IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-1837
[2012] NZHC 3181

UNDER	the Judicature Amendment Act and Part 30 of the High Court Rules
AND UNDER	the Contractual Remedies Act 1979
IN THE MATTER OF	the Port Nicholson Block (Taranaki Wh?nui ki Te Upoko o Te Ika) Claims Settlement Act 2009 Settlement Trust
BETWEEN	PORT NICHOLSON BLOCK SETTLEMENT TRUST Plaintiff
AND	THE ATTORNEY-GENERAL First Defendant
AND	TE RUNANGA O TOA RANGATIRA INCORPORATED Second Defendant

Hearing: 12-13 November 2012

Counsel: P D Green and M J Doogan for Plaintiff
P J Radich, I M G Clarke and C D Tyson for Crown
B E Ross and S R Sparksman for Te Runanga O Toa Rangatira Incorporated

Judgment: 27 November 2012

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 5.00pm on the 27th November 2012.

JUDGMENT OF WILLIAMS J

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Introduction

[1] In this case, Taranaki Whānui argues that, in entering into a Deed of Settlement with Ngāti Toa that is inconsistent with the Taranaki Whānui Deed of Settlement and Settlement Act, the Crown is in breach of the Deed and Act. Declarations of inconsistency are sought.

The Port Nicholson block claims

[2] In 16 separate hearings between 1991 and 1999, the Waitangi Tribunal investigated the claims of Taranaki Whānui and Ngāti Toa Rangatira. Taranaki Whānui incorporated Te Ati Awa, Ngāti Tama, Taranaki Tuturu, Ngāti Ruanui and other Taranaki iwi such as Ngāti Mutunga that had settled in the Wellington region in the pre-Treaty period. The claims related to the vast Port Nicholson block and Wellington Harbour.

[3] The Tribunal issued its report in May 2003. The Tribunal carefully assessed customary rights in the block circa 1840. These contested rights, as we shall see, lie beneath the present controversy. I set out below a summary of the Waitangi Tribunal's conclusions in these respects:[1]

> The customary law situation at Te Whanganui-ā-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

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[1] These extracts were first drawn from the 2003 report in the Port Nicholson Block Urgency Report (WAI 2235) in 2012. There the Tribunal's inquiry and subsequent report were a preliminary step to the present proceedings. I have simply taken a large proportion of the extracts used by that later WAI 2235 Tribunal because they are equally apposite in my inquiry.

could still develop ahi ka. The Tribunal must therefore consider who, in 1940, 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 Māori 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 Māori. 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 Māori 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.[2]

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

2.6.2 Ngāti Toa

... Ngāti 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 Ngāti Toa had a ahi ka in the Porirua basin, parts of Ohariu (other parts of which were used or occupied by Ngāti 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. Ngāti Toa had access by way of a track from Porirua to Heretaunga, which enabled Ngāti Rangatahi during the 1830s to convey their tribute of food of various kinds (including eels, and also wood or canoes) to Ngāti Toa at Porirua. It also enabled Ngāti Rangatahi to give early warning to Ngāti Toa should there be any further incursion by Ngāti Kahungunu into Heretaunga. In addition, 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.[3]

2.6.4 Ngāti Tama

... By 1840, Ngāti 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-ā-Tara. The Tribunal considers that Ngāti Tama had ahi ka at Te Whanganui-ā-Tara and the south-west coast at 1840, and also had take raupatu, having participated in the conquest of what became the Port Nicholson block.[4]

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2 *Te Whanganui-ā-Tara* report, pp16-17.
3 *Te Whanganui-ā-Tara* report, pxxvi, p41.
4 *Te Whanganui-ā-Tara* report, pxxvi, p42.

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 Ngāti 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-ā-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.[5]

2.6.6 Taranaki and Ngāti Ruanui

... Taranaki and Ngāti 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.[6]

2.6.7 Take raupatu in Te Whanganui-ā-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-ā-Tara and environs: Ngāti Toa, Ngāti Tama, Te Atiawa, Taranaki, and Ngāti 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. Ngāti Rangatahi are not included in the take raupatu to Port Nicholson because, by their own admission, they acted on behalf of Ngāti Toa and were not fully independent prior to the arrival of the Crow. Nor are Ngāti 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.[7]

2.7 Tribunal Findings

The Tribunal finds that, at 1840, Māori 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-ā-Tara and parts of the south-west coast.
- Taranaki and Ngāti Ruanui at Te Aro.
- Ngāti Tama at Kaiwharawhara and environs, and parts of the south-west coast.
- Ngāti 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.[8]

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5 *Te Whanganui-ā-Tara* report, pxxvi, pp42-43.
6 *Te Whanganui-ā-Tara* report, pxxvi, p43.
7 *Te Whanganui-ā-Tara* report, pxxvi, pp43-44.
8 *Te Whanganui-ā-Tara* report, pxxvi, p44.

[4] I note as an aside, because it became important in the subsequent Waitangi Tribunal urgent inquiry, Taranaki Whānui argued that its constituent iwi and hapu held all rights in the Port Nicholson block to the exclusion of any non-Taranaki iwi and hapu – most particularly to the exclusion of Ngāti Toa. As can be seen from the foregoing, that argument did not succeed in the Waitangi Tribunal.

[5] Following the 2003 report, Taranaki Whānui and Ngāti Toa commenced separate negotiations with the Crown. Taranaki Whānui was first out of the blocks as it were, with tribal leaders signing a final deed of settlement five years later on 19 August 2008. Six months after that on 11 February 2009, Ngāti Toa signed its own "letter of agreement" with the Crown, traditionally the last formal step prior to the parties drafting, initialling and then (following ratification by the iwi membership) finally executing a deed of settlement. Ngāti Toa and the Crown initialled a deed of settlement on 20 August this year.

[6] Taranaki Whānui says that certain items of redress offered to Ngāti Toa in the letter and deed breached the Crown's undertakings or obligations to Taranaki Whānui. In particular, Taranaki Whānui complains as follows:

(a) Taputeranga Island would be transferred to Ngāti Toa when in fact it was situated within Taranaki Whānui's area of exclusive customary rights;

(b) commercial and cultural redress were offered to Ngāti Toa from within a margin one and a half to two miles wide around Te Whanganui-ā-Tara (Wellington Harbour) when that margin was subject to exclusive customary rights in favour of Taranaki Whānui;

(c) Ngāti Toa would be given the status of "Poutiaki" of Raukawa Moana (Cook Strait) when Taranaki Whānui also claimed rights there;

(d) a statutory acknowledgment (an instrument under the Resource Management Act 1991) would be granted to Ngāti Toa in respect of Te Awa Kairangi (Hutt River) and its tributaries when such an

acknowledgment had already been made in favour of Taranaki Whānui, and the Crown had refused or failed to similarly grant such an acknowledgment in favour of Taranaki Whānui over those same tributaries;

(e) a similar statutory acknowledgment was granted to Ngāti Toa in respect of Te Whanganui-ā-Tara (Wellington Harbour) when, in Taranaki Whānui's view, the harbour was subject to the exclusive customary rights of Taranaki Whānui.

