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**

CROWN CLOSING SUBMISSIONS IN RELATION TO ISSUE 3: NATIVE LAND COURT

9 July 2021

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INTRODUCTION

1. At a summary level, 19th century land transaction activity in the region can be categorised into four cohorts, each of distinct character:

   1.1 Southern blocks:[1] Native Land Court applications initiated in this area in 1869 to enable transactions between private parties and Ngāti Apa and Ngāti Hauiti (initially consensually). After those deals failed, applications were made between 1872 within the context of prospective Crown purchasing. Disputes did not generally concern the intentions for sale or retention, but who controlled the titling process in the context of overlapping tribal interests.

   1.2 Northern blocks:[2] relatively isolated from early settlement pressures due character of the land, topography and climate. The first Native Land Court application 1875 was in but most Native Land Court activity took place in the 1880s. Each of the northern blocks were the subject of extended litigation - land that had previously been utilised seasonally for food gathering (with minimal occupation) became highly contested for sheep farming through partnerships, leases, and purchases between Taihape Māori and private parties and as deficiencies in Native Land Court title determinations (or associated Crown actions) were identified. No Crown purchasing took place in this area during the 19th century.

   1.3 Central blocks:[3] Awarua and Motukawa blocks together consisted of 300,000 acres and formed the main occupation areas of Taihape Māori and the lands most suitable for closer settlement – with minimal overlapping interests from outside of Taihape. Titles

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1 Paraekaretu, Ōtamakapua, Otairi, Taraketī, Mangoira Ruahine, Rangatira, Ohaumoko, Otumore, Waitapu. Te Kapua (although in the #A08 report, title history tracks more closely with the Southern blocks (initially part of Otairi, title determined 1884 and subsequently purchased by Crown).

2 Ōwhāoko, Ōruamatua-Kaimanawa, Mangaohāne. Timihanga and Kaweka, along with Te Koau (defined after survey error from earlier Hawkes Bay dealings clarified through 1890 Awarua Commission) are included in the 'remedial blocks' below.

3 Awarua, Motukawa. Te Koau and Te Kapua are also in the #A08 Central Aspect report. Te Koau tracked as a 'remedial block' given its creation in 1891 following clarification of the 1857 Otaranga purchases in Hawkes Bay. Te Kapua title history tracks more closely with the Southern blocks (was initially part of Otairi, title determined 1884 and subsequently purchased by Crown).

were determined in 1886, and subdivisions were made in Awarua in 1892. The North Island Main Trunk Railway development and associated Crown purchasing provide critical context to the titling process in this area, with Crown interests being partitioned out in 1896–1899.

1.4 Revised blocks:[4] titles created after significant defects in earlier dealings, titling processes, or surveys identified. These lands were treated as part of the original or adjoining titles they sat within or adjoined but came to have distinct legal histories from those lands.

Structure of these submissions

2. The first part of these submissions is structured around the Tribunal's statement of issues. Many of those questions relate to national developments that have been considered at length through previous Tribunal inquiries (including through the collaborative Whanganui Hot Tub process). With limited exceptions, these submissions therefore focus on Taihape-specific matters.

3. Detailed submissions on matters for the central and southern aspects of the district have already been filed for other issues but are relevant also to this issue:

3.1 Detailed analysis of the southern and central block histories is provided in Crown closing submissions on Issue 4: Crown purchasing and is not repeated in these submissions. There was a close interrelationship between the titling history of those blocks with Crown purchase activity. For the southern blocks, this includes submissions on the use of pre-title advances (they were not used in the central blocks) and analysis of Crown actions in relation to overlapping or contested interests in those lands.

3.2 The title history of the central blocks (Awarua and Motukawa) is addressed in detail in the Issue 4 submissions given it was closely tied into Crown purchasing for the North Island Main Trunk

4 Waitapu, Otumore, Timihanga, Te Koau, Awarua o Hinemanu. The titling history of these lands is also be to seen in light of the adjoining titles they were administered as part of prior to having distinct titles created.

Railway – including the creation and implementation of Native land laws to impose monopoly conditions, and the Crown's engagement and response with representations made by Taihape rangatira in 1892 and 1895.

3.3 Consideration is also given in Crown submissions on Issues 4, 5 and 12 to the availability and use of collective land management mechanisms. The submissions, concessions and acknowledgements made by the Crown concerning Crown purchasing in the southern and central blocks should be read in conjunction with these submissions.

4. Given that the Crown purchasing did not form a central aspect of the northern block histories, the second part of these submissions focusses on the northern blocks, in particular the 1886 Ōwhāoko and Kaimanawa Native Lands Committee inquiry. Detailed Mangaohāne title determination history and analysis is located in submissions on Issue 6.

5. The Crown's opening submissions on this subject are extensive and should be read in conjunction with these submissions.[5]

CROWN ACKNOWLEDGEMENTS AND CONCESSIONS

6. The Crown has made the following general concessions in relation to the Native land laws.

Impact of the Native Land Laws

6.1 The Crown concedes that the individualisation of Māori land tenure provided for by the Native land laws made the lands of iwi and hapū in the Taihape: Rangitīkei ki Rangipō inquiry district more susceptible to fragmentation, alienation and partition, and this contributed to the undermining of tribal structures in the district. The Crown concedes that its failure to protect these structures was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

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5 Wai 2180, #3.3.1, at 6–35.

7. The Crown further acknowledges that the introduction of the Native land laws caused great prejudice to Taihape Māori. Although some Taihape Māori tūpuna expressed considerable opposition to the land laws (or advocated for significant changes in the laws or their application), the Crown failed to respond to their concerns in a reasonable way.

8. In particular, the Crown further acknowledges that—

   8.1 the requirement of Taihape Māori to defend their interests in the Native Land Court significantly damaged relationships between Taihape Māori and their neighbours, and amongst the iwi, hapū and whānau of Taihape, the effects of which are still felt today;

   8.2 the overall operation of the Native land laws, in particular the awarding of land to individuals, undermined tribal Taihape Māori decision making and made their land more susceptible to partition, fragmentation, and alienation;

   8.3 this eroded Taihape Māori traditional tribal structures; and

   8.4 the Crown's failure to protect Taihape Māori tribal structures was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

9. The Crown further acknowledges that:

   9.1 it did not consult Taihape Māori before introducing the Native Land Acts of 1862 and 1865 which imposed a new land tenure system on Taihape Māori that transformed their customary tribal tenure into one based on individual rights;

   9.2 Taihape Māori had no choice but to participate in this system in order to protect their lands from the claims of others;

   9.3 between 1875 and 1895 Taihape Māori were frequently required to attend hearings at venues far from their settlements. This imposed a considerable burden on Taihape Māori who sometimes had to attend long hearings with insufficient food supplies and inadequate

accommodation, and made it difficult for some Taihape Māori with interests in lands to attend;

9.4 Crown actions or errors sometimes extended the duration of Native Land Court hearings, increasing the burden on Taihape Māori; and

9.5 Taihape Māori sometimes had to sell land to pay the significant costs associated with Native Land Court processes.

10. The Crown also acknowledges, specific to Taihape, that:

10.1 applications to the Native Land Court for title to Taihape Māori lands were not always adequately notified. This limited the opportunity of Taihape Māori to defend their interests in those lands;

10.2 survey and title errors resulted in incorrectly defined titles and to extensive litigation;

10.3 the inaccurate inclusion of customary land in a Crown sale of land, and the wrongful exclusion by the Native Land Court of people from titles to land, were only remedied after Taihape Māori protests led to the establishment of a special select committee in 1886 and a Royal Commission in 1890;

10.4 it did not always hold the Native Land Court to the same standards as other Courts;

10.5 Taihape Māori have suffered considerable prejudice by being required to undertake significant efforts to right wrongs done through the application of the Native land laws.

The Lack of Provision for Collective Administration of Land Under Native Land Laws Until 1894

10.6 The Crown concedes that it failed to include in the Native land laws prior to 1894 an effective form of title that enabled Taihape Māori to control or administer their land and resources collectively. This has been acknowledged previously as a breach of

te Tiriti o Waitangi/the Treaty of Waitangi and is again acknowledged as such for the Taihape inquiry district.

11. From 1894 Māori land could be incorporated and managed collectively. However, incorporation was only available for land in respect of which the Crown had not acquired a right or interest (1894/s 122). The Crown acknowledges that Taihape Māori could not therefore utilise those provisions for Awarua and Motukawa blocks until Crown purchasing in those blocks was completed. This was after 1896 in relation to Awarua and 1899 for Motukawa. By that time the tribal landholding had been considerably reduced and thus the amount of land that might have been incorporated was also significantly reduced. The Crown has conceded it failed to meet the high standards required of it as a privileged purchaser when it purchased approximately twice the amount of land in Awarua and Motukawa (200,000 acres) than it had indicated it needed for the railway and associated settlements (100,000 acres), and which Taihape leaders had expressed a collective willingness to sell.

PART 1: TRIBUNAL STATEMENT OF ISSUES RESPONSES

ESTABLISHMENT OF THE NATIVE LAND COURT

Issue 3.1: In establishing the Native Land Court and related legislation in the district how, if at all, did the Crown:

a. Consult with Taihape Māori?

f. Secure agreement, if any, with Taihape Māori?

12. Taihape Māori were not involved in determining the form and purpose of the Native Land Court or the Native land laws nationally. The Native Land Court was established in 1862, prior to direct Crown engagement in the inquiry district or with Taihape Māori (other than where the Crown engaged with Taihape Māori outside of their rohe). Māori were not represented in Parliament when this legislation was introduced.

13. The Crown acknowledges that it did not consult with Taihape Māori prior to the establishment of the Native Land Court. The Crown has

acknowledged that Māori input into the establishment of a Native Land Court was too limited to be considered satisfactory by today's standards.[6]

14. Taihape Māori agreement to the establishment of the Native Land Court in the district was not explicitly sought by the Crown. Whilst the Crown had created the Native Land Court, it only became active where people made applications to it. For the inquiry district, the first applications made were not made by individuals were not made by individuals for their own benefit but resulted from hui between multiple rangatira concerning the "Greater Paraekaretu" block (and a survey for which a Ngāti Hauiti rangatira was a conductor).

15. Claimant generic submissions present a picture of Taihape Māori being totally opposed to the Native Land Court and to the Native land laws.[7] Some technical evidence has a similar flavour – listing hui, political movements and petitions as purely oppositional.[8] With respect, the evidence seems to be more complex. The Crown concurs with claimant generic submissions that Taihape Māori were actively involved in affairs outside of their rohe and were aware of the experiences of others with the Native Land Court. Taihape Māori were therefore aware of the risks that could arise from the creation of a new form of land tenure, but were also aware of the economic opportunities that could follow the acquisition of a tradeable title – and undertook a strategic effort to access those opportunities.

16. There are numerous examples where both caution and strategic engagement are concurrently extant: the 1871 Turangarere hui may have been primarily to called to discuss and protect boundaries around Motukawa and Rangipō Waiū, but agreements were also made to provide land for a school endowment land and to lease Ōwhāoko. In 1877 a Repudiation assembly was held at Ōmahu, and concurrently Rēnata Kawepō, Ūtiku Pōtaka and Aperahama Tipae (amongst others) were discussing both the retention of Taraketī and Ōtamakapua 1 and the sale of other lands.

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6 Wai 903, #3.3.130, at [21].

7 Wai 2180, #3.3.76(k), at [70]–[71].

8 Wai 2180, #A43, at (for example) 235–245.

17. Even the Repudiation Movement appears not to have been wholly against the concept of tenure change. For example, while Rēnata Kawepō called for the end of the Native Land Court following a Repudiation Movement meeting in 1876, this did not amount to a rejection of the concept of European-style land ownership. Rather, it was a call to enable Māori to adjudicate land disputes on Māori terms as a necessary precursor to that new form of ownership. Kawepō said:[9]

> Let the claims to Maori lands be heard and decided upon according to the old custom of the Māori in respect to his land, and when such is done then let the European law step in and carry on the right of ownership.

18. Mr Armstrong (although mixing time periods a little) summarised Taihape Māori aspirations as follows:[10]

> By this time [1880s] the iwi had become convinced that whanau ownership, based on the Pakeha land ownership model, was the key to their future economic success. As Hiraka Te Rango stated in 1895, it was the ambition of the people 'to become good and useful settlers on our own lands'. But while land titles would be determined by the Native Land Court, it was anticipated that this process would be overseen by the chiefs, exercising their customary authority and acting together in a form of runanga or committee. In this way the block could speedily and cheaply pass through the Court, which would 'rubber stamp' runanga or committee decisions. It was envisaged that land interests would be apportioned to the various iwi and hapu, and in due course each individual whanau would obtain a share of land. These lands would then be leased to Pakeha run-holders or farmed by the owners themselves. Whanau or extended whanau groups, it should be said, were at this time well suited to carrying out the sort of sheep farming operations which were envisaged.

b. Consider a range of land tenure options for Taihape Māori?

c. Consider a range of title options suitable for Taihape Maori, including corporate title?

d. Try to understand and account for customary Taihape Māori tenure, tikanga, interests, and other related processes and practices?

19. There is no evidence that the Crown considered any land tenure or land title options for Taihape Māori other than those which existed in the Native land legislation that applied at the time. The Crown policy was for a national system of land tenure and although early measures for district rūnanga or councils or komiti were created or proposed – none endured in the

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9 Wai 2180. #A43, at 243.

10 Wai 2180, #A49, at 4.

legislation in a manner that provided a statutorily empowered role for some form of local governance by Taihape Māori.

20. By way of summary (the Tribunal is all too aware of the legislative framework at this stage in its national program of inquiries), the forms of tenure under which decisions were made in Taihape included:

20.1 the requirement for all owners to be determined and recorded (or their consent to any voluntary arrangement providing for others to represent their interests to be recorded);[11]

20.2 the Native Land Act 1873 contained provisions for lease or sale where all owners agreed, or if not all owners agreed, the interests of the dissenting owners to be partitioned out if the majority of the owners desired a partition. The Act represented a positive step in so far as it abolished the ten-owner rule and took the first steps towards the creation of a separate category of land within the general law that provided for Māori land 'customary land' rather than treating all post-title determination land as being Crown-derived estates in fee simple owned by the registered owners;[12]

20.3 the Native Land Court Act 1880, a revised version of the Native Land Act 1873, was the principal Native land statute in force at the time most Taihape land was titled through the Court. The 1880 Act did not repeal the 1873 Act entirely, but only so much as was repugnant to it.

20.4 Under all of the legislation that applied in the inquiry district, the Native Land Court's process to determine ownership ultimately involved the conversion of customary, collective-based tenure to individual title.

Corporate title

21. Neither the 1873 or the 1880 forms of title in themselves precluded individual owners acting collectively in terms of managing the land,

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11 The earliest title was under the 1867 s 17 title.

12 The only differences were the recourse available to the Native Land Frauds Prevention Act 1870. Professor Boast notes (Vol 1 at 97) that Fenton's opposition to the 1873 reform resulted in some of the protections proposed by the government (McLean) being removed through the Parliamentary process.

however, the Native Land Acts provided no mechanism for the conversion of Māori descent groups into corporate entities able to own customary interests in their own right and provide a legally-recognised right-holding collective body able to manage land and deal with purchasers, investors, creditors, Crown or private sector.[13] Later statutory provisions enabled collective management by owners of their land interests to a degree. The Native Committees Act 1883 and Native Land Administration Act 1886 provided statutory frameworks for recognition or expression of community management.

22. The Native Committees Act 1883 provided for limited local government and judicial functions for Māori communities but there is no evidence of those provisions being utilised in the inquiry district.[14]

23. In evidence to the Rees Carroll Commission (1891) Hīraka Te Rango endorsed the value of representative committees being empowered (working as a committee and/or, for some transactions, in conjunction with a judge or other official):[15]

> That is also my idea of what should be done. I wish to explain with regard to a certain block of land that I have got which is not yet subdivided. There are 134 of us owners in the Owhaoko block. Seven of us were appointed a Committee in respect of it, three to be a quorum; and the people who appointed that Committee were the 134 owners: but, because there was no legal authority or means of empowering this Committee to act for the whole number, as was intended they should act, we had to get a deed prepared and signed, at great expense to the people, and after that our work was carried out in a satisfactory manner through the Committee.

24. Hīraka's evidence - that his people had created a collective structure under the existing law (even though doing so had involved significant effort and expense to do so) is significant. It unfortunately was not researched in any

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13 R Boast, Native Land Court Vol 1 at 99.

14 More particularly, in relation to the Native Land Court, section 14 of the Act provided:

(1.) Where it is desired to ascertain the names of the owners of any block of land being or to be passed through the Native Land Court; or

(2.) Where it is desired to ascertain the successors of any deceased Native owner; or

(3.) Where disputes have arisen as to the location of the boundary between lands claimed by Natives, the Committee may make such inquiries as it shall think fit, and may report their decision thereon, certified in writing in the Māori language under the hand of the Chairman of the Committee, to the Chief Judge of the said Court for the information of the Court.

15 Wai 2180, #A43, at 361.

depth by technical witnesses. It is thus unclear what provisions this Committee was empowered under.

25. Retired Chief Judge Fenton stated to the 1886 Ōwhāoko Ōruamatua-Kaimanawa Native Lands Committee:

> The whole theory of the Native Lands Act, when the Court was created in 1862, was the putting an end to Maori communal ownership. To recognise the kind of agency contended for would be to build up communal ownership, and would tend to perpetuate the evil instead of removing it.

26. Premier Stout stated in the same process:

> No more monstrous injustice could be done by any Court than by declaring certain persons were owners, and treating them as absolute owners, when the Court knew they were not the whole owners, but only some of those who were owners. It was the Court's duty to name all the owners, and not to select a few only and call them 'absolute owners'. Communal title no doubt was and is bad, but depriving some of the 'community' of all their possessions was and is worse. So far as I can see, no Maori wished to perpetrate any 'monstrous injustice': those who were the means of accomplishing that were Europeans.

27. Whilst these men disagreed entirely on many of the matters addressed through that committee, it appears they concurred in their assessments that communal title was not to be supported (as at 1886). Fenton was referring to the purposes the Court had been created, and Stout some 20 years later was coming at it from another angle (Liberal advancement through individual endeavour) but nonetheless, there was little support by either – in evidence given in a Taihape-related proceeding – for corporate titles. Stout's view was not absolutely opposed however to corporate management – by 1893 he was part of the government that introduced the Mangatū Incorporation being established and was Attorney General in 1894 when incorporation provisions were made available to Māori generally.[16]

28. Claimant generic closing submissions state that despite multiple representations by Taihape Māori to the government - there was little Crown support given to attempts by rangatira to assert a collective control

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16 David Hamer. 'Stout, Robert', Dictionary of New Zealand Biography, first published in 1993. Te Ara - the Encyclopedia of New Zealand, https://teara.govt.nz/en/biographies/2s48/stout-robert (accessed 5 June 2021)

or strategy over the titling or partitioning process – and that this directly undermined tribal structures.[17] Whilst there were efforts made, the Crown accepts that it breached te Tiriti/the Treaty by not providing an effective collective land mechanism at the time it was needed. The Crown accepts that, before 1894, the legislation did not provide adequately for community management of Māori land and it has made the following concession:

> The Crown concedes that its failure to include in the native land laws prior to 1894 a form of title that enabled Taihape Maori communities to control their land and resources collectively breached the Treaty of Waitangi and its principles.

Custom

29. The investigation of title by the Native Land Court was a process set out in the Native land legislation and intended to provide a form of title that reflected customary rights and interests in land.

30. Section 24 of the Native Land Court Act 1880 required the Native Land Court to ascertain title to land "according to Native custom or usage". That same formula continued in the Native Land Court Act 1886 but was changed "to Native custom" in the Native Land Court Act 1894, and to "the ancient custom and usage of the Māori people" in the Native Land Act 1909. Evidence relating to Native custom or usage was adduced by claimants and their witnesses. The Court could also use evidence given in former cases before it, provided the parties were substantially the same.

31. In all proceedings of the Court held under the Native Land Act 1880, including determinations of title to land, the Court was to sit with one or more assessors, and the concurrence of at least one assessor was required for any judicial act or decision of the Court to be valid. The Court had the ability to use licensed interpreters and, in the determination of any case, it was empowered to give effect to voluntary arrangements "come to amongst the Natives themselves".

32. The practice of allowing time for the parties to make out-of-court arrangements were a regular feature of the Court's work throughout the

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Dr Hamer indicates Stout's re-entry into government from 1893 may have been characterised by his differences to Seddon – the Crown has not researched further what stance he took on incorporation provisions specifically.

17 Wai 2180, #3.3.76(a), at 3.1.

Taihape block hearings. A degree of tribal influence remained through that mechanism. Indeed, the making of out-of-court agreements was the Court's clear preference (see Judge Ward evidence on Awarua process to the Rees Carroll Commission in 1891 set out below).

33. The Crown notes that the Assessor's concurrence was required and that the Court's decisions could be seen to reflect collective understandings in so far as they were based on evidence that was presented in Court subject to scrutiny by other participants.

34. The Native Land Court sought to reflect owners at custom – the Native land laws did not set out to (and nor did they achieve) create a form of title that precisely replicated a customary title. The attempt to accommodate customary ownership concepts within a new tenurial system – though sincerely undertaken - was a complex process given some fundamentally different underlying premises. Continual remodelling and re-enactment of the Native land laws was directed, in part, towards providing for that complexity, alongside improving the certainty of titles. It is important to recognise that the Native land law system was a *sui generis*/custom built model designed to meet particular New Zealand circumstances. Precepts of English law are clearly evident, particularly the creation and protection of alienable property rights in land. But the statutory scheme was also largely structured around the antipodean preference for indefeasibility of title and estates in fee simple. The forms of title crafted in the 19th century Native land laws did not simply replicate English common law forms of title - the statutory scheme was also intended to (and at least attempted to) reflect custom in the titles. The experimentation involved that endeavour resulted in forms of title that did not exist in Britain - that attempted to strike a balance between protection and autonomy; collectivism and individualism; and reflect historical customary precepts whilst also enabling the titles to be fit for use in the modern world. It was no easy endeavour – and, as per the acknowledgements made throughout these submissions – involved significant cost to Māori tribal structures.

Record and fulfil any promises and assurances made to Taihape Māori?

35. There has been no evidence of specific promises, assurances, or agreements being made to Taihape Māori regarding the Native Land Court's establishment in the district.[18]

36. Several undertakings or understandings were made by the Crown in relation to the implementation of Native land laws in the district more generally – these are dealt with in subject-specific submissions. Some examples are:

    36.1 undertakings not to pay further pre-title advances were largely honoured both generally (the policy to use such payments ceased), and specifically - including in relation to the 1890-1892 Awarua subdivision proceedings;

    36.2 the shared understanding that the Crown would purchase only 100,000 acres in Awarua and Motukawa was not upheld by the Crown;

    36.3 Premier Seddon advocated for some of the specific matters raised with him in his 1894 visit to Moawhango.

Issue 3.2: What pressures (political, economic or otherwise) drove the establishment of the Native Land Court in the inquiry district? What was the Crown's intended purpose in establishing the Court in the Taihape district and did it fulfil this purpose?

General

37. Proceedings in the Native Land Court can be seen as encounters not only between Māori and the Court, or between Māori and the Crown – they were encounters between Māori and what Professor Boast summarises as "international capitalist modernity": dynamic processes of globalisation that operated "legally, socially, and culturally, including at the level of material culture" with which Māori actively and openly engaged.[19] Huge transformations in Māori society occurred in the 19th century (with new forms of property relationships, chiefly authority declining, tribal structures

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18 Wai 2180, #3.3.76(k), claimant generic submissions address this question through reference to an expectation raised in 1877 via Te Waka Māori that the government was abolishing land purchases. There is not sufficient evidence on the record to substantiate where that expectation arose from in terms of Crown actions – although Minister Sheehan is mentioned the technical report this allegation is based on is sparse on the detail of what is alleged to have occurred. Wai 2180, #A43, at 252.

19 R Boast QC Native Land Court Vol 1 at 16–18.

generally transformed, cash economy, and increased trade options). Professor Boast states that the Native Land Court did not cause these changes on its own, although it was an agent of them. He says:[20]

> They [the transformations] were caused by the forces of globalisation themselves, to which Māori people were exposed as a result of British colonisation of New Zealand.

Crown purposes for establishing the Native Land Court

38. The Crown has stated in this inquiry that:

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

39. The Crown's purposes in promoting the establishment of the Native Land Court was to have an independent and competent tribunal investigate claims, including competing claims to customary land, declare who were the owners of that land and to issue certificates of title following that determination. As has been pointed out repeatedly through Tribunal reports – those objectives are not unreasonable.[21]

40. The Tribunal jurisprudence instead identifies problems with the process through which the Native Land Court was created, and the form of the Native Land Court that was actually established, as being where the difficulties lie – particularly in the role defined within that process for Māori. Put simply, the Tribunal has been unconvinced that the Native land laws either intended to provide for Māori interests, or for Māori to exercise sufficient control over their interests (and failed to cater for customary values sufficiently - for example corporate management of lands). The Crown accepts that a key purpose was to enable tenure conversion (which included enabling trade in lands). However, a desire to open up Māori land to direct settler purchase or lease was but one aspect of the Crown's policy in promoting the Native Land Court system. The Crown also sought to

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20 R Boast QC Native Land Court Vol 1 at 16–17.

21 See for example Hauraki Report at 777.

encourage and facilitate assimilation by enabling Māori to deal as they saw fit with their land and resources by giving them the same rights as Europeans. The Crown has submitted in a previous inquiry that:[22]

> Crown policy in the 19th century and much of the 20th century generally supported the alienability of Māori land. That policy dovetailed both the philosophy that the ability to alienate land was a fundamental right of ownership inherent in the rights conferred through Article III of the Treaty, and the Crown's overarching goal to turn unproductive land – whether Māori- owned or not – into production for the benefit of the country. The ability to alienate land was seen as key to the colony's economic development, and as a benefit to Māori development and prosperity also.

41. In doing so, the Crown of that era viewed itself as enabling a version of equality (ie equal treatment). Today's understandings of equity and equality mandate different policies.

42. However, protecting Māori interests was also considered important (albeit that the views of the 19th century – largely European government – on how to do that differs significantly from contemporary views).

43. To this end, the Native Land Court in the 19th century had two principal functions: adjudicating title and supervising the rules for dealing in Māori land (ie, that code contained in the Native land laws that regulated the alienation of land whether by way of lease, sale or other disposition. For example, from 1874, the Court was charged with vetting dealings affecting certain categories of Māori-owned land against prescribed criteria with a view to protecting Māori in their dealings).

44. That dry interpretation of the law as simply in effect a conveyancing code (ie solely about converting tenure) must be complemented by realistic acknowledgement as to the wide policy context within which conveyancing laws operated.

45. The Crown considers there were good reasons for the establishment of a tribunal, independent of the Executive, to determine intersecting and disputed claims to Māori customary land, and to administer legislative modifications to customary tenure to meet new needs. Following their detailed engagement with many aspects of the Native land laws as part of

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22 Wai 898, #3.4.305, at [6].

the "Hot Tub" process carried out during the Whanganui Tribunal's Inquiry, a panel of Crown, claimant, and independent historians generally agreed that some form of court, tribunal, or rūnanga for the ascertainment of title to Māori customary lands for the purposes of alienation was necessary. This position as regards the need for an external adjudicator appears to align more with the Tribunal's analysis in the Hauraki Report than in the Turanga Report. However, the Whanganui and Te Rohe Pōtae reports draw attention to how the Crown went about that endeavour – and find that Māori autonomy and control were not prioritised appropriately.

46. There is also a constitutional dimension here. The Crown generally continued its policy of establishing its institutions throughout the country, rather than developing separate regimes for particular groups or districts.[23] Enabling the Native Land Court to be available for use in the Taihape inquiry district was therefore connected with the Crown's desire to achieve *de facto* sovereignty in the district (and indeed elsewhere in the country where it had not been secured). This objective had a different flavour in Taihape than in other districts that were involved in the New Zealand wars more directly (for example Te Rohe Pōtae) but was nonetheless relevant. The Crown had a clear – and transparent – objective to extend its institutions, including the Native Land Court to all parts of New Zealand. It considered that that objective best served Māori interests, since the Court's function was to ascertain who the correct owners were and thereby overcome problems that had attended Crown purchasing under pre-emption.

Taihape inquiry district pressures, opportunities (political, economic or otherwise)

47. In relation to the inquiry district itself, the Native lands legislation was made available for use (except in areas where disapplied – which was not the case here). Crown did not take a particular decision to extend the court to Taihape.

