IN THE WAITANGI TRIBUNAL
OF NEW ZEALAND

WAI 2180

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of the Taihape Rangitīkei ki Rangipō District Inquiry (Wai 2180)

GENERIC SUBMISSIONS IN REPLY TO CROWN SUBMISSIONS REGARDING 20th CENTURY LAND ALIENATION

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MAY IT PLEASE THE TRIBUNAL

1.0 INTRODUCTION

1.1 In reiteration of the twentieth century context, Taihape Māori entered the twentieth century with limited scope for economic development and no security surrounding land retention.

1.2 The limited scope for economic development can be attributed to the Crown's failure to give serious consideration to the proposals set out in the letter dated 9 September 1892 written by Taihape Rangatira, and the Crown's implementation of financing policies and administrative structures that did not reflect the aspirations of Taihape Māori or Māori land tenure.

1.3 Financing required Taihape Māori to meet a criteria that was far more arduous than what was required by their European counterparts. Administrative structures made available to Taihape Māori in the early twentieth century either required them to give up control of their land or were only available to lands where the Crown did not own an undivided interest.

1.4 Consequences emerging from these circumstances included a sharp decline in Taihape Māori sheep numbers which suggest a struggle for Taihape Māori to produce a sustainable income from the land.

1.5 Later in the twentieth century, we see unnecessary and unscrupulous Crown land acquisitions which include the acquisition of Ōtūmore block, a block with no economic prospects, for the payment of outstanding survey liens in circumstances where the law allowed for a remittance; the sale of Ōwhāoko C3B block which involved an erroneous valuation conducted by the Government Valuation Department which failed to account for millable timber; and the Crown acquisition of Ōwhāoko D2 block which took place at a time when Government policy and law was changing to reflect a prohibition on Crown acquisitions of Māori land.

1.6 These reply submissions provide specific responses to the Crown's submissions on Issue 12 and reiterate a series of categorical Crown breaches of Article 2 of Te Tiriti/Treaty ("**Article 2**") to actively protect Taihape Māori in the use of their lands.

More specifically, the events reiterated herewith reveal a pattern of dishonourable conduct, unfair processes and no consultation.

1.7 The specific reply submissions are set out as follows:

(a) The Crown's submission that the costs of surveys were not generally proven to be excessively high in Taihape is out of touch with the evidence demonstrating that surveys were a key factor in land alienations and long-term debts. Overall, the Crown's actions were a breach of Article 2.

(b) The Crown's submissions on finance, development and alienation of Māori land must be considered against the aspirations of Taihape Māori and whether finance and development options provided for those aspirations. Overall, the Crown's actions were a breach of Article 2.

(c) Counsel submits that a remission of the outstanding Ōtūmore survey liens would have been reasonable and lawfully possible in light of the circumstances and s 410 of the Māori Affairs Act 1953, the Crown's failure to remit the outstanding charges was a breach of Article 2.

(d) The way in which Awarua 2C15B block was alienated breached Article 2 as the Crown failed to consult with the Māori owners;

(e) The Crown's valuation of Ōwhāoko C3B block breached Article 2 by providing the Māori owners with a grossly unfair sale price; and

(f) Regarding Ōwhāoko D2, Counsel submit:

(i) Crown actions, insofar as it concerns s 121(1) of the Māori Affairs Act 1952, were a breach of Article 2.

(ii) Crown actions concerning Rosie Smith's signature on the sale and purchase agreement and the Commissioner's authority were breaches of Article 2.

2.0 DEBT DUE TO PRIOR CROWN POLICIES

2.1 The Crown assert that the cost of surveys was not generally proven to be excessively high in Taihape.[1] This assertion is out of touch with the evidence produced by Martin Fisher, Evald Subasic and Bruce Stirling. Their respective reports demonstrate that surveys were a key factor in land alienations and long-term debts throughout the twentieth century.

