In the Waitangi Tribunal **Wai 2180**
Taihape – Rangitīkei ki Rangipō 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)

Generic Closing Submissions – Native Land Court Questions One to Six

Dated 21 December 2020

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Introduction

1. The introduction and operation of the Native Land Court (**NLC**) is a key issue in the Taihape inquiry district. It is submitted that the Crown, in breach of its duties and obligations under te Tiriti o Waitangi (**Tiriti**), established the NLC to investigate and extinguish Māori customary title and to convert customary interests/rights/modes of ownership into individual titles that derived from the Crown. The NLC arrived in the Taihape inquiry district in the late 1860s, issuing its first land block title by 1872. The majority of the Court's activity took place during between the late-1870s and the 1910s, and contributed to the rapid, mass alienation of Māori-owned land throughout the rohe through mechanisms which individualised and fragmented ownership of and interests in the land blocks.

2. These submissions will, in accordance with (but not restricted by) the Tribunal's Statement of Issues (Questions 1 – 6) on the NLC, set out and demonstrate the unique features which arise from the establishment of the NLC in the Taihape district, including:

    a. Consultation with Taihape Māori;
    b. The opposition of Taihape Māori to the NLC;
    c. The alternative land tenure and title options considered;
    d. The promises or assurances made by the Crown in the nineteenth century;
    e. Taihape Māori engagement with the NLC;
    f. Determination of ownership; and
    g. Principles used by the NLC compared with Tikanga Māori.

Crown Duties

3. The Tribunal is required to evaluate the NLC processes in terms of the Crown's duties to Māori as set out in and derived from te Tiriti o Waitangi.

4. Counsel submit that at all times, the Crown had duties, under te Tiriti o Waitangi to:

a. actively protect Taihape Māori rangatiratanga and their lands to the fullest extent practicable;
b. act reasonably and with the utmost good faith towards Taihape Māori;
c. adopt a fair process in any dealings with Taihape Māori and their lands;
d. recognise and uphold Māori customs and practices;
e. foster and protect the autonomy of Taihape Māori;
f. ensure that they retained lands that they did not wish to sell and their tino rangatiratanga over those lands;
g. ensure Taihape Māori were left with a sufficient land base for their present and future needs; and
h. remedy wrongful acts and omissions of the Crown and its agents.

Crown Position and Concessions

5. The Crown made the following statement with regards to its position as to the evidence:[1]

> *[G]iven the relatively late engagement between the Crown and Taihape Māori, a higher proportion of land within this region was granted titles by the Native Land Court before significant Crown purchasing occurred than in other districts. It is apparent on the evidence that:*
>
> > *(a) the 1862 Native Land Act was not applied in the district;*
> > *(b) title for a small amount (approximately 4 per cent) of the land in Taihape district was granted under the 1867 version of the tenowner rule…*

6. In response, Counsel submit that:

[1] Wai 2180, #1.3.2, at [35].

a. While it is true that the 1862 Act did not apply in the Taihape district, it is significant in terms of setting the scene for the creation of the core legislation and principles upon which the NLC operated; and

b. Four percent across the entire district may seem like "*a small amount*", but it is submitted that this would have been 100% for some hapū or iwi. The Crown's submissions, therefore, just further demonstrates the Crown's stance of creating an environment of individualisation, and generally dealing with Māori Land, without a care for the Māori landowners.

7. The Crown also stated that:[2]

> *The Crown identifies earlier concessions or acknowledgements in relation to systemic issues with the 19th century native land law regime below, however cautions that to view any of these matters without context would be to over-simplify what was a genuinely complex era of transition and interaction between different forms of tenure. Doing so would, among other risks, negate the very real policy and political debates that informed the evolution of this regime at the time; negate Māori agency and internal politics; and draw inaccurate causal links (for example,* ***whilst the Crown accepts that individualised titles resulted in lands being more vulnerable to fragmentation and alienation, the relationship between the Native Land Court's adjudication of title function and land alienation was not one of cause and effect: the fact that the Court determined title to a parcel of land did not lead inevitably to the alienation of that land****).*

8. Counsel submit that the issues with the NLC title determination regime was not simply about alienation, but rather the fact that it hugely facilitated alienation – it was a condition precedent to the alienation of land. And the further issue is that the Crown actually took advantage of this, which, as

[2] Wai 2180, #1.3.2, at [37]. Emphasis added.

discussed further in these submissions (and in the generic Crown purchasing closing submissions[3]), Counsel submit that the clear connection is established.

9. The Crown made the following concession in relation to the Native Land laws, insofar as it is relevant to the experience of Taihape Māori:[4]

> *The Crown concedes that the individualisation of Māori land tenure provided for by the native land laws made the lands of iwi and hapū in the Taihape: Rangitīkei 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.*

10. The Crown, however, has failed to make any specific concessions regarding a systemic and pernicious problem that breached te Tiriti. The Crown still requires that to be proved for each case/block of land affected by the NLC throughout the period. It has, therefore, essentially, chosen to force the re-litigation of the issues surrounding the establishment of the NLC, and the new tenure system introduced and administered through the Court. In this respect, the Crown has taken the same approach in this inquiry as it did in the Turanganui-a-Kiwa, Hauraki, Whanganui, and Rohe Potae Inquiries. This Tribunal has, therefore, been compelled to consider the topic in detail, and claimant counsel have also, correspondingly, been obliged to make detailed submissions on this issue.

The Evidence

11. 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;

[3] Wai 2180, #3.3.49.
[4] Wai 2180, #1.3.1 at [2].

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, 'Māori 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, 'Māori and economic development, 1860-2013', #A48.

12. Counsel note that the scope of the technical reports is limited in relation to the establishment and constitution of the NLC and those reports do not provide a detailed and comprehensive coverage of those aspects of this topic.

Establishment of the NLC

13. In the 1860s, the growth of Pakeha settlement and pastoralism on Crown lands south of the Taihape inquiry district led to the need for expansion into the Taihape inquiry district. This, in turn, resulted in an increase of pressure to purchase lands from the Crown, particularly in the Waitapu, Otamakapua, and the Paraekaretu blocks.[5] This land purchase pressure put Taihape Māori in the position where, in order to benefit from (or protect) their interests, there was a need to define land boundaries and customary interests.[6]

14. At first, prior to the interference of the NLC, Mokai Patea Māori defined their boundaries and interests through customary mechanisms. Bruce Stirling recorded that these included:[7]

> *[T]he placing of pou whenua and holding hui at which land interests and boundaries were discussed and agreed, or so they thought. Later they adopted more formal committee structures to engage with the government and to proclaim their boundaries. But the Crown did not*

[5] Bruce Stirling, *Nineteenth century overview* (Wai 2180, #A43), at 1.
[6] Bruce Stirling, *Nineteenth century overview*, at 1.
[7] Bruce Stirling, *Nineteenth century overview*, at 1.

> *recognise such initiatives and tended to engage with those who sought to sell land regardless of the wishes of resident owners, who were then obliged to assert their interests in order to join a Crown deed rather than define and exclude their interests within the boundaries of the deed (much less secure reserves).*

15. However, in the 1860s, the Crown introduced the NLC with the enactment of the Native Lands Acts 1862 and 1865 – a regime which would bring in its own title determination process.

Establishment without consultation

16. The Crown did not consult with Taihape Māori prior to the introduction of the legislation and the establishment of the NLC, although it fundamentally altered the Tiriti agreement and terms. And, it is submitted in light of the fact that none of the historical evidence shows any indication of consultation and the general nationwide failure to consult is apparent from other Tribunal inquiries, this can be confidently asserted in respect of the relative backwater of Taihape. It is further submitted, therefore, that it is open to this Tribunal to make similar findings that the Crown did not consult Taihape Māori regarding the creation of a land court nor the form and processes adopted.

17. Counsel note that the Crown has made the concession that:[8]

> *Generally, the Crown has acknowledged that Māori input into the establishment of a Native Land Court was too limited to be considered satisfactory by today's standards. Given that the Native Land Court was established in 1862, prior to significant Crown engagement with Taihape Māori, the Crown acknowledges that the Crown did not consult with Taihape Māori prior to its establishment. The Crown notes however that consultation with Māori over legislation in the sense expected today was not the norm in 1862*

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

> *and to suggest it should have is to apply more present-day standards to the issue.*

18. Counsel, however, submit that the above is not a satisfactory justification. The Crown introduced and signed te Tiriti in 1840, so the obligations applied from that point.

19. The Crown has additionally stated that:[9]

> *The degree to which Taihape Māori 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.*

20. However, the leaders of Taihape hapū and iwi were often actively involved in the NLC's activity in blocks to the South of the inquiry district, and also in the Hawke's Bay region to the East (such as Renata Kawepo and those of Mokai Patea) – as their hapū/iwi boundaries and land interests often overlapped with their neighbouring whanaunga.[10] These rangatira were, therefore, quite aware of the significant problems and conflicts which the arrival of the NLC could bring. And these experiences would, no doubt, have informed their negotiations with the Crown over the introduction of the NLC in the Taihape inquiry district. Regarding the Court's eventual arrival in Taihape, Bruce Stirling summarised that:[11]

> *In the same year in which the Native Land Court first investigated land in the district (1872), the Mokai Patea tribes submitted their first petition opposing the Native land laws. It was evident from the experience of related tribes (especially in Hawke's Bay) that the new court would cause them harm when it arrived in their district. They joined other tribes in seeking to exclude it from their district, or at the very least see the Native land laws heavily amended, land*

[9] Wai 2180, #1.3.2, at 42.
[10] Subasic and Stirling, *Sub-district block study – Central aspect*, at 192; and P Cleaver, *Māori and Economic Development in the Taihape District 1860-2013*, at 85.
[11] Bruce Stirling, *Nineteenth century overview*, at 3.

