
BEFORE THE WAITANGI TRIBUNAL

WAI 898

IN THE MATTER OF **the Treaty of Waitangi Act 1975**

and

IN THE MATTER OF **the Rohe Pōtae District Inquiry**

CROWN STATEMENT OF POSITION AND CONCESSIONS

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTORY COMMENTS

1. In accordance with the Tribunal's memorandum-direction of 19 September 2011,¹ this document sets out the Crown's statement of position and concessions in the Rohe Pōtae district inquiry.

Purpose of the statement of position and concessions

2. The statement of position and concessions sets out first the concessions of Treaty breach that the Crown is able to make at this stage of the Rohe Pōtae district inquiry. Over the course of the inquiry, the Crown will continue to assess the evidence and submissions presented to the Tribunal in order to determine whether it is able to make further concessions, whether of Treaty breach or of fact.
3. Second, the statement of position and concessions sets out the Crown's position in respect of each of the issues in the amended claimant statement of issues dated 27 January 2012.²

The Crown's approach

4. Where possible, the Crown has endeavoured to respond to the amended claimant statement of issues by drawing on the evidence on the record of inquiry. In some cases the Crown has noted that further particulars are required, or that there is limited or no evidence on the record of inquiry to enable the Crown to provide a response, or that no claim in respect of an issue raised appears to be before the Tribunal. Where necessary, the Crown has used the generic pleadings in particular as a guide to understanding the scope and content of the issues.

¹ "Memorandum-Directions of Judge DJ Ambler Following the Eight Judicial Conference" (19 September 2011), Wai 898, #2.5.100, para 7.10.

² "Claimant Statement of Issues for Te Rohe Pōtae Inquiry District dated 23 December 2011 (as amended 27 January 2012)", Wai 898, #1.4.1(a).

5. The Crown has sought to engage substantively with the evidence on the record of inquiry so as to identify the elements of each issue that seem most likely to be the main points of dispute between the Crown and the claimants and would justify further scrutiny in the hearing process. It has not attempted to respond to issues by providing an exhaustive analysis of the law and facts.
6. The statement of position and concessions is made at a relatively early stage of the inquiry process and does not necessarily set out the Crown's final position on any given issue. The Crown expects that, during the course of the inquiry, its position on certain matters will evolve as the issues are clarified, as it considers the evidence and submissions presented, and as it presents its own evidence and submissions. To a large extent, the Crown's final position on claims will be able to be presented only in the course of the hearings and in the Crown's closing submissions.
7. The Crown notes also that it is better informed on certain issues than on others. In part, this reflects the fact that some of the issues in this inquiry are new or are less familiar to the Crown from its experience in other Tribunal inquiries and in Treaty settlements. It is also to some extent a reflection of the evidence that is available on the record of inquiry. It should be borne in mind that the Crown, like the claimants and the Tribunal, has questions of its own and anticipates forming a more detailed position in the course of the inquiry.

Issues raised by unrepresented claimants

8. In accordance with the Tribunal's directions,³ the Crown has reviewed the unrepresented claims in the inquiry. In doing so, it has been unable to identify issues that are not included in the amended claimant statement of issues.

³ Memorandum-Directions of Judge DJ Ambler Following the Eight Judicial Conference" (19 September 2011), Wai 898, #2.5.100, para 7.11.

Structure and terminology

9. Although the Crown’s statement of position follows closely the overall structure of the amended claimant statement of issues, in some cases the Crown has grouped together related issues within a particular topic for a single response. This means that issues may not always be addressed in the same sequence in which they appear in the amended claimant statement of issues.
10. The Crown has responded to the sub-issues posed under the primary issues in each topic contained in the amended claimant statement of issues.
11. Following the lead of the amended claimant statement of issues, the Crown has used for textual convenience the term “Rohe Pōtae Māori” to refer to all kin groups associated with the Rohe Pōtae inquiry district. In addition, the document’s reference to “the Treaty of Waitangi and its principles” (or to the more shorthand reference, “the Treaty”) includes the Treaty text as well as the principles in both the Māori (Te Tiriti) and English versions, including any differences between them.

Tribunal Jurisdiction

12. The Waitangi Tribunal’s jurisdiction is set out in section 6 of the Treaty of Waitangi Act 1975, which limits the Tribunal’s ability to inquire into certain matters. In particular, the Crown notes the following subsections of section 6 concerning the Tribunal’s jurisdiction in respect of Bills introduced into the House of Representatives and commercial fisheries:

(6) Nothing in this section shall confer any jurisdiction on the Tribunal in respect of any Bill that has been introduced into the House of Representatives unless the Bill has been referred to the Tribunal pursuant to section 8 of this Act.

(7) Notwithstanding anything in this Act or any other Act or rule of law, on and from the commencement of this subsection the Tribunal shall not have jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect of,—

(a) commercial fishing or commercial fisheries (within the meaning of the Fisheries Act 1983); or

(b) the Deed of Settlement between the Crown and Maori dated the 23rd day of September 1992; or

(c) any enactment, to the extent that it relates to such commercial fishing or commercial fisheries.

Maraeroa A and B Blocks

13. The Maraeroa A and B Blocks Claims Settlement Bill was introduced into the House of Representatives on 5 March 2012 and had its first reading on 8 March 2012. The Bill intends to give effect to the deed of settlement entered into by the Crown and the descendants of the original owners of the Maraeroa A and B blocks on 12 March 2011 for the settlement of historical claims. It follows that the Tribunal may not inquire into claims that the Maraeroa A and B Blocks Claims Settlement Bill proposes to settle, which includes (to the extent that they relate to the Maraeroa A and B blocks):⁴

- (a) Wai 329—Te Rohe Pōtae lands claim:
- (b) Wai 575—Ngāti Tūwharetoa comprehensive claim:
- (c) Wai 630—Ngāti Rereahu Rohe claim:
- (d) Wai 729—Rangitoto Tuhua Rohe claim:
- (e) Wai 1137—Te Rohe Pōtae claim:
- (f) Wai 1138—Waipā River claim:
- (g) Wai 1230—Ngāti Huru claim:
- (h) Wai 1309—Ngāti Te Ihingarangi claim:
- (i) Wai 1435—Mahuta Hapū land and resource claim:
- (j) Wai 1599—Ngāti Rereahu claim:
- (k) Wai 1640—Ngāti Whakatere ki te Tonga claim:
- (l) Wai 1704—Ngāti Rereahu claim:
- (m) Wai 1894—Ngāti Rereahu claim.

⁴ Maraeroa A and B Blocks Claims Settlement Bill, cl 12(2). The Crown understands that Wai 630, Wai 1137, Wai 1138 and Wai 1704 are not part of the aggregated or consolidated grouping of claims in the Rohe Pōtae inquiry.

14. The Crown notes that the effect of subclause 12(3)(b) of the Bill is that Wai 389 and Wai 443 remain within the Tribunal's jurisdiction as they do not come within the meaning of "historical claims that relate to the Maraeroa A and B blocks".

Claims Concerning Non-Commercial Fisheries

15. As outlined in the Crown's response to issues 17.19 to 17.23 of the claimant amended statement of issues, the 1992 Fisheries Deed of Settlement reflects the Crown's recognition of Māori fishing rights and the grievances associated with Treaty breaches in relation to those rights. Further, section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 reflects the 1992 Māori Fisheries settlement and provides for the manner in which Treaty interests in non-commercial fisheries are to be addressed.
16. In light of section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the Crown submits that any inquiry into customary non-commercial fisheries should be focused on experience today insofar as the operation of this regime is concerned.

Claims Concerning Waitomo Cave

17. On 14 June 1990, the Crown and Josephine Huti Anderson, on behalf of the hapu of Ruapuha and Uekaha, reached a final settlement in respect of Wai 51, the Waitomo claim.⁵
18. The Crown notes that the settlement of Wai 51 took effect without the need for the enactment of legislation. As a result, there is no 'settlement Act' that expressly removes the Tribunal's jurisdiction from inquiring into the same subject matter that the Wai 51 settlement covered. However, the Crown regards the Wai 51 settlement to be full and final and it does not intend to re-negotiate its terms in the course of future settlement negotiations with Rohe

⁵ See "Joint Memorandum from Crown and Claimant Counsel Advising the Waitangi Tribunal of the Settlement of the Waitomo Claim", Wai 51, A12.

Pōtae Māori. In the Crown's submission, the Tribunal should not inquire into claims that relate to the same subject matter as the Wai 51 claim. The Crown reserves the right to make further submissions on the precise scope of the Wai 51 claim and settlement if the need arises.

19. The Crown acknowledges that issues relating to the Ruakuri and Aranui caves may be matters for inquiry.

CROWN TREATY BREACH CONCESSIONS

20. The Crown recognises that Rohe Pōtae Māori have well-founded grievances. At this stage of the inquiry, the Crown is able to concede that it has breached the Treaty of Waitangi and its principles in the following ways:

Pre-1865 Crown Purchases

20.1 The Crown concedes that where it did not reserve sufficient land for the present and future needs of the iwi and hapū of Te Rohe Pōtae when purchasing land from them before 1865, it failed to uphold its duty under the Treaty of Waitangi and its principles to actively protect the interests of the iwi and hapū of Te Rohe Pōtae from whom it purchased land.

Taranaki Raupatu

20.2 The Crown concedes that the confiscation of Ngāti Maniapoto interests in Taranaki in 1864 was an injustice, and breached the Treaty of Waitangi and its principles.

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

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

The Impact of the Native Land Laws

20.4 The Crown accepts that the individualisation of Māori land tenure provided for by the native land laws made the lands of Te Rohe Pōtae iwi and hapū more susceptible to fragmentation, alienation and partition, and that this contributed to the undermining of tribal structures in Te Rohe Pōtae. The Crown concedes that its failure to protect

these tribal structures was a breach of the Treaty of Waitangi and its principles.

Crown Purchasing

20.5 The Crown accepts that it led the iwi and hapū of Te Rohe Pōtae to reasonably believe when they agreed to the passage of the North Island Main Trunk Railway through their territory in 1885, that, if they wished to sell their land, the Crown intended to establish a free market, regulated by a land board system, in which they could do so. In this context the Crown concedes that:

20.5.1 the manner in which the Crown used pre-emptive powers in land purchase negotiations in Te Rohe Pōtae during the 1890s so that some Te Rohe Pōtae Maori were left with little option but to sell their land or shares in land even when they, and other observers, considered that the prices offered represented less than the market value of their land; and

20.5.2 the aggressive tactics the Crown used on occasion to pressure Te Rohe Pōtae Maori to sell to the Crown; meant that

20.5.3 the Crown breached the Treaty of Waitangi and its principles because its conduct of land purchase negotiations in these circumstances did not always meet the high standards of good faith and fair dealing required of the Crown as a privileged purchaser of Maori land.

20.5.4 The Crown anticipates that it may be able to more fully particularise this concession, and the associated prejudice for the iwi and hapū of Te Rohe Pōtae, as the inquiry develops.

Land Takings for the North Island Main Trunk Railway

20.6 The Crown concedes that a number of owners in the Rangitoto Tuhua block never received compensation for the land the Crown took from this block for the construction of the North Island Main Trunk Railway, and that, unless this land was gifted to the Crown, the failure to pay compensation was a breach of the Treaty of Waitangi and its principles.

Land Given Up for Survey Costs

20.7 The Crown concedes that in a number of instances, for example in some subdivisions within the Rangitoto Tuhua block, the iwi and hapū of Te Rohe Pōtae had to give up unreasonably large amounts of land to pay for survey costs, and that the Crown's failure to protect the affected iwi and hapū of Te Rohe Pōtae from this burden breached the Treaty of Waitangi and its principles.

Vested Lands

20.8 The Crown accepts that it would have breached the Treaty of Waitangi and its principles if any Maori land in Te Rohe Pōtae was vested in the Tūwharetoa-Maniapoto District Maori Land Board and its successors without the consent of its owners.

The Compulsory Acquisition of Uneconomic Interests

20.9 The Crown acknowledges that between 1953 and 1974 the Māori Trustee was empowered to compulsorily acquire what were legally deemed to be "uneconomic interests". This resulted in some Te Rohe Pōtae Māori being deprived of their turangawaewae, and was a breach of the Treaty of Waitangi and its principles.

Waikato War and Confiscation

20.10 The Crown has previously acknowledged that its representatives and advisers acted unjustly and in breach of

the Treaty of Waitangi and its principles in its dealings with the Kingitanga, which included iwi and hapū of Te Rohe Pōtae, in sending its forces across the Mangatawhiri in July 1863, and occupying and subsequently confiscating land in the Waikato region, and resulted in iwi and hapū of Te Rohe Pōtae being unfairly labelled as rebels.

21. The Crown repeats that, in the course of the inquiry, it will continue to assess whether it can make further concessions of Treaty breach. To that end, it would be useful if the inquiry investigated how particular groups were affected by Crown breaches of the Treaty, where they occurred.

CONSTITUTIONAL ISSUES

What obligations of the Crown are comprised in the guarantee of te tino rangatiratanga in Article 2 of Te Tiriti o Waitangi?

Issue 2.1 Were Māori of Te Rohe Pōtae a sovereign people prior to the arrival of Europeans?

22. Using the terminology of English law, the Crown accepts that, before the Treaty of Waitangi was signed, the Māori tribes (including those of the Rohe Pōtae) held *de jure* (legal) sovereignty over New Zealand.

23. At the time of the Treaty, *jus gentium* (the law of nations) recognised self-government as the key criterion of a sovereign state. According to Emerich de Vattel, a leading 18th century jurist and scholar on the law of nations and whose work remained influential in the 1830s:

To give a Nation the right to a definite position in the great society of states it need only be truly sovereign and independent; it must govern itself by its own authority and its own laws.⁶

24. As Dr Paul McHugh notes, by the time the British Crown came to consider the New Zealand situation, recognition of the sovereignty of non-Christian societies was established in British practice.⁷ Indeed, Lord Normanby's instructions of 14 August 1839 to Captain Hobson acknowledged New Zealand as:

a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other and are incompetent to act, or even to deliberate in concert.

Issue 2.2 What is the nature of the Treaty relationship between Rohe Pōtae Māori and the Crown?

⁶ Le droit des gens, or Principes de la Loi Naturelle, appliqués a la Conduite et aux Affaires des Nations et des Souverains (1758) cited in P McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (OUP, Oxford, 1991), p 14.

⁷ Dr P G McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (OUP, Oxford, 1991), p 27.

25. The Crown acknowledges that it has a Treaty relationship with Rohe Pōtae Māori.
26. Both the courts and the Waitangi Tribunal have described the Treaty relationship in terms of a partnership, or as akin to a partnership,⁸ and thus requiring the Crown and Māori to act towards each other reasonably and with the utmost good faith.
27. The relationship is an ongoing one.

Issue 2.2 To what extent do the differing understandings and objectives of the parties affect the nature of the relationship?

28. The Crown acknowledges that, at times, Māori and the Crown have had, and continue to have, different understandings as to the meaning and effect of the Treaty of Waitangi and its principles.
29. The preamble states that, in entering the Treaty, the parties' objectives were for Queen Victoria to acquire sovereign authority (kawanatanga) so as to establish, for settlers and Māori alike, settled government and law and order over those parts of New Zealand as may be ceded to the Crown. Without further particulars, it is not clear what different objectives the parties might have had.
30. To the extent that there are or have been different understandings or objectives, the Crown does not consider that that affects the *nature* of the relationship between the Crown and Māori as such. Rather, it requires the Crown and Māori to deal with each other in good faith to try and overcome what differences there are. The Waitangi Tribunal claims process, by which the Tribunal is empowered to inquire into claims that the Crown has breached the principles of the Treaty, provides one way of achieving that.

⁸ In *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, Cooke P stated (p 664) that "The Treaty signified a partnership between races" and Casey J, p 704 referred to "a relationship akin to partnership between the Crown and Māori people".

31. Chief Judge Durie (as he then was) has stated extra-judicially:⁹

[the Treaty] can mean different things to different people. It lacks the precision of a legal contract and is more in the nature of an agreement to seek arrangements along broad guidelines.

32. Given that the Treaty is not a detailed contractual document, but is formulated in broad terms rather than as a blueprint for the future, it is unsurprising that differences in understandings between the parties sometimes arise and evolve.

33. Where differences in understanding arise, it is incumbent on both the Crown and Māori to try to work out together and in good faith reasonable and practicable solutions.

Issue 2.3 Did Rohe Pōtae Māori cede sovereignty to the Crown through Te Tiriti o Waitangi or any other instrument?

34. The Crown did not acquire sovereignty through the Treaty of Waitangi itself, but through a series of jurisdictional steps. These steps included obtaining the consent of over 500 rangatira who signed the Treaty and culminated in the gazetting of Captain Hobson's proclamations of 21 May 1840 in the *London Gazette* of 2 October 1840. In *New Zealand Māori Council v Attorney-General*, the Court of Appeal found that the Crown's sovereignty over New Zealand was beyond dispute once Captain Hobson's proclamations were gazetted.¹⁰ The Crown relies on that finding as to the fact of its sovereignty.

35. The Treaty was the means by which the Crown obtained Māori consent as a self-imposed condition precedent to its assertion of sovereignty over New Zealand. The Crown acknowledges that not all the rangatira of the hapū in the present Rohe Pōtae inquiry

⁹ Chief Judge ETJ Durie, "Part II and Clause 26 of the Draft New Zealand Bill of Rights" published in *A Bill of Rights for New Zealand* (Legal Research Foundation, 1985, p 190, cited in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 672.

¹⁰ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 690 per Somers J and Richardson J at 671.

district signed the Treaty. Dr Vincent O'Malley notes in his evidence that this is probably because:

copies of the Treaty were not taken to inland settlements such as Tokangamutu, Hanganiki or Maungatautari, their passage through the district instead being confined solely to a few coastal settlements such as Kawhia.¹¹

36. Those Rohe Pōtae rangatira who signed the Treaty agreed, in so doing, to cede kawanatanga or sovereignty. Those who did not sign did not agree to cede anything but in any case the Crown acquired sovereignty as a result of the series of steps adverted to above.

37. The Crown notes that, in the *Rekohu* report, the Tribunal states:

... the Colonial Office took the view that the Treaty applied to all, whether they had signed or not. The Treaty was primarily an honourable pledge on the part of the British to the people of such lands as might, in fact, be acquired or annexed. The consensual nature of its drafting, and to a large extent its completion, does not prevent its application as a unilateral undertaking where required, as much binding upon the honour of the Crown as a treaty to which there was full consent.¹²

38. The Tribunal added that “the Treaty must be taken to have applied in all places when sovereignty was assumed”.¹³

Issue 2.3 If so what precisely was ceded?

39. Māori ceded sovereignty – essentially the authority to govern over all the people and places within New Zealand – in return for the guarantees contained in articles II and III of the Treaty. The Crown accepts that Māori did not cede their rangatiratanga but it says that, as a necessary consequence the Crown’s acquisition of sovereignty, the rangatiratanga of Māori is balanced by the Crown’s authority over all people and places in New Zealand.

Issue 2.4 What effect did the warfare that was waged on Rohe Pōtae

¹¹ Dr V O'Malley, “Te Rohe Pōtae Political Engagement, 1840-1863”, Wai 898, A23, p 74.

¹² Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands* (2001), p 30.

¹³ Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands* (2001), p 30.

Māori by the Crown have on the sovereign authority of Rohe Pōtae Māori?

40. The Crown responds to this issue on the assumptions that “the sovereign authority of Rohe Pōtae Māori” refers to *de jure* (legal) sovereignty and that the reference to “warfare” is to the wars in Taranaki and the Waikato from 1860 to 1864.
41. As stated in response to issue 2.3, by 2 October 1840, when Captain Hobson’s proclamations of 21 May 1840 were gazetted, the Crown had acquired sovereignty over all of New Zealand and its inhabitants. The Crown therefore does not accept that, when wars occurred in Taranaki and the Waikato throughout the period from 1860 to 1864, Rohe Pōtae Māori had legal sovereign authority over their rohe.
42. However, the Crown acknowledges that, as a matter of fact, at the commencement of the wars it had limited ability to exercise its authority over Rohe Pōtae Māori and the area in which they lived. That state of affairs remained until the mid-1880s when the Rohe Pōtae Māori removed the aukati, imposed from 1864 onwards, and ‘opened up’ their rohe.
43. The Crown acknowledges that the Waikato war challenged and, in a number of ways, prejudicially affected the exercise of rangatiratanga by Rohe Pōtae Māori over themselves and their lands, other resources and their way of life.

Issue 2.5 Did the legislation, judicial processes and government institutions and mechanisms that were introduced by the Crown undermine the sovereign authority of Rohe Pōtae Māori?

44. The Crown responds to the issue on the assumption that the reference to “the sovereign authority of Rohe Pōtae Māori” is to *de jure* (legal) sovereignty. The Crown understands the phrase “legislation, judicial processes and government institutions and

mechanisms that were introduced by the Crown” to mean the general incidents of *de jure* and *de facto* sovereignty.

45. As stated in response to issue 2.3, by 2 October 1840, when Captain Hobson’s proclamations of 21 May 1840 were gazetted, the Crown had acquired legal sovereignty over all of New Zealand.
46. It follows then, that “the legislation, judicial processes and government institutions and mechanisms that were introduced by the Crown” (whatever the exact meaning of that phrase) did not undermine the sovereign authority of Rohe Pōtae Māori, since the sovereign authority they formerly had no longer resided with them.
47. However, the Crown accepts that it did not acquire complete *de facto* (effective) sovereignty over all of New Zealand simultaneously with its acquisition of legal sovereignty. The Rohe Pōtae is, classically, a case in point.
48. The Crown came to exercise effective sovereignty over the Rohe Pōtae incrementally over time and in large part not before the mid-1880s at which time Rohe Pōtae Māori removed the aukati, which they had imposed from 1864, and ‘opened up’ their rohe. By the introduction of its authority in the Rohe Pōtae, the Crown intended that both Māori and non-Māori would benefit. Nevertheless, the Crown accepts that, at times, the exercise of the Crown’s effective authority prejudicially affected Rohe Pōtae Māori. Instances of where that occurred or are claimed to have occurred are the subject of this inquiry.

Issue 2.6 Was the process by which the Crown has assumed sovereignty over Rohe Pōtae Māori carried out in accordance with Treaty principles and with *jus gentium*?

Introduction

49. The Crown responds to this issue on the assumption that the reference to “sovereignty” means *de jure* (legal) sovereignty.

50. The Crown notes that *jus gentium*, the law of nations, pre-dates the body of law that today is known as ‘international law’ and emerged in the latter part of the 19th century. The Crown adopts the following statement of Dr McHugh about *jus gentium*:

These were rules that nations recognised as guiding their conduct and relations with one another, although they were not ‘laws’ in the positivist sense of enforceable legal commands. It was up to the Crown to determine when it had met the obligations it had set itself and perceived as binding itself under the *jus gentium*.¹⁴

51. The Crown says that the process by which it assumed sovereignty over Rohe Pōtae Māori (and indeed over all of New Zealand and its inhabitants) was carried out in accordance with Treaty principles and with *jus gentium*.

Jus gentium

52. In evidence before the Paparahi o te Raki/Northland inquiry, Dr McHugh notes that the British Crown had traditionally conducted its activity overseas on the premise that such activity should be founded on law¹⁵ and that British imperial authorities felt a sense of obligation to follow the law of nations.¹⁶ The 1834 edition of Vattel’s book, *Le droit des gens*, sets out the *jus gentium* of the European States and was widely consulted in England in matters of imperial practice, as were the works of other leading scholars on the law of nations.¹⁷
53. In accordance with *jus gentium*, the British Crown recognised the sovereignty of non-Christian polities¹⁸ and that a foreign state had no right of interference or governance over another without the permission of the host sovereign.¹⁹

¹⁴ “Brief of Evidence of Dr P G McHugh”, 16 April 2010, Wai 1040, A21, para 164.

¹⁵ “Brief of Evidence of Dr P G McHugh”, 16 April 2010, Wai 1040, A21, para 16.

¹⁶ “Brief of Evidence of Dr P G McHugh”, 16 April 2010, Wai 1040, A21, para 27.

¹⁷ “Brief of Evidence of Dr P G McHugh”, 16 April 2010, Wai 1040, A21, para 29.

¹⁸ “Brief of Evidence of Dr P G McHugh”, 16 April 2010, Wai 1040, A21, para 25.

¹⁹ “Brief of Evidence of Dr P G McHugh”, 16 April 2010, Wai 1040, A21, para 26.

54. With particular reference to New Zealand, and as noted under issue 2.1, the Crown had recognised that the Māori tribes of New Zealand (including those of the Rohe Pōtae) held legal sovereignty over New Zealand before the Treaty of Waitangi was signed. In 1840, the Crown understood *jus gentium* to require it to obtain the consent of Māori before it established sovereignty.²⁰ The Treaty was the means by which it obtained that consent.
55. Dr McHugh notes that Hobson’s proclamations of 21 May 1840 were “somewhat premature” in terms of the actual completion of the gathering of Māori consent.²¹ Nevertheless, Dr McHugh states, the Crown’s continued and “unabated” signature gathering following Hobson’s May proclamations demonstrates “the sincerity of the Crown’s commitment to its perception of the requirements of *jus gentium*”.²²
56. Māori consent to the Treaty was not universal in that not all rangatira had the opportunity to sign while others had the opportunity but chose not to. Despite that, the consent the Crown obtained was substantial and broadly-based and, in the Crown’s estimation, it satisfied the prerequisite it had set itself in order to establish sovereignty over New Zealand. According to Dr McHugh, James Stephen, the Permanent Under Secretary to the Colonial Office represented the Crown view:

Stephen was certain that ‘to have such privileged spots [ie, independent territories of those whose chiefs had not signed the Treaty] in the centre of a British Territory, would be injurious to everyone’ and that the requirement of Māori consent had been satisfactorily met. ‘I apprehend’, he said, ‘that the assent of the preponderating majority of the Chiefs is binding on the Dissentient minority.’²³

Treaty principles

²⁰ “Brief of Evidence of Dr P G McHugh”, 16 April 2010, Wai 1040, A21, paras 91, 106.

²¹ “Brief of Evidence of Dr P G McHugh”, 16 April 2010, Wai 1040, A21, para 132.

²² “Brief of Evidence of Dr P G McHugh”, 16 April 2010, Wai 1040, A21, para 10.

²³ “Brief of Evidence of Dr P G McHugh”, 16 April 2010, Wai 1040, A21, para 138.

57. The Crown says that the acquisition of sovereignty was done honourably, fairly, reasonably and in good faith and in accordance with the rules of *jus gentium* that the Crown itself accepted and applied. The Crown therefore acquired sovereignty in a manner that was consistent with the principles of the Treaty. However, the Crown notes that the principles of the Treaty did not apply to the Crown's conduct before the Treaty of Waitangi took effect.

PROTECTION OF LAND AND RESOURCES

Did the Crown have a duty to protect Rohe Pōtae Māori from permanent alienation of land and resources to ensure that Rohe Pōtae Māori were left with a sufficient endowment of land and resources for their present and future needs? To what extent did the Crown fulfil any such duty?

INTRODUCTION

58. The Crown accepts that it has a Treaty obligation to take such steps as were reasonable in the circumstances to protect the land and resources of Rohe Pōtae Māori, for so long as they wished to retain them.
59. The Crown says that the Treaty envisaged that Māori would have the same rights as British subjects to deal with their lands as they wished. The Crown was required to accord Māori a significant say in whether and to what extent they retained their land. The Treaty did not envisage any absolute restriction on the alienation of Māori land.
60. The Crown also accepts that, generally, the Treaty duty required the Crown to take reasonable steps to provide protection for Rohe Pōtae Māori in relation to their lands and resources so as to ensure that they retained sufficient lands for their present and future needs. This, in turn, implies a duty and ability to monitor and assess the level of land-holdings of Māori and also presents a challenge as to determining “sufficiency” at any particular time. Efforts at defining the concept were made in legislation.
61. The challenge is that landlessness and sufficiency must be viewed in historical context. The Crown says that quantitative data illustrating district wide alienation trends over long periods of time, must be treated with caution.²⁴ A range of factors must be taken into account

²⁴ See, for instance, Generic Pleadings for Amended Statement of Claim: Protection of Land Base (9 December 2011), Wai 898, 1.5.11, paras 2.1, 2.4 and 2.13.

when considering the Crown's fulfilment of its Treaty obligations, including:

- 61.1 Significant societal and demographic changes throughout the 19th and 20th centuries, including urbanisation, the development of the welfare state and changes to tribal structures and authority;
 - 61.2 Changing economic conditions, including recessions, depressions, the development of international and domestic commodity markets, technological developments and the associated employment and economic problems and opportunities for Māori;
 - 61.3 Māori willingness to alienate land permanently;
 - 61.4 Crown motivations to purchase Māori lands, including acquisition for the purposes of national development;
 - 61.5 The avocation, trade or profession of Māori vendors or whether such Māori were otherwise sufficiently provided with a means of livelihood;²⁵
 - 61.6 Land holdings by hapū and iwi in other blocks within and outside the inquiry district;
 - 61.7 The effects of the vested lands scheme, leasehold arrangements and other temporary land alienation transactions.
62. Insufficient land retention is not a consequence of Crown purchasing alone. Although the Crown acknowledges that from 1840 to 2010 more than half of the land alienated in the inquiry district was purchased by the Crown, during the period 1910 to 1966

²⁵ Native Land Amendment Act 1913, s 91.

private purchases accounted for a significantly larger area than Crown purchases.²⁶

63. At times the Crown promoted legislation that included safeguards for the supervision of individual land transactions between Rohe Pōtae Māori and private purchasers.
64. The questions for inquiry are to identify the content of the Crown's obligations in the Rohe Pōtae and, when the Crown departed from meeting the commitments, to assess the sufficiency of the protections put in place.
65. The Crown notes that it is making the following concession in the current inquiry:

The Crown concedes that where it did not reserve sufficient land for the present and future needs of the iwi and hapū of Te Rohe Pōtae when purchasing land from them before 1865, it failed to uphold its duty under the Treaty of Waitangi and its principles to actively protect the interests of the iwi and hapū of Te Rohe Pōtae from whom it purchased land.

CROWN RESPONSE TO CLAIMANT STATEMENT OF ISSUES

Sufficiency and Land Loss

Issue 3.1 To what extent did the Crown provide mechanisms to ensure the active protection of land and resources at 1840?

66. The Crown assumed protective obligations under article II of the Treaty in 1840. The “mechanisms” the Crown set in place at that time to ensure the protection of Māori interests included the Protectorate of Aborigines and the Land Claims Commissions to investigate old land claims. The Crown also advised land agents to consider the adequacy of Māori landholdings before purchasing.
67. The “mechanisms” adopted thereafter changed over time. The Crown notes that, from the mid-1860s to the mid-1880s, these

²⁶ See T Douglas, C Innes, J Mitchell, “Alienation of Māori Land Within Te Rohe Pōtae Inquiry District: 1840-2010: A Quantitative Study” (2010), Wai 898, A21, pp 46-48. See also Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, p 572.

protective mechanisms had no practical application to the Rohe Pōtae because of the refusal of Rohe Pōtae Māori to accept the authority of the Crown and comply with the legislative regime. Protections after the mid-1880s included the Trust Commissioners regime (originally established under the Native Lands Frauds Prevention Act 1870). From 1894 the role of the Trust Commissioners in vetting transactions was taken over by the Native Land Court.²⁷

Issue 3.2 **What was the extent of the Crown’s obligations to monitor alienation of Rohe Pōtae Māori land to ensure Rohe Pōtae Māori retained sufficient land for their future needs?**

Issue 3.3 **Did the Crown adequately inquire into the lands and resources remaining for Rohe Pōtae Māori?**

Issue 3.4 **How did the Crown respond to any advice or inquiry it conducted on this question?**

68. The Crown accepts that the duty to take reasonable steps to ensure that Māori retained sufficient lands implies a duty and ability to monitor and assess the level of land-holdings of Māori. As noted above, the concept also assumes an understanding of what might be “sufficient” land.

69. Steps that were taken to monitor or to compile inventories of land remaining in Māori ownership in the late 19th and early 20th centuries included:²⁸

69.1 From 1870 the Trust Commissioner’s vetting procedures applied. The Commissioners were required to vet alienations to inquire into the validity of transactions. As part of that inquiry, they were required to assess whether the vendor had sufficient lands left for his or her support.²⁹

²⁷ Native Land Court Act 1894, ss 14(8) and 53 – 57.

²⁸ See Dr D Loveridge, ‘The Development of Crown Policy on the Purchase of Māori Lands, 1865-1910’, Wai 1200, A77, pp 55-62.

²⁹ Native Lands Fraud Prevention Act 1870, s 5.

- 69.2 From the mid 1880s onwards, the Crown monitored the amount of Māori land remaining in Māori hands in a number of North Island provincial districts.³⁰
- 69.3 The Crown compiled some inventories of lands purchased and leased from Māori in the North Island.³¹
- 69.4 Shortly after the Crown’s resumption of purchasing in the Rohe Pōtae in 1906, the Native Land Commission 1907 (“Stout-Ngata Commission”) was appointed to examine the condition of all Māori land in the North Island, including in the Rohe Pōtae, and an inventory “of the Native Lands in the North Island suitable for Settlement” was compiled for its use.³² This stocktaking of Māori land culminated in the Stout-Ngata Commission reports of 1907-08 on Māori landholdings in “The Rohe Pōtae (King-Country) District”.³³ The Crown notes that the Native Land Act 1909 reflected aspects of the Stout-Ngata Commission’s “stock-take” of Māori landholdings and the recommendations of the Report.
70. The Crown continued to take steps to monitor the amount of land remaining in Māori ownership, including the total area of Rohe Pōtae Māori lands, for example:

³⁰ See AJHR 1886 G.15 “Return of Lands possessed by Māoris, North Island”; AJHR, 1910 C.1, p 44, “Table 1. Return showing (approximately) Position of Lands of the Dominion at 31st August, 1910”. These inventories of land remaining in Māori ownership were conducted in the Hawke’s Bay, Taranaki, Wellington and Auckland (including the Kawhia County) provincial districts. The Crown notes that Crown purchases in Te Rohe Pōtae did not commence until 1892 (see AJHR 1907 G.-1B, Native Lands in the Rohe-Potae (King-Country) District, p 4).

³¹ See for instance, AJHR 1893, G.-4, Lands Purchased and Leased from Native in North Island; AJHR, 1900, G.-3, Lands purchased and Leased from Native in North Island; AJHR, 1906, G.-3, Lands Purchased and Leased from Native in North Island.

³² See Dr D Loveridge, “The Development of Crown Policy on the Purchase of Māori Lands, 1865-1910”, Wai 1200, A77, pp 61-62.

³³ AJHR 1907 G.-1B, Native Lands in the Rohe-Potae (King-Country) District, pp 10 and 12; and AJHR 1908 G.-01o, Native Lands and Native-Land Tenure: Interim Report of Native Land Commission, on Native Lands in the Rohe Potae or King Country District.

- 70.1 Vested in the Māori Land Boards;
 - 70.2 Leased for agricultural, pastoral or township purposes; and
 - 70.3 Sold to Crown and private individuals.³⁴
71. The Crown also took steps to assess Rohe Pōtae Māori landholdings including through the promotion and implementation of a statutory requirement that Māori maintain sufficient land for their occupation and maintenance, which later became a statutory ‘landlessness’ requirement.³⁵
72. The Crown also notes that Te Ture Whenua Māori Act 1993 contains provisions that reflect current awareness of the importance of Māori land remaining in Māori ownership. For example:
- 72.1 The Preamble states that “it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the *retention of that land* in the hands of its owners, their whanau, and their hapū”. (Emphasis added).
 - 72.2 Similarly, section 2 states that “it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the *retention*, use, development, and control of Māori land as taonga tuku iho by Māori owners, their whanau, their hapū, and their descendants”. (Emphasis added).

³⁴ See AJHR, 1911 G.–6A, Lands in the North Island (Particulars Relevant to) in Each Māori Land District.

³⁵ Maori Lands Administration Act 1900, Preamble and ss 21, 23 and 25; Maori Land Settlement Act 1905, s 22; Native Land Act 1909, ss 2, 220(1), 349(1)-(2); Native Land Amendment Act 1913, ss 91 and 109(10); Native Land Act 1931, s 453. The Maori Land Settlement Act 1905 contained a similar requirement that “Before the completion of any sale and conveyance to His Majesty, the Governor shall ascertain whether any of the Maoris having shares and interests in the block or parcel of land proposed to be acquired *have other land sufficient for their maintenance?*” [emphasis added] (s 22).

73. The Crown observes in contrast that, in Treaty of Waitangi historical settlements, iwi tend to prefer to avoid the Te Ture Whenua Maori Act 1993 constraints on alienation.
74. The Crown considers that the issues for inquiry are whether it met its obligations to take reasonable steps to protect the lands and resources of Rohe Pōtae Māori for as long as they wanted to retain them; provide for the retention of sufficient lands and resources; and monitor and assess the level of land-holdings of Māori.
75. The Crown says that inquiry into these issues is complex given the high level of private purchasing in the inquiry district in the 20th century.

Issue 3.5 What factors did the Crown consider when deciding whether or not to purchase Rohe Pōtae Māori land? In particular:

- (a) Economic viability of the block;**
 - (b) The value the block could add to the Crown-administered lands;**
 - (c) The ease of acquisition; and**
 - (d) The price.**
76. The Crown says that it purchased land for a variety of reasons, including, to expedite the development of prosperous settlements and infrastructure for the national benefit. The Crown denies that the purchasing of land from Rohe Pōtae Māori is itself a Treaty breach, and says that any assessment of the factors or motives which prompted the Crown to purchase Māori land must be conducted on a case-by-case basis and cumulatively.
77. In addition to the factors raised by the claimants at issue 3.5, the Crown says that the following may have also informed the Crown's decision of whether or not to purchase Rohe Pōtae Māori land:
- 77.1 The willingness of Māori owners to sell, including whether Māori owners freely and voluntarily entered into legal transactions;

77.2 Whether individual Māori owners held interests in other blocks within the inquiry district, and outside of the inquiry district; and

77.3 The land holdings by hapū and iwi in other blocks within and outside the inquiry district.

78. In addition, the Crown notes that it had statutory obligations from time to time to consider, amongst other things:

78.1 In the cases where blocks were owned by more than 10 owners, whether there was requisite support for the sale as prescribed by the statute;³⁶

78.2 The price of the block according to the valuation of particular blocks assessed under the relevant legislation governing the valuation of land;³⁷ and

78.3 Whether, as a result of a Crown purchase of Māori land, any Māori owner would be rendered landless within the meaning of the relevant Act.³⁸

Issue 3.6 To what extent was the remaining Rohe Pōtae Māori land viable in terms of:

- (a) Quality;**
- (b) Quantity;**
- (c) Shape and location;**
- (d) Access;**
- (e) Title (in the sense that the form of title allowed it to be used in some way, whether to raise capital for farming or some other purpose);**
- (f) Infrastructure; and**
- (g) Māori cultural use and values.**

³⁶ See, for instance, Native Land Act 1909, ss 370, 342, 343, 346 and 368.

³⁷ See, for instance, Native Land Act 1909, s 372.

³⁸ See, for instance, Native Land Act 1909, s 373.

79. The Crown is unable to respond to this issue in any detail at this stage of the inquiry. References to timeframes and evidence about what the claimants mean by ‘viability’ would assist.

Reserves and restrictions of alienation

Issue 3.7 Did the Crown have a duty to ensure that Rohe Pōtae Māori were left with sufficient reserves (in size, location and quality)? If so, were the reserves set aside adequate? If not, why not?

80. The Crown’s Treaty obligation was to take reasonable steps to provide for the retention of sufficient lands and resources by Māori. That obligation was not specific as to land type (i.e. land set aside as reserves, customary land or Māori freehold land). Further, it was not specific as to size, location or quality, although the Crown accepts that those factors may have informed the issue of land sufficiency. There was no obligation that the retention of sufficient lands had to be in the form of reserves. The Crown was not under a duty to set aside land as reserves in every block of land it purchased.
81. There is some evidence about the extent of remaining reserves within the Rohe Pōtae inquiry district. Evidence on the record of inquiry records some block information about lands held in reserves.³⁹
82. The evidence on the record of inquiry addresses in summary form the issue of ten per cent seller reserves. The research suggests that around 23 ten per cent seller reserves have been identified in the inquiry district, covering a total of 8,008.94 acres, and that six remain in Māori freehold today.⁴⁰ The Crown accepts that, if this evidence

³⁹ T Douglas, C Innes, J Mitchell, “Alienation of Māori Land Within Te Rohe Pōtae Inquiry District: 1840-2010: A Quantitative Study” (2010), Wai 898, A21. See for example pp 167-236 (Table C1: Te Rohe Pōtae Current Maori Land, and the comments on ‘purpose, legality and statute’ where some blocks are identified as reservations or reserves).

⁴⁰ L Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview” (2011), Wai 898, A67, pp 432-433; Dr T J Hearn, “Māori, Land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, 183-185.

is correct, it would demonstrate that ten per cent seller reserves were alienable.⁴¹

83. The evidence on the record of inquiry does not appear to identify the quality of the reserve or other land (either as alienated or remaining in ownership) across the inquiry district. This prevents an assessment as to the extent to which the reserves do or do not contribute to sufficiency of landholdings.⁴²

Issue 3.8 Did the Crown make promises of reserves to Rohe Pōtae Māori sellers in the context of land purchases? If so, what were the promises?

84. The Crown is not aware of evidence on the record of inquiry of any promises, made to Māori in the context of particular land transactions, that it would create reserves for Rohe Pōtae Māori. Whether this occurred may be a matter for inquiry. The Crown notes its response to issue 8.11, in relation to a more general issue about undertakings relating to reserves.

Issue 3.9 Did restrictions on alienation serve to protect the land Rohe Pōtae Māori wished to retain, to protect a viable and sufficient Māori land and resource base, and to meet the Crown’s Treaty obligations in these respects?

85. The Crown’s position is that the restrictions on alienation tended to provide a level of protection for Rohe Pōtae Māori in respect of land. An analysis of the effect of various restrictions is required on a case-by-case and cumulative basis to respond to this issue. The Crown has already noted that it is difficult to assess sufficiency at this juncture.

⁴¹ L Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview” (2011), Wai 898, A67, p 434.

⁴² It is noted, however, that the two research reports on the parish extension areas include a qualitative assessment based on a land use capability assessment. See: C Innes, “Alienation of Māori Granted Lands Within Te Rohe Pōtae Parish Extension 1863-2011” (2011), Wai 898, A30, pp263-262; and J Mitchell, C Innes, “Te Akau D Alienation History” (2011), Wai 898, A65, pp 80-95.

86. Issues relating to restrictions are addressed in more detail at issues 8.45 to 8.56.
87. The Crown notes that in placing and maintaining restrictions on alienation, the Crown faced a difficult balancing exercise between enabling Māori to deal freely in their land in accordance with its article III duty to accord Māori the same rights and privileges as British citizens, while at the same time ensuring that Māori retained sufficient lands for their present and future needs. The Crown submits that the maintenance of restrictions on alienation into the 20th century was increasingly likely to have been viewed by some Māori as unnecessarily paternalistic and restrictive.
88. The Crown also notes that there is no overview of the restrictions and their effect across the inquiry district (i.e. conclusions based on a systematic collation of data about how restrictions applied in the Rohe Pōtae inquiry district). The Crown indicates in its response to section 8 that there is a wealth of overlapping legislation relating to restrictive provisions in the Rohe Pōtae, and care needs to be taken in analysing particular transactions in order to understand whether restrictions applied to particular transactions or not.
89. The extent to which the restrictions on alienation served to protect the land which Rohe Pōtae Māori wished to retain is a matter for inquiry.

PRE-TREATY/OLD LAND CLAIMS

Did the Crown breach principles of the Treaty of Waitangi when it investigated the validity of pre-1840 land transactions between Rohe Pōtae Māori and Europeans? Did the Crown act reasonably and in good faith to protect Rohe Pōtae Māori interests, authority and ownership in lands in any pre-1840 transactions?

Introductory statement

90. Evidence on the record of inquiry states that, “In the Rohe Pōtae inquiry district a total of 41 claims were registered with the Old Land Claims Commission by Europeans.”⁴³ The Crown’s assessment is that there were 50 claims to the Land Claims Commissions. This assessment is made on the basis of:

90.1 The 37 claims listed in appendix 1 of Boulton’s report⁴⁴;

90.2 The following eight additional speculative claims listed in appendix 2 of that report: Kawhia (Walker and Simmonds); OLC 261 and 262 Whaingaroa; Whaingaroa (Meurant); OLC [501?] Kawhia; OLC 504 and 505 Whaingaroa; OLC 516 Whaingaroa;⁴⁵

90.3 Two additional claims that the commissioners reviewed but did not formally investigate, although Crown grants issued: OLC 950 and WMS School Endowment (Aotea);⁴⁶ and

90.4 Three pre-emptive claims and claims that fit no other category: OLC 1127 Whaingaroa; OLCs 1297 and 1352 Waipa.

⁴³ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, p 47.

⁴⁴ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, pp 471-473.

⁴⁵ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, p 474-484.

⁴⁶ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, pp 92-94, and 105-111.

91. Another claim concerning Te Mahoe Mission Station, Mokau, received no award and is not included in the total.
92. In the Rohe Pōtae inquiry district, the majority of claims to the Land Claims Commissions were speculative in nature and claimants did not pursue them. In this inquiry district, the process of investigating pre-Treaty transactions led to awards of land in only five cases. The total amount of land concerned was just over 416 acres.⁴⁷
93. The Crown considers, therefore, that any focus on pre-Treaty transactions in this inquiry should be limited to those five claims that the Land Claims Commissions approved.
94. There are no surplus land issues in the Rohe Pōtae inquiry district.⁴⁸

Issue 4.1 What particular lands or resources within Te Rohe Pōtae were the subject of pre-1840 transactions?

95. The Crown responds to this issue by citing and relying on the following summary from the evidence on the record of inquiry (verbatim):

The first land transactions between Māori communities and European traders in the Te Rohe Pōtae inquiry district took place during from the mid-1820s. This contact was largely confined to west coast harbours and river mouths such as Mokau, Kawhia, Aotea and Whaingaroa and to a lesser extend to inland waterways such as the Mokau and Waipa Rivers. In particular, Kawhia emerged as an early trading hub. These places, to varying degrees, all provided sheltered anchorages for trading vessels on what was an exposed coastline. Māori communities on both sides of Kawhia Harbour actively recruited flax traders from Sydney and developed a mutually beneficial trading relationship supplying flax and other produce in exchange for muskets.

...

From the mid-1830s, Māori communities in all these locations and in the upper Waikato at places such as Otawhao (now Te Awamutu) and Rangiaowhia also provided land to mission stations. Although missionaries were not married into these communities in the same

⁴⁷ L Boulton, "Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865" (August 2011), Wai 898, A70, p46.

⁴⁸ L Boulton, "Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865" (August 2011), Wai 898, A70, p 60.

way as traders, their presence was eagerly sought for the benefits of literacy and new agricultural tools and techniques they were able to contribute to the community. Immediately prior to the British annexation of New Zealand and the signing of the Treaty of Waitangi in late 1839-1840 a large number of speculative purchases took place. These involved Sydney merchants, who feared that this might be their last opportunity to deal freely in Māori land. They signed deeds purporting to have purchased thousands of acres of land in the Kawhia, Waipa and Waikato district, often from only one or two rangatira. They then planned to on sell that land to other merchants in their syndicates. It is likely that these transactions had no reality for Māori as no one ever settled on the land and no relationships were formed.⁴⁹

Issue 4.2 What was the nature of those transactions? Did any of the transactions alienate the land and resources from Rohe Pōtae Māori?

General comments

96. The Waitangi Tribunal has previously addressed the nature of pre-Treaty transactions in detail in the Muriwhenua and Hauraki inquiries.
97. In the *Muriwhenua Lands Report*, the Tribunal concluded that pre-Treaty transactions occurred in a wholly customary environment as ‘tuku whenua’, essentially the transfer of land as a conditional gift that depended on reciprocal relationships. In the *Hauraki Report*, the Tribunal modified that view, recognising that “more modern concepts of commodity trade and entrepreneurship had some influence” and that “some chiefs may have disregarded reciprocal customs”.⁵⁰
98. The Crown agrees with the view of the Tribunal in the Hauraki inquiry and says that, in this inquiry, too, “a sharp dichotomy between a classic ‘tuku whenua’ model and ‘sale’ in the European sense is not an adequate framework for analysing pre-Treaty transactions”.⁵¹

⁴⁹ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, pp 135-136.

⁵⁰ Waitangi Tribunal, *The Hauraki Report* (2006), vol 1, p 153.

⁵¹ Waitangi Tribunal, *The Hauraki Report* (2006), vol 1, p 153.

