KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL **WAI 2180**

IN THE MATTER OF	**the Treaty of Waitangi Act 1975**
AND	
IN THE MATTER OF	**THE TAIHAPE: RANGITĪKEI KI RANGIPŌ DISTRICT INQUIRY**

CLOSING SUBMISSIONS OF THE CROWN RELATING TO TRANCHE 2 LANDLOCKED LANDS

5 March 2021

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INTRODUCTION

1. These submissions are to be read with the Crown's closing submissions dated 1 September 2020 (Tranche 1).[1] Those submissions acknowledged that breaches of the Treaty principles of active protection and equal treatment contributed to more than 70% of the lands retained by Taihape Māori today being landlocked. These submissions focus on post 1975 legal and policy issues and on direct Crown actions in Taihape relevant to access issues.

2. The lack of an effective method between 1912 and 1975 for Taihape Māori to remedy access difficulties to lands that were landlocked or had access severely restricted made it difficult to develop or farm those lands and that this had a direct impact on land retention. Access difficulties were a factor contributing to the sale of approximately 9,348 hectares during the 1912 to 1975 period.

Structure and scope of these submissions

3. This second tranche of submissions addresses:

   3.1 Tranche 1 submission amendments;

   3.2 Legislative and policy landscape since 1975;

   3.3 Direct Crown (New Zealand Defence Force and the Department of Conservation (and predecessor agencies)) actions and omissions relevant to access to lands retained by Taihape Māori;

   3.4 Submissions on prejudice and remedies; and

   3.5 Concessions of Treaty breach by the Crown in relation to some of the above matters.

Introductory comment: context

4. Whilst these submissions necessarily address landlocking matters directly and specifically, the experience of Taihape Māori with landlocking cannot be divorced from other relevant or contributory issues.

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1 Wai 2180, #3.3.44 Crown Closing submissions regarding Landlocked Māori Land issues pre-1975.

5. The Crown has conceded that it breached the Tiriti/Treaty in the following respects.[2] These matters are of direct relevance to the matters addressed in these submissions:

   5.1 the operation of the native land legislation, which provided for the individualisation of Māori land tenure, made lands more susceptible to partition, fragmentation and alienation, which contributed to the erosion of tribal structures. The Crown's failure to adequately protect tribal structures breached the Tiriti/Treaty;

   5.2 the lack of effective collective management mechanisms prior to 1894, which enabled individual owners to deal in lands without reference to the collective even though customary rights vested in the collective, not solely individuals;

   5.3 the failure to provide effective remedial measures to secure access for Māori landlocked lands between 1912 and 1975 breached the principle of equal treatment. Legal requirements to obtain consent to access landlocked lands treated non-Māori lands and Māori lands unequally, was discriminatory, and meant there was little value in Taihape Māori seeking access to their lands during that period if their neighbours' consent had not been obtained;[3] and

   5.4 the cumulative effect of the lack of access Taihape Māori have to the majority of their retained lands is akin to having been rendered landless (in breach of the principle of active protection). Taihape Māori did not retain sufficient lands with reasonable access for their present and future needs.[4]

6. Of particular note, concessions are made in these submissions of breaches of the Treaty arising from Crown actions taken under the Public Works Act. These matters will be addressed further in submissions on the Public Works Act but are made here because those actions (in addition to the public works issues)

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2 The concessions of Treaty breach summarised in this paragraph were made in Crown opening submissions to this inquiry and in the Tranche 1 submissions. Some of the matters may be the subject of further consideration in Crown closing submissions on other topics however that further consideration is not addressed here as it would pre-empt the discussions for future submissions on particular issues (for example the efficacy for the people's of Taihape of post 1894 collective land management mechanisms).

3 Wai 2180, #3.3.44 at [120.3].

4 Wai 2180, #3.3.44 at [126].

further exacerbated access difficulties for Taihape Māori to their lands and in doing so, compounded the prejudice that arose from the breaches of principles of active protection and equal treatment made in the Tranche 1 submissions.

7. The historical experience of Taihape Māori in its entirety is also relevant to landlocking. Further broader context includes, but is not limited to:

   7.1 the specific titling processes for the high-altitude lands (most of which were highly contested and spanned a number of years and multiple legal processes);

   7.2 compromise of distinct tribal identity between the 1920s and 1980s;

   7.3 retained lands being leased and/or administered through statutory trustees (reducing the beneficial owners' direct relationships with those lands);

   7.4 limited access to development funding;

   7.5 lack of economic or political power within local authorities (and the degree of Crown responsibility for that); and

   7.6 processes such as urbanisation.

8. These matters (and others) are addressed in Crown closing submissions on other TSOI issues. The Crown does not dispute the submission made by counsel for Mōkai Pātea Claims Trust during hearing week 14 that broad historical matters are also relevant – such as processes of colonisation and education.

9. The qualification of Crown concessions of Tiriti/Treaty breach as being contributory (not sole) factors reflects the need for historical accuracy. It does not reduce the responsibility the Crown accepts for its role in the problem of landlocked lands in the inquiry district.[5] The Crown accepts its breaches of the Tiriti/Treaty are significant or, in some cases, the dominant, contributing factors to lands retained by Taihape Māori being landlocked.

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5 Questions by panel members to counsel for the Crown in relation to Tranche 1 landlocked land submissions, hearing week 14.

PART 1: RELEVANT TREATY PRINCIPLES

10. The Crown concurs with the preliminary view of the Tribunal that the relevant Treaty principles are active protection and equity:[6]

    10.1 The duty to act reasonably and with utmost good faith is not passive – it extends to active protection. This is particularly so when it involves matters guaranteed under Article 2 of the Tiriti/Treaty – including the possession of land.

    10.2 The principle of equity requires the Crown to act fairly to both non-Māori and Māori and to ensure that non-Māori interests were not prioritised to the disadvantage of Māori. Where Māori are disadvantaged the Crown is required to take active steps to restore the balance.[7]

11. In the context of Taihape, where the proportion of retained lands that are landlocked is so high as to be akin for Taihape Māori to being landless, the duty of active protection requires a responsible Crown to take reasonable measures to ensure its direct actions do not further compound or exacerbate prejudice arising from breaches of the Tiriti/Treaty. The application of this duty within Taihape is discussed below (in Part Four below).

12. The Tribunal draws a distinction between the duty of purchasers of land to take due caution in acquiring a title that it is not deficient in any material way and the position of owners of retained Māori lands (who were granted titles to lands they had pre-existing customary interests in).[8] That distinction is not disputed and is reflected in the 2020 Te Ture Whenua Māori amendments.[9]

13. The principle of reasonableness is of particular relevance when considering appropriate remedies (discussed in the remedies section below).

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6 Wai 2180, #2.6.65 at [26]. See also previous consideration of landlocking by the Tribunal: Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Wellington: Legislation Direct, 2015), vol 1, pp 456–460, 492–495. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage 1*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 615. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 622–624.

7 Various Tribunal reports as cited in Wai 2180, #2.6.65 at [28].

8 Wai 2180, #2.6.65 at [30] – [31].

9 Section 326A-D as amended in 2020 (now in force) directs decision makers to consider whether the land was purchased.

PART 2: REVISED CONCESSION 1912 - 1975

14. Tranche 1 submissions posited that effective legislative provisions were available to secure access between 1886 and 1912 but were not utilised for high-altitude lands retained by Taihape Māori, that is, access was generally not secured to those lands when titles were granted or partitioning undertaken.

15. The efficacy of remedial measures therefore became of higher importance but, as summarised in paragraph 6 above, were not available in practical terms for Taihape Māori between 1912 and 1975.[10] These matters have been acknowledged as breaches of the Tiriti/Treaty and its principles.[11]

16. Before turning to the Tranche 2 submissions, the Crown concession regarding unequal treatment in the Tranche 1 submissions is revised as follows:

    16.1 The Crown concedes that from 1912, legal requirements to obtain consent to access landlocked lands treated non-Māori lands and Māori lands unequally. From 1922 those consenting requirements were largely removed, except where the land had ceased to be Māori land prior to 1913. Because most land in Taihape had ceased to be Māori land prior to 1913, that exemption had particular impact on Taihape Māori in that, until 1975, no effective legal remedy was available to improve access difficulties to most of the land they retained unless the consent of their neighbours was secured. The Crown concedes the effect of these requirements was that between 1912 and 1975 Taihape Māori suffered inequality of treatment and indirect discrimination and this was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

17. This revision is necessary because:

    17.1 An error in paragraph 120.3 of the Tranche 1 submissions stated "outcome" rather than "treatment". The principle of equity concerns equal treatment (not unequal outcomes).

    17.2 The concessions made in the Tranche 1 submissions focus on 1922 to 1975 (the time period when consent requirements were removed other

10 Wai 2180, #3.3.44 at [120] and [126].

11 Wai 2180, #3.3.44 at [120] and [126].

than the exception for pre-1913 titles).[12] The Crown further acknowledges that the difference in consenting requirements for access from 1912 to 1922 treated non-Māori lands and Māori lands unequally and limited the efficacy of the remedial options otherwise available (and the concession as revised therefore now refers to the full period 1912 – 1975).[13]

PART 3: LEGISLATIVE AND POLICY DEVELOPMENTS POST 1975

18. From 1975[14] Māori and general lands have been treated similarly on the face of the law.[15] The power to 'unlock' Māori freehold land and General land owned by Māori has been available since 1975. This remains so, even where the owner(s) of the neighbouring land(s) do not consent and regardless of whether the neighbouring land is Māori freehold land or General land.

19. Whilst the law applying to both types of land has been the same since 1975, the legacy of the earlier discriminatory measures[16] has been (and remains) difficult to redress. In 1975 although the law was made the same for General lands and Māori lands, the land the law applied to was not in an equal situation. Māori landlocked lands and general lands that were landlocked differed in the amount of land that was landlocked; and the transaction and development histories of those lands).[17]

20. Since 1975, increasingly tailored mechanisms have attempted to ensure that the laws governing Māori land work better for land owners, whānau and hapū.[18]

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12 Wai 2180, #3.3.44 at [120].

13 Wai 2180, #3.3.44 at [120].

14 As addressed in Tranche 1 submissions (Wai 2180, #.3.3.44), the law has provided for access for Māori lands since 1886 (including retrospectively) but relied on the applicants seeking it, which they often did not. From 1909 it could be considered by the Court even without application but was subject to various consent requirements from 1912. From 1922 consent was required only where land had ceased to be Māori land prior to 1913. From 1975 consent requirements have been removed entirely (although compensation and some balancing of interests remain). Since 2003 the jurisdiction to order access on Māori land titles sits with the Māori Land Court.