48. The Crown did take a targeted and directive approach in re-establishing Crown pre-emption in the Taihape region for railway purposes (and

associated settlement). This is explored in detail in submissions on Issue 4. In November 1884 Parliament restored pre-emptive powers to the Crown for a significant period in respect of approximately 4,628,185 acres of land between Marton and Te Awamutu, and which included the majority of the inquiry district.[24]

Taihape Māori – pressures, opportunities (political, economic, or otherwise)

49. As discussed above, Taihape Māori were actively involved in various political, military, land and development initiatives or movements outside of the inquiry district prior to 1869 (when the first application involving land within the inquiry district was made to the Native Land Court) and following that. The Crown concurs with claimant generic submissions that Taihape rangatira were quite aware of the risks and benefits of the Native Land Court process, and their actions were no doubt informed by that.

50. Within the rubric of expanding settlement more generally, there were two core district developments that gave impetus towards people utilising the court – economic opportunities (in the south through leases and sales for closer settlement whilst retaining their homelands; and wool production in the north), and the railway enabling access to markets (discussed in Issue 5 submissions).

51. The evidence indicates that Taihape Māori sought an adapted form of customary title to enable the new land uses. Mr Armstrong states:[25]

> A. […] It would be an adaptation. In my – as I understand it, traditionally, whānau are occupying lands in any event, lands are assigned to them by hapū and they may occupy those lands permanently. What I'm suggesting is that the chiefs and the people thought that if you could have a system where you could know exactly where your piece of land was as a whānau and you could

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23 The Crown was not opposed to establishing different regimes for different groups entirely – but doing so was the exception rather than the norm (eg Thermal Springs District Act or Te Urewera) and there is no evidence of any such initiative being considered in the inquiry district.

24 Native Land Alienation Restriction Act 1884: s 3 prohibited dealings in the land defined in the Schedule.

Pre-emption was lifted when the Native Land Administration Act 1886 came into force on 1 January 1887. When the Act was repealed on 30 October 1888, by section 4 of the Native Land Act 1888, free trade in Māori land was renewed, except in the 'railway exclusion zone' where pre-emption was extended by various legislative mechanisms. This was continued by Crown pre-emption applying over the North Island from 23 October 1894 until 24 October 1899, when Crown purchasing was also stopped for two years. From 20 October 1900, alienation of Māori land was administered under the Maori Land Administration Act 1900. Pre-emption remained in place as qualified by this legislation.

25 All applications to the Court in Taihape (other than Waitapu and Paraekaretū) occurred following the 1867 introduction of forms of title that were required to record all individuals with ownership interests in the land (albeit those requirements were patchily implemented).

> fence it and you could devote your own energies to that land then that would be an advantage to whānau who wanted to establish farms.
>
> Q. So that degree of clarity could have been achieved through tikanga?
>
> A. Well yes, except that there was an overlay of legal, of English law. You know there were issues of stock trespass and sorting out various things and so the model that they ultimately decided to pursue seemed to them to be the most effective way of dealing with all of those issues. And of course they were constantly told that that was the key to success which was to adopt some kind of English land tenure model and you know that would be the key to their future success.
>
> Q. Surely wandering stock could be dealt with through custom?
>
> A. Well yes, but I don't think people wanted to be constantly you know having to deal with those issues.
>
> Q. So–
>
> A. It was an issue – excuse me – it was an issue when Pope went to Moawhango in 1888. I mean he noted that some people were stocking – you know hitting it up with a, you know, had put too many sheep on the land and then their sheep were trespassing and there was a bit of upheaval going on around the place. So I think they just wanted to regularise those matters and just create an environment in which everybody could get on with it.
>
> Q. And provide an effective regime for regulating quite a new form of land use –
>
> A. Yes.
>
> Q. – reasonably intensive productive economy.
>
> A. Yes, yes.

52. The evidence does not appear to accord with claims by technical witnesses and claimant generic closing submissions that: [26]

> In every case they [Taihape Māori] were obliged to participate in the Crown's processes for alienation and title investigation after claimants living outside the district had committed their lands to these processes with a view to the land being purchased.

53. The Crown considers this statement does not acknowledge the strategic approaches taken by Taihape Māori to engage with the social, cultural and economic change that was occurring (both before and after the Court's

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26 Wai 2180, #A43, at 2; Wai 2180, #3.3.76(f), at [36]–[37].

introduction).[27] Nor does it reflect the input of multiple Taihape rangatira into those processes.

54. Mr Cleaver's summary focusses more on the consequences of new land use in the context of overlapping or competing claims and new legal forms of recognition for rights and is more consistent with the Crown's reading of the evidence:[28]

> It appears that a key reason for land being brought before the Court was pressure arising from contested and overlapping land interests. While most blocks in the inquiry district were subject to competing claims, issues concerning ownership emerged most conspicuously in the north of the inquiry district and involved the lands that were the focus of pre-title leasing and farming initiatives.

55. On a purely factual evidential basis, the first applications made to the Court in both the southern and northern parts of the district were made either with the consent of, or in partnership with, 'resident' Taihape Māori, and/or through collective processes such as hui:

55.1 To the south, Ūtiku Pōtaka confirmed (even a decade after the 1869 Greater Paraekaretū application had been granted by the Court) that he and others supported that proposal and that Aperahama Tipae acted with their consent in that process – and Ūtiku Pōtaka conducted the survey party.[29] That consent remained in place for the [1872] application for Paraekaretū itself also (albeit Pōtaka was dissatisfied with how Tipae exercised that mandate with regards to distributing proceeds of sale). Some Taihape rangatira actively worked with Ngāti Apa to develop a plan to sell lands that had been informally leased to private parties in the 1860s and authorised Aperahama Tipae of Ngāti Apa to conduct that plan on their behalf. They also put Taraketī and Ōtamakapua 1 through with Ngāti Hauiti being applicant for both blocks with the strategy of retaining their tribal heartland, whilst selling other

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27 Wai 2180, #A07, at 140; see also #4.4.8 at 104.

28 Wai 2180, #A48, at 85.

29 Wai 2180, #A07, at 140; see also #4.4.8 Hearn xxn at 101. The fact the 1868-1869 deal with Lethbridge and Cameron fell over due to Taraketī being excluded from what Taihape were willing to sell; and Wai 2180, #4.1.10, at 622 and 624 Stirling agrees under cross examination.

blocks, and did (largely) retain ownership of those two blocks as at 1900.[30]

55.2 To the north, the Ōwhāoko education endowment proposal, and the proposal to survey and lease Ōwhāoko lands were derived at the Turangarere hui in 1871 and agreed to by the relevant groups.[31] The title investigation applications that followed were made solely by Rēnata and other Taihape rangatira (although not all relevant groups – as demonstrated by later events).

56. Even where agreements and relationships subsequently became unstuck, the input and intent of people at the time decisions were made to go to the court is the matter most relevant to this question. To persist with the theory that Taihape lands were drawn into the Native Land Court through the actions of 'outsiders' or 'non-resident Taihape Māori' or the Crown is not consistent with the evidence. As well as being inconsistent with the factual account of how the initial applications were made (as set out above), the theory relies on a characterisation of the customary authority exercised by Rēnata Kawepō in the inquiry district in the 1870s that the Crown submits is not supported by the evidence[32] and the people he worked with.[33] Dr Gilling states in generic closing submissions "As so often stressed by Dr Ballara, Rēnata Kawepō was a Taihape rangatira at least as much as he was of Hawkes Bay."

57. As an example of Kawepō's customary authority in the district as at 1865, the Crown notes that a proposal to extend private leasing further into the Taihape district at that time appears to have been supported by Ūtiku

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30 Wai 2180, #4.1.10, at 623. A portion of those lands is retained by Taihape Māori through to today but the Crown acknowledges that land in both Taraketī blocks and Ōtamakapua 1. was not retained entirely.

31 Wai 2180, #A43, at 32, 33.

32 Wai 2180, #4.1.10, at 620. Mr Stirling appears to take a different view of this than that taken by Hearn, or by Dr Ballara in questioning. As noted in #3.3.76(k).

See Wai 2180, #4.1.8 at 110–111: Hearn confirms Kawepō authority extended by the people and not an example of the Crown 'picking a winner'. See Wai 2180, #A07, at 50 - Tipae, for Ngāti Apa mandated Kawepō as does Ūtiku Pōtaka for Ngāti Hauiti (although both relationships have their ups and downs over subsequent years and events).

33 For example Wai 2180, #A06, account of the Turangarere hui where the education endowment idea was discussed and where authority for leasing was collectively endorsed (although later events affected that); see also Noa Huke involvement in Ōwhāoko and Ōruamatua-Kaimanawa title determination.

Pōtaka and many other Taihape Māori, but did not proceed due to Kawepō's opposition:[34]

> All the principal natives over this way, who have a claim on the said land, are agreeable that I should rent it of [sic] them but it seems that Renata Kawepo ... has the pre-eminence and is not willing that the land should be entered upon by any European – I imagine from distrust.

58. The non-resident adverse influence theory is also overly reductive – each of the transactions Kawepō was involved in were undertaken with other Taihape rangatira also (for example in the south Ūtiku Pōtaka, and in the north Noa Huke and Te Hira Oke and others). It also fails to accord weight to the exercise of customary authority by various Taihape rangatira who actively strategised and initiated or partnered land title processes in the district.[35]

59. The Crown was not involved as a prospective purchaser behind the initial southern applications (but was involved subsequently). Mr Hearn's evidence is clear that some owners offered Paraekaretū, Ōtamakapua and Ōtairi for sale to the Crown rather than the Crown initiating negotiations (in fact the Crown rejected those proposals three times prior to entering negotiations) and that the Crown was not involved at all in the initial title investigations Taraketī, Ohaumoko and Ōtūmore blocks.[36] The Crown was not involved as a purchaser at all in any of the northern blocks.

60. The Crown was directly and intensively involved in the central block dealings but they came later – and there was a mutuality of strategic interests in that area. Mr Armstrong's evidence is that the Awarua 1885 title investigation was initiated by Taihape Māori (albeit within the context of monopoly powers having been declared over the lands for railway purposes) to fulfil their economic aspirations. Mr Armstrong states:[37]

> The iwi anticipated that completion of the Main Trunk Line, and the growth of townships, including Taihape, would aid them in making a

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34 Wai 2180, #A07, at 21.

35 For example Wai 2180, #A07, at 21 Ūtiku Pōtaka with Aperahama Tipae (see also discussion with Hearn #4.1.8 at 112); Wai 2180, #A06.

36 Wai 2180, #A07, at 45, 139, 140, 150, 207, 248, 283. See also #4.1.8, at 105 (proposals to Crown for sale declined three times – Crown not interested in those lands at that time) and at 116 RE: Ohaumoko Ōtūmore.

37 Wai 2180, #A49, at 4.

> successful transition into the expanding Pakeha pastoral economy. New markets would be opened up, and the value of Maori lands would necessarily increase. Neville Lomax explains that the rangatira were indeed united in a desire to retain the bulk of their Awarua land, and 'they made every effort to reach collective agreements in order for the aspirations... of the people to be achieved'.

61. Mr Stirling incorrectly alleges that efforts of private parties in the 1860s to become purchasers in the south of the district; and an ill-fated 'gold rush' and rush for leasing in the north form part of the picture of Crown interactions in these areas.[38] These southern allegations rest on letters from the putative purchaser (Wilson) to McLean – whilst Mr Wilson might have been keen, there does not appear to be any record of his aspirations being supported or enabled by the Crown.[39] The northern ones involve some people who at times were part of the Crown but they were not acting on behalf of the Crown in that endeavour (and in any event were too late – Azim Birch was already established with the Batley's not far behind).

Did the Native Land Court fulfil its purpose?

62. Professor Boast brings attention to the historical significance of (then retired) Chief Judge Fenton's statement to the Ōwhāoko Oruamatua Kaimanawa Native Lands Committee in 1886:[40]

> Being to a certain extent a philo-Maori, if I had seen in 1865 what the result of our Acts would have been, I do not think I should have assisted in their introduction. I should have said, 'Let colonisation go to the wall' … It [that is, the Native Land Court] has destroyed the race.

63. Professor Boast states:

> Fisher and Stirling see this [Fenton's statement] as an example of mere "crocodile tears". As well as being a bit harsh – in my opinion at least – this is to obscure the historical significance of Fenton's admission. That at the end of his career Fenton could have concluded that the Native Lands Act, were a disaster and the Court had "destroyed" the Maori people is obviously important. Fenton himself turned out to be a critic of the Court in the end.

64. The views of Fenton in 1886 could not have been known in the 1860s. Fenton was also speaking both with the benefit of hindsight, and in the context of a highly critical and professionally embarrassing inquiry into his

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38 Wai 2180, #A43, at 137.

39 Wai 2180, #A07, at 21.

40 R Boast, Native Land Court vol 2 at 96; see also AJHR 1886 I-08 at 63.

actions (and thus may be looking to shift focus). Nonetheless, it is significant that the architect of the Native Land Court should have come to that conclusion by the end of his career.

65. Professor Boast suggests that if that was indeed the purpose, those colonists were sorely disappointed.[41] Many of the critics of the court that "harped on" about the intricacies and confusions of the law were less motivated by concerns about Māori, than about delays, inefficiencies and risky titles. Professor Boast states:

> If Professor Kawharu is correct in seeing the Native Land Court as an "engine of destruction for any tribe's tenure of land, anywhere" it was a very inefficient engine and the Pakeha people felt no particular gratitude towards it.

66. While the Crown maintains that, for the reasons set out above, there were good reasons to establish a process to convert customary title into secure, economically useful title, there is no question that the process resulted in the large-scale transfer of Māori land into the ownership of the Crown and predominantly European settlers. In the thirty years that followed the first application for a Native Land Court hearing in the Taihape district, less than half of the entire district remained in Māori ownership. Today, less than 15 percent of the Taihape district remains in Māori ownership.

67. If the Native Land Court's purpose was the efficient conversion of customary title into fixed, certain and secure titles, then in the Taihape district it had achieved this purpose entirely by 1900. However, Professor Boast notes that, the success was as limited and/or slow in some respects. Many titles (including approximately a third of the Taihape blocks) took a long time to complete. This impacted on both Māori and Europeans.

    67.1 Of the 20 blocks that were subject to the Court process, 16 were brought before the Court prior to 1890.[42] In the majority of cases – 14 out of the 20 blocks that passed through the Court – title was determined through a single (but sometimes lengthy) Court hearing.

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41 R Boast, Native Land Court Vol 1 at 100.

42 Wai 2180, #A49, at 87 – summary analysis by Mr Cleaver in context of economic development report.

67.2 Six blocks, however, were subject to extended and costly judicial proceedings, variously involving repeated title investigation hearings, rehearings, and other legal action: Mangaohāne, Ōruamatua- Kaimanawa, Ōtūmore, Ōwhāoko, Rangatira, and Te Koau. Except for Te Koau, all of these blocks first came before the Court before 1890.

68. Most of the inquiry district was clothed in a secure and certain title by 1900. That scale of transformation at that pace indicates the conveyancing purpose of the endeavour was undoubtably achieved. However, in the same thirty years, approximately half of the district lands were alienated from Māori (including approximately 70% of the better lands in the district – many of which would be alienated by 1930). The Crown and settlers gained land in huge quantities.

CUSTOMARY INTERESTS AND THE DETERMINATION OF OWNERSHIP

Issue 3.3: What native land legislation did the Native Land Court operate under in the Taihape inquiry district? What specific implications, if any, arose out of: […]

69. All Taihape land blocks titled in the 19th century passed through the Native Land Court, with only two exceptions (Kaweka and Waitapu).[43] These submissions focus on the legislation that Taihape lands were titled through the Court.[44]

70. All applications to the Court in Taihape occurred following the 1867 introduction of forms of title that were required to record all individuals with ownership interests in the land (albeit those requirements were patchily implemented).

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43 Kaweka and Waitapu see for example Innes, Wai 2180, #A15, at 24. Waitapu – a pre-1865 'reserve' did not go through the Court and was purchased by the Crown in 1879.

44 Claimant generic submissions suggest that approach is unacceptable given that the Native Land Court was established earlier and those earlier developments for the context for the Court being available to Taihape Māori. The Crown of course recognises that context but disagrees that there is a need to duplicate analysis of the 1862 or 1865 Acts here – there is plenty of jurisprudence already existing on events prior to 1869 when the first Taihape application went to Court. Nor is there a strong evidential basis to take dialogue on that era further - as claimant counsel note, the scope of the technical reports is limited in relation to the establishment and constitution of the Native Land Court and "those reports do not provide a detailed and comprehensive coverage of those aspects of this topic." Wai 2180, #3.3.76(k). These submissions accordingly also take a light hand on establishment issues.

71. In summary: [45]

Legislation	Blocks	Acres	%
1867 Native Lands Act certificate of title	1	44,669 acres	3.83%
1873 Memorial of Ownership	10	338,340 acres	29%
1880 certificate of title	14	488,532 acres	41.88%
1886 Native Lands Act	5	163,053 acres	13.98%
1894	6	30,000 acres	2.6%

a. The application of the ten-owner rule?

72. The Crown has accepted through previous inquiries that the ten-owner rule can be seen as an inadequate attempt to provide a form of communal title and did not operate in a manner that reflected the Crown's obligations to actively protect the interests of Māori in land they may otherwise wished to have retained.[46] The Crown has also acknowledged that no provision was made in the 'ten-owner rule' legislation to allow the community to enforce the trustee role of the named owner(s), and subsequent amendments prior to the Equitable Owners Act 1886 were inadequate.

73. Neither the Native Lands Act 1862 or the Native Lands Act 1865 (with its unamended form of the ten-owner rule) were applied in the district.

74. One block in the inquiry district was granted under the Native Land Act 1867 version of the 'ten-owner rule' - Paraekaretū in 1871. Under the 1867 version all owners were required to be recorded (but were not accorded legal rights as the acknowledged representative owners confirmed on the title itself).[47] Paraekaretū did not give rise to the usual kind of prejudice associated with that form of title (the dispossession of other rights holders) because there was in fact a general agreement to sell the land. The main cause of dispute related to the distribution of payments and not to the form

45 Wai 2180, #A15, at 25–26 (or at 65–66 in Mr Innes amended version of the report #A15(m)).

46 See for example Wai 903, #3.3.130, at [58].

or effect of the title. The dispute between Ngāti Hauiti and Ngāti Apa was a very longstanding one and again did not arise from the form of effect of the title.

75. The initial impetus for the first Taihape application appears to have been to give effect to a (putative) sale agreement between Ngāti Apa and private purchasers for a wider area (then named Upper Turakina Rangitīkei or Greater Paraekaretū) – with the support and consent of Ngāti Hauiti rangatira.[48] An interlocutory order was made in 1869 but title was never issued. The sale fell through prior to the title being finalised due to the private purchasers becoming dissatisfied with the land on offer (the portion that was Ngāti Hauiti papakainga, Taraketī, was excluded from the sale).[49] The Crown was not involved in these dealings. [50]

76. In 1870 Ngāti Apa through hui (including with Ngāti Hauiti) determined to divide "Greater Paraekaretu" into three parts with the objective of offering one of those three blocks, Paraekaretū, for sale to the Crown. In 1871, Kawana Hunia and Ngāti Apa offered to sell the block to Crown.[51] A preliminary purchase deed was signed in Wellington by Kawana Hunia, Te Keepa and others with pre-title advances being paid to signatories.[52]

77. Aperahama Tipae (with the mandate of Ngāti Apa and Ngāti Hauiti) conducted the application and informed the court that as the hapū had agreed collectively to sell the land, only his name should be put on the title and he would take care of distributing the proceeds of the sale to the collective owners.[53]

78. The criticisms that attached to the ten-owner rule may well have been in the mind of the Court in when it awarded title to Paraekaretū to Aperahama

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47 Native Lands Act 1867 s 17.

48 Wai 2180, #A07, at 21. Negotiations in 1866/1867 between Hunia and Wilson (a private party) were abandoned when outbid through negotiations between Tipae and Lethbridge and Cameron (separate private party). Wilson had offered €5,000; Lethbridge either €15,000 or €20,000.

49 Wai 2180, #A07, at 139–140; Stirling, Wai 2180, #A43, at 139.

50 Wai 2180, #A07, at 140 [2.5]; Swainson (surveyor – not a representative of the Crown) advocated in 1870 for the Crown to step in when the private sale fell through in order to future proof for roading into Mōkai Pātea however the Crown did not take the suggestion up – Crown does not negotiate in relation to Paraekaretū until at least 1878 (#A43, at 140–141).

51 Wai 2180, #A07, at 141 [3.1]; #A43, at 143.

52 Complaints about the distribution of these advances were subsequently made to the Crown.

53 Wai 2180, #A07, at 142.

Tipae solely. Before making the order, the Court took the unusual step of requiring Tipae to execute a deed of trust in favour of the ten hapū listed as owners.

79. Tipae distributed the proceeds of the sale. That distribution was not without controversy. In January 1872 Kemp received complaints about the distribution of proceeds but in March 1872 the Trust Commissioner (Heaphy) confirmed the transactions.[54]

80. The ten hapū named on the Paraekaretū title did not include Ngāti Hauiti. However one of the ten hapū, Ngāti Rangiwhaiao, appears to be a hapū of Ngāti Hauiti.[55]

Issues arising out of Paraekaretū

81. Two issues arise from the Paraekaretū title determination process:

81.1 Ūtiku Pōtaka subsequently argued that Ngāti Hauiti were customary rights holders in Paraekaretū along with Ngāti Apa and that Tipae had been authorised by Ngāti Hauiti, to act in the proceedings on their behalf, and that 50% of the proceeds of the agreed sale of the block would go to Ngāti Hauiti – he alleged they had not received their portion of the proceeds of sale.[56] Tipae vehemently disputed these allegations – stating that the Taraketī

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54 Wai 2180 #A07, at 143–144 (and see primary documents).

55 Wai 2180, #A07, at 18, Hearn's Southern Aspect report (citing Grant Huwyler's Ngāti Apa manawhenua report) states that Ngāti Rangiwhaiao "were said to have been linked to Ngati Hauiti" while noting that that their interests "were strongly contested." Hearn suggests that Ngāti Rangiwhaiao were an important hapū in the Paraekaretū/Rangatira area, and lists Aperahama Tipae, Heremaia Te Hauparoa, and Hori Te Rangiao among their members.

Ngāti Rangiwhaiao is listed as a hapū of Mōkai Pātea in the second amended statement of claim for Wai 1705, is listed as an exclusive hapū of Ngāti Hauiti in the Mōkai Pātea draft mandate strategy (and was not listed as a hapū of Ngāti Apa in their deed of settlement).

Of course it's not uncommon for the affiliations of hapū to change over time, and it may be the case that Ngāti Rangiwhaiao were mainly associated with Ngāti Apa in the 1870s but have subsequently become more closely associated with Ngāti Hauiti (Ngāti Rangiwhaiao). However, Huwyler's comment above seems to suggest that Ngāti Rangiwhaiao may have been "linked" to Ngāti Hauiti around the time of these events.

(Some complexity arises in the southern block evidence with Ūtiku Pōtaka being described as being Ngāti Apa in 1863, and with recognised Ngāti Apa leaders claiming interests in some southern blocks through Hauiti lines (Tipae in Otamakapua and Rangatira; Hunia in Taraketī)).

56 Wai 2180, #A07, at 139, 144–145, 211–214 at the Rangatira hearing; see also Pōtaka evidence in 1877 Taraketī hearing "I would not have agreed if …".

block was cut out of Paraekaretū to represent all Ngāti Hauiti interests in Paraekaretū.[57]

81.2 Whether the Paraekaretū title determination process created or exacerbated "a rift" between Ngāti Apa and Ngāti Hauiti.[58]

82. With regard to the first concern:

82.1 Given Paraekaretū passed through the court without opposition, very minimal evidence was presented; and, thus there is little to draw on to assess the arguments of Tipae and Ūtiku Pōtaka about the Paraekaretū dealings against.

82.2 More evidence was given in subsequent cases for other southern blocks than was stated in the 1872 Paraekaretū proceeding itself (Mangoira, Ōtamakapua, Otairi, Rangatira, Ōtūmore and Taraketī). That evidence must be assessed through in the context of those proceedings being contested proceedings.

82.3 It is unclear whether the proceeds Ngāti Rangiwhaiao received were received as Ngāti Hauiti but if so, it appears likely that a hapū of Ngāti Hauiti received some proceeds of the sale – even if not the 50% Ūtiku later claimed they were owed.

83. With regard to the degree to which Paraekaretū dealings contributed to or escalated conflict between Ngāti Hauiti and Ngāti Apa (as has it has been alleged it did) must be located within the tribal landscape of overlapping Ngāti Hauiti and Ngāti Apa customary interests. Huwyler (Ngāti Apa) states:[59]

> Ngati Apa and the people of Mokai Patea, in particular Ngati Hauiti, endured long periods of conflict stemming from the times of Hauiti and Pukeko. One motive for this fighting was the assertion of Manawhenua of the Central Rangitikei takiwa. The northern extent of this takiwa claimed by Ngati Apa was subject to counter claim by the people of Ngati Hauiti. This issue was compounded by ongoing feuds fuelled by the requirement to seek retribution for past losses and perceived insults. It appears that neither side fully dominated the other so both sides maintained an interest in the area. Fighting

57 Wai 2180, #A07, at 146.

58 Wai 2180, #A07, at 145.

59 Wai 2180, #A07, at 18 Hearn quoting Grant Huwyler, *Ngati Apa manawhenua report*, at 45–46.

> between these groups continued until a concerted effort was made to bring peace. To achieve this Ruta Kau from Ngati Te Upokoiro and Ngati Hauiti was married to Kawana Hunia Te Hakeke. To symbolise the significance of this marriage, Hunia's father Te Hakeke gifted Ruta Kau and her family land at Te Houhou which subsequently became the Taraketi block.

84. Ūtiku Pōtaka's evidence confirms the longstanding nature of the disputes and the overlapping interests between the groups (as well as making specific claims about the distribution of Paraekaretū sale proceeds).[60]

85. Given the above, the Crown is reluctant to assess the validity of Ūtiku Pōtaka's and Tipae's positions but considers it seems at least possible that Ngāti Hauiti "relinquished a claim on Paraekaretu in return for Taraketi" (as Hearn puts it) but then chose to relitigate that arrangement after Ngāti Apa did in fact lodge a claim to Taraketī.

86. Tension between Ngāti Apa and Ngāti Hauiti subsequently played out in relation to several of the southern blocks as they passed through the Native Land Court. Hearn and Stirling conclude that this ongoing conflict was a consequence of the Paraekaretū dealings. The Crown's view is that longstanding customary contests and political struggles were exacerbated by, rather than caused by, the Paraekaretū title determination process.

b. The granting of memorials of ownership or certificates of title?

87. Approximately 71% of the land in the inquiry district was titled under the 1873 memorial of ownership provisions (29%) or the 1880 certificate of title (41%).

88. The title determination of the following blocks was under these Acts.

1873	1880
Ōruamatua-Kaimanawa	Rangipō Waiū
Otairi	Awarua
Ōtamakapua 1	Mangaohāne

60 Wai 2180, #A43, at 148.

Ōtamakapua 2	Motukawa
Ōwhāoko	Te Kapua
Taraketī	
Mangaoira Ruahine	
Ohaumoko	
Rangatira	

89. The principal Native land statute in force when the Native Land Court adjudicated on Taihape lands was the Native Land Court Act 1880, a simplified version of the Native Land Act 1873. The 1880 Act did not repeal the 1873 Act entirely, but only so much as was "repugnant to" it. The interface between the Acts appears to have caused some difficulties (the changes between the Acts in relation to the use of sketch plans and authorisation processes for surveys is part of the Mangaohāne story).

90. Under the Native Land Act 1873, the Court recorded the names of all the persons found to be owners in a memorial of ownership and, where the majority of owners required it, the proportionate share of each owner. This system continued to apply under the 1880 Act.

91. These provisions did not in themselves preclude individual owners acting collectively in terms of managing the land. If the land was held in a memorial of ownership customary title was not extinguished (and the land was not a fee simple estate). But sales could occur if all owners agreed, or if land was partitioned under the Act (s 49). (From 1886 – and even more so from 1894 – the determination of title to land involved the conversion of customary, collective-based tenure to an individual title: Māori freehold land held in fee simple from the Crown at that point, each person listed as an owner held a share in a block of land which they could alienate without reference to the other owners.)

