In the Waitangi Tribunal **Wai 2180**

Taihape – Rangitīkei ki Rangipō District Inquiry

In the Matter	of the Treaty of Waitangi Act 1975
And	
In the Matter	of the Taihape – Rangitīkei ki Rangipō District Inquiry (Wai 2180)

Claimant Generic Closing Submissions

Nineteenth century Crown purchasing

Dated 30 September 2020

Mahony Horner Lawyers
Counsel: Dr Bryan Gilling / Katherine Hu
PO Box 24515
Wellington 6142
04 974 4702 / 04 974 4036
bryan.gilling@mhlaw.co.nz / katherine.hu@mhlaw.co.nz

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MAY IT PLEASE THE TRIBUNAL

Introduction

1. In the 1860s, due to the growth of pastoralism and settlers, the Crown began actively putting pressure on Maori in the Taihape Inquiry district to purchase their land. In 1864, the Crown relinquished its pre-emptive right of purchase over Maori-owned land and, in 1865, the Native Land Court (**NLC**) was established, which permitted sale of new legal title directly from the Maori owners to individual settlers without the Crown as intermediary. In terms of land area, a majority of the Crown purchasing of the Taihape Inquiry district was conducted between the 1870s through to the mid-1880s – a considerable area of those lands had passed through the NLC, which had supposedly determined the customary "ownership" and converted it to legal title.[1]

2. In particular, several large purchases were made in the Southern section of the Inquiry district in the 1870s – 1880s, including Paraekaretu, Mangaoira, Waitapu and Otamakapua.[2] The Northern section (an area of land which, due to its high altitude and poor quality land, was less than ideal for pastoral settlement), in comparison, was initially reasonably safe from settlement pressures and, therefore, one of the last to pass through the NLC.[3]

3. The Crown's purchasing continued throughout the 1880s and 1890s across the rohe, the most notable purchases being the blocks west of the Rangitīkei River.

4. In terms of the Crown's position as the number one purchaser of land in the region – the State had *the* responsibility to promote and see to the development of a new society and economy. It follows that the Crown may

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[1] Terry Hearn, *Sub-district block study – southern aspect* (Wai 2180, #A7) at 257.

[2] Bruce Stirling, *Taihape district nineteenth century overview* (Wai 2180, #A43) at 1.

[3] Martin Fisher and Bruce Stirling, *Sub-district block study – northern aspect* (Wai 2180, A6) at 4.

have felt obliged to act as an active agent of such developments by acquiring and purchasing land.[4]

5. However, the ruthless and forceful manner in which the Crown purchased the lands within the Taihape Inquiry district was destructive and harmful for tangata whenua, particularly those who wished to retain their whenua. These processes were clearly in contradiction to te Tiriti and its principles, but particularly in terms of the relationship of partnership between Maori and the Crown and the explicit guarantees of active protection, and land and resource retention in Article Two of te Tiriti. Today, approximately 53.95% of the land in the Taihape Inquiry district is in Crown possession due to alienation through Crown purchase.[5]

Outline of Submissions

6. These generic closing submissions deal with Issue 4 of the Tribunal Statement of Issues: Crown purchasing during the nineteenth century.[6] These submissions are filed for the benefit of all claimants within the Taihape Inquiry district. However, it is noted that these submissions do, and will not, preclude individual claimants from taking their own positions with regard to any of the issues raised.

7. As directed by the Tribubal, these Closing Submissions are structured in three levels, the order of which is as follows:

    a. Level One – the Main Closing Submissions: an overview of particular themes or issues regarding Crown purchasing in the Taihape Inquiry district;

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4 Hearn, *Sub-district block study – southern aspect*, at 258.

5 Fisher and Stirling, *Sub-district block study – northern aspect*, at 257; Hearn, *Sub-district block study – southern aspect*, at 38; Evald Subasic and Bruce Stirling, *Sub-district block study – central aspect* (Wai 2180, #A8) at 192; and Craig Innes, *Maori Land Retention and Alienation within the Taihape Inquiry District summary* (Wai 2180, #A15(h)), at [13] and [14].

6 Wai 2180, #1.4.003 at 22.

b. Level Two – Annex A: Answers to the Tribunal Statement of Issues (**TSoI**) – containing detailed answers to the TSoI questions; and

c. Level Three – a presentation summary, which will be filed as a separate document accordingly.

8. These Main Closing Submissions are set out as follows:

a. The first section deals with te Tiriti o Waitangi (**te Tiriti**), the principles, and the Crown's obligations;

b. The second section outlines the Crown position and relevant concessions;

c. The third section outlines the Maori understandings and expectations of Crown purchasing transactions;

d. The fourth section sets out and discusses the various Crown purchasing methods and the issues arising from them; and

e. The final section sets out the relief sought by the claimants.

9. The evidence relied on for these submissions is:

a. Martin Fisher and Bruce Stirling, 'Northern block history', #A6;

b. Terry Hearn, 'Southern block history', #A7;

c. Terry Hearn, 'One past, many histories: tribal land and politics in the nineteenth century', #A42;

d. Evald Subasic and Bruce Stirling, 'Central block history', #A8;

e. Craig Innes, 'Maori land retention and alienation', #A15;

f. Bruce Stirling and Terrence Green, 'Nineteenth century overview', #A43;

g. Tony Walzl, 'Twentieth century overview', #A4; and

h. Philip Cleaver, 'Maori and economic development, 1860-2013', #A48.

10. It is a general submission that many te Tiriti principles that apply to this issue are those that apply to all issues relating to Maori land more generally. Therefore, the submissions in other generic closing submissions regarding land-related issues are generally supported and the current submissions are intended to focus on this theme particularly, rather than simply reiterating submissions elsewhere by other Counsel.

Te Tiriti o Waitangi

11. In order to properly assess whether the Crown, and its conduct, was in breach of the principles of te Tiriti, it is necessary to have an accurate view of what te Tiriti and its principles mean. To avoid any doubt, the principles of te Tiriti include its terms.

Overarching obligations

12. The principles which are fundamental to the issue of Crown purchasing include, but are not limited to, the following:

    a. With respect to Maori land generally, the Crown should:
        i. actively protect the Maori interests in their lands;
        ii. consult Maori with Maori in all matters which relate to their lands;
        iii. ensure sufficient and appropriate participation of Taihape Maori in all matters which relate to their lands; and
        iv. guarantee to Taihape Maori the ability to retain their lands for as long as they wish to retain them.
    b. With respect to the Crown purchasing of land specifically, the Crown must, because of the special relationship created by the te Tiriti o Waitangi:
        i. consult with Maori in all Crown purchasing transactions;
        ii. ensure sufficient and appropriate participation of Taihape Maori in all Crown purchasing transactions;

iii. ensure Taihape Maori are treated equally when it comes to Crown purchasing transactions; and

iv. act honourably, reasonably and in good faith towards its Maori Tiriti partner.

Tino rangatiratanga and kawanatanga

13. In order to understand the expectations and understandings of Taihape Maori when entering into any land transactions with the Crown, it is necessary that one understands what is meant by "tino rangatiratanga" and "kawanatanga" under te Tiriti.

14. The Tribunal, in its landmark *He Whakaputanga me te Tiriti: The Declaration and the Treaty* Report concluded that:[7]

> *The rangatira who signed te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain. That is, they did not cede authority to make and enforce law over their people or their territories.*
>
> *The rangatira agreed to share power and authority with Britain. They agreed to the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Maori interests.*

15. Through this lens, Maori retained the ability to make and enforce law over their own people, their own territories, and their other taonga under te Tiriti.

16. The law recognised the customary rights of Maori but the Crown did not, even on a Tiriti level. Crown purchasing is a recognisable way of

[7] Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014), at 526 – 528.

acknowledging that Maori had rights, but the Crown chose to act without good faith, by not preserving Maori customary rights or being transparent in their actions.

17. The Crown designed a system that enabled it to purchase ownership interests ahead of the Courts determining title, and to purchase individuals' undivided interests before the court could determine relative interests and partition them out. The Crown system based on the requirements of the British legal system, stressed fixed and exclusive ownership of surveyed clearly defined blocks of land, by certain specified individuals. These blocks had a certain economic value, based on their potential productivity under, again British models of pastoral farming.

18. When Maori entered such transactions, they did not know the size, location or monetary value of the interests they were selling, nor did they have any means in finding this out.[8]

19. For the purpose of these closing submissions, counsel highlight the Tribunal's conclusions in *He Whiritaunoka: The Whanganui Land Report* (**the Whanganui Report**)*:*[9]

> *The Crown designed and persisted with a form of title that benefited it and not Maori, because it primarily facilitated the purchase of individuals' land interests. This breached the principles of partnership and option".*

20. In *Ngati Apa v Attorney-General* [2003] NZCA 117, the Chief Justice cited *re Lundon v Whitaker Claims Act 1871* (1872) 2 NZCA, which confirmed that:[10]

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8 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report* (Wai 903, 2015) at 535.

9 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 534.

10 *Ngati Apa v Attorney-General* [2003] 2 NZLR 643, at 656.

> *The Crown is bound, both by the common law of England and by its solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it.*

21. Similarly, Justice Tipping also stated in *Ngati Apa v Attorney-General*:[11]

> *It was not a matter of the Crown granting customary title to Maori, they already held it when sovereignty was proclaimed and continued to hold it thereafter, unless and until it was lawfully extinguished.*

22. Counsel submit that the Crown may have recognised Maori had customary rights, but not for Tiriti reasons which will become apparent in our subsequent submissions below.

Active Protection

23. In the 1987 *Lands* case, President Cooke found that the duty of the Crown was not just passive but extended to active protection of Maori people in the use of their lands and waters "to the fullest extent practicable".[12]

24. Counsel submit, the Crown deprived Taihape Maori of having authority in relation to their land, it negated tino rangatiratanga, and breached the principles of good government and active protection. The Tribunal found this was also the case in Whanganui nearby with a very similar history to Taihape.[13]

25. The Tribunal identified that, in the 1870s, the Crown frequently paid Maori money for interests in Whanganui land that had not yet gone through the NLC. These advance payments were sometimes referred to as tamana and

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[11] *Ngati Apa v Attorney-General*, at 656.

[12] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

[13] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 534.

were distributed erratically, sometimes secretly, and on occasion to people who were not recognised owners of the land.[14] Counsel submit that such dealings subvert the principle of active protection of Maori and their land.

26. In *Te Mana Whatu Ahuru*, the Tribunal found that the Crown had to ensure that the right holders retained enough land for their present and future needs. This required an investigation into the extent and quality of the land that remained with the right holders, set aside an area of sufficient size and quality, provide these reserves in a timely manner and in the correct location, and if necessary act to protect those reserves from subsequent alienation. In respect of the purchases, the Tribunal found that there was no evidence that the Crown sought to ensure the adequacy of the reserves it set aside for Maori. Subsequently, Maori experienced difficulty in trying to retain these lands due to the Crown's confusion as to the legal status of the lands, and secession issues in the NLC.[15]

27. In terms of the Crown having a monopoly on purchasing customary Maori land, the Tribunal found in *the Whanganui Report* that the Crown manipulated the land market to give itself primacy as a dealer in Maori land – in doing this, the Crown deliberately undermined tino rangatiratanga of Whanganui iwi and hapu, and breached its duties of good government and good faith. Although policies and priorities changed, there was always a repeating pattern. Governments believed they needed to acquire land for economic development, so they introduced legislation that strengthened the Crown's arm as the sole purchasing power.[16]

28. Counsel submit that given that the Crown operated in the Taihape district on the same self-privileged basis, in doing so, it committed the same undermining and breaches as the Whanganui Tribunal identified.

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[14] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 483.

[15] Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Potae Claims* (Wai 898, 2018-20) at 282 – 286.

[16] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 531.

Partnership

29. Counsel submit that the duty of partnership between Maori and the Crown is identified above under active protection and in the *Lands* case, where the Court of Appeal found that the duty of the Crown extended to active protection of Maori in the use of their land and waters.[17]

30. Counsel submit that the findings in the *Whanganui Report* are applicable to Taihape Maori. In the *Whanganui Report*, the Tribunal found:[18]

> *Maori in Whanganui had every reason to believe that the new society would proceed on the basis of partnership between their leaders and the new arrivals. This included establishing settlers on the land and working cooperatively with them. It also involved maintaining Maori authority in their own spheres and cooperating in areas of intersecting interest. Where there is an ethic of partnership, there is no room for one partner to impose changes on the other without participation and agreement*.

31. The Tribunal's findings in the *Te Mana Whatu Ahuru: Report on Te Rohe Potae Claims* are also applicable to Taihape Maori:[19]

> *As other Tribunals have explained, the Crown's duty is one of active protection, which imposes an obligation to protect Maori rights and interests 'to the fullest extent reasonably practicable'. This means that the Crown cannot ignore, deny, or interfere with Maori communities' tino rangatiratanga, including authority over and relationships with people, lands, and taonga but it also means that the Crown is positively obliged to protect and support Maori communities' tino rangatiratanga, for example, by putting in place*

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[17] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

[18] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 156.

[19] Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Potae Claims,* at 184.

legislative or administrative measures that support those communities' authority and relationships, if that is what the community wants.

Duty of Good Faith

32. The Crown has been found by the Courts to have, as a Tiriti partner of Maori, to have a duty to deal with Maori with the utmost good faith. It is submitted that the Crown failed in various times and ways to deal with Taihape Maori.

33. Counsel submit that the Crown had a duty to act reasonably and in good faith, as te Tiriti represented a partnership between Pakeha and Maori requiring each other to act towards the other reasonably and with the utmost good faith.[20]

34. In the Whanganui Report, a bad faith element identified was the Crown's policies and practices and how it managed the costs of survey and partition. The Crown's system unfairly loaded these costs on Maori who wished to retain their land. Even if the Crown did not intend to design the system as a way of forcing non-sellers to release land that they had decided not to sell, this was its outcome.[21] The evidence shows that there was a similar situation in Taihape.

35. Due to the similarities between Whanganui and Taihape, it appears the Crown was also in breach of its duty of good faith in Taihape in other ways too. The Tribunal previously found that the Crown, when dealing with Whanganui Maori and their land, consistently breached its obligations to act in good faith, when it:

[20] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

[21] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 534.

a. acted to undermine tino rangatiratanga and the ability of communities to act collectively;
b. restricted the options available to Whanganui Maori to the point where they had no other option but to sell to the Crown; and
c. it lacked good faith because the Crown abused its position as a monopoly purchaser, paying low prices and using restrictions on private dealing to prevent Maori from entering into arrangements such as leases. [22]

36. The Crown exempted itself from most restrictions and did not limit the quantity of Maori land alienated in the period. It used money as an enticement to sell, both through tamana, and through payments to rangatira to enlist their support for sales to the Crown, as discussed below.

37. In *Te Mana Whatu Ahuru*, the Rohe Potae Tribunal decided it was not satisfied that the Crown did enough to assure itself that Maori understood the effect of the purchases on their future relationships with the land – specifically noting that the Crown's tactics in the purchases involved manipulation of Maori and providing insufficient time for opposition and disputes to be settled through tikanga. Overall, these negotiations were considered by the Tribunal to be done in bad faith.[23] It is submitted that Taihape Maori held similar misunderstandings in relation to the effect of the purchases on their future relationships with land.

38. The Tribunal found in the *Whanganui Report* that:[24]

> *The nature and extent of the Crown's land purchases, happening at the same time as the disruptive and expensive process of title determination, reduced Maori from customary owners in control of*

[22] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 534.
[23] Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Potae Claims,* at 326 – 327.
[24] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 531.

most of our district to a marginalised people who had lost most of their land and had little to show for it.

The Crown's systems for determining title and purchasing land emphasised the individual in a way that took away from Whanganui Maori the ability to deal with their land collectively and intentionally diminished their capacity to make meaningful choices.

The Crown manipulated the land market to give itself primacy as a dealer in Maori land – in the Murimotu region it contrived a lease arrangement that put the Crown rather than private parties in a central and controlling role – and then paid consistently low prices.

In these ways, the Crown deliberately undermined tino rangatiratanga of Whanganui iwi and hapū, and breached its duties of good government and good faith.

The Crown and claimants in this inquiry debated whether these policies and practices constituted a 'system' designed to separate Maori from their land. We consider that the Crown's nineteenth century activities were insufficiently coherent to be described as a system, but we do agree that discernible in its native land laws, and in its policy and practice for buying Maori land, was the consistent objective of buying as much land as possible for the lowest price. Although policies and priorities fluctuated, there was a repeating pattern. Governments, convinced of the need to acquire land for economic development, introduced legislation that strengthened the Crown's arm as the sole purchasing power.

39. Counsel submit these findings apply with equal force in Taihape, and with respect, summarise neatly the situation that applied in Taihape. It is,

therefore, also submitted that it is appropriate that this Tribunal make similar findings as set out in the more detailed submissions.

Principle of Options

40. As submitted previously there is a significant historical overlap between the Taihape and Whanganui districts. The Tribunal found in Whanganui that there were a number of reasons for Whanganui Maori selling land, but in the late 1800s, they rarely made the decision freely and communally. Even Maori who genuinely wanted to sell land could not usually do it in an open market. Legislation essentially banned private purchase of Maori land in 1894, although, by this point, roughly three quarters of the inquiry district was already off limits to private purchasers.[25]

41. As already detailed at paragraph 38, the Tribunal, in its *Whanganui Report*, found that, due to the Crown's land purchasing system, Whanganui Maori had diminished capacity to make meaningful choices regarding their lands, which clearly undermined their tino rangatiratanga.[26]

42. Counsel, again, submit these findings apply with equal force in Taihape, and with respect, summarise neatly the situation that applied in Taihape. It is, therefore, also submitted that it is appropriate that this Tribunal make similar findings as set out in the more detailed submissions.

Crown Position and Concessions

43. In a Memorandum of Counsel relating to the preparation of the TSoI dated 23 October 2019, the Crown made the following observations about the issues surrounding Crown purchasing:[27]

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[25] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 533.

[26] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 531.

[27] Wai 2180, #1.3.2. at 47 – 52.

General claims are made alleging unfair purchasing practices and the consequences of Native Land Court costs – being that there was little choice other than to sell to the Crown.

Specific claims allege fraudulent misrepresentation by a Crown agent as to the value of lands (for example Ahuriri, presumably impacting on Kaweka), and "surreptitious" negotiations by the Crown with individual rangatira without the knowledge or consent of the collective. These allegations require close consideration.

Some claims allege Crown purchases without adequate investigation of customary rights and interests through the Native Land Court, however the evidence indicates that most Crown dealings in this district occurred post-Native Land Court title determination.

As above, Crown purchasing activity in the Taihape district was limited in early years (pre 1870s) relative to the purchase patterns of adjoining, more populated, coastal districts. Phases of purchasing included:

a. *Relatively limited leasing and purchase activity to the South of the district pre 1870 (eg Waitapu) and to the East (Kaweka);*
b. *Purchasing activity (both private and Crown) in the South of the district in the 1870s (Otamakapua, Paraekaretu, Rangatira, Otairi and Mangoira); and*
c. *Land acquisition for the North Island Main Trunk Railway in the 1880s and 1890s (e.g. Rangipo Waiu and Awarua) and further broader purchasing in the central and northern aspects of the district.*

44. The Crown agreed that:

The circumstances of Crown purchasing in the inquiry district are proper areas for inquiry.

