s letter of agreement provided for the gifting of a landbanked property in Nelson up to the value of \$300,000 for the purpose of a service centre.³³ A property at 408 Trafalgar Street was identified as being suitable for this purpose in the discussions leading up to the letter of agreement and was included in that document in a schedule of commercial properties in the South Island for possible gifting to Ngāti Toa.³⁴ But, in July 2009, the property was accidentally included in the South Island commercial property ballot and was selected by Ngāti Koata, who later refused to relinquish it to Ngāti Toa once the mistake was discovered.³⁵ OTS sought to provide Ngāti Toa with another property, but none suitable for the purpose of a service centre was available in the top of the South Island.³⁶

30. Daran Ponter to Teresa Buchanan et al, email, 31 March 2010, document A24(a), number 284, p 2086

31. Peter Bernard Galvin, Affidavit, 16 November 2011, document A6, paragraph 14

32. OTS, Briefing paper to the Minister for Treaty of Waitangi Negotiations, 17 December 2009, document A24(a), number 266, p 2013

33. Ngāti Toa Rangatira letter of agreement, 11 February 2009, document A24(a), number 230, p 1771

34. Ngāti Toa Rangatira letter of agreement, 11 February 2009, document A24(a), number 230, p 1782

35. OTS, Briefing paper to the Minister for Treaty of Waitangi Negotiations, 17 November 2009, document A24(a), number 261, p 1981

36. Brief of Evidence of Peter Galvin, 27 April 2012, document A16, paras 10–14

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5.2.6

On 3 November 2009, counsel for Ngāti Toa suggested properties owned by the NZTA around the Wellington inner-city bypass should be included in the Ngāti Toa RFR schedule, with one offered as an alternative to the Nelson property.³⁷ They included 12 that had been removed from the Taranaki Whānui RFR schedule owing to incomplete legal definitions, as well as 15 that Taranaki Whānui had declined to exercise their RFR rights over in October 2009. An email from Margot Fry of OTS in September suggested that counsel for Ngāti Toa had earlier requested the first category of properties be included in the settlement but indicated that OTS did not believe they would be suitable.³⁸

However, OTS considered that one of the properties that was turned down by Taranaki Whānui in October 2009 – 276 Willis Street – was a suitable replacement for the Nelson property, and in a 17 November 2009 briefing paper, OTS recommended that the Minister offer it to Ngāti Toa. OTS warned, however, that:

PNBST are likely to react negatively when they learn Ngāti Toa are being offered 276 Willis Street. Although the PNBST Deed of Settlement is silent on the matter PNBST have proceeded on the understanding that no further inner city Wellington properties will be made available to Ngāti Toa. In particular PNBST:

- a. agreed to the removal of the Wellington Central Police Station from their commercial redress package in order for it to be offered to Ngāti Toa and several cultural redress concessions were also made; and
- b. are likely to challenge the addition of property in the Ngāti Toa package as cultural redress on the basis the Waitangi Tribunal did not include Ngāti Toa as one of the Iwi who had ahi kā rights around Wellington Harbour.

OTS advised that such a reaction could be minimised by limiting the offer to one property as commercial, rather than cultural, redress, and by offering the property to Ngāti Toa at the same price as it had been offered to Taranaki Whānui.³⁹ On 23 November 2009, the Crown offered 276 Willis Street to Ngāti Toa at a cost of \$585,000. The original provision of a \$300,000 gift brought the cost down to \$285,000.⁴⁰

OTS also had to address Ngāti Toa's request for the remaining NZTA properties as RFRs. On 4 December 2009, the Minister for Treaty of Waitangi Negotiations, Christopher Finlayson, agreed that properties that were removed from the Taranaki Whānui RFR schedule because of technical deficiencies or errors that had since been rectified could be added back to their RFR schedule, as provided for in their deed of settlement. Properties acquired

37. Baden Vertongen to Justine Smith, 3 November 2009, document A24(a), number 259, p1971; Brief of Evidence of Peter Galvin, 27 April 2012, doc A16, para 17

38. Tessa Buchanan to Margot Fry, email thread, 29 September 2009, document A24(a), number 254, p1958

39. OTS, Briefing paper to the Minister for Treaty of Waitangi Negotiations, 17 November 2009, document A24(a), number 261, pp1983–1984

40. Minister for Treaty of Waitangi Negotiations to Matiu Rei, 23 November 2009, document A24(a), number 262, pp1992–1993

by the NZTA after the passage of the Port Nicholson settlement legislation, however, were to be made available for other Treaty settlements in the Wellington area.⁴¹

In December, Ngāti Toa rejected 276 Willis Street because they believed that it was over-valued at the price offered.⁴² Further, they protested the transfer of the NZTA properties removed from Taranaki Whānui's settlement being added back to Taranaki Whānui's RFR schedule. They also complained that the only property the NZTA had purchased since 2 September 2009 was in Tawa and was unsuitable for their purposes. A 17 December 2009 briefing paper prepared by OTS recommended that the Minister offer Ngāti Toa a package that would address each of these issues separately. A cash sum of \$300,000 would be offered in place of a specific property for the service centre redress. To address Ngāti Toa's concerns about the NZTA RFR properties, they would be offered 'an RFR over core Crown properties in Wellington City owned on settlement date and acquired within four years following settlement date' and 'an RFR over NZTA-administered properties in Wellington City acquired between 2 September 2009 and 2 September 2019'.⁴³ OTS did acknowledge that Taranaki Whānui were 'likely to be concerned at the offer of redress in Wellington City to Ngāti Toa'.⁴⁴ The Minister accepted the recommendations.

Peter Galvin, the current director of OTS, said in his brief of evidence of 27 April 2012 that the decisions were 'informed by the lack of commercial Crown properties in the top of the South Island for Ngāti Toa' and that the Crown knew that commercial redress 'had been secured from Taranaki Whānui's AIP in the CBD – the Police Station'. Nevertheless, the Crown's position was that 'the provision of RFR rights over property acquired post the Taranaki Whānui Deed, was a sufficiently confined piece of redress to be included in the Ngāti Toa redress package, even though it potentially included the CBD area'.⁴⁵

5.2.7 Was the undertaking broken?

We know that the Crown promised Taranaki Whānui that, other than the Wellington Central Police Station, there would be no further commercial redress for Ngāti Toa within the Wellington CBD. And, yet, a little over four months after the Taranaki Whānui settlement Act came into force, the Crown reneged on that undertaking by offering Ngāti Toa RFRS over Crown and NZTA-administered properties in Wellington City, potentially including the CBD area.

41. OTS, Briefing paper to the Minister for Treaty of Waitangi Negotiations, 4 December 2009, document A24(a), number 264, pp 2000, 2004

42. OTS, Briefing paper to the Minister for Treaty of Waitangi Negotiations, 17 December 2009, document A24(a), number 266, p 2011

43. OTS, Briefing paper to the Minister for Treaty of Waitangi Negotiations, 17 December 2009, document A24(a), number 266, p 2013

44. OTS, Briefing paper to the Minister for Treaty of Waitangi Negotiations, 17 December 2009, document A24(a), number 266, p 2012

45. Brief of Evidence of Peter Galvin, 27 April 2012, document A16, paras 24 and 28

5.2.8 Were Treaty principles breached?

We start this discussion by considering the nature of an RFR. An RFR allows a claimant group the right to purchase specific surplus Crown land at market value ahead of any other potential purchaser, if the relevant Government department decides to sell it within a specified period in the future.⁴⁶ The *Red Book* says that RFRs recognise the importance to claimant groups of building their landholdings and maintaining their relationship to the land as tangata whenua. It goes on to state that RFRs are usually not available on designated properties in an area subject to unresolved overlapping interests between claimant groups.⁴⁷

We believe that the Crown has attempted to play down the nature of the redress on offer in the form of RFRs to Ngāti Toa. In its closing submissions, the Crown characterised an RFR as a limited form of redress that simply gave Ngāti Toa an option to buy certain properties. It submitted that there was no guarantee that Ngāti Toa would obtain any property through the RFR mechanisms and they did not give Ngāti Toa a presence in the Wellington CBD.⁴⁸

That analysis ignores the fact that RFRs are a form of exclusive commercial redress.⁴⁹ They are usually not available in areas subject to unresolved overlapping claims. Via the RFR mechanisms on offer from the Crown, Ngāti Toa have the potential to acquire a significant commercial presence in the Wellington CBD.

