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

In the Matter	of the Treaty of Waitangi Act 1975
And	
In the Matter	of the Taihape – Rangitīkei ki Rangipō District Inquiry (Wai 2180)

Generic Claimant Closing Submissions in Reply – Issue 3: Native Land Court, Questions 1-6

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MAY IT PLEASE THE TRIBUNAL

1. These generic submissions are in reply to the Crown submissions on the Native Land Court (Issue 3).[1] Specifically these submissions address questions one to six from the Tribunal statement of issues. These are reproduced below for convenience:[2]

> *Establishment of the Native Land Court*
>
> *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?*
>
> *b. Consider a range of land tenure options for Taihape Māori?*
>
> *c. Consider a range of title options suitable for Taihape Māori, including corporate title?*
>
> *d. Try to understand and account for customary Taihape Māori tenure, tikanga, interests, and other related processes and practices?*
>
> *e. Record and fulfil any promises and assurances made to Taihape Māori?*
>
> *f. Secure agreement, if any, with Taihape Māori?*
>
> *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?*
>
> *Customary interests and the determination of ownership*
>
> *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:*
>
> *a. The application of the ten owner rule?*
>
> *b. The granting of memorials of ownership or certificates of title?*
>
> *4. What was the nature of, and reasons for, Taihape Māori*

[1] Crown Closing Submissions in Relation to Issue 3: Native Land Court, 9 July 2021, (Wai 2180 #3.3.104)
[2] Wai 2180, #1.4.3, at 18.

engagement with the Native Land Court process?
5. To what extent were Taihape Māori experts, or mātauranga Māori, relied on in determinations of Māori customary rights?
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?

2. These submissions will respond to the Crown's submissions on questions one to six above, in the order in which they were laid out in #3.3.104.

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?

3. Counsel recognise the Crown's acknowledgements in paragraphs 12 – 14 on the establishment of the Native Land Court (NLC), and its lack of consultation with Māori generally and Taihape Māori particularly during that establishment process.

4. However, the Crown appears to be simultaneously diminishing the extent and significance of these acknowledgements in these same paragraphs, and in subsequent submissions.

5. At paragraph 13 the Crown concedes "it did not consult with Taihape Māori prior to the establishment of the Native Land Court."[3]

6. This is accompanied by an acknowledgement that "Māori input into the establishment of a Native Land Court was too limited to be considered satisfactory *by today's standards*."[4] [emphasis added]

[3] Wai 2180, #3.3.104.
[4] At [13].

7. The claimants submit that Māori input into the establishment of the Native Land Court, and seemingly there was none at all, was not satisfactory at the time it was created. Te Tiriti o Waitangi was signed in 1840, and even the English text promised Māori control over their lands for as long as they wished to retain them.

8. Further, Māori at many times attempted to get the Government to change the Native Land Laws. It cannot be said that the Crown was ignorant of either its own responsibilities under Te Tiriti, or of the wishes of Māori to retain their rangatiratanga, including in respect of any land titling and sale system.

9. The Crown admits that "Taihape Māori were not involved in determining the form and purpose of the Native Land Court or the Native land laws",[5] and their "agreement to the establishment of the Native Land Court in the district was not explicitly sought by the Crown."[6]

10. However immediately after this the Crown says that "[w]hilst the Crown created the Native Land Court, it only became active where people made applications to it."[7] This sentence appears to put the blame back on Māori – i.e. if no Māori had ever made applications to the Court, nothing would have happened.

11. The claimants submit in reply that Māori were not availed of the option to avoid the NLC. It was the only way in which they could treat with their land, and, as was described in claimant closing submissions,[8] the Crown used its power to devise many and varied ways to get Māori land before the NLC, and out of Māori hands. But further, it is submitted, Taihape and other Māori all had to bring their land into the court if they wanted to participate in the colonial cash economy. Māori had no money of their own and increasingly through the colonial period required money to be in any way

[5] Wai 2180, #3.3.104, at [12].
[6] At [14].
[7] At [14].
[8] See for example, Wai 2180, #3.3.76(k), at [41-43] and [53-54].

involved in it. Selling or leasing their lands, disposing of their capital, was their only feasible option to gain that money. In this respect, the examples the Crown gives at [16] of rangatira both supporting the Repudiation Movement and planning to sell their lands do not indicate duplicity or a lack of consistency; each example of a "sale" needs to be analysed for its nature (e.g. did they intend to "sell" in a Pākehā sense?), its circumstances (e.g. was it landlocked and therefore inaccessible and unusable?), and its purpose (e.g. was it necessary to obtain funds to develop other lands?).

12. The Crown itself admits that "Taihape Māori had no choice but to participate in this system in order to protect their lands from the claims of others".[9]

13. The Crown states that "Claimant generic submissions present a picture of Taihape Māori being totally opposed to the Native Land Court and to the Native land laws",[10] and disagrees, asserting that the evidence is more complex.