> *purchasing methods greatly altered, and the court significantly reformed. The efforts of the local tribal committee and their participation in pan-iwi organisations such as the Repudiation Movement did not lead to any useful reform of the Native land laws. As a result the Mokai Patea tribes continued to be forced into court to defend their customary interests from those outside the district who sought to claim and to alienate their lands.*

21. The 1862 Act abandoned the right of pre-emption which the Crown had exercised theoretically since 1840 and enforceably since 1846, and provided mechanisms that gave Māori lands "legal titles" that derived from the Crown.[12] It also provided that Māori land could only be legally transacted after the NLC had awarded these Crown-derived titles. So, from that point on, for Taihape Māori to transact, protect, lease, or deal with their lands in any such way, they were required to have their rights and interests legally determined and recognised through the NLC's processes.[13]

22. On the other hand, from the Crown's position, the need to identify, consult, and obtain consent (signatures) of all owners of Māori land was, no doubt, one of the most challenging obstacles it faced. It, therefore, responded to this difficulty by limiting the number of owners whom it had to deal with.[14] The Native Lands Act 1865 individualised land titles by limiting the number of persons to whom titles could be issued to 10 named individuals.[15] This was as opposed to the land being "owned" by the hapū (or iwi) as a collective, as defined by tikanga or customary practice. The concept of Māori "owning" land in any way analogous to Pakeha legal ownership was in itself foreign to Māori interest allocations under tikanga.

23. The 1862 Act also permitted the named individuals on the title to dispose of their interests, while also providing mechanisms for the subdivision and partitioning of their interests. On top of this, it also imposed survey costs on

[12] David Williams, "*Te Kooti Tango Whenua" The Native Land Court 1864-1909* (Wellington, 1999), at 64-65.
[13] Bruce Stirling, *Nineteenth century overview*, at 1-2.
[14] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 275-276.
[15] David Williams, "*Te Kooti Tango Whenua" The Native Land Court 1864-1909,* at 94.

all named owners as a prerequisite for the issue of titles.[16] These provisions remained in place in subsequent versions and amendments of the Native Lands Act.

24. The subsequent and far more significant version of the Act was implemented in 1865 – the Native Lands Act 1865. Section 21 of the 1865 Act read:[17]

> *Any Native may give notice in writing to the Court that he claims to be interested in a piece of Native Land specifying it by its name or otherwise describing it and stating the name of the tribe or the names of the persons whom he admits to be interested therein with him and that he desires that his claim should be investigated by the Court in order that a title from the Crown may be issued to him for such piece of land.*

25. This empowered owners to apply for an investigation of title, and the evidence relating to, at least, the southern portion of the Taihape inquiry district indicates that in all cases the blocks were brought before the Court by those claiming ownership. In addition, section 83 provided that, if the Crown had entered with owners into agreements for the sale and purchase of land, the Crown could bring such blocks before the NLC to have ownership determined and titles granted in order to enforce said agreements.[18]

26. Dr Terry Hearn noted in his report that the NLC, through the Native Lands Act 1865:[19]

> *[S]et out to secure three objectives: first, to provide for 'the ascertainment' of customary owners; second, to secure 'the extinction of proprietary customs and … the conversion of such modes of ownership into titles derived from the Crown;' and third, to*

[16] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 25.
[17] Native Lands Act 1865, s 21.
[18] T Hearn, *Sub-district block study – Southern aspect*, at 258.
[19] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 25.

> *regulate the 'the descent of such lands when the title thereto is converted …'*
>
> *The overriding goal was to determine and extinguish Māori title through the issue of 'paper titles' which could then be acquired by settlers. The Act also provided that with respect to blocks of fewer than 5,000 acres no certificate of title could 'be made in favor [sic] of a tribe by name.' Further, just ten persons could be named on any title although the actual number of owners might number many hundreds. In practice, many 'trustees' acted and the NLC treated such named persons as absolute owners.*

27. As detailed by Dr Terry Hearn above, the 1865 Act, most significantly, introduced the ten owner rule**.** Section 23 provided that:[20]

> *At such sitting of the Court the Court shall ascertain by such evidence as it shall think fit the right title estate 'or interest of the applicant and of all other claimants to or in the land respecting which notice shall have been given as aforesaid and the Court shall order a certificate of title to be made and issued which certificate shall of title specify the names of the persons or of the tribe who according to Native custom own or are interested in the land describing the nature of such estate or interest and describing the land comprised in such certificate or the Court may in its discretion refuse to order a certificate to issue to the claimant or any other person Provided always that no certificate shall be ordered to more than ten persons. Provided further that if the piece of land adjudicated upon shall not exceed five thou-sand acres such certificate may not be made in favor of a tribe by name.*

28. So, for land blocks smaller than 5,000 acres could only have a maximum of 10 named owners, who, in theory, represented a larger group of other owners as "trustees".[21] Evidence indicates that these "trustee" owners were

[20] Native Lands Act 1865, s 23.
[21] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 275-276.

selected to act on behalf of the co-owners, with appointment confirmed by the NLC.[22]

29. Counsel note that, with respect to providing for the land blocks *larger* than 5,000 acres, this provision was ambiguous, and appears to suggest that communal title was possible for blocks larger than 5,00 acres. The Court, however, seems to have taken a hard line in terms of interpretation, as there is little evidence of blocks larger than 5,000 acres being awarded to communal groups.

30. In practice, however, because the law did not expressly recognise the 10 owners as being actual trustees for the unnamed owners, the NLC, in turn, did not acknowledge the named owners as trustees (or the unnamed owners as "beneficiaries"). This meant the NLC (and its related legislation), in practice, dispossessed the unnamed individuals of their customary interests in the land.[23]

31. In the Taihape inquiry district, Dr Terry Hearn noted in his report that:[24]

> ***Whether those trustees always acted in accordance with the wishes of all owners is less clear.*** *In 1885 Chief NLC Judge Fenton recorded that those who had drawn up the 1865 Act had been surprised by the scale of the abuses around the 10-owner titles. 'Our confidence [in Māori] was misplaced. No doubt many Māori had cause to regret the incompetence or naiveté of the Act's framers.* ***The real difficulty is that there was nothing in the law to prevent abuse and nothing in the law to remedy any abuses which took place.***

32. As Professor Richard Boast QC wrote in his *Native Land Court* text:[25]

[22] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 276.
[23] Richard Boast, *The Native Land Court – A Historical Study. Cases and Commentary 1862-1887* (Wellington, 2013) at 69.
[24] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 276. Emphasis added.
[25] Richard Boast, *The Native Land Court – A Historical Study. Cases and Commentary 1862-1887* (Wellington, 2013) at 68.

> *The statutory language does not clarify whether the ten acquired title as individual simply owners or whether they became trustees for the remaining owners of the block. Certainly there is nothing in the wording that point [sic] to any kind of trust, and one does not get the impression from a close examination of the early minute books that the Court practice and procedure was based on any assumption that the owners as recorded in the Court certificate of title were trustees. If the grantees were meant to be trustees it seems reasonable to assume that this would be reflected in some way in the record and such is simply not the case.*

33. Professor Richard Boast also wrote that:[26]

> *The ten were legal owners. Of course as legal owners, they could then set up an ordinary civil trust in favour of some specific class of beneficiaries if they wanted to: but it seems clear enough that legally the vesting of the block in the ten owners did not of itself set up a trust of any kind. Yet the grantees must have been seen by the Court at the very least as representatives, as it will have been obvious that only relatively few names were being included in the title records. Representatives, however, in what sense? This is not documented or explored… Representative owners are not necessarily the same thing as trustees.*

34. The concept of just ten individuals being regarded as the absolute legal owners of tribal land, however, was very contradictory to how customary/tikanga-based tenure worked. In his journal, CMS missionary Reverend Thomas Grace highlighted some issues arising from the NLC's broken ten-owner rule restriction:[27]

> *The land courts enable the worse [sic] and most drunken fellows of a tribe to alienate their lands to supply their desire for drink. The*

[26] Richard Boast, *The Native Land Court – A Historical Study. Cases and Commentary 1862-1887* (Wellington, 2013) at 68.
[27] B Stirling, *Nineteenth century overview*, at 238.

> *arrangement is to get a tribe to agree to pass a block of land through the court, and instead of giving every individual owner a title, the Crown grant is made out in the names of 10 of the number, who hold the land of the others in trust. These 10 are generally young men, who are for the most part drunkards, who get into debt or to satisfy their dissipations, too often sell the land of the tribe without the real owners being able to prevent it. Europeans are always ready to credit these men.*

35. Counsel also submit that it is unclear when the concept of the 10 owners being trustees actually became widely accepted. Fenton was the main framer of the 1865 Act, so he is being somewhat disingenuous in talking about "the Act's framers" as if they did not include himself. Also telling against the concept of trusteeship, the Crown's emphasis over the next decade when trying to "fix" the problem or more was not to clarify the "trustees'" position and responsibilities, but to try to get everyone with an interest on the title, which did not occur until the 1873 Act – creating a new set of problems.

36. So, unsurprisingly, the ten-owner rule caused great issues with Māori nationally. Dr Terry Hearn reported that:[28]

> *In response to Māori objections, section 17 of the Native Land Act 1867, while still providing for the issue of certificates of title to just ten persons, required that the names of all owners of any block were to be registered in the Native Land Court and endorsed on the back of the certificate.*

37. However, these endorsements on the back of certificates had no real legal effect or meaning in terms of ownership. So the legal status of the ten-owner rule remained unremedied.

[28] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 25; The Native Lands Act 1867, section 17.

38. It is also noted that, again, while award of tribal titles for blocks over 5,000 acres was theoretically possible under section 23, this provision was rarely used (and Counsel certainly found no evidence of such in the Taihape inquiry district) before it was repealed by the 1867 Amendment Act.[29]

39. In light of the continued complaints and criticism by Taihape Māori in relation to the Native Land legislation (and to the Crown's credit), the Crown appointed former Chief Justice Sir William Martin to investigate the issues arising from the Native Land laws and to, accordingly, make recommendations for the revision of such.[30] In his 1871 report, Sir William identified and made recommendations in relation to two major sources of issues:[31]

    a. *[T]he first related to certificates and Crown grants, principally that they were so framed as 'to sacrifice the rights of other persons equally interested in the land but not named in the instrument. They assert that in many cases that power has been actually exercised, to the great loss of persons who had no means of protecting themselves.' Martin concluded that the complaint over certificates and Crown grants was 'just and well founded,' while the so-called 'ten owner rule' had only been only partially rectified by section 17 of the Native Lands Act 1867*; and

    b. *The second grievance related to the fact that the interests of the ten persons named were, 'however diverse and unequal,' not defined. Māori expressed other concerns, among them, the power of individuals to sell interests. Martin proposed that, both retrospectively and prospectively, certificates or Crown grants should show the names of all owners and that all dealings in undivided interests should be prohibited. He also recommended, in response to complaints over NLC costs, that a scale of fees should be established, 'accompanied by a proper taxation of costs.'*

[29] Waitangi Tribunal, *The Hauraki Report (Vol II)* (Wai 686, 2006), at 698–699; Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version (Vol I – II)* (Wai 898, 2018-2020), at 1180.
[30] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 26; and AJHR 1871, A2, at 3-4.
[31] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 26; and AJHR 1871, A2, at 3-4.

