In the Waitangi Tribunal **Wai 2180**

Under the Treaty of Waitangi Act 1975

in the matter of the Taihape: Rangītikei ki Rangipō District Inquiry (Wai 2180)

CLAIMANT CLOSING GENERIC SUBMISSIONS
LANDLOCKED LANDS

Dated 5 February 2020

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. In Memorandum-Directions dated 14 August 2018, the Tribunal expressed the view that the evidence filed on the record of inquiry to that date "raise[d] concerns that that there are significant and compelling issues that need to be addressed".[1] Subsequently, Crown and additional technical and tangata whenua evidence was heard over two hearing weeks.

2. Evidence on this issue has been provided by:

    a. Tangata whenua witnesses;[2]

    b. Ms Hippolite and Ms Ohia for Te Puni Kokiri;[3]

    c. Mr Fleury for the Department of Conservation;[4]

    d. Mr Pennefather for the NZ Defence Force;[5]

    e. Ms Woodley, Māori Land Rating and Landlocked Blocks Report;[6]

    f. Mr Walzl, Twentieth Century Overview;[7]

    g. Messrs Subasic and Stirling, Sub-District Block Study – Central Aspect;[8] and

    h. Messrs Stirling and Fisher, Sub-District Block Study – Northern Aspect.[9]

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[1] Wai 2180, #2.6.65 at [1].
[2] Wai 2180, #E3 Herbert Steedman; #G1 Tama Wipaki; #G4 Ritchie Chase; #G13 Richard Steedman; #G14 Lewis Winiata; #G18 Merle Ormsby, Tiaho Pillot, and Daniel Ormsby; #H6 Ngahapeaparatuae Lomax; #H8 Peter Steedman; #H11 Te Rangianganoa Hawira; #H13 Maraea Elizabeth Oriwia Bellamy and Te Urumanao Kereti; #I2 Lewis Winiata; #I3 David Steedman; #N8 Hemi Biddle; #O1 Peter Steedman; #O3 Richard Steedman.
[3] Wai 2180, #M28 series.
[4] Wai 2180, #M7 series.
[5] Wai 2180, M3.
[6] Wai 2180, #A37.
[7] Wai 2180, #A46.
[8] Wai 2180, #A8.
[9] Wai 2180, #A6.

i. Messrs Neal, Gwyn, and Alexander, Maori Landlocked Blocks report.[10]

3. These closing submissions traverse the key legal and factual matters to be considered.

EXTENT OF THE PROBLEM – AMOUNT OF LANDLOCKED LAND IN THE INQUIRY DISTRICT

Definitions and area afflicted

4. The term “landlocked” can be defined in several different ways, and several definitions have been applied in this inquiry, but all lead to broadly similar conclusions about the extent of land to which Maori owners have no direct physical access, not even pedestrian access.

Te Ture Whenua Māori Act 1993 definition

5. As noted by the Tribunal, landlocked land is defined currently in section 326A of Te Ture Whenua Maori Act 1993 as:[11]

> a piece of land that has no reasonable access to it and is either—
>
> (a) Maori freehold land; or
>
> (b) General land owned by Maori that ceased to be Maori land under Part 1 of the Maori Affairs Amendment Act 1967

6. Where “reasonable access” is defined as "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."[12]

7. Similar provisions in the Property Law Act define "reasonable access" as "physical access for persons or services of a nature and quality that is reasonably necessary to enable the owner or occupier of the land to use and enjoy the land for any purpose for which it may be used in accordance with any right, permission, authority, consent,

[10] Wai 2180, #N1.
[11] Te Ture Whenua Māori Act 1993 quoted in Wai 2180, #2.6.65 at [3].
[12] Te Ture Whenua Maori Act 1993 s326A.

approval, or dispensation enjoyed or granted under the Resource Management Act 1991."[13]

8. Access at the whim of an adjoining owner is not reasonable access.[14]

9. The 2012 decision of the High Court in *Wagg v Squally Cove Forest*, which has been quoted with general approval by the Māori Land Court, defines "reasonable access":[15]

> Reasonable access does not invariably mean vehicular access, but nowadays the situations in which non-vehicular access will be regarded as reasonable are likely to be few because of the great dependence people now have on motor vehicles.

10. Applying the landlocked land definition in the Act, Ms Woodley calculated that 52,779.96 hectares out of an estimated 72,158.12 hectares, or around 73%, of Māori land in the Inquiry District is landlocked.[16]

Te Puni Kōkiri definition

11. Te Puni Kōkiri evidence identified on a preliminary basis 56 blocks totalling 54,084 hectares "potentially lacking direct contact with a legal or formed road".[17] Of these, 51,017 hectares were identified as being landlocked with a further 804 hectares requiring further investigation.[18] Further investigations raised their estimate of landlocked Māori lands to approximately 59,000 hectares including general land owned by Māori.[19]

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[13] Property Law Act 2017 s326.
[14] *Benham v Cameron* (1999) 4 NZ ConvC 193,013 at 193,021 per Wild J, also see *Hinde, McMorland & Sim Land Law in New Zealand* vol 2 p687.
[15] *Wagg v Squally Cove Forestry* [2012] NZHC 2763 at [60(h)]. Maori Land Court comment in *Huata* v *Robin - Rotopounamu 1B1A* (2017) 60 Takitimu MB 7 (60 TKT 7) at [71].
[16] Wai 2180, #A37(m) at 3.
[17] Wai 2180, #M28(a) Index and exhibits to evidence of Michelle Hippolite (presented by Rahera Ohia) at 10.
[18] Wai 2180, #M28(a) Index and exhibits to evidence of Michelle Hippolite (presented by Rahera Ohia) at 10.
[19] Wai 2180, #4.1.19 Transcript of Hearing Week 11 at 146.

Tribunal definition

12. This Tribunal, for the purposes of its interim conclusions, "consider[ed] as landlocked as those Māori lands that have no legal or formed road or easement granting access to them."[20] It did not undertake a separate exercise to determine the area of landlocking under this definition.