The undertaking given to Taranaki Whānui was clearly designed to influence them to release the police station from their commercial redress package. As Mr Ponter himself said, the fact that there would be only one commercial property for Ngāti Toa in the Wellington CBD was attractive to Taranaki Whānui.⁵⁰

The Crown submitted that the undertaking of no further commercial redress in the CBD was a statement as to then fact and was not a promise of future Crown conduct.⁵¹ We remind ourselves that the Treaty is a living document⁵² and that the relationship is forward looking. As the Tribunal said in its *Fisheries Settlement Report 1992*:

The essence of the Treaty is that it is all future looking. It is not about finite rules, or final pay-offs, no matter how handsome. It is about the maintenance of principle over ever-changing circumstances. Accordingly the abrogation of the Treaty interest, and the implicit responsibility of the Crown that goes with it, is a contradiction of the Treaty terms.⁵³

46. Office of Treaty Settlements, *Ka Tika a Muri, Ka Tika a Mua: Healing the past, building a future – A Guide to Treaty of Waitangi Claims and Negotiations With the Crown* (Wellington: 2002 edition), p 91

47. Ibid

48. Crown Closing Submissions, 29 June 2012, 3.3.5, p 57

49. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 97

50. Transcript 4.1.2, p 234

51. Crown Closing Submissions, 29 June 2012, 3.3.5, pp 34, 38, 57–58

52. *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at p 655

53. Waitangi Tribunal, *The Fisheries Settlement Report 1992* (Wellington : Brooker and Friend Ltd, 1992), p 11

There is no doubt in our mind that the undertaking given was intended as an assurance of future conduct. It was not qualified in any manner. OTS officials did not, for example, say that they were reserving to themselves the ability to offer further commercial redress to Ngāti Toa in the Wellington CBD at some date in the future.

As the OTS official responsible for these negotiations, Mr Ponter clearly understood that the deal in relation to the Wellington Central Police Station was that there should be no further commercial redress in that area for Ngāti Toa. He said that in a subsequent email of 31 March 2010 and in his answers to the Tribunal.⁵⁴

In November of 2009, when OTS officials were developing alternative commercial redress for Ngāti Toa in Wellington, they summarised their understanding of the basis upon which Taranaki Whānui signed their deed of settlement, which was that no further inner-city Wellington properties (other than the police station) would be made available to Ngāti Toa. They knew that it was on that basis that Taranaki Whānui agreed to the removal of the Wellington Central Police Station from the commercial redress package on offer to it. They knew that they risked a negative reaction from Taranaki Whānui should they offer further commercial redress to Ngāti Toa in the Wellington City area.⁵⁵

We are also concerned that a driver for the offer of further commercial redress in the Wellington CBD for Ngāti Toa was the failure of Crown officials to ring-fence a Nelson property for Ngāti Toa. At the urging of Ngāti Toa, the Crown had looked to provide replacement redress in the Wellington CBD, an area in which Taranaki Whānui have ahi kā. While it is only fair and Treaty compliant that the Crown should seek to provide replacement commercial redress for Ngāti Toa for this error, it was incumbent on the Crown not to do so in a way that provoked a negative reaction from Taranaki Whānui.

We do not agree with the submission from the Crown that, if the undertaking of no further commercial redress in the CBD was that important to Taranaki Whānui, they would have insisted upon its inclusion in the deed of settlement.⁵⁶ At the time that the deed of settlement was signed, such a clause was simply not necessary. Shortly before signing the deed, the Crown had committed itself by telling Taranaki Whānui that, other than the police station, there would be no commercial redress for Ngāti Toa in the Wellington CBD. That influenced Taranaki Whānui to withdraw the police station from their commercial redress package, take other commercial property, and proceed to sign the deed. At that stage, there was no other commercial redress on offer for Ngāti Toa in the Wellington CBD. Taranaki Whānui were entitled to rely upon the honour of the Crown to adhere to its promise. Taranaki Whānui were not to know that the Crown would shortly thereafter seek to break the undertaking given by offering the RFRS to Ngāti Toa. After all, the Treaty and the

54. Daran Ponter to Teresa Buchanan et al, email, 31 March 2010, document A24(a), number 284, p 2086; transcript 4.1.2, p 238

55. OTS, Briefing paper to the Minister for Treaty of Waitangi Negotiations, 17 November 2009, document A24(a), number 261, p 1983

56. Crown closing submissions, 29 June 2012, 3.3.5, p 48

5.2.9

obligations that flow from it are as much about the maintenance of Treaty relationships and the adherence to principle. What they are not about is narrow legalism.

In failing to adhere to its undertaking to Ngāti Toa to provide no commercial redress in the Wellington CBD other than the police station, we find that the Crown failed to actively protect the interests of Taranaki Whānui. The undertaking of no further commercial redress for Ngāti Toa within the Wellington CBD meant precisely that. A little over four months after the Taranaki Whānui settlement Act came into force, the Crown was prepared to break that undertaking.

The Crown also failed to act reasonably and with the utmost good faith towards Taranaki Whānui. The Crown knew full well that the undertaking not to provide further commercial redress for Ngāti Toa within the Wellington CBD was attractive to Taranaki Whānui and assisted in them agreeing to release the Wellington Central Police Station. The Crown also knew that Taranaki Whānui settled on the basis that there would be no further commercial redress for Ngāti Toa within the CBD. This was an undertaking of present and future conduct on behalf of the Crown. Notwithstanding that, the Crown were prepared to break that undertaking to Taranaki Whānui.

5.2.9 Prejudice

What prejudice, if any, has been caused to Taranaki Whānui by these Treaty breaches? On the one hand, we know that Taranaki Whānui have settled. They have received the benefit of their settlement package. Therefore, what prejudice can they show by this breach of Treaty principles?

Analysing the matter in that fashion ignores the fact that Taranaki Whānui settled on the basis of an undertaking on the part of the Crown that Ngāti Toa would not be offered any commercial redress in the Wellington CBD. It is self-evident that the breaking of that undertaking by offering Ngāti Toa RFRS in an area which encompasses the Wellington CBD is prejudicial to Taranaki Whānui.

From our reading of the *Te Whanganui a Tara* Tribunal report and the documentation and evidence presented to us in this inquiry, we are also well aware of the delicate nature of the tribal dynamic between Taranaki Whānui and Ngāti Toa.

Throughout their dual negotiation processes, it is evident to us that both Taranaki Whānui and Ngāti Toa always had an eye as to what the other would receive by way of Treaty settlement, and how that impacted upon their respective rights. The Crown was always aware of this dynamic. Examples of this were canvassed in chapter 3, when we discussed matters such as potential challenges being mounted by Ngāti Toa to the Taranaki Whānui AIP in 2008 and what was meant by condition 4 in the Thorpe email of 15 May 2008. Indeed, the

undertaking of no cultural redress and no commercial redress, other than the police station, in the Wellington CBD was a clear example of that dynamic at play.