92. The 1873 Act is criticised by some historians as "taking individualisation to a new level" by giving everyone with a customary interest an (in theory at

least) alienable share. However, it was implemented as a solution to the problems that had emerged in implementing the former ten-owner system which was "far more destructive of customary interests".[61] The Crown accepts that the 1873 Act was an imperfect solution and that the policy implemented through these Acts had significant impacts upon Taihape Māori – in particular on tribal structures.

93. Multiple hui were held prior to, and during, the period in which these Acts were in force at which Taihape Māori discussed their aspirations, concerns and strategies for their engagement with the new economy (which there is no doubt by the 1870s they wanted to be part of) for example (but by no means comprehensive): 1860 Kokako, 1866 concerning southern lands, 1867 Kaiiwi, 1871 Turangarere (focus on boundaries with Tūwharetoa and Ngāti Kahungungu and plans for Ōwhāoko and northern lands), 1874 Putiki (focus on Rangipō Waiū). Crown officials were often the recipients of letters or petitions or in-person meetings following these hui. The evidence shows these had some effect in informing the Crown of the relative parties and concerns on the ground (for example the Crown did not insert itself into the inquiry district prior to the first applications being made to the Court by Taihape Māori; District Officer Booth recommended Mangaohāne survey authority sought in 1881 be declined).[62] However, the Crown accepts that these various exercises of authority through tribal structures were not given weight in title determination processes (see Awarua under impacts section below). Mr Cleaver also concludes that shortcomings of the Court system itself was a key part of the picture:

> Alongside these factors, however, it is evident that in all three cases the drawn-out and costly proceedings surrounding title investigation owed much to failings in the Court system itself.

94. These matters are addressed in the detailed submissions on Mangaohāne (in Issue 6) and Ōwhāoko Ōruamatua-Kaimanawa (in these submissions).

95. As stated at the outset of these submissions, the Crown concedes that the individualisation of Māori land tenure provided for by the Native land laws made the lands of iwi and hapū in the Taihape: Rangitīkei ki Rangipō

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61 R Boast, Native Land Court Vol 1 at 100.

inquiry district more susceptible to fragmentation, alienation and partition, and this contributed to the undermining of tribal structures in the district. The Crown concedes that its failure to protect these structures was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

c. The development of collective land mechanisms: incorporations

96. The development of incorporation provisions has been considered in detail in the Tribunal's *Turanga Report* and is not duplicated here.

97. In summary, Apirana Ngata (who was instrumental in the development of incorporation provisions, and more so, their ongoing refinement so as to be increasingly of use to Māori) described the necessity for such provisions as follows:[63]

> It was necessary on the one hand to evolve a system of organising the individuals in the title in such a way as to stabilise corporate action and legal decisions, and on the other hand to secure legislative recognition of the title expressing such an organisation as could be legally offered to a money lender and on which he could lend...The system is known as the incorporation of native land owners and is in effect an adaption of the tribal system, the hierarchy of chiefs being represented by the Committee of Management. As with the tribal hierarchy, so with the Committee, its executive functions gravitate into the hands of someone capable of satisfying the diverse elements in the community, while complying with the business requirements of the undertaking.

98. In Taihape itself, it appears that – in addition to customary methods that operated prior to and in parallel to the legal processes – some methods of legal recognition of collective management had been developed prior to 1894 (see Hīraka Te Rango evidence to 1891 Rees Carroll Commission above).

99. The 1893 Mangatū No. 1 Empowering Act was considered a successful experiment and was thus rapidly followed by legislation to make incorporation available nationally in 1894 (see also submissions in Issue 12 – which address the degree to which the Mangatū incorporation can be drawn on as a direct comparator for Taihape). The Crown views Mangatū as an exceptional example specific to its particular political and legal history

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62 As above in Paraekaretū section. For example McLean acknowledged Kawepō's veto of an 1865 leasing proposal and made no efforts to intervene on behalf of the European seeking that lease.

63 Sir Apirana Ngata *The Maori People Today* at 139/140.

– and thus caution is warranted in asserting it as a 'norm' or expectations that it could or should have been rapidly replicated generally.

100. However, the Native Land Court Act 1894's incorporation provisions could not be utilised for blocks where Crown had acquired a right or interest.[64] For Taihape Māori,[65] this meant that incorporation was not available until the Crown completed its purchasing of interests in Awarua lands (see Issue 4 submissions: this occurred in 1896 for the Awarua block and in 1899 for Motukawa).

101. Whilst the example in paragraph [68] above demonstrate that, where sufficient cohesion existed, collective management was possible prior to 1894, the efforts required to do so also demonstrate the difficulties involved. The individualisation of interests in land through the Native land laws made it easier for individuals to assert or contest titles or transact in lands without recourse to the collective and altered the consequences that once would have arisen from the collective rejecting a rangatira's choices.[66] Tribal structures required a particular mix of leadership and consensus among those leading, and those being led. The land titling system contributed to changes to Taihape tribal structures between 1870 and 1894. By way of example (this is expressed bluntly to make the point but the Crown acknowledges it is a simplistic summary of complex relationships, roles and changes over a generation):

101.1 in 1865 (pre NLC for Taihape) Rēnata Kawepō's word (mandated at the time through traditional means) acted as a veto on a proposal to extend leasing onto Taihape land;

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64 Native Land Courts Act 1894 s 122. The Court may, with the consent of a majority of the owners **of any block of land in respect of which the Crown has not acquired a right or interest**, or of a majority of the owners of each of a number of adjoining blocks, and on being satisfied that such block or blocks can be dealt with to the advantage of the owners thereof under this Part of the Act, by order, constitute the owners of any such block or blocks, or any part thereof respectively, a body corporate with a perpetual succession and a common seal, by the name "The Proprietors of [naming the land, the owners of which are so incorporated] " and thereupon the said land shall vest in such body corporate for an estate in fee-simple, subject to any existing alienation of any estate or interest therein, or any part thereof. [*Emphasis added]*

65 Putting aside other reasons why Taihape Māori may not have utilised the provisions even if they had been technically able to (including ss 128–129 where the proceeds of alienation by the corporate owners were to be paid to the Public Trustee and distributed to the owners only after deductions were made). See also Native Land Act 1909 ss 317, 336 and 337.

66 For Awarua, the 1886 agreement reached through discussions amongst hapū was disputed by two hapū and thus, under the native land laws conditions in place, fell to an expensive and lengthy determination process.

101.2 in the 1875 Ōwhāoko and Ōruamatua-Kaimanawa title investigations Kawepō continued to (with the support at that time of the other hapū he was mandated to act in front of the Court by) assert dominance and have that accepted by the Court including the Assessor;

101.3 by the 1881 Mangaohāne survey authorisation process (and in the subsequent title determination hearing), Kawepō's views continued to be accorded significant weight but they were no longer accepted in full by either the Court or by other claimants – including those from within his own hapū.

102. These matters are recognised in the Crown's concessions concerning the undermining of tribal title contributed to by individualisation and the absence of an effective mechanism for managing land collectively prior to 1894.

103. Crown opening submissions queried why, once corporate forms of title became more effective and readily accessible through the incorporation provisions of 1894, Taihape Māori did not avail themselves of these opportunities notwithstanding having proposed arrangements in relation to Awarua two years previously.[67] With the benefit of better familiarity with the evidence, some of the reasons are now apparent.[68]

104. From 1894 Māori land could be incorporated and managed collectively. However, incorporation was only available for land in respect of which the Crown had not acquired a right or interest (1894/s122). Taihape Māori could not therefore utilise those provisions for Awarua and Motukawa blocks until Crown purchasing in those blocks was completed. This was after 1896 in relation to Awarua and 1899 for Motukawa. By that time the tribal landholding had been considerably reduced and thus the amount of land that might have been incorporated was also significantly reduced. The Crown has conceded it failed to meet the high standards required of it as a privileged purchaser when it purchased approximately twice the amount of land in Awarua and Motukawa (200,000 acres) than it had indicated it

67 Wai 2180, #3.3.1 at [61].

68 See also Wai 2180, #A49, at 84–85.

needed for the railway and associated settlements (100,000 acres), and which Taihape leaders had expressed a collective willingness to sell.

105. The incorporation model provided for in section 122 of the Native Land Court Act 1894 was developed more fully in the Native Land Act 1909 following scrutiny through the Stout Ngata Commission.

Issue 3.4: What was the nature of, and reasons for, Taihape Māori engagement with the Native Land Court process?

106. This is addressed under question 3.2 above.

107. The Crown has acknowledged that Māori who did not wish to participate in the Native Land Court were nevertheless bound to in order to seek to protect their land interests and were required to incur the costs that attended their participation and any awards the Court made.[69]

Issue 3.5: To what extent were Taihape Māori experts, or mātauranga Māori, relied on in determinations of Māori customary rights?

Issue 3.6: On the basis of what rules or principles did the Native Land Court in the Taihape district determine title, for example, ahi kā or occupation, conquest, whakapapa or ancestral connection, and to what extent did such rules/principles and their application reflect customary tenure? How consistent was the Crown in applying these tests?

108. The Crown understands Issue 3.5 to be querying the extent to which that expertise informed the Court's determinations of Māori customary rights (rather than a more generalised question).

109. With respect, these questions appear to confuse the Crown with the Court and do not appear to be within the jurisdiction of the Tribunal as they are not actions of the Crown. This response is provided to assist the Tribunal in assessing the Crown's conduct for matters which are within its sphere of responsibility (rather than the Courts).

110. As addressed elsewhere, several of the Native Land Court proceedings in the district were lengthy (with the Awarua 1890-1892 subdivision process being exceptionally long). One reason for this was the extensive amount of evidence given to the Court of customary interests. There is little evidence in the minute books (or contemporaneous newspaper accounts) of the court circumscribing witnesses – fulsome time seems to have been allowed

for parties to put their cases in the way they saw fit. (Indeed, the Court in the 19th century was at times criticised for allowing such extensive evidence to be heard, and thus proceedings to be overly long and expensive.) For example, Winiata Te Whaaro presented his case for Mangaohāne over three full hearing days, supported by four witnesses.

111. The expertise of witnesses, and the credibility of their evidence was regularly supported and/or critiqued by other claimants and witnesses – through rebuttal evidence or through cross examination (either through counsel or by claimants directly).

112. Whilst the Court was required under the legislation operative within the inquiry district to determine and record all owners, a strong preference for parties to come to agreements amongst themselves was evident. The multitude of adjournments to enable out of court discussions is evidence of this.

113. One example is the Awarua 1891 relative interests determination. Hīraka Te Rango's account to the Rees Carroll Commission set out above emphasises the court's support and preference for claimants to reach their own accommodation for their relative interests. Hīraka's account also described the difficulties involved in achieving agreements when parties who did not agree with the majority had recourse to the court, and noted frustration that the Court (for reasons unclear to the Crown) did not limit its inquiry into that were areas disputed by participants.

114. The decision of the court makes a similar statement – at least as regards the preference for out of court agreements to be reached and the support given by the court for that end:[70]

> At an early stage in the proceedings before us, we urged upon the Natives the importance of settling the partition of the block among themselves, and it appeared to us that many of the leading men had an honest desire to do this. At one period, we rejoiced in hope that this would be accomplished but at last, we found that nothing had been attained, and with unfeigned regret we had to open up the case, and proceed with it in the ordinary way. ... All this has taken a very long time and has caused much expense, nearly all of which might

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69 For example Wai 898, #3.4.305, at [29].

70 Legislation made various provisions for voluntary arrangements to be endorsed by the Court, subject to certain procedural safeguards for example Native Land Act 1873 s 46; Native Land Court Act 1886 s 59.

> have been saved had wiser counsels prevailed, and the whole matter been settled by the owners themselves. We say this, because we are of opinion that this is a case peculiarly calling for settlement by the owners themselves.

115. Where voluntary agreements were not reached and the Court was required to adjudicate on evidence, the Assessors' and Judges' methods or criteria for assessing evidence presented in cases in the inquiry district appears to have involved a mix of:

115.1 Reliance on Assessor expertise (eg in Mangaohāne, Assessor Hoani Meihana recalled a witness for further examination to clarify critical earlier evidence on which the case turned, and the decision was not made until he had satisfied himself on that point).[71]

115.2 Whakapapa evidence is the primary evidence presented – some cases are presented with whakapapa alone asserted as sufficient basis for inclusion in the title (particularly so for lands with minimal historical occupation).

115.3 Evidence of historical occupation is accorded significant weight (whilst this may include relatively recent matters such as location of birth particularly when combined with occupation – eg Ūtiku evidence of birth at Taraketī, more historical matters are more heavily weighted – eg location of tupuna graves (eg Kawepō's mother or aunty being buried on Mangaohāne was considered relevant to his rights to the land whereas contemporary occupation by parties was not)).

115.4 Conquests – both historical and more recent (eg the 1859 Pakiaka conflict in Hawkes Bay). Demonstrations of leadership were also accorded weight albeit differently by different Judges – one example is the value placed on Rēnata Kawepō reestablishing his people in the district after time in the Manawatu as result of musket wars.

115.5 Historical occupation is accorded weight in most cases. For example, in the Awarua partition hearing, the court found that the

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71 Wai 2180, #A43, at 392. See also Judge Ward's evidence to the Commission #A43, at 362–363.

evident lack of "ancestral divisional boundaries" within the enormous Awarua block meant that hapū rights in many areas were shared, making occupation an important element to the subdivision awards.[72]

115.6 Claimants often asserted that the Court's recognition of their rights in adjoining blocks was determinative evidence for them also having rights in the block subject to the current proceeding – and the opposite as an argument to keep others out. Judges do appear to have taken surrounding patterns of interests in land into account, but did not always find it compelling (eg Ngāti Apa unsuccessfully claimed their interests in Waitapu meant a rehearing of their exclusion from the adjoining Ōtamakapua was warranted.[73]

115.7 The '1840' rule was not applied consistently (if at all) for Taihape. Interestingly Airini Donnelly stated a case challenging Kawepō's rights given he was absent from the District at 1840. The Court upheld his interests. (Commenting extrajudicially after his retirement, Chief Judge Fenton expressed respect for the leadership and authority exercised by Rēnata Kawepō in battles and in bringing his people back into the district in 1861, following thirty years of displacement to the Manawatu).[74]

115.8 Evidence of use rights appears to be accorded inconsistent weight. For example in the Ōwhāoko 1885 relative interests Ihakara Te Raro based the claim primarily on ancestral connections but also use rights "the elders used to collect food on the land". The Court did not find the use rights added much to the whakapapa evidence.[75]

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72 Wai 2180, #A43, at 392.

73 Wai 2180, #A07, at 42.

74 AJHR 1886 I-08 – evidence given during the Ōwhāoko Ōruamatua-Kaimanawa Native Lands Committee investigation.

75 (1885) 11 Napier MB 50 (see also Boast Vol 1 at 185).

115.9 Relying on their own body of knowledge gleaned through their judicial career[76] and at times on evidence heard in separate but related hearings.

116. Professor Boast has concluded that rather than a fixed system of applying particular take, the Courts (whilst informed by those matters as shown above) primarily applied standard techniques practiced by all courts when presented with conflicting evidence – assessing, weighting and balancing the evidence presented to it and the credibility of those presenting it.[77]

117. It is recognised that, at times, the Native Land Court judges and assessors had to contend with large and complex cases that involved contradictory evidence. This phenomenon was not the result of the Court itself and would likely have arisen in any forum. The Crown submits that it was inevitable that the Court would approach these types of dispute in a pragmatic fashion based on notions of accommodation and compromise. Such values would likely have been to the fore in any conceivable alternative dispute resolution forum.

118. While it is unlikely that the Pākehā judges who sat on Taihape cases could have comprehended all the nuances of Māori customary rights and relationships that confronted them as judges, it is difficult to gauge retrospectively their cultural competence and suitability for the role to which they were appointed.

119. Māori assessors were an important feature of the Native Land Court regime. Section 11 of the Native Land Court Act 1880 provided that:

> One or more of the Assessors shall sit at every Court and assist in the proceedings, and the concurrence of at least one Assessor shall be necessary to the validity of any judicial act or proceeding of the Court.

120. The assent of at least one assessor continued under the Native Land Court Act 1886. Section 9 of that Act provided that the assessor's assent was required where the Court exercised its jurisdiction under Part III of the Act,

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76 One example of this (albeit a procedural decision rather than a substantive one) might be Judge Butler's recognition of Ngāti Whiti and Ngāti Tama lands being the correct place to rehear Ōruamatua-Kaimanawa.

77 R Boast Native Land Court Vol 1.

which included investigations of title, partitions and successions, and under Part IX, where there was a reference from the Supreme Court on a question of "Māori fact, custom, or usage".

121. A reason for the Court of Appeal overturning the Chief Judge's 1894 section 13/1889 Mangaohāne decision in 1895 however was that – although Judge Butler's s 13 report was based on inquiry with an Assessor present, Chief Judge Davy's was not. The Court concluded that the 1889 Act required the Chief Judge to either accept the conclusions in Butler's report; or to refer it back to him with specific queries as to the reasoning; or conduct a further hearing with an Assessor.[78] Chief Judge Davy did none of these – yet reached a different conclusion than that of Judge Butler (after hearing from all parties but without an Assessor, and considering all evidence to the court on Mangaohāne including that presented in other procedures).

122. Under the Native Land Court Act 1894, however, and thereafter, the assessor's concurrence was not necessary, and the Native Land Laws Amendment Act 1896 removed the necessity for an assessor in the Court's determination of any succession claim.

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78 *Winiata Te Whaaro v Airini Tonore and another* (1895) 14 NZLR 209 (CA).
Native Land Court Acts Amendment Act 1889 section 13:
Upon the receipt of any such application the Chief Judge may either:
(1.) By order under his hand, dismiss the application;
(2.) Hold an inquiry in open court with the assistance of an Assessor; or
(3.) Refer any question to a Judge sitting in open Court with an Assessor for his investigation and report.
Public notice of the intention to hold an inquiry shall be given in the *Gazette* and *Kahiti;* and such further and other notice may be given as the Chief Judge may deem expedient.

COST AND TIMING OF THE NATIVE LAND COURT PROCESS

Issue 3.7: When and where did the Native Land Court sit regarding the land contained in the Taihape inquiry district? Did Taihape Māori have any input into the timing and location of court proceedings?

Issue 3.8: What justifications, if any, were used for the timing and location of Native Land Court proceedings, and what was the impact on Taihape Māori?

Location of hearings

123. The Crown notes that this issue seems to pre-suppose that the Crown determined when and where the Native Land Court would sit (a view shared by at least one technical witnesses):[79]

> Strictly speaking, where the court sat was an administrative decision to be made by the Chief Judge, but in practice the government had a very large say in expressing its preference. This was most evident during the 1894 sitting at Moawhango (see below).

124. Taihape Māori repeatedly conveyed their preference for Native Land Court hearings to be held at Moawhango – particularly, but not solely, for the Awarua and Motukawa blocks (which together constituted approximately 1/3rd of the inquiry district and were the core lands of Taihape Māori).

125. Their preferences were conveyed through letters, petitions and correspondence – as well as in person with Ministers and to the Judges.[80] They gave various reassurances as to the suitability of facilities at Moawhango. They also (through correspondence and through petitions) conveyed their view that the durability of earlier Court judgements had been adversely impacted by previous hearings having been held remotely. The inconvenience and expense of which had limited their participation (they pointed to Ōruamatua-Kaimanawa, Ōwhāoko, Te Kapua, and Mangaohāne blocks, all of which were the subject of petitions for rehearings, special legislation, or protracted litigation).

126. Although their strong preference was for Moawhango, they also nominated Hastings and Marton (in that they were closer than some of the other venues hearings had been held in – the hearing they had recently finished was in Whanganui).[81] After 1890 only four relatively short matters were

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79 Wai 2180, #A43, at 349.

80 See Wai 2180, #A43, at 344–350, 620.

81 Wai 2180, #A43, at 344.

heard in Whanganui (and no further hearings occurred in places such as Palmerston North, Gisborne, Taupo or Bulls – all venues for some of the shorter hearings pre 1884).

127. These requests for hearings to be held at Moawhango were declined by the court for the Awarua 1886 title determination, 1890-91 subdivision hearing, and 1892 rehearing – which were held in Whanganui, Marton, and Hastings respectively. A substantial hearing was held in 1894 for Ōruamatua-Kaimanawa (during which a one day partition hearing was held for Awarua).

128. In June 1890, during the long Awarua partition hearing being held in Marton, Winiata Te Whaaro and Erueti Arani telegraphed the Chief Judge of the Native Land Court a very direct and solemn plea for the venue to be changed as winter was approaching:[82]

> It is quite impossible for our elderly sick to travel the long road to Marton at this time (mid-winter). (Already) one of us has died whilst living in that Pākehā town amongst the drinking establishments and appalling conditions. Marton is an exceedingly muddy, wet place in the winter time.
>
> We will die, just like those of us who died at the first Court hearing on Awarua, held at Whanganui in the winter. We were living in tents, without money as payment for food, or for accommodation in Pākehā houses. Some of us were stricken with sickness, so that seven people ultimately expired during those three months.
>
> O Judge, think kindly towards us. Our people are weeping for the corpses of their beloved who have departed to distant horizons on the burden of this Court work. They weep also for their elders who have gone to that distant place Marton, not knowing whether or not they will perhaps return to their home village.

129. This is extraordinarily compelling evidence. The Crown recognises the gravity of it and has not been able to complete further research into this matter prior to filing these submissions. Counsel for the Crown intends to do prior to the hearing.

130. The 1890/91 Marton hearing was exceptionally long – it is recorded by Stirling as having taken 241 days (which includes multiple adjournments of up to a week). In 1890, the rail had not been completed and the primary

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82 Wai 2180, #3.3.76(f), at [27]. This telegram was filed with a statement of claim in 1996 but does not appear to have been reproduced in the technical reports (although it may be quoted from and those reports certainly record that deaths were claimed to have occurred during hearings). The Crown acknowledges Mr Hockly for bringing it to the Crown's attention through generic closing submissions.

travel route from Moawhango was the Napier road – as Winiata states, the road to Marton was long and arduous.

131. This telegram in its full form has only recently come to the Crown's attention (excerpts are quoted in the technical reports which also refer to ill health, hardship and death occurring during remote hearings). It is unclear from the evidence whether the Chief Judge forwarded the above telegram to the Crown (or a copy was sent to it directly). It is also unclear what response was made or action followed.

132. In regard to the correspondence and petitions to the Crown:

132.1 The Crown conveyed the correspondence to the Court but the 1890 response of the Court conveyed the repeated response: Moawhango was unsuitable as it was remote, did not have the telegraph, and would be unduly expensive.[83]

132.2 The Native Affairs Select Committee considered one petition but only after the hearing had already commenced, nonetheless the Committee recorded that: "it is alleged that the holding of Land Courts in European townships at unsuitable times, is productive of much sickness and even worse evils among the Natives who attend Courts on these occasions" and recommended that in fixing the timing and location of hearings, the "utmost consideration" should be given to Maori "and their interests consulted as far as possible."

132.3 In 1890 visiting Ministers stated that Māori "had a very strong case for favourable consideration" by the Native Minister after hearing from Taihape rangatira advocating for Awarua hearings to be in Moawhango (but made no undertakings):[84]

> The native chiefs made a unanimous and impressive appeal to the Ministers for a 'change of venue' in connection with the adjudication of the titles over the Patea lands, which had hitherto been heard at distant places, such as Tapuaeharuru [Taupo], Hastings, and Whanganui, thus involving the owners in heavy expenses and loss of time, and also causing, as the applicants alleged, loss of large areas of land through the misconception of the Court as to

83 Wai 2180, #A43, at 345.

84 Wai 2180, #A43, at 348 quoting April 1890 newspaper reporting.

> the true ownership, from want of knowledge of the locality and position of the chiefs and the people resident in the district. The natives instanced several cases of this nature which they had experienced in the past, and which land had resulted in long years of litigation and appeals to Parliament before even some of these had been rectified. Some were still before Parliament for rectification. They therefore earnestly asked Ministers to cause immediate steps to be taken to ensure all future adjudications of the Patea lands be held in Patea itself, and said that they were prepared whenever this was granted to erect at their own cost a capacious hall for the Courts and comfortable quarters for the Judges and officers.

133. These preferences notwithstanding, the Court continued to prefer other possible venues as being more convenient on the basis that they were easier to reach and had appropriate facilities for a Court hearing. Twelve of the 22 hearings held after the 1890 Marton hearing were held in Hastings – considerably closer than Marton; four were held at Marton (mainly Motukawa), and two at Moawhango.

134. The Crown conveyed the representations made to it by Taihape Māori to the Court but it was ultimately the Court's decision (and the Court did not often concur with the Crown's suggestions).

135. In 1893 Judge O'Brien (who had refused earlier requests from the Crown) retired. Judge Butler who had worked as a Land Purchase officer in the district and had good knowledge of the land and the peoples was appointed and immediately stated that his court would sit at Moawhango to hear the Ōruamatua-Kaimanawa case.[85] He gave short shrift to the Hastings-based claimants who petitioned the Native Minister against the hearing being at Moawhango – Judge Butler responded that the bulk of the claimants were based at Moawhango or within a days ride of it. Butler's decision was also influenced by the railway – by 1893 having pushed through to Manganoho and therefore made the location more accessible for claimants and Court alike.

136. It appears, therefore, that the decision that the Court would sit in Moawhango was ultimately one that the Native Land Court made independently, having heard submissions on the point from the interested Māori parties (and influenced both by a change in Judge and also improved

infrastructure). Nevertheless, it is beyond doubt that the location of the Court was a matter that Ministers of the Crown and officials had given a degree of consideration to (and at times conveyed their views on this) – but did not control – as shown here by Judge Butler's decision.

137. Given the large size of the blocks and the large number of potential interest-holders, someone was likely to be disadvantaged or inconvenienced wherever the Court sat. The Crown also notes that there was some legitimate justification for holding hearings outside the inquiry district. Whilst the above analysis focusses on Awarua and some northern blocks, Marton was the closest town to those Māori resident in the south of the Taihape district (eg at Taraketī, Ōtamakapua 1) and thus was not an entirely unsuitable location for those hearings. Omahu/Hastings likewise was (relatively) close to the northern and eastern blocks, and was a common residential place for the people of Taihape who went to Omahu regularly (eg Winiata Te Whaaro); the Napier Road was the primary transport route prior to the railway going through. It is clear that Judge Butler took a different approach than previous Judges. The improvements to the Taihape district's transport and accommodation infrastructure between 1886 and 1894 also played a role in Moawhango becoming a more suitable venue.

Length of hearings

138. The Crown has acknowledged:

138.1 Taihape Māori had no choice but to participate in this system in order to protect their lands from the claims of others;

138.2 between 1875 and 1895 Taihape Māori were frequently required to attend hearings at venues far from their settlements. This imposed a considerable burden on Taihape Māori who sometimes had to attend long hearings with insufficient food supplies and inadequate accommodation, and made it difficult for some Taihape Māori with interests in lands to attend;

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85 Wai 2180, #A43, at 437.

138.3 Crown actions or errors sometimes extended the duration of Native Land Court hearings, increasing the burden on Taihape Māori; and

138.4 Taihape Māori sometimes had to sell land to pay the significant costs associated with Native Land Court processes.

139. As to the length of hearings, it should be noted that this included both actual hearing time and adjournments, many of which occurred at the request of Māori (although there would have been those who opposed the adjournment). In dealing with the application to the Awarua subdivision block, Judge Ward granted successive requests for adjournments.

140. The 241 day estimate of the Awarua partition hearing includes of adjournments of a few hours' length and others of up to a week and counts part days as full days, so it remains unclear how many hearing days were actually involved. Notwithstanding this, and the huge size of the block, the Crown nonetheless recognises the hearing was of an unusually[86] long duration and constitutes a significant impact on the claimant community.

141. Had the Court sought to shorten proceedings, it is likely to have encountered sharp criticism – as would the Crown if it had somehow intervened in the conduct of the case.

142. Putting aside the methodological issue of the uncertainty of the actual hearing days involved, of the 53 proceedings tracked by Mr Stirling,[87] was something of an outlier. However, while the 241-day Awarua case was exceptional, a number of other Taihape hearings were also very lengthy. The 1888 Ōwhāoko rehearing took 113 days, and eleven other proceedings were between 50 - 81 days in duration. While most of the remaining 40 hearings were relatively short, the average hearing length of 30 days still represented a significant burden for Taihape Māori."