99. The Crown says further that generalisations about what Māori intended in pre-1840 transactions are not likely to be especially helpful. The best guide to what the parties understood is likely to be their subsequent actions in each particular case.
100. The Crown notes that there was scope for misunderstandings in these pre-1840 transactions. Further, for a number of reasons, not the least of which is the passage of time, only limited evidence exists today about the transactions, which makes it difficult to reach reliable conclusions about them, including the precise understandings of the parties.
101. The Crown notes that evidence on the record of inquiry states:
- 101.1 Traders along the Rohe Pōtae coast were incorporated into hapū and iwi, and hapū and iwi in the inquiry district established and maintained significant and widespread trading networks.⁵²
- 101.2 Kawhia harbour was “one of the safest and best harbours on the entire west coast” and considerable trade from Kawhia occurred from the mid-1820s.⁵³
- 101.3 With the establishment of flax trading at Kawhia from the mid-1820s, Māori took the opportunity to visit Sydney and beyond.⁵⁴
- 101.4 It is likely that the “flourishing” flax trade led to the establishment “of a more permanent trading depot on land at Kawhia”.⁵⁵

⁵² L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, p 20.

⁵³ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, p 16.

⁵⁴ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, p 20.

101.5 Traders settled in the Whaingaroa area from the 1830s.⁵⁶

101.6 Wesleyan mission stations were established in the region from the mid-1830s.⁵⁷

102. Accordingly, the Crown says that the extent to which Māori were becoming aware of customs and expectations and the commercial transactions of Europeans as a result of early contact should not be discounted or underplayed.

Pre-Treaty transactions in the Rohe Pōtae inquiry district

103. The Crown acknowledges the evidence on the record of inquiry that the Land Claims Commissions investigated only six claims within the Rohe Pōtae district inquiry and recommended awards to claimants in five cases, with the sixth claim being abandoned. The remaining claims that the commissioners investigated were entirely speculative or for one reason or other lapsed or were abandoned.

104. The evidence on the record of inquiry does not point to objections or protest during the old land claims processes or later in respect of:

104.1 The three pre-Treaty transactions entered into by the Wesleyan Missionary Society (OLCs 946-948); and

104.2 The transaction by William Johnston (OLC 1040).

105. The Crown's position is that the absence of significant objection or protest indicates an acceptance, which may have developed over time, that these transactions were intended to be permanent alienations.

⁵⁵ L Boulton, "Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865" (August 2011), Wai 898, A70, p 26.

⁵⁶ L Boulton, "Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865" (August 2011), Wai 898, A70, p 17.

⁵⁷ L Boulton, "Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865" (August 2011), Wai 898, A70, p 20.

106. The Crown notes the evidence on the record of inquiry of opposition in respect of the claim by George Charleton (OLC 1353) to 50 acres of land at Pouewe, Kawhia. By way of background, the evidence on the record of inquiry is that a John Cowell (senior) was settled on the land around 1829 by the Ngāti Mahuta chief, Kiwi.⁵⁸ On 11 January 1840, the son of John Cowell (senior), JV Cowell, entered into a transaction for 20,000 acres at Kawhia, which included the 50 acres at Pouewe.⁵⁹ In 1846, George Charleton purchased the land from JV Cowell for £33.⁶⁰ The Land Claims Commission treated the claim to this land as a derivative claim arising from the 11 January 1840 transaction.⁶¹
107. According to the evidence on the record of inquiry, opposition to the claim first arose in response to a proposal to auction the land publicly under pre-emption waiver provisions. A newspaper reported on 2 January 1855 that the land was:⁶²
- a gift to a Mrs Cowell, (a Māori and her children); and the tribe who gave the land have sent a strong remonstrance to the Government to prevent the sale of it.
108. The same newspaper report stated that it had heard:⁶³
- from good authority, that the Natives have already said that they will not permit any stranger purchaser to take possession of the land.
109. The land was withdrawn from auction as a result, it seems, of the Māori opposition to the auction, and Charelton's claim was referred to Commissioner McLean for inquiry but it appears that he did not

⁵⁸ L Boulton, "Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865" (August 2011), Wai 898, A70, p 27.

⁵⁹ L Boulton, "Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865" (August 2011), Wai 898, A70, p 122.

⁶⁰ L Boulton, "Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865" (August 2011), Wai 898, A70, p 122.

⁶¹ P Berghan, "Block Research Narratives" (6 July 2009), Wai 898, A60, p 31.

⁶² L Boulton, "Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865" (August 2011), Wai 898, A70, pp 125.

⁶³ L Boulton, "Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865" (August 2011), Wai 898, A70, pp 125-126.

investigate it.⁶⁴ In 1858, however, the claim came before the Land Claims Commissioner, Francis Dillon Bell, who heard the matter over two days in July 1858. Several months after the hearing, Mata Ritana Kaore (ie, Mrs Cowell) and others wrote twice to the Government to complain that Charleton was merely occupying the land and that “it has been confirmed to my children for ever”.⁶⁵ Later in 1866, George Charleton’s widow was “expelled” from the property “by the Māori King Party” and was not allowed to return.⁶⁶

The Crown acknowledges that, in the case of Charleton’s claim, the evidence on the record of inquiry suggests this pre-Treaty transaction was not intended to be a permanent alienation.

Issue 4.3 Were any valid rights to land and or resources within Te Rohe Pōtae inquiry district obtained under tikanga or custom law prior to the ordinances of 14 January 1840? If so, what were they and did the Crown ensure appropriate recognition of those valid rights?

110. The Crown assumes that issue 4.3 relates to transactions that occurred between Rohe Pōtae Māori and non-Māori before the proclamation issued by New South Wales Governor Gipps on 14 January 1840.
111. The Crown observes that Rohe Pōtae Māori custom, as is the case with the custom of any other community, was not static and that the presence of settlers and the ideas, values and customs to which the settlers adhered would have influenced Māori ideas, values and customs from the early period of contact onwards. It is doubtful, therefore, that participants in pre-Treaty transactions were acting either within a purely European or a purely Māori frame of reference.

⁶⁴ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, pp 127-128.

⁶⁵ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, pp 129-130.

⁶⁶ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, p 131.

112. Evidence on the record of inquiry contends that pre-Treaty transactions between Rohe Pōtae Māori and Pakeha occurred according to tikanga Māori or custom law.⁶⁷ While that may be the case for some pre-Treaty transactions, it may not be so for others. The Crown will urge the Tribunal to avoid the automatic assumption that Māori custom was the sole determinant of the terms of the transactions.

Issue 4.4 How did the Old Land Claims Commission operate? Did the Crown require the Land Commissions to investigate pre-1840 land transactions with regard to Māori customary land tenure and in recognition of tikanga? Was the process of the Commission fair having regard to the nature of the transactions it was investigating?

113. In entering the Treaty of Waitangi, a key objective of the Crown was the management of land transactions between Māori and British settlers. The Colonial Office was aware that indigenous peoples and British subjects might have had different concepts of property ownership and the Crown recognised the possibility of misunderstanding between Māori and European, and the possibility of fraudulent dealings with indigenous peoples.

114. A corollary of that objective was a commitment to investigate previous land transactions that had occurred between Māori and non-Māori. A number of steps occurred to fulfil that commitment, including:

114.1 Proclamations by Governor Gipps and Lieutenant Governor Hobson, on 14 and 30 January 1840 respectively, that title to land in New Zealand would be valid only if it derived from or was confirmed by the Crown, and that commissioners would be appointed to investigate land transactions that had taken place;

⁶⁷ See generally, L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, ch 1.

- 114.2 The passage in August 1840 by the Governor and Legislative Council of New South Wales of “An Act to empower the Governor of New South Wales to appoint Commissioners with certain powers to examine and report on Claims to Grants of Land in New Zealand”;⁶⁸ and
- 114.3 In 1841, once New Zealand ceased to be a dependency of New South Wales, Governor Hobson’s enactment of the Land Claims Ordinance 1841, which repealed the New South Wales legislation and established the Land Claims Commission to examine the pre-1840 transactions and, where appropriate, recommend grants or leases.
115. Section 2 of the Land Claims Ordinance 1841 provided that the purpose of the Land Claims Commission was to “recognize claims to land which may have been obtained on equitable terms” from the Māori and were not prejudicial to British settlers. The Ordinance stated that settlers may claim land by way of “purchase conveyance lease agreement or any other title whatsoever” and noted that it was “expedient and necessary in all cases” that:
- an inquiry be instituted into the mode in which such claims to land have been acquired, the circumstances under which such claims may be and are founded, and also to ascertain the extent and situation of the same.
116. Section 6 of the Ordinance provided that the commissioners were to be “guided by the real justice and good conscience of the case without regard to legal forms and solemnities, and shall direct themselves by the best evidence they can procure or that is laid before them” whether that evidence would be required in other cases or not.
117. Two Rohe Pōtae pre-Treaty transactions were considered under later legislation, the Land Claims Settlement Act 1856 and the Land

⁶⁸ NSW 4 Vic. No. 7.

Claims Settlement Extension Act 1858, although only one of these led to an actual award of land (OLC 1353).

118. The Crown says that there was no legislative presumption that pre-Treaty transactions were sales. Commissioners were instructed to ascertain whether there had been “proof of conveyance according to the custom of the country and in a manner deemed valid by the inhabitants ...”.⁶⁹ The commissioners were to seek the best available advice on what those customs were.
119. The Crown does not accept that the Land Claims Settlement Act 1856 required the commissioners to regard the nature of the original transaction as a purchase. The Land Claims Settlement Act 1856 repealed only those parts of the Land Claims Ordinance 1841 that were repugnant to it; see section 1. Although section 25 of the Land Claims Settlement Act 1856 stated, “In respect of claims arising under purchases made from the Natives ...”, it did not direct the commissioners to treat every transaction as a purchase. Section 50 contemplated that transactions may not have been purchases, with the provision that:

... in all cases not specially provided for by this Act, the Commissioners shall make such orders and adjudications and give such directions as shall in their judgment be most agreeable to equity and good conscience, and as nearly as may be in accordance with the provisions of this Act.

Issue 4.5 What evidence did the Land Commissions rely on in its decision making?

120. As noted above, section 6 of the Land Claims Ordinance 1841 provided that the commissioners were to “direct themselves by the best evidence they can procure or that is laid before them” whether that evidence would be required in other cases or not. Further, instructions that Governors Gipps and Hobson issued to the commissioners stated that they were to ascertain whether there had

⁶⁹ D Moore, B Rigby, M Russell, “Old Land Claims” (Waitangi Tribunal, Rangahaua Whanui Series, July 1997, First Release), pp 15, 17.

been “proof of conveyance according to the custom of the country and in a manner deemed valid by the inhabitants ...”.⁷⁰

121. Section 9 of the Land Claims Ordinance 1841 provided that evidence was to be given on oath, although an exception was made for Māori who were not able to take an oath. In that case, the commissioners could “receive in evidence the statement of such aboriginal native subject to such credit as it may be entitled to from corroborating or other circumstances”.
122. In the case of the Wesleyan Missionary Society’s pre-Treaty transactions, evidence on the record of inquiry states that Commissioners Godfrey and Richmond heard from the Reverend John Whiteley, who represented the Wesleyan Missionary Society, as well as the following Māori witnesses: Hakopa and Waka in respect of the land at Whaingaroa (OLC 946) and Hamiora and Tawhito in respect of the land at Kawhia (OLC 947 and OLC 948).⁷¹
123. The Māori witnesses stated that they appeared as representatives of the chiefs who had signed the relevant deeds, and their evidence characterised the transactions as sales.⁷²
124. In the case of the pre-Treaty transaction of William Johnston (OLC 1040), evidence on the record of inquiry states that Commissioners Godfrey and Richmond heard from the Reverend John Whiteley on Johnston’s behalf, and from the two Māori witnesses, Hamiora and Tawhito, who had given evidence in respect of the Wesleyan Missionary Society’s claims concerning land at Kawhia.⁷³

⁷⁰ D Moore, B Rigby, M Russell, “Old Land Claims” (Waitangi Tribunal, Rangahaua Whanui Series, July 1997, First Release), pp 15, 17.

⁷¹ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, pp 69-72.

⁷² L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, pp 69-72.

⁷³ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, pp 84-85.

125. In the case of the derivative claim of George Charleton (OLC 1353), evidence on the record of inquiry states that Commissioners Bell and Dommatt heard from Charleton’s agent, Captain John Salmon, a surveyor, Mr Edwin Davy, and “Hone Wetere Ngainui, an Assessor from Ngāti Hikairo”.⁷⁴

Issue 4.6 Did the Crown ensure that Māori evidence and Māori right holders were fairly represented in the Land Commission?

126. As noted, the legislative framework relating to the investigation of pre-Treaty transactions allowed for Māori evidence to be given and the commissioners were to “direct themselves by the best evidence they can procure”. Instructions had issued to the commissioners that they were to ascertain whether there had been “proof of conveyance according to the custom of the country and in a manner deemed valid by the inhabitants ...”.

127. The Crown says that the evidence on the record of inquiry does not lead to the conclusion that Rohe Pōtae Māori were unfairly represented before the Land Claims Commissions, at least in respect of the three Wesleyan Mission Society claims and the claim of William Johnston. The Crown acknowledges that the hearings took place in Auckland, rather than in the Rohe Pōtae, but that does not appear to have prevented relevant Māori chiefs from providing evidence to the commissioners through properly authorised representatives.

128. With respect to the Charleton claim (OLC 1353), the Crown notes the evidence on the record of inquiry relating to the objections of Mata Ritana Kaore and her hapū, both at the attempted auction and after the initial hearing of the claim. The Crown acknowledges that there may have been a failure of process in respect of the hearing of this claim.

⁷⁴ L. Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, pp 128-129.

Issue 4.7 What if any action did the Crown take to respond to Māori complaints about Land Commission processes?

129. It is not clear to the Crown whether this question is directed at the general processes of the Land Claims Commissions, or at the specific hearings the Lands Claims Commissions conducted in respect of pre-Treaty transactions that occurred in the Rohe Pōtae inquiry district.

130. In either case, the Crown is unaware of evidence on the record of inquiry relating to such complaints by Māori. The Crown is aware of the objections of Mata Ritana Kaore and her hapū, but understands that these related to the claim of George Charleton, rather than to the process of the Land Claims Commission.

Issue 4.8 What lands did the Commission investigate? What was the result of those investigations?

131. Evidence on the record of inquiry states that the Lands Claims Commissions investigated six pre-Treaty transactions within the Rohe Pōtae inquiry district.⁷⁵

132. The pre-Treaty transactions that the Land Claims Commissions investigated, and the results of those investigations, are summarised in the evidence on the record of inquiry.⁷⁶

⁷⁵ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, p 47.

⁷⁶ L Boulton, “Hapu and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District, c.1840-1865” (August 2011), Wai 898, A70, p 48.

WAR AND RAUPATU

Did the Crown breach the principles of the Treaty of [Waitangi by] levying war on Rohe Pōtae Māori? What duties did the Crown have towards Rohe Pōtae Māori in the event of war? To what extent did the Crown fulfil these duties? Did the Crown breach the principles of the Treaty of Waitangi by confiscating land following the invasion of Taranaki and Waikato?

Introduction

133. The Crown says that a number of the issues the claimants raise in this inquiry relating to war and raupatu have been investigated thoroughly in other inquiries. For that reason, and in light of the concessions the Crown is making in this inquiry with respect to war and raupatu, the Crown considers that it would be most useful for the Tribunal to focus on the effects that war and raupatu had on Rohe Pōtae Māori rather than the causes of the conflicts and the legality of the Crown's actions.

Concessions

134. In this inquiry, the Crown has previously acknowledged that:⁷⁷

The wars in Taranaki and the Waikato were an injustice and that the confiscations of land were wrongful and in breach of the Treaty of Waitangi and its principles.

135. The Crown reiterates that acknowledgement and makes the following further statements of Treaty breach.

War and raupatu in the Waikato

136. With respect to war and raupatu in the Waikato during the 1860s:

The Crown has previously acknowledged that its representatives and advisers acted unjustly and in breach of the Treaty of Waitangi and its principles in its dealings with the Kingitanga, which included iwi and hapū of Te Rohe Pōtae, in sending its forces across the Mangatawhiri in July 1863, and occupying and subsequently

⁷⁷ Memorandum of the Crown Regarding Research and Concessions (19 December 2008), Wai 898, 3.1.192, para 12.

confiscating land in the Waikato region, and resulted in iwi and hapū of Te Rohe Pōtae being unfairly labelled as rebels.

137. The Crown advises that this concession will be addressed to iwi and hapū of the Rohe Pōtae independently of any reference to the Kingitanga if it is shown during the course of the inquiry that iwi and hapū of the Rohe Pōtae have rights in the Waikato raupatu district that are distinct from Waikato Tainui.

Taranaki

138. With respect to the raupatu in Taranaki:

The Crown concedes that the confiscation of Ngāti Maniapoto interests in Taranaki in 1864 was an injustice, and breached the Treaty of Waitangi and its principles.

139. The Crown considers that these concessions obviate the need for the Crown to respond in detail to a number of issues.

Issue 5.1 What obligations did the Crown have to ensure the peaceful resolution of issues between itself and Rohe Pōtae Māori?

140. The Crown accepts that the Treaty principle of partnership imposes on both Treaty partners – the Crown and Māori – a responsibility to seek to resolve issues between themselves peacefully. Although the Treaty does not displace the Crown’s power to use coercive force in appropriate circumstances – in order to maintain the peace within society, for example – the Crown accepts that the use of non-peaceful means to resolve issues between itself and its citizens, or any group of its citizens, should occur in exceptional situations only, and generally only after it has exhausted all reasonable peaceful means.

Issue 5.2 Was the invasion of Taranaki and the Waikato [an unlawful] and unwarranted option for the Crown in the 1860s? What were the Crown’s motives in declaring war?

141. The Crown acknowledges that the wars in Taranaki and the Waikato constituted an injustice. It follows that certain Crown actions in the opening of hostilities in Taranaki in 1860 or in the Waikato in 1863 were unjust.

142. Given the Crown’s position as stated in the introduction to this section, the Crown does not intend to respond further to this issue.

Issue 5.3 Did the Crown attempt any negotiated solution with the Kingitanga or Rohe Pōtae Māori leaders?

143. The Crown attempted on several occasions before the outbreak of war in 1863 to negotiate an accommodation with the Kingitanga, both directly and by introducing new policies and institutions, which it was hoped would improve relations. In January of 1863, for example, Governor Grey met with Kingitanga leaders in the Waikato to discuss the governance of the Waikato-Maniapoto area, and reportedly:⁷⁸

offered to constitute all the Waikato and Ngatimaniapoto country a separate Province, which would have had the right of electing its own Superintendent, its own Legislature, and of choosing its own Executive Government” but this proposal was rejected.

144. The Māori institutions initiated by the General Assembly in 1858, and strongly supported by Governor Grey in 1861-1863, were in part an attempt to provide Kingitanga supporters with Crown-based forms of government that would be acceptable to them.
145. Crown efforts to reach an accommodation with the Kingitanga resumed soon after the Waikato War, and during the 1870s there were several meetings between senior Crown officials and Kingitanga representatives to discuss this possibility. The Crown’s policy was to use persuasion rather than force to bring the King’s supporters back under the Crown’s authority. Several offers were made to the King but none were accepted⁷⁹.

Issue 5.4 Were the Crown actions in proportion to any perceived threat

⁷⁸ See Grey’s letter of 27 October 1869 to the Colonial Minister, in AJHR 1870 A-1b No. 1 pp. 81-82. This incident is discussed in Dr D Loveridge “The Development and Introduction of Institutions for the Governance of Maori, 1852-1865” (September 2007), Wai 903, A143, pp 198-200, and in A Ward, “A Savage War of Peace? Motives for Government Policies Towards the Kingitanga 1857-1863”, in R Boast and R Hill, eds, *Raupatu* (VUP, Wellington, 2009), pp 99-100.

⁷⁹ C Marr, “Te Rohe Pōtae Political Engagement 1864-1886” (November 2011), Wai 898, A78, chs 4 and 5.

from Rohe Pōtae Māori?

146. The Crown would require further particulars before it could respond to this issue in detail. However, it reiterates that it regards the wars in Taranaki and the Waikato were an injustice. The Crown does not consider that this issue requires further inquiry.

Issue 5.5 What was the nature of Rohe Pōtae Māori involvement in the Crown invasion of Taranaki and the Waikato? Did Rohe Pōtae Māori make efforts to restore peace?

147. The Crown says that the nature of Rohe Pōtae Māori involvement in the Taranaki war in 1860 to 1861 differs from the Waikato wars in 1863 to 1864.

148. While the Crown acknowledges that Rohe Pōtae Māori had land interests in Taranaki, they were away from Waitara, where the conflict arose. The Crown's actions in Taranaki in 1860 to 1861 did not threaten Rohe Pōtae Māori directly. Members of Ngāti Maniapoto became involved as a result of a decision on their part to support Wiremu Kingi, who opposed the Crown purchase of the Pekapeka Block, and took up arms against for that purpose. To that end, the Crown notes evidence on the record of inquiry that:⁸⁰

When the Crown sought to take forcible possession of the land in March 1860, members of Waikato and Ngāti Maniapoto subsequently fought in defence of Kingi's rights to Waitara.

149. With respect to the Waikato war, the Crown notes that the initial phases of the engagement occurred some distance north of the Rohe Pōtae and from the rohe of Ngāti Maniapoto. However, Ngāti Maniapoto had strong ties to the land north of the Puniu river, which, as a result of the war, became the northern boundary of the Rohe Pōtae. Accordingly, the Crown accepts that, once the invasion of the Waikato began, Rohe Pōtae Māori were justified in taking up arms in defence of their lands and homes.

⁸⁰ Dr V O'Malley, "Te Rohe Potae Political Engagement, 1840-1863" (December 2010), Wai 898, A23, p 114.

150. The Crown notes evidence on the record of inquiry that Kingitanga or Rohe Pōtae Māori leaders at times sought to negotiate an end to hostilities but despite those efforts the conflict in the Waikato continued until the battle at Orakau which took place from 31 March to 2 April 1884.⁸¹

Issue 5.6 Did the Crown breach the standard rules of military engagement and therefore act unfairly toward Rohe Pōtae Māori during its invasion of Taranaki and the Waikato?

for example in:

- (a) Rangiaowhia;
- (b) Rangiriri;
- (c) Kihikihi; and
- (d) Orakau

Issue 5.7 Were unarmed Māori women and children harmed by the Crown during military engagement?

151. The Crown is not aware of evidence on the record of inquiry that details the standard rules of military engagement as they were in the 1860s.

152. However, the Crown notes evidence that, in the course of fighting in the Waikato war, Crown forces killed non-combatants and caused loss of cultivations, homes and belongings.⁸²

153. The Crown acknowledges that, where such events occurred, the effects on Rohe Pōtae Māori would have been significant and long-term. Such events underscore the Crown's concession that the wars were an injustice.

Raupatu

Issue 5.8 Did the Crown have a lawful basis for confiscating Māori land following its invasion of Taranaki and the Waikato?

⁸¹ Dr V O'Malley, "Te Rohe Potae War and Raupatu" (December 2010), Wai 898, A22, ch 2.

⁸² For example, see Dr V O'Malley, "Te Rohe Potae War and Raupatu" (December 2010), Wai 898, A22, pp 107-130 as to events at Rangiaowhia, pp 130-144 as to events at Kihikihi, pp 57-72 as to events at Rangiriri and pp 144-170 as to events at Orakau.

154. The Crown has responded to this issue by way of its concession that the confiscations of land in Taranaki and the Waikato were wrongful and in breach of the Treaty of Waitangi and its principles.

Issue 5.9 Did the Crown provide an appropriate process for investigating raupatu based grievances? Did the Crown consult with Rohe Pōtae Māori regarding the establishment of such a process and take into account their views with regard to confiscation of their land?

155. The Crown acknowledges, as it has in other inquiries, that the prejudice that raupatu created was compounded by inadequacies in the Compensation Court. The Crown also acknowledges that the process for investigating raupatu-based grievances was imposed on those who were subject to raupatu and that consultation concerning the process did not take place.

Issue 5.10 Did the Crown give appropriate consideration to the needs of Rohe Pōtae Māori in general, such as compensation, ongoing support and economic sufficiency?

156. It does not appear from the evidence on the record of inquiry that the Crown gave particular consideration to the needs of Rohe Pōtae Māori following the end of hostilities. The Crown notes, however, that the establishment of the aukati following the war was a conscious decision by Rohe Pōtae Māori to restrict engagement with the Crown. The Crown also notes evidence on the record of inquiry that following the war Rohe Pōtae Māori resumed extensive agricultural production and by 1868, for example, “those living beyond the Punui River were not only able to feed themselves but were also producing surplus produce for cross-border trade”.⁸³

157. The Crown accepts that the effect on Rohe Pōtae Māori of the support they were required to give their Waikato whānaunga as a consequence of the war and raupatu is an issue for inquiry.

Issue 5.11 Did the Crown make adequate provision for Rohe Pōtae Māori who had suffered land confiscation due to “rebellion?”

⁸³ Dr V O’Malley, “Te Rohe Potae War and Raupatu” (December 2010), Wai 898, A22, p 197.

158. By 1871, 278,891 acres of confiscated land had been returned to Māori from the Waikato confiscations. All of these returned lands were returned to Māori deemed not to have been in rebellion. In 1879, steps were taken to set aside land for ‘returned rebels’. Reserves totalling 37,042 acres were made at this time.⁸⁴ The Royal Commission on Confiscation Native Lands and Other Grievances (or the Sim Commission) gave the total area of the Waikato confiscation as 1,202,172, acres of which a total of 314,364 acres were returned to Māori.

159. It is difficult to determine the level of engagement that all iwi and hapū of the Rohe Pōtae had with the Compensation Court in the Waikato. On this point, evidence on the record of inquiry states:⁸⁵

We know that members of at least some hapu and iwi from within what now constitutes the Rohe Potae inquiry district participated in the Compensation Court process in Waikato and received awards, but it is much more difficult to quantify these along tribal lines. Applications for compensation and the awards subsequently made were almost always in the names of individuals or family groups, without listing the iwi or hapu affiliations of those concerned.

160. The Crown considers that the information available from the evidence on the record of inquiry is unclear in terms of identifying the hapū or iwi affiliation of those who were awarded land.

Effects

Issue 5.12 **What basis did the Crown have for labelling Māori as “loyalists” and “rebels?” How have these labels affected Rohe Pōtae Māori?**

161. The Crown has responded to this issue by way of its concession that the war in the Waikato resulted in iwi and hapū of the Rohe Pōtae being unfairly labelled as rebels.

Issue 5.13 **What immediate effects did the war and raupatu cause in terms of:**

⁸⁴ Dr V O’Malley, “Te Rohe Potae War and Raupatu” (December 2010), Wai 898, A22, p 568.

⁸⁵ Dr V O’Malley, “Te Rohe Potae War and Raupatu” (December 2010), Wai 898, A22, p 566.

- (a) **Relations between the Crown and Rohe Pōtae Māori?**
- (b) **Loss and destruction of property?**
- (c) **Social and economic disruption? and**
- (d) **Rohe Pōtae Māori casualties?**

162. In broad terms, the Crown accepts that the war and raupatu had significant immediate effects for Rohe Pōtae Māori. These included, but were not limited to, a serious deterioration in the relationship between Rohe Pōtae Māori and the Crown, the loss of innocent lives and injuries to others, the loss of property, including land and resources considered to be taonga, and significant social and economic disruption, in part as a result of the need to provide for Waikato ‘refugees’.

Issue 5.14 To what extent was the Crown responsible for any such effects, and what measures, if any, were taken to mitigate or compensate for any such losses?

163. Through its concession that the wars were an injustice, the Crown acknowledges a high level of responsibility for the effects of war and raupatu. However, it says that care must be taken not to treat the war and raupatu as the cause of all adverse outcomes that Rohe Pōtae Māori have experienced since the conflicts of the 1860s.

164. As noted in the introduction to this section, the Crown accepts that the effects of war and raupatu on Rohe Pōtae Māori, and how it responded to those effects, is a matter for inquiry.

THE NATIVE LAND COURT

Was the establishment and activities of the Native Land Court consistent with the principles of the Treaty of Waitangi?

Introduction

165. The Otorohanga Court was the culmination of the efforts of successive Native Ministers (particularly Ballance) and the Rohe Pōtae leadership to reach consensus on the native land system and title ascertainment processes. The investigations by the Court, which opened in October 1886, was largely successful in achieving the objectives of both parties. New legislation was promulgated:

165.1 The new Native Land Court Act 1886 reflected the changes of approach that Ballance had discussed with the Rohe Pōtae leadership.

165.2 The Native Land Administration Act 1886 was meant to work as the vehicle for community management of land within the Aotea-Rohe Pōtae block once title investigation was complete.

166. After initial success, Crown purchase policy among other things, served to undermine the second arm of the legislative Scheme the Crown had promulgated. Over the period of title investigation some of the original objectives of the Rohe Pōtae leadership were challenged by emerging leaders but also by facts such as the accessibility of Crown land purchase officers and amendments to the 1886 Act that facilitated alienation. The relationship between the Court and Crown purchase policy is a key issue for inquiry.

167. The Crown makes the following concessions of Treaty breach in respect of the Native Land Court:

167.1 The Crown concedes that its failure to include a form of title that enabled Rohe Pōtae Māori communities to

control their land and resources collectively in the Native land laws prior to 1894 breached the Treaty of Waitangi and its principles.

167.2 The Crown accepts that the individualisation of Māori land tenure provided for by the Native land laws made the lands of Rohe Pōtae iwi and hapū more susceptible to fragmentation, alienation and partitions, and that this contributed to the undermining of tribal structures in the Rohe Pōtae. The Crown concedes that its failure to protect these tribal structures was a breach of the Treaty of Waitangi and its principles.

168. Other issues, such as the impacts of survey charges, though touched on in this section are addressed more fully in section 8 of the Crown's response.

Establishment of the Native Land Court

Issue 6.1 What was the social and cultural context in which Rohe Pōtae Māori communities owned and managed land in the 1840s?

169. The Crown says for the purpose of this inquiry that as at 1840 Rohe Pōtae lands were held by Rohe Pōtae Māori in accordance with custom. This statement must be subject to qualification in terms of the extensive social and economic impact of European influences during the pre-Treaty period, and the impact on customary tenure of the ebb and flow of the relationships between the Tainui waka groupings. To the extent greater detail is required for particular Native Land Court, issues this will be addressed below.

Issue 6.2 Did the Crown make promises or assurances in respect of the Native Land Court process? To what extent were any of these promises or assurances upheld?

Issue 6.3 To what extent did the Crown consult Rohe Pōtae Māori in the establishment of the Native Land Court?

170. The establishment of the Native Land Court occurred by way of the Native Land Act 1862. It is therefore during this period that the

question of consultation in relation to the establishment of the Court is relevant. However, for the purposes of this inquiry, it is the meetings between government Ministers and Rohe Pōtae Māori prior to the first sitting of the Court in the Rohe Pōtae in 1886 that are of more significance. These are addressed in the context of the Crown's response to issue 6.8 and section 7. Some particulars of relevance are:

- 170.1 The Crown accepts that such consultation as occurred with Māori prior to promulgating the legislation establishing the Native Land Court in 1862 was limited by today's standards. Nevertheless, the legislation arose out of difficulties associated with lack of Māori representation, Crown pre-emption and the lack of ability of Māori to deal directly with their land. Following the outbreak of armed conflict over the Waitara dispute in 1860, Governor Gore-Browne convened a conference at Kohimarama to address these core issues that were among the causes of the Waitara dispute. The Native Land Act 1862 which arose from these discussions was designed to provide a system for the ascertainment of title which would provide, among other things, an alternative to Crown pre-emption purchasing.
- 170.2 Section 4 of the 1862 Act made provision for the Governor to establish Courts to ascertain the proprietors of Native land for the purposes of issuing Crown-derived certificates of title. Section 36 made provision for the Governor to proclaim districts in which the Act would be in force. The Act was submitted to the British government for approval; this was received in 1863. Due in part to the outbreak of further hostilities, the 1862 Act was of very limited operation and was soon replaced by the Native Land Act 1865.

170.3 Rohe Pōtae Māori pursued a policy of non-engagement with the Crown and the Court as part of their alliance with the Kingitanga coming out of the war period, and through into the 1870s. This too limited the opportunities for formal consultation.

170.4 The Native Lands Act 1865 established the Native Land Court as it developed over the rest of the 19th century, retaining a number of the policy principles first addressed in the 1862 Act. The key difference with this legislation was that from 1865, the Native Land Court was applied to all areas within New Zealand.⁸⁶ Over time the Native land legislation was amended to reflect in some significant part Māori concerns about the operation of the Native Land Court. As at 1883 when the Crown began discussions with the Rohe Pōtae leaders about railways and the Native Land Court, the operational legislation was the Native Land Court Act 1880, a simplified version of the Native Land Act 1873.

Issue 6.4 **What was the purpose(s) of the Crown establishing the Native Land Court? Were these purpose(s) consistent with the Treaty?**

Issue 6.6 **Did the commitment of the Crown to using the Native Land Court undermine any serious consideration of land tenure alternatives for Rohe Pōtae Māori?**

171. The Crown established the Native Land Court to investigate Māori customary title and to convert “traditional” modes of ownership into titles derived from the Crown and recognisable in British law. This involved tenure reform, and was meant to facilitate Māori involvement in the new colonial economy. The Crown set aside its pre-emptive right over land whose titles had been ascertained by the Court in order to allow private dealings, and at the same time the central Government stopped buying Māori land. This tenure reform

⁸⁶ The 1865 Act removed the provision of the 1862 Act for Land Courts to be established district by district (s 36).

was consistent with the principles of the Treaty, but many issues arose as a result of the reforms and rules governing land dealings, including its impact on the form and function of existing social structures.

172. The Crown’s purpose in establishing the Native Land Court was to have an independent and competent tribunal investigate claims, including competing claims to customary land, declare who were the owners of that land, and to issue certificates of title following that determination. From 1874, the Court was charged with vetting dealings affecting certain categories of Māori-owned land against prescribed criteria with a view to protecting Māori in their dealings.
173. In summary, the Native Lands Act 1862 had three primary elements:
- 173.1 The waiver by the Crown of its right of pre-emption over Māori land where title had been ascertained by the Court (see sections 17 and 29 – 30);
 - 173.2 The establishment of a court to ascertain ownership of customary land and determine rights of succession in certain circumstances;
 - 173.3 A code or regime enabling and governing dealings where the ownership had been ascertained.
174. These elements were maintained in subsequent Māori land legislation.
175. The Crown considers there were good reasons for the Crown to establish a tribunal, independent of the Executive, to determine intersecting and disputed claims to Māori customary land, and to administer legislative modifications to customary tenure to meet new needs. The “Hot Tub Statement” produced during the course of the Whanganui inquiry sets out possible alternatives to the court. In the Crown’s view all the alternatives proposed have significant

weaknesses,⁸⁷ and unless a proposed alternative could be shown to be significantly better than the court system that had developed over decades, it would have been at best imprudent to dismantle that system altogether.

176. On the other hand, the Crown considers that the changes to the Native Land Court process adopted in the Rohe Pōtae were an improvement on the existing model. Particular improvements were the creation of the Kawhia Native Committee in 1884 under the Native Committees Act 1883, and the composition and conduct of the Court created in 1886 to deal with the Rohe Pōtae, led to an effective title determination process over the following decade. These changes met the particular requests of Rohe Pōtae leaders. These types of changes were subsequently enhanced further in Te Urewera with the establishment of Commissions for the determination of title under the Urewera District Native Reserves Act 1896.

177. In the Crown's view, the critical issue for inquiry is the manner in which the Crown purchase policy subsequently worked to undermine the significant gains that were achieved in the late 1880s.

Issue 6.5 Should Rohe Pōtae Māori have been offered a broader range of statutory options for the 'recognition' or the expression of customary interests than those provided in the Native Lands Acts? If so, why were these options not supplied?

178. The Crown accepts that an issue it needs to explore in this inquiry, as a possible breach of the Treaty of Waitangi and its principles, is whether the Crown ought to have ensured that a broader range of policy and legal options for expressing the recognition of a form (or forms) of "community title" were legislatively provided for in the Native Lands Act 1865, the Native Land Act 1873, and succeeding legislation. A tribal title was provided for in the 1865 legislation as amended by section 17 of the Native Land Act 1867, and the 1873

⁸⁷ Agreed Historian Position Statement on Native Land Court Issues, March, April and May 2009, "The Hot Tub Statement", Whanganui District Inquiry, Question 1B, para 9.

legislation provided majority owner provisions. It may have been anticipated by Parliament that Māori would be able and willing to cooperate in the management of their collective interests within this framework legislation, and that specific provisions for such management were not necessary.

179. The Native Committees Act 1883 and Native Land Administration Act 1886 provided statutory frameworks for recognition or expression of community management. Native Land Acts did not provide adequately for community management of land before 1894. The incorporation model provided for in section 22 of the Native Land Court Act 1894 was more fully developed in the Native Land Act 1909.

180. The Crown's response to issue 6.17 also addresses this issue.

Issue 6.7 To what extent did Rohe Pōtae Māori engage with the Native Land Court? Why did those who engaged do so?

Issue 6.8 To what extent was the introduction and operation of the Native Land Court within Te Rohe Pōtae Inquiry District affected by the fact of the Court's existence outside the district?

181. Although it was the Crown's policy not to allow the Native Land Court to operate within the Rohe Pōtae until local iwi were prepared to accept it, a number of applications were made to the Court before 1886 which related to lands within the Rohe Pōtae.⁸⁸ The only claims actually heard before that time involved blocks in the Mokau area, and in 1882 claims by a Taranaki iwi were heard and rejected.⁸⁹

⁸⁸ Dr D M Loveridge, "The Crown and the Opening of the King Country, 1882 – 1885" (A report for the Crown Law Office), Wellington, February 2006, Part IV.24 concerning the many applications extant at the end of 1883. See also Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907" (November 2011), Wai 898, pp 55-59, 74-85.

⁸⁹ See P Thomas, "The Crown and Maori in Mokau 1840-1911", a report commissioned by the Waitangi Tribunal for Te Rohe Potae Inquiry, February 2011, A28 Ch. 7.2. See also Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry, Wai 898, November 2011, p 55.

182. The step taken by Ngāti Matakore to place their land under the mana of King Tāwhiao at a hui at Maungarongo in October 1885 – a direct challenge to the Rohe Pōtae coalition as demonstrated in the statement issued by Ngāti Maniapoto, Ngāti Tuwharetoa, Ngāti Raukawa, and Whanganui who argued that Ngāti Matakore did not have the authority to act independently in this way – may have contributed to the decision to renew the title application in 1886.⁹⁰
183. The Kingitanga would not recognise the jurisdiction of the Court, but from 1883 the Four Tribes were prepared to entertain the possibility that their lands would be taken before the Court for ascertainment of title. This was done finally in 1886, after extensive negotiations with the Crown. The Native Land Court system enabled the conversion of customary claims into a form of title which was recognisable in English law, so allowing owners to make commercial use of their property. Security of titles and economic opportunities (available through the leasing of land) appear to have been the principal factors which led Rohe Pōtae Māori to accept the operation of the Court within the inquiry district.

Investigation of Title

Issue 6.9 **How did the Crown view Rohe Pōtae Māori customary rights and interests? Was this view consistent with its commitments under Te Tiriti and the Treaty?**

Issue 6.10 **Was the investigation of title and the Native Land Court process more generally, as devised and modified from time to time by the Crown, an appropriate vehicle to determine Rohe Pōtae customary rights and interests in land?**

184. The Crown admits that there were flaws with the Native land legislation and the processes of the Native Land Court, but considers that generally the processes could be applied as an effective means to determine customary rights and interests in land.

⁹⁰ Dr D M Loveridge, “The Crown and the Opening of the King Country, 1882 – 1885” (A report for the Crown Law Office), Wellington, February 2006, pp 58 – 59, and 66. See also Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866-1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, p 55.

185. The investigation of title by the Native Land Court was a process set out in the Native land legislation and intended to provide a form of title that reflected customary rights and interests in land. The Court process was different to traditional processes and practices of Rohe Pōtae Māori.
186. In this inquiry, the novel aspect is the operation of the Native Land Court in Otorohanga, where modifications were made at the instigation of the Rohe Pōtae leadership to improve the Court's performance.
187. The Crown considers that the approach taken to title investigation was a significantly improved model. This may well be attributable to the calibre of all participants in the process, but the changes in process seemed to ameliorate some of the more problematic elements of the Court process.
188. The Court's process was modified in a number of ways following the representations of the Rohe Pōtae leadership:
- 188.1 After the initial survey and application to the Native Land Court in 1883 by the Four Tribes⁹¹, considerable negotiation ensued between Crown Ministers and the Rohe Pōtae leadership on the Native land laws and the terms on which settlement would be allowed.⁹²
- 188.2 The Native Committees Act 1883, resulting from earlier negotiations, and associated regulations, provided for committees with a range of functions including civil judicial powers, limited local government functions and an advisory role to the Land Court in land title determination.

⁹¹ Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 59 – 60.

⁹² Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 60 – 64.

The Kawhia Native Committee was elected and, during its first three years, sought further powers. It is of significance that Ballance delegated some of his powers to the committee in response. The Crown's insistence that the Native Land Court was necessary as "an independent tribunal that will decide fairly between the conflicting parties"⁹³ remained a sticking point.⁹⁴

188.3 Nevertheless, the Crown continued to promote legislation to address the issues raised by Rohe Pōtae Māori seeking greater power to administer their lands collectively after title had been determined.⁹⁵ The Rohe Pōtae leadership clearly had in mind the effects the awarding of individual title had on the customary forms of political and land management. This resulted in the Native Land Administration Act 1886.

188.4 Specific legislative modifications adapted the Court's operations. The Otorohanga Court operated under the Native Land Court Act 1886, which came into force on 9 August 1886. This included the banning of representation by "counsel, solicitor, agent or other representative" originally inserted by an 1883 amendment to the Native Land Court Act 1880⁹⁶ and drafted in direct response to

⁹³ AJHR 1885 G.-1 "Notes of Native Meetings" p 17 (Ballance at Kihikihī).

⁹⁴ Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 64 – 68.

⁹⁵ Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 70 – 73.

⁹⁶ The Native Land Act 1880 modified but did not repeal the Native Land Act 1873 meaning that if necessary the 1873 legislation could be applied so long as it was not inconsistent with the 1880 legislation. Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 95 – 96.

the 1883 petition submitted in the names of Ngāti Maniapoto, Raukawa, Ngāti Tuwharetoa and Whanganui.⁹⁷

188.5 The Crown agreed that it would not commence purchasing operations until the Court had finished its operations and ownership of the land had been properly established.⁹⁸

188.6 Judge William Gilbert Mair who presided over the investigation of the Rohe Pōtae lands was fluent in the Māori language and knowledgeable in Māori custom.⁹⁹

188.7 The Court sat at Otorohanga, ‘principal residence’ of Taonui and the choice of Wahanui and the Kawhia Committee.¹⁰⁰

189. During the initial title investigation of the Aotea-Rohe Pōtae block from 28 July to 20 October 1886 in a Court presided over by Judge Mair and Native Assessor Paratene, with Henry Tacy Kemp as translator, great emphasis was placed on the claimants reaching agreement amongst themselves:

189.1 There were successive adjournments to allow Wahanui and Taonui, on behalf of the five tribes, to seek arrangements with other parties making claims on the land.¹⁰¹

⁹⁷ Section 4 of the Native Land Laws Amendment Act 1883. There were exceptions where the Court could at its discretion allow Maori representation; Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 95 – 96.

⁹⁸ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, p 97.

⁹⁹ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 97 – 98.

¹⁰⁰ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 98 – 100.

¹⁰¹ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 101 – 102.

Nevertheless, the internal boundaries of the five tribes were not resolved prior to the opening of the case necessitating a full hearing.¹⁰²

189.2 The Court in Otorohanga allowed considerable time for the parties to make arrangements out of Court before commencing proceedings in Court.¹⁰³

189.3 Rohe Pōtae Māori on several occasions expressed their satisfaction with the way this Court had been conducted. In 1887 they offered “great praise for the manner in which he [Judge Mair] had done the work”, and requested that Mair and Assessor Paratene Ngata “should be appointed to determine the sub-divisions”.¹⁰⁴

Issue 6.11 How did the investigation of title by the Native Land Court affect traditional processes and practices of Rohe Pōtae Māori?

(a) Were the rights and interests of women appropriately recognised and provided for?

(b) To what extent was the Native Land Court process able to be manipulated to achieve certain outcomes? Did the Crown use the Court process to manipulate outcomes? If so, how? What effect did this have?

190. The Crown is familiar with the claims made in respect of the Native Land Court’s impacts on traditional leadership roles, traditional hapū-based structures, and traditional dispute resolution among other processes and practices of Rohe Pōtae Māori. In the absence of traditional history reports, and other evidence to be led by the

¹⁰² Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 101 – 121.

¹⁰³ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 137, 164, 185-186, 190, 194, 197, 198 and 222.

¹⁰⁴ Waikato Times 27 Jan. 1887 “The Native Minister at Otorohanga”; J. Ormsby speaking on behalf the Four Tribes.

claimants, the Crown is not in a position to form a comprehensive view on such effects.¹⁰⁵

191. There is little in the evidence on the record of inquiry about provision for the traditional rights and interests of women during the investigation of title by the Native Land Court as opposed to the interests of the claimants and counter-claimants. Women were numbered among those people, for example Makereti Hinewai,¹⁰⁶ and Harete Te Waharoa.¹⁰⁷
192. The evidence on the record of inquiry has speculated that the size and significance of the Rohe Pōtae block, and the potentially devastating power dynamics at work, meant that claimants and counter-claimants alike must have felt enormous pressure to arrange, shape and possibly manipulate or even fabricate their evidence to support their arguments, crafting them to fit the way in which the Court was known to interpret and weigh different types of evidence, with given as an example. Boast and Parsonson are cited in support with their comments that histories were recited as a weapon in battle, and the Court process distorted those histories. With respect to Boast, it should perhaps be noted that he has observed that “The Rohe Potae inquiry [by the Court in 1886] was not driven by competing groups of purchasers, as no private purchasing was allowed in the Rohe Pōtae area and the Crown purchasing programme in that area had not yet begun. These are reasons for

¹⁰⁵ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 3 – 5, 12.

¹⁰⁶ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 41, 84, 198, and 211; Table 1.3: Applications for investigation of title to blocks notified in the Kahiti o Niu Tirenī 27 May 1886, p 93; Table 3.1: Applications for Rehearing Concerning the Native Land Court’s Subdivision of Te Rohe Potae, 1888-1890, p 225.

¹⁰⁷ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 115 – 116, 118, 132, and 140.

trusting more to the findings of the Rohe Pōtae case than the others’¹⁰⁸.

193. While it would likewise be naive not to expect that the parties would present their histories in the way that would best suit their case, it would also be naive to assume that experienced Judges and Assessors would not be alert to such techniques given the aims of the parties. The Crown is also unsure of the extent to which this was not simply another forum in which traditional oral histories were used in this way.

194. The Crown has not seen evidence of the Crown using the Court process to manipulate outcomes. This issue is addressed to some extent in the context of the Crown response to issues 6.14 and 8.20.

Issue 6.12 To what extent was it possible for the Native Land Court to obtain a clear and unequivocal position on customary rights and interests in land being investigated from Rohe Pōtae Māori?

195. The Otorohanga Court took every opportunity to encourage competing parties to reach agreement outside court, and the Assessor would often take a mediation role to facilitate this. Clearly this was the best way to achieve an equitable and unequivocal result. Many disputes were settled in this manner.

196. Where this procedure was not effective, the Court had recourse to the usual court processes of taking testimony from the parties. The Assessors was also very active in the examination of Tohu and signs of settlement on the ground, the interrogation of supplementary witnesses, and scrutiny of previous testimony. A large number of the disputed claims were resolved in this way, although the evidence on the record identifies several cases where the court struggled with

¹⁰⁸ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, p 140.

competing testimony and found it impossible to come to definite conclusions on some aspects of the case before it.¹⁰⁹

197. When this occurred, and the Court was obliged to make a decision, it sought to chart a “fair” course between the competing parties.¹¹⁰ Sometimes these results were accepted by the parties, and at other times they led to applications for rehearing, appeals or petitions.

Issue 6.13 Where the Court could not determine a clear and unequivocal position on customary interests in land under investigation, what was the most appropriate view to adopt, and how was this view determined?

198. The course outlined above in respect of issue 6.12 is an appropriate course to take. Among the possible alternatives was a referral to a committee established under the Native Committees Act 1883. It does not appear this happened, and it would be useful to further analyse why that did not happen, and the benefits and detriments of such an approach.

Issue 6.14 Did the Crown promote conflict among customary rights holders to its own advantage and if so, to what extent?

199. There is no evidence on the record that the Crown promoted conflict among customary rights holders before the Court at Otorohanga. In the initial title investigation phases the Crown had no role before the Court, and it was not until after title had been determined that the Crown had a significant role before the Court as a result of its Crown purchasing programme. No negotiations for Crown purchases of Māori land in the Aotea block were initiated until 1889.¹¹¹

¹⁰⁹ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, November 2011, Wai 898, A79, p 207.

¹¹⁰ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, November 2011, Wai 898, A79, p 207.

