

## CHAPTER 19

### FINDINGS AND RECOMMENDATIONS

#### 19.1 INTRODUCTION

In many of the preceding chapters, the Tribunal has made findings of Treaty of Waitangi breaches by the Crown. As we have seen, the claim in respect of the Port Nicholson block originated with the Wai 145 claim brought by the Wellington Tenth Trust and the Palmerston North Reserves Trust, representing the interests of the beneficiaries in those trusts. It was originally limited in scope. However, as evidence was adduced, it became apparent that the claimants' grievances extended beyond matters which were solely the concern of the Wai 145 claimants. As a consequence, claims brought on behalf of Ngati Toa, Ngati Tama, Ngati Rangatahi, Rangitane, Muaupoko, and Ngati Mutunga also became part of this inquiry.

In this chapter, we note some key Tribunal findings and also summarise the Crown's various breaches of the Treaty as found by the Tribunal. In doing so, we note the particular Maori group or groups affected by such breaches. This is followed by a discussion of how the question of appropriate remedies should be approached and the need in some cases for the question of representation to be settled by the parties.

#### 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 s 2.7; 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 (s 3.8.5).

**19.3 SUMMARY OF TRIBUNAL FINDINGS OF CROWN TREATY BREACHES****19.3.1 The town belt and other public reserves**

The Crown took most of the town belt land from Maori without obtaining their consent or carrying out any consultation and without making any payment (s6.3.2). The Maori adversely affected were Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama.

The Crown also took various reserves in Wellington for public purposes and assumed the ownership of Matiu (Somes Island) in 1841, again without obtaining the consent of Maori or carrying out any consultation and without making any payment (ss 6.3.4, 6.4.2). The Maori adversely affected were Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama.

**19.3.2 The switch from an inquiry to arbitration**

By insisting that the price to be paid by the New Zealand Company to Maori for 67,000 acres in the Port Nicholson block should be based on the assessed value of the land at the time of the invalid 1839 deed of purchase of the block, the Crown failed to protect the Treaty rights of Maori to sell their land at a price freely agreed upon by them. The Maori adversely affected were Te Atiawa, Taranaki, Ngati Ruanui, Ngati Tama, and Ngati Toa, being the Maori having customary rights in the Port Nicholson block (s7.6.3).

The Crown:

- ▶ failed adequately to consult with such Maori having customary interests in the Port Nicholson block before deciding to switch from proceeding with the Spain inquiry to implementing a form of arbitration;
- ▶ proceeded to implement the arbitration process without the informed consent of such Maori; and
- ▶ failed to ensure that a fair process, acceptable to Maori, would be followed by the arbitrator, in that the Crown reserved the right to impose conditions and settle compensation without the willing consent of Maori, as required by article 2 of the Treaty (s7.7.4).

The Crown imposed on such Maori having customary interests in the Port Nicholson block an arbitration regime which was intended to complete the extinguishment of any claims to title by Maori without a determinative inquiry and finding into whether or not a valid sale had occurred and which lands, if any, Maori had knowingly and willingly wished to alienate and, further, imposed on Maori the burden of establishing a valid claim to their lands and thereby shifted the burden of proof to Maori. The Crown also failed to ensure that Maori freely agreed to such a regime (s7.8.3).

In addition, the Crown prejudicially affected such Maori other than Ngati Toa by favouring the interests of the settlers over those of Maori by requiring Maori not to resume any of their lands built upon by settlers and by failing to prevent settlers from pulling down fences erected by Maori and from driving their cattle on Maori cultivations (s7.8.3).

### 19.3.3 The 1844 deeds of release

The Treaty breaches relating to the 1844 deeds of release need to be considered in the light of the Tribunal finding that those deeds related only to the 71,900 acres of land specifically referred to in the schedule attached to each of the deeds and not to the remaining land included in the 1839 Port Nicholson deed of purchase, as extended in 1844 (s8.3.10).