143. At a block level (rather than a hearing level) the northern and central blocks took many years from initial title determination to completion. 24 years for

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86 Mr Stirling and Judge Harvey suggested Tauponuiatia might be the only other one they have come across of such length.

87 Wai 2180, #A43, at 619–620.

Ōwhāoko, Ōruamatua-Kaimanawa took 23 years, 14 years for Motukawa and 8 years for Awarua. Ōtūmore and Ōtamakapua 1 were also lengthy.

144. The Native Land Court's practice of not routinely defining owners' relative titles immediately upon ascertaining title had been a concern of Crown purchasing officials from the start of the Court's operations and appears to have lengthened proceedings. Mr Hearn and Mr Stirling confirmed that, even though it was legally possible to undertake both steps in the same proceeding (title determination and determination of relative interests), this did not occur in the Taihape blocks. The Native Land Court Act 1886 Amendment Act 1888 responded to the practice of the Court by declaring that: Māori lessors who were entitled to rents accruing to them were deemed to be entitled in equal shares, unless otherwise provided in the lease; on making an order on an investigation of title, the Court was to decide relative interests "forthwith" and "whether such procedure is applied for or not".

145. As a coda on this issue: under Premier Seddon, the government and the courts became more peripatetic – he considered it important to tour the country and for government to go to the people – including Māori.[88] During his visit to Moawhango (discussed in Crown submissions on Issues 4 and 14 as he discussed railway issues) the pleas for future hearings to be held at Moawhango were repeated to him. The railway was completed, providing access through the inquiry district on a north-south axis in 1908.

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88 See AJHR 1895 G-01 at 2: Seddon "Ministers go from centre to centre so as to keep touch with the pakehas and to explain social and political questions, the settlement of the land and the labour problems. Why not deal with Maoris in the same way? This though induced the Premier to undertake a fatiguing journey, perilous in its incidence – mountains, rivers, and lakes having to be negotiated – and by meeting natives in their haunts, making himself thoroughly acquainted with the "ins and outs" of the Native question."

Issue 3.9: Were title determination hearings notified early enough and sufficiently? How were sales and changes of ownership advised to Taihape Māori and was this sufficient?

Issue 3.10: Were Native Land Court proceedings ever conducted simultaneously for multiple land blocks in which Taihape Māori claimed interests? If so, what was the impact on Taihape Māori?

Notification

146. The 1875 title investigations for Ōwhāoko and Ōruamatua-Kaimanawa were later found to have been inadequately notified. (See detailed submissions on these matters in Part 2 of these submissions.)

147. As discussed later in this submission, following the 1875 title determination for the Ōwhāoko and Ōruamatua-Kaimanawa blocks, Māori who had been left off those titles protested that they had not had enough notice to attend the hearing. Heperi Pikirangi and others informed the Chief Judge of the Native Land Court had they only received notice three days before the hearing occurred in Napier, and that they failed to arrive in time despite travelling "day and night". While this application for a rehearing was declined after Judge Rogan informed McLean that the claimants had in fact had enough time to attend, Māori continued to protest about the short notification period.[89]

148. When the Ōwhāoko and Kaimanawa Native Lands Committee investigated the title process in 1886, it heard from a local witness who stated that three days was enough to ride to Napier where the hearing occurred (the witness was a lessee farmer).[90] Despite this, the Committee ultimately concluded that the three-day notice period appeared the be "unreasonably short". However, the Committee qualified this conclusion by noting that "an application for rehearing was received and considered, but refused by Sir Donald McLean, apparently on the ground that the Natives had had sufficient time to appear."[91] Ultimately, the adequacy of the notification period was not one of the bases upon which the Committee recommended a rehearing, and was not cited as one of the reasons for the rehearing cited

89 AJHR, 1886, G-9, p 4; and Wai 2180, #A43, at 266–267; Wai 2180, #A06, at 139.

90 AJHR, 1886, I-8, Evidence of Captain Birch, p 25–26. As a practical matter, Counsel would not like to ride from Taupō to Napier with only three days notice.

91 AJHR, 1886, I-8, p 1.

in the preamble to the Ōwhāoko and Kaimanawa-Oruamatua Reinvestigation of Title Act 1886.[92]

149. The Crown notes that when giving evidence to the Ōwhāoko and Kaimanawa Native Lands Committee, the Registrar of the Native Land Court in Wellington stated that when setting the length of notices, the Court did not routinely take into consideration the distance between the location of the hearing and the place of residence of interested Māori.[93]

Delay after notification

150. At times 'clients' of the Court in Taihape complained of prolonged and possibly expensive delays as they waited for cases that had been gazetted in the Kahiti to be brought before the Court.

151. The Crown also accepts that, as a consequence of multiple hearings being notified to start at the same time, some participants faced delays as they waited for the applications in which they had an interest to proceed. For example, the Court was to hear Awarua subdivision during the same session as Native Land Court business associated with Motukawa, Ōruamatua-Kaimanawa, Timahanga, Te Koau, and Mangaohāne blocks.[94]

152. However, missing from the evidence is any extensive analysis as to how Taihape Māori who were confronted with a significant delay reacted to it in practice. The Crown accepts that the location of the Court outside the rohe –heightened the consequences of delay. (See venue, duration and timing of hearings above.)

153. The Awarua owners noted other grievances related to the Native Land Court:[95]

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92 See AJHR, 1886, I-8, p i., and preamble to Ōwhāoko and Kaimanawa-Oruamatua Reinvestigation of Title Act 1886.

93 See AJHR, 1886, I-8, p 34. "Was the distance of the block where these Natives resided from the Court ever an element in the length of notice Supposing, for instance, Natives resided twenty miles from where the Native Land Court was sitting, was that ever taken into consideration as against Natives residing, say, one hundred and fifty miles away from the Court Would not the question of distance be an element in considering what notice they should have?—l do not think it was the practice to consider them. 651. So that the question of distance was not taken into consideration in fixing the length of notice?—Well, lam not very sure on that point. I do not think it was an element."

94 Wai 2180, #A43, at 345.

95 Wai 2180, #A43, at 380.

> We also ask you to take into consideration our long stay here and the heavy expenses we have incurred for nothing in consequence of the plan forwarded by the survey office being wrong.

No concurrent proceedings

154. Claimant generic submissions conclude that the evidence does not disclose proceedings being conducted simultaneously for multiple land blocks in which Taihape Māori claimed interests.[96] The Crown concurs.

Issue 3.11: What was the impact of participation in the Native Land Court process on Māori, including court fees, liens, survey costs, attendance costs, medical costs, loss of income and roading deductions? Did the impact vary from whānau to whānau?

155. The Crown acknowledges that between 1875 and 1895 Taihape Māori were frequently required to attend hearings at venues far from their settlements. This imposed a considerable burden on Taihape Māori who sometimes had to attend long hearings with insufficient food supplies and inadequate accommodation, and made it difficult for some Taihape Māori with interests in lands to attend. Crown actions or errors sometimes extended the duration of Native Land Court hearings, increasing the burden on Taihape Māori. Taihape Māori sometimes had to sell land to pay the significant costs associated with Native Land Court processes.

156. Crown opening submissions[97] submitted that the hearing related costs for Awarua were significant but not unreasonable when seen as percentage of value of land (although evidence on survey costs was not clear on evidence). The submissions posited that the length of the hearings, which contributed directly to the costs involved, appeared to be largely due to the size of the block and the complexity of customary interests, which in turn made it difficult for all of those with interests to reach agreement about ownership.

157. The Crown's view remains that it is reasonable for Māori to bear a level of cost to achieve the economic benefits of receiving a title. However, the Crown recognises that there is a point beyond which such costs might be considered unreasonable. Professor Boast identifies the transaction costs involved for Māori in gaining title as one of two key problems with the

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96 Wai 2180, #3.3.76(f), at [35].

97 Wai 2180, #3.3.1, at [84]–[85].

Native land laws; the other being the consequences of cumulative amendments to the Native Land Laws on being able to achieve certainty. Determining whether that threshold has in fact been passed in relation to Taihape lands remains difficult because such a calculation is not possible to any degree of accuracy.

158. The Crown also recognises that in some cases Crown actions (directly or indirectly) contributed to or exacerbated those tensions between claimant communities, and that this may have contributed to the length of those hearings:

158.1 Direct Crown actions exacerbated the degree of tension within claimant communities in some cases (for example as seen in submission on Issue 6, the Crown did not rescind a survey authorisation made in error notwithstanding the District Officer having advised that the survey should not proceed and would heighten pre-existing tensions, and a statutory provision that should have accorded weight to the District Officer's advice).[98]

159. The Native land laws created an adversarial forum for the investigation of customary rights, which had the potential to create divisions among closely related rangatira, hapū and iwi. Taihape customary tenure was complex and facilitated multiple forms of land-use through shared relationships with the land. The Native land laws required those rights to be fixed within a surveyed boundary and did not necessarily include all those with customary interests in the land.

160. Given the large size of many of the Taihape blocks and the large number of potential rights-holders, it is unsurprising that many Taihape hearings involved considerable disagreement as Taihape Māori attempted to reconfigure long-held customary interests into a new, individualised form of title.

161. Mr Armstrong articulated the indirect effect of the Native land laws on exacerbating tension and costs as a matter of relative incentive:[99]

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98 See Crown closing submissions on Issue 6.

99 Wai 2180, #4.1.8, at 455.

> The point that I'm trying to make is that there's no incentive for people to participate in that process [out of court settlement or voluntary agreement] to make compromises when the Court is there, where the Court is giving you an opportunity to abandon that process and try your luck in the Court.

162. An example presented by claimants and technical witnesses of this is the Awarua title hearing in 1886. Mr Stirling argues that the "extended and expensive" hearings were caused by a single 'dissentient' putting the majority view as to relative interests to the test. He considers the degree of cohesion otherwise apparent within the claimant community was such that – but for the Native land laws enabling a forum for the 'dissentient' to contest the matter – the relative interests could have been sorted through the operation of tikanga more easily (and more affordably). He, and other witnesses advocate for a model where Komiti were empowered to determine customary rights.

163. However, the degree of consensus posited by Mr Stirling does not appear to accord with the evidence which shows the 'dissentient' was not acting as an individual – they were a recognised voice for a hapū, and in fact, two of the five hapū involved were not in consensus with the other three.[100]

164. Ennor with Armstrong:[101]

> Q: That it would be quite incorrect to describe this as one individual or a person objecting to the arrangement and therefore forcing it into Court wouldn't it?
>
> A: It's a person who is representing a tribal interest.
>
> Q. Yes. And Ngāti Upokoiri are in the same situation aren't they?
>
> A. Yes, yes they objected too
>
> Q. So you've got two of the five relevant groups uncomfortable with the arrangement being put forward in this list, yes […]

165. Hīraka Te Rango described that process to the Rees Carroll Commission as follows:[102]

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100 Wai 2180, #A49, at 56. See also Wai 2180, #4.1.8, at 114 (R Steedman) and at 451 (Armstrong). Ngāti Tama and Ngāti Ūpokoiri.

See Wai 2180, #4.1.8, at 117–118 discussion between Mr R Steedman and Judge Harvey – the point is made that it might not be as simple as "If there were no court then the chiefs could have made the decisions themselves." Judge Harvey comments that historically where the Court did not sit "the result was probably more catastrophic" – and seeks Mr Steedman's confirmation of the proposal that "It's all about processes that facilitated or enabled land loss, be it sales, be it Court, be it confiscation."

101 Wai 2180, #4.1.8, at 452.

> We, the hapus that owned that land, applied and endeavoured to obtain permission to settle the inter-hapu boundaries among ourselves. The Court consented to our going outside the Court and settling this business among ourselves. Three hapus satisfactorily arranged the boundaries between themselves, but the other two hapus, which did not join in the agreement, asked the Court to deal with the subdivisions. It went before the Court, and in consequence of the Court's investigation the contention of one of the objecting hapus fell to the ground. Then, if that dissentient hapu had listened to what the others had arranged, there would not have been the expense of fighting the matter before the Court. The case of the other dissentient hapu was then proceeded with, and the case of this particular hapu was before the Court for eight months.

166. Hīraka notes that the court might have limited costs if it had limited the scope of its investigation to the parts of the block that were in dispute.[103] It is unclear why the Court did not confine it's investigation to the disputed portion only – or why a voluntary agreement was not proposed formally or recognised for the remainder of the block.

167. The Court actively supported attempts to reach out of court agreements between the claimants through granting multiple adjournments at their request – but agreements were not able to be reached.

Did the impact vary from whānau to whānau?

168. See Crown submissions on Issue 6 for specific impacts on the Winiata Te Whaaro whānau.

Issue 3.12: In what ways, if at all, did the Crown seek to mitigate these costs?

169. As above, with the survey costs, there is evidence of the Crown reducing costs of survey and remitting interest on costs.

170. With the direct hearing related costs, there is some suggestion within the evidence that there was some assistance with food and travel costs. More generally, a question arises whether the Crown should have advanced funds to claimants or not (or otherwise grant funds to meet claimant costs):

    170.1 Pre-title advances had once operated to assist with costs related to hearings. The Crown discontinued that policy in the mid 1870s.

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102 Wai 2180, #A43, at 357.

103 Hīraka continuing: If the Court, however, had listened to the suggestion thrown out [ie proposed] by the Native Committee – and that was to confine the investigation to such portion of the block as was in dispute – the entire hearing could have been shortened considerably. But the investigation was extended to the whole block, and hence it was that it occupied such a long time. In fact, it is not over yet, and the Court has adjourned.

170.2 Multiple requests were made for advances by those participating in hearings after that time. As set out in Crown closing submissions on Issue 4 in the mid 1870s the Crown was largely consistent from that time in declining all requests for advances.

170.3 In the case of Awarua in particular, as acknowledged in claimant generic submissions, Awarua owners were aware of the issue, and specifically urged that no payments be made prior to partition "lest this should be a bad and troublesome sale like Waimarino". The Crown did not make any payments prior to partition.[104]

170.4 That view was not always shared by all claimants: some of those participating made multiple requests for advances given lengthy time spent in Marton – away from home and without their normal systems of support, and given their lands were under monopoly conditions (and thus restricted in the capital that could be raised against it). Though consistent with Crown policy and with the expressed concerns of Awarua owners, the absence of financial support (advances) was sorely felt by these people, and they advised the Crown of this.

171. Advance payments are not inherently unreasonable or a breach of te Tiriti/the Treaty. They could have been requested by customary owners and/or paid in a manner which did not cause prejudice or otherwise.

Issue 3.13: To what extent were these costs fair and reasonable?

172. The Crown acknowledges that Native Land Court processes, and in particular the need for surveys, imposed costs on Taihape Māori. Further, it is accepted that debts were incurred as the result of court-related costs and, at times, these debts appear to be satisfied by the alienation of land. The extent to which these costs contributed to the alienation of land is discussed further below.

173. The Crown accepts that there was a range of costs associated with the Native Land Court processes. In general terms, the Crown recognises and acknowledges that between 1875 and 1895 Taihape Māori were frequently

104 Wai 2180, #3.3.76(h), at [12]–[13].

required to attend hearings at venues far from their settlements. This imposed a considerable burden on Taihape Māori who sometimes had to attend long hearings with insufficient food supplies and inadequate accommodation, and made it difficult for some Taihape Māori with interests in lands to attend.

Health and well-being

174. The Crown recognises that participation in lengthy hearings, at remote locations, with limited support also contributed to costs to Taihape Māori in terms of health and well-being.

175. The evidence shows that during Native Land Court hearings, Taihape Māori lived in substandard conditions and that sickness and deaths occurred. The telegram of Winiata Te Whaaro and Eruiti Arani set out above at [128] is sobering and deeply concerning evidence – and, as stated above, Counsel for the Crown hopes to have fuller knowledge of the matter prior to the hearing.[105]

Court fees

176. As a matter of principle, the Crown considers the imposition of fees for Native Land Court cases to be appropriate. Nevertheless, the Crown accepts that fees could quickly mount and result in substantial debts that would have to be paid, and that this might eventually result in the loss of land. In appeal processes, the failure to pay costs could also result in the loss of ability to pursue an appeal.

177. Court fees were apportioned according to actual participation in the process, which is a fair method of apportionment. There is no indication in the evidence available on the record of inquiry that this approach resulted in unfairness between competing claimants, applicants and counter-claimants.

178. Court fees were not determined by the size of the block. Rather, they depended on the number of days of hearing, the number of witnesses called, and other such factors many of which were not under the control of the Court. In many cases, the title to a small block was able to be settled

105 There has been evidence in the reports of sickness and ill health but Counsel for the Crown has not registered such compelling evidence of such serious events occurring – and seeks the tolerance of the

quickly and therefore the costs of going to Court were low. Often with larger blocks there was greater potential for dissent. However, where there was significant contention between competing parties leading to lengthy hearings the costs of hearing could mount significantly.

Survey costs

179. The issue of survey costs is complex and difficult. However, a basic principle to apply in determining who should have borne survey costs is that whoever accrues benefit should contribute costs. The benefits of a secure legal title to those desiring to trade in land is clear, and the cost is immediately recoverable through standard economic transactions (ie, it is factored into the purchase price or rental agreement). Those that desire their rights identified but not to trade, retain the benefit of holding secure and certain titles. It is not unreasonable that they should have contributed to the costs of survey.

180. The Crown submits that survey boundaries were necessary in order to participate in the new economy. In the Turanga inquiry, the Tribunal found that "Maori clearly acknowledged that certain boundaries and precise ownership were both essential for proper engagement in the new pastoral economy".

181. That said, the Crown accepts it could have taken further steps to ease the burden of survey costs. Survey costs were a burden for some groups because of the low value of much of the land, excessive partitioning and because some Taihape Māori were not fully immersed in the cash economy.

182. In the Crown's view, there would have been significant practical difficulties in separating out, on the one hand, those who simply wanted to have their rights identified and secured but did not wish to sell, lease or otherwise deal with their land, from those, on the other hand, who wished to take up new economic opportunities by selling, leasing or otherwise dealing with their land in some way.

183. The Crown acknowledges that survey costs often involved significant sums. However, care needs to be taken in assessing the extent to which any

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Tribunal and claimants if that evidence has been presented but the gravity did not fully register with

particular survey costs might be said to be excessive. Survey costs could vary significantly depending on the size and terrain of the land in question.

184. For many Taihape Māori who were subject to survey costs and charges, the effect on them was the alienation of a portion of their land, or their shares in land, to meet the expenses for definition of the land they retained. This occurred either immediately after partition of their interests, or after a number of years during which their land was subject to survey liens.

185. By way of example, Fisher and Stirling allege that the Crown took land in the Ōwhāoko block in lieu of unpaid survey liens, they describe these events as follows:[106]

185.1 In 1899 Ihakara Te Raro et al petitioned the Govt about the survey costs of Ōwhāoko and asked for relief. In August 1899, the survey liens on Ōwhāoko were reduced from 1,683.2.6 to 1,080, a substantial reduction of 603.2.6. Following the reduction, the liens on the five Ōwhāoko subdivisions were paid in September 1899.

185.2 But further subdivisions resulted in more surveying costs. In 1906, a number of pieces of land were vested in the Surveyor-General in payment of survey costs.[107]

185.3 These then needed to be subdivided out, which created more surveying costs, and new liens were imposed. Other pieces were mortgaged to pay off survey costs. Some survey costs were still owed by block owners to the Surveyor General some 20-30 years later.[108]

186. The Crown accepts that 3916 acres were transferred in 1906 to the Crown in lieu of survey costs. The total area of the Ōwhāoko blocks is approximately 164,000. Thus, on the evidence available, about 2.3% of that area was taken for survey costs. There has been no allegation that the

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Counsel at that time.

106 Wai 2180, #A06, at 69–73.

107 Wai 2180, #A06, at 72.

108 Wai 2180, #A06, at 73–74. Fisher/Stirling suggest this might not be the full picture (at 74), but there is no evidence of other such vestings up to 1931 (at 75). See map at 124, which shows this land taken in lieu of survey (1906 vestings).

Crown was unduly discriminating in the land it took (ie that it took only the best land). In 1899, the Crown also substantially reduced the costs of the initial survey of 1877. In the 1950s there was some remission of interest on unpaid survey costs. The Crown submits that the totality of these events do not, therefore, demonstrate any bad faith or lack of active protection in respect of survey costs/liens on the Ōwhāoko block.

187. The Crown says that the evidence does not provide sufficient information to quantify the extent to which court-related costs contributed to the alienation of Taihape lands. However, the Crown acknowledges that overall the quantity of land alienated for the payment of survey costs, supplemented by court-related costs and fees as well as interest, was considerable.

Further issue: Was the Court independent and free from actual and apparent bias

188. Whilst this issue is not explicitly stated within the TSOI, it has become an issue throughout the inquiry and is thus addressed here. This section focusses on the issue of actual or apparent bias and in particular allegations concerning the independence of the Native Land Court from the Crown in the period between its establishment to 1900.

Scope of this section – what is and what is not being discussed

189. Two issues are not being addressed in this section as they are addressed elsewhere:

189.1 Allegations of corruption or collusion; and[109]

189.2 The specific circumstances of Ōwhāoko and Ōruamatua-Kaimanawa are addressed in their own section of these submissions (the Crown considers that situation to be an exception rather than proof of a 'norm').

190. What is being addressed in this section are specific claims that have been advanced that the 19th century Native Land Court was not independent of

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109 Various allegations of corruption or collusion have also been raised but are not discussed in this section. These have been premised primarily on the Ōwhāoko Ōruamantua-Kaimanawa affair, and on Mangaohāne dealings. Such allegations are serious matters and are addressed in the detailed Crown submissions on each of those block histories (See Ōwhāoko Ōruamatua-Kaimanawa case study in these submissions; Mangaohāne in Issue 6 submissions).

the Crown and the examples those allegations refer to. For example it is alleged:

190.1 "The influence and outright control which the Crown had over the Land Court process is illustrated in regular correspondence between the Native Department and the Court in the period and control over when applications were published in the gazette" (referencing in particular the actions of Premier Seddon after his visit to Moawhango in 1894);[110]

190.2 The Court process and timing of hearings were not independently controlled by the Court itself. Stirling points out that the Court was "instructed" in relation to Paraekaretu, Awarua and other hearings, to delay matters when the government advised the Court that it needed to move to other areas to address matters that were of great importance to it. There were allegedly "political repercussions" in that "[w]hen the court did not do the government's bidding it soon found itself brought to heel (as noted in relation to the Crown's Awarua partition hearings in 1894)."[111]

191. These submissions presume the claims (set out immediately above) about the Crown's relationship to the Native Land Court:

191.1 concern procedural matters, and do not allege Crown interference with substantive judicial decision making as to the relative merits of any case before the Court. The Crown's view is that then, as now, there is a bright line on this matter – the Crown has never assumed any control of the Native Land Court judicially, the Court was independent in this regard – and does not understand the claimants to be alleging otherwise.

191.2 relate to the 19th century during the first decades of the Court's operation. The argument presented in discussions during this

110 Wai 2180, #3.3.76(h), at [19].

111 Wai 2180, #3.3.76(d)(ii), at 1–2.

inquiry has been along the lines that the Court in the 19th century operated in a different manner than it subsequently came to do.

191.3 the alleged "political repercussions" referred to by claimant counsel are those set out at by claimant counsel in their submissions at #3.3.76(d)(ii) which are replicated here for ease of reference:

> a. a certain Judge, the recently appointed and locally active Judge Butler;
>
> b. should sit to deal with a particular application; Awarua,
>
> c. at a certain location: Moawhango;
>
> d. at a certain time as soon as possible, and ultimately starting on the 28th of March 1894.

192. Before turning to the substantive issues, the Crown notes that the list provided of alleged "political repercussions" seem to be matters over which it is alleged the Crown attempted to influence. They are not political repercussions in the normal use of that phrase – which would ordinarily connote some sort of adverse consequence being brought to bear against a person alleged to have transgressed.

The independence of the institution

193. The Crown (as the executive) is responsible in Tiriti/Treaty terms for the Native land policy and law it promoted under which the Native Land Court operated. The implication of the claims described above is that the Crown also has direct responsibility for the conduct of the court itself, that is, the Court was not independent of the Crown and was actually an agent of the Crown. The Crown does not accept that implication.

194. Whilst there is a bright line in terms of substantive judicial independence, the claims here are not alleging that any Crown actor attempted to direct a judicial officer to find for one party over another, the above questions arise in relation to administrative and procedural decisions and operations.

195. The Crown's view is that administrative and procedural decision-making was exercised by the Court itself throughout, but that is that the administrative functions of the Court were carried out variously by the

Chief Judge or officials (addressed further below). That is, the Judges made the decisions as to timing and location of proceedings (and multiple other procedural matters) but the administrative actions to implement those decisions were undertaken initially by the Chief Judge or a clerk of the Court, and between 1882 and 1894 the Native Department.

196. Professor Boast stated, in his Crown purchasing analysis: [112]

> Although the Māori Land Court's status as a separate and independent judicial body is now secure, for many years the Court was closely linked with the Native Department and with the Government administration generally. […] The Court has sometimes been accused as being a subservient instrument of the Crown. But this is unfair. Some of the judges had a strong sense of judicial independence.

197. Professor Boast, in his Native Land Court analysis five years later stated: [113]

> "Ordinarily, the Native Land Court was an independent judicial body and officials and politicians did not meddle with it".

198. It is necessary to assess matters on a case by case basis.

The law

199. It is important to appreciate that many of the operational decisions of the Native Land Court, such as giving notice of and adjourning hearings, were decisions the judges of the Court made and were not decisions of the Crown.

200. For example, under the Native Land Court Act 1880, the Chief Judge was to give notice of an application for investigation of title "as appears to him best calculated to give proper publicity to the same". That, or a subsequent notice, was to state when and where the Court would sit to hear the application. The presiding judge had a wide discretion to adjourn proceedings as he saw fit. Similar provisions were enacted in the Native Land Court Act 1886.

201. The Native Land Acts Amendment Act 1882 states:

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112 *Māori Land Law* (second edition), (Wellington: LexusNexus 2003), at 82.

113 Professor Boast in his study of the Native Land Court, Buying the Land, Selling the Land, (VUP, 2008, Wellington), at 101.

> And whereas the business of the Court would be facilitated by the establishment of local registries and offices, be it further enacted as follows:
>
> - It shall be lawful for the Governor in Council, for the purposes of the said Native Land Court Act, from time to time to divide the colony into Registrars' districts, and to annul, alter, vary such divisions.
>
> For each district the Governor may appoint a Registrar, and such other officers as may be necessary.
>
> The records, maps, and documents relating to land within each district shall be deposited, and the official or administrative work thereof carried on, at such place in each district as the Governor shall from time to time appoint.
>
> If a block of land extends into more than one district, the application may be recorded, and the papers deposited, and the work about the same conducted in either of the districts, as may be decided by the Chief Judge, if any question arises thereon.

202. However, from 1894 to 1909, it appears that the Minister of Native Affairs was responsible for appointing sittings: section 16 of the Native Land Court Act 1894 provided that the Court "shall sit at such times and places as the Minister by notice ... shall appoint". Once a sitting had started, the presiding judge, or, in the absence of a judge, the clerk of the Court, could adjourn proceedings. Under section 13 of the Native Land Laws Amendment Act 1896, the Chief Judge could at any time adjourn a sitting if it had not yet started, and any person authorised by the Chief Judge or by the presiding judge could open and adjourn any sitting or any adjourned sitting. The Crown is not aware of evidence before the Tribunal as to how this particular provision was applied in practice in the inquiry district.

Crown actions

203. A secondary question is whether or how the Crown sought to direct, interfere with, or influence those procedural decisions.

204. The claimants appear to draw the conclusion that the regularity of correspondence, and the responsibility for publishing in the *Gazette* indicates that the Court and its officers may have been more closely integrated within the workings of the colonial government's land purchasing bureaucracy than was appropriate for a supposedly independent judicial body.

205. The Crown submits that such a conclusion is not warranted based simply on the amount of correspondence - in addition to their judicial functions, Judges had administrative duties that properly require engagement with officials. It is the character of the correspondence that is of importance here. Even if the inclusion of the judges in various correspondence was inconsistent with today's standards (which is not accepted), the evidence does not suggest that the Judges were involved in any particular impropriety. Nor does the carrying out of purely administrative tasks by public servants acting (for those tasks) under the direction of a judicial officer (ie publishing notices) constitute any propriety concerns. It is unclear without further research whether the Native Department provided the secretariat for the Court, in the same way that Ministry of Justice Department of Courts provides secretariat for judges today.