Rangitīkei District Council engagement

13. Landlocked Māori land forms approximately 20% of the total land area under the jurisdiction of the Rangitikei District Council.[21] The Rangitikei District Council has agreed to lobby central government on the basis that landlocking is holding up development in the District as well as depressing the rates take.[22] The Council's support for change does not at this point extend to spending money forming new roads.[23]

Claimant Issues – prejudice alleged

14. Claimants gave extensive evidence of the difficulties resulting directly from lack of reasonable access to their lands. Among the issues cited were:

    a. Lack of funds for such matters as rates, investigations of development viability, fencing.[24]

    b. Threats of legal action from neighbours in respect of fencing;[25]

    c. Potential and actual damage to relationships with neighbours, both private owners and Crown agencies;[26]

[20] Wai 2180, #2.6.65 at [4].
[21] Wai 2180, #G13 Evidence of Richard Steedman at [24].
[22] Wai 2180, #G13 Evidence of Richard Steedman at [24]. Mana whenua have also approached Ministers and Crown officials directly in respect of this issue: #G13 Evidence of Richard Steedman at [25].
[23] Rangitīkei District Council Roading 2018-21 Programme Business Case & 2018-48 Activity Management Plan, retrieved from https://www.rangitikei.govt.nz/council/long-term-plan/ltp-2018-2028/asset-management-plans. There is no budget for new roads in this document.
[24] Wai 2180, #G1 Evidence of Tama Wipaki at [11]; #N8 Evidence of Hemi Biddle at [18].
[25] Wai 2180, #G1 Evidence of Tama Wipaki at [11].
[26] Wai 2180, #G1 Evidence of Tama Wipaki at [18]; #G13 Evidence of Richard Steedman at [37].

d. Difficulty obtaining access agreements with neighbours, including Crown agencies;[27]

e. Agreements for access providing only severely limited access, such to constrain or prevent development opportunities;[28]

f. Agreements for access coming at an ongoing financial cost for the access (as opposed to capital expenditure);[29]

g. Agreements for access being verbal only, and thus tenuous;[30]

h. Agreements for access leaving access under the control of neighbouring landowners to the detriment of landlocked Māori land owners;[31]

i. Trespass and unlawful use by others;[32]

j. Access to and across neighbouring Crown lands for non-mana whenua, when mana whenua are refused access or must compete for it e.g. through public ballot;[33]

k. The financial costs of the legislated process to get access across neighbouring lands;[34]

l. Concern that lobby groups may take opposing views to mana whenua, causing issues for their aspirations in respect of their lands;[35]

m. Resource Management Act 1991 constraints;[36]

n. Lack of access to wāhi tapu;[37]

o. Limited market for leasing;[38]

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[27] Wai 2180, #G1 Evidence of Tama Wipaki at [29], [36]-[37].
[28] Wai 2180, #G1 Evidence of Tama Wipaki at [37].
[29] Wai 2180, G18 Evidence of Merle Ormsby, Tiaho Pillot and Daniel Ormsby at [49].
[30] Wai 2180, H6 Evidence of Ngahapeaparatuae Lomax at [18].
[31] Wai 2180, H6 Evidence of Ngahapeaparatuae Lomax at [43].
[32] Wai 2180, #G1 Evidence of Tama Wipaki at [22], [33].
[33] Wai 2180, #G4 Evidence of Ritchie Chase at [23]; #G13 Evidence of Richard Steedman at [12], [15], [37.2]; #N2 Emails between Leo Watson and Lars Jason.
[34] Wai 2180, #G13 Evidence of Richard Steedman at [27]-[29].
[35] Wai 2180, H6 Evidence of Ngahapeaparatuae Lomax at [16].
[36] Wai 2180, H6 Evidence of Ngahapeaparatuae Lomax at [17], [34]-[35].
[37] Wai 2180, H6 Evidence of Ngahapeaparatuae Lomax at [25].

p. Deterioration of land quality due to neglect by lessees and the Māori Trustee;[39]

q. Administration by the Māori Trustee resulting in lack of action to resolve landlocking and access;[40]

r. Multiple avenues for access explored with no satisfactory outcome;[41]

s. Crown actions resulting in missed opportunities or access or further constraints on access;[42]

t. Loss of whenua;[43]

15. This is an unhappily long list of significant issues for the owners.

APPLICABLE TREATY PRINCIPLES

Nature of customary title

16. As the Tribunal observed in its *Memorandum-Directions Concerning Landlocked Maori Land in the Taihape Inquiry District*, the existence of extensive areas of landlocked Maori lands in the district raises a question about whether there has been a breach the Article 2 guarantee, as well as questions about equity of treatment if landlocked Maori land is surrounded by non-Maori land.[44]

17. Article 2 guaranteed the retention by Maori of the full, exclusive and undisturbed possession of their land so long as Maori wished to retain it. In the Maori version this was “te tino rangatiratanga” of lands, kainga and “taonga katoa”.

18. As Justice Bisson in the *Lands* case, said:[45]

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[38] Wai 2180, #N8 Evidence of Hemi Biddle at [48]-[49].
[39] Wai 2180, #N8 Evidence of Hemi Biddle at [27].
[40] Wai 2180, #H6 Evidence of Ngahapeaparatuae Lomax at [52]-[53].
[41] Wai 2180, #H8 Evidence of Peter Steedman at [52].
[42] Wai 2180, #O3 Powerpoint presentation of Richard Steedman at 5.
[43] Wai 2180, #G4 Evidence of Ritchie Chase at [20].
[44] Wai 2180, #2.6.65 at [27]-[28].
[45] *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641 at 663.

> The Maori Chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of the utmost good faith in the matter in which their existing rights would be guaranteed and in particular guaranteed down to each individual Maori the full and exclusive and undisturbed possession of their lands which is the basic and most important principle of the Treaty in the context of the case before this Court.

19. In the case of landlocked land, the bare land has been retained, but its utility is greatly diminished. Consequently, on any reading of the Article 2 guarantee, being involuntarily landlocked *prima facie* does not meet the definition of full, exclusive and undisturbed possession, or retention of te tino rangatiratanga.

20. To better understand why this is the case, it is useful to briefly consider the nature of Maori customary title, focussing on customary boundaries and access, and the conversion process under Native land legislation.

21. While there does not appear to have been any study of customary access per se, there is academic writing on customary boundaries that indirectly sheds light on the issue. In *Iwi: The Dynamics of Māori Tribal Organisation from C.1769 to C.1945*, Dr Ballara noted:[46]

> The nature of early to mid 19th-century boundaries has been investigated by a number of scholars in the 1990s; they all come to similar conclusions, that before land sales, boundaries followed points on the landscape but were not necessarily linear. Although nature features such as the beds of rivers and mountain ranges were often specified, points between such features were often left vague.

22. One study that Dr Ballara cites is by Lyndsay Head, who examined land documents written in Maori as well as Land Court minutes.

[46] Angela Ballara *Iwi: The Dynamics of Māori Tribal Organisation from C.1769 to C.1945* (Victoria University Press, Wellington, 1998).

23. Head noted the changing way in which boundaries were discussed in those documents the 1870s, showing that Maori thinking was in a state of change, from the use of expressions of human control, to more abstract geographic expressions:[47]

> "2.32 In the 1870s and subsequently, Maori arguing cases in the land court and elsewhere often said things like 'I am in that boundary,' or 'that block.' This kind of expression was never heard in the first half of the century, when people say unequivocally noku te wenua 'the land is mine' or 'I own the land.' The contrast seems to express a fundamental change in perception, in which people's authority over land has been replaced by a situation where the land defines the people. This is the genesis of the twentieth century conceptualisation of the relationship to the land.
>
> "2.33 The portents of change were also present in the changing language. As a word for boundary, kaha, which is resonant with human strength, was almost as common as rohe before 1860. Its use faded thereafter in favour of rohe, a word which is geographical rather than human in content. I would understand the decline of kaha as an example of Maori modes of perception shifting towards western abstraction as a result of the intervention of the third-party state in Maori society."