The Crown failed actively to protect Maori living in the Port Nicholson block who were parties to the deeds of release by:

- ▶ not ensuring that the protector of aborigines was at all times free to act independently of the Crown and was not subjected to pressure by Crown officials to facilitate the purchase of Maori land by the New Zealand Company (s8.5.3);
- ▶ failing to ensure that Maori freely and knowingly signed the deeds of release and, in particular, that they understood the nature and scope of such deeds and were not placed under pressure to sign them (s8.6.3);
- ▶ failing to ensure that Maori who were parties to the deeds of release were not threatened by Crown officials that, if they did not agree to accept the sum of money offered as compensation for signing the deeds, no higher offer would be made and the land would go to the European settlers without the consent of Maori (s8.6.3); and
- ▶ failing to ensure that the rights of such Maori to their pa, burial grounds, and cultivations (reserved to them under the deeds of release) were adequately protected by being included in an approved surveyed plan and in any Crown grant made in respect of such lands (s8.8.2).

In addition, the Crown failed actively to protect all Maori having customary rights in the Port Nicholson block at 1840 by failing to ensure the allocation by the New Zealand Company of the full number of rural tenths to which they were entitled; the shortfall in such provision amounting to some 3090 acres, making up 31 rural tenths (s8.8.2).

### 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.

19.3.5

**19.3.5 Ngati Rangatahi in Heretaunga**

The Crown breached the Treaty principle of active protection of the article 2 rights of Ngati Rangatahi by:

- ▶ failing to recognise and protect Ngati Rangatahi's rights to their lands, cultivations, and other properties in the Hutt Valley which had been acquired pursuant to Maori custom;
- ▶ ordering their expulsion from the Hutt Valley in February 1846;
- ▶ allowing the destruction and pillaging of their property after they had agreed to vacate their lands in the Hutt Valley (which destruction included the burning of their pa by the military forces of the Crown);
- ▶ failing to award them compensation for the loss of their lands and valuable cultivations following their expulsion in 1846; and
- ▶ failing to reserve lands in the Hutt Valley for their future use and enjoyment (s9.8.3).

**19.3.6 Ngati Tama in Kaiwharawhara and Heretaunga**

The Crown omitted to protect the rangatiratanga of Ngati Tama in Kaiwharawhara and Heretaunga by:

- ▶ failing to prevent them from being driven from their land and cultivations at Kaiwharawhara;
- ▶ failing to recognise their right to resort to the Hutt Valley to cultivate land for their sustenance and livelihood;
- ▶ failing to honour the provisions in the March 1844 Kaiwharawhara deed of release reserving to them all their cultivations and cleared land (ngakinga) for so long as they wished to retain the same; and
- ▶ requiring them in February 1846 to surrender their cultivations, houses, and other property in the Hutt Valley without any consultation or a freely negotiated agreement, and without paying adequate compensation for the loss resulting from their expulsion (s9.9.2).

**19.3.7 The McCleverty transactions**

Those Maori involved in the so-called McCleverty exchanges were Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama. The Crown failed to ensure that such Maori were given a free and unpressured choice as to whether they wished to relinquish their cultivations in favour of the settlers, and a free and unpressured choice as to any land they might receive in exchange. By such failure, the Crown failed to protect the rangatiratanga of Maori in and over their cultivations (s10.6.4).

The land assigned to Maori by McCleverty, in exchange for the release by such Maori in the Port Nicholson district of their cultivations on land claimed by settlers, was not waste land belonging to the Crown, nor did it belong to the New Zealand Company. It was in part tenths reserves held in trust for Maori, and the remainder was town belt or unsurveyed land belonging to Maori having customary interests in the Port Nicholson block. As a result, Maori received no compensation for the release of their valuable cultivations to the Crown (s10.7.5).

As a consequence of the foregoing, the Crown failed to fulfil its Treaty obligation to protect the rangatiratanga of such Maori in and over their land by ensuring that their tenths reserves remained intact and that they received adequate compensation for the surrender of their valuable cultivations, which had been expressly reserved to them (s10.7.5). The change of tenure of the tenths reserves also facilitated their eventual alienation.

### **19.3.8 Grey's 1848 Crown grant**

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 take raupatu rights over the remainder lands of some 120,626 acres in the Port Nicholson block.