45. The Crown in its opening submissions on evidence, made the following acknowledgements or concessions on the issue of Crown purchasing:

a. *Whilst arguing there is no evidence that the intention of the Native Land Laws was to cause Maori to become landless, the Crown accepts that significant reductions in landholdings was an outcome for Taihape Maori through a combination of:*

> *gaining tradeable titles, Crown purchasing, and (to a lesser extent in Taihape) the sale of land to private parties[…];*[28]

b. *With regard to the impact of the Native Land Laws, the Crown concedes that the individualisation of Maori land tenure provided for by the Native Land Laws made the lands of iwi and hapu in the Taihape: Rangitikei ki Rangipo inquiry district more susceptible to fragmentation, alienation and partition, and this contributed to the undermining of tribal structures in the district. The Crown concedes that its failure to protect these structures was a breach of the Treaty of Waitangi and its principles*;[29]

c. *Maori who did not wish to participate in the Native Land Court were nevertheless bound to participate in order to seek to protect their land interests and were required to incur the costs involved in Court applications, participation including attendance at hearings and any awards the Court made;*[30] and

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[28] Wai 2180, #3.3.31 at 13.

[29] Wai 2180, #3.3.31 at 14.

[30] Wai 2180, #1.3.2 at [43.2].

d. *[W]here the Crown held monopoly purchasing powers, it had an enhanced duty to exercise those powers in good faith and to actively protect the interests of Maori in lands they wished to retain.*[31]

46. So, to be clear, the Crown concedes and confirms that, where it held monopoly purchase powers, it had an ***enhanced duty*** to**:**

a. exercise its powers in ***good faith***;
b. ***actively protect*** the interests of Maori; and, in particular
c. actively protect interests of Maori in ***land they wished to retain***.

47. Counsel notes that only (a) and (d) are acknowledgements or concessions which are directly relevant to Crown purchasing, while it is submitted that (b) applies in that Crown purchasing then took advantage of the fragmented, individualising title in allowing fragments to pick off individual owners – for example, by using tamana, which does not work in a communal situation.

48. However, it is noted that none of the evidence led by the Crown directly addressed Crown purchasing issues in relation to either the methodology/manner in which purchases were carried out, or the impact of Crown purchases on Taihape Maori. Instead, the Crown led evidence from Mr Samuel Carpenter, a historian, whose evidence discussed the development of the New Zealand Settler Government's Native Land Laws during the nineteenth century, specifically outlining:

a. the intentions and context behind the development of the Native Land Laws; and
b. the context within which the availability of collective land administration mechanisms can be viewed (including forms of

[31] Wai 2180, #1.3.2, at [51].

collective title, trusts, joint venture companies, and incorporations).[32]

49. Mr Carpenter's evidence remained at a high level of political and legal thought and, it is submitted, therefore, had little relevance to Taihape Maori in the nineteenth century. In particular, the evidence not only failed to consider the perspective of Maori at this time, but also failed to discuss the relevance and influence of tikanga. The evidence appeared to, instead, attempt to justify or, to be charitable, explain the political and legal thinking of the settler government law makers. The Crown led this evidence despite the fact that it has previously conceded that the Native Land Laws were created and used to alienate Maori land (a different point from the Crown's assertion in paragraph 45(a) above). So, while the Tribunal may find it helpful in terms of context, it is submitted that it provided no value for addressing the question of whether or not the Crown had breached te Tiriti and its principles by what it actually did or did not do in its dealings with Taihape Maori, especially in regard to Crown purchasing of their land.

50. The Crown held monopoly purchasing powers throughout the majority of the nineteenth century. That concession, therefore, means that the Crown agreed that it had an enhanced duty to exercise good faith, and to actively protect Maori interests, when purchasing Maori land throughout the majority of that period. The Crown still requires that to be proved for each Crown purchase throughout the period, however, rather than conceding an overall, systemic pernicious problem that breached te Tiriti.

The Maori Understanding and Expectation of Crown purchasing Transactions

51. The Crown has claimed that:[33]

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[32] Wai 2180, #M29.

[33] Wai 2180, #1.3.2 at [42].

The degree to which Taihape Maori were aware of national dealings of this type and to which their whanaunga in adjoining districts represented their interests in the interactions between those iwi and the Crown is not yet clear on the evidence.

52. The Crown suggests that it is unclear whether Taihape Maori understood the processes and impacts surrounding Crown purchasing transactions with their whanaunga in adjoining blocks. However, with the Taihape Inquiry district being one of the last affected areas in Aotearoa, this is unlikely to have been subjected to Pakeha land purchasing. In particular, Mokai Patea – having experienced extensive and rapid land loss in the Hawkes Bay region to the east of the Taihape Inquiry district – were all too familiar with the machinery of early colonisation, including Crown purchasing, and the resulting land loss.[34]

53. Ngati Apa, for example, was one of the main iwi involved in the earlier transactions with the Crown. Dr Hearn observed that:[35]

> ***Ngati Apa may well have believed that the selling of land and its settlement by Pakeha offered it an opportunity to forge an alliance with the Crown and thus to enhance its security.*** *[…] As importantly, negotiations with the Crown would signal the Crown's affirmation of its manawhenua, of its status as a tribe that had not been conquered and enslaved, while a successful sale would constitute an important step in what would emerge as a larger plan to dispose of most of the lands along the North Island's west coast to which it lay claim and to which even greater opposition could be expected to materialise. The importance of that affirmation and the duty bestowed upon Kawana Hunia by his father would later form important elements of the Ngati Apa narrative.* ***Finally, the iwi's offer appears to have been***

[34] Subasic and Stirling, *Sub-district block study – central aspect*, at 192.

[35] Terry Hearn, *One past, many histories: tribal land and politics in the nineteenth century*, (Wai 2180, #A42) at 82 – 83. Emphasis added.

prompted by two other considerations: first, the expectation, assiduously fostered by the Crown, that in the train of European settlement would follow economic development, hospitals and schools; and, second, a fear that the Crown would negotiate with those who claimed to have conquered the lands in question. By making an offer to sell and by drawing the Crown into negotiations, Ngati Apa sought to secure Crown recognition of its manawhenua and the wealth that the land represented*.*

54. The evidence further shows that, Taihape Maori were also very clearly aware of the processes and adverse impacts of these "national dealings", particularly when it came to the methods used by the Crown. Dr Hearn observed, in Otamakapua, that: [36]

> *Some claimants, Utiku Potaka foremost among them, understood the implications of pre-title payments: so much was apparent in his complaint that in effect they allowed the Crown to usurp the role of the Native Land Court which was to establish ownership. No doubt he was also aware that acceptance of payments by one individual committed all owners to their repayment, in cash or in land, should the Crown elect not to complete a purchase.*

55. It is clear from this that Utiku Potaka (Ngati Hauiti) knew all too well what tamana implied.

56. As Tiriti partners, Taihape Maori would have expected to be treated in accordance with what the Crown promised and guaranteed under Tiriti and its principles. And Taihape Maori, in fact, often clearly demonstrated that they expected to be treated as the Crown's partners under the te Tiriti, and pursuant to principles of te Tiriti. For example, Taihape Maori land owners were often seen to have attempted to negotiate deals that would have

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[36] Hearn, *Sub-district block study – southern aspect*, at 262.

delivered them some positive outcomes (such as in the Otairi block, discussed below at paragraphs 84 – 88), demonstrating expectations of having options and having the choice of how to deal with their lands and being empowered partaking in a transaction which was of mutual benefit – both of which being principles which are embedded in te Tiriti.

Crown Purchasing Methods

The Native Land Court

57. The NLC was introduced in 1865, was the main device used by Crown purchase officers to carry out and fulfil the Crown's land purchase programme. The NLC was introduced in order to give Maori lands a "recognised" and "legal" title, which in turn made the land legally purchasable. Such a title would be issued on a block by the NLC after title investigation hearings.

58. A good example of how the NLC's title investigation process worked, and the cruel results it often led to, can be seen very clearly in the Crown's acquisition of the Awarua Block.

59. Due to the central position which Awarua had in the North Island, it was a key block for the Crown for completing its North Island Main Trunk Railway project, which would connect Wellington and Auckland. The land upon which Awarua was situated was also believed to be ideal for settling large populations and also rested on a bed of coal and copper. In 1889, the Resident Magistrate at the time, J Preece, in writing to the Native Department, strongly advised that "*no effort should be lost in securing it.*"[37] The Maori owners of Awarua were also well aware of the Crown's interests.[38] On top of this, the Crown clearly understood that the route of its intended railway was ultimately dependent on 'settling the native

[37] Subasic and Stirling, *Sub-district block study – central aspect*, at 73.

[38] Phillip Cleaver, *The Taking of Maori Land for Public Works in the Whanganui Inquiry District, 1850-2000* (Wai 903, 2004) at 183.

difficulty'.[39] Accordingly, it took every step it could to ensure it maintained an amicable relationship with the various iwi. This caution was reflected in its clear unwillingness to take any Maori land for the railway unless it was able to enter into negotiations with all the owners. So, rather than applying its usual practice of disseminating pre-title advances (discussed further in the "Advance Payments and Tamana" section below), the Crown induced the Taihape Maori owners to put their land through the NLC through a mix of great promises and pressures relating to the development North Island Main Trunk Railway within the wider region.[40]

60. The NLC processes were very expensive, and often very lengthy. In the *Sub-district block study – southern aspect* Report, Dr Hearn describes the following:[41]

> *Court fees, along with the inevitable costs that came along with the Court process including lawyers, interpreters and a host of other unsavoury characters all formed a heavy financial burden on the Maori claimants. Survey costs, which were extremely high and inevitably charged against the block, were the heaviest. Yet such costs, as high as they were, were almost impossible to avoid under the Native Land Court machinery. But the associated costs attendant with the Native Land Court process – travel, accommodation, provision of food and other life necessities, were just as high a burden for those attending the Court. The hapu from Mokai Patea were particularly badly affected in this respect, as they literally had to travel the breadth of the country – from Whanganui in the west to Napier and Hastings in the east – to attend the hearings relating to their lands. The Awarua hearings took months to complete, and it is*

39 Subasic and Stirling, *Sub-district block study – central aspect*, at 72.

40 Stirling, *Nineteenth century overview,* at 311.

41 Hearn, *Sub-district block study – southern aspect*, at 75 – 76.

very clear that costs of accommodation and life necessities would be inevitably high.

61. Thus, once the NLC hearings concluded, the already "willing" sellers, having now run up a new debt, were even more eager to sell – allowing the Crown to more easily purchase their blocks. The owners of the remaining blocks made attempts to alleviate their financial burdens by putting forward many proposals to the Crown seeking its assistance.[42] The proposals included asking the Crown to allow further subdivision and consolidation of the blocks so that so each family could have their own interests properly defined and allocated. They could have then had a place of their own to permanently occupy and improve, and/or permitting the consolidation of the various scattered subdivisions across the Awarua block so they would be more workable.[43]

62. The Crown, however, showed no interest in providing any such assistance. Instead, in the period of 1895 and 1896, the Crown resumed its purchasing activities as it had planned originally – which was to acquire as many shares as it could from willing owners, then putting the land through the NLC to define the interests.[44] This led to more fragmentation and land loss. The ultimate result was that, by August 1896, the Crown had purchased around three-quarters of the entire block of approximately 256,000 acres.[45] And, as of 1900, just over 50,000 acres of Awarua remained in Maori ownership in a large number of heavily subdivided titles.[46]

63. So, the ironic ending faced by Taihape Maori was that, in order to settle the heavy debts arising from the NLC process (a process in which the owners had been forced into participating in order to defend their interests to the

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[42] Subasic and Stirling, *Sub-district block study – central aspect*, at 101 – 102.
[43] Subasic and Stirling, *Sub-district block study – central aspect*, at 103.
[44] Subasic and Stirling, *Sub-district block study – central aspect*, at 97.
[45] Subasic and Stirling, *Sub-district block study – central aspect*, at 102 – 103.
[46] Subasic and Stirling, *Sub-district block study – central aspect*, at 160.

lands), they were eventually forced to sell to the Crown the very lands they were trying to protect and retain. Even for the "willing sellers", Stirling noted that:[47]

> *A lot of the purchase proceeds from Awarua went to clear massive debts arising from six years of title investigation and determination processes imposed on the owners by the Native Land Acts…*

64. In 1884, Te Kapua was investigated by the NLC, which controversially awarded the title to Ngati Poutama, who were the applicants in the proceedings. This decision resulted in waves of extensive protests and applications for re-hearing by approximately six other hapu groups that had customary interests/rights but were excluded from the judgement. In October 1884, individuals from one of these iwi groups wrote to Native Minister John Ballance to request that any payment of tamana be stopped. A similar request was made by another set of individuals to the Native Department in April 1885. These individuals, on behalf of their respective iwi, believed the Court decision had wrongly shut them out of their interests in the block and, therefore, the current "owners", as the NLC had decided, were not the rightful owners whom the Crown could deal with to purchase the land. At first, the Crown gave assurances that it would not pay any tamana until the application for a re-hearing expired.[48] This was not true. As noted by Subasic and Stirling, the Crown had:[49]

> *Without waiting for the appeals against the Court's award to be decided, and heedless of sustained protests from the appellants, the Crown commenced paying advances on its purchase of Te Kapua to some of the individuals awarded title in 1884.*

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47 Stirling, *Nineteenth century overview*, at 446.

48 Subasic and Stirling, *Sub-district block study – central aspect*, at 25.

49 Subasic and Stirling, *Sub-district block study – central aspect*, at 35 – 37.

65. The protests and applications for rehearing continued for many years. But, unfortunately, these efforts merely delayed the inevitable – through the payment of bribes to the "principal" owners, as determined by the questionable NLC decision, the Crown eventually managed to secure the purchase of all three blocks of Te Kapua (Te Kapua, Te Kapua A, and Te Kapua B) by November 1891 for the price of £6,040.

66. A further problem incidental to the NLC, and which the Crown heavily capitalised upon for then acquiring the land, was the costs incurred throughout the surveys conducted on the lands. These costs usually ended up being registered as mortgages or liens against the land, which would prevent title being issued to potential purchasers if Taihape Maori owners wished to sell.[50] As a result, such costs were often settled for in land to the Crown, leading to further land loss.[51]

67. Unpaid costs relating to surveys were a common reason of liens being registered against land. In Awarua, for example, there was a survey lien of £3,100 placed on the block. In order to settle the debt and have the lien discharged, Utiku Potaka entered an agreement with the Crown that, after the partition of the block the owners would vest an area of the block along the railway line in the Crown.[52]

68. Similar to Awarua, but in the west of the Taihape Inquiry district – both titles to the Motukawa block (Motukawa 1 and Motukawa 2) were mortgaged for unpaid survey costs which had been incurred during the 1886 NLC process. These debts were eventually discharged through the sale of large parts of both blocks to the Crown in the 1890s, leading to extensive title fragmentation of Motukawa 1 before 1900.[53] The case was similar in Awarua (as already discussed above).

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[50] Subasic and Stirling, *Sub-district block study – central aspect*, at 15.

[51] Subasic and Stirling, *Sub-district block study – central aspect*, at 160 – 161.

[52] Subasic and Stirling, *Sub-district block study – central aspect*, at 88.

[53] Stirling, *Nineteenth century overview*, at 43 – 44; and Subasic and Stirling, *Sub-district block study – central aspect*, at 67 – 68.

69. Therefore, by establishing and frequently employing the mechanisms of NLC to facilitate its purchasing ambitions, the Crown, effectively, forced Taihape Maori into participating in the broken and unfair system of the NLC process. The Crown then failed to act or respond when Taihape Maori advised it of the significant problems they were facing in retaining their lands due to the NLC processes, including ignoring any proposed solutions suggested by Taihape Maori to counteract the purchases. This almost always led to extensive land loss (the prejudices consequent to this are still being suffered until the present day). It is, therefore, concluded that Taihape Maori have been:

a. Ignored when they showed willingness and ability to participate and partner with the Crown in making decisions in relation to their lands. They have, therefore, been:

i. constrained to exercising little to no decision-making powers over their lands – thereby demonstrating the Crown's lack of recognition or respect for the tino rangatiratanga of Taihape Maori as promised under te Tiriti;

ii. Prevented from retaining their lands for as long as they wished and desired to – thereby constituting a Crown breach of the principle of the Article Two guarantee;

iii. Not given the opportunity to truly be treated as a Tiriti partner in the sale of their lands – thereby constituting a Crown breach of the principles of good faith and partnership.

Boundary and Surveying Issues

70. The Kaweka Block was one of the first blocks in the Taihape Inquiry district to be purchased by the Crown. This block was originally caught up in various Crown purchases from the 1850s to the 1870s – the Crown claimed to have

come into possession of the block through lump sum payments to a range of Taihape Maori individuals in 1859 and 1864.

71. The boundaries defined in all the Kaweka-related deeds were generally poorly defined due to the lack of surveys at the time of signing, which resulted in very unclear and overlapping boundaries. [54] These deeds all involved advance payments, along with the promise of the balance of the purchase price being paid upon the completion of surveys. However, as the Crown had failed to openly deal with all interests in the block, many Taihape Maori opposed and prevented the surveys being properly completed. A further reason was that the Crown had also, in 1861, refused to pay the survey cost as it thought the land was "so inaccessible and worthless" [55] – which of course begs the question of why the Crown was expending so much effort and money in purchasing it. It also begs the further question of the Crown's method of valuing land economically compared with the ways in which Maori valued whenua. The Kaweka deed was, therefore, never officially completed. However, this was not how the Crown treated the block – in official returns, the "Lands in Kaweka" were described as being purchased by Donald McLean for £130 between 1859 and 1865.[56] Although £130 was all that was paid to the Ngati Hineuru chiefs, and while a further £300 was paid to "Ngati Tuwharetoa and Ngati Kahungungu", the total promised price of £1000 was never paid in full.[57]

72. And because the settlement of the inland ranges was something that happened very slowly, and very gradually, the Maori owners did not

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[54] Fisher and Stirling, *Sub-district block study – northern aspect*, at 7.

[55] Fisher and Stirling, *Sub-district block study – northern aspect*, at 13.

[56] Fisher and Stirling, *Sub-district block study – northern aspect*, at 13 and 30; Counsel note that the table on page 30 of the #A6 report is only of the situation reported in 1860, not of the full convoluted series of transactions that affected Kaweka.

[57] Fisher and Stirling, *Sub-district block study – northern aspect*, at 13.

immediately realise that the Crown was claiming interest in and control over their lands.[58] As noted in Fisher and Stirling:[59]

> *Settlement was slow to penetrate the inland ranges so it was some time before Maori right-holders were even made aware of the Crown's pretentious claims to large areas of land in this boundary zone. In the late 1870s Renata Kawepo and others had asked a prominent settler in the area, George Prior Donnelly, to inquire about compensation from the government for the sheep that had used the pastoral land beyond what they considered to be the boundaries of its land. Donnelly was told by the government that the Crown had established an education reserve on the northern part of the Ruahine range, so in its view the settlers grazing sheep there did so legitimately. When Donnelly passed this response on to Kawepo, he was very angry, but as a "consequence of family disagreement the matter was not actively taken up." Even so, the Pakeha farmers, Moorhouse and Lyon, who had sheep grazing on land, were aware that the Maori perceived the land to still belong to them.*

73. The failure to accurately define the boundaries of the Kaweka lands being transacted did eventually result in repeated disputes and protests, but these were ignored by the Crown.[60] Thus, in reliance on the abysmal overlapping survey work, and taking advantage of the confusiosn and delay in completing the series of transactions the Crown assumed ownership of the approximate 56,273 acres of land.[61]

74. The title for the Te Koau block came into existence in 1891 as the Crown originally claimed the block was included in its 1857 purchase of Otaranga in

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58 Fisher and Stirling, *Sub-district block study – northern aspect*, at 21.