40. Martin's main recommendations were not taken on board, with the subsequent Native Land Act 1873 actually furthering the issues of the 1865 Act by eliminating any remaining possibility that titles might be issued in favour of tribes – thus, cementing the principle of individual ownership.[32]

41. In 1870, the Immigration and Public Works Act 1870 came into force. Significantly, section 34 authorised the Crown to acquire "any land" in the North Island, while section 35 allocated £200,000 for the purpose. The other key legislation implemented in the same year was the Immigration and Public Works Loan Act 1870, which authorised the government to raise £4,000,000 for immigration and public works purposes. These pieces of legislation were the Crown, essentially, giving itself the enhanced ability to acquire land.

42. In the following year, section 42 of the Immigration and Public Works Act Amendment Act 1871 provided for the acquisition of lands owned by Māori "*for the purpose of mining for gold for the establishment of special settlements or for the purposes of railway construction*", and that:

> *[I]t shall be lawful for the Governor to enter into arrangements for such purpose previous to the land passing through the NLC but it shall be necessary that subsequent to such arrangements the land shall be passed through the NLC and a certificate of title of the person entering into such arrangement with the Governor obtained and on such certificate being obtained the arrangements entered into shall be as binding on both parties as if made after the order of the Court It shall be lawful for the Governor whenever he shall have determined to enter into negotiations for the purchase of such land to insert a notice in the New Zealand Gazette that it is his intention to enter into such negotiations and after such notice is inserted it shall not be lawful for anyone to purchase or acquire from the Native owners any right title or interest or contract for the purchase of acquisition from the Native owners of any right title or interest in the*

[32] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 26.

land specified in such notice unless the notice be cancelled by the Governor provided that no such notice shall have longer operation than for the period of two years.

43. The Public Works Act Amendment Act 1871 gave the NLC an explicit role in supporting the Crown's land purchasing agenda – the Crown's intention was either to benefit from the NLC's title determination system, or use the NLC as a retrospective rubber stamp to give legitimacy to its actions and selections of "rightful owners". This, in turn, confirms that the creation and development of the NLC's regime and legislation was clearly at the whim of the Crown that was only interested in acquiring land in the fastest and easiest manner, rather than in a Tiriti consistent manner. It is also submitted that it shows that this remained the Crown's attitude a decade after it had approached the Court's creation in the same way. Again, there is no indication that any Māori, let alone those from Taihape, had been consulted about or acquiesced to these measures affecting their land.

44. The Native Lands Act 1873 then abolished the ten-owner rule and, instead, provided that *all* owners were to have their names enrolled on "memorials of ownership".[33] However, as already mentioned above, the main recommendations proposed by Sir William Martin were not incorporated.[34] And, as has already been found and established by many Tribunals, the titles awarded under the 1873 Act made it very difficult for the owners to do anything with their land other than sell it (which was the Crown's purpose in developing the NLC legislation).[35]

45. Other notable changes contained in the Native Lands Act 1873 include:

    a. Section 49 – which allowed owners to agree to an outright sale of land at any time;[36] and
    b. Section 107 – a provision relating to preliminary sale and purchase agreements – which provided the NLC the power to investigate and

[33] The Native Lands Act 1873, section 47.
[34] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 26-27.
[35] Waitangi Tribunal, *Te Rohe Potae Report*, at 1181-1182.
[36] The Native Lands Act 1973, section 49.

> make interest orders upon application of either any Māori or the Governor claiming interest in such land.[37]

46. But, as Dr Terry Hearn correctly observed:[38]

> *What the Native Land Act 1873 failed to do was to respond to concerns raised by Māori over the Crown's alleged willingness to engage in secret dealings, to deal with reputed rather than established owners, and to enter into purchase negotiations prior to title determination.*

47. In 1873, the Crown revived the Native Land Purchase Branch and appointed land purchase agents to operate throughout the North Island, with Donald McLean (Native Minister for the period from 1869 to 1876) assuming overall responsibility for the Māori land-purchasing programme.[39] Dr Terry Hearn reported that:[40]

> *The land purchase provisions of the Immigration and Public Works Acts thus marked the re-entry of the Crown into the purchasing of lands owned by Māori, a major reversal of policy justified on a range of grounds, among them that the Crown needed to create a public estate; to secure for the state the appreciation in land values which it was expected would follow the construction of roads and railways; to ensure the spread of closer settlement, the assumption being that left to the private market, 'a few adventurous speculators' would lock the land against such settlement;' to extend the Crown's territorial reach; and to improve the colony's internal security.*

48. Dr Terry Hearn also recorded that Vogel, Premier at the time, had explicitly noted that, "*we must take land as security for the railways we are constructing*," and that, "*we propose that a portion of the proceeds of lands purchased from the Natives, or a portion of the lands themselves, shall be*

[37] The Native Lands Act 1973, section 107.
[38] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 27.
[39] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 28.
[40] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 28-29.

devoted entirely to railway purposes".[41] And, further, during the debate on the Public Works and Immigration Bill 1873, McLean had emphasised that:[42]

> *There could not possibly be any safer or more satisfactory method of acquiring Native lands than by making the Government responsible for the results of its acquisition, and for the security of tenure of those settled upon it … If the North Island was to be made suitable for settlement, if they were to have colonization upon a systematic plan, inevitably the Crown alone must be responsible for the acquisitions made.*

49. The key points here are that the Crown wanted "safety" and to secure the appreciation in land values. It is submitted that the NLC was a key component in meeting these Crown policy objectives. The Court provided the safety of legal land titles as opposed to having "wild" customary land ownership and interests sitting largely beyond the reach of the legal system and supporting ongoing Māori customary societal practices and attitudes. It also enabled the Crown to access the portions of the land that provide the appreciation in value and therefore greater economic benefit. The people who were excluded from this safety and security were the Māori with customary rights and interests in the whenua, who then became "landowners" whose ownership could be attacked, undermined or acquired by various legal means. The court-supported policy also meant that Māori would be actively deprived of benefitting themselves from the appreciation in the value of the lands, a key selling point in convincing them to support and use the court. Their interests were not considered; the Wellington policymakers were oblivious to the equality of treatment and benefit Te Tiriti had guaranteed the Crown's Tiriti partners. This failure included Taihape Māori who were seen solely as sources of land for the roads and railways that would bring the economic prosperity and development.

[41] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 29.
[42] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 29.

50. Counsel submit that this point fits in with the Crown's acknowledgement as made in its Memorandum of Counsel, dated 2 September 2016, that:[43]

> *The Crown's overriding objective throughout the period key to this inquiry (1870s-1900) was to expedite economic development including settlement throughout the colony. All governments during this period were reluctant to promote or support changes in the land system which might restrict or hinder economic development. The Crown considered a Native Land Court regime to be an efficient way of ascertaining title and facilitating settlement. The Crown also viewed the continuation of Crown land purchase as a principal method of land supply for settlement.*

51. Here, the "*economic development including settlement throughout the colony*", referred to by the Crown was, essentially, only Pakeha pastoral farming (which involved the taking of land, defoliating of resources on the land, and, essentially, turning the land into a unitary model of production). The key problem, though, was the nature of the economic development was on the single model of pastoral farming, at the exclusion of Māori ability to participate – especially as they lost more and more land. Māori were, therefore, stuck in a catch-22 situation where, the more they participated, the less land they had and, therefore, a reduced capacity to participate.

52. Counsel respectfully agree with the *Te Rohe Potae* Tribunal, that:[44]

> *Essentially, the 1873 Act created a hybrid form of title that was neither truly customary nor a Crown-granted freehold. As discussed in section 10.2.1, previous Tribunals have found that the titles awarded under the 1873 Act made it very difficult for owners to do anything with their land other than sell it.*

53. In 1877, the Government Native Land Purchases Act 1877 was introduced, with the intention of enabling the Crown to not only protect its investment

[43] Wai 2180, #1.3.2, at [41].
[44] Waitangi Tribunal, *The Te Rohe Potae Report*, at 1181-1182.

in land purchases in the form of pre-title advances, but also to strengthen its position against private competitors.[45] Section 2 of the Act provided that:

> *Where any money has been paid by or on behalf of Her Majesty the Queen for the purchase or acquisition of any Native lands in the North Island, or any estate or interest therein, or where any negotiations have been entered into for any such purchase or negotiation, whether the same lands have or have not been passed through the NLC, then and in all such cases, and after the publication of a notification respecting such lands … it shall not be lawful for any other person to purchase or acquire from the Native owners any right, title, estate, or interest in any such land or any part thereof, or in any manner to contract for any such purchase or acquisition.*

54. In the same year, the Native Land Act Amendment Act 1877 was passed, with section 6 providing that the NLC could enforce any agreement the Government had made with Māori and that, "*the Native Minister may at any time cause application to be made to the NLC to ascertain and determine what interest has been acquired by or on behalf of Her said Majesty*". This, effectively, provided the Crown with another avenue to bring Māori lands before the NLC and again at a time and in a manner to suit itself.[46]

55. These two provisions cemented an effective re-imposition of Crown pre-emption in the purchase process, locking out any private purchaser. They applied regardless of whether the lands had yet been through the NLC, and they gave practical effect to the Crown agents' use of the practice of paying tamana, which is discussed in the claimant generic closing submissions regarding Crown Purchasing.[47]

56. The first provision excluded all purchasing competitors "*Where any money has been paid by or on behalf of Her Majesty…*" while the second provision

[45] T Hearn, *Sub-district block study – southern aspect* (Wai 2200, #A7) at 29-30.
[46] T Hearn, *Sub-district block study – Southern aspect*, at 258.
[47] Wai 2180, #3.3.49 at 76-115.

obliged the Court to honour the Crown's purchasing activities by awarding it land ownership.

57. Once again, it is submitted, the supposedly independent NLC was set up by the Crown to be a mere tool in its land acquisition programme. The Minister could apply at any time to have the court make a determination of the interest acquired by the Crown. There was no wiggle room for the court to exercise its own judgment about the validity of the purchasing activities, its role being simply to ascertain how much land the Crown would be given for its existing expenditure and then to make the appropriate selection and award the corresponding certificate of title.