2.2 In relation to the central aspect of the inquiry, Subasic and Stirling said overall that:[2]

> But just as evidently, economic reasons also played a major part. Putting blocks through the Native Land Court was an altogether expensive affair – Court fees, along with the inevitable costs that came along with the Court process including lawyers, interpreters and a host of other unsavoury characters all formed a heavy financial burden on the Maori claimants. **Survey costs, which were extremely high and inevitably charged against the block, were the heaviest.**

2.3 Specifically, regarding Te Koau B block they said:[3]

> The bulk of the block (Te Koau B of 6,879 acres) was privately purchased in 1922, shortly after subdivision in 1921, although the purchase price (£375) for what amounted to two-thirds of Te Koau was still **far less than the survey lien (£475) still owing on Te Koau, which appears to have been the motivation for the transaction**.

2.4 Specifically, regarding the sale of particular Motukawa blocks, they said:[4]

> It appears that Motukawa 2B3B and 2B3C were sold to Collins by 1913. Motukawa 2B3B was sold to John Collins in February 1912 for consideration of £828141. **The purchase money also included the satisfaction of the outstanding survey liens** on the block, which had amounted to £90/18/8.

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1 *Crown Closing Submissions in Relation to Issue 12 Twentieth Century Land Alienation* 7 May 2021 (Wai 2180, #3.3.81) at [30].

2 Evald Subasic and Bruce Stirling, *Sub-District Block Study Central Aspect* (Wai 2180 #A8,2012) at 75.

3 Evald Subasic and Bruce Stirling, *Sub-District Block Study Central Aspect* (Wai 2180 #A8, 2012) at 18.

4 Evald Subasic and Bruce Stirling, *Sub-District Block Study Central Aspect* (Wai 2180 #A8, 2012) at 54.

2.5 And again regarding Motukawa 2B20B block they said:[5]

> In 1914 Collins purchased a part of the block (63 acres, which became Motukawa 2B20B) from Waikari Karaitiana for the sum of £520 4s. 7d, with the **price including the outstanding rent, and an outstanding survey lien**.

2.6 A similar account of land transactions happened in the Northern aspect of the inquiry district. Fisher and Stirling record that in relation to Ōwhāoko:[6]

> **Failure to pay for the survey could result in lands being taken by the Crown in lieu of payment**. In 1906 various sections of the Owhaoko block were vested in the Surveyor- General as payment for outstanding survey liens, plus interest charges. These lands are shown on Map 9 below (in the Gifted Lands section of this chapter). The owners of Owhaoko A, Ngati Tuwharetoa, owed £120 to the Surveyor-General for the survey of the partitioned section, and the owners were forced to pay in land; namely 1,600 acres of Owhaoko A (Owhaoko A West), which was awarded to the Surveyor-General. In addition, 57 acres of Owhaoko A1 (Owhaoko A1A) was vested in the Surveyor-General for £4.5.4 in survey liens, and 410 acres of Owhaoko B (Owhaoko B West) was vested in the Surveyor-General for £31 owing. By 1906 the cost of the survey of Owhaoko C had grown to £372.7.7 and 1,366 acres of the block (Owhaoko C Part) were vested in the Surveyor-General to discharge the lien (plus interest), as was 92 acres 2 roods of Owhaoko D4 (Owhaoko D4A) on which liens of £9.5.0 were owed. Lastly, 326 acres 2 roods of Owhaoko D8 (Owhaoko D8A) was vested in the Surveyor-General for £32.13.5 owed in survey liens, and 65 acres 2 roods of Owhaoko B1 (Owhaoko B1A) for £5.4.6 of liens.
>
> After taking parts of six different subdivisions in 1906 as payment for survey liens, the Crown forced the owners to create new subdivisions to account for the lands awarded to the Crown. **In something of a vicious cycle, a number of these subdivisions then had new charging orders imposed on them for the costs of surveys that had arisen from the taking of land for earlier survey liens.** On 5 March 1931, Owhaoko B1B (the Crown having taken Owhaoko B1A in lieu

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5 Evald Subasic and Bruce Stirling, *Sub-District Block Study Central Aspect* (Wai 2180 #A8, 2012) at 63.