59 Fisher and Stirling, *Sub-district block study – northern aspect*, at 21.

60 Fisher and Stirling, *Sub-district block study – northern aspect*, at 23.

61 Fisher and Stirling, *Sub-district block study – northern aspect*, at 30.

the Hawkes Bay region. It was not until after the 1890 Royal Commission, which determined that the block had been wrongly alienated due to dodgy boundaries which the Crown had failed to define the land, that Te Koau was returned.[62] However, 7,100 acres out of the 17,340 acres remained in Crown possession. That portion had already been set aside for an education reserve around 1878, which it deemed could not be returned.[63]

75. By relying on faulty and incomplete surveys, or failing altogether to define boundaries in land purchases, the Crown disentitled Taihape Maori from their lands. This breaches its obligations under te Tiriti in the following ways:

a. By not ensuring that adequate surveys were carried out to define proper boundaries, the Crown failed to actively protect ;
b. By not conducting its purchase transactions properly in terms of having defined boundaries and not paying the full promised price, the Crown failed to meet its duty to act in good faith; and
c. By permitting the sale of lands with unclear boundaries and incomplete survey, combined with the Crown then claiming interests and control over lands which they did not properly complete, the Crown breached its Article Two guarantee of ensuring Maori could retain their lands for as long as they wished.

Tamana and Advance Payments

76. Making advance payments to Maori owners was a method that was most commonly used by the Crown to secure interests in lands which it wanted to purchase. There were two kinds of advance payments:

a. This first is known as “tamana” – which involved paying owners a deposit of money with a view of securing interests in Maori land that was yet to go through the NLC for title determination. The

[62] Subasic and Stirling, *Sub-district block study – central aspect*, at 8.
[63] Subasic and Stirling, *Sub-district block study – central aspect*, at 9.

distribution of tamana was often followed by one party or another making applications to the NLC to determine the who the title belong to; and

b. Advance payments which were used to purchase undivided shares. This involved the Crown making advance payments to the owners after the NLC determines the title of the land, but before share interests were assigned between the particular owners. Advance payments were, therefore, often followed by applications to the NLC, by the Crown, to divide up, and award, the interests according to the advances paid.

77. Due to this interplay between advance payments/tamana and the NLC, this section also delves further into the details of the havoc which the NLC and its processes were permitted to wreak due to the distribution of the two types of advance payments.

78. The Tribunals in the Te Roroa, Ngati Awa Raupatu, Hauraki, Central North Island and Whanganui Inquiries have all found the Crown's practice of paying tamana/advances to individuals to have been a breach of te Tiriti, as it created division within communities, damaged traditional leadership, and undermined collective decision-making.[64]

79. In particular, in the Central North Island Inquiry, the Tribunal also made the following findings in relation to payments of advance/tamana:[65]

> *From the evidence available to us, there were a number of aspects of pre-title dealings and payment of advances that were inconsistent with the treaty. On a broad level, the system enabled Government agents to select a few favoured right-holders and lock their communities into a transaction by paying them advances. There*

64 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 532.

65 Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Waitangi Tribunal, 2008) at 598 – 599. Emphasis added.

were limits to how far this could be taken, especially since a Crown title was ultimately dependent on the select few proving to at least be among the correct owners. But it was an effective tool for tying up Maori lands and committing whole communities to purchases without their full, free, and informed consent. ***As such, it was in breach of the Treaty.***

While we note that some purchases began with, or eventually involved, public meetings and potential communities of owners, these were dispensed with or circumvented when there was resistance to alienation. Ultimately, too, the agents could play a part in influencing use of the court process and compilation of lists of owners, enabling them to manipulate events at the final stage of title determination. More importantly, perhaps, advances were tied to blocks, even where the owners had no knowledge of them or deliberate intent that they be so, enabling the Crown to obtain land by partition, again without there having been any free, full, or informed decision to alienate it. ***This too was in breach of the Treaty. In situations where the Crown pursued the 'completion' of these flawed transactions in the 1880s, buying up further individual interests at old prices or seeking to define its interest by partition, this Treaty breach was compounded.***

[…]

Finally, it appears that the Government did too little to ensure that its agents acted with propriety. Although we do not have detailed evidence of all transactions, it was clear that the land purchase agents could not satisfy the Government's desire for huge amounts of cheap land while at the same time protecting Maori interests. The Government's failure to monitor their activities properly, to pay them on a basis that would have encouraged fair dealing, and to correct the core problems when identified, and its decision to complete rather than overturn some transactions, was in breach of the Treaty.

80. The Taihape Inquiry district was not an exception to the Crown's practice of disseminating tamana – in its endeavours to acquire land in the Taihape Inquiry district, considerable amounts of advance payments were made to Maori on almost all the blocks which were purchased by the Crown from the 1870s to 1880s.

81. Paraekaretu was another one of the earlier blocks purchased by the Crown. In November 1871, Kawana Hunia Te Hakeke, Aperahama Tahunuiarangi, Pehina Karatau, and Te Keepa Rangihiurinui signed a deed of sale with the Crown and each received £100 of tamana for their interests in the block. [66] This first purchase was never registered, and there is no evidence which indicates that advances were paid to anyone else in the various hapu who may have had interests in the block.

82. The NLC title investigation was held in December 1871, with the title of the entire block being awarded to Aperahama of Ngati Apa, to be held on trust for the 10 hapu of Ngati Apa.[67] Throughout the NLC investigation Ngati Hauiti insisted that they had a claim to the block, but the iwi was awarded nothing. This resulted in a rift developing between the two iwi – a divide which was strongly reflected in other block claims in which both iwi were involved in the rest of the Inquiry district.[68] This was the very first example of the Crown's purchasing tactics causing fissures in the whanaungatanga between the various iwi of Taihape Maori. This "divide and conquer" tactic was further applied to the complete destruction of the customary social structure of Taihape Maori – hapu within iwi became divided against one another, and, eventually, individuals within hapu were pitted against each other.

66 Hearn, *Sub-district block study – southern aspect*, at 141.

67 Hearn, *Sub-district block study – southern aspect*, at 142.

68 Hearn, *Sub-district block study – southern aspect*, at 145.

83. Mangoira was another early block subject to the practice of tamana. Stirling recorded that, by 1876, the Crown had paid £1,269 of tamana, with the agreed purchase price being a total of £12,500.[69] The NLC title investigation was held in 1877, with the entire title being awarded to Ngati Hauiti.[70] This led to the purchase of the entire block being settled very promptly after the NLC's title determination. The final payment for the block was made on 1 October 1877, with the total final price paid (which included the initial payment of tamana) coming to £4,555.[71] The block was quickly proclaimed Crown lands in 1878.[72]

84. Substantial amounts of tamana were also made to the supposed owners of Otairi from the years of 1875 – 1880, prior to the title investigation hearing for the block:[73]

> *The first advances were made by Booth in 1874. In 1875 it was recorded that £50 had been advanced against the block the area of which was then given as 200,000 acres. No price had been fixed for the block. Progress was slow, for in 1877 the amount advanced still stood at £50.*
> *[…]*
> *In February 1878 Otairi was 'notified' under the Government Native Land Purchases Act 1877: by that time the sum of £203 had been advanced against the block.*
> *[...]*
> *Up to May 1880 just under £6,916 had been advanced by the Crown: that sum included £3,000 each to Aperahama Tipae, described as 'Hauiti/Apa,' and to Utiku Potaka of Hauiti. The payments were made in February and March 1879 respectively. Smaller sums had*

69 Stirling, *Nineteenth century overview,* at 71.

70 Hearn, *Sub-district block study – southern aspect*, at 202; and Stirling, *Nineteenth century overview*, at 71.

71 Hearn, *Sub-district block study – southern aspect*, at 202 – 203.

72 Hearn, *Sub-district block study – southern aspect*, at 203.

73 Hearn, *Sub-district block study – southern aspect*, at 150 – 152.

been paid to Ngati Hinearo and Ngati Tumanunu. On 21st February 1879 and 5th March 1879 Ngati Hauiti, Ngati Tumanunu, and Ngati Hinearo signed two deeds of agreement to sell the block to the Crown and acknowledged the receipt of £6,000 as an advance towards their 'individual and collective' interests, that is, 7s 6d per acre. The vendors also agreed to 'have the said land passed through the Land Court with the least possible delay.' In December 1878, James Mackay – who had taken advantage of Booth's suspension to establish a claim to the block - assigned to the Crown all his interest in Otairi and Te Kiekie as acquired from Kawana Hunia for the sum of £55, a clear indication that he had barely secured a toehold in the block. The sums advanced to Keremene Pakura and Ropata Rangitahua were on account of provisions for the survey party, the payment of £100 to Wirihana Hunia had been made at the direction of the Native Minister, while Booth recorded that the amount of £500 had been paid to 'a section' of Ngati Apa 'who I concluded after inquiry were interested in the block, and who have since proved their claim.'

85. This shows that, in Otairi, the Crown used tamana to its advantage in the following ways:

a. It allowed the Crown to deal with various individuals, rather than a collective group of owners, which in turn enabled the Crown to:
   i. easily secure an interest in the block; and
   ii. secure an agreement to purchase the block without needing to set a purchase price;
b. It persuaded the Maori owners to put their land through the NLC; and
c. It induced Maori to pay for the survey costs which were required to enable the Crown to purchase the land.

86. In addition to the above, the evidence clearly notes that some of these advance payments were "*made at the direction of the Native Minister*" – which shows that the use of tamana was approved at the top level, not just the work of a rogue agent.[74]

87. The "severe contest" that was the title investigation of Otairi was heard in late 1880.[75] The hearings lasted 40 days, and concluded with the block being partitioned into four main titles – Otairi 1, Otairi 2, Otairi 3, and Otairi 4. To the Crown's satisfaction, the two larger blocks – Otairi 1 and Otairi 2 – were awarded to Ngati Hauiti (the major recipients of the Crown's tamana).[76]

88. In 1881, Otairi 1 and 2 were further broken up into smaller subdivisions – with the sub-blocks known as Otairi 1A and 2A being awarded to the Crown for its payments of tamana.[77] It is noted that further partitions took place in 1882 upon the Crown's application for readjustment of boundaries.[78] The situation that played out in Otairi is, therefore, a classic example of tamana – by way of the Crown's policies legislation, particularly with the NLC – being used to break up blocks of Maori land. The fragmentation of land title removed communalism, encouraged the sale of Maori lands, which ultimately undermined collective iwi authority and ownership values in lands.

89. Taihape Maori owners of Otamakapua were also at the mercy of the practice of tamana distribution. The ownership of Otamakapua (which totals 112,013 acres) was vigorously contested over the course of about 15 years:[79]

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74 Hearn, *Sub-district block study – southern aspect*, at 150 – 152.

75 Hearn, *Sub-district block study – southern aspect*, at 156.

76 Hearn, *Sub-district block study – southern aspect*, at 157.

77 Hearn, *Sub-district block study – southern aspect*, at 162.

78 Hearn, *Sub-district block study – southern aspect*, at 164.

79 Hearn, *Sub-district block study – southern aspect*, at 42.

a. During the period 1870 – 1879, the sub-block known as Otamakapua 1 (**O1**) was stuck in limbo. This was due to the various owners' lack of understanding as to the NLC processes, and also uncertainty as to their claim. So, while O1 was before the NLC in 1870 for a series of hearings, the title was not ultimately determined or issued;[80]

b. In May 1875, the Crown paid £3,200 in tamana to Renata Kawepo for Otamakapua 2 (**O2**). And, without missing a beat, in June 1875, the land was proclaimed under section 42 of the Public Works and Immigration Act 1971 (the effect of a proclamation under this provision meant it would be unlawful for any other person to try purchase the block);[81]

c. The tamana payments to Renanta Kawepo caused great objections, coming from the likes of Te Keepa Rangihiwinui, Utiki Potaka, and Kawana Hunia – all who claimed that they had interests. The skirmishing, which resulted from these interests and claims, would continue for many years, keeping the matter out of the NLC until 1879 ;[82]

d. In 1879, Renata Kawepo secured agreement with Crown agent James Booth for the sale of O2 for 10 shillings per acre, and to arrange for the NLC title investigation to be in Napier (as the Crown wished). This prompted Kawana Hunia (and some of Ngati Apa) to also agree to those same terms. Utiku Potaka (Ngati Hauiti), and various others (including some of Ngati Apa), however, opposed the sitting in Napier. The reasons for opposition were that:[83]

> *First, this land Otamakapua is in this district and not in the Napier district.*

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80 Stirling, *Nineteenth century overview,* at 39 – 42.

81 Hearn, *Sub-district block study – southern aspect*, at 48; and Stirling, *Nineteenth century overview,* at 46.

82 Hearn, *Sub-district block study – southern aspect*, at 48, and 51 – 53; Stirling, *Nineteenth century overview,* at 46 – 47.

83 Stirling, *Nineteenth century overview,* at 81.

Second. Napier is the permanent place of abode of Renata Kawepo, who is a counter-claimant, as well as some of the Ngati Apa.

Third. In fourteen days the adjudication upon Otamakapua will commence and we have not had sufficient time to meet and decide upon our course of action.

Fourth. There are no funds at our disposal to take us to Napier or to convey thither persons to give evidence in our favour.

Fifth. One of our most important witnesses is at Nelson, in the other island.

Sixth. This is the winter season and our people will not be able to go to Napier, perhaps there will be or two of us go, not more.

Seventh. This land which we are occupying and which was the property of our ancestors and descended from them to us, should be adjudicated upon in the district in which it is situate.

The valid reasons for opposition had no effect on neither the Crown nor the NLC's position;[84]

e. The opposers attempted to "resort to the law", and seek an adjournment of the NLC hearing.[85] However, as Stirling notes, "*the problem with resorting to the law in the Native Land Court was that the government held the whip hand*."[86] So, while many adjournments occurred, they were only those which the Crown wanted.[87] The Taihape Maori counter claimants were crippled financially as:[88]

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84 Stirling, *Nineteenth century overview,* at 79 – 81.

85 Stirling, *Nineteenth century overview,* at 82.

86 Stirling, *Nineteenth century overview,* at 82.

87 Stirling, *Nineteenth century overview,* at 82.

88 Stirling, *Nineteenth century overview,* at 84.

> *The government's sudden adjournment of the Otamakapua case simply compounded the convenience to which the resident claimants had been put; they were already at Napier or en route there, and could scarcely rearrange their hasty travel plans on just a few days notice. As a result they were now stuck at Napier for another month, waiting on the government's pleasure.*

f. The financial pressure finally caused various individuals and groups to give in. In August 1879, Utiku Potaka met with Renata Kawepo and Booth and, as a result accepted an advance of £120, and "*all differences between the two sections of the tribe now at an end*".[89] Kawana Hunia and various Ngati Apa representatives were, also, advanced £120 each – the total of advances amounting to just over £4000; [90]

g. The NLC's title investigation hearing for O2 was finally held in September through to October of 1879 in Napier. The Court granted the title to Ngai Te Upokoiri, Ngati Hauiti, Ngati Hinemanu, Ngati Tamakopiri, Ngati Tumokai, and Ngati Whitikaupeka; and

h. In May 1880, Utiku Potaka renewed the claim for O1 before the NLC. This was likely triggered by the skirmishing in O2, which made him eager to secure the interests of O1. There was no contest for the claim, so the title was issued entirely to Utiku Potaka and 11 others of Ngati Hauiti.

90. After the title investigations of Otamakapua, the Crown continued to make advance payments to, and securing signature of, the title owners determined by the NLC – an example of the Crown using advance payments

89 Stirling, *Nineteenth century overview,* at 84.

90 Stirling, *Nineteenth century overview,* at 84.

to purchase undivided shares.[91] The ultimate end result is that approximately 107,274 acres out of the entire 112,013 acres of the Otamakapua block is now in Crown ownership, with the total purchase price paid recorded as approximately £50,000.[92]

91. The chaos that was the Otamakapua transaction perfectly demonstrates the complication, conflict, divisions, and other issues caused by the Crown's approaches of paying tamana before the NLC title determination and making purchases of undivided shares of blocks. This block perfectly exemplified that, when the Crown prematurely decided who to pay (and who not to pay), it:

    a. took risks in paying those who may have had no rights at all – for example, it paid an approximate £4000 to individuals in Ngati Apa, a party who was found to have no rights in the block;
    b. treated substantial advance payments made to individuals as an advance against the purchase price and, therefore, into a levy imposed on all owners;
    c. forced the land to be put through the NLC, leading to heavy partitioning and fragmentation of the land;
    d. placed itself in a position where it was able to manipulate and influence the processes of NLC, creating an unfair playing field; and
    e. enabled the Crown to "buy out" individuals, which caused divide between Taihapae Maori – this thereby destroyed any ability for Taihape Maori to work as a collective group.

92. The evidence is also clear in showing how Taihape Maori viewed, and understood, both the practice of distributing of tamana and its impacts in the following blocks:

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[91] Hearn, *Sub-district block study – southern aspect*, at 75 – 88; and Stirling, *Nineteenth century overview,* at 93 – 108.

[92] Hearn, *Sub-district block study – southern aspect*, at 75 – 88, and 136; and Stirling, *Nineteenth century overview,* at 93 – 108.

a. It is noted that amidst the Otamakapua block feud (particularly O2), there were many instances of Taihape Maori claimants requesting that no further payments of tamana be made – many times, references were made to the fact that, because the Crown had made a payment to Kawepo, ownership had been effectively established. These pleas demonstrated that Taihape Maori understood issues and harm which tamana gave rise to and, thus, did not want more;[93]

b. The various Taihape Maori owners of the Te Kapua blocks, also on multiple occasions, wrote to the Crown requesting that payments of tamana be stopped until the issues (protests and applications for rehearings) relating to the controversial NLC determination had been settled;[94] and

c. As noted by Subasic and Stirling, the same was, again, observed in Awarua in 1890, where, requests were made to the Native Minister, asking that no advance payments be paid before the hearing for the partition of Awarua took place.[95]

93. The tactic of distributing tamana also enabled the Crown to deal selectively with "willing seller" owners rather than the "rightful" owners. This gave rise to serious issues, such as:

a. whether those supposed "willing seller" owners who accepted the tamana were acting with the consent of their co-owners or in their own interests; and

b. whether the "willing seller" were even the rightful person/s to deal with.

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[93] Hearn, *Sub-district block study – southern aspect*, at 51 and 54.

[94] Subasic and Stirling, *Sub-district block study – central aspect*, at 25.

[95] Subasic and Stirling, *Sub-district block study – central aspect*, at 25 – 26.

94. In Otamakapua also – Dr Hearn has noted that: [96]

> *The evidence indicates that* ***McLean was well aware that others besides Renata Kawepo had claims to Otamakapua and yet he chose to deal with the latter over the objections of other claimants****.* ***The evidence also indicates that Booth did not always identify the rightful owners: although he treated with Ngati Apa, in fact the Native Land Court subsequently rejected the iwi's claim to the block. It is at least possible that Mclean and Booth chose to deal principally with Kawepo given the latter's disposition to sell rather than with Ngati Apa or at least some members of who were prepared to consider selling to private purchasers.*** *If so, Otamakapua was not an isolated case, for the evidence relating to Rangitatau in the Whanganui Inquiry District makes it clear that Booth chose to negotiate with and make advance payments to one group of supposed owners and, apparently, to ignore the claims of those negotiating with private purchasers for the sale of the land. The evidence indicates that the latter were prepared to conclude far more favourable terms with the owners and it is clear, acting on instructions, that in dealing with another group of supposed owners Booth was attempting to disrupt those negotiations. It seems likely that he employed the same tactic in respect of Otamakapua.*

95. Dr Hearn further noted that:[97]

> *The accounts of the purchasing process offered by Booth and Sheehan imply that all owners were consulted during the purchase meetings that they described.* ***This seems unlikely, not least given the highly contested proceedings in the Native Land Court which***

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96 Hearn, *Sub-district block study – southern aspect*, at 263 – 265. Emphasis added.

