WAI 2180 TAIHAPE INQUIRY DISTRICT: MĀORI LANDLOCKED BLOCKS

John Neal

Jonathan Gwyn

David Alexander

Summary

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The Authors

John Neal (Researcher) gained experience in the interpretation and use of land data and records in his career at Department of Lands and Survey, DOSLI, and Land Information New Zealand which involved understanding the use of survey plans and land records both from a historical and contemporary perspective. Part of his employment was to service the Māori Land Court in the provision of survey and title records to support Partition Orders.

Jonathan Gwyn (Registered Land Surveyor) is a Licensed Cadastral Surveyor and member of Survey and Spatial New Zealand (New Zealand Institute of Surveyors). He has over 15 years' experience in topographic, cadastral, and set out surveying and civil engineering design and contract management.

David Alexander (Researcher) acquired specialist knowledge of land titles and title dealings during 12 years' work experience with the former Department of Lands and Survey. Since then he has spent 30 years applying that titles knowledge during the preparation of research reports for the Waitangi Tribunal and the Māori Land Court. He has prepared reports for the Taihape Inquiry on the Rangitīkei River and on post-1970 environmental matters in the Inquiry District.

Introduction

In July 2018, the Wai 2180 Taihape Tribunal found that it would be of assistance to its inquiry if further technical evidence on Māori landlocked blocks in the Inquiry District was provided[1]. It endorsed some proposals put forward by counsel[2] that the evidence should address the following matters:

- Outline of the practical realities, difficulties and opportunities for development of landlocked land;
- Outline of some suggested remedies for the situation and analysis of the pros/cons/ and feasibility of each;
- Reference to the national context in acknowledgement that this is a national problem as well as a regional one;
- Address issues of costs to landowners for obtaining access e.g. compensation to neighbouring land owners;
- Review of materials held by the Rangitīkei District Council on this issue; and
- Accompanied by a comprehensive map book which identifies each parcel of landlocked land in the inquiry district and the legal status of the land adjoining it.

It also added three further matters that it would like information about:

- The proportion of Māori land in this inquiry district which has no suitable legal access, and this is the only barrier to owner access to that land;
- The proportion of land without legal access where legal access cannot be provided because of physical/geographic barriers to access; and
- Any additional information as to why current legislative remedies are not working for providing legal access to landlocked Maori land in this inquiry district, and practical recommendations for overcoming this for the blocks concerned.[3]

The Tribunal has formed a preliminary view[4] that the Crown has a duty of active protection that obligates it to protect Māori in their lands as long as they wish to retain them. It also is required to take active steps to ensure non-Māori and Māori landowners are treated equitably

[1] Tribunal Directions, 23 July 2018. Wai 2180 #2.6.64.
[2] Wai 2180 #3.3.238, Paragraph 14.
[3] Wai 2180 #2.6.64, Paragraph 61.
[4] Tribunal Memorandum – Directions, 14 August 2018. Wai 2180 #2.6.65.

and fairly, and Māori are not disadvantaged. It is not fair that the present generation of Māori should be required to pay to obtain access to their lands when the Crown's form of legally recognised land title and process for partitioning had historically created the access problems. One of the Tribunal's preliminary recommendations is that the Crown sponsor and fund mechanisms to provide the necessary expertise, including lawyers and surveyors, to pursue applications through the courts for access to landlocked land.

The identified barriers to access are:

- The substantial costs (legal, survey, compensating neighbours, fencing, forming access), which can outweigh the expected benefits of achieving access;
- Difficulties in accessing capital for attaining access (legal, land acquisition, fencing and forming access);
- A lack of capacity and expertise to navigate the steps, including specialist advice on available options;
- Difficulties gaining agreements with surrounding landowners; and
- Neighbouring landowners may have economic or other incentives to continue restricting access to the landlocked Māori land.