15 The Property Law Act 1952 was amended in 1975 with provisions specific to landlocked lands. The general roading provisions of the Māori Affairs Act 1953 remained in place (with consenting requirements continuing).

16 See paragraph 6 above.

17 For example, landlocked general lands are more likely to have been transacted on an open market (with the concomitant opportunity for the incoming purchaser to undertake due diligence and negotiate the purchase price to reflect the impact of any access difficulties).

18 A precis of the current law is set out in Tranche 1 submissions from [10]. From [15] the implications of the recent amendments to Te Ture Whenua Māori Act are discussed.

The legal and policy issues

21. Those amendments and the further policy measures discussed below resulted from lengthy and complex processes over a number of decades. Aspects of that process are recorded in the Tribunal's 2016 *He Kura Whenua ka Rokohanga Report*.[19] Crown evidence to this inquiry and these submissions accordingly focus most directly on national landlocked lands legislative and policy developments since 2015.

22. The principal barriers to remedying access issues faced by Māori are largely agreed between the parties.[20] Te Puni Kōkiri articulated them as being:[21]

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

23. There are no 'easy answers' available given that resolution often requires legal processes, substantive technical and specialist knowledge, negotiation with affected parties and substantial financial implications (both from those processes and in establishing and maintaining access ways on the ground).

24. The principal legal issues have included: whether the court in which the application is to be assessed (and potentially appealed to) has specialist expertise in Māori land law; providing for the distinction between retained lands and purchased lands; and the breadth of matters able to be taken into account in determining what constitutes "reasonable access".

25. Technical evidence and evidence on behalf of tangata whenua and the Crown has confirmed each of these issues are present in the inquiry district.

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19 *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* Wai 2478 Waitangi Tribunal 2016.

20 Wai 2180, #M28 at [20].

21 Wai 2180, #M28 at [20] – these were identified through policy work between 2015 and 2019.

26. The Crown's response to these complex legal and policy issues is multifaceted.

Legislative responses

1975 – 2002

27. The definition of landlocked land and previous case law was set out in the Crown's Tranche 1 submissions.[22]

28. Between 1975 and 2002 two statutory options were available to resolve access issues: an application under s 129B of the Property Law Act 1952 to the High Court specific to landlocking; or pre-existing Māori Land Court powers to order roadway access (roadway access was sought in 1974 for Te Koau A but not progressed and would have failed at that time given the absence of consent of the adjoining landowner). As noted by Ruru:[23]

> The two avenues available to owners of landlocked Maori land prior to 2002 were problematic. The accessibility of the Maori Land Court in terms of venue, costs and the nature of proceedings was negated in value by the necessity of consent from neighbouring landowners. If consent was not forthcoming the owners could contest the reasonableness of their proposal in the High Court but the funds required to make the application effectively blocked this avenue.

29. From 2002 landlocked Māori land dealings have been provided for within Te Ture Whenua Māori Act 1993 itself. Ruru stated in 2004:[24]

> The extension of the Maori Land Court's jurisdiction in this way has been justified on the basis that it now will be easier for owners of Maori landlocked land to bring their applications for reasonable access to a court less formidable and less costly. However, the costs still to be absorbed by a successful applicant may prove the stumbling block for the new provision to realise its potential as the key to unlocking Māori land.

Effect of 1975, 2002 legislative amendments

30. Crown[25] evidence is that the 1975 and 2002 measures had some, albeit limited, success in resolving the longstanding issues.[26]

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22 Wai 2180, #3.3.44 at [10] – [17].

23 Jacinta Ruru and Anna Crosbie "*The Key to Unlocking Landlocked Maori Land: The Extension of the Maori Land Court's Jurisdiction*" (2004) 10 Canta LR 318.

24 Jacinta Ruru and Anna Crosbie "*The Key to Unlocking Landlocked Maori Land: The Extension of the Maori Land Court's Jurisdiction*" (2004) 10 Canta LR 318.

25 Wai 2180, #M28 M Hippolite; Wai 2180, #[xxx] R Ohia. Ms Ohia presented evidence on behalf of Te Puni Kōkiri following the departure of the original deponent Ms Hippolite. The evidence was departmental evidence rather than personal evidence and is thus collectively referred to as Crown evidence throughout these submissions.

26 Wai 2180, #M28 at [15].

31. The 2002 Māori Land Court jurisdiction expansion has led to some beneficial outcomes in that a number of applications have been made to the Māori Land Court under s326B to unlock access issues for Māori owned lands. Of the twenty-eight access applications lodged, nine have resulted in access being granted (with several applications not yet completed).[27]

32. In the Taihape inquiry district, neither the promise of the 1975 amendments nor the 2002 expansion of the Māori Land Court jurisdiction has resulted in access being 'unlocked' to the high-altitude lands.[28] Only three applications have been made (although there are possibly more to come):[29]

    32.1 A 2003 application for access to Awarua o Hinemanu over Big Hill Station. The application was dismissed in 2013 as the Trust was not in a position to continue with the proceedings due to internal Trust administration issues.[30] Costs of approximately $25,000 were ordered against the Trust.[31]

    32.2 A 2004 application for access to Ōwhaoko D6 section 3 over Ngāmatea Station lands.[32] The application was withdrawn in 2015 prior to hearing after the owners were advised by their land agent that there was little confidence of the application being granted. The land was subsequently sold.

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27 Wai 2180, #M28 at [15]-[18]. Note, Woodley says none are p524 quoted in Tribunal preliminary opinion at [10]. Wai 2180, #4.1.49 at 148 Judge Harvey discussed the reasons for the withdrawals with Ms Ohia saying they ranged from procedural issues (incorrect/insufficient information in the application); to ongoing disagreement with adjoining owners; and application withdrawn as superseded by agreement being reached with adjoining owners.

28 In addition to the following applications made once the 1975 provisions were in force, it appears that Mr Karena filed an application in late 1974. Woodley records it as having been returned to him in January 1975 as it was not completed correctly with the advice to engage a solicitor. It appears the application would have failed at that time regardless as the consent of the adjoining landowner was still required, and was not forthcoming. The Court advised Mr Karena of the need to give notice to the adjoining land owner. It appears the application was not resubmitted after the 1975 legislative changes removing the necessity for that consent. #Wai 2180, #A037 at 445.

29 Wai 2180, #M28(a) MH2.

30 *Big Hill Station Ltd v Trustees of Awarua o Hinemanu Trust* 43 Tākitimu MB 218 8 October 2015 at [1]. The application was originally filed in 2003 and eventually dismissed in 2013 on the basis that the proceedings could not be determined until outstanding issues concerning the administration of the trust had been resolved. In short, the trust had fallen into administrative and financial disarray with the result that any meaningful attempt to prosecute the proceedings was unrealistic while questions over the trustees' own conduct remain open for scrutiny and investigation. See also further explanation at [43] "Although the dismissal of the application was essentially an administrative action, it was due largely to the internal problems amongst the former trustees, the lack of available funds as a result of the actions of some of those trustees and, consequently, the limited resources of the current trustees to be able to pursue the proceedings."

31 Wai 2180, #M28(f) at 2.

32 Wai 2180, #I14(a) at 17.

32.3 A 2014 application for access to Te Koau A over Timahanga. The application was dismissed on procedural grounds (the pleadings were of a general nature and did not disclose a reasonable cause of action) and was not resubmitted.[33]

32.4 Crown evidence referred to the Whenua Māori Fund expecting to receive a revised application for Ōwhaoko B and D blocks.[34]

33. None of these applications reached the procedural point where the Court determined whether the application met the statutory test for access to be granted (nor the conditions of that order i.e. compensation, access conditions, costs issues). No preliminary indications were given in judicial conferences as to the Court's likely approach on the facts of the cases.

34. Two further comments follow for completeness.

35. Some of the facts relevant to the dismissal of two applications, and to ongoing challenges in securing adjoining landowner support for access on reasonable terms, involve difficult or sensitive events.[35] Those events should be viewed in the context set out in paragraph 6 above including: the acknowledged breaches of the Tiriti/Treaty that contributed to the lands being landlocked; the difficulties of administering or developing communally owned land; and the frustrations of having strategic aspirations repeatedly stymied, in major part by the lack of access.[36]

36. The difficulties that arise from access issues have also become difficulties in resolving those access difficulties. The fact that a high proportion of high-altitude retained Māori land suffers from severe access restrictions has limited the opportunities for that land to be developed or used to generate income. It may also have limited the ability of Taihape Māori to maintain or exercise their spiritual and cultural relationships to those lands or to transfer mātauranga Māori for many decades (other than where access was permitted by the adjoining

33 Wai 2180, #M28(f) at 2.

34 Wai 2180, #M28(d) at [20].

35 As well as unconsented access issues, the more serious matters have involved allegations of: lands being used for criminal purposes (Wai 2180, #K5 at [45], [83]); maladministration of Trust funds (*Big Hill Station Ltd v Trustees of Awarua o Hinemanu Trust* 43 Tākitimu MB 218 8 October 2015 at [1]); and unlawful earthworks (discussed during site visit Hearing Week 12 for Ngamatea and by Mr Karena for Te Koau).

36 For example, Wai 2180, #K5 at [89].

landowner, or through the limited access available by foot or helicopter).[37] The resources and relationships required to resolve the access difficulties have been accordingly restricted.[38] The most explicit example of this is the extent to which access difficulties have limited income production off the lands (income which could then have contributed to compensating neighbours or establishing roading).[39]

2020 Amendments

37. The Tribunal's preliminary views on landlocked lands were issued in time to inform the review of Te Ture Whenua Māori Act 1993 that led to the 2020 legislative amendments and complementary policy proposals.[40]

38. The 2020 amendments to Te Ture Whenua Māori Act 1993, which came into force on 6 February 2021, address the legislative barriers to improving access to Māori lands by:[41]

38.1 broadening the definition of 'reasonable access' to require the Court to have regard to the relationship the applicant has with the landlocked land and other customary values associated with the land and to the culture, traditions and taonga of the applicant in respect of the land;[42]

38.2 further distinguishing Māori landlocked land from land under the jurisdiction of the Property Law Act, for example by broadening the relevant criteria that can inform decisions whether access should be granted;[43]

38.3 relocating appeals from the High Court to the Māori Appellate Court (to take advantage of the Māori Appellate Court's expertise and to

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37 Messrs P Steedman, R Steedman, H Steedman, W Karena, and N Lomax each gave evidence of their interactions with these lands throughout their lives being restricted but nonetheless the cultural relationships with those lands being maintained and treasured.