206. The real issue is whether the Crown attempted to direct, disrupt, control or influence the judicial decision making as to procedural matters, or administrative matters; and if so, did that have any prejudicial effect.

The evidence

207. Evidence within this inquiry relevant to this, and the Crown's view of that evidence, is as follows:

207.1 Adjournment of the Paraekaretū hearing was alleged by claimants to be due to the need for the Court to sit in other locations to hear "several cases of great importance to the government" and caused inconvenience to claimants.[114] This claim is referenced to a newspaper report – that report does not provide the necessary evidence as to why the adjournment occurred or the Crown's role in it happening. No other primary evidence is provided to support these allegations.

207.2 Native Ministers and Premiers Stout and Ballance's correspondence on timing, progress, and priority of the Mangaohāne case is said to be inappropriate.[115] The

114 Wai 2180, #3.3.76(d)(ii); #A43, at 143.

115 Wai 2180, #A39, at 78–83. See also Crown closing submissions Issue 6 under "Crown correspondence with the Court".

correspondence allegedly gives a flavour of direction by the Crown (or at least the Crown considering it had the ability to direct the court on timing of hearings). However, the Court did not take direction from the Crown. The Court did not do what the Crown requested of it and no adverse consequences followed them exercising their independence. This correspondence, whilst it would not occur today between the judiciary and the executive, is limited to procedural matters; does not represent the Crown exercising undue influence over the court or preventing the court from making its own decisions; and does not advocate for the interests of any particular party.

207.3 In relation to Premier Seddon's position on a suitable Judge to conduct the Awarua partition proceedings.[116] The evidence is that Seddon asked Hīraka Te Rango "where it would be most convenient for the court to sit." Hīraka responded Moawhango (where a hearing into Ōruamatua-Kaimanawa was underway). Seddon responded that as Judge Butler was the presiding officer for the Moawhango hearing he "could not act" due to conflict arising from Butler's previous role as Crown purchasing officer for Awarua.[117] The claim that Seddon advocated for a particular Judge should hear Awarua partition hearing is simply not made out. The Ōruamatua-Kaimanawa hearing at Moawhango had been planned and announced by Judge Butler in June of the preceding year, in response to Ngāti Whiti and Ngāti Tamakōpiri long-expressed desire for hearings to be held there. Seddon's part in this shows him attempting to meet Hīraka's preferred location, not any particular Judge – and appropriately advising him that was not possible due to the conflict of interest that would be raised.

207.4 With reference to statements by Premier Seddon on timing and location of Awarua partition hearings – and further representations on Judges:[118] the technical evidence confirms Seddon made

116 Wai 2180, #3.3.76(d)(ii); #A43, at 143, 487–491.

117 Wai 2180, #A43, at 487–488.

118 Wai 2180, #3.3.76(d)(ii); #A43, at 143, 487–491.

> repeated requests for the location and timing of the proceeding to be in accordance with the preferences he'd heard in person from Moawhango rangatira. The Chief Judge repeatedly rejected those requests given that the "court had already decided to sit at Marton". Premier Seddon took further steps to achieve the location that had been requested by "the natives". Seddon identified another alternate hearing and availability of a Judge and officials minuted the new hearing and location. The Chief Judge was not happy, but did not reverse Mr Seddon's intervention. The technical evidence acknowledges that "[i]n this case, the government's interference in the court seemed to be to the advantage of Mokai Patea Māori." (in that a hearing planned for Marton was relocated to Moawhango and Hastings (one hearing day each)).[119]

Crown conclusions

208. The specific allegations regarding Judge Butler are not made out – Seddon acted appropriately and in good faith. The above events do, however, convey a pattern of the Crown acting as if it could direct the Court on procedural matters, and the Court protecting its independence by not going along with those requests. There is one instance where the matter is put to the test: Premier Seddon, in the interests of meeting the preferences of Moawhango rangatira overrides the Chief Judge's attempts to preserve his independence. The Crown accepts that this constitutes an overreach on the part of Seddon, regardless of which parties it was done on behalf of.

209. This analysis is consistent with Professor Boast's view set out above (that the Court was ordinarily independent) and demonstrates the importance of assessing each case where serious allegations are being made. In Tiriti/Treaty terms, the one instance of Crown overreach identified is directly motivated by Seddon acting in good faith with Taihape Māori and did not cause prejudice to them.

210. For completeness, caution must be exercised in drawing conclusions as to any pre-determination on the part of judges based primarily on their roles

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119 Wai 2180, #A43, at 489–490.

prior to their appointment to the Court. In the 19th century, the same people often performed a number of different tasks and performed the roles according to requirements of each one. At the time, such appointments were not considered inappropriate given the relatively small pool of skilled and qualified people from which the appointments could be made.

211. For example, the evidence does not appear to disclose that the Judge Butler's previous role as a Land Purchase officer led to him finding against the interests of Taihape Māori or otherwise failing to fulfil his judicial role appropriately. The Crown notes Judge Butler's report on the Mangaohāne s 13/1889 application finds against Winiata Te Whaaro but it is also noted that he concluded that had the evidence before the Court in 1893 been put to the Court in 1884 hearing a more favourable outcome may have been reached. That is a significant finding and was influential for the approach taken by the Chief Judge subsequently. It is submitted, however, that the Tribunal should be cautious against drawing any general inferences of bias or prejudice from this limited example.

212. While occasional instances may be found that cause consternation when viewed against today's practice and standards, caution should be exercised against converting them into generalisations or against applying today's standards to the past. It is to be noted that the notion of "apparent bias" has been developed in administrative law in the late 20th century and was not a legal standard that applied in the 19th century.

IMPACT OF THE NATIVE LAND COURT PROCESS

Issue 3.14: What impact did the Native Land Court have on Taihape Māori in respect of:

(a) Decision-making structure(s), mana whenua and tino rangatiratanga?

(b) Patterns of land retention, including the creation of uneconomic and/or landlocked blocks?

(c) Land alienation?

(d) Financial prosperity and long-term economic prospects?

(e) Impact of debts arising from Native Land Court processes on central block sales

213. The Crown has made a number of general and specific concessions and acknowledgements in these submissions concerning the impacts of the Native land laws. These are set out at the beginning of these submissions, but should be read as the substantive Crown response to the questions asked by the Tribunal concerning the impacts of the Native land laws in the inquiry district.

214. In recognising the impacts of the Native land laws, as opposed to the Native Land Court – as Issue 3.14 is phrased, the Crown is respecting the principle of the separation of powers and the jurisdiction of the Tribunal – which provides for scrutiny of the Crown's actions, omissions, and policies.[120]

215. The Native Land Court was established to investigate Māori customary title and to convert it into individualised titles derived from the Crown and recognisable in the colonial legal system. This involved tenure reform, and was meant to facilitate the involvement of Māori and their land in the new colonial economy. In 1862 (as part of establishing the Court) the Crown set aside its pre-emptive right over land whose titles had been ascertained by the Court in order to allow private dealings, and at the same time stopped buying Māori land. Crown purchasing resumed soon after, and preemption was reintroduced in various forms – most relevantly for Taihape through NIMTR associated declarations from 1884. This tenure reform was consistent with the principles of te Tiriti/the Treaty, but the Crown accepts that many issues arose as a result of the reforms and rules governing land

120 See section above assessing the independence of the court from the Crown in the 19th century.

dealings, including its impact on the form and function of existing social structures.

216. The two general concessions of Tiriti/Treaty breach focus on issues of central importance to Taihape Māori in the 19th century – the impacts of the Native land laws on the consistent and repeated attempts of Taihape rangatira to assert collective strategy and control over their lands and their development.

216.1 The Crown's general concessions on the Native land laws go directly to the impact of the Native land laws on these aspirations – specifically the Crown's failure to protect tribal structures in Taihape, or to provide an effective form of collective title. The general concessions acknowledge the undermining of tribal structures was contributed to significantly by the individualisation of Māori land tenure provided for by the Native land laws and increased susceptibility to fragmentation, alienation and partition. While the Crown recognises that it has made similar concessions in many other tribunals, this should not obscure their significance. The Crown submits that these concessions go directly to some of the most central concerns that have been advanced in the evidence and claimant submissions.

216.2 The Crown also acknowledges that the requirement of Taihape Māori to defend their interests in the Native Land Court significantly damaged relationships between Taihape Māori and their neighbours, and amongst the iwi, hapū and whānau of Taihape, the effects of which are still felt today.

217. The more specific acknowledgements also go directly to the issues raised by the Tribunal in this section (they are not set out here purely in order to reduce duplication).

218. The Crown recognises that the issues arising from the Native land laws are inextricable from many of the other aspects of what has been described in an earlier hearing as the "fabric of experience" of Taihape Māori. Whilst the acknowledgements in these submissions are specific to the Crown's

actions, omissions and policies under the Native land laws, those matters are intimately connected other Crown actions in this district – primarily Crown purchasing. They are also addressed throughout the body of the Crown's closing submissions. Submissions have already been filed that address:

218.1 political landscapes, aspirations, Crown engagement with those ideas;

218.2 land retention, including the patterns of retention and alienation and a detailed investigation into landlocking;

218.3 Crown purchasing – with a strong focus on Awarua and Motukawa and monopoly powers, the Crown's responses to the aspirations of Taihape rangatira most cohesively expressed through their 1892 letter;

218.4 economic impacts and prospects – including the Crown's 19th century focus on infrastructure development for the benefit of regions and the nation as a whole (and the critical role the railway played in this district);

218.5 the evidence on, and impacts of, debt.

219. The following further submissions therefore should be read as complementing the above submissions rather than as comprehensive responses to Issues 3.14 – 3.21.

220. The Crown submits that the specific contribution of the Native land laws to these issues relative to other contributory factors need not be assessed in detail – there are unavoidable difficulties in drawing direct causal links, particularly over large timescales. Nor in the Crown's submission is it a necessary exercise – accepting that Crown actions, omissions or policies have contributed to the issues, and assessing those Crown actions against standards of te Tiriti/the Treaty is sufficient.

Effects on decision making structures/tribal structures

221. Claimant generic closings emphasise that the land laws incentivised or forced recourse to the courts "where an individual did not agree". The

Crown acknowledges that individualisation increased susceptibility to alienation, fragmentation, partitioning, and that Taihape Māori had no choice but to participate in this system in order to protect their lands from the claims of others. However, there does not appear to be evidence in this inquiry district where Court processes were in fact triggered solely by an individual. The primary evidence relied on for this claim is the exceptionally long 1890-1891 Awarua subdivision proceeding. However, as has been addressed elsewhere, attributing that to a "sole dissentient" is not correct – the 'individual' was in fact representing a hapū interests, and two of five hapū did not agree with the consensus arrived at by the other three hapū.

222. Judge Ward was questioned by the Rees Carroll Commission as to the approach towards encouraging out of court settlements (Hīraka Te Rango's evidence to the Commission on the same matters are also set out above). Judge Ward stated:[121]

> As soon as that case [Awarua subdivision] opened I suggested that they should see if all the parties could arrange matters themselves. Of course there were a great many different parties at first, but they were narrowed down to nine or ten. At first there were nearly fifteen. The leading chiefs said, "We think we can arrange it, and we ask the Court to give us time." We gave them time, but they did not arrange matters. Two or three separate times they came and asked, "Give us till next day," and so on, "to arrange matters, and then we shall be ready." But they were not arranged, for reasons I would hardly like to mention now. We had to go on, and, metaphorically speaking, plough up almost every bit of the land; and it has taken eight months to get through that block, and we have yet to finish the Hawke's Bay portion.

223. There is an apparent contradiction regarding the claimed cohesion of the claimant community and the inability to resolve matters out of court and the role of the land laws in incentivising individual action. Mr Armstrong indicated that while the expense and disruption of Native Land Court hearings probably meant that Taihape Māori would have preferred to settle matters out-of-court (and Hīraka and others made it clear that that was in fact the case), the ability of 'individual' claimants to "take the gamble", coupled with the very high threshold for reaching voluntary agreements once in Court meant that out-of-court agreements not straightforward to

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121 Wai 2180, #A43, at 362. Note – some of that delay was caused by a survey error but that only accounts for a small portion of the time taken for this proceeding.

reach (and that drawn-out hearings should therefore not be viewed as evidence of a lack of tribal cohesion):[122]

224. Mr Armstrong and Mr Lomax's evidence described the Native Land Court operating as a disincentive to resolving matters through more traditional means:[123]

> To put it another way, the existence of the Native Land Court, clothed with the sole legal authority to determine land titles, was a major disincentive to unity and cooperation. As Neville Lomax explains, the Court:
>
> > 'dealt quite a severe blow to [iwi] cohesion and organisation. It really set whanau and hapu against each other and really destroyed the tribal cohesion of people who had been together for generations... these processes made it difficult for them to stick together'.

225. The Crown acknowledges Mr Lomax's view, which is consistent with the concession made by the Crown on its failure to protect tribal structures.

226. Mr Stirling records that Judge Ward was asked what the result would have been had the owners of Awarua "been compelled to take the advice of the district officer, and to bring in a report of some sort or another before the case went on?"[124] Judge Ward first clarified that this would also mean doing away with "Native agents" and then responded: "If that land had been left entirely to the Maori they ought to settle it, and it is to be regretted that they did not settle it." He explained that in the Awarua subdivision: "You see, one party standing out spoils everything; and one party did stand out in this case." Hīraka Te Rango had also identified this risk to the Commission. They both ventured views on possible improvements: committees being empowered as decision makers, and using costs orders as a disincentive to "recalcitrants". It is unsure how this later suggestion would have been viewed in terms of access to justice. The Whanganui Hot Tub ventured a number of alternatives to the Native Land Court that might have been reasonably available at the time – the Crown does not wish to relitigate that further other than noting that any assertions that are premised on

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122 Wai 2180, #4.1.8, at 456.

123 Wai 2180, #A49, at 5.

124 Wai 2180, #A43, at 363–364.

speculation as to what might have been should be transparently caveated as that.

227. The impacts of land determinations (fixing of exclusive property rights), meant that claimants and counter-claimants alike must have felt enormous pressure to arrange, shape and possibly manipulate their evidence to support their arguments, crafting them to fit the way in which the Court was known to interpret and weigh different types of evidence. The incentive for this to occur is one form of impact of the Native land laws on tribal structures:

227.1 Submissions on this as it relates to Mangaohāne are contained in Issue 6;

227.2 Claimants argue that Ngāi Te Ohuake was one of the active hapū or iwi lines but "disappeared" from the historical record after not being recognised as a successful line in either the 1884/85 Mangaohāne title or Awarua 1891 subdivision.[125] The Crown welcomes the Tribunal's guidance on this allegation in terms of customary landscapes (acknowledging it has contemporary ramifications).

228. While it would be naive not to expect that the parties would present their histories in the way that would best suit their case, it would also be naive to assume that experienced judges and assessors would not be alert to such techniques given the aims of the parties. The Crown is unsure as to whether traditional oral histories were also presented in particular ways in other fora in order to achieve certain purposes ie whether this practice was caused by, or unique to, Native Land Court processes.

229. The Crown recognises that the English-law tenurial system adopted in colonial New Zealand did not easily accommodate the sophistication of communal ownership and multiple levels of rights that existed in Māori customary tenure. However, customary tenure did not offer the degree of security and certainty that was required for land transactions in the new economy. The forms of tenure prior to the Native Land Court, including

125 Wai 2180, #A49, at 56.

those under custom, were capable of attracting some finance but – as addressed elsewhere – incurred higher terms to reflect the level of risk/security involved. Hīraka Te Rango's 1895 letter also spells out some of the limitations with pre-title tenurial systems that they wished to address through gaining secure titles. A modified form of customary tenure might well have become quite capable of doing so – but that cannot be assessed directly given that it is not what happened.

Alienation

230. The Crown accepts that an award of title under the Native land legislation enabled the individuals who were recognised as owners to alienate their land interests by lease or sale. However, during the period when Crown pre-emption applied, the only effective alienation possible was by sale to the Crown.

231. The Crown accepts that, in the long term, the implementation of the Native land legislation and the operation of the Native Land Court undermined the exercise of traditional leadership and community decision-making in respect of land. It is difficult, however, to gauge the extent to which the impact can be attributed to a range of other factors as well.

232. The Native land legislation and the Native Land Court played a key role in enabling the alienation of Māori land in the inquiry district. The Crown's policy of actively acquiring Māori land was expressed through a combination of purchase policies and practices and Native land laws, which played out in the forum of the Native Land Court.

233. Claimant counsel have focussed on the "removal of the power of choice from communities and their leaders" leading to a loss of control of the speed and extent of alienation. Claimant counsel submit that the extent of alienation must necessarily mean that something other than the choices of Māori was at play.

234. The Crown accepts that the 19th century land laws can fairly be criticised for failing to provide for more effective corporate/communal governance mechanisms. Although there was provision from 1886 for owners to elect a block committee to determine whether or not to sell or lease land, and the

incorporation model was available from 1894 (although not for land subject to Crown interests), the Crown accepts that the individualisation of Māori land tenure provided for by the Native land laws made the lands of the Taihape iwi and hapū more susceptible to fragmentation, alienation and partition, and that this contributed to the undermining of tribal structures in the district. The Crown concedes that its failure to protect these tribal structures was a breach of the Treaty of Waitangi and its principles.

e. Impact of debts arising from Native Land Court processes on central block sales

235. The central aspect report states costs from prolonged Court sittings in distant and costly venues and survey costs (in particular for subsequent partitioning for Crown purchases) "forced some leading rangatira into bankruptcy and encouraged cheap land sales to the Crown."[126]

236. This oversimplifies matters. The Crown accepts that debts arising from Awarua titling and partitioning processes may have contributed to financial difficulties of some Taihape Māori, however, Hīraka himself did not attribute his bankruptcy to Native land law issues.

237. Mr Armstrong's evidence differed from that in the central aspect report.[127]

> Q. And at footnote 44 you state that in relation to the *Sub-District Block Study Central Aspect* that Stirling attributes these bankruptcies to costs associated with the Native Land Court. Your assessment is that does not seem to be a correct conclusion to reach. Your assessment is that it was clearly the dealings with Donnelly that were –
>
> A. Yes.
>
> Q. – the factor here.
>
> A. Yes. I haven't seen anything which enables me to attribute that bankruptcy to the Land Court.

238. Mr Stirling's own evidence is that the bankruptcies were not solely the result of Native Land Court costs but were (as Hīraka's own evidence states)

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126 Wai 2180, #A08, at 160.

127 Wai 2180, #A49, at 39 (fn 44). See also Wai 2180, #4.1.8, at 461 This exchange continued:

> A. I would say that Donnelly seemed to be a particularly difficult man to deal with and dealings with him always ended badly.
>
> Q. I suspect the Crown can't take responsibility for that.
>
> A. I'm sure you can.
>
> Q. I'm sure we can.
>
> A. Try harder.

primarily attributable to consequences of the long depression and the fall in wool prices – although the ability to raise credit off land not yet titled and under pre-emption measures contributed:[128]

> Q. Well you refer to the bankruptcy of Ihakara and Hiraka and the debts that had been incurred presumably in connection to their farming operations such as they were.
>
> A. Yes, well I think yes, they were the victims of that long depression in the 1880s so I mean the bankruptcy might not have been until 1891 92 but they were well in trouble before that. Others, yes survived and got into trouble later for different reasons but they very much he [Hiraka] very much said that was the result of the fallen prices.

Issue 15: To what extent, if any, were protective measures, such as restrictions on alienation, available to Taihape Māori landowners and customary interest holders, and what impact did these have? If there were legislative protections:

a. Were they effective in protecting the interests of Taihape Māori?

b. Were they intended to ensure retention of sufficient lands or customary interests for occupation, subsistence and development of Taihape Māori? Were those protections also cognisant of preserving land quality?

c. Was there an obligation on the Crown to ensure such protections were effective?

239. At a general level, the legislation governing restrictions was the Native Land Court Act 1886 Amendment Act 1888. Section 13 required the Court to ascertain, when making a title or partition order, if each owner had a sufficiency of inalienable land for his support. Where it found an owner did not, the Court was to declare inalienable so much land as was necessary for his or her support. Section 5 of the Native Land Frauds Protection Act 1881 Amendment Act 1888 (NLFPA 1888) prohibited dealings in Māori land until 40 days after ownership was ascertained.

240. Over time, however, the Crown accepts that the restrictions on alienation were reduced. For example:

240.1 Section 14 of the Native Land Purchases Act 1892 empowered the Governor, for the purpose of a sale to the Crown, to declare void any restriction on the alienation of Native land.

240.2 Section 12 of the Native Land Purchase and Acquisition Act 1893 enabled the owners of a majority of shares in a block, or if the

128 Wai 2180, #4.1.10, at 518.

number of shares was undetermined, the majority of owners in number, to sell to the Crown despite any restriction on alienation. Such a conveyance bound all owners, including infants and others under a disability.

240.3 Section 52 of the Native Land Court Act 1894 allowed for the removal of restrictions on alienation with the assent of one third of the owners in number, provided every owner had sufficient land left for his support.

241. However, Crown policy faced a dilemma: whether to treat Māori on the same basis as non-Māori and allow individuals to deal with their land as they wished or exercise a more protective role (or what balance to strike between these things). That dilemma continues to animate policy discussions for Māori land administration even today.

Protective measure for Mangaohane No.2 backfires

242. At a more specific level, a clause was inserted into the Native Land Court Certificates Confirmation Act 1893 expressly to protect and preserve access to the courts for Winiata te Whaaro. Section 7 states:

> No certificate under section four of this Act shall be issued in respect of the block called Mangaohane No. 2, or any part thereof, until the final determination of the several matters specified in a memorandum signed by the solicitors of the several parties, and filed in the office of the Native Land Court, at Wellington, on the eleventh day of September, one thousand eight hundred and ninety-three.

243. The memorandum included Winiata's right to take action under section 13 of the Native Land Courts Acts Amendment Act 1889 – a remedial measure available to correct errors made by the court. Both s 7 and s 13 were available as protective measures in Winiata's case. A somewhat tragic irony is that s 7 scuppered the settlement agreed between Studholme and Winiata in 1894/95. The clause prevented the Studholme's title being validated whilst proceedings were underway (its intended effect); but also prevented Winiata and the Studholmes agreeing to implementing the terms of their settlement (under which each would finalise title to a portion of Mangaohāne No. 2) whilst litigation was still underway (a possibly unintended effect). As parties to the litigation, the Donnelly's consent would thus have been required (to satisfy s 7) but was not forthcoming. The

statutory protective measure put in place by the government specifically to ensure access to the courts, prevented the settlement from being completed.

No alienation breaching statutory requirements

244. Mr Walzl records that 'in all the alienation files examined for this report, not one example was found where an alienation breached [the statutory requirements]'.[129] He records one occasion the Board blocked a sale by an individual Māori owner. Mr Walzl notes that the early 20th century legislative measures to ensure adequacy of remaining landholding were complied with. He concludes:[130]

> Therefore most of the requirements of the legislation were provable by fact gathered by testimony or documentary attestation. In all the alienation files examined for this report, not one example was found where an alienation breached these requirements. Neither was there an example where a lessee/purchaser tried to get one past the Board (eg a 50-year lease) and was caught by the Board. Instead, the file record indicates that lessees/purchasers knew the rules and therefore acted in accordance with them.

245. He notes some deficiencies in the quality of enquiry required to satisfy those measures however:

> There is an inherent problem with reliance on the "other lands" form as all that is recorded is a list of blocks and the acreage of interests held in each block by the lessor(s)/vendor(s). There is no record of how many other owners are in the blocks, how big the blocks are (if there is only a part interest held), the quality of land or even where the blocks are in relation to where the lessor(s)/vendor(s) live.

246. He confirms it cannot be assumed that these apparent methodological weaknesses translate into impact or effective landlessness for the lessor(s)/vendor(s) concerned in relation to any particular transaction.

d. Were there sufficient opportunities, policies and processes that allowed Taihape Māori to voice their concerns about potential fragmentation, partition and alienation of their lands?

247. The Crown did not establish any particular or separate avenues for Taihape Māori to express concerns about the effects of the Native Land Court's processes on tikanga or their lands. Nevertheless, there were several means by which they were able to express such concerns. These included the

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129 Wai 2180, #A46, at 176–177.

130 Wai 2180, #A46, at 176.

normal avenues by which citizens could lobby lawmakers and decision-makers including:

247.1 Petitions to the Governor or to Parliament.

247.2 Representations to and through Members of Parliament, including the Māori Members of Parliament.

247.3 Representations to the Premier, or to responsible Ministers and senior officials, particularly the Minister of Native Affairs and his officials.

248. There is a considerable amount of evidence of Taihape Māori using these avenues in order to express concerns about the Native Land Court's processes and the effects on tikanga. There is also a considerable amount of evidence of the Crown responding to such approaches. Some rangatira also established relationships with the local Crown officials or representatives (Ūtiku Pōtaka and Hīraka Te Rango appear to have done so).

Issue 16: Did the Crown from time to time monitor the sufficiency of land remaining for Taihape Māori? Did any remedial Crown action result?

249. The Crown acknowledges that it did not have a system in place to ensure that it did not purchase land that was needed by hapū and iwi of Taihape to maintain themselves. This was a failure of active protection and a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

250. The Crown has also acknowledged the effect of access restrictions on the high proportion of those lands that have been retained is relevant to assessments of sufficiency as follows: (See Issue 11 submissions)

> The Crown concedes that most of the land retained by Taihape Māori is landlocked. The lack of reasonable access to their lands has made it difficult for owners to exercise rights of ownership or maintain obligations as kaitiaki. The experience of Taihape Māori has been that their practical, economic and cultural connections to the important lands they have striven for decades to retain and to utilise have been significantly disrupted and for Taihape Māori, this has been akin to being landless. The Crown's failure to ensure Taihape Māori retained sufficient lands with reasonable access for their present and future needs breached te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

251. The 1907 Stout Ngata Commission, amongst other tasks, undertook a systemic review of lands retained by Māori. The Commission did not visit the inquiry district but identified a number of blocks as suitable for vesting or sale at that time. No Taihape lands were vested in the Land Board at that time. See Crown closing submissions on Issue 12 at [41]–[42].

252. See Crown closing submissions Issue 5 at [25]–[27], [47]–[49], [103]–[107] and [111] for assessment of evidence on sufficiency of lands retained.

Issue 17: How did Native Land Court practices related to succession, wills and intestacy affect, if at all, processes of partition, fragmentation and the alienation of Taihape Māori land?

253. As the Crown stated in the Whanganui inquiry in relation to succession, the Crown concurs generally with the following conclusion of the Tribunal in the Hauraki inquiry:

> The court-developed rules on intestate succession (essentially a division of the estates of both parents equally amongst all children, without any residence requirement) were a significant departure from custom and, along with increasing mobility of population, contributed to significantly to land interests being held by absentee owners. They also lead [sic] to the increasing fractionation of shares and titles once the Māori population started to increase (although the extent of this was hardly foreseeable in the 1860s, when the Māori population was declining). However, by the 1880s Māori themselves had become accustomed to the principles adopted; although the right of all children to succeed in equal shares to their parents' interests was not entirely customary, they tended to regard the right as a version of tikanga and resisted efforts by the Legislature to have succession conform more closely to English rules. Being possessed of an interest in the land of one's parents or grandparents become increasingly valuable as a mark of identity and belonging to a hapu, regardless of the economic worth of the interest. But with the increasing numbers on titles, the want of a legal mechanism for the named owners to act corporately was increasingly felt.

254. The Native Land Court only had jurisdiction over intestate estates in the 19th century.

255. The Native Land Acts transferred the authority to make succession decisions from chiefs and their communities to the Native Land Court. Section 45 of the Native Lands Court Act 1880 empowered the Native Land Court to ascertain who should succeed to Māori land "according to Native custom or usage".

256. Despite the legislative injunction to ascertain succession according to tikanga Māori, the Native Land Court (not the Crown) developed and applied rules that reflected English law, not Māori custom. Whereas English law favoured succession on intestacy to the surviving spouse or to the surviving children in equal shares, tikanga Māori, emphasised the maintenance of ahi kaa and of whakapapa to the land.

257. The rules and practice that developed were the product of the Native Land Court, which is independent of the Crown. Indeed, the legislative framework reflected the Crown's policy that succession be determined according to Māori custom.

258. The Crown acknowledges that the succession rules that the Native Land Court developed and applied have been a principal cause of land fragmentation, with a range of prejudicial consequences for Taihape Māori communities, especially enlarged communities of owners, some of which were sometimes unable to cohere in the management or utilisation of their land.