The Crown did itself no favours in breaking the undertaking, thereby straining already sensitive tribal relationships.

We are also alive to the submissions made by counsel for Ngāti Toa about the prejudicial effect of this inquiry on them.⁵⁷ Through no fault of their own, Ngāti Toa have been embroiled in this application for urgency. We accept that they have spent time and have incurred expense in the preparation and defence of their position throughout this inquiry, and that in many respects the case argued by Taranaki Whānui has not succeeded.

Furthermore, also through no fault of Ngāti Toa's, a Nelson property which was previously identified as potential redress for them ended up being selected by another iwi. What concerns us is that the Crown has compounded this error by then offering Ngāti Toa commercial redress in the Wellington CBD, which they promised Taranaki Whānui they would not do. The Crown referred to the need to balance the competing interests of the claimant groups.⁵⁸ However, an attempt at balance should not come at the expense of breaking an undertaking made during settlement negotiations.

5.2.10 Conclusion

In this chapter, we were required to interpret the meaning of an entire agreement clause and a reference in that clause to the Treaty of Waitangi. The interpretation of what is meant by the entire agreement clause is specifically permitted by section 10(5) of the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act 2009.

We reached the conclusion that Taranaki Whānui were and remain Treaty partners. Clause 7.4.3 of their deed of settlement reinforces that fact and is a reminder to Taranaki Whānui and the Crown that neither party can contract out of the Treaty and the obligations that flow from it. We also reached the conclusion that the reference to the Treaty in clause 7.4.3 of the deed of settlement should be read to include a reference to the principles of the Treaty.

We then analysed the undertaking given to Taranaki Whānui in relation to cultural and commercial redress in the Wellington CBD and the subsequent actions and omissions of the Crown for compliance with the Treaty and Treaty principles.

We concluded that there had been a breach of the undertaking not to provide cultural redress to Ngāti Toa in the CBD and that the manner in which the Crown acted in breaching that undertaking was in breach of Treaty principles. We stopped short of making a positive recommendation in relation to that issue, however, because Taranaki Whānui knew before signing their deed of settlement that there was an offer of cultural redress in the CBD to

57. Closing Submission on Behalf of Ngāti Toa, 29 June 2012, 3.3.6, pp 71–73

58. See Brief of Evidence of Peter Galvin, 27 April 2012, A16, para 33

Ngāti Toa in the form of a plaque at Parliament. Furthermore, that offer was subsequently withdrawn.

We further found that the Crown broke its undertaking that there would be no further commercial redress in the Wellington CBD for Ngāti Toa and, in so doing, breached Treaty principles.

The undertaking given to Taranaki Whānui concerning the Wellington Central Police Station was set against a backdrop of simultaneous negotiations involving, on the one hand, the Crown and Taranaki Whānui and, on the other, the Crown and Ngāti Toa. It is of serious concern to us that the Crown was willing to break its undertaking not to provide cultural redress in the CBD, knowing full well that that undertaking had been negotiated in good faith with Taranaki Whānui. That breach was then compounded by the Crown, with knowledge of what had been promised to Taranaki Whānui in relation to commercial redress, proceeding to offer Ngāti Toa exclusive RFR redress which potentially involves the Wellington CBD.

5.3 RECOMMENDATION

We found that the Crown failed to act reasonably and with good faith, let alone the utmost good faith, towards Taranaki Whānui. It also failed to actively protect the interests of Taranaki Whānui. In offering further commercial redress in the Wellington CBD to Ngāti Toa other than the police station, not only did the Crown break an undertaking, but by its actions it also contributed to straining already sensitive tribal dynamics. The Crown also needed to ensure that Ngāti Toa were not penalised for its failure in this respect.

We urge the Crown to take steps to act honourably and to rectify the situation that it has created. Therefore, we make the following recommendations to the Crown pursuant to section 6(3) of the Treaty of Waitangi Act 1975:

- ▶ That it review the offer of RFRS to Ngāti Toa over Crown and NZTA-administered properties in Wellington City.
- ▶ That, if necessary, it amend the offer of RFRS to ensure that no commercial properties are made available via that mechanism to Ngāti Toa in the Wellington CBD. We are not concerned about properties located outside the CBD. For the purpose of this exercise, we adopt the Wellington City Council's definition of the Wellington CBD, as defined for district planning purposes and as shown in map 3.
- ▶ That, if, as a result of implementing the above two recommendations, the commercial redress package currently on offer to Ngāti Toa is in any way diminished, the Crown should identify and offer alternative substitute commercial redress for Ngāti Toa.

CHAPTER 6

CONCLUDING REMARKS

6.1 INTRODUCTION

This Tribunal has not found in favour of the claimants with respect to their central claim, namely that

Taranaki Whānui understood the Crown to have made an undertaking or commitment that the Wellington Central Police Station would be the only property offered to Ngāti Toa from within the Port Nicholson Block (as either commercial or cultural redress).¹

However, we have found that the Crown breached the Treaty of Waitangi in its dealings with Taranaki Whānui. We have also found that Taranaki Whānui were prejudiced by Crown actions in breaking an undertaking to offer Ngāti Toa no properties, other than the Wellington Central Police Station, within the Wellington CBD. This broken undertaking was, in our view, a breach of Treaty principles. Therefore, in chapter 5, we made a number of recommendations relating to the Crown's negotiations with Ngāti Toa over the Port Nicholson block.

The Tribunal has, in the past, emphasised that the Crown should not create new wrongs when settling the injustices of the past. The *Ngati Awa Settlement Cross-Claims Report* had much to say in this regard. There, the Tribunal noted the importance of ensuring that 'the cost of settlement in the form of damage to tribal relations is kept to the absolute minimum':

Inevitably, officials become focused on getting a deal. But they must not become blinkered to the collateral damage that getting a deal can cause. A deal at all costs might well not be the kind of deal that will effect the long term reconciliation of Crown and Maori that the settlements seek to achieve.²

We are concerned about the way in which the Crown conducted aspects of its negotiations in the Port Nicholson block. Much of the blame for this appears to lie at the feet of what was referred to in our hearings as the 'silo' approach of OTS in its negotiations with Taranaki Whānui and Ngāti Toa. This was touched upon in chapter 1 and is discussed in

1. Amended Statement of Claim 1.1.1(a), 22 March 2012, p 15

2. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p 88

more detail below. We also discuss a matter which became apparent to us, namely the imprecision of language used at times by OTS officials.

6.2 THE SILO APPROACH

In June 2007, when the negotiations with Taranaki Whānui were well under way and Ngāti Toa were soon to sign their terms of negotiation with the Crown, the Tribunal released its *Tāmaki Makaurau Settlement Process Report*. As with this inquiry, the report dealt with a situation where multiple groups had overlapping interests in a predominantly urban area. An important distinction is that in Tāmaki Makaurau the Crown was already in negotiations with one significant group – Ngāti Whātua o Ōrākei – while no other group with interests in the area yet had a mandate to negotiate with the Crown. But these other groups were concerned that Ngāti Whātua had such a head start in the settlement negotiations that their own interests would be overlooked. The situation in the Port Nicholson block was rather different, for two groups were negotiating at the same time, albeit being at different stages in the negotiations process. Despite this distinction, we consider that the findings and observations in the *Tāmaki Makaurau* report are highly relevant to our current inquiry. That report was critical of what has since been dubbed the ‘silo’ approach used by OTS in its settlement negotiations (although that term was never actually used in the 2007 report). The report stated:

The Office of Treaty Settlements officers seem to be oblivious to the impact their dealings with a group in settlement negotiation can have on relationships among Maori groups in the same area. . . . Sequestering themselves with one group and conducting secret negotiations on the basis of documents that others are not allowed to see of course arouses suspicion, and provides the seeds of resentment, both towards the mandated group and the Crown.³

The silo approach refers to a situation where negotiations with groups with overlapping interests are conducted in relative isolation, either because of timing issues, as in Tāmaki Makaurau, or because different OTS teams are negotiating with different groups. In either case, no one has a clear overview of the overlapping interests within a geographical area and how this might affect redress. The latter situation applied in Port Nicholson, as was noted by several witnesses in our inquiry.