Maori who had rights in this block had not, as the 1848 Crown grant claims, made a full and valid cession of all their rights to the land in the Port Nicholson district. In particular, such Maori had not relinquished their take raupatu rights over some 120,626 acres or thereabouts included in the grant to the New Zealand Company.

As a result, the Crown failed to act reasonably and in good faith towards its Treaty partners in disposing of the remainder lands without making any payment to or obtaining the consent of such Maori and, further, it failed actively to protect the Treaty rights of such Maori (s10.8.6).

### **19.3.9 Failure to reserve adequate land for Port Nicholson Maori**

The Crown neglected to protect the rights of Maori living in the Port Nicholson district who were parties to the McCleverty deeds by failing to set aside reserves which left them with an adequate land base for their short- and long-term cultivation and resource-gathering needs and which made adequate provision for Maori to develop on an equal footing with Pakeha (particularly by taking up pastoralism or other farming and land-use activities) (s11.2.3).

### **19.3.10 The Crown's administration of tenths reserves, 1840–82**

The Tribunal is satisfied that Maori having customary rights in the Port Nicholson block as at 1840 were intended to be the beneficial owners of the tenths reserves to be provided for

out of the land in the block acquired by the company. These reserves were to be held in trust for such Maori (s12.4.3).

The above finding on the status of the tenths reserves leads to a number of findings of Treaty breaches. The Crown failed in its Treaty duty actively to protect the interest of the beneficial owners of the Wellington tenths reserves in a number of respects. During the period 1840 to 1882, the Crown failed:

- ▶ to devise a satisfactory policy to administer the reserves in the best interests of the beneficiaries;
- ▶ to pass legislation defining the legal status of the reserves and providing for their effective administration;
- ▶ to provide for the effective administration of the reserves and the continuous supervision of the reserves commissioners;
- ▶ to consult with the beneficial owners and to involve their representatives in the reserves' administration;
- ▶ to ensure that payments were made only to persons entitled to them; and
- ▶ to ensure the prompt rental of reserves, the prompt payment of income to beneficial owners, and the prompt ascertainment of those entitled to be beneficiaries (s12.5.2).

#### **19.3.11 The alienation of urban reserves, 1840–82**

The Crown acted in breach of Treaty principles in the following respects:

- ▶ In appropriating 23 valuable tenths reserves for hospital, educational, and religious purposes without any consultation with or the consent of the Maori beneficial owners of such lands (s13.2.9).
- ▶ In eventually paying compensation for the appropriation of the above reserves which was manifestly inadequate (s13.2.9).
- ▶ In failing to compensate the beneficial owners for the loss of income from such reserves for some 24 years (s13.2.9).
- ▶ In authorising, without any consultation with or the consent of the beneficial owners, the occupation by military forces of town acres 89 and 90, being two tenths reserves in Mount Cook, and in allowing the military to continue occupying these reserves without paying any rent for some 26 years until they were formally purchased by the Crown in 1874. In purchasing rather than leasing these two reserves, the interests of the beneficial owners were further prejudiced (s13.2.9).
- ▶ In adopting the policy that it was desirable to remove Maori out of the town of Wellington and, as a consequence, facilitating the sale of their land in Te Aro and Pipitea Pa, thus failing to protect the interests of the owners of the pa reserves (s13.3.3).

**19.3.12 Trustee administration of Wellington and Palmerston North reserves, 1882–1985**

For the reasons given in chapter 14, the Tribunal has concluded that, as a matter of law, the Public, Native, and Maori Trustees were not, in the performance of their respective duties and responsibilities as trustees for Maori reserve lands, acting by or on behalf of the Crown in terms of section 6 of the Treaty of Waitangi Act 1975.