14. The Claimants submit that they sought to describe the strong opposition of Taihape Māori towards the Native Land Court.[11] No resistance will ever be total, however, it is further submitted that the evidence before the Tribunal indicates that Taihape Māori at many points sought to be heard in relation to their objections to the NLC (which were largely ignored).

15. As the claimants said in their generic closing submissions:[12]

> *Counsel submit that the evidence before this Tribunal indicates very clearly that Taihape Māori did oppose the NLC, over many years, certainly in regard to the matter (sic) in which it operated and the effects it had on their retention and use of their lands, from the principles under which it operated to the loss and separation from whenua that resulted from its processes.*

[9] Wai 2180, #3.3.104, at [9.2].
[10] At [15].
[11] Wai 2180, #3.3.76(k), at [70].
[12] At [70].

16. While Taihape Māori may have seen that the NLC could not be avoided altogether, they objected to the manner in which it operated, the principles that were developed to guide that operation, its effects on their retention and use of land, and the resulting separation of Taihape Māori from their whenua.

17. The Crown further states that:[13]

> *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.*

18. The claimants submit that even if Taihape Māori were aware of the opportunities that could be gained from a tradeable title, and attempted to access those opportunities, it is clear that the system in which they operated at the time ensured that their successes were slim to none. The groups who benefitted most from the Native Land Court were Pākehā settlers and the Crown. It is further submitted that additionally there still remains to be added the compulsion derived from the fact that Taihape Māori were left without choice; it was not a willing buyer, willing seller situation, but for numerous reasons they had to participate in the NLC and eventually were cornered into doing so.

19. As part of its argument that Taihape Māori sought to engage strategically with the NLC the Crown states:[14]

> *Even the Repudiation Movement appears not to have been wholly against the concept of tenure change. For example, while Rēnata*

[13] Wai 2180, #3.3.104, at [15].
[14] At [17].

> *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:*
>
> > *Let the claims to Māori 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.*

20. The claimants submit that this is not necessarily an acceptance of European-style ownership. Even if it were, Kawepō was clearly opposed to the Native Land Court as the means of achieving it, which is the topic of these submissions, e.g. the way in which the Crown established the Court, and set up the parameters for its operation, and manipulated an "independent" body to its own ends.

21. The kind of title envisaged by Kawepō cannot be known. However, the claimants reject the suggestion that Kawepō embraced complete individualisation. Chiefly as he was, this would undermine his own rangatiratanga; the NLC system allowed anybody to apply for a title and then he would be dragged into court whether he wanted to be or not. What he was supporting at that point was the implementation of a "by Māori, for Māori" system, one in which Māori used tikanga to communally determine rights and interests in whenua, which then apparently used the Pākehā title system to carry things after that. Counsel submit that he was thinking more of a protective system, retaining traditional interests in land and protecting the rangatiratanga of leaders such as himself, than of one that fragmented Māori society and reduced everyone's mana and authority to a democratic levelling.

22. Counsel acknowledge that Kawepo's story and rights in this inquiry district are complicated and that the evidence shows that some of his actions here were clearly to the detriment of some of the Mokai Patea groups. Other

claimants have made and will continue to make submissions on those points. However, for present purposes, counsel are focusing on the Crown's point about him (and the Repudiation Movement) espousing the British legal land ownership system. To be clear, counsels' submissions are limited to the comments that, whatever "ownership" he envisaged, it was subject to customary rights and interests being determined in a customary manner, which must inevitably have changed its nature somewhat. Further, it is counsels' submission that, as with the usual understanding of the relationship between individualisation and rangatiratanga, acknowledged by the Crown concessions, for him to have been an advocate for individualisation in the NLC style he must necessarily have subverted his own rangatiratanga, a position which is not accepted.

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

23. The Crown's closing submissions submit that the Native Land Act 1873:[15]

> *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.*

24. The claimants submit that the jurisprudence on this Act is not consistent with the Crown's reading. Our submissions state that the main recommendations from former Chief Justice Sir William Martin 1871 report:[16]

> *were not taken on board, with the subsequent Native Land Act 1873 actually furthering the issues of the 1865 Act by eliminating any remaining possibility that titles might be issued in favour of tribes – thus, cementing the principle of individual ownership.*

[15] Wai 2180, #3.3.104, at [20.2].
[16] Wai 2180, #3.3.76(k), at [40].

25. As was noted by the Te Rohe Potae Tribunal, "previous Tribunals have found that the titles awarded under the 1873 Act made it very difficult for owners to do anything with their land other than sell it."[17]

26. To say it is a "positive step" is to ignore the harm caused to Māori communal structures and the ability for Taihape Māori to retain their land caused by this Act. It is also inconsistent with the Crown concession, referred to at paragraph [38] below, which states:

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

The claimants submit that whereas the ten-owner rule formulated under the 1865 Act subverted tribal ownership and use according to tikanga by vesting land blocks in no more than ten people, regardless of how numerous the tribal group was, the 1873 Act resulted in the individual members of that numerous group each receiving legal title to a court-determined fraction of the whole. The tribal group was splintered, only to be fragmented again and again as succession hearings awarded each splinter to the individual heirs of the original recipient, until the splinters became vanishingly small and unable to support even the small numbers of people still attached to them – and therefore rendering them ripe for alienation.