38 For example, Wai 2180, #K5 at [89].

39 Although this should not be overstated as the income potential of the lands was also restricted by factors other than the access (ie lands largely not suitable even for large scale pastoralism).

40 Wai 2180, #2.6.65 at [2].

41 See both Wai 2180, #M28, and Wai 2180, #M28(d)(i) at 3.

42 Wai 2180, #M28(d) at [9].

43 The Property Law Act 2007 s 326 definition of reasonable use is narrower in that the "purposes of use" are those "enjoyed or granted under the Resource Management Act 1991". There are no equivalents in the Property Law Act regime to these additional relevant criteria recently inserted into Te Ture Whenua Māori Act 1993.

reduce costs for Māori land owners). This was identified by the Tribunal as a key issue with the legislation prior to amendment;[44] and

38.4 providing for improved, tikanga-centred, dispute resolution mechanisms as a statutory alternative to court proceedings.[45]

39. These amendments go a long way towards addressing both the technical and the practical issues raised with the legislation, including the cost issues related to legal proceedings (in part through the dispute resolution provisions).[46] It is expected that they (along with other measures) will improve the likelihood that applications for the granting of reasonable access will be made, and that those applications will succeed. These matters will be also affected by complementary policy initiatives along with the legislative changes.

40. Neither the 2002 nor the 2020 amendments change the provisions relating to compensation or costs of access establishment and maintenance (which are of great significance). Along with policy measures discussed below, the 2020 amendments may however support the Court in reaching nuanced arrangements regarding matters it has discretion over given the increased distinction between general lands and matters relevant to Māori retained lands. These include:[47]

40.1 limiting potential costs of the application process (for instance making procedural decisions that ensure proceedings are well focussed on key issues only);[48]

40.2 what a 'reasonable cost' of establishing the access (which is to be borne by the applicant) may be on the particular facts;

40.3 full discretion concerning what compensation (if any) is ordered; and

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44 Wai 2180, #2.6.65 at [18].

45 Wai 2180, #M28(d) at [12]. This process is accessible for all disputes within the jurisdiction of the Court – including in relation to landlocked lands.

46 Claimant Generic Closing Submissions accept that the technical difficulties are largely addressed by these reforms.

47 Te Ture Whenua Māori Act 1993 s 326B - 326C.

48 Note for completeness: Wai 2180, #3.3.41 at [11], [13]. [18], [23] Mr Glazebrook disputes whether costs of pursuing an application under the Act were the primary barrier for the Awarua o Hinemanu access application (pointing instead to the conduct of the claimants, the Court itself, and perhaps to the impending district inquiry). He considers that the costs in implementing solutions are the real barrier and advocates for the Crown to fund such matters.

40.4 a broad discretion to make any other terms and conditions the Court considers necessary or desirable (including for maintenance of the access).

41. Concerns raised in claimant generic closing submissions about indefeasibility of title acting as a potential constraint on appellate court views are not substantiated.[49] None of the successful s326B access applications has been appealed to the High Court. However, the Court of Appeal has confirmed that the very purpose of the landlocking provisions is remedial and their application constitutes a deliberate restraint on the indefeasibility of titles of adjoining landowners.[50] The 2020 amendments to the Act put this beyond any remaining doubt.

42. Claimant generic closings submit that these legislative changes are passive, and do not amount to active protection (premised on the key barriers to Taihape Māori 'unlocking' land being cost rather than legislative barriers).[51] The Crown submits that the passing of legislation targeted to address key issues, even where it does not provide a complete answer - is indeed a form of active protection.

Policy responses

43. The 2020 legislative amendments discussed above address some factors previously identified as barriers (by the Tribunal in its 2016 report, by claimants in this inquiry, and through government policy processes). Crown witnesses set out the range of further support and funding measures that are either available, or are under development, to assist in resolving further barriers to Māori utilisation of their lands.

44. In addition to the 2020 legislative changes set out above, an improved dispute resolution service is now provided for in the legislation and is in development, as are regional advisory services.[52] The most directly relevant policy initiative has been the establishment in 2015 of the Whenua Māori Fund to support

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49 Jacinta Ruru and Anna Crosbie "*The Key to Unlocking Landlocked Maori Land: The Extension of the Maori Land Court's Jurisdiction*" (2004) 10 Canta LR 318.

50 *Murray v BC Group (2003) Ltd* HC Wellington CIV 2007-485-198 [2009] NZHC 114; [2009] 3 NZLR 257 (12 February 2009) per Williams J upheld as below. Citing *BA Trustees v Druskovich* [2007] NZCA 131 (para 15). Jacinta Ruru and Anna Crosbie "*The Key to Unlocking Landlocked Maori Land: The Extension of the Maori Land Court's Jurisdiction*" (2004) 10 Canta LR 318 at 7.

51 Wai 2180, #3.3.34 at [88].

52 Wai 2180, #M28(a) MH4.

owners and trustees of Māori land to increase productivity of their whenua.[53] In March 2017 Cabinet supported the scope of the Whenua Māori Fund being broadened to support owners of Māori owned landlocked land (the application form was subsequently amended to invite applications for such support). $56.1 million over four years has been committed.[54] Specialised, dedicated, regionally located support forms part of this package. The Crown understands an application to assist with initiatives for Ōwhaoko B and D blocks may be made.[55]

45. Crown evidence sets out other relevant funding pools.[56] That evidence acknowledged that these programmes - whilst going some way towards helping Māori landowners achieve access to their whenua – are in their early stages and are being developed further to ensure better targeting (including for cultural connection not only development objectives) and more effective communications.[57]

PART 4: DIRECT CROWN ACTIONS RELEVANT TO TAIHAPE MĀORI LAND ACCESS ISSUES

46. From the 1950s – 1990s Crown agencies sought to expand, consolidate or rationalise the lands held in the inquiry district for defence and conservation purposes (soil conservation, biodiversity conservation, and recreation) through public works takings, purchases, and land exchanges with adjoining private landowners. The submissions below address some impacts of those processes on Taihape Māori.

Access solutions not generally available solely through public lands

47. The majority of the landlocked lands (at least in part) adjoin public lands (administered by New Zealand Defence Force (NZDF), Department of Conservation (DOC), or Land Information New Zealand (LINZ)). The Tribunal expressed early views that access should have been, or could now be,

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53 Wai 2180, #M28(d) at [15]

54 Wai 2180, #M28(d) at [15]. Note, this amount (albeit not dedicated to resolving landlocked lands issues on their own) exceeds that provided for the High Country Tenure Review pointed to by Mr Watson as an example of whether the Crown has committed significant fiscal resource to resolve a longstanding and somewhat intractable issue (average $10 million per annum 2005 – 2008) – see Wai 2180, #3.3.036.

55 Wai 2180, #M28(d)(i).

56 Wai 2180, #M28(d) at [23]. Contributions as part of wider development plans through the Provincial Growth Fund (PGF) Whenua Māori Allocation. See Wai 2180, #M28(f) at 2 – two examples where PGF used for bridges to improve access to landlocked land. See also Hearing Week 11 Transcript at 145 (and subsequent answers to questions from the panel eg Dr Soutar at 151; and from claimant counsel).

57 Wai 2180, #M28(d) at [37]; see also Hearing Week 11 Transcript at 144; 158 – 160 (Judge Harvey Ms Ohia).

provided across those public lands to 'unlock' landlocked Taihape high-altitude retained lands.[58] However, those views have not been borne out.

48. There are few situations where the ability to resolve access issues is entirely in the Crown's hands. The detailed practical[59] and technical assessment undertaken by Gwyn et al concluded that (other than Oruamatua Kaimanawa 4 blocks and those behind) there are no other situations where an access solution is available across public land without also requiring access over private land.[60] There are in fact limited routes that involve public lands at all (Te Koau A, Awarua o Hinemanu).[61] This was consistent with the evidence presented by each of the witnesses who have had their boots on these lands (e.g. for claimants, Messrs P Steedman,[62] R Steedman,[63] Ngahape Lomax, Karena, and on behalf of the Crown, Messrs Pennefather, Hibbs and Fleury).[64]

49. Counsel is instructed that progress is being made where the most reasonable access is solely across Crown administered land (NZDF licence with Ōruamatua Kaimanawa block Trustees).

50. The most reasonable access routes all traverse private lands (either entirely, or in combination with access across publicly administered lands).[65] The Tribunal does not have jurisdiction to recommend the return to Māori ownership of any private land or the acquisition by the Crown of any private land (which at law includes interests in land).[66] The Tribunal is alert to the sensitivities of this situation and has invited participation from interested parties accordingly.

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58 Wai 2180, #4.1.10, Hearing Week 3 at Taihape Area School, Judge Harvey to R Steedman.

59 Wai 2180, #4.1.20 at 108. It is of concern that the authors of #N1 met with claimants but not with Crown agencies in developing their proposed routes or ground truthing them. In addition to the limitations acknowledged in #N1 Mr Gwyn acknowledged that his access route exercise did not take into account Geotech, climatic implications for road construction, nor RMA matters. Feasibility and costs estimates for roading are thus only indicative. This is relevant to assessments of 'reasonableness' under remedies. Cost estimate of $1 million per kilometre did not include bridges, culverts, retaining etc – study not at that level of detail but these factors acknowledged as escalating costs.

60 Wai 2180, #4.1.20 at 108 and 130.

61 Wai 2180, #N01; See Wai 2180, #4.1.20 at 108.

62 Wai 2180, #O1 and #O1(a).

63 Wai 2180, #O3.

64 Wai 2180, #4.1.20 at 116.

65 Wai 2180, #4.1.20 at 108 and 130.

66 Treaty of Waitangi Act 1975 s 6(4A).

New Zealand Defence Force actions and omissions relevant to access to lands retained by Taihape Māori

1973 Ōruamatua Kaimanawa public works taking for defence purposes

Background

51. The Crown took a total of 24,000 acres of land under the Public Works Act in 1973, including nearly 8,000 acres of Māori land to expand the Waiōuru Military Training Area to:[67]

    51.1 counter the practical effects of the state highway cutting through the defence area which had limited the defence exercises that could be undertaken near the highway or on the land to the east of the highway; and

    51.2 replace land that had been lost from the defence training grounds during the 1960s due to the construction of the Tongariro Power Development Scheme.