97 Hearn, *Sub-district block study – southern aspect*, at 265. Emphasis added.

followed title investigations and which were devoted to establishing who precisely the owners were in any given block.

96. So, to be clear, even when Crown agents lead their readers to believed that there was full consultation over their purchases, this cannot be taken at face value, and is indeed highly unlikely.

97. However, as we have seen from the blocks above already, regardless of these "unwilling" owners, the payment of tamana to *any one* "willing" seller could have triggered the NLC mechanisms. This allowed the Crown to easily single out and deal with willing individuals, rather than the iwi/hapu as collective groups. And through the workings of the NLC, the Crown easily secured as much land as possible, for as cheaply as possible in this manner.

98. The Crown also selectively dealt with "owners" in the block that is now known as Waitapu. The Waitapu block was "ingeniously discovered" by Kawana Hunia (Ngati Apa) – it was found that, after the purchase of the Rangitikei-Manawatu block just south of the Taihape Inquiry district, the surveyors had actually omitted a large block of land (Waitapu).[98]

99. Ngati Hauiti claimed ownership interests in the block – they had been largely excluded from the Rangitikei-Manawatu block purchase negotiations and deed although it had purported to include a large area of their land. As Ngati Hauiti were the key owners of the very large adjoining Otamakapua block (which the Crown was in the midst of negotiating the purchase of), the Crown agreed, in 1872, to adjust the boundaries for the Waitapu block, presumably to influence Ngati Hauiti in relation to their nearby interests, such as in Otairi and Otamakapua.[99]

100. Matters relating to Waitapu, however, were put on hold not long after the boundaries were re-defined, likely due to the extensive and troubled

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[98] Hearn, *Sub-district block study – southern aspect*, at 245.

[99] Subasic and Stirling, *Sub-district block study – central aspect*, at 56.

negotiations over the Otamakapua block.[100] And, in 1876, the Crown decided that half of Waitapu would go to Ngati Apa, and the other half to Ngati Hauiti and Upokoiri.[101] This led to further conflict between Taihape Maori claimants, with the Waitapu matter eventually falling into abeyance again for three years.[102]

101. In 1879, purchase negotiations for Waitapu were re-ignited. Ngati Hauiti and Upokoiri were paid half of the purchase price in October 1879.[103] Kawana Hunia of Ngati Apa was, however, unhappy that Ngati Hauiti and Upokoiri had been paid and recognised as having interests in the block. Kawana Hunia, therefore, refused to sign the Ngati Apa half of the deed until the Crown promised to make an Inquiry into the relative interests with Waitapu. Dr Hearn has recorded that:[104]

> *It emerged that Hunia had signed the deed on the express understanding that the sale did not debar him from pressing his alleged claim against the government in respect of the monies paid over at Omahu to Utiku Potaka, Renata Kawepo, Hamuera Te Raikokiritea and others for their share of Waitapu. Booth agreed to assist Hunia to secure an investigation into his claims 'by competent authority,' a concession made to Hunia individually and not to Ngati Apa generally.*

102. The Crown, however, failed to honour this promise. It was not until 1886, when Kawana Hunia's son raised the issue again, that Booth, as the Resident Magistrate of the time, dismissed the claim – the Crown appears to have based its decision on the NLC determination in favour of Ngati Hauiti and

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100 Stirling, *Nineteenth century overview,* at 59.
101 Stirling, *Nineteenth century overview,* at 60.
102 Stirling, *Nineteenth century overview*, at 61.
103 Stirling, *Nineteenth century overview,* at 65 – 66.
104 Hearn, *Sub-district block study – southern aspect*, at 252 – 253.

Upokoiri for the Otamakapua block, "of which Waitapu was originally a portion".[105]

103. The situation which played out in Waitapu further emphasises the issues already outlined at paragraph 97 – that the Crown's approach of paying advances was a risky technique which essentially locked all owners of the block into land sales without having to legitimately consult obtain their consent.

104. It is noted, however, that the Crown occasionally made attempts to ensure under-the-table tactics were not used to secure land. In 1875, the land purchase officers were reminded by the Native Minister that:[106]

> *All land transactions in behalf of the Government must be conducted as openly as possible and that in all cases the leading chiefs must be consulted, and they are strictly to avoid making payments to individuals who stealthily offer to part with their interests; such a course is decidedly objectionable as leading in some instances to natives receiving money without due inquiry as to their right to dispose of the land, thereby causing much discontent among the real owners and prejudicing the native mind against the action of Government officials.*

105. Despite such apparently clear instructions, however, the evidence is clear in that confidential and undisclosed pre-title advance payments continued to be paid out until the 1880s – such as in the Otairi block (see paragraphs 84 – 88). Or, regardless of the ban, the Crown would insist on completing the transactions in which it had already paid tamana – such as the Otamakapua block.

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[105] Hearn, *Sub-district block study – southern aspect*, at 255; Stirling, *Nineteenth century overview,* at 67 – 69.

[106] Hearn, *Sub-district block study – southern aspect*, at 261.

106. So, while the Crown officially directed that secret dealings and payments were not to take place, this was simply a passive action. The fact that the Crown agents continued to distribute tamana and conduct transactions in secret shows that the their superiors in Wellington took a back seat rather than actively taking action to ensure that such practices were not being carried out. Maori landowners in Taihape were hardly protected in the ownership of their lands and resources by those at the head of the Crown system.

107. Also, the Crown, in its purchase of Awarua, recognised that the route of its intended railway was ultimately dependent on "*settling the native difficulty*".[107] Accordingly, it took every step it could to ensure it maintained an amicable relationship with the various iwi. This caution was reflected in its clear unwillingness to take any Maori land for the railway unless it was able to enter into negotiations with the owners, and also in its resistance to making any advance purchases. This clearly shows that the Crown recognised the issues and risks related to the use of tamana, and was also capable of refraining from this practice – when its own interests were to do so, as opposed to acquiring the land by any means possible.

108. In summary, the evidence shows that tamana often meant that:

a. The "willing sellers" were provided with the financial ability to bring the land to the NLC and, therefore, give them an advantage in terms of obtaining title to the land over any other "non-seller" owners. This, in turn, gave the Crown a substantial advantage in obtaining shares to a block before any "unwilling seller" owners even had an opportunity to put their case for ownership. This sabotaged any already-limited ability to conduct collective consultation or decision making within the iwi as a united body of owners, thereby allowing the Crown to set down the purchase price for a block without

[107] Subasic and Stirling, *Sub-district block study – central aspect*, at 72.

needing to deal with the owners collectively. This was the very epitome of the divide and conquer principle, and the very opposite of good faith dealing and active honouring of the Tiriti guarantees;

b. The recipients of the monies were recognised to that extent as the owners by Crown officials. Accordingly, the acceptance of tamana was viewed by the willing seller owners as the very first step to establishing title to lands; and

c. If one willing seller owner accepted tamana, this could spark concern amongst the other owners of either ending up being paid less or being deprived of the title and their interests altogether. This belief was not without foundation, as sometimes the Land Purchase Department or the NLC apportioned advances paid at the time of partition over the shares of all grantees in the block as a body irrespective of which individuals had taken the advances.

109. It is therefore clear that the practice of distributing tamana allowed the Crown to hold the real power when blocks were brought before the NLC. As the Te Roroa Tribunal found:[108]

> *The payment of tamana was undoubtedly an established pressure tactic, an unfair practice designed to purchase land as quickly and cheaply as possible, and incompatible with the Crown's fiduciary duty under the Treaty.* ***Tamana was a sprat to catch the mackerel.***

110. This undermining of collective right-holding and community decision making, which was at the core of Maori society and attitudes, is a breach of te Tiriti and its principles. In Whanganui, for example, the Tribunal found that the Crown had acted in bad faith when it purchased undivided share purchases because:[109]

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[108] Waitangi Tribunal *The Te Roroa Report* (Wai 38, 1992) at 60. Emphasis added.

[109] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 535.

> *When part-owners sold their interests in a block, usually without reference to the wishes of the wider community of owners, those who elected not to sell bore the costs of the surveys and partitions that selling necessitated. Partition costs should have been borne by the party seeking to buy, sell, or lease. In particular, the Crown alone should have borne the cost of its piecemeal purchase of blocks, and the more frequent surveys and partitions that resulted.*

111. Whanganui Maori communities could not choose to opt out of the Crown's system. The Crown's title and purchasing system undermined the collective agency of Maori communities. They were ultimately at the mercy of any member who needed money. On some occasions the land would sold by someone who lived outside the community, and was included on the title 'out of aroha'. The scope of decision-making was limited to an individual level, making it almost impossible at the community level – this was fatal to their communal culture, as was the case in Taihape.[110]

112. When there is destruction and loss of communal decision making, this then leads to a loss of community title and control – yet a further prejudice upon Taihape Maori. In the *Tangata Turanga Tangata Whenua Report*, the Tribunal held that:[111]

> *The **expropriation of community title and control through the individualisation of sales, breached both the title and control guarantees in the Treaty**. As we said in section 2, the control guarantee was made in respect of each right holding level in Maori society 'ki ngarangatira' (to the chiefs), 'ki nga hapu' (to the tribes or communities), 'ki nga tangata maorikatoa' (and to all of the ordinary or Maori people). The title guarantee in the English text contained*

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110 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 533.

111 Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) at 535. Emphasis added.

similarly comprehensive wording. ***It is no answer to say that community rights were adequately replaced by individual rights.*** *They could not be. The Treaty guarantees were made at both levels.* ***Most importantly, Maori, both in Turanga and nationally, consistently demonstrated that they wanted to retain community titles in the new economy. In our view, that aggravated the breach. The title guarantee was, after all, to hold good 'for as long as they wished to retain the same'.*** *The expression of Maori preference in this respect was disregarded because it was inconvenient.*

113. In conclusion, the Crown, through its practice of paying tamana, while not illegal under the provisions of the various Native Land statutes at the time, breached its obligations under te Tiriti and its principles in the following ways:

a. By permitting itself, and even preferring, to deal with individuals rather than the collective hapu or iwi owners, the Crown:
   i. Undermined the collective ownership and community decision-making abilities of Taihape Maori, thereby disregarding and failing to recognise the tino rangatiratanga of Taihape Maori as guaranteed in te Tiriti; and
   ii. Denied the unwilling owners a chance to be properly consulted or participate in decisions regarding their lands, therefore, failing to meet its duty to consult, in breach of the principle of partnership;

b. In failing to take appropriate action in limiting or stopping the continual use of tamana, it permitted the ultimate result of land loss – thereby being in breach of its duty of active protection; and

c. By using tamana, it was able to proclaim the lands in question, therefore, locking out any private competition. This limited the options for Taihape Maori owners to deal with their lands, thereby

breaching the Article Two guarantee in relation to the principle of options.

114. And, just as Dr Hearn has observed: [112]

> *Just as it was clear that secret pre-title advances contributed significantly to the tension over land transactions that emerged in the Upper Whanganui region during the late 1870s and early 1880s,* ***so they did in the Taihape Inquiry District****.*

115. As the evidence demonstrates that the circumstances in Taihape were very similar to that of Whanganui, it is submitted that the same should apply in terms of findings in relation to the Crown breaches.

Enlisting Assistance

116. The Crown also made payments that were additional to tamana. In Otamakapua, for example, Renata Kawepo, before receiving tamana in the sum of £3,200, was paid £2,000 for his "assistance".[113] Such payments were mostly made with the intention of enlisting the assistance of individuals for the purchase of the land the Crown was interested in. And, unsurprisingly, these monies significantly compromised such individuals' ability to act in the interests of their co-owners.[114]

117. In 1873, for example, when the Crown entered into negotiations for the purchase of the Otamakapua block with Utiku Potaka in 1873, the Crown agreed to meet the expenses for Potaka to assist in getting "*the Otamakapua claim investigated at the last sitting of the Native Land Court at Rangitikei, with a view to its ultimate disposal to the Crown*".[115] Potaka's

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[112] Hearn, *Sub-district block study – southern aspect*, at 261. Emphasis added.

[113] Hearn, *Sub-district block study – southern aspect*, at 265 – 266.

[114] Hearn, *Sub-district block study – southern aspect*, at 265.

[115] Hearn, *Sub-district block study – southern aspect*, at 46.

efforts were, however, thwarted by imperfect survey work, leading to the NLC investigation being adjourned. This resulted in Potaka never getting paid his honorarium of £52 for the work undertaken. [116]

118. In 1874, the Crown continued considering negotiations for the purchase of Otamakapua – in particular, negotiating O2 with Renata Kawepo. The officials found negotiating with Kawepo a difficult task. This was aggravated by the fact that, at this point, O2 had already been advertised to the public, and a private purchaser had offered to sell at 5s 6d per acre, which Kawepo had been instructed by Ngati Apa to accept. These difficulties resulted in negotiations being put on hold.[117] In 1875, however, Booth paid Renata Kawepo the sum of £3,200, as: [118]

> *'First payment on account of purchase of block of land known as Otamakapua containing 147,325 acres'. That same day, he was paid* ***£1,000 'For services in negotiating sale of block of land to the government 147,325 acres*** *Oroua district' and £1,000 for the survey of the block 'and other incidental expenses.'*

119. Similar monies were also paid to enlist such assistance in Te Kapua: [119]

> *To secure its purchase of the contested Te Kapua title at less than the land was worth,* ***the Crown resorted to bribing influential owners with bonus payments, and succeeded in acquiring all three portions in 1891. This underhanded action ultimately secured not only the Crown's title but also that of those to whom it had earlier been wrongly awarded.*** *The Supreme Court later found that the Chief Judge of the Native Land Court had failed to inquire into the applications for a re-hearing; an improper action that would have*

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116 Hearn, *Sub-district block study – southern aspect*, at 46.

117 Hearn, *Sub-district block study – southern aspect*, at 47.

118 Hearn, *Sub-district block study – southern aspect*, at 48. Emphasis added.

119 Subasic and Stirling, *Sub-district block study – central aspect*, at 37. Emphasis added.

led to the title being quashed but for the fact that, by the time the Supreme Court made this determination in 1893, the Crown had already acquired title to all of Te Kapua.

120. In the Whanganui district Inquiry, also, the Crown was also found to have made payments for the purpose of (1) encouraging the recipients to persuade co-owners to sell, and (2) recompensing the recipients for other services which advanced the Crown's purchasing objectives.[120] The Tribunal found there that: [121]

> *Good faith was lacking because the crown abused its position as a monopoly purchaser, paying low prices and using restric-tions on private dealing to prevent Maori from entering into arrangements like leases. It exempted itself from most restrictions, so did not limit the quantity of Maori land alienated in the period.* ***Rather, it used money as an enticement to sell,*** *both through tamana, and* ***through payments to rangatira to enlist their support for sales to the crown. This subverted traditional leadership.*** *The crown also made too few reserves.*

121. In conclusion, the Crown, by paying individuals monies (or bribes) to enlist their "assistance" to further Crown purchasing intentions:

a. Breached its duty to act in good faith and thereby also the principle of partnership; and
b. Interfered with the ability of hapu/iwi to make their own communal decisions according to their own tikanga and preferences, and thereby undermining the customary social structure –breaching its duty to actively protect Maori interests and tino rangatiratanga.

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120 Hearn, *Sub-district block study – southern aspect*, at 265 – 266.

121 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 535. Emphasis Added.

Monopoly Powers

122. The evidence shows that the Crown had an inclination towards excluding any form of competition when it came to purchasing land to give itself an advantage and "save" money by getting the land for a heavily discounted price. From 1840 to 1865, the Crown considered that it had a pre-emptive right to purchase land regardless of whether or not it had obtained agreement from Maori – this, essentially, established the Crown's monopoly powers. In 2017, the Supreme Court case of *Proprietors of Wakatu v Attorney-General* summarised pre-emption in that period as follows:[122]

> *No land could be alienated by Maori, except to the Crown. The Crown's exclusive right of pre-emption was granted by Maori to the Crown in the Treaty and was imposed by legislation on European would-be purchasers of land, including in respect of pre-Treaty purchases. The Crown recognised no title to land in New Zealand other than that held by Maori according to their customs and usages and that established by the Crown's own grants (following extinguishment of native title).*
> *[…]*
> *No land in New Zealand became Crown land until native title was first cleared away. Native title could be cleared in two ways: by direct exercise of the Crown's exclusive right of pre-emption, through purchase by the Crown from Maori; or through a determination by a Commissioner under the Land Claims Ordinance process that a pre-1840 purchase had been on equitable terms.*

123. In 1864, the Crown relinquished its pre-emptive right of purchase when it created the NLC which had as its primary task the conversion of customary rights and interested into Crown derived title. The Crown, however, was able to continue locking out purchasing competition from private interests

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122 *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 [28 February 2017] at [96] and [99].

through section 42 of the Immigration and Public Works Act Amendment Act 1871. The effect of this provision was that, if the Crown was to enter into negotiations for purchasing customary land from Maori for the purposes of public works, no private party could seek to acquire such land. This was then extended by section 2 of the Immigration and Public Works Act 1874, which provided that section 42 would also cover any land which the Crown was negotiating to lease with an option to purchase. These notifications were placed on the title for two years, and could be re-issued.[123]

124. In 1877, the Crown's right of pre-emption was reinstated with the passing of the Government Native Land Purchases Act 1877 (**GNLP Act**). Section 2, in particular, provided that if the Crown had paid any money or entered into any negotiations for the purposes of purchasing Maori land in the North Island, and such land had not yet passed through the NLC, a notification could be issued regarding such land, and it would be unlawful for any other person to attempt to deal with this land.

125. In the Whanganui Inquiry, a number of owners of a certain block actually sought to repay tamana received from the Crown with the prospect of having the notifications revoked so it could pursue negotiations with private purchasers.[124] There, the Tribunal found that the Crown – in restricting the options available to Whanganui Maori to the point where they were forced to sell to the Crown – had not acted in good faith and, therefore, breached its duties under te Tiriti.[125] The Tribunal found that: [126]

> *The obligation to act in good faith is fundamental to any partnership. In its dealings with Whanganui Maori and their land, however, the Crown repeatedly breached it when it acted to undermine te tino rangatiratanga and the ability of communities to*

123 Hearn, *Sub-district block study – southern aspect*, at 266.
124 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 535.
125 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 535.
126 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 535.

act collectively, and when it restricted the options available to Whanganui Maori to the point where they had to sell to the Crown.

126. The Crown made frequent use of its powers under section 2 of the GNLP Act, to the detriment of private purchasers in the Taihape district.[127] Dr Hearn observed that:[128]

> *In the case of the blocks in the southern section of the Taihape Inquiry District, the evidence is clear that while owners may have wished to proceed, private purchases were deterred by the notifications that had been issued* [i.e. Gazette notices saying the Crown had acquired an interest].

127. In the Taihape Inquiry district, it was evident that, in many cases, private purchasers were willing to offer terms of purchase more favourable than those offered by the Crown, with which the Crown often interfered (or attempt to interfere) to its own advantage. In Otairi, for example, the Crown's concerns and intentions with regard to private interests are clearly reflected in the reports of Land purchase agent Booth to the Native Land Minister:[129]

> *1st Otara is the very choicest portion of the Otairi Block, and 2nd* […] *it will be establishing a dangerous precedent to allow any portion of a proclaimed Block to pass into private hands.*

128. However, he continued on to say: [130]

> *It might fairly be argued that valuable reserves out of a large Block ought to be made inalienable.*

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127 Hearn, *Sub-district block study – southern aspect*, at 268 and 269.