259. Over time, the Crown has sought to address those consequences in a number of ways, including provision for the incorporation of owners as a way to promote the better management and use of land, consolidation and amalgamation schemes and legislative measures such as whānau, pūtea and whenua topu trusts under Te Ture Whenua Maori Act 1993. However, there has never been a simple solution to the problem of an ever-increasing number of owners.

260. The Crown notes that it does not follow that succession decisions of the Native Land Court were always contrary to the wishes of the communities concerned, or always resulted in an outcome that conflicted with Maori custom. Succession cases were able to be the subject of out-of-court arrangements and that is likely to have mitigated the concerns that some communities may have otherwise held.

261. Detailed submissions on Issue 12.8 address the effect of intestacy on Ōwhāoko D2.

262. Evidence was presented by Wai 401 on succession issues from the Kawepō estate. The Crown makes no submissions on that matter (which does not indicate either support or contest to those claims).

Financial prosperity and long-term economic prospects – succession and fragmentation

263. The overall economic history and issues for the inquiry district are addressed in submissions on issues 5 and 12 (other submissions also touch on relevant matters). There are examples of some Taihape whānau achieving long-term economic success. The evidence of Mr Kerry Whale is of particular interest and is addressed in other submissions in more detail.

264. The salient point in response to a question about succession and fragmentation is to be made from his evidence. Mr Whale sets out that his whānau success was enabled through an ancestor becoming a sole title holder (through tragic circumstances that affected the whānau deeply). From that time the whānau made a strategic decision that the lands would be succeeded by only one member of each generation in order to avoid fragmentation. Whilst this has been a successful strategy economically, Mr Whale acknowledged it has come at some cost – both to tikanga and to members of the whānau over (now successive) generations who have waived/not succeeded to interests they may otherwise have been entitled to.

Issue 3.18: What social and cultural impacts were felt by Taihape Māori in regard to the partition, fragmentation and alienation of land?

265. The evidence does not demonstrate that Taihape land had become fragmented into uneconomic or inaccessible parcels in the 19th century (Awarua land for example was only partitioned in 1896). It was, however, heavily partitioned.

266. The legislative provision allowing landowners to have their particular interests in a land block defined, 'cut out' and recognised in a separate certificate of title was a necessary corollary of individualisation. Individualisation served no utility without it.

267. The ability to partition was therefore intended to benefit a number of stakeholders. It would benefit landowners, at least economically, in that they would be able to deal with their land as they wished and without the constraints imposed by other owners. It would benefit those who purchased

the interests of individual owners, including the Crown, in that purchasers could have their interests defined cut out so that they too could deal with their land interests as they wished. There was also a wider national benefit in that it would define individual ownership, facilitate entrepreneurialism and more effective management of land, and result in more land becoming productive. In practice, the ability to partition entailed the risk of that land becoming so fractionated that it would lose its economic potential and its social and cultural value.

268. The Crown accepts there are instances of extensive partitioning in the inquiry district. However, some care needs to be taken before concluding that partitioning was excessive at the time it occurred. Each case needs to be considered in terms of the circumstances that existed when the decision to partition was made, including the motivations of the owners. It may be that the justification that existed for partition at the time it occurred was subsequently eroded by later circumstances that might not have been foreseen or foreseeable.

269. There appears to be a pattern that the most heavily partitioned titles as at 1900 are:

269.1 the high-quality residential lands retained (eg in Awarua – where the partition hearing was not contested, but the earlier subdivision one had been - representing to some degree decisions being made in 1896 to partition down to whānau parcels); or

269.2 northern blocks (eg Ōwhāoko and Ōruamatua-Kaimanawa where the level of partitioning bears no resemblance to occupational patterns or land use potential. No clear evidence has been provided to explain this level of partitioning – the Crown concludes, however, that there is a degree of corelation between that level of partitioning and the fact of those titles being highly contested and litigated).

270. It is also to be noted that there was substantial support from an early stage among Taihape Māori for the ability of individual or family groups to partition out their shares in land. Mr Walzl suggests the preferred unit of

management was at whānau level for the better lands. He notes aspirations for the hapū collective administration of the other lands.

271. Substantial partitioning and subdivisions happened throughout the inquiry district but the motivations for this work are rarely discussed in the evidence. Working out the motivations lying beneath these decisions is complex as the evidence rarely exists to indicate the purpose, especially in the 20th century where there is little on the record of Taihape voices – it has been constructed through transactional files of the land court.

272. Several of the partitions were to create blocks to pay for survey fees (as discussed above).

273. The Crown accepts that partitioning of land in the inquiry district has had a contributory effect in undermining Taihape Māori tribal structures. It also accepts that partitioning required all affected owners to re-engage in the Court process and incur the associated costs, whether or not they supported the application to partition. Whether those costs were reasonable will depend on the particular circumstances of the case.

Issue 3.19: What was the impact of Native Land Court title determinations, if any, on Taihape Māori customary interests in the district in terms of their present and future needs?

274. The Crown has made an acknowledgement and concession in relation to the sufficiency of land in submissions on Issue 11.

Issue 3.20: In what ways, if at all, was the Crown, through the Native Land Court, responsible for obstructing the exercise of customary rights, in particular the utilisation of environmental resources customarily known to belong to respective iwi/hapū?

275. The Native land legislation enacted from 1862 onwards did not provide for the overlay of residual rights from the customary system it replaced. The tenure reform that occurred by way of the Native Land Act 1862, was a response to the economic need for defined tracts of land and a simple, uncluttered bundle of rights, as opposed to the complex configuration of rights based on resource use such as food-gathering sites that may have characterised earlier times. Although it may have been possible for the new forms of title to have done so, it would have likely limited significantly the ability to deal in those lands, whether by lease or sale.

Issue 3.21: Where there were delays in the issue of title certificates for Māori-owned land:

a. What prejudice was experienced from such delays?

b. Why did such delays occur?

276. See Crown closing submissions on Issue 6 – Mangaohāne.

OPPOSITION, DISPUTES AND REMEDIES

Issue 22: On occasions where it was found that incorrect or disputed boundaries had been used to determine title and sale of land (for example, the Mangaohane, Tīmāhanga and Te Kōau blocks):

a. What obligations did the Crown have to rectify such discrepancies?

b. If attempts by the Crown/Court were made to rectify those mistakes, what process was undertaken and was it sufficient?

c. How did such discrepancies occur?

d. If compensatory arrangement(s) was offered, was it appropriate?

Issue 23: What Crown-led processes were there for Taihape Māori to appeal Native Land Court decisions (such as rehearings, petitions to Parliament, and appeals)?

a. Were such processes used and if so, in what circumstances and were they effective in securing sufficient redress?

Processes within the statutory scheme - general

277. The facilitative approach the Court preferred to employ (encouraging Māori to come to agreement where possible rather than imposing a determination) encouraged appropriate decisions to be made. (See Judge Ward quotes above.)

278. The re-hearing and appeal processes in the statutory scheme governing the Native Land Court provided Taihape Māori with a further avenue to raise concerns about particular decisions they considered to be wrong. Sections 47 and 48 of the Native Land Court Act 1880 and sections 75 to 78 of the Native Land Court Act 1886 allowed any Māori who felt aggrieved by a decision of the Court to apply for a rehearing within three months of the decision having been given.

279. From 1894, appeals could be made to the Native Appellate Court, which was constituted under the Native Land Court Act 1894.

280. Petitions relating to Māori land or the Native Land Court were usually directed to the Native Affairs Select Committee. In the Ōwhāoko case a

special select committee was convened (the Ōwhāoko Kaimanawa Native Lands Committee). The Committee's investigations could take a variety of forms, including hearings and the taking of oral evidence. While the Committee reported to the House of Representatives, it had no power to make the Crown adopt its recommendations. This applied to all petitions to Parliament, regardless of who brought them or what their subject matter was; the report of a select committee on a petition has always been binding on no-one.

281. The low reversal rate of Native Land Court decisions that were the subject of petitions to Parliament does not in itself demonstrate that the system was flawed. Each petition needs to be considered on its own facts in order to determine whether there was a rational and Tiriti/Treaty-compliant basis for the decision that was reached with regard to each petition and whether the matter was dealt with in a timely way. The Crown notes that some petitions did result in a favourable result for the petitioners – the Ōwhāoko case being significant nationally as one of the few situations where a re-hearing resulted in an (almost total) reversal of the decision at first instance.

282. The Court relied largely on the whakapapa and other evidence that claimants and their witnesses and counter-claimants and their witnesses decided to present to it.

283. However, it is likely that at times witnesses supported claims they were making by presenting to the Court whakapapa that others might have challenged for one reason or other. In contested cases, the adversarial nature of proceedings might have encouraged such challenges on occasions. However, there may have also been occasions where the adversarial nature of proceedings ensured a more complete picture was presented. Generalising is problematic.

284. The Crown submits that rights of appeal and the encouragement the Court gave to out-of-court agreements would have mitigated some of the problems that are claimed to have existed. As Professor Boast notes, in his Native Land Court study, particular cases need to be studied very carefully to assess the consequences of a decision on Māori customary interests, as the effect of a determination that appeared to favour one group at the

expense of others could be ameliorated in the drawing up of ownership lists.

Taihape specific matters

285. Of the 20 blocks that were subject to the Court process, 16 were brought before the Court prior to 1890. In the majority of cases – 14 out of the 20 blocks that passed through the Court – title was determined through a single but sometimes lengthy Court hearing.

286. Two Commissions were convened and undertaken by the Crown as part of its supervisory check and balance role – the Ōwhāoko Kaimanawa Native Lands Committee and the Awarua Commission 1890.

287. Six blocks were subject to extended and costly judicial proceedings, variously involving repeated title investigation hearings, rehearings, and other legal action: Mangaohāne, Ōruamatua-Kaimanawa, Ōtūmore, Ōwhāoko, Rangatira, and Te Koau. Except for Te Koau, all of these blocks first came before the Court before 1890.

287.1 Mangaohāne: see Crown closing submissions on Issue 6.

287.2 Ōwhāoko and Ōruamatua-Kaimanawa: see detailed block submissions earlier in these submissions.

287.3 Ōtūmore: see Crown closing submissions Issue 5.5

287.4 Te Koau: the Crown accepts the factual account in claimant generic closing submissions (#3.3.76(a) at [5.5]). The 1890 Awarua Commission found "the Crown has wholly failed to show any title either legal or equitable."[131]

288. Five blocks arose through some form of remedial action following definitional issues.

288.1 Waitapu: see Crown closing submissions on Issue 4 at 30–37.

131 Wai 2180, #A43, at 368.

288.2 Te Koau 1891 and Timahanga 1894: arose through lack of clarity with the Eastern boundary and early Hawkes Bay purchases after the findings of the Awarua Commission 1890.

288.3 Aorangi (Awarua) 1912; Awarua o Hinemanu 1992.

289. The evidence illustrates that faulty surveys on occasions occurred in the inquiry district. Given the number of surveys undertaken, it would be surprising if they had occurred entirely free of mistakes. However, the Crown submits that the evidence does not point to faulty surveys occurring on a widespread or routine basis such as to impugn the entire surveying system.

290. The Crown recognises that some survey errors had significant effects for Taihape landowners and, where Government or Government-contracted surveyors committed the errors and the Crown had knowledge of the errors, it had a duty to take reasonable steps in the circumstances to put things right.

Issue 24: What, if any, acts, organisations, forum or hui of opposition to the Native Land Court system did Taihape Māori rangatira participate in, and why? For those acts or forum that took place:

a. Who participated and what were their motivations?

b. Was there opportunity for the Crown to participate in such acts, organisations, forum and hui and did it take up those opportunities?

c. What was the outcome of such acts, organisations and forum for Taihape Māori?

d. To what extent, if at all, did this affect the Native Land Court process in the Taihape inquiry district?

291. See Crown closing submissions on Issue 2.

292. As described in closing submissions on Issue 2, the views and positions of Taihape Māori differed between iwi, hapū, whānau and individuals and often differed in relation to different blocks and varied over time. The patterns of opposition and willing participation are complex and fluid. Alongside the active engagement with the emerging settler economy evident through the applications made to the Court for blocks in which the Crown had not conducted any dealings, a strong strand of opposition to land sales,

loss of control of land or decision making, and to the Native Land Court is evident amongst some Taihape Māori through the 1860s – 1890s.

293. Some Taihape Māori advocated for, and undertook, active participation in the settler economy, including through sales of land. Some Taihape Māori desired continuation of customary forms of tenure and opposed tenure definition and land sales. Some Taihape Māori did both.

Kōkako hui 1860

294. The Crown considers that a primary motivation for the Kōkako hui of 1860 and subsequent hui in the 1860s was to fix and determine boundaries and land interests between iwi and hapū amongst themselves rather than through colonial structures. Some hapū and iwi sought this in part to restrict further land sales (as well as for political motivations, including allegiance to the Kīngitanga; and enabling acknowledged owners to consider their options without further inter-iwi contest). It would be overly-simplistic to describe the hui as having a single objective, or as having achieved consensus. Those outcomes of the hui that seem to have had some degree of broad acceptance were revisited within short timeframes. This is indicated, for example, by the fact that pou were subsequently relocated, some within months of the hui.[132]

Repudiation movement

295. Some Taihape Māori also engaged with Repudiation movement ideas and actions in the 1870s including through petitions, representation at hui, and discussion through Te Wānanga.[133] As above for instance, Kawepō articulated a vision whereby tribal structures would determine rights that would then be empowered through state mechanisms. It is clear that some of these same people and other Taihape Māori also either actively or reactively engaged with the Native Land Court, the Crown and/or with private leasees and purchasers from the late 1860s, including, for example, both Rēnata Kawepō and Ūtiku Pōtaka playing roles in the repudiation hui and also offering Ōtamakapua block to the Crown as early as 1872.[134]

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132 Wai 2180, #A43, at 20.

133 Wai 2180, #A43, at 241–243; see also Paurini Karamu of Mōkai Pātea in 1876, at 247.

134 Wai 2180, #A07, at 45–46.

Kōmiti and Kōtahitanga

296. Some Taihape Māori were active in the Kōmiti movement of the 1870s and 1880s and the Kōtahitanga movement in the 1890s.[135] Some Taihape Māori petitioned the Crown in opposition to the Native Land Court;[136] some made significant efforts between 1884-1896 to manage the title investigation and partial alienation of the huge Awarua and Motukawa blocks through an owner committee;[137] some were represented at the Kotahitanga Pāremata throughout the 1890s as part of the Taupōnuiatia me Pātea district; and some advocated directly to government representatives for the empowerment of the kōmiti Māori in the 1890s.[138]

297. The goals of each of the above actions or movements varied in priority or emphasis but included seeking the clarification of tribal interests and boundaries, cessation or significant reform of the Native Land Court and Crown purchasing activity, and enabling more collective forms of land administration including collective ownership and management. The certainty presented through evidence on these matters does not appear to be reflected in the written historical record.

298. Notwithstanding the complexities and evidential limitations described above, the Crown accepts that a degree of protest and resistance at the political, pan- tribal level is evident amongst Taihape Māori interests to the Native land legislation, the operations of the Court and colonial forms of land administration. This appears to be particularly so for the lands in the central and northern parts of the inquiry district.

299. An example of more direct communication is from March 1891, Winiata Te Whaaro and others petitioned the Native Minister from Marton where the Awarua subdivision hearing was underway (having also petitioned the year prior – on similar issues – and as above, pleading for a change of venue due

135 See for example, Wai 2180, #A43, at 235.

136 Wai 2180, #A43, at 237.

137 Wai 2180, #A43 at 239.

138 Wai 2180, #A43, at 596 fn 1944; regarding 1893 Kotahitanga Pāremata representation appears to be through Taupō me Pātea elected representatives, see #A43, at 601 and for 1895 at 605; Hīraka Te Rango advocacy to Seddon and Carroll during Moawhango visit of 1894, see #A43, at 604 fn 1966.

to the impacts on health and wellbeing heading into Winter). In the 1891 petition they observed that:[139]

> the hearing "has afforded us an opportunity of being fully convinced of the irregularity and confusing nature" of the Native Land Acts. They were aware that the Acts had been "very irregular all along" but they were now feeling the ill effects, although their complaint focused on "only the principal ones," which were rather fundamental, as the court constituted under the Acts, "commencing from 1862 has not given satisfactions." Such a court should be "independent and untrammelled," and it was "utterly wrong" for the Court to be "partial towards either one party or the other," yet the judges held their office at the "pleasure" of the government rather than being "placed on a similar footing to those of the Supreme Court, that is to say, they should be independent of the Government." Such independence would "avoid the reflection of partiality being cast on the Government" through the court "favouring those Natives who are friendly towards it and who are also ready to sell." They emphasised that they did not find fault with the judges presiding over the Marton court or the assessor sitting with them: "What we are finding fault with is the law and the different ways in which the offices work, that is, having each differently administered."

300. The Crown responded by addressing the survey issue identified.

301. Hīraka Te Rango's letter of 1895 has become something of a touchstone for the inquiry (along with the collective rangatira letter of 1892). Hīraka's letter is not repeated here. The letter however emphasises the consequences of the significant delays being experienced in achieving clear, certain and final title.

302. The same concerns had been conveyed to Premier Seddon during his 1894 visit. The led at that time to Seddon advocating strongly for (perhaps even overreaching) a hearing to enable the Crown's interests to be partitioned out (addressed above). The circumstances in which purchasing then recommenced are addressed in submissions on Issue 4.

303. In brief, the Crown accepts that these various exercises of authority through tribal structures were not given weight in title determination processes. Although some of the movements influenced development in Native land policy and law, a thorough consideration of that is beyond the scope of this inquiry district.

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139 Wai 2180, #A43, at 349–350.

THE MANGAOHANE BLOCK

Issue 3.25 – 3.29

304. Issues related to Mangaohāne title determination are addressed in Crown closing submissions on Issue 6 and are thus not duplicated here.

QUALITY OF ACCESS

Issue 3.30 – 3.34

305. Access issues are thoroughly addressed in Crown closing submissions on Issue 11 and are thus not duplicated here.

PART 2: NATIVE LAND COURT IN THE INQUIRY DISTRICT

306. Many aspects of the Taihape inquiry district experience of Native land laws and of the Native Land Court are similar to those experienced elsewhere in the North Island. However, title histories in the Taihape inquiry district are distinguished from other regions by:

306.1 The relatively late start of formal land dealings: eg only one block was subject to the ten owner rule (Paraekaretū).

306.2 The fact that the history of land in the Taihape district relates almost exclusively to the operation and effect of the Native land laws after 1873. The Native Land Court only became active in the region in the early to mid-1870s - some years after the Court was established nationally. A relatively small amount of land within the inquiry district was affected by pre-1865 Crown purchases, and then largely due to issues arising from uncertain boundaries of those purchases rather than direct early purchase activity having occurred in the district itself. Lands in the inquiry district were not directly affected by the events and consequences of the New Zealand wars (eg through raupatu) although the people themselves were variously involved and affected.

306.3 Taihape Māori were able to, with varying success and/or consequences, draw on the experiences of other iwi in the ways they conducted their land affairs. Intensive dialogue between Taihape rangatira, hapū and iwi about the benefits and consequences of land dealings, including intertribal hui and

significant leasing activity with private interests took place prior to any applications being made for Taihape lands to the Court. Taihape Māori took a strategic approach to engaging with the Court, the Crown, and with land development in general.

306.4 A further consequence of the relatively late entrance of the Court into the region is that the Court itself applied hard learnt experience to various dealings within the region, for example, in the case of Ōtamakapua block refusing to authorise the distribution of payments for land until all interests had been adequately identified and provided for.[140]

306.5 The duration of court proceedings, and their location outside (and at some distance from) the rohe of Taihape Māori differed from more populated or less remote regions – and significantly impacted upon how Taihape Māori conducted their land titling affairs.

ŌWHĀOKO AND ŌRUAMATUA-KAIMANAWA

307. Events relating to the Ōwhāoko and Ōruamatua-Kaimanawa blocks in northern Taihape became the focus of public attention in the mid-1880s after a memorandum by the then Premier, in his role as Attorney General, Hon Sir Robert Stout,[141] was published in the Appendices to the Journal of the House of Representatives. Stout's report alleged errors had been made in the title determination hearings and a rehearing was thus warranted. A number of "irregularities" in the Native Land Court's procedures had occurred, and raised conflict of interest concerns due to correspondence between the Judge, Fenton (previously Chief Judge, retired in 1885),[142]

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140 T J Hearn, Sub-District Block Study – Southern Aspect, Wai 2180, #A07, at 104–107.

141 David Hamer. 'Stout, Robert', Dictionary of New Zealand Biography, first published in 1993. Te Ara - the Encyclopedia of New Zealand, https://teara.govt.nz/en/biographies/2s48/stout-robert (accessed 3 June 2021). The Native Minister referred the Ōwhāoko issue to Stout in his role as Minister of Education due to the education endowment (addressed below) however at the time he also held office as the Premier and the Attorney General. It appears he himself was not particularly concerned which of those roles his report was authored from:

AJHR I-08 at 11 (19 of pdf): Bell to Stout:: I do not know what I ought to call you—whether Premier or Attorney-General. I feel inclined almost to call you "my learned friend."

Hon. Sir R. Stout: I do not care which it is.

142 The original block title determinations were done by Judge Rogan, who also appeared before the Committee. Fenton was Chief Judge throughout the period the court determined title in 1875 and subsequent challenges were made to that title. He, as Chief Judge, accepted a withdrawal for a rehearing in 1880 but was not otherwise a Judge in the case itself. Fenton retired in 1885. Stout's memo and the Committee investigation were in 1886.

Māori land-owners, a leading lawyer (Dr Buller), and European lessees, who later became the land-owners.

308. This section sets out the history of those events, focussing on the Crown's role, given that it is one of only two cases within the Inquiry district that attracted national controversy, and such high-level intervention by the Crown (the other being the Awarua Commission in 1890). The Crown acted thoroughly and decisively following Premier Stout's report by establishing a special select committee to investigate those claims; and ultimately by promoting special legislation which provided for the reinvestigation of both blocks by the Native Land Court.[143] Those rehearings led to significant amendments to the original Court decisions.

309. The Committee's report recommended, and the Ōwhāoko and Kaimanawa-Oruamatua Reinvestigation of Title Act 1886 explicitly provided, that any new owners identified through a subsequent rehearing would not be entitled to any back rent. No provision was made to compensate those owners belatedly admitted to the title for any financial loss suffered by, for example, not receiving any of the rents that derived from the blocks between 1875 and 1886.

310. The Committee inquiry elicited evidence of generalised or systematic issues in the Native land legislation and in the practice of the Native Land Court. Whilst the Committee itself was not constituted to inquire into these broader matters, at least some of the issues raised were addressed subsequent to the inquiry (or in parallel to it).

311. The narrative below is not strictly chronological, but considers the various events alongside the subsequent findings of Stout's memorandum and the Ōruamatua-Kaimanawa Native Lands Committee (henceforth "the Committee"), including the evidence provided to the Committee by Fenton and others.

312. By way of overview: The original title investigations occurred in 1875. A rehearing was granted in 1878 but was not set down for hearing until mid

143 The Ōruamatua-Kaimanawa Native Lands Committee and the Ōwhāoko and Kaimanawa-Oruamatua Reinvestigation of Title Act 1886.

1880. Prior to the hearing commencing the applicants withdrew - in questionable circumstances which were to become a focus of the later inquiry. Further protests followed:[144]

312.1 Three petitions for rehearings (and a number of complaints to Premier Stout) followed the 1885 subdivision of the blocks, which had resulted in a larger portion of the blocks going to Kawepō than the Ngāti Whiti Ngāti Tama owners thought warranted.[145] The Native Minister referred those to Stout also.

312.2 In 1886 the Native Minister became aware that Ōwhāoko No. 1 (the education endowment block) was about to pass out of Trust and "into the hands of certain Natives" and referred the matter to Sir Robert Stout in his capacity as Minister of Education.[146]

313. Stout was provided with the relevant papers and found "many other complications beyond those appearing at first sight". Stout posited that various administrative irregularities meant that no valid title had ever been issued for the Ōwhāoko blocks but later amended that position after hearing evidence in the Committee investigations.[147]

Initial title determinations (1875 – 1876)

314. The 163,432 acre Ōwhāoko block and the 115,420-acre Ōruamatua-Kaimanawa blocks were contiguous blocks that together covered almost a quarter of the entire Taihape Inquiry District.[148] Most of this land was suited only to occupation as large sheep runs/extensive pastoralism.[149]

315. The initial impetus for putting some of this land through the Native Land Court was a proposal by Rēnata Kawepō at the Turangarere hui in 1871 to set aside land to endow a Native School (for children of Ngāti Whiti, Ngāti Tama, Ngāti Hinemanu, Ngāti Ūpokoiri, Ngāti Tūwharetoa, and upper

144 AJHR, 1886, G-9, p 20.

145 Wai 2180, #A43, at 287–288.

146 Hansard, vol. 54, p 515, June 16 1886, and AJHR 1886, I-8, Minutes of Evidence, p 11 (p 19 of pdf).

147 AJHR 1886, I-8, Statement by the Hon Sir R Stout, pp 81–83 (89–91 of pdf). During the Committee's investigations, Stout explicitly accepted Judge Rogan's explanation of the various administrative errors, and in his final statement to the Committee he no longer asserted that the memorials of ownership were invalid on the basis of these irregularities.

148 Wai 2180, #A43, at 260.

149 Wai 2180, #A15(m), at 67.

Whanganui hapū) and to lease some of the land.[150] An area of land for the Ōwhāoko school endowment was surveyed in 1874 and an informal lease was subsequently arranged for Richard Maney (a Hawkes Bay stock agent) by Rēnata Kawepō on behalf of Ngāti Whiti and Ngāti Tama and others.[151] According to Maney, a condition of this lease was that a legal title would be obtained through the Native Land Court in order to legalise the lease. In 1875 Rēnata Kawepō, Te Hira Oke, and Noa Huke applied for a hearing into the Ōwhāoko block.[152] Rēnata Kawepō and Noa Huke also made a title application for Ōruamatua-Kaimanawa Block in 1875.[153]

316. Considering the size of these two blocks and the range of tribal groupings involved in the Turangarere hui discussion, the minutes of their respective Native Land Court hearings are very short – and the numbers of owners recognised by the Court were few (later attributed to a short notification period; owners claiming voluntary agreement in place as trustees;[154] and the Court's willingness to accept the applicants as owners despite being informed about the existence of other rights-holders).[155]

Ōruamatua-Kaimanawa

317. The hearing for the 115,100-acre Ōruamatua-Kaimanawa Block took place in Napier on 16 September 1875.[156] Only two witnesses gave evidence:

317.1 According to the minutes, Rēnata Kawepō described himself as a member of the "Ngati-te-Upokoira and Ngatiwhiti hapus … of Ngati Kahungunuau". He stated had "not been on the land" but had travelled over it. He claimed the block "from my ancestors".

317.2 The other witness, Noa Huke, stated that he was born on the land. He also referred to an important local chief and his children, and

150 Wai 2180, #A06, at 32–33; Wai 2180, #A43, at 263; Wai 2180, #A06, at 32–33..

151 Wai 2180, #A06, at 37–38 – see also at 39, 67, 147. See also Wai 2180, #A43, at 263.

152 Wai 2180, #A06, at 34.

153 Wai 2180, #A06, at 138; Wai 2180, #A43, at 264–265.

154 Wai 2180, #A43, at 283. In the later 1885 subdivision hearing evidence was given of the named owners being put on to the titles as trustees for others, but that arrangement was not undertaken formally (and did not last).

155 AJHR 1886, I-8, Minutes of Evidence, p 19 (p 27 of pdf). However, it is also worth noting that the minutes of the presiding Judge were later destroyed by fire, and the available minutes for these hearings were produced by the Court's clerk. The recollections of the Judge a decade later suggest that the Ōruamatua-Kaimanawa hearing at least included a discussion about other rights-holders that was somewhat fuller than recorded.