52. Crown evidence sets out that, following the 1973 decision to take the Ōruamatua Kaimanawa lands for public works for defence purposes, in 1974 the Crown considered transferring part of (the recently taken) Ōruamatua Kaimanawa 4 to the New Zealand Forest Service in order to better rationalise boundaries of the public lands (reallocating its use from defence to conservation purposes).[68]

53. In 1976, the (then) Minister of Māori Affairs, Hon. Matiu Rata, discussed the matter with the Trustees of Ōruamatua Kaimanawa 4. Both he and a senior Crown official stated that entire block was not really required for defence purposes.[69]

54. Crown evidence states that the:[70]

> Ōruamatua Kaimanawa 4 Trustees would have had a genuine expectation that part of the OK 4 Block would not be required for military purposes once boundary adjustment discussions had occurred with other Crown agencies;
>
> Ministers/officials were inconsistent in their messages and actions between themselves and to Maori in relation to the Block;

67 Wai 2180, #M03 at [32]-[34].

68 Wai 2180, #M03 at [36].

69 Wai 2180, #M03 at [37]-[38].

70 Wai 2180, #M03 at [39].

> the Ministry of Defence and NZ Forest Service had complicated the issue with their different land acquisition agendas and were to some extent in competition with one another; and the military justification for the entirety of the OK 4 Block was not adequately tested at the time.

55. In 1976, following various internal discussions, the government concluded that the lands were needed for defence purposes.[71] The 1976 decision was based on factors such as the possibility that the acquisition of more modern weapons might make the land necessary in the future; that discussions about other boundaries adjustments to the training area were ongoing; and that the Army had already started using the land. Crown evidence is that the lands have continued to be used for defence purposes and today remain a valuable part of the Waiōuru Military Training Area.[72]

Concessions regarding NZDF land dealings at Waiōuru and their effect on access

56. The Crown has already acknowledged that, in breach of the Treaty of Waitangi and its principles, it failed to consult with or adequately notify all of the Māori owners of the Ōruamatua Kaimanawa 2C2, 2C3, 2C4 and Ōruamatua Kaimanawa 4 blocks before these lands were compulsorily taken under the Public Works Act 1928 in 1973.[73]

57. In reaching its decisions to acquire the land in 1973 and to retain the land as defence lands in 1976, the Crown did not appear to adequately consider:

    57.1 alternatives to taking all of Ōruamatua Kaimanawa 4;

    57.2 the views of the Māori owners (as acknowledged directly above, all owners were not notified prior to the 1973 decision);

    57.3 the Crown's Treaty obligation to actively protect lands that Māori wish to retain (particularly in the context where the proportion of land subject to access restrictions is sufficient to be akin to landlessness); and

    57.4 (or for the 1976 decision) the relevance of the failure to consult the owners of Ōruamatua Kaimanawa 4 prior to the original decision.

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71 Wai 2180, #M03 at [35].

72 Wai 2180, #M02 Major Hibbs.

73 Crown Opening Submissions (Part 1) (Week 9), Wai 2180, #3.3.30 at 4.

58. The available evidence suggests that the Crown was motivated to acquire the land quickly due to the efforts of competing interests, and then to determine what the land might be used for later. The statements of Crown officials cited above demonstrate that it was debateable whether all of Ōruamatua Kaimanawa 4 was in fact necessary at the time it was taken.

59. The absence in 1973 of a sufficiently detailed plan to demonstrate how the land would be used further suggests that insufficient consideration was given to how much land was actually necessary for the stated purpose. The majority of discussions about how the land would be used occurred after the taking.

60. The Crown therefore further concedes that:

60.1 its decision to take all of Ōruamatua Kaimanawa 4 without first adequately assessing how much land was in fact required for military training purposes meant that it took more of the block than was reasonably necessary.

1990 Impact of Ohinewairua land exchange on access

61. To further rationalise the boundaries of the Waiōuru Military Training Area, the Crown negotiated a land exchange with an adjoining landowner (Ohinewairua Station) in 1990.[74]

62. Prior to the 1990 exchange, the owners of Ōruamatua Kaimanawa 1U and 1V blocks had an informal agreement with Ohinewairua Station to access these blocks by crossing station lands. The already-limited ability of the Māori owners of the Ōruamatua Kaimanawa 1U and 1V blocks to access those landlocked lands was further restricted by the Ohinewairua land exchange. The exchange did not provide for ongoing access for the owners' of Ōruamatua Kaimanawa 1U and 1V owners. Their previous access route across Ohinewairua was substantially shorter than the new route accessing the blocks through the Waiōuru exercise area. This increased the distance to be travelled but also the difficulty of gaining approval to cross to their lands (the difference between crossing a farm via a phone call and crossing a national Defence Area with the attendant heightened security restrictions and permitting requirements).[75]

74 Wai 2180, #M03 from [42].

75 Wai 2180, #M03 at [48] and [49].

63. The Crown did not consider the interests of the Ōruamatua Kaimanawa 1U and 1V owners before agreeing to the swap with Ohinewairua Station.[76] In the context of Taihape, where Crown actions in breach of the Tiriti/Treaty contributed to a very high proportion of lands having become, and continuing to be, landlocked a reasonable Crown aware of its Treaty duty to actively protect Māori interests would have taken the owners' access to Ōruamatua Kaimanawa 1U and 1V into account before arranging the land exchange. The Crown's failure to do so caused prejudice to the owners of Ōruamatua Kaimanawa 1U and 1V, who found it much more difficult to access their land following the exchange.

64. The Crown concedes that:

64.1 it failed to consult with or actively protect the interests of the owners of the Ōruamatua Kaimanawa 1V and Ōruamatua Kaimanawa 1U blocks when it negotiated a land exchange with private interests in 1990. This failure exacerbated access issues to the blocks and was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

Department of Conservation (DOC) actions and omissions relevant to access to lands retained by Taihape Māori

DOC land exchanges affecting access

65. Attempts have been made from (at least) the 1940s to secure improved access to land administered as the Ruahine State Forest to facilitate wild animal control, revegetation of eroded land (soil conservation), conservation management and recreational access. The adjoining Māori landowners expressed concerns regarding access issues from the 1970s.[77]

66. When seeking increased access across private lands, DOC must navigate the tensions between its Treaty obligations, and risks to the goodwill it needs to achieve its statutory purposes (conservation management). In managing those tensions the Crown is obliged through section 4 of the Conservation Act 1987 to interpret and administer its conservation functions so as to give effect to the principles of the Treaty of Waitangi. Ongoing efforts over decades have been

76 Wai 2180, #M03 at [44]; see also Wai 2180, #4.1.18 at 135 – 137.

77 Wai 2180, #M07(c) at [3].

made to achieve legally secure and practical outcomes in the context of complex relationships and varying (and shifting) interests.

Access issues for Awarua o Hinemanu and Te Koau A

67. To access the landlocked Awarua o Hinemanu and Te Koau A blocks, access across the privately owned Timahanga and/or Big Hill Stations is required. The Awarua o Hinemanu and Te Koau A access issues are interrelated as the blocks adjoin each other (and can thus, to a certain extent, make use of the same access route). Factors common to the blocks include:

    67.1 Both blocks have Ngā Whenua Rāhui kawenata in place. These assist owners to further their conservation aspirations on the lands (and are relevant to future development proposals).

    67.2 Access to both is not available through public conservation land alone.[78] The most practical access routes traverse intervening private land and dealings with those third parties are sensitive.

    67.3 Efforts to ensure legal access have been complicated by legal routes (unformed legal road and registered right of way) not aligning with the most practical formed routes on the ground.

    67.4 Applications for access to both blocks to the Māori Land Court have failed (albeit for different reasons).

68. In addition to direct negotiations between Māori land owners and facilitated discussions with DOC, applications for access to the blocks have been made to the Māori Land Court. (Addressed at paragraph [35] above.)

Land exchange with Timahanga Station affecting access to Te Koau A

69. The most direct and practical access to Te Koau A block traverses public conservation land and private land (Timahanga Station).

70. Timahanga Station was purchased from the Crown under a deferred payment licence arrangement. Prior to the land being finally free-holded a long-formed access strip, the 'old track', was reserved from the sale (60 acres also known as

78 Wai 2180, #N01. Wai 2180, #4.1.20 at 108. Although Big Hill Station advocates for an access route from the Mangles Road, Mr Fleury's evidence was that the route would be impractical from an engineering perspective given the topography of the land. The Tribunal was presented pictures of the proposed route during hearing week 9.

'the access strip' or Section 8) to retain access into adjoining forest parks and to the Taruarau River. This was reserved against the objections of the private purchaser. [79]

71. The 'old track' (which remained publicly owned) did not reach Te Koau A but reached only to the Taruarau River. Since 1915 there has been (and remains) 5 km of intervening privately-owned Timahanga Station between the Timahanga Track and Te Koau A.[80]

72. The 'old track' formed on the publicly owned Section 8 was passable with vehicles but was not the best physical alignment with the topography of the land. Over time, parts of the 'old track' were re-aligned off Section 8 and onto the adjoining (by that time) private land to improve the track. By the late 1960s the formed track on the ground followed a different route 'the new track' and was no longer located solely within Section 8 and legal access to the River by vehicle was no longer possible without trespassing the adjoining private land.

73. In the 1970s negotiations commenced for land exchanges between Timahanga Station and the Crown to improve soil conservation/erosion prevention measures.[81] Control of the access route was the 'sticking point' between the parties at that time.[82] Negotiations also occurred in this period amongst the owners of Te Koau A, and between them and the Station owner (in the context of potentially establishing a deer operation).[83]

74. In 1993, decades of negotiations in a context of conflict between the landowner and other parties (for which the Crown often acted as mediator)[84] concluded with DOC and Timahanga Station agreeing to a land exchange (Section 8 to Timahanga, various lands with conservation values to the Crown) which addressed the access issues by agreeing to the 'new track' realignment and securing an easement over that 'new track'.[85] The easement provided for legal

79 Wai 2180, #M07(c) at [8] and [11].

80 Wai 2180, #A037 at 441. The Crown drew the lack of access to the Court's attention in the 1920s following partition, but no further action was taken at the time to remedy it.

81 Wai 2180, #M07(c) at [9].

82 Wai 2180, #M07(c) at [10] – [11].

83 Wai 2180, #A037 at 446.

84 Wai 2180, #M07(c) at [71].

85 Wai 2180, #M07(c) at 6-7.

public access by foot, with prior notification to the owner being required (who could deny access for farm management reasons). [86]

75. Before entering the agreement, DOC was advised that the proposal could adversely affect access for the owners of the lands behind Timahanga (Te Koau A) in that it did not secure legal access for them and, to some extent, provided a lesser legal right than the 'old track' (albeit that the 'old track' was no longer formed on the ground).[87] DOC nonetheless proceeded on the basis that (as recorded in its decision document): [88]

75.1 the conservation benefits outweighed those concerns;

75.2 access across intervening private land to Te Koau A located behind Timahanga Station was for the owners to pursue through the Court not via DOC and DOC had been advised by the owners that they intended to submit an application to the Court; and

75.3 the access route (both the 'old track' and the 'new track') went to the river only (5 km short of the boundary of Te Koau A which could not be reached without crossing Timahanga Station – ie the access desired by the Te Koau A owners was not within the Crown's control to provide via retaining the 'old track' anyway).[89]

76. An application for urgent consideration of the issue was made to the Waitangi Tribunal the day after the decision was made. Urgency was not granted.[90] DOC's decision was also criticised by the Hawkes Bay Fish and Game Council for a lack of consultation and perceived loss of guaranteed access to the river.[91]

77. DOC did not accept those concerns, arguing that:[92]

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86 Wai 2180, #M07(c) at [78].