We were commissioned by the Crown Forestry Rental Trust to prepare a gap-filling report on Māori Landlocked Blocks in the Wai 2180 Taihape Inquiry, focusing specifically on the three key areas*:*

- The proportion of Māori land in the Taihape inquiry district which has no suitable legal access and this is the only barrier to owner access to that land;
- The proportion of Māori land without legal access where legal access cannot be provided because of physical/geographic barriers to access; and
- Any additional information as to why current legislative remedies are not working for providing legal access to landlocked Māori lands in this inquiry district and practical recommendations for overcoming this for the blocks concerned.

For the Māori Landlocked Blocks report[5] ("**the report**") we have started broadly by identifying all Māori land in the Taihape Inquiry District and examining what access provisions those land blocks have. This has allowed us to identify the following categories:

- Māori Land with legal access and physical access;[6]
- Māori Land with legal access but not physical access;
- Māori Land without legal access.

We concentrated our efforts on the access needs of the second and third of these categories, looking at some of these lands to see what would be required to provide practical access of a standard that could be legally endorsed and ordered by a Court. From the assessment we identified and made recommendations about some possible ways forward. We do not imagine that this report can somehow magically resolve the matter.

Where the land adjoining landlocked land is Maori-owned, the owners of the adjoining land are in the same position as the Crown or private owners with respect to the statutory protections they enjoy and the advisability of negotiating an access solution is with them. The Authors therefore have not assumed that any adjoining Maori neighbours have shared interests or any particular duty of obligation to assist neighbours with access. It has been a longstanding problem because of the complexity of the issues, and the need for a variety of interests to align correctly in order to identify and define a sustainable solution.

Legal and Physical access to Māori Land in Taihape Inquiry District

For identification of Māori land we have relied primarily on Māori Land Court records, specifically www.maorilandonline.govt.nz ("**Māori LOL**"). We have correlated the Court records with Land Information New Zealand's records on www.landonline.govt.nz ("**LINZ LOL**"). This methodology provides good coverage of Māori Freehold land. It does not reliably record General Land owned by Māori – there is no current suitable database for this.

[5] John Neal, Johnathan Gwyn, David Alexander, "Wai 2180 Taihape Inquiry District: Māori Landlocked Blocks", August 2019, Wai 2180, doc # N1

[6] Māori LOL and LINZ LOL used in conjunction with Google Earth aerial photography and street view.

During the cross-correlation exercise, it became apparent that the two databases contained contradictory information about Owhaoko D1, Owhaoko D7B, Part Awarua 4C9I (Section 9 Block II Potaka Native Township) and Part Awarua 4C9K (Sections 24-26 Block III Potaka Native Township). Details are set out in pages 8-10 of the report.

Analysis

For the purposes of analysis later in this report, the northern area of Part Owhaoko D7B has been included as Maori land, while the southern area of Part Owhaoko D7B has been treated as a separate block within WN27B/52 and has not been included as Maori land. The eastern and western area of Owhaoko D1 has been included as Maori land. Part Awarua 4C9I (Section 9 Block II Potaka Native Township) and Part Awarua 4C9K (Sections 24-26 Block III Potaka Native Township) has been included as Maori land.

Legal Access

Legal Access is the legal right to access land from a public legal road, an easement over adjoining land or frontage to a Māori roadway.

Limited Access Road

State Highway 1 traverses through the Taihape Inquiry District in a north to south direction which abuts land in Motukawa, Awarua, and Taraketi Blocks.

In three locations, State Highway 1 has been declared a Limited Access Road where for safety reasons access to the highway from adjoining land blocks has been restricted by the highway authority. The restriction may limit a property to one or more approved access points where the land owner can gain access to the highway. In some cases, this access point may be shared between two or more adjoining properties.

For all blocks of Māori land in Motukawa, Awarua, and Taraketi Blocks which gain access to State Highway 1 where the highway is defined as Limited Access Road (LAR), the property

title has been checked,[7] and the existence of the access restriction (and the number of approved access points at the time the restriction was registered)[8] has been recorded in the Land Table (Appendix A of the report).

