HE WHENUA KARAPOTIA, HE WHENUA NGARO

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HE WHENUA KARAPOTIA, HE WHENUA NGARO

Priority Report on
Landlocked Māori Land
in the Taihape Inquiry District

PRE-PUBLICATION VERSION

WAI 2180

WAITANGI TRIBUNAL REPORT 2024

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DR ANGELA BALLARA

16 August 1944 – 17 September 2021

Aue, e taku manu whititua, te manu ariki o te ao kōrero i ngā whakaaro o tāukiuki, noho noa koe ka whakarere i a mātau i ō hoa hei whakatutuki i te kerēme o Taihape i tīmatatia ai e tātau katoa.

Ka ngaro koe, ka tūtakarerewa, ka hurihuri noa, ka pātai me aha mātau kua ngāro nei koe? Engari ka rongo i a koe e whakahau ana, 'Kia kaha, kia ū, mahia kia oti, mahia kia kounga!'

Kua oti rā e Kui. Kua tutuki tēnei wāhanga ki tētahi taumata tiketike e koa ai koe, e kata ai te Pō. Ka rongo hoki i te ngeri tautoko a ngā tīpuna o Mōkai Pātea e awhi mai nā i a koe i te Pō.

Ae, kua hunaia koe e Mate-ki-te-pō, kua ngū tō reo korihi i te ata, i te ahiahi. Kua kore e rangona e pūwawau ana i ngā pari kārangaranga o te ao hītori me te ao mātauranga. Ahakoa, ko ō kupu ka mau tonu i te mea kua whakairotia ki ngā pakitara o ngā whare huhua o te motu i whai kupu ai koe, kua tāia ki ngā whārangi o ō whakairiwhare. Ko tō wairua me ō tohutohu kei roto i ngā whārangi o tēnei pūrongo e rere ana hei whakamaharatanga ki a koe. Inā kite te kanohi, rongo te

ngākau, ka maumaharatia koe, ka kōrerotia koe, ka mīharotia koe, ka waiatatia koe. E kore koe e warewaretia.

Takoto mārie i te urunga tē taka, i te moenga tē whita, te moenga tē rea, te moenga tē whakaarahia, e Kui e.

Alas, my bird that has flown beyond this world, the lead bird that heard and retold the stories of the age-old past, you audaciously left us, your friends, to complete the claim of Taihape, which we all began together.

Your departure caused deep loss and sadness, leaving us to look this way and that, wondering what to do now that you were gone. Then we heard your voice: 'Be of strong mind, keep going, complete the mission, and do it well!'

It is done, O Distinguished Lady. We have completed this part of the mission to the highest standard, for which you will be proud and will bring a smile to the Spirit World. We hear the chants of support from the ancestors of Mōkai Pātea in the Spirit World, they who embrace you.

Yes, you have been taken by the Keeper of the Night; your voice and song that was heard in the morning and at dusk is silent and will never again echo in the hallowed halls of history and knowledge. Be that as it may, your words will live on, for they have been etched into the walls of the houses of the land in which you spoke and written in the pages of your publications. Your spirit and your guiding hand permeate this report, which is dedicated to your memory. As long as eyes can see and hearts can feel, you will be remembered, you will be spoken of, you will be admired, you will be sung in verse. You will not be forgotten.

Lie in peace in the eternal sleep, on the bed of unbroken slumber, the bed where time stops and where there is no rising, O Distinguished Lady.

PREFACE

This is a pre-publication version of the Waitangi Tribunal's *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape Inquiry District*. As such, all parties should expect that, in the published version, headings and formatting may be adjusted, typographical errors rectified, and footnotes checked and corrected where necessary. Maps, photographs, and additional illustrative material may be inserted. The Tribunal reserves the right to amend the text of these parts in its final report, although its main findings will not change.

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CONTENTS

LIST OF MAPS

EDITORIAL NOTE

For ease of reference, Tribunal findings have been indicated by shaded bars in the page margins.

Waitangi Tribunal
Te Rōpū Whakamana i te Tiriti o Waitangi
Kia puta ki te whai ao, ki te mārama

The Honourable Tama Potaka
Minister for Māori Development, Minister of Conservation

The Honourable Paul Goldsmith
Minister for Treaty of Waitangi Negotiations

The Honourable Judith Collins
Minister of Defence

Parliament Buildings
WELLINGTON

16 January 2024

E ngā Minita,

Tēnā koutou i roto i ngā taka-huritanga o te wā whai muri iho i ngā pōti o te motu. Otirā ko ngā pōti o te motu tērā. Ko ngā raru-raru o te motu me ōna iwi, ka tū tonu mai i te ao i te pō, ahakoa ko wai te kāwanatanga, ahakoa ko wai ngā minita. Nō reira anei mātau o Te Rōpū Whakamana i te Tiriti o Waitangi me ā mātau mihi matakuikui ki a koutou e ngā Minita.

Tēnei tā mātau pūrongo mō ngā whenua Māori kua karapotia pūtia e ngā whenua o te hunga tūmataiti me te Karauna te tukua atu nei hei pānui, hei wānangatanga mā koutou. He pīkaunga taumaha

Ministers,

Greetings to you as we emerge from the exhilaration of the recent election process. Despite that, the problems of the country and its communities confront us every day no matter who governs and who the ministers are. The Tribunal greets you Ministers.

We present our report regarding Māori lands which are landlocked by the surrounding lands of private owners and the lands which belong to the Crown and Crown agencies for your perusal and consideration. These landlocked lands have been a long-standing burden for the owners as access is closed and they are unable to develop and

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MINISTRY OF JUSTICE
Tāhū o te Ture

tēnei mā te hunga nō rātau ngā whenua kua karapotia, i te mea kua kore rātau e whai wāhi ki aua whenua e āhei ai rātau ki te ahu me te whakamahi i aua whenua, hei oranga mō rātau. Koia rātau ka tuku i tā rātau kerēme ki te aroaro o tēnei Taraipiunara. Nā, anei a mātau whakataunga e tukua atu nei ki a koutou.

benefit from those lands. Hence, they have lodged a claim with the Tribunal. Here are our findings.

We enclose our priority report on landlocked Māori land in the Taihape inquiry district. In 2017, we signalled our intention to prioritise claims about landlocking in Taihape. We released our preliminary views on these claims in August 2018. Having now heard from the claimants, the Crown, and the interested parties, we present this priority report, which precedes our main report into the district's historical claims.

Landlocking is a universal problem affecting access to Māori land. It is particularly acute for Taihape because more than 70 per cent of remaining Māori landholdings are landlocked – in excess of 50,000 hectares. Our decision to prioritise the issue in a separate report reflects the scale and gravity of the challenge, as well as the fact that none of the Crown's attempted legislative fixes have solved this problem.

Most landlocking of Māori land in the inquiry district occurred between 1886 and 1912. The native land legislation of the time did not require the Native Land Court to preserve access to all partitions. Upon the sale or lease of a partition with road access, therefore, blocks of Māori land lying beyond it usually became landlocked. The Crown introduced measures in 1886 to allow owners to apply for access to their lands as they passed through the court or within five years thereafter. The Crown observed, somewhat critically, that Māori owners in the district had made little use of these provisions. The reality, though, is that the court still had discretion on whether to grant access, and any access granted was likely to be very costly to the Māori owners to put into effect.

Moreover, as a matter of principle, we consider that Māori owners should not have had to take such steps to ensure they retained access to their own land. The risk of landlocking did not result from actions taken by Māori but was inherent in the native land legislation the Crown imposed on them. The Crown was obliged to ensure access could not be lost in this fashion. Its expectation that Māori apply to the court to retain

access, and pay for it, undermined the treaty guarantee of 'full exclusive and undisturbed possession' of land. We find that the Crown committed multiple breaches of the treaty in allowing the landlocking of Māori land to occur.

From 1912, the court could grant retrospective access to landlocked Māori land, but, as we interpret the law, not if the neighbouring land to be crossed had been alienated. On the Crown's reading of the law, the court could order access across such land, but only with the owner's consent (see section 2.2.3). Either way, these measures effectively negated the court's ability to restore access to landlocked Māori land in Taihape, which had almost entirely become landlocked – as neighbouring blocks were alienated – before 1912. This legislative failing remained in place for over sixty years.

In recent decades the Crown has introduced measures to try and remedy the situation. From 1975 Māori landowners could pursue access via the Supreme Court (as the High Court was called then) without the need for any other land owner's permission. However, the court's costs, along with the requirement that the applicant both pay for the formation of the access granted and compensate the affected land owner(s), made this new avenue financially prohibitive and effectively illusory in terms of providing a practical remedy. In 1993, new measures provided a less expensive pathway for Māori land owners to seek access via the Māori Land Court but prohibited the court from ordering access unless the neighbouring land owner agreed. In 2002 this requirement for agreement was removed, but the neighbouring owner could simply appeal to the High Court. It was not until 2020 that appeals arising from Māori Land Court decisions on access had to be heard in the Māori Appellate Court.

Ultimately, these changes have edged matters forward, but not in a way that has actually been effective for Māori owners of landlocked land in Taihape. None have successfully used these remedies to unlock their land. The key problem has remained financial, rather than legislative. The regime has placed the enormous cost of restoring access on the owners of landlocked Māori land themselves. Among many inequities, the Crown has treated these owners no differently from owners of general land seeking to access landlocked land they have purchased.

Since the advent of helicopter access in the 1970s, new economic opportunities for landlocked blocks in the Taihape district have developed. The cost of such access, however, erodes most of the financial gains. More to the point, the iwi and hapū of the inquiry district need access to their landlocked blocks for cultural as well as economic reasons. They need to

exercise their kaitiakitanga and ensure the intergenerational transmission of their mātauranga relevant to those lands. In short, we consider that the lack of ready access to so much of their remaining land base has caused them significant prejudice.

We note, too, that the Department of Conservation has previously failed to take the opportunities available to it to improve access to landlocked Māori land, and that certain actions of the Ministry of Defence have even worsened access. Among various treaty shortcomings, we find that these two agencies have been in breach of the principle of partnership in this regard.

We have concluded that the remedy to the ongoing blight of landlocking in the Taihape district must be financial. We recommend that the Crown establish a contestable fund of money to which the Māori owners of landlocked land in the district can apply to pay for the access that may be granted by the Māori Land Court, including any compensation payable to neighbouring landowners. We propose the fund be contestable because not all blocks of landlocked land can be provided with access at once, nor is it realistic to provide access to every last landlocked sliver of land. We do consider, however, that the process we recommend should eventually fund access to all significant landlocked blocks in Taihape. To that end we set out a process that entails feasibility studies, land owner cases, decisions by an independent committee, and appropriate avenues for review and appeal. We recommend this approach be tied to the Māori Land Court process for making an access order and note that changes to Te Ture Whenua Maori Act 1993 will therefore be required to implement our recommendations.

Critically, we recommend that, if the honour of the Crown is to be maintained, the substantial funds that will be required to provide access to landlocked Māori land in Taihape should not be taken from the sum set aside to settle the district's historical claims. The issue should be treated in the same way as other specific and enduring problems, such as the grievances over rentals paid on Māori reserved lands. Indeed, landlocking is an issue affecting remaining Māori landholdings all over the country and had we the jurisdiction to do so, we would recommend a national scheme, along the lines of the reserved lands settlement. Regardless, we think a priority must be placed on resolving the landlocking of Māori land in Taihape. For too long the Māori landowning communities of Taihape have experienced the unjust and ongoing absence of legal access to their lands and have had to endure the sight of surrounding lands being developed while the potential of their own lands has continued to languish.

Access can only become a reality if significant funding is made available to complement the legal pathways that have been provided. This will then facilitate the development of those landlocked lands for the benefit of the owners, their whānau, and hapū.

Nāku noa, nā

Justice Layne Harvey
Presiding Officer

ABBREVIATIONS

AJHR	*Appendix to the Journals of the House of Representatives*
AOT	Aotea minute book
app	appendix
CA	Court of Appeal
ch	chapter
CJ	chief judge's minute book
cl	clause
doc	document
DOC	Department of Conservation
ed	edition, editor
GST	goods and services tax
KC	King's Counsel
ltd	limited
LLAC	Land Access Commission
MB	minute book
memo	memorandum
MBIE	Ministry of Business, Innovation and Employment
MV	motor vessel
NZ	New Zealand
NZLR	*New Zealand Law Reports*
NZPD	*New Zealand Parliamentary Debates*
OBE	Officer of the Order of the British Empire
p, pp	page, pages
para	paragraph
PC	Privy Council
pl	plate
pt	part
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
TKT	Tākitimu minute book
TTK	Taitokerau minute book
v	and (in legal case names)
vol	volume
Wai	Waitangi Tribunal claim
WAR	Waiariki minute book

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2180 record of inquiry, a full copy of the index to which is available on request from the Waitangi Tribunal.

UPOKO 1

TE TĀHŪ

INTRODUCTION

This priority report addresses claims that the Crown allowed Māori land in the Taihape inquiry district to become landlocked and failed to remedy the problem, breaching the Treaty of Waitangi. It precedes our main report on the Taihape: Rangitīkei ki Rangipō district inquiry (Wai 2180), which encompassed hearings from 2016 to 2021 into 46 historical claims.

1.1 Te Whakatau kia Tukua he Pūrongo Tuatahi / Decision to Issue a Priority Report

The decision to release a priority report dates back to 2017, when the evidence we heard revealed to us that a disproportionate amount of Māori land in the inquiry district is landlocked.[1] Indeed, the region may be unique in the extent of this problem. The Crown has acknowledged that more than 70 per cent of land 'retained by Māori' in the inquiry district – more than 50,000 hectares – is landlocked.[2] This means that, although Māori retain ownership of these lands, they cannot reach them unless they trespass on private or Crown land, hire a helicopter to fly them there, or negotiate some other way of securing access. Due to the drastic extent of this problem, we embarked on a process to issue a priority report to address claims concerning this landlocked land.

In December 2017, we contacted parties about the possibility of early reporting on the landlocked land claims.[3] Early reporting could contribute to immediate and meaningful change in our inquiry district, we suggested. One reason was the unusually high proportion of Māori land that is landlocked. The second was that efforts to resolve the issue in other ways – for example, by using the existing

1. In 2017, the Tribunal panel for this inquiry comprised Judge (now Justice) Layne Harvey as presiding officer, Professor (now Professor Tā) Pou Temara, the late Dr Angela Ballara, Dr Monty Soutar, and Sir Douglas Kidd. Dr Paul Hamer was appointed to the panel in August 2020. Dr Ballara passed away in September 2021, and Sir Douglas resigned as a member of the Tribunal and this panel in May 2023 (see memos 2.6.102, 2.7.1).

2. Submission 3.3.44 (Crown), p 2. The Crown's use of the term 'land retained by Māori' is discussed in section 1.4.2.4 of this report.

3. Memorandum 2.6.64, p 2. We originally proposed to issue our views via a 'discrete report', but later clarified that we would issue our preliminary views in August 2018 followed by a priority report (see memo 2.6.36, p 3; memo 2.6.64, p 2).

legislative remedies under Te Ture Whenua Maori Act 1993 – had not been successful. The third was that the Crown was undertaking its own work on 'barriers to Māori land development'.[4]

We sought submissions from counsel on the proposal to issue a priority report. We also sought submissions on the scope and timing of any potential priority report; the evidence that should be considered (including an extra commissioned report on the feasibility of access to landlocked Māori land); potential conflicts of interest; and other matters.[5] The claimants supported our proposal to provide a priority report and submitted that it should include findings and recommendations as per section 6(3) of the Treaty of Waitangi Act 1975.[6] The Crown did not oppose these submissions.[7]

On 23 July 2018, we advised parties that we intended to issue preliminary views on landlocked land claims ahead of our priority report.[8] We stressed that our preliminary views would be of an interim nature only, as they would predate our hearing of the Crown's evidence.[9] The priority report, by contrast, would be issued once all the evidence and submissions had been heard and would include findings and recommendations.[10]

1.2 Te Kaupapa o ngā Whenua Karapotia / The Issue of Landlocked Land

All parties to this inquiry accepted that landlocked Māori land is a significant problem, but they disagreed about several key points.[11] Disputed matters included the extent to which the Crown was responsible for causing the lands to become landlocked; whether the Crown and its delegated authorities have ever provided Māori owners with adequate avenues for legal access to their lands; and the nature of the remedies available to ameliorate this situation today.

The main argument in the many claims we heard about landlocked land was that the Crown allowed Māori land to become landlocked, and in doing so breached its duty under article 2 to protect the tino rangatiratanga of Māori over their lands.[12] The Crown is ultimately responsible for the legal framework that caused extensive areas of Māori land to be landlocked for generations, claimant counsel argue, because the relevant native land laws introduced in the nineteenth century did not compel the Native Land Court to order access when blocks of Māori land were

4. Memorandum 2.6.64, p 2
5. Memorandum 2.6.64, pp 2–10
6. Memorandum 2.6.64, p 11; submission 3.2.238, p 1
7. Memorandum 2.6.64, p 3; transcript 4.1.13, p [21]
8. Memorandum 2.6.64, p 12
9. Memorandum 2.6.64, p 12
10. Memorandum 2.6.64, p 12
11. Submission 3.3.34 (Bennion and Black), p 4; submission 3.3.44 (Crown), p 2
12. Submission 3.3.34 (Bennion and Black), pp 8, 14–15; transcript 4.1.21, pp 450–453; submission 3.3.40 (Sykes), pp 4–5, 12, 19; submission 3.3.33 (Hockly), pp 1, 18; submission 3.3.35 (Gilling), pp 1, 17, 32; submission 3.3.36 (Watson), pp 8–9; submission 3.3.38 (Naden), pp 1, 3

being investigated or partitioned.[13] Rather, these laws left the provision of access to the court's discretion. The claimants contend that, as a result, the court often ignored the need for Māori to have continued access to their land. They say many blocks became landlocked upon partitioning and have remained inaccessible ever since, causing long-term and ongoing prejudice for iwi, hapū, and whānau of the inquiry district.[14]

In this report we seek to determine the causes and consequences of landlocking in the inquiry district, the effectiveness of the Crown's responses, and whether its actions have been consistent with its treaty obligations. In terms of scope, we focus mainly on landlocked land that remains in Māori ownership today, though we do note the issue of land loss due to landlocking. This focus reflects the claims we heard, which centred on land that remains landlocked now and the need for remedies to restore access to it. The Crown made several concessions during our hearings – discussed in chapter 2 – which have allowed us to narrow the focus of our inquiry. The Crown accepted, for example, that some of the prejudice Māori suffered due to landlocking breached the treaty. It also conceded that the remedies available to owners of landlocked land between 1912 and 1975 were inadequate. We therefore do not discuss in detail the evidence relating to these and other conceded breaches.

1.3 Whakaaro Tōmua mō ngā Whenua Karapotia / Preliminary Views on Landlocked Land

We released our preliminary views on landlocked land in the inquiry district on 14 August 2018.[15] We discussed some of the evidence that had been presented to that point, which showed that Māori land had become landlocked through a process that allowed the Native Land Court to partition it with no obligation to order proper legal access routes to all the new Māori land titles. An apparent Crown unwillingness to provide effective solutions, we observed, had 'profound consequences' for Māori land owners, even prompting some to sell their landlocked land.[16] We considered evidence on the emergence of landlocked blocks in Ōwhāoko, and examined the Crown's legislative access provisions from the late nineteenth century to 2018, including those under Te Ture Whenua Maori Act 1993. We identified active protection and equity as relevant treaty duties and principles, and gave a preliminary view on the Crown's responsibility to protect access to Māori land and provide remedies:

> The responsibility to ensure protection and reasonable remedies lay with the Crown, and based on the evidence received to date, we have experienced some

13. Submission 3.3.33 (Hockly), p 18; submission 3.3.34 (Bennion and Black), p 16; transcript 4.1.21, p 406
14. Submission 3.3.33 (Hockly), pp 6, 17–18; submission 3.3.34 (Bennion and Black), pp 16–17; transcript 4.1.21, p 406
15. Memorandum 2.6.65
16. Memorandum 2.6.65, p 3

difficulty in identifying how and where that obligation has been discharged in a manner that is congruent with the Crown's responsibilities under Treaty principles.[17]

Since we could not make findings or recommendations, we then outlined a number of suggestions. These included that the Crown consider creating a contestable fund to support owners of Māori land to pay the costs of creating reasonable access to their land. We also suggested the Crown consider broadening the legal definition of 'reasonable access' to take account of the land's topography and owners' intended use of the land, whether cultural or commercial. (For example, we suggested that for some commercial purposes, land should be accessible by vehicle, not just walking tracks.)[18]

We have now heard all the parties' evidence – including from a wide range of technical and tangata whenua witnesses – along with submissions from the claimants, the Crown, and two of the interested parties. Having considered all the evidence and submissions on landlocked Māori land, we are now in a position to provide this priority report on the claims before us.

1.4 Ngā Kupu Whakamahi / Terminology

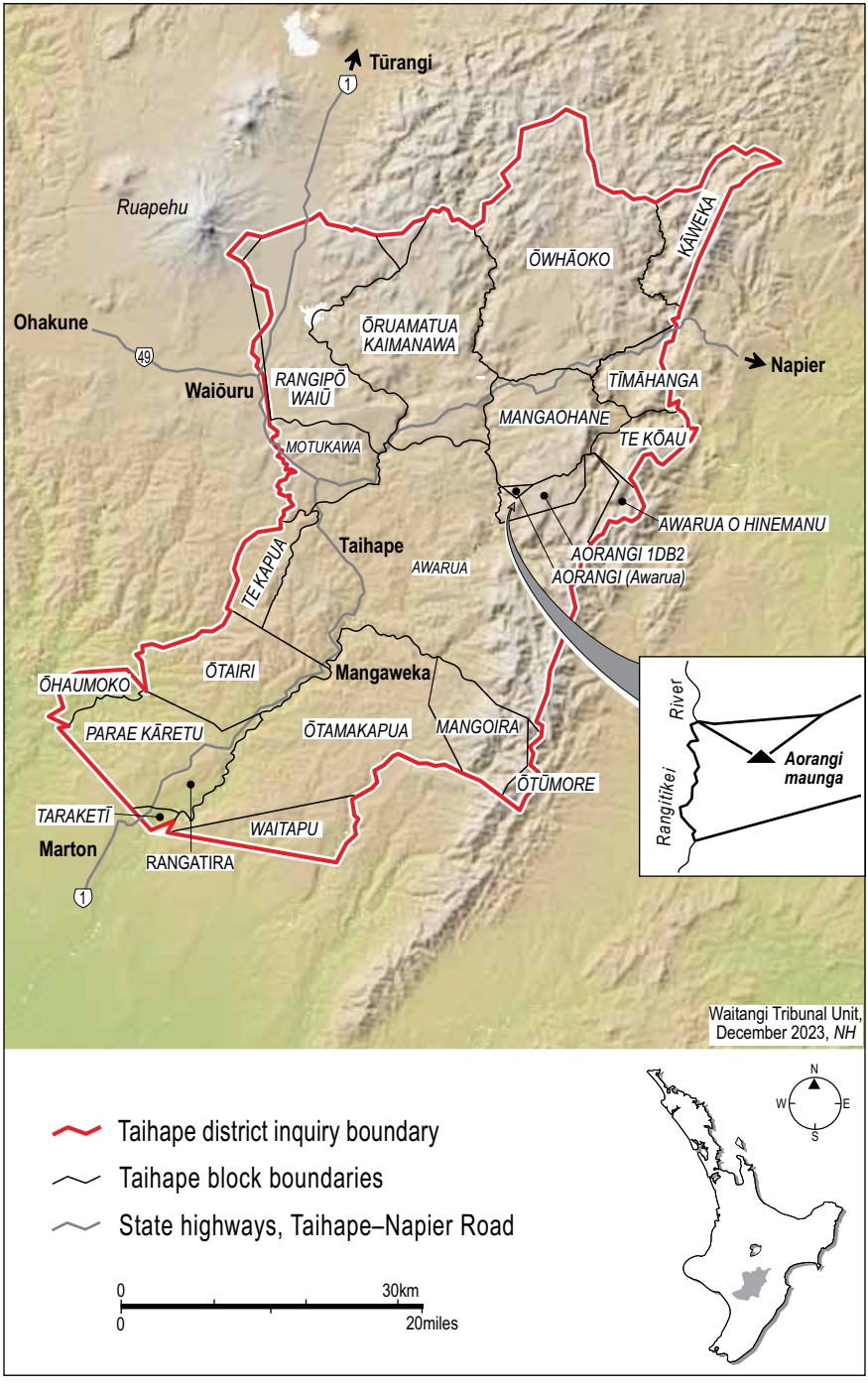
Although our main report will discuss specific terms we have adopted in this inquiry, some are used in this priority report. The key terms and our rationale for adopting them are set out below. We begin by outlining the forms of access that a road can provide, before outlining various road types. With these definitions in mind, we then consider what constitutes 'landlocked land'.

1.4.1 Ngā rori me ngā momo ara / Roads and forms of access

As the New Zealand Transport Agency notes, the statutory definition of a 'road' has broadened beyond the common understanding of the term.[19] The Land Transport Act 1998 defines a road as including:

(a) a street; and
(b) a motorway; and
(c) a beach; and
(d) a place to which the public have access, whether as of right or not; and
(e) all bridges, culverts, ferries, and fords forming part of a road or street or motorway, or a place referred to in paragraph (d); and
(f) all sites at which vehicles may be weighed for the purposes of this Act or any other enactment[20]

17. Memorandum 2.6.65, p 7
18. Memorandum 2.6.65, pp 7–8
19. 'What is a road?', Waka Kotahi New Zealand Transport Agency, https://www.nzta.govt.nz/resources/what-is-a-road/what-is-a-road/, accessed 26 September 2023
20. Land Transport Act 1998, section 2



Map 1: Location of the Taihape inquiry district

Ngā Whenua Māori kua Karapotia i te Rohe Uiui o Taihape: He Kōrero Poto/Landlocked Māori land in the Taihape Inquiry District: A Snapshot

- Total landlocked Māori land in the inquiry district: researchers gave calculations of 52,780 hectares[1] and 57,942 hectares.[2]
- Total Māori land in the inquiry district: 72,158 hectares.[3]
- Total size of the inquiry district: approximately 515,000 hectares.
- Amount of landlocked Māori land as a percentage of total Māori land: researchers gave calculations of approximately 73 per cent[4] and close to 74 per cent.[5] The Crown acknowledged that 'more than 70 per cent' of land retained by Māori in the inquiry district is landlocked.[6]
- Proportion of all Māori land that is landlocked in New Zealand: estimated to be up to approximately 20 per cent.[7]

1. Document A37(m) (Woodley), p 3
2. Document N1 (Neal, Gwyn, and Alexander), p 15. The reason for the difference between the figures provided in the reports by Suzanne Woodley and by John Neal, Jonathan Gwyn, and David Alexander appeared to be that the latter identified some contradictions in the records on Māori land, which led them to calculate total Māori land in the inquiry district differently: doc N1 (Neal, Gwyn, and Alexander), pp 8–11. Te Puni Kōkiri witnesses presented an estimate that was lower than Ms Woodley's, at 51,017 hectares, but Crown counsel said limited weight should be placed on it as it was based on a preliminary desktop exercise: doc M28(a) (Hippolyte), p 10; submission 3.3.44 (Crown), p 2.
3. Document A37(m) (Woodley), p 3. We discuss in chapter 1 (section 1.4.2.2) why the Crown adopted the term 'land retained by Māori'. We also explain (in section 1.4.2.4) some of the complexities involved in calculating total Māori land and total 'land retained by Māori' in this district, and the differences between them.
4. Document A37(m) (Woodley), p 3
5. Document N1 (Neal, Gwyn, and Alexander), p 15
6. Submission 3.3.44 (Crown), p 2
7. Submission 3.3.44 (Crown), p 2; transcript 4.1.23, p 13; Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wellington: Legislation Direct, 2016), pp 68, 86, 243

A road can provide legal or physical access, or both. Legal access, as it suggests, is the legal right to access land. Most commonly, this is achieved by the parcel of land having frontage onto a public legal road. Alternatively, legal access can be provided by an easement over adjoining land, a right of way, or a frontage to a Māori roadway. Physical access is the unrestricted ability to reach one's lands along a marked and defined route.[21]

Legal roads can also be either formed or unformed. A formed road has been constructed through gravelling, metalling, and being sealed or permanently

21. Document N1, pp 11, 14

surfaced.[22] An unformed legal road (colloquially referred to as a 'paper road') is a legally recognised road that is not developed or fully formed, but provides public access to a particular place. Often, the existence of unformed roads is only known locally. They may pass through bush reserves, sporting fields, or farmland or other private land. We note that an unformed legal road does not constitute physical access.

Roads can also be private or public. A private road is a restricted road which allows access, but use of the road may be restricted to its owners, the owners of any blocks it services, or a combination of both. Since private roads are neither council nor public roads, they need to be maintained by their owners and beneficiaries. The inverse applies to a public road, which gives access to any member of the public. Such roads are either the responsibility of the relevant local council, or maintained by the New Zealand Transport Agency where they are state highways or motorways.[23]

Lastly, a term we use with some regularity in the report is 'track', usually in the context of lands in private ownership. 'Track' does not appear to have a legal definition, but a dictionary definition provides a useful explanation of what we mean: '[A] path or rough road that is made of soil rather than having a surface covered with stone or other material'.[24]

1.4.2 He whakamārama: whenua karapotia/Landlocked land

1.4.2.1 *Te tūranga mataaho o ngā kaikerēme/The claimants' position*

In the generic claimant closing submissions on landlocked land, Tom Bennion and Lisa Black pointed to the definition of 'landlocked land' set out in section 326A of Te Ture Whenua Maori Act 1993:

> a piece of land that has no reasonable access to it and is either—
> (a) Maori freehold land; or
> (b) General land owned by Maori that ceased to be Maori land under Part 1 of the Maori Affairs Amendment Act 1967.[25]

On the question of what constitutes 'reasonable access', they again quoted the definition given in section 326A of Te Ture Whenua Maori Act 1993 – 'physical access of the nature and quality that may be reasonably necessary to enable the occupier for the time being of the landlocked land to use and enjoy that land' – and noted the similar definition in the Property Law Act 2007.[26]

22. 'Unformed Legal Roads', Herenga ā Nuku Aotearoa, https://www.walkingaccess.govt.nz/knowledge/access/unformed-legal-roads/, last updated 24 April 2023
23. 'Te Uru ki Tō Whenua: Access to Your Land', Te Kooti Whenua Māori – Māori Land Court, https://www.xn--morilandcourt-wqb.govt.nz/en/maori-land/use-your-land/access-your-land/, accessed 24 August 2023
24. Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/track, accessed 11 February 2022
25. Submission 3.3.34 (Bennion and Black), p 3
26. Submission 3.3.34 (Bennion and Black), p 3

Referring to the fact that, in the case of landlocked land, access depends on the cooperation of a neighbouring owner, claimant counsel argued that 'access at the whim of an adjoining owner is not reasonable access'. They also highlighted a 2012 High Court decision, later endorsed by the Māori Land Court, which essentially said that nowadays, reasonable access was likely to mean vehicular access.[27]

1.4.2.2 *Te tūranga mataaho o te Karauna / The Crown's position*

Crown counsel referred to the recent amendments to the definition of 'landlocked land' and 'reasonable access' in Te Ture Whenua Maori Act 1993.[28] (These were made after the claimants had presented their closing submissions). Under the amendments made by Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020, reasonable access now means 'physical access to land for persons or services that is of a nature and quality that are reasonably necessary to enable the owner or occupier to use and enjoy the land.'[29] In other words, the key change was the insertion of the words 'for persons or services'.

Reviewing case law on what constitutes reasonable access, Crown counsel submitted the question was well settled. Determining whether land was landlocked required a case-by-case, evidence-based asesssment. Access at an adjoining owner's discretion was not considered reasonable. However, reasonable access did not mean the best access or necessarily mean vehicular access; rather, it turned on what was practical.[30] Crown counsel highlighted instances where the Māori Land Court had determined that whether reasonable access existed required the court to make a value judgement on the basis of the evidence. Echoing claimant submissions, Crown counsel cited the court's opinion that although reasonable access did not invariably mean vehicular access, nowadays it was likely to mean that in most cases.[31]

It was important, Crown counsel argued, to use terms that were precise and correct when referring to landlocked Māori land.[32] To use loose terminology such as 'land owned by Māori' could include general land that Māori people had bought, and would alter the total amount of Māori land in the inquiry district and the proportion that is landlocked.[33] Therefore, the Crown adopted the descriptor 'lands retained by Māori' to describe lands that Māori had retained through to today without intervening alienation.[34] Crown counsel accepted, however, that

27. Submission 3.3.34 (Bennion and Black), p 4
28. Submission 3.3.44 (Crown), p 4
29. Submission 3.3.44 (Crown), p 4
30. Submission 3.3.44 (Crown), p 5
31. Submission 3.3.44 (Crown), p 6
32. Submission 3.3.44 (Crown), p 10
33. Submission 3.3.44 (Crown), p 10
34. Submission 3.3.44 (Crown), p 10. The Crown noted that it took 'lands retained by Māori' to include lands that Māori of the inquiry district had gifted to the Crown during the First World War and that the Crown had later returned to Māori: submission 3.3.44 (Crown), p 10.

where this definition was used, more than 70 per cent of the land retained by Māori of the inquiry district could be deemed landlocked.[35]

1.4.2.3 *Te tūranga mataaho o ngā kaikerēme i ā rātau whakautu / The claimants' position in reply*

Claimant counsel took issue with the Crown's comment that the court had found pedestrian access to be reasonable access in some contexts. Even if pedestrian access for individuals was physically viable in such situations, it was not formal access. Owners of Māori land would have no right to create or improve any walkways on public land, could bring onto the land only what they could physically carry, and would have no right to form a road.[36] This did not amount to reasonable access, especially where economic development was involved.[37]

1.4.2.4 *Ngā tātaritanga a te Taraipiunara / Tribunal analysis*

We acknowledge the importance of using precise terminology to refer to landlocked land. In this priority report, we adopt the definition of 'landlocked land' set out in Te Ture Whenua Maori Act 1993, but expand it to include land formerly lost through Crown actions which Māori have reacquired, hold as general land, and which is landlocked. As set out earlier, in the recent amendments to the Act, section 326A defines 'landlocked land' as a piece of land that has no reasonable access to it and is either Māori freehold land, or general land owned by Māori that ceased to be Māori land under Part 1 of the Maori Affairs Amendment Act 1967. (Land in the latter category had its status changed to European land under the 1967 Act via the process known as 'Europeanisation'.) This means landlocked land is land that has neither physical nor legal access (in other words, land which has legal but no physical access is still landlocked). The reason we expand the definition to include landlocked general land reacquired by Māori (as outlined above) is because we think these land owners deserve the same level of relief as those specified in section 326A.

We also acknowledge that, as Crown counsel pointed out, the ownership arrangements of Ngamatea Station – as well as Mounganui Station – make it important to be precise in the terms we use in this priority report. This is because Ngamatea and Mounganui Stations are now run by a Māori whānau (the Apatu family) and include significant amounts of general land, as well as Māori land. Using loose terminology such as 'total land owned by Māori' or 'Māori-owned land' could include in our calculations around 60,000 hectares of general land. Were those general lands included, said Crown counsel, the proportion of Māori land in the district that is landlocked would be closer to 50 rather than 70 per cent, and the amount of land owned by Māori overall would be approximately 20 per cent (rather than the commonly accepted 14 per cent).[38]

35. Submission 3.3.44 (Crown), p 10
36. Submission 3.3.96 (Bennion and Black), pp [8]–[9]
37. Submission 3.3.96 (Bennion and Black), p [8]; submission 3.3.102 (Sykes), p [7]
38. Submission 3.3.44 (Crown), pp 2, 9

Despite these considerations, we do not think it is necessary to adopt the Crown's term 'lands retained by Māori'. For one thing, this term would exclude land reacquired by Māori which is landlocked. For another, the section 326A definition of 'landlocked Māori land' (set out above) was used in both technical reports, with each relying on figures from Māori Land Online, along with other sources (although researcher Suzanne Woodley sometimes used the terms 'Maori owned landlocked blocks' and 'Maori-owned land' in her report).[39] This means the evidence presented and tested in our inquiry uses the Act's definition. It is therefore appropriate that we adopt this definition – with the exception already noted. We are conscious that, as John Neal, Jonathan Gwyn, and David Alexander explained, there is currently no reliable database that records general land owned by Māori (the Crown's calculation of around 60,000 hectares of general land owned by Māori was based on the specific identification of several large blocks).[40] This means that although technically this category of land is included in our definitions – and in our discussion of certain criteria for relief in section 7.3.5 of this report – we do not have reliable figures on it, and cannot practically include it in our figures or analysis. In terms of the landlocked land claims before us, we understand that the great majority if not all of the landlocked blocks addressed in the claims are Māori freehold land.[41]

For the purposes determining these claims, therefore, the Crown's preference for 'lands retained by Māori' and the definition in Te Ture Whenua Maori Act ultimately bring us to the same place. The important point is that the Crown accepted that more than 70 per cent of land retained by Māori in the inquiry district is landlocked.[42]

Turning to the question of what constitutes reasonable access, we suggested in our preliminary views on landlocked land – as noted earlier – that the Crown consider amending the definition of 'reasonable access' in section 326A (as it then stood) to take account of topographical factors, and cultural and commercial purposes. For some commercial purposes, we suggested, reasonable access would need to be vehicular, not just walking tracks.[43] As set out in our summary of the Crown's position (section 1.4.2.2), the statutory definition of 'reasonable access' has since been amended in a small way to take account of these factors. For the purposes of our priority report, we therefore consider the plain wording of the Act provides sufficient guidance for considering the claims before us.

On the question of precisely what constitutes reasonable access and whether it necessarily means vehicular access, both the claimants and the Crown cited

39. Document A37 (Woodley), pp 15, 20–22; doc A37(m) (Woodley), pp 2–3; doc N1 (Neal, Gwyn, and Alexander), p 8

40. Document N1 (Neal, Gwyn, and Alexander), p 8

41. Even so and to avoid doubt, it is likely that there will be general land owned by Māori in the inquiry district and that may include significant farming entities. Further land with this status may also be acquired in the future. Land that was Māori land before the 1967 amendment should also be eligible for landlocked land access funding (as we note in section 7.3.5).

42. Submission 3.3.44 (Crown), pp 9–10

43. Memorandum 2.6.65, pp 7–8

statements made in the case *Wagg v Squally Cove Forestry Ltd*, and set out in *Huata v Robin – Rotopounamu 1B1A*.[44] As Crown counsel observed, the court's view was that '[w]hether there is reasonable access is a value judgement that the court has to make on the basis of the evidence.'[45] Accordingly, we do not believe the definition of 'reasonable access' needs to be debated at length here.

1.4.3 Te Tiriti me te Treaty / Te Tiriti and the Treaty

In our inquiry, claimant counsel submitted it was important to recognise the differences between the Māori and English texts of the treaty, and for the Tribunal to reflect these differences in its reports.[46] Our main report will include a discussion of these issues.

In this priority report we use 'te Tiriti o Waitangi' or 'te Tiriti' when referring to the text in te reo Māori, and 'the Treaty of Waitangi' or 'the Treaty' when referring to the text in English. When referring to both texts together, or to the making of the treaty in 1840 without specifying either text, we use the term 'the treaty' in lower case.

1.4.4 Ngā Māori o te rohe uiui / Māori of the inquiry district

Counsel for Ngā Iwi o Mōkai Pātea Services Trust (hereafter Ngā Iwi o Mōkai Pātea) submitted that the term 'Taihape Māori', which has been used in various stages of this inquiry, is not a preferred term when referring to the Māori people of the inquiry district.[47] However, counsel for Ngāti Hinemanu me Ngāti Paki submitted that 'Mōkai Pātea' was not an appropriate term for all claimants either, and requested a more 'neutral' term be used.[48] In the absence of agreement, we use a combination of descriptors including 'tangata whenua of the inquiry district', 'Māori of the inquiry district', 'tribes of the inquiry district', 'iwi and hapū of the Taihape region' or 'district', and, where appropriate, simply iwi, hapū, and whānau.[49]

1.4.5 Tohutō / Macrons

In this report, the Māori names of Māori Land Court blocks are spelled with macrons.[50]

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44. Submission 3.3.34 (Bennion and Black), p 4; submission 3.3.44 (Crown), pp 5–6
45. *Huata v Robin – Rotopounamu 1B1A* (2017), 60 Takitimu MB 7 (60 TKT 7), paras 68, 71 (submission 3.3.44 (Crown), p 6)
46. See, for example, submission 3.3.54(b) (Naden and Sykes), p 7.
47. Transcript 4.1.8, p 13
48. Transcript 4.1.8, p 479
49. To clarify, the Taihape inquiry district is an administrative construct created by the Tribunal for the purpose of inquiring into claims. We also acknowledge that how individual claimant groups choose to name and define themselves is up to them.
50. The Waitangi Tribunal has not done this in its previous reports, because the blocks' administrative names in the Māori Land Court are not macronised; however, we have decided to use macrons on block names in order to support the proper use of Māori names. In keeping with previous Tribunal practice, though, we do not use macrons on people's names.

1.5 Kei Hea ngā Whenua o ngā Māori Kua Karapotia i te Rohe o te Uiui / Location of Landlocked Māori Land in the Inquiry District

The Taihape: Rangitīkei ki Rangipō inquiry district covers an area west of the Ruahine and Kāweka Ranges and south of the Kaimanawa mountains. Aorangi maunga stands prominently in this area and is a cultural, historic, and spiritual centre of great significance for tangata whenua.[51] Another important feature is the Rangitīkei River, which flows through the heart of the district. Hunterville, Taihape, and the eastern part of Waiōuru also fall within the inquiry boundaries. Much of the land in the northern and eastern parts of the district is high and mountainous.[52]

Most of the district's landlocked blocks lie in these northern and eastern areas. Sometimes steep and featuring large areas of indigenous forest, they have little potential for typical economic uses like livestock farming.[53] They are also affected by harsh climate conditions, especially in winter, when significant areas of the landlocked land are periodically covered in snow. These factors add to the challenges of access, including the likely difficulty of forming and maintaining any access roads in the future.[54] The largest area of landlocked Māori land is in the north of the inquiry district, concentrated particularly in Ōwhāoko and Ōruamatua–Kaimanawa.

More large blocks of landlocked Māori land lie to the east. These include Aorangi (Awarua), where Aorangi stands; Awarua 1DB2, which adjoins Aorangi (Awarua); Awarua o Hinemanu; and Te Kōau A. Indigenous forest covers much of this whenua, which is now operated under Ngā Whenua Rāhui kawenata (covenants). Providing 25-year renewable covenants, the Ngā Whenua Rāhui Fund assists Māori to protect and care for indigenous ecosystems within their land independently of the Department of Conservation.

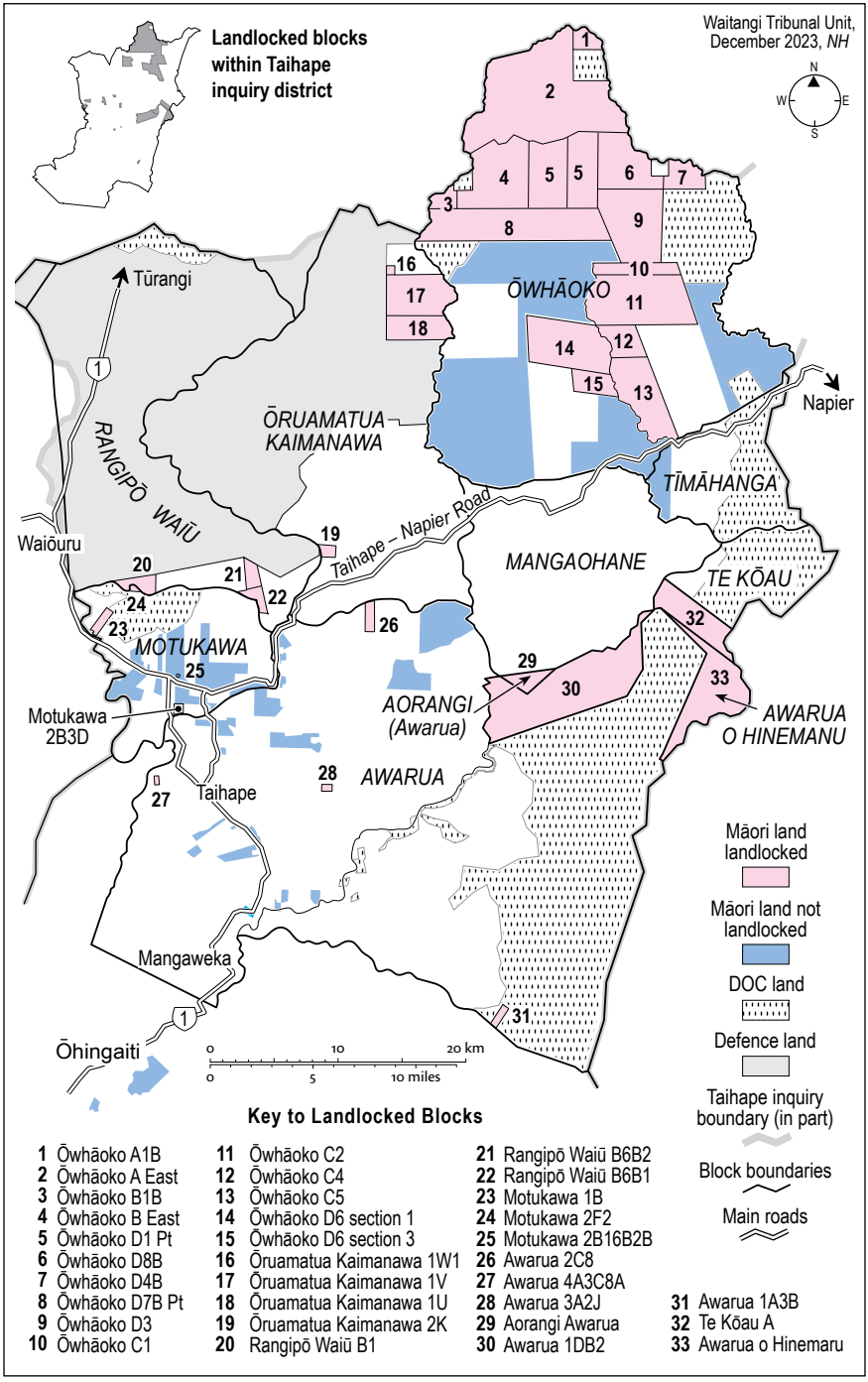
The properties bordering the landlocked blocks of Māori land include large farm stations in private ownership and Crown-owned lands used for military training purposes or conservation. Owners must either use helicopter transport to get to their landlocked Māori land, or negotiate with surrounding owners to cross their properties by vehicle or on foot.

There are a number of smaller, stand-alone blocks of landlocked land elsewhere in the district, including some urupā (burial grounds).

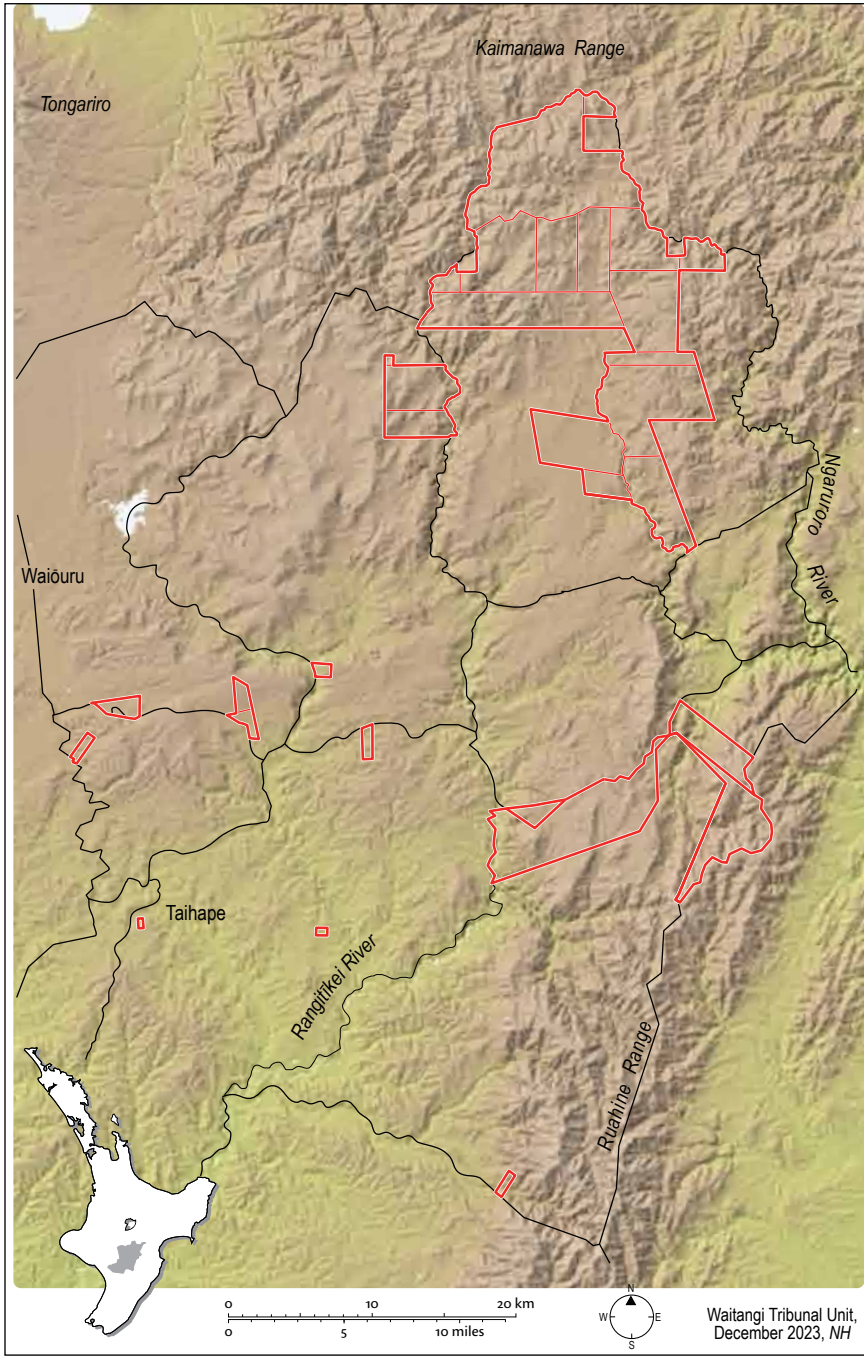
1.6 He Whenua, he Iwi: Ko Wai Rātau? / Who are the People?

A discussion of the tangata whenua of this inquiry district will be provided in our main report. Here, we include a brief outline only as context for our discussion of landlocked Māori land. This account is based on the traditions of tangata whenua, as described to us by claimants in their evidence and submissions.

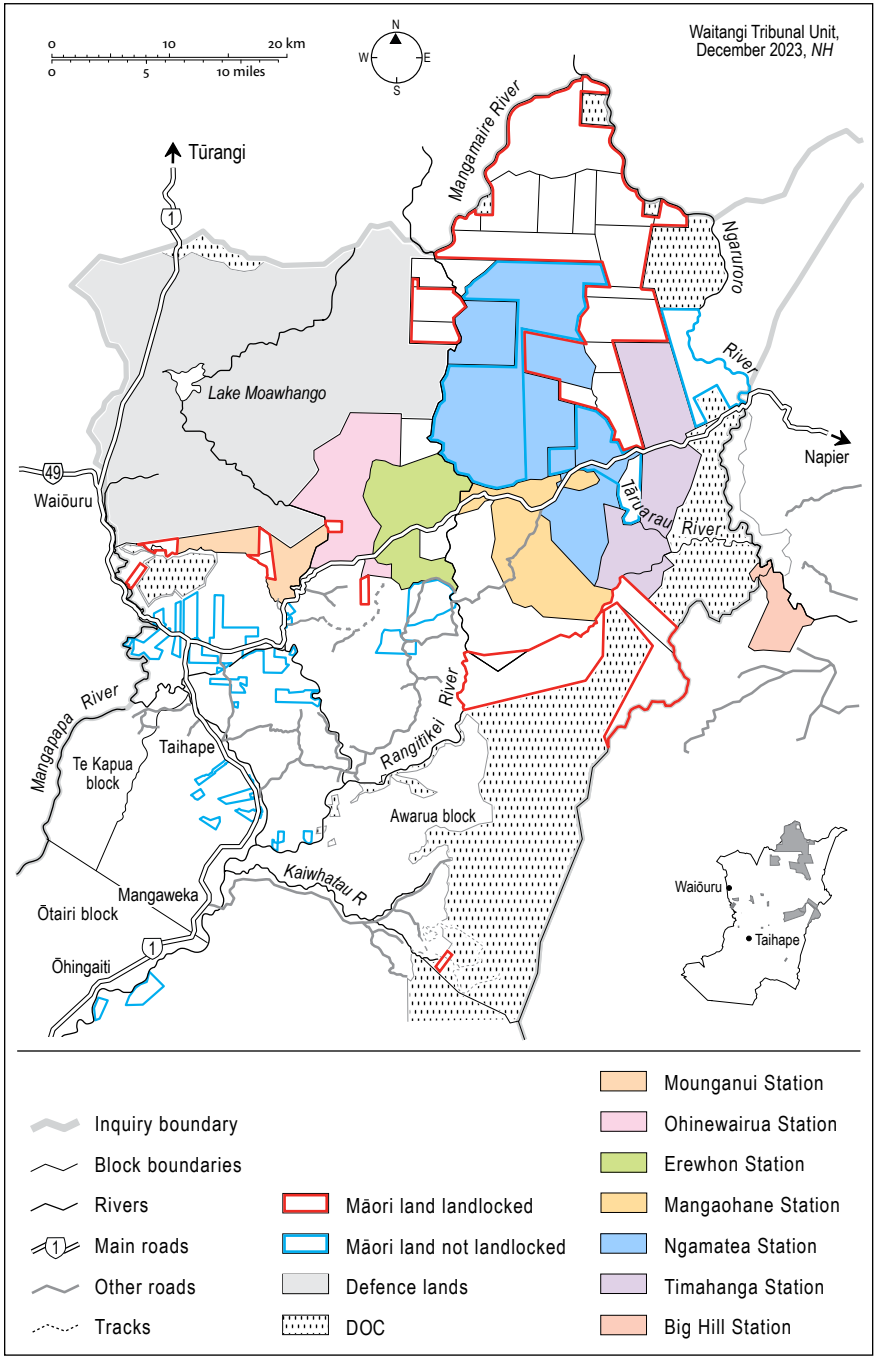
51. Transcript 4.1.8, p 698; transcript 4.1.6, p 25; doc A52(b) (McBurney), p 5
52. Document A15(m) (Innes), pp 70–71
53. Document A15(h) (Innes), pp 6–8; doc A15(m) (Innes), pp 70–71
54. Transcript 4.1.20, pp 57–58



Map 2: Overview of landlocked Māori land in the Taihape inquiry district



Map 3: Topography of the Taihape inquiry district (in part), showing landlocked Māori land and main block boundaries



Map 4: Overview of Māori land (landlocked and not landlocked), Crown land, and farm stations in the Taihape inquiry district

1.6.1 Ngā kōrero ō nehe ā te iwi / Historical traditions

The claimant tribes in the inquiry district told us that they draw their whakapapa and mana from several key sources, including tūpuna who lived there both before and after the waka migration from Hawaiki. In their traditions, a central pillar of tribal identity is the *Tākitimu* waka and the many prominent ancestors and descendants from the *Tākitimu* who migrated into the area from Tūranga-nui-a-Kiwa and Te Tairāwhiti, the eastern regions of Te Ika a Māui (the North Island), intermarrying with the papatipu tribes who already lived there.[55] The claimants told us that groups with these joint affiliations include Ngāti Tamakōpiri, Ngāti Whitikaupeka, Ngāi Te Ohuake, Ngāti Hauiti, and Ngāti Hinemanu me Ngāti Paki.[56] A key tupuna for all these groups is Tamatea-pokai-whenua, who is strongly associated with the migration of the *Tākitimu* peoples into the area, because he journeyed there first, leaving several mōkai (which in this context some of the claimants translated as 'pets') to affirm his mana and his claim on the land.[57]

The claimants told us that before the *Tākitimu* groups migrated into the region, various peoples flourished there, including Patupaiarehe, Ngāti Hotu, Ngāti Whatumamoa, Ngāti Mahu, and Te Tini o Te Hā. These are the groups that witnesses described as the papatipu tribes, which meant they originated not from arrivals on waka but from the land itself.[58] We heard that Whatumamoa is a central figure in the whakapapa of the iwi and hapū of this rohe who, like Hotu, forms an important link between the pre-migration and post-migration tribes.[59] The claimants said that, before the main migrations, Whatumamoa's domain extended from the East Coast into the inquiry district, perhaps through an ancestral connection with Ngāti Hotu.[60] We were told that the intermarriage of the incoming *Tākitimu* peoples with the descendants of Whatumamoa was an important phase in consolidating the rights of the *Tākitimu* peoples in the area.[61] Similarly, although accounts of their history and traditions varied, witnesses agreed that Ngāti Hotu were initially widespread in the area. Ngāti Hotu's interactions with the incoming *Tākitimu* people, the claimants said, including battles and strategic marriages, were important factors shaping settlement patterns.[62]

According to the claimants, Mahu-tapo-a-nui is another significant tupuna of this rohe. An uri of Toi Te Huatahi and therefore part of Te Tini o Toi

55. Transcript 4.1.4, p 11; doc E6(a) (J Winiata-Haines), p 2; transcript 4.1.6, p 12; submission 3.3.63 (Watson), p 7; submission 3.3.71 (Sykes), pp 17–18
56. Transcript 4.1.4, p 11; submission 3.3.63 (Watson), p 7; submission 3.3.71 (Sykes), pp 18, 24
57. Transcript 4.1.6, pp 13–21; submission 3.3.63 (Watson), p 6. Sometimes an alternative term – 'ngā kaitiaki' rather than 'ngā mōkai' – is used for the beings that Tamatea-pokai-whenua left on the land: see transcript 4.1.6, p 12.
58. Transcript 4.1.4, pp 11–12; doc E6(a) (J Winiata-Haines), p 2
59. Submission 3.3.63 (Watson), p 7; submission 3.3.71 (Sykes), p 18
60. Submission 3.3.71 (Sykes), p 18
61. Document E6(a) (J Winiata-Haines), p 2; transcript 4.1.4, p 19
62. Transcript 4.1.6, pp 40–41; transcript 4.1.4, pp 11–12

– the multitudes of Toi – Mahu-tapo-a-nui became prominent in the Lake Waikaremoana area and eventually journeyed back to the Eastern Bay of Plenty region near Putauaki maunga. Before then, we heard that he travelled through Taihape and Heretaunga-Ahuriri, leaving descendants who became Ngāti Mahu (another important descendant was Whatumamoa, in some traditions a son or mokopuna (grandchild) of Mahu-tapo-a-nui).[63]

Witnesses emphasised the importance of these traditions as a source of identity and mana whenua status in their areas.[64] They also said that through intermarriage and alliances between particular tribes, over time key links were formed with neighbouring iwi, including, for example, Ngāti Tūwharetoa. Eventually, over several generations, the combined papatipu and *Tākitimu* whakapapa converged, leading to the consolidation of the influence of these iwi and hapū within what is now the Taihape inquiry district.