27. The Crown has not addressed the Immigration and Public Works Acts 1870 and 1871. Nor has it addressed the claimants' commentary on these Acts, including their statement that:[18]

> *The Public Works Act Amendment Act 1871 gave the NLC an explicit role in supporting the Crown's land purchasing agenda – the Crown's*

[17] At [52], quoting Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version (Vol I – II)* (Wai 898, 2018-2020), at 1181-1182.
[18] Wai 2180, #3.3.76(k), at [43].

> *intention was either to benefit from the NLC's title determination system, or use the NLC as a retrospective rubber stamp to give legitimacy to its actions and selections of "rightful owners".*

28. The Crown also did not address Native Land Act Amendment Act 1877, and the statement that "section 6 providing that the NLC could enforce any agreement the Government had made with Māori".[19] Under the Act:[20]

> *The Minister could apply at any time to have the court make a determination of the interest acquired by the Crown. There was no wiggle room for the court to exercise its own judgment about the validity of the purchasing activities, its role being simply to ascertain how much land the Crown would be given for its existing expenditure and then to make the appropriate selection and award the corresponding certificate of title.*

29. The Act gave the "Government the power to compulsorily refer land for investigation by the court no matter what the owners wished."[21] This applied whenever the Crown had gained an interest – which gave practices such as the payment of tamana such potency, becoming the thin end of the wedge in legally forcing tangata whenua off their land.

30. The claimants therefore respectfully submit that, in the absence of any Crown argument to the contrary, the claimants' submissions should therefore be accepted by the Tribunal.

31. The NLC benefitted the Crown by providing:[22]

> *the safety of legal land titles as opposed to having "wild" customary land ownership and interests sitting largely beyond the reach of the legal system and supporting ongoing Māori customary societal practices and attitudes. It also enabled the Crown to access the*

[19] At [54].
[20] At [57].
[21] At [109], quoting Bruce Stirling, *Nineteenth century overview* (Wai 2180, #A43), at 252.
[22] Wai 2180, #3.3.76(k), at [49].

> *portions of the land that provide the appreciation in value and therefore greater economic benefit.*

32. The claimants submit that the Crown should have acknowledged that the Court was created to serve its own policy objectives. It is also submitted that recognition should have been given to the fact that that customary ownership (sic) actually protected Maori land from the legal system, rather than the system providing "safety". For example, the Execution of Judgments Against Real Estate Act 1867 which permitted the taking of land in satisfaction of debts, a common problem for nineteenth century Maori.

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

33. The Crown further said that "[n]either the 1873 or the 1880 forms of title in themselves precluded individual owners acting collectively in terms of managing the land".[23] This is again inconsistent with the Crown concession, referred to at paragraph [38] below, which states:

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

34. This argument is also inconsistent with the Crown concession that:[24]

> *the individualisation of Māori land tenure provided for by the Native Land Laws made the lands of iwi and hapū in the Taihape: Rangitikei ki Rangipo inquiry district more susceptible to fragmentation, alienation and partition and this contributed to the undermining of tribal structures in the district…*

The individualisation of Māori land tenure and the undermining of tribal

[23] Wai 2180, #3.3.104, at [21].
[24] Wai 2180, #1.3.1 at [2].

structures in the district created a significant barrier(s) to the ongoing collective management of Taihape Māori lands.

35. The claimants submit that this is being deliberately naïve – to say that there was nothing stopping tangata whenua from acting collectively does not mean they were enabled to do this. In fact, the availability of the succession and partition provisions, functioning cumulatively with the ability of almost any Maori to apply for a title investigation by the Court, meant that collective action would have been extremely difficult. The Crown-created system was devised precisely to discourage collective dealings with Māori land.

36. As the Crown quotes in its submissions; then-retired Chief Judge Fenton stated to the 1886 Ōwhāoko Ōruamatua-Kaimanawa Native Lands Committee (on the purpose for which the Court was created):[25]

> *The whole theory of the Native Lands Act, when the Court was created in 1862, was the putting an end to Māori 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.*

37. It is submitted that Fenton's view, n.b. that of the chief judge himself, that communal ownership was an "evil", is fatal to any argument that the court, its policy, systems and operations, can be seen as acting to do anything other than destroy both communal ownership, rights and decision making. It is the view of the key insider, the person who designed and drafted the 1865 Act and who then led its implementation through the first decade and a half of the court's life. It is clearer, closer to the action, and therefore more damning than the often-quoted 1870 statement of politician Henry Sewell, a former premier and attorney-general, that the court was intended to end the "beastly communism", within which Māori lived.

[25] At [25].

38. On the issue of collective land management the Crown has conceded that:[26]

> *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 Māori communities to control their land and resources collectively breached the Treaty of Waitangi and its principles.*

39. The claimants agree with that concession, which they say is rightly made, but submit further that even after 1894 there was not an acceptable way for Taihape Māori communities to control their land and resources collectively for the reasons discussed at 3.4(c).