156 AJHR, 1886, G-9, p 1. See also Wai 2180, #A06, at 138.

> appeared to suggest that Rēnata Kawepō descended from them. Huke then explicitly stated that "[t]here are Natives who are not present who have claim. The people now living on the land have a claim. About twenty people – men, women, and children – are living on the land."[157]

318. The Court stated that a map of the block was on the way to the Court from Auckland, and that a memorial of ownership would be ordered when it arrived. The map arrived on 21 September, and the Court ordered a memorial of ownership for five owners and issued a memorial of ownership on the same day.[158] The existing informal Ōruamatua-Kaimanawa lease was formalised as soon as the title was issued.[159]

319. In December 1875, three months after the initial hearings into the Ōruamatua-Kaimanawa and Ōwhāoko school endowment blocks, Heperi Pikirangi and 25 others wrote to the Chief Judge of the Native Land Court, Francis Fenton, and the Native Minister, Sir Donald McLean, complaining that they had received insufficient notice of the Ōruamatua-Kaimanawa hearing. Pikirangi stated that he had only received the notice on 13 September 1875, three days before the hearing occurred in Napier, and that despite travelling "day and night" he and his party had not arrived in time to participate.[160] McLean sought information about the complaint from Judge Rogan, who expressed the view that Pikirangi and the others had in fact had time to appear, and further stated that the protestors had not subsequently claimed any rent from the farmer leasing the land. On the basis of this advice McLean declined their request for a re-hearing.[161]

320. Sir Robert Stout later found that "there is no minute nor anything to show but that their [the objectors'] statement is absolutely correct"[162] and despite evidence from the lessee that sufficient notice had been given,[163] the

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157 AJHR, 1886, G-9, p 2. See also Wai 2180, #A43, at 265; Wai 2180, #A06, at 140.

158 AJHR, 1886, G-9, p 3. Rēnata Kawepō, Karaitiana Te Rango, Ihakara Te Raro, Te Retimana Te Rango, and Horima Te Ahunga. See also Wai 2180, #A43, at 265.

159 Wai 2180, #A06, at 144. Lease signed on 22 September 1875.

160 Wai 2180, #A43, at 266; Wai 2180, #A06, at 139.

161 AJHR, 1886, G-9, p 4. See also Wai 2180, #A43, at 266–267.

162 AJHR, 1886, G-9, p 3.

163 AJHR 1886, I-8, Minutes of Evidence, p 30 (p 94 of pdf).

Committee ultimately found that the three-day notice appeared to have been "unreasonably short".[164]

321. In his memorandum, Stout condemned in the strongest terms the Court's decision to issue title to five owners despite clear evidence from the applicants that other Māori had interests in the block:[165]

> No more monstrous injustice could be done by any Court than by declaring certain persons were owners, and treating them as absolute owners, when the Court knew they were not the whole owners, but only some of those who were owners. It was the Court's duty to name all the owners, and not to select a few only and call them 'absolute owners'.

322. During the Committee's subsequent investigation, Judge Rogan (Judge at title determination) referred to an exchange that had occurred during the 1875 hearing which was not recorded in the minutes. Rogan stated that he had asked Kawepō and Huke for the names of the other owners that Huke had mentioned, but they had refused to provide them. According to Rogan, Kawepō had informed him that the owners "have an arrangement among ourselves about the land" and that while "others are living on the land" the five owners "are the names we have decided upon to put in this block."[166] Rogan suggested that he had got into an "argument" with Rēnata about the issue, but that Rēnata had insisted that "the land is mine and the people are mine".[167] Rogan told the Committee that he had asked his Native Assessor about the matter, and had been advised to accept the five names on the basis that Rēnata Kawepō "is a chief of great responsibility, and if he makes any mistake the mistake will be his, and the responsibility not ours."[168]

323. The Committee was advised – correctly – that while the Native Land Laws gave the Court the power to recognise voluntary arrangements over land

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During the Committee's hearings, the lease-holder of the Ōruamatua-Kaimanawa block informed the Committee that he was able to ride a horse from his residence on the block to Napier in twenty-six hours, which included a twelve-hour stop for rest – arguing that three days notice was sufficient for them to have reached Court.

164 AJHR 1886, I-8, p i (p 2 of pdf).

165 AJHR, 1886, G-9, p 14. The Native Land Court Act 1873 required the names of all the owners to be recorded on a memorial of ownership. Voluntary arrangements between owners (eg for the title to be held by representatives) were able to be accepted and recognised by the Court so long as they were recorded in the Court minutes and the consent of all owners to the voluntary agreement was recorded.[165] For Ōruamatua Kaimanawa only five owners were recorded on the title and no voluntary agreement was registered (or consent of other owners recorded).

166 AJHR 1886, I-8, Minutes of Evidence, p 18–19 (p 27 of pdf).

167 AJHR 1886, I-8, Minutes of Evidence, p 19 (p 27 of pdf). See also Wai 2180, #A06, at 45.

(such as to name representative owners only), any such arrangement had to be formally recorded in the Court's minutes, as did the consent of those parties to the arrangement.[169] A Registrar of the Native Land Court advised the Committee that in his experience no such arrangement would be recognised where the people it affected were not present or had not provided their written authority. In the case of the Ōruamatua-Kaimanawa block, no Court minute or signed document existed to confirm the existence of any arrangement regarding representative owners or consent.

324. The Committee noted the statement that Noa Huke had made before the Court confirming that "Natives not present [at the hearing] had a claim; that the people then living on the land had a claim." This became the core rationale (along with notification) for a rehearing to be ordered through the Ōwhāoko and Kaimanawa-Oruamatua Reinvestigation of Title Act 1886.[170]

Owhaoko 1

325. The initial hearing into the Ōwhāoko school endowment block was also heard in Napier on 16 September 1875. The Court's minutes stated that the block comprised 38,220 acres. Again, only Rēnata Kawepō and Noa Huke gave evidence. Rēnata Kawepō described the location of the land and stated that his claim to the land was "through [his] ancestors" but left it to others to trace his genealogy. Noa Huke did so by stating that his claims, along with those of Rēnata Kawepō and Karaitiana te Rango, were based on their descent from the important local chief, Whitikaupeka. Huke then explained that there were "a great many" descendants of that ancestor living in the area, but that they had agreed to set the block aside for a school endowment. Huke also stated that it was for the other owners of the rest of

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168 AJHR 1886, I-8, Minutes of Evidence, p 18 (p 27 of pdf).

169 AJHR 1886, I-8, Minutes of Evidence, p 44–45 (p 52–53 of pdf). Native Land Act 1873 section 46 provides: In carrying into effect the preceding sections, or any of the sections hereinafter contained regarding partitions, the Court may adopt and enter of record in its proceedings any arrangements voluntarily come to amongst themselves by the claimants and counter- claimants, and may make such arrangement an element in its determination of any case concurrently or subsequently pending between the same parties. In every such record there shall be entered the names of the persons with whose consent, and the names of the persons by whom any claim shall have been settled by any such arrangement.

170 Ōwhāoko and Kaimanawa-Oruamatua Reinvestigation of Title Act 1886 Preamble "in the evidence upon which [the Court's 1875] decision was arrived at it was stated, and not disputed, that Natives besides those so declared to be owners had a claim on the land, and there is good reason to suppose such evidence was true."

the Ōwhāoko block to decide whether that land should be put through the Court.[171]

326. The Court concluded that there had been no objections to the claim, and that "the investigation of title to this block is clear enough". As with the Ōruamatua-Kaimanawa block, the Court stated that a memorial of ownership would be ordered as soon as the survey was completed.[172]

The balance of the Ōwhāoko block

327. On 27 June 1876, the Native Land Court issued notice for a hearing into "Owhaoko, near Napier". The notice did not describe the boundaries of the land to be investigated and noted only that plans were available for viewing in Napier. When the hearing began on 1 August 1876, the minutes clarified that block under investigation was the 164,500-acre Ōwhāoko block (this appears to have included Ōwhāoko 1 (the school endowment block).[173]

328. Rēnata Kawepō was the only witness, and claimed the 164,500 acre block on the same basis as the smaller Ōwhāoko school block.[174] Given that this area included the school endowment block, Noa Huke's earlier evidence about the existence of other owners in that block would have applied here too. In its judgement, the Court stated that "although this is large block of land, there was evidently no objection to Rēnata's claim", and noted that "some person had stood up to substantiate his claim." The Court stated that as soon as a correct plan was provided, an order would be made to issue a memorial of ownership for Rēnata Kawepō, Noa Huke and Hira Te Oke.[175]

329. The Committee was later to find both the Ōwhāoko 1 and the Ōwhāoko total block suffered from the same defects as the Ōruamatua-Kaimanawa title (not all owners recorded, no voluntary arrangement recorded).

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171 AJHR, 1886, G-9, p 2; Wai 2180, #A43, at 264–265; Wai 2180, #A06, at 35.

172 AJHR, 1886, G-9, p 2; Wai 2180, #A43, at 265.

173 AJHR, 1886, G-9, p 4; Wai 2180, #A43, at 267; Wai 2180, #A06, at 36.

174 AJHR, 1886, G-9, p 4; Wai 2180, #A43, at 267.

175 AJHR, 1886, G-9, p 5; Wai 2180, #A43, at 267.

Irregularities in the Native Land Court Minutes for the Ōwhāoko blocks

330. The evidence then describes a complex series of alterations to the minute books relating to the Ōwhāoko block and title. Under questioning from the Committee, Judge Rogan explained the origins of these alterations.

330.1 He stated that during a hearing at Porangahau in Hawkes Bay on the 1st or 2nd of December 1876, the lease-holder of the Ōwhāoko No. 1 school endowment, Mr Maney, had come to Court and provided Rogan with a completed survey plan of the block. The survey showed that the area was approximately 28,000 acres, rather than the 38,000 that had been recorded in the minutes of the original hearing. Rogan stated that he thought it was "proper" for him to receive the plan, and instructed a junior clerk of the Court to minute its reception. According to Rogan, the clerk then mistakenly referred to a sketch plan of the larger Ōwhāoko Block and on that basis changed the existing minute for the Ōwhāoko No. 1 block to state that it consisted of 164,500 acres, rather than 28,000 acres as instructed.[176]

330.2 A few days later, Rogan travelled to Gisborne where he instructed the Court's principal clerk to issue a memorial of ownership for Ōwhāoko No. 1 as a correct map had now been provided. On the basis of the incorrect minute, the memorial was made out for the 164,500-acre Ōwhāoko Block, which Judge Rogan signed on 20 December 1876 without checking the minutes himself and apparently not noticing the error.[177]

330.3 It appears that the matter lay in abeyance until October 1877, when a survey plan for the larger Ōwhāoko block was finally received by the Court.[178] At that point, Judge Rogan wrote from Gisborne where the Court was sitting to the Auckland office of the Native Land Court requesting the names of the owners of the 134,650 Ōwhāoko block, presumably for the purpose of ordering the memorial of ownership. The Auckland office replied that no

176 AJHR 1886, I-8, Minutes of Evidence, p 22 (p 30 of pdf). See also Wai 2180, #A43, at 268.

177 AJHR 1886, I-8, Minutes of Evidence, p 22 (p 30 of pdf).

178 AJHR 1886, I-8, Minutes of Evidence, p 23 (p 31 of pdf).

order for the block had been made but that the "names for [Owhaoko] Nos. 1 and 2 are the same—viz Rēnata Kawepō, Ihakara te Raro, Karaitiana te Rango and Retimana te Rango, Noa Huke, and Hira te Oke."[179] The chief clerk at Gisborne then entered a minute dated 31 October 1877 to order a memorial of ownership for the block to these six owners.[180] A memorial of ownership for these owners was prepared by the clerk and signed by Judge Rogan on the same day. The memorial contained a further error, stating that the memorial had been ordered at a sitting of the Court in Porangahau, rather than at Gisborne.

331. Following the issue of title, the larger Ōwhāoko block was leased to the runholder John Studholme for £1,000 per annum in October 1878. Ōwhāoko No. 1 was also leased to Studholme in October 1878 at a rental of £750 per annum (Studholme had purchased the lease from Maney).[181]

332. The Committee found that a number of significant "irregularities" were made during the process of issuing title to the various Ōwhāoko blocks:

332.1 In his cross examination, Rogan himself confirmed that the junior clerk's alteration of the original minute included an incorrect description of the size of Ōwhāoko No. 1, and confirmed that the chief clerk's minute ordering a memorial of title for the 134,000-acre Ōwhāoko block was made on a date when the Court did not in fact sit.[182]

332.2 Rogan also agreed that the final memorial of title cited an incorrect location for the relevant Court hearing.

332.3 In addition to these administrative errors, Rogan appeared to confirm that some of the Court's practices did not strictly conform to the requirements of the Native Land Laws. For example, when asked why a minute had been entered on a day when no Court sat, Rogan stated that memorials of ownership for the "whole east

179 AJHR, 1886, G-9, p 5.

180 AJHR, 1886, G-9, p 5.

181 Wai 2180, #A43, at 271.

182 AJHR 1886, I-8, Minutes of Evidence, p 23–24 (p 31–32 of pdf).

Coast country" had been made in the Court's Gisborne office, despite the memorials stating that they had been made in Court sittings.[183]

333. The Committee found (and the Crown accepts the Committee's findings) that administrative errors and 'irregularities' occurred; that the Court had not implemented the legislative requirement to identify all owners, and that the Court did not record any voluntary arrangement under section 46 of the Native Land Act 1873.

333.1 Fenton, himself agreed that the Court was obliged to name all those it believed to be owners, except in cases where voluntary arrangements had been made and recorded or minuted by the Court.[184]

333.2 Evidence suggests that considerably more than "about twenty" people may have been excluded from the 1875 title investigation. Hīraka te Rango of Ngāti Whitikaupeka and Ngāti Tama stated that he was unable to name all of those with interests in the Ōwhāoko and Kaimanawa blocks because the two tribes numbered about 170 people, "old and young".[185]

334. On the basis that Fenton agreed that a witness had explicitly referred to other owners before the Court in 1875, and that no minute or record of any voluntary arrangement to exclude them from the title existed, the Crown agrees that the remedy provided by the Committee was necessary – a rehearing, with proper notification, so that all claimants had an opportunity to present their case.

Rehearings granted but 'withdrawn' in questionable circumstances

335. An application for a rehearing of Ōwhāoko block alleging that notification had been inadequate was granted.[186] Prior to the rehearing commencing it was withdrawn – in circumstances that attracted serious scrutiny by the Committee as set out in this section. Although multiple issues were

183 AJHR 1886, I-8, Minutes of Evidence, p 24 (p 32 of pdf).

184 AJHR 1886, I-8, Minutes of Evidence, p 44–45 (p 52–53 of pdf).

185 AJHR 1886, I-8, Minutes of Evidence, p 38 (p 46 of pdf).

186 Wai 2180, #A43, at 274; Wai 2180, #A06, at 37.

considered by Stout, and the Committee – this withdrawal was the basis on which a rehearing for the Ōwhāoko block was ultimately recommended.

336. As mentioned above, a memorial of ownership of the 134,650-acre Ōwhāoko Block was issued to six owners on 31 December 1877. A month later, on 31 January 1878, Topia Turoa and others submitted a petition to the Governor complaining that they had received no notice of the adjudication of the block.[187]

336.1 Acting Native Minister John Ballance wrote to the Chief Judge and "respectfully recommended" that a rehearing be granted, apparently on the basis that there appeared to be little information available about the block.

336.2 The Chief Judge referred the matter to Judge Rogan, who responded by stating that the block had gone through the Court without opposition and that he knew "little or nothing of the boundary or the Natives" before referring the question about the issuing of notices to a local Court official.[188] The official did not comment on whether notices had been issued, but simply recommended the proposed rehearing be granted.

336.3 On 25 September 1878, Chief Judge Fenton recommended that the request for a rehearing be granted.[189] The new Native Minister, John Sheehan, requested clarification about the location of the land in question, and then on 26 March 1879 consented to a re-hearing.[190]

337. However, a week later the rehearing was "stayed" after a Native Land Court official advised that the twelve-month window within which applications for rehearing could be made had lapsed.[191] This advice was based on the assumption that the main Ōwhāoko Block had been adjudicated in October 1876; the date of the junior clerk's incorrect minuting of the smaller

187 This was separate to the protest addressed above by Heperi Pikirangi concerning notice.

188 AJHR, 1886, G-9, p 7.

189 See Fenton's letter of 16 October 1879, reproduced in AJHR, 1886, G-9, p 8.

190 AJHR, 1886, G-9, pp 7–8.

191 AJHR, 1886, G-9, p 8.

Ōwhāoko No. 1 block.[192] In fact only a month had passed between the adjudication of the larger Ōwhāoko block in December 1877 and Topia's application for rehearing. Shortly after the rehearing was stayed, another petition for a rehearing was submitted by 'Na Hika' [sic].[193]

338. In August 1879, Land Purchase officer Gilbert Mair advised District Officer Booth that Hika and others "have a real grievance" about the Ōwhāoko Block.[194] The following month, Fenton wrote to the Native Minister noting that he had recommended a rehearing in September 1878 but that no further action had occurred.[195] It appears that Fenton was then informed about the lapsed twelve-month application period. Fenton realised that this was incorrect, provided the Under-Secretary of the Native Department with the correct dates and advised that "everything seems regular" with the application.[196] After a change in government, the new Native Minister, John Bryce, recommended a rehearing into the Ōwhāoko block, and on 4 February 1880 an Order in Council directed that a rehearing should take place within three years of the date of the final adjudication, 31 October 1877.[197] To this end, an order appeared in the *Gazette* on 8 June 1880, setting the date for the rehearing on 30 June 1880.[198]

339. At some point during the next two or three weeks, Dr Walter Buller applied to the Chief Judge requesting an adjournment of the 30 June 1880 rehearing on the basis that the claimants (who Buller stated mostly resided at Taupo) had not received adequate notice.[199] Stout's report later stated Buller had a retainer from them and noted the impropriety of a solicitor acting for both sides of a dispute – and of the Judge accepting representations from Buller without query.[200] Given that the rehearing had the potential to jeopardise

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192 AJHR, 1886, G-9, p 8; Wai 2180, #A43, at 274.

193 AJHR, 1886, G-9, p 8. Stout's summary of these communications does not provide a date for Na Hika's letter.

194 AJHR, 1886, G-9, p 8.

195 AJHR, 1886, G-9, p 8; Wai 2180, #A43, at 275.

196 AJHR, 1886, G-9, p 8; Wai 2180, #A43, at 275.

197 AJHR, 1886, G-9, pp 8–9; Wai 2180, #A43, at 275.

198 AJHR, 1886, G-9, p 9. Stout's memorandum noted the gazettal of this order contained further errors relating to the location of one of the earlier hearings.

199 AJHR, 1886, G-9, p 9. Neither Stout nor the Committee provided the date of Buller's request. See also Wai 2180, #A43, at 275.

200 AJHR, 1886, G-9, p 9.

the interests of Kawepō and the Studholmes, Buller's application for an adjournment, ostensibly on behalf of those who were seeking the rehearing, appears inappropriate, and was considered so by the Committee upon later investigation.

340. On 23 June 1880, a notice signed by Fenton appeared in the *Gazette* postponing the rehearing "to a future date".[201] Fenton insisted (while being cross-examined before the Committee in 1886) that the adjournment had nothing to do with Buller's request. Fenton stated he had not seen Buller's request, and that he had ordered the adjournment because he was carrying out work for the government in Wellington and was unable to get to Napier for the scheduled start date.[202]

341. On 26 July 1880, Buller wrote to the Native Land Court Registrar in Auckland requesting the names of those who were seeking the re-hearing. Buller stated that he wanted the names because Chief Judge Fenton "has advised Studholme to make terms with a view to withdrawal [of their application for a rehearing]." The Court provided the names.[203]

341.1 Stout's 1886 memorandum would later suggest that such advice was "a new function for a judge to have assumed." Stout later accepted Fenton's word that he had not in fact given Studholme any such advice, and denied any intention to imply corrupt behaviour on Fenton's part.

341.2 The Crown also notes Fenton's evidence to the Committee which clarified that Buller was in fact legally entitled to the information.[204]

Stout understood Buller was on retainer to both. Buller was definitely retained by one of the owners of the Owhaoko Block, Rēnata Kawepō and also taking instructions from (and payment from) the Studholmes who were leasing the block.

201 AJHR, 1886, G-9, p 9; Wai 2180, #A43, at 275.

202 AJHR 1886, I-8, Minutes of Evidence, p 3 (p 11 of pdf). Stirling et al are unconvinced of this given the particular timing.

203 AJHR, 1886, G-9, p 9.

204 Wai 2180, #A43, at 275. AJHR 1886, I-8, Minutes of Evidence, p 4 (p 12 of pdf).

Fenton quoted from the Rules of Court which provided for the inspection of Court papers at a fee of 2s. 6d and a letter from the Court on the contents of records for a 5 shilling fee. With respect, the Crown notes that this evidence appears inconsistent with Mr Stirling's allegation that Fenton "had no business to give Studholme the advice referred to by Buller."

341.3 Dr Buller later wrote to the House explicitly denying that his statement about Fenton's advice had been untruthful.

342. On 16 October 1880, a notice was published in the *Gazette* setting a new date for the rehearing of the Ōwhāoko Block to be held in Napier – 29 October 1880.[205] Fenton instructed Court officials to open the Court on that day but then adjourn until the following Monday, 1 November. On 25 October, the Court Registrar advised Fenton that the rehearing had to be called on or before 31 October 1880, this being three years since the adjudication of the Ōwhāoko Block. This advice notwithstanding, the Registrar sent instructions to the Court the following day that the hearing be adjourned until 1 November.[206] When this action was considered by the Committee, Fenton informed them that he had been uncertain how long it would take to complete his work in Wellington and so requested the latest possible hearing date to avoid the possibility of further adjournments.[207]

343. On 26 October 1880, the same day that the instruction to adjourn the rehearing was issued, Buller sent a telegram to Fenton in Napier advising that he was posting a "fully signed" withdrawal of the application for re-hearing. Upon receiving the telegram, Fenton advised his staff that the Ōwhāoko re-hearing had been withdrawn.[208] In his 1886 memorandum, Stout remarked that at this time Fenton had no evidence that the application for a re-hearing of Ōwhāoko had been withdrawn beyond Buller's telegram, and stated:[209]

> no Court would consider a telegram from the solicitor of the parties objecting to the rehearing to be evidence of the withdrawal of claims by those who had applied for a rehearing.

344. When the Court sat at Napier on 1 November, with Fenton as Judge, Buller appeared and claimed to represent those who had applied for the re-hearing

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Mr Stirling also makes no reference to Fenton's statement to the Committee that while he denied advising Studholme in this case, doing so would not have been inappropriate or even unusual: as Chief Judge he routinely sought to "make up quarrels" in order to ease the work of the Court.

205 AJHR, 1886, G-9, p 10. Fenton later clarified that while the English language version of the *Gazette* gave the date of the hearing as 20 October the correct date was 29 October (as published in the Kāhiti). See AJHR 1886, I-8, Minutes of Evidence, p 46 (p 53 of pdf).

206 AJHR, 1886, G-9, p 11; Wai 2180, #A43, at 276.

207 AJHR 1886, I-8, Minutes of Evidence, p 3 (p 11 of pdf).

208 AJHR 1886, I-8, Minutes of Evidence, p 11 (p 12 of pdf); Wai 2180, #A43, at 276; Wai 2180, #A06, at 37.

209 AJHR 1886, I-8, Minutes of Evidence, p 11 (p 12 of pdf).

but now wished to withdraw – the Judge did not query his ability to do so. Buller later confirmed he had acted for the two parties at once and gave his explanation.[210] His explanation did not result in the House reaching a different view from the Committee on this matter. A lawyer who purported to represent some of those who had been excluded from the original title was prohibited from participating in the hearing by Fenton, on the basis that his clients were not among the applicants for the rehearing that was then before the Court.[211]

345. There followed a series of adjournments, called to enable Fenton to consider the question of whether, in circumstances where an application for a rehearing had been granted but then withdrawn, the original judgement should stand.[212]

346. In the middle of these adjournments, on 3 November 1880, Heperi Pikirangi and others wrote to Fenton reiterating their view that the inadequate notification of the first Ōwhāoko hearing had made it impossible for them to attend. They also stated that their subsequent attempts to be heard in Court had been frustrated by a series of adjournments, before accusing Buller of "working mischief" among those who had applied for the rehearing. They said that Buller "wrote the names of absent persons" in the withdrawal letter and suggested that one person who had declined to sign the letter had then been paid £5, presumably to change his mind.[213] Later, Hiraka Te Rango also stated that Buller had offered others £5 and "gave Topia £50".[214] Te Rango later told the Committee that he confronted Buller about these payments, but Buller had denied he had paid them.[215] Buller himself wrote to the Committee denying

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210 AJHR 1887 G1 at 3. Buller stated he had acted for both Kawepō and Topia for some years and did not perceive them "in any way opposed to each other" up to that time. Buller argued that he thought Topia had been "made the catspaw of the Patea people, for I could not see what possible interest he or his tribe could set up in in Owhaoko". He says Renata agreed with this view, and that Buller conveyed a letter from Kawepō to Topia urging withdrawal. Buller stated no money was paid to Topia or the other claimants for the withdrawal. See Wai 2180, #A43, at 277.

211 AJHR, 1886, G-9, p 13 (p 13 of pdf).

212 Wai 2180, #A43, at 267–268; Wai 2180, #A06, at 38.

213 AJHR, 1886, G-9, p 15 (p 15 of pdf); Wai 2180, #A43, at 279–280.

214 Wai 2180, #A43, at 279–280.

215 AJHR 1886, I-8, Minutes of Evidence, pp 38–39 (pp 46–47 of pdf). See also Wai 2180, #A43, at 279–280.

that he had offered or made any payments.[216] Later, some witnesses at the 1887 Ōwhāoko title rehearing investigation testified that Buller plied Topia and others with alcohol before inducing them to sign the withdrawal letter.[217]

347. On 3 November 1880, the Court reconvened and Fenton stated that the withdrawal of the application for a rehearing meant that there was nothing for the Court to consider. He also said he would refer the legal question about the status of the Ōwhāoko block to the Supreme Court.[218]

347.1 Stout later stated that it was "to be regretted that the whole facts had not been stated in the case by the Chief Judge to the Supreme Court. He knew that persons who had applied for the rehearing had not abandoned the prosecution of their appeal."[219]

347.2 However, Fenton later claimed before the Committee that he had not seen Heperi Pikirangi's letter although he "cannot explain why he did not".[220] This notwithstanding, Fenton also argued that "nothing was more frequent after the decision of the Court than for dissatisfied parties who had lost their case to come in multitudes and complain". Complaints of fraud and falsification were so common, Fenton stated, that "it would be quite impossible" for the Court to investigate them.[221]

348. A week after Fenton's decision to accept the withdrawal of the rehearing, some of those who had ostensibly asked to withdraw their application for a rehearing (at least according to Buller) wrote separately to Native Minister Bryce asking that their names be removed from the document.

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216 Ōwhāoko and Kaimanawa Native Lands. Sir W L Buller's Statement; Appendix to the Journals of the House of Representatives, 1887 Session I, G-01, pp 2–3.

217 Wai 2180, #A06, at 37.

218 AJHR, 1886, G-9, pp 13–14 (pp 13–14 of pdf); Wai 2180, #A43, at 277–278.

219 AJHR 1886, I-8, Minutes of Evidence, p 17 (p 17 of pdf).

220 AJHR 1886, I-8, Minutes of Evidence, p 50 (p 58 of pdf).

221 AJHR 1886, I-8, Minutes of Evidence, p 14 (p 22 of pdf).

Fenton also claimed that the Court's inconsistent practices with notification (as had occurred for Ōwhāoko and Ōruamatua-Kaimanawa) was in part attributable to the Court being inadequately resourced for the scale of task it performed. Without further evidence however these submissions cannot take that matter further (whilst Fenton was well placed to assess the scale of resourcing, the context in which he made this allegation is such that his statement would require further evidence to confirm its accuracy).