6 Martin Fisher and Bruce Stirling, *Sub-District Block Study Northen Aspect* (Wai 2180 #A6, 2012) at 72-73.

of the survey lien) had a charging order of £5.15.0 was made for the survey of the subdivision.

On 5 March 1931, Owhaoko D4B had a charging order of £3.1.4 was made for the survey of the subdivision. On 12 March 1931, Owhaoko D8B had a charging order for £3.14.0 issued for the survey of the subdivision. **When survey liens were owed land was not always vested in fee simple in the party that was owed the money. The land could also be charged by way of mortgage to pay off the survey costs.** This occurred in Owhaoko D, Owhaoko D4, Owhaoko D5 No.'s 2–4 and Owhaoko D6 No.'s 2–3. The files indicate that the survey liens for Owhaoko D5 No.'s 2–4 were paid. The original cost of the surveys for each partition and sub-division is not indicated in research to date, but snapshots of survey dues owing have been found. In April 1921 the owners of Owhaoko C5 still owed the Surveyor-General £119.2.0 for the survey of the section in 1894, and the owners of Owhaoko C4 still owed £43.4.6 for the survey of their section. The owners of Owhaoko C1 still owed £33.17.6 for the survey of their section and the owners of Owhaoko C7 owed £183.19.6. In 1930 the owners of Owhaoko D7 A still owed the pittance of 17 pence for the survey of their block and the owners of Owhaoko D7B still owed £4.3.7.191

2.1 Tony Walzl in the Twentieth Century Overview Report recorded that:

(a) The Crown acquired seven parcels of Ōwhāoko land, totalling almost 4,000 acres in satisfaction of survey liens.[7]

(b) In 1962, the Crown acquired Ōtūmore in part to pay outstanding survey liens of £566.17.3.[8]

2.2 Tribunal reports about inquiry districts surrounding Taihape reveal similar experiences. Conclusions and findings from those inquiries are reproduced below to assist the Tribunal.

2.3 The Tribunal in the National Park District Inquiry (North west of the Taihape Inquiry) concluded that:[9]

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7 Tony Walzl, *Twentieth Century Overview* (Wai 2180 #A46, 2016) at 334.
8 Tony Waizl, *Twentieth Century Overview* (Wai 2180 #A46, 2016) at 679 a.
9 Waitangi Tribunal *The National Park District Inquiry Report* (Wai 1130, 2013) at 568.

> It is clear that in all parts of the district the imposition of survey liens, the mounting interest charges on unpaid survey costs, and the danger that land would anyway be lost as Crown survey awards, constituted an additional and unfair pressure on the owners to alienate their holdings.

2.4 Lastly, the Tribunal in the Whanganui District Inquiry (South west of the Taihape Inquiry) found that:[10]

> Where the Crown took land in lieu of payment for surveys, it amounted to little more than expropriation, and breached article 2.

2.5 The cost of surveys in Taihape were a significant factor in land alienations and long-term debt as such we invite the Tribunal to make a finding that the Crown breached Article 2.

3.0 FINANCING, DEVELOPMENT AND ALIENATION OF MĀORI LAND

3.1 Counsel respond to the following submissions set out by the Crown:[11]

> 98. **One high-level point that could be made is that Māori freehold land and the history of its tenure was different from the tenure systems applying to non- Māori private parties.** European tenure in this period was usually either leasehold or freehold and held by individuals. Māori tenure under the native land legal system recognised the collective to varying extents, while providing for individualisation – but the form of title being a hybrid did not provide collectively held Māori land with the same access to mortgages etc that freehold land titles had (until 1903).
>
> 99. **Given these differences, there should not be a presumption that Crown policies providing economic support for development should have catered to both sets of land tenure systems in (exactly) the same way.** It has been observed in other Tribunal inquiries and reports that lending against collectively held land was seen to carry more risk than lending against an individual freehold. **It was possible under the Native land laws for Māori freehold title to be converted to the equivalent of a general title or Crown**

[10] Waitangi Tribunal *The Whanganui Land Report* (Wai 903, 2015) at 1480.