40. It is agreed that the 1894 Act was an improvement. However, by then the conversion of Māori customary land to freehold land in legal title had pretty much already happened. By 1900, the Native Land Court largely dealt with land administration alongside the Māori Land Committees and Māori Land Boards, such that this "improvement", whatever its merits, was too little, too late.

41. Incorporations are a Pākehā legal construct which turn landowners into shareholders and put them at the mercy of the incorporation, which has legal obligations to the entire group of owners, in preference to individual owners who many wish to deal with their lands separately.

42. Also, to the extent that incorporations are a type of collective dealing with lands they still do not replicate customary interests – every shareholder is

[26] At [28].

as good as another, which is not tikanga. Some have more mana than others.

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

43. The Crown submits that the Court was "was empowered to give effect to voluntary arrangements 'come to amongst the Natives themselves'",[27] and that this was its "clear preference".[28]

44. The claimants submit it is an over-generalisation to say the "Court", i.e. the entire NLC preferred Māori to come to arrangements themselves. The Crown is referring to Judge Ward's testimony before the Rees-Carroll Commission, in which that Judge said it was his preference that Māori arrange themselves out of court.[29]

45. In any case, the example that Judge Ward spoke of, the Awarua Block, was not a successful example of out-of-court arrangements:[30]

> *Based on Ward's evidence, Awarua illustrated the major drawback of the approach favoured by the Awarua owners, the commission, and Judge Ward: as Hiraka Te Rango had already told the commission it took only one party to reject consensus to force everyone back into the smothering embrace of the court.*
>
> *…*
>
> *He [Ward] explained that in the Awarua subdivision: "You see, one party standing out spoils everything; and one party did stand out in this case." It was the law, not the owners, who empowered one party to reject custom in favour of a costly and inconvenient litigation.*

46. The Crown claimed that the NLC "sought to reflect owners [*sic*] at custom – the Native land laws did not set out to (and nor did they achieve) create a

[27] At [31].
[28] At [32].
[29] Bruce Stirling, *Nineteenth century overview* (Wai 2180, #A43) at 362.
[30] At 363.

form of title that precisely replicated a customary title."[31]

47. The claimants submit that the Court could not have created a customary title because at custom there was no such thing as ownership. Rights were determined according tikanga (usufructuary rights). As Judge Fenton quoted above, the whole purpose of the NLC was to break down customary ownership because it was collective and was the antithesis of the individualised legally defined title that that English legal system adhered to.

48. The claimants submit that the Court, as confirmed by Fenton's testimony above and the general flow of the evidence through the nineteenth century, and more general historical scholarship and Tribunal jurisprudence, most certainly did not try to replicate customary ownership.

49. That would have been self-defeating. It aimed to achieve the opposite, a legal title that was subdivisible, could be handed down by Pākehā rules of succession, and could ultimately be sold off should circumstances persuade the individual owners of the desirability of doing so. All of these were inimical to the basic tenets and operations of customary rights and interests in whenua and the associated resources.

50. Counsel further submit that to even talk of a "customary title" is to talk of something that did not exist in te Ao Māori. The Tribunal will not need reminding of the consistent evidence by claimants in this inquiry and all others that Māori did not have "legal title" of any sort, that they were sustained and nurtured by Papatuanuku, and that they could not conceive of cutting up the whenua to which they were attached by the burial on it of their own whenua and that of their tribal group. To speak of a "customary title" takes us in a wrongheaded direction from the outset as there was no such thing which the court might have even attempted to replicate.

51. In relation to assessors and interpreters the Crown said that:[32]

[31] Wai 2180, #3.3.104, at [34].
[32] At [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".*

52. In regard to the assessors' relevance to the question - i.e. how did the Crown in setting up the NLC "try to understand and account for customary Taihape Māori tenure, tikanga, interests, and other related processes and practices" - the claimants accept that, as Māori, the assessors in all likelihood had more knowledge of Māori custom than did the judges.

53. However, the assessors were also meant to be independent, and therefore as a matter of course were not from the same area as the matter before the Court. This meant that they were not knowledgeable in local tikanga.[33] The claimants submit that, although independence is an ideal in European courts, it is sometimes not consistent with tikanga.

54. How independent the assessors actually were is another matter. For Māori to be picked as assessors, they clearly would have to have been seen by the government as friendly to government policies.[34]

55. In at some cases, they were not independent regarding the matter at hand at all. Stirling notes such a circumstances from the inquiry district:[35]

> *During the Te Kapua title investigation at Whanganui in 1884 it was an "open secret" that the assessor, Hoani Meihana (primarily Rangitane but with many other connections), was "a near relation" to some of those involved in the case.*

[33] Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004), at 449.
[34] At 404.
[35] Bruce Stirling, *Nineteenth century overview* (Wai 2180, #A43), at 359-360.

56. It is also not known how much influence assessors actually had. The assessor, Te Wheoro of Waikatoi, "resigned prior to the 1873 Act complaining that assessors were little more than window dressing."[36] Commentators have often observed that the records contain virtually no information about how much notice judges took of the assessors in either procedural or decision-making elements. This impression must have been reinforced by the reduction in the number of assessors sitting with a judge from two, to one, and finally they were removed altogether.