1.6.2 Ngā kaitono matua o ngā hapori i mohoā nei / The principal claimant communities today

Two claimant groups – Ngā Iwi o Mōkai Pātea, and Ngāti Hinemanu me Ngāti Paki – represented a significant proportion of the claims in this inquiry. Together, the claimed interests of these groups cover most of our inquiry district area, and both featured prominently in the evidence on landlocked Māori land.[65] Claimants associated with Ngāi Te Ūpokoiri, closely connected to Ngāti Hinemanu on both sides of the Ruahine Ranges, also filed claims on the issue.[66] The Tūwharetoa Māori Trust Board filed claims concerning landlocked land in northern areas such as Ōwhāoko A.[67]

The ahu whenua trusts that administer many of the larger landlocked lands in this rohe are another important grouping in the context of our inquiry. These include the trusts that administer Te Kōau A, Aorangi (Awarua), and Awarua 1DB2, Awarua o Hinemanu, and the Ōwhāoko B and D lands. While the tribal collectives led the claims concerning landlocked land, a brief review of the trustees of these large ahu whenua trusts discloses an important and unsurprising overlap of

63. Transcript 4.1.4, p 13; transcript 4.1.6, p 40; see also Wai 201 ROI, doc R8 (Parsons), pp 6–7.
64. Transcript 4.1.4, pp 10–11; doc E6(a) (J Winiata-Haines), p 2
65. Claim 1.2.23 (Watson), pp 5–6; submission 3.3.36 (Watson); claim 1.2.17 (Sykes), pp 9–10; submission 3.3.40 (Sykes)
66. Document A12 (Walzl), p 24; claim 1.2.10 (Gilling), pp 5–6. Ngāti Tūope were another group to file claims on landlocked land (submission 3.3.33 (Hockly), p 1).
67. Submission 3.3.73 (Feint), p 5. A number of other groups claimed a presence in the area over time and filed claims in our main inquiry, registering their interests in various parts of the inquiry district without making claims relating to landlocked land. These groups included Ngāti Rangi in some north-western blocks, Ngā Poutama to the west, and Ngāti Kauwhata, Rangitāne, Muaūpoko, and Ngāti Pikiahu and Ngāti Waewae in the southern areas of the district: see doc A12 (Walzl), pp 24–25; claim 1.2.24, p 3; claim 1.2.16, p 3; claim 1.2.3, pp 2–3; claim 1.2.18, p 2.

personnel.[68] This highlights the critical relationships between the historical claims spearheaded by the iwi and hapū on the one hand, and Māori land administrators confronted with the very real challenges of continually seeking practical solutions to accessing their lands, on the other. Combined, their evidence is critically important to our understanding of the complex issues and serious problems the phenomenon of landlocked land has created for Māori of the inquiry district.

1.7 Ngā Tikanga o te Uiui / The Hearing Process

Once hearings began in March 2017, landlocked land quickly emerged as a central issue for the claimant community. More than 20 tangata whenua witnesses gave evidence on the subject, with evidence presented during eight of the 12 hearings. This evidence was heard at Rātā Marae, Taihape Area School, Winiata Marae, and Moawhango Marae.[69]

Crown evidence on landlocked land was heard in hearings nine and 11 at Maraeroa-o-ngā-hau-e-whā Marae at Waiōuru. The Crown called witnesses from the Department of Conservation, the Ministry of Defence, and Te Puni Kōkiri.[70]

We also heard evidence from expert technical witnesses in hearing four at Winiata Marae in December 2017,[71] and in hearing 12 at Moawhango Marae in August 2019.[72]

Two site visits undertaken during the hearings were particularly relevant to our inquiry into landlocked land. The first (November 2019) included visits to Ngamatea Station, which adjoins some of the landlocked land involved in the inquiry, and other sites offering views to various landlocked Māori lands. The second (February 2020) was a haerenga through the land of Big Hill Station towards the Māori and public conservation lands that lie beyond or can be seen from the

68. See, for example, 'Block: Te Koau A', Pātaka Whenua, Te Kooti Whenua Māori – Māori Land Land Court, https://customer.service.maorilandcourt.govt.nz/prweb/PRAuth/app/MLCPM_/xtAzLytWz7QIvNlxtGqs8MQiiEm8mler*/!STANDARD, accessed 26 September 2023; 'Block: Owhaoko D No 3 (Owhaoko D3), Pātaka Whenua, Te Kooti Whenua Māori – Māori Land Court, https://customer.service.maorilandcourt.govt.nz/prweb/PRAuth/app/MLCPM_/xtAzLytWz7QIvNlxtGqs8MQiiEm8mler*/!STANDARD, accessed 26 September 2023; 'Block: Awarua o Hinemanu', Pātaka Whenua, Te Kooti Whenua Māori – Māori Land Court, https://customer.service.maorilandcourt.govt.nz/prweb/PRAuth/app/MLCPM_/xtAzLytWz7QIvNlxtGqs8MQiiEm8mler*/!STANDARD, accessed 26 September 2023; doc A37 (Woodley), pp 284, 426, 437; doc O1 (P Steedman), p 2; doc G13 (R Steedman), p 5.

69. These included briefs of evidence presented at hearing week 1: doc E3(a) (H Steedman), p 24; hearing week 3: doc G1 (Wipaki); doc G13 (R Steedman); doc G5 (Smallman); doc G18 (D Ormsby, M Ormsby, and Pillot); hearing week 4: doc H1 (Benevides); doc H6 (N Lomax); docs H8, H21 (P Steedman); hearing week 5: doc I2 (L Winiata); doc I3 (D Steedman); doc I14 (P Cross); hearing week 6: doc J6 (Whale); doc J9 (G Toatoa and R Toatoa); doc J10 (Karena); doc J11 (Whakatihi); doc J12 (Biddle); doc J15 (R Steedman); hearing week 7: doc K5 (P Steedman); hearing week 8: doc L10 (R Steedman); hearing week 12: doc O1 (P Steedman); doc O3 (R Steedman).

70. Document M1 (Kaio); doc M2 (Hibbs); doc M3 (Pennefather); docs M7 to M7(l) (Fleury); doc M8 (Kemper); docs M28 to M28(g) (Hippolite and Ohia)

71. Documents A37–A37(o) (Woodley); transcript 4.1.11, pp 321–448

72. Documents N1(a)–(e) (Neal, Gwyn, and Alexander); transcript 4.1.20, pp 21–130

station. Ngamatea Station and Big Hill Station are both interested parties to this inquiry.[73] To further assist our inquiry into landlocked Māori land, a member of our panel, Dr Monty Soutar, accepted an invitation from Crown counsel to fly by helicopter over some of the landlocked blocks under inquiry to get an appreciation of the area, the terrain, the distances involved, and other issues.[74]

Claimant counsel presented their closing submissions on landlocked land at Ōmahu Marae in February 2020.[75] Closing submissions for the Crown and Big Hill Station were then heard at Rātā Marae and at the Tribunal's Wellington offices in January 2021 and April 2021.[76]

1.8 Ngā Rōpū / The Parties

1.8.1 Ngā kaikerēme / The claimants

As foreshadowed, a significant number of claims in our inquiry concern landlocked land. We have summarised the essence of these allegations in the introduction to this chapter and discuss the claims in detail in chapter 2. The claims addressed in this priority report (as per statements of claim or, in some cases, relevant submissions) are:

- The Ngāti Tūwharetoa Comprehensive Claim, a claim filed by Te Ariki, Te Heuheu Tukino VII Tā Hepi, for and on behalf of Ngā Hapū o Ngāti Tūwharetoa, and now advanced by Te Ariki, Te Heuheu Tukino VIII Tā Tumu (Wai 61 and 575).[77]
- Henry Tiopira Mathews and Wero Karena on behalf of those Māori who were owners of Ōwhāoko C3A, C3B, C6, C7, and D2, as well as Te Kōau and Tīmāhanga, and on behalf of Ngāti Hinemanu and Ngāi Te Upokoiri (Wai 378).[78]
- Neville Franze Te Ngahoa Lomax and others for and on behalf of the Potaka Whānau Trust and Ngā Hapū o Ngāti Hauiti (Wai 385).[79]
- Ranui Toatoa, Greg Toatoa, Rhonda Toatoa, and Wero Karena on behalf of Ngā Hapū o Heretaunga ki Ahuriri (Wai 400).[80]
- Neville Franze Te Ngahoa Lomax and others for and on behalf of Te Rūnanga o Ngāti Hauiti (Wai 581).[81]

73. Submission 3.2.477 (Ngamatea Station); submission 3.3.41 (Big Hill Station)
74. Transcript 4.1.20, pp 16–17
75. Submission 3.3.33 (Hockly); submission 3.3.34 (Bennion and Black); submission 3.3.35 (Gilling); submission 3.3.36 (Watson); submission 3.3.38 (Naden); submission 3.3.40 (Sykes); transcript 4.1.21, pp 393–458
76. Submission 3.3.44 (Crown); submission 3.3.44(d) (Crown); submission 3.3.41 (Big Hill Station)
77. Submission 3.3.73 (Feint); statement of claim 1.1.12
78. Claim 1.2.10 (Gilling)
79. Claim 1.2.23 (Watson)
80. Claim 1.2.8 (Gilling)
81. Claim 1.2.23 (Watson)

- Isaac Hunter and Maria Taiuru and others for and on behalf of Ngāti Tamakōpiri and Ngāti Whitikaupeka (Wai 588).[82]
- Maria Taiuru and others for and on behalf of Ngāti Tamakōpiri and Ngāti Whitikaupeka (Wai 647).[83]
- Peter Steedman, Herbert Winiata Steedman, and Jordan Winiata-Haines on behalf of themselves and the descendants of Winiata Te Whaaro and the hapū of Ngāti Paki (Wai 662).[84]
- Terrill Te Manuao Campbell, Whakatere Terrence Whakatihi, Alec Phillips, Heta Konui, and Margaret Poinga, on behalf of Ngāti Hikairo and Ngāti Tūope (Wai 37 and Wai 933).[85]
- Merle Mata Ormsby, Daniel Ormsby, Tiaho Mary Pillot, and Manu Patena for and on behalf of themselves and members of Ngāti Tamakōpiri, Ngāti Hikairo, and Ngāti Hotu (Wai 1196).[86]
- Hari Benevides, Hoani Hipango, and Wilson Ropoama Smith on behalf of themselves and the Pohe whānau descendants (Wai 1632).[87]
- Isaac Hunter, Utiku Potaka, Maria Taiuru, Hari Benevides, Moira Raukawa-Haskell, Te Rangianganoa Hawira, Kelly Thompson, Barbara Ball, and Richard Steedman on behalf of themselves, Ngā Iwi o Mōkai Pātea, and the Mōkai Pātea Waitangi Claims Trust (Wai 1705).[88]
- Lewis Winiata, Ngahapeaparatuae Roy Lomax, Herbert Winiata Steedman, Patricia Anne Te Kiriwai Cross, and Christine Teariki on behalf of themselves and the descendants of Ngāti Paki me Ngāti Hinemanu (Wai 1835).[89]
- Waina Raumaewa Hoet, Grace Hoet, Elizabeth Cox, Piaterihi Beatrice Munroe, Terira Vini, Rangimarie Harris, and Frederick Hoet on behalf of themselves, their whānau, and all descendants of Raumaewa Te Rango, Whatu, and Pango Raumaewa (Wai 1868).[90]
- Iria Te Rangi Halbert on behalf of Ngāti Whitikaupeka (Wai 1888).[91]
- Fred William Herbert on behalf of himself and Ngāti Paretekawa, Ngāti Ngutu, Ngāti Te Mawa, and Ngāti Ruanui hapū (Wai 1978).[92]

On 25 August 2016, a second amended statement of claim for Wai 385, Wai 581, Wai 588, and Wai 1705 was filed, bringing all these claims together under the umbrella of Ngā Iwi o Mōkai Pātea.[93]

82. Claim 1.2.23 (Watson)
83. Claim 1.2.23 (Watson)
84. Claim 1.2.17 (Sykes)
85. Claim 1.2.21 (Hockly)
86. Claim 1.2.9 (Patea)
87. Claim 1.2.15 (Sinclair)
88. Claim 1.2.23 (Watson)
89. Claim 1.2.17 (Sykes)
90. Claim 1.2.17 (Sykes)
91. Claim 1.2.23 (Watson); memo 2.1.41
92. Claim 1.1.42(a) (Singh)
93. Claim 1.2.23 (Watson), pp 2, 4

On 30 August 2016 an amended statement of claim for Wai 662, Wai 1835, and Wai 1868 was filed to bring all these claims together under the umbrella of Ngāti Hinemanu me Ngāti Paki.[94]

1.8.2 Te Karauna / The Crown

The Crown was represented by Crown counsel, Rachel Ennor. While the Crown did not produce historical research on landlocked land, several witnesses did appear on its behalf on the issue: Colonel James Kaio, Major Patrick Hibbs, and Gary Pennefather of the New Zealand Defence Force; Bill Fleury and Reginald Kemper of the Department of Conservation; and Rahera Ohia of Te Puni Kōkiri, who also read the brief of Michelle Hippolite.

1.8.3 Ngā rōpū e mata aro mai ana / The interested parties who made submissions on landlocked lands

1.8.3.1 *Te Teihana o Big Hill / Big Hill Station*

Big Hill Station Ltd was the only interested party in this inquiry to make submissions on landlocked land. Located to the east of the inquiry district, it is represented by Magnus Macfarlane and Lara Bloomfield.[95]

1.8.3.2 *Te Kaunihera ā Rohe o Rangitīkei / Rangitīkei District Council*

Mayor Andy Watson made a statement on behalf of the Rangitīkei District Council.[96]

1.9 Te Hanga o tēnei Pūrongo / The Structure of this Report

The rest of our report is organised into five chapters. Chapter 2 begins with an overview of the legislation under which Māori land in the district became and remained landlocked, to provide context to the issues in this report. It then outlines the parties' positions and issues in dispute. Chapter 3 briefly surveys the jurisprudence on landlocking and related themes, and identifies the treaty principles and duties that apply to the claims before us.

In chapters 4 to 6, we analyse the issues in dispute and reach findings. Chapter 4 considers whether the Crown was responsible for the landlocking of Māori land in the inquiry district in the period up to 1912, during which most landlocking occurred.

Chapter 5 considers whether the Crown's attempted remedies since 1912 have been effective and treaty compliant, and examines the prejudice landlocking has caused the claimants.

94. Claim 1.2.17 (Sykes), p 8

95. Submission 3.3.41 (Big Hill Station), p 1. Ngamatea Station was an interested party to our inquiry and hosted a site visit concerning landlocked land, but, apart from its application for interested party status (submission 3.2.477), did not file submissions or evidence.

96. Submission 3.2.803 (A Watson), p 1

1.9

In chapter 6, we consider whether specific actions of the Ministry of Defence and Department of Conservation have worsened access difficulties for some owners of Māori land in the inquiry district. Finally, in chapter 7, we summarise our findings and set out our recommendations.

UPOKO 2

TĀ TE TURE TIROHANGA WHĀNUI, TE TŪRANGA O NGĀ RŌPŪ, ME NGĀ TOHE E TOE ANA

LEGISLATIVE OVERVIEW, THE PARTIES' POSITIONS, AND WHAT REMAINS IN DISPUTE

2.1 Te Tāhū / Introduction

This chapter sets out the parties' positions, including the Crown's concessions, on the issues raised by landlocked land claims in Taihape. It then identifies what remains in dispute between the parties and the issues we must determine in this report. To provide essential context for the parties' positions and the issues, the chapter first outlines the legislation relevant to landlocked land. Many of the parties' arguments focused on provisions within this legislation and it features strongly in our later analysis of the issues.

2.2 Te Tirohanga Whānui a te Ture / Legislative Overview

This narrative sets out the detail of the legislation relevant to the issues in this report. We have done this through quoting in full, as much as practicable, from the laws themselves. The narrative falls into four relatively distinct phases. First, from 1865, the Native Land Court was established to investigate and award title to customary Māori land. The law made no provision for the maintenance of access to partitions of Māori land, despite the ability – from the 1870s – of the Crown and private purchasers to partition out their interests. Secondly, from 1886 to 1912, the law provided the option for the Native Land Court to order roads or rights of way to Māori land at the time of the court's title investigation or partition, or within five years of that point. Thirdly, from 1912 to 1975, the law allowed the court to retrospectively order access to Māori land blocks, but not if the land the accessways would cross had ceased to be Māori land before 1913, or between 1913 and 1922. Finally, since 1975, the law has allowed the High Court or Māori Land Court to order access to landlocked land irrespective of when the neighbouring land ceased to be Māori land, but the burden of paying for and maintaining access has remained with the applicant.

2.2.1 I mua atu i te 1886 / Pre-1886

We begin with the law in place before 1886. As is well settled, Māori held their lands under long-established tikanga before the Native Land Court was introduced.

This customary form of landholding included rights to access those lands and to control access to them.

With the introduction of the Native Land Court, customary land could be converted into a form of title that could be transferred – by lease or sale – to settlers or the Crown. Although courts dealing with Māori land had been established by the Native Lands Act 1862, it was not until the Native Lands Act 1865 that the Native Land Court was established as a formal court of record. Under the 1865 legislation, the court's function was to investigate and award title to customary Māori land. Māori could bring a claim to the court for title investigation, and if successful, up to 10 of those with interests in the land could be deemed the owners and receive a Crown grant for the block in question. However, the 1865 Act made no provision for roads or rights of way to be provided to the newly titled Māori land.

In the 1870s, the native land laws were changed to allow for Māori land to be partitioned, or divided into smaller blocks with separate titles according to the proportionate shares of the owners. The Native Land Act 1873 essentially defined this change. The Act allowed for more than 10 people to be registered as owners and also required every hapū member with interests in the land to be named on the title. But any person named on the title could partition out their interests (divide them off from the original block) and sell them individually. From 1877, under section 6 of the Native Land Act Amendment Act 1877, the Crown could apply to the court to partition out any individual interests it had purchased in land owned by Māori. Where the Crown acquired individual interests in a land block over many years, that block could be partitioned many times. From 1878 the Crown's ability to partition out its interests was extended to private individuals, as Māori owners and any 'other person interested' could apply for a partition.[1] This led to further partitioning. The partitioning system was well established by the time customary Māori land in our inquiry district came before the Native Land Court, which issued its first title to land in Taihape in 1872. Investigations of title and partitioning of most blocks of land in the inquiry district took place in the 1880s and 1890s.

Before 1886, the native land laws did not provide specifically for access to Māori land, either when the Native Land Court was investigating a block's title or partitioning it.[2] However, a programme of work creating public roads, primarily to support European settlement, had existed well before this. Public works legislation, which empowered the Crown to take land to create public works including roads, was central to achieving this. From 1865, legislation allowed the Crown to take up to 5 per cent of Crown-granted Māori land for roads, without the Crown having to pay compensation to the owners.[3] Under the Public Works Act 1876, existing roads could be vested in the Crown without compensation, and local bod-

1. Native Land Act Amendment Act (No 2) 1878 Act 1878, s 11
2. Document A37 (Woodley), p 239
3. Document A9 (Cleaver), p 15

ies had the authority to take Crown-granted and customary Māori land for public works including roads.[4]

2.2.2 1886–1912 / 1886–1912

The Native Land Court Act 1886 was the first piece of legislation containing any provisions to create private roads giving access to Māori land. Section 91 stated that

> When upon an investigation of title to Native land, or upon partition, land is ordered to be divided into several parts or parcels, each of such parts or parcels shall be subject to such rights of private road for the purpose of access to other or others of such parts or parcels as may be ordered.
>
> Such order may be made by the Court at the time when division or partition is ordered, or it may, on the application of any person interested therein, be made by the Court or a Judge at any time within five years from the date of such division or partition.

In other words, an order for access could be made by the court either at the time of partition or, upon application, within five years of the time of partition. Section 92 of the same Act also allowed the court to order access to any earlier partitions, so long as application was made within two years (that is, by August 1888):

> Each part or parcel into which land has heretofore been divided under any Act relating to Native land, shall be subject to like rights of private road, for the purpose of access to the other or others of such parts or parcels, as the Court or Judge may order, provided such order be applied for within two years from the passing of this Act.

The 1886 Act was repealed by the Native Land Court Act 1894, although section 69 of the new Act reproduced section 91 nearly verbatim:

> When upon an investigation of title of Native land, or upon partition, land has been or shall be ordered to be divided into several parcels under 'the Native Land Court Act, 1886,' or under this Act, each of such parcels shall be subject to such rights of private road for the purpose of access to other or others of such parts or parcels as may be ordered.
>
> Such order may be made by the Court at the time when partition is ordered, or it may, on the application of any person interested therein, be made by the Court at any time within five years from the date of such partition.

The 1894 Act did not, however, reproduce section 92.

4. Document A37 (Woodley), p 240; doc A9 (Cleaver), pp 16–17, 188

The regime introduced in 1894 remained in force until the passage of the Native Land Act 1909, which repealed and consolidated dozens of pieces of legislation. The 1909 Act made no reference to an ability to apply for an order concerning access nor, of course, to there being a five-year period for doing so. In section 117, the initiative rested solely with the court, which could lay out roads at the time of partition only:

> (1) Upon any partition the Court shall lay out upon the land partitioned such road-lines (if any) as the Court thinks necessary or expedient for the due settlement and use of the several parcels.
> (2) The Governor may by Proclamation proclaim any road-line so laid out as a public road, and the same shall thereupon vest in the Crown as a public road accordingly.
> (3) Unless and until such a Proclamation is made, the land so set apart as road-lines shall remain Native land held in common ownership as if no partition order had been made.
> (4) In lieu of or in addition to laying out road-lines under this section the Court may, if it thinks fit, in and by any partition orders made by it, create private rights of way over any parcels of the land partitioned and appurtenant to any other of those parcels; and in any such case every partition order made in respect of any such parcel shall set forth any right of way to which that parcel is so subject or which is so appurtenant thereto.

2.2.3 1912–75 / 1912–75

The 1909 legislation was therefore a turning point in terms of the provision of access to Taihape landlocked land. Even more pronounced change, though, came in 1912. In section 10(1) of the Native Land Amendment Act 1912, the Native Land Court's ability to order access retrospectively upon 'the application of any person interested' was reinstated. However, under section 10(3) no such order could be made if the land over which the accessway would need to pass had ceased to be Māori land. Nor could the court order access over any land that was being leased when the Act commenced (1 December 1912), without the lessee's written consent:

> (1) When any Native freehold land has been partitioned, either before or after the commencement of this Act, in such manner that any subdivision thereof has no access to any public road, the Court may, if it thinks fit, on the application of any person interested, at any time thereafter, by order, lay out any road-line over any portion of the land so partitioned which is necessary to afford to any such subdivision access to a public road.
> (2) The effect of any such order shall be to empower and authorize the Governor, by Proclamation, at any time thereafter to proclaim as a public road any road-line so laid out by the order; and on the making of any such Proclamation the road-line shall thereupon become a public highway accordingly.

(3) No road-line shall be so laid out or public road so proclaimed over any land which, at the date of the order or Proclamation, has already ceased to be Native freehold land, nor shall any such order or Proclamation authorize the laying-out of any road-line or the proclamation of any public road over any land the subject at the time of the commencement of this Act of an existing valid lease during the continuance of such lease without the consent in writing of the lessee.

Section 10(3) had serious implications for Māori of the inquiry district. As we interpret it, from the time the Act came into force in 1912, it prevented the court from laying out roads over general (non-Māori) land. In Taihape, much of the land adjoining blocks of landlocked Māori land had become general land by that time. Unlocking these blocks would, in almost all cases, require new roads to be created that crossed general land. If the 1912 Act prevented the court laying out such roads, it was of no help to most Māori with landlocked land in Taihape.

Section 10(3) also prevented the court from laying roads over land that was being leased, unless the lessee consented in writing. This measure would have applied only to Māori land, on our reading – given the section expressly prevented the laying of roads over any non-Māori land (leased or not). By implication, section 10(3) also allowed the court to lay roads over Māori land that was not being leased. It made no mention of the need for consent from owners of Māori land.

Crown counsel and Ms Woodley's interpretation of section 10(3) differed from ours. Although the Act was silent on the matter of consent from a block's owner, both considered the effect of the section was that roads could be laid over general land if the owner's permission was obtained.[5] In their understanding, where general land was leased, the lessee's permission was also required.

We are not sure this interpretation is correct. There is nothing in the Act to suggest the key constraint in section 10(3) – that 'No road-line shall be . . . laid out or public road . . . proclaimed over any land which . . . has already ceased to be Native freehold land' – applied only if the owner's consent was *not* obtained. Rather, on a reading of the section's plain terms, where land had ceased to be native freehold land, consent was irrelevant; the court had no power to lay roadlines over the land.

On either reading of section 10(3) – whether it prevented the court laying roads over general land or allowed it to, subject to owners' permission – the 1912 Act clearly prioritised the rights of general land owners over the access rights of Māori land owners.

The next legislative development was the Native Land Amendment Act 1913. Section 49(6) repealed both section 117 of the 1909 Act and section 10 of the 1912 Act and replaced them with sections 48–53. These new sections largely reproduced the content of the previous provisions: section 49(3), for example, stated that no accessway could be created over land that had ceased to be Māori land, nor any created over any land 'subject at the time of the commencement of this Act of an

5. Document A37 (Woodley), p 245; submission 3.3.44 (Crown), p 15

existing valid lease, during the continuance of such lease, without the consent in writing of the lessee'.

The next legislative change came with the Native Land Amendment and Native Land Claims Adjustment Act 1922. It did not repeal or amend any of the relevant sections inserted into the 1909 Act by the 1913 amendment, but rather added a further provision in section 13.[6] Most notably, section 13(1) and (2) stated that

> (1) The Court may, in order to give access or better access to any European land which has ceased to be Native land since the fifteenth day of December, nineteen hundred and thirteen, lay off over any adjoining Native land (whether freehold or not) such lines of roads or private way as the Court thinks necessary or expedient.
> (2) The Court may likewise, in order to give access or better access to any Native freehold land, lay off over any adjoining European land which has ceased to be Native land since the fifteenth day of December, nineteen hundred and thirteen, such lines of roads or private way as the Court thinks necessary or expedient.

An order made in this section could be 'registered against any title affected by it' (subsection 5). The amendment thus expanded the court's ability to order access, but maintained an exemption for land that had ceased to be Māori land before 15 December 1913. Importantly, while the court could now order access over lands Europeanised since that date, this power was probably not intended to be retrospective. In keeping with the 1913 Act, then, the 1922 Act likely gave the court no jurisdiction to order access over lands that were Europeanised between December 1913 and 31 October 1922 (when the 1922 Act came into force).

The 1922 Act's provisions essentially prevailed over the following decades, with some minor adjustments. The Maori Affairs Act 1953 provided that, for the purpose of providing access to any Māori freehold land, roadways could be laid out over land Europeanised before 15 December 1913, but only with the written consent 'of the owner and of every other person having any estate or interest therein'.[7]

2.2.4 Mai i te 1975 / Since 1975

The most significant new development came in 1975, with an amendment to the Property Law Act 1952. Though not specifically aimed at Māori landlocked land, this was the first legislative attempt to remedy the problem of landlocked Māori land in a district like Taihape, where the lands required for access had passed out of Māori ownership before 1913. The amendment inserted section 129B into the Property Law Act, which dealt expressly with the issue of landlocked land. It defined landlocked land as land without 'reasonable access to it', and permitted owners of such land to apply to the High Court for an order granting access across

6. Document A37 (Woodley), p 248; submission 3.3.44 (Crown), pp 15–16. Crown counsel submitted that the 1913 provisions 'remained in force' and the 1922 amendments were to be 'read with' them.
7. Maori Affairs Act 1953, s 418(2)(a)

neighbouring properties. The court, in turn, was required to consider a range of factors in coming to its decision.

(6) In considering an application under this section the Court shall have regard to—
  (a) The nature and quality of the access (if any) to the landlocked land that existed when the applicant purchased or otherwise acquired the land;
  (b) The circumstances in which the landlocked land became landlocked;
  (c) The conduct of the applicant and the other parties, including any attempts that they may have made to negotiate reasonable access to the landlocked land;
  (d) The hardship that would be caused to the applicant by the refusal to make an order in relation to the hardship that would be caused to any other person by the making of the order; and
  (e) Such other matters as the Court considers relevant.

(7) If, after taking into consideration the matters specified in subsection (6) of this section, and all other matters that the Court considers relevant, the Court is of the opinion that the applicant should be granted reasonable access to the landlocked land, it may make an order for that purpose—
  (a) Vesting in the owner of the legal estate in fee simple in the landlocked land the legal estate in fee simple in any other piece of land (whether or not that piece of land adjoins the landlocked land):
  (b) Attaching and making appurtenant to the landlocked land an easement over any other piece of land (whether or not that piece of land adjoins the landlocked land).

The requirement for an adjoining land owner's consent, therefore, was removed. In subsection 8, the court could impose various conditions, such as the completion of a survey and the applicant paying compensation to the other land owner(s) and/or having to exchange land with them. Subsection 9 also set out that the applicant would ordinarily be liable for the costs involved in creating the accessway:

(9) Every order made under subsection (7) of this section shall provide that the reasonable cost of carrying out any work necessary to give effect to the order shall be borne by the applicant for the order, unless the Court is satisfied, having regard to the matters specified in paragraphs (b) and (c) of subsection (6) of this section, that it is just and equitable to require any other person to pay the whole or any specified share of the cost of such work.

For reasons that we will set out, in 1993 Parliament included further provisions for resolving landlocking of Māori land in Te Ture Whenua Maori Act, this time providing an avenue via the Māori Land Court. Section 316 stated that

(1) For the purpose of providing access, or additional or improved access, the Court may, by order, lay out roadways in accordance with the succeeding provisions of this section and of this Part of this Act.

(2) For the purpose of providing access, or additional or improved access, to any land to which this Part of this Act applies, the Court may lay out roadways over any other land.
(3) For the purpose of providing access, or additional or improved access, to any land other than land to which this Part of this Act applies, the Court may lay out roadways over any land to which this Part of this Act applies.
(4) Any order laying out roadways may be a separate order, or may be incorporated in a partition order or other appropriate order of the Court.

However, in contrast to the Property Law Act, section 317(3) stipulated that where an access route would need to cross general land, permission from the owner was first required (regardless of when the land had passed out of Māori ownership): 'The Court shall not lay out roadways over any General land without the consent of each owner.' In this respect, the 1993 Act was more restrictive than the Maori Affairs Act it superseded (which, as noted, required consent only where general land had been Europeanised before 15 December 1913 – though in that case, both interested parties' and owners' consent was needed). Permission was also required from the director-general of lands where the access would cross Crown land (section 317(4)), and from owners of Māori freehold land where the access would cross their land (section 317(1)). Section 319 provided for the court to determine the issue of compensation.

These provisions in Te Ture Whenua Maori Act were strengthened in 2002 by the addition of section 326B, which removed the requirement for affected owners' consent and thus brought Te Ture Whenua Maori Act into line with the Property Law Act:

(1) The owners of landlocked land may apply at any time to the Court for an order in accordance with this section.
(2) On an application made under this section,--
    (a) the owner of land adjoining the landlocked land that will or may be affected by the application must be joined as a party to the application; and
    (b) every person having an estate or interest in the landlocked land, or in any other piece of land (whether or not that piece of land adjoins the landlocked land), that will or may be affected if the application is granted, or claiming to be a party to or to be entitled to any benefit under any mortgage, lease, easement, contract, or other instrument affecting or relating to any such land, and the local authority concerned, are entitled to be heard in relation to any application for, or proposal to make, any order under this section.

Under section 326B(4) and (5), the court was then to consider the merits of the case and could make an order, following a process similar to that required under section 129B(6) and (7) of the Property Law Act. Section 326C(1)(a) provided for the payment of compensation, and section 326C(2) used similar wording to section 129B(9) of the Property Law Act to stipulate that the applicant would likely bear the reasonable cost of creating the access.

Crucially, also, section 326D stated that

(3) The High Court, and not the Maori Appellate Court, has jurisdiction to hear and determine appeals from any order made under sections 326B or 326C that affects General land.
(4) Every appeal to the High Court under subsection (3) is by way of rehearing.

Finally, Te Ture Whenua Maori Act was amended again by Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020. Section 69 of this Act amended the definition of 'reasonable access' in section 326A of the principal Act, specifying that such access must be fit for use by 'persons or services' (not just persons, as the definition had previously implied). Section 70 required the court to have regard for the landlocked land's 'cultural or traditional significance' to owners when assessing their applications for access, modifying section 326B(4)(d). Section 71 repealed section 326D(3)-(4), meaning any appeal against the court's decision to order access would now be heard in the Māori Appellate Court rather than the High Court. This would make it less costly and more viable for owners of landlocked Māori land to contest such appeals.

2.3 Te Tūranga o ngā Rōpū / The Parties' Positions

The parties' arguments raised a number of issues for us to address. In this section we introduce the issues and set out the parties' positions on them (including the Crown's concessions). Our discussion of the issues spans chapters 4, 5, and 6 which deal, respectively, with the period from 1886 to 1912; the period after 1912; and specific actions of the Ministry of Defence and the Department of Conservation. The issues are as follows:

- *Was the Crown aware of landlocking prior to, and following, the determination of title?* This issue asks whether the Crown knew landlocking was a potential or existing problem for Māori land between 1886 and 1912, when most customary Māori land in Taihape was converted to freehold title in the Native Land Court, and some became landlocked. The crux of this issue was that, if the Crown was aware of landlocking during this time, it could reasonably have been expected to ensure access was provided to newly titled Māori land, as part of the titling process.
- *Under what circumstances did Māori land become landlocked and was the Crown responsible for the situation?* This issue arose from the parties' opposing views on what factors led to landlocking in Taihape and whether they were within the Crown's control. Key areas of disagreement were whether the Crown's native land laws caused landlocking, whether Māori could have made better use of the laws to secure access, whether actions of the Native Land Court were to blame (in particular, its failure to make access orders), and whether the Crown was responsible for the court's actions.
- *What efforts did the Crown make to remedy the landlocking of Taihape Māori land from 1912–75?* This issue focuses on the legal measures in place for

restoring access to landlocked Māori land in the decades after landlocking occurred in Taihape, and asks whether they were adequate. As outlined in section 2.2, the Crown included such measures in its Native Land Amendment Act 1912, Native Land Amendment Act 1913, Native Land Claims Adjustment Act 1922, and Maori Affairs Act 1953. As already noted, these measures contained provisions that treated Māori and general land owners unequally; for the purposes of unlocking Māori land, the court could freely order roads over other Māori land,[8] but not over general land, if it had ceased to be Māori land before 1913, or between 1913 and 1922. On the parties' reading, these provisions meant the court could only order access over general land of this nature with the owner's prior consent. The parties' discussion of this issue focused mainly on this consenting requirement (as they viewed it) and its effect on Māori of the inquiry district.

- *What was the role of local government in causing or failing to remedy landlocking?* Local authorities were responsible for building and maintaining roads in Taihape in the period when Māori land became landlocked (1886 to 1912) and after, when it remained landlocked. Whether their actions contributed to landlocking in Taihape was therefore a pertinent question for inquiry. The parties expressed views on whether local authorities had prioritised access to general rather than Māori land when developing roading networks, and whether they should have challenged government regulations that disadvantaged Māori land owners. A related question – and key point of dispute between the parties – was whether the Crown was responsible for local authorities' actions.
- *Have Crown measures since 1975 been adequate responses to the issue of landlocked land in Taihape?* This issue focuses on the legal measures in place for restoring access to landlocked Māori land from 1975, when landlocking in Taihape had become a long-term problem. As outlined in section 2.2, these measures appeared in the Property Law Act 1975, Te Ture Whenua Maori Act 1993, and 2002 and 2020 amendments to the latter Act. At the time of our inquiry, no Māori of the district had successfully used these measures to secure access to their landlocked land. The parties' discussion of this issue therefore focused on why these measures have been ineffective.
- *What prejudice have Māori suffered because of the landlocking?* Identifying the various ways in which long-term lack of access to their land has prejudiced Taihape Māori was an important aspect of this inquiry – both in terms of recognising the prejudice suffered and formulating appropriate redress. The parties' submissions focused on forms of economic and cultural prejudice and the sale of landlocked land.
- *Did the actions of the Department of Conservation and the Ministry of Defence worsen the claimants' access difficulties?* Much landlocked Māori land in the inquiry district adjoins large areas of Crown land administered by these two agencies. This issue concerns several actions these agencies

8. Except where Māori land was being leased, in which case the lessee's consent was required.

have taken since the 1980s that allegedly worsened access problems for some owners of landlocked Māori land. These actions involved the exchange of Crown land for land in private ownership, the purchase of private land for defence purposes, and negotiation of agreements with station owners for better access to Crown land. The claimants say that in each case, the Crown prioritised its own interests and access needs while overlooking theirs. We background these Crown actions more fully when presenting the parties' positions (section 2.3.7.1).

2.3.1 E mōhio ana te Karauna ki ngā mate karapoti i mua atu, i muri mai hoki o te whakataunga taitara? / Was the Crown aware of landlocking prior to, and following, the determination of title?

2.3.1.1 *Te tūranga o ngā kaikerēme / The claimants' position*

Claimant counsel argued that the Crown knew landlocked Māori land was a problem from an early stage. Counsel for members of Ngāti Tamakōpiri, Ngāti Hikairo, and Ngāti Hotu submitted that the Crown's awareness of the access issues Māori faced could be inferred from the access it provided to European land from the 1840s onwards. Between 1840 and 1900, counsel submitted, numerous public works statutes provided for the formation of roads. This showed the Crown was 'abundantly aware' of the need to access land and that it was 'a significant issue for European settlers'.[9]

In generic submissions, claimant counsel argued the Crown probably knew landlocking was a problem affecting Māori land generally by 1886, and pointed to the introduction of access provisions in the Native Land Court Act 1886 as evidence of this awareness.[10] Counsel for members of Ngāti Tamakōpiri, Ngāti Hikairo, and Ngāti Hotu argued that the Crown's awareness of land owners' access needs was clearly evident in section 20 of the Public Works Acts Amendment Act 1900, which stated that all new allotments of European land were to have legal frontage (meaning access to a public road).[11] Claimant counsel argued that, in the Taihape inquiry district itself, the Crown had been aware of the problem since at least 1905. This was evident in the fact that, in that year, the valuer-general had warned that if certain leasing agreements were allowed to go ahead, they could cut off access to Māori land.[12]

More generally, claimant counsel argued there was a 'bias in the law' whereby access provisions were essentially geared towards ensuring access for Pākehā purchasers of partitioned Māori land. Section 93 of the Native Land Court Act 1886, for example, specified the Crown's right to take 5 per cent of a block for public roads, and section 245 of the Counties Act 1886, which was passed nine days later, effectively confiscated native tracks as public roads in districts where the Act applied. In fact the almost simultaneous passage of the Counties Act and

9. Submission 3.3.38 (Naden), p 23
10. Submission 3.3.34 (Bennion and Black), pp 17–18
11. Submission 3.3.38 (Naden), p 25
12. Submission 3.3.34 (Bennion and Black), p 19; submission 3.3.33 (Hockly), p 14

the Native Land Court Act 1886, said counsel, indicated that the access provisions of the latter 'were squarely aimed at ensuring access for new non-Maori settlers'. Counsel described a 'long-standing inequitable policy that private Maori land should be freely available for new, invariably non-Maori, settlement, while no protection was required for customary access'. Referring to an example cited by Ms Woodley where, on the same day, the same judge ordered access to Taraketī 2 but not to Ōruamatua–Kaimanawa 3, counsel implied that the greater suitability of Taraketī 2 for (Pākehā) settlement may have coloured the judge's thinking. In counsel's view, such examples suggested the court became 'a force for European settlement through an inequitable approach to making orders for access'.[13]

Counsel added that the introduction of the Torrens system of indefeasible title into the Land Transfer Act in 1870 created a further difficulty for Māori owners of landlocked land in establishing any kind of prior right of access. That is, it created the notion of 'unchallenged rights from time immemorial'.[14]

2.3.1.2 *Te tūranga o te Karauna / The Crown's position*

The Crown said the 1886 access provision was simply a part of standard land administration measures, introduced as increasing amounts of Māori land were being developed, as it had been for European-owned private lands or Crown granted lands earlier.[15] Indeed, if access problems were so widely known at the time, the Crown submitted, it was 'curious' that the access provisions were not used more widely by land owners, the court, or the lawyers representing Māori of the inquiry district between 1886 and 1912.[16]

Crown counsel countered the comparison that claimant counsel and Ms Woodley drew between the provisions enabling access to Māori land and the standard of legal access that appeared to be mandated for all general land under the Public Works Act 1894, as amended by the Public Works Act 1900.[17] Claimant counsel and Ms Woodley's position was that from 1900, all general land was required to have access. In the Crown's view, this was not quite accurate.[18] The Crown argued that the relevant provision (section 20) 'reached into private developments of land', requiring developers to create public roads to every subdivided title;[19] it did not apply to all general land transactions. Crown counsel compared it to current provisions that require developers to provide roads when subdividing under the Resource Management Act 1991.[20]

Crown counsel accepted that the Crown knew about block-specific access issues from the early 1900s relating to possible routes into areas within the Motukawa, Ōwhāoko, and Ōruamatua–Kaimanawa blocks. In those cases, counsel said,

13. Submission 3.3.34 (Bennion and Black), pp 18–21
14. Submission 3.3.34 (Bennion and Black), p 22
15. Submission 3.3.44 (Crown), p 29
16. Submission 3.3.44 (Crown), p 29
17. Submission 3.3.44 (Crown), p 24
18. Submission 3.3.44 (Crown), p 24
19. Submission 3.3.44 (Crown), p 24
20. Submission 3.3.44 (Crown), p 24

officials' response had been 'largely to point parties towards utilising the legal measures and remedies available to them or [to] express caution about further partitioning'.[21] However, she did not point to a specific example of this. Crown counsel argued that there was little record of systemic concern about access in the period prior to the 1970s.[22]

2.3.1.3 *Te tūranga o ngā kaikerēme i ā rātau whakautu / The claimants' position in reply*

In reply, claimant counsel submitted that the Crown's account did not clearly reflect the disparities in its efforts to provide and form roads for settlers and for Māori. The Crown had 'a substantially greater amount of knowledge' than Māori about how essential roads were, and as a result, it took care to ensure that settlers had road access in the inquiry district. This was 'part of the Crown's plan for colonisation in this inquiry district', claimant counsel asserted.[23]

2.3.2 He aha ngā pūtake i karapotia ai ngā whenua Māori, ā, i whai wāhi te Karauna ki aua pūtake? / Under what circumstances did Māori lands become landlocked and was the Crown responsible for the situation?

2.3.2.1 *Te tūranga o ngā kaikerēme / The claimants' position*

In their submissions on how Māori land became landlocked, claimant counsel first explored the nature of customary access before te Tiriti o Waitangi was signed (in 1840) and before native land laws were introduced (in 1862). Access to land was an integral part of customary interests, counsel submitted, enabling groups to exercise the use rights they had established under the tikanga of the time.[24] Further, 'boundaries were not sharply fixed abstract concepts' but 'a matter of reciprocal understandings between people and communities'.[25] In counsel's view, these customs showed that 'where customary land was retained', Māori 'must have' intended to retain access rights to it, regardless of whether the land was held in customary title or had been converted to individual title through the Native Land Court.[26]

If Māori intended to continue using their land, then in treaty terms, access to Māori land should have been protected under the Crown's guarantee of full, exclusive, and undisturbed possession in article 2, some counsel argued.[27] Where legal access was not preserved, the article 2 guarantee had been breached along with several treaty principles.[28] In generic submissions, counsel said these included the principles of active protection, development, reasonableness, good faith, and

21. Submission 3.3.44 (Crown), p 29
22. Submission 3.3.44 (Crown), p 29
23. Submission 3.3.96 (Bennion and Black), p [8]
24. Submission 3.3.34 (Bennion and Black), pp 10–11; submission 3.3.36 (Watson), pp 4, 6
25. Submission 3.3.34 (Bennion and Black), p 10
26. Submission 3.3.34 (Bennion and Black), p 11
27. Submission 3.3.34 (Bennion and Black), pp 8–11; submission 3.3.40 (Sykes), p 19
28. Submission 3.3.34 (Bennion and Black), pp 8–11; submission 3.3.36 (Watson), pp 8–9

equity.[29] Other submissions cited additional treaty principles counsel considered were breached when legal access was not preserved: mutual benefit,[30] options,[31] and partnership.[32]

On the question of how Māori land then became landlocked, counsel highlighted the role of native land legislation introduced by the Crown in the nineteenth century. The Crown never made any positive provisions, claimant counsel said, to protect continuing access to Māori land.[33] It was not until the Native Land Court Act 1886 that access to blocks of Māori land was provided for in law.[34] But the access provisions in this and subsequent Acts were discretionary: they did not compel the court to order access when blocks of Māori land were being investigated or partitioned, but let the court choose whether to order access. This was the key cause of landlocking, the claimants contended, as it meant the court frequently ignored the need for access.[35] As a result, many blocks became landlocked as soon as they were partitioned or shortly after, and have remained landlocked.[36]

Counsel submitted that leaving the provision of access to the court's discretion also meant the law could be applied inconsistently. Counsel highlighted the aforementioned example cited in Ms Woodley's report where, on the same day, the court ordered access to lands in the Taraketī block, but did not order access to lands in the Ōruamatua–Kaimanawa block.[37]

Counsel for Ngāti Tūope also asserted that one of the Crown's concessions on the native land laws was implicitly relevant to landlocked land, though it did not mention landlocking explicitly.[38] The Crown conceded in its opening statement that it failed to include in the native land laws before 1894 an effective form of title enabling Māori to control or administer their lands and resources collectively.[39] Counsel for Ngāti Tūope argued this statement could be read as an acknowledgement that one reason the title was ineffective was the lack of provision for access.[40] Counsel said it was for the Crown to clarify whether access was a part of this 'ineffective' title. The Crown should also explain what changes it had made to the legislation and Native Land Court processes after 1894 to remedy those problems.[41]

29. Submission 3.3.34 (Bennion and Black), pp 11–15; see also submission 3.3.35 (Gilling), pp 13–14.
30. Submission 3.3.35 (Gilling), p 15; submission 3.3.40 (Sykes), p 38
31. Submission 3.3.35 (Gilling), pp 14–15
32. Submission 3.3.35 (Gilling), pp 10–11; submission 3.3.38 (Naden), pp 30–32; submission 3.3.40 (Sykes), p 32
33. Submission 3.3.34 (Bennion and Black), p 16
34. Submission 3.3.34 (Bennion and Black), p 16
35. Submission 3.3.34 (Bennion and Black), p 16; transcript 4.1.21, p 407; submission 3.3.36 (Watson), p 7
36. Submission 3.3.33 (Hockly), pp 6, 17–18; submission 3.3.34 (Bennion and Black), pp 15–16; transcript 4.1.21, p 406
37. Submission 3.3.34 (Bennion and Black), p 19
38. Submission 3.3.33 (Hockly), p 2
39. Submission 3.3.1 (Crown), p 18
40. Submission 3.3.33 (Hockly), p 2
41. Submission 3.3.33 (Hockly), pp 2–3

2.3.2.2 *Te tūranga o te Karauna / The Crown's position*

The Crown prefaced the second (post-1975) part of its closing submissions with the following acknowledgement: 'The Crown accepts its breaches of the Tiriti/Treaty are significant or, in some cases, the dominant, contributing factors to lands retained by Taihape Māori being landlocked.'[42] Despite this, Crown counsel argued that no single factor had solely caused the landlocking of Māori land. Rather, landlocking had come about through a 'mixture of historical circumstance' and, for reasons of historical accuracy, it was important to consider these multiple factors.[43] First, Crown counsel admitted that some causative factors were within the Crown's responsibility. These included the policy behind the laws governing access (including the legislative remedies) and direct Crown actions in land dealings such as Crown-initiated partitioning, Crown purchasing, and exchanges of land.[44] Secondly, Crown counsel contended that Māori were responsible for some causative factors. These included partitioning initiated by Māori owners, low uptake of the legal measures that were available to secure access between 1886 and 1912, some commercial decisions, and individuals' actions.[45] Thirdly, Crown counsel argued that some causative factors were the responsibility of neither the Crown nor Māori. These included the characteristics of the lands in question (which Crown counsel described 'fact specific' to Taihape), such as topography; the decisions of local authorities and other third parties; and the conduct of the Native Land Court.[46]

Addressing the causative factors within the Crown's control, counsel emphasised that the native land laws included provisions enabling access to Māori land from 1886 onward.[47] Under the Native Land Court Act 1886, owners could apply to have access provided to their blocks of Māori land when title was investigated or when blocks were partitioned. Applications could also be made up to five years after the date of division or partition.[48] Crown counsel argued that by giving land owners the ability to apply for access and empowering the court to order it – but not compelling it to do so – the legislation was 'permissive rather than prescriptive'.[49]

Counsel submitted that in later Acts, the Crown gave the court further direction on the exercise of its discretion to order access. For example, section 117 of the Native Land Act 1909 required the court to 'turn its mind' to access issues and to lay out roadlines that were necessary for settlement and use.[50] And section 118 of the Act required the court to avoid creating titles that were unsuitable for separate ownership or occupation.[51]

42. Submission 3.3.44(d) (Crown), p 3
43. Submission 3.3.44 (Crown), p 21; submission 3.3.44(d) (Crown), p 3
44. Submission 3.3.44 (Crown), pp 21–22
45. Submission 3.3.44 (Crown), pp 21–22
46. Submission 3.3.44 (Crown), pp 21–22
47. Submission 3.3.44 (Crown), p 11
48. Submission 3.3.44 (Crown), p 13; submission 3.3.44(a) (Crown), p 38
49. Submission 3.3.44 (Crown), p 13
50. Submission 3.3.44 (Crown), p 13
51. Submission 3.3.44 (Crown), p 13

Crown counsel also explored some of the legislative provisions available to owners of landlocked land retained by Māori. Counsel said that, from 1886 to 1909, owners could apply for private roads to be laid across any land that had previously been divided under any of the Native Land Administration Acts to secure access over adjoining blocks.[52] Until 1912, there was no requirement for the consent of the adjoining land owner whose land the access would traverse.[53] This date was important, the Crown submitted, because most lands in the district still retained by Māori today (except Awarua o Hinemanu) were granted title or partitioned between 1886 and 1912.[54] Indeed, the Crown said the actions that resulted in landlocking of Māori land largely occurred before 1913.[55]

Crown counsel responded to post-hearing questions from the Tribunal about the meaning of access provisions in the Native Land Court Act 1886. Counsel clarified that, under section 91, access orders were tied to 'the land for which the title or partition was being sought'; they could not be made over blocks adjoining this land (a restriction that remained in place in the 1894 Act, under section 69). However, section 92 of the 1886 Act was 'broader', enabling Māori to apply for access to any 'part' or 'parcel' of land the court had partitioned previously (before the 1886 Act was passed).[56] Counsel further clarified that section 92 was in force for two years only, as it was not extended beyond 1888 and was not replicated in the 1894 Act.[57] Therefore, Māori had only a two-year window – between 1886 and 1888 – to apply retrospectively for access to their landlocked land. In counsel's view, section 92 was 'intended as a broader measure . . . to give remedial effect for lands that had passed through the Court at an earlier date but had not had private roading registered on the title. This would include land granted in other parent title blocks'.[58]

Finally, Crown counsel submitted that the Crown's responsibility to provide access depended on what was reasonable in the circumstances. It was not reasonable, in counsel's submission, to expect that 'formed access' to every block 'should have been publicly funded, no matter the topography, utilisation potential, expense, or intensity of occupation'.[59] Counsel argued that, by providing a means of gaining legal access to Māori land from 1886, the Crown had satisfied its good governance requirements under the treaty.[60]

Turning to causative factors that Māori could control, the Crown emphasised that the ideal times to create legal access were when new titles were created, such as

52. Submission 3.3.44 (Crown), p 14
53. Submission 3.3.44 (Crown), p 15
54. Submission 3.3.44 (Crown), p 13
55. Submission 3.3.44 (Crown), p 19
56. Although technically this would include Māori and European land – as some Māori land had been transferred to Europeans since it was partitioned – counsel clarified that section 92 probably applied to Māori land only.
57. Submission 3.3.44(g) (Crown), pp 3–5
58. Submission 3.3.44(g), p 3
59. Submission 3.3.44 (Crown), p 26
60. Submission 3.3.44 (Crown), p 27

when the parent block was investigated or the block was partitioned.[61] Despite this, '[v]ery few' owners had made applications for access to the large blocks at such times.[62] Crown counsel noted that some successful applications were made, which showed the legislation was effective and Māori could have used it to secure access to other lands at the time.[63] Why more Māori had not made applications when the blocks were partitioned 'remain[ed] unknown'.[64] The relatively low uptake of measures to secure legal access to Māori land in the critical period between 1886 and 1912 – when the Native Land Court investigated title in, or partitioned, most of the land that became landlocked – was not the Crown's responsibility.[65]

The extent of partitioning in key blocks was another causative factor for which Māori may have been responsible, Crown counsel said. Counsel noted that extensive partitioning occurred in the Ōwhāoko and Ōruamatua–Kaimanawa blocks, creating uneconomic parcels early on, which made it difficult to secure access later.[66] This partitioning had not been well explained by the technical witnesses, counsel alleged, and might in fact reflect the contested nature of the border lands between the inquiry district and Hawke's Bay.[67] It was not possible to conclude that the Crown was responsible for that amount of partitioning.[68] Crown counsel also noted that each time land was sold or leased without securing access, it became more difficult to 'remed[y] access for the contiguous Māori owned blocks further back'.[69]

Finally, addressing the causative factors it considered beyond the responsibility of either the Crown or Māori, Crown counsel emphasised the particular characteristics of the land that had become landlocked, including its climate, topography, remoteness, and demographics (that is, 'residential patterns and population sizes'). The Crown argued these characteristics were a key cause of the land becoming landlocked.[70] Another factor was the conduct of the Native Land Court. Why the court had not taken a more active role in providing for access to be secured, although the relevant laws enabled it to, was 'unknown'.[71] The 'decisions, actions and legal rights of private third parties and local authorities' were yet another factor that contributed to landlocking, Crown counsel submitted.[72]

According to the Crown, a related factor outside the control of the Crown or Māori was the change in land use patterns over time. This had influenced which lands Māori sold and which they retained, the Crown submitted. Although in the last 50 years, new and innovative uses for land had emerged – such as venison

61. Submission 3.3.44 (Crown), p 23
62. Submission 3.3.44 (Crown), pp 13, 18
63. Submission 3.3.44 (Crown), p 23
64. 70 Submission 3.3.44 (Crown), pp 23–24
65. Submission 3.3.44 (Crown), p 27
66. Submission 3.3.44 (Crown), pp 20, 25
67. Submission 3.3.44 (Crown), p 20
68. Submission 3.3.44 (Crown), p 25
69. Submission 3.3.44 (Crown), p 26
70. Submission 3.3.44 (Crown), p 22
71. Submission 3.3.44 (Crown), pp 23–24
72. Submission 3.3.44 (Crown), p 22

farming, remote tourism, mānuka honey production, and carbon farming – this was not the case in the critical earlier period.[73] These Crown submissions implied that in the earlier period, Māori had sold their most useful land – land well-suited for settlement, agriculture and farming – because it was in higher demand and more valuable, and had retained their least useful (or little-used) land. Roading networks were developed to service the more well-used land, leaving retained Māori land to become landlocked.