[7] Ultimately Taranaki Whānui wants the Crown to remove the offending redress from the Ngāti Toa deed. I will address the declarations sought in more detail below. For consistency, I refer throughout this judgment to the Taranaki interests as Taranaki Whānui – including when I am referring to the Taranaki negotiators pre-settlement, or the post-settlement Port Nicholson block Trustees. The only exceptions are when the context requires a more specific reference. Similarly, I refer to the representatives of Ngāti Toa – whether the negotiators or the corporate entity, Te Runanga o Toa Rangatira Inc – as simply Ngāti Toa.

The negotiations

[8] The negotiating team for Taranaki Whānui styled themselves the Port Nicholson Block Claims Team (PNBCT). The team comprised the chair, Professor Ngatata Love (as he then was), Sir Paul Reeves, Kara Puketapu, Neville Baker, Mark Te One, Liz Mellish, Dr Catherine Love, Kevin Amohia, Dawn McConnell, June Jackson and Spencer Carr. On the other side of the table the Office of Treaty Settlements (OTS) team was headed up by Brian Roche, with Dean Cowie having a day to day management role working with Warren Wairau.

Exclusive rights

[9] A crucial issue throughout the early phase of negotiations was whether Taranaki Whānui was the sole customary rights holder in the Port Nicholson block. On 17 February 2007, Mr Cowie wrote to Ngatata Love in relation to OTS'

assessment of overlapping interests in the Port Nicholson block. Mr Cowie advised that in the difficult historical factual matrix of the Port Nicholson block, particular caution was required. He said:

> As the Crown and other external factors affected Taranaki Whānui and Ngāti Toa's ability to sustain and develop their customary rights after 1840, a group's subsequent development (or diminishing) of rights is likely to have been influenced by Crown actions and omissions. It is difficult, if not impossible, for the Crown to ascertain with any degree of certainty how it might have affected the development of any one group's customary rights after 1840 (I acknowledge the PNBCT's view that Taranaki Whānui believes it suffered raupatu in Wellington and that they lost most of their areas of ahi ka. Other claimant groups also make similar claims). For that reason, the Crown attempts to determine as much as it can where claimant groups in Wellington might at 1840 have clearly exercised dominant customary rights, such as ahi ka, before the Crown possibly impacted on the development of rights in that area. In those areas where the Crown considers a group exercised dominant customary rights at 1840, the Crown would usually seek to provide exclusive redress to that group.

[10] Mr Cowie then provided a reasonably specific assessment of the areas in which dominant rights were likely to produce exclusive redress:

> Based on our approach above the interpretation of the evidence, particularly the findings of the [Waitangi Tribunal's] Wellington District Report, the Crown considers therefore that Taranaki Whānui had dominant customary rights around the rim of Te Whanganui-ā-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 **[here, using the old meaning of the Hutt Valley rather than the modern suburb]** 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.

[11] This approach, whereby officials accepted as subject to dominant Taranaki Whānui rights a sizeable margin around the edge of the harbour, appears to have been the position throughout the time that Mr Cowie and Mr Wairau were in the Crown's Port Nicholson negotiation team. I note by way of example only, meeting minutes of 14 February 2007 in which OTS summarised and confirmed the essence of the letter referred to above and a Cabinet Policy Committee paper of 4 December 2007 which provided as follows:

> The Crown's offer to Taranaki Whānui (Wellington) is based on the Waitangi Tribunal's findings in the Te Whanganui-ā-Tara Me Ona Takiwa report that those groups who now comprised Taranaki Whānui (Wellington) had, by

> 1840, established ahi ka rights of occupation in a 1.5 mile strip of land around Wellington harbour.

[12] A Crown draft presentation for Taranaki Whānui and the Crown in relation to an overlapping claims meeting on 12 December 2007 was to similar effect:

> Most of the sites are in a 1.5 mile strip around the harbour, that the Tribunal identified as where the groups that now make up Taranaki Whānui (Wellington) had ahi ka roa interests.

[13] Taranaki Whānui did not, at any stage of the negotiations, agree with OTS' position in this respect. Their position from the beginning was that Taranaki Whānui tribes held all customary rights inside the block and that Ngāti Toa's interests were all to the west and south outside the block. The Crown's indication was not warmly received.

[14] Some time in 2008, Dean Cowie and Warren Wairau moved on and Daran Ponter took over as primary negotiator under Brian Roche as head negotiator. The evidence was that the 'dominant customary rights' debate soon fell away as insoluble and unproductive. The Crown moved from mana whenua on maps to lists of qualifying assets as a technique for heading off this controversy. As I explain below, Taranaki Whānui eventually agreed to remove the word 'exclusive' in relation to the wider Port Nicholson block from that part of the Deed recitals that set out their own position.

Ngāti Toa redress

[15] In 2008 negotiations with Ngāti Toa had got to the point where the Crown wished to offer Ngāti Toa one significant property from the Wellington CBD in their commercial redress package. A letter from the Associate Minister of Treaty Settlements to PNBCT in May 2008 set this out. I note that the Crown's Ngāti Toa claims negotiating team was entirely separate from its Taranaki Whānui claims team with, it seems, relatively limited co-ordination or liaison between them.[9] This was dubbed the silo approach and it has now, I am told, been discontinued. Given the

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[9] This became the subject of significant negative comment by the Waitangi Tribunal in the WAI 2235 report.

sensitivities around customary rights in the block, this silo approach was, frankly, asking for trouble.

[16] Ultimately Taranaki Whānui were prevailed upon by the Crown to agree to give up the Wellington Central Police Station, an asset originally intended for inclusion in the Taranaki Whānui commercial redress. This freed the station up to be offered to Ngāti Toa in its settlement. Other properties and tactical concessions were sought by Taranaki Whānui in substitution. PNBCT sent a letter to the Crown confirming this. It provided in part as follows:

> The Crown may offer Ngāti Toa the opportunity to purchase Wellington Central Police Station under the commercial sale and leaseback mechanism provided that:
>
> (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 co-operation; and
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> (4) Ngāti Toa immediately cease all cross-claimant actions relating to the Port Nicholson Block Claim.

[17] Just what was meant by proposed Condition (4) in that letter became a matter of controversy both in the Waitangi Tribunal and to a lesser extent in this proceeding. Taranaki Whānui said it was intended to mean Ngāti Toa would make no claim to redress from within the Port Nicholson block. The Crown argued it meant only that Ngāti Toa must agree not to object to Taranaki Whānui's settlement. Meanwhile Wellington Central Police Station was duly transferred from the Taranaki Whānui redress schedule to that of Ngāti Toa, and the latter did not in fact object to Taranaki Whānui's settlement.