¹¹¹ Dr D M Loveridge, “ In Accordance with the Will of Parliament” The Crown, the Four Tribes and the Aotea Block, 1885 – 1889, a report for the Crown Law Office, 31 August 2011, A79, p 82, para 82.

200. Evidence on the record briefly addresses the issue of whether conflicts of interest arose in terms of potential relationships between officers of the Court and Crown land purchase officers.¹¹² The Crown takes the view the Court was an independent judicial body and officials and politicians did not meddle with it. The Crown accepts that there were close connections with the administrative side of the Court, but says such connections were understandable in the context of the times.

Issue 6.15 Did the prejudices of the Crown affect how the Court treated certain groups, and what impact did this have on the title determination process?

201. The evidence on the record does not address the issue of whether the Crown was prejudiced in respect of certain groups. By the time of the Otorohanga Court the period of warfare was some twenty years before. Ministers such as Bryce and Ballance had worked extremely hard to develop a relationship with Rohe Pōtae Māori recognising the benefit to New Zealand of moving old relationships onto a new footing. This too was an approach embraced by the Rohe Pōtae leadership. It was important to the Crown that this relationship be maintained.

202. The issue is further addressed in respect of the experience of certain Waikato groups before the Court in issue 6.16.

Issue 6.16 What was the effect of the recognition and promotion of some whakapapa over others? Did the Court and Crown agents promote or allow the promotion of interests of those considered friendly over those considered rebels? If so, how? What was the effect?

203. It is a difficult task to go behind Court decisions to determine the motivations of the Judges in making decisions after a title investigation. There are some examples in the evidence of

¹¹² Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry, November 2011, Wai 898, A79, p 393.

comments about political affiliations, but it is another step to see a pattern of promotion of interests.

204. There is some indication that supporters of the Kingitanga were more likely to boycott the Court, and as a consequence risk the Court overlooking their rights. As with the investigation of the Aotea-Rohe Pōtae case, there are also indications with Wiremu Te Wheoro's Kawhia claims¹¹³ that steps were taken by the claimants to avoid that situation. In that case later comment by Judge Gudgeon indicates his view that if Waikato had appeared in force before the Court, the Court's decision would be very different. At this point, this type of evidence is insufficient to indicate the promotion, or allowance of the promotion of certain interests. Rather, there is more a case of there not being sufficient safeguards to protect the interests of those that deliberately chose to stay away.
205. The evidence does not suggest that once title was awarded in a block, and relative interests determined, that Crown land purchase officers discriminated in this way in their land purchasing.

Title Options

Issue 6.17 Did the new tenure system, introduced through the Native Land Court, provide for the recognition of a range of customary rights and interests, including shared, overlapping and usufructuary rights?

206. The Crown's response to issue 6.29 addresses this issue. In essence, the rightsholding was converted to ownership within a block with the nature of the rightsholding being one reflected in the extent of landholding within a block. There are many examples of people from different groupings from the owners of the main block having their interests cut out of the block.

Individualisation and Partition

¹¹³ Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry, November 2011, Wai 898, A79, p 115.

Issue 6.18 How and to what extent was the ownership of land individualised through the Native Land Court system in Te Rohe Pōtae Inquiry District?

207. Once owners had been identified, and the extent of their shares in a particular block had been identified they might be said to have individualised interests that they could sell: the legislation that made the identification of relative interests mandatory for the Court was section 21 of the Native Land Court Act 1886 Amendment Act 1888. Previously, under section 42 of the Native Lands Court Act 1886 an application from an interested person was necessary. The effect of this provision is discussed further in the Crown’s response to issue 8.20.

208. It appears that virtually all relative interests had been identified in the Rohe Pōtae by 1901 though there were some subsequent hearings of appeals and petitions in respect of the Court’s decisions.¹¹⁴

Issue 6.19 In what ways did the mechanisms provided in the Native Land legislation for partition work either to the benefit, or to the detriment, of Rohe Pōtae Māori owners?

209. There was substantial support among Rohe Pōtae Māori for the ability of individual or family groups to partition out his or her share or their shares in land. In November 1887, Judge Mair ruled that when subdivisions did proceed in the Rohe Pōtae they would begin from larger tribal subdivisions before passing to those of ‘hapu and individuals.’ This was consistent with the views of the tribal leadership. The judge had considerable discretion as to how he would order cases brought before him – his approach allowed for orderly progress and for decisions at hapū level not to partition lands into individual allotments if that was wished.¹¹⁵ The work of partitioning blocks at the behest of Rohe Pōtae Māori began in 1888

¹¹⁴ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, November 2011, Wai 898, A79, p 283.

¹¹⁵ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, November 2011, Wai 898, A79, p 171.

and continued through to 1899. Although the motivations for this work are rarely discussed in the evidence, Rohe Pōtae Māori clearly saw benefits in further subdividing the Rohe Pōtae block.¹¹⁶ Working out the motivations lying beneath these decisions is complex as the evidence rarely exists to indicate the purpose. Several of the partitions were to create blocks to pay for survey fees.

210. Extensive partitioning as a result of Crown purchasing is a feature of the courts' activities from 1892, and is referred to in the Crown's response to section 8 of the amended claimant statement of issues. This mechanism is particularly detrimental to the Rohe Pōtae non-sellers as discussed in respect of issues 6.30 and 6.42.

Issue 6.20 To what extent, if any, did Te Rohe Pōtae land become fragmented into uneconomic and/or inaccessible parcels?

211. There is no evidence that Rohe Pōtae land had become fragmented into uneconomic and/or inaccessible parcels in the 19th century. The Native Land Commission of 1907 commented on the close subdivision of many Rohe Pōtae blocks, but did not suggest that this was detrimental to the owners in any way, only commenting that the relative lack of subdivision east of the railway line was not the fault of the "Departments of State". It would appear that the Commission considered most of the subdivision to be a necessary consequence of the way Ngāti Maniapoto and the other tribes decided to parcel out and manage their lands.¹¹⁷
212. There is evidence of acquisition of 'uneconomic' parcels being acquired under Part XIII of the Māori Affairs Act 1953, and sections

¹¹⁶ This approach is consistent with the study Robert Hayes made of the 1891 Native Lands Commission. He concluded that there was substantial support among Maori for the right of the individual or family groups to partition out their shares in land throughout much of the 19th Century.

¹¹⁷ AJHR 1907 G.-1B pp 2 – 3. See also Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry, November 2011, Wai 898, A79, p 520.

9 – 14 of the Māori Reserved Land Act 1955.¹¹⁸ Specific examples are provided in a number of the statements of claim.¹¹⁹

213. It is, however, difficult from the evidence available to quantify when and to what extent Māori land in the Rohe Pōtae became fragmented into uneconomic and/or inaccessible parcels.

Issue 6.21 To what extent, if at all, did processes of individualisation and fragmentation of titles, succession and partition facilitate the alienation of land?

214. The Crown accepts that the individualisation of Māori land tenure provided for by the Native land laws made the lands of the Rohe Pōtae iwi and hapū more susceptible to fragmentation, alienation and partition, and that this contributed to the undermining of tribal structures in the Rohe Pōtae. The Crown concedes that its failure to protect these tribal structures was a breach of the Treaty of Waitangi and its principles.

215. Quantifying the extent of facilitation, rather than the fact of facilitation and the trend of the evidence is a more difficult if not impossible task without a detailed understanding of the motivations of those who sold their shares.

Succession

¹¹⁸ Dr T J Hearn “Land Titles, land development, and returned soldier settlement in Te Rohe Potae”, Wai 898, A69; pp 20, 124 – 125, 132, 134, 136, 146 – 147; Table 3.6. Crown and Maori Trustee purchases (including ‘uneconomic interests’) in Te Rohe Pōtae development schemes, by June 1967, p 148; and Table 11.2. ‘Uneconomic’ interests in the Tiroa development scheme (Rangitoto-Tuhua blocks, p 430.

¹¹⁹ Uneconomic parcels – Wai 1523 ASOC 9 Dec 2011, pp 8 and 9, Wai 2291 ASOC, 9 Dec 2011, pp 11, 14, 19 and 22, Wai 2084 ASOC 9 Dec 2011, p 3; Inaccessible parcels – Wai 2291 ASOC, 9 Dec 2011, p 42-45; Wai 1500 ASOC, 9 Dec 2011, p 34 – 35.

Issue 6.22 In what ways did the mechanisms provided in the Native Land legislation to regulate succession work either to the benefit, or to the detriment of Rohe Pōtae Māori land owners?

Issue 6.23 To what extent did the Native Land Court rules on succession depart from custom?

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

“The court-developed rules on intestate succession (essentially a division of the estates of both parents equally amongst all children, without any residence requirement) were a significant departure from custom and, along with increasing mobility of population, contributed to significantly to land interests being held by absentee owners. They also lead to the increasing fractionation of shares and titles once the Māori population started to increase (although the extent of this was hardly foreseeable in the 1860s, when the Māori population was declining). However, by the 1880s Māori themselves had become accustomed to the principles adopted; although the right of all children to succeed in equal shares to their parents’ interests was not entirely customary, they tended to regard the right as a version of tikanga and resisted efforts by the Legislature to have succession conform more closely to English rules. Being possessed of an interest in the land of one’s parents or grandparents become increasingly valuable as a mark of identity and belonging to a hapu, regardless of the economic worth of the interest. But with the increasing numbers on titles, the want of a legal mechanism for the named owners to act corporately was increasingly felt.”¹²⁰

Issue 6.24 To what extent, if any, did that departure reflect the wishes of Rohe Pōtae Māori?

217. From mid-1890 an increasing number of succession cases were heard by the Court at Otorohanga.¹²¹ The evidence on the record suggests that many applications were passed without objection, succession cases could be the subject of amicable arrangements before being brought to court, and there were examples of contested cases.¹²² There are also a number of cases of succession appeals and

¹²⁰ *The Hauraki Report*, Wai 686, Waitangi Tribunal Report 2006, p 782, para 16.4.

¹²¹ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, November 2011, Wai 898, A79, p 169.

¹²² Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, November 2011, Wai 898, A79, pp 285 – 289, 291 – 292, 375 – 376, 391, 398, 403, 408, 416, 429, 430, 500 – 501.

one petition.¹²³ No mention is made about the reasoning for the appeals, but the evidence tends to suggest the *Hauraki Report's* findings are valid in the Rohe Pōtae as well.

Alienation

Issue 6.25 At the times when the Court had the power of confirming alienation of land, did it ensure that all owners were aware of, and consented to, such alienations?

218. Since there were very few private alienations within the inquiry district before 1900, and the Land Board was responsible for confirming all leases from 1905 onwards and all alienations from 1908 onwards, this is not a major issue. It would principally have affected the small number of private sales involving blocks with fewer than 10 owners in 1900-1910.¹²⁴ There do not appear to be claims or evidence that the owners involved were not aware of or did not consent to these sales. Part V(5) of the Native Land Claims Act 1894 required that the Court, before confirming an alienation, satisfy itself of a series of factors, including in section 53 that the effect of any deed “was explained by a licensed interpreter to each Native before signing the same”.

Issue 6.26 To what extent did Crown policy, as embodied in the Native Land legislation, actively facilitate the alienation of Maori land in Te Rohe Pōtae Inquiry District for the Crown's own purposes?

219. This issue is dealt with generally in the context of issue 6.21. There are also, in the period when the Otorohanga Court was most active, evidence of particular amending legislation that had the effect of facilitation Crown purchasing. The most obvious example is the

¹²³ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district Inquiry (Wai 898), November 2011, Table 6.10: Notices of appeal 1895-1906 A79, pp 454 – 460, 462; Table 6.14: Court costs incurred in cases heard before the Native Appellate Court 1895-1906, pp 463 – 464; Table 6.15: Petitions presented to Parliament protesting decisions made between 1889 and 1907 by the Native Land Court and Native Appellate Court concerning specific blocks of land within the boundaries of the Aotea-Rohe Potae block, p 473.

¹²⁴ Some are listed in AJHR 1909-II G-11 “King Country Native Lands Leased or Disposed of During the last Five Years”, p 15.

Native Land Court Act 1886 Amendment Act 1888 that provided for the Crown to make application to ascertain the Crown's interests (section 7); provided for partition of land where there were more than 20 owners (section 12); provided for interlocutory orders or decisions of the Court in the Rohe Pōtae to have the effect of orders under section 20 of the Native Land Court Act 1886 (section 15); the same provision prevented dealings in that land for 3 years but excepted the Crown; and provided that it was the duty of the Court to determine relative interests whether the procedure was applied for or not (section 2).

Issue 6.27 To what extent, if any, did Court-related costs, including Court fees, and the costs of attending hearings contribute to the alienation of Te Rohe Pōtae lands?

220. The evidence does not provide sufficient information to quantify the extent to which Court-related costs contributed to the alienation of Rohe Pōtae lands. The Crown acknowledges that overall the quantity of land alienated for the payment of survey costs, supplemented by court-related costs and fees, was very considerable. It was not unusual for 'sale' blocks set aside for payment of survey fees to also be used by the Court for Court-related costs incurred by Rohe Pōtae Māori.¹²⁵

Surveys

Issue 6.28 Was it consistent with the Crown's legal and Treaty obligations for the Crown to require Rohe Pōtae Māori to have land surveyed for title investigation by the Native Land Court?

221. It was necessary for Rohe Pōtae Māori to have their land surveyed if they wished to obtain Native Land Court titles which would facilitate their land being integrated into the modern economy. The Crown considers it Treaty compliant for Rohe Pōtae Māori to have paid reasonable survey costs as Native Land Court titles could potentially create economic benefits. Nevertheless, the Crown had a

¹²⁵ Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry, November 2011, Wai 898, A79, pp 246, 332, 486 and 530.

Treaty duty to actively protect Māori in the land they wished to retain, and to protect Māori from having to give up excessive amounts of land to pay survey costs.

Issue 6.29 Were surveyed boundaries compatible with tikanga Rohe Pōtae relating to interests in land?

222. The Crown acknowledges that an essential element of tenure reform was to convert land that had formerly been held collectively under the mana of a particular iwi or hapū whose rights could merge or overlap with other groups into discrete blocks, each with its own set of fixed boundaries and a defined list of owners. There is little evidence available on the record to indicate particular objections to this process, and the initiative for the survey of the external boundary of the Aotea-Rohe Pōtae block came from Rohe Pōtae Māori who had been planning such a survey for some time before.

223. As an example, there is evidence that Land Purchase Officer Wilkinson held meetings with the non-sellers of the different blocks with a view to settling outside the Court the question of how the land was to be divided.¹²⁶ Comment during the Maniapoto consolidation scheme was that surveyed boundaries often followed tribal lines rather than what would be suitable for an economic unit. This tends to suggest that although the ascertainment of boundaries was not in accordance with, it could be made to be compatible with, tikanga Rohe Pōtae.

Issue 6.30 Were survey costs excessive?

224. This question is a complex one. There were agreements between the Crown and the Rohe Pōtae Māori on the outer survey of the Rohe Pōtae block and the survey of the subdivisions of the Aotea-Rohe Pōtae block. The outer survey of the Rohe Pōtae block cost £1600 as negotiated between the government and the Rohe Pōtae leaders in 1883. This was substantially less than the actual survey would

¹²⁶ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, p 253.

cost but would allow the government to undertake a trigonometric survey at the same time that would make later surveys easier and cheaper.¹²⁷ The Chief Surveyor's 'applications for orders for costs of survey' were heard by the Court on 9 August 1892. They totalled £6,348 with the survey charges levied by the Court on each block varying depending on the size of the block, the nature of its terrain, and the type of division or subdivision involved.¹²⁸ It is the Crown's position that these survey charges were not excessive.

225. The initial terms for the survey of the subdivisions of the Aotea-Rohe Pōtae block were set by a hui between Crown officials and a number of the Ngāti Maniapoto leaders at Otorohanga over 22 and 23 January 1889. The Government undertook 'to advance the cost' of the necessary surveys with Māori providing reimbursement either 'in monies or lands.' The Crown's outlay was to be secured through liens placed on the relevant pieces of land under section 86 of the Native Land Court Act 1886 (as amended by section 25 of the Native Land Court Act 1886 Amendment Act 1888).¹²⁹
226. The subsequent partitioning of land led to a range of survey costs. Clearly land that had difficult terrain would cost more to survey than flat land. The costs were generally under 20 per cent of the block being surveyed and averaged 15 per cent within the Rohe Pōtae block. The Crown notes that survey costs were on occasions very high, and left the owners with a substantial debt resulting in the sale of large areas of land to pay for these costs. The Crown concedes that in a number of instances, for example in some subdivisions in the Rangitoto Tuhua block, the iwi and hapū of Rohe Pōtae had to

¹²⁷ Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 41 – 42.

¹²⁸ Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, p 244.

¹²⁹ Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 300.

give up unreasonably large amounts of land to pay for survey costs, and that the Crown's failure to protect the affected iwi and hapū of Rohe Pōtae from this burden breached the Treaty of Waitangi and its principles.¹³⁰

227. There is an additional set of issues that potentially link with this concession, and with the Crown's Treaty breach concessions in respect of Crown purchasing that the Crown considers deserve further inquiry.
228. It is almost certain (though not completely clear from the evidence available)¹³¹ that the survey charges paid in land at the time of the Crown's partition of its interests were calculated at the same rates at which the land was purchased. This would mean that the amount of land required to cover survey costs was increased as a result of monopoly pricing, so reducing the land retained and the land of non-sellers; survey costs were paid in land with low values. The issue does not arise to the same extent for those that sold their shares as they were not charged for the survey costs; these were carried by the Crown. Similar issues arise with sale blocks that were used to pay for survey charges, court fees and other costs. These circumstances changed with the Māori Land Settlement Act 1905. Section 25 of this Act required that the purchase-money to be paid for any land acquired by the Crown from Māori should be not less than the capital value of the land as assessed under the Government Valuation of Land Act, 1896.

¹³⁰ The extent to which this concession applies to particular groups within Te Rohe Pōtae is an issue for inquiry.

¹³¹ Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 317 – 318, 321 – 322.

Issue 6.31 What was the effect on Rohe Pōtae Māori of accumulating debt from survey costs, survey liens and the interest on sums owned?¹³²

229. For many Te Rohe Pōtae Māori who were subject to survey costs and charges, the immediate impact on them was alienation of a portion of their land, or their shares in land, to meet the expenses for definition of the land they retained. This occurred immediately after partition of their interests, or after a number of years during which their land was subject to survey lien.

230. The evidence on the record of inquiry provides various calculations and figures for the proportion of the original Aotea-Rohe Pōtae block that was alienated for survey costs and charges at different times:

230.1 91,388 acres in total were alienated between 1892 and 1907.¹³³

230.2 Some of the sale blocks have been omitted from the calculation of 91,388 acres. When the sale blocks Maraeroa A1 and B1 (6,358 acres),¹³⁴ Maraetaua 4A (5,000 acres) and Taurangi (10,000 acres) totalling 21,358 acres are added the total acreage is 112,746.¹³⁵

230.3 Sale blocks were often used to defray other expenses, including court costs, and in some cases funds remained

¹³² See also issue 8.65.

¹³³ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 280 and 370 (Table 5.31: Total land alienated in Te Rohe Potae to cover survey and related charges: 1890-1907).

¹³⁴ The Pouakani Report notes ‘some agreement’ had been reached for the owners to sell A1 & B1 to defray survey liens, which can be construed as sale blocks: Waitangi Tribunal, *The Pouakani Report*, (Wai 33) Waitangi Tribunal Report: 6 WTR, Brooker & Friend Ltd, Wellington, 1993, pp 197, and 222. Note also that the Maraeroa blocks are not within the Rōhe Pōtae inquiry district.

¹³⁵ When the use GIS calculations used by Douglas et al are applied the acreage is 114,039.35 acres or 15% of the total land alienated to the Crown: Tutahanga Douglas, Craig Innes and James Mitchell, ‘Alienation of Maori land with Te Rohe Potae Inquiry District, 1840-2010: A Quantitative Study’, June 2010, Wai 898, A21.

after alienation and the payment of all applicable survey charges & interest that were returned to the former Māori owners,¹³⁶ so the figures for survey costs are not definitive.

231. Similarly, the evidence on the record provides various calculations and figures for the monetary value of survey charges: the total sum of survey charges imposed by the Otorohanga Court between 1892 and the 1907 amounted to at least £22,017. By adding the survey charges for the Mokau Mohakatino 1 blocks and Wharepuhunga the total comes to a minimum of £23,728.¹³⁷
232. There are likely to have been other impacts, for example alienation from Turangawaewae, that the Crown has insufficient knowledge to plead to.

Issue 6.32 Did the Crown have fair, appropriate and affordable processes for remedying survey errors?

233. This issue is addressed in the Crown’s response to issue 8.63.¹³⁸

Operation of the Native Land Court

Membership

Issue 6.33 Did the Crown ensure the judges appointed to the Native Land Court were competent to determine matters of law and custom, and were independent and free from actual or apparent bias?

234. This issue is answered in respect of the judges who presided over the Otorohanga Court:
- 234.1 Judge William Gilbert Mair was the most prominent judge who presided over the Court. He was known as “an

¹³⁶ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, p 324.

¹³⁷ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 280, 330.

¹³⁸ See also Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 501 -505.

accomplished Māori linguist”, and was and experienced a Native Land Court judge.¹³⁹ As Resident Magistrate and Native Agent at Waikato in the 1870s, he possessed “an extensive and intimate acquaintance with natives affairs” within the area.¹⁴⁰ Mair’s previous service as a military officer does not appear to have affected his ability as an independent and impartial arbiter as demonstrated by the work he had engaged in before his tenure on the Otorohanga Court.¹⁴¹ His conduct of the Otorohanga court demonstrates independence and freedom from bias.¹⁴²

234.2 Ten other judges sat on the Court with a variety of experience and knowledge. There is nothing to suggest that ‘Judges were lacking in a sense of judicial independence or that the Court unquestionably applied government policy.’ The closeness of the administrative connections between the Court and the Government though surprising to modern eyes, were not considered untoward at the time. They reflect the very small size of the public service and government infrastructure. The judges themselves seem to be have had very clear

¹³⁹ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 94 – 95.

¹⁴⁰ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 106.

¹⁴¹ For example, the Taupo case, M. P. K. Sorrenson, “The Purchase of Maori Lands, 1865-1892,” MA Thesis, Auckland University College, 1955, p 110; Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry (Wai 898), November 2011, A79, p 106.

¹⁴² Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 106 – 108, 109 – 110, 136 – 137, 139 – 142, and 231 – 232.

understandings of their roles as judicial officers to impartially test the evidence before them.¹⁴³

Issues 6.34 What role did assessors play in deciding titles to Rohe Pōtae Māori lands?

235. From 1865 to 1894 (except for the years 1873 and 1874) the legislation required the Assessors to agree with the decision of the Court for it to be valid.¹⁴⁴
236. Assessors during the course of the Otorohanga hearings in Te Rohe Pōtae were the influential Rangatira: Paratene Ngata of Ngāti Porou and Nikorima Poutotara of Ngāti Tamahanu from Thames.
237. During the course of the hearings the Assessors, particularly Ngata, were extremely active in the questioning of witnesses, mediating between parties, inspection of land, and fixing of boundaries.¹⁴⁵
238. The Native Assessor played a significant part in the operation and adjudication of the Court with Judge Mair placing a great deal of reliance on Paratene Ngata and Nikorima Poutotara.¹⁴⁶

Issues 6.35 What role did the Crown land agents play in the Court process and its decisions?

239. The Crown used the Native Land Court processes in a number of ways during the course of its Crown purchasing:

¹⁴³ Richard Boast, *Buying the Land, Selling the Land. Governments and Maori Land in the North Island, 1865-1921*, (Wellington, Victoria University Press & Victoria University of Wellington Law Review), 2008, pp 97 & 101. Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 145, 233 – 236, 238, 248, 299, 379, 388 – 395.

¹⁴⁴ The relevant legislation during the hearings of the Otorohanga Court in Te Rohe Potae was the Native Land Court Act 1880, ss 6 and 11. See also Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry (November 2011), Wai 898, A79, pp 94 – 95.

¹⁴⁵ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, November 2011, Wai 898, A79, pp 115, 150, 191, 195 – 196, 388 – 395.

¹⁴⁶ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 196 – 197, 388 – 395.

239.1 It used aspects of the Native Land Court process to conclude its own purchases. The Crown had a right to appear in Court as an interested party, and could apply to the Court to define the interests it had acquired and make an award to the Crown.¹⁴⁷ The Crown could also apply to the Court for registration of survey liens.^{148 149}

239.2 Crown land purchase officers made applications for partition following purchase of all the shares they could in particular blocks.¹⁵⁰

240. Crown land purchase officers had no role to play in the Court's decisions. It was the Judge and Assessor who made decisions on applications made by the Crown land purchase officer and presented to the Court. The independence of the Court is demonstrated by its range of decisions – it did not uniformly rule in favour of the Crown in disputes between the land purchase officer and Māori land owners, and on one important occasion criticised the conduct of both the Survey and Land Purchase Departments.¹⁵¹

Rules and procedures

¹⁴⁷ Native Land Court Act 1886, s 23.

¹⁴⁸ Native Land Court Act 1886, s 86.

¹⁴⁹ Agreed Historian Position Statement on Native Land Court Issues, March, April and May 2009, “The Hot Tub Statement”, Whanganui District Inquiry, Question 8, para 82.

¹⁵⁰ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district Inquiry, (November 2011), Wai 898, A79, pp 239 – 241, 247 – 248, 382 – 385, and 387.

¹⁵¹ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 382 – 388.

Issue 6.36 Did the Native Land Court adopt rules and procedures that were fair to Rohe Pōtae Māori litigants? In particular:

- (a) Did the timing and notification of hearings allow proper participation by the relevant parties?
- (b) Did the Crown respect the wishes of Rohe Pōtae Māori in determining when and where the Native Land Court would sit?
- (c) What impact did the location and length of hearings have on Rohe Pōtae Māori?
- (d) Was the Crown aware of difficulties that may have arisen, and did it act adequately to address problems of attendance?

241. Section 13 of the Native Land Court Act 1880 provided powers for the Judges to make rules for regulating the sittings, practice, forms, and procedure of the Court, and for fixing the fees to be paid, the time and mode of payment. In general, the rules and procedures applied in the Otorohanga Court were fair to Rohe Pōtae Māori.

242. The evidence on the record details the notification process. There do not appear to be cases where notification processes failed to the detriment of Rohe Pōtae Māori. However, delays in notified hearings did cause problems. This is largely caused by the lack of resources available to the Court.

243. Further research, or assessment of the research on the record may identify what steps were taken to try to ameliorate these delays, and what prejudice resulted from these delays.

244. These issues are also addressed in part by the Crown's response to issue 8.48.

Costs

Issue 6.37 Did Court-related costs cause hardship for Rohe Pōtae Māori?

245. The Crown acknowledges that where costs associated with the determination of land titles, in particular survey costs, were an excessive and disproportionate burden on Māori land owners, and where land was alienated to cover these excessive costs, there is a

real issue of whether there was a failure on the part of the Crown to design a fair titling regime, and a failure on the part of the Crown to protect Māori interests in land they wished to retain.

Issue 6.38 Were Native Land Court fees part of an equitable system for Rohe Pōtae Māori? In particular:

- (a) Should Rohe Pōtae Māori have been required to pay these fees to acquire title to their own land in all the circumstances?**
- (b) Were the fees properly proportioned between claimants/applicants and successful counter-claimants?**
- (c) Were Court fees equal for small and large blocks? If so, why?**

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

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

248. Court fees were not determined by the size of the block. Rather, they depended on the number of days of hearing, the number of witnesses called, and other such factors many of which were not under the control of the Court. In many cases the title to a small block was able to be settled quickly therefore the costs of going to Court were low. Often with larger blocks there was greater potential for dissent. However, where there was significant contention between competing parties leading to lengthy hearings the costs of hearing could mount significantly.

Remedies

Issues 6.39 Did the Crown provide recourse for Rohe Pōtae Māori aggrieved by the Native Land legislation and the Native Land Court process, deliberations and decisions? If so, were those mechanisms suitable for Rohe Pōtae Māori needs? If not, why not?

Issues 6.40 Were there situations where the Crown was made aware of Native Land Court decisions that resulted in significant injustice? Did the Crown respond appropriately?

249. The Native land legislation provided for rehearings of Native Land Court decisions between 1865 and 1894. In 1894 the Native Appellate Court was established to hear appeals. Aggrieved Rohe Pōtae Māori also had recourse to Parliamentary Petitions. These were usually considered by the Native Affairs Select Committee.

250. In the Rohe Pōtae in the period from 1886 to 1909 there were 181 applications, appeals or petitions:

250.1 Sixty-six rehearing applications;

250.2 Seventy-eight appeals; and,

250.3 Thirty-seven petitions.¹⁵²

251. In terms of the petitions, 22 were recommended by the Native Affairs Select Committee as being worthy of further ‘inquiry’ or ‘consideration’ by the Government. The claims of five petitions, concerning four blocks, were selected for investigation by the royal commission appointed by Governor Plunket under the provisions of

¹⁵² Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae District Inquiry, (November 2011), Wai 898, A79, Table 6.9 Applications for rehearing 1892 – 1894; Table 6.10: Notices of appeal 1895-1906; Table 6.11: Cases heard by the Native Appellate Court 1894-1906; Table 6.15: Petitions presented to Parliament protesting decisions made between 1889 and 1907 by the Native Land Court and Native Appellate Court concerning specific blocks of land within the boundaries of the Aotea-Rohe Potae block, pp 453 – 473. See also J J Mitchell, “King Country Petitions Document Bank, Te Rohe Potae District Inquiry” (Wai 898), Research Commissioned by the Crown Forestry Rental Trust, January 2008, Wai 898 A09; & accompanying Document Bank. Mitchell’s report notes that it does not include petitions outside the Parliamentary system, & that other sources, which have also not been consulted for this project, include the New Zealand Parliamentary Debates (NZPD) & newspapers, pp 3, 8, 14.

the Māori Land Claims Adjustment and Laws Amendment Act, 1904.

252. These related to 45 of the 245 distinct blocks that had title awarded to by the Native Land Court. The number of applications, appeals and petitions is relatively few in relation to the total number of cases, which came before the Native Land Court at Otorohanga. By far the majority are in respect of the Rangitoto Tuhua block with 44 appeals and 10 petitions.
253. While there is significant coverage of the applications, appeals, and submissions on the record of inquiry, there is insufficient detail to determine whether these mechanisms were an adequate form of remedy for Te Rohe Pōtae Māori grievances concerning the outcome of Native Land Court processes.
254. The evidence tends to suggest for the most part the title investigation process worked very well, and for the most part Te Rohe Pōtae Māori were satisfied with the outcome. However, in cases where there was significant contention it was extreme; and difficult for any process to reach a result where all parties were satisfied with the outcome. The length and extent of protest can be a good indicator that a balance has not been achieved, however.¹⁵³
255. There is a significant example of sustained protest in Te Rohe Pōtae with the Maraeroa and Hurakia boycott of the Court at Otorohanga. Taonui, Hauauru and others refused to proceed in Otorohanga until their application for rehearing of the Maraeroa and Hurakia blocks had been heard. After the case at rehearing was rejected, the leaders still considered the case unresolved but did not pursue the boycott. There had been a prolonged closure of the court as a result of the

¹⁵³ Dr P Husbands, Dr J S Mitchell, “The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907”, A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 420 – 438.

boycott, and Mair eventually indicated he would continue the Court at Alexandra or Kihikihi.¹⁵⁴

256. In terms of these cases, two additional avenues for review and reconsideration of disputed decisions of the Native Land Court are illustrated: actions in the Supreme Court and the convening of a Royal Commission. In these blocks actions in the Supreme Court and a Royal Commission being agreed to by the Government. The Royal Commission accepted Taonui's evidence on part of the boundary leading to special legislation to put the Commission's findings into effect. This is addressed in the Waitangi Tribunal's Pouakani Report.
257. The Crown says further inquiry into these issues will be required before it can reach a final position.

Protections

- Issue 6.41** What were the Crown's Treaty duties regarding whether the Native Land Court [was] operating in a way that protected Māori land interests?
- Issue 6.42** Did the Crown have any special obligations to protect the interests of non-sellers? If so, to what extent if at all were any of these obligations discharged?
258. This issue is addressed in the context of issue 6.30.
- Issue 6.43** Did the Crown have any obligations to protect the interests of owners whose title was being investigated and who may not have been present or otherwise aware that their lands were being investigated? If so, how were these obligations discharged?
259. This issue is addressed in issues 6.15 and 6.36.

¹⁵⁴ Dr P Husbands, Dr J S Mitchell, "The Native Land Court, land titles, and Crown land purchasing in the Rohe Potae district, 1866 – 1907", A report for the Te Rohe Potae district inquiry, (November 2011), Wai 898, A79, pp 170 – 173.

TE ROHE PŌTAE COMPACT

Did the Crown fail to recognise the traditional authority and control of iwi within Te Rohe Pōtae, beyond the aukati, whether by treaty with the relevant tribes or by way of a district under the New Zealand Constitution Act 1852 or otherwise?

Independence of the Rōhe Pōtae and Kingitanga

Issue 7.1 How did the Crown view the fact that it did not exert sovereign authority over areas inside the aukati for up to two decades after the New Zealand wars?

260. As set out in the response to issue 2.3, the Crown’s position is that it acquired *de jure* (legal) sovereignty over all of New Zealand and its inhabitants through a series of jurisdictional steps that included obtaining the consent of the rangatira who signed the Treaty and culminated in the gazetting of Captain Hobson’s proclamations of 21 May 1840 in the *London Gazette* of 2 October 1840.

261. While the Crown accepts that it did not acquire *de facto* (effective) sovereignty over all the Rohe Pōtae until the aukati was removed in the mid-1880s, it consistently asserted legal sovereignty over the district, as it did over all of New Zealand, from 1840s onwards. The Crown did not accept or recognise the Māori King’s claims to possess a separate legal sovereign authority of any kind in any part of New Zealand, although the Crown treated with him as a senior chief who represented a significant number of Māori.

262. The Crown’s aim was to bring the benefits of colonial settlement, including the institutions of government and economic and social development, to all parts of New Zealand, including the Rohe Pōtae, through the establishment of effective sovereignty, and it was anxious to do so as rapidly as possible. Nevertheless, from the end of the New Zealand wars until the lifting of the aukati, the Crown was unwilling to extend the exercise of its *de facto* (effective) sovereignty in the Rohe Pōtae given its perception of a risk of a

violent reaction from the Kingitanga and the Rohe Pōtae hapū and iwi following their decision to isolate themselves from the rest of the country.

263. From the latter half of the 1860s onwards, and in recognition of the risks that a more assertive approach would entail, the Crown adopted a policy of persuading the Kingitanga through negotiation to recognise its authority.

Issue 7.2 What were legal understandings at the time about sovereignty between and within countries and in relation to settlement and dealings with indigenous groups?

264. The Crown has largely responded to this issue in the constitutional issues section of this statement of position and concessions. To restate matters, in accordance with *jus gentium* (the law of nations), the British Crown recognised that:

264.1 Self-government was the key criterion of a sovereign state;

264.2 Non-Christian polities could exercise sovereignty;

264.3 Self-government was the key criterion of a sovereign state;

264.4 Non-Christian polities could exercise sovereignty;

264.5 A foreign state had no right or interference or governance over another without the permission of the host sovereign; and

264.6 With regard to the situation in New Zealand, it required the consent of Māori before it established sovereignty.

265. The Crown's position was and remains that, pursuant to law and the Treaty, it and it alone could exercise *de jure* (legal) sovereignty over New Zealand and its inhabitants. In 1840, the Crown brokered with hapū and iwi leaders and gained sovereignty through the Treaty and its proclamations of 21 May 1840.

Issue 7.3 In the Crown’s dealings with Māori to 1883, what understandings did it give or expectations did it acknowledge about the extension of Crown sovereignty beyond the aukati, including in relation to:

- (a) Crimes committed there and law and order;**
- (b) The ability of the inhabitants to manage their own civil affairs without interference.**

266. The Crown responds to this issue on the understanding that the reference to “the extension of Crown sovereignty beyond the aukati” is a reference to the Crown’s effective sovereignty within the area bounded by the aukati. The Crown says that it acquired legal sovereignty over all of New Zealand and its inhabitants in 1840.

267. The ‘realpolitik’ of the times required the Crown to recognise that, until the mid-1880s, Rohe Pōtae Māori did not accept, or accept fully, its authority within the area bounded by the aukati. This did not prevent interactions between the Crown and Rohe Pōtae Māori from time to time, but those interactions involved a pragmatic acknowledgment on the part of the Crown that, for the time being, it was unwise to seek to exercise full authority over Rohe Pōtae Māori or within the Rohe Pōtae.

268. Nevertheless, from the late 1860s to the mid-1880s, the Crown embarked on a policy of diplomacy and persuasion in an endeavour to improve relations and bring the Māori King and his supporters under its effective authority. Throughout this period, the Crown consistently maintained the position that it wanted Rohe Pōtae Māori to accept that they should be treated like all other British subjects in New Zealand. To that end, the Crown sought to establish in the area within the aukati the same system of law and order that existed elsewhere in the colony. Law and order was a central and legitimate focus of the Crown in light of its kawanatanga responsibilities under article I of the Treaty and in light of events such as killings of Europeans by Māori, stated to be in defence of

the aukati, and the retreat of criminal suspects into the Rohe Pōtae to evade the reach of colonial law.

269. In furtherance of its policy of reconciliation and to establish a sound relationship for the future, the Crown at times entered into various discussions with Kingitanga and Rohe Pōtae leaders. At a meeting at Waitomo in 1875, for example, the Crown presented the following preliminary proposals in order to promote further discussion:¹⁵⁵

1st. Tāwhiao to exercise authority over the tribes within the district where he is now recognized as the head.

2nd. A certain number of Chiefs to be selected by him to assist him in maintaining order and repressing crime among his people.

3rd. The Government to support him in carrying on the duty which would thus devolve upon him.

4th. A suitable house to be built for him at Kawhia and certain portions of land on the Waipa and Waikato Rivers to be granted to him.

270. Similar proposals provided the basis for further discussions between the Crown and the Kingitanga and Rohe Pōtae leadership until May 1879. However, the exact scope and effect of the proposals was not agreed and they did not crystallise into any formal agreements.

271. The Crown does not accept that the discussions that occurred during this period, or the proposed terms that arose out of them, amounted to the Crown's acceptance that "the ability of the inhabitants to manage their own affairs" would be outside the reach of Parliament or of the colonial legal system.

272. On the other hand, between 1882 and 1885 Parliament showed a willingness to shape legislation to reflect the desires of Rohe Pōtae and other Māori with, for example, the passage of the Amnesty Act 1882 and the Native Committees Act 1883.

¹⁵⁵ AJHR 1875 G-4, p 3.

Issue 7.4 Were Crown ultimatums and its change in policy from around 1882 away from efforts to seek a comprehensive agreement over authority in the region appropriate and made in good faith?

273. In responding to this issue the Crown notes that the Rohe Pōtae Compact generic pleadings state:¹⁵⁶

- 1.9 At negotiations in May 1879 Premier Grey abruptly delivered an ultimatum that government proposals for some limited authority for the Kingitanga [sic] be accepted or they would be permanently withdrawn.
- 1.10 From 1882 under Native Minister Bryce the government took a more aggressive policy towards the assertion of colonial law against the authority of the Kingitanga.
- 1.11 At Whatiwhatihoe in October 1882 Native Minister Bryce withdrew previous offers to consider recognition of the authority of the Kingitanga, offering a treaty including limited returns of some confiscated lands and personal posts for Tawhiao to ‘settle and put an end to the trouble which has existed between certain natives tribes and the European Government’. He delivered an ultimatum that the proposal must be immediately accepted. After this, the Crown did not undertake any further negotiations for a comprehensive agreement over authority beyond the aukati.

274. The Crown understands that negotiations referred to in para 1.9 of the Rohe Pōtae Compact generic pleadings is a reference to the hui that began at Te Kopua on 7 May 1879 between the Kingitanga leadership and Premier Grey, Native Minister Bryce and officials.

275. The Crown notes the evidence on the record of inquiry that:

- 16.1 by the time the hui at Te Kopua began on Wednesday 7 May 1879, “Tawhiao was no longer willing to settle with the government on terms as they were now understood”.¹⁵⁷
- 16.2 Premier Grey did not address the hui until Monday 12 May 1879, when he told the assembled chiefs that:

he would wait until 10am the next morning and if they told him by then they would accept or discuss the terms, he would remain to discuss them. If not, the terms

¹⁵⁶ Wai 898, 1.5.16.

¹⁵⁷ C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, p 467.

would be withdrawn absolutely, and any further arrangement would be on a new understanding.¹⁵⁸

276. The Crown does not accept that Premier Grey’s response at Te Kopua was made otherwise than in good faith.
277. The Crown says it is incorrect to say, as the Rohe Pōtae Compact generic pleadings do, that, at Whatiwhatihoe in October 1882, Native Minister Bryce “withdrew previous offers to consider recognition of the authority of the Kingitanga”. The evidence on the record of inquiry is that, at the main session on 30 October 1882, Tāwhiao recalled the proposals discussed with Sir Donald McLean in 1875 and with Premier Grey in 1878 and indicated that he thought they should be renewed. Native Minister Bryce did not, at Whatiwhatihoe in October 1882, withdraw the earlier proposals as they had been withdrawn when Tāwhiao refused to accept them at Te Kopua in May 1879.
278. The Crown accepts that, at Whatiwhatihoe on 2 November 1879, Native Minister Bryce informed Tāwhiao and his supporters that they had until Saturday 4 November to decide whether to accept new proposals he had outlined a few days earlier on 30 October and that, if they were not accepted without equivocation, they would be withdrawn. Native Minister Bryce issued the ultimatum because of Tāwhiao’s insistence that the issue of sovereignty remain in abeyance, whereas the Native Minister regarded it as an essential condition of the proposal that Tāwhiao and his supporters accept the sovereignty of the Queen and her laws.¹⁵⁹ The Crown does not accept that the issuing of the ultimatum was a breach of good faith.
279. Further, the Crown does not accept that there was a change in Crown policy “from around 1882 away from efforts to seek a comprehensive agreement over authority”. The Crown continued to

¹⁵⁸ C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, p 472.

¹⁵⁹ C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, p 659.

seek such agreement in the Rohe Pōtae, as meetings between Premier Hall and Tāwhiao and between Native Minister Bryce and Rewi Maniapoto in early 1882, for example, demonstrate.¹⁶⁰ The Crown notes, however, that recent internal pressures within the Kingitanga pointed to the possibility of the movement breaking up. The Crown monitored and assessed such developments, as they necessarily influenced how it should deal with the issue of authority. The Crown also notes that, on the question of sovereignty, it maintained the position stated by Premier Hall in February of 1882 that:¹⁶¹

There could be only one sovereign in the country, and they all, both Maoris and Europeans, lived under the shadow of her law.

Issue 7.5 What was the understanding of the application and effect of the New Zealand Constitution Act 1852 between 1860 and 1883?

280. The Crown responds to this issue on the assumption that it is directed at the application and effect of section 71 of the New Zealand Constitution Act 1852.

281. The New Zealand Constitution Act 1852 was an Act of the United Kingdom Parliament and provided, amongst other things, for the establishment of provinces and Provincial Councils and for a General Assembly to consist of the Governor, a Legislative Council and House of Representatives. Section 71 of the Act provided:

And whereas it may be expedient that the Laws, Customs, and Usages of the aboriginal or native Inhabitants of *New Zealand*, so far as they are not repugnant to the general Principles of Humanity, should for the present be maintained for the Government of themselves, in all their Relations to and Dealings with each other, and that particular Districts should be set apart within which such Laws, Customs, or Usages should be so observed.

It shall be lawful for Her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from Time to Time to make Provision for the Purposes aforesaid, any Repugnancy of any

¹⁶⁰ Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, pp 18-25.

¹⁶¹ Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, p 19.

such native Laws, Customs, or Usages to the Law of *England*, or to any Law, Statute, or Usage in force in *New Zealand*, or in any Part thereof, in anywise notwithstanding.

282. The creation of native districts was not mandatory. Furthermore, it is clear from the terms of section 71 that Māori within a native district would be subject to colonial administration and law in those matters that were outside the limited scope of the section, such as relations between Māori and Pakeha and where “native Laws, Customs, or Usages” were repugnant to English or New Zealand law.
283. In the 19th century, the Crown pursued an amalgamationist policy and it sought to ensure that institutions for Māori were compatible with the broad aims of that policy. The concept of separate native districts was controversial for many 19th century humanitarians. Ultimately, the Crown came to the view that it was neither “expedient” nor for the good of Māori development to establish such districts. None was established in New Zealand.
- Issue 7.6** **Were there any practical or legal impediments up to 1883 to provide for a Māori district beyond the aukati under the 1852 Act or otherwise?**
- Issue 7.7** **Were there any practical or legal impediments after 1883 to provide for a Māori district covering the Rohe Pōtae or part of it under the 1852 Act or otherwise?**
284. The Crown is not aware that any legal impediment existed, either before or after 1883, that would have prevented the establishment of a native district under section 71 of the New Zealand Constitution Act 1852 in the area within the aukati.
285. At times, there would have been practical difficulties in establishing a Māori district, including during the period of armed conflict in the 1860s, and during the existence of the aukati, when relations between the Rohe Pōtae leadership and the Crown were infrequent and limited. From the Crown’s perspective, it would have also had the difficulty of overcoming widespread Pakeha resistance to the

establishment of a native district. Other factors informed the Crown's perception as to whether native districts were feasible, including the provision in the New Zealand Constitution Act 1852 that such districts were intended to be temporary¹⁶² and the Crown's understanding from time to time that the Kingitanga faced internal divisions that would have affected its ability to exert authority over the district.¹⁶³

Issue 7.8 Did the Crown maintain a dual policy towards the Kingitanga? That is, did the Crown actively undermine the traditional authority of the Maniapoto and Kingitanga Māori leaders even while it was negotiating with them?

286. The Crown says that it did not maintain a “dual policy” towards the Kingitanga by actively undermining the traditional authority of the Maniapoto and Kingitanga leaders even while it was in negotiation with them.

287. Nevertheless, the Crown acknowledges that it perceived the Kingitanga as a challenge to the Queen's sovereignty and it sought to persuade all Rohe Pōtae Māori to place themselves under the authority of the Crown.

288. The Crown recognised the Māori King as a senior chief and acknowledged that many Māori regarded him as their representative. However, it did not recognise the Māori King as having any kind of sovereign authority.

Issue 7.9 Did the Crown allow appropriate time for consultation among Māori and their leaders about Crown proposals to open up the region?

289. The Crown says that negotiations to ‘open up’ the region spanned three years, more or less. A range of factors influenced the amount

¹⁶² C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, p 1149.

¹⁶³ C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, p 177.

of time that was taken. The Crown says it was not an unreasonable or inappropriate period of time.

The Rohe Pōtae compact

Issue 7.10 What was the nature of the Crown undertakings on 16 March 1883? What could Māori reasonably expect from the Crown as a consequence?

290. At Whatiwhatihoe on 16 March 1883, a delegation of Rohe Pōtae chiefs met with Native Minister Bryce. This followed an incident on 14 March 1883 when the government surveyor, Charles Hursthouse, on trying to travel south from Alexandra and up the Waipa valley, was turned back at Otorohanga by a group of Ngāti Maniapoto.¹⁶⁴

291. At the meeting, the chiefs agreed that Crown surveyors would be allowed to undertake exploratory surveys between Alexandra and Mokau for the purpose of judging the suitability of the country for a railway. Also, Wahanui asked Native Minister Bryce not to send Mr Hursthouse until a messenger had informed communities of his consent. Native Minister Bryce told the chiefs that there would be plenty of time to discuss matters before an actual survey or the laying off of a railway took place.¹⁶⁵

292. The Crown notes the contention in evidence on the record of inquiry that:

The 16 March agreement began what has come to be known as the Rohe Pōtae ‘compact’ (or ‘sacred compact’) between the government and territory chiefs. This was understood to recognise in principle their external boundary and their authority over it; their Rohe Pōtae.¹⁶⁶

293. The Crown acknowledges that Rohe Pōtae Māori regard the agreement of 16 March 1883 as symbolically significant in that it

¹⁶⁴ Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, p 64.

¹⁶⁵ Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, pp 68-69.

¹⁶⁶ C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, p 769.

heralded a new relationship between them and the Crown. For its part, the Crown also acknowledges the agreement as one of significance. It hesitates, however, to categorise the agreement in terms of a ‘sacred compact’. In plain terms, the Crown considers that it was an understanding that enabled a government surveyor to enter the area bounded by the aukati for the purpose of undertaking exploratory surveys for a possible railway. The Crown agrees that the principle of good faith required it to keep to the terms of the agreement unless sufficient justification existed for it to depart from those terms, and to discuss any departure with the Rohe Pōtae leadership.

Issue 7.11 How was the 1883 petition linked to those undertakings? What could Māori reasonably expect from the Crown as a consequence?