However, the Tribunal has found that the Crown, in promoting certain legislation, acted in breach of Treaty principles and, further, that some legislative provisions were also in breach of the Treaty. We record these as follows:

- ▶ In failing to consult with the Maori beneficiaries prior to the enactment of the Native Reserves Act 1882, and in further failing to make provision for the active involvement of Maori beneficiaries in the administration of their reserves, the Crown breached Treaty principles (s15.2.2).
- ▶ In failing to ensure that the beneficial owners of the Wellington tenths were consulted prior to the enactment of legislative provisions for the compulsory acquisition of the uneconomic interests of such owners, the Crown failed to fulfil its Treaty obligation to consult with Maori and to act reasonably towards them (s15.6.2).
- ▶ The 1955 legislative provisions enabling the Maori Trustee to acquire shares from the beneficial owners of uneconomic interests in Wellington tenths land, without any requirement that the trustee first consult with and obtain the consent of such beneficial owners, were in breach of article 2 of the Treaty (s15.6.2).
- ▶ The Crown breached its Treaty obligations to Maori by failing to ensure that the beneficial owners of the Wellington tenths were consulted prior to the enactment of the 1967 legislative provisions for the freeholding of reserve land (s15.7.2).
- ▶ The 1967 legislative provisions enabling the Maori Trustee to freehold Wellington tenths land, without any requirement that the trustee consult with and obtain the consent of the beneficial owners, were in breach of article 2 of the Treaty (s15.7.2).
- ▶ The omission from the 1967 freeholding legislation of any provision enabling beneficial owners to have priority in acquiring the beneficial interest of any owner who wished to dispose of such interest, and thereby maintain the ‘corpus’ of the Wellington tenths land, was in breach of article 2 of the Treaty (s15.7.2).
- ▶ The proclamations made by the Crown under the provisions of the Public Works Act 1908 (and its amendments) and the Public Works Act 1928 compulsorily vesting part of the Palmerston North Maori reserve in the Palmerston North Borough Council as a recreation ground and compulsorily acquiring another Palmerston North reserve section for a technical high school were in breach of Treaty principles in the following respects:
  - These proclamations were fundamentally inconsistent with the basic guarantee given in article 2 of the Treaty that Maori could keep their land until such time as they wished to sell it at a price agreed upon with the Crown or the local authority, as appropriate.

19.3.13

- The Crown had failed to ensure that there had been consultation with, and the consent obtained of, the Maori beneficial owners before the proclamations were made (s15.11.4).

### 19.3.13 Perpetual leasing of reserves

In relation to the perpetual leasing regime for Maori reserved land, the Tribunal has found that the Crown acted in breach of its Treaty duties to the beneficial owners of the Wellington tenths and Palmerston North reserves by:

- ▶ failing to ensure that the beneficial owners of the Wellington tenths and Palmerston North reserves were consulted before the passage of the legislation which imposed, without their consent, the perpetual leasing regime on their reserves (s16.3.2);
- ▶ enacting various legislative provisions imposing a perpetual leasing regime on Wellington tenths and Palmerston North reserves (s16.3.4); and
- ▶ imposing, under the Maori Reserved Land Act 1955, a fixed-percentage rental formula in perpetually renewable leases for 21-year terms without the consent of the beneficial owners of the Wellington tenths and Palmerston North reserves (s16.3.6).

The Tribunal has refrained from making any Treaty breach findings on the grievances of the Wai 145 claimants concerning certain aspects of the Maori Reserved Land Amendment Act 1997. However, we consider that the Crown should be prepared to negotiate the early surrender, on appropriate terms, of the perpetual leases held on the South Wellington Intermediate School site and the property at 11 Pipitea Street, Wellington (s16.6).

### 19.3.14 The taking of Waiwhetu Pa land for river protection purposes

The provisions of the Public Works Act 1908 and the River Boards Act 1908, under which most of the Waiwhetu Pa reserve was taken by the Hutt River Board, were in breach of Treaty guarantees that Maori could keep their land until such time as they wished to sell it at an agreed price. Those Maori affected were the owners of the Waiwhetu Pa reserve land, represented by the Wai 442 and Wai 145 claimants (s17.5.6).

### 19.3.15 Wellington Harbour and foreshore

The Tribunal has found that:

- ▶ Maori have been prejudicially affected by the actions of the Crown and legislative provisions which authorised the reclamation of substantial parts of the foreshore of Wellington Harbour. Those Maori so affected were Te Atiawa, Ngati Tama, Taranaki, and Ngati Ruanui (s18.6.3).