[18] During this period, the redress to be provided to Ngāti Toa became a matter of ongoing interest to Taranaki Whānui. The Crown's position was that negotiations with Ngāti Toa were not sufficiently advanced to allow it to advise Taranaki Whānui

of what was to be offered. The Crown said the extraordinary speed with which Taranaki Whānui had progressed through its own negotiations meant the Ngāti Toa negotiations had not got to a point where there was sufficient certainty around what proposed redress might be acceptable to both the Crown and Ngāti Toa until quite late in the Taranaki Whānui negotiations.

Notification of Ngāti Toa redress

[19] On 9 August 2008, Paul James then Director of OTS finally wrote to Ngatata Love advising of progress in the parallel Ngāti Toa negotiations.[10] This letter was dated 11 days before the scheduled final sign-off of Taranaki Whānui's deed of settlement. The letter advised Taranaki Whānui (inter alia) that the Crown proposed redress that would recognise Ngāti Toa's role as kaitiaki[11] of Cook Strait giving the iwi a role in regulatory matters relating to the Strait; that (subject to the consent of Wellington City Council) Taputeranga Island would be vested in Ngāti Toa; that a plaque acknowledging the historical significance to Ngāti Toa of the grounds of Parliament would be placed in the grounds; and listed a series of sites with the boundaries of the Port Nicholson block (some within the two mile harbour margin identified by Cowie) proposed either for transfer, sale and leaseback, or first right of refusal in favour of Ngāti Toa. There was no mention of any statutory acknowledgment in respect of Wellington Harbour. This would come later.

Taranaki Whānui parks the issue

[20] Professor Ngatata Love, no doubt anxious not to lose the long awaited deed signing on 19 August, replied in writing the following Monday (11 August 2008). The letter complained that the timeframe for response was too tight, particularly given that Ngāti Toa had possessed Taranaki Whānui's list of redress items for months prior to the sign-off by Taranaki Whānui.

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10 The letter was dated Saturday 9 August but was in fact hand delivered by Daran Ponter some time after 5pm on Friday 8 August. PNBCT were in the middle of de-camping to new premises to set up as the Port Nicholson Block Settlement Trust, Taranaki Whānui's post-settlement governance entity.

11 This term is later changed at the request of the tribe to 'Poutiaki'.

[21] Professor Love indicated that extensive arrangements had been made for 19 August, with many dignitaries and tribal members travelling to the occasion from afar. He wanted to know whether in light of the Crown's 9 August letter concerning Ngāti Toa's redress, the Taranaki Whānui signing should be cancelled, as cancellation would need to be notified that same day in order to give fair notice to travellers. The letter contained no comment in respect of any of the individual items of redress about which there is now complaint.

[22] In the 9 August letter, the Crown asked for letters of non-challenge both from Taranaki Whānui and from Ngāti Toa. This, it was felt, would give greater comfort to all three parties. Taranaki Whānui refused to provide one. On the eve of the deed signing ceremony,[12] Professor Love wrote to the Crown again, this time in the following terms:

> We are not in a position to commit to a letter of non-challenge as requested by you. The reasons for this are that an agreement in Principle has not to our knowledge been reached between the Crown and Ngāti Toa and therefore PNBCT are not being afforded the same opportunity and courtesy as Ngāti Toa were afforded in response to our negotiations when full public disclosure of our AIP has been available since December 2007. Your request places Taranaki Whānui in an unfair and disadvantageous position.

[23] Thus, Taranaki Whānui indicated that it did not know what the ultimate Ngāti Toa/Crown agreement would contain and would provide no comfort until it knew.

[24] The Taranaki Whānui Deed of Settlement ("the Taranaki Whānui Deed") was duly signed on the 19th of August as planned. The Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act ("the Taranaki Whānui Settlement Act) came into effect a year later on 4 August 2009.

Taranaki Whānui protests

[25] As I said, Ngāti Toa initialled its own letter of agreement with the Crown on 17 February 2009. Taranaki Whānui then began to protest in earnest about the detail of the Ngāti Toa settlement. Their new settlement entity, the Port Nicholson Block Settlement Trust (PNBST) wrote to Paul James of OTS in that respect on 26 March

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[12] Letter Ngatata Love to Hon Michael Cullen 18 August 2008.

2009. The letter complained that Ngāti Toa had no customary rights of any kind inside the Port Nicholson block. It complained that Taputeranga Island was just a few hundred metres away from a traditional Te Ati Awa kainga; that Ngāti Toa had no rights inside the harbour but was being given a statutory acknowledgement as if they did; that any recognition of Ngāti Toa interest in Cook Strait should be subject to the agreement of Taranaki Whānui; and that Crown properties in the Port Nicholson block should not have been offered to Ngāti Toa without first being offered to Taranaki Whānui.

[26] For completeness, I note the record of a meeting between OTS officials and Taranaki Whānui on 30 March 2010. It is written by Taranaki Whānui and gives full vent to that group's indignation as follows:

> The Crown offer to Ngāti Toa in terms of its encroachment on Port Nicholson Block whenua, its agreement on matters which were rejected when raised by negotiators for the Port Nicholson Block claims and the devious manner in which the Crown agents have kept information from Port Nicholson Block during the settlement is deemed as most offensive. The devious conduct is itself a Treaty breach.
>
> The Waitangi Tribunal findings in respect of the Port Nicholson Block area were clear and well founded.
>
> The granting to Ngāti Toa of cultural and commercial redress within our rohe is totally unacceptable. The Crown needs to remove any cultural and commercial redress within the Port Nicholson Block rohe, including Tapu Te Ranga island (which is private land owned by the citizens of Wellington) (or any replacement redress), Akatarawa Road Conservation Area, cash to purchase three schools within the Port Nicholson block, gifting of $2.04 million specific cultural redress properties.
>
> The mandated representatives reluctantly agreed – as mana whenua – to the withdrawal of Wellington Central police Station from the Taranaki Whānui redress on the premise that this would be available to Ngāti Toa as a commercial opportunity. Our negotiated understanding was clearly that this commercial opportunity would be the only commercial one offered to Ngāti Toa within the Taranaki Whānui rohe.
>
> The idea that the Crown would contemplate investigating the placement of a plaque in Parliament grounds is an anathema to Taranaki Whānui. In early negotiations Taranaki Whānui sought several forms of redress in respect of Parliament Grounds – all of which were rejected by the Crown despite being in our rohe.
>
> The removal of the word 'exclusive' from the Background to the Taranaki Whānui Deed of Settlement where Taranaki Whānui "assert" mana whenua was on the premise that good faith and goodwill would be demonstrated by the Crown in considering an offer to Ngāti Toa (page 5 DoS), provision of

> cash to purchase school properties within the area. Likewise the insertion at the beginning of the Background was agreed on the basis that it was a Taranaki Whānui statement and not necessarily agreed by the Crown.
>
> Cook Strait – this is offensive, unacceptable and prejudicial to Taranaki Whānui. No one iwi had a Kaitiaki role over Cook Strait and the term 'maritime empire' is clearly overstepping the position. Ngāti Toa was recognised in Pelorus Sound and Wairau Bay but these two discrete areas do not amount to an overlordship of Cook Strait.