[11] *Crown Closing Submissions in Relation to Issue 12 Twentieth Century Land Alienation* 7 May 2021 (Wai 2180, #3.3.81).

Grant, thus putting it on the same playing field as far as accessing Crown and third-party finance for development.

100. However, in doing so, owners would also assume the same risks that attached to that category of land – there is a direct correlation between the security a lender can have over the land they extend credit to, and the amount and terms by which that credit can be extended. This is true for private financing. It is also true of the markets in which the government itself secures finance. **Technical witnesses have suggested that the same level of financing should have been made available by the State as a development initiative. To some extent that is what was in put in place through the efforts of Ngata.** However, it is a long bow to draw to suggest the 19th century government could have secured the further credit that would have been required to finance such a scheme earlier – as Mr Cleaver has set out, the government itself suffered from financial difficulties in the 1880s and 1890s.

101. In summary, any differences of treatment as to financing and other policies for development of Māori land must take adequate account of the differences of tenure and the challenges of that tenure – as insightfully discussed by Sir Apirana Ngata. The differences between the different land-holding "communities", and their aims and objectives should also not be forgotten.

3.2 Counsel agrees that the tenurial systems were different, the European system was based on individual title and the Māori system was based on a communal style of ownership that was intertwined with its leadership and social structures.[12]

3.3 What must be reinforced is that Crown policies concerning development finance only accommodated the European system of land tenure, specifically individualised title. Māori landowners who took advantage of those policies had to conform with the European systems of ownership to the detriment of Māori versions of land tenure and their overall social and leadership structures.[13]

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[12] Philip Cleaver, *Māori and Economic Development in the Taihape Inquiry District 1860-2013* (Wai 2180 #A48, 2016) at 191-192.

[13] Philip Cleaver, *Māori and Economic Development in the Taihape Inquiry District 1860-2013* (Wai 2180 #A48, 2016) at 191-192.

3.4 The key points for Taihape Māori concerning these issues is the time in which this was taking place (1890-1910), and the letter dated 9 September 1892 by Taihape Rangatira setting out a proposal to merge the two world views for the economic benefit of both Treaty partners.[14] The proposal, included a comprehensive plan that involved land development and financing.

3.5 In reiteration of Counsel's generic submissions, timing was a crucial factor. At 1890, Taihape Māori were poised with the right leadership, expertise and sheep numbers from which to have a significant and positive impact on their communities.[15] However, in order to realise this impact, Taihape Māori required the assistance of its Treaty partner, the Crown.

3.6 Rangatira such as Wiremu Broughton, Utiku Potaka, Raumaewa Te Rango, Hiraka Te Rango and Wirihana Hunia devised a proposal that sought to realise this objective and take into account the needs of European settlers.[16] The Crown were dismissive of this letter.[17]

3.7 The Crown point to external events such as the Great Depressions of the 1930s and the fact that wool prices in the early twentieth century affected all farmers not just Māori.[18] In response, by the 1930's the damage was done, Māori land tenure had been dismantled by individualised title.

3.8 The following key indicators inform us about *when* Māori were best positioned to take advantage of the emerging world:[19]

(a) In 1896 Māori owned sheep populations were about 150,000.

(b) In 1905 that figure had fallen to 12,502 from a total population of 661,000.

(c) By 1919 there were only about five Māori farmers in Taihape running a total of 6,642 sheep.