87 Wai 2180, #M07(c) at [75] - [76]. Whereas vehicle access along the Timahanga Track was previously permitted it was reduced to foot access as part of the overall agreement.

88 Wai 2180, #M07(c) at [76].

89 Wai 2180, #M07(c) at [77].

90 Wai 2180, #M07(c) at [80].

91 Wai 2180, #M07(c) at [86].

92 Wai 2180, #M07(c) at [86] – [88].

77.1 the previous legal access was impractical (the formed access route had not followed the legal route (therefore public access along it was technically trespass and was not secure);

77.2 the agreement aligned secure legal access with the formed access albeit allowing foot access only;

77.3 the agreement improved the situation when viewed in the context of the decades of conflict prior to the agreement; and

77.4 the agreement resulted in net conservation gain.

78. It is arguable that the access of Te Koau A owners was reduced through this agreement in that they previously had vehicle access to the river (albeit not to their land) over the publicly owned 'old track'/Timahanga Track but subsequently only had foot access. That argument however is countered by the reasons given by the decision maker at the time (set out immediately above). The quality of the pre-existing access was not as secure in legal terms as the claimants alleged as the vehicle track did not align with the legal access.

79. Unlike the Ōruamatua Kaimanawa 4 dealings above, the decision maker was well informed as to the views of the Māori owners of Te Koau A and had regard to them in reaching the decision.

Access to Te Koau A and Awarua o Hinemanu via Big Hill Station and public conservation lands

80. An unformed legal road traverses Big Hill Station but does not align with the formed access. In 1980 agreement was reached for a land swap which included provision for access "by written permit with the control vested in Forest Service" via a registered right of way easement "for sole use by the Crown and its permittees".[93] Unlimited public access was not secured (or seen as desirable given the costs involved in establishing the required standard of roading).

81. The conditions on public access under the 1980 easement were to be "agreed from time to time"[94] and have become increasingly restrictive with access from 1990 being for restricted numbers (by 1999 2-3 people per week only) solely by ballot.

93 Wai 2180, #M07(c) at [19].

94 Wai 2180, #M07(c) at [19].

82. DOC evidence to the Tribunal states:[95]

> Various points of conflict have been involved along the way within the landowner Trusts, with the farmers, with DOC and with some user groups. Some of those events have led to pragmatic responses to particular issues and have resulted in increased restrictions on access via agreements between DOC and the farmer (especially with Big Hill where arguably, over time, the terms of the legal easement have been lost sight of and been outweighed by other relational or pragmatic objectives resulting in the incremental increases in access restrictions).

83. In 1991 the Māori Land Court clarified ownership of Awarua o Hinemanu (further land located behind Big Hill Station that had been wrongly understood to be Crown land as a result of an historical surveying error).[96] The Tiriti/Treaty analysis of the circumstances in which Awarua o Hinemanu block came to be defined are addressed in other Crown submissions (including titling processes and survey errors under the native land laws).

84. Access across Big Hill Station became increasingly important for Māori as it enabled access to both Te Koau A (albeit only part of that block given the topography) and the newly defined Awarua o Hinemanu block. The Awarua o Hinemanu owners sought increased access for their purposes but also supported public access being restricted (to avoid trespass and poaching on their lands).[97]

85. The increased access restrictions over time have exacerbated the Māori landowners' ability to access their lands. The Māori landowners currently access their lands either through the ballot system or if the owners of Big Hill Station give consent.

86. The easement over Big Hill Station provides for access of the Crown for conservation management purposes and for "agents and invitees" of the Crown and was negotiated prior to Awarua o Hinemanu title being created. Claimants argue that DOC can and must now authorise their access to Awarua o Hinemanu under the easement as "invitees". They say this would comply with Conservation Act 1987 section 4 (along with broader Treaty duties).

87. The potential for such access should not be overstated. The easement is not unrestricted and would not be legally capable of providing for the level of access

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95 Wai 2180, #M07(c) at [98].

96 Wai 2180, #M07(c) at [46].

97 Wai 2180, #M07(c) at [47] and onwards.

sought by the owners of Awarua o Hinemanu who ultimately seek unrestricted access for themselves for whatever purposes they see fit, along with the ability to control access of others to their lands. The easement is subject to:

87.1 conditions "as agreed from time to time" between DOC and the owners of Big Hill Station; and

87.2 uses consistent with the Conservation Act 1987 (i.e. access to enable development projects that are not consistent with conservation purposes (e.g. exotic forestry) on the Māori-owned lands is unlikely to be consistent with the Conservation Act).

Decisions do not exacerbate access difficulties to Te Koau A and Awarua o Hinemanu – but neither do they progress matters significantly

88. Te Koau A and Awarua o Hinemanu access issues have been contributed to through historical Crown actions that were inconsistent with the Treaty principles of equity and active protection. The consequences of those historical decisions are very difficult to remedy. In that context and in those circumstances (where such a high proportion of land is landlocked so as to be akin to being landless), the Crown should ensure its actions do not further exacerbate access difficulties for Taihape Māori, subject to the standard of reasonableness.

89. The DOC land exchanges with Timahanga and Big Hill stations have involved access considerations. In both cases the access agreed is more legally secure than that available previously and is able to be utilised by the owners of Te Koau A and Awarua o Hinemanu (albeit the access is not at the level they seek). For Awarua o Hinemanu the exchange and access agreement predates the Awarua o Hinemanu title being created and thus did not exacerbate access difficulties (and may present some opportunity for some improvement on current access levels).

90. The access sought by the owners of Te Koau A and Awarua o Hinemanu involves traversing private lands in a manner that is not within the Crown's control to secure on their behalf. Reasonable measures DOC can take are limited to:

90.1 taking a more active role in mediating between parties;

90.2 considering closely the scope for meeting owners' aspirations in respect of the easement (in discussion with both the owners and the Station owners); and

90.3 supporting applications under Te Ture Whenua Māori Act 1993 s 326 to be made (in a manner consistent with both Tiriti/Treaty duties (e.g. with support through the Whenua Māori Fund discussed above) and with the Crown's further legal obligations (under administrative law and under legal mechanisms in place with other parties)).

Big Hill Station

91. Big Hill Station has participated in these proceedings as an interested party.[98]

92. Among other comments, Mr Glazebrook strongly opposes access across general lands (in particular the DOC easement across Big Hill Station) forming part of the solution.[99] Mr Glazebrook states: [100]

> [15] It would be of great concern should the inquiry be seen as an instrument to circumnavigate the requirements of the [Te Ture Whenua Māori Act] for any one particular landlocked land situation.

93. The Crown makes no submissions in response to the submissions made on behalf of Big Hill Station. The absence of submissions should not be viewed as support or non-contest of those submissions (the Tribunal inquiry is not a conventional civil litigation model). The Crown considers the more fruitful path for resolution of the current situation to be direct discussions with all involved parties (rather than litigation through a Tribunal historical inquiry process or the focus of the inquiry into Crown actions being diverted to the actions, interests or views of third parties).

PART 6: FURTHER MATTERS

Low altitude landlocked lands retained by Taihape Māori

94. As set out in the Tranche 1 submissions, the pattern of landlocking in Taihape is fact-specific – the Taihape pattern of landlocking is not consistent across the whole district (few low-altitude lands are landlocked) and is not replicated nationally (the amount of land that is landlocked in Taihape far exceeds that of

98 Wai 2180, #3.3.41.

99 Wai 2180, #3.3.41 at [2] – [3], [30] – [33].

100 Wai 2180, #3.3.41 at [15].

any other region). The vast majority of lands in Taihape that are landlocked are high-altitude lands.

95. However, evidence has been presented on two lower altitude blocks concerning landlocking and these are addressed here.

95.1 The Iwi Urupa situated south of Opaea Marae (Awarua 3D3 No.17B) is landlocked with the adjoining title owned by individuals who affiliate to Ngāti Tamakopiri.[101] It appears that resolution to this particular instance of landlocking may be available amongst Ngāti Tamakopiri. Mr Steedman stated that access to the urupā is currently available because of the "relationships with whanaunga and neighbouring farmer" as the adjoining land that the urupā is landlocked by is owned by a whanaunga.[102] It was acknowledged under questioning that securing an easement over that adjoining land might be possible and preferable in order to future-proof access.[103]

95.2 Rangipo Waiu B6 blocks are landlocked by an adjoining private title. The blocks themselves lock the owner of those private lands from accessing further lands also owned by that owner to the West of the Rangipo Waiu B6 blocks. There would appear to be a possible mutuality of benefit available to these parties should they grant access to each other (either through private processes or, through application under the revised s326A process).

96. In addition to land management mechanisms available without requiring recourse to courts (e.g. agreement to register easements on titles), legal remedies have been available through the courts since 1975 to secure access to the above low-altitude lands across intervening private lands, some of which are in whanau ownership. Applications could be, but have not been to date, made to the Māori Land Court to formalise access to those lands should arrangements not be able to be reached between the parties.

101 Wai 2180, # J15 R Steedman; Wai 2180, #4.1.14 Transcript Hearing Week at 38 – 42.

102 Wai 2180, # J15 R Steedman.

103 Wai 2180, #4.1.14 Transcript Hearing Week at 74.

Land loss where access a major contributing factor

97. In the Tranche 1 submissions the Crown recognised that access restrictions were a contributing factor to the sale of some Māori lands in Taihape (amongst other factors including raising capital for development, the servicing of debt or land being uneconomic due to topography and climate).[104]

98. Technical evidence records a pattern of landlocked land being sold. Ms Woodley identifies approximately 16 sales of land prior to 1975 where access has been a factor in sale of lands (listed in paragraph 104 below).[105] There are examples of the owners of those lands wishing to develop or farm these lands but being unable to do so as the units on their own, without access, were not economic.[106] There is also evidence of adjoining landowners utilising the lands even without a legal agreement being in place to do so. Whilst there were other contributing factors involved with each of these sales, the Crown accepts the evidence of Ms Woodley in this regard.