128 Hearn, *Sub-district block study – southern aspect*, at 269.

129 Hearn, *Sub-district block study – southern aspect*, at 152.

130 Hearn, *Sub-district block study – southern aspect*, at 152.

129. It is noted that the Crown purchase agent had first to cut the reserves out of the purchased block which did not often happen to the extent that Taihape Maori would have wished. However, those reserves frequently were not protected by the Crown agencies and systems, and were not genuinely respected as inalienable.

130. And, in early 1880, Ngati Hauiti actually indicated that, as part of the purchase transaction, they wished for 11,000 acres of Otairi to be set aside as a reserve. This was, however, not going to happen on the Crown's watch. Dr Hearn recorded that:[131]

> *Native Minister Bryce was adamant. 'We cannot allow the best of the block to be cut out in the manner proposed,' he announced, in July 1880. 'A very high price is being paid considering the character of the land and Govt cannot afford to allow the best to be picked out.'*

131. And:[132]

> *The Crown thus decided to defer consideration of the purchase […] It was at the same time negotiating with Utiku Potaka and others for the purchase of the adjacent Otamakapua. Booth thus suggested to Gill that if the final purchase of Otairi were 'adjourned,' there would be a 'greater chance of completing [the] Otamakapua purchase.' In short, the Crown clearly expected Ngati Hauiti to employ its position in Otamakapua to secure its wants in Otairi.*

132. This is a clear demonstration of the Crown using its monopoly powers in a coercive manner. It operated in a way which, essentially, meant that if Taihape Maori did not agreed to sell them the best land and give it up

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131 Hearn, *Sub-district block study – southern aspect*, at 159.

132 Hearn, *Sub-district block study – southern aspect*, at 159.

forever, the Crown would put off, stall, or stop negotiating with them all together. It is submitted that, acting coercively in its land purchase dealings completely goes against any notion of acting in good faith and, therefore, constitutes a breach of the principle of partnership.

133. In Otamakapua also, the Crown was able to deal with a group of supposed owners who were more predisposed to selling to the Crown (Ngati Apa), while ignoring the other co-owners (and perhaps *the rightful* owners) who looked to negotiate with private purchasers.[133] And, as negotiations for the Crown's purchase dragged out due to reluctance from the owners' side, it was observed by Stirling that:[134]

> *… The government was becoming impatient and Booth observed confidentially that he expected Renata Kawepo would do what he could to get the Otamakapua deed completed as he was "very much in want of money just now." This comment was made in the context of Renata seeking an advance on an adjacent block (Otairi). In response Booth recommended the government "put him off," in order to "induce him to complete the Otamakapua sale." Renata had been in financial strife for some time. His plight was such that, in March 1880, he had judgments against him for other debts and borrowed £257 from Buller, promising to repay that sum from the Otamakapua purchase proceeds.*

134. This was, again, another example of the Crown using, in an abusive manner, the monopoly it had over land purchasing. It would use knowledge of the Taihape owners' weaknesses and struggles to its own advantage to either induce or force Taihape Maori owners into a position where they had to sell their land. The Crown has, therefore, not:

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133 Hearn, *Sub-district block study – southern aspect*, at 263 – 264.

134 Stirling, *Nineteenth century overview,* at 99.

a. acted in a good faith, and thereby has not accorded to the principle of partnership as required under te Tiriti;
b. met its obligation to actively protected Taihape Maori interests; and
c. met its obligations in relation to the Article Two guarantee for Maori to retain their lands for as long as they wished.

135. A point in relation to the Crown's "monopoly powers", however, is the fact that the Crown actually had the ability to revoke the notifications it had on a particular land block under section 3 of the GNLP Act once it relinquished negotiations, or ceased to have interests in the land. The Crown clearly showed that it was able to do this in Otairi – in 1886, the Taihape Maori owners became concerned at the Crown's delay in completing the sale and, therefore, indicated their wishes to repay the advances (likely so they could deal with private purchasers offering better deals).[135] Here, the Crown, however, effectively trapped the Taihape Maori owners into a catch-22 situation: the bank which the owners were dealing with was unwilling to help with repayment monies if the Crown's notification on the block remained. However, the Crown, on the other hand, was also *unwilling* to revoke the notification if it did not secure repayment of advances first.[136] This therefore meant that the Crown could continue to block any other dealings on the land, which it did. It simply refused to make proper efforts alongside the Maori owners to work their way out of this predicament. Instead:[137]

> *The Under Secretary of the Native Land Purchase Department advised Native Minister Bryce that '**No proposal will be satisfactory to winding up this matter, either than by purchasing the whole Block 58,905 acres @ 7/6 per acre or the Native Land Court***

[135] Hearn, *Sub-district block study – southern aspect*, at 160.
[136] Hearn, *Sub-district block study – southern aspect*, at 160 – 162.
[137] Hearn, *Sub-district block study – southern aspect*, at 162. Emphasis added.

ascertaining what interest the Government have in the Block ...'
Bryce directed that the matter should be referred to the Court.

136. This not only shows that the Crown had no interest in assisting, or even simply allowing, the owners to retain their land, in accordance with the owners' clear wishes, it also shows that the Crown's position was, effectively, intransigent self-interest and pursuit single-mindedly of its own settler-focused policies and practices. This, it is submitted, clearly constitutes breaches of the Crown's duties of active protection, partnership, and to act in good faith.

137. Similar tactics of excluding private purchaser competition were seen in Awarua. Subasic and Stirling observed that:[138]

> *It was not so much the route of the railway line through Taihape that was critical for the Crown to secure (for that was a relatively easy task). More important to the Crown was securing the land around the railway, and it sought to acquire as much of Awarua as possible for as little as possible before the railway was put through. It could then sell the land for a profit to help fund its costly and critical piece of infrastructure.* ***It was assisted in this strategy by the imposition of pre-emption, which excluded private competitors from the market and forced Maori land prices down to the meagre level the Crown was willing to pay.***

138. Ultimately, the fact that only approximately 25% of land was sold to private purchasers is a good indicator that the Crown was relatively successful in shutting out private competition.[139]

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[138] Subasic and Stirling, *Sub-district block study – central aspect*, at 160. Emphasis added.

[139] Fisher and Stirling, *Sub-district block study – northern aspect*, at 257; Hearn, *Sub-district block study – southern aspect*, at 136; and Subasic and Stirling, *Sub-district block study – central aspect*, at 192.

139. As already discussed in paragraph 122, the Crown was clearly concerned about purchase competition which intensified in the 1870s – the main reason being that the competitors would push prices up. Arguably, this would have set a fair market price for the sellers – but those Maori sellers' interests did not enter the Crown's calculus.

140. This, in turn, gave rise to the further issue relating to purchase prices, and *how* the Crown set what it would pay. There seems to be little evidence in the Inquiry record of how the Crown came up with the prices it offered to purchase land – other than the fact that it looked to acquire as much as possible for as cheaply as possible.

141. Mangoira provides an example of the Crown's random "system" of shifting in the prices it agreed to pay and, consequently, also demonstrates how Taihape Maori were prejudiced by this "system". In 1876, the Crown agreed to pay the owners of Mangoira a total £12,500 for the area which it had believed, at that point, to be approximately 50,000 acres (so, a rate of five shillings per acre). The actual area was determined to be closer to 35,000 acres upon surveying in 1877. Even so, the Crown recognised that at least a third of the block was "excellent level land". Stirling has observed that:[140]

> ***The excellent land east of Otamakapua was presumably worth the 10 shillings per acre being paid for Otamakapua; this part of Mangoira was thus worth at least £5,000 which is considerably more than the government was proposing to pay for the entire block****. A separate and slightly later return noted the final area of 35,660 acres, and an adjusted total purchase price of £6,250 (or three shillings five pence per acre).*

142. However, when the purchase of Mangoira was completed, the final price paid amounted to only £4,555 – which was not even half of what was

[140] Stirling, *Nineteenth century overview,* at 71. Emphasis added.

originally agreed upon.[141] Counsel notes that the evidence is not clear as to how the Crown convinced the Taihape Maori owners to accept the final purchase price. Dr Hearn also noted in his report that:[142]

> *In the Native Office registers for 1876-1878, a period for which there are no land purchase registers, several references to Mangaoira were located, but all the relevant files were destroyed by fire. The following account relies largely on the Minute Books of the Native Land Court.*

143. In Awarua, as already noted at paragraphs 58 – 63, the Crown was also seen to have attempted to acquire as much of the land around the intended railway as possible, while paying a minimal amount. Here, the Crown imposed its powers of pre-emption, thereby excluding any competition from private purchasers and, consequently, easily forcing the prices down to the derisory amounts which it was willing to pay. It then sold those lands, marketing them as prime real estate near the railway, for a profit to actually fund its North Island Main Trunk railway project.[143] It was a process, implemented to the detriment of the Taihape Maori land owners that was unchanged from the days of Governor Hobson.

144. In the Central North Island Inquiry, the Crown was also shown to have been very concerned about minimising the prices for the sales and purchase of land. There, the Tribunal found that:[144]

> *The Crown's purchase system used monopoly powers to prevent other uses of the land, to keep prices low, and to coerce sales to the Crown.*

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141 Stirling, *Nineteenth century overview,* at 71.

142 Hearn, *Sub-district block study – southern aspect*, at 201.

143 Subasic and Stirling, *Sub-district block study – central aspect*, at 160.

144 Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, S1,* at 650.

> *The system of determining prices was unfair to Maori. It was unrelated to a market value and there were no .auctions or independent valuations, both of which were suggested as remedies. prices were kept low, and no minimum price was set. Instead, the Government left its agents to operate within a maximum price, and many individuals (especially the first to sell) received less than others.*

145. It follows that it would be consistent for the same to be found with respect to the neighbouring Taihape Inquiry district. The historical evidence does not suggest that the Crown practices or methods were uniquely good in Taihape.

146. In summary, the Crown, through its self-awarded pre-emption powers and other methods which it used to lock out competition, limited the options Taihape Maori had when looking to deal with their lands. This meant that it was able to impose a system by which it was able to set prices for land purchase – something that was very unfair towards Taihape Maori. There is neither evidence that it accorded them the market value, nor evidence of Taihape Maori being given opportunities to obtain fair prices through methods such as independent valuations, auctions or tenders. Instead, the evidence points to the Crown excluding any competition through monopoly powers, and arbitrarily setting upper limits for its purchase agents to work within in order to purchase as much land as possible for as cheaply as possible.[145]

147. It is therefore concluded that the Crown, in practice, had a monopoly over land purchasing in the nineteenth century by which breached te Tiriti in the following ways:

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[145] Hearn, *Sub-district block study – southern aspect*, at 270.

a. failed to recognize or give effect to the tino rangatiratanga of Taihape Maori as promised under te Tiriti;

b. through limiting the options Taihape Maori had in dealing with their land, acted in a way which constituted a breach:

   i. the principle of options under Article Two;

   ii. its duty of good faith and, therefore, the principle of partnership; and

c. by imposing a monopoly over land purchasing for its own interests, without proper consideration of Taihape Maori interests, is a clear breach of its duty to actively protect Maori interests under te Tiriti.

Relief Sought

148. The Claimants seek the following relief from the Waitangi Tribunal as a result of the prejudice the Claimants have suffered, and continue to suffer, from the Crown's breaches of the terms and principles of Te Tiriti o Waitangi which have caused the loss of the Claimants' use and retention of their land:

a. a finding that the Claimants' claims concerning the issues resulting from nineteenth century Crown purchasing are well founded;

b. a finding that the Crown has thereby breached its obligations under te Tiriti and its principles;

c. a recommendation that the Crown apologise publicly to the Claimants for loss of land through its own purchasing activities and methodologies;

d. a recommendation that the Crown apologise publicly to the Claimants for causing, as a result of the loss of land, the loss or diminution of the Claimants':

   i. Tino rangatiratanga;

   ii. Kaitiakitanga;

   iii. Culture;

   iv. Identity;

   v. Wairua;

vi. Mana;

vii. Self-worth;

viii. Matauranga Maori; and

ix. Tikanga Maori.

e. Recommendations pursuant to sections 8A – 8HJ of the Treaty of Waitangi Act 1975 for the return to the Claimants of all:

i. Crown Forestry land within the claim rohe;

ii. land held by any State Owned Enterprises within the claim rohe;

iii. land held by any institution under the Educations Act 1989;

iv. land vested under the New Zealand Corporation Restructuring Act 1990; and

v. any interest in any such land and together with any improvements;

f. Recommendations that the Crown pay compensation to enable the Claimants to purchase any land wrongly acquired by the Crown but which is no longer in the ownership or control of the Crown;

g. Recommendations that the Crown pay compensation to the Claimants for the prejudice suffered by the Claimants as a result of the Crown's acts, omissions, policies, legislations and practices; and

h. Any other recommendations that the Tribunal considers to be appropriate.

Dated at Wellington this 30th day of September 2020

Dr B D Gilling and K Hu

Counsel for the Claimants of Wai 378, 382, 400 and 972.

PURCHASE PRICES, COMPENSATION AND AGREEMENTS

Q1 – How did the Crown instruct their agents in the purchase of Maori land and how did the Crown set purchase prices?

1. As discussed at paragraph 146 of the main closing submissions, the Crown often instructed its agents to operate within an upper limit that was set by the Minister or senior officials in Wellington. And as exemplified in Otairi, it was generally "the Crown's way or the high way" (see paragraphs 127 – 132 of the main closing submissions).

Q2 – What legal devices, if any, were utilised by the Crown in order to set the terms, and payment, of purchase?

2. This question overlaps with the previous one.

3. The Crown imposed a monopoly on land purchasing through the following legal devices:

    a. During 1840s through to 1865, the monopoly was imposed by the Crown with the imposition of Crown pre-emption (see paragraph 122 of the main closing submissions) – which locked out any purchasing competition and allowed the Crown to determine the terms and prices of purchase. This monopoly was based in part on Article Two of Te Tiriti (or the Crown's understanding of it), the traditional legal doctrines that required radical title to be held by the notionally feudal Crown, and the practical necessity of the colonial government supporting itself financially by establishing a hefty margin between the low prices paid to Maori and then the inflated prices at which it onsold the lands to settlers, complete with

legal title from the new Crown grant. This regime was supported by governors' proclamations and the Native Land Purchase Ordinance 1846;

b. During the period of 1865 to 1877, the Crown:

   i. Found methods (such as paying tamana or making promises of development) to put land through the NLC pursuant to the Native Lands Act 1865 (and the subsequent Native Land Act 1873) – the NLC process often pitted Taihape Maori against each other (be it between individuals or hapu/iwi), fragmentation of land, and indebtedness;

   ii. The Crown also utilised section 42 of the Immigration and Public Works Act 1871, which provided that, if the Crown was to enter into negotiations for purchasing customary land from Maori for the purposes of Public Works, no private party could seek to acquire such land. The application of section 42 was extended by section 2 of the subsequent Immigration and Public Works Act 1874, meaning it would also cover any land which the Crown was negotiating to lease with an option to purchase. These laws excluded any other competition, making it very easy for the Crown to acquire the land and set low purchase prices; and

c. From 1877 onwards, the Crown continued to use the NLC process, but also crystallised its monopoly through the Government Native Land Purchases Act 1877 – section 2, in particular, provided that if the Crown had paid any money or entered into any negotiations for the purposes of purchasing Maori land in the North Island, and such land had not yet passed through the NLC, a notification could be issued on such land, and it would be unlawful for any other person to attempt to deal with this land. This, once again, locked out any private competition or, for that matter, any ability for the land to be dealt with. This, effectively, allowed the Crown to dictate the terms, conditions and prices of purchases of Maori land.

Q3 – What were Taihape Maori understandings and expectations of Crown purchase transactions, in terms of immediate payment and long term advantages, and on what basis did such expectations arise?

4. The expectation of Taihape Maori was that they would be appropriately compensated for their lands that were purchased or otherwise alienated by the Crown. These expectations arose from the fact that they were Tiriti partners with the Crown, but more usually arose from promises made by Crown agents during negotiations or transactions, which, of course, bound the Crown, especially in the eyes of Tiriti partners.

5. The situation in Awarua, for example (as discussed in paragraphs 58 – 63 of the main closing submissions), particularly highlights the expectations which Taihape Maori had in terms of advantages they were to receive as part of their transactions with the Crown:[146]

> *Awarua was retained under customary title until the 1880s, when a* ***mix of Crown promises and pressures associated with the development of the North Island Main Trunk Railway within the wider region induced the land's owners to put their lands through the Native Land Court*** *in an effort to manage the process of colonisation; a process that was both spearheaded and underpinned by the railway and the land transactions associated with it.*

6. However, once the costly NLC process of title determination of Awarua had finished:[147]

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[146] Stirling, *Nineteenth century overview*, at 331 – 332. Emphasis added.

[147] Stirling, *Nineteenth century overview*, at 408. Emphasis added.

> *The construction of the North Island Main Trunk Railway […] was strangely inactive after the Awarua owners had finally secured their costly titles in August 1892. This was* ***despite the best endeavours of the owners, who were eager to engage with the Crown in the anticipated development of their lands and their district****.*

7. As already set out at paragraph 53 of the main closing submissions, Ngati Apa, for example, expected, as often was promised by the Crown, that transacting their land to the Crown would provide:[148]

    a. Opportunities to forge an alliance with the Crown and thus to enhance the security of the iwi;
    b. The bringing in of European settlement, which would in turn bring about benefits such as economic development, hospitals and schools; and
    c. Security of the Crown's recognition of, and therefore an affirmation of, the manawhenua of the iwi.

8. Taihape Maori also expected to be "*treated equally with Pakeha when it came to land purchasing, as Seddon promised*".[149] However, the expectations arising from this promise would not be met:[150]

> *Prior to 1895, there was no independent assessment of the value of Maori land before it was purchased under Crown pre-emption, and nor was the process by which a price was fixed subject to independent review. For those owners who retained their land, there was not yet access to the government sources of development finance that was available to the subsidised settlers who were to purchase the Awarua land from the government. These*

148 Hearn, *One past, many histories,* at 82 – 83.
149 Stirling, *Nineteenth century overview*, at 445.
150 Hearn, *One past, many histories*, at 82 – 83.

disadvantages were on top of the handicap of a title held under the Native Land Acts, and the enormous costs of securing its dubious benefits; after years of the vast expense and inconvenience of obtaining title at numerous distant, clashing, and costly court sittings, all the owners had to show for their efforts was an undefined individual interest somewhere within the increasingly fragmented block left to them from apparently endless Crown purchasing.

9. Further in Kaweka (see paragraphs 70 – 73 of the main closing submissions), the expectations derived directly from explicit Crown promises. Not long after the completion of the Ahuriri deed in the 1850s, it was brought to the Crown's attention that the Kaweka block had been wrongly included. The Crown, therefore, then agreed in 1859 to compensate those who had interests in the block, but were excluded from the deed (e.g. Ngati Hineuru and others).[151] The compensation promised was to be for both the land itself, and for failing to recognise their interests in the deed. However, as the Crown realised that, in its own financial terms, the land was not in fact worth it, it cynically elected to not make good on these promises. Even when pressed by the hapu, the Crown chose to ignore them for decades.[152] It was not until the 1890 Royal Commission, when the Commission made the determination that the Crown had never acquired the land as part of its dealings in the early 1850s, that the Crown was finally forced to take steps to remedy the situation – three decades late.[153]

151 Fisher and Stirling, *Sub-district block study – northern aspect*, at 11 and 12.

152 Fisher and Stirling, *Sub-district block study – northern aspect*, at 12 and 13.

153 Fisher and Stirling, *Sub-district block study – northern aspect*, at 27.

Q4 – What promises and/or agreements, if any, were made with Taihape Maori, beyond monetary payment and to what extent were they fulfilled?