She also records that:[48]

> "3.5 Maori conceived land ownership in terms of both resources and territory, and of both group and individual rights. The interaction between all these requires study."

It is also evident from the above studies that customary access to and across lands was usually private, in other words, while some access may have been common tracks, most access was not a right in common with all Maori. In Dame Joan Metge's words:[49]

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[47] LF Head *Maori Land Boundaries*. 1993 Wai 212 #C2 at 30-31.
[48] LF Head *Maori Land Boundaries*. 1993 Wai 212 #C2 at 33.
[49] Quoted in Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 11.

> The mana delegated to tribal subdivisions involves the right not only to exclude would-be users of the tribal resources but also the right to include them.

24. The Tribunal in the Foreshore and Seabed Inquiry described Māori customary title in respect of the foreshore, seabed, beach, and sea as including resource use, regulation, management, and control of access: [50]

> […] the evidence of Hohepa Kereopa, Hector Busby, Angeline Greensill, and others showed that Maori relationships with beach and sea, based on whakapapa and reflected in complex tikanga, have been passed to the present generation from the tupuna who have gone before. They described resource use, regulation and management (through rahui), and control of access not merely to food and resources, but to wahi tapu and other sacred sites. They see the beach and sea, and their gifts, as taonga, to which obligations of kaitiakitanga are owed.

and the Tribunal said of this: [51]

> We think it axiomatic that such concepts would have applied with absolute force when the Crown made its Treaty promises in 1840.

25. The obvious conclusions are that:

    a. Access to areas of land to exercise use rights was an integral part of customary interests;

    b. For the most part, boundaries were not sharply fixed abstract concepts but were a matter of reciprocal understandings between people and communities that could not be reduced to a line on a map.

26. It follows that, where customary land was retained, despite the underlying legal tenure changing, in the absence of compelling

[50] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 19.
[51] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 19.

evidence of an alternative intention, the intention must have been to retain rights of access to that land.[52]

27. In Treaty terms, the conclusion is inescapable that unless evidence is provided of a deliberate and unforced choice on the part of Maori owners that they wished to forgo reasonable access to the lands retained, including those retained under the Native Land Court process, then the Article 2 guarantee has been breached.

28. This means that other Treaty principles are in play, namely the principles of active protection, development, reasonableness, good faith, and equity that flow from the Article 2 guarantee, which included a guarantee of access.

Active protection

29. In its 14 August 2019 Memorandum-Directions the Tribunal took the preliminary view that the principle of active protection applied in this situation.[53]

30. the *Mohaka River Report,* the Tribunal found that active protection meant that 'the Crown is obliged to protect Maori property interests to the fullest extent reasonably practicable'.[54] This included rights of access.

31. The Muriwhenua Fishing Tribunal found:[55]

> Maori were protected in their lands and fisheries (English text) and in the retention of their tribal base (Maori text). In the context of the overall scheme for settlement, the fiduciary undertaking of the Crown is much broader and amounts to an assurance that despite settlement Maori would survive and because of it they would also progress.

[52] This last point suggests that it is possible that access rights, even if not specifically delineated in freehold tenure with linear boundaries, may have 'survived' in some form despite the conversion to freehold tenure.
[53] Wai 2180, #2.6.65 at [26]-[27].
[54] Waitangi Tribunal, *The Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications, 1996, p 77.
[55] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed, Wellington, GP Publications, 1996 at 194.

32. This means that the Crown needed to both monitor whether access rights were retained to land, and retain and use tools to intervene if access was threatened.

Development

33. In the Te Ika Whenua Rivers report the Tribunal noted:[56]

> ...the Tribunal has, over a number of years, consistently upheld the principle that the Treaty did not simply preserve the status quo at 1840 but that it must be adapted to meet changing needs and circumstances—in other words, it must allow a right of development.

34. This right also exists in the The United Nations Declaration on the Rights of Indigenous Peoples:[57]

> Article 11
>
> 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies [...].

35. There is no reason why this would not apply to customary access rights. Just as power boats are used at sea, vehicular access is the norm for land access.

Reasonableness

36. In *The Hauraki Report* the Tribunal commented:[58]

> 'Reasonableness', we believe, must also be the test of the Crown's actions historically. We must consider, then, what might reasonably have been done at the time of the events under consideration. Notwithstanding the perennial quality of treaty principles, historical contexts cannot be ignored.

[56] Te Ika Whenua Rivers Report (Wai 212, 1998) at [10.2.4].
[57] (UNDRIP)1 GA Res 61/296, A/RES61/296 (2007).
[58] The Hauraki Report, Volume III (Wai 686, 2006) at 1206.

37. Access was known to be a significant issue for landowners throughout the period of European settlement. It was reasonable to expect that the Crown, as pre-emptive purchaser and architect of the native land laws, would be aware that it was important to Māori and make provision for it.

38. That Tribunal report also noted:[59]

> The weight and resources of the Crown, as compared to the limited capacities of private citizens, must be taken into account and every reasonable effort made to redress the imbalance.

39. This is relevant to remedies that the Crown may reasonably be expected to provide.

Good faith

40. This principle includes aspects of openness, trust and consultation.[60] It would be breached if there was underhanded, undisclosed or inequitable dealings leading to blocks being landlocked.

41. Good faith also requires that:[61]

> The Crown, as a Treaty partner acting in good faith, should recognise past error when it comes to light, and consider the possibility of remedy under present conditions.'

42. This is relevant to remedies that are required today.

Equity

43. In its 14 August 2019 Memorandum-Directions the Tribunal also took the preliminary view that the principle of equity applied in this situation.[62]

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[59] The Hauraki Report, Volume III (Wai 686, 2006) at 1097.
[60] *New Zealand Maori Council v Attorney-General* [20071 NZCA 269, 12008] I NZLR 318 [Te Arawa Cross Claim (CA)] at [81].
[61] *Taiaroa v Minister of Justice* unreported, 29 August 1994, McGechan J, HC Wellington cp 99/94, at 70.
[62] Wai 2180, #2.6.65 at [28]-[29].

44. This principle applies in the sense that Maori rights to access their land were safeguarded in the same manner as any other positive rights held by NZ citizens. This does not mean that the Crown was merely obliged to ensure that laws and practices did not discriminated in the provision of access to land. Rather, the Maori right needed to be unheld as any other right – given that it was prior to, and superior to, non-Maori access rights which derived entirely from subsequent Crown grants.

