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**

PRESENTATION SUMMARY OF CLOSING SUBMISSIONS OF THE CROWN RELATING TO TRANCHE 2 LANDLOCKED LANDS

18 March 2021

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INTRODUCTION

1. These submissions focus on post 1975 legal and policy issues and on direct Crown actions in Taihape relevant to access issues.

Concessions and context

2. The Crown has 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[1] and that it breached the Tiriti/Treaty in the following relevant respects:[2]

   2.1 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;

   2.2 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;

   2.3 the failure to provide effective remedial measures to secure access for Māori landlocked lands between 1912 and 1975 breached the principle of equal treatment 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]

   2.4 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]

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

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.

3 Wai 2180, #3.3.44 at [120.3].

4 Wai 2180, #3.3.44 at [126].

3. The historical experience of Taihape Māori in its entirety is also relevant to landlocking. Further relevant context is recognised out in the main submissions at paragraphs 7 and 8.[5]

PART 1: RELEVANT TREATY PRINCIPLES

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

   4.1 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.

   4.2 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]

5. 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).

6. The principle of reasonableness is of particular relevance when considering appropriate remedies.

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5 Wai 2180, #3.3.44(d).

6 Wai 2180, #2.6.65 at [26].

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

PART 3: LEGISLATIVE AND POLICY DEVELOPMENTS POST 1975

The legal and policy issues[8]

7. The principal barriers to remedying access issues faced by Māori are largely agreed between the parties. Te Puni Kōkiri articulated them as being:[9]

> 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.

Legislative responses 1975 - 2002

8. From 1975 Māori and general lands have been treated similarly on the face of the law.[10] 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.

9. From 2002 landlocked Māori land dealings have been provided for within Te Ture Whenua Māori Act 1993 itself. Ruru stated in 2004:[11]

> 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.

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8 The legislative amendments and 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 on Claims about the Reform of Te Ture Whenua Māori Act 1993* Wai 2478 Waitangi Tribunal 2016 and are not replicated in these submissions.

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

10 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).

11 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.

10. Crown evidence is that the 1975 and 2002 measures had some, albeit limited, success in resolving the longstanding issues.[12]

11. Whilst the law applying to both types of land has been the same since 1975, the legacy of the earlier discriminatory measures 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.[13]

12. 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. Nationally - of the twenty-eight access applications lodged, nine have resulted in access being granted (with several applications not yet completed).[14] None of the three applications lodged in Taihape have been completed.

2020 Amendments

13. The 2020 amendments to Te Ture Whenua Māori Act 1993 address the legislative barriers to improving access to Māori lands by:[15]

    13.1 broadening the definition of 'reasonable access';

    13.2 further distinguishing Māori landlocked land from land under the jurisdiction of the Property Law Act;

    13.3 relocating appeals from the High Court to the Māori Appellate Court (to take advantage of the Māori Appellate Court's expertise and to reduce costs for Māori land owners); and

    13.4 providing for improved, tikanga-centred, dispute resolution mechanisms as a statutory alternative to court proceedings.

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12 Wai 2180, #M28 at [15].

13 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).

14 Wai 2180, #M28 at [15]-[18].

15 See both Wai 2180, #M28, and Wai 2180, #M28(d)(i) at [3], [9], [12].

14. 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).[16] 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

15. In addition to the 2020 legislative changes set out above:

    15.1 An improved dispute resolution service is now provided for in the legislation and is in development, as are regional advisory services.[17]

    15.2 The Whenua Māori Fund has been established (2015) to support owners and trustees of Māori land to increase productivity of their whenua. The scope was broadened in 2017 to support landlocked land resolution.[18] $56.1 million over four years has been committed.[19]

    15.3 Crown evidence sets out other relevant funding pools (including their limitations and intended improvements).[20]

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

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

16. 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.[21]

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16 Wai 2180, #3.3.34 at [88].

17 Wai 2180, #M28(a) MH4.

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

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

20 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).