348.1 On 10 November, Rawiri Kahia, whose name was on the letter but who had not signed, informed the Minister that his name had been added "secretly without my concurrence" and restated his desire for a rehearing. Native Minister Bryce suggested that "it is likely enough that the writer's name has been forged to some document, as he alleges" and referred the matter to his officials.[222]

348.2 In a telegram to the Minister sent the following day, Hohepa Tamamutu, who had signed the withdrawal application, stated that Buller had "cajoled" him and other signatories to sign the withdrawal letter, which Tamamutu appeared to believe had been drafted by the Native Minister. Native Minister Bryce made a note on the telegram stating that he had not drafted any document for Buller, and ordered that the telegram be 'repeated' to the Chief Judge.[223]

349. On 15 January 1881, the Under-Secretary of the Land Purchase Department, R J Gill sought further information from the Court. The Registrar of the Native Land Court informed Gill that the Ōwhāoko case was going to the Supreme Court and would probably not be concluded before the next Parliamentary session. On this basis, Gill informed the Under-Secretary of the Native Department that "this case is very complicated one, and will probably only be decided by the Supreme Court." He suggested that a "simple acknowledgement" to Kahia's letter was appropriate.[224]

350. When asked about these complaints by the Committee, Fenton again told the Committee that he had not seen the telegram which had been forwarded from the Native Minister. When it was pointed out that the Minister's telegram had been received and filed by his clerk, Fenton "guessed" that it may have been put before him when he was "engaged in

222 AJHR, 1886, G-9, p 16; Wai 2180, #A43, at 280.

223 AJHR 1886, I-8, Minutes of Evidence, p 15 (p 15 of pdf); Wai 2180, #A43, at 280.

224 AJHR, 1886, G-9, p 16; Wai 2180, #A43, at 280–281.

making a genealogical table, which is a piece of work requiring great attention."[225]

351. After hearing Fenton deny to the Committee that he had read either Heperi Pikirangi's letter or the Native Minister's telegram, Stout:

351.1 accepted that his 1886 memorandum had been mistaken to suggest that Fenton was aware of these complaints when he referred the Ōwhāoko case to the Supreme Court;

351.2 but maintained instead that he "should have felt bound to comment on the carelessness of the administration of a Native Land Court Office that allowed such a telegram and such a memorial not to be perused by the person to whom they were addressed."[226]

352. Ultimately, however, Fenton argued that the continuing opposition of claimants who had been excluded from the original title but were not among those who had applied for the rehearing (and then withdrawn it) was irrelevant at law. In Fenton's view, only the original applicants could participate in a rehearing (ie given that Topia et al application had been withdrawn, the Hika/Huke case could not proceed). He argued that when the Ōwhāoko rehearing came before the Court in November 1880, it did so under the provisions of the Native Land Act of 1880, which he said made no provision for a case to be heard de novo but only provided for a rehearing of the original claimants.[227] In Fenton's judgement:

> the assent or concurrence of the others did not signify. The same power that applied for the rehearing had withdrawn the application. As often happened with Natives, the same person who signed the names in the application signed them in the notice of withdrawal also. The right to do this had never been questioned.

353. In a written statement to the Committee made after its hearings completed, Stout reiterated his disagreement with Fenton's interpretation, and noted that Judge Rogan had expressed a view to the Committee on this matter

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225 AJHR 1886, I-8, Minutes of Evidence, p 49 (p 57 of pdf).

226 AJHR 1886, I-8, Minutes of Evidence, p 82 (p 90 of pdf).

227 AJHR 1886, I-8, Letter from Mr Fenton to the Chairman, p 84 (p 92 of pdf). Under the 1873 Native Land Courts Act s 58, rehearings were to be de novo; the Native Land Court Act 1880 section 47 is silent on that particular matter.

that directly contradicted Fenton's (ie in Rogan's view any new party could participate in a rehearing).[228]

Crown action relating to allegations concerning the withdrawal of the rehearing

354. Mr Stirling characterises the advice that officers of the Native Land Court provided to Crown officials during these investigations as "carefully misleading".[229] The Crown does not agree. As the narrative above suggests, the story of the Ōwhāoko block was complex, and the question of statutory interpretation that Fenton referred to the Supreme Court was indeed complicated.[230] The question was debated by Fenton and various lawyers over the course of the November 1880 hearing, and Fenton concluded that:[231]

> certain doubts had been raised in the minds of himself and colleague as to the construction of the present statute law, upon which they had decided to take the opinion of the Supreme Court.

355. With respect, the Crown submits that there was no clear reason for the Crown to have intervened more forcefully regarding the withdrawal of the rehearing at that time. The Native Minister referred the two complaints made to him to officials and to the Chief Judge of the Land Court. He then (perhaps because he did not receive a reply from the Judge) directed officials to obtain information about the status of the Ōwhāoko block, with a comment that the complaint was probably valid. Those officials sought further information and were informed (correctly, in the Crown's view) that the matter was complex and was before the Supreme Court. The Crown submits that in those circumstances, acknowledging the complainant's letter and letting the judicial process play out was a reasonable course of action.

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228 Wai 2180, #A39, at 151–152. It should be noted that, in its 1891 decision quashing the Mangaohāne title, the Court of Appeal was asked to consider similar issues. In that case, the Court decided that the rehearing would only involve those who could claim through the same ancestral lines that the rehearing applicant claimed through. In other words, a rehearing did not necessarily mean that the title determination would restart from scratch. Stout, by that time acting for Winiata Te Whaaro, argued against the Court's view on this.

229 Wai 2180, #A43, at 280.

230 AJHR, 1886, G-9, p 13. Buller had argued, for example, that "the provisions of the Interpretation Act, 1878 as to repeals did not apply to such case as the present [and] that the proceedings were regulated by the various Native Land Acts as modified and controlled by the amending and consolidating Act of 1880."

231 AJHR, 1886, G-9, pp 13–14.

356. In July 1881, the Supreme Court found that if the decision of the original Court had not been reversed or amended, it should stand.[232] Following this judgement, Fenton made an order confirming the ownership of the 134,650-acre Ōwhāoko block to the original six grantees.[233]

357. Later, following its investigation, the Committee found that it "appears from the evidence that some at least of the parties who had applied for rehearing did not intend that their application should be withdrawn."[234] On this basis, the Committee recommended a rehearing with respect to Ōwhāoko No. 1, Ōwhāoko No. 2, and the wider Ōwhāoko block (as discussed under Outcome below).

Allegations of improper conduct

358. In his memorandum, Stout clearly alleged a level of impropriety in the actions of Fenton, Buller, and Studholme regarding the Ōwhāoko block in particular (with some suggestion of favour to Kawepō also). Stout alleged that:

358.1 Buller's application to adjourn the hearing of June 1880 was done in the interests of Rēnata Kawepō and his lessees the Studholmes, and further suggested that "some correspondence or communication" must have taken place between Fenton and Kawepō "or the people acting for him"; indeed he even implied that Fenton and Studholme may have been in direct contact while they were both in Auckland in October 1880, the month before the case for the rehearing was ostensibly withdrawn.[235]

358.2 Initially, Stout believed that Fenton did in fact advise Studholme to make terms with those who were disputing the Ōwhāoko title, and expressed discomfort at Fenton's willingness to cancel the rehearing on the strength of a telegram from Buller alone.[236] His memorandum reproduced, without significant comment, a telegram from Studholme to Fenton in which Studholme

232 AJHR, 1886, G-9, p 17.

233 AJHR, 1886, G-9, p 18.

234 AJHR 1886, I-8, Minutes of Evidence, p i (p 1 of pdf).

235 AJHR, 1886, G-9, pp 9–10.

236 AJHR, 1886, G-9, pp 10–11.

professed to be "anxious [and] relying on you" about proposed amendments to the question that was to be forwarded to the Supreme Court, along with Fenton's reply that he had "delayed case until last moment, for obvious reasons. Buller is now settling it."[237]

358.3 Stout also reproduced communications between Buller, Studholme and Fenton that ultimately led to the dismissal of a further application to hear land that was included in the Ōwhāoko block (Ngaruroro) in 1882 (discussed below).[238]

359. Stout alleged that the Native Land Court had acted "both improperly and illegally" in its treatment of the requests for a rehearing of the Ōwhāoko block.[239] More pointedly, he stated:[240]

> I do not care to comment upon the conduct of the various persons whose action I have had to allude to in this memorandum. The facts are sufficient without comment. Let me only add that, if this case is a sample of what has been done under our Native Land Court administration, I am not surprised that many Natives decline to bring their land before the Courts. A more gross travesty of justice it has never been my [mis]fortune to consider.

360. During the Committee's hearing, Stout retreated slightly from that position. He was explicitly asked whether he "intended … to infer any act of corruption [or] collusion" against Fenton. Stout's reply was somewhat ambiguous; he first said that he intended to "make no charge whatsoever" against Fenton, but then stated that "I think from the documents which I have seen that he has acted improperly in several cases." Stout then said that "I do not believe there was any corrupt bargain … whatever between himself and Mr. Studholme or Dr. Buller; and never said so. I do not believe so." However, when asked explicitly whether Fenton's behaviour had been illegal or improper, Stout replied "well, I do not think he has acted properly, nor legally."[241]

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237 AJHR, 1886, G-9, p 17.

238 AJHR, 1886, G-9, pp 19–20.

239 AJHR, 1886, G-9, p 17.

240 AJHR, 1886, G-9, p 23.

241 AJHR 1886, I-8, Minutes of Evidence, p 5 (p 13 of pdf).

361. During the course of the Committee's investigation, Fenton offered some plausible responses to some of the questions about his conduct during these events – that were accepted by the Committee at the time:

361.1 This submission has already noted, for example, that Fenton explicitly denied advising Studholme to come to an arrangement with some of those Māori protesting the Ōwhāoko title, as Buller had suggested (and later reiterated), Stout accepted Fenton's word.

361.2 In response to the concerns raised about Buller corresponding directly with Fenton about the adjournment and rehearing withdrawal the Committee asked Fenton who someone should go to when they wished to "approach the Native Land Court about anything", Fenton replied "to myself" (ie to the Chief Judge).[242] In his evidence, Fenton noted that his role as Chief Judge carried a broad range of administrative duties, including issuing preliminary and final notices of Court sittings, corresponding with Survey Department to ascertain where the land claimed was situated, and to communicate with Judges and surveyors about surveys and maps.[243] With this in mind, some of the communications that Fenton engaged in appear less problematic than they otherwise might.

361.3 Fenton argued that the "obvious reasons" for delaying the question to the Supreme Court were to ensure that Parliament would be in session and have the opportunity of "immediately rectifying" the issue if the Supreme Court found that the judgement for Rēnata Kawepō and others no longer stood. A secondary reason was apparently to ensure that Justice Richmond, whose legal knowledge Fenton held in high esteem, would hear the case.[244]

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242 AJHR 1886, I-8, Minutes of Evidence, p 10 (p 18 of pdf).

243 AJHR 1886, I-8, Minutes of Evidence, pp 15–16 (pp 23–24 of pdf).

244 AJHR 1886, I-8, Minutes of Evidence, p 12 (p 20 of pdf).

361.4 For completeness,[245] any judicial preference for a party is problematic and would risk a departure from appropriate judicial norms applicable at the time. Fenton's professed desire to protect "large interests" in the Ōwhāoko block may not have related exclusively to Studholme's interests, as Mr Stirling concludes. During his testimony to the Committee, Fenton expressed strong sympathies for Rēnata Kawepō.

Ngaruroro: example of legitimate correspondence between Fenton, Buller and Studholme

362. An application to the Court by Taupō-based claimants in September 1881 for title determination of the Ngaruroro Block provides a clear example of Fenton's statement that he, as Chief Judge, was the appropriate contact point to raise issues with the Court.

362.1 In response to the application, the Native Land Court scheduled the hearing to take place in a sitting of the Court starting in Napier on 25 October 1881 (although there must have been adjournments as the hearing did not take place until 18 January 1882).[246]

362.2 In the interim, it appears that Buller discovered that the Ngaruroro claim in fact related to the Ōwhāoko lands. On 11 January 1882, Buller telegrammed Studholme informing him that "Owhaoko gazetted for hearing. Get Fenton wire Heale judgment affirmed."[247] Studholme then sent a telegram to Fenton, stating: [248] "Judge Heale is apparently unacquainted with the facts of the case. Will you kindly advise him? It would be very annoying if there was any further difficulty re title."[249]

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245 AJHR 1886, I-8, Minutes of Evidence, p 12 (p 20 of pdf). A further potential conflict issue on the evidence is Fenton's apparent support of Rēnata Kawepō. Fenton described him as "a man of rank and great spirit" [who] "was not only the father of [his] tribe, but during all these wars he was the preserver of the tribe. They would have all gone into slavery but for the remarkable energy and military skill of this single man." In Fenton's view, Kawepō's tribe had turned against him due to the agitation of a European who had married into the tribe.

The clear implication was that Fenton's activities regarding the Ōwhāoko block may have been motivated by a wish to prevent Kawepō from being "subject to the same indignities, to the same loss of interest in land" as had occurred previously. Whether there was such conflict and/or whether it influenced Fenton's decision making on the withdrawal application is unable to be determined at this remove but – as stated above – a judge preferring any party is of serious concern.

246 AJHR, 1886, G-9, p 19.

247 AJHR, 1886, G-9, p 19.

248 AJHR, 1886, G-9, p 19.

249 Wai 2180, #A43, at 282; Wai 2180, #A06, at 38.

362.3 Fenton did so, advising Judge Heale that "Owhaoko has been heard and is finished. This claim should be dismissed with costs."[250]

362.4 When the block (referred to as "Owhaoko" in contemporary newspaper reports) was called at Napier on 18 January 1882, Buller asked for the case to be dismissed on the basis that the title had already been confirmed. The case was dismissed accordingly. Judge Heale declined to impose costs on the applicants as they "were probably not made aware of the position of the matter" but stated that he would impose full costs if they made a similar claim in the future.[251]

363. The communications between Buller, Studholme and Fenton that led to the Ngaruroro application being dismissed were both lawful and appropriate:

363.1 Ngaruroro did indeed form part of the Ōwhāoko Block that the Court had already determined the title of, and the application could not proceed in such circumstances regardless of whether the applicants were aware of that overlap or not.

363.2 As Studholme's lawyer, Buller was within his rights to inform his client about activities relevant to land he was leasing, and as Fenton stated in his evidence, the Chief Judge was the appropriate first point of contact for people with questions about Native land.[252] It was undoubtedly appropriate for Fenton to act on information that a piece of land was about to be heard twice, and to inform the presiding Judge accordingly.

363.3 Fenton also argued that it was appropriate for him to advise Buller to seek costs. Fenton stated that it was a common tactic for unsuccessful claimants to apply for title to the same land under a different name. He stated that as Chief Judge he routinely recommended the imposition of full costs against such claimants

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250 AJHR, 1886, G-9, p 19.

251 Hawke's Bay Herald, 19 January 1882, p 3, online at Papers Past | Newspapers | Hawke's Bay Herald | 19 January 1882 | NATIVE LAND COURT. (natlib.govt.nz)

252 AJHR 1886, I-8, Minutes of Evidence, p 10 (p 18 of pdf).

> as a deterrent against making such claims; although he noted that Judges rarely if ever imposed them on the basis that they were rarely paid.[253]

Committee's findings on impropriety – and implications from Buller's defence

364. The Committee ultimately rejected any inference from the evidence laid out in Stout's earlier memorandum that Fenton was "actuated by improper motives". The Committee reported it saw "nothing in the evidence to show any such partiality or favouritism on the part of either Mr Fenton or Mr Rogan."[254] They reached that conclusion after closely investigating the allegations of improper conduct. The Crown submits that in doing so they discharged the Crown's supervisory obligation. The conclusions they reached were not unreasonable on the evidence before them. The Crown is not in a position to substitute its own judgment for that of the Committee at this remove.

365. A key allegation – that Judge Fenton advised a party how to proceed – was explicitly denied by him. In denying that, Judge Fenton in effect stated that Buller had lied. In the absence of evidence to the contrary, the Committee accepted Fenton's word (as did Stout) and found:[255]

> 7. Several serious charges have been made against Dr. Buller in the course of the inquiry, as to which, that gentleman being absent and unrepresented, the Committee offer no opinion.

366. Dr Buller strongly objected to Fenton's implication that Buller had lied or otherwise acted inappropriately. In his support, Dr Buller provided a letter Fenton had written to Studholme in London, whilst Fenton was being examined by the Committee:[256]

> I am doing the best I can for all of us, and you or he might take a line which would destroy everything, and be extremely disastrous. You

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253 AJHR 1886, I-8, Minutes of Evidence, pp 14–15 (pp 22–23 of pdf).

254 AJHR 1886, I-8, at 1–2.

> 6. The memorandum of the Hon Sir Robert Stout would appear to have conveyed to Mr Fenton the impression that, in coming to the decisions that he did, he was actuated by improper motives; and that he had been influenced by friendship, and had unduly favoured certain parties. The Committee have to report that, in their opinion, there is nothing in the evidence to show any such partiality or favouritism on the part of either Mr Fenton or Mr Rogan; and that the Hon Sir Robert Stout, in his second memorandum (p 81), states that he at least did not intend to charge corrupt conduct.

255 Buller was out of the country and thus could not appear directly in front of the Committee – he was in fact in London with Mr Studholme at the time.

256 AJHR 1887 G-1 at 1–2.

> know Buller's impetuosity, and how he might be writing something which would put all the fat in the fire. Pray see him at once, and tell him to write nothing. I can see what is best, much better than you or he can, away from the place, so pray take some trouble in insisting that nothing shall be said or written by either of you. Conflict would be destruction. I think there is a disposition to protect the European interests. Stout, however, is mad on the subject of the natives. You will understand, I hope, the importance of silence at present on the part of yourself and Buller.

367. The Crown's view is that the content of the letter raises serious concerns as to the conduct of Fenton:

367.1 The letter clearly evidences a close relationship between Fenton and Studholme ("doing the best I can for all of us") and – more concerningly – some degree of orchestration between them (and Buller) for how to deal with the inquiry.

367.2 The letter also suggests Fenton perceives the committee may have a degree of preference or support to "protect European interests" over those of Māori – which he himself seems to view favourably. This is of deep concern coming from a (by then retired) Chief Judge of the Native Land Court. We cannot of course accord any weight to whether he is correct as to the Committee's view or not.

367.3 The letter does not seem consistent with the evidence Fenton gave to the committee of his relationships with Studholme and Buller – which may impact upon the weight that can be accorded to his other statements to the Committee.

367.4 During his testimony, Fenton insisted that the fact that he had filed all of the communications between himself, Buller, and Studholme in the Native Land Court's records demonstrated that "it never entered my mind that there was any understanding between us. If there had been, as an ordinary man of the world I should have destroyed [the letters]."[257] Fenton's claim of transparency is difficult may be dented by the later plea he makes in the above letter to Studholme and Buller for their silence.

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257 AJHR 1886, I-8, Minutes of Evidence, p 6 (p 14 of pdf).

367.5 It is possible that Fenton's clear sympathies for Rēnata Kawepō may in part explain his desire to avoid "disaster" in the form of a recommendation by the Committee for rehearing. However, the letter seems more likely to refer to being a disaster for the correspondents themselves (ie the European interests). However, it is entirely inappropriate for a Judge to extend preferences to any party regardless.

368. This letter was available to the House of Representatives when they were assessing the Committee's report. It had not been available to the Committee itself prior to it completing its investigation and report. The House, in considering the Committee's report, and Dr Buller's correspondence, expressed concerns about Fenton's letter but ultimately decided no further sanction was warranted.

369. The Crown considers that Fenton's letter raises significant concerns as to improper conduct – if not in relation to the 1880 events themselves, to the orchestration of a response to the Committee in 1886.

Outcome of the 1886 inquiry – special legislation and a full rehearing ordered

370. Parliament's Ōwhāoko and Kaimanawa Native Land Committee subsequently reported:

> There has no doubt been much irregularity in the proceedings of the Native Land Court; but the Committee are of opinion that it would not be right to judge that Court by such a strict standard as might fairly be applied to other Courts.

371. The Ōwhāoko and Kaimanawa-Oruamatua Reinvestigation of Title Act 1886 did not cite the Court's administrative 'irregularities' as a reason for the rehearing.

372. The Crown considers this conclusion to be underwhelming given the matters covered in the Committee's investigation.

372.1 The view that "it would not be right to judge that Court by such strict standard as might fairly be applied to other Courts" is unsatisfactory in Tiriti/Treaty terms, in the absence of clear explanation as to what is meant by that. Whilst specialist jurisdictions may differ from the general courts – quite what is

meant by concluding the Native Land Court need not be held to the standards of other courts is uncertain and appears problematic.

372.2 The Crown notes, however, that, whilst the conclusion is somewhat tepid (particularly when seen in light of the Fenton letter disclosed by Dr Buller) the remedy of introducing special legislation to order a full rehearing was an appropriate response.

373. The outcome of the 1886 inquiry was the Ōwhāoko and Oruamatua-Kaimanawa Reinvestigation of Title Act 1886, which provided for the titles to both blocks to be investigated as if they were customary Māori land:[258]

373.1 Ōwhāoko was to be reheard due to the circumstances in which the rehearing was withdrawn in in 1880;

373.2 Ōruamatua-Kaimanawa was to be reheard due to the court failing to record all owners on the title, contrary to legislation and even though evidence had been given in court that there were more owners. Notification was also mentioned as an issue but it was not the determinative reason for the rehearing being granted.

374. The rehearing resulted in Kawepō being removed from the title, although he was restored, but to a considerably reduced extent, a year later. Professor Boast comments that this is one of the few times where a rehearing resulted in the initial title determination being largely overturned.

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258 AJHR 1886 I-8 at 1–2:

1. With regard to the lands called Ōwhāoko No. 1, Ōwhāoko No. 2, and Ōwhāoko, it appears that a rehearing was ordered as alleged in the first paragraph of the preamble to the Bill, and that no such rehearing ever took place. It also appears from the evidence that some at least of the parties who had applied for a rehearing did not intend that their application should be withdrawn.
2. The Committee are therefore of opinion that there should be a rehearing with respect to Ōwhāoko No. 1, Ōwhāoko No. 2, and Ōwhāoko.
3. With regard to the Kaimanawa-Ōruamatua land it appears that on the hearing a witness, Noa Huke, stated that "Natives not present had a claim; that the people then living on the land had a claim." But, after endeavouring, without success, to obtain from Noa Huke and Benata the names of Natives other than were put in the memorial of ownership, the Court, notwithstanding Noa Huke's evidence, made an order in favour of five Natives only. Two of the absent Natives have been examined, and another has been represented by his son, before the Committee. They object to Benata being made a part-owner with them, and also complain that the hearing was held in their absence. It is stated by them that they had only three days' notice, which appears to the Committee to have been unreasonably short. It is however material that an application for a rehearing was received and considered, but refused by Sir Donald McLean, apparently on the ground that the Natives had had sufficient time to appear.
4. The Committee are of opinion that a prima facie case for a rehearing has been made out in the case of the Kaimanawa-Oruamatua Block […]

375. The Committee also recommended, and the Act provided for, leases held over the land to be preserved, and that any new owners would not have any claim to back rent from the lessees.

> 5. In the opinion of the Committee, provision should be made, in granting a rehearing in respect of any of the said blocks, that the rights of the lessees respectively should not be prejudiced.

376. The Crown considers it was reasonable to protect any party from retrospective adverse consequences of Crown or court processes.

377. The Crown sees no reason to disagree with the conclusion of the Ōwhāoko and Kaimanawa Native land Committee that there had been "much irregularity in the proceedings of the Native Land Court". The Crown role here is in the checks and balances that, collectively, were intended to ensure proper administration of the Native land laws.

378. The Crown submits that the evidence set out above demonstrates that the Crown exercised its oversight responsibilities appropriately in the case of the Ōwhāoko and Ōruamatua-Kaimanawa blocks.[259]

378.1 At a granular level Crown Ministers and officials were responsive to complaints as they were made, and acted on those complaints by seeking information and referring questions to the Chief Judge and other Court officers.

378.2 At a high level, the Native Minister's decision to refer the complaints to the Premier and Attorney General (and Minister of Education) Sir Robert Stout; his investigation and memorandum; the establishment of a special Select Committee to investigate the

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259 None of these three men are Crown officials and thus the Crown does not have direct responsibility for their actions – but does have the oversight role set out in this paragraph.

For completeness: In his evidence to the Committee, Chief Judge Fenton argued that he was only acting in a judicial role when he was in court deliberating on the particular proceedings before him. He argued that when he was undertaking administrative tasks he was not exercising a judicial function and that such task were functions of the executive, in his view this seemed to include procedural decisions of the court. He argued that his receipt of correspondence and complaints from parties that was recorded in Stout's memorandum was dealt with in an executive administrative function not judicial. In his view, the only judicial function that was before the Committee was his procedural decision to accept the rehearing withdrawal notice.

This does not accord with the Crown's view. The Crown accepts that deliberation is at the core of the judicial role (and thus to be most highly protected from any undue influence or blurring of the separation of powers). However, procedural decisions, and the conduct and operation of the court as a whole form part of the Court's sphere of control and influence – both in terms of the legislation (then and now) and the constitutional premise of the separation of powers.

claims in detail; and the promotion of special legislation the Ōwhāoko and Oruamatua-Kaimanawa Reinvestigation of Title Act 1886, collectively constitute the Crown responding appropriately and effectively to the continuing complaints of Māori who disputed the 1875 Court decision.

378.3 At an overview level, the investigation appears to have contributed to the ongoing scrutiny of, and reform of, the Native land laws.[260]

379. To a large extent, Fenton characterised any inadequacies in the Court's practices (for example requirements to notify interested parties, to keep reliable records, and to adequately respond to complaints) to a lack of funding for the Court. Professor Boast notes also that the Court was not well endowed, however, this issue would require further research to be developed further.

Crown response to systemic issues

380. As stated at the outset of these submissions, although the Committee was constituted to inquire into the block title histories, the Committee also heard evidence of generalised or systemic issues in the Native land legislation and the practice of the Native Land Court. The Committee did not make recommendations on those issues but the inquiry appears to have had some impact on them.

381. Whilst Professor Boast observes that Premier Stout was not a 'detached observer' (noting his representation of Airini Donnelly) and some at the time considered him to be 'playing politics', the Ōwhāoko investigation contributed to the public reputation of the Court having "fallen very low" by the 1890s: "denounced by most and defended by few". This in turn led to various reforms of the Native land laws; the period between 1887 and 1894 was a particularly active period in law reform, as the new 'Liberal' policies and ideologies became implemented.

382. Professor Boast attributes the transition of the Court from its earlier era as arising from:

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260 For completeness the Crown records that Fenton alleged the Crown failed to fund the Court to a degree that enabled it to carry out its duties effectively. That issue is not addressed in these submissions.

382.1 the changes in the nation between the 1850s and 90s[261] (Professor Boast states: Judges Fenton and Rogan "whose careers had begun before the New Zealand Wars had even begun, now seemed to belong to an earlier world");[262]

382.2 political and ideological changes to increased state role in both facilitating development but also an increasing role to protect social values and public health;[263]

382.3 the standards of practice of the court, including decisions taken to the ordinary courts due to the complexities of the Native Land Court titles and "jurisdictional mistakes" by the court; and

382.4 "growing pressure for a remodelling of the Native Land Laws, widely denounced as a confusing mess, for full equality between the races", and for remedial legislation which would clarify the rights of those who had "purchased Māori land in good faith" but who now found their titles uncertain and vulnerable to attack in the courts.

383. Premier Stout's memo in May 1886 led to the Committee hearing in July. The Native Land Court Act 1886, a comprehensive consolidation and clarification of the Native land law,[264] received assent in early August and came into force in October that year. The degree to which the Committee inquiry contributed to subsequent policy, legislative amendments or Crown conduct is not clear. The inquiry occurred at the early stages of a period which some substantial shifts in Native land policy and legislation occurred.

384. During Stout's short period as Premier,[265] in parallel with or very soon after the Committee inquiry, the Native Land Court legislation was clarified and consolidated – including some substantive reforms.[266] The Native Land

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261 R Boast, Native Land Court Vol 2 at 93–95. Professor Boast uses the term "New Zealand saw itself as …". It is unclear who's lens or perspective he intends to be represented by "New Zealand" in this analysis – and in particular whether he considers Māori as also sharing these views in the 1890s.

262 R Boast, Native Land Court Vol 2 at 94.

263 R Boast, Native Land Court Vol 2 at 94. Whilst 1890s very much an individualist era, the seeds of the substantive global 'revisiting of individualism and collectivism' Boast traces in his third volume can be seen in increasing collective measures also (eg 1894 incorporation provisions).

264 R Boast Native Land Court Vol 2 at 8 describes this statute as "clear, logically set out, and well-drafted".

265 Stout was voted out in 1887 and not back in the House until 1893.

266 Native Land Courts Act 1886.

Court Act 1886 abolished the sketch plan system. Investigations would require a certified map (with only a very limited exception); and the 1873 memorial of ownership/1880 certificate of title for land (the Ōwhāoko and Ōruamatua-Kaimanawa forms of title); and provided for the Court's determinations to have effect on the title immediately upon registration.[267]

385. Further substantive changes occurred between 1886 to 1894, broadly focussing on achieving secure and final titles, including through remedial measures, measures to support close settlement and national infrastructure development, and increasing provision for collective land management.

9 July 2021

R E Ennor / MGA Madden
Counsel for the Crown

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

267 Native Land Court Act 1886 at ss 18, 22.