294. The Crown notes that, at the time of the meeting of 16 March 1883, Rohe Pōtae Māori were considering the idea of petitioning Parliament. For example, evidence on the record of inquiry states that, on the eve of that meeting, the Rohe Pōtae chiefs:¹⁶⁷

understood that if they kept resisting even to protect their boundary and lands they would bring loss and suffering on their communities. They had to find a better way of protecting their boundary and their communities and they should allow Bryce to go on with his railway survey if in return they could get agreement to send a petition to parliament that would result in a peaceful recognition of their boundary and territory and their continued management of it.

295. In addition, the chiefs’ letter of 16 March 1883 to Native Minister Bryce stated:

Secondly, when the talk of the Ngatimaniapoto [about surveys] is over, a petition will be addressed to you praying you and your Parliament to pass a satisfactory law for the lands of the Ngatimaniapoto.

296. The Crown says, however, that it was open to Rohe Pōtae Māori to petition Parliament at any time, and they did not require the

¹⁶⁷ C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, p 759.

agreement of Native Minister Bryce to do so. Further, the evidence on the record of inquiry is unclear as to whether the possibility of Rohe Pōtae Māori petitioning Parliament about their territory and its management was discussed at the meeting on 16 March and, if it was, what Native Minister Bryce’s response, if any, was.

Issue 7.12 What did the 16 March agreement provide as to Crown actions and Māori responses?

297. The Crown understands that it has responded to this question at issue 7.10.

298. It is not clear to the Crown as to what the reference to “Māori responses” means.

Issue 7.13 Did the Crown deliberately or recklessly proceed with the survey without allowing time for Rōhe Pōtae communities to consider their position?

299. The Crown says it did not proceed deliberately or recklessly with the exploratory survey without allowing time for Rohe Pōtae communities to consider their position. At Whatiwhatihoe on 16 March 1883, Native Minister Bryce consulted with the leaders of Rohe Pōtae Māori who claimed ownership of the land in question and received their approval for the exploratory survey of possible routes.

300. The Crown notes evidence on the record of inquiry that, at the first opportunity after the agreement was made, Native Minister Bryce rescinded instructions for a planned trigonometric survey of the King Country. The instructions to undertake the trigonometric survey had issued before the agreement of 16 March 1883.¹⁶⁸

Issue 7.14 Did the Crown intend to place pressure on Māori and encourage divisions by undertaking these actions?

¹⁶⁸ Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, pp 64, 67.

301. By consulting with Rohe Pōtae Māori leaders at Whatiwhatihoē on 16 March 1883 and undertaking the exploratory survey, the Crown hoped to encourage Rohe Pōtae Māori to approve the construction of a railway line through their rohe in the near future.

302. The Crown notes that there were developing tensions and divisions within the Kingitanga at the time of the exploratory survey. It denies that it encouraged divisions intentionally.

Issue 7.15 What did the 16 March 1883 agreement provide as to survey?

303. The Crown understands that it has responded to this issue at issue 7.10.

Issue 7.16 Did the Crown deliberately breach the agreement by surveying beyond the agreement?

304. At Whatiwhatihoē on 16 March 1883, the chiefs agreed that Crown surveyors would be allowed to undertake exploratory surveys between Alexandra and Mokau for the purpose of judging the suitability of the country for a railway.

305. There was, at that stage, no identified railway route. By its very nature, an exploratory survey to find the best route for a railway would require the surveyors to consider alternative routes. The Crown does not accept that it “breached the agreement by surveying beyond the agreement”.

Issue 7.17 Did the Crown issue threats if it was opposed in this course?

306. The Crown understands that this issue arises from the following paragraphs of the Rohe Pōtae Compact generic pleadings:¹⁶⁹

2.33 Native Minister Bryce explicitly threatened Rewi by telegram that the government would ‘clear its own path’ unless Hursthouse was allowed through, and similarly threatened Wahanui.

2.34 Native Minister Bryce instructed Hursthouse to proceed within 24 hours of sending the threatening telegrams.

¹⁶⁹ Wai 898, 1.5.16.

307. The circumstances set out in paragraphs 2.33 and 2.34 of the generic pleadings occurred before the agreement of 16 March 1883. As noted in response to issue 7.10, a group of Ngāti Maniapoto had stopped government surveyor Charles Hursthouse. In a telegram to Rewi Maniapoto on 14 March 1883, Native Minister Bryce described the action of the Ngāti Maniapoto people as “a foolish proceeding” and asked that he and Wahanui clear the way. He stated that “truly I can clear my own path” but “it is better that you should do it”.¹⁷⁰
308. The Crown says that, in sending the telegram, Native Minister Bryce was asking for their assistance in finding a way to resolve the problem. The Native Minister did not threaten to ‘clear the path’ come what may. The Crown notes that it was the Minister’s overture that led directly to the agreement of 16 March.

Issue 7.18 What did the 1883 petition provide as to the inalienable reserve?

309. In the 1883 petition, the petitioners prayed “That Parliament will pass a law to secure our lands to us and our descendants for ever, making them absolutely inalienable by sale.”¹⁷¹
310. The petition was not binding on the Crown.

Issue 7.19 To what extent did the Native Land Laws Amendment Act 1883 and Native Committees Act 1883 respond to the petition? Did the Crown mislead Māori as to the management and control of Rōhe Pōtae lands under them?

311. The Native Land Laws Amendment Act 1883 and the Native Committees Act 1883 reflected the policy of the Government of the day to accommodate the desires of Rohe Pōtae and other Māori where it was considered feasible.
312. To that end, the Native Land Laws Amendment Act 1883 sought to reform aspects of the Native Land Court process. It prohibited all

¹⁷⁰ C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, p 754.

¹⁷¹ “Petition of the Maniapoto, Raukawa, Tuwharetoa, and Whanganui Tribes”, AJHR 1883 J.-1.

negotiations for the alienation of Māori lands until 40 days after the Native Land Court had ascertained to those lands,¹⁷² although the prohibition did not apply to the Crown or to Crown officials acting under the direction of a Minister.¹⁷³ It prohibited the appearance of “any counsel, solicitor, agent or other representative”, except where the Court decided that a person was unable or incompetent to appear as a result of age, sickness, infirmity or unavoidable absence,¹⁷⁴ and it provided that:¹⁷⁵

it shall be a duty of the Court, by the best ways and means, without reference to legal formalities, to ascertain and determine the ownership of land held by Natives under their customs and usages, or any other title.

313. The Native Committees Act enabled the Governor to proclaim an area a Native district. Each district would have an elected Native Committee which could act as a Court of arbitration in disputes between Māori normally resident in the district and where the subject matter of did not involve more than £20¹⁷⁶ and investigate title to land and report to the Native Land Court.¹⁷⁷

314. In introducing the Bill to Parliament, Native Minister Bryce stated that the measure was “intended to meet a want which the Māoris feel” and that:

They would like to have some status which would entitle them to investigate the claims of their own people to land, and it is intended to constitute in various districts of this Island Māori Committees, who will have power to inquire into the title to land, with a view to assist the inquiries made by the Court. It is not intended that they shall have the power of arriving at a legal decision as to the title to the land; but it is hoped that the investigation by the Maoris themselves may assist the Court in arriving at a just judgment, and it appears to me that it will to a large extent satisfy the demand which

¹⁷² Native Land Laws Amendment Act 1883, s 7.

¹⁷³ Native Land Laws Amendment Act 1883, s 13.

¹⁷⁴ Native Land Laws Amendment Act 1883, s 4.

¹⁷⁵ Native Land Laws Amendment Act 1883, s 6.

¹⁷⁶ Native Committees Act 1883, ss 11-13.

¹⁷⁷ Native Committees Act 1883, s 14.

has been made by the Māori from time to time, and which has been made recently with greater urgency than before.

315. The Crown accepts that Rohe Pōtae Māori raised objections that the Native Land Laws Amendment Act 1883 and the Native Committees Act 1883 did not give effect to all the matters they had raised in their 1883 petition.¹⁷⁸ However, the Crown denies any claim that, through these enactments, it “mislead Māori as to the management and control of Rohe Pōtae lands under them”.

Issue 7.20 Did the Crown ever support or promote the inalienable reserve idea?

316. In 1882, Native Minister Bryce responded to indications from Rohe Pōtae Māori that some form of inalienable reserves would be desirable by introducing the Native Reserves Bill, which enabled Māori to transfer their land to the Public Trustee to hold it on trust for them. Specifically, section 21 of the Native Reserves Act 1882 provided:

The owners of any land in respect of which the Native title has not been extinguished ... may apply to the Court for the purpose of transferring all their estate and interest in such land to the Public Trustee, upon such particular trusts and purposes as they shall declare to the Court. Upon any such application the Court shall proceed ... to determine the Native title over the land comprised in the application, and may make an order vesting such land to be held in fee-simple in the Public Trustee, subject to such trusts as the Court shall declare in that behalf.

317. The terms of any trust created under the Act could have included restrictions, including absolute restrictions on alienation if the owners desired.
318. Although the Crown expected significant areas of the Rohe Pōtae to be placed under the Native Reserves Act 1882, Rohe Pōtae Māori chose not to make use of that legislation.¹⁷⁹

¹⁷⁸ Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, p 100.

¹⁷⁹ Dr D Loveridge, “The Crown and the Opening of the King Country, 1882 – 1885”, (February 2006), Wai 898, A41, pp 73-74.

Issue 7.21 What were Rohe Pōtae leaders intending with their application for an external boundary survey?

319. The Crown says that the Rohe Pōtae chiefs saw the application to the Native Land Court for a survey of the boundary of their rohe as a first step in what would eventually lead to the ascertainment of title to that area and the issue of a Crown grant. This is clear, for example, from:

60.1 The letter of 19 December 1883 that the chiefs sent to Chief Surveyor, C.P Smith, in which they stated:¹⁸⁰

... we consent that the government should make an accurate survey of the external boundary of our block in order that a crown grant may issue to us, our tribes and our hapus

320. Pepene Eketone’s statement in 1889 to the Royal Commission on the Tauponuiatia Block that:¹⁸¹

The survey [was] to be carried out by Government surveyors, the title to be investigated and the Crown Grant to be awarded to the owners.

321. The Crown notes evidence on the record of inquiry that the Rohe Pōtae chiefs who signed the application sought one survey of the entire external boundary to the area that was under their collective control, and not surveys of tribally-based boundaries.¹⁸² The Crown accepts that, despite making the application for survey, the Rohe Pōtae chiefs sought to retain control as to when and how (if at all) the Native Land Court would operate in the district. It notes, for example, that Pepene Eketone also stated to the Royal Commission on the Tauponuiatia Block that:¹⁸³

¹⁸⁰ C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, p 982.

¹⁸¹ Dr D Loveridge, “The Crown and the Opening of the King Country, 1882 – 1885”, (February 2006), Wai 898, A41, p 113.

¹⁸² For example, C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, p 945

¹⁸³ Dr D Loveridge, “The Crown and the Opening of the King Country, 1882 – 1885”, (February 2006), Wai 898, A41, p 113.

All minor subdivision surveys within the Block to be stopped, and the trig survey to be conducted in such manner as not to affect title to the land.

322. However, the Crown says that Rohe Pōtae Māori understood that, once the Court investigated title, it would apportion title according to tribal rights.

Issue 7.22 Could the law at the time deliver what they intended through such a survey?

323. Evidence on the record of inquiry suggests that it is not clear that the Native Land Court could:¹⁸⁴

just confirm an external boundary and certainly not one that was a political boundary based on pan-tribal lands originally pledged to the King, rather than a ‘customary’ or traditional ‘tribal’ boundary line. It is not even clear the Court could confirm a ‘tribal’ boundary line only without also investigating land title within it

324. The Crown acknowledges that the “law” as it was in 1883 was premised on the Native Land Court, on application by Māori claimants, investigating and where appropriate awarding title, rather than merely confirming a tribal boundary. Further, the Court would determine title “according to Native custom or usage” only.¹⁸⁵

325. However, the Crown’s position is that the chiefs understood that, when the Native Land Court determined an application for investigation of title, lands would be apportioned according to tribal rights.

326. The Crown’s policy, which it observed, was that the Native Land Court should not operate in the district until Rohe Pōtae Māori had agreed that it should.

¹⁸⁴ C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, p 946.

¹⁸⁵ Native Land Court Act 1880, s 24.

327. Since the Rohe Pōtae chiefs had already undertaken their own survey and marking of the external boundary earlier in 1883¹⁸⁶, it is evident that they considered a new survey to be necessary for the purposes of an application to the Native Land Court and title ascertainment.

Issue 7.23 Did the Crown mislead Rohe Pōtae Māori as to what the survey might achieve?

328. The Crown denies that it misled Rohe Pōtae Māori as to what the survey of the external boundary of their territory might achieve. When meeting with Rohe Pōtae Māori chiefs at Kihikihi at the end of November and the beginning of December 1883, Native Minister Bryce outlined his understanding of speeches that Rewi Maniapoto and Wahanui had made by stating:¹⁸⁷

‘what you want is that the tribal boundary should first be fixed, after that the subdivisions’ and that ‘that there should be subdivisions to the different hapus of Ngatimaniapoto’.

329. At another meeting two weeks later at Kihikihi, Native Minister Bryce stated:¹⁸⁸

“... If you have real claims, you will not fear to have them investigated The application is to determine tribal boundaries as between tribe and tribe. Afterwards will come applications for subdivisions between hapu and hapu, and possibly after that for settlement of individual claims. What better course than this? ...

Issue 7.24 What undertakings were given about how the Crown might manage competing applications?

330. The Crown did not “manage” applications to the Court, except that on some occasions it used its power under section 38 of the Native Land Court Act 1880 to restrict the Court’s freedom of action in

¹⁸⁶ Dr D Loveridge, “The Crown and the Opening of the King Country, 1882 – 1885”, (February 2006), Wai 898, A41, pp 65-66 and 90-91.

¹⁸⁷ Dr D Loveridge, “The Crown and the Opening of the King Country, 1882 – 1885”, (February 2006), Wai 898, A41, p 108.

¹⁸⁸ Dr D Loveridge, “The Crown and the Opening of the King Country, 1882 – 1885”, (February 2006), Wai 898, A41, pp 108-109.

responding to applications as it did, for example, in the case of the Rohe Pōtae and Taupo.

331. However, Native Minister Bryce agreed with Rohe Pōtae Māori that the Native Land Court would ascertain tribal titles first, with any subdivisions occurring later.¹⁸⁹

332. The November/December 1883 discussions at Kihikihi included the issue of Ngāti Maniapoto claims overlapping with those of Ngāti Hikairo at Kawhia. On this point, Native Minister Bryce stated:

It will be for you to determine where the boundary is. The evidence of Wahanui and friends will be heard as well as others. Boundaries in that way will be fixed The applications of the Ngatimaniapotos will be simultaneous with the Ngatihikairois The way I regard the matter is that the application you now propose to make, will be considered on the same footing as theirs. It does not matter by which application the boundary is fixed. We want such application[s] as will enable us to decide the Ngatimaniapoto boundary.¹⁹⁰

333. The Crown notes that in his statement of 1889, Pepene Eketone stated that the Rohe Pōtae chiefs had agreed:

That only one application for investigation of the title to the land [was to] be made, the said application to be heard in full at one Court.¹⁹¹

Issue 7.25 Was undue pressure applied to get agreement to the survey?

334. Rohe Pōtae Māori initially sought to obtain a Crown-recognised title independently of the Native Land Court process. Native Minister Bryce advised the chiefs that that was not possible and that they would need to make an application to the Court for investigation of title. A survey of their land was a preliminary step to that end.

335. The Crown denies that it applied undue pressure to get the agreement of Rohe Pōtae Māori to obtain a survey of their territory.

¹⁸⁹ Dr D Loveridge, “The Crown and the Opening of the King Country, 1882 – 1885”, (February 2006), Wai 898, A41, p 118.

¹⁹⁰ Dr D Loveridge, “The Crown and the Opening of the King Country, 1882 – 1885”, (February 2006), Wai 898, A41, p 108.

¹⁹¹ Dr D Loveridge, “The Crown and the Opening of the King Country, 1882 – 1885”, (February 2006), Wai 898, A41, p 113.

While the Crown considered it to be in the national interest for the lands within the Rohe Pōtae to be brought under the existing regime for the management of Māori lands and for the construction of a railway to be built through the Rohe Pōtae, the evidence on the record of inquiry makes it clear that Rohe Pōtae Māori wanted an external boundary survey of their territory to proceed.¹⁹²

Issue 7.26 What undertakings were given about how the Crown might manage competing applications?

336. See the Crown’s response to issue 7.24.

Issue 7.27 Did the Crown properly represent its role in holding back applications?

337. The Crown says that Native Minister Bryce was clear with Rohe Pōtae leaders that the Crown would not allow the Native Land Court to hear applications concerning their district until they were ready to proceed. However, he also made it clear that he would not be able to suspend the operation of the Court indefinitely. At the November/December Kihikihi meeting, he advised:¹⁹³

it is my duty to add one more remark by way of explanation, and that is, that if you decide to take this course [of making application to the Land Court], well, but if not, I cannot hold back the Court any longer, when people ask to have their title to land investigated to which they have a claim. I recognise it as reasonable, and it can no longer be delayed.

Issue 7.28 Did it hold back applications in its own interest?

338. The Crown says that it was in the interests of both it and Rohe Pōtae Māori that the Crown ‘hold back’ applications that concerned the area within the aukati to the Native Land Court unless and until Rohe Pōtae Māori decided to proceed. The Crown was aware that if the Court operated in the district before Rohe Pōtae Māori were ready to proceed, they would react angrily and the Crown’s

¹⁹² For example, see C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, p 960.

¹⁹³ Dr D Loveridge, “The Crown and the Opening of the King Country, 1882 – 1885”, (February 2006), Wai 898, A41, p 107.

relationship with them, and its goals for the Rohe Pōtae to be brought under the existing regime for the management of Māori lands and for the construction of the railway through the district would be put at risk.

Issue 7.29 Did the Crown actively [promoted] the Taupouiatia and Waimarino block applications?

339. The decision of Ngāti Tuwharetoa in October 1885 to apply to the Native Land Court for the determination of title to the Taupouiatia block appears to have been prompted by perceived pressure on their rohe from the Four Tribes' external boundary survey, agitation by supporters of the Kingitanga, and a large number of applications to the Court for blocks in the Ngāti Tuwharetoa rohe.¹⁹⁴

340. The decision of Whanganui chiefs in December 1885 to apply to the Native Land Court for the determination of title to the Waimarino block appears to have been influenced by concerns about the Whanganui boundary as a result of the Four Tribes' external boundary and the Taupouiatia application.¹⁹⁵ There is also evidence on the record of inquiry that the Whanganui chiefs were more disposed to work co-operatively with the Crown's proposed system of land boards.¹⁹⁶

341. The Crown says that there is insufficient evidence on the record of inquiry to conclude that the Crown actively promoted the making of either application, although it acknowledges that it was willing for the applications to proceed and did not exercise its power to stop the Court from hearing them.

Issue 7.30 Was it aware that those applications would affect the external boundary survey? Did the Crown intend them to weaken the

¹⁹⁴ Dr D Loveridge, "The Crown and the Opening of the King Country, 1882 – 1885", (February 2006), Wai 898, A41, pp 192-194.

¹⁹⁵ C Marr, "Te Rohe Pōtae Political Engagement 1864-1886", (November 2011), Wai 898, A78, p 1245.

¹⁹⁶ C Marr, "Te Rohe Pōtae Political Engagement 1864-1886", (November 2011), Wai 898, A78, p 1245.

position of the Rohe Pōtae leadership?

342. The Crown says that both the Tauponuiatia and the Waimarino applications were made in late 1885, after the completion of the Rohe Pōtae boundary survey.¹⁹⁷
343. The Crown denies that it intended these applications to weaken the position of the Rohe Pōtae leadership.

Issue 7.31 To what extent did the Native Land Administration Act 1886, which provided for block committees, satisfy concerns about allowing the land court into the district?

344. The core concern of the Rohe Pōtae leadership in allowing the Native Land Court into the district was that they could retain control over the administration and disposal of their land.¹⁹⁸
345. The 1886 Act allowed Māori to lease or sell land to private parties, through commissioners acting on behalf of block committees representing owners. Evidence on the record of inquiry suggests that the Rohe Pōtae leadership would have been broadly comfortable with the new system (subject, perhaps, to some modification), had it not been repealed before it could be used in the Rohe Pōtae district.¹⁹⁹

Issue 7.32 Why did Rōhe Pōtae leaders allow the land court into the district, despite their reluctance to do so?

346. The Rohe Pōtae leaders decided ultimately to accept the operation of the Native Land Court in the Rohe Pōtae because they acknowledged that the Court's process of formally determining titles, which the Crown recognised, was a necessary preliminary step to any legal alienation of their lands, be it by sale or lease, and they wished to participate more fully in the colonial economy. The

¹⁹⁷ Dr D Loveridge, "The Crown and the Opening of the King Country, 1882 – 1885", (February 2006), Wai 898, A41) p 125.

¹⁹⁸ Dr D Loveridge, "In Accordance with the Will of Parliament' The Crown, the Four Tribes and the Aotea Block, 1885-1899" (2011), Wai 898, A68, paras 47-48.

¹⁹⁹ Dr D Loveridge, "In Accordance with the Will of Parliament' The Crown, the Four Tribes and the Aotea Block, 1885-1899" (2011), Wai 898, A68, para 88.

ascertainment of title was also a desirable step in itself given tribal rivalries that existed and the reality that Ngāti Tuwharetoa and Whanganui chiefs, amongst other neighbours, had already applied for investigation of title to the Court.

The railway

Issue 7.33 **Did the Crown place undue pressure on Rohe Pōtae leaders to grant access for the railway route survey? Was fear of armed intervention and confiscation part of that pressure?**

347. The Crown says that it did not place undue pressure on Rohe Pōtae leaders to grant access for the railway route survey. The extension of the railway through the Rohe Pōtae district was seen as an important national project. The Crown wanted the agreement and cooperation of Rohe Pōtae Māori, and pursued a policy of persuasion to get it.

348. The Crown says that it did not use a fear of armed intervention and confiscation as a means of pressuring Rohe Pōtae leaders to grant access for the railway survey. It was realised from the beginning that any such policies would be counter-productive, in that they would further delay the opening up of the King Country to settlers and to the construction of the railway²⁰⁰. The 1882 Amnesty Act was a clear signal to Rohe Pōtae Māori that the Crown wished to leave the policies and attitudes of the 1860s behind and make a new start. Had there been any idea of playing on residual fears of armed intervention and confiscation, it would have been abandoned once the split between the Four Tribes and the Kingitanga took place

²⁰⁰ See Premier Hall's statement on this point in February of 1882. Urged to initiate a survey to find the best railway route through the King Country, he replied that, "there were other difficulties in the way which required to be as carefully dealt with, if they did not wish to delay the work for a considerable period. These difficulties required to be treated with very great caution and judgment. He thought perhaps, the less said upon the subject the better, because any undue urgency in pressing the survey of a railway through native districts, might possibly postpone the matter for a very considerable time". The Government, the Premier stated, was committed to the completion of the Main Trunk line as soon as possible, but only to the extent that "anything they could prudently do to further that object would be done" (*New Zealand Herald* 3 Feb. 1882 "Deputation to Ministers", cited in Dr D Loveridge, "The Crown and the Opening of the King Country, 1882 – 1885", (February 2006), Wai 898, A41) p 7.

early in 1883. This was seen as a major step towards the opening of the area, which vindicated the decision to rely on persuasion.

Issue 7.34 Why did the Crown ultimately insist on pre-emption in association with the railway? How were potential effects on Māori considered?

349. The Crown ultimately insisted on pre-emption because it considered it the best way of promoting settlement and economic development. There are many examples on the record of inquiry where the Crown considered the effects of pre-emption on Māori. The effects were considered in a variety of ways, for example:

349.1 In debates on the range of legislation that provided the Crown with monopoly powers when those concerns were raised by Ministers in Parliament, or Māori Members of Parliament.²⁰¹

349.2 Through the Native Land Laws Commission 1891, which was established to investigate and report on the Native land laws.

89.3 Alternatives were brought to the Crown's attention by Māori (for example in negotiations between the Rohe Pōtae leadership and the Crown in 1891-1892 where Māori sought to have pre-emption lifted). The Crown considered that alternative, but ultimately could not agree with Māori as to the approach.

350. Other examples of the consideration of the potential effects of pre-emption on Māori are identified in the response to section 8 of the amended claimant statement of issues.

Issue 7.35 Did the Crown threaten compulsory purchase if owners would not agree to sales of land?

²⁰¹ See for example, Dr D Loveridge, "The Crown, the Four Tribes and the Aotea Block, 1885-1899", (August 2011), Wai 898, A68, p 187, which details Minister James Carroll's opposition to pre-emption in November 1893.

351. There are two such examples that the Crown is aware of. The statements were made in the context of negotiations between Rohe Pōtae leadership and the Crown for mutually beneficial land purchase arrangements [1891-1892]. The Crown refers to newspaper reports of statements by Native Minister Cadman and Premier Ballance on 19 December 1891, as set out in Dr Loveridge’s 2011 report:²⁰²

“The *New Zealand Herald*... commented that:

In his opening speech Mr. Cadman made it unmistakably clear that either by mutual consent or through the Legislature, the Government were determined that the land beyond the confiscation line, through which the Main Trunk Railway passes, must not only be handed over for settlement as the necessity arose or in anticipation of actual requirements, but must also be made to contribute towards the taxation of the countryhe further informed them that the European population was determined to force the Government to do as indicated, and he advised the natives to accept the inevitable.²⁰³

... the Premier issued a warning to King Country Māori. If they rejected the proposals being put to them by Cadman, he stated, the restrictions would be kept in place. “It would not be permitted”, Ballance declared, “the the natives should continue to hold the keys of the country, and block settlement – waiting till their lands were enhanced enormously in value by the labour and exertions of the colonists. He assured the *New Zealand Herald’s* reporter that the Government “would see that the rights of the public in these lands in the King Country were duly conserved”. If necessary, steps might be taken during the next session to apply taxation to their lands “in precisely the same way as was done on land held by Europeans”.²⁰⁴

352. The Crown considers that these statements amounted to aggressive tactics that placed undue pressure on those negotiations. The statements left Rohe Pōtae Māori in no doubt as to the Crown’s determination to put the main trunk railway through the Rohe Pōtae

²⁰² Dr D Loveridge, “The Crown, the Four Tribes and the Aotea Block, 1885-1899”, (August 2011), Wai 898, A68, pp 133-134.

²⁰³ *New Zealand Herald* 23 Dec. 1891: ‘The Opening of the King Country’ as cited by Dr D Loveridge, “The Crown, the Four Tribes and the Aotea Block, 1885-1899”, (August 2011), Wai 898, A68, p 133.

²⁰⁴ *New Zealand Herald* 21 Dec 1891 “Native Land Proposals. – Interview with the Premier”.

district. However, the Crown acknowledges the option of possible compulsion may have remained an element in Rohe Pōtae Māori decision-making. The Crown has conceded that this was a factor in the Crown's land purchase negotiations breaching the Treaty of Waitangi and its principles.

Issue 7.36 Was private purchase a valid alternative at the time?

353. The Crown responds to this issue on the understanding that it relates to the final decades of the 19th century.
354. Some private purchasing did occur in that period.
355. According to evidence on the record of inquiry, Government awards for the period 1889-1906 amounted to approximately 644,452 acres.²⁰⁵ Nearly 19,422 acres are listed as alienated by “Private Awards” in the same period – approximately 17,797 acres to the end of 1899.²⁰⁶ The Stout-Ngata Commission report notes that some 17,818 acres of Māori land had been sold privately²⁰⁷; it is noted that that statistic is not date specific and relates to the Rohe Pōtae area defined for their purposes.
356. It may be that the purchasing recorded in these statistics accounts for purchases in those areas where pre-emptive restrictions were not in force within the inquiry district, as the restrictions that could be applied changed from time to time. The Crown notes further that some pre-emptive restrictions only applied when the Crown chose to apply them. For example, section 14 of the Native Land Purchase Act 1892.

²⁰⁵ Douglas/Innes/Mitchell Alienation of Māori land within Te Rohe Pōtae 1840-2010: A quantitative study (June, 2010), Wai 898, A21, at 131.

²⁰⁶ Douglas/Innes/Mitchell Alienation of Māori land within Te Rohe Pōtae 1840-2010: A quantitative study (June, 2010), Wai 898, A21, at 131.

²⁰⁷ AJHR 1907 G.-1B p. 11.

357. A case by case analysis would be required to consider the legality of the various private purchases, and the extent to which the purchases were ‘valid’.

Issue 7.38 How much might Rohe Pōtae Māori have expected for their lands either in a free market or independent valuation?

358. The Crown has noted in its concession regarding Crown purchase tactics that Māori and other observers considered that the prices offered by the Crown represented less than the market value of their land.

359. The Crown **accepts** that the value of land sold by Māori is a matter for inquiry and considers that the key issue is whether the Crown paid a fair price for land.

Issue 7.37 Was independent valuation a valid alternative at the time?

Issue 7.39 Was leasing a valid alternative which Crown pre-emption prevented?

360. The Crown assumes the issues relate to the final decades of the 19th century.

361. The Crown notes that the extent of leasing from 1880 to the first few years of the 20th century is addressed in research on the record of inquiry. The suggestion is that the pattern of leasing was small-scale, scattered and based almost entirely on extraction of natural resources (with the exception of use of land for sheep grazing).²⁰⁸ Limitations to the research are also noted:

It is difficult to know how many leases and partnerships were entered into by Māori and Europeans despite the [pre-emptive] restrictions because the record of such leases and partnership in the inquiry district is partial. Details of some are recorded in the Native land purchasing files and general Māori Affairs files for the Rohe Pōtae. However, this sample is somewhat biased as we only know about these particular leases and private purchases because the European asked the Government to step in and resolve a dispute (this happened even in locations where leases were illegal), or the

²⁰⁸ L. Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An overview” (August 2011), Wai 898, A67, at 306.

presence of such arrangements was hindering the Crown's purchase programme. It is possible that other leases went on smoothly and so were not recorded in the land purchase files. Māori voices, other than the occasional letter preserved in those files, are almost entirely absent from the sources examined so far.²⁰⁹

362. The extent to which Crown pre-emption prevented leasing is a matter for inquiry. The Crown makes comments below about how alternatives should be assessed.
363. In terms of valuation practice, the Crown notes that, although there was in general no statutory requirement or procedure for obtaining an independent valuation (from the Valuation Department) until 1905, there was a statutory procedure for independent valuations under the Native Land Purchase and Acquisition Act 1893. The Act does not appear to have been used in this inquiry district.²¹⁰
364. To assess whether there were reasonable alternatives available to the Crown, the Tribunal should be satisfied it has a firm body of evidence to justify the view that a particular (alternative) policy option was reasonably practicable, both in implementation and purported outcome, by the standards and context of the time. Such analysis must be qualified by the inability to judge with any accuracy how particular policies would have operated in practice.
365. The Crown does not deny that significant decisions might have been taken differently. That observation itself does not, by itself, prove a Treaty breach. The Courts have been clear that Treaty principles are not so narrowly determinative of Crown policy.²¹¹ When considering policy options with the benefit of hindsight, the visibility and

²⁰⁹ L Boulton, "Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An overview" (August 2011), Wai 898, A67, at 306.

²¹⁰ Dr D Loveridge, *The Crown, the Four Tribes and the Aotea Block 1885-1899*, (February 2006), Wai 898, A41, p 200)

²¹¹ *Broadcasting Assets* pp 517, 520. See also *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 665 where Cooke P held: "The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed, to try to shackle a Government unreasonably would, itself, be inconsistent with those principles. The test of reasonableness is necessarily a broad one, and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other co-operation."

practicality of alternatives to actions at the time must be considered. The complexities of causality and prejudice over time must also be considered.

366. The issues of whether independent valuation and leasing were reasonably practicable both in implementation and purported outcome by the standards and context of the time are issues for inquiry.

Alcohol and Ohaaki Tapu

Issue 7.40 Was the Crown aware of the concerns of the Rohe Pōtae leadership about alcohol consumption?

367. The Crown notes evidence on the record of inquiry that “[f]rom the mid-1870s there was a movement amongst Rohe Pōtae Māori towards abstention [from alcohol consumption]” and that reports relating to this were made from time to time to the Crown.²¹²
368. In September 1884, a petition supported by the signatures of 1,400 Māori was presented to the Governor through the agency of the Gospel Temperance Mission. The petitioners asked the Governor to act under section 25 of the Licensing Act 1881 and “not in anywise permit a publican’s licence to become legal through our district extending to Waipa, Kawhia, Mokau and all its boundaries”.²¹³
369. The Crown responded to the petition by issuing a proclamation on 3 December 1884 that declared that no licence would be issued in the Kawhia Licensing Area, which, except for a small area north of Aotea harbour, encompassed the Rohe Pōtae inquiry district.²¹⁴

Issue 7.41 Did the Crown efforts to open up the Rohe Pōtae frustrate control over alcohol consumption in the district?

²¹² Dr H Robinson, “Te Taha Tinana: Māori Health and the Crown in Te Rohe Pōtae Inquiry District, 1840 to 1990” (March 2011), A31, p 35.

²¹³ “Liquor and the King Country”, AHJR 1953 H-25, p 5.

²¹⁴ Dr H Robinson, “Te Taha Tinana: Māori Health and the Crown in Te Rohe Pōtae Inquiry District, 1840 to 1990” (March 2011), A31, p 36.

370. The Crown notes evidence on the record of inquiry that, when Governor Jervois visited Kawhia in March 1884, the chiefs who were present raised concerns that the Government would allow a hotel to be established in the township. Officials advised the Governor that the establishment of a hotel was a matter for the local licensing committee.²¹⁵
371. Evidence on the record of inquiry also refers to complaints from chiefs about the supply to local Māori of liquor from the armed constabulary canteen in Kawhia following the establishment of the armed constabulary there in May 1884, and then as that body/group worked along parts of the Alexandra-Kawhia road. In response, Native Minister Bryce advised that only armed constabulary men were to be supplied liquor from the canteen and that the keeper of the canteen would lose his license “if any of the liquor found its way to Māori”.²¹⁶
372. The Crown says that the evidence of the record of inquiry does not support a conclusion that the Crown’s response to liquor control was inadequate. As noted in response to issue 7.40, the Crown responded promptly to the ‘liquor petition’ of 1884 by proclaiming a ban on sales of alcohol within most of the Rohe Pōtae.

Issue 7.42 Were there too few government officers to enforce the ban?

373. The Crown notes that there is general evidence on the record of inquiry that illegal sales of liquor occurred within the Rohe Pōtae inquiry district during the period of the liquor ban.
374. While the Crown also notes evidence on the record of inquiry that no more than seven police officers were stationed in the inquiry district between 1900 and 1930, the Crown is not aware of evidence

²¹⁵ C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, pp 1028-1029.

²¹⁶ C Marr, “Te Rohe Pōtae Political Engagement 1864-1886”, (November 2011), Wai 898, A78, pp 1028-1029.

on the record of inquiry that provides an appropriate comparison of police numbers with other areas.

375. The Crown says that the evidence on the record of inquiry is insufficient to support a conclusion that low police numbers in the Rohe Pōtae inquiry district was the dominant reason as to why breaches of the liquor ban occurred. Prohibition regimes generally fail to be entirely effective. A lack of local support from Māori and Pakeha within the Rohe Pōtae inquiry district would have compounded difficulties in enforcing a complete ban on the sale of liquor. Further, how effective merely increasing the number of enforcement officers would have been is unclear given that prohibition appeared to encourage drinking in private homes rather than in public.²¹⁷

376. A decision to provide enough enforcement officers in the Rohe Pōtae inquiry district for the ban to have worked with complete success all the time would likely have been expensive and may not have been the best use of limited resources. It would also likely have been unpopular given that Rohe Pōtae residents did not have the right to vote on the local option, unlike the rest of the population after the mid-1890s.

377. Despite the evidence that there were breaches of the liquor ban in the Rohe Pōtae inquiry district, the Crown notes the evidence on the record of inquiry that enforcement of the licensing regime in the Rohe Pōtae inquiry district did occur.²¹⁸

Issue 7.43 Were Māori given insufficient authority to enforce the ban.

378. Enforcement of the statutory ban relating to alcohol was a public rather than a private function. However, the leaders of Rohe Pōtae Māori were free to impose on their own people non-legal controls

²¹⁷ Dr H Robinson, “Te Taha Tinana: Māori Health and the Crown in Te Rohe Pōtae Inquiry District, 1840 to 1990” (March 2011), A31, p 107.

²¹⁸ Dr H Robinson, “Te Taha Tinana: Māori Health and the Crown in Te Rohe Pōtae Inquiry District, 1840 to 1990” (March 2011), A31, p 107.

on the sale and consumption of alcohol through customary means if they wished, and evidence on the record of inquiry indicates that they did so on occasion.²¹⁹

379. The evidence on the record of inquiry indicates that, in the period before World War I, many Rohe Pōtae Māori did not support the existing ban on sales of alcohol within the district, and would have preferred a license regime that facilitated control of consumption.

Issue 7.44 Did the Crown ignore the sacred compact when it provided for a vote to end it?

380. The Crown does not accept that agreements between the Rohe Pōtae leadership and the Crown, including agreements relating to the control of alcohol, amounted to a ‘sacred compact’.

381. However, the Crown was aware that during the first half of the 20th century it was often asserted that the Crown was bound by a ‘sacred compact’, made with Rohe Pōtae Māori in the early 1880s, not to allow licensed sales of alcohol in the King Country under any circumstances. A number of Māori and European witnesses repeated such claims to the Royal Commission on Licensing in 1945, and the Commissioners decided that that a closer examination of the ‘Sacred Pact’ was necessary. Justice Smith subsequently concluded that “the weight of the evidence” was “heavily against the view” that any agreement had been made between the Crown and Rohe Pōtae Māori in the 1880s which prevented “the Natives of today ... from deciding, in the circumstances of today, what ought to be done in their best interests about the sale of liquor in the King-country”²²⁰. The other Commissioners accepted his conclusions and recommended that a licensing poll be held in which Rohe Pōtae Māori would decide if they wanted licensing (with a 60 per cent majority being required for a change). When this poll was held in

²¹⁹ See, for example, Dr H Robinson, “Te Taha Tinana: Māori Health and the Crown in Te Rohe Pōtae Inquiry District, 1840 to 1990” (March 2011), A31, p 106.

²²⁰ AJHR 1946 H.-38 Appendix C, p 380, para 92.

1949 under section 89 of the Licensing Amendment Act 1948, the majority in favour of licensing fell a few votes short of the required level.²²¹

382. In 1953, before introducing to Parliament a Bill that would provide for the licensing question in the King Country to be decided by a single poll of all of the citizens affected, the Crown commissioned Dr A.H. McLintock, the Parliamentary Historian, to conduct “An Examination of the Facts Concerning a Sacred or Solemn Pact, Covenant, Pledge, or Treaty Said to Have Been Made Between the Government of New Zealand and the Māori Chiefs of the King Country”. Dr McLintock also concluded that no ‘sacred compact’ involving agreements relating to the control of liquor in the Rohe Pōtae had ever existed.²²²

383. As a result of Dr McLintock’s report, the Crown decided that there was no eternal ‘pact’ or ‘compact’ to which it was required to adhere, and a majority of Members of Parliament agreed with this conclusion. Pursuant to the Licensing Amendment Act (No 2) 1953, a poll held in 1954 led to the introduction of a licensing regime in the King Country after a large majority of residents voted for this option. They included, on this occasion, more than 60 per cent of the Māori voters.²²³

²²¹ *New Zealand Gazette* 1949 p 862 “Declaration of Result of Special Licensing Polls in the King-country” of 29 March 1949.

²²² AJHR 1953 H-25.

²²³ See *King Country Chronicle* 16 Nov. 1954, and the *New Zealand Gazette* 1955 pp. 440-441 for the official results.

CROWN PURCHASING POLICY AND PRACTICE

Introduction

The issues

384. The Crown acknowledges that it was an active purchaser of Māori land in the Rohe Pōtae during the late 19th and 20th centuries, and that it acquired a substantial acreage of land within the inquiry district.
385. Crown purchasing in the Rohe Pōtae was conducted to further the Crown's governmental responsibilities for expediting economic development, and facilitating the creation and growth of viable and prosperous settlements and infrastructure. Such endeavours were conducted for the benefit of all Māori and non-Māori inhabitants of the colony. The Crown's purchasing policy and practice must be viewed in this historical context. The Crown denies that the purchasing of land from Rohe Pōtae Māori is itself a Treaty breach.
386. In order to promote settlement and development, the Crown adopted policies and promoted legislation designed to facilitate the alienation of Māori land from those Māori willing to sell their interests in land. The outcomes and cumulative effects of Crown purchasing will need to be assessed.
387. When evaluating the fairness and reasonableness of Crown purchases, a case by case basis (or block by block) assessment is required, having regard to the statutory framework in place and the wider social, economic and political circumstances of the time.
388. In the Crown's view, the critical issues for the hearing stage of the inquiry are the nature and extent of the use of monopoly powers in the Rohe Pōtae inquiry district and whether, in particular transactions, Crown purchasing was conducted in a manner consistent with the Crown's Treaty obligations.

Framework of Concessions

389. On its current assessment of the evidence available on the record of inquiry, the Crown makes the following concessions of Treaty breach in relation to Crown purchasing policy and practice:

389.1 The Crown concedes that where it did not reserve sufficient land for the present and future needs of the iwi and hapū of the Rohe Pōtae when purchasing land from them before 1865, it failed to uphold its duty under the Treaty of Waitangi and its principles to actively protect the interests of the iwi and hapū of the Rohe Pōtae from whom it purchased land.

389.2 The Crown accepts that it led the iwi and hapū of the Rohe Pōtae to reasonably believe when they agreed to the passage of the North Island Main Trunk Railway through their territory in 1885 that, if they wished to sell their land, the Crown intended to establish a free market, regulated by a land board system, in which they could do so.

389.3 In this context the Crown concedes that:

389.3.1 the manner in which the Crown used pre-emptive powers in land purchase negotiations in Te Rohe Pōtae during the 1890s so that some Te Rohe Pōtae Māori were left with little option but to sell their land or shares in land even when they, and other observers, considered that the prices offered represented less than the market value of their land; and

389.3.2 the aggressive tactics the Crown used on occasion to pressure Te Rohe Pōtae Māori to sell to the Crown; meant that -

389.3.3 the Crown breached the Treaty of Waitangi and its principles because its conduct of land purchase negotiations in these circumstances did not always meet the high standards of good faith and fair dealing required of the Crown as a privileged purchaser of Māori land.

389.4 The Crown anticipates that it may be able to particularise this concession more fully, and the associated prejudice for the iwi and hapū of the Rohe Pōtae, as the inquiry develops.

389.5 The Crown concedes that in a number of instances, for example in some subdivisions within the Rangitoto Tuhua block, the iwi and hapū of the Rohe Pōtae had to give up unreasonably large amounts of land to pay for survey costs, and that the Crown's failure to protect the affected iwi and hapū of the Rohe Pōtae from this burden breached the Treaty of Waitangi and its principles.

390. There are issues that have not yet been fully explored in the evidence that the Crown on its current assessment considers may lead to further Treaty breach concessions. These are outlined in responses to the issues in this section.

Nature of settlement policy and Extent of Crown Purchasing in the Rohe Pōtae District

Issue 8.1 What were the Crown's policies and objectives for the settlement of Te Rohe Pōtae District? To what extent were these consistent with its obligations under Te Tiriti?

Issue 8.2 What other political and economic objectives underpinned Crown land purchase policy and activities?

391. Crown purchasing in the Rohe Pōtae was intended to acquire land for settlement.

392. In terms of the last third of the 19th century, it is well established the Crown's motivation for purchasing land from Māori was to promote

settlement and economic development.²²⁴ The points of emphasis within those broader settlement objectives changed with different administrations. While in the mid-1880s there was some strong support for Māori to deal directly with settlers, ultimately the Crown's approach was to acquire itself land for disposal to settlers. The Crown legitimately sought to minimise the risk of land speculation and to control and regulate settlement for the benefit of the colony as a whole.

393. The Crown does not consider that the imposition of pre-emption was itself a Treaty breach. The construction of the main trunk railway and purchases associated with it were seen as a significant way of boosting the economy. As an overall policy of the government, there are justifications for pre-emption. However, the Crown says that issues for inquiry are whether in all the circumstances the Crown's pre-emptive arrangements were consistent with its obligations under the Treaty, and whether, in carrying out its policies, the Crown paid due regard to the interests of Rohe Pōtae Māori.

394. The Crown accepts that at the start of the 20th century it had a general policy objective to acquire land for settlement. Relevant to assessing this policy are:

394.1 The extent to which policy and practice were influenced by the political, economic and social demands of the time,²²⁵ including the continuation of the 19th century views that productive land was fundamental to New Zealand and its economy, and that the building of infrastructure and the development of settlements upon large areas of unoccupied

²²⁴ See for example: Michael Macky, "Kemp's Trust" (22 November 2005), Wai 1130, A55, p 15 para 67.

²²⁵ See Dr T J Hearn, "Māori, land and the Crown in Te Rohe Pōtae c 1900 to c 1935" (2011), Wai 898, A73, p 45.

lands would be of national benefit and in the interests of both Māori and Europeans of the colony; and

394.2 The political pressures imposed on the Crown to purchase Māori land within the Rohe Pōtae inquiry district, including the perception that large areas of unoccupied land within the district were fit for settlement and the desire to resettle returning servicemen from the First World War.²²⁶

Issue 8.3 What obligations were on the Crown to purchase and only then by means that were fair and transparent? Were these obligations met?

395. The Crown understands this issue to mean: What obligations were on the Crown to purchase land by fair and transparent means?

396. Under the Treaty itself, the Crown was clearly envisaged as being a purchaser of Māori land. It was inherent in the Treaty relationship that land would be purchased by the Crown, and that the land purchased would be used for settlement. That was envisaged by the Treaty itself, and cannot be seen as contrary to it.

397. The question is what duties rested on the Crown over and above those that would apply to an ordinary purchaser of land, and whether those duties were complied with.

398. In this context, two core Treaty principles apply apparent from the jurisprudence of the Courts and the Waitangi Tribunal:

398.1 Māori and the Crown should act honourably, reasonably and in good faith towards one another because of their special relationship created by the Treaty of Waitangi.²²⁷

²²⁶ For example, see Dr T J Hearn, “Māori, land and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, p 318.

²²⁷ *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 and *New Zealand Maori Council v Attorney-General* [1987], 1 NZLR 641.

398.2 The Crown must actively protect the Māori interests protected by the Treaty. Such protection is not absolute but requires the Crown to do what is reasonable in the circumstances.²²⁸

399. As a purchaser with pre-emptive powers of purchase, the Crown was in the position of a privileged purchaser, which imposed significant obligations on the Crown to apply high standards of good faith and fair dealing. The Crown acknowledges that the unreasonable or unfair use of its powers as a privileged purchaser would amount to a Treaty breach. The use of purchasing tactics is considered below at issue 8.25.

400. The assessment of whether the Crown's purchase practices met the standards required of the Crown under the Treaty is a matter for inquiry. The Crown says that this assessment requires an understanding of the circumstances.

401. These circumstances might include:

401.1 The extent to which Māori owners actively and willingly engaged with Crown officials for the sale of Māori land and whether Māori attitudes towards sale changed during the course of Crown purchase negotiations; and

401.2 Changes to authority and tribal structures which preceded, or occurred irrespective of, Crown purchasing in the inquiry district.

402. The Crown says that it imposed legal obligations upon itself to purchase Rohe Pōtae Māori land by fair and transparent means. The Crown says that, by virtue of the 20th century native land laws, for example:

²²⁸ *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517.

- 402.1 Māori Land Boards were required to perform a vetting process of Crown purchases of Rohe Pōtae Māori land;²²⁹
- 402.2 From 1905, the Crown could not purchase Rohe Pōtae Māori land at less than government valuation;²³⁰
- 402.3 No alienation of Rohe Pōtae Māori land was to be approved unless the Māori Land Board was satisfied that the Māori owner would not become landless.²³¹
403. These provisions are also addressed at issues 3.2-3.5 of the Crown's response to section three, Protection of Land and Resources, and at issues 9.1 and 9.9 of the Crown's response to section 9, Private Purchasing.
- Issue 8.4 How did socio-cultural understandings such as the view that Māori were a dying race influence Crown purchasing policies and practices? What was the understanding of Rohe Pōtae Māori of the nature of Crown purchase transactions?**
404. In so far as this issue relates to socio-cultural understandings, such as the 'fatal impact theory', the evidence on the record of inquiry does not suggest that these social-Darwinian ideas had any influence on Crown purchasing policies and practices. The Crown would require further particulars before it could engage with this issue.
405. While there are suggestions on the record of inquiry that Rohe Pōtae Māori may have had different understandings of land transactions,²³²

²²⁹ See, for instance, Maori Land Laws Amendment Act 1908, s 7; Native Land Act 1909, ss 217, 220, 223. Under sections 224-233 of the Maori Affairs Act 1953, the Maori Land Court was required to confirm alienations of Māori land before such alienations could have any force or effect (s 224). The Maori Land Court continues to perform a vetting role in relation to alienations of Māori freehold land under Part 7 of the Te Ture Whenua Maori Act, 1993.