The Crown submitted, for example, that between 1880 and 1900, when title to most land in the inquiry district was investigated by the Native Land Court, the primary use of land was large-scale pastoralism.[74] Little land in the central, southern, and lower altitude parts of the inquiry district had become landlocked because that land was more suitable for intensive settlement and production, resulting in 'fairly comprehensive roading and access infrastructure'.[75] The northern, eastern, and higher altitude areas of the district, by contrast, had attracted much less roading and infrastructure. Land in these areas suitable for large-scale agriculture – much of which Māori sold – was farmed as large runs, while other land in these areas became public land or was retained by Māori.[76] The Crown conjectured that Māori made very few applications for access to these lands because they were not suitable for farming at the time.[77] This could also account for the case claimant counsel had raised where, on the same day, the court ordered access to blocks in Taraketī, while making no such order for blocks in Ōruamatua–Kaimanawa. Crown counsel contended that, rather than reflecting bias in the court, this could simply show that somebody had applied for access to Taraketī 2 because it was in an area that was a 'central hub of occupation', whereas the Ōruamatua–Kaimanawa 3 block was not.[78]

2.3.2.3 *Te tūranga o ngā kaikerēme i ā rātau whakautu / The claimants' position in reply*

In reply, claimant counsel rejected what they saw as the general tenor of the Crown's argument, which was to minimise the Crown's role in creating landlocked land. In fact, claimant counsel said, the Crown was entirely responsible.[79] In the claimants' assessment, all the factors that led to lands becoming landlocked were within the Crown's control, including its legislation, policy, processes, the change to the land tenure system it introduced, and its actions and inactions.[80] Where the Crown argued there were multiple causes of landlocked land, counsel for Ngā

73. Submission 3.3.44 (Crown), p 18
74. Submission 3.3.44 (Crown), p 18
75. Submission 3.3.44 (Crown), pp 18–19
76. Submission 3.3.44 (Crown), p 19
77. Submission 3.3.44 (Crown), p 23
78. Submission 3.3.44 (Crown), p 25
79. Submission 3.3.96 (Bennion and Black), p [5]
80. Submission 3.3.96 (Bennion and Black), pp [5]–[6]

Iwi o Mōkai Pātea submitted that the dominant factor was the Crown's failure to provide for the tino rangatiratanga of Māori over their land.[81]

Counsel for the Ngāti Tūope claimants submitted that the Crown's actions were the dominant factor in all of the cases of landlocked land affecting Ngāti Tūope, not just some of them.[82] Counsel for the Ngāti Hinemanu me Ngāti Paki claimants highlighted several factors that led to landlocking of Ngāti Hinemanu me Ngāti Paki land. One was early Crown and private purchasing in the Ōtaranga and Ruataniwha North blocks, which undermined the claimants' ability to access Awarua o Hinemanu and Te Kōau A. Another was the 'confusion over the rugged eastern boundary of the Taihape Inquiry District, where inadequate surveying and Crown failures to consult with the land's owners led to assumptions that Māori title had been extinguished' – including in Awarua o Hinemanu – 'when it had not.'[83] Other factors were the history of survey errors and flawed title decisions surrounding the Mangaohane block, including Winiata Te Whaaro's exclusion from title. These factors – which counsel for Ngā Iwi o Mōkai Pātea referred to as a 'web of injustice' – had influenced the loss of legal access through Mangaohane via Winiata's Track.[84]

Counsel rejected the Crown's argument that it was not responsible for the actions of the Native Land Court on the basis that the Crown passed the empowering and enabling legislation.[85] Counsel for the Ngāti Tūope claimants submitted that the court was 'a piece of state machinery designed by the Crown' and stood at the 'centre of the issue' of Māori land historically. The Crown was therefore the 'key' factor in all cases of landlocking affecting Ngāti Tūope.[86] The claimants also rejected the Crown's suggestion that factors such as climate and topography were important contributors to landlocking. As counsel put it, these issues, as well as remoteness and demographics, 'were present pre-colonisation and did not lead to landlocking then.'[87]

Claimant counsel also took issue with the Crown's argument that the alleged complexity of partitioning in some blocks was a cause of landlocked land.[88] Counsel for Ngā Iwi o Mōkai Pātea submitted that complexity was not a valid basis for failing to provide for a basic tenet of land use, which was the right of Māori owners to access their whenua.[89] Moreover, through its legislation the Crown had set the parameters to allow a complex partitioning situation to evolve unchecked, claimant counsel argued.[90]

81. Submission 3.3.97 (Watson), p 3
82. Submission 3.3.98 (Hockly), p 2
83. Submission 3.3.102 (Sykes), pp [9], [16]–[17]
84. Submission 3.3.97 (Watson), p 5; submission 3.3.102 (Sykes), pp [17]–[18]
85. Submission 3.3.96 (Bennion and Black), p [6]; submission 3.3.97 (Watson), p 4
86. Submission 3.3.98 (Hockly), p 2
87. Submission 3.3.96 (Bennion and Black), p [6]; submission 3.3.97 (Watson), p 4
88. Submission 3.3.96 (Bennion and Black), p [6]; submission 3.3.97 (Watson), p 3
89. Submission 3.3.97 (Watson), p 3
90. Submission 3.3.36 (Bennion and Black), p 6; submission 3.3.97 (Watson), p 4

Counsel for members of Ngāti Tamakōpiri, Ngāti Hikairo, and Ngāti Hotu argued that section 91 of the Native Land Court Act 1886 was largely ineffective because it allowed private roads to be ordered only over the lands that were being partitioned, not over adjoining land. Furthermore, counsel said, section 92 applied only between 1886 and 1888, which did not align with the timing of partitioning and purchasing activity in most blocks within the inquiry district.[91] Taken together, these factors meant that the access provisions of the 1886 Act were 'largely unavailable' to most owners of Māori land in the inquiry district.[92] In the claimants' view, the 1894 and 1909 Acts had similar flaws because, under the key sections, access could be ordered only upon the land that was being partitioned, not adjoining land.[93]

Counsel responded to the Crown's argument that very few Māori land owners applied for access to their lands between 1886 and 1912. According to counsel, the Crown's argument implied that rangatira did not apply because they thought they would never need access to their land. This view mischaracterised the relationship Māori had with their whenua, counsel submitted. The Crown's argument also implied that Māori 'might' (in claimant counsel's words) 'simply ignore the question of access to a major economic and cultural resource', a view counsel rejected.[94] There was 'no evidence', counsel said, 'that rangatira thought they would lose their front lands and as a result lose access to the back lands at the time'.[95]

2.3.3 He aha ngā mahi whakatikatika a te Karauna i ngā whenua Māori o Taihape i karapotia mai i te tau 1912 ki te tau 1975 / What efforts did the Crown make to remedy the landlocking of Taihape Māori land from 1912 to 1975?

As noted earlier (section 2.3), the parties' positions on this issue focused on the legal measures the Crown provided for securing access to landlocked Māori land, specifically, provisions in the Native Land Amendment Act 1912, Native Land Amendment Act 1913, Native Land Claims Adjustment Act 1922, and Maori Affairs Act 1953. As also noted in section 2.3, the parties' arguments centred on what they viewed as unequal consenting requirements in these provisions. A key concern for the claimants was the longstanding restriction – in place from 1912 until 1975 – on the court's power to order accessways over neighbouring general land, if it had ceased to be Māori land before 1913. In the claimants' view, this restriction required Māori to obtain consent from owners of such land before the court could order access over it. (We have already noted our differing view that the law outright prevented the court from ordering access over such land until 1953, and introduced a requirement for consent only then.) Because most blocks of

91. Submission 3.3.99 (Naden), pp 3–4
92. Submission 3.3.99 (Naden), p 5
93. Submission 3.3.99 (Naden), pp 5–7
94. Submission 3.3.96 (Bennion and Black), p [7]
95. Submission 3.3.96 (Bennion and Black), p [7]

landlocked Māori land in Taihape neighboured general land of this nature – and the roads needed to unlock them would, in most cases, have to cross this general land – this restriction greatly disadvantaged Māori of the inquiry district. Without the required consent – or without the option of obtaining consent – they could not use the Crown's access provisions to secure access to their land.

2.3.3.1 *Te tūranga o ngā kaikerēme / The claimants' position*

Counsel for members of Ngāti Tamakōpiri, Ngāti Hikairo, and Ngāti Hotu highlighted the requirement in the Crown's 1912–1975 remedies to obtain written consent from neighbouring European owners to create accessways over their land, if the land had ceased to be Māori land before 1913. Counsel argued that 'most of the European land in the inquiry district' fell into this category so 'could not be made subject' to the relevant provisions. Even where neighbouring lands were Europeanised after 1913, he added, the law still required Māori to pay compensation to the owners, should accessways be created. Regarding the differing treatment of Māori and European land that neighboured landlocked land, counsel remarked that 'Through arbitrary date-setting and through the manipulation of the legislative process, the Crown ensured that all Māori freehold land interests could be crossed for access purposes whilst just few European land interests could be treated in this way.'[96] Counsel for the Ngāti Tūope claimants argued that the consent requirements in the legislation were 'largely insurmountable'.[97]

2.3.3.2 *Te tūranga o te Karauna / The Crown's position*

The Crown made acknowledgements and concessions of treaty breach about the legal regime for remedying landlocked Māori land from 1912 to 1975. Counsel noted that, from 1912, the adjoining land owner or lessee's consent was required if the access being sought would cross over non-Māori land or leased Māori land. The Crown conceded that these legal requirements to obtain consent treated non-Māori lands and Māori lands unequally.[98] From 1922, the consent requirements were largely removed, except where the land that would be traversed by the access route had ceased to be Māori land before 1913. Because most land in the inquiry district fell into that category, that exemption had 'particular impact' as, until 1975, there was no effective legal remedy for owners of landlocked blocks unless they obtained the consent of their neighbours. The Crown conceded that the effect of these requirements was that, for the entire period between 1912 and 1975, owners of Māori land in the inquiry district 'suffered inequality of treatment and indirect discrimination', and this was a breach of the treaty and its principles.[99]

96. Submission 3.3.38 (Naden), pp 10–11, 14
97. Submission 3.3.33 (Hockly), p 13
98. Submission 3.3.44(d) (Crown), p 5
99. Submission 3.3.44(d) (Crown), pp 5–6

2.3.4 He aha te whānuitanga o ngā mahi a ngā kaunihera i whai wāhi atu ki te karapotitanga o ngā whenua Māori? / To what extent did local authority practices influence the landlocking of Māori land?

2.3.4.1 *Te tūranga o ngā kaikerēme / The claimants' position*

Counsel for Ngāti Tūope claimants submitted that local councils contributed to the landlocking of Māori land by taking the same attitude to issues of access as the Crown. The legislation was discretionary and 'the dominant attitude', counsel submitted, was one of 'informality', which essentially amounted to indifference and neglect. Along with the the Native Land Court and the Crown, local councils did not show concern that the awards of title made under the native land laws should be fully functional, and did not enable the owners to use their land in the same manner as their settler neighbours.[100] Counsel cited Ms Woodley's comment that the Crown, local authorities, and the court had shown 'indifference' to the problem of Māori land without legal access.[101]

Another way local authorities contributed to the creation of landlocked land was by prioritising access to settler land, while failing to provide access to Māori land, claimant counsel argued. The Crown ensured that land acquired through the Native Land Court had access before selling it to settlers, and counsel said this would to some extent have been in step with local government activity, as the actual formation of paper roads and maintenance was immediately a local government role.[102] But local government did not develop the roading network in the inquiry district with a view to providing access to landlocked blocks of Māori land.[103]

Counsel further argued that the absence of Māori involvement in and leadership of local authorities was a relevant factor in the creation of landlocked land. Māori did not feature in the official record of local government in the inquiry district, except in references to land purchasing and rating. Citing technical research on local government in the inquiry district, counsel submitted that Māori were 'virtually invisible in the local histories' of the district and regional councils, except in 'the initial land purchase phase'. Māori were not elected to local authorities until after 1989, and researchers found no records of Māori deputations (groups who approached the authorities to discuss matters of concern) apart from those concerning rates. In counsel's view, it seemed that after the land base in Taihape transferred from Māori ownership to Crown and private ownership, political power in the region likewise transferred from rangatira to the Crown and local authorities.[104]

100. Submission 3.3.33 (Hockly), p 13
101. Submission 3.3.33 (Hockly), pp 13–14
102. Submission 3.3.33 (Hockly), p 18
103. Submission 3.3.33 (Hockly), p 19
104. Submission 3.3.40 (Sykes), pp 24–25

2.3.4.2 *Te tūranga o te Karauna / The Crown's position*

Crown counsel accepted that local authorities' 'decisions, actions, and legal rights' were a 'relevant and significant' factor that had contributed to landlocking in the district. However, they were not within the Crown's control and not its responsibility, counsel argued.[105]

2.3.4.3 *Te tūranga o te Kaunihera ā-rohe o Rangitīkei / The Rangitīkei District Council's position*

In his submission filed on behalf of the Rangitīkei District Council, the mayor of Rangitīkei, Andy Watson, acknowledged the impact of actions taken by the council and its predecessor, the Rangitikei County Council. Having attended hearings where the evidence had been discussed, he reviewed the work done by the councils to build roads in the district:

> I learned with dismay and shame that the Rangitikei County Council . . . had not built roads to access Māori land but had concentrated its energies (and funds) for roads to access non-Māori land. In addition, and in accordance with Government regulations, the Rangitikei County Council did not pay compensation to Māori for Māori land taken to build roads, whereas compensation was paid for non-Māori land taken to build roads. I acknowledge that the Rangitikei County/District [Council] was not unique in this approach as it was considered standard practice at the time. This does not make it right.[106]

Mayor Watson then issued an apology on behalf of the council. He said the council accepted that its actions, in not challenging government regulations on Māori land, had contributed to the landlocked situation:

> I believe that the Rangitikei District Council must accept responsibility for the actions of Rangitikei County Council in not challenging the impacts of Government regulations on Māori landowners, specifically how those regulations inhibited access and how Māori landowners were not compensated for land taken for construction of roads. The Rangitikei District Council considers it wrong that policies were knowingly applied in such ways as to advantage non-Māori over Māori. The Rangitikei District Council accepts that those actions have contributed to this landlocked situation in the northern Rangitikei. Accordingly, the Rangitikei District Council unreservedly apologises to all Māori in the Rangitikei District for this injustice.[107]

105. Submission 3.3.44 (Crown), pp 21–22
106. Submission 3.2.803 (A Watson), p 4
107. Submission 3.2.803 (A Watson), p 4

2.3.4.4 *Te tūranga o ngā kaikerēme i ā rātau whakautu / The claimants' position in reply*

In reply, counsel for Ngā Iwi o Mōkai Pātea submitted that, like the Native Land Court, local authorities 'acted as [an arm] of the Crown'. They were established to promote the objectives of the Crown's land tenure system: 'settler acquisition and occupation of Māori land'.[108] Counsel also submitted that, if the Tribunal were to accept the Crown's position that local government was not the Crown, we could nonetheless still recommend the Crown work with councils to enable them to acquire land for roads giving access to landlocked Māori land.[109]

2.3.5 Mai i te 1975, i eke anō ngā whakatau a te Karauna mō ngā whenua o Taihape i karapoti ki tētahi taumata pai? / Have Crown measures since 1975 been adequate responses to landlocked land in Taihape?

2.3.5.1 *Te tūranga o ngā kaikerēme / The claimants' position*

Counsel for members of Ngāti Tamakōpiri, Ngāti Hikairo, and Ngāti Hotu noted that the 1975 amendment to the Property Law Act had removed the requirement for permission from a neighbouring owner where an accessway would cross their land. However, counsel submitted that the remedy this Act provided had turned out to be too costly for Māori of the inquiry district to use as it required them to meet expenses like surveys and a High Court hearing. The costs, he submitted, were 'prohibitive'.[110]

Regarding the remedies provided through Te Ture Whenua Maori Act 1993, counsel said that although the introduction of provisions that could force access to landlocked land had been 'a positive step', the costs involved and the ability of neighbouring owners to frustrate and delay the legal process had made these provisions ineffective.[111] Even many years after the legislation came into effect, no progress had been made in gaining access to landlocked land in the inquiry district. This confirmed the low priority that the Crown gave to solving the problem of landlocked Māori land, claimants argued.[112]

Where the legal remedies provided by the Crown could not produce solutions, access had to be informally negotiated with adjoining land owners. Claimants knew from experience that there were many pitfalls with these sorts of agreements, which represented short-term solutions to an enduring problem.[113]

Turning to the Crown's most recent policies and law changes, including Te Ture Whenua Maori Amendment Act 2020, counsel for Ngā Iwi o Mōkai Pātea argued that legal remedies still could not fundamentally solve the access problem. The main barrier for owners of landlocked land was not the law, but the need to finance

108. Submission 3.3.97 (Watson), p 3
109. Submission 3.3.96 (Bennion and Black), p [13]
110. Submission 3.3.38 (Naden), pp 2–3, 18–19
111. Submission 3.3.34 (Bennion and Black), p 24
112. Submission 3.3.40 (Sykes), p 9
113. Submission 3.3.40 (Sykes), pp 50–51

any access that could be achieved through the legal process.[114] Also, the Crown's principal fund for supporting the development of Māori land, the Whenua Māori Fund, was not targeted specifically at resolving problems of access to landlocked land.[115]

2.3.5.2 *Te tūranga o te Karauna / The Crown's position*

Crown counsel submitted that from 1975 until 2002, when Te Ture Whenua Maori Act 1993 was amended, Māori had two options to resolve access issues. They could apply to the High Court under the Property Law Act 1952, which had been amended in 1975. Or they could use pre-existing Māori Land Court powers, which from 1993 were provided under Te Ture Whenua Maori Act. However, the Crown accepted that both avenues had been problematic. The Māori Land Court was more accessible in terms of venue and cost, but the consent of affected neighbouring land owners was required. If they did not consent, Māori applicants had to apply to the High Court, which involved more costs.[116] Crown counsel accepted that despite its 2002 amendments to Te Ture Whenua Maori Act – which, among other changes, removed the need for consent from neighbouring owners – neither these changes nor the 1975 Property Law Act amendments had enabled access to the high-altitude landlocked land in the inquiry district.[117] Three applications were made in the period after 1975 (in 2003, 2004, and 2014), but none were successful.[118]

The Crown said it took steps to address some of these challenges under the reforms introduced by the 2020 amendments to Te Ture Whenua Maori Act 1993. Crown counsel submitted that these reforms went a 'long way' towards realising the technical and practical reforms we suggested in our preliminary views.[119] The changes included broadening the definition of 'reasonable access' and shifting appeals from the High Court to the Māori Appellate Court, reducing the costs involved.[120] The Crown also made policy changes, including broadening the scope of the Whenua Māori Fund to support owners of landlocked land. Owners and trustees of landlocked land could now apply for funding to increase productivity of their land.[121] Another initiative was developing the dispute resolution service that was set up alongside the 2020 amendments to the Act.[122] Even so, the Crown acknowledged that 'the current problems with landlocking in the inquiry district are, to a very large extent, not reasonably capable of being remedied by the owners of landlocked lands today without significant assistance.'[123]

114. Submission 3.3.36 (Watson), pp 11, 12, 16
115. Submission 3.3.36 (Watson), p 14
116. Submission 3.3.44(d) (Crown), p 8
117. Submission 3.3.44(d) (Crown), p 9
118. Submission 3.3.44(d) (Crown), pp 9–10
119. Submission 3.3.44(d) (Crown), p 12; memorandum-directions 2.6.65, pp 2, 7
120. Submission 3.3.44(d) (Crown), pp 11–12
121. Submission 3.3.44(d) (Crown), p 14
122. Submission 3.3.44(d) (Crown), p 13
123. Submission 3.3.44(d) (Crown), p 39

2.3.5.3 *Te tūranga o Big Hill Station / Big Hill Station's position*

Counsel for Big Hill Station submitted that although Te Ture Whenua Maori Act 1993 provided legal remedies, there were problems. One was that the process was open to abuse by applicants who, frustrated by their inability to access their lands via other means, could make an application in an attempt to force a favourable response from the court, even though the access they sought might not be the most logical or appropriate.[124] Counsel submitted that the station opposed the use of remedies that focused on access through private land and thereby created conflict with owners of general land who had no responsibility for the Crown's acts and omissions.[125]

2.3.5.4 *Te tūranga o ngā kaikerēme i a rātau whakautu / The claimants' position in reply*

Counsel for Ngā Iwi o Mōkai Pātea responded that the remedies the Crown had highlighted in its submissions were inappropriately focused on changes to the law and Crown policy, since the central obstacle to solving the problem of landlocked Māori land was cost.[126] Several counsel argued that financial assistance was required to enable owners of Māori land seeking access to meet the two major costs: forming the road itself, and compensating any neighbouring private land owner whose land might be crossed.[127] Counsel for Ngāti Tūope submitted that court costs and the cost of assessing access options should also be financed.[128] In some situations, physical roadways might not be the solution; rather, rights of way, easements, and other forms of access might be required.[129] In generic submissions, claimant counsel argued that in some situations, the vast distances and rugged terrain involved could mean funding for helicopter transport was the most practical option.[130]

Counsel submitted that the suggestion we made in our preliminary views in 2018 – that a contestable fund be developed to work on resolving landlocked Māori land – was not sufficient to meet the Crown's treaty obligations.[131] In their submission, it was also unacceptable for the Crown to emphasise the restricted ability of agencies like the Department of Conservation to generate solutions, because the treaty relationship was not just with the department, but with the Crown.[132]

Counsel argued that a comprehensive solution was required instead, which would involve the Crown creating a special landlocked land commission. With involvement from all of government, including Crown Law, this commission should be given a 'make it happen' mandate and the powers and authority to

124. Submission 3.3.41 (Big Hill Station), pp 1–4
125. Submission 3.3.41 (Big Hill Station), p 1
126. Submission 3.3.97 (Watson), p 12
127. Submission 3.3.96 (Bennion and Black), pp [9]–[10]; submission 3.3.97 (Watson), p 12
128. Submission 3.3.98 (Hockly), p 4
129. Submission 3.3.98 (Hockly), p 4
130. Submission 3.3.96 (Bennion and Black), p [9]
131. Submission 3.3.96 (Bennion and Black), p [13]
132. Submission 3.3.96 (Bennion and Black), p [12]

implement solutions. Staff of the commission would need to have leadership skills and experience to get 'buy in' from others within their state agencies and departments. Whatever form the solution might take, the Crown must have the 'cultural humility' to let Taihape Māori lead solutions while also 'throw[ing] its considerable weight' and resources behind them.[133] Claimant counsel emphasised that the solution should be focused specifically on the Taihape inquiry district.[134]

Claimant counsel reiterated their view that owners of landlocked Māori land should receive compensation for the loss of their ability to access and use their lands for over a century, and compensation in cases where they have lost land due to lack of legal access.[135]

2.3.6 He aha ngā whakatoihara i pā ki te Māori i te karapotitanga o ō rātau whenua? / What prejudice have Māori suffered due to landlocking of their land?

2.3.6.1 *Te tūranga o ngā kaikerēme / The claimants' position*

Claimant counsel submitted that lack of access to their clients' landlocked land had resulted in profound cultural, economic, and other prejudice. The economic prejudice included serious restrictions on their ability to develop their lands, generate income from them, and sustain their communities.[136] Some claimants argued they had been 'paralysed' in their efforts to advance economically and that lack of access to lands had a 'crushing' effect on whānau aspirations.[137] Lack of access also had impacts on the value of the lands in leasing terms, and on their capacity to support local body rates.[138]

Ngāti Hinemanu me Ngāti Paki claimants emphasised the cultural prejudice of landlocking and how, up to and including the legislative changes in 2020, the Crown had not sufficiently recognised the degree to which landlocking undermined cultural connections to ancestral land.[139] Counsel for these claimants submitted that lack of access had negatively affected the claimants' relationships with their lands and left them unable to fulfil their obligations as kaitiaki.[140] In these ways, lack of access interfered in a fundamental way with their obligations as tangata whenua to both their tūpuna (ancestors) and their mokopuna (grandchildren).[141] Counsel for Ngā Iwi o Mōkai Pātea claimants also emphasised that access to the Māori world, including whenua, was essential for 'cultural wellbeing'.[142] They referred to relevant whakataukī (proverbs) that captured the importance of maintaining connections to the whenua for sustenance and the prejudice arising when those

133. Submission 3.3.96 (Bennion and Black), pp [12]–[13]
134. Submission 3.3.96 (Bennion and Black, p [12]
135. Submission 3.3.96 (Bennion and Black), pp [10], [14]; submission 3.3.97 (Watson), p 12; submission 3.3.102 (Sykes), p [22]
136. Submission 3.3.34 (Bennion and Black), pp 5–6; submission 3.3.35 (Gilling), p 22; submission 3.3.40 (Sykes), pp 10, 39, 62
137. Submission 3.3.40 (Sykes), p 39; submission 3.3.36 (Watson), p 10
138. Submission 3.3.36 (Watson), p 7; submission 3.3.40 (Sykes), pp 46, 50
139. Submission 3.3.40 (Sykes), p 12
140. Submission 3.3.40 (Sykes), p 12
141. Submission 3.3.40 (Sykes), p 12
142. Submission 3.3.36 (Watson), pp 4–5

connections were severed.[143] Counsel invoked a concept of whenua tū-mokemoke, 'whenua which has become isolated from those who are entitled to exercise their mana whenua' and which becomes limited, in turn, in its capacity to nourish and empower them.[144] A further aspect of prejudice was inequality; claimants did not enjoy 'the same privileges as their European neighbours where they can freely and at any time of the day visit and enjoy their lands'.[145]

Counsel submitted that whānau experienced 'frustration and difficulties' in attempting to access their landlocked land and, in many cases, these challenges had led owners to consider selling them.[146]

2.3.6.2 *Te tūranga o te Karauna / The Crown's position*

The Crown submitted that as a result of our hearings, it was very aware of the experience of Māori owners of landlocked land in the inquiry district. The implications of restricted access – in cultural, practical, and economic terms – had been expressed strongly by claimants.[147] Crown counsel acknowledged that lack of access had limited the opportunities of tangata whenua to develop their landlocked lands or generate income from them. It may also have limited their ability to maintain or exercise cultural relationships with these lands and therefore to transfer mātauranga Māori. The lack of income from lands had also restricted the ability of Māori to fund applications for access to their landlocked land.[148]

The Crown also recognised that access restrictions had contributed to Māori selling their land. It accepted the evidence that sometimes neighbouring land owners who could access the landlocked land had used it without permission, and that landlocked land had been sold to such owners.[149] Crown counsel recognised that access difficulties were a factor in the sale of 9,348 hectares of land from 1912 to 1975, and that the failure of the available remedies to provide access in this period was a factor in those sales.[150] As noted earlier in this chapter, the Crown conceded that between 1912 and 1975 its remedies were flawed and in breach of the treaty. Where access difficulties had been a factor in the sale of landlocked blocks, 'the sales constitute[d] prejudice arising from the historical breaches which contributed to the lands having become landlocked'.[151]

Crown counsel further acknowledged that Māori of the inquiry district had insufficient land with reasonable access for their present and future needs. The

143. Submission 3.3.36 (Watson), p 3
144. Submission 3.3.36 (Watson), p 5
145. Submission 3.3.40 (Sykes), p 50
146. Submission 3.3.40 (Sykes), p 58
147. Submission 3.3.44 (Crown), p 2
148. Submission 3.3.44(d) (Crown), pp 10–11
149. Submission 3.3.44(d) (Crown), p 28
150. Submission 3.3.44(d) (Crown), p 29. Later the Crown added to this total amount of land that was sold 'where access difficulties were a factor contributing to those sales', adding the sale in 1968 of Ōwhāoko C3B, a block of approximately 3,601 hectares. In our analysis, this increases the total area of land to approximately 12,949 hectares: see submission 3.2.899 (Crown), pp 11–12; doc A57 (Herlihy), p [7]; doc A37 (Woodley), pp 153, 541; doc A6 (Fisher and Stirling), pp 69, 112, 114.
151. Submission 3.3.44(d) (Crown), pp 28–29

failure of the access remedies the Crown had provided between 1912 and 1975 was a key factor in creating this situation.[152] Crown counsel also acknowledged that very small amounts of land had been retained by Māori in lower-lying areas (between 3 and 4 per cent of all lands in the district, excluding all the landlocked land Māori had retained). This low retention rate could also be considered a state of landlessness, even though most of those lower-lying lands did have legal access.[153]

The Crown conceded that, for Māori of the inquiry district, their practical, economic, and cultural connections to the important lands they had striven for decades to retain and utilise had been significantly disrupted. This experience was akin to being landless.[154] The Crown conceded that its failure to ensure Māori of the inquiry district retained sufficient lands with reasonable access for their present and future needs breached the treaty and its principles, in particular the principle of active protection.[155] This lack of access had 'made it difficult for owners to exercise rights of ownership or maintain obligations as kaitiaki' over their landlocked land.[156]

2.3.6.3 *Te hunga e mata aro ana / The interested parties' positions*

Counsel for Big Hill Station submitted that private owners of general land, such as the station, were also negatively impacted by the Crown's acts and omissions in respect of landlocked land.[157] They alleged that responsibility for providing access solutions was laid at the foot of the private land owners, even though they had not caused the lack of access in the first place.[158] Further, because they were neighbours to owners of landlocked Māori land, owners of private land could find themselves involved in costly court proceedings as Māori attempted to use legal remedies to secure access.[159]

On behalf of the Rangitīkei District Council, Mayor Watson said the council had long accepted that lands that were landlocked could not be developed to their full potential. Mayor Watson was 'sobered' by the evidence presented about the impact of lack of access on the landlocked block Ōwhāoko B1B (see section 5.4.1).[160]

2.3.6.4 *Te tūranga o ngā kaikerēme i a rātau whakautu / The claimants' position in reply*

In reply, counsel submitted that claimants acknowledged the concessions the Crown had made on the impact of landlocked land. The Crown's acknowledgement that the claimants' experience of landlocking was akin to land loss and had

152. Submission 3.3.44 (Crown), p 36
153. Transcript 4.1.24, pp 25–26
154. Submission 3.3.44 (Crown), p 36
155. Submission 3.3.44 (Crown), p 37; submission 3.3.44(d) (Crown), p 2
156. Submission 3.3.44 (Crown), p 36
157. Submission 3.3.41 (Big Hill Station), pp 1, 7
158. Submission 3.3.41 (Big Hill Station), p 7
159. Submission 3.3.41 (Big Hill Station), pp 1–4, 7
160. Submission 3.2.803 (Rangitīkei District Council), p 4

caused generational disconnection from their ancestral lands particularly resonated with claimants.[161]

However, counsel said the Crown focused on the present in its submissions and thus failed to recognise and acknowledge 'the historical missed opportunities for the claimants'. Counsel emphasised that the inability of the claimants and their hapū to develop their lands economically and 'in a manner consistent with their cultural preferences' had impacted them in far-reaching ways.[162]

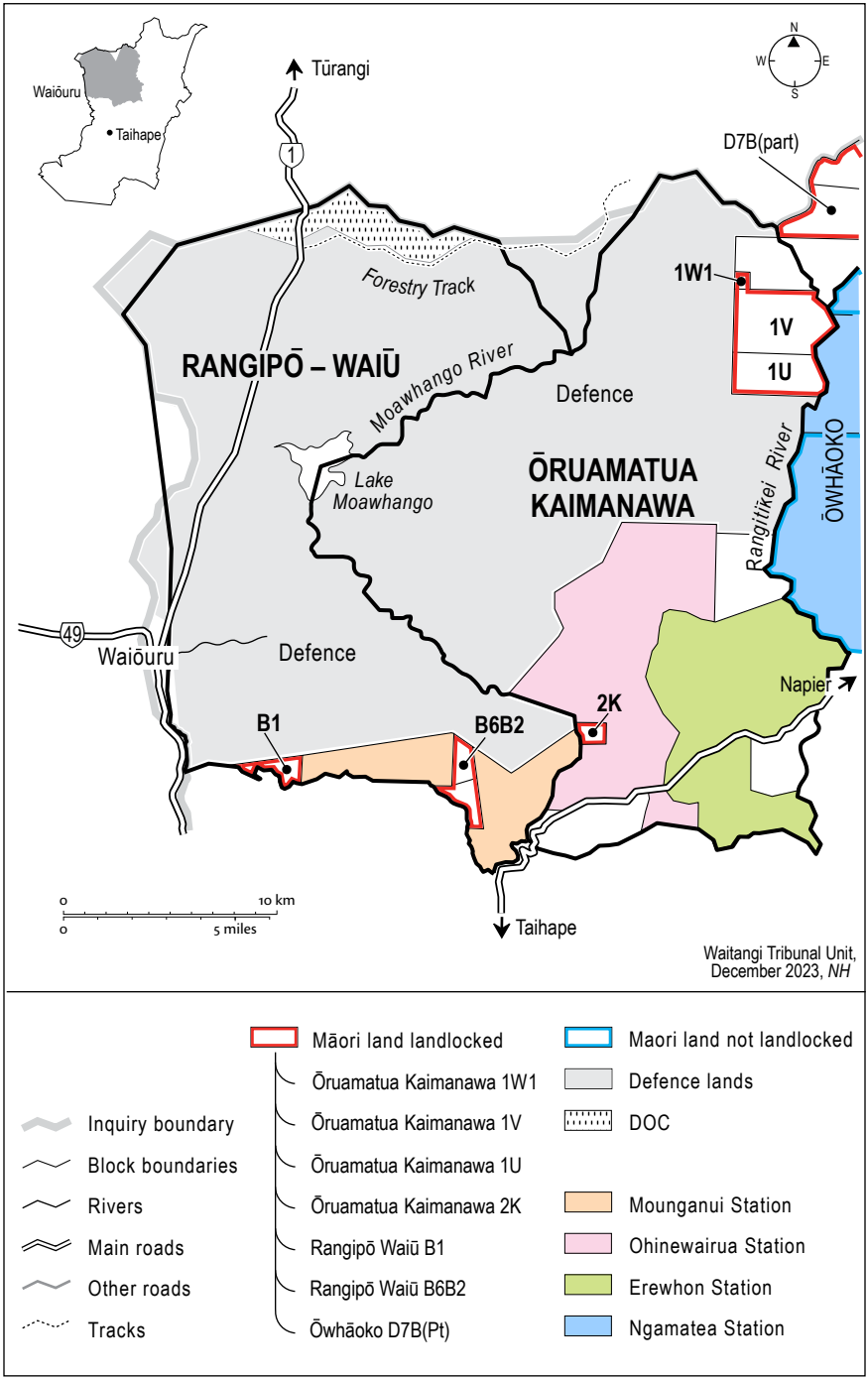
2.3.7 Nā ngā mahi a te Manatū Kaupapa Waonga me Te Papa Atawhai i hē kē atu ai ngā aheinga huarahi? / Did the actions of the Ministry of Defence and the Department of Conservation worsen access problems?

2.3.7.1 *Te tāhū* / *Introduction*

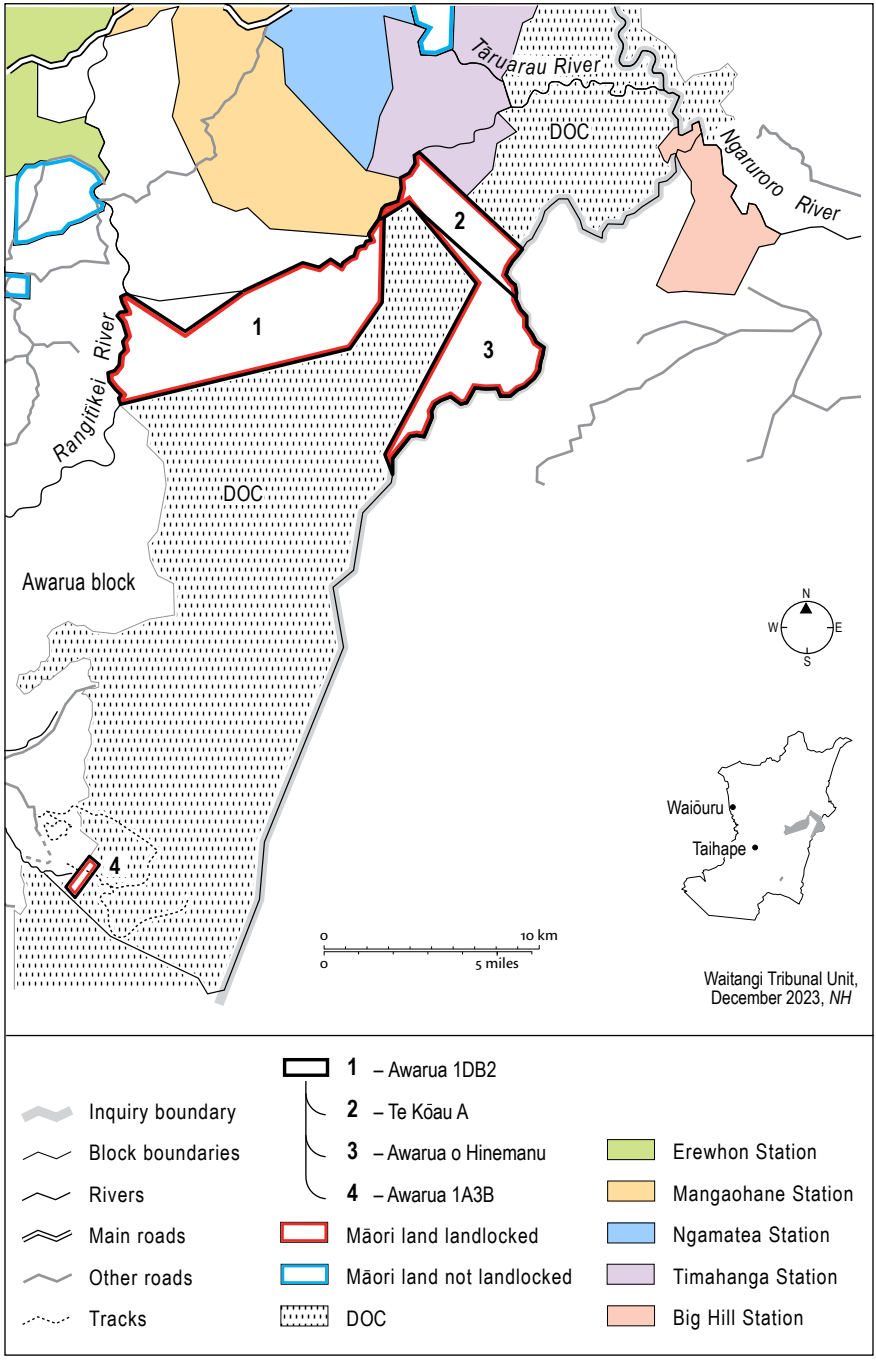
As noted in section 2.3, much landlocked Māori land in the inquiry district is bordered by large areas of Crown land predominantly used for defence and conservation purposes. Comprising approximately 62,175 hectares, the Waiōuru Military Training Area covers a vast swathe of the northern part of the inquiry district.[163] The evidence shows that the defence lands adjoin seven blocks of landlocked Māori land: Rangipō–Waiū B1, Rangipō–Waiū B6B2, Ōruamatua–Kaimanawa 1W1, Ōruamatua–Kaimanawa 1V, Ōruamatua–Kaimanawa 1U, Ōruamatua–Kaimanawa 2K, and Ōwhāoko D7B (Part) (see map 5).[164]

Public conservation lands – including the Kaimanawa Forest Park, the Kāweka Forest Park, and the Waingakia Stream Conservation Area – border a significant amount of the landlocked Māori land in the Ōwhāoko block (see map 9).[165] In addition, three blocks of landlocked Māori land in the Rangipō–Waiū and Motukawa blocks adjoin public conservation land.[166] They are Motukawa 1B and 2F2, which adjoin the Hihitahi Forest sanctuary;[167] and Rangipō–Waiū B1, which adjoins both the sanctuary and the Hihitahi Conservation Area (see map 8).[168] The large area of public conservation land comprising Ruahine Forest Park borders several blocks of landlocked Māori land, and completely surrounds the relatively small block of Awarua 1A3B.[169] Other adjacent blocks are Awarua 1DB2, which is partly bordered

161. Submission 3.3.97 (Watson), p 2; submission 3.3.98 (Hockly), pp 1–2; submission 3.3.102 (Sykes), p [3]
162. Submission 3.3.102 (Sykes), p [19]
163. Document M3 (Pennefather), p 1
164. Document A37 (Woodley), pp 383, 425, 505; doc N1(a) (Neal, Gwyn, and Alexander), pls 6–9; doc N1(f) (Watson), p 1
165. Document A37 (Woodley), p 425; doc M7(f) (Fleury), pp 3–7; doc N1(f) (Watson), p 1
166. Document M7(f) (Fleury), pp 8–12
167. Document A37 (Woodley), pp 383, 515, 533; doc M7(f) (Fleury), pp 8–9; doc N1(a) (Neal, Gwyn, and Alexander), pl 16. Ms Woodley noted that Motukawa 1B has access via a roadway that is for foot traffic only and is therefore classified as landlocked land (see doc A37 (Woodley), p 381).
168. Document A37 (Woodley), pp 383, 515, 533; doc M7(f) (Fleury), p 9; doc N1(a) (Neal, Gwyn, and Alexander), pl 36
169. Document A37 (Woodley), pp 325, 327; doc M7(f) (Fleury), p 9; doc N1(a) (Neal, Gwyn, and Alexander), pl 18



Map 5: Defence land bordering landlocked Māori land in the Taihape inquiry district



Map 6: Department of Conservation land bordering landlocked Māori land in the south-east of the Taihape inquiry district

by Ruahine Forest Park;[170] and Awarua o Hinemanu and Te Kōau A, which are both bordered by Ruahine Forest Park and the Awarua Conservation Area (see map 6).[171]

2.3.7.2 *Te tūranga o ngā kaikerēme / The claimants' position*

Counsel for Ngā Iwi o Mōkai Pātea submitted that the actions of the Crown agencies showed the Crown had prioritised the negotiation of access to its own land over access to landlocked Māori land.[172] One example was the Crown's exchange of defence lands for private land in Ohinewairua Station in 1990, which had restricted access for the Māori owners of Ōruamatua–Kaimanawa 1U and 1V.[173] Another was the Crown's failure to facilitate access for the Māori owners of the landlocked Ōwhāoko D blocks when it acquired Ōruamatua–Kaimanawa 4 for defence purposes.[174]

Other examples of the Crown's prioritisation of access to its own lands included the 1993 arrangement that the Department of Conservation had negotiated with Timahanga Station to secure access through the station to public conservation lands.[175] Counsel for Ngāti Hinemanu, Ngāi Te Upokoiri, trustees of the Owhaoko C7 Trust, the hapū of Ngāti Kahungunu, and Ngā Hapū o Heretaunga ki Ahuriri argued that, in large part, the Crown's negotiated route followed what had been known as the Tīmāhanga Track (which had been owned by the Crown). Counsel submitted that this route also provided the most direct access towards the Te Kōau A block (although not all the way), yet the Crown had not tried to improve the situation for the Māori owners at the time.[176] Counsel for Ngā Iwi o Mōkai Pātea described this negotiation as a missed opportunity, whereby an exchange of land was agreed with a private land owner without improving access for claimants at the same time.[177] Counsel alleged the Crown had been in a position of having 'bargaining leverage' when negotiating this and other exchanges, which it had used to negotiate a good access deal for itself. However, the Crown had not taken action to meet the access needs of Māori.[178]

Another example the claimants cited was the arrangement the Crown had negotiated with private land owners to achieve access through Big Hill Station to Ruahine Forest Park. Under this 1980 agreement, conservation officials and members of the general public could access the Crown's lands. But claimants submitted that the Crown never tried to improve access for Māori owners through

170. Document A37 (Woodley), p 301; doc M7(f) (Fleury), p 9; doc N1(a) (Neal, Gwyn, and Alexander), pl 17
171. Document A37 (Woodley), pp 436, 473; doc M7(f) (Fleury), pp 10–11; doc N1(a) (Neal, Gwyn, and Alexander), pls 17, 38
172. Submission 3.3.36 (Watson), pp 9–10
173. Claim 1.2.17 (Sykes), p 80
174. Submission 3.3.36 (Watson), p 10
175. Submission 3.3.35 (Gilling), pp 28–29
176. Submission 3.3.35 (Gilling), pp 28–29
177. Submission 3.3.36 (Watson), p 9; transcript 4.1.20, p 70
178. Transcript 4.1.20, p 70

the station, even once it became aware that the owners of landlocked Awarua o Hinemanu also wanted to gain access through the station and the conservation lands.[179] Counsel for Ngāti Hinemanu, Ngāi Te Upokoiri, trustees of the Owhaoko C7 Trust, the hapū of Ngāti Kahungunu, and Ngā Hapū o Heretaunga ki Ahuriri submitted that the department and Big Hill Station might as well own Awarua o Hinemanu, because the block's owners could not get access to it. The department was 'at least complicit', counsel said, in perpetuating this hardship.[180]

2.3.7.3 *Te tūranga o te Karauna / The Crown's position*

Crown counsel submitted that the majority of the landlocked lands under inquiry were bordered by Crown lands administered by the Ministry of Defence, Department of Conservation, or Land Information New Zealand.[181] Despite this, there were few situations where the access problems to those landlocked lands could be entirely solved by providing access across Crown lands. This was because, except in the case of lands lying behind Ōruamatua–Kaimanawa 4, gaining access involved crossing private land as well as Crown land.[182] Counsel reminded the Tribunal that we do not have jurisdiction to recommend the return of private land to Māori.[183]

On the defence lands specifically, the Crown made concessions of treaty breach. On the matter of its 1973 takings of Ōruamatua–Kaimanawa 2C2, 2C3, 2C4, and 4 under the Public Works Act 1928, the Crown acknowledged that, in breach of the treaty, it failed to consult with or adequately notify all of the Māori owners of the blocks before they were taken. Counsel said that when the Crown reached its decisions to acquire those lands in 1973 and to retain them in 1976, it had failed to adequately consider factors such as its obligation to actively protect retained Māori land – especially in this situation, where the proportion of landlocked land in the district was already so high as to be akin to landlessness.[184] The taking of Ōruamatua–Kaimanawa 4 was not based on a sufficiently detailed plan of how the land would be used, nor sufficient consideration of how much land was actually needed. The Crown conceded that its decision to take all of the block without first adequately assessing how much would be needed for military purposes meant it took more than was reasonably necessary.[185]

With respect to landlocked land, the Crown accepted that the owners had no opportunity to tell the Crown how the takings would affect their access to their remaining lands. The takings reduced the options for access that could have been

179. Submission 3.3.35 (Gilling), pp 29–32; submission 3.3.36 (Watson), p 10
180. Submission 3.3.35 (Gilling), p 31
181. Submission 3.3.44(d) (Crown), p 14
182. Submission 3.3.44(d) (Crown), p 15. We assume that the lands 'lying behind' Ōruamatua–Kaimanawa 4 to which the Crown refers are Ōruamatua–Kaimanawa 1U, 1V, and 1W1, which, in theory at least, could be accessed across defence land alone.
183. Submission 3.3.44(d) (Crown), p 15
184. Submission 3.3.44(d) (Crown), p 17
185. Submission 3.3.44(d) (Crown), p 18

developed if the lands had not become defence lands. The takings increased the owners' difficulty in getting direct access because, once the lands were part of the Waiōuru training area, there were more administrative and security requirements to observe.[186]

The Crown submitted that the takings also led to the Crown's 1990 land exchange with private lands in Ohinewairua Station, which had 'a direct adverse effect' on access to Ōruamatua–Kaimanawa 1U and 1V.[187] The Crown conceded that this exchange had exacerbated access issues for the Māori owners of Ōruamatua–Kaimanawa 1U and 1V, was in breach of the treaty, and had caused prejudice to the owners.[188]

The Crown also addressed the Department of Conservation's negotiations with private land owners for better access to its own lands. In essence, the Crown argued that although these negotiations had not significantly improved access for the Māori owners of Te Kōau A and Awarua o Hinemanu, they had not worsened it either.[189] The Crown's central argument was that, prior to the Department of Conservation's exchanges and negotiations for access with Timahanga Station and Big Hill Station, the legal routes did not align with the most practical formed route on the ground.[190] The exchanges that were negotiated achieved more legally secure access via both stations, and Māori could apply to use that access, along with people wanting to use the routes to access the Crown's public conservation lands.[191]

Noting that the route through Timahanga Station lands provided the most direct and practical access to Te Kōau A, the Crown described the history of this access and its 1993 exchange of land with Timahanga Station.[192] Crown counsel argued that the quality of the pre-existing access (along the defined boundaries of the Tīmāhanga Track) had not been as secure in legal terms as claimant counsel alleged, because the vehicular track did not align with the legal access; this meant that people using the vehicular track could trespass on the station lands without meaning to.[193] The Crown officials who decided to carry out the exchange and access agreement were well informed about the views of the Māori owners of Te Kōau A and had considered them in reaching their decisions, counsel submitted.[194]

On its negotiations to improve access to public conservation lands through Big Hill Station, Crown counsel submitted that these negotiations concluded before the Māori Land Court 'clarified ownership' of Awarua o Hinemanu in 1991 (see section 5.3.2). The easement agreement provided access to the 'agents and invitees'

186. Submission 3.3.44(d) (Crown), pp 30–31
187. Submission 3.3.44(d) (Crown), pp 18–19, 30–31
188. Submission 3.3.44(d) (Crown), pp 18–19
189. Submission 3.3.44(d) (Crown), p 25
190. Submission 3.3.44(d) (Crown), p 20
191. Submission 3.3.44(d) (Crown), pp 23–25
192. Submission 3.3.44(d) (Crown), pp 20–22
193. Submission 3.3.44(d) (Crown), p 23
194. Submission 3.3.44(d) (Crown), p 23

of the Crown, and the department could not provide the kind of unrestricted access that Crown counsel said claimants were seeking.[195]

Counsel submitted that, because in both cases the access the claimants sought crossed private land, the Crown was now limited in the steps it could take to assist Māori owners in their efforts to seek access.[196] It could:

- take a more active role in mediating between the parties;
- consider how it could help to meet the access requirements of owners by use of the easements that the Department of Conservation had negotiated; and
- as appropriate, support applications for access under Te Ture Whenua Maori legislation, bearing in mind the Crown's wider obligations.[197]

2.3.7.4 *Te tūranga o Big Hill Station / Big Hill Station's position*

Counsel for Big Hill Station submitted that the Crown's approach had been passive, and had left responsibility for providing access to Māori lands to private land owners. All the while the Crown had prioritised the assets of its own departments and protected its position, rather than considering what a rightful solution might be.[198] Counsel opposed any proposals that focused on access through private land and created conflict with owners of general land, who had no responsibility for the Crown's acts and omissions.[199] They also submitted that the formed road through Big Hill Station did not provide the best access for the owners of Te Kōau A and Awarua o Hinemanu, as it led to the highest and most remote parts of the blocks with the poorest weather conditions. They argued that the best access was not through Big Hill Station but from the Rangitīkei side of the ranges.[200] Counsel also drew attention to a potential route starting from Mangleton Road (on the Heretaunga side of the ranges) and travelling through the Crown's public conservation lands to Awarua o Hinemanu.[201]

2.3.7.5 *Te tūranga o ngā kaikerēme i ā rātau whakautu / The claimants' position in reply*

Claimant counsel alleged that the Crown's concession on the taking of Ōruamatua–Kaimanawa 4 mischaracterised the actual situation.[202] The problem with the taking was not that more of the block was taken than was reasonably necessary, but that it was 'difficult to argue the acquisition was necessary at all'.[203] The land had never been reasonably necessary for defence purposes and, even now, was not a valuable part of the Waiōuru Military Training Area as Crown

195. Submission 3.3.44(d) (Crown), pp 24–25
196. Submission 3.3.44(d) (Crown), p 25
197. Submission 3.3.44(d) (Crown), pp 25–26
198. Submission 3.3.41 (Big Hill Station), pp 7–8
199. Submission 3.3.41 (Big Hill Station), p 1
200. Submission 3.3.41 (Big Hill Station), pp 4–5
201. Submission 3.3.41 (Big Hill Station), p 5
202. Aspects of these allegations are outside the scope of this priority report, but aspects that relate to access to landlocked lands are relevant and are discussed in our analysis.
203. Submission 3.3.96 (Bennion and Black), p [11]

counsel maintained.[204] The Army had made this obvious when it allowed licensed commercial helicopter companies to drop off recreational fishermen on the block and stopped the practice only when the Mōkai Pātea Waitangi Claims Trust complained about it, counsel for Ngā Iwi o Mōkai Pātea argued.[205] Even if some land acquisition had been necessary, Defence officials said at the time that only much smaller areas of the block were required.[206]

Counsel contended that the Crown's submissions focused on the present and did not adequately take account of the earlier missed opportunities for securing or improving access to Māori land.[207] The Crown's arguments also failed to acknowledge the loss of cultural and economic potential that would have been created if those Māori lands had been at the forefront of the Crown's negotiations regarding Tīmāhanga, Ōruamatua–Kaimanawa, and Te Kōau.[208]

Counsel for Ngā Iwi o Mōkai Pātea argued that the Crown had not explained why it did not secure access to Māori lands when it sold Timahanga Station to private owners. Nor had the Crown explained why, during its 1970s land exchanges with Timahanga Station, it had not prioritised access for Māori.[209] Counsel disputed the Crown's arguments that its 1993 exchange of land with the station had addressed access problems for Te Kōau A owners. Counsel contended that when the Crown decided conservation benefits 'outweighed' the concerns of Māori, this was a fundamental breach of section 4 of the Conservation Act. Where Crown counsel said the agreement improved the previous situation of conflict between the various parties, counsel for Ngā Iwi o Mōkai Pātea said it had improved the situation for the Department of Conservation but not for the owners of Te Kōau A. Counsel also argued that although the Crown submitted that the views of Māori owners were 'well known' when the Crown made its decision, it was 'not enough in Treaty terms' for the Crown 'to be "well-informed"'. Rather, the treaty required active protection and the department failed repeatedly to give effect to it.[210]

Turning to the question of access to Awarua o Hinemanu, counsel for Ngā Iwi o Mōkai Pātea took issue with the Crown's emphasis on its limited ability to improve access for Māori under the existing agreement with Big Hill Station.[211] If the Crown were to use the easement to assist access to the landlocked blocks, that would 'represent a start', counsel said, and would ensure that owners of landlocked Māori land were involved. It would also allow those owners to develop a productive relationship with the station. To meet its section 4 obligations, the Department of Conservation had to enable, at the least, the active inclusion of the Awarua o Hinemanu owners in the easement.[212]

204. Submission 3.3.97 (Watson), pp 6–7
205. Submission 3.3.97 (Watson), pp 6–7
206. Submission 3.3.96 (Bennion and Black), p [11]
207. Submission 3.3.96 (Bennion and Black), pp [10]–[11]; submission 3.3.97 (Watson), p 7
208. Submission 3.3.96 (Bennion and Black), p [11]
209. Submission 3.3.97 (Watson), pp 7–8
210. Submission 3.3.97 (Watson), pp 8–9
211. Submission 3.3.97 (Watson), p 7
212. Submission 3.3.97 (Watson), pp 10–11

In response to Big Hill Station's submission that access to Awarua o Hinemanu should instead be provided via Mangleton Road, counsel for Ngā Iwi o Mōkai Pātea submitted that the evidence did not support the view that this was a better access route. Counsel emphasised that this was not the most pragmatic solution given access was already possible through Big Hill Station.[213]

2.4 He Aha ngā Tohe e Toe Ana? / What Remains in Dispute?

Having set out the history and nature of the legislation relevant to landlocked Māori land, and having discussed the positions of the parties, we now identify what remains in dispute between them and what issues require our analysis in this report.

The parties agreed that the Crown was aware of landlocking issues in the inquiry district from the early 1900s. Some claimant counsel argued that provisions for access in legislation before that were evidence of an earlier Crown awareness, but these provisions were dismissed as standard procedure by the Crown. When landlocking of Māori land did become an overt issue in Taihape, the Crown's position was simply that Māori could seek access under the legislation then in force. Sitting behind these debates lay a deeper disagreement about whether the Crown had generally prioritised road access for Pākehā settlers over access for owners of customary or freehold Māori land. For example, one claimant submission implied that the 1886 provisions had essentially been aimed at ensuring access for imminent Pākehā settlement rather than for the ongoing needs of Māori.

Regarding the Crown's responsibility for the initial landlocking of Māori land in the inquiry district, the parties were divided on almost every issue. The claimants, for example, rejected the Crown's argument about the relevance of climate and topography or what the Crown regarded as its lack of responsibility for the actions of the Native Land Court. The claimants also disagreed strongly with the Crown's description of matters it believed were within Māori control, such as applying for access at the time of partition or the very extent of partitioning itself.

As outlined, the Crown made concessions about the inadequacy of its remedies for the period from 1912 to 1975, and to this extent there was little disagreement between the parties. Nor did they disagree about local authorities having contributed to the landlocking of Māori land, with the mayor of the Rangitīkei District Council himself conceding this point. There was dispute, however, over whether the Crown bore responsibility for the actions taken by local authorities: the claimants said it did, but the Crown maintained that the legal rights and actions of local government were beyond its control.

The Crown and claimants shared similar views on the remedies the Crown had introduced since 1975. The claimants said they had been clearly inadequate, and the Crown accepted they had been 'problematic' and that owners today could not resolve the problem of landlocking without 'significant assistance'. This

213. Submission 3.3.97 (Watson), p 11

acknowledgement seemed to recognise the claimants' point that tinkering with the legislation had done nothing to resolve the underlying issue of cost.

The Crown and claimants also agreed that the owners of landlocked land had suffered prejudice. The Crown accepted there had been significant cultural and economic impact on the owners, including the sale of over 9,300 hectares of land where lack of access had been a factor. The Crown acknowledged that the access issues were such that the owners' experience was akin to being landless.

Finally, while the Crown made some concessions of treaty breach about the Ministry of Defence's acquisition of Ōruamatua–Kaimanawa lands for a military training area, these did not go far enough for the claimants. They also took issue with the Crown's claims that the Department of Conservation had acted neutrally with regard to access routes into Te Kōau a and Awarua o Hinemaru and had even made access more secure. The claimants instead contended that the Crown had breached section 4 of the Conservation Act 1987, and could still do much more to assist the owners to access Awarua o Hinemaru via Big Hill Station.

After discussing relevant treaty principles and jurisprudence in chapter 3, we go on – in chapters 4, 5, and 6 – to analyse the issues in disupte in light of the parties' positions summarised above.

UPOKO 3

TE HOROPAKI O TE TIRITI I ROTO I NGĀ WHENUA MĀORI KUA KARAPOTIA

TREATY CONTEXT OF LANDLOCKED MĀORI LAND

3.1 Te Tāhū / Introduction

In this chapter, we consider the treaty context of the claims before us. We note at the outset that jurisprudence can offer our priority report only limited assistance. While a number of previous inquiries have engaged with landlocked Māori land in their districts, none have been explicitly concerned with it. Indeed, landlocking is a fairly marginal issue in other reports. As such, we cannot point to an extensive body of Tribunal discussion specific to landlocked Māori land. Nonetheless, the Tribunal has considered landlocked land on several occasions. We begin by briefly reviewing this small body of targeted analysis and findings. We then highlight key Tribunal findings on themes we consider most closely related to our priority report – namely, land alienation and the development and governance of retained land – and treaty principles the Tribunal has previously invoked in reports dealing with these themes. Next, we outline the treaty principles the parties have invoked in their submissions on landlocking. Finally, we discuss the principles and duties we have decided to apply as we consider claims about landlocked Māori land in Taihape.

3.2 Ngā Kōrero kua Takoto i te Taraipiunara / What the Tribunal has Previously Said

3.2.1 He whenua Māori kua karapotia / Landlocked Māori land

As we set out in our preliminary views of August 2018, the Tribunal has considered the issue of landlocked Māori land before, to a limited extent.[1] While the analyses and findings of those Tribunals are specific to the circumstances of particular inquiries, they do present a few themes and conclusions that may assist our deliberations. We draw on a few representative reports to briefly review these themes and conclusions.

In the *Te Roroa Report* (1992), the Tribunal considered the Crown's treaty obligations in circumstances where its own land adjoined landlocked Māori land.

1. Memorandum 2.6.65, p 5

In one instance, the Crown had closed a public road to the Waipoua settlement, forcing Māori who lived there to access the settlement through state forest instead. The Tribunal found the Crown 'should have accepted more responsibility for the well-being of those it dispossessed'. It noted that, as well as the Crown's special treaty obligations, 'it surely has a special duty to be a good neighbour'.[2]

Previous inquiries to consider landlocking have generally emphasised the Crown's culpability in creating conditions leading to the landlocking of Māori land and made connections between landlocking, dispossession of land, and the economic underdevelopment of Māori communities. In the *Mohaka ki Ahuriri Report* (2004), the Tribunal commented that the Crown had failed to provide access to the Te Matai block when the adjoining land was subdivided and alienated and the Crown thus bore 'the ultimate responsibility' for that block becoming landlocked.[3] In the *Wairarapa ki Tararua Report* (2010), the Tribunal identified landlocked land as a 'major problem' facing Māori landholders. It reported that owners of landlocked Māori land could be left 'completely dependent' for access to their land 'on the whim of the owner of the surrounding land', who sometimes took advantage of this situation by using the landlocked land without paying rent. The Tribunal noted that, '[u]nsurprisingly, the frustrations associated with dealing effectively with landlocked blocks often leads ultimately to their sale.' Acknowledging the importance of costs, the Tribunal recommended the Crown engage with Māori in the district to explore the feasibility of a Crown-sponsored project that would fund the necessary expertise, including lawyers and surveyors, to pursue applications for access to landlocked land through the Māori Land Court.[4]

In *He Whiritaunoka: The Whanganui Land Report* (2015), the Tribunal found that lack of road access to Māori land 'made it very difficult for owners to develop this land', and that the burdens of 'resolving problems of access caused by landlocking' could 'threaten the economic viability of the land involved'.[5] Access to the road and rail network was 'crucial', it determined, if Māori land owners 'were to have any chance of sharing equally in the fruits of a growing economy'.[6] The Tribunal observed that as a treaty partner, the Crown should have paid more attention to the need for Māori owners in the district to have proper access to their lands, especially since it promoted the purchases and partitions that led to problems like landlocking and lack of access to a road.[7] That Tribunal followed

2. Waitangi Tribunal, *The Te Roroa Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 207
3. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 328
4. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, pp 622–623, 636–637
5. Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Wellington: Legislation Direct, 2015), vol 2, pp 1082, 1085–1086
6. Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 1086
7. Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 1086

the recommendations made in the *Wairarapa ki Tararua Report*, stating that the Crown should provide funding to help with applications for access through the courts, including paying the costs for surveyors and lawyers.