- ▶ The prejudice arose from the consequential destruction of the foreshore, which was of great cultural and spiritual significance to Maori. As a result, Maori progressively lost their right of access to the foreshore, which served as a source of food, as a place for landing waka, and as a ready link between the land and the sea (s18.6.3).
- ▶ In so destroying much of the foreshore, the Crown failed at any time prior to the 1980s to consult with Maori or to compensate them for the loss of their rights of access to the foreshore and the loss of their customary fisheries. Such actions and omissions of the Crown and the legislative measures which authorised the destruction of foreshore were inconsistent with the Treaty obligation of the Crown under article 2 to consult with Maori before any such reclamation was undertaken and to compensate Maori for the loss of their rights in respect of that foreshore (s18.6.3).
- ▶ The failure of the Crown to make legislative provision for the involvement of Wellington Maori in the management of the harbour and its resources until very recently is in breach of its Treaty obligation to protect their customary rights in the harbour and the foreshore (s18.6.7).

This Tribunal has also endorsed a finding of the Whanganui River Tribunal as being equally relevant to Wellington Harbour. In its 1999 *Whanganui River Report*, the Tribunal found the Resource Management Act 1991 to be:

inconsistent with the principles of the Treaty in that it omits any provision that ensures that all persons as identified in section 2 of the Act exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are to do so in a way that is consistent with, and gives effect to, the Treaty of Waitangi.

(See section 18.6.8.)

#### **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 south-west 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.

The Tribunal has upheld various claims by the Wai 145 claimants brought on behalf of all beneficiaries of the Wellington Tenths Trust and Palmerston North Reserves Trust. However,

counsel for the trust has acknowledged that, as a result of Crown actions designed to alienate Maori from their lands and interests in such lands, the current beneficial owners' list does not reflect the total number of Maori who should benefit from any settlement of the Wai 145 claim. Accordingly, the Wellington Tenths Trust and the Palmerston North Reserves Trust recognise the need for 'all who whakapapa to Maori in possession of Te Whanganui-a-Tara from the 1839–40 period to participate in and benefit from' any settlement with the Crown (emphasis in original).<sup>1</sup> For this reason, we were advised by Mr Green that a separate settlement trust has been developed:

with a view to bringing all persons eligible through whakapapa to be a part of the trust. This includes persons who had their shares defined as 'uneconomic' and subsequently confiscated, those who were left out of succession, those who sold their shares as a result of coercion and/or lack of reasonable return and those whose tupuna were left off owners' lists last century, but who had an entitlement to the lands.<sup>2</sup>

We are unaware what progress has been made towards the establishment of the proposed settlement trust. However, it appears to go some way to meeting serious concerns represented to us by Ihakara Porutu Puketapu in claim Wai 562, which was brought on behalf of himself and of descendants of Te Matehou and Puketapu hapu of Te Atiawa iwi. Both these hapu and members of other hapu of Te Atiawa were present in the Port Nicholson block in 1840.

In his evidence in support of this claim, Mr Puketapu made it clear that he generally supported the claim brought by the Wellington Tenths Trust.<sup>3</sup> However, he was seriously concerned that the proceeds of any settlement with the Crown should not automatically be deposited in a 'general pool' of assets administered by the Wellington Tenths Trust for existing shareholders only, to the exclusion of all others who were present in the Port Nicholson block but whose descendants are not represented among the beneficiaries of the Wellington Tenths Trust. In support of this contention, Mr Puketapu referred, by way of example, to Duncan Moore's evidence to the Tribunal on the Wellington town belt.<sup>4</sup> Moore's evidence showed that only a relatively small proportion of individuals living at Te Aro and Pipitea Pa were included on McCleverty's deeds relating to those pa.<sup>5</sup>