According to Mr Ponter, OTS’s culture was changing by the time he took up his negotiating role in July 2007. He told the Tribunal that OTS had

3. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), pp 87–88

taken on board . . . this Tribunal's earlier recommendations in the *Te Arawa* report and in the *Tāmaki Makaurau* report for change within the Office of Treaty Settlements. And so it was making a transition from very siloed geographic type negotiation teams to a more regional approach.⁴

However, he also emphasised on several occasions that the teams negotiating settlements in the Port Nicholson block still followed the silo approach: “The team that formed around me in relation to the Taranaki negotiations was still of that old-school variety; it was a small team and it was just based around negotiating the Port Nicholson block settlement.”⁵

We understood from the evidence presented to us that the silo approach meant that Mr Ponter's OTS team, which was negotiating the Taranaki Whānui settlement, operated largely in isolation from the team negotiating with Ngāti Toa. The two teams regularly communicated and exchanged information with respect to possible overlapping interests but were otherwise largely ignorant of the settlement being negotiated by the other team. They had occasional glimpses of what redress was on offer but no sense of where the two sets of negotiations were heading overall. We note that it appears that silos operated, not just between OTS teams but also at times between Treaty Negotiations Ministers. For example, in relation to the proposed deal over the Wellington Central Police Station, the Treaty Negotiations Minister was briefed by the OTS team negotiating with Ngāti Toa, while the Associate Minister was briefed by the Taranaki Whānui team.⁶ The briefing papers contained different information relating to the separate negotiations, and neither Minister therefore necessarily had a sense of what was happening overall in the Port Nicholson block.⁷

Mr Ponter told the Tribunal that the silo approach can have advantages in expediting rapid settlements.⁸ But it is apparent to us that this approach also has its dangers. Information provided by one team to another may be misunderstood or incomplete. We note that, in the above example, the two Ministers were given slightly different information by their respective teams. The Associate Minister was informed that the police station was included in the Taranaki Whānui AIP as a sale and leaseback property. However, the Minister was told that the police station was in the list of RFR properties only.⁹ The difference is material. A sale and leaseback property provides certainty of sale and a guaranteed tenant. An RFR gives a group an opportunity to purchase a property should the Crown

4. Transcript 4.1.2, p 153

5. Transcript 4.1.2, p 153

6. OTS, Briefing papers to Minister for Treaty of Waitangi Negotiations, 7 May 2008, document A24(a), numbers 118 and 119, pp 948–973.

7. The briefing papers were sent to all relevant Ministers for them to ‘note’, but no decisions were required of them.

8. Transcript 4.1.2, p 158

9. OTS, Briefing papers to Minister for Treaty of Waitangi Negotiations, document A24(a), number 119, p 961 and doc A24(a), number 118, p 954

choose to sell it at some later date. The Minister may thus have gained the impression that what was being asked of Taranaki Whānui was not significant.

The main risks if information is poorly communicated, incomplete, or misunderstood are that two groups will be treated differently with respect to the same or similar items of redress, and that assurances will be given about redress provided (or not provided) to other groups that turn out to be untrue. These risks are exacerbated by the incentives that teams have within the silo system to achieve a single settlement in a timely manner. Negotiating teams may be unwilling to hold up a settlement in order to satisfy the concerns of other groups that they are not negotiating with. From the evidence we saw in our inquiry, these risks and incentives worked on several occasions to the detriment of Taranaki Whānui.

6.3 THE EFFECT OF THE SILO SYSTEM IN PORT NICHOLSON

The silo system resulted in misinformation being provided to Taranaki Whānui at key points in the negotiations. The most obvious example was during the discussions over the police station proposal. On 13 May 2008, Mr Ponter informed the PNBCT by way of email that ‘there is no cultural redress for Ngāti Toa in the Wellington CBD area.’¹⁰ As outlined in chapter 5, he told the Tribunal that he provided the same assurance verbally in a meeting with the PNBCT the following day. Yet, even then, this assurance was misleading. A month earlier, OTS negotiators had discussed with Ngāti Toa the possibility of a plaque in Parliament grounds as cultural redress. The matter was also apparently raised in a meeting between the Treaty Negotiations Minister and Ngāti Toa on 23 April 2008.¹¹ By mid-May, the Minister was in discussions with Parliament’s Speaker about a possible plaque.¹² Technically, the plaque was not yet included in the proposed cultural redress for Ngāti Toa, but it was certainly high on the agenda. From Mr Ponter’s evidence to the Tribunal, it appears that the PNBCT was misled because of the silos then in operation. Mr Ponter had simply not been told, and was surprised to discover, a plaque was on offer to Ngāti Toa:

Judge Clark: Well what happened to the agreement about Taranaki Whānui about no cultural redress with the CBD?

Mr Ponter: Well, at the time that I was negotiating that, that wasn’t included. When I saw the plaque redress in here, I raised it with the Ngāti Toa team and we had a rather difficult discussion about it.¹³

10. Daran Ponter to Aroha Thorpe, email, 13 May 2008, document A24(a), number 130, p 1049

11. OTS, File note of meeting with Ngāti Toa, 16 April 2008, document A24(a), number 103, p 861

12. OTS, Briefing paper to Minister for Treaty of Waitangi Negotiations, 16 May 2008, document A24(a), number 141, p 1122

13. Transcript 4.1.2, p 235

The plaque was later removed from the list of proposed cultural redress, but that does not undo the fact that all along it was in contravention of an undertaking given to the PNBCT.

In addition, Sir Ngatata Love told the Tribunal that Taranaki Whānui had asked for something similar but had been turned down.¹⁴ This exemplifies another aspect of the silo system – that different groups may end up being treated differently with respect to the same or similar items of redress. It is hardly surprising that this may cause resentment among cross-claimant groups. Another instance where this occurred was in relation to Taputeranga Island off Island Bay. At a meeting between PNBST and OTS representatives on 27 July 2011, Rebecca Elizabeth Mellish stated that Taranaki Whānui had requested the island but were turned down because it was owned by the Wellington City Council and was thus, technically, private land.¹⁵ This evidence was disputed in our hearings, but what was not disputed was that the PNBCT had requested land in the Wellington City green belt but had been turned down for the same reason. This was discussed when Sir Ngatata Love and Ms Thorpe met with mediator Pat Snedden in June 2011. Mr Snedden, in his report to OTS on this meeting, said the following:

Their most serious assertion is that the Crown acted in bad faith in allowing access to Council land as redress (viz Tapu Te Ranga Island) for Ngāti Toa whilst at the same time denying access to Council land as redress (the green belt in their exclusive area of interest) during this lead up to their own settlement. In short two parallel streams of OTS negotiation were giving different signals to each of the claimant groups at the same time about the availability of Council land to be within the instruments of possible redress.¹⁶

This particular email from Mr Snedden was the subject of the following exchange during our hearings:

Judge Clark: There's an email in these bundles from Pat Snedden at one stage when he was brought in later on to facilitate meetings with the Port Nicholson Settlement Trust, and he made a comment, albeit in relation to cultural redress, that this was an example of the two silos not communicating. Do you agree with that or . . . ?

Mr James: There would be an element of truth to that.