10. First, Counsel submit that, in situations when the Crown had made explicit *promises* or *agreements*, it is then the honour of the Crown that would require it to fulfil its promises. On the other hand, if the Crown made these statements as part of a mere sales pitch, the principles of partnership and good faith would require that the purchasing process be conducted in an open, honest, fair manner.

11. As seen above in paragraphs 5 – 7 of these answers (and paragraph 58 – 63 of the main closing submissions), the Crown made promises to the Awarua owners for long term advantages which would result from the construction of the North Island Main Trunk Railway.[154] Promises were also made in relation to the employment opportunities – Cleaver noted that:[155]

> *A number of specific promises were made regarding the building of the railway, including that Rohe Potae Maori would be able to earn income from construction work.*

12. For Utiku Potaka, however, Stirling noted that, in 1897, the Minister of Lands, McKenzie, advised that:[156]

> *If Utiku Potaka wishes to deal with this land privately he should be allowed to do so in consideration of the assistance which he gave us in the purchase by the Crown of other portions of the Awarua block. He was promised any concessions of this kind which we could give him, by Mr Cadman.*

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154 Stirling, *Nineteenth century overview,* at 311.

155 Phillip Cleaver, *Maori and Economic Development in the Taihape Inquiry District 1860 – 2013* (Wai 2180, #A48), at 126.

156 Stirling, *Nineteenth century overview*, at 550.

13. It is further noted that:[157]

> *Few other Awarua owners had such special privileges as the freedom to manage their own lands, but special services to the Crown and special dispensation from the Native Minister was required for such freedom; it was certainly not a right others could expect to exercise.*

14. In the purchase relating to Otamakapua, the Crown seems to have made promises relating to setting aside reserves. Here, Utiku Potaka claimed that McLean had promised to make a reserve of approximately 1,000 acres near his home in Te Houhou for his assistance to the Crown during the transaction of the purchase. However:[158]

> *After being refused on all fronts, in 1886 Utiku petitioned about the unmade reserve of 1,000 acres, which he said was promised by McLean in exchange for his assistance dating back to the Rangitikei purchases of the 1860s. On 30 April 1887, the long-serving Native Department Under Secretary T. W. Lewis advised Native Minister Ballance that, given Utiku's extensive help with government purchasing, "a gratuity sufficient to cover his expenses [in repeatedly coming to Wellington to argue his case] and also as a recognition of his position and services" should be paid and he suggested £25. This was approved (and presumably was paid). It was scant reward.*

15. Another example of Taihape Maori being promised non-monetary benefits relates to the signing of the deed for Waitapu. There, the Crown promised Kawana Hunia that, if he signed the Crown deed for Waitapu, it would hold an inquiry into his claims into the block. Kawana Hunia, therefore, signed the deed with the perfectly clear and reasonable understanding and expectation

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157 Stirling, *Nineteenth century overview*, at 551.

158 Stirling, *Nineteenth century overview*, at 125.

that this would happen. However, the Crown never properly made good on even this easily fulfillable promise.[159]

Q5 – Were there sufficient opportunities for Taihape Maori to voice potential concerns in the purchase process, and were the resources and capacity of Taihape Maori enough to empower their participation in such processes?

16. When Taihape Maori had concerns about, or disagreed with purchase processes, they did not have the liberty to refuse to participate as the Crown's NLC system meant they had to participate if they wished to defend their interests in the land.

17. The practice of distributing tamana – and the fact that Crown agents often dealt with individuals or distributed these monies in secret – often deprived Taihape Maori of being able to participate in the purchase process as a collective group. The practice also meant that there was very little opportunity for non-sellers to voice their concerns about the purchase process because the payment of tamana committed all the owners (as discussed in the "Tamana and Advance Payments" section of the main closing submissions). Taihape Maori were, therefore, forced support themselves to participate through their own methods – such as, writing pleading letters to the Ministers asking that advance payments or tamana not be made before the NLC determined the titles. Example of these have been noted in Awarua:[160]

> *The rangatira in Mokai Patea were well aware of the Crown's interest in acquiring parts of Awarua, and subsequently the Ngati Whiti committee wrote to the Native Department in August 1889 asking the Crown not to commence purchasing activities in the block until it was subdivided by the Native Land Court.*

159 Stirling, *Nineteenth century overview*, at 68 and 69.

160 Subasic and Stirling, *Sub-district block study – central aspect*, at 74.

18. And, again:[161]

> *In late April 1890, Hiraka Te Rango, Te Oti Pohe and Wiremu Paratene asked the Native Minister Edwin Mitchelson once again that no advance payments on account of Awarua be paid before the partition hearing. It seems that this concern may have been driven by some of the owners requesting advance payments on account of the block before the partition hearing.*

19. Similar attempts were seen in the Te Kapua block:[162]

> *Following the judgment in the Ta Kapua title investigation, there was considerable protest over the Court's decision. Hohepa Tutawhiri, writing on the behalf of the Ngati Tumaunu (?) hapu of the Ngati Rangituhia (?) iwi, wrote to the Native Minister Ballance in October 1884* ***asking that the payments of moneys by Government agents for the purchase of the block be stopped****. Tutawhiri stated that they were not satisfied with the decision of the Court, which deprived them of the whole block, and were applying for a re-hearing to settle the ownership, and indicated that they were intending to appeal to the Parliament if their application for a rehearing was not approved.*
>
> ***A similar application to the Native Department not to pay any advances for the purchase of the Te Kapua block came from Winiata Te Puhaki and Hori Matene in April 1885, who stated that the title of the block was not yet settled****.*

20. The NLC processes, and their effects were also inextricably linked to the Crown purchase process. The ability for Taihape Maori, within the NLC

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161 Subasic and Stirling, *Sub-district block study – central aspect*, at 80.

162 Subasic and Stirling, *Sub-district block study – central aspect*, at 25. Emphasis added.

process, to participate and have opportunities to voice their concerns are, therefore, also an integral part of the Crown purchase process. However, it was often the case that such opportunities were not readily afforded, and Taihape Maori had to, again, create their own opportunities in order to have their concerns heard. Taihape Maori would often either:

a. Make submissions or applications to the NLC disputing decisions or asking for rehearings; or
b. Protest and petition procedural matters or the decision of the NLC to Parliament.

21. A particularly notable concern that Taihape Maori had with the NLC process related to the locations/venues in which title investigation hearings were held. These hearings were often held in faraway lands, which were not only physically inconvenient but also financially crippling for Taihape Maori to attend. Subasic and Stirling have reported that:[163]

> *The much anticipated Awarua sub-division hearing was due to be held in Marton. This, however, caused much consternation among the claimants, who preferred the hearing to take the place on the actual block, at Moawhango. In September 1889, Henry Mitchell, writing on behalf of the Ngati Whiti owners, urged the Native Minister Mitchelson to schedule the hearing to Moawhango, partly because hearing the sub-division of the block on the actual land would be helpful in delineating the internal boundaries of the block. The Government officials were initially dismissive of this request, claiming that since Moawhango was too distant from the telegraph lines, it would be inconvenient to hold the hearing there. The calls for holding the hearing at Moawhango continued, however.*

163 Subasic and Stirling, *Sub-district block study – central aspect*, at 74.

22. Ultimately, the concerns and proposals of Taihape Maori over the location of the NLC hearings were ignored.

23. So, on top of the already NLC process, which was already costly in itself, the Maori owners were put under further financial pressure in needing to pay for costs associated with travelling to the hearings. This combination severely pauperised the Taihapae Maori owners, which, quite evidently, does not demonstrate the empowering of the participation of Taihape Maori in a process which was ultimately required for Crown purchase.

24. In Te Kapua, the NLC made the very hotly contested decision of awarding the block to Ngati Poutama. There:[164]

> *Following the judgment in the Ta Kapua title investigation, there was considerable protest over the Court's decision. Hohepa Tutawhiri, writing on the behalf of the Ngati Tumaunu (?) hapu of the Ngati Rangituhia (?) iwi, wrote to the Native Minister Ballance in October 1884 asking that the payments of moneys by Government agents for the purchase of the block be stopped. Tutawhiri stated that they were not satisfied with the decision of the Court, which deprived them of the whole block, and were applying for a re-hearing to settle the ownership, and indicated that they were intending to appeal to the Parliament if their application for a rehearing was not approved.*

25. The application for re-hearing, however, was dismissed by the NLC. This effectively set the stage for the Crown to purchase the block.[165] In response to this, petitions were brought to Parliament/the Native Affairs Committee in 1885, asking:[166]

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164 Subasic and Stirling, *Sub-district block study – central aspect*, at 25.

165 Subasic and Stirling, *Sub-district block study – central aspect*, at 27.

166 Subasic and Stirling, *Sub-district block study – central aspect*, at 27.

That re-hearing of the block be granted on the grounds that the verdict of the Judges was against the evidence given, that the Native Assessor at the hearing was an interested party, that the Interpreter at the hearing did not fulfil his duties in a proper manner, and that the overall proceedings of the case were irregular.

26. This petition was dismissed, leading to a further petition being forwarded to Parliament in 1886. This further petition was, again, rejected.[167] Still not prepared to accept the injustice they suffered, counter claimants to Te Kapua continued protest. In 1888 and 1891, further petitions for a re-hearing were made to Parliament - neither of which resulted in a successful outcome.[168] And, finally, in 1891, the Crown finalised its purchase of the block with the "owners" (according to the controversial NLC decision), putting the title out of reach of legal challenge.[169] So, despite their many attempts, many of the perhaps rightful Taihape Maori owners of Te Kapua were neither given sufficient opportunity to voice their concerns nor given the chance to properly participate in the sale process.

Q6 – Were there circumstances in which Crown purchase occurred prior to the determination of title? If so, what were these circumstances?

27. The purchase of Kaweka is the one main circumstance in which Crown purchase occurred prior to the determination of title. This was attributed to the fact that the block was originally caught up in various overlapping Crown purchases relating to Hawkes' Bay blocks between the 1850s and 1870s. The inland boundaries of these deeds were generally poorly defined and lacked proper surveying at the time of signing. This meant that many areas covered

167 Subasic and Stirling, *Sub-district block study – central aspect*, at 28.

168 Subasic and Stirling, *Sub-district block study – central aspect*, at 29.

169 Stirling, *Nineteenth century overview*, at 312.

(or not covered) by the deeds were unclear and assumed to be overlapping.[170]

28. The Crown then arranged to "formally" acquire Kaweka in 1859 and 1864. These deeds were abruptly signed by insufficient amount of right holders. And, again, little to no surveying took place before such deeds were "completed".[171] The cumulative result of lack of surveying and dealing with an insufficient number of right holders was that, the exact extent of Taihape Maori interests were unclear.[172]

29. Waitapu is another example in the district where a Crown purchase occurred without a NLC title determination. As already discussed in the main closing submissions, Waitapu, only came into existence in 1872 – 1873, when McLean agreed to have the inland boundary of the Rangitikei-Manuwatu block redefined.[173] This was despite, for example, Aperahama Tipae objecting to dealings without the block going through the NLC. In 1875, he wrote:[174]

> *Should you return me my land I will be satisfied; if it passes the Court I will agree to the sale of it. Should you not let me have it, I will not relinquish my hold upon this land Waitapu extending to Otamakapua and also my boundary line from Waitapu to Pariroa.*

30. Booth also "*appears to have considered asking the Native Land Court to consider Waitapu together with Otamakapua*."[175] However, when Booth

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170 Fisher and Stirling, *Sub-district block study – northern aspect*, at 7.
171 Fisher and Stirling, *Sub-district block study – northern aspect*, at 30.
172 Fisher and Stirling, *Sub-district block study – northern aspect*, at 20.
173 Hearn, *Sub-district block study – southern aspect*, at 246.
174 Hearn, *Sub-district block study – southern aspect*, at 247.
175 Hearn, *Sub-district block study – southern aspect*, at 249.

consulted with Walter Buller, "Counsel for the Crown", he was advised that:[176]

> ***The Court has no jurisdiction whatsoever over this land & no amount of consent would have clothed it with a power unknown to the statute. The Waitapu Reserve is part of the Rangitikei-Manawatu Block over which the Native Title was extinguished by Gazette proclamation in 1869. It was one of the numerous reserves afterwards made by Sir Donald McLean to allay the discontent in the district & the machinery provided by the legislature for giving legal effect thereto was the Rangitikei-Manawatu Crown Grants Act 1873.*** *Some doubt existed as to what particular natives were entitled to the land under McLean's promise & the issue of the Waitapu Grant was delayed in consequence. I proposed to the late Native Minister that a Royal Commission should issue to a Judge of the Native Land Court or some other person to ascertain and report who of the rival claimants were so entitled in order that the act might take effect. It seems to me however that the present is a very favourable opportunity for acquiring the estate for the Crown on the same terms as Otamakapua to which indeed it is the natural key. In the event of a purchase the govt should obtain a deed of release executed by both the contending parties. This would get rid of McLean's promise & the reserve could then be dealt with as ordinary waste lands of the Crown.*

31. The Rangitikei-Manawatu Crown Grants Act 1873 referred to by Buller provides in its preamble that:

> *Whereas disputes have been for some time pending between the Government of the Colony and certain persons of the Aboriginal Native race who claimed to be proprietors of certain lands in the*

[176] Hearn, *Sub-district block study – southern aspect*, at 250. Emphasis added.

districts of Rangitikei and Manawatu in the Province of Wellington: And whereas certain of such disputes were some time since adjusted by Isaac Earl Featherston, and certain other of the said disputes were some time since adjusted by the Honorable [sic] Donald McLean, acting for the said Government, and it was agreed that certain lands in the said districts should be granted by the Crown to certain Natives in fee simple, and that certain other lands should be reserved for the benefit of certain Natives…

32. It was, therefore, on this basis which the Crown proceeded with its purchase – obtaining signatures and making payments – without passing the land through the NLC.

33. To be clear, the Crown considered that the original "Crown purchase" had occurred prior to the NLC as part of the Rangitikei-Manawatu block purchases. And, according to advice from Buller, the land not Maori customary land, but rather land which was returned under Crown grant (under the Rangitikei-Manawatu Crown Grants Act 1873) and, therefore, outside the NLC's jurisdiction. But, as the evidence reports (and as will be discussed in further detail at paragraphs 92 – 93 of these answers), Buller's advice was not correct.[177]

34. It is noted that the Waitapu block will be discussed in further depth later in these answers, specifically, in paragraph 87 – 106 of these answers.

[177] Stirling, *Nineteenth century overview,* at 63.

Q7 – To what extent, if at all, did the Crown encourage a system of advance payments for Taihape Maori land before court title investigation hearings (such as for the Mangoira and Te Kapua blocks), and if so, why?

35. As seen in "Tamana and Advance Payments" section in main closing submissions, the Crown often encouraged a system of advance payments for Taihape Maori land before court title investigation hearings. For example:

    a. In Mangoira, the Crown had advanced approximately £1,269 of tamana to Ngati Hauiti in 1874. This was before the NLC title investigation, which was subsequently held in 1877;[178]

    b. In Te Kapua, the NLC had determined and awarded the title of the Block to Ngati Poutama. There, the Crown, as noted by Subasic and Stirling,:[179]

> *Without waiting for the appeals against the Court's award to be decided, and heedless of sustained protests from the appellants, the Crown commenced paying advances on its purchase of Te Kapua to some of the individuals awarded title in 1884.*

This was despite the many, many protests, petitions and appeals made by Taihape Maori against this decision during the period between 1884 and 1891.[180] And, as already noted at paragraph 26 of these answers (and paragraphs 64 – 65 of the main closing submissions), in 1891, however, before the questionable title could be successfully quashed, Te Kapua was wholly purchased by the government and was, therefore, beyond legal challenge.[181]

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[178] Hearn, *Sub-district block study – southern aspect*, at 202 ; and Stirling, *Nineteenth century overview,* at 71.

[179] Subasic and Stirling, *Sub-district block study – central aspect,* at 35 – 37.

[180] Subasic and Stirling, *Sub-district block study – central aspect*, at 32 – 33.

[181] Stirling, *Nineteenth century overview*, at 312.

36. Such practices do not appear in legislation or official regulations and instructions. It is submitted that the reasons must be that the Crown agents used them as a cynical means of achieving the Crown's goals of Maori land acquisition. However, if it did not meet with higher-level approval, it could not have continued as the agents would have had to pay from their own pockets. Crown disavowals of the practice ring hollow.

Q7(a) – Did Maori request such payments, and if so, why?

37. The evidence shows that Maori have been the party to request payments of advances.

38. Te Kapua is a block where Taihape Maori individuals were seen to have requested payments of advances. Here, the requests for advances were made by the individuals to whom the NLC had so controversially awarded the title. The Crown paid these advances despite the fact that there were ongoing protests and appeals against the NLC's controversial title decision.[182] The evidence does not seem to indicate why Taihape Maori asked for such payments. It may be noted, though, that there will always be some who need the money in the new cash economy, others who are merely opportunistic, but many who overtly opposed even the possibility of them being offered.

Q7(b) – How widespread was any such practice and how did it impact on Taihape Maori?

39. This practice was very widely spread, affecting almost all the land purchased by the Crown in the Taihape district in the nineteenth century – please also see the "*Tamana and Advance Payments*" section of the main closing submissions, which also discusses the impact of this wide spread practice.

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182 Subasic and Stirling, *Sub-district block study – central aspect*, at 25.

Q8 – To what extent were Taihape Maori preferences for lease, as opposed to sale, acknowledged and exercised?

40. As noted by Cleaver, some Taihape Maori land owners would prefer to lease as it meant they could earn more money without losing their lands. He also noted that it was more prevalent in the north, which was not purchased so early and so quickly: [183]

> *Within the developing agricultural economy, leasing provided Taihape Maori with an opportunity to derive an ongoing financial return from lands that they were unable or did not wish to farm. Unlike permanent alienation through sale, Maori could earn rental income without losing ownership of land and the potential to one day utilise it themselves. As noted above, it is likely that Maori used income from leases to help establish their sheep farming operations in the north of the inquiry district. It has also been stated that during the period covered in this chapter leasing was more widespread in the north, where lessees were able to move sheep directly on to open tussock country and commence grazing. Leasing was much more limited in the south of the inquiry district, where land sales were extensive.*

41. Confirming the geographical distinction, similar preferences were noted in Northern Taihape by Fisher and Stirling:[184]

> *The lands at the heart of Patea remained secure from such Crown dealings for a few decades more, as the local people strived to keep such troubles away. They preferred to lease their lands directly to settlers, so the extensive Owhaoko and Oruamatua–Kaimanawa blocks were leased to Pakeha runholders in the late 1860s and early*

183 Cleaver, *Maori and Economic Development in the Taihape Inquiry District 1860-2013*, at 102.
184 Fisher and Stirling, *Sub-district block study – northern aspect*, at 254.

1870s (Studholme and Birch respectively). So too was the Mangaohane block, lying between these large sheep runs to the west, and the settler world of Hawke's Bay to the east.

42. Counsel, however, notes that the evidence does not show the extent which Taihape Maori preferences for lease were acknowledge and exercised. As set out at paragraphs 40 – 41 of these answers, the evidence goes no further than simply mentioning that some Taihape Maori may have preferred to lease their lands.

Q9 – Were the Crown's purchase methods fair and reasonable, and Treaty compliant? Did they involve willing sales by communities of willing owners?

43. No. The Crown's purchase methods were rarely fair and reasonable, or Tiriti compliant. In terms of its purchases involving willing sales of willing communities of owners - the key is *communities*. There were, and always will be, willing *individuals* – which was what the Crown played on when looking to purchase the lands and taking advantage of those through the payment of tamana. As discussed in paragraphs 97 and 103 of the main closing submissions, the Crown would pick and choose particular individuals to deal with, which would effectively commit the entire community of owners to the purchase process – they would be forced to participate in the NLC process to defend their interests.