²³⁰ See, for instance, Maori Land Settlement Act 1905, s 25; Native Land Act 1909, s 372 and Native Land Act 1931, s 452.

²³¹ See, for instance, Native Land Act 1909; ss 220(1)(c), 349(1), 373; Native Land Amendment Act 1913, s 109(10) and Native Land Act 1931, s 453. The Maori Land Administration Act 1900 also provided that no alienation of Māori freehold land could occur unless and until each owner was able to prove (by way of producing a papakainga certificate or other evidence) that a papakainga had been allocated to him or her) that he or she had sufficient land left for his occupation and support (see ss 21 and 23).

that they came to understand the nature of purchase transactions is evident from, for example, their membership of the Kingitanga, their desire to avoid any sales within their district and expressions of a preference for leasing.

406. It is clear that Rohe Pōtae leaders understood the nature and effect of the title determination process associated with the Native Land Court by the 1880s. This is articulated, for example, in the June 1883 petition submitted in the names of Ngāti Maniapoto, Raukawa, Ngāti Tuwharetoa and Whanganui which:

“1. It is our wish that we may be relieved from the entanglements incidental to employing the Native Land Court to determine our titles to the land, also to prevent fraud, drunkenness, demoralization, and all other objectionable results attending sittings of the Land Court.”²³³ (emphasis added)

407. It is also clear that Rohe Pōtae Māori understood the nature of pre-emption. This was reflected in the range of objections raised about pre-emption (see issue 8.15).

Issue 8.5 Did the Crown consider realistic alternatives to the absolute alienation of Māori land, such as leasehold arrangements? Should the Crown have done so? What alternatives were practically available?

408. The Crown accepts that the absolute alienation of Māori land was the Crown’s preferred mode of alienation in the Rohe Pōtae inquiry district during the 19th and 20th centuries. The Crown refers to its response to issue 7.39 regarding the validity of leasing as an alternative in the final decades of the 19th century.

409. There was ongoing Parliamentary debate between the mid-1880s and the turn of the century about the best way to alienate Māori

²³² L Boulton, “Hapū and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District c 1840-1865” (2011), Wai 898, A70, p 449. See also, for example: P Thomas, “The Crown and Māori in Mōkau 1840-1911” (2011), Wai 898, A28, pp 45-49.

²³³ AJHR 1883 J.-1 “Petition of the Maniapoto, Raukawa, Tuwharetoa, and Whanganui Tribes”.

lands for the benefit of the colony as a whole, in which many favoured different forms of leasing.²³⁴

410. Alternatives were also brought to the Crown’s attention by Māori (for example in negotiations between Rohe Pōtae leadership and the Crown in 1891-1892 where Māori sought to have pre-emption lifted). The Crown considered that alternative, but ultimately could not agree with Māori as to the approach.
411. Whether the Crown could have reasonably adopted other alternatives in the 19th century is a matter for inquiry. Whether other alternatives the Crown could have reasonably adopted in the 19th century is a matter for inquiry. The Crown notes that the provisions in the Native Land Administration Act 1886 were not available to Rohe Pōtae Māori in practical terms, and says that it is appropriate to inquire into why provisions of that nature were not made available subsequently.
412. The Crown notes that, in the 20th century, the Crown developed further alternatives to absolute alienation and promoted them in legislation. For example:
- 412.1 The Māori Lands Administration Act 1900 provided that Māori land could be vested in the Māori Land Councils “upon such terms as to leasing, cutting up, managing, improving, and raising money upon the same”.²³⁵
- 412.2 Provisions for the leasing of Māori land were maintained in subsequent 20th century Māori land laws;²³⁶ and
- 412.3 Where there were more than 10 owners, Māori land could be administered, managed, farmed and improved by a

²³⁴ Dr D Loveridge, ‘In Accordance with the Will of Parliament’. *The Crown, the Four Tribes and the Aotea Block, 1885-1899* (2011), Wai 898, A68, pp 101 – 107.

²³⁵ See Māori Lands Administration Act 1900, s 28.

²³⁶ See Native Land Settlement Act 1907, s 11. Native Land Act 1909, ss 227-229, 257-267.

committee of incorporated owners, who held land on trust for the Native owners.²³⁷

413. The Crown also refers to its response to section 12, 20th Century Māori Land Administration and Development.

Issue 8.6 How much land was alienated in Te Rohe Pōtae inquiry district region through Crown acquisitions before 1865?

Issue 8.7 Did the Crown breach Te Tiriti o Waitangi by the extent and manner of its acquisition of land in Te Rohe Pōtae in this period?

414. The research on the record of inquiry estimates that pre-1865 Crown purchases accounted for approximately 129,181 acres or 6.7 per cent of the total area of the inquiry district.²³⁸ The areas acquired by the government were located relatively near the coast and centred largely in two geographical areas – in the south in the area near present day Mokau, and in the north near Harihari, south of Kawhia.²³⁹

415. The Crown reiterates its concession that, where it did not reserve sufficient land for the present and future needs of the iwi and hapū of the Rohe Pōtae when purchasing land from them before 1865, it failed to uphold its duty under the Treaty of Waitangi and its principles to actively protect the interests of the iwi and hapū of the Rohe Pōtae from whom it purchased land. Whether the Crown breached the Treaty by any other actions or omissions related to its acquisition of land in the period to 1865 may be a matter for inquiry.

416. To the extent that this issue relates to pre-Treaty and old land claims, the Crown refers to its response to the issues posed in section 4.

²³⁷ See Native Land Court Act 1894, s 122; Native Land Settlement Act 1907, s 61(1); Native Land Act 1909, Part XVII.

²³⁸ T Douglas, C Innes, J Mitchell, “Alienation of Māori land within Te Rohe Pōtae inquiry district: 1840-2010: A quantitative study” (2010), Wai 898, A21, p 41.

²³⁹ L Boulton, “Hapū and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District c 1840-1865” (2011), Wai 898, A70, pp 146-147; T Douglas, C Innes, J Mitchell, “Alienation of Māori land within Te Rohe Pōtae inquiry district: 1840-2010: A quantitative study” (2010), Wai 898, A21, pp 41-42.

Issue 8.8 Did the Crown ascertain whether Rohe Pōtae Māori retained sufficient land for present and future needs?

417. The Crown refers to section 3 of its response, where sufficiency issues are addressed.

Promises

Issue 8.9 Did the Crown make promises and assurances to Rohe Pōtae Māori about the benefits of alienating land to the Crown?

Issue 8.10 What was the understanding of Rohe Pōtae Māori about any such promises and assurances? What was the Crown's understanding of any such promises or assurances? Was there genuine misunderstanding about the nature and extent of any promises and assurances made?

Issue 8.11 If the Crown made promises and assurances, to what extent did benefits occur or prejudice result for those Rohe Pōtae Māori who may have sold land to the Crown in anticipation of benefits?

418. In the late 19th century the Crown communicated to Rohe Pōtae Māori its vision for national economic prosperity. It does not accept that it made promises or enforceable undertakings that Rohe Pōtae Māori would receive economic benefits associated with settlement. The more appropriate issue for inquiry appears to be whether, in Treaty terms Māori had access to appropriate economic opportunities. These issues are addressed in the Crown's response to section 21.

419. The Crown considers that an issue for inquiry is whether it was justified in Treaty terms in re-imposing pre-emptive powers in the Rohe Pōtae from 1888 to the turn of the century. On that point, it is relevant to take into account, for example that:

419.1 The Crown accepts that it led the iwi and hapū of the Rohe Pōtae to reasonably believe when they agreed to the passage of the North Island Main Trunk Railway through their territory in 1885 that, if they wished to sell their land, the Crown intended to establish a free market, regulated by a land board system, in which they could do so.

419.2 The land board system outlined by Ballance in 1885 envisaged both sale and leasing.

419.3 At Ballance's meeting at Kihikihi in February 1885, he informed Rohe Pōtae representatives that the colonial government was contemplating introducing legislation into Parliament to give greater powers to Native Committees in respect of a number of matters, including a role in preparing cases for the Native Land Court, with the Committee processing those cases in the first instance.²⁴⁰

420. The Crown is not aware of evidence on the record of inquiry where the Crown made specific and enforceable promises to Rohe Pōtae Māori during the 20th century about the benefits of alienating land to the Crown.

421. With respect to an undertaking that the Government would not begin purchasing until the process of subdivision was complete, the Crown points to the following passage from evidence on the record of inquiry in relation to a meeting between Native Minister Ballance and Rohe Pōtae leaders at Otorohanga on 26 January 1887:²⁴¹

... Ballance returned to this subject, and stated unequivocally that "The Government would not purchase any land until the subdivisions had been made". He also advised Maniapoto and the fellow-owners "in their own interest, to set aside blocks of land for European settlements, and thus advance the value of the remainder". (Wahanui laughed aloud at this rather self-serving suggestion, whereupon Ballance "caused some amusement by remarking that Wahanui ... evidently rejoiced at the proposal").

The Native Minister thus undertook on behalf of the Government that land purchasing by the Crown in the Aotea block would not begin until the process of subdivision was completed. Although, as far as can be determined, there was no written agreement of any kind involved, the bureaucracy in Wellington took note of his promise, and honoured it. Two years later, when the Crown decided that sufficient progress with subdivision had been made, it was considered necessary for Native Under Secretary T.W. Lewis to write

²⁴⁰ AJHR, 1885, G-1, p 17.

²⁴¹ Dr D Loveridge, " "In Accordance with the Will of Parliament." The Crown, the Four Tribes and the Aotea Block, 1885-1899" (2011), Wai 898, A68, pp 81-82.

a formal letter to chiefs Wahanui, Taonui and Hauauru giving them advance notice that the Government intended to enter into purchase negotiations for “surplus Native Lands” within “the Rohe Pōtae Block”.

422. If there are examples on the record of inquiry of purchases made in breach of this agreement as to subdivision, the matter of prejudice would be a matter for inquiry.
423. To the extent that this issue concerns alleged promises relating to the construction of the railway, the Crown refers to its response in section 14.
424. There Crown is not aware of evidence that establishes that ‘ongoing benefits such as new markets for produce, schools, hospitals, roads and other services and infrastructure were also promised to Māori’²⁴² during negotiations for land.²⁴³
425. The Crown is not aware that enforceable undertakings were made to Rohe Pōtae Māori that reserves would be provided to them:
- 425.1 In relation to promises about the provision of reserves in particular transactions, the Crown refers to its response to issue 3.8.
- 425.2 The Crown is not aware of any evidence on the record of inquiry that a promise was made to Māori that 10 per cent seller reserves would be made available.
- 425.3 While indications were made to Rohe Pōtae Māori that the Crown intended to create reserves, the Crown is unaware of evidence on the record of inquiry that these were enforceable undertakings.

²⁴² Crown Purchasing Issues Generic Pleadings”, 9 December 2011, Wai 898, 1.5.004, p 7.

²⁴³ L. Boulton, “Hapū and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District c 1840-1865” (2011), Wai 898, A70, pp 463-4; 271; 290 - 291.

426. In the absence of particulars, the Crown does not accept that policy decisions relating to reserves were binding or that they amounted to ‘assurances’ or enforceable ‘promises’.

Motivation

Issue 8.12 For what reasons did Rohe Pōtae Māori enter into land purchase transactions with the Crown? What were the Crown’s motives for purchasing land from Rohe Pōtae Māori?

427. It is clear that the desire to participate in the economy was a motivation for Māori to sell land to the Crown in the 19th century. This was not the only motivation, although it appears to have been one of the main objectives in opening the Rohe Pōtae in the early 1880s.

428. With respect to particular transactions, it is likely that Māori had a range of motivations to sell land. It will be difficult however, to discern those from the historical record. It may be possible to infer more general influences and motivations.

429. The Crown notes that, during the 20th century, the sale of land to the Crown was one of a number of options available to Rohe Pōtae Māori. For example:

429.1 From 1900, Māori could alienate their land to private purchasers;²⁴⁴ and

429.2 As noted at issue 8.5, realistic alternatives to the absolute alienation of Māori land were available to Rohe Pōtae Māori.

430. Crown motivations for purchasing land have also been addressed at issues 8.1 and 8.2.

Crown Pre-emption and the Use of Monopoly Powers

Issue 8.13 To what extent, and when, did the Crown attempt to assert

²⁴⁴ See Māori Lands Administration Act 1900, s 23; Native Land Act 1909, s 207.

monopoly powers in respect of the lease or purchase of Rohe Pōtae Māori land in parts, or all, of the district? How was this done and why?

Issue 8.14 To what extent did the Crown take unfair advantage for its own benefit, of a requirement that from 1840-1864 Rohe Pōtae Māori could only sell land to the Crown?

Issue 8.16 What was the impact on Rohe Pōtae Māori of any such attempts to use monopoly powers?

Pre-emption

431. Article II of the Treaty expressed a right of pre-emption in land dealings with Māori and reflected imperial policy of the time; this applied in the pre-1865 period.

432. Legislation made pre-emptive restrictions available to the Crown in the final decades of the 19th century. Some legislation provided for blanket monopoly restrictions across significant parts of the inquiry district (for example, the Native Land Alienation Restriction Act 1884), other legislation enabled the Crown to apply pre-emption on a case by case basis (such as under section 14 of the Native Land Purchases Act 1892).

433. In practical terms, pre-emptive restrictions were available to the Crown in the Rohe Pōtae inquiry district from the enactment of the Native Land Court Act 1886 Amendment Act 1888 until the turn of the century. The area to which, or in which, the monopoly applied varied under the range of enactments which gave effect to it.

434. At a broad level, and after the failure of Ballance's 1886 reforms, the Government sought to acquire land not only for the railway corridor itself but, for settlement purposes, land that would potentially benefit from the Main Trunk Railway. The objectives of the Crown's purchasing policy are set out at issues 8.1 and 8.2.

435. The Crown accepts that it was required in Treaty terms to exercise its monopoly powers of purchase fairly and responsibly (both before and after 1865), and to apply high standards of good faith and fair

dealing while the monopoly was in place. The particular justifications for the relevant legislation are an important matter for inquiry. Additional issues for inquiry include:

- 435.1 The extent to which pre-emptive powers were available to the Crown and applied in the final two decades of the 19th century;
 - 435.2 The reasoning behind the use of pre-emptive powers, and whether these were Treaty-consistent;
 - 435.3 Whether the extent of the application of pre-emptive powers over Rohe Pōtae Māori lands was appropriate in Treaty terms;
 - 435.4 Whether the use of the monopoly powers was reasonable in Treaty terms, taking into account the length of time that monopoly powers were available and used by the Crown; and
 - 435.5 In terms of the effect on Rohe Pōtae Māori, the nature and extent of any prejudice resulting from the use of the monopoly powers.
436. The Crown notes that, because different statutory provisions were operative at various times, care needs to be taken to ascertain which blocks were subject to restriction at any particular time. The Crown notes further that the research on the record of inquiry identifies the legislation in place, but does not analyse systematically which land was subject to the restrictions.
437. The Crown has conceded in this inquiry that the use of monopoly powers contributed to Treaty breach. The Crown anticipates that it will be able to particularise the concession more fully as the inquiry develops.

438. The Crown accepts that, during the early 20th century, it had the ability to exclude private purchasers from the market through the use of orders prohibiting private settlers from alienating Māori land (“private prohibition orders”).²⁴⁵ Section 363 of the Native Land Act 1909 provided:

(1.) When any contract has been made for the purchase by the Crown of any Native land or of any interest therein, or when any negotiations are contemplated or in progress with a view to making any such purchase, the Governor may, on the recommendation of the Native Land Purchase Board, make an Order in Council prohibiting for such period as he thinks fit, not exceeding one year from the date of the Order, all alienations of that land other than alienations in favour of the Crown

(2) ...

439. The Crown is aware of evidence on the record of inquiry that private prohibition orders were applied to certain blocks of Māori land in the Rohe Pōtae inquiry district at particular times during the early 20th century.²⁴⁶

440. The Crown does not accept that a private prohibition order was of itself a breach of the Treaty. The Crown is required to balance competing governance rights and obligations, including the need to expedite the development of settlements and infrastructure, and the need to take reasonable steps to protect Māori land interests (including protection from land speculators) in accordance with article I.

441. The Crown says that the effect that private prohibition orders had on Rohe Pōtae Māori is difficult to quantify precisely. Any determination would require an assessment of:

441.1 The length of time that the prohibition orders were applied to particular blocks and any evidence of price;

²⁴⁵ Native land Act 1909, s 363; Native Land Amendment Act 1913, s 111.

²⁴⁶ See Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, chapter 10. See also, Dr T J Hearn, “Raukawa, land, and the Crown: a review and assessment of land purchasing in the Raukawa Rohe, 1865 to 1971” (2008), Wai 898, A12, [chapter 7](#).

- 441.2 Whether there was competing demand for the purchase of those blocks; and
- 441.3 Whether the proclamations caused Māori to lose the opportunity to lease their land to private parties.
442. Prohibition orders were not applied to all blocks of land within Rohe Pōtae.
443. The Crown has previously conceded breaches of the Treaty regarding the manner in which it continually rolled over proclamations establishing monopoly powers over Māori land after 1909. At present, the Crown is not aware that evidence on the record of inquiry supports such a concession in the Rohe Pōtae inquiry district. The Crown will carefully consider this issue as the inquiry develops.

Issue 8.15 [In] what ways and in what forums did Rohe Pōtae Māori oppose Crown Pre-emption in the area?

444. From the late 1880s into the early 20th century, Rohe Pōtae Māori objected persistently to monopoly restrictions and sought to manage their lands as they chose; there had been objections in some quarters (particularly from the Kingitanga) to permanent land alienation of any kind before that date.²⁴⁷ It is notable that between 1891 and 1892, Rohe Pōtae leaders and the Crown were negotiating for mutually beneficial land purchase arrangements. On the one hand, the Crown was focused on its settlement objectives, and on the other, Māori sought an end to restrictions on some lands and a role in setting prices where it was agreed that sales would take place. Ultimately, an approach could not be agreed.²⁴⁸

²⁴⁷ Dr D Loveridge, “In Accordance with the Will of Parliament.” The Crown, the Four Tribes and the Aotea Block, 1885-1899” (2011), Wai 898, A68, part III (pp 100 - 161) and para 226; and L Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview” (2011), Wai 898, A67, p 113 - 114 and 131.

²⁴⁸ Dr D Loveridge, “In Accordance with the Will of Parliament.” The Crown, the Four Tribes and the Aotea Block, 1885-1899” (2011), Wai 898, A68, part III (pp 100 - 161); and L

445. Objections to pre-emption were expressed in a range of forums, including, for example: in meetings with government Ministers, before the Native Land Laws Commission²⁴⁹, by way of boycott of the Native Land Laws Commission of 1891²⁵⁰, and by way of petition to Parliament.²⁵¹

Issue 8.17 Following diminution of the Crown’s right of pre-emption, to what extent did the Crown pursue the purchasing practice of ‘ear-marking’? What was the impact of this practice on Rohe Pōtae Māori?

446. The Crown requires better particulars in order to respond to this issue. It appears that there is limited evidence on the record of inquiry suggesting there was a Crown practice of ‘ear-marking.’²⁵² It may be relevant to the inquiry to consider whether there was such an official purchasing practice in the Rohe Pōtae, and whether such practice was exploitative or inherently unfair.

447. After 1909, the Crown could purchase interests in Māori freehold land in the same manner as if the land was European land, including purchasing from Rohe Pōtae Māori on an individual basis, and over a period of time.²⁵³

Valuation of Rohe Pōtae Māori lands purchased by the Crown

Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview” (2011), Wai 898, A67, pp 292 – 293.

²⁴⁹ Dr D Loveridge, “In Accordance with the Will of Parliament.” The Crown, the Four Tribes and the Aotea Block, 1885-1899” (2011), Wai 898, A68, part III (pp 100 - 161); and L Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview” (2011), Wai 898, A67, pp 292 – 293.

²⁵⁰ Dr D Loveridge, “In Accordance with the Will of Parliament.” The Crown, the Four Tribes and the Aotea Block, 1885-1899” (2011), Wai 898, A68, p 113.

²⁵¹ L Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview” (2011), Wai 898, A67, pp 157, 290 and 300, for example; and Dr P Husbands, Dr J Mitchell, “The Native Land Court, Land Titles and Crown Land Purchasing in the Rohe Pōtae District 1866-1907” (2011), Wai 898, A79, p435.

²⁵² See Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, pp 89-91. According to Dr Hearn, the practice of ‘ear-marking’ is where “the Crown set out to acquire a few interests in the various subdivisions in an effort to deter or prevent owners and Pakeha from dealing privately” (p 89); and L Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview” (2011), Wai 898, A67, pp 385 and 460.

²⁵³ See Native Land Act 1909, s 369(1).

Issue 8.18 What role did the Crown play in valuations of land in the nineteenth century?

448. There is a lack of evidence on the record of inquiry as to the process of valuation used by the Crown in the Rohe Pōtae inquiry district in the 19th century. However, the Crown notes that there were different approaches to valuation in the 19th century and says:

448.1 Crown Land Purchase Officers had knowledge of the value of the Māori land they were treating for, and many of the leading Māori, with whom they were dealing, likewise had knowledge of the value of their land.

448.2 During the 1880s, the Crown used competent valuers for the purpose of ascertaining compensation for taking lands under the Public Works Acts, for ascertaining the value of improvements made on Crown leases, and – when the Crown began to repurchase former Crown lands from private parties under the “Land for Settlements” legislation (from 1892 onwards) – as a starting point for working out what should be paid for lands it was acquiring. On the basis of this, it is fair to say that there was an accepted set of rules for valuation in New Zealand, and a body of people with the expertise to apply them, throughout the period in question.

448.3 It appears that the system for the Crown’s use of valuations was formalised in the Government Valuation of Land Act 1896, to which the Māori Land Settlement Act 1905 refers.

448.4 Although there was no general statutory requirement or procedure for obtaining an independent valuation from the Valuation Department until 1905, there was a statutory procedure for independent valuations under the Native Land Purchase and Acquisition Act 1893.

449. From 1905, the Crown could not purchase Māori land at less than the government valuation.

450. The Crown accepts that the role the Crown played in the valuation of land in the Rohe Pōtae district in the 19th century is a matter for inquiry.²⁵⁴

Issue 8.19 Was the Crown under any obligation to ensure that Rohe Pōtae Māori land was competitively valued?

451. The Crown accepts that, as a privileged purchaser, it was obliged to pay a fair price for Rohe Pōtae Māori land. The Crown accepts that there is an issue as to how a fair price could be determined when monopoly conditions applied. Further, the Crown says that competitive valuation should be considered in that context.

Use of the Native Land Court

Issue 8.20 Did the Native Land Court process facilitate Crown purchasing policy and practice to the detriment of Rohe Pōtae Māori interests? For example, to what extent did the Crown use its own powers to force land into the Native Land Court for partitioning and subsequent alienation to the Crown?

452. The Crown used the Native Land Court processes in a number of ways during the course of its purchasing. It used aspects of the Native Land Court process to conclude its own purchases;²⁵⁵ the Crown exercised a measure of control over where the Court could sit;²⁵⁶ the Crown could stay the operation of the Court where it would interfere with its wider policy objectives, for example the

²⁵⁴ It is noted that the CNI Tribunal received a body of evidence on this issue including, for example: Dr D Loveridge, “The Development of Crown Policy on the Purchase of Maori Lands, 1865-1910” (2004), Wai 1200, A77; M Macky “Crown Purchasing in the Central North Island Inquiry District, 1870-1890” (2004), Wai 1200, A81; and D Alexander, “Te Matua Whenua: The Land History Alienation Database” (2005), Wai 1200, A97.

²⁵⁵ For example, the Crown had a right to appear in Court as an interested party, and could apply to the Court to define the interests it had acquired and make an award to the Crown - section 23 Native Land Court Act 1886; The Crown could also apply to the Court for registration of survey liens - section 86 Native Land Court Act 1886.

²⁵⁶ Agreed Historian Position Statement on Native Land Court Issues, March, April and May 2009, Whanganui District inquiry, Question 8, paragraph 83.

maintenance of public order.²⁵⁷ On the other hand, it was rare for the Crown through its Ministers and officials to interfere directly with the Court. In addition, the Crown did not use its power to influence how the Court administered the law.²⁵⁸

453. The Crown considers there are several areas for inquiry into its actions in utilising the Native Land Court to assist its purchasing objectives in the Rohe Pōtae. In particular:

453.1 From 20 May 1890, amendments were made to the Court's practice in the Otorohanga Court with the Court announcing that the 'interests of individuals would 'be defined', and that the orders for all blocks adjudicated since the passing of the 'Act of 1887' 'would be kept open until this was done'.²⁵⁹ (The enactment referred to is the Native Land Court Act 1886 Amendment Act 1888, which came into force on 31 August 1888, which made it the task of the Court when decide when relative interests were to be determined under section 42 of the Native Land Court Act 1886 whereas previously an application from an interested person was required (section 21).)

453.2 The Crown's applications to the Māori Land Court for partition of its interests once it had bought all the shares it could in a particular block,²⁶⁰ and associated applications for survey liens.

454. It is appropriate that the Tribunal inquire into whether the Crown's request of the Native Land Court in 1891 to hasten the task of the

²⁵⁷ Agreed Historian position Statement on Native Land Court Issues, March, April and May 2009, Whanganui District inquiry, Question 8, paragraph 84 and 86.

²⁵⁸ Agreed Historian position Statement on Native Land Court Issues, March, April and May 2009, Whanganui District inquiry, Question 8, paragraph 86.

²⁵⁹ Dr P Husbands, Dr J Mitchell, "The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907" (2011), Wai 898, A79, p 169.

²⁶⁰ Dr P Husbands, Dr J Mitchell, "The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907" (2011), Wai 898, A79, p 169.

definition of individual interests was Treaty-consistent. The defining of relative interests simplified the task of the Land Purchase Officer, and enabled the purchase of shares. From July 1892 this became a priority for the Court.

455. In terms of defining individual interests, there are several issues to consider:

455.1 Although the Court announced in May 1890 that interests of individuals would be defined, the Under Secretary of Native Affairs (supported by the Native Minister) asked the Chief Judge in April 1891 if this task could be hastened. From July 1892 this became a priority for the Court.²⁶¹

455.2 The defining of relative interests simplified the task of the Land Purchase Officer, and enabled the purchase of shares.

456. The purchase of individual interests resulted in the purchase of a significant amount of land the Rohe Pōtae inquiry district in less than 20 years.²⁶²

457. The Crown's applications for partition and survey liens affected non-sellers. Applications for partition required further survey, and non-sellers were required to pay a share of the cost of survey. At least until 1900, the Crown assumed the seller's share of the cost of surveying the land it acquired.

458. The Crown says that the effect of its applications for partition and survey liens on non-sellers and whether the Crown ought to have assumed all or a greater proportion of the survey costs given its initiation of partition are matters for inquiry.

²⁶¹ Dr P Husbands, Dr J Mitchell, "The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907" (2011), Wai 898, A79, pp 219, 238.

²⁶² T Douglas, C Innes, J Mitchell, "Alienation of Māori Land Within Te Rohe Pōtae Inquiry District: 1840-2010: A Quantitative Study" (2010), Wai 898, A21, pp 46-48. See also Dr T J Hearn, "Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935" (2011), Wai 898, A73, p 44.

Issue 8.21 To what extent was the Native Land Court process separate in reality from the purchasing policy and practice of the Crown in the Rohe Pōtae inquiry district

459. The system of Māori land tenure that the Crown established through the native land legislation, and in particular through the processes for the adjudication of title, clearly contemplated the purchase of land from Māori for settlement. In practical terms, the implementation of the purchase policy and the Native Land Court process intersected to some degree as the Land Purchase Officer would go to the Court to seek definition of the Crown's interests. The Crown did not use its power to influence how the Court administered the law.
460. The Crown accepts that the Native Land Court determined the title, which was then used to trade in land.

Use of Waikato-Maniapoto MLB to acquire land

Issue 8.22 Did the Crown, by way of the Native Land Settlement Act 1907, acquire a significant quantity of land from the Waikato-Maniapoto Māori Land Board?

Issue 8.23 Did the Crown legislate to effectively allow itself to enter negotiations with the Waikato-Maniapoto Māori Land Board? Was the price of these lands fixed below market value?

Issue 8.24 Was the Crown required to negotiate or consult with owners regarding such purchases? If not, why not?

461. Evidence on the record of inquiry states that approximately 200,000 acres of Rohe Pōtae Māori land was vested in the Maniapoto-Tuwharetoa Māori Land Board (later the Waikato-Maniapoto Māori Land Board) under Part I of the Native Land Settlement Act 1907.²⁶³ This would have meant the land was not considered to be required for Māori occupation and was instead available for sale or lease. The evidence at this stage is that approximately 100,000 acres of

²⁶³ See Dr T J Hearn, "Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935" (2011), Wai 898, A73, p 182.

vested lands were sold to the Crown over the course of the vested lands scheme.²⁶⁴

462. The Crown’s position is that its purchase of lands vested in the Land Board was not inherently inconsistent with Treaty principles. Lands vested under Part I of the 1907 Act were (at least partly) proposed for sale, following a process of consultation with owners through the Stout-Ngata Commission. Although, as set out in the Crown’s response topic 10 dealing with vested lands, it is acknowledged that issues have been raised about the adequacy of this consultation leading up to vesting.
463. It is accepted that the legislative regime did not appear to require the Crown to consult with owners when purchasing lands vested under Part I of the 1907 Act.²⁶⁵ In practice it appears that the Crown generally proceeded to purchase vested lands through consultation with owners.²⁶⁶ The Crown notes the allegation that it would have paid a below “market” price. However, the Crown does not accept that the evidence on the record of inquiry shows that it was somehow manipulating prices in the manner suggested.
464. The Crown does not accept that it applied the legislative provisions relating to vested lands in order to exploit Māori owners, to confiscate land or to impose pressure on the Waikato-Maniapoto Māori Land Board to sell.

Crown methods

Issue 8.25 Did the Crown use inappropriate methods to induce sales? Were these methods in breach of Te Tiriti if not the law? In particular, did the Crown:

²⁶⁴ The Crown notes evidence on the record of inquiry stating that “the Crown acquired 103,085 acres or practically half of the total area ever vested in the Waikato-Maniapoto District Māori Land Board” (Dr T J Hearn, “Scoping Report: Te Rohe Pōtae land issues post 1908 to c 2008” (2009), Wai 898, A61, p 76, citing the Royal Commission on Vested Lands (1951), AJHR 1951, G5, (page number omitted)).

²⁶⁵ Native Land Settlement Act 1907, s 53; Native Land Act 1909, s 366(2).

²⁶⁶ See Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, p 329.

- (a) Foster indebtedness, or exploit a situation of indebtedness?
- (b) Use willing sellers to commit unwilling sellers to sale?
- (c) Pressurise Rohe Pōtae Māori to sell their land?
- (d) Use leasing to facilitate freeholding of land?
- (e) Deal with individuals rather than hapū or communities?
- (f) Pay advances to individuals or groups before title was determined?
- (g) Bribe individuals to promote sales and 'purchase' signatures?
- (h) Conduct negotiations in secret with willing sellers while failing to inform or seek out all others with interests and/or
- (i) Ply reluctant sellers with alcohol or give other inducements?
- (j) Acquire interests from Minors?

Issue 8.26 **If so, to what extent were these practices typical?**

465. The evidence on the record of inquiry identifies examples of where the Crown has used some of the purchasing tactics of the nature identified in issue 8.25.

466. The extent to which Māori owners of land were actively and willingly engaged with Crown officials for the sale of Māori land is a matter that needs to be considered before conclusions can be drawn about any Crown methods identified in issue 8.25. The Crown notes that the evidence on the record of inquiry demonstrates that, in some cases:

466.1 Crown purchases were preceded by extensive negotiations between Crown officials and Māori, some of whom had legal representation; and

466.2 Crown offers could be and, in certain cases were, rejected by Rohe Pōtae Māori owners.²⁶⁷

467. The research lacks a quantitative study of the use of purchasing tactics in the inquiry district which constrains the ability to identify the extent to which particular tactics were used. The extent of the use of the methods identified at issue 8.25 is an issue for inquiry, as is the prejudice that resulted in any particular instance.
468. In terms of 8.25(a), the research does not demonstrate that the Crown fostered indebtedness, or exploited a situation of indebtedness.
469. In terms of 8.25(b), the Crown is unaware of any evidence that it used willing sellers to commit unwilling sellers to sale. The Crown sought to engage with willing sellers. Sale agreements involving all owners in a given block in the 19th century were the exception rather than the rule.
470. In terms of issue 8.25(c), the Crown repeats the concession it is making in this inquiry that aggressive tactics were used on occasion to pressure Rohe Pōtae Māori to sell to the Crown. The Crown has noted in its response to issue 7.35, that such pressure was applied in the 1891/1892 negotiations context. The Crown will endeavour to particularise its concession more fully and the associated prejudice, as the inquiry develops. Aside from such tactics, there is also a broader question about whether and to what extent the Crown's policy created pressure for Rohe Pōtae Māori to sell. In terms of pressure, this is perhaps the primary issue for inquiry in the 19th century context. It sets the context for the use of purchasing tactics in the 19th century and is relevant to the analysis of whether pressure

²⁶⁷ See for example, Dr T J Hearn, "Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935" (2011), Wai 898, A73, pp 364, 365, 371, 393, 412, 417, 422; H Bassett, R Kay, "Crown Administration and the Alienation of Maori Land in Te Rohe Potae Inquiry District c 1931 – 2010" (2011), Wai 898, A75, p 45.

was exerted in particular transactions. This issue is addressed in more detail in the Crown’s response to issues 8.32 – 8.38.

471. In terms of issue 8.25(d), the Crown is not aware of examples of the Crown using leasing to facilitate the freeholding of land. The Crown’s preferred mode of land acquisition was to purchase Māori land rather than to lease land from Māori.
472. In terms of issue 8.25(e), pre-1865, the Crown purchased lands after negotiations with Māori. The evidence on the record of inquiry suggests the Crown sought to purchase individual interests, but did so with reference to a wider community group. It also concludes that some transactions were not completed because the Crown was not satisfied that there was sufficient community support,²⁶⁸ while in others the suggestion is that the Crown ignored opposition of some groups before concluding purchases.²⁶⁹ After 1865, the Crown purchased Māori lands held under titles determined by the Native Land Court, which awarded titles to named individuals. In the 20th century, the Crown continued to purchase individual interests in Rohe Pōtae Māori land. The extent to which there was prejudice arising from the Crown’s methods of purchase in any transaction, or as a general approach, is a matter for inquiry, and the evidence needs to be tested in that context.
473. In terms of issue 8.25(f), there are examples on the record of inquiry where the Crown paid advances to Rohe Pōtae Māori before title was determined (being advances pre-dating the completion of a pre-1865-transaction, or before the relative interests were defined by the Native Land Court).²⁷⁰ The Crown does not accept that advance

²⁶⁸ L Boulton, “Hapū and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District c 1840-1865” (2011), Wai 898, A70, p 451.

²⁶⁹ L Boulton, “Hapū and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District c 1840-1865” (2011), Wai 898, A70, p 453.

²⁷⁰ See for example: L Boulton, “Hapū and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District c 1840-1865” (2011), Wai 898, A70, p 170 citing Donald McLean, Principal Commissioner, Waipa to John Rogan, 13 July 1855, *AJHR* 1861, C-1, p 153.

payments were in themselves a breach of the Treaty. It is difficult to determine the extent to which advance payments were used in this inquiry district, although the use of part payments is discussed more comprehensively discussed in relation to pre-1865 transactions.²⁷¹

474. In terms of issue 8.25(g), there are some examples on the record of inquiry of individuals who were approached by the Crown to assist with its purchasing effort in the 19th century. The role and effect of this practice, and the extent to which the practice occurred within the inquiry district, are matters for inquiry.

475. In terms of issue 8.25(h), the Crown accepts the premise that it negotiated with willing sellers. As the Crown understands it, the question is whether, and to what extent, the Crown purchased interests from individuals without informing the wider community or Rohe Pōtae leaders and/or without seeking out others with interests in a sale. The Crown accepts that this is an appropriate issue for inquiry in respect of the 19th century purchases. A range of issues will need to be considered. For example:

475.1 In the pre-1865 period, the research suggests that the Crown was willing to ignore opposition by dealing with willing sellers, although it did work to satisfy opponents to particular transactions.²⁷²

475.2 From late 1888, Crown transactions focused on the purchase of the interests or shares of individual owners.

²⁷¹ See for example, L Boulton, “Hapū and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District c 1840-1865” (2011), Wai 898, A70, pp 323 - 324.

²⁷² L Boulton, “Hapū and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District c 1840-1865” (2011), Wai 898, A70, p 451-457.

475.3 The evidence on the record of inquiry suggests the Crown sought to secure agreements between sellers and non-sellers about how the land was to be divided.²⁷³

476. Based on its current assessment of the evidence, the Crown denies that it conducted negotiations in secret or deliberately failed to inform or seek out all other Māori with land interests during the course of entering into 20th century land purchases. The mere fact that sales were conducted with individual Māori or at meetings of assembled owners does not mean they were conducted in secret. The Crown is not aware of evidence where the Crown Purchase Officer's activities went beyond this. For example, the Land Purchase Officers attended the title investigation before the Court and the whole community was aware of these activities.

477. In terms of issue 8.25(i), the Crown is not aware of any examples where it plied reluctant sellers with alcohol. In terms of inducements for particular transactions, the Crown engaged in purchase transactions and offered a price for land in exchange for title.

478. In terms of issue 8.25 (j), the Crown notes examples in the evidence on the record of inquiry where the Crown acquired interests from minors²⁷⁴ and says that the extent to which this occurred is a matter for inquiry. Legislation restricted the alienation of minors' shares (see the discussion at issues 8.46 – 8.50). Analysis is required to determine whether the Crown fulfilled its legal and Treaty obligations in particular transactions. Issues relating to minors interests are addressed at issue 8.46.

Issue 8.27 Were purchases unfair as a result of such conduct? To the extent that the purchases were unfair, how significant were the

²⁷³ Dr P Husbands, Dr J Mitchell, "The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907" (2011), Wai 898, A79, pp 253 - 254.

²⁷⁴ For example, Dr P Husbands, Dr J Mitchell, "The Native Land Court, Land titles and Crown Land Purchasing in the Rohe Pōtae District 1866-1907" (2011), Wai 898, A79, pp 450-451 in relation to the Pirongia West Block.

flaws in the process?

479. The Crown accepts that it is appropriate to inquire into the fairness of the Crown's conduct in making purchases. The Crown says that, in doing so, the Tribunal should: identify the particular purchase techniques used; consider the extent to which Māori owners engaged actively and willingly with Crown officials over the sale of their land; and determine what, if any, prejudice to owners occurred because of any Crown Treaty breach.

480. A further issue to consider is what duties rested on the Crown over and above those that would apply to an ordinary purchaser of land, and whether it complied with those duties.

Issue 8.28 What role did Crown agents play in the alienation of Rohe Pōtae Māori land? To what extent, if at all, did Crown agents act inappropriately, and if so, with what impact on Rohe Pōtae Māori?

481. While Donald McLean played a key role in pre-1865 transactions, the principal Crown Land Purchase Officer in the inquiry district in the 19th century was George T Wilkinson, who had extensive experience with Māori in this region and was fluent in te reo.²⁷⁵ Wilkinson was responsible for the operational aspects of Crown purchasing in the railway district, and received regular and frequent instructions from his superiors in Wellington, including the Native Ministers from Ballance onwards, that shaped his engagement in the inquiry district. The evidence shows that Wilkinson regularly sought clarification about these instructions, and did his best to comply with them.

482. The Crown says that it may be relevant to consider whether, in any particular transaction, or as a general approach, the Land Purchase Officer took steps that were detrimental to Rohe Pōtae Māori or inconsistent with commitments made by the Crown. This may

²⁷⁵ See for example, L Boulton, "Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview" (2011), Wai 898, A67, p 179.

involve consideration of whether the Land Purchase Officer was acting within his instructions and whether there was appropriate monitoring by the Crown of his actions. The extent to which Māori willingly transacted with the person in his capacity as a Crown agent may also be relevant.

Identification of owners

Issue 8.29 Did the Crown use any organised process to identify the owners and right-holders in land it wished to acquire? How adequate were the processes and practices used by the Crown to identify the owners or those holding rights in Māori land or other resources?

Issue 8.30 Did the Crown identify the correct right-holders? What was the recourse for true rights-holders when Crown [sic] dealt with the wrong people? How did the Crown respond to complaints about its purchase procedures?

483. Up to 1865, the Land Purchase Officer played a key role in the Rohe Pōtae inquiry district in identifying the owners and right-holders in land it wished to acquire.

484. The Surveyor General was in charge of the Crown's land purchasing programme during the late 1840s and early 1850s and much of the land purchasing was being carried out by Donald McLean under the instruction of Governor Grey.²⁷⁶ After 1854 McLean, as a Land Purchase Commissioner, and then as head of the colony's Land Purchase Department (from 1852), played a major role in land acquisitions.²⁷⁷

485. Purchasing officers operated under their instructions and had a degree of flexibility as to how those instructions would be implemented. The evidence on the record of inquiry suggests that in the 1840s negotiations were more open to allow for community consensus, but between 1854 and 1859 (when the majority of pre-

²⁷⁶ L Boulton, "Hapū and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District c 1840-1865" (2011), Wai 898, A70, p 164.

²⁷⁷ L Boulton, "Hapu and Iwi Land Transactions With the Crown and Europeans in Te Rohe Potae Inquiry District, c. 1840 – 1865" (2011), Wai 898 A70, p166.

1865 negotiations were progressed) the approach varied and tended to be more hasty, with varying degrees of consensus achieved.

486. The Crown also refers to its response to issues 8.25(e) and (h), and its response to the issues in section 4, Pre-Treaty/Old Land Claims.
487. The evidence as to the nature and effect of the processes used to determine ownership before 1865 needs to be tested further, and these issues are matters for inquiry.
488. From 1865, the key process used by the Crown to identify the owners and rights holders in land it wished to acquire was the organised process of the Native Land Court. The Native Land Court was effective in identifying owners and rights-holders, and a system of re-hearing and appeal was available. From time to time the ownership of particular blocks was disputed, requiring the Native Land Court make a determination.²⁷⁸
489. There are examples in the evidence on the record of inquiry of direct communication to the Crown by Māori who claimed that the ‘Crown dealt with the wrong people’, including petitions to Parliament.²⁷⁹ The adequacy of the Crown’s response to such petitions is a matter for inquiry.

Issue 8.31 Did the Crown appreciate that complete permanent land alienation was not part of Māori culture? Was anything done to introduce this concept to Māori? If so, what was the response?

490. Māori had been exposed to European ideas about title and land ownership since the 1820s. That the concept of permanent alienation was soon well understood by Rohe Pōtae Māori is demonstrated by Rohe Pōtae Māori complaints about Crown pre-emptive purchasing in the 1840s and 1850s, and the efforts of the Kīngitanga to stop all alienation from the late 1850s onwards until

²⁷⁸ See, for example: Dr P Husbands, Dr J Mitchell, “The Native Land Court, Land Titles and Crown Land Purchasing in the Rohe Pōtae District 1866-1907” (2011), Wai 898, A79, p435.

²⁷⁹ See for example: Dr P Husbands, Dr J Mitchell, “The Native Land Court, Land Titles and Crown Land Purchasing in the Rohe Pōtae District 1866-1907” (2011), Wai 898, A79, p435.

the 1890s. (See also the response to issue 8.15.) Māori eventually agreed to sell land to the Crown. The reasons Māori sold to the Crown is a relevant issue for the Rohe Pōtae district inquiry.

Advance Payments

Issue 8.32 To what extent, if at all, did the Crown encourage a system of payments for Rohe Pōtae Māori land prior to title investigation, and if so, why?

491. Evidence on the record of inquiry provides examples in pre-1865 transactions of payments being paid to Māori before the transaction was fully complete.²⁸⁰ Advance payments were used in order to progress Crown purchasing.

492. At issues 8.9, 8.10 and 8.11, the undertaking that the Crown would not begin purchasing until the process of subdivision was complete is recorded. The extent of the use of advance payments in the Rohe Pōtae inquiry district after this undertaking was made is difficult to determine on the evidence available. It does not appear to be part of the common practice of the Crown. The matter of prejudice would be a matter for inquiry.

Issue 8.33 Did Rohe Pōtae Māori request such payments, and if so, why?

Issue 8.34 Were Rohe Pōtae Māori committed to sale through receipt of advance payments, or would the Crown allow them to change their minds and repay the advances?

Issue 8.35 If the Crown changed its mind regarding purchase, did it demand the repayment of advances?

Issue 8.36 Was demanding repayment of all advances proper even if they had been paid to individuals found subsequently by the Native Land Court to have no interest in the block on which the advance was paid?

Issue 8.37 What were the typical proportions of advances out of the final

²⁸⁰ See for example: L Boulton, “Hapū and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District c 1840-1865” (2011), Wai 898, A70, p 170 citing Donald McLean, Principal Commissioner, Waipa to John Rogan, 13 July 1855, *AJHR* 1861, C-1, p 153. L Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview” (2011), Wai 898, A67, p 237 suggests that such payments were made in respect of the Te Kopua No 1 block.

price paid?**Issue 8.38 How widespread were such advances and how did they impact on Rohe Pōtae Māori?**

493. The Crown agrees that the use of advance payments may be an issue for inquiry together with the Māori interest in seeking and/or accepting advance payments, the reasons why they accepted advance payments, and any resulting prejudice.

494. It is also relevant to consider whether:

494.1 the Crown refused to accept the return of advances made to Māori;

494.2 the Crown preferred that existing obligations be met and a sale proceed to completion; or

494.3 the Crown sought the repayment of advance payments, and in what circumstances this occurred.

495. The research does not draw together data on the use of advance payments throughout the inquiry district throughout the 19th century (although it is noted that some pre-1865 data is collated²⁸¹). It is therefore difficult to draw conclusions about how widespread the use of the advances was, the nature of the arrangements, or what the typical proportion paid was, and the resulting prejudice.

Payment of Assistance**Issue 8.39 Did the Crown make payments to people who were willing to help secure signatures in support of sales and to bring applications for partitions before the Native Land Court?**

496. This question appears to repeat issue 8.25(g), and the Crown refers to its answer to that issue.

Price

²⁸¹ L. Boulton, “Hapū and Iwi Land Transactions with the Crown and Europeans in Te Rohe Pōtae Inquiry District c 1840-1865” (2011), Wai 898, A70, p, pp 323-324

- Issue 8.40** **Was the Crown under an obligation to pay a fair price when purchasing land from Rohe Pōtae Māori? Did the Crown ensure that Māori secured a fair and economic return for the alienation of lands during this period?**
497. The Crown accepts that where it is in the position of a privileged purchaser it has significant obligations to apply high standards of good faith and fair dealing, and a duty to purchase reasonably and fairly. This extends to the obligation to pay a ‘fair’ price.
498. The question ‘what is a fair price?’ is central to this inquiry.
499. There is no simple formula in determining whether a ‘fair’ price was paid for land; it is a vexed question, particularly given the lapse of time. The assessment should take account of physical features of the land, for example, the location and quality of land. It should also take account of the context of the particular transactions. For example, the fact that a private purchaser may have indicated a willingness to pay a higher price does not mean the price paid by the Crown was not ‘fair’; however, what the private purchaser was willing to pay is relevant to a comparison with the price the Crown offered and ultimately paid. The reasonableness of the justification for excluding private competition (for example, to avoid land speculation) needs to be considered.
500. Where an absence of good faith can be demonstrated (for example, where officials knew that there was valuable timber included as part of the purchase but not reflected in the purchase price), and where there are no public policy reasons justifying a particular action, such conduct falls short of the standards of fair dealing and reasonableness inherent in the Treaty and is a breach of the Treaty and its principles.
501. The Crown concedes in this inquiry that it led the iwi and hapū of the Rohe Pōtae to reasonably believe when they agreed to the passage of the North Island main trunk railway through their territory in 1885 that, if they wished to sell their land, the Crown

intended to establish a free market, regulated by a land board system, in which they could do so. Against that background, it is necessary to consider whether:

501.1 A fair price for land was paid; and

501.2 Pre-emption purchasing had the effect of extracting from Rohe Pōtae Māori an unfair contribution toward the cost of building the railway. (Costs for infrastructure generally fell on the Crown, and the Crown frequently had to retain land for long periods of time. A question is whether these costs were unfairly transferred to Māori.)

502. The Crown notes that there is very little evidence on the record of inquiry about the price finally paid for land; whether the Crown in fact on-sold the land, and if so, the price received; the costs incurred by the Crown in putting the land on the market; and the costs to the Crown for acquiring title and paying for its necessary expenses such as roads and public works within the inquiry district. The Crown says that further research on these points is required before the matter can be considered fully.