Judge Clark: Mmm. I wonder if it's entirely accurate though, when, as Mr Ponter said yesterday, at least in relation to overlapping redress for Ngāti Toa in the Police Station, there was some communications between the two teams, ie, the two teams should have known what was being promised to Taranaki Whānui.

14. Transcript 4.1.2, p 92

15. PNBST, Notes taken at a meeting with OTS, 27 July 2011, document A24(a), number 297, p 2139

16. Pat Snedden to Peter Galvin et al, email, 15 June 2011, document A24(a), number 293, p 2119. Although Pat Snedden does not say that Taranaki Whānui requested Taputeranga Island as redress, evidence elsewhere in our record of inquiry indicates that this may have been the case: see the PNBST notes taken at a meeting with OTS, 27 July 2011, doc A24(a), number 297, p 2139.

6.3

Mr James: Yes. I think the environment at the time was very tough internally. People were going days without seeing each other, not necessarily, it was just the dynamic in the hours that were being worked and the locations that were being worked around negotiations. And that would lead to silos being in place. And, but it was my expectation as director that everyone was finding times to talk to everyone and share all that information. Did it happen at every point in time? It may not have done.

Judge Clark: Well, that leads into my next question which was if promises were being made by the Office of Treaty Settlements in relation to the release of the police station, it doesn't really matter from our perspective whether there are silos or not internally within OTS, is there?

Mr James: That's correct.¹⁷

In this exchange, Mr James concedes that the operation of silos does not excuse OTS from being held to promises made on its behalf. Mr Ponter told the Tribunal that he counselled OTS staff against the inclusion of Taputeranga Island in the Ngāti Toa settlement, on the ground that it was 'going to be [a] lightning rod for future tension', but he was over-ruled.¹⁸ Mr Ponter was of course never a member of OTS's Ngāti Toa negotiating team. This is another example of the silo system working to the detriment of Taranaki Whānui.

A further example of the negative effects of the silo system can be found in the nature of the offer of the Wellington Central Police Station to Ngāti Toa. Although the police station was included in the Taranaki Whānui AIP as a sale and lease of land only, it was to be offered to Ngāti Toa with land and improvements. The PNBCT did not discover this until 8 August 2008, although that had been the Crown's plan since early May. This can be seen from a New Zealand Police internal email dated 6 May 2008 and a briefing paper to the Treaty Negotiations Minister the following day.¹⁹ The briefing paper outlined the reasons for the difference, namely a desire for equity between the various groups settling in the northern South Island. 'The inclusion of improvements would provide Ngāti Toa with redress not offered to Taranaki Whānui, but which is consistent with the offers made to the other Te Tau Ihu groups for the sale and lease back of land and improvements of one property per iwi.'²⁰ Equity between Ngāti Toa and Taranaki Whānui appears to have been considered less important.

Mr Ponter did not mention these facts to Taranaki Whānui when outlining the proposed police station deal. We doubt that he was aware that Ngāti Toa were to be offered the police station with land and improvements, since owing to the silo system he was in a separate negotiating team. His name also does not appear on the 7 May 2008 briefing paper quoted

17. Transcript 4.1.2, p 325

18. Transcript 4.1.2, pp 212–213, 230

19. New Zealand Police internal email, 6 May 2008, document A24(a), number 116, p 941

20. OTS, Briefing paper to Minister for Treaty of Waitangi Negotiations, 7 May 2008, document A24(a), number 118, p 954

above. The PNBCT was displeased when it found out about the change of status on 8 August. In his letter of 11 August, Sir Ngatata Love stated that he considered changes had been made to the terms of the police station deal. An OTS briefing paper of 14 August records, following discussions with Sir Ngatata Love, that Taranaki Whānui did not react well to the information provided in the letter from Mr James delivered on 8 August. The briefing paper states that one of the specific issues raised by the PNBCT was ‘The provision of the Wellington Central Police Station (land and improvements) as sale and lease back, when Taranaki Whānui Ki Te Upoko O Te Ika had been previously informed that improvements could not be provided under the sale and lease back mechanism.’²¹ Sir Ngatata Love’s subsequent letter of 18 August 2008 reflects Taranaki Whānui’s understanding that they had agreed that Ngāti Toa could be offered a sale and lease back opportunity for the land only. While the claimants did not raise this issue in our inquiry, it was clearly of concern to them in 2008.

6.4 IMPRECISION IN LANGUAGE

The Tribunal would like to raise another issue that became apparent during our hearings, namely the vagueness of language used at times by OTS officials. We noted in chapter 4 that on occasions this non-specificity is deliberate, used in order to avoid the fruitless turf wars that firm geographical descriptions and defined lines on maps may provoke. But vagueness can sometimes be unhelpful, including to OTS staff. In previous chapters, we noted that some staff in negotiations were clearly unaware that the notion of a 1.5-mile line around Wellington Harbour was largely an OTS construct. Only a 1.5-mile line inland from the Petone foreshore was mentioned by the Waitangi Tribunal in its *Te Whanganui a Tara* report. Yet, the officials were supposedly negotiating largely on the basis of the Tribunal’s recommendations, according to the evidence presented to our inquiry.

Another example relates to the Wellington CBD. OTS officials knew that Ngāti Toa were seeking property there. The Crown had given Taranaki Whānui an undertaking that Ngāti Toa would be offered only one property within the CBD, but OTS staff at times appear to have given no more than a cursory thought as to where the CBD was, as former director Paul James confirmed in his evidence to the Tribunal:

In hindsight I don’t think we ever sat back and tried to define what the CBD was in terms of the line. I always understood it as being where the tall buildings are, in short. And so for instance that would raise a question of Parliament grounds, is that part of the CBD or not? I don’t think we stopped to think about that.²²

21. OTS, Briefing paper to Minister for Treaty of Waitangi Negotiations, 14 August 2008, document A24(a), number 214, p 1654

22. Transcript 4.1.2, p 324

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6.5

This imprecision had obvious consequences when Mr Ponter was trying to ascertain from the OTS team negotiating with Ngāti Toa whether any offer of cultural redress was planned within the CBD. If the team did not consider that Parliament was in the CBD, then it is not surprising that it failed to mention the proposed Ngāti Toa plaque there. This omission had downstream effects, as already outlined.

Another matter we note is the confusion between the words ‘dominant’ and ‘exclusive’, as illustrated by the following exchange during our hearings:

Mr Green: Now, you’ve just used the words ‘dominant area of interest’, can you help me here, when you say that, do you distinguish that from Taranaki Whānui having an exclusive area of interest or are you using the words ‘dominant’ and ‘exclusive’ interchangeably?

Mr Ponter: I think at times those terms are used interchangeably. I think at times I’ve probably slipped into using those terms interchangeably. I don’t think that those terms are the same terms, however.

Mr Green: No, they mean different things.

Mr Ponter: They do mean different things, but I think in the language that I and others have sometimes used, yes, we’ve used one interchangeably with the other.²³

There was also understandable confusion at times over the dual meaning of the term ‘exclusive redress’. This expression can mean that redress will be provided to one group, and one group only, in a particular area. But it is also commonly used, in the Treaty settlement context, to refer to the transfer of property in fee simple title, a type of redress that cannot be shared between groups. This is in contrast to shared forms of redress such as kaitiaki over areas or resources, which can be shared by multiple groups. An example of the confusing use of the terms is contained in the letter that OTS manager Dean Cowie wrote to Sir Ngatata Love in February 2007. In one place, he stated that the Crown was ‘seeking to provide exclusive redress to Taranaki Whānui’ in certain areas. In another, he stated that the Crown was ‘able to offer exclusive redress in the overlapped area where there is clear evidence of Taranaki Whānui’s interests.’²⁴ What is the meaning of exclusive redress in these two statements? Is it the same or different? The Tribunal is not quite sure, so it cannot be expected that claimants will be entirely sure either.