Q10 – After the introduction of the Native Land Court, was unfair pressure put on Taihape Maori individuals to alienate their land?

44. The overall answer to this question is yes – please see paragraphs 57 – 69 of the main closing submissions. Counsel also defer to the submissions specific to issues of NLC.

Q10(a) – Did Crown agents pursue individuals to acquire their interests, for example, following them to tangi or social hui? Did they employ bounty hunter tactics? Did they pay extra for early signatures?

45. Counsel cannot locate any evidence of Crown agents pursuing individuals to acquire their interests such as following them to tangi or social hui, nor can Counsel locate evidence that suggests that Crown agents paid for early signatures.

Q10(a) – Did Crown agents sometimes purchase the interests of minors? Was this done as soon as, or sometimes before trustees were appointed, or before trustees were officially appointed and gazetted?

46. The Crown did purchase interest of minors.

47. The "Mohaka (Mangatainoko Tapapa) Block", is described as both "adjacent to the northern Kaweka range",[185] but also lying "entirely within the 50,000 acres of the original Kaweka block".[186] The existence of this "block" is an example of the overlapping of Crown deeds.[187] The deed was formally signed on 3 May 1875 by 43 Maori, with the Crown paying just under £1000 for approximately 50,000 acres of this block over the course of 20 years.[188] In 1886, the block was investigated as part of the Tauponuiatia title investigation. The title to Mangataionoko (16,435 acres) was awarded, without dispute, to 27 individuals which apparently represented the 14 hapu with interests in the land. Tapapa was divided into two portions – one comprising 7,256 acres, which was awarded to the same 27 individuals who had been awarded Mangatainoko, and the other comprising 39,355 acres was awarded to 366 individuals. Once the title of the larger part of the block

185 Fisher and Stirling, *Sub-district block study – northern aspect*, at 14.

186 Dean Cowie, *Rangahaua Whanui District 11B, Hawke's Bay* (Waitangi Tribunal, 1996), at chapt 5.3.2.

187 Fisher and Stirling, *Sub-district block study – northern aspect,* at 14.

188 Fisher and Stirling, *Sub-district block study – northern aspect*, at 14.

was awarded, the Crown land purchase officer, William Grace, started purchasing the interests of the individual owners, offering less than one shilling per acre. Many of the 366 owners were minors, to whom William Grace's brother, Lawrence Grace, was often appointed as a trustee to facilitate the sale and purchase of their interests.[189]

48. In 1884, with respect to Otamakapua:[190]

> *A deed conveying the whole of the land, that is, 104,521 acres, to the Crown and signed by every 'registered owner and* ***trustees appointed in the case of minors*** *…'*

49. Similarly, in Te Kapua:[191]

> *In September 1891, Riini Te Rua, the Trustee for Hinewai Riina, Tauri Riina and and Hoani Maka Riina, minors who had shares in the block, requested that all the purchase moneys due to them from the sale of Te Kapua be paid to them, as they were in "great want of clothing and food," and also had no money to pay for the cost of hearing their other lands before the Native Land Court. Similarly, in May 1895 Hera Utiku, the trustee for Miriama Tita, Mihi Teira, and Nikorima, minors who had had shares in the block before its sale, applied to receive the balance of the moneys belonging to the minors for their shares in the block which had been deposited with the Public Trustee. Utiku stated that the reason for the application was to provide clothing, food and other necessities of life for the minors in question, and her application was approved by Robert Ward, Native Land Court judge, on 9 May 1895. That concluded the purchase of Te Kapua.*

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189 Fisher and Stirling, *Sub-district block study – northern aspect,* at 18.

190 Hearn, *Sub-district block study – southern aspect*, at 108. Emphasis added.

191 Subasic and Stirling, *Sub-district block study – central aspect*, at 36 and 37.

50. In terms of whether trustees were appointed before or as soon as the Crown purchased the interests of minors – Counsel are, unfortunately, unable to assist in answering this question as the relevant information cannot be located in the relevant reports.

IMPACT OF CROWN PURCHASE ON TAIHAPE MAORI

Q11 – What impacts were felt by Taihape Maori as a result of Crown purchases in the district?

51. The impacts felt as a result of Crown purchases generally relate to consequences of land loss. Counsel, therefore, defer to the submissions made in relation the Twentieth Century Land Alienation, which further elaborate and discuss in detail the impacts felt as a result of land alienation.

Q12 – Did Crown purchase agents routinely set aside adequate, or any, reserves for Taihape Maori as part of acquiring each block? Should they have? What was the total number of reserves made by the Crown for Taihape Maori? Were these reserves protected from alienation at all, or for a period?

52. The evidence is clear that Crown purchase agents did not set aside adequate reserves for Taihape Maori as part of acquiring blocks in the district, routinely or even occasionally.

53. Fisher and Stirling, for instance, located nothing about reserves set aside from post-1865 Crown purchases.[192]

54. It is, however, agreed that a consistent element of the official Crown policy during the nineteenth century was that the Crown had to ensure that Maori

192 Fisher and Stirling, *Sub-district block study – northern aspect*, at 3.

retained a "sufficiency of land" for their "maintenance".[193] The policy was even summarised by McLean, to Parliament in 1873, that:[194]

> *The chief object of the Government should be to settle upon the natives themselves in the first instance**, a certain sufficient quantity of land which would be a permanent home for them, on which they would feel safe and secure against subsequent changes or removal**; land in fact, to be held as an ancestral patrimony, accessible for occupation to the different hapus of the tribe; to give them places which they could not dispose of, and upon which they would settle down and live peaceably [...]*

55. This policy was reflected in the various Native Land statues which required reserves to be set aside, with the appointment of trust commissioners and district officers (under the Native Lands Frauds Prevention Act 1870 and Native Land Act 1873, respectively) to ensure Maori lands set aside as reserves were secured as inalienable and held "in accordance with native custom and usage". Formal provisions for reserves were also explicitly laid out in sections 21 to 32 of the Native Land Act 1873, with section 24 providing that:[195]

> *It shall also be the duty of every District Officer to select, with the concurrence of the Natives interested, and to set apart, a sufficient quality of land in as many blocks as he shall deem necessary for the benefit of the Natives of the district: Provided always that no land reserved for the support and maintenance of the Natives, as also for endowments for their benefit, shall be considered a sufficiency for such purposes, unless the reserves so made for these objects added together shall be equal to an aggregate amount of not less than fifty*

193 Hearn, *Sub-district block study – southern aspect*, at 277.

194 Hearn, *Sub-district block study – southern aspect*, at 277. Emphasis added.

195 Native Land Act 1873, s 24.

acres per head for every Native man, woman, and child, resident in the district.

56. So, the statutory minimum set aside from a Crown purchase for the vendors should have been 50 acres per capita of the vendor. It should have also been "sufficient" for their support and maintenance and to provide an endowment for the future. But all of this was all dependent on what the Crown official "shall deem necessary" – they were at his/her mercy.

57. It is submitted both that the 50-acre limit and the discretionary nature of the reserves did not meet the standard of a partner conducting the transaction in good faith. Particularly in Taihape, 50-acres was not remotely "sufficient" for a person's support and maintenance, while reserve-making should have been compulsory, not at the whim of a Crown purchase agent.

58. The Crown, however, did very little to actively monitor or protect the Taihape Maori land base during the nineteenth century. So, despite statutory provision having existed for the creation of reserves, these powers were seldom exercised, leaving Maori with scant reserves and, as it turned out, little protection of their inalienability due to the enactment of the Native Reserves Act, which provided that, from 1882 onwards, all Maori reserves were vested in the Public Trust.[196]

59. The evidence shows that, in 1886, a return setting out the details of reserves created "in accordance with the various Native Reserves Acts[…]" was published in the Appendix to the Journals of the House of Representatives. The return showed that *only three area*s within the Taihape Inquiry district were formally "protected" (as opposed to actually being reserved for the benefit of Taihape Maori vendors):[197]

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[196] Native Reserves Act 1882, s 8.

[197] Cleaver, *Maori and Economic Development in the Taihape Inquiry District 1860-2013*, at 108 – 109.

> *All within the category of lands described as 'inalienable': Otamakapua 2C (10 acres), Paraekaretu (46,975 acres), and Te Kapua (11,000 acres). The first area, Otamakapua 2C, contained an urupa and was one of three areas retained by Maori when the Crown's interest in Otamakapua 2 was defined in 1884. The inclusion of the Paraekaretu block was an anomaly, because (as the return noted) the Crown had already purchased this land. The last area, Te Kapua, was part of the larger Te Kapua block (12,878 acres), which following title investigation in 1884 had been divided into three subdivisions – Te Kapua, Te Kapua A, and Te Kapua B.*

60. Further, Cleaver has noted that there is very little evidence as to how thoroughly the Crown considered the issue of the "sufficiency of land" when dealing with proposed alienations of Taihape land. This was likely not helped by the legislation, which provided little guidance as to how sufficiency of land was to be assessed and the level of economic wellbeing that it should provide to enable "maintenance".[198] As submitted above, it seemingly all depended on the energy and generosity of the District Officer or purchase agent.

61. The evidence does not provide explanations or reasons for the Crown's failure to provide sufficient reserves in the Taihape region. However, in the *Sub-district block study – southern aspect* report, Dr Hearn notes an example of the excuses used by the District Officer, Booth (who was also a prominent Crown land purchase officer in the Taihape region), in relation to the lack of reserves made between Waikanae and Manawatu. There, Booth attempted to explain away the lack of reserves (and therefore his failure to follow the law) by stating that:[199]

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198 Cleaver, *Maori and Economic Development in the Taihape Inquiry District 1860-2013*, at 111.

199 Hearn, *Sub-district block study – southern aspect*, at 278.

> *With respect to amount [sic] of reserves between Waikanae and Manawatu, they are not, properly speaking, reserves under the Act of 1873, but in the majority of instances they were put through the Court with the intention, on the part of the Natives, and with my knowledge and consent, to reserve them from sale altogether. Unless therefore (which is rather doubtful), the Native owners can be induced to make these lands, so reserved, reserves under the Act, there is nothing to prevent them, on receiving their certificates of title, from disposing of this property to the highest bidder. In a few instances, where the reserves have been made out of blocks sold, such reserves will be under the Act, and so be made inalienable; but, in cases where the Government has no direct interest in way of advances or otherwise, the Natives are jealous of interference, and prefer to manage their property independently of Government aid, if possible.*

62. With respect to these regions, Booth appears to be attempting to claim that, the Crown *did*, in fact, put aside reserves, but such land was simply not "reserves" as under the definition of the Native Land Act. His reasoning was that "reserving" land under the Act would mean that, going forward, any matters relating to the alienability of the land would require consultation and consent from the Crown. He, therefore, essentially, places the blame on the fact that it was difficult to "induce" Maori to agree reserving lands, as they were "*jealous of interference, and prefer to manage their property independently of Government aid*". However, this is very doubtful because, as noted by Dr Hearn, there was nothing in the Act which necessitated the consent of the Maori owners for the Crown to put aside reserves.[200] The problem described by Booth relating to reserves in relation to the restrictions against alienability was, therefore, overstated. This was further proven in the following years, as the Crown amended the legislation so that the removal and/or variation of any restrictions on alienability of land

[200] Hearn, *Sub-district block study – southern aspect*, at 279.

became easier.[201] It follows that the Crown clearly had no good reason as to why so few reserves had been put aside, nor why it did virtually nothing to protect the supposedly inalienable reserves on which the Maori land owners were relying.

63. Also contrary to Booth's argument that Maori were actually reluctant to set aside reserves: In Otairi (as already discussed in paragraphs 84 – 88), Ngati Hauiti had indicated that they wished for 11,000 acres to be set aside as a reserve. But, because the Crown was of the view that the 11,000 acres of land sought to be reserved was, as Under Secretary Richard Gill of the Native Land Purchasing Department thought, "*the best of the block*", it could not "afford" to allow Taihape Maori to keep it.[202] It may be noted that there seems to be an implicit racism in operation here: settlers should be allowed have the best land, but it was considered unreasonable and unaffordable for the existing Maori owners to be allowed to keep for their own use and enjoyment, their best land. They were to be condemned to the economic rubbish, if anything.

64. Stirling has also noted, with regard to Otamakapua, that:[203]

> *It is remarkable that the government would contemplate purchasing a block as large as 104,000 acres in the 1880s without making any provision for reserves. It might have been able to point to the adjoining Otamakapua 1 block as amounting to some sort of reserve, but it was actually an entirely different title with a different and much, much smaller group of grantees. The existence of Otamakapua 1 (held by a handful of grantees) did not remove the need for reserves in Otamakapua 2. In any case, the government's failure to set aside reserves sufficient to support even Maori*

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201 Native Land Act 1865, s 28; Native Land Court Act 1886 Amendment Act 1888, s 6; Native Land Laws Amendment Act 1890, s 3; Native Land Purchase and Acquisition Act 1893, s 12.

202 Hearn, *Sub-district block study – southern aspect*, at 159.

203 Stirling, *Nineteenth century overview*, at 98.

subsistence – much less reserves adequate for their present wants and future needs – is not something that is unique to Otamakapua; it is instead a noteworthy characteristic of Crown land purchasing in the entire Taihape inquiry district.

65. Once again, it is apparent that the Crown agents most definitely did not routinely set aside adequate, or any, reserves as part of acquiring each block. Seldom did they do it, even in specific blocks.

66. Counsel note that the Tribunal in its *Whanganui Report*, in noting that the Crown had put aside too few reserves, found that this was an act of bad faith.[204] It is submitted that it is open to this Tribunal to make the same finding.

Q13 – What was the purpose of the 1890 Royal Commission of Inquiry (Awarua Commission of Inquiry) and what does it illuminate about the Crown purchasing regime in the district during the 19th century?

67. The 1890 Royal Commission of Inquiry (**Commission**) was established after much protest and lobbying from Mokai Patea Maori for the following purposes:[205]

1. *To inquire and ascertain what are the boundaries of certain blocks land known as the Otaranga Block and the Ruataniwha North Block, and to inquire and ascertain how the boundaries of the said blocks of land affect the blocks of land known as the Awarua Block and the Mangaohane Block, and any other blocks of land in the locality of the said Otaranga and Ruataniwha North Blocks;*

204 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report,* at 534 – 535.
205 Fisher and Stirling, *Sub-district block study – northern aspect*, at 20.

2. *To inquire and ascertain and lay down what is the Western boundary of the said Otaranga Block;*
3. *To inquire and ascertain and lay down what is the actual boundary between the Ruataniwha North Block and the Te Awarua Block.*

68. The Commission was originally referred to as the Otaranga and Ruataniwha North Commission as the western boundaries of these two main Crown deeds were the issue. However, it was also referred to as the Awarua Commission, as it needed to also resolve the eastern boundary of the Awarua block,[206] which, at this time, was (a) before the NLC for subdivision purposes and (b) where the issue of boundaries came to a head.[207]

69. These issues relating to the blocks' boundaries arose from the long-disputed, and long-confused boundaries of land in the rohe between Mokai Patea and Heretaunga – what would be later identified as the Te Koau block and Timahanga block.[208] Subasic and Stirling describe the boundary dispute before the Commission as follows:[209]

> *The central issue that the Commission was seeking to ascertain was the western boundary of the Crown's Otaranga purchase in 1857. The Crown claimed that the boundary of the purchase extended westward beyond the Ruahine ranges, to another ridge known as Otupai. The Maori owners vehemently denied this, claiming that the boundary was at the top of the Ruahine ranges, and never extended as far west as Otupai.*

70. The Commission was not at all tasked to inquire into the nature of Crown purchasing in this area. Nevertheless, the Commission illuminated the

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206 Fisher and Stirling, *Sub-district block study – northern aspect,* at 21.
207 Stirling, *Nineteenth century overview,* at 367 – 368.
208 Subasic and Stirling, *Sub-district block study – central aspect*, at 7.
209 Subasic and Stirling, *Sub-district block study – central aspect*, at 8.

improper way Crown conducted its dealings when purchasing land in the area. As was discovered by the Commission, in neglecting to adequately define the boundaries of the blocks purchased in the 1850s, the Crown asserted a claim to land beyond what it had actually transacted and compensated Maori for. The Crown continued to assert this claim, even with evidence to the contrary arising before, at the time of, and after, the Commission issued its findings, causing many hardships for Mokai Patea Maori. As Stirling and Fisher noted:[210]

> *This reflected the Crown's earlier failure to negotiate openly with the full range of right holders, as well as its failure to properly define the lands it was transacting. These failings are despite repeated protests from interests ignored by the Crown concerning lands which had not been transacted by the customary owners. For decades it had been difficult to distinguish between lands that had been transacted with the Crown and lands that remained in the possession of Maori, especially where Maori occupation and use of the land endured.*

Q13(a) – What process did the Commission follow in its inquiry and with what justification?

71. The Commission comprised Napier Resident Magistrate, George Preece, and Auckland Surveyor, John Connell.[211] Stirling describes its process as follows:[212]

> *The Commission was given less than one month to inquire into and report on the issues referred to it. It held 18 sittings on 11 days in Hawke's Bay, taking evidence from 27 witnesses including 10 Maori. Those of Mokai Patea who testified were Winiata Te Whaaro and Ihakara Te Raro, the other witnesses being based in Hawke's Bay.*

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210 Fisher and Stirling, *Sub-district block study – northern aspect*, at 23.

211 Stirling, *Nineteenth century overview*, at 368.

212 Stirling, *Nineteenth century overview*, at 368.

> *Among the surveyors who testified were Henry Mitchell, who was responsible for the survey of Awarua block in 1887, and Charles and Alfred Clayton, who actually did the surveying for Mitchell as well as having surveyed the provincial boundary between Wellington and Hawke's Bay. The commissioners also ascended the Ruahine range at Otupae (on Mangaohane block) just after a heavy snowfall in order to observe the summit of the ranges to the north and south of this peak.*

72. The Commission's key finding was the Crown's failure to survey the boundaries of the Otaranga land block properly, relying on the boundaries being pointed out from afar by the sellers who did not know much about the land they were selling.[213] On this basis, the Crown presumed that the boundary of the Otaranga deed extended to Otupai:[214]

> *In the Crown's view, the provincial boundary followed the watershed between the east coast and the west coast, and this watershed was the same line as the summit of the Ruahine ranges. The summit of the ranges was also the inland boundary of the Ruataniwha North and Otaranga Crown deeds of the 1850s.*

73. This is despite Maori asserting that this was not the case, and that had they known, they would have strongly objected to any such interpretation:[215]

> *The evidence of Noa Huke, for example, was very explicit on this point: "The boundaries of the land then sold to the Government did not extend to Otupai. The boundaries ended at Ruahine range on which stands the points which I have already given." Winiata Te Whaaro corroborated Noa Huke's evidence, adding that if he had been aware that the Crown considered Otupai as the western*

213 Fisher and Stirling, *Sub-district block study – northern aspect*, at 23.

214 Stirling, *Nineteenth century overview*, at 368.

215 Subasic and Stirling, *Sub-district block study – central aspect*, at 8.

boundary of the deed he would have strongly objected to it at the time.