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[14] Tony Walzl, *Twentieth Century Overview* (Wai 2180 #A46, 2016) at 181.
[15] *Generic Closing Submissions 20th Century Land Alienation* 9 November 2020 (Wai 2180, #3.3.52(c)) at [4.54].
[16] Tony Walzl, *Twentieth Century Overview (*Wai 2180 #A46, 2016) at 181.
[17] Tony Walzl, *Twentieth Century Overview* (Wai 2180 #A46, 2016) at 183.
[18] *Crown Closing Submissions in Relation to Issue 12 Twentieth Century Land Alienation* 7 May 2021 (Wai 2180, #3.3.81) at [33].
[19] David Armstrong, *Mokai Patea Land, People and Politics* (Wai 2180 #A49, 2016) at 10.

3.9 From 1896 – 1905, there is a dramatic drop in the number of sheep owned by Taihape Māori. This indicates that the window of opportunity for Māori was closing around 1900 and that the proposal set out in the 1892 letter was vital for the future prosperity of Taihape Māori.

3.10 The Crown's response to the circumstances of Taihape Māori was late and incompatible. The list below sets out failed Crown attempts to accommodate Māori aspirations for land development and financing:

(a) The Government Advance Settlers Act 1894 was a manifestation of the Crown's policy to encourage land settlement. Under this Act the Crown offered finance to settlers seeking to develop and secure land. Mortgages were offered to settlers at reasonable rates. Māori were not excluded from applying for finance under the Act, however the criteria for Māori was different and it did not suit the established mode of Māori land tenure, multiple ownership title. To attain finance Māori had to be the sole owner of their land and have a secondary leasing income capable of servicing the mortgage. Conversely, for a European to attain finance they needed to demonstrate that they had single ownership title over land and that their land produced income sufficient to repay a mortgage;

(b) Section 30 of the Māori Lands Administration Act 1900 permitted owners on blocks with 10+ owners to form themselves into body corporates. Section 31 allowed the majority of owners to appoint the Māori Land Council to administer the land on their behalf, but in doing so they lost control of the land. This effect being a loss of autonomy and mana; and

(c) Incorporation was available under the Native Land Act 1909 in cases where land was owned by five or more owners. Committees of Management could be elected within incorporations if owners holding half of the shares agreed. These committees had the power to alienate land, manage farming operations and borrow money using the land as security. Most Māori land in Taihape was not eligible for incorporation because incorporation was not

permitted on blocks where the Crown owned an undivided interest. The Crown owned undivided interests on most of the land at this time.[20]

3.11 The 1892 letter proposed the establishment of a company to facilitate governance by Taihape Māori Rangatira over their lands, the implementation of a company would have allowed Taihape Māori to attain finance as a single entity but maintain their own governance structures.

3.12 The proposal set out in the 1892 letter was the key to sustained prosperity for Taihape Māori. The Crown's unwillingness to meet Taihape Māori on their own terms meant that their identity and economic security was jeopardised.

4.0 ŌTŪMORE BLOCK

4.1 In reiteration of generic submissions, the decision to recoup outstanding costs through survey charges in 1963 was not fair and reasonable and could have been avoided.

4.2 On this issue, the Crown provides the following acknowledgement:[21]

> 144. The Tribunal SOI asks whether the alienation of Ōtūmore from Māori ownership could have been plausibly avoided. This question is almost impossible to answer given the multiplicity of factors involved, **but the Crown does recognise that, had it not sought to recover the survey fee, the process would not have been triggered.** At the same time, in this instance, the block concerned was quite small, isolated, unoccupied, and had little prospect of economic development given topography and altitude. There was also a history of at least one sale offer on the block. As such, it is not possible to know what the owners may have decided over time.

4.3 In summary, the decision was unfair because the block was not capable of generating at income to pay the outstanding survey liens.[22] Additionally, to remediate such an issue without resorting to alienation, the Crown had s 410 of the

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[20] David Armstrong, *Mokai Patea Land, People and Politics* (Wai 2180 #A49, 2016) at 12.

[21] *Crown Closing Submissions in Relation to Issue 12 Twentieth Century Land Alienation* 7 May 2021 (Wai 2180, #3.3.81).

[22] Craig Innes, *Māori Land Retention and Alienation within Taihape Inquiry District 1840-2013* (Wai 2180 #A15(m), 2018) at 75.