Guarantee of tino rangatiratanga

45. The Foreshore and Seabed Tribunal said:[63]

> In our view, the Crown's guarantee of te tino rangatiratanga is meaningless if the tikanga that sustain and regulate the rangatira and his relationship to the people, and the land, are discounted and undermined. Indeed, we go further. We say that in order properly to fulfil the role of Treaty partner, and actively protect the cultural foundation of what it is to be Maori, the Crown must itself be schooled in the essentials of tikanga.

46. We submit this is particularly apposite in the case of landlocked Māori land, where the Crown has demonstrated a tendency to focus on economic issues to the detriment of the entire relationship the claimants have with their whenua.

47. In summary, Crown Treaty obligations in relation to customary access were:

    a. To understand the nature and importance of customary access and its development;

    b. To provide for its retention where Maori wish to retain it, including in its developed form (i.e. from walking to vehicular access);

    c. To monitor its continued provision;

[63] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 3.

d. To retain tools to intervene and restore access where it was removed or under threat.

48. As we discuss below, most of these positive obligations were not upheld, and in fact, the Crown was not merely passive as to whether Maori access was retained or lost, but in many cases actively diminished that access, by allowing land to be cut off, and using Maori land to provide public access. While on its face this provision of public access may have looked like equity, it cut across customary private access rights.

49. The English property law system, which profoundly changed the nature of customary interests, also affected the customary approach access and to boundaries. This changed these fundamental elements of custom law so significantly that access became a significant problem in a way and to an extent that it had not been before.

CREATION OF LANDLOCKED LAND

English property law, approach to boundaries, and access

50. The English property law brought to NZ in 1840 had been shaped by several centuries of enclosure, under which ancient communal rights were replaced by private titles held by a few persons, and land subdivided with fixed boundaries.

51. In a crude way, Native title legislation could be viewed a form of enclosure, rapidly applied, where the English enclosures had occurred over several centuries. As Geoff Park put it lyrically in *Nga Uruora*:[64]

> Fly over the country where the European culture staked its claim to New Zealand's best land: the coastal plans of the Hutt, Nelson, Canterbury and Kaipara, Manawatu and Rangitikei, the Waikato and Hauraki. Look down on the grid towns preserving forever their origin on drawing boards in England, and beyond them, the geometric checkerboards of greens and browns stretching away. Miles and miles of

[64] Geoff Park *Nga Uruora/the Groves of Life: Ecology and History in a New Zealand Landscape* (1st ed, Victoria University Press, Wellington, 1995) at 26.

> straight fences, barberry hedges, roads and drains, intersecting at right angles. […] The colonial surveyors' grid reshaped New Zealand's best land with all the features that had enclosed Britain's open fields and commons […].

52. But in contrast to the legal and political history of English enclosure, in New Zealand, before settlement and the introduction of new forms of property law, the Crown gave an absolute guarantee that Maori customary rights, largely communal in nature, would be protected in their entirety.

53. As noted, there has been no specific report on customary access and applicable laws in New Zealand. Neverthless, Native land legislation has been extensively considered in numerous research reports and Tribunal reports, including provsions regarding access and roadways, The Crown never instituted any positive protective provisions regarding continuing access to Maori land before the recent land-locked land amendments – which are themselves reactive and rely on Maori landowners paying to restore access.

54. Instead, provisions regarding access were discretionary and permissive.

55. It was not until 1886 that Native land legislation expressly provided discretion for road access to Māori land to be provided on investigation or partition.[65] Section 91 provided that where Native land was to be partitioned:

> each of such parts or parcels shall be subject to such rights of private road for the purpose of access to other or others of such parts or parcels as may be ordered.

56. Section 92 provided that the discretion was retrospective for all Māori lands that had been partitioned to date, provided that application for an order of this nature was made within two years of the legislation:

> Each part or parcel into which land has heretofore been already divided under any Act relating to Native land, shall be subject to like rights of private road, for the purpose of access

[65] Native Land Court Act 1886, sections 91-92.

to the other or others of such parts or parcels, as the Court or Judge may order, provided such order be applied for within two years from the passing of this Act.

57. Woodley summarises the situation prior to and after 1886:[66]

> As noted, legislation prior to 1886 contained no provision for the Native Land Court to create roadways or rights of way over Maori land with the sole intention of ensuring access to the partition created or to the block where title had been investigated. The Native Land Court Act 1886 was the first Act that provided for private roads to be ordered by the Native Land Court when title to Maori land was being investigated or partitioned. It was, however, restricted to the land being partitioned, so that a private road could not be ordered over adjacent Māori owned blocks or European land. Section 91 stated that the Court could order that the parts or parcels of the block under consideration were 'subject to such rights of private road for the purpose of access to other or others of such parts or parcels'. The order could be made by the Court at the time the division or partition was ordered or, on the application of 'any person interested', within five years of the date of the division or partition.
>
> Section 92 allowed the Court to make a similar order for land already partitioned or investigated previously with the proviso that the order must be applied for within two years of the passing of the 1886 Act. The remainder of section 92 emphasised that these provisions for private roads did not 'affect the rights of the Crown to reserve or take sites for roads, nor any reservation for roads provided for by law, or the right to take the sites for and to construct and maintain roads by law, given to any person or corporate body'. Indeed section 93 specified that the Governor had the right to take and lay off roads for public purposes provided that the total quantity of land taken was less than 1/20 th of the whole of the block.

[66] Wai 2180, #A37 Suzanne Woodley *Maori Land Rating and Landlocked Blocks Report 1870-2015* (Crown Forestry Rental Trust, Wellington, 2015) at 243.

58. These provisions suggest that by 1886 landlocking, or, more accurately, loss of customary access rights when title was converted, was a known problem for Māori lands.

59. Marr also notes that the New Zealand Parliamentary Debates from 1872 demonstrate "two very common understandings" of Māori; that the Crown had in the past paid for the use of land for roads, and that Māori land would not be landlocked.[67]

60. In addition, the Counties Act 1886 confiscated all customary tracks over Native lands where the Act applied, which seems to have been in all of the district except the area then known as East Taupo County.[68] The fact that this provision was passed in the same year and assented to 9 days after the Native Land Court Act 1886 (9th August and 18th August 1886 respectively) indicates that the access provisions of the Native Land Court Act 1886 were squarely aimed at ensuring access for new non-Maori settlers.

61. This bias in the law regarding access, and the discretion that lay with the Native Land Court, raises the prospect that the Court became a force for European settlement through an inequitable approach to making orders for access. This possibility was raised with Woodley:[69]

> Q. Okay. All right then let's go to page 10. You talk about access to land. Apparently you had the same Judge giving access to land to a block and then next day he doesn't allow access to another block. Same Judge same issue. So the question is, what kind of reasoning would a Judge have for allowing or disallowing access to two separate blocks?

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[67] Cathy Marr *Rangahaua Whanui National Theme G: Public Works Takings of Maori Land, 1840-1981* (Waitangi Tribunal, Wellington, May 1997) at 75.