58. The result of the establishment of the NLC (and its relevant legislation) was consistent with, and fulfilled the Crown's intended purposes (as outlined above in paragraph 26). The in-depth impacts of the establishment of the NLC will be examined in later chapters of these generic closing submissions, but Counsel submit that, among other things, the general outcomes caused by the Crown's intended purposes included:

a. Heavy individualization of titles and, in turn, the fragmentation of land blocks;
b. The imposition of burdensome debts, and other related costs on Taihape Māori which, in turn, led to further adverse consequences on Taihape Māori;
c. The erosion and undermining of customary/traditional Taihape tikanga, authority, autonomy, practices, processes and social structures; and
d. The breaking down of, and division of, Taihape Māori between their own whanau, hapū and iwi.

59. It is, therefore, submitted that, while these Crown intentions fulfilled, these purposes (and their outcomes) were inconsistent with and in breach of te Tiriti and its principles.

60. It is submitted that the above evidence shows clearly that the Crown's intended purpose of the NLC was to enable itself to more easily acquire Māori lands. It is therefore submitted that the Crown established the NLC to, essentially:

a. Convert customary ownership into a form of title that it could then easily alienate;
b. Promote colonisation and settlement on lands made available by NLC alienations consequent upon NLC title investigation; and, therefore, ultimately
c. Undermine customary Māori authority, achieving a crucial social objective as well as the economic ones relating to the land as an economic resource.

61. Counsel further submit that it is important to know whether the legislation which established the NLC was created and implemented with any Māori participation, consultation and approval, whether Taihape Māori played any role within that, and also whether such engagement took place in the generation of subsequent amendments to Native Land legislation.

62. The Hauraki Tribunal found that: [48]

> *There were good reasons for the Crown to establish a tribunal, independent of the Executive, to determine intersecting and disputed claims to Māori customary land, and to administer legislative modifications to customary tenure to meet new needs. The tribunal actually established, however – the NLC – was in many respects unsatisfactory, particularly because of the kind of role that Māori were limited to playing in it.*

63. The Hauraki Tribunal also found that, with respect to the changes that the Native Lands Act 1862 made to Māori land tenure, this "*warranted explicit,*

[48] Waitangi Tribunal, *The Hauraki Report* (Wai 686, 2006), volume II, at 777.

prior consultation with Māori",[49] and that Native Lands legislation of 1862, 1865 and 1873:[50]

> *[A]imed at simplifying custom for the purpose of dealing in or developing the land would not have been inconsistent with the Treaty provided it involved reasonable Māori input at the planning stage in the tenure changes proposed and the introduction of tenures suited to Māori needs and purposes and a genuine choice for the owners as to whether they put their land through the system.*

64. It is submitted, though, that no such Māori input occurred, the tenures were wholly unsuitable to Māori needs and purposes, and in numerous ways Māori were left with no genuine choice. Accordingly, as the Hauraki Tribunal implies the failures rendered the Court's establishment as being in breach of te Tiriti.

65. The Central North Island Tribunal has further found that the Crown not only has an obligation under te Tiriti to consult with Māori about how their lands should be managed and administered, but also to secure their consent to the introduction of any new tenure and title determination systems.[51] It is submitted that this did not occur in Taihape.

66. In the Whanganui Inquiry, the Tribunal concluded that:[52]

> *The Crown established the NLC not in order to meet Māori aspirations or needs, but with a view to furthering its own policy objectives, of which opening up Māori lands for settlement purposes was foremost. Advancing the interests of colonisation took priority over facilitating fuller or more secure forms of Māori engagement in the colonial economy. Adequate input and agreement by nineteenth century standards would have entitled Māori to:*

[49] Waitangi Tribunal, *The Hauraki Report*, at 710
[50] Waitangi Tribunal, *The Hauraki Report*, at 782.
[51] Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One* (Wai 1200, 2008), at 536.
[52] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report (Volume I)* (Wai 903, 2015), at 388-389.

- *The opportunity to review draft legislation that affected their land tenure before its passage through the General Assembly;*
- *Address any concerns with Crown representatives; and*
- *See their views fairly reflected in the final legislation.*

This happened neither with the Native Lands Act 1862 nor the Native Lands Act 1865. In denying Māori input into the design and makeup of the NLC, the Crown ignored its side of the Treaty bargain.

67. It also found that:[53]

The imposition of the Court on Whanganui hapū breached treaty principles. The Crown undertook to protect Māori in the ownership of their land unless and until they wished to sell. Logically, this should have extended to Māori choosing when and how to transform its title.

68. The Te Rohe Potae Tribunal subsequently found that:[54]

[T]he Crown's key failure was that the native land legislation and the court process authorised by it resulted in a lack of Māori control and input into title determination, contrary to the express wishes of Te Rohe Pōtae Māori. Despite the expectations of Te Rohe Pōtae Māori, the Kawhia Native Committee did not play any substantive role in the title determination process. We considered that the Crown's failure to follow through with its commitment to reform the legislation relating to native committees so that they could play such a role represented a cynical disregard for the Te Rohe Pōtae Māori demand for mana whakahaere. Accordingly, we found that the Crown's failure to provide Te Rohe Pōtae Māori with a greater role in the court's title determination process was in breach of the express

[53] Waitangi Tribunal, *The Whanganui Report (Volume I)*, at 471.
[54] Waitangi Tribunal, *Te Rohe Potae Report (Volume I and II),* at 1297.

terms of article 2 of the Treaty and its guarantee of tino rangatiratanga It was also in breach of the principle of partnership and the obligation to act reasonably and in good faith.

69. Counsel submit the above findings, including in neighboring districts, similarly apply to the current Inquiry and, therefore, request that the Tribunal adopt in this current inquiry the approaches taken by previous Tribunals as outlined above. It is open to this Tribunal to find that the Crown, in establishing the NLC to determine and extinguish Māori customary interests, and converting customary/tradition-based ownership into Crown-defined and Crown-derived titles, breached its duties and obligations under te Tiriti in the following ways:

a. Consultation with Taihape Māori with regard to the establishment of the NLC, and its relevant legislation, was non-existent, as admitted by the Crown;
b. Consultation with Taihape Māori with regard to subsequent reforms and amendments of the NLC, and its relevant legislation, if it happened at all, was far too limited to be considered satisfactory; and, thus,
c. The Crown's failure to establish, develop, and amend the NLC (the procedures and outcomes of which greatly impacting on Taihape Māori) in consultation with Taihape Māori was in breach of the Treaty principles of good faith partnership, autonomy, active protection and equal treatment.

Taihape opposition to the NLC

70. Counsel also submit that it is essential that the strong opposition of Taihape Māori against the NLC be taken into account when determining whether the Crown's establishment of the NLC and its relevant legislation (and subsequent amendments) were in breach of te Tiriti and its principles.

71. Counsel submit that the evidence before this Tribunal indicates very clearly that Taihape Māori did oppose the NLC, over many years, certainly in regard

to the matter in which it operated and the effects it had on their retention and use of their lands, from the principles under which it operated to the loss and separation from whenua that resulted from its processes.

72. It is submitted that Taihape Māori, having seen the impact of the NLC in other areas, wanted their whenua and tino rangatiratanga to be protected from the worst aspects of the process. Instead, the NLC had no regard for tikanga, and ultimately enabled vast quantities of land (including most of their productive lands) to be alienated, and/or for much of their remaining lands to become landlocked.

73. When it came to land allocation and use, rangatira and runanga traditionally played significant roles in making such decisions on behalf and in association with the iwi group.[55] And, with the increase of Pakeha settlement in the 1860s, starting in the South of the inquiry district, "*intertribal hui became increasingly important for the iwi in the wider region, not least as a forum for agreeing on tribal boundaries but also for political purposes.*"[56]

74. The evidence confirms that the hapū and iwi of the Taihape (and adjacent) districts indeed convened many inter-tribal hui for such purposes.[57] The 1860 Kokako hui, for instance, was a particularly notable example of Taihape Māori efforts to ascertain customary interests according to tradition.[58]

75. Similar hui were also convened at in 1867-1871, after the introduction of the NLC, particularly to settle the boundaries of various groups within Mokai Patea.[59] For example, komiti Māori had made a decision at one of these hui on the Moawhango boundary issues in favour of Mokai Patea, "*but because the komiti had no legal authority Ngati Rangi and others of Whanganui were free to ignore it and prefer [sic] their claims to the Native Land Court*".[60] This was similar to a hui held in 1871 in relation to Parikino and, according to the

[55] Phillip Cleaver, *Māori and Economic Development in the Taihape District 1860-2013* (Wai 2180, #A48), at 85.
[56] B Stirling, *Nineteenth century overview*, at 16.
[57] B Stirling, *Nineteenth century overview*, at 19-31; and P Cleaver, *Māori and Economic Development in the Taihape District 1860-2013*, at 85.
[58] B Stirling, *Nineteenth century overview*, at 19-31; and P Cleaver, *Māori and Economic Development in the Taihape District 1860-2013*, at 85.
[59] B Stirling, *Nineteenth century overview*, at 25.
[60] B Stirling, *Nineteenth century overview*, at 31.

Whanganui Resident Magistrate, William Woon, the boundaries were settled "for the most part," with a view to preventing future disputes in the NLC. However, again, given the nature of the Native land legislation, the hui had little effect on subsequent NLC title investigations.