74. The surveyor of the Awarua block, Henry Mitchell, corroborated the evidence of Maori interest holders. In his testimony to the Commission, he described how the Chief Surveyors insisted that Crown lands extended to Otupai despite the Crown's failure to survey the 1850 purchases, and ignored evidence provided by Mitchell through his mapping of the boundaries effectively showing that there was no overlap.[216]

75. The Commission noted the inconsistencies of the Crown's claim that the Otaranga deed extended to Otupai, emphasising that:[217]

> *[…] the Crown did not "set up" any claim to the disputed area until 1887, at the time of the Awarua survey. Indeed, about 10,500 acres of the Mangaohane block (surveyed in 1884 and investigated by the court in 1884–1885) lay east of the watershed line/provincial boundary asserted by the Crown as defining its lands, but it had not objected to the Mangaohane plan. It was only when Awarua was surveyed in 1887 that an objection was made and the Hawke's Bay Chief Surveyor refused to approve the plan on the basis that it included Crown lands within the Hawke's Bay district.*

76. Essentially, the Commission found that the Crown's claim was factually incorrect:[218]

> *[…] some of the Ruahine range did define the watershed line, but from a little north of the Ruahine peak Te Atua Mahuru the range headed to the east and then to the north, whereas the much lower line of the watershed headed west and then to the north. This*

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216 Stirling, *Nineteenth century overview,* at 370 – 371.

217 Stirling, *Nineteenth century overview,* at 369.

218 Stirling, *Nineteenth century overview,* at 368.

Otupae watershed insisted upon by the Crown as the boundary of its Hawke's Bay deeds was not even a mountain range at all, whereas the Ruahine range most certainly was.

77. In addition, evidence before the Commission noted that not all of the Otaranga block interest holders sold their share of the land. The Crown engaged with some but not all of the Maori interest holders, as shown by the evidence presented before the Commission by Rainiera Te Ahiko:[219]

> *All the owners of Otaranga did not sell. I for one and Renata for another. Renata was at variance with Tawhara, that is why we were not parties to the sale. [Renata and Tawhara] were cousins. Te Watene went away to Te Hapuku to carry out the sale. When Aorangi was sold Renata asked McLean for their share of the purchase money but the government took no notice. We never received any of the Otaranga money. [The] Pakiaka fight was a result connected with [the] Otaranga sale between Renata's people and Te Hapuku's people.*

78. Furthermore, the Crown often engaged with individual right holders in secret, such as Hine-i-paketia and Te Hapuku. Hine-i-paketia testified to Commission that she had signed the Otaranga deed of sale, but did not know much about the inland boundaries, and also as ignorant of the ongoing protests over the area.[220]

79. By limiting engagement to those Maori who wanted to sell, regardless of whether the land was their share to sell, the Crown failed to adopt the proper steps to ensure all interests were acknowledged and land was properly defined for purchase.[221]

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219 MA-MLP 1 78, 1906/64-1906/105, ANZ in *Northern Taihape Blocks Document Bank*, at 312 – 317; as cited in Fisher and Stirling, *Sub-district block study – northern aspect*, at 25.

220 Fisher and Stirling, *Sub-district block study – northern aspect*, at 26 – 27.

221 Fisher and Stirling, *Sub-district block study – northern aspect*, at 25 – 27.

Q13(b) – What conclusions were made by the Commission in regard to the Crown's purchase of land in the Otaranga, Te Koau and Tīmahanga blocks and its purchasing method?

80. The Commission's findings favoured Maori. It found that the Te Koau and Timahanga blocks were not included in the Otaranga deed as its boundaries were found by the Commission to only extend to the summit of the Ruahine ranges and not over the summit to the Otupai watershed.[222]

81. As noted above in paragraph 70 of these answers, the Commission merely made findings regarding the issue of the land blocks' boundaries and did not make any findings relating to the purchasing methods of the Crown in this area, despite many of these improper methods coming to light before the Commission.[223] Fisher and Stirling note the area the Crown claimed to have purchased as part of the Otaranga deed amounted to approximately 24,000 acres:[224]

> *The Commission decided that the northern part of the Ruahine range, not the Otupae watershed, was the boundary of the Otaranga block acquired by the Crown. This meant that an area of approximately 17,400 acres in between the Ruataniwha, Otaranga, Awarua, and Mangaohane blocks had not been included in the Crown's dealings. Another 6,800 acres near the Otaranga block had similarly never been acquired.*

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[222] Subasic and Stirling, *Sub-district block study – central aspect*, at 9; Fisher and Stirling, *Sub-district block study – northern aspect*, at 27.

[223] See also George Preece and John Connell, Report to the Governor, Napier, 23 August 1890 MA-MLP 1/1906/91, ANZ in *Northern Taihape Blocks Document Bank* (Wai 2180, #A006(a)), at 262 – 292.

[224] Fisher and Stirling, *Sub-district block study – northern aspect*, at 27.

Q13(c) – Of the Commission's recommendations that were implemented, what was the impact on Taihape Maori?

82. The findings of the Commission were accepted by the Crown, and as a legislative remedy, it enacted the Native Land Clams and Boundaries Adjustment and Titles Empowering Act 1894. Fisher and Stirling note that:[225]

> *By this Act the Crown relinquished its claims to a considerable area of disputed land, and agreed to pay compensation for other land that it had wrongly claimed but had already alienated. The area of land over which the Crown withdrew its claims comprised 17,400 acres, being portions of "Te Kuao" [sic; Te Koau] and Timahanga blocks (see Map 3 below). The 1894 Act (s.3) declared this land to be Native land, the title to which was to be ascertained by the Native Land Court.*
>
> *In respect of the land wrongly claimed by the Crown as a result of its flawed 1850s deeds, but which had already been alienated, this comprised 7,100 acres. Most of this (5,600 acres) had been set aside as an Educational Reserve (endowment) which had been leased out (to Harding in this case) to generate income for educational purposes. The other 1,500 acres had been sold for settlement. The 1894 Act (s.3) empowered the Native Land Court to identify the former owners and what compensation they should receive for this land.*

83. The Commission's recommendations effectively returned land to Taihape Maori to do with it as they wished. Where it had been already alienated, the

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225 Fisher and Stirling, *Sub-district block study – northern aspect*, at 27; Counsel are aware of the 300 acre discrepancy in the figures quoted, which are both provided by Fisher and Stirling in the same paragraph. Counsel note that this discrepancy may be due to the source material cited by the authors, but are of the view that this discrepancy is not material to the submissions.

Crown was to compensate the rightful owners.[226] The 7,100 acres that were alienated by the Crown, through its incorrect belief of the Otaranga deed's boundaries, were in the area of the Te Koau and Timahanga blocks.[227] These blocks still required the NLC to issue title in order for the Crown to compensate the correct parties for the alienation of land.

84. The title investigation of the Timahanga block was held in 1894, but it was not until 1900 that the parties to be compensated for the wrongly alienated land in this area was identified.[228] Meanwhile, the title investigation of the Te Koau block was held in 1900, one of the last blocks to be investigated in this area. [229] Compensation of the 7,100 acres across these two blocks, found by the Commission to have been wrongfully alienated, was not paid until 1906, 16 years after the Commission's findings.[230]

85. In respect of the Awarua block and its survey which led to the Commission being established, the Commission's findings were not communicated to the interest holders at all.[231] The interest holders of the Awarua block were largely preoccupied with its ongoing partition proceedings, which commenced in 1890 in Marton, just prior to the Commission being established in the same year.[232] The partition proceedings did not conclude until 1891, partly due to the Commission's findings affecting the title area of the Awarua block, as the acres of land wrongly claimed by the Crown as Crown land through the Otaranga deed, required evidence of customary interest to be presented before the NLC.[233] However, the significant

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226 Fisher and Stirling, *Sub-district block study – northern aspect*, at 27; and Subasic and Stirling*, Sub-district block study – central aspect,* at 9.

227 Fisher and Stirling, *Sub-district block study – northern aspect*, at 27.

228 Fisher and Stirling, *Sub-district block study – northern aspect*, at 246.

229 Fisher and Stirling, *Sub-district block study – northern aspect*, at 27; Subasic and Stirling, *Sub-district block study – central aspect,* at 9.

230 Fisher and Stirling, *Sub-district block study – northern aspect*, at 246; Subasic and Stirling, *Sub-district block study – central aspect,* at 17.

231 Stirling, *Nineteenth century overview,* at 372.

232 Stirling, *Nineteenth century overview,* at 372.

233 Stirling, *Nineteenth century overview*, at 392.

contributor to the protracted proceedings was due to the Crown delaying the completion of the survey it promised the Awarua block interest holders, despite the Commission's findings on the northeast and eastern boundary of the block establishing its boundary.[234]

86. Overall, the impact on Taihape Maori of the Commission's recommendations that were implemented returned what was erroneously claimed as Crown land to Taihape Maori to use do with as they wish. This involved Taihape Maori further engaging with the Crown's land system, namely the NLC, in order for them to benefit from the approximately 24,000 acres erroneously claimed by the Crown as Crown land.

THE WAITAPU AND KAWEKA BLOCKS

Q14 – What circumstances led to the discovery of the Waitapu block?

87. The Waitapu block was a leftover piece of land arising from uncertainty around the inland boundaries of the Rangitīkei-Manawatū and Rangitīkei-Turakina purchases. It was purchased in the 1870s following the establishment of the NLC in the district. In *Early Rangitikei*, J.G. Wilson claimed Waitapu was the first land purchase by the Crown north of the Rangitikei-Manawatu block. He recorded Kawana Hunia (Ngati Apa) as the one who "ingeniously discovered" that the surveyors had misjudged, leaving a section of the Rangitikei-Manawatū block for which the Crown had not paid. Hunia discovered that the boundary of the Rangitikei-Manawatū block extended from the Waitapu Stream to Parimanuka. This meant that the Waitapu block had been laid off, but not paid for in the original purchase. This meant the Crown had to pay a further sum to Ngati Apa and Ngati Whiti to secure ownership of the block.[235]

234 Stirling, *Nineteenth century overview,* at 391 – 392.
235 Hearn, *Sub-district block study – southern aspect*, at 245.

Q15 – How did the Crown purchase/acquisition of the block occur? Was that purchase/acquisition a fair and reasonable process between Treaty partners?

88. As Dr Hearn reported:[236]

> *[…] It was Kawana Hunia who successfully claimed to have discovered that the boundary of Rangitikei-Manawatu ran from the Waitapu Stream to Parimanuka instead of to Umutoi as the surveyors had it.*

89. Following this "ingenious discovery" by Kawana Hunia, in 1872:[237]

> *McLean made clear his desire to have the inland boundary of the Rangitikei- Manawatu block between Waitapu and the Oroua River defined. 'Nothing is fixed and neither party can deal with the land definitely until this is done … A line from Waitapu to some point on Oroua all inland boundary necessary, as Natives will soon be prepared to sell land beyond boundary, but cannot do so till boundary question settled.*

90. As summarised by Dr Hearn, the result was:[238]

> *The Waitapu block, [which was] laid off but not paid for in the original purchase and necessitating the payment of further recompense to Ngati Apa and Ngati Whiti. Morrow noted that Ngati Hauiti, Ngati Hinemanu, and Ngai Te Upokoiri were also involved.*

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[236] Hearn, *Sub-district block study – southern aspect*, at 245.
[237] Hearn, *Sub-district block study – southern aspect*, at 245 – 246.
[238] Hearn, *Sub-district block study – southern aspect*, at 245.

91. Again, also already discussed above at paragraphs 29 – 34 of these answers, the Waitapu block did not go through the NLC title determination process before purchase because:

a. The Crown purchase of the block had taken place prior to the NLC being able to determine the title – the block was assumed to have been acquired as part of the earlier Crown purchase of Rangitikei-Manawatu block;[239]

b. The block was, therefore, according to advice from Buller to Booth:[240]

i. Crown land which had been returned in 1872, by McLean to Taihape Maori, under Crown grant; and

ii. Therefore, outside the NLC's jurisdiction.

92. However, Sir Francis Bell, the arbitrator appointed under the Rangitikei-Manawatu Crown Grants Act 1873, when calculating compensation for the Wellington Province, specifically excluded Waitapu from his calculations. His "expert legal opinion" was that:[241]

> *Waitapu was not within the purchase, so Native title could not have been extinguished by a proclamation that related only to land within the purchase boundaries (which, it should be noted, were neither surveyed nor clearly defined at the time of the 1869 proclamation extinguishing Native title). It is also evident that Waitapu was not named among the reserves made from the Rangitikei-Manawatu block during the protracted arguments about reserves between resident Maori, central government, and the Wellington Provincial government from 1866 to 1872. In other words, Waitapu appears to have been customary Maori land, and the Crown should not have*

239 Hearn, *Sub-district block study – southern aspect*, at 245.
240 Hearn, *Sub-district block study – southern aspect*, at 250.
241 Stirling, *Nineteenth century overview*, at 63.

purchased it except from those identified by the Native Land Court as its owners.

93. In 1879, however, the Crown purchase proceeded on the assumption that Buller's advice was correct.[242]

94. This motivated members of Ngati Apa, Ngati Hauti, Ngai Te Upokoiri and Ngati Paueiri to assert their interest over the whole or part of Waitapu by communication to successive Native Ministers and Crown agents between 1875 and 1879. These members included Aperahama Tipae and Kawana Hunia of Ngati Apa, Utiku Potaka, Arapeta Potaka and Rawinia Potaka of Ngati Paneiri, and Renata Kawepo and Hamuera Te Raikokiritia of Ngai Te Upokoiri and Ngati Hauiti, among various whanaunga or associates of each individual. Kawana Hunia and others insisted that Ngati Apa alone owned Waitapu, rejecting the others claims, while Utiku Potaka and Renata Kawepo asserted their various hapu and iwi respectively owned parts of Waitapu.

95. The Crown's solution was for various Crown agents to accept, among themselves and without official investigation, that all of the Taihape Maori concerned must have some interest.[243] This is despite the evidence (see paragraph 92) that Waitapu was still customary Maori land, and the clear competing interests asserted by various iwi and hapū (discussed above at paragraphs 88 -94 of these answers). Regardless of these concerns, the Crown allocated half the purchase price to "Kawana Hunia and others" while the other half went to "Utiku Potaka and others".[244] That purchase price appears arbitrarily arrived at by Crown Agents, without reference to appropriate valuation (discussed below at paragraphs 104 – 106).

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[242] Stirling, *Nineteenth century overview*, at 62 – 63.

[243] Hearn, *Sub-district block study – southern aspect*, at 246 – 253.

[244] Hearn, *Sub-district block study – southern aspect*, at 252 – 253.

96. Counsel submit that this process cannot be called reasonable or fair when Crown actively avoided investigation into customary interests or appropriate compensation, despite its knowledge of the issues at play.

Q16 – Were there opportunities, processes or policies available that enabled Taihape Maori to express their concerns or hopes for the transaction of ownership and if so, were Taihape Maori in a suitable position (eg. financially, economically, politically) to take advantage of them?

97. As noted above, the "opportunity" to express "concerns and hopes" about ownership were largely made through direct correspondence with successive Native Ministers or Crown purchasing agents by members of Ngati Apa, Ngati Hauti, Ngai Te Upokoiri and Ngati Paueiri who claimed ownership of all or part of Waitapu. This correspondence can largely be characterised by Crown agents choosing when someone was important enough to be responded to, based seemingly on how legitimate the Crown considered that group or person's claim to be.[245]

98. Therefore, Taihape Maori were not in a suitable position to take advantage of the opportunities presented by the Crown, if it can be called as such.

Q17 – What method(s), if any, did the Crown employ to adequately investigate customary interests in the Waitapu block? Why did the block not go through the process of title determination by the Native Land Court before purchase?

99. On the evidence, the Crown did not employ any methods which could be described as amounting to an adequate investigation of customary interests in the block. The evidence does not appear to indicate that the Crown officially investigated any customary interests in the block. Instead, the evidence suggests that the Crown simply decided who it thought it should

[245] Hearn, *Sub-district block study – southern aspect*, at 245 – 255.

deal with. As noted by Stirling when Booth paid the "owners" of the block, he:[246]

> *[…] proceeded to Napier to pay the two contending tribal groups their respective half of the purchase price without bothering about precisely whose or what title was being paid for.*

100. Further:[247]

> *The government had done nothing to identify the legal owners of Waitapu before paying over the purchase money to one of the parties claiming it.*

101. The only action from the Crown that came remotely close to an investigation into customary interests related to the promise made by Booth to Kawana Hunia in 1879, to investigate the interests in the block, as part of Hunia signing the Waitapu purchase deed.[248] However, it was not until 1886, after Hunia's passing and his son insisting on the matter being dealt with, that Native Minister John Ballance agreed that a further inquiry should be made. Booth (who was then Gisborne's Resident Magistrate) was asked to complete a full report. Booth brought forward minimal new information – he insisted that:

a. It was McLean who had recognised Kawana Hunia, Utiku Potaka, and Renata Kawepo as co-owners;
b. That the situation was conveyed out the decision of the NLC to award the adjacent Otamakapua block, "*of which Waitapu was originally a portion*", to Ngati Hauiti and Ngati Upokoiri; and
c. The matter was, therefore, then left to rest.[249]

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[246] Stirling, *Nineteenth century overview*, at 63.
[247] Stirling, *Nineteenth century overview*, at 63.
[248] Hearn, *Sub-district block study – southern aspect*, at 252.
[249] Hearn, *Sub-district block study – southern aspect*, at 255.

Q18 – What was the impact, if any, of the Crown determining title in, and purchase of, the Waitapu Block on Taihape Maori customary interests, in terms of their present and future needs? Following purchase/acquisition of the Kaweka and Waitapu blocks, what constrictions of customary interests, if any, were experienced by or imposed on Taihape Maori?

102. The impact of the Crown determining title in the Waitapu block – by paying who it chose – was that it gave itself the ability to, essentially, determine who had customary interests. The Crown never adequately determined who had what "legal title" (or even *what portion* of the "title"). Instead, it simply paid money to some of the contending iwi groups who were claiming interests, and ignored multiple complaints about its determination process.

103. The evidence on record does not specifically set out the impact of this on Taihape Maori. However, drawing from the evidence, Counsel submit that all Taihape Maori with any customary interests in the block:

    a. Did not have their customary interests properly acknowledged or recognised by the Crown;
    b. Had their interests constricted to whatever the Crown had arbitrarily determined; and, therefore,
    c. Likely lost out on receiving the proper compensation that would have reflected their interests in the block, and, which would have allowed them to financially meet their present and future needs.

Q19 – What compensation, including payment and/or providing reserves of land, was offered to Taihape Maori for the Waitapu block and how was the amount determined?

104. The purchase price for Waitapu first appeared in Booth's October 1879 letter to Native Minister John Bryce requesting £14,742 for the purchase of Waitapu.[250] In November 1879, Kawana Hunia "and others" and Utiku Potaka "and others" received £7,371 each for Waitapu.[251] The evidence on record does not state how Booth arrived at that price, nor were any reserves noted.

105. As detailed in paragraphs 139 – 146 of the main closing submission, the exclusion of competitive pricing via the right of pre-emption meant Crown alone set prices. Dr Hearn has reported that, in southern Taihape generally, the Crown generally set prices "*to transfer the lands acquired from Maori into the hands of settlers at a profit*" rather than by the commercial value of the land. Notably, the Crown resisted independent valuation of Maori-owned lands.[252]

106. This combination meant Taihape Maori likely received much lower prices for Waitapu than they would have received on the open market, and that the amount was determined by a process that was not necessarily based on "consistent or consistently applied criteria".[253]

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[250] Hearn, *Sub-district block study – southern aspect*, at 249.

[251] Hearn, *Sub-district block study – southern aspect*, at 253.

[252] Terry Hearn, *Sub-district block study – southern aspect (#A7) summary of report by Dr Terry Hearn* (Wai 2180, #A7(f)) at [7.2].

[253] Hearn, *Sub-district block study – southern aspect (#A7) summary of report by Dr Terry Hearn*, at [8.2].