57. On interpreters, the claimants note that (although we lack specific evidence of it happening) there were clear indications that Māori were complaining that they were being bought off. A petition from the Repudiation Movement stated that the writers prayed that Parliament would see "how the interpreters, with whom has rested the explaining of the different writings to the Māori, were bought over by sums of money to the exclusive service of the Europeans".[37]

58. The Crown submits that there was a sincere attempt to "accommodate customary ownership concepts" which "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."[38]

59. The claimants submit that the "attempts" described above were not adequate. The Crown unilaterally decided how it would recognise Māori customary ownership. The result was devastating for Māori.

60. The Crown rightly acknowledges that this experimentation "involved significant cost to Māori tribal structures."[39]

Issue 3.2: What pressures (political, economic or otherwise) dove the establishment of the Native Land Court in the inquiry district? What was the

[36] Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004), at 404.
[37] Bruce Stirling, *Nineteenth century overview* (Wai 2180, #A43), at 238.
[38] Wai 2180, #3.3.104, at [34]
[39] At [34].

Crown's intended purpose in establishing the Court in the Taihape district and did it fulfil this purpose?

Crown purposes for establishing the Native Land Court

61. The Crown states that its purpose "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."[40]

62. The claimants submit that this was not the purpose of establishing the NLC – what the Crown is describing here is the "how", not the "why". The "why" of establishing the NLC was as described by Chief Judge Fenton, quoted above - "putting an end to Māori communal ownership." The mechanism for achieving that – a Pākehā-style court converting customary rights and interests into legal title of surveyed discrete parcels of land – was how the Crown unilaterally decided it should be done.

63. The Crown's purpose in establishing the NLC was to serve the Crown's overriding objective. The Crown describes that overriding objective throughout the key period in the inquiry and addressed by these submissions (1870s to 1900) as "to expedite economic development including settlement throughout the colony,"[41] which flows from the abolition of customary "ownership". To this end:[42]

> *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.*

[40] At [39].
[41] At [38].
[42] At [38].

64. The Crown also states that "a key purpose was to enable tenure conversion (which included enabling trade in lands)", in order to "open up Māori land to direct settler purchase or lease".[43]

65. However, it says that it "also sought to 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",[44] and that "the Crown of that era viewed itself as enabling a version of equality (ie equal treatment)."[45]

66. The claimants firstly submit that a concern for the rights of Māori was not at the forefront of the minds of colonial legislators. In fact, we submit that the euro-centric economic and social ideals were the goals for which the legislators were aiming.

67. Then, that version of equality required the assimilation of Māori life generally, and association with Papatuanuku specifically, into the Pākehā legal system under a completely different way of viewing the world, and which was simply assumed to be "better" for them. That was not equal treatment, and neither were the outcomes. More to the point, it was known to be unequal by 1867 at the latest when the first ineffectual tinkering with the Native land laws occurred to try to fix them, only two years after the 1865 Act created the system.

68. Further, the claimants take issue with the Crown's comment immediately after that: "[t]oday's understandings of equity and equality mandate different policies."[46] This implies that there was not as great an impetus on the Crown to take into account a Māori view of equality. Clearly, the Crown did not consider that anything but a European way of living and land tenure was correct and desirable. The claimants submit that the Crown was obligated inter alia by Articles II and III to allow Māori the right to live as they saw fit, and not impose upon them a foreign way of living, or assimilate them into a foreign culture.

[43] At [40].
[44] At [40].
[45] At [41].
[46] At [41].

69. The Crown implies that the functions of the Native Land Court were for the purpose of protecting Māori interests:[47]

> *…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). 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…*

70. It is submitted again that the adjudication of title and supervising rules for dealing in Māori land were not about protecting Māori interests, they were about the conversion of Māori customary interests and "native title" for the benefit of Pākehā settlers, and income for the Crown. It is also submitted that "adjudication" implies that there was a dispute that required resolution, whereas the actual primary task was to investigate the customary rights and then conduct that conversion. During the course of that process, of course disputes arose as the process itself, and the prospect of being cut off from customary rights, forced Māori in the court to do whatever they thought was required to protect those rights and access to the lands, resources and mana that went with them.

71. On the functions of the Court, the Crown admits in the next paragraph that this "dry interpretation of the law as simply in effect a conveyancing code…must be complemented by realistic acknowledgement as to the wide policy context within which conveyancing laws operated."[48]

72. The claimants accept this acknowledgement, but think it should go further – the overarching goal was clear, as the claimants have noted many times. The NLC was established to convert Māori title to land into a form by which it could be acquired by settlers and the government. It served the Crown's goals of Pākehā settlement and the growth of a cash economy centred on

[47] At [42-43].
[48] At [44].

European ideals.