Where Māori land abuts those portions of State Highway 1 where it is not a Limited Access Road, the title is not noted in terms of the State Highway and access applies without the access limiting factor.

The fact that State Highway 1 is held as a Limited Access Road in part, does not appear to unduly restrict access into any adjoining Māori land. NZTA does regulate access primarily from a road safety aspect.

Private Level Crossings over KiwiRail railway track

Of the nine Private Level Crossings in this Inquiry District which provide access over railway land to Māori land, two properties have an approved Deed of Grant. Six properties are noted in KiwiRail records as being processed to be issued with a Deed of Grant for permitted access. One property is using a crossing and appears to not have a noted Deed of Grant within KiwiRail records. The details are noted in the table on page 13 of the report.

There does not appear to be any legal impediment gaining access to Māori land by way of Private Level Crossings over KiwiRail railway track in the Inquiry District.

Physical access

This is access that is available to owners of Māori land so that they have an unrestricted ability to reach their lands along a route that is marked and defined on the ground formed up to at least some degree – an unformed legal road does not constitute physical access.

[7] Land titles were obtained from LINZ LOL.
[8] Notice recorded on title.

A landlocked block could be accessible to a lessee where the lessee owns adjoining land over which physical access passes. That, however, That, however, does not necessarily mean that unrestricted access is available to the Māori landowners, and the Māori land would not therefore enjoy physical access.

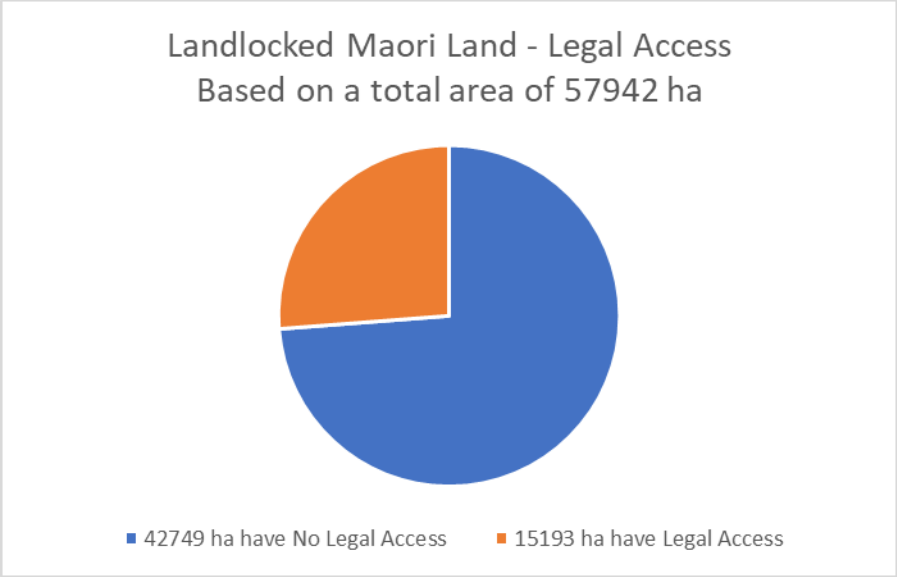
Legal and Physical Access to Māori Land in Taihape Inquiry District