In *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (2016), the Tribunal described issues including landlocked land as 'a result of past Treaty breaches'. In the Tribunal's assessment, legislation that prioritised sale and partitioning processes, without also protecting adequate access to remaining Māori lands, was responsible for the creation of landlocked blocks. This left Māori owners dependent on the goodwill of neighbouring land owners for access to their land. Even where neighbourly goodwill existed, access could be restricted, uncertain, and subject to change at short notice. An 'absence of neighbourly goodwill' or a change in circumstances left Māori owners unable to utilise their land for cultural or economic purposes, or fulfil their duties as kaitiaki to safeguard and care for wāhi tapu, urupā, and other sites of significance. The Crown, the Tribunal said, had a treaty duty to remedy such outcomes from past treaty breaches.[8]

3.2.2 Ngā take whenua e whai wāhi ana / Closely related land issues

3.2.2.1 *Te hoko me ngā toenga whenua e ora ai te Māori / Alienation and sufficiency of Māori landholdings*

Many Tribunal inquiries considering the alienation of Māori land in the nineteenth and twentieth centuries have discussed the Crown's responsibility for ensuring the 'sufficiency' of remaining Māori landholdings and what that standard should be. The Tribunal has commented extensively on the Crown's duty, reflected in Lord Normanby's 1839 instructions to Governor Hobson and embodied in the treaty itself, to ensure Māori retained sufficient land for their present and future use. In the *Ngai Tahu Report* (1991), the Tribunal stated that article 2 of the treaty, 'read as a whole, imposed on the Crown a duty first to ensure that the Maori people in fact wished to sell [land]; and secondly that each tribe maintained a sufficient endowment [of land] for its foreseeable needs'.[9] It later specified that this latter duty 'did not cease' at the time of Crown purchase, but 'extended to ensure that the tribal endowment was maintained'.[10] In other words, where factors within the Crown's control – including land laws – facilitated the alienation of Māori land, leaving Māori with too little, the Crown was accountable under the treaty. Later

8. Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Lower Hutt: Legislation Direct, 2016), pp 40, 252

9. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: GP Publications, 1991), vol 2, pp 238–239

10. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995* (Wellington: GP Publications, 1995), p 276

lands-based reports affirmed this duty,[11] and characterised it as a requirement of the principle of partnership and the Crown's duty of active protection.[12]

In the *Ngai Tahu Report*, the Tribunal also found the Crown had a correlative duty to ensure Ngāi Tahu were left with land of sufficient quantity and quality 'to enable them to engage on an equal basis with European settlers in pastoral and other farming activities', so they could 'enjoy the added-value accruing from British settlement'.[13] Later reports affirmed this duty, one referring to it as the 'principle' requiring the Crown 'to reserve sufficient good land for the existing and future needs' of hapū or iwi.[14]

3.2.2.2 *Ngā herenga tiriti e pā ana ki te Karauna i a ia ka tuku mana ki ngā kaunihera* / *Delegation of power and the Crown's treaty obligations in respect of local government*

When assessing the effects of local government systems on Māori land and land rights, the Tribunal has often invoked the equity rights enshrined in article 3. It has observed that the benefits of local government must be distributed equally between Pākehā and Māori. In *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2023), it argued that a local government system which 'existed primarily to advance Pākehā settlement' would breach equity rights and the principle of participation.[15]

The Tribunal has also found that the Crown cannot escape its treaty duty to protect Māori interests by delegating responsibilities (for example, the provision of roads) to local authorities without requiring them to provide the same degree of protection as the treaty requires of the Crown. If it does make such delegations, the Crown 'must also ensure that local authorities are acting consistently with the principles of the Treaty. Failure to do so is a breach of the duty of active protection.'[16]

11. See, for example, Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 26; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 629; Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, 6 vols (Wellington: Legislation Direct, 2023), vol 1, pp 279–280; Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report*, p 16; Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, p 150; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, p 1363. *The Wairarapa ki Tararua* report referred to it as the 'Treaty obligation to ensure sufficiency of land and resources' for Māori (see vol 2, p 626), while *The Ngai Tahu Ancillary Claims Report* referred to it as 'the Treaty principle requiring the Crown to ensure Maori were left with sufficient land for their needs' (p 16).

12. See, for example, Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report*, p 276; Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 387; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 21, 151.

13. Waitangi Tribunal, *The Ngai Tahu Report*, vol 2, p 239

14. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 629; see also Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 26.

15. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 4, p 2243

16. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 4, p 2243; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, p 22

3.2.2.3 *Ngā herenga tiriti a te Karauna e pā ana ki te Kōti Whenua Māori / The Crown's treaty obligations in respect of the Native Land Court*

The Tribunal has also reflected at length on the Crown's relationship to the Native Land Court and whether and how treaty obligations apply to its processes and outcomes. While accepting that the Crown is not responsible for court decisions, the Tribunal has found that the Crown 'cannot divest itself of its Treaty obligations by conferring an inconsistent jurisdiction on the Native Land Court or other judicial or non-judicial bodies'.[17] Explaining this view in the *Report of the Waitangi Tribunal on the Orakei Claim*, the Tribunal clarified: 'it is not any act or omission of the Native Land Court that is justiciable, but any omission of the Crown to provide a proper assurance of its Treaty promises when vesting any responsibility in the Court.'[18]

The Tribunal has also affirmed the Crown's responsibility for ensuring the treaty compliance of court processes. In the *Mohaka ki Ahuriri Report*, for example, it found the Native Land Court system had imposed financial and other costs on Māori that were 'significant and unreasonable'.[19] In allowing or legislating for such a situation, the Crown had breached its protective obligations, it argued.[20] In *He Whiritaunoka*, the Tribunal similarly found the Crown breached the treaty through its 'failure to work with Māori to ameliorate the [Native Land Court] process and to lessen both the costs and their adverse effects'.[21]

3.2.2.4 *Te ahu pai i ngā whenua Māori e toe ana / The development of remaining Māori landholdings*

The Tribunal has also considered how Māori who retained their land faced barriers to development, and the Crown's treaty obligations in the circumstances. In the *Mohaka ki Ahuriri Report*, the Tribunal found Māori had lost 'far too much land' to benefit from developing what little they retained, even with State assistance.[22] In the *Wairarapa ki Tararua Report*, the Tribunal found Māori land owners had minimal development opportunities as they had retained too little land, land of poor quality, and lacked the finance to develop it.[23] The Te Urewera Tribunal found that the 'inescapable' problems of 'insufficient land and poor quality land' meant that Māori land development schemes established in the 1930s, though partly beneficial, could not sustain communities in the long term.[24] In the *Tauranga Moana* report, the Tribunal emphasised that Māori have a right to 'positive assistance' to develop their properties, where appropriate to the circumstances, including to

17. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed (Wellington: GP Publications, 1996), p 209
18. Waitangi Tribunal, *Report on the Orakei Claim*, p 192
19. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 2, p 448
20. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 2, p 448
21. Waitangi Tribunal, *He Whiritaunoka*, vol 1, p 473
22. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 2, p 678
23. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 625
24. Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Legislation Direct, 2017), vol 6, p 2504

overcome unfair barriers to participation in developing them – especially barriers created by the Crown.[25]

3.2.3 Ngā mātāpono me ngā whakatau o te tiriti / Treaty principles and duties

In its previous, fairly limited engagement with the issue of landlocking, the Tribunal has not often explicitly discussed treaty principles. However, it has extensively discussed treaty principles when assessing claims about closely related Māori land issues such as land alienation, and the development and governance of retained land. The treaty principles and duties most commonly raised in relation to these themes include:

- the principle of partnership and the related duties of active protection and consultation;
- the principles of the right to development and of mutual benefit;
- the principle of equity;
- the principle of options; and
- the principle of redress.

Below (in section 3.4) we outline the principles and duties we consider most relevant to determining the claims before us and discuss their development in the jurisprudence of the courts and the Tribunal. First, however, we outline the submissions of the parties to our inquiry on which treaty principles are pertinent to our consideration of landlocking in Taihape.

3.3 Ngā Tuku Kōrero a ngā Rōpū / What the Parties Submitted

The claimants in this inquiry identified various principles they considered the Crown had breached by allowing Māori land in the district to become and remain landlocked. In generic closing submissions, they cited a number of matters that sit under the broader banner of partnership. They argued that the treaty's article 2 guarantee – promising Māori the 'full, exclusive and undisturbed possession' of their lands – included a 'guarantee of access' to the lands Māori had retained. By allowing these lands to become landlocked, the Crown had breached this guarantee and the related principles of active protection, development, reasonableness, good faith, and equity.[26]

The claimants argued the Crown had breached the principle of active protection by failing to protect Māori property rights – specifically, rights of access to one's property – and to financially assist owners to restore access to landlocked land.[27] The claimants also argued that lack of vehicular access to landlocked land had prevented Māori from developing it, breaching the right to development.[28] They further argued the Crown would have been aware, in the settlement period and after, that access to their lands 'was important to Māori'. In light of this awareness,

25. Waitangi Tribunal, *Tauranga Moana 1886–2006*, vol 1, p 160
26. Submission 3.3.34 (Bennion and Black), p 11
27. Submission 3.3.34 (Bennion and Black), pp 11–12, 26
28. Submission 3.3.34 (Bennion and Black), p 12

the Crown's failure to provide for access breached the principle of reasonableness.[29] The claimants asserted that if 'underhanded, undisclosed or inequitable [Crown] dealings' had led to Māori land being landlocked,[30] this would breach the principle of good faith. So too would any subsequent Crown failure to consider providing remedies for landlocking under present-day conditions.[31] The claimants also maintained that, by failing to safeguard Māori rights to access their land 'in the same manner as any other positive rights held by NZ citizens', the Crown had breached the principle of equity.[32] In their view, this principle meant that 'the Maori right needed to be upheld as any other right – given that it was prior to, and superior to, non-Māori access rights which derived entirely from subsequent Crown grants'.[33] Finally, the claimants argued that the Crown had failed to uphold the guarantee of tino rangatiratanga by failing to understand the nature and importance of customary access, '[to] provide for its retention where Maori wish[ed] to retain it, including in its developed form', and to intervene to restore it where necessary.[34]

Individual claimant groups identified further principles they considered the Crown had breached by failing to ensure access to Māori land. The Wai 378, Wai 382, and Wai 400 claimants appealed to the principle of mutual benefit, arguing that Māori who signed the treaty reasonably expected they would 'receive benefit from being a partner to Te Tiriti', not thereby lose access to their land.[35] They also maintained the Crown had 'overstepped its partnership role in breach of Te Tiriti' by requiring owners of landlocked blocks to 'seek permission from the NZ Defence Force, DOC and private owners to access their whenua'.[36] Finally, they invoked the principle of options, arguing that lack of access to their lands undermined the claimants' freedom to choose between tikanga Māori and Pākehā/settler culture when it came to social, cultural, and economic pathways: 'Landlocked land in reality means Māori owners have no options, unless they have a helicopter.'[37]

The Wai 1196 claimants asserted that landlocking of Māori land in the district resulted from discriminatory law-making and that the Crown had therefore breached article 3 of the treaty.[38]

The Crown expressed the view that the principles of active protection and equity were relevant to claims about landlocked Māori land in the Taihape inquiry district. It conceded that some of its actions in respect of landlocked land had breached these principles (see sections 2.3.2, 2.3.3, 2.3.5).[39]

29. Submission 3.3.34 (Bennion and Black), pp 12–13
30. Submission 3.3.34 (Bennion and Black), p 13
31. Submission 3.3.34 (Bennion and Black), p 13
32. Submission 3.3.34 (Bennion and Black), pp 14, 16
33. Submission 3.3.34 (Bennion and Black), p 14
34. Submission 3.3.34 (Bennion and Black), pp 14–15
35. Submission 3.3.35 (Gilling), p 15
36. Submission 3.3.35 (Gilling), p 11
37. Submission 3.3.35, pp 14–15
38. Submission 3.3.38 (Naden), pp 5–7
39. Submission 3.3.44(d) (Crown), pp 5, 17–19, 30

3.4 Ngā Mātāpono me ngā Whakatau e Whai Wāhi Nui ana ki ō Mātau Whakaaro / Principles and Duties we Consider Most Relevant

Having reviewed previous Tribunal findings on landlocked Māori land, key jurisprudence on closely related land issues, and the treaty principles the parties applied to the claims before us, we now outline the principles and duties we consider most relevant to determining whether these claims are well-founded.

3.4.1 Te mātāpono o te mahi takirua / The principle of partnership

The principle of partnership derives from the expectations of the treaty partners and concerns the relationship between kāwanatanga (the Crown's authority to govern) and tino rangatiratanga (the customary and inherent authority guaranteed to Māori in article 2 of te Tiriti).

The foundations of what became known as the principle of partnership were laid in early Tribunal reports. As far back as 1985, the Tribunal emphasised that tino rangatiratanga means significantly more than 'the full exclusive and undisturbed possession' guaranteed in the English text. As the *Report of the Waitangi Tribunal on the Manukau Claim* (1985) confirmed, rangatiratanga is inextricably linked with mana: '[i]n Maori terms, the two words are really inseparable . . . As we see it, "rangatiratanga" denotes "authority". "Mana" denotes the same thing but personalises the authority and ties it to status and dignity.'[40] The *Report of the Waitangi Tribunal on the Orakei Claim* (1987) subsequently argued that mana is inseparably bound up with whenua:

> the Maori text of the treaty conveyed to the Maori people that, amongst other things, they were to be protected not only in the possession of their lands but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences.[41]

The principle was more fully articulated in *New Zealand Maori Council v Attorney-General* (the *Lands* case) (1987), when the Court of Appeal referred to the treaty relationship between Māori and the Crown in terms of a 'partnership' requiring them 'to act towards each other reasonably and with the utmost good faith.'[42] The court also described these mutual obligations as 'analogous to fiduciary duties.'[43]

Treaty jurisprudence has subsequently characterised the basis of the treaty partnership in terms of an 'exchange' of the Crown's right to exercise kāwanatanga for the article 2 guarantee to protect Māori tino rangatiratanga.

40. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 67
41. Waitangi Tribunal, *Report on the Orakei Claim*, p 209
42. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 667
43. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 664

However, understandings of the nature of the relationship between these two forms of authority have evolved over time. In the last decade, the Tribunal has recognised that Māori who signed the treaty in February 1840 viewed 'kāwanatanga' not as overarching sovereign power, but as a more limited power to make decisions relating mainly to the British sphere of influence and international relations. As the Tribunal found in *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (2014), northern rangatira who signed the treaty 'did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories'.[44] Since then, the Tribunal has increasingly viewed the exchange between kāwanatanga and rangatiratanga as signifying a relationship between equals with separate spheres of authority. Each treaty partner has the right to exercise authority within their respective spheres, with partnership being most relevant in areas where their authority overlaps.[45]

Tribunal reports concerning land alienation have often invoked the principle of partnership when critiquing the Crown-created conditions that made excessive land alienation possible. Most basically, these reports emphasised the Crown's responsibility, in exercising kāwanatanga, to respect and enable Māori to exercise tino rangatiratanga in relation to land. In the *Mohaka ki Ahuriri Report*, for example, the Tribunal found that the guarantee of tino rangatiratanga meant the Crown

> could not unilaterally take [Māori] land, by confiscation or compulsion, or alienate it by other means (other than through the exercise of Crown pre-emption), or alter the tenure, without the willing assent of the chiefs. Indeed, the Crown had no licence under the Treaty to do anything with Maori land without the approval of Maori unless exceptional circumstances prevailed.[46]

In *Te Mana Whatu Ahuru*, the Tribunal determined that the guarantee of tino rangatiratanga meant the Crown could not 'ignore, deny, or interfere with Māori communities' tino rangatiratanga'. As article 2 makes clear, this includes ensuring that Māori have possession of and authority over their lands for as long as they wish to retain them.[47] As noted earlier, other inquiries have interpreted the tino rangatiratanga guarantee as binding the Crown to ensure that sufficient land of good quality is available and accessible for the future 'wellbeing' of Māori communities.[48]

Another facet of treaty partnership highlighted in the jurisprudence on land alienation is the need for the Crown to act 'with scrupulous honesty and fairness

44. Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wellington: Legislation Direct, 2014), pp 526–527
45. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 210
46. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 22
47. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 211
48. Waitangi Tribunal, *Tauranga Moana 1886–2006*, vol 1, p 21

toward its Treaty partner, and in a spirit of mutual respect and, where appropriate, joint-decision-making'.[49] Any aspects of the land administration system that failed to live up to these expectations – including laws, policies, and processes that favoured settler over Māori interests – therefore breached the principle of partnership.[50]

Recent lands-based reports have highlighted the treaty partners' reciprocal obligation to respect each other's sphere of authority. Describing the basis for treaty partnership in Whanganui in the settlement period, the Tribunal said it included

> establishing settlers on the land and working cooperatively with them. It also involved maintaining Māori authority in their own spheres and cooperating in areas of intersecting interest. Where there is an ethic of partnership, there is no room for one partner to impose changes on the other without participation and agreement.[51]

Similarly, in the Te Rohe Pōtae report, the Tribunal argued '[n]either partner can act in a manner that fundamentally affects the other's sphere of influence without their consent, unless there are exceptional circumstances'.[52]

Recent reports have also emphasised that mutual benefit is an essential feature, and measure, of treaty partnership. The Whanganui land report stated that the 'exchanges fundamental to being a partner must provide advantage that is mutual, with benefits flowing in both directions'.[53] In the Te Rohe Pōtae report, the Tribunal argued that partnership required the Crown and Māori to work out how their respective spheres of authority might intersect 'in a manner that made a place for both powers while also delivering on the Treaty's promise of mutual protection and benefit'.[54]

Finally, lands-based jurisprudence on partnership has addressed the question of what constitutes 'reasonableness' when the Crown's past actions (or inactions) are under scrutiny. In *The Hauraki Report* (2006), the Tribunal concluded that to determine what might reasonably have been done at the time of the events in question, it was necessary to consider whether an idea or concept had been voiced and was in the public arena at that time.[55] If Māori had spoken or written to Crown officials or politicians about their concerns, asked for remedy, or sought support for an initiative they thought would be beneficial – or if the Crown's own stated policy proposals included certain options – it was entirely reasonable, the Tribunal

49. Waitangi Tribunal, *Te Tau Ihu*, vol 3, p 1361; see also Waitangi Tribunal, *The Te Roroa Report*, p 30. The Tribunal has emphasised that these expectations are not modern interpretations of what the treaty demands, but were clearly indicated in the instructions under which its terms were drafted; see, for instance, Waitangi Tribunal, *Te Tau Ihu*, vol 3, pp 1360–1361.
50. See, for example, Waitangi Tribunal, *Te Tau Ihu*, vol 3, pp 1408, 1411, 1418, 1420.
51. Waitangi Tribunal, *He Whiritaunoka*, vol 1, p 156
52. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 216
53. Waitangi Tribunal, *He Whiritaunoka*, vol 1, p 156
54. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 210
55. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 3, p 1206

said, to take account of such concerns and options when assessing the Crown's subsequent actions or inactions.[56] In *Horowhenua: The Muaūpoko Priority Report* (2017), the Tribunal affirmed that 'what Māori leaders said to (and sought from) the Crown', and treaty principles themselves, were relevant 'standards of the time' by which the Crown's past actions should be judged.[57]

Turning to the circumstances of our inquiry, we note the Crown had an obligation to enable Taihape Māori to exercise tino rangatiratanga in their sphere of authority. If the Crown's land laws led to landlocking of Māori land in the district, disallowing the exercise of tino rangatiratanga, the principle of partnership would have been breached. We therefore consider the principle of partnership, applying as it does to the relationship between kāwanatanga and rangatiratanga, directly relevant to our consideration of the claims before us.

3.4.1.1 *Te mātāpono o te tāwharau mataora* / *The principle or duty of active protection*

It is well established in treaty jurisprudence that the duty imposed on the Crown through the treaty partnership 'is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.[58] Though inherently linked to the principle of partnership, this duty is effectively a principle in its own right, the Tribunal having referred to it as such in many previous reports.[59] The duty of active protection derives from the article 2 guarantee of tino rangatiratanga, but also from article 3, insofar as active steps may be needed to ensure equity between Māori and non-Māori.[60]

Many Tribunal reports and court decisions have elaborated on the nature of this duty of active protection, which the *Lands* case decision originally described as one of the Crown's 'fiduciary duties' mentioned above.[61] Of relevance to this inquiry, the Tribunal has said this duty means that the Crown

> cannot ignore, deny, or interfere with Māori communities' tino rangatiratanga, including authority over and relationships with people, lands, and taonga. But it also means that the Crown is positively obliged to protect and support Māori communities' tino rangatiratanga, for example, by putting in place legislative or administrative measures that support those communities' authority and relationships, if that is what the community wants.[62]

56. Waitangi Tribunal, *The Hauraki Report*, vol 3, p 1207
57. Waitangi Tribunal, *Horowhenua: The Muaūpoko Priority Report – Pre-Publication Version* (Wellington: Waitangi Tribunal, 2017), p 22
58. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 664
59. See, for example, Waitangi Tribunal, *Te Tau Ihu*, vol 1, pp 4–5, 269; Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 505; Waitangi Tribunal, *Te Urewera*, vol 2, p 711; Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 22.
60. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, pp 210–211; Waitangi Tribunal, *Hauora* (Lower Hutt: Legislation Direct, 2019), p 32
61. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 664
62. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 211

While active protection places on the Crown a positive duty to look to the Māori interest at all times, and to protect that interest to the extent reasonably practicable in the circumstances,[63] it is not only a positive duty. When the Crown omits to actively protect Māori interests, it breaches the treaty just as much as when it commits a positive act that removes rights.[64] For example, where a resource or taonga has become vulnerable because the Crown previously failed to protect it, then 'the Crown has a duty to restore the taonga'.[65]

In lands-based reports, the Tribunal has firmly established the Crown's duty to actively protect the right of Māori to exercise rangatiratanga in respect of their lands. It has identified various practical dimensions of this duty, two of which we have noted already – the need for the Crown to ensure Māori retained sufficient land of good quality for their present and future needs (section 3.2.2.1); and to ensure local government and other bodies involved in land administration operate in a treaty-compliant way (section 3.2.2.2).

Another dimension of active protection invoked in lands-based reports is the need for the Crown to monitor its policies and laws to ensure they are effective in practice and that their effects are treaty compliant. In the *Tauranga Moana* report (2010), for example, the Tribunal asserted that the Crown had 'a fiduciary duty to monitor the impact of its policies and legislation and, as part of that monitoring, to consult with Tauranga hapū and iwi leadership to ensure that Tauranga Māori were able to retain as much land as they wanted and participate in the local economy'.[66]

The Tribunal has also established that the Crown must actively protect the right of Māori to develop the economic potential of the properties they retained; we discuss this obligation when outlining the principle of the right to development (section 3.4.2).

Aside from the need to protect land as a physical and economic resource for Māori, the duty of active protection applies to the relationship Māori have with the land, including with sites of cultural and spiritual significance. In the *Tauranga Moana* report, the Tribunal held that the Crown must ensure legislative or administrative constraints do not unnecessarily inhibit Māori from using their resources according to their cultural preferences. The Tribunal also noted the Crown must ensure Māori are protected from the actions of others that impinge upon their tino rangatiratanga by adversely affecting their use or enjoyment of their resources in 'spiritual or physical' terms.[67] In the *Te Roroa Report*, the Tribunal specified that to uphold its fiduciary duties, the Crown must not deny tangata whenua the 'right . . . to control and protect wahi tapu'. Ongoing access to wāhi tapu was fundamental to this right, it considered. It also said the Crown must not use or manage its land in

63. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 120
64. Waitangi Tribunal, *Report on the Manukau Claim*, p 70; Waitangi Tribunal, *Report on the Orakei Claim*, p 191
65. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1243
66. Waitangi Tribunal, *Tauranga Moana 1886–2006*, vol 1, pp 148–149
67. Waitangi Tribunal, *Tauranga Moana 1886–2006*, vol 1, p 22

a way that 'deprive[d] tangata whenua of their kaitiakitanga over taonga'.[68] While these findings concerned loss of legal access to wāhi tapu on lands purchased by the Crown, we consider they also apply where access to wāhi tapu has been lost through landlocking.

Finally, the Tribunal has expressed the view that 'the Crown should not expect Maori to subsidise its duty of active protection'.[69] In other words, the Crown must bear the cost of any work required to honour its duty to protect Māori interests; it should not transfer these costs to Māori.

We consider each of these dimensions of the duty of active protection relevant to the claims before us. First, to the extent that landlocking often prevented owners from occupying or using their land – driving some owners to sell their land – the Crown's duty to ensure Māori retained sufficient land for their foreseeable needs is relevant to landlocking. The Crown's duty to ensure Māori retained sufficient land of good quality for their needs is also relevant. While the Tribunal has generally applied this duty where Māori were left with land that was unproductive or difficult to use, it also applies to landlocked land, given loss of access severely compromised the utility of the land, for owners in particular.[70]

Secondly, the Crown's duty to monitor the impact of its policies and laws is relevant when considering the legislative context in which land became landlocked and the efficacy of the Crown's provisions for restoring access to landlocked land. Thirdly, the Crown's duty to protect the cultural and spiritual dimensions of rangatiratanga in respect of land is pertinent. This jurisprudence informs our consideration of the current claims given the claimants allege lack of access to their land has had profound cultural and economic consequences.

Lastly, the Tribunal's view that Māori must not subsidise the Crown's duty of active protection is relevant when considering the treaty compliance of the Crown's legal remedies for landlocking and what provision they made for the costs of restoring access.

In sum, we consider that active protection – being the Crown action necessary to ensure that the tino rangatiratanga guaranteed in article 2 is realised and that treaty partnership can therefore occur – applies to the claims before us.

3.4.1.2 *Te whakatinanatanga o te tuari kōrero* / *The duty to consult*

As the Court of Appeal established in *New Zealand Maori Council v Attorney-General* (the *Forests* case) (1989), the Crown has a duty to consult Māori on matters important to them.[71] The Tribunal has stated that this duty particularly applies

68. Waitangi Tribunal, *The Te Roroa Report*, p 291. In this report, the Tribunal did not identify specific Treaty principles relevant to the claim before it. Rather, it considered whether the Crown's actions were 'fair, reasonable and proper[,] bearing in mind the tapu of the Treaty and the Crown's fiduciary duty to act honourably and in good faith to the community as a whole, Maori and Pakeha' (p 30).

69. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1244

70. See, for example, Waitangi Tribunal, *Te Tau Ihu*, vol 3, p 1363; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 629; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 26

71. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (the *Forests* case)

where the Crown is making decisions on the way that land is now controlled and governed.[72]

The duty to consult Māori derives, the Tribunal has confirmed, from the overarching principle of partnership, as well as the duties of good faith and active protection.[73] The principle of partnership recognises the Crown's responsibility, when making decisions, to ensure that appropriate arrangements for the conservation, control, and management of resources are in place. This responsibility means the Crown will often be required to consult its treaty partner.[74] This is particularly relevant to our present inquiry where claimants have alleged that the Crown did not adequately consult them on decisions that negatively affected their access to one of their most important resources – their ancestral land.[75]

Although it is important to consult on matters important to Māori, the Tribunal has said that the duty to consult is not absolute or mandatory in every case. Instead, it depends on the specific circumstances. The nature and extent of the consultation required is determined by what information the Crown needs to make an informed, treaty-consistent decision in a particular case.[76] The Tribunal has said in the past that sometimes, the Crown will already have enough information to act consistently with treaty principles. At other times, it will not have that information, and will need to consult Māori.[77]

The extent of the consultation will also depend on the nature of the resource or taonga that will be affected by the decision and on the likely effects that the policy, action, or legislation will have.[78] As land is a principal interest guaranteed to Māori under the treaty, developments affecting it require consultation.[79]

In assessing the Native Land Court and its laws, the Tribunal has consistently found that the guarantee of tino rangatiratanga required the Crown to consult Māori about, and obtain their express consent to, any changes in the mode of ownership, control, and management of their lands, fisheries, and forests, before such changes were formulated and implemented.[80] Echoing previous findings, the Tribunal in the *Te Tau Ihu o te Waka a Maui* (2008) report, for example, determined that the Crown's failure to 'meaningfully consult with Maori over the introduction of a system bearing upon their customary lands' was 'a serious

72. Waitangi Tribunal, *The Ngai Tahu Report*, vol 2, pp 244–245
73. Waitangi Tribunal, *The Ngai Tahu Report*, vol 2, pp 240, 244–245; Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), pp 150–151
74. Waitangi Tribunal, *The Final Report on the MV Rena and Motiti Island Claims* (Lower Hutt: Legislation Direct, 2015), p 12; Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1236–1237
75. See, for example, submission 3.3.36 (Watson), pp 9–10; submission 3.3.97 (Watson), pp 5–9.
76. Waitangi Tribunal, *The Final Report on the MV Rena and Motiti Island Claims*, p 12
77. Waitangi Tribunal, *The Turangi Township Report* (Wellington: Brookers Ltd, 1995), pp 287–288; Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1237; Waitangi Tribunal, *The Final Report on the MV Rena and Motiti Island Claims*, p 30
78. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1237
79. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 22
80. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 671; Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 681; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 402

breach of the Treaty'.[81] In the *Mohaka ki Ahuriri Report*, the Tribunal stressed that the Crown 'could not act unilaterally and had a responsibility to consult Maori on matters affecting them, especially in relation to land and other resources'.[82] In the *Hauraki Report*, the Tribunal specified standards of consultation the Crown would have met when introducing native land laws in the late nineteenth and twentieth centuries if it had acted in good faith. These included Māori 'consent' to and 'cooperation' with the design and implementation of the laws, 'serious discussion' with Māori about the constant adjustment of the laws to ensure that the changes 'reflected their wishes', and evidence that the laws 'did include realistic provisions for Maori advancement as well as that of settlers'.[83]

The Tribunal has also stressed that in the settlement context, where 'competing claims to finite resources' and the 'protection of Māori resources and taonga' are at stake, 'consultation in the spirit of utmost good faith between the Treaty partners is of paramount importance'.[84]

In 2016, the Tribunal considered what modern-day consultation requires of the Crown where the management of Māori land is at stake. Reporting on claims about proposed reforms to Te Ture Whenua Maori Act 1993, it found a high level of consultation is required where the Crown intends to make decisions on such 'fundamentals' as how Māori land is to be 'owned, used, governed and retained'.[85] It quoted one of the claimants saying that full, free, and informed consent was required when a legislative change would substantially affect, or even control, a matter squarely under the authority of the Māori treaty partner. The governance and management of Māori land, a taonga tuku iho, was just such a matter.[86] Therefore, the Crown could not proceed 'without an indication of broad, fully informed support from Māori'.[87] In reaching its determination, the Tribunal emphasised that the authority to govern and manage land was fundamental to the exercise of rangatiratanga. The governance and management of Māori land were thus matters on which the Crown must consult Māori.[88]

In sum, the Crown has a duty to consult Māori on major developments affecting their sphere of interest, of which land is a fundamental part. A failure to consult on developments affecting access to Māori land, including land laws, would therefore breach the treaty. As such, the duty to consult is relevant to our determination of claims about landlocked Māori land in Taihape. In saying this, we note that consultation is a minimum requirement where Crown actions affecting tino rangatiratanga are concerned. In light of recent jurisprudence which understands the treaty partnership as a relationship between equals with separate spheres of authority – notably, the Te Raki Stage 1 report's findings – we are mindful that the

81. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 681
82. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 22
83. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 671
84. Waitangi Tribunal, *Tauranga Moana 1886–2006*, vol 1, p 22
85. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, p 158
86. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, p 157
87. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, p 159
88. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, pp 157–158

concept of 'consultation' may understate the importance of gaining Māori consent to intrusions into the realm of tino rangatiratanga.

3.4.2 Ngā mātāpono o ngā tika ki te whakawhanake me ngā painga hei oranga whānui / The principles of the right to development and mutual benefit

In *He Maunga Rongo: Report on Central North Island Claims* (2008), the Tribunal found that Māori had a treaty right to develop their properties and taonga as they chose and to profit from them.[89]

The Tribunal also emphasised the Crown's corresponding duty to actively protect this right of development.[90] As the Tribunal observed:

> The Government was required to provide equality of access to development opportunities. In practical terms . . . this meant providing the same level and quality of assistance to Maori that it provided to settlers and, where its own actions had created barriers to Maori development, appropriate assistance to overcome those barriers.[91]

Without active protection of this kind, the Tribunal commented that 'even Maori who retained land might well end up little better off than if they had been unable to retain any land at all'.[92] We note that the Tribunal was here referring to Māori land that was accessible. For Māori whose land had become landlocked, the barriers to development were even greater and the chance of overcoming them without assistance even more remote.

The Tribunal has repeatedly emphasised that the treaty development right requires the Crown to do more than simply protect Māori in a subsistence lifestyle.[93] Governments could and should actively assist Māori economic development, at least to the extent that they did for settlers, and provide 'the means to deliver on the Treaty bargain of mutual prosperity from settlement'.[94] In the *Mohaka ki Ahuriri Report*, the Tribunal noted the negative social and economic consequences of the Crown's failure to uphold the development right of Māori.[95] Even where Māori had managed to retain land in the district, they lacked opportunity to derive full benefit from the developing local economy because the land they retained 'was largely rugged and unproductive', and in one case – the Te Matai block – landlocked. All Māori land in the district had at one time or another 'suffered from a lack of development finance, a lack of access, fractionated ownership, or disputes over title'.[96]

We consider the right to development applies to the claims before us. In assessing them, we must consider whether claimants in the Taihape district have

89. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 903, 912
90. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 903
91. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 896
92. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 894
93. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 894
94. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 896
95. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, pp 27–28
96. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 2, p 681

suffered obstacles to development, focusing on their particular and heightened disadvantage as owners of land that was not only rugged and unproductive, but also landlocked.

The principle of mutual benefit from settlement is allied to the right to development, and it too derives from the principle of partnership. Indeed, Tribunal reports have described mutual benefit as the original intent and promise of the treaty. As the *Te Tau Ihu* report put it, '[w]hen the Treaty was signed, both settlers and Maori were expected to obtain or retain the resources necessary for them to develop and prosper in the new, shared nation state . . . The colonisation of New Zealand was thus to be for [their] mutual benefit'.[97]

In *Te Kāhui Maunga*, the Tribunal elaborated on this idea, saying that to realise the desired goal of mutual benefit, both treaty partners 'need to acknowledge their reciprocal obligations and responsibilities'.[98] Similarly, *He Maunga Rongo* stated that the treaty's 'overall intent' was to enable 'both peoples to live together, to participate in creating a better life for themselves and their communities, and to share in the expected benefits from settlement'.[99]

The Tribunal has observed that, in practice, achieving the promise of mutual benefit 'relied to a large extent on Maori being able to utilise some of their properties and taonga for economic development'.[100]

We consider the principle of mutual benefit applies to the claims before us. The disproportionate landlocking of Māori land in the district raises the question of whether the laws under which this occurred benefited one treaty partner but not the other.

3.4.3 Te mātāpono o te whiwhi ara rau / The principle of options

The principle of options refers to the right of Māori to choose their own path in the new society established under the treaty – that is, to live under tribal authority according to tikanga, or to participate in settler society and the modern economy, or both. This right 'to walk in two worlds', as the Tribunal has put it, reflects the dual status of Māori under the treaty as people who hold rangatiratanga (affirmed in article 2) and possess the rights and privileges of British subjects (affirmed in article 3).[101] The principle of options is related to the principles of autonomy, partnership, active protection, and equity.

In lands-based reports, the Tribunal has applied the principle of options when considering the need for Māori to retain sufficient land for their needs, to be able to utilise their land as they wish, and to retain customary rights of access to resources located on alienated land.

In the Te Tau Ihu inquiry, the Crown conceded that it had failed to reserve sufficient land in Māori ownership and to ensure Māori retained access to resources on

97. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 5
98. Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2013), vol 1, pp 16–17
99. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 894–895
100. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 893
101. Waitangi Tribunal, *Te Tau Ihu*, vol 1, pp 3–4

which they customarily relied, which therefore impaired their ability to maintain their tribal society and economy. The Tribunal agreed with the Crown that these failures breached the principle of options.[102]

In *He Maunga Rongo*, the Tribunal found the Crown had used its right of pre-emption to unfairly restrict the right of Māori to utilise their land in the new economy, placing them under economic pressure to sell it. It considered the Crown had thereby breached the principle of options, as well as its duty of active protection.[103]

We note that landlocking may prevent Māori from developing their land, cutting them off from participation in the modern economy. Equally, it may prevent them from using their land for customary purposes, undermining their ability to engage in a traditional way of life. As such, owners of landlocked land may lack genuine options to participate in either the settler/Pākehā or Māori spheres. Therefore, we consider the principle of options applies to the circumstances of landlocking in Taihape.

3.4.4 Te mātāpono o te tika ōrite / The principle of equity

Article 3 of the treaty obliges the Crown to ensure Māori enjoy all the rights and privileges of British subjects.[104] The principle of equity derives from article 3 and is linked closely to the duty of active protection. It requires the Crown to act fairly between non-Māori and Māori, and to ensure non-Māori interests are not prioritised to the disadvantage of Māori interests. It applies to Māori 'exercising rights as individual citizens' rather than as part of 'groups exercising rangatiratanga.'[105]

Summarising what the principle of equity required in the settlement period, the Tribunal has said the Crown 'could not favour settlers over Māori at an individual level, and nor could it favour settler interests over the interests of Māori communities.'[106] Upholding these standards was also essential to the exercise of good government under the treaty in the settlement period. In *He Whiritaunoka*, the Tribunal asserted that '[t]here ought to have been no room for laws or policies calculated to defeat Maori interests in order to favour settler interests. On the contrary, the Crown expressed the intention in the Treaty of protecting Maori rights.'[107]

The Tribunal has established that the Crown must act to reduce disparities between non-Māori and Māori where they have been found to exist, whatever

102. Waitangi Tribunal, *Te Tau Ihu*, vol 3, p 1427
103. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 589
104. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 27, vol 2, p 695. Some back-translations of te Tiriti have considered that article 3 also included the duties and obligations of British subjects. See, for example, Sir Hugh Kawharu's translation in *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi*,
ed I H Kawharu (Auckland: Oxford University Press, 1989), pp 319–321.
105. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, pp 27–28
106. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 212
107. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 737 (Waitangi Tribunal, *He Whiritaunoka*, vol 1, p 158)

their cause.[108] Such action is required by the principle of equity 'in conjuction with the principles of active protection and redress'.[109] In this inquiry, the extent to which the Crown has fufilled its duty to 'actively intervene' to address the problems faced by owners of landlocked Māori land in the Taihape district is a central issue for determination.

The principle of equity has often been at the forefront of inquiries dealing with claims about Māori access to services and the exercise of citizenship rights.[110] However, it is also relevant whenever the Tribunal considers the Māori land administration and title system that developed alongside the (separate) regime for general land in the late-nineteenth and twentieth centuries. Like the Tribunal in the Central North Island inquiry, we consider that the principle of equity – the treaty promise that Māori would enjoy 'equal standards, equality of access, and equal outcomes' – is relevant when determining the treaty-compliance of the Crown's land administration regimes.[111]

In considering the relevance of this principle to our inquiry, we refer back to the preliminary view we expressed in our 14 August 2018 memorandum-directions. There, we noted the Crown has long accepted it has an obligation to recognise and protect Māori land. It has long provided for legal recognition of Māori land title with its own legislation and administration through the Native (later Māori) Land Court. Late twentieth-century legislation, such as the Te Ture Whenua Maori Act 1993, has more explicitly recognised the need to protect remaining Māori land title. With recognition of Māori land title come responsibilities to ensure equivalent rights, protections, and privileges for owners of Māori land as are recognised for owners of general land – including rights of reasonable access to enjoy and use one's land.[112] To assess the claims before us, we must consider whether the Crown has fulfilled these responsibilities. The principle of equity therefore applies to the circumstances of our inquiry.

Though it is valid to compare owners of Māori land and owners of general land in this way, we note that the principle of equity applies to our inquiry in another sense. To fully assess the administrative regimes under which Māori land became and remained landlocked, important differences between Māori land owners and general land owners must be taken into account. General land owners had actively bought their land with the support of the State under the principle of 'buyer beware', which obliged them to ensure before completing the purchase that the title was not deficient in some key respect. This included ensuring there was reasonable access to the land. By contrast, Māori land owners were retaining land their whānau or hapū had traditionally held before the new system of

108. Waitangi Tribunal, *Te Urewera*, vol 8, p 3773; Waitangi Tribunal, *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Lower Hutt: Legislation Direct, 2017), pp 27–28

109. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 5; see also Waitangi Tribunal, *Te Kāhui Maunga*, vol 1, p 17.

110. For example, the Napier Hospital and Health Services, Māori Electoral Option, Kōhanga Reo Claims, and Health Services and Outcomes Kaupapa inquiries.

111. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 428

112. Memorandum 2.6.65, p 6

land titles was introduced. 'Buyer beware' therefore did not apply to them, and their existing ownership rights were also at greater risk of being overlooked. In examining whether the Crown's land regimes were equitable, therefore, we must consider whether they properly accounted for this fundamental difference in situations between Māori and non-Māori, or, on the contrary, allowed it to work to the disadvantage of Māori. In short, were the land regimes under which so much Māori land in the district became and remained landlocked equitable? Or did they favour non-Māori interests to the disadvantage of Māori?

3.4.5 Te mātāpono o te tikanga whakatika / The principle of redress

The principle of redress arises from the Crown's duty to act reasonably and in good faith towards its treaty partner. Previous Tribunal reports – many referring to the 1987 *Lands* case – have said that if the Crown fails to protect tino rangatiratanga rights and the result is detrimental to Māori, the Crown is obliged to provide redress.[113] This obligation is particularly strong where Crown conduct threatens or impacts on taonga.[114] The obligation to remedy treaty grievances and provide redress gives the Crown the opportunity to 'restore the honour and integrity of the Crown and the mana and status of Maori'.[115]

Both the Tribunal and the Court of Appeal have acknowledged that strict 'eye for eye' remedies are unavailable. Rather, the fundamental aim of the treaty principle of redress is to right wrongs by recognising and recompensing them fairly and reasonably.[116] The Tribunal has also repeatedly emphasised that the Crown must never, in making amends for its actions, create further grievances for others.[117]

In the *Report on the Waiheke Island Claim* (1989), the Tribunal confirmed that the purpose of redress should be to 'rebuild the tribes and furnish those needing it with the land endowments necessary for their own tribal programmes'.[118] In situations involving sacred sites and places of significance (which feature in some of the landlocked land claims in this inquiry), the Tribunal has previously found that

> the Crown has a duty to ensure not only that the redress for past wrongs is adequate but also that, where possible, it connects the tribes back to those places and the resources that might once have provided for an appropriate tribal endowment for the future. Such an endowment, we consider, involves both the means for economic and

113. See, for instance, Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend, 1992), pp 272–273; Waitangi Tribunal, *The Turangi Township Report*, p 288; Waitangi Tribunal. *He Maunga Rongo*, vol 4, p 1248.

114. Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), pp 70–71; Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 6

115. Waitangi Tribunal, *The Tarawera Forest Report*, p 29

116. Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), p 66, referencing *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 693 (CA)

117. One example is *The Mohaka ki Ahuriri Report*, vol 1, p 29.

118. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 41

social development looking forward and the means to ensure the survival and well-being of tribal taonga . . .[119]

As to the form of redress the Crown should provide, the Tribunal has been non-prescriptive, acknowledging 'it will always be a challenge to find the right reparation package in particular cases'.[120] In *He Maunga Rongo*, the Tribunal concluded that redress options available to the Crown might include the restoration of iwi or hapū rangatiratanga over their property and taonga, the return of land, the passing of legislation, and restoration work in the case of environmental damage. Such redress may require 'the joint efforts of a number of agencies working with Maori if that is what the parties agree to' and possibly the development of new joint management regimes.[121]

It is clear to us that if Taihape Māori have been prevented, as alleged, from utilising their land for customary and economic purposes due to Crown actions and omissions breaching treaty principles, then the question of what redress might remove or compensate for such prejudice, and prevent others from being similarly affected, is an essential consideration of our inquiry.

For reasons outlined in the preceding discussion, we apply the principle of partnership and related duties of active protection and consultation, along with the principles of the right to development, mutual benefit, options, equity, and redress as we consider claims about landlocked Māori land in the Taihape district.

119. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 168
120. Waitangi Tribunal, *The Petroleum Report*, p 66
121. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1248

UPOKO 4

TE WĀHI KI TE KARAUNA KI TE KARAPOTI I NGĀ WHENUA MĀORI MAI I TE TAU 1886 KI TE TAU 1912

THE CROWN'S ROLE IN THE LANDLOCKING OF MĀORI LAND FROM 1886 TO 1912

4.1 Te Tāhū / Introduction

In this chapter, we deal with the period up until 1912, during which Māori land in the inquiry district became landlocked. As outlined earlier, the claimants and Crown disagreed about the extent to which the Crown's legislation at the time allowed Māori land owners to ensure they retained access to their lands. They were also in dispute about other matters the Crown argued were outside its control, such as the actions of the Native Land Court. We address these matters through the use of illustrative examples from the history of the landlocked blocks that was presented to us. We also discuss the Crown's responsibility for the actions of local authorities.

First, however, we must address a preliminary issue raised by the parties as to what method we should use to assess the causes of landlocking.

4.2 Mā te Mātai i ia Kēhi e Mārama ai i Pēhea i Karapotia ai ēnei Whenua ? / Is a Case-by-Case Approach Required to Understand How these Lands became Landlocked ?

Claimant counsel rejected the Crown's opening submission that determining what caused the landlocking of Māori land required a 'case by case' approach which would examine the history of each piece of landlocked land.[1] Instead, it would be 'a rare situation' where landlocked land did not stem from a treaty breach, counsel argued.[2] Counsel for Ngāti Hinemanu me Ngāti Paki said the problem was of such magnitude in the inquiry district that 'almost every claimant' had a story about how landlocked land had affected them, while counsel for Ngāti Tūope stated there was 'a chorus of evidence' supporting the claimants' arguments.[3] For these reasons, counsel for Ngāti Hinemanu me Ngāti Paki argued, a case-by-case approach was

1. Submission 3.3.34 (Bennion and Black), p 24
2. Submission 3.3.34 (Bennion and Black), p 24
3. Submission 3.3.40 (Sykes), p 7; submission 3.3.33 (Hockly), p 3

not needed and in fact a generic approach was more appropriate for a problem of such scale.[4]

Indeed, in his submissions (already referred to in section 2.3.2.1), counsel for Ngā Iwi o Mōkai Pātea argued that the Tribunal could begin from a 'baseline *presumption* that Māori land should have reasonable lawful access, granted under the new title system that the Crown introduced (emphasis in original)', and where Māori land lacked reasonable lawful access, this was a breach of Te Tiriti o Waitangi. This 'presumption of treaty breach' where land was landlocked could then be rebutted by the Crown on a case-by-case basis, if it chose to do so.[5]

However, other claimant counsel submitted that if the Tribunal did prefer a case-by-case approach, sufficient evidence was available. Some counsel provided analyses of how specific blocks of their clients' Māori land had become landlocked.[6]

In support of its advocacy for a case-by-case approach, the Crown described the landlocked land situation in the Taihape inquiry district as 'highly fact specific'. As mentioned earlier, counsel meant by this that the particular characteristics of the lands in question played a key part in causing them to become landlocked. These characteristics included the lands' high altitude, rugged topography, relatively harsh climate, remote location, and the fact they were mostly considered unsuitable for uses such as pastoral farming.[7]

In the Crown's view, the importance of a case-by-case approach was consistent with its interpretation of the case law on the definition of 'reasonable access'. The Crown therefore argued that, in the context of the case law, determining whether land was landlocked required a case-by-case, evidence-based assessment.[8]

In reply, claimant counsel reiterated the argument of counsel for Ngā Iwi o Mōkai Pātea that the Tribunal must start at a baseline presumption that Māori land should have reasonable lawful access, and where it does not, this was a breach of treaty principles. The Crown had the opportunity to rebut that presumption case by case, but its evidence and submissions had not established a rebuttal, claimant counsel submitted.[9]

Previous Tribunal reports have considered the Crown's argument that a case-by-case approach is necessary when inquiring into claims about other matters, such as Crown purchasing and public works takings. In respect of Crown purchasing, the Tribunal responded in the *Hauraki Report* that it was 'obviously impracticable' to examine every individual land purchase in Hauraki, or even to discuss in detail every block history submitted in the Hauraki inquiry. Instead, the Tribunal would

4. Submission 3.3.40 (Sykes), p 7
5. Submission 3.3.36 (Watson), pp 8–9
6. These included submission 3.3.33 (Hockly), pp 6–11; submission 3.3.35 (Gilling), pp 19–31; submission 3.3.40 (Sykes), pp 40–51.
7. Submission 3.3.1 (Crown), p 63; submission 3.3.44 (Crown), pp 2, 35
8. Submission 3.3.44 (Crown), p 5
9. Submission 3.3.96 (Bennion and Black), p [5]

have regard to particular examples.[10] In *He Maunga Rongo*, the Tribunal said it could not undertake a case-by-case analysis of all public works takings, but it was 'clear from the evidence available' there had been 'sustained Treaty breaches'.[11]

For the purposes of this priority report, we too consider it neither practical nor necessary to conduct a granular analysis of every single title of landlocked Māori land in the inquiry district. Instead, as noted, we use examples from the evidence to illustrate the issues we must resolve in order to make our findings.

We respond directly here, however, to the Crown's argument that 'fact specific' matters such as terrain and climate (and the resulting unsuitability of land for pastoral farming) must be considered in each case of landlocking. We accept that these characteristics may have influenced Māori and Crown motivations, but this does not mean they were independent causative factors in their own right. As such, we reject the implication that they legitimately discounted the Crown's treaty obligations. Put simply, if the system that governed access to Māori lands had been working properly, by protecting the access Māori had always had to their lands before the native land laws came into force, those characteristics would have been completely irrelevant.

Moreover, several examples undermine the Crown's position that matters such as climate and topography influenced whether Māori applied for access to their lands upon partition. Ms Woodley found no record, for instance, of access being discussed when Motukawa 2F2 and other partitions were created in 1899, or when Motukawa 2B3D (which was landlocked for many years) was created in 1905. This was despite Motukawa being much more suited to pastoral farming than other blocks such as Ōwhāoko.[12] By contrast, in 1899 Waikari Karaitiana made applications for access to three partitions in the Ōruamatua–Kaimanawa block and one to Ōwhāoko D2 (see section 4.4.2).[13] In his case, at least, the fact that these lands were more rugged was no deterrent. Ongoing access to other landlocked blocks with perceived low economic potential would also surely have been valued by Māori at the time they were partitioned. Awarua 1DB2 and Aorangi (Awarua), for example (to which titles were awarded in 1903 and 1912 respectively), are the site of the culturally important maunga Aorangi and its surrounds.

In our discussion that follows, therefore, we have chosen not to entertain the Crown's argument that the mountainous topography and challenging climate of parts of the district may have been genuine contributing factors in individual cases of landlocking. As claimant counsel said, Māori could (and did) access these areas before the advent of the native title system. This suggests that landlocking had more to do with the imposition of that system than these 'fact specific' matters.

10. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 801
11. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 859, 872
12. Document A37 (Woodley), pp 272, 378
13. Document A37 (Woodley), p 477

4.3 I te mārama te Karauna ki ngā hua me ngā mate o te karapoti whenua? / Was the Crown Sufficiently Aware of the Prospect or Fact of Landlocking?

In addressing the extent to which the Crown was aware of landlocking as an issue before and following the Native Land Court's determination of title in the inquiry district, we first consider the Crown's approach to land access generally. This provides important context for assessing whether the Crown would or should have known that lack of access was an existing or potential problem for Māori land in this period.

The evidence confirms that Crown officials were aware from an early stage that access to land was an important component of settlement. Historian Cathy Marr wrote that 'from the earliest years of settlement', the Crown retained some prerogative right to make provision for roading in Crown-granted land that was sold to settlers. When the land was sold, the right to make future provision for roading was reserved in the Crown grant.[14] The Crown then developed legislation, from the 1860s, that provided for public works takings for roads (the Public Works Acts and their use in the inquiry district will be addressed in our main report). For our current purposes, we note that public works provisions were used to take land for what became the Taihape–Napier Road in the early 1880s.[15] The Crown also carried out takings under the 5 per cent provisions of the Native Land Court Act 1886, the same Act that first provided for the court to order access (on a discretionary basis) to Māori land when it was partitioned.[16]

The Government of the time further emphasised the link between European settlement and the provision of access. In 1892 the Minister of Public Works said the construction of roads to open up Crown lands for sale was, in comparison with other roads, 'of by far the greatest importance'. Then in 1895 the Minister said road access to Crown land needed to be provided before the land was settled.[17]

Alongside the Minister's comments, the Crown built a considerable network of roads in the Taihape district between 1890 and 1905. Again, this work was primarily to support the settlement of the region and was driven by the construction of the North Island Main Trunk Railway. As Mr Cleaver put it, a 'key focus' of road building in the Taihape inquiry district was to provide access to lands taken up by European settlers.[18] Reflecting this programme, between 1890 and 1905 the Crown acquired around 1,126 acres of Māori land (approximately 456 hectares) for roading purposes by means of public works takings. After 1905, an additional 115 acres were taken, indicating that the bulk of the takings for roading purposes occurred before 1905.[19] Mr Cleaver's evidence that road construction gradually lessened as land purchasing activity eased, again reflecting the pairing of provision

14. Cathy Marr, *Public Works Takings of Maori Land, 1840–1981*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 63
15. Document A9 (Cleaver), pp 188–189
16. Document A9 (Cleaver), p 189
17. Seddon, AJHR, 1895, D-1, p 12 (doc A9 (Cleaver), p 181)
18. Document A9 (Cleaver), p 195
19. Document A9 (Cleaver), pp 180–181

of access with European settlement, was compelling.[20] He also made the point that comparatively little of the roading formed in the inquiry district was intended to provide access to Māori land.[21]

We turn now to the question of whether the Crown was aware of landlocking as an issue before the determination of title in the inquiry district. It will be recalled that it was not an issue in Taihape in 1886 because the major title investigations and partitions of the blocks that now contain landlocked titles occurred after that date.[22] In fact, from the available evidence, it is difficult to tell what motivated the Crown to legislate for the provision of private roads to Māori land in the Native Land Court Act 1886. As noted in section 2.3.1.1, the claimants argued these provisions were passed with eventual access for settlers in mind, not the access needs of Māori. The relevant *Parliamentary Debates* of 1886, where the passing of the Native Land Court Bill 1886 is recorded, do not offer any insights.[23]

However, the desirability of providing road access to lands as they were partitioned had been discussed in Parliament before the passing of the Native Land Court Bill, suggesting this was a live issue of debate at that time. Speaking in the second reading debate on his private member's Bill, the Native Land Laws Amendment Bill, the member for East Coast Samuel Locke said that ideally his Bill should include a provision 'for carrying out roads as subdivision [partitioning] goes on, so as to get to the different blocks'. He expressed a hope that, should his Bill progress and be adopted by the Government, the Government could insert such a measure in the legislation.[24] When Native Minister John Ballance spoke on the second reading, he opposed Locke's Bill, without referring to the suggestion that a clause on the provision of roads should be added.[25] Nevertheless, this discussion in 1884 suggests that Parliament, *before* the Native Land Court Act 1886 was passed, was aware of the desirability of providing access to blocks as they were partitioned.