6.5 CONCLUSION

This Tribunal is disappointed that it has felt obliged to raise the issues of the silo approach and the need for the Crown to avoid creating new grievances through its settlements five years after the Tāmaki Makaurau Tribunal raised these very issues. We do acknowledge

23. Transcript 4.1.2, p169

24. Dean Cowie to Sir Ngatata Love, 14 February 2007, document A24(a), number 39, p149

that, by the time that Tribunal had released its report in June 2007, the negotiations with Taranaki Whānui were well under way. But there has been ample opportunity in the years since then for the Crown to have taken the Tribunal's recommendations on board. On the positive side, we note that, when negotiating with Taranaki Whānui, the Crown remained well aware of having to make provision for possible redress to overlapping claimants not yet in negotiations.

Although we have not found in favour of the claimants with respect to their main claim, this Tribunal strongly sympathises with the frustrations that led them to seek an urgent hearing. It therefore seems appropriate to end our report with a cautionary note sounded by the *Tāmaki Makaurau* report:

The burden on both Maori and Pakeha of the great wrongs that were done in the past will not be lifted if the process of settling creates new wrongs.²⁵

²⁵ Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p2

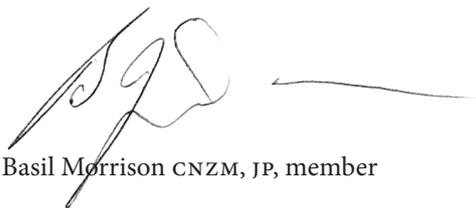
Dated at *Wellington* this *26th* day of *July* 20*12*



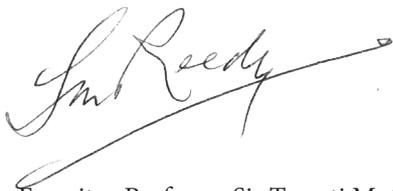
Judge Stephen Clark, presiding officer



The Honourable Sir Douglas Lorimer Kidd KNZM, member



Basil Morrison CNZM, JP, member



Emeritus Professor Sir Tamati Maturangi Reedy, KNZM, PhD, member



APPENDIX

RECORD OF INQUIRY

RECORD OF HEARINGS

TRIBUNAL MEMBERS

The Tribunal constituted to hear the Port Nicholson block urgency claim comprised Judge Stephen Clark (presiding), the Honourable Sir Douglas Lorimer Kidd KNZM, Basil Morrison CNZM, and Sir Tamati Reedy.

THE HEARING

The hearing was held on 12, 13, and 14 June 2012 at the Waitangi Tribunal's offices, Wellington.

RECORD OF PROCEEDINGS

1. STATEMENTS

1.1 Statements of claim

1.1.1 Sir Ralph Heberley Ngatata Love, Sir Paul Alfred Reeves, Rebecca Elizabeth Mellish, Kevin Hikaia Amohia, Neville McClutchie Baker, June Te Raumange Jackson, Catherine Maarie Amohia Love, Hinekehu Ngaki Dawn McConnell, Mahara Okeroa and Hokiopera Jean Ruakere. Statement of claim concerning the proposed comprehensive settlement of the Ngati Toa historical claims within the Wellington region, 17 December 2009

(a) Sir Ralph Heberley Ngatata Love, Sir Paul Alfred Reeves, Rebecca Elizabeth Mellish, Kevin Hikaia Amohia, Neville McClutchie Baker, June Te Raumange Jackson, Catherine Maarie Amohia Love, Hinekehu Ngaki Dawn McConnell, Mahara Okeroa and Hokiopera Jean Ruakere. Amended statement of claim concerning the proposed comprehensive settlement of the Ngati Toa historical claims within the Wellington region, 17 March 2012

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1.2 Final statements of claim

There were no final statements of claim

1.3 Statements of response

1.3.1 Helen Carrad and Cameron Tyson. Crown statement of response, 27 April 2012

1.4 Statement of issues

There was no statement of issue

1.5 Final generic statements of claim

There were no final generic statements of claim

2. PAPERS IN PROCEEDINGS: TRIBUNAL MEMORANDA, DIRECTIONS, AND DECISIONS

2.1 Registering new claims

2.1.1 Deputy chairperson. Memorandum registering Wai 2235, 18 December 2009

2.2 Amending statements of claim

2.2.1 Judge Stephen Clark. Memorandum registering amended statement of claim, 30 March 2012

2.3 Waitangi Tribunal research commissions

There were no Waitangi Tribunal research commissions

2.4 Section 8D applications

There were no papers concerning section 8D applications

2.5 Pre-hearing stage

2.5.1 Chairperson, memorandum regarding a teleconference with Judge Clark, 21 December 2009

- 2.5.2 Judge Stephen Clark. Memorandum deferring application for urgency, 23 December 2009
- 2.5.3 Judge Stephen Clark. Memorandum concerning application for urgent hearing, 28 September 2011
- 2.5.4 Judge Stephen Clark. Memorandum granting leave to file further submissions and evidence in support of the application for urgency, 28 October 2011
- 2.5.5 Judge Stephen Clark. Memorandum convening a telephone conference for 18 November 2011, 4 November 2011
- 2.5.6 Judge Stephen Clark. Memorandum relating to matters arising from the judicial conference held on 18 November 2011 and setting a filing date, 22 November 2011
- 2.5.7 Judge Stephen Clark. Memorandum requesting Crown to file an update on Deed of Settlement, ratification timetable and introduction of legislation into Parliament, 2 December 2011
- 2.5.8 Judge Stephen Clark. Memorandum setting a filing date for further submissions relating to the application for urgency, 22 December 2011
- 2.5.9 Judge Stephen Clark. Memorandum setting a filing date for the applicant to file further submissions relating to the application for urgency, 27 January 2012
- 2.5.10 Judge Stephen Clark. Memorandum granting the application for urgency, 13 February 2012
- 2.5.11 Judge Stephen Clark. Memorandum appointing Judge SR Clark to preside over this inquiry and Sir Tamati Reedy, Sir Douglas Kidd and Basil Morrison as Tribunal members for this inquiry, 22 February 2012
- 2.5.12 Judge Stephen Clark. Memorandum scheduling a judicial teleconference and seeking acknowledgment from counsel regarding participation, 22 February 2012
- 2.5.13 Judge Stephen Clark. Memorandum granting leave for additional material to be filed, 24 February 2012

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2.5.14 Judge Stephen Clark. Memorandum concerning matters arising from the 29 February 2012 teleconference, 1 March 2012

2.5.15 Judge Stephen Clark. Memorandum granting extension and amending timetable, 23 March 2012

2.5.16 Judge Stephen Clark. Memorandum convening a telephone conference for Tuesday 17 April 2012, 16 April 2012

2.5.17 Judge Stephen Clark. Memorandum granting leave and setting filing and hearing dates, 17 April 2012

2.5.18 Judge Stephen Clark. Memorandum granting granting leave to file late, addressing other matters relating to the inquiry timetable, and setting a filing date, 8 May 2012

2.5.19 Judge Stephen Clark. Memorandum granting a further extension to file late, 9 May 2012

2.5.20 Judge Stephen Clark. Memorandum addressing matters raised at the teleconference, convening a judicial conference and setting filing dates, 15 May 2012