73. The Crown states that it believed that its "objective to extend its institutions, including the Native Land Court, to all parts of New Zealand" was in the best interests of Māori because "the Court's function was to ascertain who the correct owners were and thereby overcome problems that had attended Crown purchasing under pre-emption."[49]

74. The claimants reject any insinuation that the Crown was interested in the "best interests of Māori", or that it had the right to decide what was in Māori best interests. The Crown was interested in its own goals, which the assimilation of Māori and the individualisation of their land titles would help achieve. In the present context, it is submitted that those goals and the manner in which they were achieved, constituted numerous breaches of the provisions and the principles of Te Tiriti, only beginning with the Article II guarantees.

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

75. The Crown suggests that Māori were "aware of the risks and benefits of the Native Land Court process" and attempted to utilise the Native Land Court to gain these benefits.[50] The Crown also states that "there were two core district developments that gave impetus towards people utilising the court – economic opportunities … and the railway enabling access to markets".[51]

76. Further, the Crown states that "[t]he evidence indicates that Taihape Māori sought an adapted form of customary title to enable the new land uses."[52]

77. Even if Māori had their own economic aspirations, the Claimants ask: did these aspirations eventuate? Have Māori in the Taihape region benefitted economically (even in the long term) from the sale of their lands? The fact is Māori were hamstrung from benefitting economically by the land and

[49] At [46].
[50] At [49].
[51] At [50].
[52] At [51].

economic systems introduced by Pākehā. Before the Native Land Court, Taihape Māori were more prosperous and involved in trade. The introduction of the Court actually facilitated their economic base (land) being taken away from them through the last third of the nineteenth century; they were no longer able to participate in the economy to the extent that they had been attempting to do from the mid-century.

78. The Crown states that:[53]

> *The evidence does not appear to accord with claims by technical witnesses and claimant generic closing submissions that:*
>
> > *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.*
>
> *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 introduction). Nor does it reflect the input of multiple Taihape rangatira into those processes.*

79. The claimants submit that the Crown is taking this out of context – the full quote, which is reproduced in the generic closings, is as follows:[54]

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

[53] At [52-52].
[54] Wai 2180, #3.3.76(f), at [36]–[37], quoting Bruce Stirling, *Nineteenth century overview* (Wai 2180, #A43), at 2.

> *outside the district had committed their lands to these processes with a view to the land being purchased.*

80. There is a clear emphasis on resident owners in the southern part of the district, which is all Mr Stirling is referring to. It is not a blanket statement regarding all Native Land Court dealings in Taihape as the Crown's submissions imply.

81. The Crown states that Mr Cleaver's summary is more consistent with its "reading of the evidence" as that 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". The Crown quotes the following excerpt from Mr Cleaver's report:[55]

> *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.*

82. The claimants submit that this quote, too, does not have the full context of the paragraph in Mr Cleaver's report, which starts by staying that the Court overshadowed efforts for Māori decision making, and was the only legally enforceable tool for determining ownership of Māori land. This actually demonstrates the effects of the NLC imposition on Māori, not their independent willingness to engage with it. Also, any competition arose from the system again, and the need for Māori to pass through the NLC system to resolve anything to do with their lands, which in itself fostered an adversarial approach and all that went with it. The Court was not resolving and quenching the fires of competition, but lighting and fanning them.

[55] Wai 2180, #3.3.104, at [54].

83. By focussing on the fact that Māori were technically the ones to bring claims to the Court, the Crown is implying that Māori are somehow to blame. In reality, as the claimants repeatedly submit, the cause of the contested and overlapping land interests was the way in which the Crown imposed a foreign tenure system on Māori via the Native Land Court. The developing self-granting by the Crown to itself of the right to bring lands into the court also tells against the Crown's position.

84. In a number of paragraphs, the Crown seeks to minimise its role as a purchaser. It disclaims being a "prospective purchaser behind the initial southern applications (but was involved subsequently)", and states that it "was not involved as a purchaser at all in any of the northern blocks."[56]

85. At the same time, it points to Māori as offering up land for sale, or bringing it before the Court, stating "Mr *(sic) Hearn's* evidence is clear that some owners offered Paraekaretū, Ōtamakapua and Ōtairi for sale to the Crown rather than the Crown initiating negotiations".[57]

86. The Crown should not seek to downplay the impact of its purchasing or of the purchasing by Pākehā magnates such as Studholme. The fact is, it did acquire a large quantity of land in Taihape, whether or not it had a grand plan to do so at the outset. Also, as has been submitted above, the fact that Māori brought the land into the court system does not mean they supported it or liked what it did and how it did it; they were trapped between using the system and suffering the many other negative consequences if they did not. Including the fact that if they did not, someone outside the hapū could bring it in anyway without any right to do so, as most infamously happened in the enormous Tahora Block further up the East Coast.

87. The Crown also fails to give proper recognition to the fact that, through several pieces of legislation such as the Native Land Act Amendment Act 1877, the Crown gave itself the right to bring Māori land into the Court for its own convenience. It is submitted that rangatira must have felt that the

[56] At [59].
[57] At [59].

only way they could keep any semblance of control was to initiate applications, or risk being at best counter-claimants for their own hapū lands.