Māori Affairs Act 1953 which permitted the part or full remittance of a survey debt, this is consistent with the Crown's highlighted statement above.

4.4 As set out in Counsel's generic submissions,[23] the starting point should have been that the burden of surveys be shared between Māori and the Crown because they both received benefits through indefeasible title.[24]

4.5 From this point, the Crown should have considered the circumstances further; that being the ambiguity surrounding survey boundaries and titles, and the fact that the block was small and uneconomical.

4.6 Counsel submit that overall, the Crown's failure to actively avoid alienation in these circumstances, was a blatant breach of the Crown's Article 2.

5.0 AWARUA 2C15B BLOCK

5.1 Regarding Awarua 2C15B block, the Crown has welcomed the Tribunal's guidance on whether the Minister's advice and subsequent decision was warranted when viewed through a Tiriti/Treaty lens.[25]

5.2 In summary the block was unoccupied, covered in noxious weeds and had outstanding rates. The Minister recommended to the Court that the land be vested in the Māori Trustee under s 438 of the Māori Affairs Act 1952 to sell on behalf of the owners. Instead the Court vested the land directly in the Rangitīkei County Council on trust to sell, pay outstanding fees against the block and transfer the balance to the owners.[26]

5.3 The outstanding rates were $21.54, the Council prosecution stated that it spent $161.62 on clearing noxious weeds and legal expenses were $102.45. The block was sold for less that the total of these outstanding amounts.[27]

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[23] *Generic Closing Submissions 20th Century Land Alienation* 9 November 2020 (Wai 2180, #3.3.52(c)) at [7.6].

[24] Waitangi Tribunal, *Report on Te Rohe Pōtae Claims Parts I and II* (Wai 898, 2018) at 1269; Waitangi Tribunal, *Te Urewera Report Volume 3* (Wai 894, 2017) at 1195.

[25] *Crown Closing Submissions in Relation to Issue 12 Twentieth Century Land Alienation* 7 May 2021 (Wai 2180, #3.3.81) at [162].

[26] *Central Taihape Block Study Document Bank* (Wai 2180, #A8(a)(2)) at 566-567.

[27] *Central Taihape Block Study Document Bank* (Wai 2180, #A8(a)(2)) at 566-567.

5.4 The Crown points out that there is no evidence that the owners were consulted or given any notice of the Council's intention to sell the block. [28]

5.5 In assisting the Tribunal, Counsel submit that these circumstances give rise to a breach of Article 2, specifically the obligation of partnership which includes the duty to consult Māori and obtain their full, free and informed consent in any transaction for their land. This did not happen.

6.0 ŌWHĀOKO C3B BLOCK

6.1 The Crown sets out a narrative in its submissions which conveys a timeline of events in the history of Ōwhāoko C3B block.[29]

6.2 Article 2 of the Treaty requires the Crown to provide fair prices to Māori for the sale of their land.[30] Taihape Māori did not receive a fair price as the Government Valuation Department valued Ōwhāoko C3B Block at $3,000.00 and failed to take into account millable timber growing on the property.[31]

6.3 The Ōwhāoko C3B block investigation conducted by R T Feist provided that Terry and Margaret Apatu extracted approximately 60,000 cubic yards of timber from the block in 1970 and received a royalty of $1 per cube and the contractor who removed the timber received payment of approximately $1.80 per cube.[32]

6.4 Counsel for Terry and Margaret Apatu acknowledged that millable timber was taken from Ōwhāoko C3B block subsequent to the date of purchase.[33]

6.5 Based on this erroneous valuation, the Māori owners of Ōwhāoko C3B block agreed to sell their land for $3,600.00.[34]

6.6 During Hearing Week 16 (Crown Closing Submissions), the Tribunal sought clarity about the facts surrounding Ōwhāoko C3B, particularly as it concerns the Valuation.