2.5.21 Judge Stephen Clark. Memorandum addressing discovery matters and convening a teleconference, 25 May 2012

2.5.22 Judge Stephen Clark. Memorandum addressing further discovery matters and setting a filing date, 30 May 2012

2.5.23 Judge Stephen Clark. Memorandum concerning the hearing, time tabling and setting filing dates, 1 June 2012

2.5.24 Judge Stephen Clark. Memorandum concerning the filing of Crown documentation, 7 June 2012

2.6 Hearing stage

There were no papers in proceedings at hearing stage

2.7 Post-hearing stage

2.7.1 Judge Stephen Clark. Memorandum concerning matters following the June hearing, 18 June 2012

2.7.2 Judge Stephen Clark. Memorandum declining the leave sought and granting an extension to counsel for Crown and Ngāti Toa to file by 4:00pm Friday 29 July 2012, 25 June 2012

3. SUBMISSIONS AND MEMORANDA OF PARTIES

3.1 Pre-hearing stage

3.1.1 Counsel for Wai 2235. application for urgent hearing in relation to Ngati Toa Rangatira Comprehensive Settlement, 17 December 2009

3.1.2 Counsel for Wai 2235. Memorandum renewing urgency application, 21 September 2011

3.1.3 Counsel for Wai 377, memorandum seeking directions from the Tribunal re: Wallaceville Property, notifying the Tribunal of intent to file a remedies application and seeking to join the Wai 2235 urgency application as an interested party, 26 September 2011

3.1.4 Counsel for Wai 2235. submission in support of application for urgency, 7 October 2011

3.1.5 Crown counsel. Memorandum seeking leave to file late, 17 October 2011

3.1.6 Counsel for Ngati Toa, memorandum seeking leave to file late, 17 October 2011

3.1.7 Counsel for Ngati Toa, memorandum in opposition to application for urgency, 18 October 2011

3.1.8 Crown counsel. Memorandum in opposition to application for urgency, 18 October 2011

3.1.9 Counsel for Wai 2235. Memorandum seeking leave to file further submissions and evidence in support of the application for urgency, 27 October 2011

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3.1.10 Crown counsel. Memorandum regarding the timing and initialling of the deed of settlement with Ngāti Toa and opposing the application for urgency, 28 October 2011

3.1.11 Counsel for Wai 2235. Memorandum in response to Crown memorandum (memo 3.1.10) opposing the application and filing further information in support of the application for urgency, 2 November 2011

(a) Deed of settlement between Taranaki Whānui, Port Nicholson Block Settlement Trust and the sovereign in right of New Zealand, 18 November 2011

3.1.12 Crown counsel. Memorandum seeking leave to file affidavit of Peter Galvin, 16 November 2011

3.1.13 Counsel for Wai 2235. Memorandum in response to matters arising from the judicial conference held on 18 November 2011, 21 November 2011

3.1.14 Counsel for Wai 2235. Memorandum in response to memorandum of Judge Stephen Clark (paper 2.5.6) and seeking further directions, 24 November 2011

3.1.15 Crown counsel. Memorandum in response to claimant counsel memorandum (memo 3.1.14) regarding the likely timing for initialling the deed of settlement with Ngāti Toa, 29 November 2011

3.1.16 Counsel for Ngāti Toa, memorandum in response to claimant counsel memorandum (memo 3.1.14) regarding requests for undertakings of the Crown, 29 November 2011

3.1.17 Crown counsel. Memorandum in response to memorandum of Judge Stephen Clark (paper 2.5.7), 16 December 2011

3.1.18 Counsel for Wai 2235. submission in response to the affidavit of P B Galvin of 16 December 2011 and the accompanying memorandum for Crown counsel also of that date, 19 January 2012

3.1.19 Counsel for Ngāti Toa, memorandum in response to memorandum of Judge Stephen Clark (paper 2.5.8), 22 December 2011, 20 January 2012

3.1.20 Crown counsel. Memorandum in response to memorandum of Judge Stephen Clark (paper 2.5.8) and seeking leave to file late, 26 January 2012

3.1.21 Crown counsel. Memorandum in response to memorandum of Judge Stephen Clark (paper 2.5.8) and filing additional documents omitted in an earlier submission (memo 3.1.17), 26 January 2012

3.1.22 Counsel for Wai 2235. submission in response to various Crown and Ngāti Toa submissions, 2 February 2012

3.1.23 Crown counsel. Memorandum in response to memorandum of Judge Stephen Clark (paper 2.5.6) and seeking leave to file additional material, 23 February 2012

3.1.24 Counsel for Wai 2235. Memorandum regarding the filing of evidence and seeking an extension to file late, 22 March 2012

3.1.25 Crown counsel. Memorandum in response to memorandum (paper 2.5.15) seeking leave to file late the statement of response, witness statements, maps and other material, 13 April 2012

3.1.26 Counsel for Ngati Toa, memorandum seeking an extension to file late, 13 April 2012

3.1.27 Counsel for Wai 2235. Memorandum in response to memoranda of the Crown and Ngāti Toa and seeking an extension to file late, 16 April 2012

3.1.28 Crown counsel. Memorandum filing Crown statement of response and evidence, 27 April 2012

3.1.29 Counsel for Wai 2235. Memorandum seeking an extension to file late, 7 May 2012

3.1.30 Counsel for Wai 2235. Memorandum seeking a further extension to file late, 9 May 2012

3.1.31 Counsel for Wai 2235. Memorandum in response to memorandum of Judge Stephen Clark dated 8 May 2012, (paper 2.5.18) responding to issues raised, 10 May 2012

3.1.32 Crown counsel. Memorandum in response to memorandum of Judge Stephen Clark dated 8 May 2012, (paper 2.5.18) regarding timetabling and other matters, 11 May 2012

3.1.33 Counsel for Ngati Toa. Memorandum in response to memorandum of Judge Stephen Clark dated 8 May 2012, (paper 2.5.18) regarding timetabling and other matters, 11 May 2012

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3.1.34 Counsel for Wai 2235. Submission in response to memorandum of Judge Stephen Clark dated 15 May 2012, (paper 2.5.20) and addressing concerns to the adequacy of the Crowns discovery, 17 May 2012

(a) Professor Sir Ngatata Love to Peter Galvin concerning Official Information Act request, 4 October 2011

(b) Professor Sir Ngatata Love to Peter Galvin concerning further request under Official Information Act, 16 November 2011

(c) Table of deficiencies in Crown discovery, 17 May 2012

3.1.35 Crown counsel. Memorandum in response to memorandum of Judge Stephen Clark dated 15 May 2012, (paper 2.5.20) and claimant counsel's submission 17 May 2012 (memo 3.1.34) regarding document disclosure and timetabling issues, 21 May 2012

3.1.36 Crown counsel. Memorandum in response to memorandum of Judge Stephen Clark (paper 2.5.21) and seeking direction on further discovery, 29 May 2012

3.1.37 Counsel for Wai 2235. Memorandum in response to memorandum of Judge Stephen Clark (paper 2.5.22) and seeking direction on further discovery, 31 May 2012

3.1.38 Crown counsel. Memorandum in response to memorandum of Judge Stephen Clark (paper 2.5.24) regarding bundle of documents, 8 June 2012

3.2 Hearing stage

There were no submissions or memoranda of parties at hearing stage

3.3 Opening, closing, and in reply

3.3.1 Crown counsel. Opening submissions, 11 June 2012

3.3.2 Counsel for Ngati Toa, opening submissions, 11 June 2012

3.3.3 Counsel for Wai 2235. Opening submissions, 11 June 2012

3.3.4 Counsel for Wai 2235. Closing submissions, 22 June 2012

(a) Amended closing submissions, 29 June 2012

3.3.5 Crown counsel. Closing submissions, 2 July 2012

3.3.6 Counsel for Ngati Toa. Closing submissions, 2 July 2012

3.3.7 Counsel for Wai 2235. Submissions in reply, 4 July 2012

(a) Map of Wellington: Relationship of Ngāti Toa Settlement offerings to Taranaki Whanui cultural sites, Pa sites and reserves, 4 July 2012