Regarding the question of whether the Crown was aware of landlocking of Māori land in the Taihape inquiry district after 1886, the earliest evidence we received dated to 1896. Settler Alexander Munro wrote to the commissioner of Crown lands asking to lease both the Aorangi (Awarua) and Awarua 1DB blocks for a period of 21 years.[26] He said that neither block was 'accessible by road or even

20. Document A9 (Cleaver), p 181
21. Document A48 (Cleaver), p 76
22. Crown counsel noted that the blocks in the north and east of the district, where the significant areas of landlocked land are located, all passed through the Native Land Court between 1886 and 1912. The exception is Awarua o Hinemanu, title to which was not created until 1992: submission 3.3.44 (Crown), pp 2, 13.
23. 'First Readings', 19 May 1886, NZPD, vol 54, p 32; John Ballance, 7 August 1886, NZPD, vol 54, pp 331–332; 'Third Readings', 7 July 1886, NZPD, vol 55, p 335; 'First Readings', 7 July 1886, NZPD, vol 55, p 385
24. Samuel Locke, 17 September 1884, NZPD, vol 48, p 402
25. John Ballance, 2 October 1884, NZPD, vol 49, pp 158–159, 162
26. This was of course before the title to Aorangi (Awarua) had been investigated. Munro himself was uncertain of its status, describing it as 'a Native Reserve I think or more probably Crown lands': doc A37(h) (Woodley), p 180.

a bridle track'.[27] The commissioner replied: 'I have to inform you that as the land you refer to is Native Land, I have therefore no power to deal with it.'[28]

Lack of access to the Awarua 1D B block was again highlighted in Crown correspondence in 1900. That year, the anticipated expiry of a power to take land for roading purposes in the Awarua block led the chief surveyor to ask officials what roads might be needed.[29] The surveyor in Raetihi suggested a road through Awarua 1D A and 1D B. However, he did not say why it was necessary, or whether it was the Crown or Māori land – or both – that should be provided with access.[30]

Regardless, the evidence conclusively confirms that from about 1905 at the very latest, the Crown was aware that Māori land in the inquiry district was landlocked. Claimant and Crown counsel concurred that correspondence involving Crown officials showed this awareness in regard to specific blocks. As noted earlier, the valuer-general, for instance, reported to the Native Land Court in 1905 that leasing out Ōwhāoko D5 sections 2, 3, and 4 would cut off access to the balance of the Ōwhāoko lands because those sections were the means of accessing the public road.[31] In 1907 access to Ōwhāoko was again discussed, this time by an inspector for the Department of Agriculture in a report to the commissioner of Crown lands. The inspector described Ōwhāoko D5 section 1 as 'the key to the whole of Owhaoko', and said it was in the interests of the 'several Native Owners' that it should not be partitioned and should be leased as a whole block to preserve access to the lands beyond.[32] In the case of other blocks, Crown officials commented on access issues later, a 1914 report by the Crown lands ranger on Ōruamatua–Kaimanawa 4, for example, noting that the block had 'no legal road access'.[33] Also in 1914, the Department of Lands and Survey considered the lack of road access to Motukawa 2B3C.[34] In the case of Te Kōau A, staff of the Department of Lands and Survey raised the lack of legal access to the block in 1921.[35]

Evidence suggests that the Crown was becoming aware of landlocking of Māori land elsewhere in the country from the same time. As Dr Terry Hearn put it, 'One other difficulty was increasingly apparent by the middle of the first decade of the twentieth century, that of "land-locking" in which lands owned by Māori were surrounded by Crown or privately owned land and hence without legal access.'[36]

All this leads to the question of whether the Crown was sufficiently aware of the prospect or fact of landlocking in Taihape before 1912. In short, wider questions about the Crown's consultation on the native land laws in place from 1886

27. Munro to commissioner, 13 April 1896 (doc A37 (Woodley), pp 289–290; doc A37(h) (Woodley), pp 179–185)
28. Commissioner to Munro, 22 April 1896 (doc A37(h) (Woodley), pp 181–182)
29. Document A37 (Woodley), pp 288–289; doc A37(h) (Woodley), p 169
30. Document A37 (Woodley), pp 288–289; doc A37(h) (Woodley), p 172
31. Document A37 (Woodley), p 400
32. Inspector to inspector of stock, Wellington, 13 April 1907 (doc A37 (Woodley), p 401)
33. Document A37 (Woodley), p 480
34. Document A37 (Woodley), p 272
35. Document A37 (Woodley), pp 440–441
36. Wai 898 R01, doc A146 (Hearn), p 415. Dr Hearn presented this evidence in the Te Rohe Pōtae inquiry but it was discussed in this inquiry by Ms Woodley, claimant counsel, and Crown counsel.

are outside the scope of this report. We have also been unable to locate sufficient evidence to determine the causes behind the Crown's decision to include in the 1886 legislation a provision – section 91 – providing for private roads to be laid off to blocks of Māori land when they were partitioned or within five years of that date. We therefore cannot conclude whether section 91 was 'squarely aimed' at facilitating the progress of settlement rather than providing access to Māori land, as the claimants alleged. Ultimately, though, we do not believe it is necessary to establish this, as the prejudice was the same regardless.

4.4 Ko te Karauna Anake te Kaiwhakamana i te Karapotitanga o ngā Whenua Māori? / Was the Crown Solely Responsible for the Landlocking of Māori Land?

4.4.1 I whakamahia e te Māori ngā ara whakawhiti e tuwhera ana ki a rātau? / Should Māori have made more use of the access provisions?

In assessing the Crown's responsibility for the landlocking of Māori land in the inquiry district, it makes sense to begin with the legislation (which we have set out in some detail in chapter 2). The Crown called the provisions that were in effect between 1886 and 1909 'remedial measures',[37] but we do not believe this is an apt description. In 1886, in Taihape at least, there was no landlocking in need of remediation. The measures are really better described as access provisions, with a five-year grace period.

As we have outlined, section 91 of the 1886 Act provided for the court to order 'rights of private road' over partitions of Māori land. We do not know what the exact thinking behind this provision was because, as also noted, it was not discussed in the House as the Bill was being debated. Nor are there any helpful judgments: some modern case law mentions section 91 but does not touch on the interpretation of this historical provision, instead commenting more generally on its use to provide for private roads.[38] Under the section, to reiterate, the court was not compelled to make an order for access when the title was being partitioned; instead, it was simply able to order a private road at that time if it chose to. Alternatively, if any interested person applied, the court could make an order within five years of the date of the partition.

We have set out the Crown's submissions on this matter at section 2.3.2.2. To recap, the Crown thought 'the ideal time' to legally secure access on a title was when that title was created, whether it was a parent block or a subsequent partition.[39] Counsel noted that few applications were made at these 'critical times'. Counsel submitted that it 'remains unknown' why this was and why the court was

37. Submission 3.3.44 (Crown), p 14

38. *Deputy Registrar – Oharotu 4* (2010) 7 Taitokerau MB 234 (7 TTK 234), paras [7], [49]; *Deputy Registrar – Utakura 7* (2010) 7 Taitokerau MB 71 (7 TTK 71); *Whakatāne District Council – Part Allotment Matatā Parish 6* (2015) 124 Waiariki MB 282 (124 WAR 282); *Western Bay of Plenty District Council – Part Taumata 3A2B* (2015) 128 Waiariki MB 49 (128 WAR 49); *Butler v N F Fraser & Co Ltd Mangawhaiti 3B1 & Takahiwai 3A2* (2013) 2013 Chief Judge's MB 59 (2013 CJ 59)

39. Submission 3.3.44 (Crown), p 23

Map 7: The Ōruamatua–Kaimanawa block 1894 subdivision

not more proactive in ordering access itself. Counsel was quick to submit, however, that '[t]he Crown is not responsible for the actions of the Court.'[40] Regardless, counsel made clear the Crown's view that Māori shouldered some responsibility for their lands becoming landlocked because they did not take the opportunity to apply for access.[41]

The evidence certainly suggests that the time of partitioning was crucial. For example, the Ōruamatua–Kaimanawa block was partitioned into four large blocks

40. Submission 3.3.44 (Crown), pp 18, 23–24
41. Submission 3.3.44 (Crown), p 22

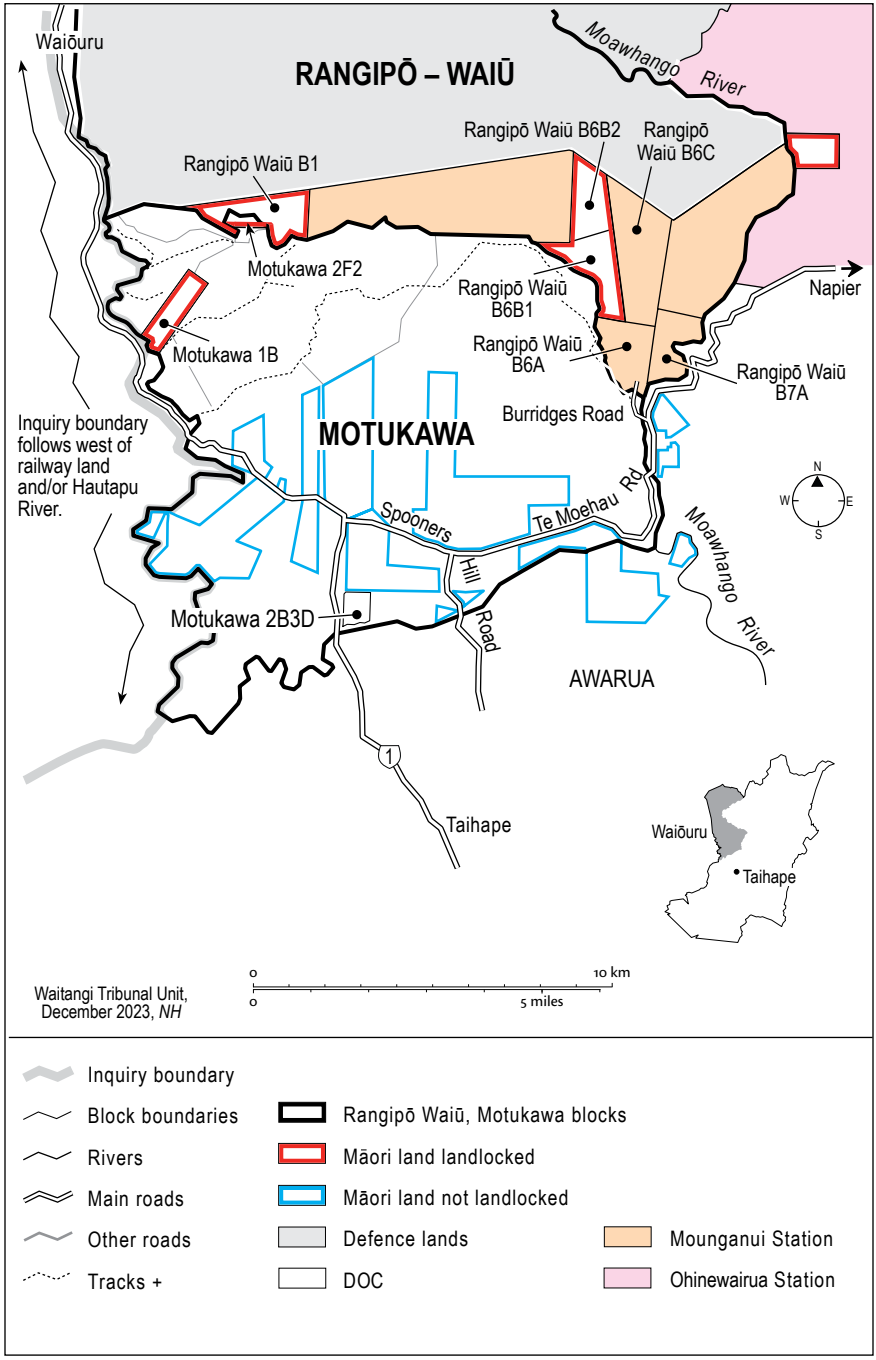
(numbered 1–4) in 1894 (see map 7). The Taihape–Napier Road ran through Ōruamatua–Kaimanawa 1 only. Ōruamatua–Kaimanawa 2 and 3 were partitioned in 1897 and no roadlines were ordered by the court. At that point the owners had no need of them, being able to access the road via Ōruamatua–Kaimanawa 1. In the period up to 1913, however, vital parts of Ōruamatua–Kaimanawa 1 were sold or leased, meaning access was now cut off by lands under private (European) control.[42]

The same applied to Rangipō–Waiū B: at the time of its partition into B1–B13 in 1905, it was accessible from the Taihape–Napier Road via what had become B7. In 1909 – after B7 was partitioned with no court order for access – B7A (which was closest to the road) was leased for 21 years, resulting in loss of access to the other partitions (see map 8).[43] And when Ōwhāoko was partitioned into A, B, C, and D in 1888, C and D lay alongside (or were bisected by) the Taihape–Napier Road. After C was partitioned in 1894, and D5 and D6 in 1899, these points of access were subsequently lost (or in the case of C7, were simply non-existent because of the terrain adjoining the road) (see map 9).[44]

We should also mention Motukawa 2B3D, which is no longer landlocked but was for many years (see map 8). Situated north of Ōpaea Marae, this block was created when Motukawa 2B3 was partitioned into four parts in 1905, without the court ordering road access.[45] Motukawa 2B3D was located some distance from the road, so when Motukawa 2B3B and Motukawa 2B3C were sold in 1912, permission was required from the owner of those blocks to access it.[46] It was not until a land exchange was achieved in 1962 that access was restored to the block.[47]

Despite the clear importance of the time of partition, however, we do not agree that the owners had responsibility for landlocking when they did not apply for access. We might ask why Māori should have had to take the initiative to do this themselves at all. The owners were merely holding their land as they had always done. Now, though, they were having to do so under a system of land tenure that had been imposed upon them in 1865. They had not been consulted about its rules nor had they agreed to its implementation. In many cases they would not have wanted the partitions that the court ordered, but the purchase of undivided interests was enough to prompt an unwelcome subdivision. As long as adjoining partitions connected with public roads, however, and thus ensured ongoing access to their lands, there was little incentive to make an application to the court. As we have seen, that was the situation when Ōruamatua–Kaimanawa, Rangipō–Waiū B, Ōwhāoko, and Motukawa 2B3 were partitioned. Formalised access via a court order risked land being more heavily rated or laden with debt from the cost of the survey and road construction.

42. Document A37 (Woodley), pp 475–476; doc A6 (Fisher and Stirling), pp 157–158, 166
43. Document A37 (Woodley), pp 335, 337–338, 377
44. Document A37 (Woodley), pp 397–398, 418, 425
45. Document A37 (Woodley), p 272; doc N8 (Biddle), pp 1–2; doc N8(a) (Biddle), pp 9–10
46. Document A37 (Woodley), p 272
47. Document A37 (Woodley), pp 274–275; doc N8 (Biddle), pp 1–5



Map 8: The Rangipō–Waiū and Motukawa blocks

In other words, it is perfectly understandable why applications for access were not made. The Māori owners were not acquiring land without reasonable access and thus hardly subject to the burden of 'buyer beware'. Instead, they were the unwilling recipients of a new tenure system imposed without their consent. The Treaty had guaranteed them the full, exclusive, and undisturbed possession of their land and they had every right to expect it.

We should add that other partitions or titles were created before the close of 1912 that had no access via other Māori land to public roads. Title to Te Kōau, for example, was investigated in 1900 and resolved after an appeal heard in 1906. But access to the block had already been compromised by the sale of Mangaohane G to private interests in 1893.[48] Similarly, when the court awarded title to Aorangi (Awarua) in 1912, any legal access along the preferred route – Winiata's Track – would have meant crossing private lands in the Mangaohane block. The same applied to Awarua 1DB2, which was created when 1DB was partitioned in 1903 (and which adjoins Aorangi (Awarua)): in fact at the time of this partition, all the surrounding parts of Awarua were owned by the Crown.[49] In none of these three cases did the court order access when it partitioned the land or awarded title.[50]

Other Tribunals have discussed the process of partitioning and its importance in the creation of landlocked land. In *He Kura Whenua ka Rokohanga*, the Tribunal noted that each time land was further partitioned, the possibility that land remaining in Māori ownership could become landlocked increased.[51] This certainly happened in other inquiry districts, where access to remnant blocks of Māori land was lost as surrounding lands were partitioned and sold.[52] In *Te Mana Whatu Ahuru*, the Tribunal heard evidence that several blocks had been landlocked ever since they were partitioned by the Native Land Court.[53] It also noted the Crown accepted that one of the detrimental impacts of Native Land Court titles in Te Rohe Pōtae was the creation of landlocked blocks.[54]

Where Māori land was left without legal access, other Tribunals have found that the Crown bears responsibility for that loss.[55] In *He Whiritaunoka: The Whanganui Land Report*, for instance, the Tribunal concluded:

> As a Treaty partner, the Crown should have paid more attention to the need for Māori owners to have proper access to their lands, especially since it promoted the

48. Document A37 (Woodley), pp 439–440
49. Document A37 (Woodley), pp 285–289
50. Document A37 (Woodley), pp 285–286, 439
51. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, p 40
52. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 622; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, pp 322, 327; Waitangi Tribunal, *He Whiritaunoka*, vol 2, pp 1071–1072, 1086; Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 2, pp 1293–1294
53. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 2, pp 1293–1294
54. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 2, p 1228
55. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 328; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 636; Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 1086, vol 3, p 1500

purchases and partitions that led to problems such as landlocking and lack of access to a road.[56]

4.4.2 I pēhea i te tonotanga o te Māori mō ngā ara whakawhiti? / What happened when Māori did apply for access?

On rare occasions owners did apply to the court for access and it is worth noting what happened in those cases. According to Ms Woodley's evidence, only two such applications for access were made before 1912, both when the 1894 Act was in force.[57] Counsel for Ngā Iwi o Mōkai Pātea submitted that a further application was made at some point before 1912 by Karaitiana Te Rango for access to Ōwhāoko D5 section 4, but we received no evidence about this application. In any event, counsel submitted that Karaitiana Te Rango 'suffered bankruptcy and the access application was not progressed'.[58]

The first of the two applications Ms Woodley referred to was brought by Waikari Karaitiana for access to Ōruamatua–Kaimanawa 1K, 1L, and 2G and to Ōwhāoko D2 (as mentioned above). This was heard in 1899.[59] The court decision stated '3 orders to be made accordingly'.[60] Ms Woodley considered that these orders applied to the three Ōruamatua–Kaimanawa blocks and noted there was no reference to an order being made for Ōwhāoko D2.[61] Crown counsel, by contrast, included the Ōwhāoko D2 application in her list of those that were successfully made and granted. Counsel used this list to support her argument that Māori could use the application provisions to gain access to their lands between 1886 and 1912.[62]

No information about the access order for Ōwhāoko D2 was located in the block order file and no reference was made to it in subsequent court minutes.[63] It is therefore difficult to conclude that this application was successful, especially as the only orders the minute book refers to seem to relate to the Ōruamatua–Kaimanawa 1K, 1L, and 2G blocks.[64] It may be that Karaitiana lodged the Ōwhāoko D2 application just outside of the mandated five-year time period after the block's July 1894 partition.

With regard to Ōruamatua–Kaimanawa, the court made separate orders for access to each of the three partitions – 1K, 1L, and 2G – from the Taihape–Napier Road by 'right of way' half a chain wide.[65] It appears that Karaitiana needed the access to support his sheep-farming operation.[66] However, it is not clear whether the access ordered was ever acted on: Ms Woodley located a reference

56. Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 1086
57. Document A37 (Woodley), pp 243, 398–399, 477; submission 3.3.44(b) (Crown), p 48
58. Submission 3.3.97 (Watson), p 5
59. Document A37 (Woodley), p 477; doc A37(i) (Woodley), pp 30–31
60. Document A37(b) (Woodley), p 7
61. Document A37 (Woodley), p 398
62. Submission 3.3.44 (Crown), pp 20, 23
63. Document A37 (Woodley), p 398; doc A37(b) (Woodley), pp 4–7
64. Document A37(b) (Woodley), pp 4–6; doc A37(i) (Woodley), pp 30–31
65. Document A37(b) (Woodley), pp 4–7; doc A37 (Woodley), pp 477–478
66. Document A46 (Walzl), pp 530, 533

in 1962 court records which suggested the right of way to 1K was never surveyed. Moreover, by 1903 Karaitiana's farming interests had failed, in no small part due to the substantial costs he had faced in finalising his titles through the court.[67] It is highly likely that Karaitiana faced the cost of surveying and constructing the access himself, which put it beyond his financial reach. Section 91 of the 1886 Act did not specify who should pay such costs, and only one of the few orders that do exist (which we discuss below) states who was liable (that is, the applicant).[68] Karaitiana's financial difficulties led to the sale of Ōruamatua–Kaimanawa 2G in 1907, 1L in 1911, and part of 1K in 1907. The remainder of 1K was sold in 1962.[69]

The other application was made in 1902 on behalf of Ani Kiritako for access to Ōwhāoko D5 section 1, a block which had recently been transferred to a Pākehā auction firm for mortgage purposes. The court ordered the access but specified that survey costs were to be borne by the applicant.[70] There is no further reference to the order in subsequent evidence put before us, suggesting that the survey was never completed. Presumably, this was because of the cost. What we do know is that the new Pākehā owners established an internal access road. We conclude that this road served as access to D5 section 1 because, from at least 1906, these owners also leased Ōwhāoko D5 sections 2, 3, and 4, which lay between D5 section 1 and the Taihape–Napier Road (see map 9).[71]

The Crown contended that a successful access application was also made in the period before 1912 for Taraketī 2 (as mentioned earlier), in 1897.[72] However, while the court did order access to Taraketī 2, no records of an application to the court for access were located on the application file for the block. We therefore cannot conclude that the court's order was based on an actual application.[73]

In sum, Māori land owners in Taihape made little use of their ability to apply for access under section 91 of the 1886 Act and section 69 of the 1894 Act; there were only two applications. While these were granted, we reject the Crown's view that they were 'successful', because neither applicant could afford to give effect to them. Moreover, Karaitiana's application for access to Ōwhāoko D2 appears to have fallen marginally outside the five-year grace period. As noted, the Crown suggested that Māori were somehow remiss in not making more applications, but if the Crown established a mechanism for access that no one used then the logical conclusion is that the fault lay with the mechanism itself. It appears to us that cost was the determinative factor, discouraging land owners from applying for access even after neighbours' consent was no longer required. Given the sheer expense of participation in the Native Land Court title investigation process, and the added costs

67. Document A37(b) (Woodley), pp 4–7; doc A37 (Woodley), pp 477–478, 498; doc A46 (Walzl), pp 528, 531
68. Document A37(b) (Woodley), pp 4–7; doc A37 (Woodley), pp 477–478
69. Document A37 (Woodley), p 478; doc A6 (Fisher and Stirling), pp 160–161
70. Document A43 (Stirling), pp 577–578; doc A46 (Walzl), p 202; submission 3.3.97 (Watson), p 5; doc A37(b) (Woodley), p 107
71. Submission 3.3.44(b) (Crown), p 48; doc A37 (Woodley), p 400
72. Submission 3.3.44 (Crown), p 23
73. Document A37(l) (Woodley), pp 22–23

of attempting to develop remaining land holdings in order to participate in the colonial economy, it is not suprising this was the outcome.

The court's impact will be addressed in our main report, but it is worth noting here that the introduction of the Crown's new title and purchasing system brought a period of vast change for Māori of the inquiry district. Indeed, Crown counsel made a number of concessions and acknowledgements about the native land laws.[74] The Crown accepted that these laws and the court process may have affected the decisions Māori made about applying for access.[75] The Crown also conceded, early in our inquiry, that the impact of the native land laws made the district's Māori lands more susceptible to fragmentation, alienation, and partition, and thus contributed to the undermining of tribal structures. These impacts had 'direct relevance', the Crown said, to the issue of landlocking.[76] Crown counsel accepted it may have been difficult for Māori owners to apply for access to lands that were in multiple ownership.[77]

Finally, we need to mention a further pre-1912 application for access. In 1910 the Public Trustee applied on behalf of the owner of Rangipō–Waiū B7B to get access to the block via an 'old road or track' that ran through B7A (which was owned at the time by Waikari Karaitiana). The court obliged by making an order for access. This did not, however, reach the public road and the Native Department informed the Public Trustee that a public road, running from the other direction, would need to be built under the Public Works Act, presumably (the Native Department thought) by the local authority. Whether the local authority would oblige and who would pay for the access was never tested, because Karaitiana and his lessee appealed the order to the Supreme Court. The court ruled that the order had been made without jurisdiction because, at this point, the Native Land Act 1909 applied rather than section 69 of the Native Land Court Act 1894.[78] (Crown counsel acknowledged that the 1909 law change restricted the opportunity to seek access orders, stating 'Whether this was an intentional decision to remove a remedial capacity or not, that was its effect').[79]

4.4.3 I puta i te kōti he whakatau whakawhiti ahakoa kāore he tono? / In the absence of applications, did the court order access at its own discretion?

As already explained, the court was able to exercise its own discretion about access and could order it at the time a block was partitioned. Leaving aside the issue of how the access would be funded, the court's almost complete failure to make access orders is another indictment on the Crown's legislative regime. Crown counsel argued that the conduct of the court was outside its control, but the Crown could have legislated to ensure access. In terms of whether the court exercised

74. Submission 3.3.109 (Crown), pp 5–10
75. Transcript 4.1.23, p 37
76. Submission 3.3.44(c) (Crown), p 1; submission 3.3.44(d) (Crown), p 2
77. Transcript 4.1.23, p 37
78. Document A37 (Woodley), pp 341–344; doc A37(b) (Woodley), p 66; doc A37(g) (Woodley), p 266
79. Submission 3.3.44 (Crown), p 14

its discretion, we have already noted the access order for Taraketī 2 in 1897. The only other order we are aware of that does not seem to have been prompted by an application was for Rangipō–Waiū B6 in 1907, where a judge ordered access through Rangipō–Waiū B7. However, Waikari Karaitiana and others then appealed the court decision awarding titles to Rangipō–Waiū B6–B13. In turn the court eventually made new orders for B6 and B7A–B7E in 1909, but without providing for access. As we have seen above, B7A was then leased out for 21 years. Access could theoretically have been ordered when B6C was further partitioned in 1909, but the court again ordered no access.[80]

4.4.4 E āhei ana ngā kaipānga ki te whakamahi i te tekihana 92 o te Ture 1886? / Could the owners use section 92 of the 1886 Act?

If section 91 of the 1886 Act – enabling the court to order 'rights of private road' over partitions of Māori land – ultimately offered little practical assistance to owners in Taihape, could they instead use section 92? As we outlined in chapter 2, section 92 allowed the court to order access over any land partitioned or divided under native land laws before the 1886 Act commenced (August 1886), provided owners sought access orders within two years of that date. This law was of little use to Māori of the inquiry district because, when it came into force, most of the partitioning that led to landlocking of their land had not yet occurred. Indeed, all the blocks of Māori land in the inquiry district that contain landlocked land today were partitioned after the Act commenced, not before. Section 92 therefore did not apply to the blocks under discussion in this priority report.[81]

4.5 Ko te Karauna te Kaiwhakamana i ngā Mahi a ngā Kaunihera? / Was the Crown Responsible for the Actions of Local Authorities?

As noted earlier, the parties agreed that local authorities played a role in the landlocking of Māori land. They disagreed, however, on the Crown's responsibility for the local bodies' actions. Before we discuss that issue, we first address Mayor Watson's account of previous actions by his council and its predecessor and the acknowledgements and apology he made within that submission. While the mayor did not restrict himself to the period up to 1912, we will keep a focus on that period in this section.

When the Rangitikei County Council was established in 1876, its boundaries included none of the landlocked blocks under discussion. At that time, the vast majority of the Māori land that is now landlocked lay within the Hawke's Bay County Council area, also established in 1876. In 1904 the boundaries changed, but still the southern part of Ōwhāoko, part of Te Kōau, and the Aorangi (Awarua) block remained in the Hawke's Bay County Council area. It was not until 1920, when the boundaries moved again, that most of the land containing the landlocked

80. Document A37 (Woodley), pp 335–338; doc A37(g) (Woodley), pp 219–221
81. Submission 3.3.44 (Crown), pp 2, 13

blocks under discussion came within the Rangitikei County Council boundaries.[82] In the circumstances, therefore, we consider Mayor Watson made his apology on behalf of past local government in the district. Aside from his apology, the parties did not present extensive evidence on the role that the local authorities played in causing Māori land to become landlocked.

The first local government body established in the district was the Rangitikei Highways Board in 1872.[83] The board carried out the earliest road building in the district, providing access from Marton to the Paraekāretu block in the south.[84] It ceased to function in 1883 when the Rangitikei County Council took over its responsibilities.[85] Both the highways board and the Rangitikei County Council were reluctant to push roads through Māori land during the 1870s.[86]

In terms of facilitating access, local government's role in the period when Māori land became landlocked (1886–1912) was to construct and maintain roads in the inquiry district (as mentioned in section 2.3). From 1876 until 1922, central government subsidised road construction undertaken by local authorities such as the Rangitikei Highways Board, the Rangitikei County Council, and the Hawke's Bay County Council. The Crown also built roads and then transferred ownership and maintenance responsibilities for those roads to local authorities.[87]

The major period of road-building in the inquiry district began with the construction of the North Island Main Trunk Railway in the 1880s. Philip Cleaver wrote that by the time it was completed in 1908, a 'fairly extensive' network was in place. Roads were built both to support the construction of the railway and to provide access to the lands that were purchased as the railway advanced through the district. The Rangitikei County Council was involved in this work along with the Public Works Department and the Department of Lands and Survey, which were both departments of the Crown. A significant proportion of these roads were formed through lands that, at that time, were still in Māori ownership.[88]

As noted in section 4.3, the Crown took 1,126 acres for roading purposes between 1890 and 1905, and 115 acres after 1905.[89] The available evidence does not provide detailed information on the responsibilities of local authorities in terms of these roads. Despite the mayor's genuine regret about past council actions, therefore, we lack the requisite evidence to draw firm conclusions about the extent of the local authorities' responsibility for the landlocking of Māori land. We leave comment

82. Document A37 (Woodley), pp 53–57. Landlocked blocks that lay outside the Rangitīkei council boundaries were the northern part of Ōwhāoko, most of Awarua-Hinemanu, and parts of Te Kōau, among others. Other councils that had responsibilities within the inquiry district over time included the Kiwitea and Pohangina County Councils, and Waimarino County Council.
83. Document A5 (Bassett and Kay), p 7
84. Document A9 (Cleaver), p 179
85. Document A9 (Cleaver), p 178
86. Document A9 (Cleaver), p 179
87. Document A9 (Cleaver), p 178
88. Document A9 (Cleaver), p 179
89. Document A9 (Cleaver), p 181

on whether these authorities made sufficient efforts to contribute to rectifying the problem for the next chapter.

On the issue of whether the Crown was responsible for local authorities' actions, however, we can be more definitive. We endorse the conclusions of previous Tribunals on the Crown's treaty responsibilities when delegating authority to local bodies such as local councils, and on its continuing duty to maintain oversight over local authorities to ensure they act consistently with treaty principles. In *Tauranga Moana*, the Tribunal said the Crown had a responsibility to monitor the activities of local government and this duty of oversight was part of the Crown's duty of active protection.[90] *Te Mana Whatu Ahuru* said the Crown had a responsibility to ensure that local authorities acted consistently with the treaty.[91] We therefore reject the Crown's contention that the 'legal rights' of local authorities were as much beyond the Crown's control as factors such as 'climate, topography, remoteness, and demographics'.[92]

4.6 Ngā Tātaritanga me ngā Whakakitenga Tiriti / Treaty Analysis and Findings

In making our conclusions, we emphasise that Māori of the inquiry district had rights of access to their lands before the native land laws were introduced. Holding land under the tikanga of the time included the right of reasonable access to that land and to control access to it. These rights were protected when the treaty was signed. As the claimants pointed out, the English text of article 2 guaranteed to Māori the full, exclusive, and undisturbed possession of their lands and other resources. In the Māori text, Māori retained te tino rangatiratanga over their whenua, kāinga, and taonga katoa. At the time of the signing of the treaty, access was mediated by the prevailing tikanga. During the period from 1886 to 1912, however, the Māori owners of landlocked blocks had to rely on the Native Land Court to exercise its discretionary power to order access to their lands upon partition, even where they applied (within five years) to the court to make such an order. Alternatively, if adjacent blocks that lay between their own land and the nearest road were still in Māori ownership, allowing for continued access under tikanga, they could hope that situation prevailed.

For its part, the Crown seems to have become aware of the issue of landlocking of Māori land at the turn of the twentieth century, as its effects became more apparent. Despite the Crown's increasing awareness of access problems for Māori land owners, however, its priorities lay elsewhere. There is no evidence that it regarded the issue as sufficiently important to act upon; if anything, its native land legislation became more problematic for the owners of landlocked land.

Regardless of whether the access provisions in the legislation were useable, we do not believe that Māori land owners – in treaty terms – should have had to

90. Waitangi Tribunal, *Tauranga Moana 1886–2006*, vol 1, p 476
91. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 4, p 2243
92. Submission 3.3.44 (Crown), p 22

resort to them. They had not bought into a Crown land scheme, with attendant 'buyer beware' risks over access. Rather, they were merely holding onto their lands in a complex and costly system they did not want. The Crown, in exercising its duty of active protection, should have ensured that Māori owners kept access to their land without having to go to such lengths to maintain it. We agree with counsel for Ngā Iwi o Mōkai Pātea that the default, treaty-compliant position should have been the retention of access. The tenurial system was the Crown's creation and it was imposed without consideration for the distinct possibility of landlocking. Furthermore, the need for applicants to pay for the access was a particular disincentive, especially since viable access could bring additional financial consequences, such as a higher burden of rates. The Crown's position that Māori bore some responsibility for not making applications ignores these factors.

Without pre-empting the consideration of claims relating to the court in our main report, we observe that the Tribunal has said in previous reports that the court's process was, in itself, costly and demanding for Māori.[93] The Crown also acknowledged that the court processes involved 'significant costs' for Māori of the inquiry district, who sometimes had to sell land to meet these costs. The Crown further acknowledged that, even if they did not want to, Māori had no choice but to participate in the court system in order to protect their lands from the claims of others.[94] This burden has been set out thoroughly in the text of Professor Richard Boast KC's *Buying the Land, Selling the Land: Governments and Maori Land in the North Island, 1865–1921*.[95]

In the circumstances, it was a considerable challenge for the owners simply to retain access to their lands. We are reminded of the Tribunal's remarks in volume 4 of *Te Mana Whatu Ahuru* when referring to land lost through unpaid rates. The Tribunal noted that owners of Māori land found that 'merely retaining their property rights required them to exercise a degree of vigilance unfathomable to Pākehā'.[96] We consider that a similar situation applied in the Taihape district in maintaining access to land.

Even in the two cases where Māori owners made supposedly 'successful' applications, the cost proved insurmountable. The access application provisions in the Crown's native land regime from 1886 to 1909, therefore, yielded nothing for the owners of landlocked land in the Taihape inquiry district. Moreover, because the legislation did not require it, the court itself almost entirely failed to exercise its own discretion to order access. The Crown claimed the court's actions were beyond its control, but the legislation governing those actions certainly was not. The Crown's failure to ensure the native land laws worked to maintain owners' access to their lands represents a breach of its duty of active protection.

93. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 519–520; Waitangi Tribunal, *Te Urewera*, vol 3, pp 1270–1272
94. Submission 3.3.104 (Crown), pp 7–8
95. Richard Boast, *Buying the Land, Selling the Land: Governments and Maori Land in the North Island, 1865–1921* (Wellington: Victoria University Press, 2008)
96. Waitangi Tribunal, *Te Mana Whatu Ahuru*, volume 4, p 2257

Further, the fact that the vast majority of landlocking in the district affected Māori land, not general land, indicates that the legislation under which it occurred was inequitable. Māori were more likely to end up with landlocked land under the new title system because they were retaining land they had long held, while settlers were actively buying their land and able to avoid purchasing blocks that risked becoming landlocked. In other words, the potential for landlocking in the Crown's land legislation was disproportionately borne by Māori.

We do not accept, either, that the Crown bears no responsibility for the actions of the local authorities that contributed to landlocking. However, we lack sufficient evidence to state exactly what those actions were in the period to 1912, despite Mayor Watson's apology. We have more to say about the local authorities in the next chapter.

Based on the preceding analysis of the Crown's role in the landlocking of Māori land, we now make findings. The courts and this Tribunal have repeatedly found that the duty of active protection is not a passive obligation, but 'extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.[97] Further, the omission to provide active protection is as much a breach of the treaty as a positive act that removes rights.[98] Leaving the protection of access to the discretion of the courts or within the responsibility of Māori does not meet the requirements of active protection 'to the fullest extent practicable.' We therefore find that:

- the general failure of the Crown to address the considerable risk of landlocking in its native land legislation;
- the specific failure of the Crown to require the Native Land Court (in provisions such as section 91 of the Native Land Court Act 1886 and section 69 of the Native Land Court Act 1894) to ensure Māori retained access to their land; and
- the failure, too, to meet the costs of creating that access

were breaches of the Crown's duty of active protection.

The duty of active protection also requires the Crown to monitor the efficacy of its laws to ensure they are working as intended. While we consider Māori should not have had to apply for access to their lands, it is also clear to us that the measures the Crown provided for them to do so before 1912 were wholly ineffective.

We therefore find that the Crown's failure to monitor the efficacy of access application provisions in its native land legislation (Native Land Court Act 1886 and Native Land Court Act 1894) breached its duty of active protection.

Furthermore, the court's discretion to order access and the owners' responsibility to pay for it was also a breach of the plain terms of article 2, which guaranteed te tino rangatiratanga over whenua or the 'full exclusive and undisturbed possession' of land. A situation where access to those lands was in doubt *unless*

97. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 664; Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 211
98. Waitangi Tribunal, *Report on the Orakei Claim*, p 191

Māori made an application to a court, or unless the court exercised a rarely used discretionary power to order access, could not possibly meet these guarantees.

As outlined in chapter 3, partnership under the treaty obliges the Crown, in exercising kāwanatanga, to allow Māori to exercise tino rangatiratanga in their sphere of authority, including over land. By allowing its legislation to result in the landlocking of Māori land, the Crown interfered with and undermined the tino rangatiratanga Māori had previously enjoyed in respect of their land.

We therefore find that the failure of the Crown to uphold the customary rights of Taihape Māori to access their lands breached the principle of partnership.

The principle of equity requires the Crown to act fairly between Māori and non-Māori and ensure they enjoy equivalent rights, protections, and privileges. The vastly disproportionate landlocking of Māori land in Taihape indicates that the land administration systems under which landlocking occurred were not equitable.

We therefore find that:

- The Crown's failure to ensure that owners of Māori land title had the same rights of access to their land as owners of general land title;
- the Crown's more fundamental failure to account for the different situations of Māori who were retaining their land and settlers who were purchasing their land (and thus subject to 'buyer beware' rules), when developing its land laws; and
- the Crown's failure to actively legislate to protect the pre-existing access rights of Māori, to avert the disproportionate landlocking of Māori land

were breaches of the principle of equity.

UPOKO 5

HE AHA NGĀ TIKANGA WHAKATIKATIKA A TE KARAUNA I NGĀ MATE O NGĀ WHENUA KARAPOTI, Ā, HE AHA NGĀ WHAKATOIHARA I PĀ KI NGĀ MĀORI O TE ROHE UIUI?

HOW DID THE CROWN ATTEMPT TO REMEDY LANDLOCKED MĀORI LAND AND WHAT PREJUDICE HAVE MĀORI OF THE INQUIRY DISTRICT SUFFERED?

5.1 Te Tāhū / Introduction

In the previous chapter, we considered the Crown's responsibility for landlocking in the district from 1886 to 1912.

This chapter discusses the Crown's efforts since 1912 to remedy the situation. It also discusses the prejudice suffered by Māori of the inquiry district due to such a large proportion of their lands being landlocked. As we have outlined, the Crown made a number of concessions about the post-1912 period. It acknowledged that the legislative regime in place from 1912 to 1975 was in breach of treaty principles as it provided no effective legal remedy and owners of Māori land were not treated equally under the law. The Crown accepted that its solutions since 1975 had been 'problematic', although it claimed it had been taking steps in the right direction. And it conceded that Māori had had limited opportunities to develop their lands and generate income from them, an insufficient land base with reasonable access for their present and future needs, and an experience that was akin to landlessness.

These concessions mean that much less of the history of the landlocked blocks since 1912 needs to be traversed in this chapter than would otherwise be the case. This is not to say that the post-1912 history is entirely uncontested, however. While the claimants welcomed the Crown's concessions, they nevertheless felt that some of the Crown's emphases were wrong, and they still regarded the Crown's current position as falling far short of the comprehensive solution they argued is needed. The prejudice the claimants suffered from 1912 to 1975 is also relevant to the post-1975 engagement over remedies. The claimants argued that the Crown's failure between 1912 and 1975 to even recognise their lack of recourse to achieve access exacerbated the existing and historical prejudice they suffered, and should have prompted a more committed consideration of their needs after 1975. They are therefore seeking compensation for those grievances. With this in mind, we aim to strike a balance in this chapter between conveying the scope of the Crown's failings, on the one hand, and focusing on the matters that are truly in dispute, on the other. We leave until the following chapter discussion of specific actions by

the Ministry of Defence and Department of Conservation that affected owners of landlocked Māori land.

5.2 Ngā Tono a ngā Māori mō ngā ara ā Ture mai i te Tau 1912 ki te Tau 2002 / Māori Attempts to Gain Legal Access, 1912–75

In setting out its concessions concerning the period 1912–75, the Crown remarked that 'in the absence of the consent of adjoining owner/lessee there would be little value in making an application under the remedial provisions'.[1] Despite this, three applications were made. Two were for access to Rangipō–Waiū B6C by Kingi Topia, a prominent rangatira who in 1919 received an OBE for his work to support the Crown's First World War effort by encouraging young Māori to enlist.[2] According to the evidence before us, he made these applications in 1923 and again in 1928, seeking access via different routes.[3] The 1923 application, for access via Rangipō–Waiū B6A (which had been sold to its then lessees, Cornford and Burridge, in February 1912), was dismissed for 'non-prosecution' in 1927.[4] The 1928 application was for access via B7A, which had been sold to its lessee, J A Pearson, in 1914 (see map 8). Pearson had subsequently sold it to Jessie Burridge in 1919. Mr and Mrs Burridge told the Native Land Court that they objected to Mr Topia's application.[5]

Ms Woodley felt the Burridges' objection should not have carried particular weight, since B7A had become European land in 1914 and thus their permission was not needed (given section 13(2) of the Native Land Amendment Act 1922 had removed the need for such permission). However, we are unsure this interpretation is correct. While B7A had passed out of Māori ownership after 1913, there is nothing to suggest that section 13(2) of the 1922 Act applied retrospectively (as we noted in section 2.3.3). If the Native Land Amendment Act 1913 applied, section 49(3) would have outright prohibited the court from ordering access over B7A, in our view, making the question of the Burridges' consent irrelevant. Section 49(3) also stated that no order could be made over lands subject to a valid lease at the time of the Act's commencement – which describes B7A – but only 'during the continuance of such lease', and of course the lease ended when Pearson purchased the block in 1914. All things considered, therefore, the court may not have had any jurisdiction to order access. Regardless, Ms Woodley did not find any more evidence on the application, suggesting it was not taken further. Indeed, it too was dismissed for want of prosecution in 1931.[6]

Crown counsel considered that the withholding of consent to access B6C by the lessee of B6A and B7A at the time of Mr Topia's applications in the 1920s was

1. Submission 3.3.44 (Crown), p 27
2. 'Kingi Topia OBE', *Taihape Daily Times*, 6 June 1919, p 4; Monty Soutar, *Whitiki! Whiti! Whiti! E! Maori in the First World War* (Auckland: David Bateman, 2019), p 486; doc L10 (R Steedman), p 14
3. Document A37 (Woodley), pp 348–349, 355
4. Document A37 (Woodley), pp 347–349
5. Document A37 (Woodley), pp 344, 355–356
6. Document A37 (Woodley), pp 338, 343–344, 355–356

determinative. In this, counsel seems to have been under the incorrect impression that both blocks were leased at the time.[7] According to Ms Woodley's evidence, as we have just set out, the blocks had been sold in 1912 and 1914 respectively.

The third application was made by the owners of Rangipō–Waiū B6B2, who sought access to their partition in 1926. This accessway would need to traverse B6A (see map 8). However, their application was also dismissed by the Native Land Court for want of prosecution.[8] Noting that the application was made at a similar time to Kingi Topia's fruitless attempt to get access to Rangipō–Waiū B6C, Ms Woodley said it was likely that the application for access to B6B2 came up against the same problem as Mr Topia's: the road would have to cross freehold land.[9]

Ms Woodley observed that, in situations like Mr Topia's, no agency was prepared to take responsibility for the problem and take the matter further. She described this as a kind of official 'indifference' to the plight of owners of landlocked land.[10] It is not clear to us, however, what power any agency might have had to resolve these issues, given the limits set by the prevailing law.

We comment briefly here on the extent to which the local authorities helped to rectify the problem of landlocking in the inquiry district after 1912. In short, the evidence before us is slight, but the absence of roads leading to areas of Māori land is inescapable. What we do have, however, is evidence that the local authorities exacerbated the situation by charging rates on Māori land that had no legal access (including Rangipō–Waiū B6C). We discuss this in section 5.3.3 below.

5.3 He Aha ngā Whakatika a te Karauna i Muri mai o te 1975, ā, i Puta Anō he Hua e Āhei ai te Māori ki ana Whenua kua Karapotia Rā? / What Remedies did the Crown Provide after 1975 and Did they Successfully Provide Access to Landlocked Māori Land?

5.3.1 Ngā ture whakatikatika mai i te tau 1975 ki te tau 2002 / Legislative remedies, 1975–2002

We have already set out the Crown's legislative remedies introduced since 1975 in section 2.2.4. As we noted there, a major legislative change arose in 1975 when the Property Law Amendment Act 1975 dropped the requirement for the consent of adjoining owners before access could be ordered. The change was prompted in part by cases of landlocked Māori land having been brought to the attention of the Department of Maori Affairs. The Minister of Maori Affairs, Duncan MacIntyre, initially sought a change to the law in 1972 to resolve the matter.[11] With a change of government in 1972, amending legislation was eventually passed in 1975, when Matiu Rata was Minister.

7. Submission 3.3.44 (Crown), pp 27–28
8. Document A37 (Woodley), p 363
9. Document A37 (Woodley), p 363. Today, Rangipō–Waiū B6B2 sits in the middle of Mounganui Station land, dividing the station in two (see map 8). Since November 2020, the station has had a lease registered over the block for $7,000 + GST per year.
10. Document A37 (Woodley), pp 356, 523
11. Document A37 (Woodley), pp 252–254

The need for applicants to pay for any access granted, pay compensation to the owner whose land would be crossed, and pay for High Court proceedings – as well as their lack of familiarity with the High Court – made this remedy unlikely to be used. For owners of Māori land in this inquiry district, this appears to have been the case. In her research, Ms Woodley found no evidence of them using the 1975 legislative remedy.[12] As detailed in the report by Messrs Neal, Gwyn, and Alexander, the legal pathway introduced by the 1975 legislation is still available under the Property Law Act 2007.[13] The options available under the Act apply to both general and Māori landlocked land.[14] An important aspect of the Property Law Act 2007 is that the High Court can now decline to grant an order if it decides that Te Ture Whenua Maori Act 1993, which covers only Māori landlocked land and not general landlocked land, provides a better way of resolving the access issue. In that case, the matter can be referred to the Māori Land Court.[15]

Provisions for addressing landlocked Māori land specifically were included in Te Ture Whenua Maori Act 1993. As we have set out, the consent of private land owners or the Crown was needed before the court could order access over private or Crown lands. In response to ongoing inquiries about landlocked land, in 1997 the Minister of Maori Affairs, the Minister in Charge of Treaty Negotiations, and the Minister of Transport set up a working party called the Landlocked Maori Land Officials Group and charged it with identifying possible solutions.[16] The working party recommended changes to Te Ture Whenua Maori Act 1993, including bringing the powers of the Property Law Amendment Act 1975 into Te Ture Whenua Maori.[17] This meant that some of the High Court's powers to order access to landlocked Māori land would be available to the Māori Land Court, and owners of Māori land would be able to access the more familiar and less expensive Māori Land Court for that purpose.[18] However, applicants would still face the perennial issue of costs, and any appeal against an access order over general land would lead to a full re-hearing in the High Court.

The authors of both technical reports on landlocked Māori land gave evidence that these appeal provisions discouraged applications.[19] Although legislators voiced in Parliament a clear desire to alleviate the problems associated with landlocked Māori land, they had little opportunity to put the desired provisions into law because the property rights of general land owners were still considered untouchable.[20] This emphasis on private property rights meant that lawmakers were effectively hamstrung. According to panel member Sir Doug Kidd – who, as

12. Document A37(l) (Woodley), p 17
13. Document N1 (Neal, Gwyn, and Alexander), p 26
14. Document N1 (Neal, Gwyn, and Alexander), p 27
15. Document N1 (Neal, Gwyn, and Alexander), p 27
16. Document A37 (Woodley), p 259
17. Document A37 (Woodley), pp 260–261
18. Document N1 (Neal, Gwyn, and Alexander), p 28
19. Document N1 (Neal, Gwyn, and Alexander), p 29; doc A37 (Woodley), pp 524–525
20. Document A37 (Woodley), p 265; transcript 4.1.11, p 361

a cabinet Minister, helped develop the original 1993 Act – legislators of the time were 'approaching the subject in a straitjacket' and had very few options available to them.[21]

Presenting Crown evidence, Rahera Ohia, deputy chief executive of policy partnerships at Te Puni Kōkiri, acknowledged that the amendments made to the access provisions in 2002 had 'not been as successful as the Crown anticipated'.[22] As stated in section 2.2.4, the 2002 amendments removed the need for consent from adjoining land owners before access could be ordered (bringing Te Ture Whenua Māori Act 1993 in line with the Property Law Amendment Act 1975). Crown evidence showed that, by October 2018, nine orders had been granted under the 2002 legislation from a total of 27 applications (plus one joinder application), although some applications were still being processed.[23] This pattern was reflected in the Taihape inquiry district, where Māori owners made three applications to gain access to their landlocked land using the 2002 amendments but none were successful.[24] Referring to the remedies the Crown provided through both the 1975 amendments to the Property Law Act and the 2002 changes to Te Ture Whenua Maori Act 1993, Crown counsel acknowledged that: 'In the Taihape inquiry district, neither the promise of the 1975 amendments nor the 2002 expansion of the Māori Land Court jurisdiction has resulted in access being "unlocked" to the high-altitude lands.'[25]

5.3.2 Ngā tono a ngā kaipānga ki te whakamahi i ngā whakatikatika o te tau 1993 me te tau 2002 i te rohe uiui o Taihape / Owners' attempts to use the 1993 and 2002 remedies in the Taihape inquiry district

In this inquiry district, applicants included the former owners of Ōwhāoko D6 section 3, who made multiple attempts to use Te Ture Whenua Maori Act 1993 to secure legal access to their land.[26] Access to this block had to cross Ngamatea Station, which we explained in chapter 1 includes a mixture of general and Māori land. It is worth pausing here briefly to set out more detail about Ngamatea, because it sits between the public road and multiple blocks of landlocked Māori land. As seen in map 9, the crucial partitions securing access to the rest of the Ōwhāoko blocks are Ōwhāoko D5 sections 3 and 4. In 1969 Terry Apatu, who had married into the family that owned Ngamatea, purchased the remaining shares of Ōwhāoko D5 section 4 from a Māori owner. The block is now wholly owned by

21. Transcript 4.1.11, p 361
22. Document M28 (Hippolite), p 5. Ms Ohia adopted the evidence of Crown witness Michelle Hippolite, who submitted the evidence originally but left her position at Te Puni Kōkiri before this evidence was heard.
23. Document M28(a) (Hippolite), pp 1–2
24. Submission 3.3.44(d) (Crown), pp 9–10
25. Submission 3.3.44(d) (Crown), p 9
26. We heard evidence that the owners of Ōwhāoko D6 section 3 had also previously tried to gain access to the block under the Maori Affairs Act 1953. The proposed access would have crossed private land that had left Māori ownership before 1913, however, and was therefore affected by the consenting requirements under the 1953 Act; see doc A37 (Woodley), pp 409–410.

members of the Apatu whānau and farmed as part of the station.[27] Mr Apatu then bought interests amounting to one-third of the title of Ōwhāoko D5 section 3 from Māori owners in 1972. According to technical witnesses Martin Fisher and Bruce Stirling, Mr Apatu acquired those interests in the block 'through purchase and not by customary right'. The evidence we heard showed that the Apatu whānau still own approximately one-third of the interests in the block, which is Māori land and has 21 owners in total. It is administered by an ahu whenua trust and farmed in conjunction with Ngamatea Station.[28] An irony of the situation concerning access to the landlocked Māori land in Ōwhāoko today, therefore, is that some of the key blocks adjoining the Taihape–Napier Road, and either owned or controlled by Ngamatea Station, are in Māori title. Thus access to Māori land is blocked by Māori land.

The attempts to gain legal access to Ōwhāoko D6 section 3 using Te Ture Whenua Maori Act 1993 began with an access application in 1996 (the only application the claimants made under the original 1993 enactment, according to the evidence we received). Under the 2002 amendment, the owners made a second access application in 2004 and efforts to reach access agreements in 2005 and 2012.[29] At various times, these attempts involved the claimants and Ngamatea Station in court proceedings and negotiations, including for exchanges of land to facilitate access. Because our focus is on Crown actions and omissions and the remedies the Crown provided to resolve access problems, we do not discuss these proceedings in detail other than to record that ultimately they were unsuccessful. Eventually the owners decided to sell Ōwhāoko D6 section 3.[30] As we noted above, the Crown acknowledged that the difficulty the owners faced in navigating the legal process to unlock the land had contributed to its sale.[31]

In 2003 Hape Lomax, a trustee of Awarua o Hinemanu but acting in his capacity as a trust beneficiary, applied for legal access to Awarua o Hinemanu.[32] Title to Awarua o Hinemanu was not awarded until 1992, after it was discovered in 1990 that survey and court errors in 1886 had cut it off from the rest of Awarua.[33] At the time of its creation, Awarua o Hinemanu was already landlocked. Mr Lomax's

27. Document A6 (Fisher and Stirling), p 114; doc A37 (Woodley), p 425; 'Block: Ōwhāoko D No 5 Subdivision 4 and Section 1 Survey Office Plan 34801 {Ōwhāoko D5 Sec 4}', Pātaka Whenua, Te Kooti Whenua Māori – Māori Land Court, https://customer.service.maorilandcourt.govt.nz/prweb/PRAuth/app/MLCPM_/xtAZLytWz7QIvNlXtGqs8MQiiEm8mler*/!STANDARD, accessed 26 September 2023

28. Document A37 (Woodley), pp 404–405; doc A6 (Fisher and Stirling), p 112; 'Block: Ōwhāoko D5 Sec 3', Pātaka Whenua, Te Kooti Whenua Māori – Māori Land Court, https://customer.service.maorilandcourt.govt.nz/prweb/PRAuth/app/MLCPM_/xtAZLytWz7QIvNlXtGqs8MQiiEm8mler*/!STANDARD, accessed 26 September 2023

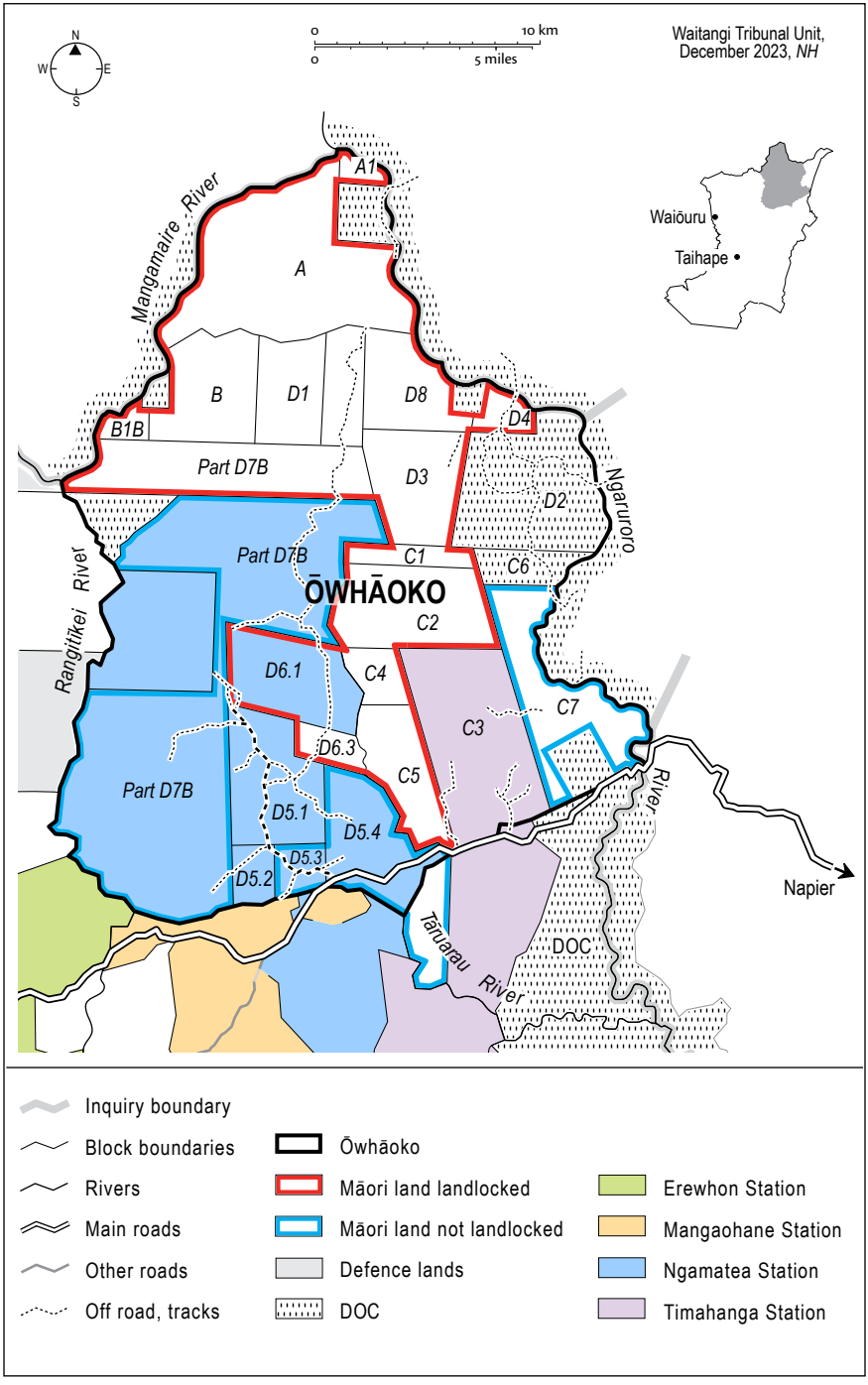
29. Document A37 (Woodley), pp 411–418; see also transcript 4.1.12, p [539]; doc I14(a) (Cross), pp 19, 21.

30. Document A37 (Woodley), p 418; see also *Steedman v Apatu – Owhaoko D6 Subdivision 3* (2015) 341 Aotea MB 164 (341 AOT 164).