Mr Puketapu strongly urged that, if there is to be a durable settlement, all assets received from the Crown for allocation to Te Atiawa should be for all those Te Atiawa who can whakapapa back to the original owners and occupiers and should not be confined to the present Te Atiawa shareholders in the tenths trust. While Mr Puketapu was naturally concerned with the inclusion of all such Te Atiawa in any settlement with the Crown, the same concern

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1. Document 05, p 660

2. Ibid, pp 660–661

3. Document K5

4. Ibid, p 3

5. Document K3, pp 34–35

applies equally to all Taranaki, Ngati Ruanui, and Ngati Tama who can whakapapa back to the original owners and occupiers of the Port Nicholson block. The Tribunal shares this concern and believes that full consultation should take place between the four Maori groups involved to ensure that all are included in any settlement with the Crown. This would not occur if only existing beneficiaries were to benefit. The Tribunal considers that this issue should be resolved by the parties as a precondition to any settlement with the Crown.

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.

An important question arises as to whether, as appears to be contemplated in the draft trust deed, 'some specific parts of the settlement will belong firmly with the listed owners in the Wellington Tenths and Palmerston North Reserves'.<sup>6</sup> We understood that Mr Puketapu, speaking on behalf of those he represented from Te Atiawa, considered that all proceeds accruing from the settlement relating to Te Atiawa should be shared among all of the widened class of those who can whakapapa back to ancestors in the Port Nicholson block in and about 1840.

This matter has not been the subject of submissions to the Tribunal, and accordingly we can make no recommendation on the question at this stage. Our present view, which is given in case it is of assistance, is that, if a portion of any Crown settlement were to be reserved for current trust beneficiaries, it should not include compensation given for Treaty breaches affecting Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama prior to 1888, when, for the first time, the Native Land Court decided who should be the beneficiaries of the trust.<sup>7</sup> However, this question is certainly arguable. It may be that the parties involved will recognise that some subsequent Treaty breaches can fairly be regarded as relating solely to existing trust beneficiaries. In the event that the parties are unable to reach agreement on this or related questions, leave is reserved for any of the parties affected to seek a recommendation from the Tribunal.

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6. Peter Love, Wellington Tenths Trust, notice seeking registration of interest in Port Nicholson block claims, 6 March 1998 (doc 05(a), p 94)

7. The list of the specific beneficiaries was not completed until 1895.

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. In speaking of those who have raupatu rights, Ngarongo Iwikatea Nicholson said that 'it is for that collective to reach consensus as to the extent each of them should be entitled and what the [share of any] entitlement is to be'. He stressed that, as a matter of tikanga, they should recognise one another's contribution.<sup>8</sup>

In making its findings in respect of each Treaty breach, the Tribunal has indicated in each case the particular Maori or group of Maori that has been prejudiced by such breach. Where we have referred to the beneficiaries or beneficial owners of Wellington tenths reserves, this is not to be taken as necessarily excluding those who are not beneficiaries in the existing Wellington Tenths Trust.

Claims were made by two groups of Ngati Tama. It will be for them to agree on who is to represent them in their negotiations with the Crown in respect of the various Treaty breaches which affected Ngati Tama along with Te Atiawa, Taranaki, and Ngati Ruanui. In only one instance is a Treaty breach found in respect of Ngati Tama alone. This concerns their being driven from Kaiwharawhara and their later expulsion from the Hutt Valley.

In this report, we have frequently made reference to Taranaki and Ngati Ruanui as groups which have customary interests in the Port Nicholson block and which suffered prejudice as a result of Treaty breaches by the Crown. We have done so because these two groups, which lived in and around Te Aro Pa, were clearly distinct and independent from other groups in the nineteenth century. However, descendants of these groups have not submitted separate Treaty claims relating to our inquiry area. This may well be because they are now so thoroughly intermingled with other iwi that they no longer have a distinct identity in Wellington. We note, for example, that Sir Ralph Love, who originally brought the Wai 145 claim to the Tribunal, was of Taranaki and Ngati Ruanui, as well as Te Atiawa, descent.<sup>9</sup> It may well be appropriate, therefore, for the Wellington Tenths Trust to represent all Taranaki and Ngati Ruanui interests in settlement negotiations (subject to our view, stated above, that the current beneficiaries of the tenths trust should not be the only ones to benefit from the settlement). This is, however, a matter for the descendants of those Taranaki and Ngati Ruanui present at Port Nicholson in 1840 to determine.