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

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

17. 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.[22]

18. The Crown further concedes that:

    18.1 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

19. 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.[23]

20. The Crown concedes that:

    20.1 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 Te Koau A and Awarua o Hinemanu by Taihape Māori

21. 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.[24]

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

23 Wai 2180, #M03 from [42].

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

22. 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.

23. 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).

24. 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:

    24.1 taking a more active role in mediating between parties;

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

    24.3 supporting applications under Te Ture Whenua Māori Act 1993 s 326 to be made (in a manner consistent with both Tiriti/Treaty duties (eg with support through the Whenua Māori Fund discussed above)).

PART 6: FURTHER MATTERS

25. Submissions on two further matters are made in Wai 2180, #3.4.44(d):

    25.1 Low altitude landlocked lands retained by Taihape Māori; and

25.2 Land loss where access a major contributing factor (addressed below).

PART 7: PREJUDICE AND REMEDIES

Prejudice

26. Access difficulties were a factor contributing to the sale of the following lands during the 1912 to 1975 period (during which no effective remedy was available for Taihape Māori) totalling 9,348 hectares:[25]

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

26.2 Ōruamatua Kaimanawa 1K and 2F in 1962;

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

26.4 Mōtukawa 2E2 in 1951; and

26.5 Ōwhaoko D5 section 2 in 1953.

27. 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.

28. 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:

28.1 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

25 Wai 2180, #A37 at 275 – 283.

4 blocks before these lands were compulsorily taken under the Public Works Act 1928.

28.2 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.

28.3 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.

29. Submissions relevant to the prejudice of economic harm experienced by claimants are made in Wai 2180, #3.4.44. The very high proportion of the lands retained that suffer from access difficulties means that, even where the lands themselves had low economic potential, the loss of that potential has a proportionately stronger effect.

30. The economic prejudice 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.

Remedies

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

32. The remaining remedies issues, concern what can now be done by the Crown as a responsible Treaty partner.

33. The Tribunal's preliminary views informed the Crown's 2020 amendments to the Te Ture Whenua Māori Act 1993 and the associated policy and operational developments discussed above. Points (b) and (c) in those preliminary views are provided for in the legislation as amended in 2020 and are also consistent with longstanding case law.

Process issue remedies and implications

34. The process issues previously identified have now largely been resolved through the 2020 legislative amendments and the complementary policy and operational processes and support.

35. 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.[26] These 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.

Funding issues

36. Crown evidence was that these measures improve the situation but do not resolve it. 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.

37. 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.

38. 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:[27]

> 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

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

27 Wai 2180, #4.1.19 at 153.

> 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.

39. 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:[28]

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

Available legal remedies

40. 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). 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).

41. 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

42. 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.

43. The *prima facie* presumption that access solutions should be available to most lands via the adjoining public lands was dismissed by both tangata whenua

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

witnesses with close knowledge of the most practical routes, and by technical witnesses.[29] The technical evidence confirmed that:

43.1 access solutions utilising solely public land is limited to access to traverse the Waiōuru Military Training Area to access the Ōruamatua Kaimanawa blocks.[30] 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.

43.2 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).

44. A legislative requirement on Crown agencies that administer lands adjoining landlocked Māori land to provide access or justify why they cannot has been suggested.[31] The utility of such a measure should not be overstated for Taihape given, as above, there are few opportunities to improve access for Taihape Māori that do not require traverse of intervening private lands.[32]

Conclusion on Remedies

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

46. 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.

29 Wai 2180, #4.1.20 at 108 and 130.

30 Wai 2180, #4.1.20 at 108 and 130.

31 Wai 2180, #3.3.34.

32 Wai 2180, #3.3.34 at [90].

47. 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. Mr R Steedman's suggestion of practical prioritisation of the access issues is welcomed.[33] Factors that may be relevant to that prioritisation process were discussed with Messrs Neal, Gwyn and Alexander.[34]

48. 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.

18 March 2021

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Counsel for the Crown

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

33 Wai 2180, #G13; #O3.

34 Wai 2180, #4.1.20 at 128-129.