88. The Crown again points towards Māori seeking to use the sale of land for their own benefit:[58]

> *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…*

89. The claimants repeat their submissions on the Crown's view of Māori economic aspirations above. To this they would add the further submissions that (a) this was the only way in which Māori could participate in the cash economy beyond working at the bottom of the wage labour pool, if such jobs even existed locally, (b) an attempt to better themselves economically is not an endorsement of the court system, and (c) the context of the Crown's monopoly powers should not be easily brushed aside as it yet again boxed Taihape Māori in and removed from them the options that they should have had to make their own decisions freely and unencumbered.

90. The claimants repeat the following quote from the Turanga Tribunal which they included in their closing submissions:[59]

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

[58] At [60].
[59] Wai 2180, #3.3.76(k), at [117], quoting Waitangi Tribunal, *The Turanga Report*, at 444.

demand for individualisation.

91. Again, the claimants respectfully adopt for Taihape the argument and findings of that Tribunal and would add a third argument that has also been conflated; that the means by which the form of that title was ascertained and conferred should not necessarily be through the Native Land Court, which is shown by the Repudiation Movement and copious other examples of objections in Taihape and elsewhere to the court and its works.

Did the Native Land Court fulfil its purpose?

92. In answer to this question the Crown noted that:[60]

> *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.*

93. However, throughout this section of the Crown's closing submissions it seeks to qualify this statement by saying that the NLC was not actually very efficient:[61]

> *Professor Boast suggests that if that was indeed the purpose, those colonists were sorely disappointed. 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 Pākehā people felt no particular gratitude towards it.*

[60] At [67].
[61] At [65].

94. The very next paragraph of the Crown's submissions seems to say that there was in fact a quick and large scale transfer:[62]

> *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.*

95. Thirty years is a very short time in which to lose half of one's land, especially when the 50 percent of the land lost contained 70 percent of the better lands in the district.[63] It would not have been enough time for Taihape Māori to have adapted to their new reality. The entire system and resource base upon which they existed for hundreds of years was gone in one generation.

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: […]
a. The application of the ten-owner rule?

96. In relation to the ten-owner rule, the Crown accepts that:[64]

> *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.*

97. The claimants note the acceptance and acknowledgement quoted above, while noting the very limited applicability of the ten-owner rule within the Taihape inquiry district. While very properly made, they do not in themselves amount to a full-blown concession that the ten-owner rule per se was a breach of Te Tiriti. The claimants submit that it was just that, and request that the Tribunal make a finding to that effect.

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[62] At [66].
[63] At [68].
[64] At [72].

98. The claimants also note the Crown's point that no efforts to "fix" the effects of the ten-owner rule and the reduction of customary interests to legal ownership by ten individuals were adequate until 1886.[65] The claimants agree, but say further that even the trustee provisions of the 1886 Native Equitable Owners Act and the subsequent creation of incorporations from 1894 were not adequate to provide a form of "communal title" that replicated Māori customary rights and interests in whenua, as has also been submitted above.

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

99. In this section, the Crown seems to be defending the hyper-individualisation system created by the Native Lands Act 1873 as being far less destructive of Māori collective ownership than the ten-owner system had been.[66] As has already been submitted, both were highly destructive, albeit in opposite ways. Whereas the 1865 Act had concentrated all power, responsibility and liability to debt in the hands of only ten individuals, the 1873 exploded the tribal interests into the hands of everyone with an interest. It probably made for generally smaller portions being alienated in each transaction, but meant that many more people had to exercise self-restraint or to consider that what remained to them was worth retaining.

100. The 1873 form of title resulted in more of a death by a thousand cuts, compared with the 1865 version of death by several large slashes.

101. Also, turning from alienation alone, the 1873 form of title made doing anything with the land collectively extremely cumbersome and inefficient. Compounded by the court's implementation of its succession oversight, the exponential fragmentation made any administration of Māori land increasingly unwieldy, a legacy that still confronts today's Court. The easier road was partition and alienation.

c. The development of collective land mechanisms: incorporations

[65] At [72].
[66] At [87-95].

102. In regard to incorporation, the Crown noted that it originally questioned 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".[67] However, it concedes that:[68]

> *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.*

103. The claimants note that, regardless of the s 122 provisions mentioned above, Taihape Māori only retained 50 percent of their land by 1900, including 70 percent of the more profitable lands. There were only six years between the incorporation provisions become available and the date of this statistic. It can probably be assumed that Māori land holdings six years earlier were little better than they were at 1900, so the opportunity to utilise the new structures was diminished correspondingly.

104. Further, as noted in the Turanga Report, the new incorporations were not empowered to raise finance until 1903, so there was little incentive to use them in the first nine years.

105. Also, as submitted above, while from a Pākehā viewpoint incorporations may seem a viable form of collective management, they do not approximate Māori collective rights and interests. The most obvious problem was that those enjoying tribal rights originally, then became individual owners of a parcel of some size but still with close ties to the land, and then they became mere shareholders in an incorporation, when to assert one's

[67] At [103].
[68] At [104].

individual preferences becomes a challenge to the corporate responsibilities of the incorporation which looks after all shareholders.