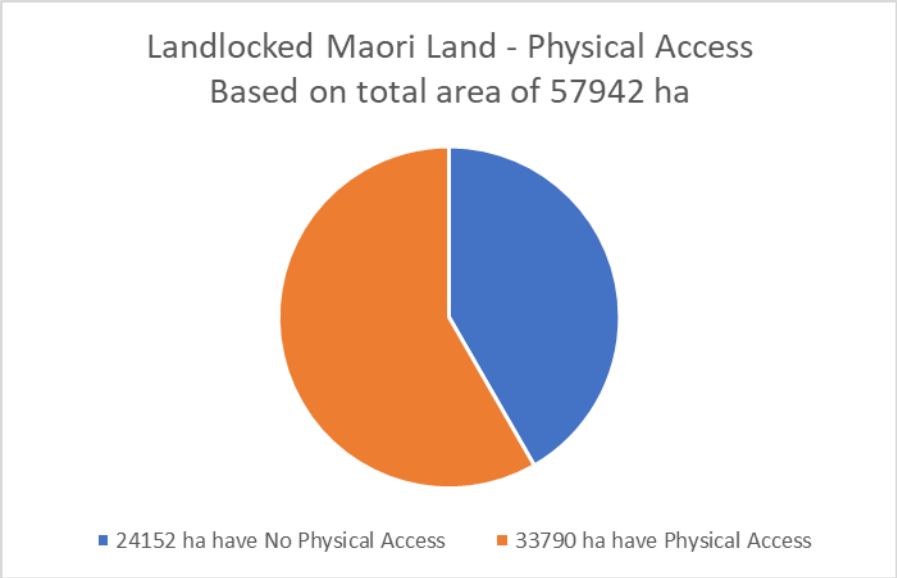
All Māori land in the Inquiry District, whether it does or does not have legal or physical access, is listed in the Land Table (Appendix A of the report).

Legal and Physical Access to Māori Land

Appendix A of the report includes all Māori-owned land blocks as identified on MLC LOL and LINZ LOL (as at 11 July 2019).

Appendix A lists 176 titles. The number of the titles that do not have legal access, or do not have physical access, are shown in the following pie charts; the areas used have been taken from titles. If a title is part-cancelled no area adjustment has been made. Where part of a title does not have physical or legal access, the title has been treated as not having physical or legal access.





Some features of the landlocked blocks

- The greatest concentration of landlocked blocks is in the northern part of the Inquiry District, in the Owhaoko and Oruamatua Kaimanawa lands. There is a smaller concentration along the northern and north-western edge of the Ruahine Forest Park. These particular blocks are all effectively beyond the edge of the farmed landscape created by traditional types of land usage.
- There are different types of affected adjoining properties. For some landlocked blocks, which include urupa, access will have to be across other Māori freehold land, and the specialist skills of the Māori Land Court and the legislation it works under

will be required to come up with a solution. Other landlocked blocks will probably need access across Crown-owned land such as the NZDF Waiouru Army Training Area (for access to some Oruamatua Kaimanawa blocks) or Ruahine Forest Park (for access to Awarua 1A3B), and the Crown would need to agree to negotiate access solutions.

- For most landlocked blocks, however, the affected adjoining properties are privately owned, and the Crown has traditionally declined to play an active role in finding solutions.
- Where there are concentrations of landlocked blocks, the most viable solution is likely to be a single spine route that serves a number of blocks, from which shorter side routes branch off towards individual blocks.

Can physical access be provided to landlocked blocks?

Investigative work has been done on the feasibility of provision of reasonable physical access. This investigation is the result of a desktop research project investigating the potential for access to the land locked Māori land blocks within the Wai 2180 Taihape: Rangitīkei ki Rangipō Inquiry District. This assessment of the feasibility of providing practical physical access is based on high-level conceptual design. Legal requirements or mechanisms to protect an access in perpetuity through the creation of Roads, Rights of Way, Access Lots, or Roadways has not been considered.

Criteria of Practical Physical Access

The specification for practical physical access is one that is not clearly defined. Legislation does not provide a clear answer. A definition from Section 326A Te Ture Whenua Act 1993 states “reasonable access means physical access of the nature and quality that may be reasonably necessary to enable the occupier for the time being of the landlocked land to use and enjoy that land.”

In this instance we have not been able to ascertain all intended uses for the blocks in question. We have therefore turned to the Rangitikei District Council District Plan for guidance as to what would be required if such an access was to be provided to the block if subject to an

action under the Resource Management Act 1991. The District Plan refers to two documents in setting access specifications:

1. NZS 4404:2010 New Zealand Standard for Land Development and Infrastructure
2. Rangitikei District Council Land Development and Subdivision Infrastructure Addendum to NZS 4404:2010, dated March 2017.