[27] With respect to Taputeranga Island, it appears that there is no allegation that the Crown undertook or represented that the Island would not be transferred to anybody else. Rather, the evidence referred to by the plaintiff suggests that when Taranaki Whānui tried to acquire land in the Wellington town belt, they were rebuffed on the basis that this was council land, and therefore unavailable for Treaty settlements. Taranaki Whānui complains that despite this stance the Crown was subsequently willing to buy Taputeranga from Wellington City Council in order to transfer it to Ngāti Toa as cultural redress. This they saw as a double standard. This was confirmed in an internal OTS memorandum in which Pat Sneddon, brought in as an independent Crown mediator, advised Director Peter Galvin of the concerns expressed by Taranaki Whānui in their meeting with him on 16 June 2011:

> Their most serious assertion is that the Crown acted in bad faith in allowing access to council land as redress (viz Taputeranga Island) for Ngāti Toa whilst at the same time denying access to council land as redress (the green belt and their exclusive area of interest) during the 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.

[28] Minutes of a meeting between Taranaki Whānui and OTS officials a month and a half later on 27 July 2011 demonstrated that this issue still rankled:

> An example being the double-standard employed with regard to private land, TW were informed categorically that the Crown could not negotiate where private land was concerned TW therefore did not pursue claims in respect of the town belt and over open spaces, whereas now the Crown is going to legislate in respect of Taputeranga even when the WCC are not comfortable with that proposition.

[29] Clearly, Taranaki Whānui would not be walking away from this conflict.

Waitangi Tribunal Claim WAI2235

[30] In the first instance, Taranaki Whānui's complaints in relation to these events were taken to the Waitangi Tribunal under urgency in Claim WAI 2235. The scope of the inquiry for that Tribunal was carefully circumscribed in nine questions posed by the learned presiding Judge, I understand with the agreement of all concerned. They were as follows:[13]

> - 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?
> - 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?

[31] In a memorandum of 1 June 2012, Judge Clark added three further questions to be considered:[14]

> - 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.

[32] Thus the Tribunal confined its inquiry to the negotiation process only, and within that, to whether any commitments or undertakings had been given by the Crown to Taranaki Whānui in relation to any redress now being offered to Ngāti Toa.

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13 Memorandum 2.5.10, 13 February 2012 at [64].
14 Memorandum 2.5.23, 1 June 2012 at [25].

It is important to understand that the Tribunal's inquiry is a very different one to that confronting this court. Section 6 of the Treaty of Waitangi Act 1975 requires the Tribunal to focus on acts or omissions of the Crown that breach the principles of the Treaty of Waitangi. Within that parameter, the Tribunal focused on agreements and understandings in relation to Ngāti Toa cross-claims exchanged between the Crown and Taranaki Whānui at the time the parties were discussing removing the Wellington Central Police Station from Taranaki Whānui's redress list.

[33] The Tribunal found:

(a) condition (4) in the PNBCT Police Station letter asking that Ngāti Toa desist from cross-claims did not amount to a requirement that Ngāti Toa refrain from seeking any redress in the entire Port Nicholson block;

(b) the 2003 Te Whanganui-ā-Tara me ona Takiwa Tribunal report did not support exclusive Taranaki Whānui rights in the whole Port Nicholson block, and the Crown offered no undertakings in that regard;

(c) once Mr Ponter took over, the issue of the 1.5 to 2 mile harbour margin was not further discussed. It was, the Tribunal concluded, therefore never a part of the Wellington Central Police Station negotiation in mid-2008, Taranaki Whānui still at that stage taking the high ground position that they held exclusive rights throughout the Port Nicholson block;

(d) the Crown through Mr Ponter and OTS director Paul James, did however give undertakings that, apart from the Police Station, no further commercial or cultural redress would be offered in the Wellington CBD.

[34] The Tribunal found that notwithstanding the all of agreement clause in the Taranaki Whānui Deed (cl 7.4) excluding any pre-deed undertakings or promises, the

Crown would be in breach of Treaty principles if it pressed ahead with providing such redress in the face of the undertakings given.

[35] On the basis of that narrow finding in favour of Taranaki Whānui, the Tribunal recommended that all proposed commercial and cultural redress for Ngāti Toa in the Wellington CBD (apart from the Police Station) be removed. This in turn led to the Crown removing several properties from Ngāti Toa's list that had been tagged for rights of first refusal. The proposed plaque in the Parliament grounds had been earlier removed.

The current proceeding

[36] Notwithstanding these amendments to redress, the Ngāti Toa deed still contained the cultural and commercial redress complained of by Taranaki Whānui and discussed at [6] above. The plaintiff commenced these proceedings accordingly.

[37] The relief originally sought by Taranaki Whānui was executory in nature, in the sense that it asked the court to step in to prevent the Crown from completing its proposed agreement with Ngāti Toa. In its original statement of claim of 29 August 2012, PNBST sought relief as follows:

> (a) a declaration that the Crown *ought not* to offer cultural or commercial redress to Ngāti Toa in breach of alleged commitments to the plaintiff; and
>
> (b) orders *prohibiting* the Crown from initialling the Deed of Settlement with Ngāti Toa until it had adjusted the redress being offered to Ngāti Toa so as to be consistent with those commitments. (All emphases are mine).

[38] The problem with this approach was briefly discussed by Miller J when he addressed Taranaki Whānui's application for interim relief. The Judge invited the plaintiff to adopt a form of declaration that was solely interpretive in approach. The plaintiff did not take that advice immediately, but in the end applied to amend its

relief during the course of hearing before me. This was unopposed. The amended relief sought is as follows:

> 1. A declaration that the following terms of cultural redress offered to Ngāti Roa Rangatira in its Deed of Settlement with the Crown as initialled on 30 August 2012, are inconsistent with the statutory acknowledgements made by the Crown at section 23 of the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act 2009 and concerned with the association of Taranaki Whānui with its Coastal Marine area, the Hutt River and Wellington Harbour, namely:
>
> 1.1 The Poutiaki instrument insofar as it applies to the Coastal Marine area of Taranaki Whānui (clauses 5.23 to 5.34);
>
> 1.2 The proposed Coastal Statutory Acknowledgement insofar as it applies to Wellington Harbour and the Coastal Marine area of Taranaki Whānui (clauses 5.37 to 5.40);
>
> 1.3 Deeds of Recognition over the Hutt River and its tributaries (clauses 5.41 and 5.42);
>
> 1.4 The vesting of Taputeranga Island.
>
> 2. A declaration that as a matter of interpretation of the Taranaki Whānui settlement (as recorded in the Deed of Settlement dated 19 August 2008 and given effect to in the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act 2009), any and all items of cultural or commercial redress, other than the Wellington Central Police Station, now on offer to Ngāti Toa Rangatira pursuant to its Deed of Settlement initialled with the Crown on 30 August 2009, and which fall within the area within which the Crown acknowledged that Taranaki Whānui exercised dominant customary rights, being the rim of Te Whanganui-ā-Tara including the current Wellington City, Petone, Waiwhetu and Wainuiomata areas and extending approximately one and a half to two miles from the Petone Foreshore, are inconsistent with the Taranaki Whānui settlement.