99. In each case, the land appears to have been sold to the adjoining landowner. This is consistent with the pattern observed by the Tribunal in the Whanganui district inquiry that the adjoining landowner became by default the sole viable purchaser of such lands. In 1972 the Department of Māori Affairs recorded (in a policy process concerning access issues that subsequently led to requirements for consent being removed in 1975):[107]

> There are some very old Maori Land Court titles for which access was not adequately provided, eg some of the Ōwhaoko blocks, but again the policy has been to deal with them as the need arises and the requirements become known.
>
> Cases occasionally come to light through alienation proceedings where the occupier of adjoining or surrounding lands is the only person, because of access problems, able to purchase or lease. In many of these instances it is known that access by road would never be physically practicable because of the nature of the country.

100. To the extent the sale of these lands resulted from access difficulties, the sales constitute prejudice arising from the historical breaches which contributed to

104 Wai 2180, #3.3.44 at [68].

105 Wai 2180, #A37 at 275 – 283.

106 Awarua 2C12A2A Wai 2180, #A37 at 276; Ōwhaoko D6(3) Wai 2180, #A37 at 408 – 417.

107 Wai 2180, #A37 at 254.

the lands having become landlocked. Those breaches were conceded in the Tranche 1 submissions and are summarised at paragraph 6 above.

PART 7: PREJUDICE AND REMEDIES

Prejudice

101. The consequences of landlocking are both historical and contemporary. Claimants describe in strong terms the cultural dislocation and economic disadvantage they have experienced, and continue to experience, due to the lack of secure access to their retained high-altitude lands.[108]

Legislative regime and land loss

102. The Crown has acknowledged that, historically, it breached te Tiriti/the Treaty as set out in opening submissions and, particular to landlocking, the Tranche 1 submissions (including as revised in these submissions).[109]

103. The Crown recognises that the lack of an effective method between 1912 and 1975 for Taihape Māori to remedy access difficulties to lands that were landlocked or had access severely restricted made it difficult to develop or farm those lands. This had a direct impact on land retention. Access difficulties were a factor contributing to the sale of the following lands during the 1912 to 1975 period totalling 9,348 hectares:[110]

    103.1 Awarua 2C12A2A in 1953; 4C13B in 1953; 2C4 in 1954; 1A3C in 1965; 4C15F1H2 and 4C151H1 in 1966; 1A3A in 1968;

    103.2 Ōruamatua Kaimanawa 1K and 2F in 1962;

    103.3 Rangipō Waiu B5 in1927 and 1928; B6C2 in 1929; B6C1 in 1946; B4 in 1950, B2 and B3 in 1966;

    103.4 Mōtukawa 2E2 in 1951; and

    103.5 Ōwhaoko D5 section 2 in 1953.

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108 Wai 2180, #E3 Herbert Steedman; #G1 Tama Wipaki; #G4 Ritchie Chase; #G13 Richard Steedman; #G14 Lewis Winiata; #G18 Merle Ormsby, Tiaho Pillot, and Daniel Ormsby; #H6 Ngahapeaparatuae Lomax; #H8 Peter Steedman; #H11 Te Rangianganoa Hawira; #H13 Maraea Elizabeth Oriwia Bellamy and Te Urumanao Kereti; #I2 Lewis Winiata; #I3 David Steedman; #N8 Hemi Biddle; #O1 Peter Steedman; #O3 Richard Steedman. See also Wai 2180, #2.6.36(a) for claimant evidence prior to February 2018.

109 At [6] and [17.1] of these submissions; at Wai 2180, #3.3.44 [120] and [126]; and Wai 2180, #3.3.1 at 8-9.

110 Wai 2180, #A37 at 275 – 283.

104. Even after legislation was amended to provide a more effective legal pathway to resolve access difficulties in 1975 and 2002, the consequences of the historical unequal treatment continued. The lack of access and the difficulty of successfully navigating the legal process to 'unlock' land contributed to the sale of Ōwhaoko D6 section 3 (556 hectares) in 2016.

105. The following direct Crown actions exacerbated access difficulties for Taihape Māori to their high-altitude retained lands and in doing so, breached te Tiriti/the Treaty:

105.1 The Crown concedes it took nearly 8,000 acres of Māori land for the Waiōuru Military Training Area in 1973. The Crown, in breach of te Tiriti o Waitangi/Treaty of Waitangi and its principles, failed to consult with or adequately notify all of the Māori owners of the Ōruamatua Kaimanawa 2C2, 2C3, 2C4 and Ōruamatua Kaimanawa 4 blocks before these lands were compulsorily taken under the Public Works Act 1928.

105.2 The Crown further concedes that its decision to take all of Ōruamatua Kaimanawa 4 without first adequately assessing how much land was in fact required for military training purposes meant that it took more of the block than was reasonably necessary.

105.3 The Crown concedes that it failed to consult with or actively protect the interests of the owners of Ōruamatua Kaimanawa 1V and Ōruamatua Kaimanawa 1U blocks when it negotiated a land exchange with private interests in 1990. This failure exacerbated access issues to the blocks, and was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

106. The Public Works aspects of the above events are to be addressed further in submissions on the Public Works Act. These events are relevant also to the issue of landlocked lands as the public works breaches compounded prejudice experienced by Taihape Māori with the high proportion of their retained lands that are landlocked. The access implications of these public works actions included: the owners having no opportunity to convey how the taking of those lands would affect their access into their retained lands; a reduction in access options that might have been able to be developed if the land had not become

defence land; increased difficulty of direct access due to the increased administrative and security requirements for access across defence lands to the lands retained behind the lands that were taken; and by leading to the 1990 land exchange (which had a direct adverse effect on access).

Economic prejudice

107. Various witnesses have provided evidence as to their views of the economic potential of the lands or lost economic opportunities when commercial endeavours were not able to be fully realised.[111] Several witnesses have pointed to the economic successes of the large adjoining stations as evidence of the lands' potential. Access is only one of the factors relevant to the different economic history of these Stations with the retained land located behind those stations. A majority of retained Māori land that is landlocked or suffers from restricted access within the inquiry district is of relatively low quality according to traditional assessments of economic potential (both in soil type and in topography). The adjoining Stations generally include more productive land more suitable for large scale pastoralism including having both summer and winter grazing lands (indeed that was the basis for the original purchases and leases being taken up on those lands). Those lands also benefitted from economies of scale and from administrative efficiencies through not being collectively owned to the same extent as most of the adjoining Māori-owned land. The economic potential of the majority of the high-altitude retained land for a large part of the period in which they have been landlocked was limited by topography, climate and distance from markets. Evidence has also been presented that the development of manuka honey and, to a lesser extent, extreme tourism have resulted in the lands having greater economic potential currently than at previous times in their history.

108. The above points are relevant to the prejudice of economic harm experienced by claimants. The very high proportion of the lands retained that suffer from access difficulties is also relevant – it far exceeds that of any other district the Tribunal has conducted an inquiry, and means that, even where the lands themselves had low economic potential, the loss of that potential has a proportionately stronger effect.

111 For example, Wai 2180, #J10 Karena; #G13 Steedman.

Cultural relationships

109. The economic prejudice contributed to by the above matters is not the only form of prejudice experienced by Taihape Māori. The disruption to cultural relationships and exchanges of land-specific mātauranga Māori contributed to by access difficulties is another form of prejudice that claimant evidence has articulated strongly, and that the Crown recognises.

Remedies

110. The Crown has acknowledged that the remedies available between 1912 and 1975 treated Māori unequally and were ineffective.

111. The Tribunal and all parties (including of course the claimants themselves) are well aware that resolving landlocked lands issues is complex, difficult and expensive as it involves (often entrenched and contested) legal and technical issues, compensation payments and significant costs in establishing and maintaining the access.

112. These remaining remedies issues concern what can now be done by the Crown as a responsible Treaty partner.

113. At a systemic level, the Tribunal has previously recommended:[112]

> The Crown engage with Māori to explore the feasibility of a Crown-sponsored project that would fund the necessary expertise, including lawyers and surveyors, to pursue applications for access to landlocked land through the Māori Land Court;

114. In this inquiry, the panel's preliminary views on landlocking suggested the following remedies:[113]

> (a) that the Crown consider creating a contestable fund to which Māori landowners can apply, to pay the costs of creating reasonable access;
>
> (b) that the Crown, while reviewing the Te Ture Whenua Māori Act 1993, consider the definition of 'reasonable access' for landlocked lands, especially to take account of topographical factors. This is because in our view the laying out of 'paper' access routes, where the terrain is rugged, with straight lines that run over cliffs and rivers and down banks is something of a pointless exercise; and
>
> (c) Reasonable access in some circumstances needs to take account of cultural and commercial purposes for the landlocked blocks. For some

112 *Waiararapa ki Tararua Report*, 2010 Vol 2 pp 637-638; *He Whiritaunoka: The Whanganui Land* Report, 2015 vol 3, p 1500.

113 Wai 2180, #2.6.65, at [35].

commercial purposes, this will mean that reasonable access needs to be vehicular, not just walking tracks.

115. These views informed the Crown's 2020 amendments to the Te Ture Whenua Māori Act 1993 and the associated policy and operational developments discussed above.

Reasonable access includes consideration of matters recommended

116. The Crown submits that points (b) and (c) in the Tribunal's preliminary views recorded directly above are provided for in the legislation as amended in 2020 and are also consistent with longstanding case law.

116.1 Topographical factors can be taken into account when considering what access is reasonable. Long-established case law is that reasonableness is a matter of practicality and is to be determined on the particular facts, including topography.[114]

116.2 The Tribunal's reference to 'paper' roads is unclear. Unformed legal roads were primarily laid on titles in the past and are not often placed on titles today (and where they are it would be hoped that the lessons of the past regarding impractical routes have been learnt are not being repeated). By way of further assistance however, in dealing with legacy issues of impractical unformed legal roads, whilst legal rights of access are limited to legally defined routes, it would not seem unreasonable for a court assessing an application for access to landlocked lands to take into consideration the existence of an unformed legal road as evidence of access through the lands having been clearly contemplated (at the time the unformed legal road was placed on the title) even if subsequently found to be impractical in that specific route alignment i.e. where an unformed legal road exists, an application for access across that title might be accorded some greater weight.

117. Likewise, case law is clear that "whilst reasonable access is not invariably vehicular, the circumstances in which non-vehicular access will be reasonable

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114 *Asmussen v Hajnal* (2005) 6 NZCPR 208 at 221-222 specifically mentions topography as a relevant factor in determining what access is reasonable. See also *Murray v BC Group (2003) Ltd* HC Wellington CIV 2007-485-198 [2009] NZHC 114; [2009] 3 NZLR 257 (12 February 2009) per Williams J at [23] upheld as below.