31. Submission 3.3.44(d) (Crown), p 30

32. Document A37 (Woodley), pp 431–432; doc H6 (N Lomax), p 7

33. Document A37 (Woodley), pp 426–427; doc A8 (Subasic and Stirling), pp 188–189; doc K5 (P Steedman), pp 16–17



Map 9: The Ōwhāoko block

2003 application (for which the block's trustees later confirmed their support) sought access through Big Hill Station, which lies outside the inquiry district, beyond its eastern border (see map 12).[34] At one stage the parties met in an effort to reach an agreement over access, but were unsuccessful.[35] The Māori Land Court eventually dismissed the application in 2013 as the trust became mired in review and accountability proceedings that continue to this day. The applicants were granted leave to file a new application when they were in a position to do so.[36]

According to tangata whenua witnesses, trying to gain access to Awarua o Hinemanu through the Māori Land Court left the applicants with significant costs to pay and still without legal access.[37] However, Peter Steedman was clear that the process of applying had left an important legacy. 'The former Trustees should be credited for their attempts to gain access', he said. 'Their attempts were unsuccessful, but they left a legacy showing the unjust laws around landlocked lands.'[38]

We should note that counsel for Big Hill Station submitted that the application had also been very expensive for the station.[39] Counsel further submitted that the station owners had granted access to owners of Māori land on occasion and would continue to do so if required. However, they did not want owners of Māori land (nor members of the public) to have full and unrestricted use of the station's private farm tracks over which the station had agreed to an easement in favour of Department of Conservation staff (see chapter 6).[40] Despite this submission, Crown witness Bill Fleury, giving evidence for the Department of Conservation, said the department had started to look into ways it could facilitate access via the easement to the blocks of landlocked Māori land.[41]

In 2014 Wero Karena, one of the owners of Te Kōau A and a former trustee, applied for legal access to the block through Big Hill Station and public conservation lands.[42] Mr Karena had earlier worked to establish deer operations on the block.[43] The application was for legal access through Big Hill Station and also through public conservation lands. Mr Karena gave evidence that he ultimately

34. Document A37 (Woodley), pp 432–433, 473; doc A55 (Wai 2180 inquiry map book), pl 83
35. Document A37 (Woodley), p 433
36. Document M28(a) (Hippolite), p 3; doc M28(f) (Ohia), p 2; doc A37 (Woodley), p 433; see *Lomax v Apatu – Awarua o Hinemanu Trust* (2013) 22 Tākitimu MB 282 (22 TKT 282) and *Big Hill Station Ltd v Hemana – Awarua o Hinemanu Trust* (2015) 43 Tākitimu MB 218 (43 TKT 218); see also *Big Hill Station Ltd v Hemana – Awarua o Hinemanu Trust* (2015) 39 Tākitumu MB 16 (39 TKT 16). The case against Big Hill Station was dismissed because the then trustees could not account for some $200,000 in Ngā Whenua Rāhui funding that could have served as security for costs regarding the position of Big Hill Station Ltd. Once these funds were dissipated, the trust no longer had enough money to satisfy a costs award should their application for access prove unsuccessful. In any event, with the loss of those funds at the hands of former trustees, the trust could not afford to continue with the case, so its application for access did not proceed past a preliminary interlocutory stage.
37. Document G13(f) (R Steedman), pp 3–4
38. Document K5 (P Steedman), p 17
39. Submission 3.3.41 (Big Hill Station), p 7
40. Submission 3.3.41 (Big Hill Station), p 1
41. Transcript 4.1.19, p [225]; doc M7 (Fleury), p 17
42. Document J10(a) (Karena), pp 3, 9; doc M28(a) (Hippolite), p 3
43. Document A37 (Woodley), pp 445, 449; doc J10 (Karena), pp 8–9

'could not proceed [the] application' because he 'was not the registered proprietor' of the land – which is administered by the Te Koau A Trust. Moreover, the trustees of Te Kōau A did not support his application.[44] In separate proceedings initiated by Mr Karena in 2015, the trust indicated it had not supported the application because (in the words of the court) 'the access issues [were] expensive and uncertain' and the trust had 'found a workable and pragmatic arrangement' with the neighbouring owner while they sought 'solutions in other fora, such as the Waitangi Tribunal'.[45]

Therefore, none of the legal remedies introduced since 1975 have resulted in access to landlocked Māori land in this inquiry district. Claimant Richard Steedman said that members of the Mōkai Pātea claimant community had become 'very familiar' with the landlocked land provisions of Te Ture Whenua Maori Act 1993 from their attempts to use them, and had lobbied to change them.[46] He put it simply: 'The provisions on Landlocked Māori Land are not able to achieve a result for which they were designed.'[47] Pointing to the high costs involved and the fact that, at that time, appeals required a rehearing in the High Court, Mr Steedman said the provisions were not working for Māori generally and certainly not for Māori of the inquiry district.[48] He expressed in strong terms the frustration that came from having no workable legal remedy, saying that as each week and month went by without an effective means of access, 'our aspirations as Iwi are seriously impacted.'[49]

It was clear to us that each attempt to use the available remedies had cost all parties financially, emotionally, and in other ways – not only the Māori owners who applied for access, but also, to an extent, the neighbouring owners whose land the proposed access would cross.[50] Crown counsel accepted that the prejudicial effects of long-term landlocking could compound the difficulties of achieving access to landlocked Māori land. For example, owners' limited ability to generate income from their landlocked land could leave them without the financial means to compensate neighbours or establish roading. Loss of cultural connection to the land could also restrict the resources and relationships needed to pursue access solutions.[51] We add here that it is not difficult to see how these long-standing impacts could make it harder to coordinate the funds, expertise, and collective

44. Document J10 (Karena), p 9. Since 2014, Mr Karena has been involved in four sets of related proceedings concerning Te Kōau A and his overall dissatisfaction with the conduct of the trustees: *Karena v Steedman – Te Koau A* (2019) 76 Tākitimu MB 183 (76 TKT 183); *Karena v Te Koau A Trust – Te Koau A* (2017) 61 Tākitimu MB 25 (61 TKT 25); *Karena v Allen – Te Koau A* (2016) 55 Tākitimu MB 148 (55 TKT 148); *Allen v Karena – Te Koau A* (2016) 51 Tākitimu MB 91 (51 TKT 91); and *Karena v Haines–Winiata – Te Koau A Trust* (2015) 43 Tākitimu MB 200 (43 TKT 200).

45. *Karena v Allen – Te Koau A* (2016) 55 Takitimu MB 157 (55 TKT 157)

46. Document G13 (R Steedman), pp 6–7. Peter Steedman's evidence also showed a significant track record of efforts to lobby for improvements to the legislative remedies: doc H8 (P Steedman), pp 6–9.

47. Document G13 (R Steedman), p 7

48. Document G13 (R Steedman), pp 6–7

49. Document G13 (R Steedman), p 7

50. See submission 3.3.41 (Big Hill Station), pp 2–5, 7; submission 3.3.44(d) (Crown), pp 7, 10.

51. Submission 3.3.44(d) (Crown), pp 10–11

decision-making needed to pursue the legal remedies and manage relationships with other land owners.

Richard Steedman made a telling comment on the legal remedies' failure to deliver outcomes for Māori over recent decades. He said he had learnt it was best to avoid the courts completely. The costs involved, in every sense, made it simply too 'damaging' to attempt a court application:

> The best way to attempt to gain access using the current laws and situation is to stay away from the Courts and instead attempt to negotiate access agreements with neighbouring land owners. This is not to say this is any more successful than a Court application and could also be risky and expensive but is definitely less damaging.[52]

Richard Steedman's comments speak to the legal remedies' failure to provide owners of Māori land with practical solutions and to the frustration and pain such failure has caused. It is also significant that Mr Steedman's remarks concern the period in which the grant of access has no longer depended on the consent of neighbouring owners.

5.3.3 Ngā āheinga o te ture 2020 / The adequacy of the 2020 law change

The Crown took steps to improve the legal remedies again in 2020 by passing Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act and making corresponding policy changes to reflect the new law. Our preliminary views on the landlocked land situation in the inquiry district and the effectiveness of existing legal remedies were released in sufficient time (2018) to inform these changes to the legal remedies and policy, Crown counsel submitted.[53]

One of the problems we highlighted in our preliminary views was that, under section 326C(2) of the 2002 amendment, any applicants who were successful in securing access still had to pay the costs of compensating other land owners and actually forming the access. Another problem was that, under section 326D(3), appeals against Māori Land Court orders that affected general land would be heard in the High Court. This was likely to involve significant legal costs and to discourage owners of landlocked Māori land from pursuing access.[54] Given such flaws, we said in our preliminary views that the legal remedies were still failing to provide Māori of the inquiry district with reasonable access to their landlocked land.[55]

In 2018, we were unable to make recommendations and were restricted to issuing suggestions. As we set out in chapter 1, our first suggestion was that the Crown consider creating a contestable fund to support owners to pay the costs of creating reasonable access to their landlocked land.[56] This suggestion was

52. Document G13(f) (R Steedman), p 4
53. Submission 3.3.44(d) (Crown), p 12
54. Memorandum 2.6.65, p 4
55. Memorandum 2.6.65, pp 4–5
56. Memorandum 2.6.65, p 7

driven largely by our understanding, from the evidence presented to that point, that the major obstacles to achieving access were the costs of compensating other owners whose land would be crossed and the expense of forming and maintaining whatever access the court might order. Our second suggestion was that the Crown reconsider the definition of 'reasonable access' in Te Ture Whenua Maori Act 1993, especially to take account of topographical factors. We considered it important to avoid the potential for access to be ordered over impractical routes that did not take account of rugged terrain and other natural obstacles.[57] Our third suggestion was that 'reasonable access' should take account of both cultural and commercial purposes for the landlocked blocks. This was driven partly by the evidence we had heard about the vital importance to the claimants of achieving practical legal access so they could act on their commercial aspirations for their lands, as well as their cultural obligations. Our preliminary view was that, in some cases, these needs would be satisfied only if reasonable access was suitable for vehicles, not just walking tracks.[58]

The Crown's recent changes to the law and policy have only partially addressed the concerns with the remedies we outlined in 2018. Below we outline the 2020 changes to Te Ture Whenua Maori Act 1993, before considering the accompanying changes to policy.

Our concern that appeals against access orders affecting general land would be heard in the High Court has been addressed, with appeals now to be heard in the Māori Appellate Court. This not only reduces the costs associated with a High Court rehearing, but also brings the appeal into a court that is more accessible in terms of venue and cost and has expertise in tikanga and Māori land.[59] Taken together, this change to the appeal provisions removes part of the discouraging effect we identified in our preliminary views.

To an extent, our concerns about the definition of reasonable access have also been acted on in the 2020 amendment. We discussed some of these changes in section 2.2.4. The definition in the amended Act is now worded to recognise the land's topography and the need, in most cases, for access to be vehicular (that is, enabling 'services') and sufficient for both commercial and cultural purposes. Under section 326A, reasonable access now means 'physical access to land for persons or services that is of a nature and quality that are reasonably necessary

57. Memorandum 2.6.65, p 7
58. Memorandum 2.6.65, p 8
59. See, for example, *Kameta v Nicholas* [2012] 3 NZLR 573, para [9]: 'The Māori Appellate Court is constituted to hear appeals from time to time by three or more members of the Māori Land Court. Judges of that Court have been appointed having regard to their "knowledge and experience of te reo Maori, tikanga Maori and the Treaty of Waitangi". Its specialist nature and status is reinforced by s 61 of the Act, which enables the High Court to state a case to the Māori Appellate Court on any question of fact relating to the interest or rights of Māori in any land or on any question of tikanga Māori and provides that the opinion of the Māori Land Court, subject to any reference back, is binding on the High Court. In this case, the Māori Appellate Court's decision was influenced significantly by its collective knowledge of tikanga or Māori customary values and practices. Its decision, being a unanimous judgment of three judges, represents the result of a factual inquiry within the relevant statutory framework.'

to enable the owner or occupier to use and enjoy the land'.[60] The factors the court must 'have regard to' when considering applications to order reasonable access to landlocked land have also changed.[61] Under section 326B(4), they now include the applicant's relationship with the landlocked land and any water, site, place of cultural or traditional significance, or other taonga associated with the land, and the applicant's culture and traditions with respect to the landlocked land.[62] As Crown counsel suggested, these changes could result in greater weight being given to cultural relationships and practices for Māori land.[63]

Crown counsel also pointed to the development of an improved dispute resolution service, which could provide a statutory alternative to court proceedings. This process would be culturally appropriate for Māori and centred around relevant tikanga, counsel said.[64] Provided by the Māori Land Court but taking place outside of a court sitting, the service was free of charge for owners of Māori land.[65] It involved parties to the dispute being guided by a mediator through a process based on the tikanga that the parties agreed. The proceedings would be confidential to the parties. No record of the conversations that took place within the mediation would be publicly available on the Māori Land Court record. If necessary, a Māori Land Court judge could make an order to formalise what the parties had agreed. If no agreement was reached, then the mediator would notify the court and the options for next steps from that point would include proceeding to a hearing or further mediation with the same or a different mediator. However, we observe that use of the dispute resolution service is voluntary, meaning all parties involved in the dispute must agree to take part.[66] In situations where Māori seeking access and owners of general land are at loggerheads, which in our experience is not uncommon, the service will be of limited use.

Taken together, the changes introduced by the 2020 amendments represent an improvement to the existing legal remedies. They could reduce the cost of access applications. The change to appeal provisions further reduces the potential costs of an application in the long term.

However, the most crucial element of the legal remedies – the costs of forming the access and compensating other land owners – remains unchanged under the 2020 amendments. Even if a Māori applicant is successful in using the amendments and actually gets an order for access granted by the court, it is the applicant who

60. Document M28(d)(i) (Ohia), p 3
61. Submission 3.3.44 (Crown), p 4
62. Submission 3.3.44 (Crown), pp 4–5
63. Submission 3.3.44 (Crown), p 6
64. Submission 3.3.44(d), p 12
65. 'Dispute Resolution Service' (factsheet), Te Kooti Whenua Māori – Māori Land Court, www.Māorilandcourt.govt.nz, accessed 26 September 2023; 'Disputes about Māori Land', Te Kooti Whenua Māori – Māori Land Court, Disputes about Māori land | Māori Land Court (xn--morilandcourt-wqb.govt.nz), accessed 26 September 2023
66. 'Dispute Resolution Service' (factsheet), Te Kooti Whenua Māori – Māori Land Court, www.Māorilandcourt.govt.nz, accessed 26 September 2023; 'Disputes about Māori Land', Te Kooti Whenua Māori – Māori Land Court, Disputes about Māori land | Māori Land Court (xn--morilandcourt-wqb.govt.nz), accessed 26 September 2023

must meet the costs of forming the road. Under section 326C(2), the 'reasonable cost of carrying out any work necessary to give effect to the order is to be borne by the applicant', unless the court decides that any other person should pay for all or part of the work. Mr Gwyn told us that the costs involved in forming access would include professional design, construction, and certification of the road, as well as obtaining necessary consents. Taken together, these costs could run to '[m]any, many, many' millions of dollars.[67] Also, under the new iteration of the 1993 Act, the possibility that applicants could be required to pay compensation to other land owners continues (see below). It is clear that if all these costs are to be met by the applicant, they represent a significant and continuing barrier for owners of Māori land seeking to use legal remedies to get access to their landlocked land. Crown counsel acknowledged that the provisions requiring applicants to pay for compensation and for forming and maintaining the access are 'of great significance'.[68]

Crown counsel argued that the 2020 law changes, along with some of the policy changes, could in fact help the court to reduce the costs to applicants.[69] The court has the power to determine what a 'reasonable cost' of establishing the access might be, based on the particular facts. The court also has the discretion about what, if any, compensation should be ordered. The court has broad discretion on whether it will make other terms and conditions applicable, including whether the applicant will be responsible for maintaining the access after the road has been formed.[70] However, in the absence of further evidence, these projected cost reductions are only theoretical. Experience demonstrates that until the major cost impediments are removed, these changes are likely to be of only limited effectiveness.

In 2017, the Crown broadened the scope of its Whenua Māori Fund to assist with the expense involved in gaining access.[71] This fund was created in 2015 to support Māori owners and trustees to increase the productivity of their lands.[72] Aspects of its development were discussed in the Tribunal's report on the proposed reforms of Te Ture Whenua Maori Act 1993, *He Kura Whenua ka Rokohanga*.[73] The fund is targeted at supporting and assisting 'pre-commercial activities'. These include education and training, confirming the visions and aspirations that land owners have for their land, confirming land-use capability, options for development of land, business planning, developing value-added opportunities, and overcoming constraints to the development of Māori land.[74]

Under the 2017 changes to the Whenua Māori Fund, owners can apply to the fund specifically for help and advice on overcoming impediments to developing

67. Transcript 4.1.20, pp 58–59
68. Submission 3.3.44(d) (Crown), p 12
69. Submission 3.3.44(d) (Crown), p 12
70. Submission 3.3.44(d) (Crown), pp 12–13
71. Document M28 (Hippolite), p 7
72. Document M28 (Hippolite), p 6
73. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, pp 149, 242
74. Document M28 (Hippolite), p 6

their land, including options for accessing landlocked land.[75] They cannot, however, get help from the fund for capital expenditure such as forming accessways, compensating neighbouring land owners affected by access applications, or to pay for lawyers to work on access applications through the courts or draw up access agreements.[76] The Ōwhāoko B and D Trust made two applications to the fund, in 2017 and 2019, but neither related to access.[77] The Aorangi (Awarua) Trust has been successful in receiving funding to explore options for niche crops and products on Aorangi (Awarua) and Awarua 1DB2.[78] Under cross-examination, Ms Ohia said that essentially the fund's most practical use for owners of landlocked land was to support the development of business cases.[79]

In terms of funding to help with the costs of actually forming access, we received evidence that money from the Provincial Growth Fund could be used to help meet such costs, including building roads and fencing.[80] The Provincial Growth Fund was a three-year programme launched in February 2018.[81] It was not, however, a targeted fund specifically for landlocked land, but rather a broad-purpose fund aimed at regional investment and administered by the Ministry of Business, Innovation and Employment.[82] A stream of the fund was targeted at Māori economic development, with $100 million allocated in 2019 to projects that supported the development of Māori-owned land.[83] The projects had to be 'investment ready' with all consents and other legal requirements settled before funding could be considered. This meant that legal access had to have been granted by the Māori Land Court already.[84] On the question of how frequently the provisions had been used, Ms Ohia replied that the Provincial Growth Fund had received no applications to pay for the costs of providing access to landlocked land.[85] She did not know why.[86] She subsequently said that two applications had since been made for funding to build bridges to improve access to landlocked Māori land. She did not say where in the country these applications were from.[87]

The Provincial Growth Fund's broad overall focus on regional development is probably one reason why owners of landlocked land did not apply to the fund,

75. Document M28 (Hippolite), p 7
76. Document M28 (Hippolite), p 7
77. Submission 3.3.97 (Watson), p 6
78. Document M28 (Hippolite), p 7
79. Transcript 4.1.19, p [157]
80. Document M28(d)(i) (Ohia), p 6
81. 'Appendix 2: About the Provincial Growth Fund', Controller and Auditor-General, https://oag.parliament.nz/2020/managing-pgf/appendix2.htm, accessed 29 October 2021
82. 'The Provincial Growth Fund', Ministry of Business, Innovation and Employment, https://www.growregions.govt.nz/established-funds/what-we-have-funded/the-provincial-growth-fund/, accessed 7 May 2023
83. 'Māori Economic Development', Ministry of Business, Innovation and Employment, https://www.growregions.govt.nz/established-funds/what-we-have-funded/the-provincial-growth-fund/maori-economic-development/, accessed 07 May 2023
84. Document M28(d)(i) (Ohia), p 6
85. Transcript 4.1.19, pp [152], [160]
86. Transcript 4.1.19, p [152]
87. Document M28(f) (Ohia), p 2

despite its stream of funding aimed at the economic development of Māori land. We note Ms Ohia's comment, though, that Te Puni Kōkiri was committed to working with the fund to ensure owners of landlocked Māori land were aware of the fund and its potential availability.[88] Another issue we identified in hearing was that large Māori landholdings, like the landholdings of some of the trusts of landlocked land in our inquiry district, might not have been eligible, since applications to the fund would generally be considered from small to medium Māori landholdings.[89] The Provincial Growth Fund's three-year term ended in February 2021 and in May 2021 it was replaced with a new $200 million Regional Strategic Partnership Fund.[90] One of this fund's listed goals is to accelerate Māori economic aspirations, primarily through funding to support developments on 'undeveloped or underutilised' Māori land, but it does not state whether creating access to landlocked land is eligible.[91]

Finally, the Crown presented evidence of additional policy developments it had been pursuing in an attempt to assist owners of landlocked Māori land. We were told, for example, that Te Puni Kōkiri had started a pilot study on landlocked Māori land in our inquiry district.[92] Again, these initiatives seem potentially useful, but they pale in significance compared with the fundamental and unchanging problems of potential road construction and compensation costs. In short, without funding to build roads and pay compensation, access to landlocked Māori land will remain out of reach. In a district where even the Crown recognises that over 70 per cent of the Māori land is landlocked, that continuing failure to provide the necessary resources to enable and improve access can hardly be seen as a treaty-compliant approach.

The Tribunal has previously recommended that the Crown take a more active role in assisting owners of landlocked Māori land to overcome access problems. In the *Mohaka ki Ahuriri Report*, the Tribunal said the Crown had the ultimate responsibility for a particular block being landlocked. However, the Tribunal was prevented by section 6(4A) of the Treaty of Waitangi Act 1975 from recommending the return to Māori of land in private ownership (or the acquisition by the Crown of such land). In its report, the Tribunal also noted that it had discretion under section 7(1)(c) not to inquire further into a claim if there was an alternative 'adequate remedy or right of appeal' which the applicant could reasonably pursue. The Tribunal implied such an alternative remedy was available in respect of the block in question: the owners could make an application under Te Ture Whenua Maori Act 1993 (as amended under Te Ture Whenua Maori Amendment Act

88. Document M28(d)(i) (Ohia), p 6
89. Transcript 4.1.19, pp [159]–[160]
90. Hon Stuart Nash, 'Next step for regional economic recovery', Beehive.govt.nz, https://www.beehive.govt.nz/release/next-step-regional-economic-recovery, accessed 29 October 2021
91. 'Our objectives and allocations', Ministry of Business, Innovation and Employment, https://www.growregions.govt.nz/new-funding/the-regional-strategic-partnership-fund/our-objectives-and-allocations/, accessed 7 May 2023
92. Document M28(d)(i) (Ohia), p 4

2002) for an order relating to access to their land.[93] In later reports, by contrast, the Tribunal has placed more onus on the Crown to assist claimants in their use of that legal remedy. Drawing attention to the significant costs Māori would otherwise face, the Tribunal has recommended the Crown explore the feasibility of a Crown-sponsored initiative to fund the necessary expertise, including lawyers and surveyors, that Māori would need to apply for access through the Māori Land Court.[94]

In *He Kura Whenua ka Rokohanga* the Tribunal went further, saying first that the Crown needed to do more research on the problem of landlocked Māori land across the country. The Crown had acknowledged it had very little information about the extent of the problem, including how much of its own land was impeding access to Māori land blocks. Getting this information first was 'obviously essential', the Tribunal said, before any real solution could be found.[95]

In the same report, the Tribunal also noted that the key factors that made gaining access to landlocked Māori land difficult and expensive were the cost of negotiating or pursuing remedies, forming and fencing access ways, and other issues.[96] Accordingly, the Tribunal recommended that work 'continue urgently' on landlocked land and that access to finance be made a matter of 'urgent attention'.[97]

5.4 Whakatoihara / Prejudice

5.4.1 Whakawhanake ōhanga whāiti / Limited economic development

Prior to European settlement, the lands of the Taihape inquiry district provided a diverse range of traditional resources that sustained tangata whenua.[98] After regular European contact began in the mid-to-late nineteenth century, Māori quickly established commercial ventures on their land (to be discussed in our main report). Here we note only that hapū and whānau were involved in extensive sheep-farming from about 1870. Although estimates vary, by 1890 Māori were running more than 70,000 sheep in the inquiry district and more still in partnership with Pākehā farmers. While these flocks were principally in the vicinity of Moawhango, Pākehā leaseholders were also running substantial numbers on Ōwhāoko and Ōruamatua–Kaimanawa.[99] In several letters to the Crown in the

93. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 328; see also Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report*, p 336.
94. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 637–638; Waitangi Tribunal, *He Whiritaunoka*, vol 3, p 1497
95. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, p 244
96. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, p 243
97. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, pp 265–266
98. Document A12 (Walzl), pp 471, 527, 610, 671, 720, 728, 883–884; doc A45 (Armstrong), pp 15–16; doc L10(a) (R Steedman), p 7
99. Document A48 (Cleaver), pp 66–69; see also, for example, doc A16(a)(2), pp 12276–12277; doc A43 (Stirling), p 590.

1890s, local rangatira sought government assistance in order to continue their sheep-farming operations.[100]

Despite this, Māori involvement in sheep farming sharply declined from the 1890s. We heard submissions and evidence linking this decline to several causes, including financial costs and land losses related to participation in the Native Land Court process and Crown purchasing.[101] Land alienation continued into the twentieth century. By 1910, Māori involvement in agriculture, which dominated the Taihape economy as a whole, had dramatically reduced.[102] From that point, Māori opportunities for economic development were restricted and many came to rely on wage labour for their income.[103] In considering this evidence, we acknowledge that the wider topic of economic development is outside the scope of this priority report and we reserve further discussion for our main report.

It is important to note that from the early decades of the twentieth century, most of the lands remaining in Māori ownership were located in the more remote and mountainous regions of the district. This meant they had relatively less potential for economic development through uses like livestock farming.[104] Again, the Crown's concessions are relevant; it recognised that the severely restricted access to a significant proportion of these high-altitude lands limited the opportunity for tribal land development.[105] The Crown also recognised instances where Māori wanted to develop or farm their lands but could not 'as the units on their own, without access, were not economic'.[106]

Later in the twentieth century new opportunities for economic development emerged, including on the more remote and high-altitude landlocked land. Tribes of the inquiry district looked to exploit them – especially through business ventures that relied less on factors such as soil fertility and moderate climate, which were so important to livestock farming. From the 1970s, Māori made determined efforts to pursue these opportunities on their landlocked land. For example, deer farming, trophy hunting, and timber and honey production were among the commercial operations explored or pursued on the Ōwhāoko block.[107] In the 1970s, members of the Steedman whānau purchased Ōwhāoko D6 section 3.[108] The block of 556 hectares was already landlocked when they purchased it, but they intended to develop it for commercial purposes.[109] Claimants told us that the initial plan was to develop a deer-hunting unit on the land and also forestry.[110]

100. Document A16(a)(2), pp 12272–12277, 12414–12421; doc A43 (Stirling), pp 408–415, 592; doc A46 (Walzl), pp 181–186; doc A48 (Cleaver), p 176
101. Document A43 (Stirling), p 590; doc A48 (Cleaver), pp 116, 298
102. Document A48 (Cleaver), p 301
103. Document A48 (Cleaver), pp 293–294
104. Document A15(m) (Innes), p 115; doc A48 (Cleaver), p 19
105. Submission 3.3.44(d) (Crown), p 10
106. Submission 3.3.44(d) (Crown), pp 28–29
107. Document A37 (Woodley), pp 411, 415, 416, 419, 527
108. Document I14 (Cross), pp 3–4
109. Document A46 (Walzl), pp 300, 870–871; doc I14 (Cross), pp 2–4; doc H8 (P Steedman), p 8
110. Document H8 (P Steedman), p 8; doc I14 (P Cross), pp 4–5; doc A46 (Walzl), p 871

Elsewhere in Ōwhāoko, other hunting operations were running at the time of our inquiry hearings in 2017.[111] Mānuka honey production was also becoming an important business as the market grew in value and scale. The elevation and remoteness of the Ōwhāoko land made it suited for honey production.[112] In the 2014–15 honey season, for example, the Ōwhāoko B1B block was home to a honey venture supporting 544 beehives which produced 19 tonnes of mānuka honey.[113]

Between the 1970s and 2010s commercial ventures were also pursued on Te Kōau A. Some deer operations were developed on the block in the 1970s and 1980s, and huts were later built with a view to attracting deer hunters and eco-tourists.[114] Hape Lomax told us in 2017 that honey production was being pursued there as well.[115] On the nearby Aorangi (Awarua) block, whānau undertook live deer capture, and Peter Steedman said in 2018 that commercial deer hunting experiences were again being offered.[116]

Several of these ventures enjoyed some success. However, we heard evidence that for many commercial opportunities, poor access to the lands created serious limitations and costs and severely restricted the potential for further development.[117] High transport costs due to the lack of road access were a particular burden.[118] For instance, complicated arrangements for the transport of honey produced on landlocked blocks cut deep into the margins of the business. According to Richard Steedman, five or more different trusts had to use helicopters to access their honey crops. In some cases, a 'convoy' of large helicopters was needed, with costs running up to $100,000.[119] By way of example, we were told that helicopter transport to hive locations in Ōwhāoko B1B cost about $2,500 an hour.[120] The mayor of Rangitīkei, Andy Watson, described this evidence as sobering.[121]

In the area of trophy hunting, Peter Steedman said that two-thirds of the total income from this operation would generally have to be spent on hiring helicopters to transport hunters and equipment in and out.[122] Thus, a three-day hunt for a party of three would incur about $1,500 in helicopter charges, and return only about $900 in net income for the land owner.[123]

111. Document G18 (M Ormsby, D Ormsby, and T A Pillot), p 23
112. Document G13 (R Steedman), p 4; transcript 4.1.16, p 51; doc G18 (M Ormsby, D Ormsby, and T A Pillot), p 21
113. Document G18 (M Ormsby, D Ormsby, and T A Pillot), p 21
114. Document A37 (Woodley), pp 438, 445–446, 457; doc J10 (Karena), p 9; doc K5 (P Steedman), pp 9, 12–14; doc H6 (N Lomax), p 3
115. Document H6 (N Lomax), p 3
116. Document G1 (Wipaki), p 4; doc K5 (P Steedman), p 15
117. Document I3 (D Steedman), p 10; doc K5 (P Steedman), p 15; doc N1 (Neal, Gwyn, and Alexander), p 29
118. Document I3 (D Steedman), p 10; doc G1 (Wipaki), p 9; doc G5 (Smallman), p 5; doc N1 (Neal, Gwyn, and Alexander), pp 7, 29
119. Transcript 4.1.16, p 53
120. Document G18 (M Ormsby, D Ormsby, and T A Pillot), p 21
121. Submission 3.2.803 (Rangitīkei District Council), p 4
122. Document K5 (P Steedman), p 15
123. Document K5 (P Steedman), p 15

We also heard that attempts to economically develop land despite known access problems have ultimately failed due to the lack of access. As noted earlier, the Steedman whānau bought Ōwhāoko D6 section 3 as an investment property in the 1970s. The block adjoined Ngamatea Station and had no legal vehicular access (a situation we discuss more below).[124] Access therefore had to be negotiated with the station. The Steedmans' ability to develop the land was 'severely impeded' as a result.[125] While they were aware of the block's landlocked status when they bought it, and it is uncertain whether their planned economic developments of the land would have succeeded,[126] the access issues ultimately proved insurmountable. Though not representative of landlocked issues in the inquiry district (this block having been purchased rather than retained), this is one of many instances where attempts to develop lands economically despite access problems have proven very difficult.

Claimant witnesses shared their frustration and acute sense of mamae (hurt) at having their economic development plans thwarted by the high costs of accessing their landlocked land. As Richard Steedman told us:

> if there's one thing that has disturbed our whānau, my immediate whānau and my wider whānau over the years, it is landlocked Māori land.
>
> We have expended so much time attempting what is almost impossible with the type of resources that we have to try and solve these problems. Everywhere we have gone to attempt to develop, we have hit the roadblock of landlocked lands. It is a very sore and raw issue.[127]

5.4.2 Te ngaronga o ngā ara ki ngā wāhi tapu / Loss of access to wāhi tapu

Landlocked lands in the district contain wāhi tapu and other areas of cultural significance, and the lack of legal access means tangata whenua have considerable difficulty visiting, connecting with, and exercising kaitiakitanga over these sites.[128] During our hearings claimant counsel raised questions about definitions of wāhi tapu, and the Tribunal questioned witnesses about the related concept of wāhi tūpuna and whether both terms should be used in our inquiry.[129] Resolving such questions is beyond the scope of this priority report and we reserve further discussion of wāhi tapu and associated issues for our main report. For present purposes, we note the Tribunal's view in previous reports that wāhi tapu are places of historical and cultural significance.[130] We acknowledge too that past mistreatment of sites of cultural significance, along with other factors, may have caused tangata

124. Document H8 (P Steedman), p 8; doc I14 (P Cross), p 5
125. Document I14 (Cross), p 5
126. See submission 3.3.44(d) (Crown), p 40.
127. Transcript 4.1.10, p 98
128. Document A45 (Armstrong), pp 12, 350–362; doc H6 (H Lomax), pp 4–5
129. Submission 3.3.42 (Naden, Lambert, Sykes, and Delamere-Ririnui), pp 2–5; transcript 4.1.16, p 300
130. Waitangi Tribunal, *The Te Roroa Report*, p 227; Waitangi Tribunal, *The Report on the Management of the Petroleum Resource*, pp 33, 36

whenua to become reluctant to discuss widely the location and other details of such places in the district.

We heard evidence that landlocked wāhi tapu in the inquiry district included urupā – for example, the urupā situated near Opaea Marae, Awarua 3D3 17B. There was no direct legal access to this urupā, and whānau relied on the fact that adjoining land was owned by relatives, who permitted access.[131]

In addition, Hape Lomax told us of sites of special cultural significance that he understood existed on Te Kōau A. However, as Mr Lomax observed, even when it was possible to negotiate access, it was difficult for tangata whenua to reach them unless they were physically fit.[132] Mr Lomax had tried several times to connect people of his hapū, including rangatahi, with their ancestral lands in Te Kōau A and Awarua o Hinemanu. He told us that having to negotiate with other land owners for access made this considerably more problematic.[133] The lack of legal access to such places imposed a far-reaching hurt on his hapū by limiting their ability to connect for traditional cultural purposes with their lands, atua (gods, supernatural beings), and tūpuna: 'Ngāti Paki was born from the seed of Papatūānuku, so if we were to lose the land we've got nowhere to set our roots down. Spiritually we are still attached to the land we own, even if we can't get reasonable access to it.'[134] In the words of Mr Lomax, denying access to such places and connections amounted to 'a spiritual assault'.[135]

We have seen some of the lands in question during our site visits, at least from a distance or from above during the Crown-supplied helicopter visit. We therefore have some appreciation of the cultural connection claimants could derive from reconnecting with these ancestral lands. We endorse the statements made in previous Tribunal reports on the importance of access to lands for traditional cultural purposes.[136]

In *He Kura Whenua ka Rokohanga*, the Tribunal also acknowledged the impact of owners' continuing lack of access to their wāhi tapu and urupā. Such owners were cut off from vital cultural connections and unable to fulfil their core obligations as kaitiaki, that Tribunal found.[137]

131. Submission 3.3.33 (Hockly), p 20; submission 3.3.44(d) (Crown), p 27; doc J15 (R Steedman), p 4; doc J11 (Whakatihi), p 4. The evidence of Neal, Gwyn, and Alexander showed that an urupā also exists on Motukawa 2B16B2B. According to their evidence, there is no direct legal access to this urupā, and whānau also rely on the fact that adjoining land is owned by relations, who permit access: see doc N1 (Neal, Gwyn, and Alexander), p 48; doc N1(a) (Neal, Gwyn, and Alexander), pl 15.

132. Document H6 (N Lomax), pp 4–5

133. Document H6 (N Lomax), p 7

134. Document H6 (N Lomax), p 2

135. Document H6 (N Lomax), p 2

136. See, for example, Waitangi Tribunal, *The Report on the Management of the Petroleum Resource*, p 36.

137. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, p 40; see also Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 2, p 637.

5.4.3 Rēti, he pīkaunga taumaha / Rates burden

We return here to the role of local authorities. Even though many owners of Māori land could not access their lands or generate income from them, they were still expected to pay local body rates from the late nineteenth century.[138] Rating of Māori land will be further addressed in our main report. Here, we focus our discussion on the application and impact of rates on landlocked Māori land specifically.

Local authorities were able to charge rates on Māori lands in the inquiry district from 1882, and from 1896 the rating of Māori land increased significantly.[139] Māori of the inquiry district were not consulted about the introduction of rates charges. Councils generally showed little concern that much of the land could not support rates because it was undeveloped, had little development potential, and was sometimes landlocked.[140]

In fact, in many cases before the 1940s, local authorities made no allowance for landlocking when rating land; they still charged rates on landlocked blocks. When the rates were not paid, the legislation of the time allowed authorities to recoup arrears through several means, including liens and charging orders.[141] The Rangitikei County Council was particularly active in using charging orders to get payment for rates arrears, including from undeveloped and landlocked land.[142]

The necessity of having to pay rates on landlocked blocks, without the opportunity to develop them or receive income from them, sometimes led owners to consider alienating their land. For example, in 1929 Mr K H Hakopa, a representative of the owners of the landlocked Rangipō–Waiū B6C (discussed above) wrote to the Rangitikei County Council asking for a reduction in rates. More than £330 in rates had been registered against the block.[143] Mr Hakopa pointed out that lack of access prevented the owners from leasing the block, meaning they could not pay the rates.[144] Their only option, he said, had been to sell the block to the European owner of the adjoining land, who had refused to let them access their block through his land. Mr Hakopa also said the adjoining owner had paid less for Rangipō–Waiū B6C than would have been the case if the Māori owners had the option of selling to anyone else. They had no such option because the adjoining land owner was the only person who could access the block. Mr Hakopa complained that, even though the Māori owners had sold the land, they were still expected to pay the outstanding rates. Eventually the council agreed to halve the

138. Document A37 (Woodley), p 530; doc A37(j) (Woodley), p 8
139. Document A37 (Woodley), pp 23, 43, 136, 228
140. Document A37 (Woodley), pp 43, 228–235; see also submission 3.3.80 (Crown), pp 4, 20–21.
141. Document A37 (Woodley), p 230
142. Document A37(j) (Woodley), p 5
143. Document A37 (Woodley), pp 356–357
144. Document A37 (Woodley), p 357

amount owed for most of the period (until 1927), but charged the full amount for the most recent two-year period (between 1927 and 1929).[145]

When local authorities used charging orders to recover unpaid rates on landlocked land, this practice also contributed to land alienations.[146] Seven blocks of Māori land totalling 12,152 acres (approximately 4,918 hectares) were sold in the 1940s, 1950s, and 1960s after charging orders were imposed on them. Six of these seven were landlocked.[147] In another example, owners of the landlocked Awarua 1DB2 cited rates arrears as one of the reasons they considered harvesting native forest on the block in the 1970s and 1980s – a move that brought them into conflict with environmentalists.[148]

The local councils developed some policies to exempt Māori land from rates. However, they did not apply these policies consistently and rating legislation did not require councils to create exemptions.[149] One example relates to the East Taupo County Council's exemption policies in the nineteenth century and the first half of the twentieth century for the Ōruamatua–Kaimanawa, Rangipō–Waiū, and Ōwhāoko blocks.[150] The council applied exemptions to some of the Māori lands in these areas at various times between 1882 and 1954. However, after 1954, it applied rates to the land once again, even though most of the relevant area was undeveloped, landlocked, and did not generate any revenue.[151]

Few other records of rates exemptions were located before the 1940s, except for Ōwhāoko D6 section 1, which was exempted in 1927.[152] The block was landlocked Māori land, but unfenced. While there was no record of a lease over Ōwhāoko D6 section 1, the Ruddenklau brothers – who at the time were proprietors of Ngamatea Station and were leasing the adjoining block – were deemed to be using it. The Rangitikei County Council demanded that the brothers pay rates on it. The brothers refused, instead campaigning for the block to be exempted.[153] The block was eventually exempted in 1927, although the evidence shows that rates were later charged intermittently.[154] Elsewhere in the inquiry district, the Kiwitea County Council exempted blocks of Māori land in Awarua 1A3 from rates charges from 1944. Lands in this block had no legal access and were undeveloped.[155]

145. Document A37 (Woodley), p 357; doc A37(j) (Woodley), p 13. According to Ms Woodley's evidence, the sale of the bulk of this block was finalised in 1929, with the only owner who refused to sell being Kingi Topia.
146. Document A37 (Woodley), pp 231–234, 534–538
147. Document A37 (Woodley), p 233
148. Document A37 (Woodley), pp 294–300, 530; doc K5 (P Steedman), p 14
149. Document A37(j) (Woodley), p 8
150. Document A37 (Woodley), p 205
151. Document A37(j) (Woodley), p 8; doc A37 (Woodley), pp 205–208
152. Document A37(j) (Woodley), p 8; doc A37 (Woodley), pp 115–122. We note that today, Ōwhāoko D6 section 1 is landlocked for only some of its owners. The Apatu whānau are a part owner of Ōwhāoko D6 section 1 and also own adjoining Ngamatea Station land. They can therefore access Ōwhāoko D6 section 1 through their station land.
153. Document A37 (Woodley), pp 115–116
154. Document A37(j) (Woodley), p 8; doc A37 (Woodley), pp 115–122
155. Document A37(j) (Woodley), p 8; doc A37 (Woodley), pp 308–309

Many owners of landlocked Māori land did not benefit significantly from the major change in the rating of Māori land which took place in 1947 (to be covered in our main report). In that year, almost 58,000 acres (approximately 23,472 hectares) of Māori land in the inquiry district were exempted from rates.[156] Although this lifted the burden of future rates charges for some owners of landlocked Māori land, the policy was not applied consistently. Only some blocks were exempted, including lands discussed earlier such as Aorangi (Awarua), Ōwhāoko D2 and D3, Motukawa 2E2 and 2F2, and Ōruamatua–Kaimanawa 1V and 1U. The council continued to charge rates on other landlocked blocks such as Te Kōau A and Awarua 1DB2, which adjoined Aorangi (Awarua). Ms Woodley's evidence showed no clear reason for this inconsistency.[157] The council also did not wipe the unpaid rates that had accumulated before the exemptions were introduced. Owners were still expected to pay those outstanding rates on their landlocked land and could face further action if they did not do so.[158] In comparison, Crown land that was not occupied and not developed was not subject to local body rates.[159]

Councils in the inquiry district did not introduce dedicated rates remission policies applying to all landlocked Māori land until the 2000s. Following changes to the Local Government Rating Act 2002, local authorities were required to adopt rates remission policies in respect of Māori freehold land.[160] The Rangitīkei District Council introduced a policy in 2004, and the Hastings District Council (whose area by that time covered Te Kōau A and Awarua o Hinemanu) introduced its own policy in 2009.[161] Access to the land, its development, and its preservation and use were issues that councils could consider when making decisions to exempt Māori lands from rates. Under both policies, outstanding rates that had not been paid could also be written off, including where they applied to landlocked land.[162] We heard evidence that Horizons Regional Council, which also covers the inquiry district, had introduced a rates remission policy too, similar to the policy of the Rangitīkei District Council.[163]

5.4.4 Te whakamahi i ngā whenua karapotia e ētahi atu tāngata / Use of landlocked Māori land by other owners

Without legal access, owners were often unable to fence or otherwise protect their land from the trespasses of other users and their animals. Indeed, Crown counsel accepted Ms Woodley's evidence that landlocked land had been used by adjoining owners, even where they had no legal right to do so; this formed part of the

156. Document A37 (Woodley), p 150. This represents about one-third of all land remaining in Māori ownership in the inquiry district.
157. Document A37 (Woodley), pp 150, 152–154, 530–531
158. Document A37 (Woodley), pp 154–156; doc A37(j) (Woodley), p 8
159. Document A37 (Woodley), p 238
160. Document A37 (Woodley), p 40
161. Document A37 (Woodley), pp 72–73, 198–203, 238
162. Document A37 (Woodley), pp 73, 198–203, 238; doc H21 (P Steedman), pp 2–4; doc H21(a) (P Steedman), pp 1–5
163. Document H21 (P Steedman), p 3; doc H21(a) (P Steedman), pp 6–9

Crown's acknowledgement that lack of access was a factor in the sale of more than 9,000 hectares of Māori land.[164]

Ms Woodley referred to the example of Kingi Topia, whose efforts to gain access to Rangipō–Waiū B6C were discussed earlier. Mr Topia told a Public Works Department official in 1926 that the farmer of the adjoining land had grazed his animals on the block without permission for seven years; because Mr Topia did not have legal access, he could do nothing to stop it.[165] There was also unauthorised grazing of Rangipō–Waiū B4 in the 1940s.[166] In her evidence, Ms Woodley referred to several additional examples of this by adjoining owners in the Ōwhāoko, Motukawa, and Te Kōau blocks.[167]

Other owners suffered more recently from illegal use of their landlocked land, such as poaching in the Ōwhāoko and Aorangi (Awarua) blocks in the 1980s and 1990s.[168] At an unspecified point in time, the trustees of Te Kōau A found that others were using their block for the cultivation of illegal drugs.[169]

The unauthorised use of landlocked land by others has also featured in other inquiries. In Wairarapa ki Tararua, the Tribunal found that because the owners could not access or monitor their blocks, neighbouring private owners could use the landlocked land without permission.[170] In one case, a neighbour blocked access and then used the land without permission and without paying rent – even after two courts issued orders compelling the neighbour to stop trespassing.[171]

5.4.5 Nā te kore huarahi ture i ngaro ai ngā whenua karapotia? / Did lack of legal access lead to further alienation of landlocked Māori land?

The evidence confirmed that the challenges associated with a lack of legal access often resulted in land being leased or sold to adjoining owners who could access the block from their existing landholdings.[172]

For example, the landlocked block Awarua 2C8 has been leased continuously since the 1930s (and still is today) to a neighbouring farmer, who was the only land owner who could access the block.[173] The same is true of the landlocked Rangipō–Waiū B1 block.[174] Ms Woodley gave these and other cases of leasing as examples of the limited options available to owners who lacked legal access to their lands.[175]

164. Submission 3.3.44(d) (Crown), p 28
165. Document A37 (Woodley), pp 351, 528
166. Document A37 (Woodley), pp 369–370, 528
167. Document A37 (Woodley), p 528
168. Document A37 (Woodley), p 422; doc G1 (Wipaki), p 4
169. Document K5 (P Steedman), p 13
170. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 622–623; Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, p 40
171. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 623–624
172. Document A37 (Woodley), p 526
173. Document A37 (Woodley), pp 508, 527
174. Document A37 (Woodley), p 527
175. Document A37 (Woodley), p 526

Lack of legal access could also lead to lower rental returns on landlocked Māori land, such as the 'cheap rental' that the owners of the landlocked Rangipō–Waiū B1 agreed to in the 1970s.[176]

We were also provided with multiple examples where the lack of legal access contributed to the sale of landlocked Māori land.[177] In its concessions (outlined in section 4.4.2), the Crown accepted Ms Woodley's evidence that lack of access was a factor in 17 sales of blocks of Māori land in the district between 1912 and 1975.[178] The blocks sold under these circumstances were:

- Awarua 2C12A2A in 1953; 4C13B in 1953; 2C4 in 1954; 1A3C in 1965; 4C15F1H2 and 4C151H1 in 1966; 1A3A in 1968;
- Ōruamatua–Kaimanawa 1K and 2F in 1962;
- Rangipō–Waiū B5 in 1927 and 1928; B6C2 in 1929; B6C1 in 1946; B4 in 1950 (to the adjoining owners who had been using the land for grazing without permission as referred to in the previous section);[179] B2 and B3 in 1966;
- Motukawa 2E2 in 1951; and
- Ōwhāoko D5 section 2 in 1953.[180]

Later, the Crown added the 1968 sale of Ōwhāoko C3B, a block of approximately 3,601 hectares, to this list. By our calculation, this increases the total area of land sold from approximately 9,348 hectares to approximately 12,949 hectares.[181] Crown counsel emphasised that Ōwhāoko D6 section 3 – which Māori purchased back in the 1970s – had a different purchase and access history than lands Māori had retained continuously, but it also accepted that lack of access was a factor in that block's sale in 2016 as well.[182]

Other inquiries have considered the sale of landlocked land. In the *Wairarapa ki Tararua Report* the Tribunal found it 'unsurprising' that the combination of costs, frustrations, and difficulties would lead Māori owners to consider selling their landlocked land.[183] The Te Rohe Pōtae Tribunal noted that for owners of landlocked Māori land, often the only option has been to sell to those people who own the adjoining land: an outcome that one claimant said 'has happened on so many occasions'.[184]

176. Document A37 (Woodley), p 377
177. Document A37 (Woodley), pp 526–527
178. Submission 3.4.44(d) (Crown), p 28
179. Document A37 (Woodley), pp 369–370
180. Submission 3.3.44(d) (Crown), p 29
181. Submission 3.2.899 (Crown), pp 11–12; doc A57 (Herlihy), p [7]; doc A37 (Woodley), pp 153, 541; doc A6 (Fisher and Stirling), pp 69, 112, 114
182. Submission 3.3.44(d) (Crown), pp 30, 40–44
183. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 623; see also Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 2, p 1294; Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, p 40
184. Tangiwai Hana King, brief of evidence concerning Ngāti Mahuta and Taharoa (Wai 898 R01, doc J1), p 5 (Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 2, p 1294)

5.5 Ngā Tātaritanga me ngā Whakakitenga Tiriti / Treaty Analysis and Findings

5.5.1 Ngā whakatikatika ā ture mai i te tau 1912 ki te tau 1975 / Legislative remedies, 1912–1975

We accept the Crown's position that the remedies it provided for landlocked Māori land between 1912 and 1975 were ineffective and breached the principle of equity by treating owners of Māori land in a manner that was unequal and indirectly discriminatory. We reiterate, however, that our reading of the relevant laws differs from the Crown's, along with our understanding of why exactly they were discriminatory. The Crown considered its remedies had discriminated against Māori by imposing unequal consenting requirements – in particular, by making access to Māori land dependent on general land owners' consent, where the accessway would need to cross land Europeanised before 1913. But on our reading, the 1912, 1913, and 1922 remedies completely precluded the court from ordering accessways over land Europeanised before 1913, and land Europeanised between 1913 and 1922; they did not even give Māori the option of obtaining owners' consent to create accessways over this land (see section 2.2.3). Consenting requirements were therefore not the only problematic feature of the Crown's remedies between 1912 and 1975, in our view. However, we consider the Crown's concessions are broad enough to cover the additional inequity we perceive in the legislation.

We also accept the Crown's concession that the failure of its remedies between 1912 and 1975 left Taihape Māori with insufficient land with reasonable access for their present and future needs, breaching the principle of active protection.

Given these concessions, there is no need for us to provide an extensive treaty analysis. However, some further comment is required. First, we note that the Crown's obligation to monitor the efficacy of its laws applies to its 1912–1975 legislative remedies. The remedies' restriction of the court's power to order access over land Europeanised before 1913 remained in place for 63 years, though it effectively ruled out any prospect of remedy for owners of landlocked Māori land in Taihape (as the Crown acknowledged). This suggests that, for much of this period, the Crown either failed to monitor the efficacy of its access provisions, or did monitor them, but failed to act when it learned they were ineffective. We do not have evidence to determine which is the case, but note that either of these scenarios is inconsistent with the Crown's duty of active protection.

Secondly, as well as the principles the Crown identified, we consider the principle of redress applies to this issue. We have found the Crown breached treaty principles by causing Māori land to become landlocked, impinging on the tino rangatiratanga of Taihape Māori (section 4.6). As such, it had an obligation to provide redress to remove the prejudice it had caused. We say this even though the Crown did not concede any treaty breach in the period before 1912, when the landlocking occurred. To an extent, the Crown's concession for the period after 1912 contradicted its self-exoneration for the earlier period.

Regardless, we find that the failure of the Crown to supply effective legislative remedies for landlocking of Māori land between 1912 and 1975 breached the principle of redress.

5.5.2 Ngā āheinga o ngā whakatikatika a te Karauna mai i te tau 1975 / The adequacy of the Crown's remedies since 1975

We acknowledge that since 1975 the Crown has recognised there is a problem. As we noted, the first significant change was achieved through the Property Law Amendment Act 1975, which included provisions allowing for the creation of legal access to landlocked Māori land without the consent of owners of affected general land. This was a significant step, but the high costs associated with making an application through the High Court, as well as the costs of compensating other land owners and actually forming any access that might be ordered, made this remedy essentially illusory. According to the evidence we received, it was never used by Māori of the inquiry district.

While the Property Law Amendment Act 1975 was a remedy targeted equally at landlocked Māori and general land, and did not distinguish between them, Te Ture Whenua Maori Act 1993 recognised the special characteristics of Māori land and included provisions targeted specifically at providing access to Māori land. However, the consent of affected land owners was still required. In an effort to overcome these problems, Te Ture Whenua Maori Act 1993 was amended in 2002 to remove the necessity to gain consent. However, this remedy once again involved high potential costs as affected land owners would still need to be compensated and the road formed and maintained, in all likelihood out of the applicant's pocket. A further disincentive came via the appeal provisions, which meant that appeals from objecting parties would be heard by the High Court. No owners of landlocked Māori land in our inquiry district have been able to use these remedies to achieve access to their landlocked land.

Some of the disincentives to using the remedy have been ameliorated by the 2020 amendment to Te Ture Whenua Maori Act 1993, which has moved appeals to the Māori Appellate Court and introduced a dispute resolution service. However, depending on the court's decisions, the applicant is still liable for compensating other land owners and paying for the accessway to be surveyed, constructed, and maintained.

As we acknowledged in our preliminary views, providing a remedy requires a reasonable balancing of the interests of property owners affected by the long-standing problem of lack of access to landlocked Māori land.[185] We acknowledge, too, that the Crown has taken steps since 1975 to resolve the issue, responding to calls from the Māori community – including comments made in the course of this inquiry. However, the long-standing nature of the problem only adds to the injustice for those owners of landlocked Māori land. We also consider that the proof is in the numbers. No owners of landlocked Māori land in our inquiry district have been able to achieve lasting practical legal access, even by using the post-2002 legal remedies. Indeed, nationwide, few applicants have been able to achieve access using the current legal remedies.[186]

185. Memorandum 2.6.65, p 7
186. Document M28(a) (Hippolite), p 2

The underlying reason for this is that the remedies available since 1975 have all placed the onus on Māori to effect access. It has been the applicant who must compensate affected owners of general land and pay for the access to be built. The problem of remedies remains largely a financial one. So too is the solution. If owners of Māori land were able to get funding to compensate affected land owners and to survey, build, and maintain any access the court might order, they might have greater confidence in using the Crown's remedies, knowing that the costs involved would not be so enormous as to make the whole exercise futile.

We acknowledge that the Crown has reduced the costs associated with making legal applications by moving appeals to the Māori Appellate Court and introducing a dispute resolution service. But the funding streams available to potential applicants are not targeted specifically at landlocked land. The Whenua Māori Fund is geared towards Māori land, but its funds cannot be used to compensate land owners or actually build access to landlocked land. Instead, those funds are mostly focused on preparing business cases. Meanwhile, the Provincial Growth Fund, which has since been replaced, could be applied to for purposes such as constructing access, but was not utilised at the time of our hearings – probably because all consents and other requirements had to be achieved first, including legal access.[187] This meant that owners wanting to achieve access first had to pay for all the costs associated with the court and consenting process, before potentially getting money from the fund to build the access. The circularity of these well-intentioned yet ineffective options has been a source of added frustration.

We consider that, currently, these funding initiatives are insufficiently targeted and coordinated to resolve what has become the very long-standing and crippling problem of landlocked Māori land. Thus, while some assistance with funding is potentially available, the onus still falls on Māori to secure access to their own landlocked land, despite having continued ownership of those lands since well before the Crown arrived in the district.

In summary, after 1975, there were moments where it might have seemed that owners of Māori land would be provided, by their treaty partner, with a means to reach their landlocked ancestral lands. In particular, the access provisions of the Property Law Amendment Act 1975 and, almost two decades after that, Te Ture Whenua Maori Act 1993 and its amendments in 2002 and 2020, appeared to represent such a vehicle. However, with those remedies leaving the extraordinary costs of road construction and compensation to owners, the vehicle turned out to have no engine.

In this context, it is important to consider whether the Crown's duty of active protection has been met. As we set out in chapter 3, the treaty requires the Crown to actively protect the tino rangatiratanga of Māori over their lands. In the English text, this meant actively protecting the full, exclusive, and undisturbed possession of those lands. However, the remedies, or more accurately, the dearth of meaningful solutions, has left Māori owners of Māori land without legal and practical access to their landlocked land. The onus is still on Māori to establish and maintain

187. Document M28(d)(i) (Ohia), p 6

the access (albeit to a slightly lesser extent than before), and therefore it cannot be said that the plain terms of article 2 have been upheld. Moreover, as we outlined in chapter 3, the Crown should bear the cost of any work required to honour its duty of active protection, not pass that cost to Māori. The Crown's remedies have required Māori to largely fund the restoration of access to their land, falling short of this obligation. In practice, this failure has left the claimants unable to remedy their lack of access due to the high costs involved.

The treaty also requires that Māori should have the same rights of access to their landlocked land as owners of general land enjoy. Here, the principle of equity applies. As we explained in chapter 3, the principle of equity stems from article 3 of the treaty and imposes an obligation on the Crown to act fairly between non-Māori and Māori, and to ensure non-Māori interests are not considered to the disadvantage of Māori.[188] Also, where inequities and disadvantages for Māori exist, the Crown has a responsibility – in terms of its duty of active protection – to reduce these disparities.[189] Particularly where they stem from historical unfair advantage, overcoming these disparities may require more than efforts to ensure equality of opportunity today. In line with the principles of equity and active protection, the Crown may need to take active measures to 'restore the balance'.[190] The vast majority of landlocked land is Māori-owned land, not land in general title owned by non-Māori. The Crown's remedies introduced since 1975 have done practically nothing to redress the imbalance. This situation remains manifestly iniquitous.

This situation is especially unfair in light of the concept of 'buyer beware', which we discussed in our preliminary views and in section 3.4.4 of this report. There we said that 'buyer beware' puts the onus on people who are buying land to ensure before completing the purchase that the title is not deficient in some critically important way. This includes ensuring there is reasonable legal access to the land. Owners of Māori land were not in this position because they had held their lands since before the Native Land Court system of land titles was introduced. 'Buyer beware' therefore did not apply to them.[191] Crown counsel did not dispute this statement.[192]

Based on the preceding analysis, we make the overall finding that the remedies the Crown has provided since 1975 have not reduced the landlocking of Māori land in the Taihape inquiry district. As such, these remedies are in breach of the Crown's duty of active protection and the principles of equity and redress.

Regarding the flaws we have identified in the Crown's post-1975 remedies, we find that:

- By failing to take full responsibility for the cost of restoring access to landlocked Māori land and instead offering remedies that transferred much

188. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 212; Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 5
189. Waitangi Tribunal, *Te Urewera*, vol 8, p 3773; Waitangi Tribunal, *Tū Mai Te Rangi!*, pp 27–28
190. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 5
191. Memorandum 2.6.65, pp 6–7
192. Submission 3.3.44(d) (Crown), p 5

of the burden of that cost to Māori, the Crown breached its duty of active protection.

- By providing remedies that treated Māori as though they held equivalent responsibility for unlocking their retained land as general land owners held for unlocking purchased land, the Crown breached its duty of active protection and the principle of equity.
- By continually failing to remedy the inequity in landlocking between Māori and non-Māori owners, the Crown breached its duty of active protection and the principles of equity and redress.

5.5.3 Whakatoihara / Prejudice

We acknowledge the Crown's concession that the failure of its remedies between 1912 and 1975 left Māori of the inquiry district with insufficient land with reasonable access for their present and future needs, breaching the principle of active protection. We also acknowledge its concession that the right of Māori to maintain their customary observances and practices was significantly curtailed by the intergenerational and ongoing inability to enjoy access to most of their lands.

We also note that, until the availability of air access during the second half of the twentieth century, landlocking prevented some hapū and whānau from exercising kaitiakitanga and maintaining customary rights over sacred sites and wāhi tapu on their land. Invariably this has also led to an erosion of the customary knowledge bases of the affected tribes. We also add that the claimants impressed upon us the profound sense of mamae they have experienced, notwithstanding the connections they have been able to maintain, because it is simply so difficult to access their landlocked land.