[68] Section 245 provided: "All lines of roads or tracks passing through or over any Crown lands or Native lands, and generally used without obstruction as roads, shall, for the purposes of this section, be deemed to be public roads, not exceeding sixty-six feet in width, and under the control of the Council aforesaid, notwithstanding such lines of roads have not been surveyed, laid off, or dedicated in any special manner to public use." Section 8 excluded East Taupo County, which covered Oruamatua Kaimanawa (part 1X1, part 1X2, 1W2, 3A), Rangipo Waiu 2B2 and 2B1E and the top northern third of the Owhaoko block (part D1, part D2, part D3, D4, part D7B, D8, A and B. See Wai 2180, #A37, Suzanne Woodley *Maori Land Rating and Landlocked Blocks Report 1870-2015* (Crown Forestry Rental Trust, Wellington, 2015) at 205.

[69] Wai 2180, #4.1.11 Transcript of Hearing Week 4, questions of Professor Pou Temara to Suzanne Woodley at 351.

A. Yes. So the minutes off the Māori Land Court minutes they don't say why. It was just, "The order is made so we're not privy to any sort of discussion as to why." I've been thinking about it a lot and I wonder whether – so Taraketi 2 which access was ordered was being made available to settlers; people were farming those areas and I wonder whether that was part of the reason why the access was ordered, whereas the Ōruamātua-Kaimanawa 3 Blocks where no access was ordered to them on the day they were petitioned [sic - partitoned]. They were not considered suitable for settlement. So whether or not that was what was in the minds of the Judge I don't know because they don't say.

Q. Yes. It just goes back to what the Judge was saying about you know the unfairness of the 73 percent of Māori landlocked land. The land is made available for settlement, it's sold and then it's got access.

A. Yes.

Q. But land that's still in Māori ownership doesn't get access. That's the decision given a day after. Okay. Well I'm going to have to think about that –

A. Okay.

Q. – but I might be arguing for fairness. Thank you very much.

62. The Crown knew of the landlocking issue in this Inquiry District from at least 1905, when the Valuer-General noted that the proposed lease of Ōwhaoko D5 sections 2, 3, and 4 would cut off access to the rest of the Owhaoko block.[70] The land was leased by the Maori Land Council to the proposed lessee regardless.

63. This problem of bias in the law persisted even in later legislation that mandated consideration of access, because it the consideration was explicitly for the purposes of laying out road-lines for future public

[70] Wai 2180, #4.1.11 Transcript of Hearing Week Four at 364.

access for settlement and not to retain customary access. Section 117(1) of the Native Land Act 1909 provided:[71]

> Upon partition, the Court shall layout upon the land partitioned such road-lines (if any) as the Court thinks necessary or expedient for the due settlement and use of the several parcels.

64. Subsection 2 provided that such road-lines might be proclaimed public roads, while subsection 4 provided that provision for ongoing private access continued to be a purely discretionary matter:

> (4.) In lieu of or in addition to laying out road-lines under this section the Court may, if it thinks fit, in and by any partition orders made by it, create private rights of way over any parcels of the land partitioned and appurtenant to any other of those parcels;

65. Accordingly, this continued a long-standing inequitable policy that private Maori land should be freely available for new, invariably non-Maori, settlement, while no protection was required for customary access.

66. Within the Inquiry District, referring to public roads, Cleaver reports that:[72]

> At least 1,240 acres of Maori land have been acquired for roads, most of which was taken in the period between 1890 and 1905.

67. Cleaver explicitly links Crown policy of providing public road access to European lands with the takings in the Inquiry District: [73]

> Alongside the roads built in connection with the railway, roads were also specifically built for the purpose of enabling settlement of lands purchased from Maori in the Taihape inquiry district. Inevitably, some of these roads were built through areas of Maori land that had been retained from sale.

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[71] Native Land Act 1909, section 117(1).
[72] Wai 2180, A9 Phillip Cleaver *Taking of Maori Land for Public Works within the Taihape Inquiry District* (Waitangi Tribunal, Wellington, 2012) at 178.
[73] Wai 2180, A9 Phillip Cleaver *Taking of Maori Land for Public Works within the Taihape Inquiry District* (Waitangi Tribunal, Wellington, 2012) at 181.

> In its 1892 report, the Public Works Department commented that the construction of roads to open up Crown lands for sale was, in comparison with other roads, 'of by far the greatest importance'. The importance of such roads was reiterated in later reports. In its 1895 report, the Public Works Department stated that road access to Crown land needed to be provided before the land was settled.

68. The details of these takings are matters for consideration in other closing submissions, but are mentioned here to illustrate the inequitable approach to Maori customary access rights compared to efforts made to assure access for new European settlers. The Crown power to take Maori land for roads without compensation was not ended untl 1927, at which time the then Native Minister admitted that it operated in a discriminatory manner.[74]

69. From 1873 Native land legislation included schemes to check that 'sufficient' land was retained by Maori, and later, that they not be made 'landless' by any alienations.[75] Those schemes incorporated the idea of monitoring or a 'protective check' on Maori interests, but never had a specific access component and have been repeatedly found by expert historical research and Tribunal reports to be deficient in both their substance and operation in any event.

The Torrens System

70. The problems created by the abrupt changes to customary interests, including customary approaches to access and boundaries wrought by Native land legislation, were exacerbated by the early introduction into NZ of a scheme of state guaranteed compulsory paper title, which drew a curtain across all possible prior interests which might not have been captured by the abrupt title conversion under Native land legislation. That is, if the conversion had left out important access rights, the guaranteed title system closed off all routes to a remedy.

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[74] Hauraki vol 3 p 1057. By way of comparison, since 1866, under the Crown Grants Act 1866 s10 reserved to the Crown a five year right (three years if the land had been granted before the passing of the Act) to take roads over non-Maori land, but with the requirement that compensation was to be paid in land or money.

[75] Native Land Act 1873, section 24.

71. As noted in our opening generic submissions on this issue, from 1840 to 1870 the deeds system recorded property ownership in New Zealand. It was replaced by the Torrens system of state guaranteed title under the Land Transfer Act 1870. the system became compulsory for all land transactions in 1924.[76]

72. Torrens title was imported from South Australia and was a radical reform, from a radical Irish reformer, Robert Richard Torrens.[77] It was developed in the legal circumstances of Australia's terra nullius, so it did not cater for things such as rights by prescription. English law recognised the idea of unchallenged rights from time immemorial and the fiction of the lost grant to cover the period back to 1189; there was no need for such doctrines in Australia if only the recent Crown granted property rights of pastoral settlers were capable of registration.

73. Accordingly, beyond a limited theoretical window of time in which Māori with rights over European land might have claimed rights by prescription at the moment that the title was being brought into the land transfer system, once title was registered, the ability to claim such right by that route was gone:[78]

> The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, has an indefeasible title against all the world.