It is noted that the Rangitikei District Council Land Development and Subdivision Infrastructure Addendum to NZS 4404:2010 (RDCA) is to take precedence over NZS 4404:2010.

The design specifications from both NSZ 4404:2010 and the RDCA are set to meet the minimum requirements of a full legal road with an open road design speed. Whilst this is desirable as this maintains consistency with Council's current standards and would ensure all future landowners' needs are met, the first assessments indicated that the parameters were too onerous to comply with in full for many of the blocks and therefore not practical in terms of the hilly terrain encountered. Consequently, we have reassessed the design parameters and have reduced the criteria to provide greater flexibility in design whilst maintaining a suitable standard of access for 6 wheeled trucks as used for commercial activities such as farming and delivery of resources and materials for development of the land. The revised design criteria that we have applied is set out below:

	Revised Design Parameters
Carriageway Width	5.5m
Shoulder Width	1.0m (each side)
Maximum Longitudinal Gradient (Metalled)	10%
Surfacing	Metal for gradients <10.5% Seal for gradients >10.5%

Methodology

The process used to assess the feasibility of providing practical physical access is described below.

1. Identify blocks that do not have legal access. 44 blocks were identified through the data comparison.

2. Locate data for each of the land-locked blocks to build a dataset for analysis. The data used and source is listed below:
    a. Cadastral Boundaries (Land Information New Zealand.)
    b. Aerial Photography (Land Information New Zealand & Google Earth where appropriate)
    c. Roads and tracks as shown on the Topo50 Series Plans (Land Information New Zealand)
    d. Digital Surface Model (Horizons Regional Council)
3. Build a dataset to correlate all sources of data for each block within GIS.
4. Transfer data to 12d Engineering modelling software, generate 3d surface model
5. Analyse information and model access routes. The hierarchy used to priorities routes to be modelled was:
    a. Unformed legal roads where present.
    b. Existing informal access tracks where present.
    c. New routes without requiring culverts and bridges.
    d. New routes requiring culverts and bridges.
6. Produce a summary for each assessed property itemising parameters used and identifying areas requiring further investigation.

With the assessments being both desktop and of a high-level conceptual nature there are a number of limitations applicable to the methodology applied. Detail of these limitations and assumptions are discussed within the report.

Findings

Of the 44 identified blocks, 27 were classified as having an achievable practical access route (yes); 14 were classified as needing further investigation (maybe); and the remaining 3 blocks being Owhaoko A1B, Owhaoko B1B and Owhaoko D4B were deemed unable to be provided a practical physical access (no). Refer summary table of “Findings” on page 22 of the report.

The 27 blocks identified as having an achievable practical access have been assessed as meeting the design parameters determined above or, in some cases, as largely meeting the design parameters with some exceptions. These exceptions have been deemed to be of a scale and complexity that could be overcome through relatively conventional road construction

techniques. An example of this is the use of chip seal to allow sections of access route to be constructed at a longitudinal gradient of greater than 10%.

The 14 blocks that have been classified as requiring further investigation have been identified as having potential access however they have more significant constraints to overcome and, in our opinion, this could make the routes impractical. The constraints range from steeper and extended lengths of longitudinal gradient, significant earthworks which may also require extensive retaining walls and crossings over significant rivers.

The 3 blocks that are classified as being unable to be provided with practical access are all located within the Owhaoko Block. These blocks are unable to be accessed due to the very steep terrain.

What practical recommendations can be made?

The claimants' views

At the three hui we attended in January 2019, we were left in no doubt that the owners of the landlocked lands considered that, in the first instance, the standard of access that their lands should have was public legal road access.

This was seen by claimants as a matter of placing them on an equal footing with most other landowners in New Zealand. Māori landowners want to experience the same advantages as are enjoyed by owners whose lands were originally granted by the Crown. The most significant advantage of public legal road access is that the practical provision of access then becomes a communal responsibility, through local authority rating and central Government subsidy, rather than the responsibility only of those landowners that are provided with access.