We also acknowledge the Crown's concessions that encompass the significant impacts lack of access has had on the ability of hapū and whānau to develop their lands economically and to generate income from them. The Crown accepted that lack of access had led to the sale of a large amount of land in the Taihape inquiry district.

Where these sales occurred due to the flaws in the remedies provided between 1912 and 1975, the Crown accepted that its own breach of the treaty had contributed to this loss of land. It was not clear from the Crown's submissions whether counsel intended its concessions on the economic impacts of lack of access, and the inability to generate income, to also encompass the land's ability to support rates. However, we note that even though it was often impossible for owners to develop or generate income from their landlocked land, they were nonetheless subject to rates, which inevitably began to accumulate. In some cases the need to pay rates and rates arrears was among the factors that led owners to consider selling their landlocked land. As discussed, in the case of Awarua 1D B2, the need to pay rates influenced Māori decisions to investigate a possible logging venture that brought them into conflict with environmentalists.

We consider that the principles of active protection, equity, mutual benefit, the right to development, and options are relevant to these circumstances. As we outlined in chapter 3, the Tribunal has firmly established the Crown's duty to

actively protect the right of Māori to exercise te tino rangatiratanga in respect of their land. We discussed various dimensions of this duty, including the need to enable Māori to maintain cultural and spiritual relationships to the land, to act as kaitiaki of wāhi tapu and taonga, and to economically develop their land. We also noted that active protection requires the Crown to ensure local authorities act consistently with treaty principles. In this inquiry, we have seen clear evidence of the Crown breaching these obligations. As a result, the cultural component of the claimants' relationships with their lands has been significantly disrupted, as have their opportunities for economic development. Local authorities' imposition of rates charges has created further economic pressure.

The principle of equity, deriving from article 3 and granting to all Māori the benefits, rights, and privileges of British subjects, requires the Crown to act fairly between non-Māori and Māori, and to ensure non-Māori interests are not considered to the disadvantage of Māori.[193] The evidence confirms that landlocking has prevented most owners of Māori land in the district from experiencing the same benefits of land ownership as general land owners, whose land is by rule accessible. These benefits include the opportunity to develop their lands economically and generate income. Māori have suffered this inequity despite still owning very significant amounts of land.

Moreover, until 2020, when the Crown amended Te Ture Whenua Maori Act 1993, its remedies continued to wrongfully treat owners of landlocked Māori land as though they bore the same responsibility for solving their access problems as owners of landlocked general land (as we found in section 5.5.2). As already argued, this approach ignored the difference in situation between general land owners, who had purchased their land, and Māori land owners, who had retained their land. In failing to provide remedies that accounted for this distinction, the Crown perpetuated the inequity it had created by allowing Māori land to become disproportionately landlocked in the first place. By placing an unjustified burden on Māori to solve their lack of access, particularly in terms of cost, the Crown contributed to Māori land remaining landlocked and helped entrench the prejudicial effects of landlocking over several generations.

Further, the principle of the right to development is relevant to these circumstances. As set out in chapter 3, the rights of Māori protected under articles 2 and 3 included rights of property ownership. The right of owners to develop their properties as they choose is central to the enjoyment of full property rights.[194] Yet we have seen many examples where, due to their lack of access, iwi, hapū, and whānau of the inquiry district have not been able to develop their lands according to their own priorities. Where there is no legal and physical access, economic development is clearly very difficult, with implications for the claimants' right to development.

193. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 62; Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 185; Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 5

194. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 890–891

Despite these difficulties, some claimants have made extensive efforts to develop their land, particularly in more recent decades, with several successes. Some projects have seen Māori develop innovative solutions to their access problems and generate revenue for their communities. However, when reviewing these figures, the opportunity cost was very apparent. While owners of Māori land in the inquiry district have been able to establish mānuka honey and hunting businesses, for example, the costs of accessing helicopter transport have limited the profitability of these businesses and their potential to develop and return wider benefits to the business owners and their communities. In these circumstances it cannot be said that, despite owning vast areas of land, Māori have enjoyed the full rights of property owners.[195]

In this context, the principle of mutual benefit is also relevant when considering the consequences of landlocked land. As explained in chapter 3, the treaty's overall intention was to enable both peoples to live together, to engage in and to enjoy mutually beneficial relationships following settlement. In the situations we have analysed, Māori managed to retain some land under the new title system, but could not share in the expected benefits of settlement. In this chapter we have seen examples where, with their lands landlocked, the best that Māori owners can hope for is to stand on the nearest public road and look forlornly towards their landlocked ancestral lands, as we experienced on several site visits during the inquiry. In such circumstances, there has been a benefit, just not a mutual one.

Finally, we consider that the principle of options applies to the prejudice caused by landlocking. By curtailing the ability of hapū and whānau to maintain their customary practices and kaitiakitanga over land, landlocking has undermined their freedom to pursue a traditional way of life. Equally, by compromising their ability to successfully develop their land, landlocking has restricted their opportunities to participate actively in the commercial world.

Based on the preceding analysis of the prejudice caused by the landlocking of Māori land and the Crown's longstanding failure to remedy it, we make the following findings.

We accept the Crown's concessions that landlocking of Māori land in the district

- left Taihape Māori with insufficient land with reasonable access for their present and future needs, breaching the Crown's duty of active protection; and
- caused cultural and economic prejudice to Taihape Māori.

As the Crown did not specify which treaty principles applied to these forms of prejudice, we find that:

- By undermining the ability of Māori with landlocked land to maintain their customary practices and knowledge, including kaitiakitanga over wāhi tapu and taonga, the Crown breached its duty of active protection.
- By impairing the ability of Māori with landlocked land to successfully develop their land, if at all, and denying them the expected benefits of

195. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 890–891

settlement as a result, the Crown breached the principles of the right to development and mutual benefit.

- By reducing the opportunities available to Māori with landlocked land to pursue a traditional way of life, on the one hand, and to actively participate in the modern economy, on the other, or to do both, the Crown breached the principle of options.
- By allowing the cultural and economic disadvantage suffered by owners of landlocked Māori land to persist and compound over generations, exacerbating the inequity the Crown originally created in permitting the disproportionate landlocking of Māori land, the Crown breached the principle of equity.

Further to the Crown's concessions, we reiterate that the duty of active protection requires the Crown to ensure that bodies to whom it delegates power act in a treaty compliant way. Where local authorities perpetuated the prejudice caused by landlocking, the Crown was responsible for their actions.

We therefore find that, by failing to ensure local authorities took active steps to create access to landlocked Māori land, and by failing to prevent local authorities from exacerbating the situation through charging rates on inaccessible lands, the Crown breached its duty of active protection.

UPOKO 6

I PĀ ANŌ ĒTAHI MAHI A TE MANATŪ KAUPAPA WAONGA ME TE PAPA ĀTAWHAI I HĒ KĒ ATU AI NGĀ ĀHEINGA HUARAHI KI NGĀ MĀORI?

DID SPECIFIC ACTIONS OF THE MINISTRY OF DEFENCE AND DEPARTMENT OF CONSERVATION WORSEN ACCESS DIFFICULTIES FOR LANDLOCKED MĀORI LAND OWNERS?

6.1 Te Tāhū / Introduction

In this chapter, we first consider how specific Ministry of Defence actions affected the claimants' access to their landlocked land. We examine whether the Crown's concessions apply to those actions and, where they do not, consider whether these actions complied with treaty principles. Turning then to Department of Conservation actions, we discuss the evidence on the department's negotiations with private land owners for access to its own lands, and the impacts on access for the owners of Te Kōau A and Awarua o Hinemanu. Finally, we present our findings on those negotiations.

Aside from some limited discussion below of public works takings that affected access to landlocked land, claims relating to the Crown's actions in respect of public works takings, the Waiōuru Military Training Area, and environmental management will be considered in our main report. Here, we restrict our discussion to the question of whether these Crown agencies, in making certain key decisions, affected the ability of Māori to gain access to their landlocked land, including by means of the legislative remedies the Crown had provided.

6.2 Ngā Mahi a te Manatū Kaupapa Waonga / The Actions of the Ministry of Defence

6.2.1 Did the actions of the Ministry of Defence make it more difficult for Māori to access their landlocked land? / I whai wāhi anō ngā mahi a Te Manatū Kaupapa Waonga i uaua kē atu ai mō ngā Māori ki te whai ara ki ō rātau whenua kua karapotia?

In this section, we consider whether the Crown prioritised its own access interests over those of Māori with landlocked land when it acquired private land in the district for defence purposes. As outlined in chapter 2, the claimants alleged it had done so on two occasions: when taking Ōruamatua–Kaimanawa lands for public works in 1973 and when negotiating an exchange of land with Ohinewairua Station in 1990.

We accept the Crown's acknowledgements and concessions on the exchange of its defence lands with private land in Ohinewairua Station, in which it acquired land adjoining landlocked Ōruamatua–Kaimanawa 1U and 1V. We agree that the exchange exacerbated access problems for owners of these blocks.

Before the Crown acquired the land adjoining Ōruamatua–Kaimanawa 1U and 1V, the Māori owners had negotiated access arrangements with the owners of Ohinewairua Station through Ōruamatua–Kaimanawa 1S and 1T (see map 10). This access, which exited the Taihape–Napier Road at the southern boundary of Ōruamatua–Kaimanawa and led north to blocks 1U and 1V, followed a route that Māori had formerly used to travel north from what is now the Taihape–Napier Road.[1] This access arrangement was no longer available after the Crown's 1990 exchange because, as part of the exchange, the Crown acquired Ōruamatua–Kaimanawa 1S and 1T.[2] For Māori, continuing to use their traditional access route through Ōruamatua–Kaimanawa 1S and 1T to 1U and 1V would now mean having to cross defence land used as a training area. This was, as Ms Woodley put it, 'obviously problematic'.[3] Previously the owners could achieve access by making a phone call and crossing a farm; now they have to get permission from the Army.[4] Before granting permission, the Army has to consider all safety issues, including whether any army manoeuvres or live firing are scheduled, as well as the possibility of 'blinds' or unexploded ammunition.[5]

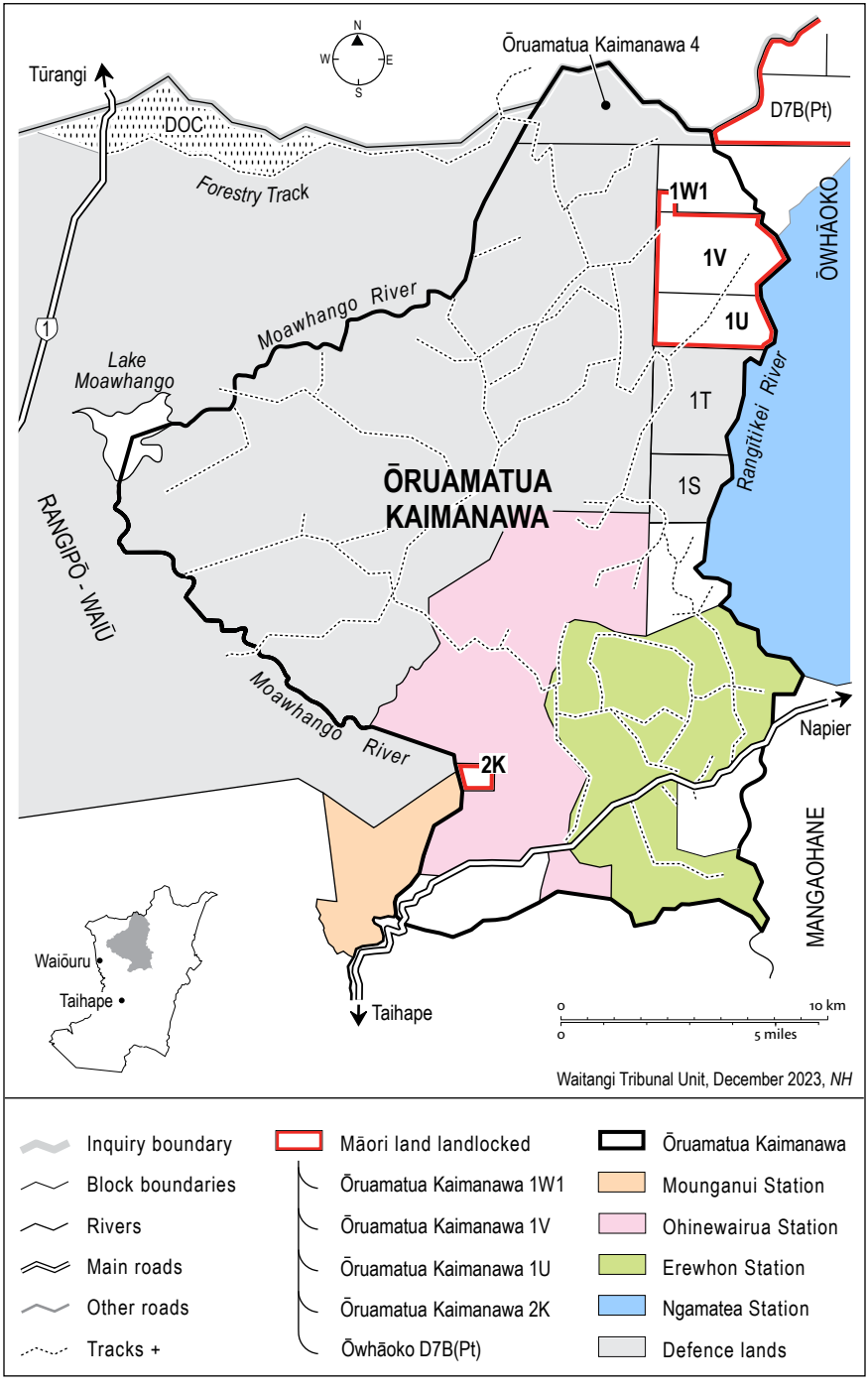
This is clearly an instance where a recent Crown action worsened an already difficult access situation for the claimants. The Crown acted rightly by conceding in this inquiry that this action breached the treaty and its principles and caused prejudice to the owners.

The Crown acknowledged it should have 'taken the owners' access to Ōruamatua–Kaimanawa 1U and 1V into account before arranging the land exchange'. In the Taihape context in particular, where Crown treaty breaches had contributed to extensive landlocking, 'a reasonable Crown aware of its Treaty duties to actively protect Māori interests' would have done so, it stated. The Crown also accepted that its flawed exchange made access to Ōruamatua–Kaimanawa 1U and 1V 'much more difficult' for the blocks' owners.[6]

The Crown therefore conceded that it failed to consult with or actively protect the interests of the owners of Ōruamatua Kaimanawa 1V and 1U when it negotiated its 1990 land exchange with Ohinewairua Station, and that this failure breached the treaty and its principles.

The Crown also made concessions on the taking of other Ōruamatua–Kaimanawa lands, including Ōruamatua–Kaimanawa 4. We will address these public works takings in our main report. Here we note particularly that the Crown emphasised in its submissions the effect of the exchange and these public works

1. Document A37 (Woodley), pp 501, 504–505; doc A9 (Cleaver), p 124
2. Document A9 (Cleaver), pp 121–124
3. Document A37 (Woodley), p 530; doc A9 (Cleaver), p 124
4. Submission 3.3.44(d) (Crown), p 18
5. Document M2 (Hibbs), pp 7–9
6. Submission 3.3.44(d) (Crown), p 19



Map 10: The Ōruamatua–Kaimanawa block and surrounds

takings on access to Māori landlocked land.[7] It also said the takings reduced the options for access that could have been developed if the lands had not become defence lands.[8]

In this context, the Crown's concession that it took more of the Māori land contained in Ōruamatua–Kaimanawa 4 than it required is also relevant to the question of access to the Ōwhāoko D lands.[9] One of the Ōwhāoko D blocks – D7B (Part) – is contiguous with Ōruamatua–Kaimanawa 4.[10] Leading from State Highway 1 is a forestry track that heads through public conservation lands towards Ōruamatua–Kaimanawa 4 (see map 10).[11] Under cross-examination, Department of Conservation witness Bill Fleury accepted that, although it was steep and very rugged in places, foot access via a poled track could be achieved from State Highway 1 through what are now public conservation lands, without requiring permission.[12] The route could then provide access to some of the landlocked blocks of Māori land in Ōwhāoko. There are also tracks leading through the defence lands.[13] In its submissions the Crown acknowledged that this was a case where access could be provided wholly through Crown-owned public lands, without requiring access over private land as well.[14]

However, when the Crown took land in Ōruamatua–Kaimanawa 4 in 1973, air transport offered the most convenient option for accessing and developing Ōruamatua–Kaimanawa 4. The owners of the block had partnered with a tourism operator, who had developed an airstrip on Ōruamatua–Kaimanawa 4.[15] When the owners became aware of the Crown's intention to take Ōruamatua–Kaimanawa 4, one of the trustees wrote to the Minister of Maori Affairs, Matiu Rata, to object. The trust had spent $8,000 in development, she said, but had recently begun to receive revenue from the firm's use of the airstrip and was investigating further development of the block.[16] The trust continued to object to the taking over a number of years.[17]

These wider issues will be discussed further in our main report; here, it is important to recognise the lost economic opportunity for the land's owners. Richard Steedman said the development opportunities were in deer recovery, which at the time was expanding rapidly and returning significant income on neighbouring blocks. Crown documents referring to such partnerships between Lakeland Aviation and owners of Māori lands in the area, including the former arrangement

7. Submission 3.3.44(d) (Crown), p 17
8. Submission 3.3.44(d) (Crown), pp 30–31
9. Document O3(a) (R Steedman), pp 15–16; submission 3.3.36 (Watson), p 10
10. Document A37 (Woodley), p 505
11. Document A37 (Woodley), p 505
12. Transcript 4.1.19, pp [254]–[259]. We note that Mr Fleury suggested that to avoid some of the most difficult terrain, in his view it would require crossing into defence lands; see also transcript 4.1.20, p 163.
13. Document A37 (Woodley), p 505
14. Submission 3.3.44(d) (Crown), p 15
15. Document A9 (Cleaver), p 103; doc M7(g) (Fleury), pp 7–9
16. Document A9 (Cleaver), p 103
17. Document A9 (Cleaver), pp 102–113

with the owners of Ōruamatua–Kaimanawa 4, acknowledged that deer recovery opportunities at the time were lucrative and driving increased interest in land prices and access to land.[18] The trust's 1973 letter protesting against the intended taking made the potential impacts on their economic development well known to the Crown, yet the Crown finalised the taking.

6.2.2 Ngā tātaritanga me ngā whakakitenga tiriti / Treaty analysis and findings

First, we emphasise that our comments here focus on a small number of Ministry of Defence actions affecting access to landlocked Māori land; broader issues will be considered in our main report.

We accept the Crown's concessions on its 1990 exchange of defence lands with Ohinewairua Station. This relatively recent action struck us as a particularly egregious example of the Crown's failure to protect or secure access arrangements for Māori owners of landlocked land, especially given the owners already had such limited options for accessing their land. This behaviour occurred at a time when discussion of treaty principles was at the forefront of political discourse following the landmark Court of Appeal decision *New Zealand Maori Council v Attorney-General* (the *Lands* case), which makes this example all the more inexplicable.

As well as the duties of active protection and consultation invoked by the Crown, we observe that the principle of partnership applies to this situation, given the owners' clear interest in the land the Crown sought to acquire. As a treaty partner, the Crown should have acted toward the owners in good faith, reasonably in the circumstances, and in a way that provided mutual advantage. In practical terms, this meant the Crown had 'a special duty to be a good neighbour', as the *Te Roroa Report* put it.[19] While that report did not expressly link this duty to treaty principles, we consider it aptly characterises the Crown's obligations as a treaty partner to facilitate access to neighbouring landlocked Māori land.

We turn now to the Crown's concession on the 1973 takings of Ōruamatua–Kaimanawa 2C2, 2C3, 2C4, and Ōruamatua–Kaimanawa 4. The Crown conceded that in carrying out these takings, it did not consult with or adequately notify all owners of these blocks. The impacts on the owners were multiple: they had no opportunity to tell the Crown how the takings would affect their access to their lands; the taking of land left them with less scope for developing accessways, reducing their chances of unlocking the land; and it was harder for them to gain direct access because any direct route would now cross defence lands.

The Crown also conceded that it did not adequately assess how much of the Ōruamatua–Kaimanawa 4 block it needed for military purposes and therefore took more than was reasonably necessary – the entire block. At the time, the block's owners opposed the proposed taking, expressing concern that it would undermine the potentially lucrative business (in deer recovery) they had begun developing. The likely impacts were made clear to the Minister of Māori Affairs, but the taking went ahead.

18. Transcript 4.1.20, p 169; doc M7(g) (Fleury), pp 7–9
19. Waitangi Tribunal, *The Te Roroa Report*, p 207

As discussed above (in section 2.3.7.5), claimant counsel disputed the Crown's characterisation of the taking of Ōruamatua–Kaimanawa 4, submitting the problem was not that the Crown took more land than it needed, but that the taking could scarcely be justified at all. These arguments over the soundness of the taking will be addressed in our main report. Here we are restricted to making findings on how the taking affected access to landlocked Māori land.

In summary, and in line with the preceding analysis:

- We accept the Crown's concession that, in its 1990 exchange with Ohinewairua Station, its failure to consult the owners of Ōruamatua–Kaimanawa 1U and 1V and actively protect their interests breached the principles of the treaty. In addition, we find that its conduct was inconsistent with the principle of partnership.
- We accept the Crown's concessions that its 1973 takings of Ōruamatua–Kaimanawa 2C2, 2C3, 2C4, and Ōruamatua–Kaimanawa 4 had detrimental impacts on legal access. Those concessions were expressed in terms of the duties of active protection and consultation. In addition, we find that the Crown's conduct was inconsistent with the principle of the right to development.

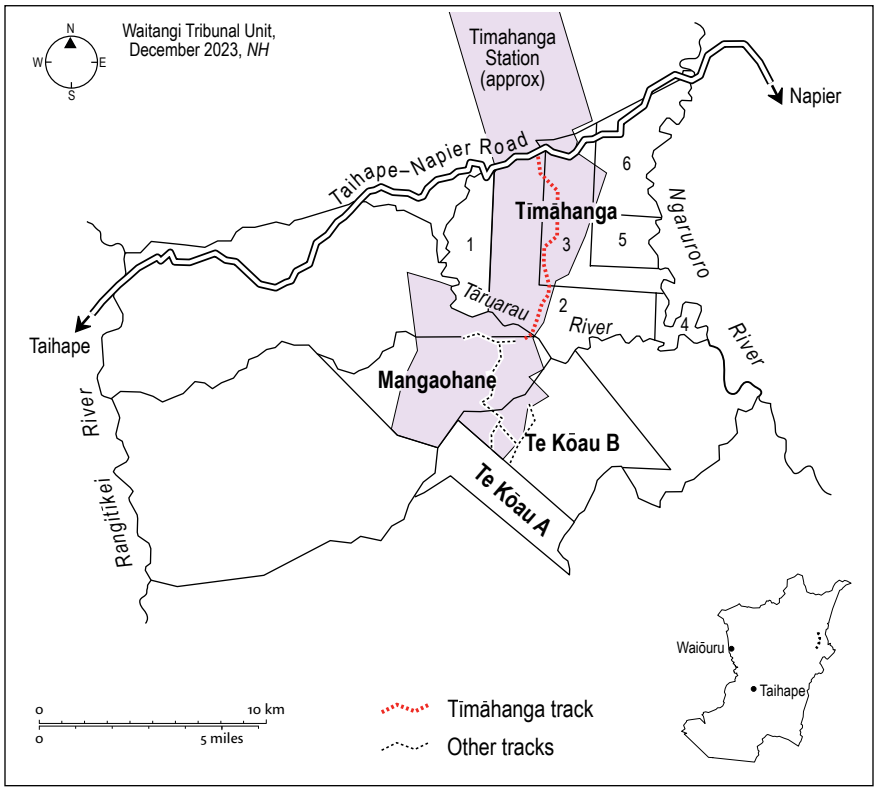
6.3 Ngā Mahi a Te Papa Ātawhai / The Actions of the Department of Conservation

6.3.1 Nā ngā mahi a Te Papa Atawhai i kaha kē atu ai te aukatia o ngā Māori nō rātau a Te Kōau A, ā, e hāngai ana ēnei mahi ki ngā mātāpono o te Tiriti? / Did the actions of the Department of Conservation increase access difficulties for the Māori owners of Te Kōau A, and were they compliant with treaty principles?

6.3.1.1 *Matapaki / Discussion*

We examine first the Department of Conservation's actions to improve access to its own land by negotiating and exchanging land with the owners of Timahanga Station, and how these decisions affected access to Te Kōau A. The parties' arguments centred on the arrangements the Crown made with Timahanga Station's owner in 1993 and the negotiations that led up to it. The most direct access to Te Kōau A is via a route that begins from the Taihape–Napier Road and travels on through the Tīmāhanga, Mangaohane G, and Te Kōau B blocks (see map 11). In earlier times Māori could use this route, but by 1893, the bulk of the Mangaohane G block had already been alienated and the rest had gone by 1908. Between 1911 and 1915, the Crown bought Tīmāhanga 2, 3, 4, 5, and 6 as well.[20] This meant that, by 1915, the access route to Te Kōau was over land owned by either the Crown (in the case of the Tīmāhanga 2 to 6 blocks, where the track began) or private owners (in the case of Mangaohane G, over which the track continued before reaching

20. Document A37 (Woodley), pp 440, 443; doc A6 (Fisher and Stirling), pp 247–251; doc A55 (Wai 2180 inquiry map book), pl 80



Map 11: The Tīmāhanga Track

Te Kōau B and then Te Kōau A).[21] Under various arrangements, Tīmāhanga 2 to 6 were then leased to private interests from 1913 through to the 1960s.[22]

From the 1960s, even as the Crown took more active steps to secure access to public lands beyond Timahanga Station, it did not make efforts to also improve access for the Māori owners of Te Kōau A. In 1961, the leasing arrangements on some of the Tīmāhanga 2 to 6 lands were about to expire and the Department of Lands and Survey reported on the situation, including access issues.[23] Their report noted there was an unsurveyed track (described above) through the lands and that this track provided the only practical access to the Tāruarau River and adjoining lands.[24] It was 'essential', the report said, that the public should have physical and legal access to those areas, yet it made no mention of continued access to

21. Document A37 (Woodley), pp 440, 443, 473; doc A6 (Fisher and Stirling), pp 200, 230–233, 247–250
22. Document A37 (Woodley), p 450
23. Document A37 (Woodley), p 450
24. Document A37 (Woodley), p 451

Te Kōau A.[25] In order to preserve access for the public, the Crown proposed to exclude from future leases a strip of land along the existing road. When it sold 7,587 acres of the Tīmāhanga 2 to 6 lands to the lessee in 1966 (under a deferred payment licence), the strip was specifically excluded from the licence.[26] This strip of land became known as the access strip (or section 8).[27] To comprehend what came later, it is important to understand that, over time, the station owner repaired and improved the formed track; as a result, parts of the formed track moved away from the surveyed line.[28] This meant that the physical track now crossed lands that were not within the access strip (section 8), and instead crossed the private lands of Timahanga Station.[29]

In 1971, hunters wishing to access lands beyond Timahanga Station clashed with the station owner, who did not believe they were allowed to use the access through station land.[30] The commissioner of Crown lands confirmed that the station was obliged to let people use the access through its land, but vehicular access was not allowed.[31] The hunters were given a permit allowing walking access only, and had to get the permission of the owner if they wished to use vehicles.[32]

In the early 1970s, Wero Karena, one of the owners of Te Kōau A, tried to establish a deer operation on the block. As part of this project, he applied to the Māori Land Court for access across Timahanga Station lands to Te Kōau A, but the court returned the application in 1975 because it was not completed correctly. No further evidence of that application exists.[33] From 1972 the New Zealand Forest Service sought to purchase part of Te Kōau B from Timahanga Station.[34] The station owner did not wish to sell but instead proposed a land exchange, swapping part of Te Kōau B for lands on the Tīmāhanga Track. The Department of Lands and Survey did not accept the exchange, saying that if its existing access strip via the Tīmāhanga Track was lost, then Timahanga Station would control access into the rivers and lands beyond.[35]

In 1973 and 1974 the New Zealand Forest Service approached Timahanga Station with another attempt to purchase Te Kōau B, and issues with access via the Tīmāhanga Track were again discussed. The station owner complained to Crown officials about alleged incidents that had occurred on the access track, saying users had left gates open and placed nails to puncture the tyres of station vehicles.[36] In subsequent meetings between the New Zealand Forest Service and the Lands and Survey Department, Crown officials agreed that the Forest Service would help

25. Document A37 (Woodley), p 451
26. Document A37 (Woodley), p 451
27. Document M7(c) (Fleury), p 2
28. Document M7(c) (Fleury), p 2
29. Document M7(c) (Fleury), p 2
30. Document A37 (Woodley), p 452
31. Document A37 (Woodley), p 452
32. Document A37 (Woodley), p 452
33. Document A37 (Woodley), p 445; submission 3.3.35 (Gilling), p 29
34. Document A37 (Woodley), p 454
35. Document A37 (Woodley), p 454
36. Document A37 (Woodley), p 455

maintain the track and consider sharing with the station owner the costs of fencing the access strip. Officials agreed that although the long-term aim was public access, they accepted the owner's proposal that in the meantime entry should be by permit only.[37] The department would issue the permits, enforce the restrictions, provide a signpost to help keep people on the track, and direct a ranger to maintain a vigilant watch over it.[38]

In the early 1980s, the owner of Timahanga Station remained concerned that the continued existence of public access via the access strip exposed the station to risks and disturbances.[39] In this period, it appears that access to Te Kōau A was blocked to the Māori owners, although an access agreement between people wishing to access Te Kōau A and the station owners seems to have been in place for a time during the 1970s.[40] Ms Woodley noted that this change in arrangements coincided with the period when the block was leased and deer operations were carried out on it.[41] In the same period, a member of the general public was also advocating for public access across the Timahanga Station lands to the Tāruarau River, prompting their local member of Parliament to lobby the Minister of Forests on public access through the station for a number of years.[42]

Accordingly, in 1982, the owner of Timahanga Station again proposed to exchange Te Kōau lands adjacent to the Crown's Ruahine Forest Park for lands in the access strip. Crown agencies disagreed with each other over this proposal, with the New Zealand Forest Service in favour but the Department of Lands and Survey against it.[43] The need for access to the Māori land in Te Kōau A was mentioned during this dispute, when the commissioner of Crown lands in Napier wrote that access to Māori land beyond depended on the existing access via the access strip.[44] The Land Settlement Board was called in to adjudicate on the dispute between the Crown agencies and decided that the access strip should not be exchanged with the Te Kōau lands that the station was offering. The board also clarified that the access strip should be unavailable to vehicles but people on foot should have unrestricted access.[45] In Mr Fleury's view, this renewed denial of vehicular access contributed to the tensions that then developed between the station owners and people using the public access strip.[46]

The desire of the Māori owners of Te Kōau A to achieve access across the Timahanga Station lands was increasingly evident in the early 1990s.[47] According to the available evidence, by 1992 the trustees of Te Kōau A had managed to

37. Document A37 (Woodley), p 456
38. Document A37 (Woodley), p 456
39. Document M7(c) (Fleury), p 6; doc A37 (Woodley), p 457
40. Document A37 (Woodley), pp 446, 457
41. Document A37 (Woodley), p 459
42. Document M7(c) (Fleury), p 6
43. Document M7(c) (Fleury), p 6
44. Document A37 (Woodley), p 458; doc M7(c) (Fleury), pp 6–7
45. Document M7(c) (Fleury), p 7
46. Document M7(c) (Fleury), p 7
47. Document M7(c) (Fleury), p 15; doc A37 (Woodley), pp 447–449

negotiate an agreement with Timahanga Station for access to the block, but it was never formalised (and currently no agreement is in place).[48] In 1992 the trust's then-secretary, Richard Steedman, told the Māori Land Court that the trust had discussed with the Department of Conservation its desire for access and asked the regional and district councils for relief from rates.[49] Mr Fleury acknowledged this, saying that in the 1990s, owners of Māori land in the inquiry district had alerted the department to their concerns over lack of access, as well as public trespass over their lands by other people.[50]

It is a striking irony that, at this time, the trust was working towards goals that would have aligned, to some extent, with the department's conservation purposes. The trust signalled in the Māori Land Court in 1992 that, following internal discussions on plans to generate income on the block and cover costs such as rates and maintenance, it wanted to achieve a Ngā Whenua Rāhui covenant on Te Kōau A.[51] As outlined in chapter 1, Ngā Whenua Rāhui kawenata (covenants) help Māori owners to protect and care for lands that contain indigenous ecosystems, through a body that is independent of the Department of Conservation.[52] A core part of the fund's work is supporting the protection of indigenous biodiversity; we heard evidence that where kawenata operate on Māori lands, there are considerable conservation gains for Aotearoa-New Zealand as a whole. Crown witness Mike Mohi said that, given the cost to the Crown, kawenata provided 'really cheap conservation'.[53] The fund was set up in 1991, meaning that in 1992, the Te Kōau A Trust was early in signalling its intention to make use of the fund and the 25-year renewable covenants it provides.[54] The connection between the objectives of the kawenata established on Te Kōau A and those of the Department of Conservation were highlighted in our hearings by Peter Steedman.[55]

At the same time, the Crown was working towards a lasting solution for access to its own lands. In 1991 the Minister of Conservation and departmental officials met the owner of Timahanga Station on site. The department's report on the meeting made no direct reference to access issues or arrangements for the Māori owners of Te Kōau A.[56] The station owners and the department agreed that the legal access route was now 'virtually useless' for the general public (because, as outlined above, it no longer followed the physical route) and that the access strip should be closed. The department would transfer the access strip to Timahanga Station in return for an easement over the actual current road. The Department of

48. Document A37 (Woodley), pp 447–449, 459
49. Document A37 (Woodley), p 448
50. Document M7 (Fleury), p 16
51. Document A37 (Woodley), p 448
52. Document A37 (Woodley), p 437; doc M6 (Mohi), p 3; doc M6(a) (Mohi), p 2. A covenant was achieved on Te Kōau A in 2006: doc A37 (Woodley), p 449.
53. Transcript 4.1.17, p 216
54. 'Ngā Whenua Rāhui Fund', Department of Conservation Te Papa Atawhai, https://www.doc.govt.nz/get-involved/funding/nga-whenua-rahui/nga-whenua-rahui-fund/, accessed 14 April 2021; transcript 4.1.17, p 201
55. Document O1 (P Steedman), p 7
56. Document M7(c) (Fleury), p 16

Conservation would then use the easement, as would anyone it permitted to use it.[57] Under the exchange, the station would also transfer an area of bushland to the Crown which would be added to Ruahine Forest Park.[58]

The evidence shows that the Department of Conservation did not consult Te Kōau A's owners on the exchange proposal or involve them in the discussions leading up to it. Claimant Richard Steedman described the exchange as one of three examples in the inquiry district where the Crown 'has swapped [its] lands with large adjoining stations without any consultation with mana whenua or iwi'.[59] He expressed frustration that the department often expressed empathy for the plight of the owners of landlocked Māori land, yet made such exchanges without consulting them.[60] For the Department of Conservation, Crown witness Mr Fleury broadly agreed. As he put it: 'The historic actions in relation to land acquisition or exchanges by DOC in the inquiry district show that there was little or no consultation with tangata whenua at the relevant times.'[61] He observed, though, that those actions were made under a 'different legislative climate' and if the department was taking the same steps now, it would be required to ensure it had accurate information and to consider whether active steps were needed to protect Māori interests.[62] We note, however, that the Conservation Act had been enacted in 1987, approximately six years before the exchange was approved, and contained a section 4 directive that the Act should be interpreted and administered to give effect to the principles of the treaty.

It is important to recognise that as the exchange proposal was progressed, some conservation officials did raise concerns about the potential impacts on access to Te Kōau A. These concerns were highlighted in a briefing for the Minister, which explained that Te Kōau A's owners currently gained vehicular access via the access strip and other roads within Timahanga Station. However, this access was available only 'at the pleasure' of the private land owner and relationships between the two parties were 'rather strained' at times. Officials understood that the trust intended to apply for access through Timahanga Station under the Property Law Act, but said that the application was a matter for the court and a separate issue from the proposed exchange.[63] The briefing included a section on consultation, which cited the view of the department's kaupapa atawhai manager that, while the exchange could get an unfavourable reaction from some of Te Kōau A's owners, it should go ahead because of the benefits to conservation.[64] The briefing also drew attention to the problems with the existing access via the access strip (section 8).[65]

57. Document M7(c) (Fleury), p 16
58. Document M7(c) (Fleury), pp 17–18
59. Document G13 (R Steedman), p 9. The other two exchanges were with Ohinewairua Station (discussed in section 6.2) and Big Hill Station (discussed in section 6.3.2).
60. Document G13 (R Steedman), p 9
61. Document M7 (Fleury), p 20
62. Document M7 (Fleury), p 21
63. Document M7(d) (Fleury), p 78
64. Document M7(c) (Fleury), p 17; doc M7(d) (Fleury), p 78
65. Document M7(c) (Fleury), p 17

The Minister approved the exchange in 1993. The agreement included a right-of-way easement over Timahanga Station lands 'in favour of the "Crown and its invitees"'. Officers of the Department of Conservation could use the access at any time, in vehicles, after giving prior notice to the station. For members of the public, foot access only was allowed.[66] All people who wished to use the access had to contact the trustees of Timahanga Station first, who could deny access for farm management reasons including lambing and high fire risk.[67] The costs of the survey, bulldozing, and fencing works that would be required were to be shared 50–50 between the department and the private land owner.[68]

As for the current situation, we heard evidence from claimants with experience of the Te Kōau lands that the route through Timahanga Station is still the best way to access the block.[69] Despite this, there is currently no formalised agreement between the station owners and the trust for access to Te Kōau A.[70]

6.3.1.2 *Ngā tātaritanga me ngā whakakitenga tiriti / Treaty analysis and findings*

Our analysis has shown that the 1993 exchange obtained for the Crown (and the general public) a more legally secure route over private land to the Crown lands beyond. In negotiating this result, the Crown was aware of the access needs of Te Kōau A's owners; it knew the block was landlocked, that access through the station was preferred, and that signing the agreement with the station would likely provoke a negative reaction from the Māori owners. Despite this, the Crown did not try to improve access for the Māori owners and instead signed an agreement that meant access for them and members of the public would now be on foot only. We recognise that the Crown's access agreement did not cover the further stretch of Timahanga Station that would also need to be crossed to reach Te Kōau A. (It was unclear to us whether the existing access route across this stretch of land traverses Mangaohane and Te Kōau B, or Mangaohane only.)[71] The point is that the Crown, while negotiating with the private land owner, had the opportunity to improve the access situation for the owners of Te Kōau A, but did not try to do so; it instead created an agreement principally designed to benefit conservation staff, not its treaty partner.

The more legally secure access route did have the scope to reduce tension that had developed between the station owner and some users of the previous access. Not all those users were owners of Te Kōau A, though. The Crown also bore some responsibility for the tensions that developed. As Crown counsel has

66. Document M7(c) (Fleury), p 18; doc M7(d) (Fleury), p 83
67. Document M7(c) (Fleury), p 18; doc M7(d) (Fleury), pp 82–83
68. Document M7(d) (Fleury), p 77
69. Document O1 (P Steedman), pp 2, 6; doc O3(a) (R Steedman), p 17
70. Document A37 (Woodley), p 461; doc G13 (R Steedman), p 9
71. Ms Woodley stated that the Timahanga Track 'is the first portion of the access route to Te Koau A' and that 'the remaining portion . . . is through Mangaohane G': doc A37 (Woodley), pp 449–450. However, a map appended to her evidence shows access routes to Te Kōau A from the end of the Timahanga Track traversing both Mangaohane and Te Kōau B: doc A55 (Wai 2180 Inquiry Map Book), pl 83.

acknowledged, the Crown's own acts and omissions substantially contributed to the situation where the owners of Māori land had no legal access to their lands.[72] Native land laws that contributed to landlocking before 1912 and the Crown's failure to provide effective remedies between 1912 and 1975 had left the owners of Te Kōau A without legal access ever since the block was titled. Elsewhere in their submissions, Crown counsel acknowledged that lack of access to land generates a range of difficulties – including economic frustrations and loss of cultural connections to land – which may leave owners without the 'resources and relationships' they need to resolve the lack of access.[73] In the years since the exchange, the owners of Te Kōau A have sometimes been able to negotiate informal access agreements with the station owners, but these arrangements have not endured. In contrast, conservation officials (by vehicle) and the general public (by foot) have enjoyed legal access to Crown land via an easement (notwithstanding the station's ability to restrict that access for farming reasons).

In its defence, the Crown also said that Ministers and officials had taken the needs of owners of Māori land into account when making their decision. But we were struck by the way that the long-standing access problems facing the owners of Te Kōau A were raised and considered during the lead-up to the decision, and noted in the briefing to the Minister, but then set aside so definitively. As foreshadowed, the exchange was likely to provoke a negative reaction from Te Kōau A's owners, the briefing said, but should proceed regardless because it would make public access more secure and provide conservation benefits. It seems ironic that this advice was reportedly given by the department's kaupapa atawhai manager.[74] The officials' briefing did note that a court application for legal access was ongoing and that the department could not intervene in that process. However, this did not preclude the Crown from attempting to secure access for the Māori owners at the same time, during the years it worked to negotiate better access to its own lands and to finalise the exchange. That option was available, but it was not taken up. This demonstrated that the Crown was giving the access needs of the treaty partner a lower priority than its own access needs and those of the general public.

Further, as we have said, there is an uncomfortable irony in the timing of the Crown's decisions on the Tīmāhanga exchange. At the same time that the Crown was deciding whether to execute the exchange, the trustees of Te Kōau A were setting out their determination to work towards getting a Ngā Whenua Rāhui kawenata on the block (eventually achieved in 2006).[75] Establishing a kawenata would have real benefit to the Crown in terms of its larger conservation goals. Therefore, even as the Crown was gaining such a benefit from the owners, it was cutting them out of discussions about access solutions involving their long-favoured route to the block. In such circumstances, it is not difficult to understand the claimants'

72. Submission 3.3.44(d) (Crown), p 25
73. Submission 3.3.44(d) (Crown), pp 10–11
74. Document M7(d) (Fleury), p 78
75. Document A37 (Woodley), p 449

dismay at officials' apparent lack of regard for their predicament as owners of landlocked land.

We are also mindful of a point that counsel for Ngā Iwi o Mōkai Pātea made in his cross-examination of Mr Alexander. Counsel said that the Crown's treaty obligations were not born in 1987, when the Conservation Act with its section 4 responsibilities became law.[76] As we have emphasised already in chapter 3, the Crown's duty to actively protect the tino rangatiratanga of Māori over their lands was established in article 2 of the treaty in 1840, and this included the need to ensure Māori had continued access to the lands they retained. The duty of active protection was not a passive duty but one that required the Crown to act to the fullest extent practicable. Section 4 of the Conservation Act 1987 requires the Crown to interpret and administer the legislation so as to 'give effect to the principles of the Treaty of Waitangi'. Measured against that requirement and the relevant treaty principles, the Crown's failure to actively protect the interests of the affected owners of Māori land, given their unique circumstances, seems inexplicable.

We also consider the principle of partnership applies to this issue. As outlined in chapter 3, partnership under the treaty requires the Crown and Māori to act toward each other in good faith, reasonably in the circumstances, and with a view to their mutual advantage. It also requires each partner to respect the other's sphere of authority. As we have repeatedly stated, for Māori, that authority includes the ability to exercise tino rangatiratanga over their land. Where that ability has been compromised – as it had been for Te Kōau A's owners – the Crown should take any opportunity available to help restore it. This would be consistent with its partnerhip obligations. The Crown's choice not to help Te Kōau A's owners more easily access their land was inconsistent with its partnership obligations.

We have also discussed the Crown's treaty duty to consult in order to make informed decisions. As we explained in chapter 3, the Crown has a responsibility to consult Māori when making decisions which affect matters that are important to them, but this duty is not mandatory in every case.[77] Sometimes, the Tribunal has said, the Crown will already have enough information to act consistently with treaty principles. At other times, it will not have that information and will need to consult.[78] Regarding the decision to execute the exchange with Timahanga Station, the Department of Conservation chose not to consult with Māori although they would be directly affected by the decision and had been seeking access for some time. In this situation, the Crown did not have sufficient information to act consistently with treaty principles. The Māori owners of Te Kōau A were suffering the impacts of never having legal access to their land, an outcome caused by inequitable access provisions that the Crown has conceded breached treaty principles. Any decision relating to access to those lands would therefore be of great importance to them. Knowing about the Crown's intentions might have altered a range

76. Transcript 4.1.20, p 71
77. Waitangi Tribunal, *The Final Report on the MV Rena and Motiti Island Claims*, p 12
78. Waitangi Tribunal, *Turangi Township Report*, pp 287–288; Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 67; Waitangi Tribunal, *The Ngai Tahu Report*, vol 2, pp 244–245

of decisions they were making themselves, including the decision to continue to pursue legal access through the courts. As discussed, an irony is that the owners were considering the option of pursuing a Ngā Whenua Rāhui kawenata, potentially boosting the Crown's wider conservation effort. The Crown's decision not to consult meant it was not sufficiently informed about several potential impacts on its treaty partner.

Based on the preceding analysis, we find that:

- By failing to seek to improve the access situation for owners of Te Kōau A when executing its exchange with Timahanga Station, the Crown breached its duties of active protection and partnership; and
- by failing to include the owners of Te Kōau A in its negotiations over the exchange, the Crown breached its duty of consultation.

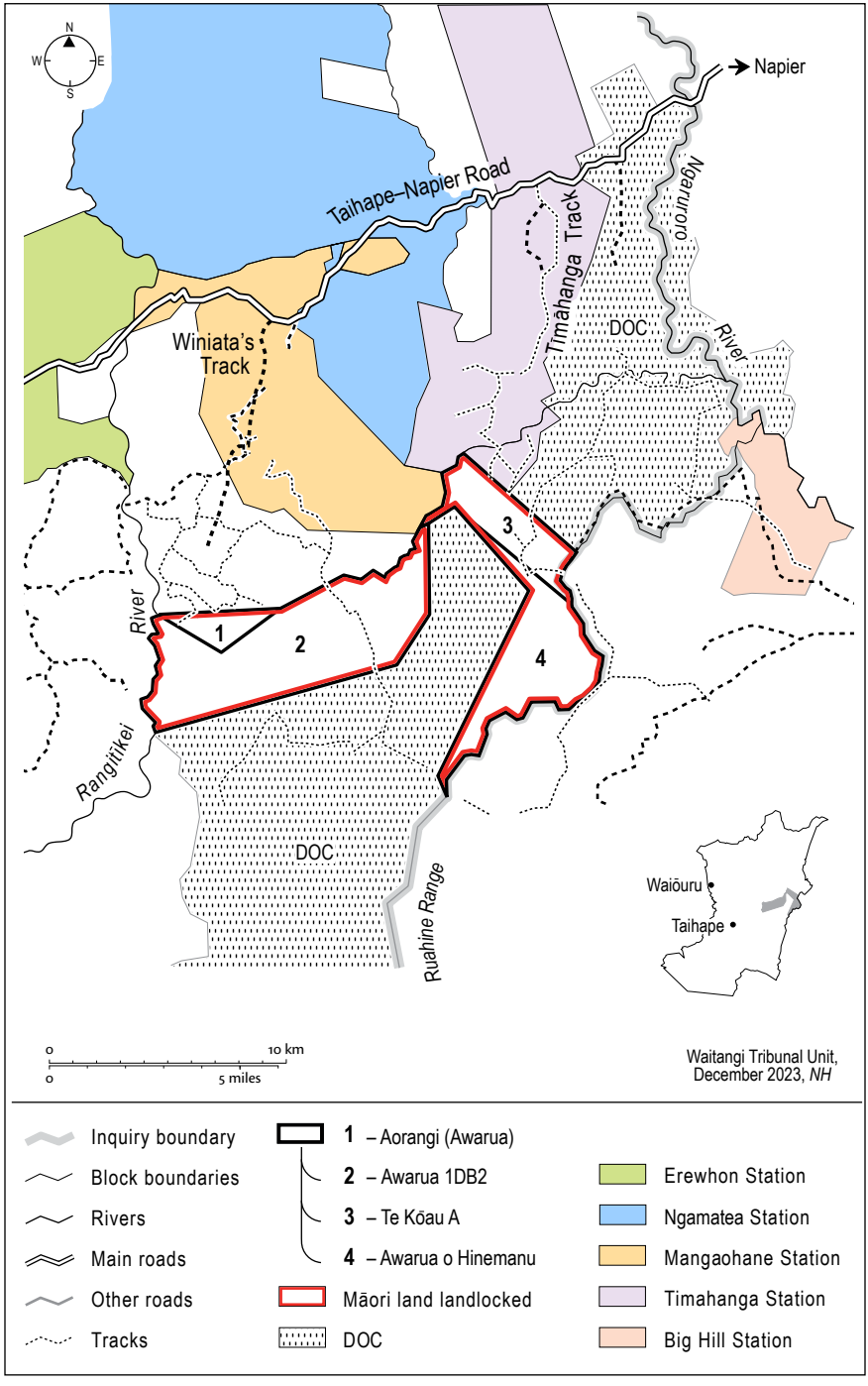
6.3.2 I whai wāhi anō ngā mahi a Te Papa Ātawhai ki te kati i te āheinga huarahi ki ngā kaipānga Māori o Te Awarua a Hinemanu, ā, i te whakatinana Te Papa Ātawhai i ngā mātāpono o te Tiriti? / Did the actions of the Department of Conservation increase access difficulties for the Māori owners of Awarua o Hinemanu, and were they compliant with treaty principles?

6.3.2.1 *Matapaki / Discussion*

We now consider the Crown's negotiations for access through Big Hill Station to its own land and their implications for access to Awarua o Hinemanu and other Māori land. As we explained in chapter 5, Big Hill Station lies to the east of the inquiry district (see map 12). Over time, the Crown and Māori owners have separately requested access through the station to the lands they own beyond it. From the late 1960s, the Crown sought access through the station to the public conservation lands beyond and its negotiations with Big Hill resulted in a formalised access agreement in 1980, allowing for Crown and public access through the station. The Crown's agreement is still in place, although now with fewer users permitted than previously. From 1991, Māori owners sought access through the station and beyond to their lands including Awarua o Hinemanu (predominantly) and parts of Te Kōau A.[79] Currently the owners can access their lands through the Crown-negotiated permit system, or if the owners of Big Hill Station give consent.[80]

The Crown's negotiations with Big Hill Station for access to its own lands were well under way by 1969 and stemmed from the fact that a legal unformed road ran over the station to the Ruahine State Forest.[81] This road did not follow the formed road through Big Hill Station; the legal unformed road in fact followed a route that was much less practical than the formed road.[82] The Crown negotiated for a land exchange to allow its officials and invitees to use the formed road through Big Hill Station. Concluded in 1980, the agreement required the parties to exchange lands and meet other terms, and required the station to grant the Crown a registerable

79. Document M7(c) (Fleury), pp 10–11
80. Transcript 4.1.19, pp [450]–[451]; submission 3.3.44(d), p 24
81. Document A37 (Woodley), p 428; doc M7(c) (Fleury), pp 3–4
82. Document A37 (Woodley), p 428; doc M7(d) (Fleury), pp 97–98



Map 12: The Aorangi, Awarua, and Te Kōau blocks

right of way along the formed road.[83] The right of way would be used by 'the Crown and its permittees.'[84] The Crown would pay the legal expenses and the survey costs associated with the exchange of lands, while the station was required to meet some fencing costs.[85] At this stage, there was no limit on the number or type of users that the Crown could permit to use the right of way.[86] In our hearings, counsel for Ngā Iwi o Mōkai Pātea described this agreement as the first of three 'layers' making up the Crown's access agreement with Big Hill Station.[87]

The second layer was added in 1982, when the Crown and the station signed a memorandum of transfer. This memorandum gave effect to the easement they had negotiated in 1980 and included a requirement that the Crown consult the station on its use.[88] The parties agreed in 1983 on signage that would be erected at the entrance to the right of way, and on an information sheet that would be given to anyone using the access.[89] These notices explained that before the road through Big Hill Station could be used, users had to obtain a permit from the New Zealand Forest Service. They also had to get a gate key from the station and contact the station before using the road, to be advised of any other conditions that might apply at the time.[90]

The third layer making up the Crown's access agreement with Big Hill Station was introduced in 1988, when the Department of Conservation and the station agreed to reduce the number of people who would be permitted to use the access.[91] Only three permits would be issued per week, users had to obtain them a week in advance from the Department of Conservation office in Napier, and each permit was valid for one week.[92] Department of Conservation officials explained that these changes were required due to recent difficulties with illegal shooting of deer on the station lands and some hunters' attitudes towards station staff.[93] This new system was implemented on 21 November 1988.[94] The evidence shows that Big Hill Station had a number of additional concerns over the security of the farm's operations and personnel, which, from its point of view, formed part of the basis for the permit system.[95] As with the previous two agreements reached, this agreement had no specified end date.[96]

In 1990, however, one of the Department of Conservation's legal advisers observed that the system then in operation was inconsistent with the original

83. Document M7(d) (Fleury), p 22
84. Document M7(d) (Fleury), p 22
85. Document M7(d) (Fleury), pp 21–22
86. Document M7(c) (Fleury), p 5
87. Transcript 4.1.19, p [266]
88. Transcript 4.1.19, p [267]; doc M7(d) (Fleury), p 28
89. Document M7(c) (Fleury), p 5
90. Document M7(d) (Fleury), p 36
91. Transcript 4.1.19, p [267]
92. Document M7(d) (Fleury), p 38
93. Document M7(d) (Fleury), p 38
94. Document M7(d) (Fleury), p 38
95. Document M7(d) (Fleury), p 38
96. Document M7(c) (Fleury), p 5; doc M7(d) (Fleury), pp 36, 38

agreement. That agreement did not require the Crown 'to consult Big Hill Station over who it permitted to use the right of way'.[97] The memorandum of transfer (the second layer) had taken the matter further than was contemplated in the original agreement.[98] Indeed, the adviser said the form in which the right of way was being used in 1990 – where Big Hill Station had a right to be consulted and only three permits could be issued per week – was 'unduly restrictive' in light of the actual legal right of way that existed.[99] The decision to allow only three permits per week in particular was 'totally unreasonable' and indefensible from a legal point of view.[100] During cross-examination, Mr Fleury accepted that in agreeing to these restrictions, the Department of Conservation had effectively compromised its legal rights.[101]

This history of the access through Big Hill Station is important because title to Awarua o Hinemanu was investigated by the Māori Land Court in 1991 and awarded in 1992. From this point, access through the station became increasingly important to claimants in our inquiry because it offered the potential for access to both Awarua o Hinemanu and parts of Te Kōau A.[102] As outlined earlier, this access would involve the Māori owners travelling along the formed road through Big Hill Station, then on through the section owned by the Department of Conservation and from there to their own blocks.[103] The owners could enter the ballot to get a permit to use the access, or they could attempt to negotiate access directly with the station and also seek permission to use the further track owned by the Department of Conservation.[104] At times this access was given.[105]

The question of whether the formed road provided the best access to blocks such as Awarua o Hinemanu is an important one. Counsel for Big Hill Station argued that, although it might have offered the most practical access until now, it did not provide the best and fairest access. Counsel submitted that the access route through Big Hill Station and the public conservation lands offered access to the highest, most remote, and most inclement parts of Awarua o Hinemanu and Te Kōau A. In the station's view, access could better be provided from the Rangitīkei side of the ranges.[106] William Glazebrook, who gave evidence on behalf of the

97. Document M7(d) (Fleury), pp 44–45
98. Document M7(d) (Fleury), p 45
99. Document M7(d) (Fleury), p 46
100. Document M7(d) (Fleury), p 46
101. Transcript 4.1.19, pp [269]–[270]
102. Document M7(c) (Fleury), p 11. The evidence on the period before 1991 shows that Wero Karena approached the New Zealand Forest Service in 1976 about the possibility of accessing Te Kōau A through the Crown's Forest Service Lands and Big Hill Station. However, Mr Karena's lawyer said his access at that time was through Timahanga Station. Forest Service officials considered that the purpose of Mr Karena's inquiry was to 'explore all other avenues of access and if these are not granted or are not feasible, he intends to go through the Courts to force [the owner of Tīmahanga Station] into granting access rights': doc M7(d) (Fleury), pp 11–13.
103. Document M7(c) (Fleury), p 11
104. Submission 3.3.44(d) (Crown), p 24
105. Transcript 4.1.19, pp [448]–[450]
106. Submission 3.3.41 (Big Hill Station), pp 4–5

station, said access could also be provided from Mangleton Road up through public conservation lands to Te Kōau A, without the need to cross private land at all. Creating the track would require work, but in his view, it could be made suitable for a four-wheeled vehicle and trailer.[107] However, Mr Fleury said that while this access route would theoretically provide a direct route to Awarua o Hinemanu, it was steep – the average slope was 22 per cent, with some sections being more than 50 per cent – and constructing it would cause significant environmental damage.[108] Counsel for Ngā Iwi o Mōkai Pātea raised a range of practical, environmental, and legal problems with this proposed access.[109] The important point for our purposes, though, is that this access does not exist. Nor did it exist in the 1990s. At that time the formed access route through Big Hill Station was the easiest option for access to blocks such as Awarua o Hinemanu, which was why the Crown had negotiated to use that route to access its own lands adjoining Awarua o Hinemanu and Te Kōau A in 1980. The owners of those two blocks simply wanted to use the same access the Crown was using.