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[28] *Crown Closing Submissions in Relation to Issue 12 Twentieth Century Land Alienation* 7 May 2021 (Wai 2180, #3.3.81) at [157].

[29] Brian Herlihy & Associates, *Report on Ōwhāoko C3B Block* (Wai 2180 #A57, 1995) at 27.

[30] Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage 1, Volume 2 (Part 3)* (Wai 1200, 2008) at 436.

[31] Brian Herlihy & Associates, *Report on Ōwhāoko C3B Block* (Wai 2180 #A57, 1995) at Exhibit D1 and R.

[32] Brian Herlihy & Associates, *Report on Ōwhāoko C3B Block* (Wai 2180 #A57, 1995) at Exhibit R3.

[33] Brian Herlihy & Associates, *Report on Ōwhāoko C3B Block* (Wai 2180 #A57, 1995) at Exhibit V.

[34] Brian Herlihy & Associates, *Report on Ōwhāoko C3B Block* (Wai 2180 #A57, 1995) at Exhibit K.

Counsel mentioned that the evidence was set out in the #A57 report titled *The Report on Ōwhāoko C3B*.

7.0 ŌWHĀOKO D2 BLOCK

7.1 In relation to Ōwhāoko D2 block, the Crown submit that it acted lawfully and in good faith (on balance) and that the Tribunal can still reach findings on Tiriti/Treaty consistency despite the ambiguities in the legal position. Counsel does not agree.

7.2 In response, Counsel submits that:

(a) despite whether the Crown's actions were lawful under s121(1) of the Māori Affairs Act 1952, its acquisition of Ōwhāoko D2 block was a breach of Article 2; and

(b) Crown actions concerning Rosie Smith's signature on the sale and purchase agreement and the Commissioner's authority were breaches of Article 2.

7.3 The material facts in the alienation of Ōwhāoko D2 block are reproduced from Counsel's generic submissions as follows:

(a) On 20 July 1973, Māori Affairs wrote to the Commissioner stating that it understood that he had received a Ministerial Direction not to initiate sales of Māori land to the Crown;[35]

(b) On 20 July 1973, Māori Affairs informs the Commissioner that Robert has died intestate and advises that Robert's wife (Rosie Ngaromata Karaitiana), who he has issued divorce proceedings against, will inherit his share in Ōwhāoko D2;[36]

(c) On 12 October 1973, the Māori Purposes Bill (no 2) was before the House of Representatives for consideration. **Clause 6 sought to repeal section 257 of the Māori Affairs Act 1953, which empowered the Crown to purchase Māori land;**

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[35] M Fisher and B Stirling, *Supporting Documents to Block Study – Northern Aspect Volume 1* (Wai 2180 #A6(a), 2012) at 134.

[36] M Fisher and B Stirling, *Supporting Documents to Block Study – Northern Aspect Volume 1* (Wai 2180 #A6(a), 2012) at 134.

(d) On 23 November 1973, the Māori Purposes Act (no 2) 1973 ("the 1973 Act") commenced;

(e) On 26 November 1973, **the Commissioner wrote to Rosie's solicitors requesting that they backdate execution of the agreement for sale and purchase to before 23 November 1973**, to which they obliged and backdated the agreement to 8 October 1973;[37] and

(f) On 30 May 1974, the Commissioner informed the Māori Land Court Registrar that the agreement for sale and purchase of Ōwhāoko D2 was executed before the 1973 Act commenced.[38]

Section 121(1) of the Māori Affairs Act 1953

7.4 In reiteration of generic submissions, these circumstances demonstrate the in ability of the Māori Affairs Act 1953 to give effect to Article 2 obligations.[39]

7.5 The Crown gave no acknowledgement to Robert's blood relatives as the correct rights holders or potential successors, in these circumstances s121(1) of the Māori Affairs Act 1953 gave priority to Rosie. As Robert and Rosie remained legally married at the time of his death the fact that they were separated and engaged in divorce proceedings did not matter.