Murray v BC Group [2010] NZCA 163 [19] citing *Wagg v Squally Cove Forestry Ltd; Asmussen* and *B A Trustees v Druskovich* [2007] NZCA 131, [2007] 3 NZLR 279 at [61]. See also *Kingfish Lodge (1993) Ltd v Archer* [2000] 3 NZLR 364 (CA) where water access only was found to be reasonable in those circumstances.

will be few."[115] Messrs Alexander, Gwyn and Neal appeared to consider that access to Awarua 13DB may be such a situation.[116]

118. Whilst these matters could already be taken into account, it is anticipated that the 2020 legislative amendments provide further clear indications that Māori lands are not identical to other lands and are subject to a broader range of considerations. An Act must be applied both from its text but also in light of its purpose.[117] The purposes of Te Ture Whenua Māori Act 1993 reflect the Treaty rights of retention and utilisation and the importance of the cultural dimensions of Māori lands and interpretation and implementation of the Act must apply those purposes.

Process issue remedies and implications

119. Consistent with the Tribunal's recommendation and suggestions above (and as noted in the claimants' generic closing submissions)[118] the process issues previously identified have now largely been resolved through the 2020 legislative amendments and the complementary policy and operational processes and support.

120. The provisions now in force enable the Court to take account of a broader range of factors, and by doing so, will help gain greater access to retained lands that are landlocked. (This is achieved through the combination of measures discussed under legislative and policy developments earlier in these submissions.)

121. Crown evidence from Te Puni Kōkiri officials confirmed that substantial policy work has been undertaken towards a "pipeline of support" for owners of landlocked lands – and that those work programmes are ongoing.[119] These

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115 *Murray v BC Group (2003) Ltd* HC Wellington CIV 2007-485-198 [2009] NZHC 114; [2009] 3 NZLR 257 (12 February 2009) per Williams J at [23(d)] upheld on appeal as cited in footnote above.

116 Wai 2180, #4.1.20 at 117-118 answer to Ennor question.

ENNOR: So, sorry I'm still a little confused, is it that one of you are saying the most practical access here is walking access, i.e. on page 96, but then another of you on page 24 is saying, vehicle is what we are modelling here?

ALEXANDER: If I can understand that. It's one of those situations where the block of land is obviously bush, it's isolated, it's amidst of a forest park. I would be not an area that would be – it would be of high use to vehicles but to keep it in keeping with the rest of the report Jonathan has looked at it no differently from any other block so that if walking access is acceptable than that's the accepted access for that block of land but there is the availability and there is the possibility that vehicle access could get created to that block of land.

117 Interpretation Act 1999 s5.

118 Wai 2180, #3.3.34 at [113].

119 Wai 2180, #M28(a) MH3; Wai 2180, #M28(d) at [36].

include funding for technical and professional services relevant to preparing and pursuing an application to access landlocked land (e.g. development and business plans, surveys) but do not currently include funding for litigation or compensation, construction or maintenance.

122. Crown evidence was that these measures improve the situation but do not resolve it entirely. Ms Ohia (as a witness for the Crown) stated that a comprehensive package of support and funding is required in order to make further meaningful change. For Taihape itself, the senior officials who gave evidence to the Tribunal on behalf of Te Puni Kōkiri, the Department of Conservation, and the New Zealand Defence Force expressed strong commitment to being part of the solutions for Taihape Māori.

Available legal remedies

123. As the Tribunal is aware, the Māori Land Court has had jurisdiction to consider applications to gain access to resolve landlocking since 2002. The Tribunal's Wairarapa Report states, "[…] and the Māori Land Court now has jurisdiction to order access to landlocked blocks."[120] As set out above, the available legal remedies have not been exhausted in relation to Taihape Māori retained landlocked lands (although there is tangata whenua evidence of exhaustion in trying to navigate the issues and to resolve the matters).

124. As set out at 33 above in the inquiry district there have been three applications, none of which proceeded to the point where the Court determined access rights (one failed on procedural grounds, one was dismissed for case-specific reasons with costs subsequently awarded against applicant, one was withdrawn prior to hearing).

125. Claimants pointed to uncertainty of outcomes and difficulties achieving consensus amongst multiple owners as contributing factors to the minimal recourse that has been exercised to date to the Māori Land Court. However, in their view, the dominant factor was cost (and concern for potential appeal to the High Court).[121] A significant cost award was one consequence of the failure of the Awarua o Hinemanu application to the Māori Land Court. The

120 Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 636-637.

121 For example, Wai 2180, #I14. Note, Big Hill Station (the other party in those proceedings) submits that costs were not the primary factor pointing instead to internal issues and to compensation and road establishment and maintenance costs Wai 2180, #3.3.41 at [11] and [23].

circumstances of those events are specific to that case, and were not directly within the control of the Crown. However, it is accepted that where access is resisted by the adjoining landowner (and therefore a higher risk of being a contested/costly process exists), decisions to lodge applications would be proceeded with cautiously.

126. The Māori Land Court has a role here too – both in terms of facilitating the process and in providing clear direction to all parties of the rights of access and what reasonable arrangements may look like. Strong direction from the Court through developing case law is likely to guide parties in subsequent steps (i.e. the legal risks and benefits involved in appealing decisions).

Limited direct solutions available in Taihape that are solely within Crown control

127. In relation to the direct access issues in Taihape, the fact that each of the most practical potential access routes traverse intervening private lands (and are thus likely to involve more delicate negotiations and more extensive compensation and cost issues) is significant.

128. The *prima facie* presumption that access solutions should be available to most lands via the adjoining public lands was dismissed by both tangata whenua witnesses with close knowledge of the most practical routes, and by technical witnesses.[122] The technical evidence confirmed that access solutions utilising solely public land is limited to access to traverse the Waiōuru Military Training Area to access the Ōruamatua Kaimanawa blocks.[123] Counsel is instructed NZDF has undertaken active efforts to improve relationships and to improve access to those blocks since NZDF appeared before the Tribunal in 2019. Only one access route they recommend traverses public conservation land (access to Awarua o Hinemanu and Te Koau A in combination with Big Hill access easement).

129. A legislative requirement on Crown agencies that administer lands adjoining landlocked Māori land to provide access or justify why they cannot has been suggested.[124] The utility of such a measure should not be overstated for Taihape

122 Wai 2180, #4.1.20 at 108 and 130.

123 Wai 2180, #4.1.20 at 108 and 130.

124 Wai 2180, #3.3.34.

given, as above, there are few opportunities to improve access for Taihape Māori that do not require traverse of intervening private lands.[125]

Further funding issues

130. The practical, technical and financial implications of Taihape high-altitude lands that arise from the climate and topographical conditions are real and present a significant consideration in future decision making by both Taihape Māori and the Crown in working together to resolve these issues. Recommended remedies must be tempered by the principle of reasonableness in this regard. This was acknowledged by Judge Harvey in discussion with Crown witness, Ms Ohia:[126]

> Q: […] That if we are going to use public funds, there needs to be a return so that someone wanting a million-dollar road to get to land to lease for $2000 a year, probably doesn't add up.
>
> A: Mmmm, mmm, indeed Sir
>
> Q: Setting that aside, people are still entitled as Dr Ballara says, to access their land for all sorts of other purposes, merely the quite enjoyment of it, for cultural purposes, for all sorts.
>
> A: Yes
>
> Q: So you would agree that the principle barrier is funding?
>
> A: Yes, I would have to agree with that.

131. In Taihape, the access solutions involve very considerable costs indeed. Mr Gwyn estimated a minimum of $1 million per each of the 67 kilometres of the proposed Ōwaoko access. As Mr R Steedman noted:[127]

> So, when we talk about landlocked land, we don't talk about metres or hundreds of metres, we talk about kilometres.

132. Mr R Steedman's suggestion of practical prioritisation of the access issues is welcomed.[128] Factors that may be relevant to that prioritisation process were discussed with Messrs Neal, Gwyn and Alexander.[129]

133. The Whenua Māori Fund is not a contestable fund but is nonetheless funding that is available to assist resolve difficulties. Ms Ohia's evidence was that Te Puni Kōkiri is considering whether the Fund's purposes should be broadened

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125 Wai 2180, #3.3.34 at [90].

126 Wai 2180, #4.1.19 at 153.

127 Wai 2180, #G13 discussed at #4.1.10 at 33.

128 Wai 2180, #G13; #O3.

129 Wai 2180, #4.1.20 at 128-129.

beyond development objectives (to better reflect cultural duties and relationships with land not only the economic ones).

134. The Crown acknowledges that there is no current dedicated funding stream (contestable or otherwise) available for compensation to adjoining landowners or for construction of private roads.

Other improvements available

135. Some measures to improve the current and future situation may be within the control of Māori landowners. The Crown draws attention to these matters not to distract from the measures the Crown itself can take or contribute to; or the difficulty of resolving the primary issue of securing access to the blocks across intervening private lands, but to ensure the full suite of relevant measures to remedy the current situation is considered.

136. The Tribunal in its *Wairarapa ki Tararua* Report stated:[130]

> Under the Te Ture Whenua Māori Act 1993, there is potential for processes to be undertaken within the Māori Land Court that could ameliorate the situation of some of these blocks, and some of these owners. For instance, amalgamations and exchanges could be embarked upon with a view to reorganising blocks so that owners are left with holdings that are decent-sized, and coherently organised and shaped.

137. The Tribunal goes on to acknowledge the difficulties involved in undertaking such measures and notes that funding would be required to support them.

138. Such an approach, or at least the provision of legally registered easements across adjoining Māori owned lands, may assist in future proofing access across contiguous blocks. For example, the Ōwhaoko C and D blocks are largely administered by the same Trust and currently consist of multiple titles – evidence was given of access across the blocks.

139. Potential remedies available in relation to lower altitude retained lands in Taihape are discussed above under "Low altitude landlocked lands retained by Taihape Māori".

Conclusion on Remedies

140. The extent of landlocking in the inquiry district, along with the contributory factors beyond the control of the Crown (including climate, topography,

130 Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 636-637.

remoteness and demographics, and third party interests) mean that resolving landlocking in Taihape is a very complex and difficult problem indeed. In that circumstance, the range of initiatives outlined in the Crown evidence demonstrate good faith and reasonable efforts towards addressing them.

141. Further steps could be taken by the Crown and (as per Crown evidence set out above) are continuing to be developed. At regional and local levels there is now more support in place than previously for Māori landowners. They, and the Māori Land Court, and adjoining landowners (including the Crown in its capacity as administrator of adjoining lands) can also take further steps.