It was also in the 1990s that the familiar concern of trespass onto landlocked land became an issue for the owners of Awarua o Hinemanu. The trespassing was associated with the access the Department of Conservation had negotiated for itself through private land. In 1992 and 1996, both the Awarua o Hinemanu and Te Kōau A trusts alerted the Department of Conservation to their concerns that people who had been issued permits by the department were trespassing onto their land and staying at No Man's Hut, which they said was not on Crown land but on Te Kōau A. The matter of the hut's ownership was subsequently clarified in a Māori Land Court decision, which confirmed that the hut is the property of Te Kōau A trust.[110]

The evidence confirms that the Department of Conservation did make some efforts to respond to these concerns, meeting with trustees in 1997 to discuss the situation.[111] Mr Fleury said the department also promised to investigate the option of preferential treatment for the Māori owners so they could use the Big Hill Station easement, asking its own solicitor for advice. However, he could not find what advice was given.[112] The court's ruling that No Man's Hut was owned by Te Kōau A owners also led the department to reduce the number of hunting permits from three to two per week.[113]

Tensions occasionally developed between the station owners and some owners of Awarua o Hinemanu and Te Kōau A, just as they had between the station owners and some users of the public access (such as hunters).[114] Mr Glazebrook said there

107. Document M23 (Glazebrook), p 3; doc A37 (Woodley), p 473
108. Document M7(f) (Fleury), pp 11, 17
109. Transcript 4.1.19, pp [280]–[281]
110. Document M7(c) (Fleury), p 13; doc M7(d) (Fleury), p 48
111. Document M7(c) (Fleury), p 13
112. Document M7(c) (Fleury), p 13
113. Document M7(c) (Fleury), p 13
114. Document M7(d) (Fleury), p 93

was a lack of trust because access arrangements had been breached in the past.[115] He agreed these breaches came from a 'rogue element' of access users and that, while some individuals breached agreements, others never did so and were good to deal with.[116] The station was not opposed to providing access generally and took the attitude that the owners of the Māori blocks were just like any other neighbour trying to access an 'awkward back corner' of land. Providing access in such situations was 'akin to a farming courtesy', in the station's view.[117]

Occasional tensions between Big Hill Station and a small minority of Māori land owners were also discussed in a 2010 review of the situation by an officer of the Hastings District Council, who described a 'breakdown' in the relationship between the owners of Māori land and the station.[118] The council officer noted a similarity between the Big Hill situation and what had occurred with the access through Timahanga Station – including both stations having experience of a 'bad relationship', as the council officer put it, with 'the same particular Maori land owner'.[119] In the case of Big Hill Station, the parties were by this time also involved in court proceedings; in 2003, one owner of Awarua o Hinemanu had applied under Te Ture Whenua Maori Act 1993 for access to the block through Big Hill Station, and subsequently received support for the application from Awarua o Hinemanu and Te Kōau A trustees.[120] As we have already discussed, the application was dismissed in 2013 due to internal issues within the Awarua o Hinemanu Trust. Court proceedings over costs occurred again in 2015.[121] Mr Glazebrook said that from the station's point of view, there was a 'hardening of attitude' once the court application had been made.[122]

In light of this history of the relationship between the station and various owners of the landlocked blocks, it is clear that Department of Conservation officials considered they were in a delicate position and had to tread carefully to avoid losing the access through Big Hill Station altogether. However, the department did have scope to take more action to assist the Māori owners to access their landlocked land. Under cross-examination, Mr Fleury accepted that the terms of its agreement with Big Hill Station had never precluded the department from stating that owners of Māori land should be a specific category under the permit system. The department could have asked Big Hill Station for this specific category to be established but, as Mr Fleury accepted, the department took no such steps. Counsel for Ngā Iwi o Mōkai Pātea alleged this amounted to a failure by the

115. Transcript 4.1.19, pp [449]–[450]
116. Transcript 4.1.19, pp [449], [454]–[455]
117. Transcript 4.1.19, p [448]
118. Document M7(d) (Fleury), p 93
119. Document M7(d) (Fleury), p 96
120. Document H6 (Lomax), p 7
121. Document A37 (Woodley), pp 432–435
122. Transcript 4.1.19, p [454]

Department of Conservation to actively protect the interests of the Māori land owners.[123] Mr Fleury said in hearing this was correct.[124]

However, the position expressed by Mr Fleury was modified in subsequent Crown submissions, as Crown counsel contended that the potential for access via the easement should not be overstated.[125] Counsel submitted that the easement was subject to conditions as agreed from time to time between the station and the Department of Conservation, and was restricted to uses that were consistent with conservation purposes.[126] Counsel also emphasised that, as with access to Te Kōau A, the access through Big Hill Station was more legally secure than it had been before the exchange, and the Māori owners could apply for access through the permit system.[127] Counsel also stressed that the Crown's exchange was carried out before the Māori Land Court awarded title to Awarua o Hinemanu in 1991, and therefore had not exacerbated access difficulties for the owners.[128] Just as it had when contemplating access through Timahanga Station, the Department of Conservation had only limited options, counsel said, to assist Māori owners with future access through Big Hill Station. These options included taking a more active role in mediating between the parties, and, to the extent it was appropriate, supporting applications the owners might make under current Māori land legislation.[129] As we noted earlier, counsel for Ngā Iwi o Mōkai Pātea argued in reply that allowing access via the easement would at least be a start and could allow a productive relationship to develop between the owners of Māori land and the station.[130]

6.3.2.2 *Ngā tātaritanga me ngā whakakitenga tiriti / Treaty analysis and findings*

We turn now to the question of whether the Crown's actions in respect of the access arrangements through Big Hill Station and their impact on access to Awarua o Hinemanu complied with treaty principles. We recognise that, as Crown counsel stressed, the Crown negotiated the exchange and access agreement before Awarua o Hinemanu was returned to tangata whenua in 1992. From 1976, Forest Service officials were aware of some level of inquiry about access through Big Hill Station and Forest Service lands to Te Kōau A, as Mr Karena's lawyer had inquired into that possibility that year. However, it was not considered the preferred route for accessing the bulk of Te Kōau A and, before the Crown's exchange in 1980, the level of interest in it was nothing like that expressed in access via Timahanga Station.

It is also clear that by the time the Awarua o Hinemanu owners had secured title and were interested in access via Big Hill Station and the Crown's forest lands, the

123. Transcript 4.1.19, pp [269]–[271]
124. Transcript 4.1.19, pp [269]–[271]
125. Submission 3.3.44(d) (Crown), p 24
126. Submission 3.3.44(d) (Crown), p 25
127. Submission 3.3.44(d) (Crown), p 25
128. Submission 3.3.44(d) (Crown), p 25
129. Submission 3.3.44(d) (Crown), pp 25–26
130. Submission 3.3.97 (Watson), pp 10–11

Department of Conservation considered it was in a difficult position. The tensions generated by previous use of the access by some hunters had led to a decrease in the number of people who were allowed to use it and the introduction of a permit system. The Department of Conservation was wary of losing access not only for the public but also for its own officers to carry out conservation work. As we have noted, the access agreement was open-ended so could presumably be terminated by Big Hill Station at any time. These tensions that had developed before 1992, when title to Awarua o Hinemanu was granted, were not the fault of the owners of the newly 'created' block of Māori land.

Evidently, though, tensions did develop later between the station owners and some owners of Awarua o Hinemanu. The 2003 court application for access by one of the block's owners (and later supported by Awarua o Hinemanu and Te Kōau A trustees) involved the parties in court proceedings over a number of years, which the evidence and submissions show placed further strain on the relationship.[131] However, in making this application, the owner of Awarua o Hinemanu was simply exercising a legal right available to him under the Crown's legislative regime, following a period of failed efforts to negotiate a more viable access agreement. As our report has shown, that legal right was one of the very few options that owners of landlocked blocks had open to them, even as they faced considerable prejudice from their ongoing lack of access.

We reiterate that Awarua o Hinemanu was returned to Māori ownership entirely without access. Finding themselves the title-holders of landlocked land, the owners had very few opportunities for access. As Crown counsel accepted, historical Crown actions that were inconsistent with the treaty principle of equity and the duty of active protection had contributed to the access issues afflicting both Te Kōau A and Awarua o Hinemanu.[132]

We note again that the courts and the Tribunal have found that the Crown's duty requires it to act not passively, but actively to protect the tino rangatiratanga of Māori to the fullest extent practicable. In this context, we found the argument of the claimants compelling. The Department of Conservation considered itself to be constrained by the agreement it had negotiated with the station. Its own internal advice showed that, legally, it was not as constrained as it believed it was. More importantly, though, the option was there to negotiate with the station for the owners of landlocked land to get some form of special category under the permit system. Given that under the permit system, members of the general public (such as hunters) were able to gain access, it would seem appropriate for the Crown's agency to have prioritised the access needs of its treaty partner to their lands in some way and to have secured that special status. After all, the Department of Conservation was acting under a treaty obligation in section 4 of its establishment Act and was therefore required to ensure it worked to actively protect the tino rangatiratanga of Māori to the fullest extent practicable. The fact that, since 1992, the department has never tried to prioritise the access needs of Awarua o

131. Document H6 (N Lomax), p 7; submission 3.3.41 (Big Hill Station), pp 2–3, 7
132. Submission 3.3.44(d) (Crown), p 25

Hinemanu's owners within the access system underscores the Crown's continuing failure in this context.

We also reiterate that the principle of partnership requires the Crown to act toward its treaty partner in good faith, reasonably in the circumstances, and for the mutual advantage of both partners. Again, where the ability of Māori to exercise tino rangatiratanga has been compromised – as it had been for the owners of Awarua o Hinemanu and other affected landlocked blocks – the Crown should take any available opportunity to help restore it. This would be consistent with the Crown's partnership obligations. That former treaty breaches were to blame for these owners' lack of access only intensifies the Crown's obligations in the circumstances. By failing to seek enhanced rights for them to use the access route it had negotiated for itself and the public through Big Hill Station, the Crown let its treaty partner down. To draw on the *Te Roroa Report*, it did not take enough responsibility for the well-being of those it had 'dispossessed' through landlocking, nor fulfil its duty to 'be a good neighbour'.[133]

It may be that the Crown felt constrained from attempting to enhance access for the owners of Awarua o Hinemanu because of their action in the Māori Land Court from 2003 to 2015. We do not believe this is a defensible position, since there was no legal barrier to the Crown's pursuit of such a solution. It should be borne in mind that the Crown's very inaction prior to 2003 was one reason for the court application, as Hape Lomax explained.[134] Furthermore, Mr Glazebrook said the station had provided access to the owners of Awarua o Hinemanu since the application was dismissed, which he said showed 'a level of goodwill' on its part.[135] This certainly suggests there was scope for the Crown to make a positive contribution. Its inaction simply added insult to injury after the owners had been deprived of the block for more than a century due to errors that were not of their own making. Having returned the land without access and then made no efforts to apply its influence to secure access, the Crown – through the Department of Conservation – simply appeared to be content with throwing its hands in the air in a Pilate-like abdication of responsibility to its treaty partner.

Based on the preceding analysis, we find that, by failing to seek enhanced access for owners of landlocked Māori land when negotiating its access agreement with Big Hill Station, following the award of title to Awarua o Hinemanu in 1992, the Crown breached the principle of partnership and its duty of active protection.

133. Waitangi Tribunal, *The Te Roroa Report*, p 207
134. Document H6 (N Lomax), p 7
135. Transcript 4.1.19, pp [454]–[455]

UPOKO 7

TE WHAKARĀPOPOTOTANGA O NGĀ WHAKAKITENGA ME NGĀ WHAKATAUNGA

SUMMARY OF FINDINGS AND RECOMMENDATIONS

7.1 Te Tāhū / Introduction

This chapter sets out a summary of our findings, followed by our recommendations for steps or actions the Crown could take to remove or mitigate any established prejudice.

To begin, however, we note the Crown's acknowledgements and concessions and the claimants' comments on what some of the concessions meant to them (set out in sections 2.3.3.2, 2.3.3.3, 2.3.5.2, and 2.3.5.4). We also note the submissions and apology that the mayor of Rangitīkei District Council, Andrew Watson, made on behalf of the council and its predecessor. We were encouraged by Mayor Watson's words and look forward to seeing how they translate into actions.

7.2 Te Whakarāpopototanga o ngā Whakakitenga me te Whakatoihara / Summary of Findings and Prejudice

In this section, we list the Crown's concessions and the findings we have made in our report (sections 7.2.1–7.2.7), then provide summary reflections on these findings and the prejudice landlocking has caused (section 7.2.8).

7.2.1 Ko te Karauna anake te kaiwhakamana i te karapotitanga o ngā whenua Māori? / Was the Crown solely responsible for the landlocking of Māori land?

We find that:

- The general failure of the Crown to address the considerable risk of landlocking in its native land legislation;
- the specific failure of the Crown to require the Native Land Court (in provisions such as section 91 of the Native Land Court Act 1886 and section 117 of the Native Land Act 1909) to ensure access was maintained to Māori lands; and
- the failure, too, to meet the costs of creating that access

were breaches of the Crown's duty of active protection.

We also find that:

- The Crown leaving it to the court's discretion to order access and to the owners to pay for it was a breach of the plain terms of article 2, with its

guarantee of te tino rangatiratanga over whenua or the 'full exclusive and undisturbed possession' of land.

- The failure of the Crown to monitor the efficacy of access application provisions in its native land legislation (Native Land Court Act 1886 and Native Land Court Act 1894) breached its duty of active protection.
- The failure of the Crown to uphold the customary rights of Taihape Māori to access their lands breached the principle of partnership.

Finally, we find that:

- The Crown's failure to ensure that owners of Māori land title enjoyed the same rights of access to their land as owners of general land title; and
- the Crown's more fundamental failure to account for the different situations of Māori who were retaining their land and settlers who were purchasing their land (and thus subject to 'buyer beware' rules), when formulating its land laws; and
- the Crown's failure to actively legislate to protect the pre-existing access rights of Māori, to avert the disproportionate landlocking of Māori land

were breaches of the principle of equity.

7.2.2 Ngā whakatikatika ā ture mai i te tau 1912 ki te tau 1975 / Legislative remedies, 1912–75

We accept the Crown's concession that the remedies it provided between 1912 and 1975 were ineffective and breached the principle of equity by treating owners of Māori land in a manner that was unequal and indirectly discriminatory.

We also accept the Crown's concession that the failure of its remedies between 1912 and 1975 left Taihape Māori with insufficient land with reasonable access for their present and future needs, breaching the principle of active protection.

Further to these concessions, we find that the failure of the Crown to supply effective legislative remedies for landlocking of Māori land between 1912 and 1975 breached the principle of redress.

7.2.3 Ngā āheinga o ngā whakatikatika a te Karauna mai i te tau 1975 / The adequacy of the Crown's remedies since 1975

We make the overall finding that the remedies the Crown has provided since 1975 have not reduced the landlocking of Māori land in the Taihape inquiry district. As such, these remedies are in breach of the Crown's duty of active protection and the principles of equity and redress.

Regarding the flaws we have identified in the Crown's post-1975 remedies, we find that:

- By failing to take full responsibility for the cost of restoring access to landlocked Māori land and instead providing remedies that transferred much of the burden of this cost to Māori, the Crown breached its duty of active protection.
- By providing remedies that treated Māori as though they held equivalent responsibility for unlocking their retained land as general land owners held

for unlocking purchased land, the Crown breached its duty of active protection and the principle of equity.

- By continually failing to remedy the inequity in landlocking between Māori and non-Māori owners, the Crown breached its duty of active protection and the principles of equity and redress.

7.2.4 Whakatoihara / Prejudice

We accept the Crown's concession that landlocking of Māori land in the district left tangata whenua with insufficient land with reasonable access for their present and future needs, breaching the Crown's duty of active protection.

We also accept the Crown's concession that landlocking in the district caused cultural and economic prejudice to tangata whenua. As the Crown did not specify which treaty principles applied to these forms of prejudice, we find that:

- By undermining the ability of Māori with landlocked land to maintain their customary practices and knowledge, including kaitiakitanga over wāhi tapu and taonga, the Crown breached its duty of active protection.
- By impairing the ability of Māori with landlocked land to successfully develop their land, if at all, and denying them the expected benefits of settlement as a result, the Crown breached the principles of the right to development and mutual benefit.
- By reducing the opportunities available to Māori with landlocked land to pursue a traditional way of life, on the one hand, and to actively participate in the modern economy, on the other, or to do both, the Crown breached the principle of options.
- By allowing the cultural and economic disadvantage suffered by owners of landlocked Māori land to persist and compound over generations, exacerbating the inequity the Crown had originally created in permitting the disproportionate landlocking of Māori land, the Crown breached the principle of equity.

Further to the Crown's concessions, we find that, by failing to ensure local authorities took active steps to create access to landlocked Māori land, and by failing to prevent local authorities from exacerbating the situation through charging rates on inaccessible lands, the Crown breached its duty of active protection.

7.2.5 Ngā mahi a te Manatū Kaupapa Waonga / The actions of the Ministry of Defence

We accept the Crown's concession that, in its 1990 exchange with Ohinewairua Station, its failure to consult the owners of Ōruamatua–Kaimanawa 1U and 1V and actively protect their interests breached the principles of the treaty. In addition, we find that its conduct breached the principle of partnership.

We also accept the Crown's concession that its 1973 takings of Ōruamatua–Kaimanawa 2C2, 2C3, 2C4, and Ōruamatua–Kaimanawa 4 had detrimental impacts on legal access. This concession was expressed in terms of the duties of active protection and consultation. In addition, we find that the Crown's conduct breached the principle of the right to development.

7.2.6 Ngā mahi a Te Papa Ātawhai / The actions of the Department of Conservation

We find that:

- by failing to seek to improve the access situation for owners of Te Kōau A when executing its exchange with Timahanga Station, the Crown breached its duties of active protection and partnership; and
- by failing to include the owners of Te Kōau A in its negotiations over the exchange, the Crown breached its duty of consultation.

We also find that, by failing to seek enhanced access for owners of landlocked Māori land when negotiating its access agreement with Big Hill Station, following the award of title to Awarua o Hinemanu in 1992, the Crown breached the principle of partnership and its duty of active protection.

7.2.7 Ngā whakarāpopototanga o ngā whakakitenga me ngā whakatoihara / Summary of findings and prejudice

Our task in this priority report has been to investigate the extent to which Crown actions and omissions have been responsible for the historical and continued lack of legal access to Māori lands in the inquiry district. Based on the parties' arguments, we have focused on three key areas: the causes of lands becoming landlocked, the adequacy of the Crown's attempted remedies, and the prejudice owners have suffered due to their lack of access. Flaws in the legislation between 1886 and 1912 were a major factor in Māori lands becoming landlocked. Discriminatory legislation between 1912 to 1975 contributed to many lands remaining landlocked, and continuing flaws in the available remedies have further contributed to their remaining landlocked. The causes of landlocking, the prejudice that flowed from landlocking, the Crown's attempted remedies, and certain actions and omissions of the Crown's defence and conservation agencies that further hindered access to landlocked land, are all breaches of the treaty. The Crown has breached the article 2 guarantees of tino rangatiratanga and full, exclusive, and undisturbed possession; the duties of active protection and consultation; and the principles of partnership, equity, mutual benefit, options, and the right to development.

The prejudice suffered by the tribal communities of the inquiry district because of the Crown's failures to comply with its treaty obligations is extensive and enduring. It has multiple dimensions, including cultural, economic, and social. Economic aspects of the prejudice include the long-term inability of Māori to develop their lands and generate income from them, even as they have sometimes been expected to pay costs such as rates. Land loss has been another aspect of the prejudice. As described in sections 2.3.6.2 and 5.4.5, Crown counsel acknowledged that access difficulties were a factor contributing to the sale of nearly 13,000 hectares of land from 1912 to 1975, the period in which the Crown conceded the available remedies were discriminatory and ineffective for Māori owners.

The cultural aspects of the prejudice must not be overlooked. The disruption to the intergenerational transfer of customary knowledge due to the lack of access to important wāhi tapu and other sacred sites remains a continual source of whakamā (shame, embarrassment) to the iwi. This sense of hurt is worsened

by the landlocked land being the surviving remnant of much larger land loss and therefore highly symbolic. Many of these lands have been landlocked for more than a hundred years, meaning generations of the hapū and iwi have never been able to readily set foot on their whenua. Inevitably, the cumulative and ongoing effects of this dislocation have compromised their kaitiaki role as custodians of mātauranga Māori. Together with the loss of so much other land, this has been to the detriment of tribal identity and cohesion.

Although we reserve further discussion of these impacts for our main report – and acknowledge the view that loss of land in core accessible blocks (like Awarua) exacerbated them – we heard evidence that landlocking weakened Māori economic potential in the district. Further economic prejudice has derived from the lack of workable remedies. Prominent Māori leaders of the district across generations have devoted considerable time and expertise in attempting to overcome the lack of proper access, diverting their energies and limited resources from other important areas of tribal life. Ultimately, their efforts have ended in disappointment, because the available 'remedies' cannot provide the solutions they need.

We also take into account the potential for future cultural prejudice if the current situation is not addressed. Generations of owners of landlocked Māori land have already been prevented from connecting freely with their lands in ways that are culturally appropriate. If the situation is not addressed, new generations of Māori will inherit both the same cultural isolation as their elders as well as the same loss of economic opportunity.

7.3 Whakataunga / Recommendations

We have concluded that the Crown breached the article 2 guarantees of tino rangatiratanga and full, exclusive, and undisturbed possession; the treaty duties of active protection and consultation; and the principles of partnership, equity, the right of development, mutual benefit, and options. We have also found resulting prejudice. The Crown accepted that 70 per cent of Māori land in the inquiry district is landlocked and that Crown treaty breaches were 'significant or, in some cases, the dominant, contributing factors'. We therefore find that the claims regarding the landlocked land under inquiry in this priority report are collectively and in all significant respects well founded. We note that this overall finding does not preclude us from making more detailed findings on individual landlocked land claims in our main report.

We now turn to our recommendations. First, though, we set out the limitations on our jurisdiction in this regard.

Several claimant counsel called on the Tribunal to make recommendations for access to be created over adjoining lands to various specific landlocked blocks. However, we must consider first whether we are prevented from taking such action by provisions of the Treaty of Waitangi Act 1975.

Under section 6(4A), the Tribunal is unable to recommend '(a) the return to Maori ownership of any private land; or (b) the acquisition by the Crown of any private land'. In their commissioned research on options for achieving practical

legal access to the landlocked blocks, Messrs Neal, Gwyn, and Alexander found that the most reasonable access routes would all cross private lands. In some cases, the preferred access routes would traverse only private lands, while in others they would also cross Crown land.[1] Therefore, if we were to recommend access be provided via specific routes to landlocked blocks identified in this inquiry district, we would be acting outside of the Tribunal's jurisdiction.

Section 7(1)(c) of the Treaty of Waitangi Act 1975 states that the Tribunal may, in its discretion, decide not to inquire into, or not to inquire further into, any claim where 'there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to the Ombudsman, which it would be reasonable for the person alleged to be aggrieved to exercise'. In previous reports the Tribunal has relied on this section, declining to make a finding on landlocking claims given the legal remedies available at the time under the Property Law Act 1952 and Te Ture Whenua Maori Act 1993 – remedies still available today in contemporary legislation.[2]

In this report we have not taken that approach. We have concluded from the evidence that, in practical terms, Te Ture Whenua Maori Act 1993 alone is not and could never be an adequate remedy. Indeed, Crown counsel acknowledged that, effectively, the current problems with landlocking in the inquiry district cannot be solved without significant additional assistance.[3] That comment was accompanied by other statements acknowledging that, so far, the legislative remedies had not provided 'a complete answer', and that there were 'remaining problems' with the remedy.[4] In effect, the Crown is saying that the current remedy – the Act alone, without significant financial assistance – is not adequate. We agree. Therefore we consider that section 7(1)(c) does not apply.

7.3.1 Me pukumahi ki te kimi huarahi whakaora, kāore he wāhi mō te ringa tautau / Take an active, not passive, role in solving the problem

Adding to the increasingly loud calls the Tribunal has made in recent reports, we urge the Crown to take a more active role than it has done historically to resolve the lack of appropriate access to landlocked Māori land.[5] This was a key suggestion made by Messrs Neal, Gwyn, and Alexander in their report on practical ways

1. Transcript 4.1.20, pp 116, 130. Although Ōruamatua–Kaimanawa 1U, 1V, and 1W1 could in principle be accessed from State Highway 1 across defence land alone – as the Crown seems to have acknowledged (see section 2.3.7.3) – Messrs Neal, Gwyn, and Alexander considered that the most practical access routes to these blocks would traverse both defence and general land: see doc N1 (Neal, Gwyn, and Alexander), pp 82–84.

2. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995*, p 336; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 328. Section 129B of the Property Law Act 1952, which the *Ngai Tahu Ancillary Claims Report 1995* cited, is substantially reproduced in sections 326 to 331 of the Property Law Act 2007.

3. Submission 3.3.44(d) (Crown), p 39

4. Submission 3.3.44(d) (Crown), p 13; transcript 4.1.24, p 44

5. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 637–638; Waitangi Tribunal, *He Whiritaunoka*, vol 3, p 1497; Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, pp 243–244, 265–266

to solve the lack of legal access.[6] We acknowledge that achieving access can be complicated, requiring the balancing of interests of private property owners with other priorities, such as conservation and defence objectives. However, the treaty breaches are significant and long-standing and have resulted in serious ongoing prejudice. Generations of tangata whenua have had no or very limited ability to set foot on their ancestral lands. Added to this is the failure of the legal remedy. As already noted, without supporting funding, the legal framework under Te Ture Whenua Maori Act 1993 alone is simply inadequate. We consider that what is actually needed now is significant Crown funding that would make the remedies available under Te Ture Whenua Maori Act 1993 an adequate response to the lack of reasonable access to this landlocked Māori land (as we discuss below). It is incumbent on the Crown to take active steps to remove the prejudice.[7]

Therefore, in addition to our recommendation below to establish an entity dedicated to resolving access issues, we urge the Crown to take additional active steps to help resolve the problem. We refer again to the pilot study Te Puni Kōkiri has launched to gather information on landlocked land in the inquiry district.[8] We also heard about another initiative in the form of an agreement between several Crown agencies that encourages and enables them to work more proactively on resolving cases of landlocked Māori land.[9] The agreement, which had not been finalised at the time of our hearings, includes Crown agencies with significant amounts of land adjoining the landlocked Māori land, such as the Department of Conservation and the New Zealand Defence Force. Te Puni Kōkiri, which was facilitating the preparation of the agreement, told us that it included 'guiding principles' for Crown agencies to use where their lands block access to Māori lands. A 'framework' had also been prepared to give agencies stronger guidance on their options when responding to requests for access through their lands.[10] We also heard submissions, as we set out in chapter 2, that the Ministry of Defence had prepared a draft licence agreement for access through defence land to Ōruamatua–Kaimanawa 1U and 1V, was consulting with the trustees of these blocks, and would work to facilitate access to other landlocked blocks where practical.[11] While encouraging, such initiatives are insufficient to restore access to most landlocked land because, in most cases, the solution must also involve private land. We encourage the Crown to keep pursuing such projects nonetheless.

Accordingly, as well as our principal recommendation that a contestable fund be created (see section 7.3.5), we recommend that the Crown take additional active steps to resolve landlocking in the Taihape district in partnership with the hapū and iwi of the area.

6. Document N1 (Neal, Gwyn, and Alexander), p 6
7. Document A37 (Woodley), p 523
8. Document M28 (Hippolite), p 12
9. Document M28 (Hippolite), p 12
10. Document M28 (Hippolite), pp 11–12
11. Transcript 4.1.25, p 144

7.3.2 Te whatu hōmiro ki ngā huarahi whakaora e hāngai pū ana ki tēnei rohe / Focus on solutions specifically targeted at this inquiry district

The problem of landlocked Māori land is not specific to Taihape and if we had a mandate to make recommendations on a national basis, we would do so. However, given the scale of the issue in the Taihape inquiry district, where more than 52,000 hectares (or more than 70 per cent) of Māori land is landlocked, we believe the Crown should focus any efforts to resolve the issue of landlocked land here. This prioritisation is amply justified by the extensive ongoing prejudice for owners of landlocked Māori land in the Taihape district.

We do not say this to diminish the scale of the problem elsewhere. Ms Woodley said that in 1999, Te Puni Kōkiri officials estimated 'a maximum of 30 [per cent] of Maori land blocks' across the whole country could be landlocked, although it should be emphasised that this estimate is now more than two decades old.[12] In our hearings Crown counsel submitted that the national estimate is now 'up to 20 [per cent]' of 'Māori freehold land', but said the work had not been done to arrive at a more accurate figure.[13] These estimates suggest the proportion of all Māori land affected by landlocking is significant. Therefore, while our mandate to recommend solutions is limited to the Taihape inquiry district, we observe that our solutions may be applicable elsewhere. In particular, the fund we are recommending (see section 7.3.5) may provide a useful framework in other areas that have a high incidence of landlocked Māori land.[14]

We heard from counsel for the Ngāti Hinemanu me Ngāti Paki claimants that they feared funding solutions for establishing legal access may be 'swallowed up' by larger, better-resourced iwi and hapū, thus jeopardising their chance to finally receive targeted assistance to provide access to their lands.[15] We do not know if this concern is valid, but nonetheless reiterate that prioritising the resolution of these matters in the Taihape inquiry district is appropriate in the circumstances.

Accordingly, we recommend that the Crown focus any efforts to resolve the issue of landlocked land in the Taihape inquiry district.

7.3.3 Te whakapiri me te tangata whenua ki te kimi putanga pai / Partner with tangata whenua when developing solutions

We agree with Crown and claimant counsel that tangata whenua of the inquiry district should be very closely involved, as partners, in whatever solutions are

12. Document A37(l) (Woodley), p 19

13. Transcript 4.1.23, p 13; submission 3.3.44 (Crown), pp 2, 2 n We acknowledge that the 1999 estimate quoted by Ms Woodley, describing the total number of land *blocks* that are landlocked, is a different measure from the 20 per cent figure quoted by Crown counsel, which gives a percentage of all Māori freehold *land* (emphasis added).

14. To take an example (on a much smaller scale), Te Puni Kōkiri officials suggested that, if programmes such as their pilot study of landlocked Māori land in the Taihape inquiry district proved useful in the effort to understand and unlock landlocked land, they may be applied in other regions: doc M28 (Hippolite), p 12.

15. Submission 3.3.40 (Sykes), pp 66–67, 70–71

found to access their own landlocked land.[16] We came to appreciate the very considerable experience and expertise members of the claimant community had developed over the many years they had spent searching for solutions to their lack of legal access. It will be important for the Crown to partner with these experts when seeking solutions.

As such, we recommend that the Crown should seek the agreement of tangata whenua of the inquiry district in its response to the recommendations we make in this report and any other steps the Crown takes to resolve landlocking in the district.

7.3.4 Kaua e tīkina ngā pūtea whakaora, i te tahua whakatau i ngā kerēme tiriti whānui / Do not take funding for solutions from funds for general treaty settlements

Before making our further recommendation in section 7.3.5 below, we stress that the funding required should not be taken from those funds already set aside for the purposes of settling the treaty claims of this inquiry district. There is precedent for solutions to specific and enduring problems to be provided in this way – independently of treaty settlement processes. A prominent example concerns the long-standing grievances over the rental on Māori reserved lands. Those grievances related to landholdings of Māori in, for example, Taranaki and the West Coast of the South Island. The funds allocated to address these problems were not taken from any particular treaty settlement.[17]

The same approach needs to be taken here. The costs of resolving the reserved lands claims outlined above were not taken from the settlement quanta of the affected tribes' historical treaty claims, and neither should they be in this case. Resolving landlocked land will be extremely expensive, and Māori of this inquiry district should not have to expend their settlement quantum on the provision of what should have been a basic treaty right all along: continued access to their own land. This is especially important given it is well established that financial compensation as part of treaty settlements typically amounts to a tiny percentage of the value of what was lost.

Accordingly, we recommend that the Crown develop its solutions without diminishing the funds that would otherwise be used for the settlement of the historical treaty claims of this district.

7.3.5 Te hanga tahua whakataetae hei āwhina i te Māori ki te huaki huarahi / Establish a contestable fund to assist Māori with the costs of achieving access

We acknowledge the steps that the Crown has taken recently to remove some of the primary problems from the existing remedies. In some cases, these steps have responded to the suggestions and commentary we set out in our preliminary

16. Transcript 4.1.24, p 39; submission 3.3.96 (Bennion and Black), p [14]

17. Te Puni Kōkiri, 'Rent Reviews of Māori Reserved Lands: Prepared by Te Puni Kōkiri for the Māori Affairs Committee', 2011, https://www.parliament.nz/resource/0000160920, pp 2, 5; submission 3.3.36 (Watson), p 14

views.[18] These include removing the requirement, under Te Ture Whenua Maori Act 1993, for appeals to be heard in the High Court. We urge the Crown to continue to look for such opportunities within the legislative remedies to remove barriers that prevent owners of Māori land from achieving legal access to their landlocked blocks.

However, we reiterate that the principal barrier to access remains financial, not legislative.[19] Even with the recent changes to Te Ture Whenua Maori Act 1993, owners of Māori land can still be liable for the cost of surveying, forming, and maintaining the access, and for the compensation of land owners whose land any access will traverse. We heard evidence from technical witness Jonathan Gwyn that the costs of forming road access could run to '[m]any, many, many' millions of dollars, with one rough estimate calculating a cost of up to approximately $38.5 million in earthwork and construction costs alone for a road of 40 kilometres (although these costs could be significantly reduced depending on whether heavy vehicle access was required).[20] Alternative transport options, for example by helicopter, are in most cases prohibitively expensive. For Māori to be left with the task of meeting such costs is manifestly unfair.

If the Crown continues to make only legislative changes, while ignoring the resource needs to enable owners of Māori land to meet these costs, it will simply be repeating the mistakes of the past, perpetuating the treaty breaches, and creating further prejudice. As we set out in chapter 3, the principle of the right to development requires the Crown to actively assist Māori economic development, at least to the extent that it did for settlers, and provide the means to deliver on the treaty bargain of mutual prosperity from settlement. In short, the Crown needs to finally commit the investment that is required to overcome the blight of landlocked Māori land.

Before discussing the contestable fund we recommend, we emphasise that precedent exists of the Crown investing significant funds and expertise to facilitate changes to the legal status of land, where the circumstances of the land's tenure have become outdated and problematic. The High Country Tenure Land Review saw the Crown spend just under $117 million over 25 years to purchase pastoral leasehold rights to more than 330,000 hectares of high country land that had been leased to settlers.[21] As indicated earlier, in another example, the Crown responded to long-standing complaints by Māori about low rental payments for reserved Māori lands. Under the Maori Reserved Land Amendment Act 1997, the leasing system was amended to allow owners of Māori reserved lands to receive payments closer to fair market rentals. Lessors and lessees received $95 million to compen-

18. Memorandum 2.6.65, pp 7–8

19. In saying this, we acknowledge that legislation will be required to put our recommendations into effect.

20. Transcript 4.1.20, pp 58–59

21. Ann Brower, 'A Case of Using Property Rights to Manage Natural Resources: Land Reform in the Godzone', *Case Studies in the Environment*, vol 1, 2017, doi 10.1525/cse.2017.sc.348268, p 2. Legislation to end the tenure review system, the Crown Pastoral Land Reform Act, was passed in 2022.

sate for the changes under the 1997 Act, and an additional $47.5 million was paid to lessees for back payments in 2002.[22]

We recognise that the claimants, as set out in chapter 2, did not support a contestable fund. We accept that it is not ideal, but the reality is that much discretionary Crown funding is disbursed in this way. An example is content and music for Māori broadcasting, which Te Māngai Pāho funds on a contestable basis.[23] We want our recommendations to be taken up by the Crown, and we want them to actually result in practical and enduring access solutions that resolve the landlocked land problem at last. Thus we must approach solutions pragmatically, and so a contestable fund, with a supporting secretariat and pool of accessible expertise, is the best solution.

We also acknowledge that the claimants may find it perverse that they would somehow have to compete with each other for funding to access their landlocked land. The reality is, however, that the resolution of any individual case of landlocking would depend first on a considered assessment of the applications submitted. They would necessarily have to be prioritised, because not all landlocked Taihape land could be unlocked at once. We do not believe, however, that significant landlocked blocks would miss out in a contested process. Rather, the expense and logistics involved would mean that the process would simply take time and, within that, certain cases would need to be ranked ahead of others.

Accordingly, in summary, we recommend that the Crown establish an entity, or commission, dedicated to achieving lasting legal access solutions for landlocked Māori land in the Taihape inquiry district. This entity, Te Kōmihana Huaki Whenua Karapotia/the Landlocked Land Access Commission (or LLAC), should administer a contestable fund allocated by a komiti or board (not dissimilar to Ngā Whenua Rāhui). The fund should primarily be used to create access and pay any required compensation following a Māori Land Court access order. It should also be used to support land owners through the steps required to reach that point. Modest sums should be granted to pay for initial feasibility studies, to support land owners' applications to the court for an access order. If access proves feasible, the fund should then be used to prepare land owner cases that the komiti will consider when deciding whether to fund actual access.[24] If the komiti decides to fund access, the judge would make an access order, with funding to be released if the order stands and is no longer subject to rights of appeal. Māori representatives will be integral to the komiti's membership, and the commission may also draw support for its work from several government ministries and agencies, including the Ministry of Business, Innovation and Employment (MBIE), Te Arawhiti, and

22. Te Puni Kōkiri, 'Rent Reviews of Māori Reserved Lands: Prepared by Te Puni Kōkiri for the Māori Affairs Committee', 2011, https://www.parliament.nz/resource/0000160920, p 5; submission 3.3.36 (Watson), p 14

23. Te Māngai Pāho, 'Annual Report 2019–20', https://www.tmp.govt.nz/en/documents/3/TMP_Annual_Report_2019–20_FINAL.pdf, pp 23, 48

24. A land owner case would make an argument for the creation of access based on the owner's intended use of the land, whether commerical or cultural. Like a business case, it would evaluate the benefits, costs, and risks of creating access.

Te Puni Kōkiri. In the interests of accountability and transparency, funding decisions should also be subject to rights of review to an accessible appeal body.

In making this recommendation, we stress that the Crown must make a high-level commitment; this entity must be funded, led, supported, and staffed at the level needed to solve access problems that typically have complex financial, legal, and technical elements. It must have leadership and executive support from within the Crown at a high level to ensure its leaders can obtain, from both central and local government agencies, the expertise and support that will be required. The entity must also partner with Māori of the Taihape inquiry district, and its core purpose must be to actively protect the tino rangatiratanga of Māori owners over their landlocked land.

In this context, elements of the Ngā Whenua Rāhui Fund's structure may provide a useful starting model. Ngā Whenua Rāhui is a contestable ministerial fund that, as we have already discussed, facilitates the protection of indigenous biodiversity on Māori lands, including through the creation of Ngā Whenua Rāhui kawenata. These agreements can involve funding and practical support for Māori land owners to support them to fulfil their roles as kaitiaki to protect the indigenous biodiversity of their lands that sit under the kawenata.[25]

Like the solution we are recommending, the fund exists for Māori owners, with Māori land authorities such as trusts and incorporations, organisations representative of whānau, hapū, or iwi, and Māori owners of general land able to apply. The fund is led by an independent komiti made up of Māori members who may be recommended for the role by Ngā Whenua Rāhui members or staff, and who are appointed by the Minister of Conservation in consultation with the Minister for Māori Development. Most members are appointed for a three-year term initially, with the chair (Sir Tumu Te Heuheu) and deputy chair (Kevin Prime) remaining on the komiti at the Minister's discretion.[26] This komiti provides oversight and advises the Minister of Conservation on the use of the funds administered by Ngā Whenua Rāhui.[27] The fund is supported by the Ngā Whenua Rāhui Unit, which provides secretariat services to the komiti, including managing and distributing money through two contestable funds.[28] Although we reserve further discussion of Ngā Whenua Rāhui for our main report, we observed first-hand during the hearings the involvement of prominent tribal leaders in the komiti and the commitment of staff to the kaupapa.[29] The fact that, at the time of writing, Māori groups of the inquiry district have reached at least 10 agreements under Ngā

25. Transcript 4.1.17, pp 205–206
26. Document M6 (Mohi), pp 3–6; transcript 4.1.17, pp 212–213; 'About the Ngā Whenua Rāhui Fund', Department of Conservation Te Papa Atawhai, https://www.doc.govt.nz/get-involved/funding/nga-whenua-rahui/nga-whenua-rahui-fund/about-the-fund/, accessed 26 September 2023
27. Document M6 (Mohi), pp 3–6; Ngā Whenua Rāhui, '2019 Annual Report to the Komiti', Department of Conservation Te Papa Atawhai, 2020, https://www.doc.govt.nz/globalassets/documents/getting-involved/funding/nga-whenua-rahui-annual-report-2018–2019.pdf, pp 5–6
28. Transcript 4.1.17, p 200
29. Transcript 4.1.17, pp 194–263

Whenua Rāhui arrangements suggests that the model has at least some level of buy-in and familiarity amongst whānau, hapū, and iwi of the rohe.[30]

Given the complexity of some legal access applications for Māori Land Court access orders, and the sums of public money that would be involved in giving effect to them, transparency and due process will be important elements of funding allocation. For this reason, it should include avenues for review and/or appeal by any person directly affected by the decision. If applicants seeking access to their landlocked land, having been provided with initial funding and a positive feasibility study report, are then declined funding for a land owner case, they could appeal that decision to a review panel chaired by a Māori Land Court judge. If they are turned down by the komiti for funding to create access, they could also seek leave to have that decision assessed by the review panel. Where the review panel upholds the komiti's decision, applicants could in turn appeal that decision to the Māori Appellate Court. This multi-step process would help counter any bias in funder and review panel decisions to decline funding. Where the komiti does decide to fund access, adjoining land owners and others directly affected could object once the Māori Land Court has made an access order, by appealing that order to the Māori Appellate Court. These parties could also participate as interested parties in reviews or appeals (initiated by applicants) against komiti decisions to decline funding for access.

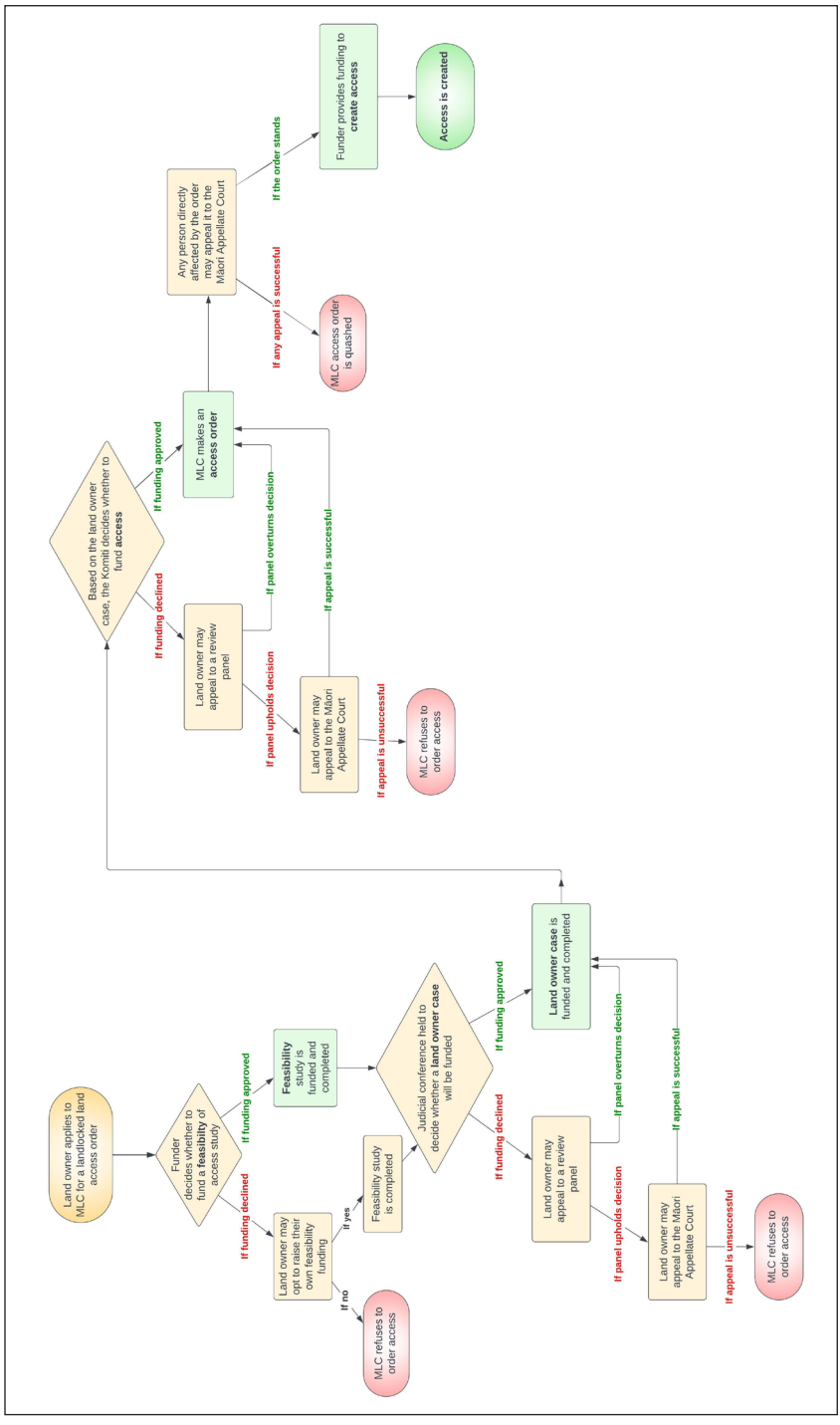
Aspects of the process used by the Land Valuation Tribunal may provide a useful precedent in this context. The tribunal deals with objections to rating valuations and valuations for land taken under the Public Works Act. Tribunals exist in each region, and are made up of a district court judge and two registered valuers.[31] Persons appearing before the tribunal must have already objected to their local council and must then fill out an application form with details of the property, their relationship to it, and their objection, along with other documents such as the notice of valuation and the previous decision on the valuation.[32] At the hearing they can present their own case or ask for a lawyer to present it for them and must provide other documents requested by the tribunal. Hearings are formal and held in public (unless a private hearing is requested) and are attended by the chair of the tribunal (who is the district court judge), two tribunal members, the applicants and their lawyers or advocates, the authority that issued the valuation, and any other parties to the case. Each party can submit evidence and produce witnesses (who may be questioned) and, in all but rare cases, evidence is given under oath or affirmation. The judge issues the panel's decision in writing, generally five or six weeks after the hearing, and decisions can be appealed to the High Court.[33]

30. Document M6(a) (Mohi), p 3. Mr Mohi's evidence said 23 such agreements had been reached, but, according to our analysis, some of these are outside the inquiry district.

31. Ministry of Justice, 'Land & Title: Land Valuation Tribunal', https://www.justice.govt.nz/tribunals/land-and-title/land-valuation-tribunal, last updated 21 August 2023

32. Ministry of Justice, 'Objection to Valuation Form', https://www.justice.govt.nz/assets/LVT-Objection-to-Valuation-form-2022.pdf

33. Ministry of Justice, 'Land & Title: The Hearing', https://www.justice.govt.nz/tribunals/land-and-title/land-valuation-tribunal/the-hearing, last modified 27 February 2020



Recommended approach for allocating funding through the proposed Te Kōmihana Huaki Whenua Karapotia / Landlocked Land Access Commission

Such a legal process involving the applicants and anyone else directly affected by the decision, with a panel chaired by a judge which hears evidence and makes written decisions, will be necessary at the review stage of the contestable fund process to ensure a robust system for resolving contested funding decisions. Again, we recommend a system adapted to suit the Māori land situation, with a judge of the Māori Land Court chairing the review panel – assisted by up to two lay people – and appeals made to the Māori Appellate Court.

Turning to the body required to support the contestable fund, again precedent exists of the Crown establishing a commission whose sole function is to secure access to land – in this case, public access to public land. That body is Herenga ā Nuku Aotearoa, the Outdoor Access Commission.[34] Set up under the Walking Access Act 2008, the commission's purpose is to 'provide New Zealanders with free, certain, enduring, and practical access to the outdoors'.[35] Its functions include several relevant to our discussion of landlocked land – specifically, working with local authorities, negotiating with landholders to obtain access over private land, and helping to resolve disputes. For 13 years, this organisation has been publicly funded to resolve problems of public access to public land, while Māori in the Taihape inquiry district have faced steep costs to resolve problems of access on their own, again suggesting the inequity that has been allowed to continue for too long.

However, there are some crucial differences between the work of Herenga ā Nuku Aotearoa and that of the body we recommend should be established. First, it is responsible for creating walking and biking access, not access by vehicle or for commercial purposes. Secondly, it does not have the function of administering and distributing funds that we have discussed in this chapter. For these reasons, the supporting body we are recommending will need to be provided with a considerably larger funding base, and is likely to require the involvement of much more legal, engineering, and technical expertise or the ability to secure such advice when required. This difference is reflected in the amount of funding Herenga ā Nuku Aotearoa receives from the Crown, which was less than $3.6 million in 2020–21. The funding required for the Taihape landlocked land entity will need to be signficantly larger.[36] Finally, Herenga ā Nuku Aotearoa is empowered to achieve access only on the basis of negotiation, whereas the commission we are recommending will have powers to compel the creation of access, on the basis of a Māori Land Court order.

Herenga ā Nuku Aotearoa also provides a useful starting place for conceiving of the roles required to work on achieving access. The commission has a board of four people and a mixture of national office staff and regional field advisors. Based

34. The commission was formerly called the Walking Access Commission Te Ara Hikoi Aotearoa, acquiring its current name in July 2022.

35. 'Statement of Performance Expectations 2020–2021', https://www.herengaanuku.govt.nz/about-us/publications/older-publications/spe-2020–2021, accessed 9 March 2023

36. Walking Access Commission: Ara Hīkoi Aotearoa, 'Statement of Performance Expectations for the 2020/2021 Financial Year', https://www.herengaanuku.govt.nz/assets/Publication/Files/spes-and-sois/occoeofied/Walking-Access-spe-2020.pdf, last modified 1 July 2020, pp 7, 10

in Wellington, the national office staff number 14. Thirteen part-time contractors make up the regional field advisors across New Zealand, who use their connections and experience to help resolve disputes and mediate between landholders, recreationalists, local authorities, and others.[37] While this staffing model provides a useful starting place, the leadership and staff of the landlocked land entity we recommend will require much more significant Māori involvement. We agree with both claimant and Crown counsel, who stressed the need for the people who know the landlocked land best and have the most relevant experience – the hapū and iwi of the inquiry district – to be closely involved in future Crown efforts to achieve access to landlocked land.[38] This could be at an advisory level, or even – where no conflict of interest exists – as members of the commission's staff or of the komiti itself.

Restoring the access of Māori to their landlocked land for traditional cultural purposes – not just commercial purposes – including the ability to act as kaitiaki over their land, is vital to removing the prejudice we have outlined. Therefore we recommend that using the fund's resources to provide access to land for traditional cultural purposes should be considered just as valid as providing access for commercial objectives.

Due to the distances of some of the landlocked land from existing public roads, the terrain and climate, and the fact that forming an access road would be expensive, we consider that in some instances it may be a better use of funds to provide helicopter transport rather than road access. Claimant and Crown counsel acknowledged that helicopter transport may be required, and claimant counsel added that the Crown routinely funds the use of helicopter transport to access remote lands, as Department of Conservation staff often travel by helicopter to carry out their duties on public conservation lands.[39] Again, in making such decisions, the expertise and experience of those tangata whenua who know the lands best will be crucial.

We consider that the bodies with shared Crown responsibility for the fund and its supporting commission should be MBIE, Te Arawhiti, and Te Puni Kōkiri. We suggest MBIE because it has experience in administering funds for Māori land projects through the Provincial Growth Fund and earlier initiatives of a similar kind. Te Arawhiti is nominated for its role and experience in enabling Treaty settlement projects, and we suggest that Te Puni Kōkiri should play an oversight role, periodically reviewing both the effectiveness of and policy settings for the proposed Kōmihana Huaki Whenua Karapotia.

Finally, as we are recommending that the allocation of contestable funding be tied to the Māori Land Court process for making an access order (and vice versa),

37. Walking Access Commission: Ara Hīkoi Aotearoa, 'Statement of Performance Expectations for the 2020/2021 Financial Year', https://www.herengaanuku.govt.nz/assets/Publication/Files/spes-and-sois/occoeofied/Walking-Access-spe-2020.pdf, last modified 1 July 2020, pp 3–4; 'Our People', https://www.herengaanuku.govt.nz/about-us/our-people/, accessed 24 May 2023

38. Submission 3.3.96 (Bennion and Black), p [14]; transcript 4.1.24, p 39

39. Submission 3.3.96 (Bennion and Black), p [9]; transcript 4.1.24, p 38

changes to the legislation governing this court process – Te Ture Whenua Māori Act 1993 – would be required to put our recommendations into effect.

We acknowledge that the precedents we have set out for the commission all have a national role or purview, while the commission would be solely focused on the Taihape inquiry district. As we have said, we have no mandate to recommend a body whose operations would be national in application, encompassing all landlocked Māori land in the country. Simply, we have not heard from Māori owners of landlocked land in other districts, and cannot presume to know whether they would support the formation of such a commission. However, we believe that the Taihape district may prove a useful pilot for the rest of the country. If other land owners believe it is a worthwhile solution, the Crown could negotiate with them to expand the scheme nationwide.

In conclusion, then, we recommend that the Crown establish a contestable fund, allocated by a komiti or board and supported by a commission, dedicated to achieving lasting legal access solutions for landlocked Māori land in the Taihape district. As alluded to earlier, we recommend the process allow Māori land owners to apply to this entity for funding to, first, produce a feasibility study, and secondly (if access proves feasible) to provide a land owner case, whether their intended use of the land involves commercial outcomes or they are seeking access to the land to exercise their obligations as kaitiaki. Any feasibility study or land owner case may include assessments of access costs and possible compensation. This would help avoid the scenario of securing orders for access, only to have them lie in court because the funding required for access is not available due to over-allocation, or because the application for funding has been declined with that decision being upheld on appeal. Thirdly, the fund should then be used to implement access orders made under existing Māori land legislation (amended as necessary to give effect to our recommendations). That is, the fund would be used to enable applicants to meet all the costs that may be required to form and maintain reasonable legal access to their landlocked land and, if necessary, to pay compensation to anyone whose land the accessway will cross, as may be ordered by the court. Finally, since funding decisions can sometimes prove unsatisfactory for claimants, the process should include review options to an accessible appeal body with knowledge of Māori land, with a further option of appeal to the Māori Appellate Court.

We therefore recommend that a contestable fund be established and the following criteria should apply to it.[40]

1. The contestable fund should be allocated by a komiti made up of appropriately skilled and experienced Māori members who are not members of the hapū associated with the lands in question.[41]

40. In making these recommendations, we draw in part on suggestions made by Messrs Alexander, Gwyn, and Neal in their technical report: doc N1 (Neal, Gwyn, and Alexander), pp 30–35.

41. In recommending that the komiti be made up of Māori members, we observe that the komiti of Te Māngai Paho and of Ngā Whenua Rāhui both comprise entirely Māori membership, to take two examples.

2. The concept of the fund and its supporting commission should initially be agreed to, in principle, by tangata whenua of the Taihape inquiry district.
3. The bodies with shared Crown responsibility for the fund and its supporting commission should be MBIE, Te Arawhiti, and Te Puni Kōkiri.
4. The Crown-funded supporting commission should exist to administer the fund and facilitate its use by Māori land owners in the Taihape district, including:
    (a) investigating landlocked land situations, commissioning reports, and preparing initial discussion documents and proposals; and
    (b) providing access to all legal, survey, engineering, and other expert advice that may be required to create the access.
5. Applications for funding to access lands for traditional cultural purposes should be equally as valid as commercial purposes.
6. A portion of the contestable fund should be set aside to provide feasibility funding for land owners seeking an access order from the Māori Land Court, so the court is informed of their application's viability.
    (a) These pūtea should be capped at $20,000 (adjusted for inflation).
    (b) Once a feasibility study is complete, a judicial conference between the applicant, the funder, and a Māori Land Court judge should be held to decide whether the application for an access order will progress to land owner case funding or be declined. If there is no agreement, the funder should decide.
7. The contestable fund process should enable the parties to object to funding decisions by way of review and/or appeal. Applicants should be able to:
    (a) Seek a panel review if, having received funding for a feasibility study followed by a recommendation that access is feasible, they are declined funding for a land owner case. As set out above, this panel should be chaired by a Māori Land Court judge and include up to two lay people to assist him or her. It should be empowered to hear evidence given under oath or affirmation, question witnesses and hear others question them, and make written decisions. Appeals should be made to the Māori Appellate Court.
    (b) Seek a panel review if they are declined funding to create access. Appeals should be made to the Māori Appellate Court.

    In addition, parties directly affected by a decision to fund access should be made aware that they can object by appealing the relevant Māori Land Court access order to the Māori Appellate Court.

The following points provide further relevant context and rationale:

- The Māori Land Court should have the power to review a komiti decision on whether to fund access – namely, whether all relevant factors were considered, no irrelevant factors were considered, and the decision was rational.
- In addition to initial funding to create lasting legal access, a residual annual funding responsibility should be administered, on an annual basis, by Te Puni Kōkiri to pay for ongoing remedial work on formed accessways that will require maintenance and repairs.

- In some cases, it may be more appropriate to fund and facilitate access to lands by helicopter rather than by forming and maintaining new accessways by land. The commission should have discretion to fund only helicopter access in these cases, even where the court has made an access order.
- The commission should fund the reasonable costs of owners of landlocked land to participate in the contestable funding process, such as attending preparatory hui and appearing before the komiti itself.
- As well as applications from owners of landlocked Māori land in Taihape, applications for funding to access landlocked general land owned by Māori in the district should be eligible, where those lands became general land ('Europeanised') under section 6 of the Maori Affairs Amendment Act 1967, or where tangata whenua have reacquired landlocked land lost through prior Crown actions (including landlocking) and hold it under general title. We include these lands in these criteria, as we noted in section 1.1.2.4. We have not discussed them in our report because we did not receive evidence on the scale of such lands or their location, but we believe that, as a matter of principle, they should be treated in the same way as other landlocked land that is still held in Māori title.[42]
- The aim of the fund and its supporting body does not necessarily need to be the unlocking of all the landlocked Māori blocks in the inquiry district. This is because a proportion of landlocked blocks may be tiny slivers of land and have other characteristics that make the creation of physical and legal access to them disproportionately expensive or difficult. Again, some balancing of priorities may be required. We acknowledge that, ideally, we would recommend every fragment of landlocked land be made accessible, but we need to be practical. Besides, the Crown typically expends only a fraction of the value of what was lost when it settles historical treaty claims, as we have previously noted.

Finally, though we are recommending the Crown establish an independent commission to support this fund, we acknowledge that it may be more administratively efficient to base the fund in an existing government body (such as Te Arawhiti, MBIE, or Te Puni Kōkiri). We consider this would be a viable alternative to a commission-based fund, so long as the funding process itself remained as we have recommended. Should the Crown take this approach, it should form a new secretariat or unit within the relevant government body to support the fund and its independent komiti.

42. According to the evidence we received, there is 'no current suitable database' that records general land owned by Māori: doc N1 (Neal, Gwyn, and Alexander), p 8. The evidence we received focused on Māori land: see doc A37 (Woodley), pp 20–22. See also section 4 of Te Ture Whenua Maori Act 1993 for the definition of general land owned by Māori.

Dated at Wellington this 16th day of January 2024

Justice Layne Harvey, presiding officer

Dr Paul Hamer, member

Dr Monty Soutar, member

Professor William Te Rangiua (Pou) Temara, member

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