503. The Crown accepts the adequacy of purchase price in respect of the 20th century Crown purchases is also an issue for inquiry.

504. From 1905, the Crown could not purchase Māori land at less than the government valuation. The Māori Land Settlement Act 1905 provided that the Crown could not purchase Māori land at less than the capital value of land as assessed under the Government Valuation of Land Act 1896.²⁸² The requirement was continued in the Native Land Act 1909 and the Native Land Act 1931.²⁸³

²⁸² Māori Land Settlement Act 1905, s 25.

²⁸³ Native Land Act 1909, 372; and Native Land Act 1931, s 452.

505. The Crown does not accept that it had a duty to pay more than the government valuation for Rohe Pōtae Māori land. This system of valuation was fair and transparent.

506. The Crown acknowledges that, if the evidence demonstrates that it deployed unfair or unreasonable tactics when setting purchase prices, such as use of outdated valuations or withholding of material information concerning valuations from Māori vendors, that there may be case to answer in terms of the Crown's obligations under the Treaty.

Issue 8.41 Did the Crown employ tactics to limit the price it would have to pay and subsequently on-sell the land at a much greater price?

507. The record of inquiry lacks evidence of purchase price and on-sale price for Rohe Pōtae Māori lands.

508. The Crown accepts that to some degree it sought to limit the price it would have to pay for land. It was required to make fiscally responsible decisions and it incurred significant transactional costs in purchasing land from Māori, including, for example infrastructure costs, which had to be accounted for.

509. The Crown says that there was a range of means by which it may have added value to Māori land which it had purchased, before that land was on-sold to settlers. The following factors may have influenced the price which the Crown on-sold Māori land to settlers:

509.1 The period of time for which the Crown owned the land, and the effect that that time would have had on land valuation figures for the land in question;

509.2 The rate and extent of development and improvements made to the Māori land, as well as the development of settlements within close proximity;

- 509.3 The fact that private purchasers were acquiring guaranteed good title from the Crown; and
- 509.4 The conditions in which the land was on-sold, including the availability of credit and time-payment options for private purchases.
510. In terms of the 19th century, the evidence on the record of inquiry includes some examples of instructions to the Crown Purchase Officer setting a maximum price to be offered in purchase negotiations.²⁸⁴
511. As noted the response to issues 8.13, 8.14 and 8.16, pre-emptive restrictions were more or less in place over a significant part of the inquiry district for a significant period of time in the late 19th century. The availability and use of pre-emptive powers informed the context for price negotiations within the inquiry district and is a key factor to consider in terms of its impact on price.
512. In terms of the 20th century, the Crown notes that there appears to be little evidence on the record of inquiry concerning the prices which may have been payable had certain blocks of Māori land not been subject to private prohibition orders. Many Crown purchases in Rohe Pōtae were of large tracts of land of a quality that private purchasers may not have been interested in.
513. The Crown accepts that the extent to which, if at all, the use of prohibition orders influenced the price paid for blocks subject to such orders is a matter for further inquiry.
- Issue 8.42 Were promises of collateral benefits a feature of the purchase negotiations?**
514. The Crown is unclear as to which matters are considered to be ‘collateral benefits’. To the extent that this issue relates to any

²⁸⁴ L Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866 – 1908: An Overview. Supporting documents V1 & V11” (2011), Wai 898, A67(a), pp 157 – 158.

benefits from the railway, the Crown's position is that any promises or assurances were in the nature of general statements of expectations as to the benefits the railway would bring to communities, and did not amount to legally binding statements.

515. Whether any specific promises of collateral promises in purchase negotiations were made or broken is a matter for inquiry.

Issue 8.43 What provisions were made to protect Māori landowners' rights under debt instruments?

516. The Crown requires further particulars in order to respond to this issue.

Pre-title Determination purchasing

Issue 8.44 Did the Crown buy shares in land blocks prior to the determination of individual shares, and in doing so treat all owners as holding equal shares in the block?

517. The Crown has addressed this issue in its response to issues 8.32 – 8.38.

Restrictions

Introduction

518. To the extent that the issues raised in this section are about the use of pre-emptive restrictions, the Crown relies on the answers given to issues 8.13 - 8.17, above. To the extent that the issues relate to the use of reserves, the Crown refers to its response to issues 8.57 - 8.62.

519. The extent of land in the Rohe Pōtae inquiry district which was subject to restrictions is a matter for inquiry. The Crown notes that, because different statutory provisions were operative at various times, care needs to be taken to ascertain which blocks were subject to restriction at any particular time.

520. The Crown notes that some private purchasing did occur within the Rohe Pōtae inquiry district in the 19th century. According to evidence on the record of inquiry 'Government Awards' for the

period 1889-1906 amounted to approximately 644,452 acres.²⁸⁵ Nearly 19,422 acres are listed as alienated by ‘Private Awards’ in the same period, and approximately 17,797 acres to the end of 1899.²⁸⁶ The Stout-Ngata Commission report notes that some 17,818 acres of Māori land had been “Sold privately”;²⁸⁷ it is noted that that statistic is not date specific and relates to the Rohe Pōtae area defined for its purposes.

Issue 8.45 What did the Crown intend by permitting limited restrictions on alienation on some Rohe Pōtae Māori land?

521. There were a variety of reasons why restrictions on alienation were imposed in relation to Rohe Pōtae lands. The Crown was making efforts to strike a balance between providing protection mechanisms for Māori land and advancing its broader objectives for the management of the process of settlement.

Issue 8.46 Were the restrictions that were imposed appropriate? Did the Crown act in breach of the restrictions imposed?

522. The Crown acknowledges that the appropriateness of the restrictions, and whether the Crown acted in breach of them, are issues for inquiry. The inquiry into these issues would be informed by consideration of what the restrictions are intended to achieve and whether the conditions applying when a restriction was originally put in place continued to be relevant.

523. The generic pleadings focus on protections for minors, which were provided for in legislation.²⁸⁸ The legal framework for the provision

²⁸⁵ T Douglas, C Innes, J Mitchell, “Alienation of Māori land within Te Rohe Pōtae inquiry district: 1840-2010: A quantitative study” (2010), Wai 898, A21, p 131.

²⁸⁶ T Douglas, C Innes, J Mitchell, “Alienation of Māori land within Te Rohe Pōtae inquiry district: 1840-2010: A quantitative study” (2010), Wai 898, A21, p 131.

²⁸⁷ AJHR 1907 G.-1B p. 11.

²⁸⁸ In the Claimant’s “Crown Purchasing Issues Generic Pleadings”, 9 December 2011 (Wai 898, #1.5.004), p 34, the focus is on the Land Purchase Act 1892 and the Māori Real Estate Management Act 1888 Amendment Act 1893.

for the protection of land owned by minors had been in place since 1867.²⁸⁹

524. The Crown acknowledges that the evidence on the record of inquiry includes examples of its purchase of the interests of minors.²⁹⁰ The Crown is aware of at least one example in the 20th century where it acquired interests in Māori land from the Native Trustee who held these interests on behalf of a minor.²⁹¹ The involvement of the Native Trustee provided a protective element given the Trustees' duties to act in the best interests of the child. The extent to which this occurred more widely in the Rohe Pōtae inquiry district is a matter for inquiry. The Crown is not aware of any evidence on the record of inquiry that it purchased interests in land directly from Rohe Pōtae Māori minors in the 20th century.
525. As to whether the Crown breached any Treaty obligations in its purchase of minors' shares, it is relevant to consider whether wider community support was required to transfer the interests of minors, including for example, what the position was under tikanga in this regard, and whether that had any bearing on the transaction, and the legality of purchasing the shares.
526. Some legislation enabled the Crown to be legally excluded from restrictions. For example, under section 14 of the Native Land Purchases Act 1892, the Crown could apply to have any restrictions

²⁸⁹ The legal framework for the provision for the protection of land owned by minors had been in place for some time. See, for example: Maori Real Estate Management Act 1867; the Maori Real Estate Management Act 1888, the Native Land Purchases Act 1892, s 15 (which provided more limited protection – if shares were £10 or under, the Crown could purchase minor's shares without the consent of the Supreme Court Judge or Native Land Court) ; Maori Real Estate Management Act 1888 Amendment Act 1893; the Native Land Court Act 1894, s 50.

²⁹⁰ For example, Dr P Husbands, Dr J Mitchell, "The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907" (2011), Wai 898, A79, pp 450-451 in relation to the Pirongia West Block, and pp419-420 in relation to Mahoenui A.

²⁹¹ See Dr T J Hearn, "Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935" (2011), Wai 898, A73, p 494.

on alienation removed in order to purchase Māori land.²⁹² It appears that the rationale for this provision was the Crown's position to consider whether a restriction was necessary or not.

Issue 8.47 Did Rohe Pōtae Māori have input into decisions to restrict alienation?

Issue 8.50 What were the circumstances around the lifting of these protective restrictions, and what input, if any, did Rohe Pōtae Māori have into decisions made about the lifting of restrictions on Rohe Pōtae Māori land?

527. The Crown notes that there is no overview in the evidence on the record of inquiry of the restrictions and their effect across the inquiry district (i.e. conclusions based on a systematic collation of data about how restrictions applied in the Rohe Pōtae inquiry district). Given the wealth of overlapping legislation relating to restrictive provisions in the Rohe Pōtae, care needs to be taken in analysing particular transactions in order to understand whether restrictions applied to them or not, and whether the restrictions reflected any stated Māori preferences.

528. There is evidence of some Māori participation in the lifting of restrictions. While section 117 of Native Land Court Act 1894 applied pre-emption over the North Island, section 4 of the Native Land Laws Amendment Act 1895 provided for exceptions to that rule where the Governor, by Order in Council, approved it. There is evidence that Rohe Pōtae Māori made use of this mechanism.²⁹³

529. While the Crown could apply restrictions on transactions under certain legislation, the Native Land Court also had power to impose restrictions on alienation. In order to understand the extent to which such restrictions reflected what Māori wanted, it would be

²⁹² The 1892 Act was intended to expire in 1897 by virtue of s 22 but this section was repealed by section 36 of the Native Land Laws Amendment Act 1896. The Native Land Purchases Act 1892 was eventually repealed in 1909 by section 431 of the Native Land Act 1909.

²⁹³ There is evidence that this mechanism was used in the Rohe Potae inquiry district. See for example: AJHR, 1896, G-7; AJHR, 1898, G-6; AJHR, 1905, G-6; AJHR, 1906, Session II, G-6; AJHR, 1909, G-9b; AJHR, 1909, G-9; AJHR 1910, G-9.

necessary to identify whether restrictions were imposed and to look at the Court records for each block.

530. The extent to which the Crown consulted Māori on the imposition of pre-emptive restrictions on particular land transactions is not comprehensively addressed in the evidence on the record of inquiry. The Crown notes that there are a few examples in relation to particular transactions. For instance:

530.1 Some Rohe Pōtae Māori requested the sale of reserves that had been set aside.²⁹⁴

530.2 In 1893 Rohe Pōtae Māori wrote to the Minister of Native Affairs to seek the removal of a proclamation. That request was ultimately denied.²⁹⁵ It is unclear to what extent requests for the removal of proclamations or restrictions were typical, or what the government response was.

Issue 8.48 What protections were available to Rohe Pōtae Māori who may not have wished to alienate land? How effective were these protections, should they have existed, and what was the Crown’s responsibility to ensure this?

531. In terms of the 19th century, the Crown accepts that an issue for inquiry is whether the Crown used its pre-emptive powers of purchase fairly and responsibly (see, for example the issues for inquiry as framed in the Crown’s response to issues 8.3 and 8.13, 8.14 and 8.16).

532. In the 20th century, the Crown took into account the possible detrimental effects of land alienation on Māori communities by enacting various statutory provisions to require that individual Māori retain certain amounts of land. For example:

²⁹⁴ See for example: L Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview” (2011), Wai 898, A67, p 471

²⁹⁵ L Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview” (2011), Wai 898, A67, p 303-304 re: the Kinohaku East No 4 block (Mairoa).

532.1 From 1900, Māori could not alienate land unless each of the owners was able to prove that he or she had ‘sufficient land left for his occupation and support’.²⁹⁶

532.2 From 1909 no alienation of Māori land could be confirmed unless the Māori Land Board or the Native Land Court was satisfied that no Māori would become landless within the meaning of the Act.²⁹⁷

532.3 Part 7 of the Te Ture Whenua Māori Act 1993 contains provisions to promote the retention of Māori land in the hands of its Māori owners, their whanau, and their hapū.²⁹⁸ The Act provides that:

532.3.1 Māori customary land is inalienable;²⁹⁹ and

532.3.2 Persons with the capacity to alienate Māori freehold land must give the right of first refusal to prospective purchasers or donees that belong to the preferred classes of alienees recognised by the Act.³⁰⁰

533. Issues of land retention and sufficiency, including the Crown’s implementation of the above statutory requirements, are addressed in response to section 3, Protection of Land and Resources.

Issue 8.49 Did the Crown attempt to take into account possible detrimental effects of land alienation on Māori communities? Was there any obligation to do so? If so, how was this obligation discharged?

²⁹⁶ Maori Lands Administration Act 1900, ss 23, and ss 21, 25.

²⁹⁷ Native Land Act 1909, ss 220, 373; Native Land Act 1931, s 453.

²⁹⁸ Te Ture Whenua Māori Act 1993, s 2.

²⁹⁹ Te Ture Whenua Māori Act 1993, s 145.

³⁰⁰ Te Ture Whenua Māori Act 1993, ss 147 and 147A.

534. The Crown has set out broadly its position in respect of Treaty obligations to protect Māori from excessive land loss in response to section 3, Protection of Land Resources.
535. The Crown did, at many points, take into account possible detrimental effects of land alienation on Māori communities. Native Minister Ballance's 1886 legislation, for example, was designed to allow Māori owners much greater control over the management of their lands. As noted at issues 8.9, 8.10 and 8.11, the Native Minister undertook on behalf of the Government that land purchasing by the Crown in the Aotea (Rohe Pōtae) block would not begin until the process of subdivision was completed. In 1899 the initiation of new Crown purchases was terminated by Parliament in response to Māori concerns about landlessness, although this concession was made on the understanding that all Māori land would have to be brought into production. The Māori Lands Administration Act 1900 introduced a regime in which (with a few exceptions) Māori lands could be leased but not sold. This was further developed in the Native Land Act 1909 (which is addressed in response to issue 8.55, below).

Alienation of land with protective restrictions

- Issue 8.51** **What legal protections were there for Rohe Pōtae Māori who retained residual lands out of a purchase transaction? Did such residual lands receive any form of legal recognition as reserves or endowments for the future benefit of their owners? What was the nature of the relationship between the Crown and these remaining owners?**
536. This issue requires further particularisation.
537. To the extent that this issue relates to reserves in Crown purchases before 1865, the Crown repeats the concession it is making in this inquiry, that the Crown concedes that where it did not reserve sufficient land for the present and future needs of the iwi and hapū of the Rohe Pōtae when purchasing land from them before 1865, it failed to uphold its duty under the Treaty of Waitangi and its

principles to actively protect the interests of the iwi and hapū of the Rohe Pōtae from whom it purchased land.

538. The Crown also refers to its response at issues 8.57 – 8.62.

Issue 8.52 What obligations, if any, did the Crown have to ensure that land restricted from alienation, for the purposes of protection, was not alienated? How were such obligations discharged?

539. The Crown considers it will be necessary for the Tribunal to identify land subject to protective restrictions, and to consider the basis or justification for the lifting of those restrictions. The evidence available on the record of inquiry in respect of these points is limited, and therefore the Crown is not in a position to provide a detailed response to this issue that takes account of the range of relevant obligations on the Crown.

Issue 8.53 To what extent did the Crown protect the interests of Rohe Pōtae Māori who did wish to alienate land, and if so, in what manner?

540. The Crown purchased land from Māori who wanted to alienate land. The Crown has noted that an inquiry into whether pressure was applied in particular transactions is appropriate. The quality of Māori consent to land transactions must be closely scrutinised.

541. An issue arises as to whether non-sellers were prejudicially affected by the costs associated with partitioning their interests from those the Crown had acquired. There is evidence the Crown worked closely with non-sellers to agree how land would be partitioned.³⁰¹

Issue 8.54 Why were Trust Commissioners established, and with what effect concerning the alienation of Rohe Pōtae Māori land?

542. The Tribunal's report on the claims of Turanganui a Kiwi records why Trust Commissioners were established:

³⁰¹ Dr P Husbands, Dr J Mitchell, "The Native Land Court, Land Titles and Crown Land Purchasing in the Rohe Pōtae District 1866-1907" (2011), Wai 898, A79, pp 253 – 254. Agreement could not always be reached; see for example: Dr P Husbands, Dr J Mitchell, "The Native Land Court, Land Titles and Crown Land Purchasing in the Rohe Pōtae District 1866-1907" (2011), Wai 898, A79, p 377.

The Native Lands Frauds Prevention Act 1870 created the office of the Trust Commissioner. The commissioner sat as an independent quasi-judicial officer to determine whether alienations by Māori were ‘contrary to equity and good conscience’, not in contravention of any trust, and not paid for with liquor or arms (section 4). The commissioner was also required to be satisfied that ‘sufficient land is left for the support of the Natives interested in such alienation’ (section 5).³⁰²

543. Trust Commissioners reviewed private transactions but not those between Māori and the Crown.

544. Evidence on the record of inquiry about the effect of the Trust Commissioner in this inquiry district appears to be limited. While there is some discussion of Trust Commission activities,³⁰³ a summary of decisions does not appear to be available.³⁰⁴

Issue 8.55 **What was the actual effect of the Native Land Act 1909 on land formerly protected by restrictions on alienation? Did the change in law and policy constitute an effective removal of protections, or merely a change in the way in which Māori lands were protected? How significant was the end of the pre-1909 restrictions on the continuing alienation of Rohe Pōtae Māori land in the twentieth century?**

545. The Native Land Act 1909 included provisions which changed the way in which Māori lands were protected.³⁰⁵ For example, the 1909 Act:

545.1 Removed all existing prohibitions or restrictions on the alienation of Māori lands by a Māori (section 207(1));

³⁰² Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa claims* (2004), Wai 814, p 455.

³⁰³ See for example, P Berghan, “Block Research Narratives” (2009), Wai 898, A60, p 208.

³⁰⁴ Leanne Boulton, for instance, notes that the Trust Commissioner records for this inquiry district have not been located, and other sources provide few details in L Boulton, “Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview” (2011), Wai 898, A67, pp 338-340.

³⁰⁵ Dr Loveridge notes that the “old restrictions were not so much eliminated as replaced by a standard set of statutory restrictions” (see Dr D Loveridge, “Māori Land Councils and Māori Land Boards: A Historical Overview, 1900 to 1952” (Waitangi Tribunal, Rangahaua Whanui National Theme K, December 1996, First Release), p 83).

545.2 Provided that Māori could alienate or dispose of land or any interests in land in the same manner as a European (section 207(2)); and

545.3 In the case of land held by more than ten owners, established new purchasing procedures, including sales by assembled owners (under Part XVIII of the Act) and sales with the precedent consent of the Māori Land Board (the latter option repealed by the Native Land Amendment Act 1912 (section 8(1)). These provisions applied to both the Crown and private purchasers.

546. The decision to change the restrictions on alienation was, at least in part, a response to Māori objections to Crown pre-emption and the Crown's use of monopoly powers, as well as Māori pressure on the Crown to permit dealings with private purchasers on an open market,³⁰⁶ so that they could freely alienate their land to private purchasers if they so desired.³⁰⁷ The Native Land Act 1909 replaced former restrictions with a new, uniform set of restrictions designed to protect Māori in their dealings with both the Crown and private purchasers. Amongst other things, these protective mechanisms:

546.1 Required the Māori Land Boards to perform a vetting process of all Crown and private purchases of Māori land within the Rohe Pōtae pursuant to the provisions of the

³⁰⁶ Dr Hearn notes that “The Native Land Act 1909 inaugurated what has been described as a ‘free market approach’ to Māori land, removing most restrictions on alienation, and establishing a clearly defined sale process” (Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, p 556).

³⁰⁷ See AJHR 1907 G.-1B at pp 5-7. The Crown notes that in 1907, certain Rohe Pōtae Māori made submissions to the Stout-Ngata Commission asking for an expansion in the scope of land sales to private purchasers. Members of the progressive party asked the Stout-Ngata Commission to arrange that their “surplus lands be leased or sold by auction”, and that “All restrictions ... be removed from lands of capable Natives” (p 6). Members of Ngati-Maniapoto submitted that wished “to deal with our lands, by sale or lease, direct with the purchaser or lessee without ... interference” (p 7).

Native Land Act 1909 Act. Before it was permitted to confirm an alienation, a Board had to be satisfied that:³⁰⁸

- 546.2 The alienation was not contrary to the interests of the Māori vendor;
- 546.3 The consideration was adequate;³⁰⁹
- 546.4 No Māori would become landless within the meaning of the Act; and
- 546.5 No person acquiring any interest under the alienation (including private purchasers) was prohibited from acquiring that interest by virtue of the provisions in the Act relating to limitation of area;³¹⁰

547. The legislation also imposed further restrictions on Crown purchases, including:

- 547.1 Conditions that the Crown could not purchase at less than government valuation, and that the Crown could not purchase unless it was satisfied that no Māori would become landless within the meaning of the Act.³¹¹
- 547.2 Where Māori land was owned by more than ten owners in common, the Crown could not purchase land other than by way of a resolution of the assembled owners in accordance with Part XVIII of the Act,³¹² including the requirement

³⁰⁸ See Native Land Act 1909, ss 217, 220, 223. See also Māori Land Laws Amendment Act 1908, s 7.

³⁰⁹ The adequacy of the consideration was to be determined by reference to the relevant government valuation, or if the Board thought it fit to do so, by reference to a new valuation (Native Land Act 1909, s 223(1)).

³¹⁰ Native Land Act 1909, s 220.

³¹¹ Native Land Act 1909, ss 372, 373.

³¹² Native Land Act 1909, s 370.

that such purchases were subject to the confirmation process by the Māori Land Board.³¹³

548. The Crown notes that there were similar protective mechanisms in the Māori Lands Administration Act 1900 which permitted the sale of Māori land owned by more than 2 owners, but only when the consent of the Governor in Council was obtained first (section 22) and only where the Māori owner had been issued a papakainga certificate (section 23). The Māori Land Boards became responsible for confirming all alienations of Māori land pursuant to the Māori Land Settlement Act 1905 (section 16 applying to alienations by lease) and the Maori Land Laws Amendment Act 1908 (section 7 applying to alienations by sale.)
549. Some Members of Parliament viewed the changes in the 1909 Act as necessary to consolidate the existing restrictions on alienation in one Act.³¹⁴
550. The Crown notes that during the period 1910 to 1966, private purchases accounted for a significantly larger area than Crown purchases,³¹⁵ but says that this increase in private purchasing cannot be attributed solely to the 1909 Act or the changes to the restrictions on alienation. There were a number of reasons why Rohe Pōtae Māori and the Crown entered into land transactions during the 20th century. Some of these factors have been outlined in the Crown’s response to issues 8.1, 8.2 and 8.12.
551. The effect that these statutory changes had on Māori land formerly protected by the pre-Native Land Act 1909 restrictions on alienation is a matter for inquiry.

³¹³ See Native Land Act 1909, ss 368, 370, 348, 349.

³¹⁴ See, for instance, NZPD vol 148, 1909, p 1276 (Findlay) and p 1101 (Carroll).

³¹⁵ See T Douglas, C Innes, J Mitchell, “Alienation of Māori land within Te Rohe Pōtae inquiry district: 1840-2010: A quantitative study” (2010), Wai 898, A21, pp 43-44,46-48. Also see Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, p 572.

Issue 8.56 What systems of redress (other than Trust Commissioners) did the Crown set in place to investigate complaints concerning land title investigation or land alienation? Did these systems ensure proper consideration of grievances, and provide for proper redress when complaints were upheld?

552. This issue is largely addressed in the response to issue 8.30.

553. In addition the Crown says that the Native Land Court was required to vet transactions in certain categories of Māori land: land held under memorial of ownership and land held under certificates of title issued under the Native lands Acts of 1865 and 1867, and (relevantly for this district) the Native Land Court Act 1880.³¹⁶

554. From 1894, when the Trust Commissioners were disestablished, the Native Land Court was responsible for the confirmation of all alienations, being required to ensure that transactions were properly carried out, that all the terms and conditions were understood by the owners of the land, and that “each Native alienating... has sufficient land left for his support” (section 53(2)(c) Native Land Court Act 1894).

555. The effectiveness of the mechanisms may be an issue for inquiry.

Reserves

Introduction

556. The Crown notes the concession it is making in relation to reserves in this inquiry district:

The Crown concedes that where it did not reserve sufficient land for the present and future needs of the iwi and hapū of the Rohe Pōtae when purchasing land from them before 1865, it failed to uphold its duty under the Treaty of Waitangi and its principles to actively protect the interests of the iwi and hapū of the Rohe Pōtae from whom it purchased land.

Issue 8.57 To what extent did the Crown ensure that adequate reserves of land were available to Rohe Pōtae Māori, so as to enable them to:

³¹⁶ Section 70. In this regard, reference should also be made to Native Land Act 1873 ss 59-61.

- (a) **Retain sites of cultural significance;**
- (b) **Maintain the coherence of traditional social structures;**
- (c) **Have ongoing access to mahinga kai;**
- (d) **Retain their customary association with their traditional area;**
- (e) **Meet their contemporary and future cultural, social and economic needs?**

557. The Crown has responded to similar questions at issues 3.6 and 3.7 in relation to the extent of remaining reserves, and refers to those responses and the introduction to the Crown's response to section 3, Protection of Land and Resources.

558. The inquiry into whether issues (a) to (e) were provided for is not an issue limited to 'reserves', but relates to the wider question of sufficiency.

Issue 8.58 Were the reserves sufficient for the needs of claimants and their tupuna and were they inalienable?

Issue 8.59 To what extent, if any, did the reserves remain in the ownership and control of the Māori for whom they were set aside?

Issue 8.60 To what extent were these reserves subsequently alienated? Was it appropriate for the Crown to purchase reserves?

559. The Crown has largely responded to these issues in its response to issue 3.7. The Crown says that issues of sufficiency are not limited to an inquiry into the sufficiency of reserves. Limitations of the evidence on the record of inquiry have also been noted. The Crown's response to the remainder of the issues are set out below.

560. In terms of whether reserves were made and subsequently alienated, the Crown adds that the research on the record of inquiry suggests that reserves were largely provided for in pre-1865 purchases where they were requested by sellers. However, some of these, including the largest reserve made were later purchased by the Crown.

561. The evidence on the record of inquiry also suggests that around 23 ten per cent seller reserves have been identified in the inquiry district, covering a total of 8,008.94 acres, and that six remain in Māori freehold today.³¹⁷
562. There is some evidence about the extent of existing reserves within the Rohe Pōtae inquiry district. For example, some evidence records some block information about lands held in reserves.³¹⁸ However, it appears that a comprehensive summary is not available, making an assessment of reserves issues difficult at this stage of the inquiry.
563. The Crown says that the appropriateness of any purchase of reserves is to be assessed on its merits. Māori agency in the sale is to be considered, as is the Crown's responsibility to balance its article II and article III duties under the Treaty. There may also be issues as to whether the Crown applied pressure to alienate reserves.

Issue 8.61 Did the Crown ensure that Rohe Pōtae Māori retained their land as long as they desired to do so and that they were left with a sufficient land base for their present and future needs? What was done to provide adequate reserve land for Rohe Pōtae Māori own support [sic] and preservation for their present and future needs?

564. The Crown has already addressed these issues in its response to topic 3. The Crown accepts that these are issues for inquiry.

Issue 8.62 Were Māori left with sufficient land and capital resources?

565. The Crown has responded to this issue in its response to section 3, Protection of Land and Resources.

Surveys and Survey costs

³¹⁷ L Boulton, "Land Alienation in the Rohe Pōtae Inquiry District, 1866-1908: An Overview" (2011), Wai 898, A67, pp 432-433; Dr T J Hearn, "Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935" (2011), Wai 898, A73, pp 183-185.

³¹⁸ T Douglas, C Innes, J Mitchell, "Alienation of Māori Land Within Te Rohe Pōtae Inquiry District: 1840-2010: A Quantitative Study" (2010), Wai 898, A21. See for example pp 167 - 236 (Table C1: Te Rohe Pōtae Current Maori Land, and the comments on 'purpose, legality and statute' where some blocks are identified as reservations or reserves).

Issue 8.63 To what extent were purchases accurately and sufficiently defined by survey? Were boundaries clearly understood by the parties?

566. The evidence on the record of inquiry does not provide a comprehensive analysis of the extent to which purchases were accurately and sufficiently defined by survey. This is a matter for inquiry.

567. By way of a general point, the Crown notes that the Native Land Court was active from 1888-1892 addressing applications for partition orders brought by the Crown. The Crown's policy was to purchase land (specifically shares in land) after the original partition orders had been made and surveyed, and the three-month period for applications for rehearing had passed, although it accepts that there may have been instances of purchases that did not follow this process.³¹⁹

568. Land Purchase Officer Wilkinson identified that:

in some cases [the Native owners of the land] have proved that the survey had not been carried out in accordance with the Court's Order, and the work, or part of it, has had to be done over again.³²⁰

569. There are some examples of survey inadequacies in the district. For example, complex issues about the adequacy of survey arise in relation to the Umukaimata block, which in turn appear to have been affected by survey uncertainties of surrounding blocks in the Mokau district.³²¹

³¹⁹ Native Land Court Act 1886, Ss 29, 30 and 75.

³²⁰ Dr P Husbands, Dr J Mitchell, "The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907" (2011), Wai 898, A79, pp 501-502 citing G T Wilkinson to P Sheridan, Memorandum: Re certain subdivisions of Rangitoto Tuhua Block which have been cut out to be sold to pay cost of survey of other Block, 25 April 1903, NLP 1903/31, MA-MLP Series 1, Box 71: NLP 1904/7: Rangitoto Tuhua Sale Blocks, Archives New Zealand, Wellington.

³²¹ For example, complex issues about the adequacy of survey arise in relation to the Umukaimata block, which in turn were affected by survey uncertainties of surrounding blocks in the Mokau district. These blocks are mentioned in several research reports on the

570. The Crown accepts that there are several examples of problems with surveys. It considers that further research is required to identify the nature and extent of these problems, and whether they were adequately rectified.

571. Wilkinson sought to secure agreement between parties as to the portion of land to be allocated to the Crown as a result of his purchase of shares, and where relevant for survey charges.³²² Where on occasion there was disagreement, the Court made a decision. The evidence does not appear to disclose any significant issues where uncertainty arose.

Issue 8.64 Did the Crown attempt to use imposed survey costs to the benefit of the Crown and the detriment of Māori, by attempting to have survey costs waived in situations where it served the Crown?

572. In the Rohe Pōtae district inquiry, the two key examples of reduction or waiver of survey costs were:

572.1 With respect to the outer survey of the Rohe Pōtae block, the Crown and Rohe Pōtae leaders negotiated survey at the costs of approximately cost £1,600 in 1883 (substantially less than the actual survey would cost). The benefit for the Crown was the ability to undertake a trigonometric survey at the same time that would make later surveys easier and cheaper.³²³ The Chief Surveyor applied for orders for costs of survey in August 1892. These totalled £6,348 and were apportioned across each block according to the size of the

record of inquiry, and is the subject of a case study in Dr P Husbands, Dr J Mitchell, “The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907” (2011), Wai 898, A79, pp 541-599.

³²² Dr P Husbands, Dr J Mitchell, “The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907” (2011), Wai 898, A79, pp 253 -254.

³²³ Dr P Husbands, Dr J Mitchell, “The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907” (2011), Wai 898, A79, pp 41-42.

block, the nature of its terrain and the type of division or subdivision involved.³²⁴

572.2 When the Crown purchased shares in blocks in the 1890s, the share of the cost of survey can be seen as part of the consideration for sale of the shares along with the 10 percent owner reserves.³²⁵ The Crown also reimbursed Māori for survey liens that had already been paid when the Crown purchased to remain consistent with this policy.³²⁶

573. In respect of the reductions in cost associated with the outer boundary there are benefits for the Rohe Pōtae; a significantly lower price for survey and cheaper prices for survey in the future. The benefit for the Crown lay in the ability to undertake the trigonometric survey.

574. In terms of waiver in the context of purchasing shares, that would have made the Crown's offer more attractive and therefore more likely to be accepted. For Rohe Pōtae Māori it reduced a cost on the land that was sold. The detrimental aspects for non-sellers have already been addressed in the Crown's response to issue 8.53.

Issue 8.65 What was the impact of survey costs and charges on Rohe Pōtae Māori?

575. The Crown concedes that in a number of instances, for example in some subdivisions within the Rangitoto Tuhua block, the iwi and hapū of the Rohe Pōtae had to give up unreasonably large amounts of land to pay for survey costs, and that the Crown's failure to protect the affected iwi and hapū of the Rohe Pōtae from this burden breached the Treaty of Waitangi and its principles.

³²⁴ Dr P Husbands, Dr J Mitchell, "The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907" (2011), Wai 898, A79, p 244.

³²⁵ Dr P Husbands, Dr J Mitchell, "The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907" (2011), Wai 898, A79, p 311.

³²⁶ Dr P Husbands, Dr J Mitchell, "The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907" (2011), Wai 898, A79, pp 311-312, 324, 327.

576. While the Crown agrees that survey costs breached the Treaty in some instances, the Crown denies any generalised allegations that the Crown imposed significant or unreasonable costs on Rohe Pōtae Māori through survey requirements. The Crown says the circumstances in which the imposition of survey costs is said to have contributed to the sale of Māori land need to be considered.
577. As a general rule, it was appropriate for the landowner to meet the cost of survey. An issue arises where costs were excessive or the effects unreasonable. Transaction costs such as survey costs are usually taken into account by the parties to a land transaction. The Crown says that, where Māori wanted rights identified and Native Land Court titles confirmed, it was not unreasonable for Māori owners to contribute towards survey costs.
578. The Crown notes the evidence on the record of inquiry that for certain Rohe Pōtae Māori who were subject to survey costs and charges, the immediate impact on them was alienation of a portion of their land, or their shares in land, to meet those expenses for definition of the land they retained.³²⁷ This occurred immediately after partition of their interests, or after a number of years during which their land was subject to survey lien.
579. The evidence on the record of inquiry provides various calculations and figures for the proportion of the original Aotea block that was alienated for survey costs and charges at different times:
- 579.1 91,388 acres in total were alienated between 1892 and 1907.³²⁸
- 579.2 Sale blocks could be used to defray other expenses, including court costs. In some cases funds were returned

³²⁷ Dr P Husbands, Dr J Mitchell, “The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907” (2011), Wai 898, A79, pp 315 – 317.

³²⁸ Dr P Husbands, Dr J Mitchell, “The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907” (2011), Wai 898, A79, pp 280, 370 (Table 5.31: Total land alienated in Te Rohe Pōtae to cover survey and related charges: 1890-1907).

to the former Māori owners where they remained after alienation and the payment of all applicable survey charges and (and interest) had been paid.³²⁹ Accordingly, the figures for survey costs are not definitive.

580. Similarly, the evidence on the record of inquiry provides various calculations and figures for the monetary value of survey charges: the total sum of survey charges imposed by the Otorohanga Court between 1892 and the 1907 amounted to at least £22,017. By adding the survey charges for the Mokau Mohakatino 1 blocks and Wharepuhunga the total comes to a minimum of £23,728.³³⁰
581. There are likely to have been other impacts, for example alienation from turangawaewae, that would be relevant to prejudice.

Remedy

- Issue 8.66** What systems of redress did the Crown provide for Rohe Pōtae Māori concerned about processes and practices in respect of land alienation? Were Rohe Pōtae Māori consulted regarding their establishment?
- Issue 8.67** To what extent were Rohe Pōtae Māori concerns investigated, upheld and acted upon? How effective were systems of redress in addressing Rohe Pōtae Māori concerns?
582. The Crown has addressed these issues in its response to issues 6.39, 6.40, 8.29 and 8.30.

³²⁹ Dr P Husbands, Dr J Mitchell, “The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907” (2011), Wai 898, A79, p 324.

³³⁰ Dr P Husbands, Dr J Mitchell, “The Native Land Court, land titles and Crown land purchasing in the Rohe Pōtae district 1866-1907” (2011), Wai 898, A79, pp 280, 330.

PRIVATE PURCHASING

Did the Crown breach the principles of the Treaty of Waitangi by introducing and operating a system that allowed private purchasing? What duties did the Crown have when implementing this system? To what extent did the Crown fulfil any such duty?

Introduction

583. The Treaty of Waitangi requires the Crown to balance a number of competing obligations. Under article I, the Crown is required to govern in the national interest. Under article II, the Crown is required to take such steps as are reasonable in the context of the time to protect Māori lands and resources, for so long as Māori wish to retain them. Under article III, the Crown has an obligation to extend to Māori all the rights and privileges of British subjects.
584. The Crown also accepts that, generally, the duty under article II required the Crown to take reasonable steps to provide protection for Rohe Pōtae Māori in relation to their lands and resources so as to ensure that they retained sufficient lands for their present and future needs.
585. The components of the Crown's duty pursuant to article II of the Treaty are discussed in the introduction of the Crown's response to Section 3, Protection of Land and Resources.
586. The Crown denies that, by introducing and operating a system that permitted private purchasing of Māori land interests, it breached the Treaty and its principles.
587. The Crown's responsibility in the Treaty context lies with the policy and statutory framework in which land transactions between Māori and private purchasers took place.

588. In particular, the Crown’s duties included taking reasonable steps to ensure that the legislative regime provided for a fair and orderly system of private dealings in Māori land.

Crown response to Claimant Statement of Issues

Legislative Regime

Issue 9.1 What legislative mechanisms and policies were enacted and pursued by the Crown to facilitate the alienation of Māori land by way of private purchasing?

589. Legislation in place in the 19th century regulated the sale and purchase of Māori land. Pre-emption restrictions (discussed at issues 8.13, 8.14, 8.16 and 8.47 and 8.50 above) were one feature, but not the only feature, of the 19th century scheme. Mechanisms were in place for title ascertainment in the Native Land Court process,³³¹ and for vetting of transactions (see issues 8.53-8.56 above). Once restrictions were cleared (for example, under section 4 of the Native Land Laws Amendment Act 1895³³²), private purchase could, and did occur.
590. Evidence on the record of inquiry records approximately 17,797 acres as alienated by ‘Private Awards’ between 1889-1899.³³³
591. The Crown notes that it promoted a number of legislative mechanisms that provided for the alienation of Māori land by way of private purchasing. For example, the Maori Lands Administration Act 1900 permitted the sale of Māori land (owned by more than two owners) to the Crown or to “any other person”(s 23), where:

³³¹ Examples of the legislation relating to Native Land Court processes include: s 14 Native Lands Act 1867; s 59 Native Land Act 1873; s 24 of the Native Lands Administration Act 1886 and s 14(8) Native Land Court Act 1894 (which also provided for pre-emption over the North Island in s 117, and provided in s 118 that the advancement of certain leases or sale transactions was not possible within an area that included parts of the Rohe Potae inquiry district).

³³² While section 117 of Native Land Court Act 1894 applied pre-emption over the North Island, section 4 of the Native Land Laws Amendment Act 1895 provided for exceptions to that rule where the Governor, by Order in Council, approved it. The evidence that Rohe Potae Maori made use of this mechanism is discussed at issue 8.47 and 8.50, above.

³³³ T Douglas, C Innes, J Mitchell, “Alienation of Māori Land Within Te Rohe Pōtae Inquiry District: 1840-2010: A Quantitative Study” (2010), Wai 898, A21, p 131.

591.1 The consent of the Governor in Council was first obtained (s 22);

591.2 The Māori vendor had been issued a papakainga certificate (s 23);

591.3 The alienation was effected by an instrument executed in accordance with the conditions set out in section 25.

592. The Native Land Act 1909 facilitated the alienation of Māori land by way of private purchasing by:

592.1 Removing all existing prohibitions or restrictions on the alienation of Māori lands by a Māori (s 207(1));

592.2 Providing that Māori could alienate or dispose of land or any interests in land in the same manner as a European (s 207(2)); and

592.3 In the case of land held by more than ten owners, establishing new purchasing procedures, including sales by assembled owners (under Part XVIII of the Act) and sales with the preceding consent of the Māori Land Board (the latter option repealed by the Native Land Amendment Act 1912 (s 8(1)). These provisions applied to both the Crown and private purchasers.

593. However, alienations were subject to a protective mechanism.

594. The Native Land Act 1909 balanced the Crown's competing duties to protect Māori from landlessness and to provide Māori the right that non-Māori had to alienate their land as they wished. For example, the Act introduced a new, uniform set of measures designed to protect Māori in their dealings with both the Crown and private purchasers. Amongst other things, these protective mechanisms:

- 594.1 Required the Māori Land Boards to perform a vetting process of all Crown and private purchases of Māori land within the Rohe Pōtae pursuant to the provisions of the Native Land Act 1909 Act. Before it was permitted to confirm an alienation, a Board had to be satisfied that:³³⁴
- 594.2 The alienation was not contrary to the interests of the Māori vendor;
- 594.3 The consideration was adequate;
- 594.4 No Māori would become landless within the meaning of the Act;³³⁵ and
- 594.5 No person acquiring any interest under the alienation (including private purchasers) was prohibited from acquiring that interest by virtue of the provisions in the Act relating to limitation of area;³³⁶
595. The adequacy of the consideration was to be determined by reference to the relevant government valuation, or if the Board thought it fit to do so, by reference to a new valuation.³³⁷
596. The Crown says that the legislation:
- 596.1 Protected sellers against private ‘speculator’ purchasers;³³⁸

³³⁴ See Native Land Act 1909, ss 217, 220, 223. See also Maori Land Laws Amendment Act 1908, s 7.

³³⁵ “Landless Native” was defined as “a Native whose total beneficial interests in Native freehold land (whether as tenant in fee-simple or as tenant for life, and whether at law or in equity) are insufficient for his adequate maintenance” (Native Land Act, 1909, s 2).

³³⁶ Native Land Act 1909, s 220.

³³⁷ Native Land Act 1909, s 223(1).

³³⁸ Dr T Hearn states that section 3 of the Native Land Amendment and Native Land Claims Adjustment Act 1915 amending s 356 (8) of the Native Land Act 1909, “included a section intended to check the ‘speculator’ at meetings of assembled owners by requiring each purchaser not only to give a declaration as to land already owned but also to affirm that he was not acting as an agent” (See Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, p 588).

596.2 Protected owners who objected to sales which were agreed to by a majority of a quorum of owners;³³⁹ and

596.3 Imposed restrictions to prevent private purchasers whose initial offers were rejected by Māori owners, from convening further meetings of the assembled owners at the owner's expense.³⁴⁰

597. The decision to lift restrictions on private purchasing was at least in part, a response to Māori objections to Crown pre-emption, as well as Māori pressure on the Crown to permit dealings with private purchasers on an open market,³⁴¹ so that they could freely alienate their land to private purchasers if they so desired.³⁴²

Issue 9.2 What was the extent and pattern of private purchasing in the Rohe Pōtae district throughout the twentieth century?

³³⁹ Section 100 of the Native Land Amendment Act 1913 provided that no resolution passed by assembled owners could be confirmed by the Board until the expiration of three clear days in which time an owner objecting to sale could lodge written objections to the sale. Section 4 of the Native Land Act Amendment and Native Land Claims Adjustment Act 1915 extended the three day objection period to seven days.

³⁴⁰ Section 4(6) of the Native Land Act Amendment and Native Land Claims Adjustment Act 1915 provided that where the assembled owners have rejected any resolution proposed by any intended purchaser, no further meeting of such owners could be convened at the instance of the same intended purchaser either alone or in conjunction with others for a period of 12 months unless the intended purchaser deposited with the Board a sum to cover the owners expense in attending such meeting. Dr T Hearn notes that “intended to thwart those who, having failed to secure a decision to sell at one meeting, called further meetings, usually at considerable expense to the owners” (Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, p 589).

³⁴¹ Dr T Hearn notes that “The Native Land Act 1909 inaugurated what has been described as a ‘free market approach’ to Māori land, removing most restrictions on alienation, and establishing a clearly defined sale process” (Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, p 556).

³⁴² See NZPD vol 115, 1900, pp 166-167 (Seddon), pp 174-175 (Napier) and p 175 (Kaihau (Western Maori)); AJHR 1907 G.-1B at pp 5-7. In the Rangahaua Whanui report, “Maori Land Councils and Maori Land Boards: A Historical Overview, 1900 to 1952” (Waitangi Tribunal, Rangahaua Whanui National Theme K, December 1996, First Release), Dr Don Loveridge notes that there was support for the Maori Lands Administration Bill 1900 from the Chiefs and representatives of North Island Māori (pp 16-18). The Crown also notes that in 1907, certain Rohe Pōtae Māori made submissions to the Stout-Ngata Commission asking for an expansion in the scope of land sales to private purchasers. Members of the progressive party asked the Stout-Ngata Commission that their “surplus lands be leased or sold by auction”, and that “All restrictions ... be removed from lands of capable Natives” (p 6). Members of Ngati-Maniapoto submitted that wished “to deal with our lands, by sale or lease, direct with the purchaser or lessee ... without interference” (AJHR 1907 G.-1B at p 7).

598. The Crown refers to evidence on the record of inquiry which, amongst other things, illustrates land alienation by type between 1840 and 2010, and land alienations in five-yearly intervals within the Rohe Pōtae inquiry district.³⁴³

Issue 9.3 What was the impact of private purchasing legislation and policies on Rohe Pōtae Māori?

599. Evidence on the record of inquiry suggests that private purchasing of Māori land within the Rohe Pōtae inquiry district during the 20th century had a substantial effect on Rohe Pōtae Māori, including on the extent of land alienation and the amount of land remaining in Māori ownership.³⁴⁴

600. Approximately 28 per cent of land alienations between 1840 and 2010 were private awards.³⁴⁵ This amounted to nearly 24 per cent of the inquiry district.³⁴⁶

601. While acknowledging this is a significant area of land, the Crown does not consider this effect can be attributed solely to legislative regimes which provided alienation by way of private purchasing.

602. The Crown says that Māori motivations for selling, as well as fluctuations in demand for Māori land, inevitably affected the rate and nature of alienation to private purchasers.

603. The Treaty questions are of the Crown's obligations in relation to cumulative land alienation (Crown and private purchases).

³⁴³ See T Douglas, C Innes, J Mitchell, "Alienation of Māori Land Within Te Rohe Pōtae Inquiry District: 1840-2010: A Quantitative Study" (2010), Wai 898, A21, at pp 52-53.

³⁴⁴ See for instance, H Bassett, R Kay, "Crown Administration and the Alienation of Maori Land in Te Rohe Potae Inquiry District c 1931 –2010" (2011), Wai 898, A75, p 89; T Douglas, C Innes, J Mitchell, "Alienation of Māori Land Within Te Rohe Pōtae inquiry district: 1840-2010: A Quantitative Study" (2010), Wai 898, A21, pp 52, 59; Dr T J Hearn, "Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935" (2011), Wai 898, A73, at p 572.

³⁴⁵ T Douglas, C Innes, J Mitchell, "Alienation of Māori Land Within Te Rohe Pōtae Inquiry District: 1840-2010: A Quantitative Study" (2010), Wai 898, A21, pp 52-53.

³⁴⁶ T Douglas, C Innes, J Mitchell, "Alienation of Māori land within Te Rohe Pōtae Inquiry District: 1840-2010: A Quantitative Study" (2010), Wai 898, A21, p 54.

- Issue 9.4 How effective and practical were protection mechanisms implemented by the Crown and its agencies in ensuring Rohe Pōtae Māori retained land sufficient for present and future needs? How carefully did Crown agencies monitor the alienation process and ensure compliance with such protections?**
604. The protective mechanisms (outlined under issue 9.1) were a genuine attempt by the Crown to take reasonable steps to provide protection for Rohe Pōtae Māori in their land dealings with the Crown and private purchasers,³⁴⁷ and to ensure that Rohe Pōtae Māori retained land sufficient for their present and future needs.
605. The Crown accepts that the effectiveness and practicality of protection mechanisms in both the 19th and 20th centuries in ensuring Rohe Pōtae Māori retained sufficient land for present and future needs is a matter for inquiry.
606. The Crown responds to this issue on the assumption that the reference to “Crown agencies” relates to the Māori Land Boards and, with respect to the Rohe Pōtae, the Maniapoto-Tuwharetoa Māori Land Board, which later became the Waikato-Manaipoto Māori Land Board in 1910.
607. The Crown’s position is that the Māori Land Boards, including the Waikato-Maniapoto Māori Land Board, were not agents of the Crown.³⁴⁸
608. The Māori Land Boards were established under an Act of Parliament to carry out certain statutory functions, which they performed

³⁴⁷ See for instance, NZPD vol 115, 1900, p 170 (Seddon); NZPD vol 148, 1909, pp 1102-1103 (Carroll).