(b) Judgment of the Court of Appeal in *PAE (NZ) Ltd v Brosnahan* [2009], 4 July 2012

(c) The Contractual Remedies Act 1979 Dawson and McLauchlan, Sweet and Maxwell (NZ) Ltd 1981 (pp36–40), 4 July 2012

3.4 Post-hearing stage

3.4.1 Crown counsel. Memorandum in response to memorandum dated 18 June 2012 (paper 2.7.1) regarding initialing the deed of settlement for Ngāti Toa, 21 June 2012

3.4.2 Counsel for Ngati Toa, memorandum in response to memorandum of Judge Stephen Clark (paper 2.5.23) and seeking leave to file closing submissions late, 22 June 2012

3.4.3 Counsel for Wai 2235. Memorandum in response to memorandum dated 22 June 2012 (memo 3.4.2) opposing the leave sought, 25 June 2012

3.4.4 Counsel for Wai 2235. Memorandum recording corrections and the addition of transcript references to the amended and refilled closing submissions, 29 June 2012

3.4.5 Crown counsel. Memorandum in response to claimant's closing submissions (memo 3.3.7), 9 July 2012

4. TRANSCRIPTS AND TRANSLATIONS

4.1 Transcripts

4.1.1 Judicial conference, Waitangi Tribunal, Wellington, 18 November 2011

4.1.2 Transcript of hearing, Waitangi Tribunal, Wellington, 12–14 June 2012

4.2 Translations

There we no translations

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5. PUBLIC NOTICES

5.1 Judicial conferences

There were no public notices relating to judicial conferences

5.2 Hearings

5.2.1 Registrar. Notice of hearing, 8 June 2012

5.3 Agenda for conferences and hearings

5.3.1 Waitangi Tribunal. Timetable for Wai 2235 Port Nicholson Block Settlement Trust urgency inquiry, 11 June 2012

RECORD OF DOCUMENTS

A DOCUMENTS RECEIVED UP TO COMPLETION OF CASEBOOK

A1 Sir Ralph Heberley Ngatata Love. Affidavit, 17 December 2009

A2 Sir Ralph Heberley Ngatata Love. Second affidavit, 21 September 2011

A3 Morris Te Whiti Love. Affidavit, 7 October 2011

A4 Matiu Rei. Brief of evidence, 11 October 2011

A5 Sir Ralph Heberley Ngatata Love, 3rd affidavit, 2 November 2011

A6 Peter Bernard Galvin. Affidavit, 16 November 2011

A7 Peter Bernard Galvin. Second affidavit, 16 December 2011

A8 Bruce John David Farquhar. Brief of evidence, 27 March 2012

(a) Notes from the 15 May 2008 teleconference regarding the release of the Wellington Central Police Station, 15 May 2008

(b) Aroha Thorpe. Email concerning the process and timeframe for signing the deed of settlement, undated

- (c) Waitangi Tribunal. *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District*. Wellington: Legislation Direct, 2003, pp 39–41, 458
- (d) Shane Jones to Professor Ngatata Love, 7 May 2008
- (e) OTS. Aide memoire for Cabinet Policy Committee, undated
- (f) Map showing Taranaki Whānui Historical Sites of Significance, undated

A9 Morris Te Whiti Love. Brief of evidence, 27 March 2012

- (a) Map showing relationship of Ngāti Toa Settlement offerings to Taranaki Whānui Cultural Sites, Pā sites and Reserves, March 2012

A10 Rebecca Elizabeth Mellish. Brief of evidence, 27 March 2012

- (a) Map showing Taranaki Whānui ki Te Upoko o Te Ika Area of Interest, undated
- (b) Te Rūnanga o Toa Rangatira Inc, Accidental Discovery Protocol, undated

A11 Sir Ralph Heberley Ngatata Love. Brief of evidence, 27 March 2012

- (a) Taranaki Whānui Agreement in Principle, 13 December 2007
- (b) Taranaki Whānui Deed of Settlement of Historical Claims, 18 August 2008
- (c) Hon Michael Cullen to Professor Ngatata Love, 8 August 2008
- (d) Paul James to Professor Ngatata Love, 9 August 2008
- (e) Professor Ngatata Love to Paul James, 11 August 2008
- (f) Professor Ngatata Love to Paul James, 13 March 2009
- (g) Professor Ngatata Love to Paul James, 26 March 2009
- (h) PNBST. Minutes of meeting with Paul James the Director of Office of Treaty Settlements, Peter Galvin, Daran Ponter and Port Nicholson Block Settlement Trust, 30 March 2010

A12 Bruce John David Farquhar. Affidavit concerning list of documents, 28 March 2012

- (a) Amended index to list of documents, 30 March 2012
- (b)(1) List of documents, volume 1, 28 March 2012
- (b)(2) List of documents, volume 2, 28 March 2012
- (b)(3) List of documents, volume 3, 28 March 2012

A13 Matiu Rei. Second brief of evidence, 27 April 2012

- (a) Index to second brief of evidence of Matiu Rei, 27 April 2012
- (b) Bundle of documents to second brief of Matiu Rei, 27 April 12

A14 Daran Ponter. Brief of evidence, 27 April 2012

A15 Brian Joseph Roche. Brief of evidence, 27 April 2012

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A16 Peter Bernard Galvin. Brief of evidence, 27 April 2012

A17 Map showing Taranaki Whānui Area of Interest, undated

A18 Key to Maps of Ngāti Toa proposed settlement commercial redress within Taranaki Whānui Area of Interest, undated

(a) Map showing Ngāti Toa proposed cultural redress in the Taranaki Whānui Area of Interest, undated

(b) Map showing Ngāti Toa proposed commercial redress within Taranaki Whānui Area of Interest, undated

(c) Map showing Ngāti Toa proposed cultural and commercial redress within Te Whanganui a Tara & environs, undated

A19 Key to map of Taranaki Whānui Treaty settlement redress included in their deed of settlement and associated Act, undated

(a) Map showing Taranaki Whānui commercial and cultural redress, undated

A20 Paul James. Brief of evidence, 30 April 2012

A21 Peter Bernard Galvin. Affidavit providing an index of documents in response to memorandum of Judge Stephen Clark (paper 2.5.14), 2 May 2012

(a) Documents falling within discovery direction, 2 May 2012

(b) Official Information Act request documents with additional disclosure, 2 May 2012

(c) Crown bundle of documents (as referred to in Crown briefs of evidence) and additional document, various dates

A22 Bruce John David Farquhar. Brief of evidence, 11 May 2012

A23 Sir Ralph Heberley Ngatata Love, reply brief of evidence, 11 May 2012

(a) Map of Hutt Valley showing relationship of Ngāti Toa settlement offerings to Taranaki Whānui cultural sites, pa sites and reserves, May 2012

(b) Map of Waiwhetu showing relationships of Ngāti Toa settlement offerings to Taranaki Whānui cultural sites, pa sites and reserves, May 2012

(c) Map of Wellington central business district showing Ngāti Toa settlement offerings to Taranaki Whānui cultural sites, pa sites and reserves, May 2012

(d) Map of Karori showing Ngāti Toa settlement offerings to Taranaki Whānui cultural sites, pa sites and reserves, May 2012

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(e) Map of Wellington showing relationship of Ngāti Toa settlement offerings to Taranaki Whanui cultural sites, Pa sites and reserves, May 2012

A24 Index to agreed bundle of documents, 8 June 2012

(a) Agreed bundle of documents, 8 June 2012

A25 Index to agreed key bundle of documents, 29 June 2012

(a) Agreed key bundle of documents, 29 June 2012