76. As Bruce Stirling reported:[61]

> *In the 1860s and early 1870s [Taihape Māori] met with other tribes at large hui convened to consult and reach a consensus on tribal interests and the boundaries for land dealings. This was not the first time, and certainly not the last time, that they sought to resolve such matters in a customary manner, and nor was it the first time (or the last time) that they found themselves undone by the Crown's willingness to ignore their boundaries and to deal with those prepared to offer Taihape lands without reference to the resident owners.*

77. The NLC and the troubles it caused led to a significant amount of political action amongst Taihape Māori in association with many other Māori throughout New Zealand. This included the Repudiation Movement based close by amongst their whanaunga in Hawke's Bay, which challenged the validity of the NLC, its processes and titles resulting from its investigations.[62]

78. In July 1872, Te Riuopuanga of Moawhango presented to Parliament the first petition opposing the NLC.[63] The Repudiation Movement also held its first hui in 1872, which led to substantial petitions in 1873, including one signed by Renata Kawepo and 553 supporters, "*signatories [we]re not recorded but it is highly likely that those of Mokai Patea who supported the Movement signed on for the petitions*".[64] The petitions opposed the work of the NLC, while also seeking fuller inquiries into specific NLC handling of land transactions. Initially, there were promising signs, such as McLean's Native Councils Bill, which would have provided a significant role for Komiti Māori

[61] B Stirling, *Nineteenth century overview*, at 6.
[62] B Stirling, *Nineteenth century overview*, at 236.
[63] B Stirling, *Nineteenth century overview*, at 237.
[64] B Stirling, *Nineteenth century overview*, at 237.

in title determination and land management. However, this Bill was withdrawn before it even had the chance to be voted down.[65]

79. Generally, the government did not welcome these issues being raised – when Kingi Herekiekie of Mokai Patea later, in 1875, wrote to *Te Waka Māori*, the "*government's bi-lingual mouthpiece*", to complain that the NLC was "*killing the land*," the government refused to print his complaint. [66] Instead, the response received was that he should take up his issues "*with his friends, as it did not concern the paper's Māori readership*".[67] This response is not only unlikely to be the true with respect to "the paper's Māori readership", but also very inappropriate. This is particularly so as it is clear that the whenua, and *how* the whenua was held in accordance with tikanga, was actually of great significance to Taihape Māori. This was demonstrated in the evidence – Raihania Potaka, for example, stated that:[68]

> *The land is a source of identity to our people. Ngai Te Ngaruru acted as kaitiaki of the whenua. Land alienation has disempowered our people which has, in turn, had a major impact on the social, physical, mental and spiritual wellbeing of the hapū and Iwi of Ngai Te Ohuake.*

80. Dr Moana Jackson also considers in his evidence that:[69]

> *[T]he contrary reality in tikanga that land is a part of whakapapa which therefore carries certain reciprocal rights and obligations cementing the relationship between humans and Papatūānuku. It positions that reality within tikanga as a legal or jural construct and focusses on the basic elements of that construct as they relate to the land and the authority and responsibility which Iwi and Hapū have always had in relation to the whenua within their rohe.*

[65] B Stirling, *Nineteenth century overview*, at 237.
[66] B Stirling, *Nineteenth century overview*, at 238.
[67] B Stirling, *Nineteenth century overview*, at 238.
[68] *Brief of Evidence of Raihania Potaka* (Wai 2180, #H12), at 7.
[69] *Brief of Evidence of Moana Jackson* (Wai 2180, #H7), at 35.

81. In 1876-1877, the Repudiation Movement convened a series of pan-tribal hui at Pakowhai and Omahu, which generated huge petitions signed by hundreds of Māori from several tribal districts, including Taihape Māori.[70] The main topic of the hui and subsequent petitions related to "*the abolition of the NLC*".[71] The question was posed:[72]

> *Why is it, and what is the reason that we, the Māori race cannot, or are not allowed, to work with the Government, in regard to the adjudication of Māori claims to land. We Māori of our own knowledge, know all our rights to our lands. We know who are the owners, and who are spurious claimants. We know all this without the aid or teaching of the European… Why is it that we, the Māori race, cannot, or are not allowed to work, with the Government in regard to the adjudication of Māori claims to land. We, the Māori people, are fully enlightened, and know all our own old customs with regard to land claims, and by us alone can a full and clear, and true judgment be given in our own land disputes. And we, the Māori alone, are competent to sit as Judges in Māori disputes or claims to land, as we are guided by our perfect knowledge of our own laws and customs to our own land ... the European is ignorant of our ancient laws in regard to our Māori lands, and the European is wrong in his mode of investigation, also in his judgment and decisions given by him in all Māori land claims, as the landless man obtains by the foolish acts of the European, as Judge, the lands of the rightful Māori owners.*

82. As Bruce Stirling noted, the position outlined above was one which Taihape Māori had already repeatedly expressed to the government since the establishment of the NLC.[73] The hui and petitions also expressed the concerns and opposition Taihape Māori had regarding the new Crown-derived titles issued by the NLC, and the disadvantages posed when the Court extinguished Māori customary title (such as the costs associated with

[70] B Stirling, *Nineteenth century overview*, at 240.
[71] B Stirling, Nineteenth century overview, at 241.
[72] B Stirling, Nineteenth century overview, at 241.
[73] B Stirling, *Nineteenth century overview*, at 242.

having a Crown-derived title).[74] Renata Kawepo summarised the position plainly:[75]

> *There is death in everything created. Let the NLC cease all action... In the acts of the Government there is not any life or good derived therefrom by the people. There is nothing but death in all their words.*
>
> *... We the Māori people are fully enlightened and know all our own old customs in regard to land claims, and by us alone can a full and clear and true judgment be given in our own land disputes. And we the Māori alone are competent to sit as Judges in Māori disputes or claims to land, as we are guided by our perfect knowledge of our own laws and customs to our own land. The European is ignorant of our ancient laws in regard to our Māori lands, and the European is wrong in his mode of investigation, also in his judgment and decisions given by him in all Māori land claims, as the landless man obtains by the foolish acts of the European, as Judge, the lands of the rightful Māori. The European laws are not a right guide by which claims to Māori lands are to be investigated. Let the claims to Māori lands be heard and decided according to the old custom of the Māori in respect to his land, and when such is done then let the European law step in and carry on the right of ownership.*

83. Counsel note that, as so often stressed by Dr Ballara, Renata Kawepo was Taihape rangatira at least as much as he was of Hawke's bay. He and others straddle the Kaweka range and their understanding and views do not change from one side to the other.

84. After a hui was convened in Pakowhai in June 1876, the main focus, again, was Māori concerns regarding the NLC. Hui attendees comprised of those from Ngati Tama of Mokai Patea, Ngai Te Upokoiri, as well as iwi from other districts.[76] Again, this shows that Taihape Māori were informed by and

[74] B Stirling, *Nineteenth century overview*, at 242.
[75] B Stirling, *Nineteenth century overview*, at 243.
[76] B Stirling, *Nineteenth century overview*, at 244.

involved in these broader anti-NLC activities. The minutes of the hui stated that:[77]

> *The manner of purchasing land in accordance with the regulations now in force is evil and the cause of much confusion and that all land purchasing under such regulations should cease. That* ***land should not be bought in unalienated districts. That not till a majority of the Māori people have consented shall land by surveyed or put into the NLC*** *... or sold. And in all districts where the consent has not been given to the land being sold, in no case shall money be paid in advance for land to those Natives who claim land. ... Government officers shall not without authority or invitation from the majority of the Natives go into Native districts and annoy by requesting the Natives to put their lands through the NLC and to sell them. Let the Natives use their own discretion as to the survey, or passing them through the NLC...*
>
> *…*
>
> *[A] new law, one which is not marred by ambiguity or contradictions, and by which the Māori lands can by fully investigated and correctly settled.*

85. Counsel note that this hui took place less than a decade after the creation of the NLC and prior to the formal re-imposition of partial pre-emption with the Crown's self-protection of its purchasing position in 1877. Yet the matters complained of largely relate to the way in which the Crown was already taking advantage of the NLC process to acquire land for itself. The introduction of Crown purchasing in areas where there was no collective willingness to sell (facilitated by the legislation requiring the NLC to facilitate the Crown's use of tamana), the use of tamana (which would then permit the Crown to activate those provisions), alternatively requesting Māori to put their lands through the NLC process, the requirements for surveying which were divisive and onerous to both "sellers" and non-sellers alike, and so on.

[77] B Stirling, *Nineteenth century overview*, at 246-247. Emphasis added.

86. The 1876 hui resulted in two significant petitions – one being presented in August 1876, and the other in September 1876. The petitions were, "*about the death of our lands. Enough, [it is] because of the remnants of its death that I speak my mind.*"[78] They further called for:[79]

> *[T]he repeal of the Native Land Act, and replaced by "a clear Act, and one under which Native land matters could be fairly dealt with."*
>
> *… [T]hat the court to be constituted under this new Act have the same status as other courts, "and that the Government should have no authority over such Native Land Court judges," a reference to the interference they had seen by the Government in Native Land Court business.*

87. The lament about "the death of our lands" echoes the complaint of Kingi Herekiekie quoted above that the NLC was "killing the land". These were very powerful and symbolic statements of the negativity of Taihape Māori towards the NLC and the associated processes being used, and the effects its processes were having on them. This opposition was expressed to the Crown in an unequivocal way in the 1870s and 1880s.

88. The Native Affairs Committee, however, did not take these petitions into consideration seriously, and neither did the government.[80] As Bruce Stirling recorded:[81]

> *Certainly, there were no subsequent policy changes that made any concession to the pleas of the petitioners. If anything, the policies and practices protested to by the petitioners got worse*.

89. A further hui, with similar resolutions, was held in March 1877 involving Renata Kawepo and Mokai Patea supporters of the Repudiation Movement.

[78] B Stirling, *Nineteenth century overview*, at 248.
[79] B Stirling, *Nineteenth century overview*, at 250.
[80] B Stirling, *Nineteenth century overview*, at 250.
[81] B Stirling, *Nineteenth century overview*, at 250.

This, again, resulted in further petitions being presented to Parliament at the end of July 1877. In response, the Native Affairs Committee simply noted that these petitions raised issues which were "deserving of the careful consideration by the House," but decided it was not necessary to make any recommendations. And, thus, nothing further was done.[82]

90. A week after, in August 1877, further petitions were presented to Parliament (including one which was signed by Renata Kawepo and 1022 other Māori), urging that the NLC Bill at the time, which was before Parliament, "*to be not speedily passed and pointing out its objectionable clauses*."[83] That particular Bill was, indeed, at the time, withdrawn. However, the withdrawal was attributed to:[84]

> *The ongoing attacks led by [former Governor] Grey. He too had rejected the NLC Bill, as not only were his Māori supporters opposed to it, but so too was the more politically significant lobby of small settlers. They considered that the Bill would enhance the position of speculators and big runholders … but do little to help small settlers. Ultimately the Bill was defeated not by Māori opposition, but by Ballance moving a simple amendment that the Bill aim for closer settlement.*

91. Nevertheless, everything started going downhill after this with the entry of the Grey Government two months later in October 1877, and appointment of John Sheehan as the Native Minister:[85]

> *[I]t was soon apparent that Grey and Sheehan were not going to make good on the undertakings they had given to the Repudiation Movement. Apparently, political obligations to their small settler supporters proved more compelling, and Sheehan pushed ahead with Crown land purchases, using questionable techniques and the cloak of proclamations debarring private competition (as noted*

[82] B Stirling, *Nineteenth century overview*, at 255.
[83] B Stirling, *Nineteenth century overview*, at 255.
[84] B Stirling, *Nineteenth century overview*, at 256
[85] B Stirling, *Nineteenth century overview*, at 256-257.