Besides the notion of equality, the thinking of claimants was that public legal road access represents the least amount of restriction on their ability as landowners to access their lands. They can travel to their lands at any hour of their choosing, in a variety of forms of transport, and with no need to open and close gates through fence-lines that cross the access route.

While not universally expressed, some claimants accepted that public legal road access might be hard to achieve, because of the high costs and therefore greater difficulties involved in all parties being able to reach agreement. They were willing to adopt a more pragmatic approach that would accept the possibility of alternatives if those alternatives meant quicker resolution of the access problem.

It was the research team's understanding that when claimants spoke at these hui of the need for the least restrictive access to their lands, they were probably thinking in terms of large blocks whose use potential has been stymied by lack of access. They were probably not thinking of blocks which are urupa or wahi tapu, or have strong cultural connections where the absence of publicly available access might be beneficial. These matters were not explored or discussed at the hui.

Following the lead taken by the legislation concerned with landlocked Māori lands, we have considered it appropriate to consider a range of access alternatives, rather than assess practical and reasonable access only in terms of public legal road access.

Why aren't current statutory remedies achieving traction?

There are two paths to resolution described in legislation: one in the Property Law Act 2007 (Sections 326-331), and the other in Te Ture Whenua Māori Act 1993 (Sections 326A-326D).

Without invoking the landlocked land provisions of Te Ture Whenua Māori ("**TTWM**"), the Māori Land Court is authorised to make access orders that create easements (Sections 315-315A TTWM), roadways (Sections 316-319), and roadways intended to become public roads (Sections 320-321).

Both statutory measures concerning landlocked lands are written as though the access problem is taken to the Court for it to arrange a solution among the interested parties. Courts can institute mediation hearings into their procedures, which can reduce the amount of court time involved in hearing proposals and counter-proposals from interested parties. However, the amount of time and energy involved is still significant, with the stress of the financial cost

a constantly-ticking burden. At the end of a prolonged process, the Court may decide, for whatever reasons, that it is not appropriate to make an order.

The statutory measures have no regard for the often long-standing nature of the access problems faced by owners of landlocked lands. In many instances there has been a history of conflict on the ground and attempts to resolve the problems. Affected parties have frequently tried and failed to reach agreement. A court environment is not necessarily going to facilitate the finding of a solution if an atmosphere of distrust and disillusion among the parties already exists. In fact, a court is likely to be successful in only a small proportion of such cases.

A further difficulty lies in the cost of the exercise. Court hearings are expensive, but the costs of the court may be insignificant compared with the costs of the legal and physical provision of access. It is implicit in the statutory opportunities that are available that the affected parties will bear the cost of laying out the access route and forming it up. No one else is volunteering to do so. In practice the landlocked Māori landowners are the most significant of the affected parties, so there is an expectation that they would pay most of the cost. Yet the landlocked nature of the Māori property has hindered its economic development and prevented the owners from gaining much income from it. The owners do not have the funds to pay their share.

The issue of where the costs fall is apparent with respect to public legal roads. Local authorities, responsible for management of the roading network, are not prepared to fund new extensions. They view a new road extension in the same manner as they would view a new road servicing a new housing subdivision. They want another party, usually those who would benefit from having the new road, to pay for construction, and only once it is constructed would the local authority be prepared to accept a handover of the road so that it became a Council responsibility.

The main feature of the statutory measures currently available is that the Crown is not recognised as an interested party and is not required to be involved.

If the Crown has some duty to be involved, how could that best be achieved?

It does not make sense to expect that the Crown would be silent and uninvolved until an application is made for a court order. That would then expand the range of interested parties in the Court proceedings to include the Crown, yet in that position it is not clear what role the Crown would play vis-a-vis other parties.

More effective advantage could be achieved if the Crown became involved before a court application was made. This would involve the Crown in investing in negotiations before an application was made, with any resulting court involvement being a check of the statutory and equitable validity of any negotiated agreement, and the issue of any order establishing legal access.