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?

106. The claimants agree with the Crown that question 6 above mentions both the Court and Crown and could be seen as confusing the two.[69] Is the question "How consistent was the Crown in applying these tests?" under question 6 intended to be "the Court" or "the Crown"?

107. The claimants note the implication of the Crown's statement at [109]. The NLC was a judicial body, so its actions were not those of the Crown. However, the Crown created the NLC, and sought to influence its proceedings in a number of ways and generally speaking the claimants are not prepared to agree that the Native Land Court was not an agent of the Crown, however much principles of separation of powers and the like apply to the general courts . For example, judges of the Native Land Court also held positions in the executive, like the Under-Secretary of the Native Affairs Department,[70] and having a position on the Legislative Council.[71] The Crown also created statutes to privilege itself in the NLC.[72]

108. The NLC was a creature of statute – primary and secondary. Everything it set out to do, and how it did it, was controlled by the Crown – including (but not limited to) its members, how it was structured, what it was to decide upon, how applications could made to the court, etc.

[69] At [108-109].
[70] Dr Bryan Gilling, *The Nineteenth-Century Native Land Court Judges: An Introductory Report* (Wai 64, #G6), at 21.
[71] At 32.
[72] As described in Wai 2180, #3.3.76(k), at [41-43] and [53-54].

109. It is submitted that the Tribunal in its statement of issues is not asking about overturning specific factual judgements by the Court, it is investigating how the Court operated, including the principles which it, as a Pākehā court, used to determine and apply Māori tikanga.

110. The Crown submits that one of the reasons for NLC proceedings being lengthy was "the extensive amount of evidence given to the Court of customary interests", and there was "little evidence…of the court circumscribing witnesses".[73]

111. The claimants accepts that this may be so, however, they submit that the Court should have put more effort into timetabling its hearings. The length of the NLC proceedings was well known nationally to be extremely prejudicial to Māori because they were expected to be available for the entire proceeding. They were not given a specific time (or even a short window) in which they would be expected to give evidence and prosecute their case. Because the court refused to operate in an inquisitorial manner, they had to be present or risk losing everything to someone who was there and could present evidence and engage in person. Compliance costs mounted and Māori often had to borrow against their land interests to receive food so they could stay at the NLC, and their presence at the NLC put pressure on the local community.

112. On the issue of how the NLC assessed evidence, the Crown submits that it "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."[74]

113. The claimants accept that these are core tenets of reaching a determination, according to a European-style court. However, the claimants question the idea that the Court needed to be based on European ideals and modes of operation. The NLC was supposed to be deciding upon issues of Māori land and custom - concepts that were foreign to European land ownership.

[73] Wai 2180, #3.3.104, at [110].
[74] At [116].

114. It is not a fait accompli, as the Crown suggests, that these ideas of judgement were a given, if it is accepted that the structure of the NLC was not the correct way in which to decide these issues on behalf of Māori.

115. Further, the claimants dispute the Crown's claim that the Court approached disputes in a "pragmatic fashion based on notions of accommodation and compromise".[75] The Court's functions and decision making were not consistent with these ideas.

116. Firstly, the Court was attempting to do away with communal living and Māori tikanga. This was not a compromise with the position of Māori. The Crown (by way of the Court) was forcing Māori to conform with laws which the Crown unilaterally devised and imposed.

117. Secondly, the Court was not attempting to reach compromises. It was attempting to declare who were the winners and who were the losers in terms of land holding. Entire hapū have been dispossessed because the NLC preferred the evidence of one group over another; the discussion above regarding the ten-owner rule and the 1873 individualised form of title demonstrate that.

118. On the NLC judges, the Crown states:[76]

> *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. The claimants submit that it not likely that the judges of the NLC were very culturally competent, especially as the century wore on and the "native men" were increasingly replaced by civil servants and professional lawyers.

[75] At [117].
[76] At [118].

Some may have been aware of Māori customs, and have been able to speak te reo. However, cultural competence is more than just knowledge of another culture – it is a respect for that culture, and willingness to accommodate it. By its very nature, the NLC – and by extension, its judges – was not culturally competent, because its entire existence was premised upon changing something fundamental about Māori culture.

120. The Crown also states that "Māori assessors were an important feature of the Native Land Court regime."[77] However, it appears to the claimants that the assessor's role was one of waning importance as the years went by. In the first 1862 iteration of the NLC, the assessor's role (although they were not called such) was to be part of a komiti of four rangatira, and one judge. From 1865, one or two assessors sat with a Judge. From 1865 to 1894 their concurrence was required, although it is seldom possible to ascertain whether it was given or ignored. Then, as Taihape lands were being considered in large quantity, from 1894 (as the Crown has acknowledged) their concurrence was no longer needed.[78] And from 1896, their presence were not required at all.

Dated at Wellington this 27th day of September 2021

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Counsel for the claimants

[77] Wai 2180, #3.3.104, at [119].
[78] At [120].