74. Apart from fraud, the Torrens system as introduced did - and continues to - provide an additional, very limited exception to indefeasibility that concerns access, that being omitted easements. The reason comes from the South Australian context, where legislators realised that the system could not be expected to capture all easement arrangements between pastoralists.[79] This eventually

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[76] A New Zealand legal history. Peter Spiller et al. Brooker's 2001 pp100-101. Maori land obviously being the exception. The Crown defrayed the costs to owners of bringing old deeds under the system after 1924.
[77] Boast, Richard *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865-1921* (Victoria University Press, 2008) p 123.
[78] *Fels v Knowles* (1906) 26 NZLR 604 (CA) at 619 per Edwards J.
[79] See, for example, Ardagh, Rebecca "The Torrens System and the In Personam Claim 103" [2011] NZLawStuJl 7, accessed at http://www.nzlii.org/nz/journals/NZLawStuJl/2011/7.html.

became section 62(b) of the Land Transfer Act 1952, now s 52(1)(e) of the Land Transfer Act 2017.

75. It goes without saying that this was not designed to recognise aboriginal interests in Australia, and was never intended to provide a route to recognise Māori rights of access.

76. Adverse possession against a registered title was introduced in 1963 as an amendment to the Land Transfer Act 1952, but with no retrospective effect, and limited to situations where "the registered proprietor who has abandoned his land or allowed others to occupy it and fails to observe in any way the acts and obligations of ownership."[80]

77. Today, the creation of new landlocked parcels is largely avoided by the necessity to gain resource consent for subdivisions under the Resource Management Act 1991.[81] For example, the Rangitīkei District Plan Rules provide:[82]

> **B9.1 Vehicle Access to Individual Sites**
>
> At the time a site is developed, provision must be made for vehicle access to a public road and before any activity commences in a building and/or on the site, the vehicle access must be formed in accordance with the following standards:
>
> > B9.1-1 All vehicle access (including access ways, private roads, access lots and rights of way), must be dimensioned and formed in accordance with the Council's Subdivision and Development Code of Practice.

78. Land Information New Zealand requires completion certificates from the District Council before it will accept the subdivision and survey documentation for registration in the title system.[83]

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[80] Law Commission *Review of the Land Transfer Act 1952* (NZLC IP10, 2008) p 220 at [19.5], quoting EK Phillips, former Registrar-General of Land.
[81] Resource Management Act 1991, sections 9 and 11, and Part 10.
[82] Many of the terms in this Rule, such as 'vehicle access' and 'public road' are given specific definitions in the Plan.
[83] Comprehensive guidelines are provided by LINZ at https://www.linz.govt.nz/regulatory/20777.

The Crown Position

79. In its opening submissions in this inquiry the Crown argued that landlocked Maori land blocks need to be examined on a case by case basis to determine whether the Crown is at fault for the landlocking.[84] The Crown argues that "this landlocked land did not always result from Crown purchasing or other Crown actions."[85]

80. The foregoing submissions argue that it would be a rare situation in which the existence of land-locked Maori land did not stem from a Crown Treaty breach.

81. Crown submissions refer to "taken steps to address the problem of landlocked land by promoting the enactment of remedial legislation", namely the 1886 legislation and subsequent legislative provisions.[86]

82. But nothing in the Crown submissions or evidence consider any historic monitoring role that the Crown was required to undertake or has undertaken in relation to Maori landlocked land, or any other steps that recognise a duty to actively protect Maori land from becoming landlocked and losing customary access that was guaranteed by Article 2.

83. The enactment of provisions to force access to landlocked Maori landcare obviously a positive step, but the evidence from Te Puni Kōkiri is that costs to the owners to pay to restore access and the ability of neighbours to frustrate and delay the legal process are major reasons that these provisions have not been effective to date:[87]

> The Crown considers, based on previous policy work. consultation, and Waitangi Tribunal reports, that the principal barriers faced by Maori landowners seeking to achieve access are:
>
> > 20.1 The substantial costs (legal, survey, compensating neighbours, fencing, forming access), which can outweigh the expected benefits of achieving access.

[84] Wai 2180, #3.3.1 Crown opening submissions at [189].
[85] Wai 2180, #3.3.1 Crown opening submissions at [189].
[86] Wai 2180, #3.3.1 at [197].
[87] Wai 2180, #M28 Brief of evidence of Michelle Hippolite for Te Puni Kōkiri at [20].

> 20.2 Difficulties in accessing capital for attaining access (legal, land acquisition, fencing and forming access).
>
> 20.3 A lack of capacity and expertise to navigate the steps, including specialist advice on available options.
>
> 20.4 Difficulties gaining agreements with surrounding landowners.
>
> 20.5 Neighbouring landowners may have economic or other incentives to continue restricting access to the landlocked Maori land.

84. Te Puni Kōkiri concluded:[88]

> Landlocked Maori land is a long standing and difficult problem faced by many Maori landowners. There are limited options available to owners of landlocked Māori land, and the steps required to achieve access are often long, complex and costly. Previous Crown attempts to address this issue have not proven to be effective. […]

85. Landlocking was still being raised as a critical issue during the 2012-2017 review of Te Ture Whenua Māori 1993, and Te Puni Kōkiri has sought further amendments through Te Ture Whenua Maori (Succession, Dispute Resolution and Related Matters) Amendment Bill ('the Bill").[89]

86. Te Puni Kōkiri successfully lobbied for appeals in respect of orders made under section 326B to be removed from to the High Court to the Māori Appellate Court, in the Bill. This is anticipated to result in lower costs of participation for owners of landlocked Māori land.[90] We suggest this amendment may simply delay the inevitable: appeals from the Māori Appellate Court will go to the Court of Appeal, or, in exceptional circumstances, directly to the Supreme Court.[91]

87. The Bill "broadens the factors to which the Māori Land Court must have regard when considering an application for reasonable access

[88] Wai 2180, #M28 Brief of evidence of Michelle Hippolite for Te Puni Kōkiri at [66].
[89] Wai 2180, #M28 Evidence of Michelle Hippolite for Te Puni Kōkiri at [7].
[90] Wai 2180, #M28 Brief of evidence of Michelle Hippolite for Te Puni Kōkiri at [38].
[91] Te Ture Whenua Māori Act 1993, sections 58A and 58B.

to landlocked land", and "[r]eplaces the definition of reasonable access with "reasonable access means physical access to land for persons or services that is of a nature and quality that are reasonably necessary to enable the owner or occupier to use and enjoy the land".[92]

88. As His Honour has pointed out, however, and as Te Puni Kōkiri's evidence states, the issue is not primarily legislative; it is financial.[93] In these circumstances, revised legislation is a passive form of engagement by the Crown; it is not the active protection required under the terms of the Treaty.