> *earlier). Far from assisting Māori, Sheehan in fact boasted that he had doubled, then trebled, the amount of land passing through the NLC, with land alienation increasing at the same dramatic rate.*

92. A further Repudiation Movement hui was held in March 1878, followed by the filing of four petitions in October 1878, which, as noted by Stirling, was likely to have included Mokai Patea supporters.[86] All the petitions outlined the extent which Māori had been harmed by the introduction of the NLC, and also requested that "*some unbiased and impartial judge be appointed to try their cases against various Europeans*", which suggests dissatisfaction with the existing NLC judges.[87] The Native Affairs Select Committee, again, made no recommendations on the petitions and, ultimately, again, no remedies were offered from the Crown's side.[88]

93. Ultimately, as Bruce Stirling observed, when it came engaging with the NLC:[89]

> *[E]fforts by tribal committees were, unfortunately, largely for naught. The NLC undermined any responsibilities the committee might assume for itself as a body with a meaningful role in the investigation or administration of Māori lands. They were legally powerless and remained so, being marginalised by a government that failed to see the potential good that could be achieved by active engagement with such Māori initiatives. This official neglect was an insurmountable obstacle to the efficacy of any Māori committee, runanga, or pan-iwi movement that remained features of Māori efforts to manage their lands and lives for the rest of the century.*

94. It is, therefore, evident, that the Crown failed, in any way, to address the fundamental Taihape Māori concerns about the NLC, its processes, and its

[86] B Stirling, *Nineteenth century overview*, at 257.
[87] B Stirling, *Nineteenth century overview*, at 257.
[88] B Stirling, *Nineteenth century overview*, at 257.
[89] B Stirling, *Nineteenth century overview*, at 260.

related legislation, in the face of sustained, clear and strongly articulated opposition.

Alternative land tenure/title options

95. In the original Native Lands Act 1862, the Crown had clearly envisaged that tribal ownership was a possibility. Counsel say this as, for example, sections 20 and 21 provided for cases where tribes or communities had been issued with certificates of title in their favour. This shows that the Crown had clearly envisioned tribal/community ownership as an option – an option which would thereby preserve ownership rights under tikanga and custom. The 1862 Act, however, lived a short life with the implementation of the 1865 Act, where such an option of community ownership was erased, as already submitted.

96. So despite knowing alternative land tenure options were a possibility, there is no specific evidence that the Crown considered actually offering such an option to Taihape Māori when establishing the NLC and creating the regime in which it operated. Thus, it is clear that the Crown sought to simply make its own job of land acquisition easier in pursuit of its model of economic development. The Crown, in extinguishing and then converting traditional/customary Māori modes of ownership into Crown-derived individual titles, did not try to understand and account for customary land tenure and related processes and practices – clearly breaching its duties and obligations under te Tiriti.

97. The Hauraki Tribunal concluded that the title created by the Crown's NLC laws intended to facilitate the alienation of Māori-owned land rather than permit the Māori owners' use and development.[90] The Tribunal that inquiry concluded that the NLC:[91]

[90] Waitangi Tribunal, *The Hauraki Report*, at 755.
[91] Waitangi Tribunal, *The Hauraki Report*, at 779 and 843.

> *[F]undamentally changed Māori social relationships and relations with the land... It was utterly destructive of efforts to develop the land, pauperising, socially damaging and psychologically dispiriting.*

98. And:[92]

> *So long as the Crown allowed the purchase of undivided individual interests or practised it systematically itself ... it is idle to talk of Māori volition. A debt-driven people, without any other ready form of cash or credit, could do little to prevent alienation when the system dealt with them as individuals, rather than as a community.*

99. The Turanga Tribunal reported in depth on this issue.[93] It found inter alia that the Native Lands Act 1873 did do away with the "*oppressive 10-owner rule which so damaged the relationship between chiefs and their communities*". But it also found that the 1873 Act, far from repairing the damage, severed that relationship entirely. It provided a "kind of virtual individual title", under which private purchasers could still buy up individual interests (the Crown maintained its own complete privilege to continue to buy directly), while the oversight by the NLC was simply at the level of supposedly ensuring that any such transactions were fair. Advances were allowed to be deductible from the final purchase price, cementing ongoing tamana practices amongst both private and Crown purchasers. Neither rangatira nor the collective could under tikanga prevent individuals from alienating land: "*Any individual could partition out his or her interests.*" [94]

100. The 1873 Act took matters further, however. Again, the Turanga Tribunal pointed out that the way in which this individualisation was done – the complete list of individuals, but with undivided shares – was solely for the purpose of facilitating alienation of the land:[95]

[92] Waitangi Tribunal, *The Hauraki Report*, at 779 and 843.
[93] Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004), at 443–446.
[94] Waitangi Tribunal, *The Turanga Report* (Vol II), at 443.
[95] Waitangi Tribunal, *The Turanga Report* (Vol II), at 443–444.

> *The 1873 Act individualised the sale of Māori land. In fact, it individualised Māori title only for the purpose of alienation. For every other purpose, it was merely customary land outside English law and commerce…. The objectionable effect of the Act was therefore that Māori could participate in the new British prosperity only by selling or leasing their land. The colonial economy would recognise no other form of engagement.*

101. The fact that Māori relied on the sale of their dwindling supply of land to acquire funds to participate in the Pakeha cash economy has long been recognised, but largely thought of as simply a more or less necessary consequence of the fact that Māori had little else to trade for the monetary resources they needed to do so. It is submitted that the key point here, exposed at length and in detail by the Turanga Tribunal, is that the Crown actually forced them into this situation by the way in which it created and used the Native land legislation and the NLC as the means for forcing them to do so.[96]

102. The Turanga Tribunal, accordingly, found that, this form of title was introduced despite the opposition of most Māori, who wanted a form of title that reflected communal rights in land, and demonstrated a "deep commitment to community title".[97] The Turanga Tribunal found that the Crown's individualisation of land titles was a clear breach of the Article 2 guarantee of tino rangatiratanga, as it excluded hapū from sale and lease decisions, failed to provide legal support for chiefly leadership, and in these ways *"confiscated rights formerly vested in tikanga Māori"*.[98]

103. Based on the evidence in the Taihape Inquiry record, and as set out in the submissions above, Taihape Māori were also in a very similar position to those in the Turanga Inquiry. Counsel, therefore, submit that it is open to this Tribunal to make findings similar to those outlined above by the Turanga Tribunal.

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[96] Waitangi Tribunal, *The Turanga Report* (Vol II), at 443–444 and 446.
[97] Waitangi Tribunal, *The Turanga Report* (Vol II), at 443–444 and 446.
[98] Waitangi Tribunal, *The Turanga Report* (Vol II), at 446.

104. The Te Urewera Tribunal also found that Māori:[99]

> *[O]ught to have been provided with a form of community title more reflective of customary arrangements*".

105. The evidence in the Taihape district inquiry does not suggest that the options of a community title or corporate management mechanisms were ever contemplated in the nineteenth century or ever offered to Taihape Māori. The only example found in the inquiry evidence actually related to the 1930s, decades later. Bruce Stirling, with reference to the owners of the Awarua block, reported that:[100]

> *It was not until the 1930s – more than a generation too late – that title improvements such as consolidation were implemented and Māori land development was funded to any significant extent by the government. The sort of reform the Awarua owners sought – especially the focus on corporate management of collective assets – was far ahead of the government's blinkered, short-sighted, and self-serving policy framework for Māori land titles, even though such reform was no more than Māori had already been seeking for more than 25 years.*

106. Counsel, therefore, respectfully request that this Tribunal endorse and adopt the positions of the previous Tribunals as outlined above, and make findings that, the Crown, in breach of te Tiriti, established the NLC (and its system of title investigation, and of titles) by neither considering other land tenure options nor considering a range of title options suitable for Taihape Māori. It did not do this in the mid-twentieth century and certainly did not even contemplate it in the period when the NLC was established and developed.

[99] Waitangi Tribunal, *Te Urewera Report* (Wai 894, 2017), at 600
[100] B Stirling, *Nineteenth century overview,* at 416.

Promises and Assurances?

107. In 1877, Taihape Māori had thought, on the basis of a notice printed in the "government's mouthpiece", *Te Waka Māori*, that the government was abolishing land purchases. Native Land Minister Sheehan had, also, at the time, apparently, indicated that the upcoming Government Native Land Purchase Act 1877 was the "beginning of the end of government land purchases"[101] and, by association, the NLC.

108. And this was exactly what the 1876 petitioners expected when they so strongly supported the new administration during the election campaign.[102] However, when the Act 1877 was actually passed, it actually strengthened the Crown's purchasing position – in 1878 alone, the Crown was able to ban private purchasers from approximately 4.5 million acres of land that it intended to acquire for itself.[103]

109. Bruce Stirling reported:[104]

> *The Native Land Act Amendment Act 1877 did nothing to ameliorate the wrongs of the Native Land Court; giving the Government the power to compulsorily refer land for investigation by the court no matter what the owners wished. The 1876 petition had in fact sought the exact opposite, asking that all Māori owners consent to land being put through the court. The 1877 legislation also enabled costs to be awarded against those who sought rehearings, further discouraging the proper investigation of claims where the NLC erred or failed to hear from all claimants. The Native Land Amendment Act (No. 2) 1878, aggravated this difficulty by reducing the period in which a rehearing had to be applied for to three months. The 1878 Act also prohibited Māori from taking out mortgages of land held under a memorial of ownership or Crown grant, Sheehan being of the view that Māori seeking to raise finance should sell, rather than*

[101] B Stirling, *Nineteenth century overview*, at 252.
[102] B Stirling, *Nineteenth century overview*, at 252.
[103] B Stirling, *Nineteenth century overview*, at 252.
[104] B Stirling, *Nineteenth century overview*, at 252.

> *mortgage their land. The Act also enabled any grantee or other interested person (such as the purchaser of an individual interest) to apply for their interest to be partitioned out, again exactly the opposite of the collective control the petitioners had sought to exert over the sale of land, and over the court's interference in that land.*

110. Counsel submit the Crown acted in this way to avoid protecting collective authority and communal decision making which was part of its obligations arising from te Tiriti guarantee of tino rangatiratanga. Instead, the Crown favoured individuals acting for themselves which, in turn, made its ultimate goal of alienating Māori land easier. This was in clear breach of its duties under te Tiriti, particularly in terms of the principles of active protection and good faith partnership.