³⁴⁸ Dr T Hearn states that “Hutton concluded that ‘it is clear that the Board operated as an agent of the Crown.’ The Board was required to apply the law but had some discretion in doing so, and hence its conduct is open to assessment. For all that, ‘The Board was created by the Crown and followed Crown policy.’ There is little in the evidence adduced above to suggest that Hutton’s conclusions were anything other than well-founded.” (Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, p 612).

independently of the Crown. The adequacy of the statutory framework is of relevance so far as the Crown is concerned.

Consultation

Issue 9.5 What motivated the Crown to implement legislation and policy to enable private purchasers to purchase land in the Rohe Pōtae rohe?

609. In 1862 the first Native Land Act was passed by Parliament. This enabled the alienation of Māori lands to private persons where ownership had been ascertained by a Native Land Court. This legislation was intended to provide Māori with a form of land title which was recognisable in British law, and to give them an alternative to sales of land to the Crown under pre-emption. At the time, when the franchise was based on the ownership of property with Crown titles, it also opened the way for Māori to gain the vote.

610. The Crown says that a range of factors motivated its policy to remove restrictions on private purchasing of Māori land in 1909. Such factors included:

610.1 Māori objections to pre-emption and the Crown's use of the monopoly powers in the 19th and early 20th century, as well as Māori pressure for the Crown to permit Māori land dealings with private settlers in an open market;

610.2 The desire to enable Māori to dispose freely of their lands as they so desired (which, the Crown says, were rights inherent in the guarantees to Māori under article III of the Treaty); and

610.3 The Crown regarded the removal of restrictions on private purchasing to be in the national interest, insofar as private purchasing would facilitate the use of undeveloped and underdeveloped lands and so boost economic growth. However, the Crown's focus subsequently turned to Māori

settlement and development of their land from the 1920s on.³⁴⁹

Issue 9.6 Did the Crown consult with Māori about the implementation of private purchasing legislation prior to its enactment?

611. To the extent that this issue relates to 19th century issues, the Crown refers to its response to other issues in the amended claimant statement of issues:

611.1 Consultation on the Native Land Court system is addressed in section 6 above (see, for example, issues 6.3, 6.4 above).

611.2 A key issue in the 19th century is whether the Crown consulted Rohe Pōtae Māori on the pre-emptive restrictions imposed. This is addressed at issue 14.9(c) above.

612. The Crown says that, before it introduced the Native Land Bill 1909, it was well informed as to the views of Rohe Pōtae Māori concerning the desirability of a legislative regime which permitted private purchasing.³⁵⁰

613. In 1907, the Stout-Ngata Commission was appointed specifically to inquire and report on how unoccupied Māori lands “can best be utilised and settled in the interests of the Native owners and the public good”.³⁵¹

614. The Crown notes the evidence on the record that the Stout-Ngata Commission visited the Rohe Pōtae and consulted with Rohe Pōtae Māori on at least two occasions between 1907 and 1909.³⁵²

³⁴⁹ See Crown response at Section 12, Twentieth Century Māori Land Administration and Development.

³⁵⁰ See *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, per Richardson J, p 683.

³⁵¹ AJHR 1907 G.-1, Native Lands and Native-Land Tenure (Interim Report of the Committee appointed to inquire into the question of), p i.

³⁵² See Dr T J Hearn, “Māori, Land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, pp 114-136, 149-152.

615. The Commission was informed that some groups of Rohe Pōtae Māori wanted the Crown to remove restrictions on private purchasing so that they could freely alienate their land to private purchasers if they so desired.³⁵³

616. The Crown also refers to evidence on the record of consultation with Māori prior to the introduction of the Maori Lands Administration Bill, 1900.³⁵⁴

Issue 9.7 Why did Rohe Pōtae Māori eventually enter into land purchase transactions with private purchasers?

617. In many cases, it may be difficult to determine the principal and subsidiary reasons why certain Māori elected to sell their land to private purchasers.

618. The evidence on the record concerning Māori motivations for sale is limited. The Crown says that a range of factors may have caused Māori to enter into land transactions with private purchasers, including:

618.1 Economic opportunity and/or necessity; and

618.2 Urbanisation and changes to tribal structures.

Issue 9.8 Were Māori aware of the effect that private purchasing had on their land interests?

619. The meaning of this issue, and whether it refers to the Māori understanding of the European concept of sale and permanent alienations, or to the effect land sales would have on the sufficiency

³⁵³ See AJHR 1907 G.-1B, Native Land in the Rohe-Potae (King-Country) District, pp 5-7. In 1907, certain Rohe Pōtae Māori made submissions to the Stout-Ngata Commission asking for an expansion in the scope of land sales to private purchasers. Members of the progressive party asked the Stout-Ngata Commission that their “surplus lands be leased or sold by auction”, and that “All restrictions ... be removed from lands of capable Natives” (p 6). Members of Ngati-Maniapoto submitted that wished “to deal with our lands, by sale or lease, direct with the purchaser or lessee ... without interference” (p 7).

³⁵⁴ See Dr H Robinson, Dr P Christoffel, “Aspects of Rohe Pōtae Political Engagement, 1886 to 1913” (2011), Wai 898, A71, pp 121-128; Dr D Loveridge, “Māori Land Councils and Māori Land Boards: A Historical Overview, 1900 to 1952” (Waitangi Tribunal, Rangahaua Whanui National Theme K, December 1996, First Release), pp 3-19.

of Māori landholdings remaining within the inquiry district, or to some other matter, is unclear.

620. The Crown has already responded to issues relating to the nature and effect of pre-Treaty transactions (see the response to section 4); it has noted that Māori were aware of the concept of permanent alienation (see the Crown's response to issue 8.4); it has noted that Māori objected to pre-emption (see the response to issue 8.15 for example); it has been noted that private purchasing occurred in the 19th century which indicates that Māori understood the concept of sale and permanent alienation to private purchasers.
621. There appears to be limited evidence on the record of inquiry indicating whether or not Rohe Pōtae Māori were aware of the effect that private purchasing was having on their land holdings within the inquiry district.
622. The Crown says that the purchase of land is a private and legal transaction between the purchaser and the owner of land.

Compensation

Issue 9.9 How was Māori freehold land valued prior to sale to private purchasers?

623. In the 19th century Māori and private purchasers could negotiate over the value of land unless any legislation was applicable. From 1905, the Crown had a system of valuation in place which was applicable to land alienations by Rohe Pōtae Māori. The Crown says:

623.1 Before a Māori Land Board was permitted to confirm an alienation, it had to be satisfied that the purchase price was adequate.³⁵⁵

³⁵⁵ Native Land Act 1909, s 220.

623.2 The adequacy of the consideration was to be determined by reference to the relevant government valuation, or if the Board thought it fit to do so, by reference to a new valuation.³⁵⁶

623.3 This provision was continued in section 14 of the Native Land Amendment and the Native Claims Adjustment Act 1922 and section 277(1) of the Native Land Act 1931.

Issue 9.10 How adequate were the mechanisms established to set valuations for Māori land before purchase?

624. The Crown approach to valuation in the 19th century has been addressed at issue 8.18, above.

625. The Crown says that the system of valuation introduced in the early 20th century (outlined under issue 9.9) was effective.³⁵⁷

626. The Crown notes that there may have been difficulties associated with the valuing of Rohe Pōtae Māori land, including difficulties associated with accessibility and remoteness of certain blocks. However, these do not mean the system for valuation was itself inadequate.

³⁵⁶ Native Land Act 1909, s 223(1). See also Native Land Amendment Act 1913, s 85. Section 88 of the Native Land Amendment Act 1913 provided that, on an application for confirmation of an alienation, it was lawful for the President of the Maori Land Board or the Judge of the Native Land Court, with the consent of the alienee, to modify the terms of such alienation (including the amount of purchase-money), if it appeared to the President or Judge that some “modification ought in justice” be made in favour of the Native owners alienating.

³⁵⁷ The Crown also notes that there is evidence that Government valuations were adequate: In a report dated 1 June 1907, the Under Secretary for Lands claimed that purchasing operations in the Auckland, Hawke’s Bay, Taranaki and Wellington land districts had been “singularly successful, and the price paid for the land purchased has never been less than that fixed by the Valuation Department, and in the greater number of cases it was considerably exceeded” (AJHR 1907, G. -3A, Maori Land Purchase Operations (Report under “The Maori Land Settlement Act, 1905,” for the year ended 31st March, 1907), p 1).

The 1929 Commission into the Waikato-Maniapoto Native Land Court district claimed that “the King-country lands were overvalued in the years gone by, thereby causing to a large extent the difficulties as to the rent now being experienced by the lessees ...” (T J Hearn, “Scoping Report: Te Rohe Pōtae land issues post 1908 to c 2008” (2009), Wai 898, A61, p 118 citing AJHR 1929, G7, p 8).

627. The Crown says that any assessment of the adequacy of the system of valuation must be viewed in its historical context.
628. There appears to be limited evidence on the record of inquiry concerning the processes by which Rohe Pōtae Māori land was valued in the 20th century. The Crown is aware of evidence in other inquiries that the valuations drawn up by the Valuation Department in the 20th century were often made after site visits or after comparison with valuation rolls, and taking into account the specific features of a block.³⁵⁸
629. The Crown is aware of an allegation that the Valuation Department deliberately undervalued Māori lands, but notes that the evidence in support of this allegation is very limited.³⁵⁹

Issue 9.11 To what extent, if any, did the Crown ensure Rohe Pōtae Māori interests were protected and that the prices paid would enable Māori to participate adequately in the economic opportunities afforded by the developing colonial economy?

630. The Crown considers that an issue for inquiry is the extent to which the duty to pay a fair price extended to ensuring that prices paid for land would enable Māori to participate adequately in economic opportunities afforded by the developing colonial economy.
631. To the extent that this issue relates to the 19th century, the Crown refers to its response to issues 8.40 – 8.43, above.
632. To the extent that this issue relates to protection of Māori interests in the 20th century, the Crown says that from 1905 it took steps that were reasonable in the context of the time to ensure that Rohe Pōtae Māori interests were protected in their land dealings with the Crown and private purchasers. As stated above, the legislation

³⁵⁸ David Alexander, “Brief of Evidence of David James Alexander on Te Matua Whenua The Land History and Alienation Database (May 2005), Wai 1200, #A97, Appendix 5, “Crown and Private Purchasing, 1870-1930” p 4.

³⁵⁹ See Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, p 549. Dr Hearn states that “How widespread the former practice was has not been and probably cannot now be established” (p 549).

contained mechanisms designed to protect Māori vendors, and to ensure that the prices paid for Māori land were fair.

Precedent consent

Issue 9.12 **In respect of the Maori Land Board’s discretion to dispense with alienating land by way of a meeting of owners, what factors did the Board take into account? Did the Board utilise its discretion in the best interest of Māori? Were owners given adequate notice that land was being purchased?**

633. The Crown notes that between 31 March 1910 and 30 November 1912, the Māori Land Boards had a discretion to grant “precedent” consent to the alienation of Native land owned by more than ten owners.³⁶⁰

634. The granting of precedent consent by Māori Land Boards was subject to a number of restrictions. For instance, section 209(3) of the Native Land Act 1909 required a Māori Land Board contemplating a grant of precedent consent to have regard to:

634.1 The number of owners;

634.2 The facility with which the owners could execute an instrument of alienation; and

634.3 All other material circumstances.

635. The Board had the power to consent to the proposed alienation if it had formed the opinion that, having regard to those matters identified in section 209(3), it was in the public interest and in the interests of the owners not to require a resolution of the assembled owners.

636. All alienations by way of preceding consent were subject to confirmation in the same manner as all other purchases of Māori land (section 209(6)).

³⁶⁰ Native Land Act 1909, s 209(1)(b). The Crown notes that ss 209(1)(b) and 209 (2)-(8) of the Native Land Act 1909 were repealed by section 8 of the Native Land Amendment Act 1912.

637. The Crown notes that evidence on the record of inquiry suggests that the published data does not separately identify alienations concluded on the basis of precedent consent, or clearly identify the basis on which the Board granted or decline applications for precedent consent.³⁶¹ Therefore, the Crown says that it is difficult to draw definitive conclusions about the factors which the Māori Land Board took into account when exercising its discretion to grant precedent consent, whether the Board utilised its discretion in the best interests of Māori, or whether or not owners were given adequate notice that land was being purchased.

Meetings of Owners

Issue 9.13 In respect of the Crown’s implementation of the meeting of owners mechanism to enable the private purchase of Māori land, how did the Crown ensure that dealings were made in good faith and with adequate consent of all owners of the land? What aspects of this process could be exploited to exclude Rohe Pōtae Māori from having being actively involved in such transactions?

638. The Crown accepts that, in respect of Māori land owned by more than ten owners in common, the Native Land Act 1909 provided for sales of land by resolutions (passed by a quorum) of assembled owners.³⁶²

639. The Crown says:

639.1 The system did not require the consent of all owners.

639.2 The system was considered to be, in the prevailing circumstances, the best way to allow for collective decision-making regarding the alienation of multiply-owned Māori land. It was described at the time by Native Minister

³⁶¹ Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, p 584.

³⁶² The Crown accepts that “a bare majority of aggregate interests present at an owners’ meeting could alienate land to either the Crown or private settlers (see Native Land Act 1909 s 209(1)(a) and Part XVIII, ss 343 and 346(1)).

Carroll as “practically a resuscitation of the old runanga system”.³⁶³

- 639.3 A requirement that there be one hundred per cent consent was considered an impracticable fetter on land alienation.
640. The Native Land Act 1909 contained a number of safeguards for sales of land by resolutions of assembled owners.³⁶⁴
641. The Crown notes evidence on the record of inquiry that many Māori land alienation files recording transactions in the Rohe Pōtae failed to record the number of owners present at meetings of assembled owners, thereby making it difficult to estimate the extent to which owner minorities were able to effect sales.³⁶⁵
642. It is not clear from the evidence whether, and if so, to what extent the meetings of assembled owners’ process could be exploited so as to cause prejudice to Rohe Pōtae Māori.

Issue 9.14 Were the concerns of Rohe Pōtae Māori in opposition to this process adequately addressed?

643. The Native Land Act 1909 anticipated that on occasion some individual owners might be opposed to the sale of their interests in land by a quorum of assembled owners under the Native Land Act 1909.³⁶⁶
644. Section 344(2) of the Act provided that those Māori who opposed sales through resolutions of assembled owners could sign a memorial of dissent, with such memorials being presented to the Board together with the written resolution before the Board

³⁶³ NZPD vol 148, 1909 p 1102 (Carroll).

³⁶⁴ See Native Land Act 1909, ss 348, 349, 356; Native Land Amendment and Native Land Claims Adjustment Act 1915, ss 3 and 4(6).

³⁶⁵ Dr T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c 1935” (2011), Wai 898, A73, p 587.

³⁶⁶ See Native Land Act, 1909, ss 344(2), 345. See also Te Ture Whenua Maori Act, 1993, s 178(1).

exercised its discretion to confirm or disallow the resolution, having regard to the “public interest and to the interests of the owners”. Under section 348(2), the Board was also empowered to postpone its decision “in order to afford to the owners who have not consented to the resolution [in favour of a sale] an opportunity of applying to the Native Land Court for a partition of their shares”.

645. The provisions are an effort to balance inconsistent interests, and clearly did not guarantee a minority veto right.

VESTED LANDS

Was the establishment of the vested land scheme by the Crown in breach of the principles of the Treaty of Waitangi?

Was the compulsory vesting of land in the Māori Council/Board a breach of the principles of the Treaty of Waitangi?

Was the management of vested lands by the Council/Board in accordance with the principles of the Treaty? Were vested lands returned to Rohe Pōtae at the expiration of the leases?

Issue 10.1 Why did the Crown retreat from the original objectives of the Māori Lands Administration Act 1900?

Issue 10.2 Did the Crown have a duty to ensure that Rohe Pōtae Māori benefited from vesting their land, whether voluntarily or compulsorily?

(a) What did the duty comprise?

(b) To what extent did the Crown meet its obligations?

Establishment of Vested Lands Scheme

Issue 10.3 What were the objectives of the vested land scheme?

(a) Whose interests were served by the establishment of the vested lands scheme in Te Rohe Pōtae district?

(b) Why did some Rohe Pōtae Māori agree to voluntarily vest their lands in the Māori land Council?

Issue 10.4 To what extent, if at all, did the Crown consult with Rohe Pōtae Māori regarding the establishment of the vested lands scheme? If so, what was the nature of the consultation? In particular were Rohe Pōtae Māori adequately consulted about compulsory vesting?

Compulsorily vested lands

Issue 10.5 Were the legislative provisions introducing the compulsory vesting of Te Rohe Pōtae Māori land in the Waikato-Maniapoto Māori Land Board in breach principles of the Treaty of Waitangi? If so, how?

Issue 10.6 Were Rohe Pōtae Māori adequately consulted about compulsorily vesting of their lands at the time of the Stout-Ngata Commission?

Issue 10.7 Did the Crown respond adequately to petitions and complaints objecting to compulsory vesting of particular blocks of Rohe Pōtae land?

Issue 10.8 Why was so much land compulsorily vested in the Waikato-Maniapoto Māori Land Board when compared to other Māori Land Districts?

646. The above questions are grouped together as they all broadly relate to the establishment of the “vested lands scheme” in the Rohe Pōtae.

647. The Crown understands the vested lands topic in this inquiry district to be concerned with the early 20th century vesting of approximately 203,000 acres of Rohe Pōtae Māori lands in the Maniapoto-Tūwharetoa³⁶⁷ (from 1909 the Waikato-Maniapoto) District Māori Land Council/Board and the subsequent history of those lands.³⁶⁸

648. From the evidence on the record of inquiry, it appears that almost all of this vesting took place under Part I of the Native Land Settlement Act 1907, following the Stout-Ngata Commission’s various reports and recommendations.³⁶⁹ The Crown understands these to be the “compulsorily vested lands” referred to in the above questions from the Claimant Statement of Issues. Very little land it seems was vested under the Māori Land Administration Act 1900 and its amendments.³⁷⁰

649. In terms of the long term outcomes, the evidence is that by the early 1950s, when the Royal Commission into vested lands was established, the Waikato-Maniapoto Board had approximately 35,478 acres vested in its control. The balance had either been re-

³⁶⁷ Originally, the Hikairo-Maniapoto-Tūwharetoa Māori Land Council.

³⁶⁸ T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c1935” (Wai 898, A73), p 206.

³⁶⁹ T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c1935” (Wai 898, A73), p 206.

³⁷⁰ Notably the township lands at Otorohanga and Te Kuiti which are dealt with elsewhere in this Statement of Position and Concessions. See T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c1935 (Wai 898, A73), p 76.

vested in owners (10, 843 acres), or sold privately (34,679 acres) or to the Crown (103,086 acres). Of the 35,478 acres remaining in Board control in the early 1950s, approximately 14,940 acres was under lease while the balance (more than 20,000 acres) was not leased.³⁷¹ It appears that by 1960 the leased blocks had largely been sold so that by 1960 there were no vested lands under lease in the district.³⁷² The Crown understands that the land which was not leased – including the Taumatatorara Loan Block – was re-vested in owners from the mid 1960s.³⁷³

650. The above figures require further clarification.³⁷⁴ The Crown expects that the Tribunal process will provide further data on the alienation history and re-vesting of the vested lands in the 20th century. However for the purposes of the Crown’s Statement of Position and Concessions these figures provide a broad outline of the scope of the vested lands topic.
651. In terms of whose interests were served by, and the objectives of, the vesting regime, the Crown’s position is that vesting reflected a variety of interests. It is clear that the stock-take of Māori land through the Stout-Ngata Commission, and the resulting vesting regime under the Native Land Settlement Act 1907, were part of a continued drive by the government of the day to bring more land into agricultural production. This was considered to be for the good of the country as a whole, including Māori who were expected to benefit through the leasing and/or sale of their surplus lands. Some sections of Rohe Pōtae Māori were in favour of the leasing and sale

³⁷¹ H Basset and R Kay “Crown Administration and Alienation of Māori Land in Te Rohe Pōtae Inquiry District c 1931-2010” (Wai 898, A75), p 130.

³⁷² H Basset and R Kay “Crown Administration and Alienation of Māori Land in Te Rohe Pōtae Inquiry District c 1931-2010” (Wai 898, A75), p 157.

³⁷³ H Basset and R Kay “Crown Administration and Alienation of Māori Land in Te Rohe Pōtae Inquiry District c 1931-2010” (Wai 898, A75), p 185.

³⁷⁴ It will be important to clarify, for example, whether the figures take into account the change from the Tūwharetoa-Maniapoto to the Waikato-Maniapoto Land Board.

of their surplus lands through the Land Councils/Boards. Others clearly were not.³⁷⁵

652. The available evidence shows that the Stout-Ngata Commission consulted with Rohe Pōtae Māori before issuing its various reports and recommendations.³⁷⁶ The Commissioners considered that their recommendations generally reflected the wishes of owners.³⁷⁷ The evidence on the record raises issues about the adequacy of the consultation leading up to the Commission’s recommendations, and to what extent in fact the resulting vesting under Part I of the 1907 Act gave effect to the Commission’s recommendations.³⁷⁸ The Crown considers that further research and analysis is required before it can offer a firm position on these issues, including how the Crown responded to owner concerns over particular vesting.
653. However, the Crown accepts that it would have breached the Treaty of Waitangi and its principles if any Māori land in the Rohe Pōtae was vested in the Board and its successors without the consent of its owners.
654. The Crown does not accept that it was under a duty to “ensure” Rohe Pōtae Māori benefited from vesting. The benefits (or not) of vesting would have depended on a number of factors beyond the Crown’s control, including the take up of vested land leases and wider economic trends impacting on lessees’ ability to meet rental payments. The Crown did not have the ability to control economic outcomes in the way this question supposes.

Management and Administration of the Vested Lands

³⁷⁵ T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c1935, Wai 898, A73, pp 132 to 136.

³⁷⁶ See for example T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c1935, Wai 898, A73, pp 132 to 139.

³⁷⁷ T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c1935, Wai 898, A73, pp 137 and 145.

³⁷⁸ T J Hearn, “Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c1935, Wai 898, A73, p 211.

- Issue 10.9** Was the Crown obliged to consult with Rohe Pōtae Māori when it changed the composition of the Māori Land Councils/Boards?
- Issue 10.10** To what extent is the Crown responsible for how the Māori Land Council/Board and the Māori Trustee exercised their powers?
- Issue 10.11** Did the Crown respond adequately to any concerns voiced by Rohe Pōtae Māori regarding the management of vested lands (either by the Council/Board or the Māori trustee)?
- Issue 10.12** What understandings and expectations did Rohe Pōtae Māori have regarding the use, management and control of their land when they vested it in these administrative entities?
- Issue 10.13** Was the Waikato-Maniapoto Māori Land Council/Board or the Māori Trustee adequately resourced and provided with the necessary trained staff and expertise to manage vested lands in the best interests of the owners?
- Issue 10.14** How much vested land was sold by the Waikato-Maniapoto Board to the Crown?
- Issue 10.15** Should the Crown have purchased large amounts of vested land from the Board?
- Issue 10.16** Were Rohe Pōtae Māori adequately compensated for and consulted about sales of vested land to the Crown?

655. The question of what understandings Rohe Pōtae Māori had regarding the use, management and control of vested lands is a matter for further inquiry. The evidence at this stage suggests a range of views within Rohe Pōtae Māori about how best to manage and use their lands. This included differing views over the role (if any) Land Councils/Boards should play and the appropriate composition of the Councils/Boards.³⁷⁹

656. In terms of the change from Councils to Boards, the Crown's general position is that it was not obliged to consult with Rohe Poate Māori in relation to such changes. There is no absolute Treaty duty to consult. The Crown will, however, look further at whether and (if

³⁷⁹ T J Hearn, "Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c1935, Wai 898, A73, pp 68, 125, 131 to 136.

so, to what extent) the Crown considered the views of Māori in relation to such changes.

657. The Crown also cautions against assuming that the change necessarily caused prejudice to the Rohe Pōtae Māori. The change from Land Councils to Land Boards did not change the fundamental terms of trust on which those entities were required to act. Land Boards, like their predecessor Councils, were required to administer the vested lands in the best interests of owners.
658. In relation to how the Board/Council exercised its powers, the Crown's position is that in exercising its trust powers the Council/Board is in the same position as the Māori Trustee exercising its trust powers. Previous inquiries have determined that although the Crown may be responsible for the statutory framework establishing the operation of the Māori Trustee, it is not responsible for the Māori Trustee's actual exercise of its trust powers. The same holds true for the Council/Board acting as trustee of vested lands. That is, the Crown's responsibility lies at a framework level, in establishing the vested lands scheme; but the Crown is not responsible for the exercise of trust powers by the Māori Land Council/Board in the administration of the scheme.
659. In considering how the Council/Board system functioned over the course of the vested lands scheme, and how, or if, the Crown responded to particular concerns raised by owners, it is important to take into account factors such as the wider economic situation; the limited resources of the Crown; and the expected role of Government at the time. The Crown in the early years of the twentieth century simply did not have the financial or administrative capacity of the modern welfare state that later emerged, and should not be judged in those terms. Later periods of extended economic depression, such as that of the 1930s, would have impacted both on the performance of the scheme and the ability of the state to respond to owner concerns.

660. In terms of sales of vested lands, the evidence is that by the time of the Royal Commission into vested lands, 103,086 acres of formerly vested lands had been sold to the Crown. The Crown does not accept that the purchase of vested lands by the Crown was inherently inconsistent with Treaty principles. Rather, each transaction needs to be assessed on its merits.

Lease Terms and Conditions

Issue 10.17 What was the understanding of Rohe Pōtae Māori regarding the terms and conditions of leases on vested lands prior to vesting their land in the Māori Land Council? In particular:

- (a) Was it reasonable to expect that Rohe Pōtae Māori would lose the effective control over their lands for 50 years?
- (b) Why did the Crown enact legislation which allowed the Board to reduce rentals payable to owners? Were Rohe Pōtae Māori people adequately consulted about these changes? Were Rohe Pōtae Māori who owned vested lands adversely affected by lease provisions that required them to pay lessees for the improvements made during the leases? Did the requirement affect the ability of owners to resume occupation of their land?

Valuation of Lessee improvements

Issue 10.18 Was the valuation method used by the Māori Land Board to assess the costs of improvements consistent with contemporary valuation methods used elsewhere? Why was the general method used for valuation improvements under the Valuation of the Land Act not used by the Land Board

Management of Leased Lands

Issue 10.19 Did Māori Land Board take effective action to enforce covenants and leases or collect arrears of rent when lessees defaulted on payments? If not, why not?

Issue 10.20 Did the Land Board fairly balance the interests of lessees with those of the beneficial owners to ensure that the owners received fair returns?

Compensation for Lessee improvements

Issue 10.21 To what extent, if at all, did the Crown have a duty to provide

financial assistance to Rohe Pōtae Māori owners to pay for the value of improvements when leases of vested land expired?

Issue 10.22 Why did the Crown/Māori Land Council/Board decide against creating a sinking fund out of rentals to provide for compensation to lessees?

Issue 10.23 In what ways, if at all, were Rohe Pōtae Māori prejudiced to put the Crown's failure to establish a sinking fund to assist in payment for improvement cost?

661. The above questions all largely concern one particular issue – the leasing of vested lands and whether the terms and administration of vested land leases unfairly favoured the interests of lessees over those of owners. Some of evidence on the record of inquiry argues that the leasing of vested lands deliberately and disproportionately favoured lessee interests over owner interests.³⁸⁰ The Crown does not accept this. The Crown's preliminary view is that some of these criticisms are greatly overstated and ignore the wider economic context and the fact that in any leasing scenario there will be a tension between the interests of lessors and lessees. It is accepted that there are genuine issues in this context for further inquiry. However the Crown suggests that the following points are relevant to such inquiry.

662. It was fundamentally in owners' interests to have those lands identified for leasing actually leased and developed. The Crown and the Land Boards are heavily criticised where lands remained untenanted. In order to make vested land leases attractive to potential lessees it was necessary to offer some form of security for the lessee's expected investment (the Crown's understanding is that the terms of vested land leases generally required the lessees to occupy and develop the leased lands into farms). Compensation for improvements was one method to attract lessees to take up vested land leases, and the development obligation under the leases. Extended lease terms, with rights of renewal, was another. The

³⁸⁰ T J Hearn, "Māori, land, and the Crown in Te Rohe Pōtae c 1900 to c1935, Wai 898, A73.

reasonableness of compensation for improvement provisions and extended lease terms must be assessed in this context.

663. Particularly in times of economic depression it was in owners' interests that leased lands generated some rental return, even if the return was a reduced one. The Crown and the Land Boards are criticised for not enforcing particular lease covenants and providing for rent reductions on vested land leases. The Crown's position is that where measures such as rent reductions were introduced to keep lessees on the land (and paying rent) during periods of economic depression, these measures represent an entirely reasonable response to the severe economic situation the country faced at the time. The alternative for owners must also be considered. It is unlikely to have been in owners' interests for the leased lands to have simply been abandoned and generating no income during such periods.
664. Valuation has never been an exact science. The evidence is critical of the "residue" method of valuing the underlying land value for the purposes of setting vested land rentals (where the rental was fixed as a percentage of the land value). More analysis is required on the terms of vested land leases to assess what valuation methodologies were in fact adopted. However, it cannot be assumed that there was a single, correct, "value" to land and/or improvements that should have been used. Valuation issues are pronounced in a leasing scenario: lessees will favour a valuation which takes into account any improvements to the land generated by the lessee, while lessors will favour a valuation which drives up the land value (and any rental fixed as a percentage of the land value). Again, it should not be assumed that there was, or is, a single valuation methodology which inherently achieves a fair balance between those competing interests.
665. It is likely that mistakes were made in the administration and management of vested land leases over the course of the scheme. However that is inevitable in any long term land development

undertaking. A sinking fund may, for example, have meant that owners were in a better position to meet the cost of improvements at the expiry of the leases. On the other hand, a sinking fund would have been a drain on owners' already reduced rental income and is unlikely to have been a popular measure at the time.

666. In so far as the compensation for improvements issue is concerned, it is not clear how widespread an issue this was in this inquiry district. The evidence suggests that by 1950 only 14,940 acres of the vested lands were under lease and, importantly, not all was leased under conditions which required payment of compensation on expiry of the leases.³⁸¹

Unleased Land

10.24 Was the Crown, through the Māori Land Council/Board obliged to ensure that land generated income?

667. The Crown is not yet in a position to offer a firm view on exactly how much vested land remained untenanted in this inquiry district, nor why that was the case. There are likely to have been a variety of reasons for why the land failed to attract tenants. These are matters for further inquiry. The Crown anticipates this will involve further inquiry into what became the Taumatatorara Loan Block.

Royal Commission on Vested Lands/Pōtae Vested Land Act 1954 and aftermath

Issue 10.25 At what stage should the Crown have recognised the need for a commission of inquiry into the vested lands?

Issue 10.26 What was the scope of the 1951 Royal Commission of Inquiry into Vested Lands in particular:

- (a) Did or should the Royal Commission have inquired into the general land holding situation of Rohe Pōtae Māori?**
- (b) Should the Royal Commission have inquired into all aspects of the vested land scheme? If so what were**

³⁸¹ H Basset and R Kay "Crown Administration and Alienation of Māori Land in Te Rohe Pōtae Inquiry District c 1931-2010" (Wai 898 A75), p 130.

these aspects?

- (c) **Should the Royal Commission have enquired into the Crown's acts or omissions created or influenced the problems with the vested land scheme?**

- Issue 10.27** Was the Crown's response to the Royal Commission's findings reasonable?
- Issue 10.28** Did the Māori Trustee set aside adequate funds for the resumption of lands in Te Rohe Pōtae?
- Issue 10.29** Should the Māori Trustee have sold land to fund the resumption of leases?
- Issue 10.30** To what extent, if at all, did the Crown have a duty to ensure that the Māori Trustee scheme enabled Rohe Pōtae Māori to resume leases on the vested lands in the area?
- Issue 10.31** Why was so little compulsorily vested land returned to Rohe Pōtae Māori?

668. These questions are largely concerned with the difficulties vested land owners faced in meeting the cost of improvements and resuming leases, as those leases began to expire in the late 1940s. This issue led to the establishment of a Royal Commission of Inquiry and ultimately legislative intervention in the form of the Māori Vested Lands Administration Act 1954.

669. As noted above, it is not immediately clear how widespread the above issue was within the present inquiry district. By 1950, when the Royal Commission began its work, it appears that only 14,940 acres of vested lands were actually under lease, and not all of that land was leased under conditions which required payment of compensation on expiry of the leases.³⁸² Nor is it clear how extensive the desire was amongst owners to take up possession of formerly leased lands at that point in time. These are matters for further inquiry.

670. Nevertheless the Crown accepts there would have been a number of affected leases and owners, and proceeds on that basis.

³⁸² H Basset and R Kay "Crown Administration and Alienation of Māori Land in Te Rohe Pōtae Inquiry District c 1931-2010 (Wai 898 A75), p 130.

671. The Crown’s position is that the 1950s Royal Commission into vested lands was a reasonable and timely response to particular issues affecting vested lands, and that the Crown acted reasonably in responding to the Commission’s findings.
672. Vested land owners formally petitioned the Minister of Māori Affairs for a Royal Commission in 1948 and the Government began to establish the Commission in late 1948.³⁸³ The Commission was established in response to a particular problem – the difficulty owners were facing in paying for compensation for improvements on vested lands and resuming possession at the expiry of the leases – and it was, in the Crown’s submission, entirely reasonable for the Commission to be focused on that particular problem. The Commission was given wide terms of reference to look into this issue and recommend legislative change.³⁸⁴
673. The Māori Vested Lands Administration Act 1954 was a considered and wide ranging response to the findings of the Royal Commission. In particular the Crown points to the fact that:
- 673.1 The 1954 Act provided that only those improvements that added value to the underlying land were to be taken into account for compensation purposes;³⁸⁵
- 673.2 The 1954 Act reduced by one third the amount owners had to pay by way of compensation for such improvements in any case where owners were unable to fund an immediate resumption and leases were extended for a further terms of 21 years;³⁸⁶

³⁸³ H Basset and R Kay “Crown Administration and Alienation of Māori Land in Te Rohe Pōtae Inquiry District c 1931-2010 Wai 898 A75), p 127

³⁸⁴ AJHR 1951 G-5.

³⁸⁵ Māori Vested Lands Administration Act 1954, ss 2(1), s 6(1) and 13(1).

³⁸⁶ Māori Vested Lands Administration Act 1954, ss 21 and 27(1).

- 673.3 The 1954 Act reduced by one third the amount owners had to pay by way of compensation for such improvements in any case where owners were unable to fund an immediate resumption and leases were extended for a further terms of 21 years;³⁸⁷
- 673.4 Rentals were doubled (as a minimum) going forward on any renewed leases;³⁸⁸
- 673.5 The “residue” method of valuing the “unimproved” value of leased lands was replaced;³⁸⁹
- 673.6 The 1954 Act provided for the establishment of a sinking fund to pay for improvements, and the Māori Trustee to advance funds from the Māori Trustee’s General Purposes Fund or raise money by way of mortgage for this purpose.³⁹⁰ It appears that £ 25,000 was set aside by the Māori Trustee for possible vested lease resumption in the Waikato Maniapoto District.³⁹¹
674. The Crown does not accept that it was under any Treaty duty to itself pay the cost of improvements so as to allow immediate resumption of leases.
675. An issue for further inquiry is why, despite the 1954 Act, much of the leased vested lands in the Waikato-Maniapoto District were later sold rather than being resumed by owners. The evidence is that by 1960 there were in fact no vested lands under lease in the district.³⁹² It is not clear how much leased land (if any) was re-vested in owners.

³⁸⁷ Māori Vested Lands Administration Act 1954, ss 21 and 27(1).

³⁸⁸ Māori Vested Lands Administration Act 1954, ss 22 and 24.

³⁸⁹ Māori Vested Lands Administration Act 1954, s2(1), 13(1) and 24(1)

³⁹⁰ Māori Vested Lands Administration Act 1954, s 55 and 56.

³⁹¹ H Basset and R Kay “Crown Administration and Alienation of Māori Land in Te Rohe Pōtae Inquiry District c 1931-2010” (Wai 898 A75), p 155.

³⁹² H Basset and R Kay “Crown Administration and Alienation of Māori Land in Te Rohe Pōtae Inquiry District c 1931-2010” (Wai 898 A75, p 157.

The Crown's position is that it does not follow from the fact that leased land was sold that the 1954 Act was therefore inadequate. In the neighbouring Whanganui District, for example, a substantial holding of vested lands was retained and ultimately resumed by an owner-based incorporation (the Atihau Whanganui Incorporation).³⁹³ There are likely to have been various reasons why leased lands in the Waikato-Maniapoto District were sold.

³⁹³ The Crown understands from the Whanganui District Inquiry that the Atihau-Whanganui Incorporation has retained approximately 100,000 acres of formerly vested lands. See C Innes, "Whanganui Māori Incorporations Land Parcels Summary" (Wai 903, A66(f) and A66(g)).

NATIVE TOWNSHIPS

Did the Crown breach the principles of the Treaty of Waitangi by establishing Native Townships in the Te Rohe Pōtae? Did the Crown have a right to impose and implement the Native Townships regime on Rohe Pōtae Māori?

What duties did the Crown have towards Rohe Pōtae Māori when establishing Native Townships? What did the duty comprise? To what extent did the Crown fulfil any such duty?

Consultation and consent

Issue 11.1 **What were the circumstances behind the establishment of Native Townships in the Te Rohe Pōtae district?**

Issue 11.2 **Did the Crown consult with Rohe Pōtae Māori? What was the nature of consultation and was it adequate?**

Issue 11.3 **Did Rohe Pōtae Māori consent to the establishment of native townships? If so, how did the Crown obtain Te Rohe Pōtae consent?**

676. The Crown’s general position is that this topic is best assessed as part of a wider consideration of the process of economic development and change in the Rohe Pōtae in the early 20th century. The Crown did not control and direct this process in the way that the claimants contend, or in the way a number of issues in the Claimant Statement of Issues assume. There are Crown acts in relation to native townships which rightly fall to be assessed against Treaty standards, however it is important that this assessment takes into account the wider context and what the Crown can reasonably be expected to have done in the circumstances.

677. The circumstances and drivers behind the establishment of native townships within the Rohe Pōtae differed between townships. The Crown does not accept that native townships were simply “imposed” on an unwilling Rohe Pōtae Māori population. The reality is more complex. There was a wider settler interest, supported by the Crown, in “opening up” areas such as the King

Country to closer settlement, and it is clear that the establishment and development of native townships formed part of this process. However, there was equally clearly some level of enthusiasm from some segments of Rohe Pōtae Māori for the establishment and development of townships within their district.

678. Some (though not all) Rohe Pōtae Māori welcomed the development of townships, recognising the economic opportunities they provided. Townships were already emerging in the region - notably at Te Kuiti and Otorohanga - before legislation was passed formalising them as native townships.³⁹⁴ To some extent, then, the “establishment” of native townships through particular legislation was a continuation of what was already happening.
679. Legislative provision for native townships represented an attempt by the Crown to facilitate settlement in a way that provided Rohe Pōtae Māori with an opportunity to benefit economically from such settlement and retain ownership of their lands, primarily through the mechanism of leasing. The native townships covered by this inquiry are the three townships - Karewa, Parawai and Te Puru - established around Kawhia harbour, and the Te Kuiti and Otorohanga townships built along the North Island main trunk line.³⁹⁵
680. In terms of consultation and consent, the Crown’s preliminary position is that the townships in the Rohe Pōtae were established following a degree of consultation with and consent of the Māori owners. The evidence on the record of inquiry shows that Karewa and Te Puru townships were established under the Native Townships Act 1895 following discussions with owners.³⁹⁶ Relevant

³⁹⁴ For example see H Basset and R Kay “The Impact of the Native Townships Acts in Te Rohe Pōtae: Te Kuiti, Otorohanga, Karewa, Te Puru and Parawai Native Townships” (Wai 898, A062), pp 21, 37 and 89.

³⁹⁵ H Basset and R Kay “The Impact of the Native Townships Acts in Te Rohe Pōtae: Te Kuiti, Otorohanga, Karewa, Te Puru and Parawai Native Townships” (Wai 898, A062).

³⁹⁶ See for example, H Basset and R Kay “The Impact of the Native Townships Acts in Te Rohe Pōtae: Te Kuiti, Otorohanga, Karewa, Te Puru and Parawai Native Townships” (Wai 898, A062) pp 74, 84, 91.

owners appear to have consented to the inclusion of the developing townships at Te Kuiti and Otorohanga under the Māori Lands Administration Act 1900 Act.³⁹⁷ It seems that members of the Maniapoto Tuwharetoa Māori Land Council and the land owners in fact proposed the township site at Otorohanga.³⁹⁸ The Crown accepts however that the adequacy of such consultation and consent from a Treaty perspective is a legitimate matter for further inquiry.

681. The Crown is concerned that there is no evidence on the record of inquiry of consultation before the proclamation of Parawai township³⁹⁹ and accepts this also a legitimate matter for further inquiry. The Crown is considering this matter further.

Native Townships legislative regime

Issue 11.4 What legislative mechanisms and policies were enacted and pursued by the Crown to establish Native Townships?

Issue 11.5 What was the impact of Native Townships legislation and policies on Te Rohe Pōtae Māori?

682. The Crown accepts that native townships were part of the Crown's policy to facilitate closer settlement of areas that were considered underdeveloped in an economic sense, in order to encourage economic prosperity. It was intended that Māori would benefit from townships by retaining land ownership and generating economic returns through leases and the general emergence of settlement. The Crown cautions, again, against viewing native townships as a purely one-sided, Crown-controlled dynamic in the Rōhe Pōtae.

³⁹⁷ For example, Basset and Kay, pp 96, 98, 111.

³⁹⁸ Basset and Kay, p 111.

³⁹⁹ Basset and Kay, p 90.

683. The key legislative mechanisms to establish and/or formalise native townships were the Native Townships Act 1895 and, from 1902, the Māori Lands Administration Act 1900.⁴⁰⁰
684. The 1895 Native Townships Act is much criticised, primarily it seems because of the wording of its preamble and because there was no express requirement for owners to have to consent to the establishment of townships.⁴⁰¹
685. However, the evidence on the record of inquiry suggests that it was very much Crown policy to seek owner consent before establishing townships under the 1895 Act. In the Rohe Pōtae the Crown ultimately appears to have regarded itself as bound not to proclaim townships at Te Kuiti and Otorohanga without owner consent and did not do so.⁴⁰²
686. It is important not to draw generalised and negative conclusions about a native townships “regime” by reference simply to the preamble in the 1895 Act. The Māori Lands Administration Act 1900 has a different preamble and focus to the Native Townships Act 1895. The townships at Te Kuiti and Otorohanga were eventually established under that Act, not the 1895 Act. In respect of townships established under the 1900 Act, the relevant Land Council was required to “administer the said township for the benefit of the owners” and was given powers to lay out townships for that purpose.⁴⁰³
687. The “impact” of native townships on Rohe Pōtae Māori is clearly a wide ranging question and the appropriate focus of further inquiry. The Crown will address this issue more fully in closing submissions once relevant evidence has been tested. However, the Crown makes

⁴⁰⁰ As added to by the Native and Māori Land Laws Amendment Act 1902 (see ss 8 to 13).

⁴⁰¹ Basset and Kay, p 25.

⁴⁰² Basset and Kay, pp 41 to 42.

⁴⁰³ See Native and Māori Land Laws Amendment Act 1902, s 10.

the preliminary observation that, in assessing how the townships developed over time, it is important to bear in mind the difficulty for any government in regulating future economic activity. The Crown cannot be expected to have guaranteed the economic success of townships, or of particular groups or individuals within townships. Economic decisions were made by both Māori and non-Māori as the townships developed (or in some cases, as appears to have been the case with Parawai, failed) and in response to changing circumstances. The manner in which townships developed over the course of the 20th century was to a large extent something outside the Crown's direct control. That is not to suggest that there are no Crown acts which fall to be assessed against Treaty standards, only that any such assessment must acknowledge the limitations on the Crown in controlling or directing economic outcomes, particularly in the early 20th century.

Location and layout

Issue 11.6 Did Rohe Pōtae Māori have adequate time and opportunity to consider the proposed layout of the townships?

Land protection

Issue 11.7 To what extent, if any, did the Crown provide mechanisms to ensure active protection of land and resources?

Issue 11.8 How effective and practical were protection mechanisms implemented by the Crown and its agencies in ensuring Rohe Pōtae Māori retained land sufficient for present and future needs?

688. These issues are grouped together as they are all directed at the question of the layout of native townships, and provision for owner interests.

689. The Crown's preliminary position is that it took reasonable steps to ensure that the Māori owners of township lands had real input into the layout of native townships, including the location of native allotments for owner occupation.

690. The Native Townships Act 1895 provided for Māori input into the layout of the townships in a number of ways, including provision for:
- 690.1 The Surveyor-General to set aside native allotments based upon the representation of Māori (section 6);
 - 690.2 The requirement to include in native allotments all burial grounds and buildings occupied by Māori;
 - 690.3 Consultation with Māori in the selection of native allotments (section 7); and
 - 690.4 The proposed layout plan to be displayed for two months, allowing Māori to object to it, and have their objections determined by the Native Land Court (section 9).
691. The Native and Māori Land Laws Amendment Act 1902 provided expressly for Māori input into the layout of townships by providing for parties to be heard in relation to the layout of a township (section 10(b)). Regulations made in 1903 provided for objections to be made to the relevant Māori Land Council. The Council had the power to direct the survey plan to be amended where this was required.⁴⁰⁴
692. The Native Townships Amendment Act 1903 amended the 1895 Act to allow the layout and purposes of native township sections to be varied to correct (amongst other things) errors where Māori burial grounds or occupied buildings may not have been initially included in native allotments, or where Māori wishes may not have been adequately taken into account in the original layout. Under the provisions of the 1902 Act, the layout of a township could already be varied by the Crown.⁴⁰⁵

⁴⁰⁴ Regulations 2 to 5, New Zealand Gazette 1903, February 26, p 617.

⁴⁰⁵ Native and Māori Land Laws Amendment Act 1902, s 12.

693. The Crown accepts, however, that the ultimate effectiveness or otherwise of the above legislative measures in protecting Māori land and resources (to the extent that such lands and resources were sought to be retained) are matters for further inquiry.
694. In terms of the processes leading up to the establishment of the Rohe Pōtae townships, the evidence suggests that owners were given the opportunity to consider and have input into the layout of all the townships within this inquiry district. The townships discussed in the evidence were all subject to a public notification and objections process.⁴⁰⁶ It should be noted in this respect that in the case of the townships overseen by the local Māori Land Council, this notification and objections process concerning the layout of the township was overseen by a Council with strong local Māori representation.⁴⁰⁷
695. Whether these processes were adequate is a matter for further inquiry. In this regard, however, the Crown wishes to emphasise that the Māori Land Councils/Boards were not the Crown, and their acts or omissions were not acts or omissions of the Crown.

Management and administration

- Issue 11.9** Did the Crown have a duty to consult with Rohe Pōtae Māori before passing legislation that changed the management structure of native townships in Rohe Pōtae? If so, what was the nature of the consultation?
- Issue 11.10** To what extent, if at all, did the Crown have a duty to ensure that Rohe Pōtae Māori participated in the management and control of Native Townships?
- Issue 11.11** How did the Crown's statutory framework empower the administrative entities regarding the management of native townships?
- Issue 11.12** Did the Crown facilitate the sale of native township lands to the

⁴⁰⁶ See for example Basset and Kay, pp 48, 52 and 56 (in relation to Parawai Township), 74 and 77 to 79 (Karewa), 84 to 85 (Te Puru), 105 (Te Kuiti) and 117 (Otorohanga).

⁴⁰⁷ See for example, the discussion in Basset and Kay in respect of Otorohanga, pp 93 to 94, and 117 to 127.

detriment of Rohe Pōtae Māori?**Issue 11.13 Did the imposition of survey costs of future native township land contribute to unnecessary delays in distributing monies to the Māori land owners?**

696. The Crown apprehends that the major issue here for claimants is the change in 1905/1906 from Māori Land Councils, established under the Māori Lands Administration Act 1900, to Māori Land Boards established under the Māori Land Administration Act 1905.
697. Under the Māori Lands Administration Act 1900, Māori Land Councils comprised a Crown-appointed president, two or three Crown-appointed members (including one Māori) and two or three Māori members elected by Māori.⁴⁰⁸ In the Rōhe Pōtae, five of the six Council members were Māori, the two government appointees to the Council both being prominent Māori leaders.⁴⁰⁹ Māori Land Boards replaced Māori Land Councils pursuant to section 2 of the Māori Land Settlement Act 1905, and comprised three Crown-appointed members, including one Māori member. In the Rohe Pōtae, the Council was proclaimed a Board on 6 March 1906.⁴¹⁰ In 1913, the constitution of Māori Land Boards was changed to comprise the Judge and the Registrar of the relevant Native Land Court District.⁴¹¹
698. The Crown's general position is that in inquiring into and assessing these matters it is important not to over-emphasise the effect of changes to the composition of the Councils/Boards. First, it must be borne in mind that the Land Boards had the same prime obligation to act in the interests of owners as the predecessor Councils. It cannot be assumed, simply because the Board may have had fewer Māori members than the Council, that the Board members would somehow have disregarded their prime duty. A

⁴⁰⁸ Māori Lands Administration Act 1900, s 6.