89. Nor has the Crown taken the obvious step of putting its own house in order. Crown agencies have taken steps in recent years that claimants argue have put access further out of reach for some landlocked blocks. Tangata whenua witnesses discussed the effects of Department of Conservation ("DOC") and Defence land exchanges that had negative effects on their access to their lands.[94]

90. His Honour suggested a legislative requirement on Crown agencies that are owners of land adjoining landlocked Māori land to provide access or justify why they cannot.[95] But this could also presumably be a matter of policy for many government agencies, and may even be a legal requirements for DOC, which is required to give effect to the principles of the Treaty under section 4 of the Conservation Act 1986. In cross-examination, a DOC witness agreed that education within DOC on the interaction of DOC decisions and s 4 is required.[96]

[92] Wai 2180, M28(d) Supplementary evidence of Rahera Ohia at [9]-[110.
[93] Wai 2180, #4.1.19 at 153, #M28 Evidence of Michelle Hippolite for Te puni Kōkiri at [20].
[94] Wai 2180, #G1 Evidence of Tama Wipaki at [33]; #G13 Evidence of Richard Steedman at [37]-[40].
[95] Wai 2180, #4.1.19 at 159-160.
[96] Wai 2180, #4.1.19 at 286-287. It is unfortunate that the witness's microphone cut out while he was answering this question. Our recollection is that he took the view that minor decisions, such as the decision to take no action in the hope that the claimants could reach agreement with private landowners, would not invoke section 4. See also the witness's response to His Honour's questions at 274-276.

Economic potential

91. The Crown submits that, in any case, much of the landlocked land in the Inquiry District has marginal economic value.[97] This implies that access to it would hardly alter the situation for landowners, or would not do so to the extent necessary to justify the cost of providing physical and legal access.

92. There are several problems with this argument. First, Māori owners were often left the most marginal land after partition and Crown purchasing as well as takings for survey liens. Given this historical context, the Crown cannot rely on low economic potential to absolve itself of its Treaty responsibility for access issues.

93. In fact, the economic potential of land can change over time. A current example is demand for mānuka honey, which has made it economically viable to helicopter beehives in to landlocked lands within the Inquiry District, despite the high cost of hiring the helicopter.[98] Another example of economic use of these lands is the live capture of deer by helicopter.[99] This viability may change again should a full carbon tax on fossil fuels be implemented. However, even that scenario raises the possibility that carbon farming could become profitable for these lands.

94. But by failing to rectify the issue it has created, the Crown ensures the land remains difficult in terms of economic viability and that Maori landholders are pushed towards alienating their patrimony. Woodley records that poor or no access was a factor in the sale to adjoining landowners of:[100]

    a. Awarua 1A3A in 1968;

    b. Awarua 1A3C in 1965;

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[97] Wai 2180, #3.3.1 Crown opening submissions at [190].
[98] In 2017 Richard Steedman put the cost of hiring a helicopter at $2,150 per hour: #G13 Evidence of Richard Steedman at [16]. Merle Ormsby, Tiaho Pillot, and Daniel Ormsby put the cost at approximately $2,500 per hour: #G18 Evidence of Merle Ormsby, Tiaho Pillot, and Daniel Ormsby at [49].
[99] Wai 2180, #G1 Evidence of Tama Wipaki at [12].
[100] Wai 2180, #A37, Suzanne Woodley *Maori Land Rating and Landlocked Blocks Report 1870-2015* (Crown Forestry Rental Trust, Wellington, 2015).

c. Awarua 2C12A2A in 1953;

d. Awarua 4C13B in 1953;

e. Awarua 2C4 in 1954;

f. Awarua 4C15F1H2 and 4C151H1 in 1966;

g. Oruamatua Kaimanawa 1K and 2F in 1962;

h. Rangipo Waiu B2 in 1966;

i. Rangipo Waiu B3 in 1966;

j. Rangipo Waiu B4 in 1950;

k. Rangipo Waiu B5 in1927 and 1928;

l. Rangipo Waiu B6C1 in 1946;

m. Rangipo Waiu B6C2 in 1929;

n. Motukawa 2E2 in 1951;

o. Owhaoko D5 section 2 in 1953.

Cultural connection

95. The Crown's emphasis on economic viability reflects a long-running strand of English legal thought. Marr records in her Rangahaua Whanui report on public works takings that:[101]

> The right of the state to take private land for public purposes was in fact one of the few principles that cut across the high regard normally attached to private landownership in English law. As might be expected it was therefore balanced with protections that suited the interests and needs of the powerful landed class of the time. The protections included the general principle that, where land was taken, an owner was entitled to the payment of full and equivalent compensation. In English terms it suited landowners and the promoters of the works for

[101] Cathy Marr *Rangahaua Whanui National Theme G: Public Works Takings of Maori Land, 1840-1981* (Waitangi Tribunal, Wellington, May 1997) at 7.

> the full land title to be taken and compensation to be paid, generally in money. This was because the type of land most commonly taken was regarded purely as an investment and the payment of full compensation allowed the immediate purchase of an equivalent investment elsewhere.
>
> (Emphasis added).

96. The evidence shows that the cultural relationship between the claimants and their lands is of deep and profound importance; indeed, it is a significant part of their personal and collective identity.[102] The Crown did not provide any evidence to the Tribunal that the significance of this relationship is understood by the Crown outside of Te Puni Kōkiri. In fact, claimant evidence is that the Crown is only just starting to learn who are mana whenua in the Inquiry District, to grasp their roles and relationships to their lands, and to understand their agencies' Treaty responsibilities in respect of those lands.[103]

97. Crown agencies have taken steps that claimants argue have put access further out of reach for some landlocked blocks. Tangata whenua witnesses discussed the effects of Department of Conservation ("DOC") and Defence land exchanges that had negative effects on their access to their lands.[104] In cross-examination, a DOC witness agreed that education within DOC on the interaction of DOC decisions and s 4 is required.[105]

98. Ms Ohia's evidence touches briefly on this element.[106] She notes that the Ministry for Primary Industries-led review of the Walking Access Act 2008 received feedback that better access for Māori to their sites of cultural significance is required.

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[102] See, for example, Wai 2180, H6 Evidence of Ngahapeaparatuae Lomax at [2]-[6]; G18 Evidence of Merle Ormsby, Tiaho Pillot and Daniel Ormsby at [52].
[103] See, for example, Wai 2180, #G1 Evidence of Tama Wipaki at [34]-[37]; #G13 Evidence of Richard Steedman at [4]-[12]; #M3 Evidence of Gary Pennefather at [58]; #M2 Evidence of Major Pat Hibbs at [33]-[34].
[104] Wai 2180, #G1 Evidence of Tama Wipaki at [33]; #G13 Evidence of Richard Steedman at [37]-[40].
[105] Wai 2180, #4.1.19 at 286-287. It is unfortunate that the witness's microphone cut out while he was answering this question. Our recollection is that he took the view that minor decisions, such as the decision to take no action in the hope that the claimants could reach agreement with private landowners, would not invoke section 4. See also the witness's response to His Honour's questions at 274-276.
[106] Wai 2180, #M28(d) Supplementary evidence of Rahera Ohia at [37].