One possible solution that the Crown could investigate would be to establish an agency known, for want of a better term, as a Māori Landlocked Lands Commission. The Commission would take applications from owners of landlocked land (per the medium of Māori Land Court-ordered management structures[9]) seeking Crown assistance, and be funded to investigate landlocked situations, prepare initial discussion documents and proposals, commission reports, and arrange negotiating hui. It would also be a suitable channel for distribution of any Crown financial contribution to be included in any agreements. If there were to be any limits on such a financial contribution, those limits could be that the contribution would be proportionate to both the circumstances of historical disadvantage and how widespread the benefits of the agreement would be.

There do seem to be examples of Commissions that can do this type of mahi. There is a Walking Access Commission that is charged with expanding the public walking track network and resolving disputes between walkers and landowners.[10] There is a Forest Heritage Fund that negotiates acquisitions on behalf of the Crown. There is a Ngā Whenua

[9] Not only does this have to be a management organisation agreed to by the owners and endorsed by the Court, but the management organisation also has to have a mandate to pursue resolution of the landlocked status of the land.
[10] Established under the Walking Access Act 2008.

Rāhui Komiti that negotiates Crown-funded kawenata (environmentally protective management covenants) on Māori Land.

Experience of such agencies shows that, by working nationally and in a variety of situations, their staff and negotiators develop skills and expertise in growing and obtaining support for agreements that can be used to advantage when dealing with other cases on other occasions as well. They may be able to provide a fresh perspective that can move parties beyond entrenched views and open up new ways of approaching longstanding access problems.

It should not be a pre-requisite that an application be made to the Māori Land Court under Section 326B Te Ture Whenua Maori Act 1993. Indeed, if any application has been made, it should be placed on hold while Crown-organised negotiations take place.

Advantages and disadvantages of different access alternatives

Notwithstanding the claimants' preference for public legal road access, the existing statutory measures do envisage other types of access provision such as easements and roadways. To this could be added less formalised types of provision such as local agreements. Each type of provision has its advantages and disadvantages, the significance of which will vary depending on local circumstances. The report has identified some of these factors; the listing is not intended to be comprehensive, but rather to indicate the range of matters potentially worthy of consideration.

If the Crown is involved in consideration of a response to a Tribunal finding or recommendation, then the option potentially becomes available of the creation of a new type of legal access provision additional to the types already available in legislation. This was not explored in the report.

Potential checklist of matters to be considered

It can sometimes assist parties to consider matters one issue at a time, in a staged sequence. This could include the following steps in a broad sequential order:

- Are there other solutions available under Te Ture Whenua Māori Act to the landlocked nature of Māori Land that do not require the use of Sections 326A-326D? Sometimes partitions have been ordered in the past that may have made sense at the time, but which make little or no sense today. Would amalgamation or aggregation of titles resolve access concerns? Could the ordering of a Māori roadway or an easement under Sections 315-321 provide access?
- Is more than one access route necessary to provide 'reasonable access'? This may depend on the size of the landlocked block or its topography.
- What are the present-day circumstances of use and access that an unlocking solution would have to address? Does the access to be provided need to cater for walkers, cycles, trailbikes, farm vehicles, cars, trucks or fixed-wing aircraft, or a combination of these forms of transport? What standard of access would meet the needs of present-day circumstances?
- What are the foreseeable future circumstances that an unlocking solution should also try to address?
- Are there particular circumstances best suited to access that is open and uninterrupted to landlocked landowners (i.e. all hours, no prior permission), or access for landlocked landowners that is conditional?
- Is this a local problem requiring a local solution between two adjoining landowning parties, or do third parties (e.g. territorial local authority, Crown) need to become involved? Do the benefits of a solution involving a third party or further parties outweigh the risks of additional complexity and greater difficulty in reaching agreement?
- Are there constraints on the provision of access across adjoining land (e.g. defence use, Conservation Act restrictions on use, archaeological or heritage site restrictions, protection of outstanding natural features and landscapes pursuant to Resource Management Act), and if so can work-arounds (e.g. alternative routes, improved design) be identified?