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8. Document L14, p 25

9. Catherine Love, 'Makere Rangiatea Ralph Love', DNZB, vol 5, p 292

In his closing submissions, counsel for the Wai 145 claimants referred to the outcome of an urgent hearing granted by the Tribunal, on the application of the claimants, on 22 February 1996.<sup>10</sup> Detailed reasons for granting the request are set out in a Tribunal memorandum of 29 February 1996.<sup>11</sup> The hearing concerned a proposal by the purchasers of State-owned enterprise land adjoining and overlooking the Pipitea Marae atea (courtyard of the marae) immediately in front of the wharepuni (meeting house). This Tribunal considered that irreparable damage would be done to the Pipitea Marae should a proposed three-storey building proceed, the more so since the marae was included in a proposed Wellington City Council heritage list of Maori sites and was classified as being of 'outstanding' significance.

Shortly before the urgent hearing was concluded, the Tribunal was advised that the land, which had earlier been vested by the Crown in a State-owned enterprise and on-sold by that enterprise to a developer, had been repurchased by the Crown. In so advising the Tribunal, the Crown intimated that the price which it had had to pay the developer for the land (which price presumably included loss of profits on the development) or the land's current value, whichever was the greater, would be offset against the settlement of the Wai 145 claimants' Treaty claim.

While the Tribunal was not called on to make a finding on the merits of the claim, it heard sufficient evidence to convince it that, if the proposed development were allowed to proceed, it would gravely and irreparably damage the Pipitea Marae and its amenities. In the circumstances, the Tribunal believed that the cost of avoiding the potential damage resulting from the disposal of that section of land by the Crown should be met by the Crown rather than by the claimants.

Counsel for the Wai 145 claimants also expressed concern that the trust has been left by the Crown to carry substantial legal costs in connection with a proposal by the Crown to float the sale of nine departmental buildings in the heart of Wellington city. Four of the nine buildings were relatively close to Pipitea Marae. Each of those properties was memorialised under provisions of the Treaty of Waitangi (State Enterprises) Act 1988. The claimants feared, following a public warning by the Minister in Charge of Treaty of Waitangi Negotiations that he could not rule out seeking legislation to take away the existing powers of the Tribunal to make binding recommendations for the return of memorialised property under the Treaty of Waitangi (State Enterprises) Act 1988, that they would lose their statutory right to apply to the Tribunal for such a recommendation. The Tribunal found that, in so acting, the Crown was in breach of Treaty principles.<sup>12</sup> The claimants say that they were faced with high costs to protect their interests, and we recommend that the Crown should meet their reasonable legal costs in pursuing this matter.

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10. Document 01, pp 3-4

11. Paper 2.84

12. Paper 2.185

The Wai 145 claimants alleged that the Crown had declined to accept an application to have the Tramways Building at 1–3 Thorndon Quay declared a wahi tapu site in terms of section 27D of the State-Owned Enterprises Act 1986.<sup>13</sup> They claimed that the Crown had declined the application. Crown counsel, however, advised that in fact the Crown was still considering the application and that a final decision had not been made.<sup>14</sup> As the matter has not been considered on its merits, the Tribunal makes no finding.

On 1 May 1991, the Wai 145 claimants applied to the Tribunal for orders and recommendations pursuant to the Treaty of Waitangi (State Enterprises) Act 1988.<sup>15</sup> Preliminary consideration only was given to the application by the Tribunal, and it was left in abeyance. Leave is reserved to the Wai 145 claimants to apply to the Tribunal for a determination of the application or any amendment thereof.