[39] It is important to note that Taranaki Whānui attacks *only* the redress listed in the declarations. The plaintiff no longer argues that Taranaki Whānui is exclusively entitled to redress from within the entire Port Nicholson block.

Jurisdiction

[40] The Crown advanced three preliminary arguments which in its submission went to the court's jurisdiction to hear Taranaki Whānui's case at all. It is necessary to address those arguments first, before turning to the plaintiff's substantive case.

The Crown argued that each of these three arguments excluded the court's jurisdiction. They related to:

(a) the bar to further judicial inquiry contained in s 10(4) of the Taranaki Whānui Settlement Act;

(b) the promise in cl 2.8 of the Taranaki Whānui Deed that Taranaki Whānui would not object to any Bill giving effect to a settlement between the Crown and another iwi; and

(c) the exclusion in cl 7.4 of the Taranaki Whānui Deed (the entire agreement clause) of any pre-deed negotiations, representations, warranties, undertakings, understandings, and agreements.

[41] I will deal with the first and the second issues here. I will address the third later in this judgment in the context of the plaintiff's substantive case.

Taranaki Whānui Settlement Act

[42] Section 10(1) to (4) provides as follows:

> **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.

[43] The privative clause in subsection (4) is a boilerplate provision to be found in most modern Treaty settlement deeds. Its blanket effect is softened by s 10(5) (also a boilerplate clause in modern Treaty settlements) which provides as follows:

> (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.

[44] The overall intent of s 10 when the five subsections are taken together, seems self-evidently to be to confirm the full and final settlement of Taranaki Whānui's historical claims, to prevent any re-litigation of those claims, or any attempt to revisit the redress package provided in settlement of them. But the parties can still go to court in the event of dispute over what the Settlement Deed or Settlement Act mean, and whether their terms are being given proper effect.

[45] The Crown says this proceeding is an attempt by Taranaki Whānui to upsize its redress beyond that set out in the Taranaki Whānui Deed and Settlement Act and therefore does not raise any question of interpretation or implementation of either instrument.

[46] The short answer is that Taranaki Whānui says the Taranaki Whānui Deed and Act should be interpreted and implemented on its terms and in accordance with the understandings reached between the parties and the undertakings given by the Crown in relation to Taranaki Whānui's customary interests.

[47] On the face of it (and subject to a consideration of cl 7.4 of the Taranaki Whānui Deed) such a claim necessarily raises issues of interpretation and implementation of the Deed and Act. After all Taranaki Whānui's case is that the Crown promised in that settlement not to give the redress complained of to anyone else. Whether Taranaki Whānui can make its case out on the evidence and in the face of cl 7.4 is another matter entirely, but the Taranaki Whānui case cannot logically fail at this threshold stage. If after consideration of the evidence and the Deed, it transpires that Taranaki Whānui's allegations of understandings and undertakings cannot be made out, then the Crown's characterisation of the case as an

attempt by Taranaki Whānui to upsize its settlement will logically have been proved correct. If that is so, s 10(5) will have no application and the privative clause in s 10(4) will bite. If not, s 10(5) is the applicable provision. All will depend on the evidence.

Clause 2.8

[48] The 'provisions schedule' of the Taranaki Whānui Settlement Deed contains various machinery provisions of the deed that have been relegated to a second layer. In these provisions cl 2.8 is to be found. It provides:

> **Settlement does not limit other settlements**
>
> 2.8 Taranaki Whānui ki Te Upoko o Te Ika agree that the Crown may at any time propose for introduction to the House of Representatives, and neither Taranaki Whānui ki Te Upoko o Te Ika, nor a representative entity, will object to, a bill that:
>
> 2.8.1 gives effect to a settlement with another iwi or group of Mäori; and/or
>
> 2.8.2 removes resumptive memorials from land; and/or
>
> 2.8.3 provides that legislation enabling the creation of resumptive memorials does not apply to land, or for the benefit of persons, specified by the legislation.

[49] The Crown says Taranaki Whānui's proceeding is in breach of the promise in that clause not to object (in this context) to the Ngāti Toa Settlement Bill. There does not yet appear to be a Ngāti Toa Settlement Bill formally proposed for introduction to the House although a draft Bill was prepared contemporaneously with the Ngāti Toa Deed. I do not know whether the term "proposed for introduction" is intended to be a reference to a formal step taken by the Crown such as a request that the Bill be listed on the House's Order Paper, or whether it simply refers to a more general intention formed by the Crown. It may relate to the latter, since the former is, as I understand it, not an event that is easily verifiable.

[50] Against this, as I have discussed already, is Taranaki Whānui's express reservation of its position in respect of the Ngāti Toa redress and the Crown's

acceptance of that reservation in words and action. This may suggest that "proposed for introduction" should be interpreted more narrowly and more formally.

[51] To the extent that the clause relates to Taranaki Whānui's ability to object to a Bill in a Select Committee process, it is probably unenforceable anyway since, for a court to consider such a question would be inconsistent with the 9th Article of the Bill of Rights Act 1688.[15]

[52] In any event, it may be argued that these proceedings simply test the consistency of the Taranaki Whānui Deed and Act with the Ngāti Toa Settlement Deed rather than the Bill. In light of these considerations, and of the conclusions I reach on the plaintiff's substantive case, it is best to offer no final view on this question. I am content to leave it to be answered in a case in which the answer will affect the result.

Justiciability

[53] The Crown argued, also as a threshold issue, that the subject matter of this proceeding is not justiciable because it relates to Ngāti Toa's Deed of Settlement which, though not a binding contract in its own right, was a step preparatory to the enactment of affirming legislation. It is appropriate for me to address that matter at this stage as well.

[54] The authorities are very clear that the courts may not interfere in such processes. It is unnecessary for me to mention all of the New Zealand decisions to this effect over the last 20 years (both from within the Treaty settlement sector and outside it). Two of the more recent appellate decisions will suffice at this point. *Milroy v Attorney-General*[16] concerned a conflict between Tuhoe and Ngāti Awa. The Ngāti Awa settlement proposed to transfer certain Crown forestry blocks to that tribe. Tuhoe, who had not at that stage proceeded far along the settlement track, claimed customary rights in the block. The case was cast as an attack on advice by

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15 The 9th Article provides: That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

16 *Milroy v Attorney-General* [2005] NZAR 562 (CA).

officials to settling ministers, the plaintiffs shrinking from attacking the ministers themselves.

[55] Gault P, writing for the Court of Appeal, considered that such an attack "would take the courts into the very heart of the policy formation process of government."[17] He concluded:[18]

> The formulation of government policy preparatory to the introduction of legislation is not to be fettered by judicial review.