Taihape Māori engagement with NLC process

111. The NLC was the main device used by Crown purchase officers to support them carrying out and fulfilling the Crown's land purchase programme.

112. As shown in tables from Bruce Stirling's *Nineteenth century overview* report, land blocks in the Taihape inquiry district were rapidly put through the NLC for title investigations, with almost all blocks having their titles issued by the late 1880s. Kaweka and Waitapu were the only blocks that did not go through the NLC, but that was for special circumstances as outlined in the Generic Crown Purchasing submissions, which removed them from the NLC's purview. The tables referred to are replicated below for convenience:[105]

[105] Bruce Stirling, *Nineteenth century overview*, at 618 and 619.

Block	Area (acres)	Date of Title Investigation or Hearing	Venue	Length of Case (days)
Otamakapua 1	8,952	June 1870	Bulls	1
Paraekaretu	46,975	December 1871	Whanganui	1
Owhaoko	38,220	September 1875	Napier	1
Oruamatua-Kaimanawa	115,420	September 1875	Napier	1
Owhaoko	163,432	August 1876	Napier	1
Owhaoko		December 1876	Napier	2
Owhaoko		October 1877	Gisborne	1
Taraketi	3,075	Jan & Feb 1877	Marton	3
Mangoira Ruahine	35,660	August 1877	Marton	3
Ohaumoko	11,598	Jan & Feb 1879	Whanganui	2
Rangatira	19,500	February 1879	Marton	1
Otamakapua 2	104,521	Sept & October 1879	Napier	37
Otamakapua 1		May & June 1880	Marton	7
Otairi	59,013	May & June 1880	Marton	40
Rangatira		June & July 1880	Bulls	15
Rangipo Waiu & 1 & 2	98,000	April and May 1881	Taupo	42
Rangipo Waiu & 2		1882 Re-hearing	Whanganui	3
Rangatira		May to Aug 1882	Marton	69
Rangipo Waiu & 1 & 2		1884 Partition	Whanganui	5
Te Kapua	21,878	Aug to Oct 1884	Whanganui	64
Mangaohane	54,342	Nov 1884 to Mar 1885	Hastings	63
Otamakapua 2		1884 Partition	Palm. North	19
Owhaoko		1885 Partition	Hastings	27
Oruamatua-Kaimanawa		1885 Partition	Hastings	26

Block	Area (acres)	Date of Title Investigation or Hearing	Venue	Length of Case (days)
Awarua	268,548	April to Sept 1886	Whanganui	62
Motukawa	32,935	May to July 1886	Whanganui	54
Owhaoko		1887 Rehearing	Hastings	56
Owhaoko		1888 Rehearing	Hastings	113
Mangaohane		1890 Partition	Hastings	72
Awarua		1890-1891 Partition	Marton	241
Awarua		1892 Re-hearing	Hastings	33
Mangaohane		1892-93 Re-hearing	Hastings	51
Owhaoko D	101,150	1893 Partition	Hastings	3
Mangaohane 1	22,084	1894 Partition	Hastings	16
Mangaohane 2	31,110	1894 Re-hearing	Hastings	13
Owhaoko C	36,125	1894 Partition	Hastings	46
Taraketi		1894 Partition	Marton	7
Otamakapua 1		1894 Partition	Marton	17
Oruamatua-Kaimanawa		Jan to April 1894	Moawhango	81
Awarua		1894 Partition	Moawhango	1
Awarua		1894 Partition	Hastings	1
Timahanga	21,388	Nov 1894 to Jan 1895	Hastings	65
Otamakapua 1		1895 Re-hearing	Whanganui	11
Oruamatua-Kaimanawa		1895 Re-hearing	Hastings	17
Motukawa		1895-1896 Partition	Marton	57
Motukawa		1896 Appeal	Marton	19
Oruamatua-Kaimanawa 1	60,500	1898 Partition	Whanganui	8
Motukawa		1899-1900 Partition	Whanganui	6
Owhaoko D		1899 Partition	Hastings	1
Te Koau	10,240	July to Sept 1900	Hastings	25
Motukawa		1900 Appeal	Whanganui	7
Te Koau		1905 to 1906 Appeal	Hastings	18
Total				**1,535**

113. Paraekaretu was the first land block in the inquiry district to be awarded a title by the NLC and, as shown by the above table, Bruce Stirling observed:[106]

> *[M]any more soon followed, as did the alienation of those lands. The arrival of the court enabled early interest in the southern part of the district by the Crown and large runholders to be converted into large land purchases during the 1870s and into the early 1880s, by which time most of the southern blocks were almost entirely alienated to either Crown or private purchasing.*

114. As noted by Phillip Cleaver, Taihape Māori were interested in participating in the opportunities that emerged in the district and, from the very beginning, they were keen to be involved in the principal economic activity. This, however, made it difficult, almost impossible, for Taihape Māori to avoid engaging with the NLC – the way the NLC and its legislation were set up also meant that Māori who wished to utilise or alienate land had little option but to secure title from the Court.[107] On the other hand, the NLC procedures could be triggered by an application from a single person, in turn forcing all others to participate in the process in order to protect their own interests.[108]

115. Also, as reported by Bruce Stirling, there were the cases where:[109]

> *The resident owners within the southern part of the district did not instigate the purchases or the title investigations that led to the alienation of their land. Initially they were content with the informal leasing of their land to resident Pakeha, as opposed to the speculative dealings of absentee runholders or the Crown's desire to expand northwards into their district. In every case they were obliged to participate in the Crown's processes for alienation and title investigation after claimants living outside the district had committed their lands to these processes with a view to the land*

[106] Bruce Stirling, *Nineteenth century overview*, at 2.
[107] P Cleaver, *Māori and Economic Development in the Taihape District 1860-2013*, at 100.
[108] P Cleaver, *Māori and Economic Development in the Taihape District 1860-2013*, at 85; also see Native Lands Act 1865, section 83.
[109] B Stirling, *Nineteenth century overview*, at 2.

> *being purchased. As a result those within the district found themselves having to share the title to these lands with non-resident claimants and able to do little more than secure a share of the purchase proceeds.*

116. So, while it is fair to say that Taihape Māori engaged extensively with the NLC, it is strongly submitted that this engagement *must* be viewed in the context of:

a. the fact that they were, essentially, forced to engage; and
b. the strong opposition of Taihape Māori against the NLC and its processes (as discussed above at paragraphs 70 – 94).

117. In the Turanga Inquiry, the Tribunal reported that:[110]

> *There is no question but that Turanga Māori wanted a state sanctioned and certain title so they could engage in commerce. That is not the same, however, as saying they wanted an individual title. It is certainly true that Māori did take their land to the land court … However, the Crown has, we believe, conflated two arguments. The questions of whether Māori wanted a new secure and certain title, and the question of what form it should take are related but not the same. Demand for the former should not be read automatically as demand for individualisation.*

118. Just as was the case in Turanga, in Taihape, the fact that Taihape Māori wanted to define and obtain legal title is related to, but is not the same as the form they wished such title to take. Further to the point, one must also remember the "domino effect" already mentioned earlier – that one individual could make an application to the Court, and force all other claimants into engaging, even the whole tribal group did not want to.

[110] Waitangi Tribunal, *The Turanga Report, at* 444.

119. Accordingly, Counsel submit that the Tribunal should endorse the approach of the Tribunals noted above and, therefore, make a finding that to the extent to which Taihape Māori engaged with the NLC, this engagement was mainly due to the fact that it was the only way in which they could, not only protect their interests in the land, but also utilize (or otherwise deal with) their land.

Determination of ownership

120. The NLC failed to provide reliable or effective means of determining ownership. This was evident in the fact that many major blocks in the district were the subject of protracted and expensive proceedings (such as Mangaohane, Oruamatua-Kaimanawa, and Owhaoko).[111] As noted by Phillip Cleaver, the NLC notably failed to correctly include Taihape Māori groups claiming legitimate ownership interest in the awarding of titles of the Mangaohane and Te Kapua blocks:[112]

> *This situation … affected Winiata Te Whaaro and his people in the Mangaohane block and also some groups with interests in the Te Kapua block … Te Whaaro, who was eventually evicted from the Mangaohane block in 1897, had been running sheep within the block since 1880. The experiences of Te Whaaro and his people and those who were excluded from Te Kapua contrast markedly with the Pakeha pastoralists' ability to secure their position in the district. Of particular note, John Studholme was able to use his significant financial resources to participate in the Court system, and he also appears to have benefitted from the influence and connections he possessed in parliament, which passed legislation to protect his land interests.*

121. From this, it is clear that, in the Mangaohane and Te Kapua blocks, the Court is seen to have been basing title determination on the party that was in the better financial position, or had greater political influence and connections –

[111] P Cleaver, *Māori and Economic Development in the Taihape District 1860-2013*, at 117.
[112] P Cleaver, *Māori and Economic Development in the Taihape District 1860-2013*, at 117.

almost always Pakeha, or even the Crown itself. This, in turn, meant that these titles had little reflection of customary tenure in any way.

122. Many previous Tribunals have found that the Crown, through the NLC, "usurped" the right of Māori to make their own decisions about the ownership and use of their lands and resources in accordance with traditions and tikanga.[113] In the CNI Inquiry, for example, it was found that the Crown did this despite the fact that rangatira of the CNI had "*made it clear that they wished to inquire into their own titles"* and *not* have "*the Land Court adjudicate upon them"*.[114]

123. Similarly, in Te Rohe Potae, "*Te Rohe Potae Māori were adamant that they wanted to control the pace and extent of European settlement within their rohe… As well as controlling the process of title determinations themselves…*"[115]

124. These previous Tribunals have found that, by determining ownership under the NLC regime and imposing such forms of title without the consent of the affected Māori communities, the Crown had undermined communal decision-making about land, diminished the roles of rangatira in decision-making processes and, therefore, breached its guarantee of tino rangatiratanga under te Tiriti.[116]

125. It is submitted that the evidence as discussed above clearly demonstrates that (similar to previous Inquiries), Taihape Māori were clear in the position of wanting to determine their own titles. These wishes were then not adequately responded to from the Crown's side in amending the NLC and its defective system. Counsel considers that the above findings are, therefore, also applicable to the claims of this current inquiry and should be adopted by this Tribunal.