The Tribunal has concluded that, while Muaupoko and Rangitane each claim an early association with Te Whanganui a Tara, they could provide no evidence of occupation within the Port Nicholson block in or after 1840. We have concluded that they lost their lands by the raupatu of the incoming tribes before the advent of the Crown. It was not in the power of the Crown to restore rights lost in such a way (see s 2.5.4). However, as Professor Alan Ward says, the grouping which we have referred to as the ‘Whatonga-descent peoples’ (of which Rangitane and Muaupoko were part) has left ‘hundreds of placenames on the landscape and a collective cultural memory of the human occupancy of the area since the time of Kupe’.<sup>16</sup> Such ancient associations with the Port Nicholson block remain forever.

Rangitane have requested the recognition of their ancient association with certain sacred sites in Port Nicholson, and the return of those sites. This possibility may in fact already be covered by the Wellington City Council’s site inventory and the various protection mechanisms which this affords. Moreover, the Crown has made provision to protect such connections through its various protection mechanisms (the Historic Places Act 1993, the Resource Management Act 1991, the Conservation Act 1987, the Te Ture Whenua Maori Act 1993, and Te Puni Kokiri’s process for protecting ‘significant sites’).<sup>17</sup> Whether or not this recognition is adequate is a matter for the Whatonga-descent peoples to pursue with the relevant local bodies and under the Crown’s legislation. We note that, in the Wellington City Council’s district plan, the council acknowledges that the area around Wellington Harbour was ‘formerly the domain of earlier tribes’ than Ngati Toa and Te Atiawa and that ‘The tangata whenua have a duty to ensure that the wahi tapu of all the tribes who have lived in Wellington are

13. Document 01, pp 7–8; Minister for State-Owned Enterprises to Ngatata Love, 11 March 1999 (doc 01(a), pp 147–149)

14. Document Q2, pp 24–25

15. Paper 2.27

16. Document M1, p 103

17. Te Puni Kokiri, *Sites of Significance: A Step-by-Step Guide to Protecting Sites of Cultural, Spiritual and Historical Significance to Maori* (Wellington: Te Puni Kokiri, 1996); see also Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 1999), esp pp 37, 103–104, 118–119

given proper recognition'.<sup>18</sup> We consider that it is appropriate that the relevant local bodies, the Crown, and other iwi acknowledge the ancient history of the area by recognising in a meaningful and public way the centuries-long occupation of Te Whanganui a Tara and environs prior to 1840.

Apart from the few recommendations made in this chapter we consider that, 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.

Instead of conducting a full and fair inquiry into the so-called 1839 deed of purchase, the Crown resorted, without the consent of Maori, to a highly questionable and pressured 'arbitration' process. This and the subsequent McCleverty transactions led to the 1848 Crown grant to the New Zealand Company, which arbitrarily deprived Maori of some 120,000 acres of their land, without their consent and without payment. The town belt was likewise taken by the Crown without payment to Maori and without their consent. In addition, 23 acres of highly valuable tenths reserves situated in the central business and Government district of the town of Wellington were appropriated by the Crown without the consent of the Maori beneficial owners, without making any payment for some 24 years, and without paying compensation for the loss of income resulting from the arbitrary taking of the land. When a payment was finally made for the tenths appropriated by the Crown, it was almost certainly for less than a quarter of their then value.

The perpetual leasing regime imposed by the Crown on Wellington tenths and Palmerston North reserves without the consent of the beneficial owners, including the stipulation of fixed-percentage rents for 21-year terms, resulted, over time, in significant monetary loss to the beneficiaries of those reserves. Maori also suffered the destruction of the foreshore and of their kai moana through reclamation without their consent and without compensation. These and other 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.

Leave is granted to the parties to seek more specific recommendations if agreement cannot be reached. Reasonable costs should be met by the Crown in compensation for any past litigation costs incidental to the claims, legal and related costs in the claims upheld by the Tribunal, and legal costs in negotiating a settlement.

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18. Wellington City Council, *Wellington City District Plan* (Wellington: Wellington City Council, 2000), 'Issues for Tangata Whenua', s 2.3.3, p 2/8

Dated at *Waihytu* this *1<sup>st</sup>* day of *May* 2003

*GSOrr*

GSOrr, presiding officer

*John Clarke*

J Clarke, member

*MPK Sorrenson*

MPK Sorrenson, member