[56] In *New Zealand Mäori Council v Attorney-General*[19] (the *Crown Forest Assets* case) the New Zealand Mäori Council (one of the original signatories to the agreement that led to the Crown Forest Assets Act 1989) complained that a proposed settlement with Te Pumautanga o Te Arawa (TPT) – representing a section of that traditional confederation – would breach the Council's original agreement with the Crown and the Crown Forest Assets Act itself. This was because the accumulated forestry rentals relating to the crown forest land to be transferred to TPT, were to go to the Crown rather than follow the land into TPT's coffers. It was clear that this bifurcation between land and accumulated rentals breached both the original Crown Forest Assets agreement and the 1989 Crown Forest Assets Act. The settlement would, once again, be carried into effect by legislation.

[57] O'Regan J (as he then was) writing for the court, scribed a similarly bright line:[20]

> … the courts will not grant relief which interferes or impacts on actions of the executive preparatory to the introduction of a Bill to Parliament, because to do so would be to intrude into the domain of Parliament.

[58] As I have said, the plaintiff applied during hearings before me to amend the relief sought. In this amendment the focus shifted from orders and declarations intended to have the effect of prohibiting the Crown from entering into an unacceptable settlement with Ngāti Toa to more passive declaratory language in

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17 At [11].
18 At [14].
19 *New Zealand Mäori Council v Attorney-General* [2008] NZLR 318 (CA).
20 At [60].

relation to consistency as between the Taranaki Whānui Settlement Deed and Act on the one hand and the Ngāti Toa Deed of Settlement on the other.

[59] This situation is distinguishable from that confronting Heron J in *Comalco (NZ) Ltd v Attorney-General*[21] another case in the vein of *Milroy* and the *Crown Forest Assets* case. In that case Comalco brought proceedings in relation to a government proposal (or perhaps threat) to vary the original electricity supply contract for the Tiwai Point Smelter through unilateral legislation, if a variation could not be agreed. The orders sought included a declaration that the introduction of such legislation would constitute a breach of contract. Unsurprisingly, the declarations were refused.

[60] The declarations sought in this case do not go that far. They focus on consistency only between the Taranaki Whānui Deed and Act and the Ngāti Toa Deed. Taranaki Whānui has stepped back from an attempt to have the court order the Crown to amend the Ngāti Toa Deed of Settlement to a less problematic process of construing the promises the Crown made to Taranaki Whānui in its Deed and comparing those to the promises made to Ngāti Toa in its Deed.

[61] In my view, this relief, if justified on the merits, does not cross the line scribed by the Court of the Appeal in the *Milroy* and *Crown Forest Assets* cases. It does not attempt to intervene in the legislative process, leaving it to the executive to decide what, if anything, it should do with such declarations if made.

[62] There are additional considerations. Unlike the way the case appears to have been pitched in *Milroy*, there are rights at issue here. If Taranaki Whānui is correct in the assertions made, then they have rights and interests under the Settlement Deed and Act that are, or may be, justiciable.[22] There is a satisfactory legal yardstick that a court can utilise in resolving the controversy.[23]

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21 *Comalco (NZ) Ltd v Attorney-General* [2003] NZAR 1 (HC).

22 See comments to similar effect by Allan J in *Fenwick v Ngä Kaihautu O Te Arawa Executive Council*, HC Rotorua, CIV-2004-463-847, 13 April 2006 at [85] and Robertson J in *Te Runanga o Te Ati Awa v Te Ati Awa Iwi Authority* HC NWP CP13/99, 10 November 1999 at [23].

23 Cf *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) relating to a decision to disband the RNZAF's combat force.

[63] Provided they are careful not to cross the boundary into the domain of Parliament or the executive's role in advancing legislation, it would be wrong in principle and dangerous in practice for the courts to leave the Crown to "acquit itself as best it may" as the "sole arbiter of its own justice",[24] where the controversy raises justiciable issues of statutory or deed interpretation or indeed of customary law if properly pleaded. The practical reality is that recourse is often had to the Waitangi Tribunal in the first instance in these controversies, a body expert in Treaty settlements and customary rights. But the work of that Tribunal does not mean that this court has no ongoing role. Rather, as in much Treaty rights litigation over the past generation in which both the courts and the Waitangi Tribunal have been utilised by Mäori in the same conflict, it simply means that this court must tread carefully and deferentially along paths that the Tribunal has already travelled.

[64] I find that this court is not precluded by the principle or practice[25] of comity between the legislative and judicial branches of government from considering and deciding this case.

Substantive case

[65] I turn now to Taranaki Whānui's substantive case. The plaintiff's case involved a mix of private and public law heads of argument. They were as follows:

(a) legitimate expectation (both substantive and procedural) that the redress items complained of would not be offered to Ngāti Toa without Taranaki Whānui agreement;

(b) Crown failure to act fairly and reasonably by breaching understandings given and failing to provide adequate information to Taranaki Whānui;

(c) breach of contract in the same way; and

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[24] *Wi Parata v Bishop of Wellington* [1878] 3 NZ Jur 73 (NS) (SC) at 78.

[25] See *Te Runanga o Wharekauri Rekohu Inc v AG* [1993] 2 NZLR 301 (CA) at 308 per Cooke P.

(d) estoppel.

[66] The first point to note is that the amended relief sought does not put directly in issue the underlying question in the current controversy between these two communities – that is whether (as Taranaki Whānui alleges) the Crown has acted in breach of Mäori custom by allocating redress to Ngāti Toa:

(a) from areas historically subject to exclusive customary rights of Taranaki Whānui; or

(b) in a manner that excludes the possibility of Taranaki Whānui gaining similar recognition in the future.

[67] Taranaki Whānui could hardly have pitched its case on that direct basis, its historical claims in respect of such interests having been fully and finally extinguished. Instead, the plaintiff's case relies on the express or implied terms of the extinguishing instruments. The argument is essentially that in the Taranaki Whānui Deed, the Crown promised not to allocate such redress to any other claimants and the Taranaki Whānui Act affirmed this. Of course, who has customary interests in the Port Nicholson block is the bedrock controversy between the two iwi here and is constantly referred to in evidence. But they are the backdrop for the legal controversy I must address. Customary interests are not sued upon directly.

[68] The approach taken involves a relatively narrow factual and legal inquiry. My task is to determine what was agreed between Taranaki Whānui and the Crown in respect of these matters either in the express terms of the Deed or (if permissible) any implied or collateral terms. Secondly, I must consider the Settlement Act to see whether it addresses any of these matters directly or indirectly.

The Deed – express terms

[69] Taranaki Whānui could point to no clause in the Taranaki Whānui Deed expressly providing that any area within the Port Nicholson block is subject to their exclusive rights such that no other cross-claimant could receive redress from within

that area. On the contrary, the history and terms of the Deed suggest the parties to it carefully circumnavigated this difficult area in which they could not agree.