7.6 Section 121(1) states that:

> On the death intestate, whether wholly or partially, of any male Māori leaving a widow, the Court may if it thinks fit, on application made by or on behalf of the widow, at any time within two years after the death of the deceased or within such extended time, may be allowed in accordance with section one hundred and twenty-three hereof, and on proof that she has not sufficient land or other property for her maintenance, appoint to the widow, subject to such conditions or limitations with respect to her remarriage or otherwise as it thinks fit,

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37 M Fisher and B Stirling, *Supporting Documents to Block Study – Northern Aspect Volume* 1 (Wai 2180 #A6(a), 2012) at 142-147.

38 M Fisher and B Stirling, *Supporting Documents to Block Study – Northern Aspect Volume* 1 (Wai 2180 #A6(a), 2012) at 147.

39 *Generic Closing Submissions 20th Century Land Alienation 9 November 2020 (*Wai 2180, #3.3.52(c)) at [10.5].

> any such estate or interest in the real or personal estate of the deceased as it could have appointed under section one hundred and nineteen hereof if the husband had died leaving a will.

Lawfulness of the Sale and Purchase Agreement

7.7 From the Commissioner's conduct and irregular circumstances surrounding the witnessing and backdating of Rosie's signature emerge questions about the lawfulness of those circumstances.

7.8 In spite of whether these events give rise to a breach of the law, Counsel submits that the Tribunal can still make a finding that the Crown's conduct was not honourable or fair with respect to the alienation of Robert Karaitiana's shares in Ōwhāoko D2 and therefore breached Article 2.

7.9 In these reply submissions, Counsel seek to amend generic submissions on these points as follows.

Rosie's Signature

7.10 The facts demonstrate that Rosie's signature was not dated or witnessed at the time she signed it. This means the person who purports to be the witness on the sale and purchase agreement was not in Rosie's presence when she signed it.

7.11 Counsel submits that a witness is a person who observes the signing of a legal document such as a sale and purchase agreement. When that signing of that legal document takes place they affirm it by adding their own signature to the document as an attesting witness. Such an interpretation is consistent with s 4 of the Property Law Act 1952 which provides for formalities of deeds.

7.12 Based on Counsel's submission the sale and purchase agreement is not valid as the purported witness did not observe Rosie signing the sale and purchase agreement.

7.13 Counsel acknowledge that further investigations focused on the signing of the sale and purchase agreement are needed to further substantiate any allegation of untruthfulness. However, its maintained that the Commissioner's conduct, at the very least, was unscrupulous and very suspicious.

The Commissioner's Authority

7.14 The Commissioner received a Ministerial Direction not to initiate any sales of Māori land to the Crown, Government policy prohibited acquisitions of Māori land by the Crown and the enactment of the Māori Purposes (No.2) bill was imminent.

7.15 Counsel submits that the Minister's direction alone meant that the Commissioner had to cease dealings with Rosie or at the very least seek confirmation about whether the direction applied to the negotiation of Ōwhāoko D2 which was already underway.

7.16 Alternatively, Counsel submits that the above facts considered together provide a strong inference that the Commissioner no longer possessed the authority to continue with the acquisition of Ōwhāoko D2.

7.17 Counsel acknowledge that further investigations focused on the Commissioner subjective belief and an appreciation of the consequences of his actions are required to substantiate any allegations concerning unauthorised actions. However, it is maintained that the Commissioner should have at least known that his authority to complete the acquisition was unclear.

8.0 Conclusion

8.1 Overall, the Tribunal is invited to make findings that the Crown breached Article 2 obligations and duties emerging from the principle of active protection in regard to twentieth century land alienation.

8.2 In summary, these reply submissions reveal a pattern of dishonourable conduct and unfair treatment by the Crown toward Taihape Māori. The consequent prejudice being significant land loss and a rapidly declining ability in the early twentieth century for Taihape Māori to produce a sustainable income from the land and to use the land in a way that reflected their tikanga.

Dated this 27th day of September 2021

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James Lewis

Claimant Counsel