99. Given the entirely different relationship between Māori and whenua than that envisaged by the common law, the single lens of economic potential is not an appropriate lens through which to view Māori land; a full understanding and acceptance by the Crown of the holistic relationship between Māori and their whenua is required.

Funding and resources

100. Limited Crown funding is available within the Whenua Māori Fund and the Provincial Growth Fund Whenua Māori allocation.[107] These funding sources are focussed on economic development.

101. The Whenua Māori fund provides funding for removing impediments to development and productivity.[108] At the time of Ms Ohia's oral evidence, three projects associated with access to landlocked lands were "supported" by the fund, with a fourth application (in respect of the Owhaoko B and D block) likely.[109]

102. The Provincial Growth Fund provides funding to improve productivity on small to medium blocks.[110] His Honour noted in questions to Ms Ohia that many of the blocks in the Inquiry District fall outside that category.[111] Ms Ohia described the fund:[112]

> In the case of applications for funding to establish access to landlocked Māori land, the current criteria for the Whenua Māori allocation of the PGF allows funding to be provided for the construction of physical access (such as roads and fencing).
>
> It should be noted that the application would need to be part of a wider plan for development of the land, given the current scope and purpose of the PGF (most importantly regional development and job creation). It should also be noted that all consents and other legal requirements (such as the provision of legal access by the Māori Land Court) must be settled

[107] Wai 2180, #4.1.19 at 151.
[108] Wai 2180, #M28 Brief of evidence of Michelle Hippolite for Te Puni Kōkiri at [27]-[30].
[109] Wai 2180, #M28(d) Supplementary evidence of Rahera Ohia at [20].
[110] Wai 2180, #M28 Brief of evidence of Michelle Hippolite for Te Puni Kōkiri at [40]-[42].
[111] Wai 2180, #4.1.19 at 159-160.
[112] Wai 2180, #M28(d) Supplementary evidence of Rahera Ohia at [24]-[25].

> before funding can be considered. Funding would not be considered if legal access had not been established.

103. Ms Ohia also noted that there had been no applications by owners of landlocked Māori land. [113]

104. We submit this funding is manifestly insufficient. In addition, its focus is solely on economic return when there are also significant cultural requirements for access.

105. The Whenua Māori Programme provides services to "help Māori land owners navigate the Māori land tenure system". This appears to be an admission that, 155 years after its introduction, the Crown-imposed land tenure system is not working for Māori.

106. The Regional Whenua Advisory Services element of the Programme is focussed on economic development.[114] The Whenua Knowledge Hub is intended to assist owners of landlocked Māori land assess possible access routes to their lands.[115] The improvements to the Māori Land Court services appear to be focussed on a voluntary dispute resolution service to assist parties settling disputes about access to landlocked Māori land.[116] We emphasise the voluntary nature of this service.

107. Te Puni Kōkiri's evidence also talked about an inter-agency discussion they wish to lead, with DOC, Defence, NZTA, and Kiwirail in respect of landlocked Māori lands. Ms Ohia said:[117]

> We are prioritising discussions with the New Zealand Defence Force and the Department of Conservation to advance a Crown Agency Agreement regarding the use of Crown administered land to provide access to landlocked Māori land. This is particularly because we consider that land administered by these agencies is most likely to be able to be used to address landlocked land issues in the inquiry district area.

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[113] Wai 2180, #M28(d) Supplementary evidence of Rahera Ohia at [26].
[114] Wai 2180, #M28(d) Supplementary evidence of Rahera Ohia at [17].
[115] Wai 2180, #M28(d) Supplementary evidence of Rahera Ohia at [18].
[116] Wai 2180, #M28(d) Supplementary evidence of Rahera Ohia at [36.4].
[117] Wai 2180, #M28(d) Supplementary evidence of Rahera Ohia at [31]-[32].

> These agencies have expressed a willingness to engage in discussions and we expect it to be finalised and signed in the coming months.

108. We submit that His Honour's suggestion of an approach that emphasises facilitation of access by these agencies would be a useful guiding principle for this group.[118] This is particularly so given that DOC has both the strongest legislative directive to give effect to the Treaty, but considers itself constrained by lack of legislated authority to force access across neighbouring land, and by the corresponding need to retain good relationships with those neighbours with whom it has access agreements benefiting its environment management operations.[119]

109. Mr Fleury gave evidence for DOC that DOC facilitates meetings between owners of landlocked Māori lands and owners of neighbouring lands through which access might practicably pass. Other than this, though, DOC considers that "there are no simple solutions DOC can utilise to unlock the landlocked lands" and DOC can only "acquire land and enter into access arrangements for conservation purposes under its legislation".[120]

110. Ms Hippolite's evidence concluded "In order to make any meaningful change, I believe a comprehensive package of support and funding is required."

111. In conclusion, it is clear from the evidence that, where landlocked land has arisen out of circumstances other than Crown purchasing or direct Crown actions, it has arisen out of omission by the Native Land Court or from legislation that breaches the principles of the Treaty. In such circumstances, the Crown has not explained how the Article II guarantee of undisturbed possession does not apply in this Inquiry District

112. The Crown, having almost entirely replaced customary title with Crown grant, could not, under the terms of the Treaty and the

[118] Wai 2180, #4.1.19 at 159-160.
[119] Wai 2180, #M4 Evidence of Bill Fleury at [53].
[120] Wai 2180, #M4 Evidence of Bill Fleury at [80.2].

resulting – what might be termed a constitutional - guarantee of property interests, remove customary access rights without replacing them with a reasonable substitute.

REMEDIES

113. The Tribunal Memorandum-Directions of August 2019 suggest that the key issue is funding, and that process issues have been largely resolved.

114. The authors of the second report into landlocked lands suggest a dedicated agency is required.[121] This is consistent with Ms Hippolite's evidence that "In order to make any meaningful change, I believe a comprehensive package of support and funding is required."

115. As argued above, it is incumbent on the Crown, consistent with its Artilce 2 responsibilities, to assist in funding not only the application process before the Maori Land Court, but also the cost of taking access rights over neighouring private land and forming reasonable access at least to a basic vehicular standard.

116. There is a question whether the definition of reasonable access needs to be revised to make clear that roads are intended and not just pedestrian access.

117. Finally, as an initial step, Crown agencies should adopt a landlocked land policy that ensures the reasonable access is provided to any Maori land currently landlocked by Crown land.

Dated at Nelson this 5th day of February 2020

Tom Bennion / Lisa Black
Counsel for the claimants

[121] Wai 2180, #N1 John Neal, Jonathan Gwyn, and David Alexander *Maori Landlocked Blocks* (Crown Forestry Rental Trust, Wellington, 2019) at 30.