[70] Clause 10 of the Taranaki Whānui agreement in principle provided specifically that the subsequent deed of settlement would record the differing positions of the Crown and Taranaki Whānui as follows:

> 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 (Wellington) assert exclusive mana whenua over the area defined 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".

[71] In the event, and after further discussions, this proposed reference to exclusive right did not make it into the final draft of the deed. Instead Taranaki Whānui opted to set out in a "Statement of Occupation" within the Deed, their own separate position recording their extensive history of raupatu (conquest) and ahi kā roa (use and occupation) of the Port Nicholson block. The statement concluded as follows:

> Based on the foregoing and by virtue of our association with the Port Nicholson Block since well before 1840, Taranaki Whānui ki Te Upoko o Te Ika assert mana whenua over the Pot Nicholson Block.

[72] This was still a strong statement of connection and authority on the part of Taranaki Whānui, but it did not mention exclusivity. In a land tenure system driven by kinship, the phrase mana whenua meant (and means) authority and priority, but not necessarily exclusivity.

[73] The historical account in cl 2 of the Deed was the position the parties could agree. It emphasised Taranaki Whānui residence.

> Taranaki Whānui ki Te Upoko o Te Ika consists of Te Ati Awa, Taranaki, Ngāti Ruanui and Ngāti Tama. By 1839 these groups resided in Wellington harbour and its environs and had established take raupatu and ahi kaa roa.

[74] There is acceptance of Taranaki Whānui's fully crystallised rights arising from raupatu, use and occupation[26] in the "harbour and its environs", but there was no express exclusivity.

[75] Consistent with these statements, cl 3.2 of the Deed provided as follows:

> 3.2 The parties agree that the protocols and the deed of recognition:
>
> …
>
> 3.2.2 do not override or limit:
>
> …
>
> (c) the ability of the Crown to interact or consult with persons other than Taranaki Whānui ki Te Upoko o Te Ika or the governance entity.

[76] Clause 5.4.2 relating to cultural redress protocols provided that these instruments must be consistent with cls 2.1–2.6 of the contemporaneously prepared draft Bill. Clause 2.2 of the draft Bill provided as follows:

> Protocols do not restrict–
>
> (a) the ability of the Crown to exercise its power and perform its functions and duties in accordance with the law and government policy which includes (without limitation) the ability to–
>
> (i) introduce legislation and change government policy; and
>
> (ii) interact or consult with a person the Crown considers appropriate, including (without limitation) any iwi, hapū, marae, whānau or other representative of tangata whenua …

[77] This clause was carried through into s 18 of the Taranaki Whānui Settlement Act.

[78] The best gloss that can be put on the words of the Deed in terms of Taranaki Whānui's interests was that the Crown accepted Taranaki Whānui had significant customary interests in the "harbour and its environs", due to their history of raupatu, use and occupation prior to 1840, but that did not carry through into agreement on

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[26] As opposed to the inchoate right from raupatu alone.

any form of exclusivity that might block out Ngāti Toa from access to redress from within the Port Nicholson block or any part of it.

[79] I find that there is no support in the express terms of the Deed for the plaintiff's contentions.

The Deed: implied terms and collateral understandings

[80] In light of the purely interpretative relief now sought, I consider it necessary to address this aspect of the plaintiff's case as a question of deed construction, although Mr Green originally advanced it on a platform of substantive legitimate expectation. The authorities are divided on the availability of substantive legitimate expectation as a judicial review cause of action and there was much argument before me over that question. I have found it unnecessary to choose sides between the authorities that accept substantive legitimate expectation and those that reject it. That is because whether one conceptualises the alleged undertakings as impliedly amending the deed or enforceable collateral promises or representations (ideas emanating from the private law sphere) or as promises creating a substantive legitimate expectation in a public law sense, the facts do not get the plaintiffs home.

[81] It is clear that in the first phase of negotiations, Mr Cowie and Mr Wairau had been proceeding on the basis that Taranaki Whānui had the narrower "dominant customary rights" referred to in Mr Cowie's letter of 17 February 2007 in reliance on the findings of the Waitangi Tribunal in 2003. The claim to exclusive right throughout the whole Port Nicholson block was roundly rejected by officials at the time, but there was acceptance, at that stage, that Taranaki Whānui might receive "exclusive redress" in the narrower ahi kā area.[27]

[82] Notwithstanding this, as Professor Ngatata Love confirmed in his evidence before the Waitangi Tribunal and in his affidavit in this proceeding, Taranaki Whānui continued to maintain this exclusiveness position in respect of the whole block

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[27] Just what was meant by exclusive redress here is somewhat ambiguous. OTS documents seem to suggest that Crown negotiators were talking about exclusivity in respect of the redress item rather than the area from which it came, but later developments in August 2008 meant this became unimportant.

throughout this period. The subject therefore was not further discussed once Mr Ponter moved into the role of managing the Taranaki Whānui negotiations for OTS position.

[83] It was in this context that the Crown's letter of 9 August 2008 was delivered by Mr Ponter to Taranaki Whānui and (according to him) explained on two occasions – once at the time it was delivered and once two days later. If Taranaki Whānui had really believed on the basis of the Cowie and Wairau statements, that Cook Strait, the harbour rim and a maritime zone encompassing Taputeranga Island had been the subject of undertakings from the Crown that no redress would be provided in those areas to anyone else without Taranaki Whānui consent, that letter disabused them of this understanding.

[84] Taranaki Whānui replied on the following Monday (11 August 2008). The reply was not couched in terms of breach of undertakings given by the Crown or understandings shared. It complained about insufficient time in which to consider the letter. But (with the exception of the Wellington Central Police Station) it made no comment about the items of redress listed in the schedule to the 9 August letter. Taranaki Whānui wanted time and complained that they were being put in a very difficult position with only eight days to go to the signing ceremony. The letter was careful and, I suspect, tiptoeing around the issues because of the delicate stage at which Taranaki Whānui's own negotiations were poised, and because iwi leaders did not really want to risk derailing the ceremony. With an election looming, locking the government, and any successive governments, into the Deed must have been of the greatest importance to Taranaki Whānui. Both sides were walking a tightrope, and any reference at this stage to breach of promise or misrepresentation could have been fatal. Given the larger objective, the best that could be hoped for was time to come back after settlement to revisit these difficult issues. That was the path that Taranaki Whānui took when Professor Love replied on 11 August 2008.

[85] That said, the exchange of letters of 9 and 11 August confirmed an expectation on the Taranaki Whānui side that there would be ongoing dialogue about Ngāti Toa's cultural and commercial redress within the Port Nicholson block. It was clear that, for its own reasons, the Crown was very willing to maintain that dialogue.

The Crown did not want Taranaki Whānui to challenge the Ngāti Toa settlement in the Waitangi Tribunal or this court, options that, at the very least, would produce significant delay for that settlement.