142. The Crown acknowledges that the current problems with landlocking in the inquiry district are, to a very large extent, not reasonably capable of being remedied by the owners of landlocked lands today without significant assistance.

5 March 2021

R E Ennor
Counsel for the Crown

TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel

APPENDIX: CASE STUDY ŌWHAOKO D6(3)

1. Ōwhaoko D6 section 3 is presented in the Tribunal preliminary opinion as an example of landlocking issues. The Crown queries the degree to which it is representative of landlocking issues in Taihape, or for that matter nationally. The circumstances of the block are fact specific.

Ōwhaoko D6 section 3 access issues (distinct on the facts from other blocks)

2. The history of Ōwhaoko D6 section 3 differs from those above in that it was placed in trust 1901 and only restored to active ownership by the descendants of the original grantee via a successful succession order in 1976.[131] Subsequent purchasing amongst shareholders consolidated the ownership to a single whanau.[132] Mrs Cross's evidence is that the shares were "not purchased to retain ancestrally significant land" but were acquired by the whanau as "investment land".[133] Nonetheless, the whanau had ancestral connections to the lands.

3. Access is a factor in the difficulties in retaining and developing this land but not the only relevant factor. A 1983 feasibility study prepared for the whanau stated that the climate and the soil type made the land unsuitable for cropping (the land use originally envisaged by the whanau).[134] Other uses were investigated over time - none were without difficulties. An indication of the impact of the access issue is that in 1983 it was estimated that securing legal access to the block would add 25% to its value.[135]

4. At the time of purchase of the balance of block shares (1970's) the access issues were well known to the trustees.[136] This distinguishes the dealings in this block than those in retained lands where no such decisions were involved.[137] As per the Tribunal preliminary opinion, and as reflected in the legislative test,[138] where land is purchased there is an opportunity for the buyer to take on risks in an

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131 This history is traversed in Wai 2180, #A37 at 413-417 and by tangata whenua at Wai 2180, #G13; #E3(a) 20-23 Herbert Steedman; and #I14 Patricia Cross – transcript includes Peter Steedman responding to questions of the Tribunal on these matters.

132 Wai 2180, #I14 at 3.

133 Wai 2180, #I14 at 4.

134 Wai 2180, #I14(a) "C" at 7, Peter Steedman "the property is not as fertile as first considered. It does not alter my application for access." [Considering other possibilities eg forestry or deer.]

135 Wai 2180, #I14(a) "C" at 5-6.

136 Wai 2180, #I14 at 4.

137 Wai 2180, #I14(a) "C" at 9.

138 Te Ture Whenua Māori Act 1993 s 326B(4).

informed manner that is not part of the equation for lands that have been retained continuously.

5. Having prior knowledge of access difficulties however is not the only (nor necessarily determinative) consideration in whether access should be granted under the landlocked lands provisions.[139] Other matters include the circumstances in which the land became landlocked and the efforts made over time to negotiate reasonable access (which in the case of Ōwhaoko D6(3) can only be acknowledged to be genuine and substantive albeit ultimately unsuccessful).[140] The premise of the landlocking provisions is remedial – that is, all land should have reasonable access (subject to tests of reasonableness).

6. Submissions were made on an application lodged in 1983 under the general provisions of the Māori Affairs Act 1953[141] that the consent of owners of general lands was required before access can be granted.[142] It is unclear why the application was made under the general access provisions rather than those specific to landlocking as consent requirements had been removed for landlocked lands in 1975.[143] Access was not secured at that time.[144]

7. In 2004 an application was lodged secure access under the landlocked lands specific provisions (in the recently gained Māori Land Court jurisdiction).[145] It appears that a broader collateral purpose of the application was to open access to Ōwhaoko B,C and D blocks located behind Ōwhaoko D6(3). That broader aspect was withdrawn from the application after indications were given at the first judicial conference (by Judge Isaacs) that the application should focus only on access to Ōwhaoko D6(3).[146] The potential for broader access was cited later by Ngamatea Station holders as a factor of concern to them with the application.

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139 Other relevant considerations listed in Te Ture Whenua Māori Act 1993 s 326B(4).

140 Negotiations between the owners of Ōwhaoko D6(3) and the adjoining landowners were lengthy and substantive (see Wai 2180, #I14(a)). These submissions do not assess the detail of those dealings (that is a matter for the Māori Land Court).

141 Māori Affairs Act 1953 section 418. Wai 2180, #A37 at 410 traces the genesis of this application but did not locate the subsequent court minute. Ms Cross supplied those minutes (Wai 2180, #I14(a) at 5 – 15.

142 Wai 2180, #I14(a) at 14-15 submissions of Mr Tizard.

143 Provisions specifically crafted to unlock landlocked lands were introduced into the Property Act 1952 by amendment in 1975 (ss 129B) applied to all land (Māori and European)

144 The decision was reserved. While the minutes of the hearing are on record (Wai 2180, #I14(a) at 5-17), the decision itself is not.

145 Wai 2180, #I14 (a) at 17.

146 Wai 2180, #I14(a) at 40 Mr Peter Steedman recall of comments by Judge Issacs at first hearing.

8. A draft access agreement enabling foot access was negotiated with the assistance of the Māori Land Court in 2005 but it was not formally executed.[147] Alongside the formal proceedings, parties undertook extensive direct negotiations over three decades (with serious consideration of land swaps).

9. In 2012, trustees "reactivate[d]" their application to formalise the access and to secure vehicle access.[148] Amongst other concerns, the adjoining landowner did not view the vehicle access sought as being "reasonable".[149]

10. The Court took a facilitative approach across a number of judicial conferences but (based on the written minutes of those discussions) did not give any indicative view on whether vehicle access would be considered "reasonable access" should the matter progress to a hearing.[150] The applicant's agent's was not encouraged by the Court's approach:[151]

> My interpretation of the Presiding Judge in his questions to Terry [sic] Steedman left little doubt he made himself clear he is not going to make orders in favour of the Kararaina Steedman Whanau Trust to have unrestricted unlimited access onto the subject land without consent from Ngamatea Station owners.

11. The agent advised that legal advice be sought or preparations for sale be commenced as:[152]

> should the matter proceed to a hearing, "the chances of winning are negligible. If the trust loses then Ngamatea Station has the right to request their costs be met by the applicant.

12. No opportunity was ultimately provided to test that. The Trustees sold the land in 2015.[153] It will not now be known whether the Court would have concluded that vehicle access was a necessary component of 'reasonable access' for Ōwhaoko D6(3) or the conditions that might ultimately have been attached to any grant of access (e.g. for compensation, construction or maintenance). There appears to be an element of 'lost opportunity' here as the application seemed to be consistent with case law within both the general Property Law Act jurisdiction

147 Wai 2180, #I14(a) at 22.

148 Wai 2180, #I14(a) at 19-20. Applicants said the application had not been dismissed nor adjourned but was "treated as completed and filed in the Māori Land Court archives." The Court conducts judicial conferences under that application number.

149 Wai 2180, #I14(a) at 39 (as example).

150 Wai 2180, #I14(a) 46 – 49.

151 Wai 2180, #I14(a) "H" at 58.

152 Wai 2180, #I14(a) "H" at 58.

153 Wai 2180, #A37 at 417; Wai 2180, #A37(o) at 3; See also Wai 2180, #G13; #H8; and #I14 at 6.

and the specialist Te Ture Whenua Māori jurisdiction as to when access should be granted.

13. The extensive costs order resulting from the Awarua o Hinemanu s326B access application[154] may form some context relevant to the Trust's decision – as did the opposition from the adjoining land owner to the access being sought.

14. The Tribunal incorrectly attributes the difficulties securing access to Ōwhaoko D6(3) to the adjoining land (Ōwhaoko D5 section 1) having ceased to be Māori land prior to 1913.[155] Ōwhaoko D6(3) access issues are more complex and involved multiple factors. Aside from the complicated Ōwhaoko D 5 (1) history (which included access being granted for the title in 1902 but not implemented) by the 1980's the consent of the adjoining owner was no longer a barrier to access being granted.

15. Whilst the above events are to be viewed in light of the context set out at paragraph [5] above, the Crown did not have control over specific material contributing factors to this situation including:

    15.1 the decisions or actions of the parties (both applicants and the adjoining owners); and

    15.2 the applicants' land agent, or the Māori Land Court (or soil quality or climate issues).

16. The Crown accepts that the legacy of the 1912 and 1975 period has led to entrenched problems that cumulatively were very difficult for Trustees to resolve notwithstanding making significant efforts to do so.

Response to Tribunal preliminary views case study of Ōwhaoko

17. The Tribunal preliminary opinion appears not to:[156]

    17.1 acknowledge that legal ability to secure access was available at the time the parent block title and all subsequent partitioning was undertaken;

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154 *Awarua o Hinemanu Trust v Big Hill Station* 39 Takitimu MB 16, Judge Harvey, 23 March 2015 (costs rehearing granted); 43 Takitimu MB 218, 8.10.2015 (costs award decision).

155 Wai 2180, #2.6.65 at [14].

156 Wai 2180, #2.6.65 at [14].

17.2 trace who initiated the title or partition applications. The Crown was not directly involved in any purchases or partitions in the key periods;[157]

17.3 consider why access was not applied for upon titling or partition, notwithstanding there being legal ability to do so and the parties generally being represented by capable legal practitioners (and even though it was for the lower-altitude lands at the same time);

17.4 acknowledge the challenges presented by topography, climate and scale;

17.5 consider the relevance of further interests in the land being purchased as investment land not as customary land;

17.6 take account of the fact that by the 1980s – 2000's when this block was being considered by the Court, the 1912 – 1975 consenting requirement was irrelevant – the remedial provisions were designed to counter that history;

17.7 address the reasons why the lengthy facilitative process in the Māori Land Court did not result in a formal application being lodged; and

17.8 address which of the above matters are attributable to Crown actions and omissions.

157 The Ōwhaoko lands were titled through a lengthy process (with the contest between Kawepō and others playing out over a number of decades and ultimately select committee scrutiny of Native Land Court practice). They were leased to Studholmes until 1904 when they terminated their leases (Wai 2180, #M37 at 384; see also Wai 2180 A6 at 32; 75-79; 87-92; 94) then the subject of further private leasing until purchases in the 1930s. The Crown's direct involvement was limited to putative purchase discussions in 1910-1920; 2 small purchases in 1913 and 1917; (at 99-100) soldier gifted lands 1917 – 1975; Ōwhaoko D2 in 197 for soil and conservation land purposes (#A6 at 106).