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[113] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, at 282; Waitangi Tribunal, *The Hauraki Report*, at 779; Waitangi Tribunal, *The Turanga Report*, at 425; Waitangi Tribunal, *The CNI Report*, at 480; Waitangi Tribunal, *Te Urewera Report*, at 579; and Waitangi Tribunal, *The Wairarapa Report*, at 531.
[114] Waitangi Tribunal, *The CNI Report*, at 480.
[115] Waitangi Tribunal, *The Te Rohe Potae Report*, at 1187.
[116] Waitangi Tribunal, *The Te Rohe Potae Report*, at 1187-1188; Waitangi Tribunal, *The CNI Report*, at 480.

Principles of the NLC vs Tikanga Māori

126. In 1942, Judge Norman Smith had defined the NLC's role as:[117]

> *Decid[ing] as between opposition parties of claimants who, according to native custom, would have possessed the land and then to apply Native custom to the ascertainment of the individual owners of it.*

127. And, because it was a statutory requirement that the NLC made its decision in accordance with Māori customs, Judge Smith retrospectively developed the set of four rules and principles upon which it was widely believed that the NLC based its title determination upon.[118] These rules/principles are known as the "four take":

a. Whenua kite hou – claiming rights to land by discovery;
b. Take tupuna – claiming rights to land through ancestral connection/whakapapa;
c. Take raupatu – claiming rights to land by conquest; and
d. Take tuku – claiming rights to land through gifting.

128. It is also noted that each of these "take" had to be somewhat supported by some form of occupation – ahi ka – "*the exercise of some act or acts indicative of ownership in order that the claims made might be deemed well-grounded and effectual*".[119] As Professor Boast wrote, it is:

> *[A]pparent, then, that the Court laid primary weight on occupation as the basis for a claim. Essentially the Court's practice was to allow evidence of occupation to trump claims founded only on ancestral descent, but it was not quite as simple as that. It is better to think of the Courts adjudicative process as one in which descent-based claims and occupation-based claims were both in play. There was*

[117] Norman Smith, *Native Custom and Law Affecting Native Land* (Wellington, 1942), at 47.
[118] Norman Smith, *Native Custom and Law Affecting Native Land* (Wellington, 1942); and Norman Smith, *Māori Land Law* (Wellington, 1960).
[119] Norman Smith, *Native Custom and Law Affecting Native Land* (Wellington, 1942), at 47.

> *essentially a sliding scale in operation between these two poles, but also the two categories operated in combination: claims could be based on descent plus occupation; occupation only (i.e. with no ancestral connect to the primary right-holding ancestor); and descent only. The strongest kind of claims were those in the first category. Here I would add that claims based on conquest did not really deviate from the pattern, because in practice a recognised conqueror, maintained by occupation of the conquered territory by the conqueror's descendants… [and]… By the same token, conquest unsupported by occupation did not create a strong title.*

129. The characterisations of these "take" does, to some extent, show that Māori customs were relied upon in determining customary rights. However, this only goes so far. This is because "take" can be said to have been produced "*as an abstraction rather than as a product of the Court's practice.*"[120] In reality, the Court did not have an actual set of principles/"take" which it applied to its decisions. It was much more complex than that – the determination of rights of the various parties was a complicated process, and the strategies applied were always dependent on the nature of the circumstances of each case.[121] In Professor Boast's observation:[122]

> *The main technique used by the Court was not that of applying a developed doctrine of "take", but was rather that the standard techniques of sifting and weighing up of evidence available to all judges and practiced by all courts: whether the witness was credible, whether he contradicted himself, whether he or she had personal knowledge of the events that the witness purported to described, and – very importantly – whether he or she was able to effectively withstand cross-examination. Such ordinary forensic analysis was routine.*

[120] Grant Young, *Judge Norman Smith: A Tale of Four "Take"* (2004) 21 NZULR 309, at 310.
[121] Grant Young, *Judge Norman Smith: A Tale of Four "Take"* (2004) 21 NZULR 309, at 330.
[122] R Boast, *The Native Land Court – A Historical Study. Cases and Commentary 1862-1887*, at 182.

130. So, with regard to Māori experts and mātauranga Māori being relied upon in determinations of customary rights – this would also only be to the extent that witnesses or evidence were able to be presented during NLC hearings. Even then, this type of expertise was often limited by the "ordinary forensic criteria" assessments made by the Court as mentioned above.[123]

131. Even once ownership was determined pursuant to the four take, the next issue was the relative interests – which was even more difficult to deal with.[124] Succession was the main instance of such difficulty.

132. As noted by Judge Smith:[125]

> *[F]or the purposes of determining succession, what is called Māori custom ... is, in truth, a custom that has been more or less artificially created by analogy, in order to make the usages of the Māori people fit into the social and legal system of a modem society.*
> *[…]*
> *Prior to the coming of the Pakeha, there was no known system of succession to lands in general as there is today, and the reason appears to be that, owing to the communal nature of Māori ownership of tribal lands, and the absence of the need for any method of alienation, other than by word of mouth, there was little necessity for it. The only custom actually in existence at that time was in respect of personal ornaments, heirlooms, and the like, and such limited rights to small pieces of land as were the outcome of continued use and occupation for the cultivation of food.*

133. And, as Alan Ward has quite fairly put it:[126]

> *Even with the best will in the world it could be no easy matter to translate a complex of different kinds of rights in Māori law to arrive*

[123] R Boast, *The Native Land Court – A Historical Study. Cases and Commentary 1862-1887*, at 183-184.
[124] FD Fenton, *Important Judgment Delivered in the Compensation Court and Native Land Court* (1879), at 75.
[125] Norman Smith, *The Māori People and Us* (Wellington, 1948), at 75.
[126] Alan Ward, *National Overview Volume II* (Wellington, 1997), at 223.

> *a defined list of owners. Probably, such an outcome should never have been attempted.*

134. However, as is obvious, such an outcome of systemisation and categorisation was attempted through the Crown's introduction of the NLC (an instrument which purpose was to investigate and define rights/interests to Māori land, to then convert into Crown-derived legal titles). The NLC's main approach in dealing with succession of Māori land was set out in an early judgment known as *the Papakura Judgment* of 1867.[127]

135. Papakura was a Crown grant in Taranaki which was made in 1863, the grantee of which died intestate in 1864. Here, Chief Judge Fenton conferred the entire estate on the three children of the grantee, equally, and as tenants in common. In coming to this decision CJ Fenton cited the Native Land Act 1865, which required the NLC to identify who, according to law, "*as nearly as it can be reconciled with native custom",* ought to succeed. He noted that:

> *English law shall regulate the succession of real estate among the Māoris, except in a case where a strict adherence to English rules of law would be very repugnant to native ideas and customs.*

136. And, thus, the precedent for how the NLC was to deal with succession was set – that is, in whatever the circumstance was, Māori custom was to be almost entirely set aside in favour of a Pakeha solution.

137. This Pakeha solution was, essentially, to further the individualisation that was inherent in the Native Land Act 1865, which set aside any communal/tribal claims which Māori custom and tikanga may have had in place. And, thus, the NLC continued its mission to go against the preservation of Māori custom, and to also replace Māori custom with Pakeha modes of tenure and rules of succession as quickly as possible.

[127] F D Fenton (ed), *Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879* (Auckland, 1879), at 19-20.

138. The method established by this precedent was then allowed to live on in the subsequent amendments of the NLC-related legislation. For example:

a. The Native Land Act 1873 then extended the 1865 Act's provisions to *all* customary lands for which the NLC had issued certificates of title;

b. The Native Succession Act 1881, particularly section 3, then provided the NLC with the power to act as both an authority on Māori land and a processor of land through Pakeha methods;[128]

c. The Native Land Court Act 1886, in:[129]

i. Section 43 provided for cases where Māori dying "*without having made a disposition thereof by will*", again, on the basis of custom for Māori land and English law for hereditaments; and

ii. Section 44 provided for cases where there was a will (or similar document), and that these were to be disposed of according to the law.

These sections, however, only perpetuate the issues in relation to the clash between Pakeha legal requirements and Māori customs for succession of land.

139. Counsel indicate that, for Taihape-specific examples relating to –

a. The extent in which these principles were applied in the Taihape district;

b. How consistently they were applied in the Taihape district; and

c. The extent to which mātauranga Māori and Taihape Māori expertise were relied upon

– these will be demonstrated clearly in the case studies as set out in the Block Analyses section of "the Process" chapter of the NLC generic closing submissions.

[128] The Native Succession Act 1881, s 3.
[129] The Native Land Court Act 1886, ss 43-44.

Conclusion

140. In summary, regarding this segment of these submissions, it is submitted that the following prejudices were suffered by Taihape Māori due to the Crown's establishment of the NLC and creation of related legislation:

a. There was no proper consultation in the development and imposition of an inappropriate process which used an equally inappropriate form of tenure which, in turn, lead to the replacement of customary rights;
b. The ability of Taihape Māori to make communal decisions regarding their land was destroyed as the NLC and its regime permitted individuals to make decisions without the support of the wider whanau, hapū or iwi;
c. There was no alternative to the NLC and its associated processes. To give Māori land legal protection, or to enable it to be used in any way in the Pakeha cash economy, Taihape Māori had to take their whenua through the NLC. It cannot be said they chose to do this; there was no other option;
d. Tikanga and customary-based interests over land were diminished as the Crown failed to take into account Taihape Māori expertise, mātauranga Māori, tikanga, and customary interests and practices when determining interests and titles; and
e. Taihape Māori whanau, hapū and iwi struggled to retain authority and control over lands which were put through the NLC process. After being investigated and issued with Crown-derived titles, the land became vulnerable to partition and alienation (which almost always eventuated). This undermined tino rangatiratanga over their lands.

141. It is, therefore, Counsels' submission that the Crown, in breach of te Tiriti, failed to:

a. Recognise or preserve the exercise tino rangatiratanga by Taihape Māori over their lands and resources to the fullest extent possible;

b. Recognise, respect or uphold Taihape Māori customs, practices or tikanga in determining customary interests;

c. Actively protect the lands of the Taihape Māori from alienation or sale where that was the wishes of the Taihape Māori owners;

d. Ensure that Taihape Māori were able to retain their lands for as long as they wished;

e. Ensure that Taihape Māori were able to appropriately utilise and develop the lands which they retained; and

f. Ensure it properly obtained the consent of, or even consult Taihape Māori in establishing the NLC and the entirely new tenurial system it embodied and, therefore, failed to act reasonably and with the utmost good faith towards Taihape Māori as Tiriti partners.

Dated at Wellington this 21st day of December 2020

Dr Bryan D Gilling and Katherine Hu
Counsel for Wai 378, 382, 400 and 972