[86] There is sufficient evidence, in my view, for Taranaki Whānui to properly expect that they would be further consulted over Ngāti Toa's proposed redress with a view to achieving consensus between the two groups if possible. It does not matter whether that is conceptualised as an enforceable promise to engage in further dialogue or as a public law legitimate expectation arising from Crown practices in this particular case together with applicable Treaty principles such as the duty of utmost good faith. The fact is that between August 2008 and December 2009 when the Ngāti Toa Deed was finally signed, 15 meetings were held to discuss these issues. Mr Green argued that these were essentially stonewalling meetings, and there was never any intention to modify the Crown's stance over the Ngāti Toa settlement.

[87] If the Crown really did engage in dialogue with a closed mind, that would of course have breached the Crown's consultation obligations, but there is no clear narrative on the evidence of a closed mind. The obligation on the Crown is to impart relevant information, listen to concerns that might be raised by the consultee and to do so with a genuine open mind even if a starting position has already been mapped out. The Crown was not obliged to agree with Taranaki Whānui. The fact is, once Taranaki Whānui settled its claims, its leverage with OTS became much reduced. Collateral litigation by Taranaki Whānui would be troublesome for OTS (and indeed for Ngāti Toa) but in reality once Taranaki Whānui had settled, OTS did not need them on side nearly as much as they needed a settlement with Ngāti Toa.

[88] I find the plaintiff has not proved the existence of any substantive implied terms or collateral undertakings or understandings of the kind alleged. And, although I found that the Crown owed Taranaki Whānui a post-settlement obligation to consult further, the plaintiff has not shown that the Crown had a closed mind in those consultations.

The Taranaki Whānui Settlement Act

[89] There is nothing in the terms of the Taranaki Whānui Settlement Act that can advance the case for the plaintiff here. I have already mentioned some of the relevant provisions in my discussion of the Taranaki Whānui Deed. The only additional provision I would refer to is s 37. This relates also to cultural redress. It provides:

> (1) The provision of the specified cultural redress does not prevent the Crown from doing anything that is consistent with that cultural redress, including–
>
> (a) providing, or agreeing to introduce legislation providing or enabling, the same or similar redress to any person other than Taranaki Whānui ki Te Upoko o Te Ika or the trustees; or
>
> (b) disposing of land.
>
> (2) However, subsection (1) is not an acknowledgement by the Crown or Taranaki Whānui ki Te Upoko o Te Ika that any other iwi or group has interests in relation to land or an area to which any of the specified cultural dress relates.
>
> (3) in this section, specified cultural redress means the protocols, the statutory acknowledgement, and the deed of recognition.

[90] This provision expressly entitles the Crown to provide cultural redress to other iwi that is the same or similar to the cultural redress provided to Taranaki Whānui. Given the centrality of customary rights as a driver for decisions allocating cultural redress (in contrast to commercial redress), this section would seem to be a complete answer to the Taranaki Whānui case.

[91] The provision does not necessarily run all one way however. It is possible to read into subsection (1)(a) a requirement that the Crown can only provide cultural redress to other iwi, if such provision is consistent with the cultural redress already provided to Taranaki Whānui. Mr Green invited me to interpret the subsection that way and the Crown argued that this would be inconsistent with its underlying permissive purpose. It is unnecessary for me to resolve the question, although I would say that the term "consistent" must have a purpose here and it appears to have been intended, as Mr Green submitted, to ensure that the Crown could not agree to

later redress that directly clashed (and therefore potentially undermined) the redress in the present Act. The short point though is, even if that interpretation is correct, there is no inconsistency here in fact. The cultural redress provided to Taranaki Whānui (and referred to in s 37) that overlaps with the redress to Ngāti Toa was never expressed to be exclusive.

[92] In addition, with the exception of Taputeranga Island, the redress to Ngāti Toa that Taranaki Whānui complains of, is not exclusive either. In particular, in relation to the amended relief sought:

(a) I disagree with Mr Okeroa that a "poutiaki" (the term used in the Ngāti Toa settlement in relation to that iwi's area overlapping with that of Taranaki Whānui) connotes exclusive authority. "Pou" in poutiaki is used here as a metaphor for a person or community acting as a traditional guardian. Exclusion is neither expressed nor implied in my view. Indeed for Ngāti Toa, Mr Rei specifically and publicly rejects that interpretation;

(b) Taranaki Whānui's statutory acknowledgement over Wellington harbour and its coastal marine area was not expressed to be exclusive;

(c) Taranaki Whānui's Deed of Recognition in relation to the Hutt River was not stated to be exclusive, and the fact that Ngāti Toa got the River's tributaries as well and Taranaki Whānui did not, does not create an inconsistency;

(d) in relation to Taputeranga Island:

(i) it is an island, so not in Taranaki Whānui's coastal marine area;

(ii) even if it were, the south coast zone was not declared in any Taranaki Whānui cultural redress to be exclusively theirs.

[93] There is no basis upon which to conclude that there is any inconsistency between the Taranaki Whānui Settlement Act and the Ngāti Toa Settlement Deed.

Mana

[94] Having dealt with the case as put by Mr Green, I acknowledge the difficult situation Taranaki Whānui has had to contend with being first claimant group from this district out of the blocks as it were. There are of course advantages in getting an early start, some of which are reflected upon by Mr Rei in his affidavit for Ngāti Toa who were considerably behind the play. But one of the risks in going early is not knowing what might become acceptable in policy or political terms after the deal is done. Taranaki Whānui were, on 9-19 August 2008, faced with a terrible choice: risk losing years of progress in negotiations in a last minute attempt to resolve the Ngāti Toa cross-claim issue before signing their own deed, or sign the deed and hope to resolve the cross-claim issues later. In the event, Taranaki Whānui chose the second option but not, I venture, without anxious consideration.

[95] Although Taranaki Whānui's view of matters is not reflected in the Deed or the Act, their stance in this case is understandable. Officials accepted from an early stage in negotiations, and, it appears on a sound basis, that there was a narrow zone within the Port Nicholson block where Taranaki Whānui rights were dominant even if not exclusive. In addition, the Waitangi Tribunal in 2003 found that Ngāti Toa had no rights in the harbour. Given such clear and independent support, it is hardly surprising that Taranaki Whānui would do all it could to protect its position. The problem with statutory acknowledgements and deeds of recognition in the modern era is that they do not reflect the sophisticated hierarchy of interests provided for by Mäori custom. They have the effect of flattening out interests as if all are equal, just as the Native Land Court did 150 years ago. In short, modern RMA-based acknowledgements dumb down tikanga Mäori. And that is particularly problematic in the Port Nicholson context because all relevant customary interests were fresh and evolving at the point of extinguishment.

[96] Taranaki Whānui fears, understandably, that its dominant interests will be devalued by a modern system of recognitions that lacks the sophistication of the ancient one. In the Mäori world, customary rights that have long since been extinguished in law, continue to be of transcendent importance to modern iwi. But,

there can be no doubt that the time to test these matters in the Tribunal or the courts can only be prior to the execution of a deed of settlement.

Disposition

[97] The application for declaration is therefore dismissed. The respondents will be entitled to costs. Brief memorandum can be filed if necessary.

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Williams J