⁴⁰⁹ Basset and Kay, p 138

⁴¹⁰ Basset and Kay, p 139.

⁴¹¹ Native Land Amendment 1913.

preliminary scan of the evidence of the operation of the Board does not suggest that it was in any way abdicating its responsibility to owners.⁴¹²

699. Second, if anything is to be made of the Māori-European ratio on the Council/Board, it should be noted that the key structural decisions in relation to the layout of the townships in the Rohe Pōtae were in fact made when five out of the six Council members were Māori. This included the advertising, laying-out and leasing of townships (including hearing applications from owners for reserves⁴¹³ and ordering the removal of existing buildings).⁴¹⁴
700. In relation to specific issues raised concerning management of townships, the Crown's position is that it was not under a duty to consult with owners prior to legislation changing the management structure of native townships. There is no absolute Treaty obligation to consult, although consultation may be required depending on the circumstances. Importantly, though, expectations of consultation were probably lower in the past than they are today. Further, the Crown does not accept that it was under a duty to "ensure" that Rohe Pōtae Māori participated in the management and control of native townships.
701. In relation to sales of native township lands, there are likely to have been various reasons why Rohe Pōtae Māori chose to sell township lands. Whether any particular sales of native township lands breached the standards expected of the Crown under the Treaty are matters appropriate for further inquiry.
702. In relation to survey costs, the Crown's position is that it was reasonable for Māori land that was intended to secure the benefits of the survey to have the associated costs offset against the revenue

⁴¹² See for example Basset and Kay, pp 205 and 208, discussing pressure from lessees for free-holding of township leases.

⁴¹³ Basset and Kay, p 117.

⁴¹⁴ Basset and Kay, p 129.

from the land. There would be an issue only if the survey charges were excessive by the standards of the day. Whether or not survey costs were a burden depended to a large extent on the rental income that was being generated. In this respect it must be remembered that the Treaty standard is one of reasonableness and not perfection; the success or failure of the townships (and returns to owners) depended on a sufficient number of settlers ultimately deciding to take up leases on terms they found acceptable. This could not be easily predicted, and or controlled by the Crown.

Compulsory Acquisition

Issue 11.14 To what extent, if at all, was it reasonable for the Crown to take native township land for public works and reserves?

Issue 11.15 What compensation, if any, did Rohe Pōtae Māori receive for land that was compulsorily acquired? Was this compensation adequate?

Issue 11.16 Was it reasonable for Rohe Pōtae Māori to expect the Crown to return native township lands taken for public reserves when the land was no longer required for that purpose?

703. The Crown's position is that it was reasonable for native township land to be acquired for public works and reserves. Public works were clearly essential to the development of townships and it was to be expected that Māori as well as non-Māori would have benefitted from such works.

704. As set out in the section of this Statement of Position and Concessions dealing specifically with public works takings, whether particular takings were Treaty compliant falls to be assessed on a case by case basis. As in previous inquiries, the Crown anticipates that particular acquisitions within native township areas will need to be assessed as claimants raise particular issues of concern to them as this inquiry progresses.

705. In relation to compensation, the Crown accepts that where land was set aside as public reserves or roads upon the initial declaration of a native township under the Native Townships Act 1895, the

legislation did not provide for compensation to be paid. One explanation for this is that public funds were expended in developing the areas for the purposes of the township, and that the original Māori owners benefitted from use of these areas themselves and through the likely increase in rental received on township allotments that also benefitted from the areas. The Crown accepts that an issue for inquiry is whether it was reasonable in the context of the time that Māori should not also have been entitled to direct financial compensation for the laying out of such roads and reserves.

706. The Crown's understanding is that all other compulsory acquisitions (after the initial declaration of the townships) would have occurred under the provisions of the prevailing public works legislation. Again, particular acquisitions would need to be assessed on a case by case basis. It cannot be assumed that simply because there is no direct evidence of compensation having been paid, that compensation was not in fact paid. However, if on inquiry it is established that compensation was due but not paid, the Crown accepts that, depending on the circumstances, it may have breached the Treaty of Waitangi and its principles. The Crown notes that it is not aware of any such instances.

707. In relation to land taken for one purpose then subsequently used for another, the Crown's position is that it is acceptable for land taken under public works legislation for specific purposes to be used later for another purpose, if the land was later needed for that other purpose.

Township leases

Issue 11.17 Did the Crown have a duty to consult with Rohe Pōtae Māori owners regarding leases within the townships?

Issue 11.18 Were perpetual leases consistent with Treaty principles?

708. Making township lands available for leasing was central to the whole concept of native townships. It was thought that leasing would both

facilitate settlement and benefit the Māori owners by retaining the land in Māori ownership while generating economic returns through a regular rental stream. It is clear that Rohe Pōtae Māori were open to the concept of leasing their lands and had done so on an informal basis before the formalisation of native townships. This occurred, for example, at Otorohanga and Te Kuiti.⁴¹⁵

709. In relation to the terms of native township leases, there is some question as to whether the relevant legislation originally contemplated perpetual leases. However it appears that legislative amendments were gradually made to allow recurring (or perpetual) rights of renewal for native township leases.⁴¹⁶
710. The Crown does not accept that it was under a duty to consult with owners before it proposed legislation governing lease terms and conditions; there is no absolute Treaty obligation to consult. Nor does the Crown accept that allowing for perpetual leasing was in itself necessarily a breach of the Treaty or its principles as claimants maintain.
711. In order to attract lessees to take up township leases, it was necessary to make lease terms sufficiently attractive, particularly as it was generally expected that lessees would undertake works on leased lands to provide basic infrastructure for settlement. It was clearly in the interests of Māori leaseholders that lands were leased so as to provide the expected income stream, and the Crown notes that in other inquiries it has been heavily criticised where township lands did not attract lessee investment or leases were subsequently abandoned. Perpetual leases incentivised lessees to continue to lease and invest in the land. In this way, they were intended to guarantee

⁴¹⁵ Basset and Kay, p 89.

⁴¹⁶ The Native Townships Act 1895 provided for an initial lease term of 21 years and for “renewals from time to time for a period of up to 21 years.” It is unclear from the drafting of this provision whether it was intended to permit renewals of up to 21 years each, or renewals totalling up to 21 years in duration. The 1903 Regulations specifying the permitted terms of leases under the 1902 Act were also unclear on this point.

a more secure and ongoing rental income and ensure the land under lease was developed. The Stout-Ngata Commission in fact specifically recommended that perpetual leases be provided in Rohe Pōtae townships.⁴¹⁷ The reasonableness of perpetual leases must be assessed in this context.

⁴¹⁷ AJHR 1907 G-1b p 9.

TWENTIETH CENTURY MĀORI LAND ADMINISTRATION AND DEVELOPMENT

Did the Crown breach Te Tiriti o Waitangi through the introduction, implementation, and/or the operation of the consolidation schemes in Te Rohe Pōtae?

Introduction

712. Land consolidation, as developed in the Rohe Pōtae, occurred in the context of a wide vision of Apirana Ngata for the retention and development of Māori land. Initially consolidation schemes were seen as a precursor to development, and many cases they were when owners were able to use their consolidated titles to develop workable farms. However, where the large group schemes were concerned the preliminary step of consolidation was quickly abandoned so development schemes could be implemented quickly.

713. Overall, the Crown views consolidation as a remedial step and Treaty consistent. The Maniapoto consolidation schemes avoided many of the pitfalls of other schemes, and there was limited protest. It seems to have been accepted that in the context of the Great Depression and World War Two there were significant impediments to completion. There are several issues where further analysis and evidence is needed to identify the real effects that delays in implementation had on the owners of the schemes.

Consolidation

Issue 12.1 What was the nature and extent of the land consolidation schemes in Te Rohe Pōtae?

714. Part VII of the Native Land Act 1909 (sections 124 – 132) provided for exchanges of land, and Apirana Ngata secured specific legislative provision for Crown-aided land consolidation over Māori freehold land in this legislation (ss 130 – 132).⁴¹⁸ The 1909 Act also required

⁴¹⁸ The amendments relating to consolidation schemes derived in large part from the recommendations of the Stout Ngata Report, Royal Commission into Māori Land. Part VII

the Native Land Court to avoid the subdivision of land into parcels unsuitable for separate ownership or occupation (s 118).

715. Consolidation of land interests was provided for under Māori land legislation in a number of different ways:

715.1 Provision was made for land exchange as far back as 1862 by section 17 of the Native Land Act 1862, and in subsequent legislation from 1894, including Part VII, sections 155 – 160, of the Native Land Act 1931.⁴¹⁹ Provision for exchange has been maintained in Māori land legislation though to the present day.⁴²⁰

715.2 Section 522 of the Native Land Act 1931 provided the Native Minister with powers to encourage better settlement and effective use of Māori owned land or land owned and occupied by Māori. The powers included the power to direct works to be undertaken on the land and the provision of funds to Māori to assist with farming.⁴²¹

715.3 Incorporation: the Native Land Court Act 1894 allowed blocks of land to be incorporated if a majority of owners consented, and the Crown had not acquired a right or interest in those blocks. The Native Land Act 1909 provided for all incorporations to be dealt with under Part XVIII of the Act.

of the Native Land Act 1909 was amended several times prior to the first large group consolidation scheme in the Rohe Pōtae to make better provision for effective consolidation.

⁴¹⁹ Native Land Court Act 1886; Part V, ss 44 – 45 Native Land Court Act 1894; Part VII, ss 124 – 129 Native Land Act 1909.

⁴²⁰ Part XVII, ss 187 – 192 Maori Affairs Act 1953; ss 310 – 314 Te Ture Whenua Māori Act 1993.

⁴²¹ This power was continued in the Maori Affairs Act 1953, which at s 327 states its main purpose is to “promote the occupation of Māori freehold land by Māoris and the use of such land by Māoris for farming purposes”.

- 715.4 Section 317 of the Native Land Act 1909 gave the Native Land Court the power to incorporate a group of five or more owners in common of Native freehold land.⁴²²
- 715.5 Trusts: the Native Purposes Act 1943 provided for the Court to declare trusts for Māori-owned land and Crown land reserved for the benefit of Māori.⁴²³
- 715.6 Amalgamation of land pursuant to section 435 of the Māori Affairs Act 1953.
716. In the Rohe Pōtae, large scale group consolidation pursuant to section 130 of the Native Land Court Act 1909⁴²⁴ started with the Native Minister directing the Native Land Court to prepare a consolidation scheme on 23 March 1928:⁴²⁵
- 716.1 This resulted in the King Country consolidation scheme, which by September 1929 had been re-named the Maniapoto consolidation scheme, following the exclusion of 20,000 acres belonging to Ngāti Tuwharetoa.⁴²⁶
- 716.2 The Maniapoto consolidation scheme took in the counties of Kawhia, Waitomo, Ohura, Otorohanga, and part of Taumarunui, as well as the Native Townships of Te Kuiti

⁴²² Powers of incorporation were also continued in s 269 of the Maori Affairs Act 1953 and s 247 of Te Ture Whenua Māori Act Land Act 1993.

⁴²³ Maori Affairs Act 1953, s 438 and Te Ture Whenua Māori Act 1993, s 211.

⁴²⁴ Sections 161 – 168 of the Native Land Act 1931 re-enacted the consolidation provisions of the Native Land Act 1909, as substituted by ss 6 – 8 of the Native Land Amendment and Native Land Claims Adjustment Act, 1923, and subsequent amending legislation: ss 5 – 7 of the Native Land Amendment and Native Land Claims Adjustment Act, 1924, s 7 of the Native Land Amendment and Native Land Claims Adjustment Act, 1925, s 4 of the Native Land Amendment Act and Native Land Claims Adjustment Act, 1926, ss 22 – 25 Native Land Amendment Act and Native Land Claims Adjustment Act, 1927, ss 9 – 11 of the Native Land Amendment Act and Native Land Claims Adjustment Act, 1928, and s 27 of the Native Land Amendment Act and Native Land Claims Adjustment Act, 1929. Consolidation schemes were also provided for in ss of the Maori Affairs Act 1953.

⁴²⁵ This was pursuant to s 6 of the Native Land Amendment Act and Native Land Claims Adjustment Act 1923.

⁴²⁶ Dr T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, p 63.

and Taumarunui.⁴²⁷ The estimated 40,000 acres held under 2,500 titles had been divided into four divisions and 26 series; namely, Waitomo (13 series); Otorohanga (eight series); Kawhia (three series); and Hauaroa (two series).⁴²⁸

716.3 Portions of the Maniapoto consolidation scheme are sometime referred to as a consolidation under their block name: for example, the Hauturu East consolidation, where the consolidated blocks were re-named Waitomo A and Te Kawa A.⁴²⁹

717. Exchange of land separate from the large scale group consolidation also occurred over time:

717.1 The exchange provisions of Part VII of the Native Land Act 1909 were used on occasion in Rohe Pōtae.⁴³⁰ The categories of land that could be exchanged were extended in 1913 and 1919 in relation to consolidation schemes,⁴³¹ and were to remain in Māori land legislation over time.

717.2 There are a number of examples of family exchanges under the Native Land Act 1931 provided in the evidence before this inquiry,⁴³² though the evidence available does not identify the full extent of these types of exchange.

⁴²⁷ Dr T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, pp 72 – 73.

⁴²⁸ Dr T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, p 64.

⁴²⁹ Dr T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, p 80, fn 189.

⁴³⁰ Chapter 5 Consolidation and Development Schemes in the Rohe Pōtae, “Rangahaua Whanui District Report 8”, p 92, footnote 92 provides the examples of exchanges in Taharoa A block in 1910, and Ohura South in 1911.

⁴³¹ Section 63, Native Land Amendment Act 1913 and s 3, Native Land Amendment and Native Land Claims Adjustment Act 1919.

⁴³² Dr T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, pp 105 – 107.

717.3 There is also mention in the evidence of other types of consolidation. These appear to be associated with private efforts at consolidation of land interests or parts of the Maniapoto consolidated scheme that are later incorporated into development schemes. A clear picture of the extent of consolidation prior to development is not shown in the research available. For example, Aotearoa,⁴³³ Mahoenui and Moerangi,⁴³⁴ and Waimiha.⁴³⁵

718. Excluding consolidation that later occurred in the context of development schemes, the Maniapoto consolidation scheme involved some 86,000 acres of land subject to consolidation.⁴³⁶ It is not clear from the evidence how many consolidation units and how many acres were involved at the end of the consolidation period. This is a complex task especially because of the inter-relationship with later development schemes, and incorporations and trusts.

Issue 12.2 What were the factors underlying the Crown’s decision to implement consolidation in Te Rohe Pōtae?

719. In general terms, the factors underlying the Crown’s decision to implement consolidation in the Rohe Pōtae were:

719.1 Large amounts of Māori land was leased in the Rohe Pōtae, and many leases of Crown and Māori land were abandoned during the 1921 – 22 recession. Local bodies then experienced difficulties collecting rates on the land from the Māori owners. Rohe Pōtae Māori argued against payment of rates because they had donated land for roads

⁴³³ Dr T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, p 270.

⁴³⁴ Dr T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, p 129 – 130.

⁴³⁵ Dr T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, p 403.

⁴³⁶ Dr T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, p 73. The figure is calculated from the total acreage of the confirmed instalments set out in Table 2.3. Instalments, Maniapoto Consolidation Scheme, 1930 to 1941.

and railways with no compensation. This then led to local bodies putting pressure on the Crown to take on Māori land with unpaid rates, and throw the land open for settlement.⁴³⁷

719.2 Apirana Ngata had no appetite for further alienation of Māori land, and had already been cooperating with Native Minister Gordon Coates to free up Māori land from outstanding rates demands, and provide access to development funds. As part of this approach, commissions were set up to investigate the development of Māori land by Māori.⁴³⁸

719.3 Meetings in August 1927 with local bodies and leaders from the Rohe Pōtae led to the Crown promoting a legislated solution to the issues of unpaid rates: the Native Land Amendment and Native Land Claims Adjustment Act 1927 containing measures to assist further consolidation.⁴³⁹

Issue 12.3 What were the initial aims of the consolidation schemes? Were these aims consistent with Te Tiriti o Waitangi?

720. The key aims of consolidation schemes as provided for in the Native Land Act 1909 were to define interests, provide clear titles, and thus enable owners to settle, develop, sell or lease these consolidated areas.⁴⁴⁰

⁴³⁷ Chapter 5 Consolidation and Development Schemes in the Rohe Pōtae, Rangahaua Whanui District Report 8, pp 94 -101; see also Dr T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, p 154.

⁴³⁸ Dr A Gould, “Māori Land Development Schemes General Overview, Circa 1920 – 1993”, An overview report commissioned by the Crown Forestry Trust, 30 September 2004, p 32.

⁴³⁹ Sections 23 – 26 dealing with the purchase of European land for consolidation, vesting of Māori land in the Crown, enabling rates to be liquidated, and providing powers for the Court or relevant Māori Land Board to inquire into and adjust any errors in rates claims.

⁴⁴⁰ L Campbell, “National Overview on Land Consolidation Schemes 1909 – 1931”, a report commissioned by the Crown Forestry Rental Trust, June 1998, p 41.

721. Evidence on the record of inquiry poses the following aims. Some aims are posed as the following issues by Dr Hearn’s research report:
- 721.1 Did consolidation ‘individualise’ Māori land ownership?
- 721.2 Did consolidation create holdings of a size sufficient for commercial purposes?
- 721.3 Did consolidation bring an end to partitioning and the fragmentation of ownership?
- 721.4 Did consolidation encourage Māori to retain their lands?⁴⁴¹
722. These issues are helpful, but put an extra emphasis on individualisation as an object in itself rather than title clarity, and do not fully reflect the overarching objective of ensuring retention of Māori land for the purposes of settlement, development and utilisation.
723. To illustrate the issues, one of the reasons for creating the Māori Trust Office was to make finance available to Māori for farming; the ordinary lending institutions rarely on Māori securities. A consolidation drive commenced on the East Coast for the purposes of lining up the titles so that Māori could get single titles, or so that the ownership of lands could be so arranged as to enable incorporations to be initiated, finance being provided by the Māori Trust Office. Consolidation was intended primarily to make Māori land attractive to mortgage finance, either privately or from State sources.⁴⁴²
724. The aims of consolidation were remedial in nature and Treaty consistent.

⁴⁴¹ Dr T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, p 154.

⁴⁴² Dr A Gould, “Māori Land Development Schemes General Overview, Circa 1920 – 1993”, An overview report commissioned by the Crown Forestry Trust, 30 September 2004, p 37.

Issue 12.4 Did these aims change over time and, if so, what was the nature of these changes? Were any changes consistent with Te Tiriti o Waitangi?

725. The general aims of the consolidation schemes did not change significantly over the course of time. They were to aid development of Māori land, and were quickly overtaken by the quickening pace of land development generally.
726. While initially the intention of the scheme was to consolidate land titles before entering the development phase, at a relatively early point it was recognized that this would be a lengthy process and it was important to get land consolidation underway.
727. Different mechanisms for title simplification were introduced over time as an alternative to, and in substitution for, land consolidation.
728. Consolidation as a policy was brought to a close in June 1953,⁴⁴³ and formally abandoned by the time of enactment of the Māori Affairs Amendment Act 1974.

Issue 12.5 Were any of the consolidation schemes within Te Rohe Pōtae successful? By which it is meant, were the following criteria met:

- (a) **The Crown consulted widely and effectively with all Māori owners;**
- (b) **The Crown fully explained the risks and benefits of consolidation to the owners of land included in the consolidation scheme;**
- (c) **The Crown did not force any Māori to partake in a consolidation scheme;**
- (d) **The Crown undertook consolidation in accordance with its stated aims for the programme; and**
- (e) **Consolidation was completed in a timely manner?**

⁴⁴³ Dr T J Hearn, "Land titles, land development, and returned soldier settlement in Te Rohe Pōtae" (2009), Wai 898, A69, p 220.

729. As the research available on the record of inquiry demonstrates it is extremely difficult to make a full assessment of the success, or otherwise, of the Maniapoto consolidation schemes in the Rohe Pōtae. After the initiation of the scheme, the Great Depression following on the recession of 1921 – 1922 placed significant impediments in the way of success.
730. The set of criteria listed above cannot be exhaustive or relevant in all cases. Apart from the economic crisis affecting New Zealand, there were significant problems to overcome in the establishment of a consolidation scheme that were ultimately resolved in nearly all cases.
731. Key criteria for measuring success are whether the original aims of consolidation were met:
- 731.1 Was there greater retention of land as a result of the schemes? The Crown considers there was. Local authorities were seeking to have the Crown assume land for resettlement in order to pay rates. Instead, the Crown, on behalf of Rohe Pōtae Māori negotiated significant reductions in costs; the Crown also conducted the necessary negotiations to significantly reduce survey debt, and prevent interest being charged on that debt for some 10 years. While some debt remained, much less land was utilised to pay these costs.
- 731.2 Did the Maniapoto consolidation scheme and subsequent development of those lands result in greater development and utilization of lands within that scheme? There is insufficient information available to conduct a full assessment of the benefits and disadvantages to land owners.
732. The following pleading will focus on the Maniapoto consolidation scheme. A full and well-considered response to the following

questions cannot be made as the research available on the record has not provided the detail necessary to make this assessment.⁴⁴⁴

Consultation

733. There was significant consultation with Rohe Pōtae Māori before the instigation of the consolidation scheme and during the course of giving effect to the scheme:

733.1 Meetings in August 1927 with local bodies and leaders from the Rohe Pōtae led to the Crown legislating a solution to the issues of unpaid rates: The Native Land Amendment and the Native Land Claims Adjustment Act 1927 contained measures to further assist consolidation.

733.2 The Commission work began in April 1928 with the first meeting with Ngāti Maniapoto in Te Tokanganui a Noho at Te Kuiti. The Commission discussed the proposal for the Crown to pay heavily discounted unpaid rates to councils with later reimbursement in land. The Crown was to similarly heavily discount repayment of survey liens – the balance of £5,000 to be paid in land. The commission sought the mandate of the meeting for these proposals on the proviso that consolidation be effected.

733.3 Pei Te Hurinui Jones, the officer in charge of the Maniapoto consolidation scheme, and his brother Michael Rotohiko Jones worked closely and effectively with the Māori owners to put the scheme into effect despite resourcing issues, and being diverted to work on development schemes in 1932.⁴⁴⁵ Ngata favoured the retention and strengthening of traditional leadership

⁴⁴⁴ Dr T J Hearn “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, pp 108 and 154 – 156. These are examples of further investigation needed to identify the costs associated with the delays in completing the Maniapoto consolidation scheme, and the difficulty of drawing conclusions on the evidence available.

⁴⁴⁵ L. Campbell, “National Overview on Land Consolidation Schemes 1909 – 1931”, a report commissioned by the Crown Forestry Rental Trust, June 1998, p 41.

structures and this seems to have been an approach that was followed also during the consolidation phase.⁴⁴⁶

Risks and Benefits

734. There is very little evidence on the record of whether advice was tendered on the risks and benefits of consolidation. To a large extent consolidation was a new policy, remaining somewhat experimental as to scale, and the potential risks are unlikely to have been fully known in the early stages after limited early experimentation.

Forced Participation

735. There is no evidence available to suggest there was forced participation in the Maniapoto consolidation scheme.

Implementing the Aims

736. Apart from macro-economic factors, the key impediment to consolidation appears to have been delays around potentially costly work such as new surveys and agreements over the final form of the agreement to reduce survey debt. Over time both these issues were addressed and consolidation was completed.

Timely completion

737. Given the formidable range of difficulties in bringing the Maniapoto consolidation scheme into effect,⁴⁴⁷ including staff being moved to development duties, the work of consolidation proceeded as promptly as possible in the circumstances:⁴⁴⁸

⁴⁴⁶ Dr A Gould, “Māori Land Development Schemes General Overview, Circa 1920 – 1993”, An overview report commissioned by the Crown Forestry Trust, 30 September 2004, p 137.

⁴⁴⁷ Dr T J Hearn “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, pp 108 and 154 – 156. These are examples of further investigation needed to identify the costs associated with the delays in completing the Maniapoto consolidation scheme, and the difficulty of drawing conclusions on the evidence available.

⁴⁴⁸ Dr T J Hearn “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, pp 45 – 47, 52 – 53, 64 – 66, 87 – 88, 101 – 103; See also the correspondence of the Consolidation Officer, Auckland, with Sir Apirana Ngata, the Native Minister, the Under Secretary of Native Affairs, and the Registrar of the Native Land Court, in Archives New Zealand, Wellington MA 1 558 29/3/1 Part 1. Supporting Documents, Volume 9, pp .3-224.

737.1 The first, second and third instalments of the scheme were confirmed by November 1931, the fourth by December 1933, the fifth, sixth and seventh by October 1936, and the eighth in June 1941.⁴⁴⁹ While there were still some outstanding work at the stage of confirmation and formal orders were not made until later, it appears that this was sufficient progress to allow the work of development to proceed.

737.2 Delays to confirmation and final orders arose when there were disputes within government; concerns about the costs of completing consolidation; when staff were moved to development duties; and, during World War Two.

737.3 The Maniapoto consolidation scheme seems to have been formally completed at some time before April 1949 – the Registrar of the Court noting “The consolidation schemes in the King Country did not as a rule interfere with the boundaries of the blocks and no attempt was made to re-subdivide the country, and towards the end of Judge MacCormick’s term of office he stipulated that that those schemes were to be completed and consolidation officers were to go no further with them, with the result that Mr Jones drew up the whole of the orders and they were issued and put on the files and the older orders cancelled”.⁴⁵⁰

738. There is an issue about the impact of delays in completing the Maniapoto consolidation scheme on Rohe Pōtae Māori:

⁴⁴⁹ Dr T J Hearn “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, Table 2.3. Instalments, Maniapoto Consolidation Scheme, 1930 to 1941, p 73.

⁴⁵⁰ Dr T J Hearn “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, p 111.

738.1 Incomplete consolidation proceedings were a significant source of concern to occupiers, generating uncertainty, and potentially acting as a disincentive to investment because of the risk of loss.⁴⁵¹ It is not clear how this uncertainty was addressed or ameliorated by the Crown though there are indications that occupiers were prepared to proceed on the explanation of the consolidation officer.

738.2 Further research is needed to quantify the impact of such uncertainty.

Issue 12.6 Did the Crown introduce, implement, and impose consolidation, rather than allowing the owners to determine the use of the land, to further its own interests at the expense of Māori?

739. The Crown says that the steps taken to introduce and implement consolidation were not for the purpose of furthering its own interests at the expense of Māori. Rather, the Crown's intention was to provide a remedy for some of the negative results of the fragmentation of and succession to Māori land holdings. The Crown refers again to its response to issues 12.1 to 12.3.

740. It is suggested that the Crown benefitted through reimbursement in land for its expenditure, and payment in cash where monies were available from the Waikato-Maniapoto District Māori Land Board or other source.⁴⁵² However, this was simply reimbursement of Crown expenditure as part of the rates agreement, and payment of a portion of the accumulated survey fees without any interest payment. This was a prominent aspect of the original negotiations with Rohe Pōtae Māori at Te Tokanganui a Noho at Te Kuiti and part of the rationale behind the consolidation scheme. In addition, there were complaints about the quality of land allocated to the

⁴⁵¹ Dr T J Hearn "Land titles, land development, and returned soldier settlement in Te Rohe Pōtae", Wai 898, A69, pp 63 – 64.

⁴⁵² Dr T J Hearn "Land titles, land development, and returned soldier settlement in Te Rohe Pōtae", Wai 898, A69, pp 89 – 94.

Crown in this way. While ultimately some of the land may have been used by the Crown for other purposes, in a number of cases it was simply purchased by adjoining Māori owners.

741. The Crown did anticipate some indirect benefits but it is clear there was no motive of furthering the Crown's interests at the expense of Rohe Pōtae Māori.

Consultation

Issue 12.7 To what extent, if any, were Rohe Pōtae Māori consulted prior to the introduction of the consolidation schemes? Did the Crown effectively convey to Rohe Pōtae Māori the objectives and methodology of the consolidation schemes, and the implications in terms of land loss; such as to ensure that Rohe Pōtae Māori understood the potential effects of the consolidation schemes?

742. This issue is addressed in the Crown's response to issues 12.5 and 12.6.

Issue 12.8 What commitments did the Crown make to Rohe Pōtae Māori in respect of the consolidation schemes? Did the Crown meet these commitments? If not, why not?

743. There were very few commitments made by the Crown in respect of consolidation at the outset. It was advocated as a means to provide units that could then be developed with Crown assistance.

744. The Crown identified at the outset that there were a number of impediments to completing consolidation in a timely way in the context of the Maniapoto consolidation scheme. Issues such as the large number of titles, and issues with leases that were abandoned were not simple to remedy.

745. The expectation was that the Crown would complete consolidation prior to development schemes, but this objective was quickly abandoned due to the need to get development schemes underway.

Issue 12.9 To what extent, if any, were individual owners consulted prior to the inclusion of their land in a consolidation scheme?

746. The type of consultation pursued in respect of the Maniapoto consolidation scheme is addressed in the Crown's response to issue 12.5.
747. Rohe Pōtae land owners were consulted over consolidation proceedings and their agreement sought and gained. A query has been raised about whether they were advised that orders preventing private alienation would remain in place for an extended period of time.⁴⁵³ This issue arises from the delays in finalising the consolidation schemes in respect of all series. To some extent it was inherent in consolidation that there would be limits on private alienation given the objective of Māori settlement. Nevertheless, an issue for inquiry might be what impacts delays had in this regard.

Implementation

Issue 12.10 Which Crown bodies or representatives were responsible for the introduction, implementation, and/or operation of the consolidation schemes in Te Rohe Pōtae?

748. The following Crown Ministers, departments, and officials had roles in the introduction, implementation, and/or operation of consolidation schemes in the Rohe Pōtae:
- 748.1 The Native Minister;
 - 748.2 The Native Department;
 - 748.3 The Officer in Charge of the Consolidation Scheme;
 - 748.4 The Treasury;
 - 748.5 The Registrar of the Court; and,
 - 748.6 The Lands and Survey Department.

⁴⁵³ Dr T J Hearn "Land titles, land development, and returned soldier settlement in Te Rohe Pōtae", Wai 898, A69, pp 104 – 105.

749. In addition, the following people and non-Crown bodies had roles in the consolidation schemes in the Rohe Pōtae:
- 749.1 The owners of Native land in Te Rohe Pōtae that became subject to the consolidation scheme, and the occupants.
- 749.2 Before becoming Native Minister with the United Government, Apirana Ngata worked with the Native Minister of the Reform Government, then Prime Minister, Coates on consolidation schemes.
- 749.3 The Native Lands Consolidation Commission for the Rohe Pōtae consisting of Sir Apirana Ngata (chairman),⁴⁵⁴ Sir Maui Pomare,⁴⁵⁵ Tau Henare,⁴⁵⁶ Raumoa Balneavis,⁴⁵⁷ Pei Te Hurinui Jones,⁴⁵⁸ Darby,⁴⁵⁹ and Cahill.^{460/461}
- 749.4 The Native Land Court.
750. The Māori Land Boards and the Māori Trustee also had some peripheral involvement.
751. Although local bodies were keen to encourage consolidation because of the promise of an increased rates take they had no formal role in the schemes.

Issue 12.11 What impact did the intervention of these bodies have on achieving the overall aims of the consolidation schemes?

752. The evidence on the record sets out in some detail the various contributions of the ‘bodies’ specified in the Crown’s response to

⁴⁵⁴ Member for Eastern Māori in the Liberal the United Opposition.

⁴⁵⁵ Minister without portfolio in Cabinet, Reform Government.

⁴⁵⁶ Member for Northern Māori, Reform Government.

⁴⁵⁷ Private Secretary to the Native Minister.

⁴⁵⁸ Officer in charge of the King Country Consolidation Scheme.

⁴⁵⁹ Officer of the Department of Lands and Survey.

⁴⁶⁰ Officer of the Waikato-Maniapoto Māori Land Board.

⁴⁶¹ Chapter 5 Consolidation and Development Schemes in the Rohe Pōtae, Rangahaua Whanui District Report 8, p 102.

issue 12.10.⁴⁶² Whilst criticism may be directed at the action of some, they all appear to have been offering free and frank advice to those responsible for decision-making. In general, steps seem to have been taken to address most issues that arose. For example, there seems to have been little difficulty in releasing or withdrawing lands from the consolidation scheme when sufficient case was made, and the withdrawal did not undermine the object of the scheme.

Extent of Crown Benefit

Issue 12.12 How much land did the Crown acquire from Rohe Pōtae Māori by way of compensation for the cost of the consolidation schemes?

753. It is difficult from the research available on the Maniapoto consolidation scheme to identify the costs associated with consolidation.

754. The key costs to Māori were not directly attributable to consolidation:

754.1 Outstanding survey costs; and,

754.2 Rates.

755. In respect of survey costs:

755.1 In June 1939 the Minister of Lands approved the Native Land Court's recommendation under section 503 of the Native Land Act 1931 for remissions in the Waikato-Maniapoto District totalling £13,102 (being principal of £6,742 and interest of £6,361). That left the sum of £6,696 to be paid for in cash or in land.⁴⁶³

⁴⁶² Dr T J Hearn "Land titles, land development, and returned soldier settlement in Te Rohe Pōtae", Wai 898, A69, pp 74 – 85, and 113 – 117.

⁴⁶³ Dr T J Hearn "Land titles, land development, and returned soldier settlement in Te Rohe Pōtae", Wai 898, A69, p 94.

755.2 Although on several occasions the Department of Lands and Survey advocated the continued accrual of interest on survey charges and liens, this was not supported by the Native Department and the Treasury. The Treasury saw the consolidation schemes, along with the development fund that could be made available through the Māori Trustee and the Land Settlement Fund, as adequately repaid by the prospect of further lands coming under settlement. In the case of consolidation the key aim was settlement by Māori owners.

756. In respect of the costs directly attributable to the consolidation schemes there were potentially costs of additional surveys and Land Transfer fees before consolidation titles could be issued:

756.1 Following a number of attempts to resolve the issue of the potential costs for new surveys, in January 1839 Judge MacCormick advised the Under Secretary of the Native Department that the reason that 90 per cent of the estimated 600 consolidation orders involving the Rohe Pōtae lands had been left “inchoate” and unregistered was the prohibitive cost of survey as discussed with the Surveyor-General. He estimated the total cost of surveys and the necessary Land Transfer fees would probably run into the best part of £1,000.⁴⁶⁴

756.2 His solution was eventually to issue new orders largely without additional surveys.⁴⁶⁵

Issue 12.13 Had the Crown informed Rohe Pōtae Māori prior to the introduction of consolidation in the district that consolidation

⁴⁶⁴ Dr T J Hearn “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, pp 80 – 81, 97. Dr Hearn goes on to suggest that this estimate applied to one consolidation order out of approximately 575 (see pp 97 – 98 and footnote 245). The Crown notes that given the context the estimate is likely to be in respect of the total cost for completing the Maniapoto consolidation scheme by compilation plan or survey.

⁴⁶⁵ Dr T J Hearn “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, p 110.

would be yet another method employed by the Crown to further the alienation of land from Māori?

757. The Crown denies that alienation of land from Māori was an objective of the consolidations schemes. The Crown informed Māori of the objectives of the consolidation schemes in the following ways.
758. It was anticipated that land unsuitable for a particular scheme might be exchanged with other suitable Māori or European land.
759. It was also agreed that land would be charged with its share of the survey and rates compromise. In both those situations it was anticipated that these charges might be paid through the income generated by the land managed under consolidation.

Māori Attitudes Towards Consolidation

Issue 12.14 What was the response of Rohe Pōtae Māori to the consolidation schemes? How did the Crown respond to any protest against the schemes made by Rohe Pōtae Māori?

760. The evidence on the record of inquiry suggests Rohe Pōtae Māori embraced consolidation schemes, is clear by their participation, and at the same time there is very little evidence of opposition or protest. It is not evidence in all cases what the Crown's response was when issues were raised, and that might be a matter for further inquiry.

Issue 12.15 What was the Crown purpose in providing for amalgamation of titles in legislation?

761. Section 435 of the Māori Affairs Act 1953 made provision for the Māori Land Court to amalgamate titles of adjoining land where it was satisfied that "any continuous area of Māori freehold land comprising two or more areas held under separate titles could be more conveniently or economically worked or dealt with if it were held in common ownership under one title".

762. Similar provision was made under section 279 of the Māori Affairs Act 1953 for the amalgamation of bodies corporate with their consent.
763. The purpose of these and other provisions of the Māori Affairs Act 1953 was to address the problems associated with partitions, multiple succession orders, and uneconomic blocks of land that left Māori with small and scattered land interests, which could not or were not being utilised effectively.⁴⁶⁶
764. The government adopted policies designed to make Māori land ownership more streamlined (sometimes referred to as title simplification), and promote management structures that would facilitate decision making, alienations, and financial arrangements.⁴⁶⁷ The Māori Affairs Amendment Act 1967 gave staff of the Māori Land Court and the Māori Affairs Department wide powers to encourage the amalgamation of Māori land into larger units administered by trustees.⁴⁶⁸

Issue 12.16 To what extent were Māori notified or consulted about amalgamation applications?

765. The record of inquiry identifies limited and insufficient evidence of the extent that Māori were notified or consulted about amalgamation applications. Under the Māori Affairs Act 1953 the department of Māori Affairs was responsible for arranging meetings of owners, preparing submissions to the Board of Māori Affairs, and dealing

⁴⁶⁶ Report of the Royal Commission of Inquiry into the Māori Land Courts.

⁴⁶⁷ This followed several reports into the issues arising, the most prominent being the 1961 Hunn report and the 1965 Waetford and Prichard report. See T J Hearn “Land Titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, pp 139 – 147.

⁴⁶⁸ This legislation was controversial largely because it provided powers to compulsorily acquire uneconomic interests (by inserting s 151A of the Maori Affairs Act 1953) during the exercise of the Court’s jurisdiction in respect of partition, consolidation, and amalgamation. See Dr T J Hearn “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae”, Wai 898, A69, Section 10.8, 11.9, 11.13, 11.15, 12.12, 13.3, Table 10.10.

with applications for amalgamations.⁴⁶⁹ There is evidence that the owners' consent for amalgamation was sought in respect of development schemes:

- 765.1 The Hunn report records that the first stage of post-war development schemes involved the preparation of a proposal to bring land under the development provisions of the relevant Act, and the formal meeting of owners at which they were asked to agree to a number of conditions, and where relevant to agree to the amalgamation of all titles in the block or blocks concerned.⁴⁷⁰
- 765.2 On occasion development funds were made contingent on agreement to amalgamation.⁴⁷¹
- 765.3 Before an application for amalgamation was taken to the Native Land Court, several meetings of owners occurred,⁴⁷² and often more steps to check the owners' views if it appeared there was opposition to amalgamation.
- 765.4 The Whenuatapu-Ohinemoa land development scheme is an example of the processes followed. On the calling of a meeting of owners attended by 9 of 130 owners,⁴⁷³ there was some opposition to amalgamation of the Te Whenuatapu blocks. As a result all owners were contacted

⁴⁶⁹ Dr T J Hearn "Land titles, land development, and returned soldier settlement in Te Rohe Pōtae", Wai 898, A69, pp 350.

⁴⁷⁰ Dr T J Hearn "Land titles, land development, and returned soldier settlement in Te Rohe Pōtae", Wai 898, A69, p 361; J.K. Hunn, Report on the Department of Maori Affairs, 24 August 1960. Wellington, 1961, p 50, and AJHR G9, 1954, pp18 – 22.

⁴⁷¹ Dr T J Hearn "Land titles, land development, and returned soldier settlement in Te Rohe Pōtae", Wai 898, A69, pp 416 – 419. This occurred with the Waimiha development scheme with owners being asked to approve the amalgamation of 9 Whenuatapu blocks, including two blocks of Crown land.

⁴⁷² Examples in the evidence include the Waimiha and Troopers' Road and development schemes. Dr TJ Hearn, "Land titles, land development, and returned soldier settlement in Te Rohe Pōtae", Wai 898, A69, pp 416 – 419, and 426.

⁴⁷³ It is not clear whether these 9 owners represented a larger number of owners, or the extent of their ownership of the land in question.

for their views. The majority of owners by shareholding supported amalgamation, but in the case of three blocks the majority by shareholding opposed amalgamation. Another meeting of owners agreed to amalgamation and the application for amalgamation was made to the Māori Land Court in June 1966.⁴⁷⁴

Issue 12.17 To what extent were Māori objections taken into consideration by the Native Land Court?

766. There is insufficient evidence on the record of inquiry to judge the extent of Rohe Pōtae Māori objections to amalgamation, and how these may have been addressed or taken into consideration by the Māori Land Court.

767. One report of officials recommended taking away the right of appeal over amalgamation.

768. The Whenuatupu-Ohinemoa land development scheme is the one example provided where there was some opposition among the owners group during the changes to the Waimiha development scheme. This seems to have been addressed in a series of meetings, and by the time the proposed scheme was considered by the Court any previous issues seem to have been resolved.

Issue 12.18 To what extent did amalgamation applications and decisions take into account traditional ownership patterns?

Issue 12.19 To what extent did amalgamation applications and decisions take into account the value of traditional use and occupation of land?

Issue 12.20 How did amalgamations affect traditional ownership patterns and tangata whenua connections to the land?

769. These issues are not addressed in the research on the record of inquiry, and therefore the Crown has insufficient information to form a view.

⁴⁷⁴ Dr T J Hearn, "Land Titles, land development, and returned soldier settlement in Te Rohe Pōtae", Wai 898, A69, pp 416 – 419.

MĀORI LAND DEVELOPMENT SCHEMES

Did the Crown breach the principles of the Treaty of Waitangi through the introduction, implementation, and/or the operation of the Māori Land Development Schemes in Te Rohe Pōtae?

Introduction

Overview

770. The Māori Land Development Schemes in Rohe Pōtae (“the schemes”) were a success overall. Requisite prejudice, in terms of the Treaty of Waitangi Act 1975, has not been established on the pleadings and evidence reviewed to date so as to justify a Crown concession now that the claims to in this inquiry about the schemes are well-founded.
771. To the extent that conversion of uneconomic interests featured in the operation of the development schemes, the Crown concedes that this resulted in some Rohe Pōtae Māori being deprived of their tūrangawaewae, and was a breach of the Treaty of Waitangi and its principles.
772. The generic pleadings advance allegations and criticisms without for the most part even illustrative factual instances relating to particular schemes.⁴⁷⁵ To prove the issues raised are generic to the schemes in Rohe Pōtae requires comparative discussion of the facts of particular schemes rather than repetition of issues identified in Tribunal inquiries to date that relate to development schemes. In other words, was an experience so common that it became a characteristic of how development schemes were implemented by the Crown or on behalf of the Crown?
773. Several of the specific amended claims contain allegations about the establishment and operation of particular schemes that the Crown will respond to by questioning witnesses and via legal submissions.

⁴⁷⁵ Wai 898, 1.5.12.

Evaluation

774. Development schemes were conceived of as a bold step change. Despite the inevitable bureaucratisation of the schemes over time and evolution of policy goals they delivered that change. The schemes cannot now be fairly characterised as too little assistance provided too late. Evaluated now, the district-wide outcome of schemes was not prejudicial to Māori land owners.

Purpose

775. The schemes were a success in Rohe Pōtae at a district level measured against their purpose.

776. Development schemes were intended as assistance to increase the use of and return from selected Māori land for its owners and occupiers. The evidence and pleadings risks losing sight of this goal in criticising scattered elements of the schemes' design and administration.

777. The purpose was that undeveloped and underdeveloped Māori land would be developed for agriculture (principally pastoral farming). The Māori land asset base would be improved so it generated greater (and wherever possible commercial) returns for its owner-occupiers in the case of small schemes, the lessee occupiers and the lessors in the case of other small and medium sized schemes or the community of owners in the case of larger schemes.

778. For occupiers, the schemes would help to lift living standards for rural Māori.

779. For landowners, the schemes would generally mean the land would pay its own way and hopefully generate commercial returns meaning some earnings could be reinvested or distributed to owners.

780. The schemes also contributed to regional and national goals. They occurred at a time when it was reasonably assumed that New

Zealand's economic outputs would be increased as a result of further land being made into farms.

Finance was advanced on reasonable conditions

781. Development finance was made available by the Crown. Unsurprisingly, finance was advanced on conditions. These involved charging the land and surrendering incidents of control while development was undertaken. The impact of the loss of control varied significantly from smaller to larger schemes. The position of an owner occupier on a small farm is not comparable to larger communities of non-resident owners holding shares in large unoccupied blocks made subject to development.
782. Taken together with other pressures on the Māori land base in the twentieth century, along with shifting policy towards re-prioritising community interests in that land, the fact that individual owners of land within the schemes were not completely free to continue dealing with their land interests on an individuated basis while development occurred was not an unreasonable condition in return for development finance.
783. The Crown's provision of development finance through the schemes overcame difficulties faced by many owners of Māori land in accessing finance. The scale of financial assistance granted across development districts meant greater risks could be taken in committing finance to try and develop individual blocks of sub-optimal land than would have been economically viable if assessed singly.
784. The Crown regularly considered whether to write down or write-off debt when reviewing its capital expenditure before handing back control of scheme lands still carrying development debt.
785. Crown-sourced development finance was probably considerably less expensive for owners than private finance would have been if it were

available. Private finance would have required registered security interests which put at risk title to the land. Cost-free financial assistance was not a credible option.

Obtaining consent to undertake development

786. It is not accurate to allege that the Crown failed generally to consult in the establishment of the schemes.⁴⁷⁶
787. Was the consent of the owners obtained either at community level or individually? The answer to this question depends in part on the time period in which land was committed to development. Earlier established schemes involved community level engagement while the later period placed greater emphasis on individual owners.

Loss of control while development occurred

788. Did loss of control of land under development prejudice owners?
789. It is not accurate to allege generally that, while the schemes eventually became profitable enterprises during the period of development, Rohe Pōtae Māori were deprived of productive use and enjoyment of their whenua.⁴⁷⁷ It is necessary to take a longer-term view of whether or not the loss of control that actually occurred during the development phase was a reasonable measure in the circumstances, in order to be able to later return developed land to owner control.

Administration and management

790. Allegations about procedural inefficiencies and sub-optimal administration are made without showing that any such incidents led to prejudice ultimately for affected owners at the point at which scheme lands were released and returned to owners.⁴⁷⁸

⁴⁷⁶ Wai 898, 1.5.12 at 15.1.

⁴⁷⁷ Wai 898, 1.5.12 at 19.1.

⁴⁷⁸ Wai 898, 1.5.12 at 18.16-18.19.

791. The question that arises for the Tribunal is whether any administration and management inefficiencies caused prejudice to owners by increasing unreasonably the costs of development for scheme lands or by contributing materially to delay in completing development of scheme lands? Even if inefficient practices occurred in relation to particular schemes a subsequent question arises as to whether any resulting prejudice was ameliorated by subsequent decisions to write-off debt.

Managing debt levels and development costs

792. It is not accurate to allege that the loading of debt onto the schemes inhibited economic, social and cultural development and led to a relative decline in living standards as between Māori and Pākehā.⁴⁷⁹ Debt was used as a tool to progress development faster than land owners could achieve from their own resources by lifting economic outputs from land included in the schemes and using those outputs to pay for the improvements to the land.
793. Instead, the questions that arise in relation to debt and Rohe Pōtae land included in the schemes are:
- 793.1 Was the Crown reasonable in planning for and committing levels of development expenditure against land?
- 793.2 Did the Crown take unnecessary risks in attempting to develop for its owners some land for pastoral farming given the topography and profile of the land?
- 793.3 Was return of land delayed unreasonably because of high debt levels?
- 793.4 In what circumstances did the Crown write down or write-off debt?

Returning developed land to owners

794. Insufficient emphasis is given to the fact that the result of the schemes was that affected land was not alienated from Māori

⁴⁷⁹ Wai 898, 1.5.12 at 19.1.

ownership. In a number of situations a form of community ownership was restored to the land. The questions that arise in relation to the return of developed land are:

794.1 Were any schemes abandoned as not successful and land returned? If so, was the Crown at fault and what actual prejudice resulted to the owners?

794.2 Were owners' left with unreasonable governance and management challenges on return of land after development?

794.3 Were owners' views given effect to whether land should be returned as smaller farms for nominated occupiers or in larger blocks to incorporated communities of owners or to communities of beneficial owners whilst under the legal ownership of trustees?.

Issue 13.1 What was the nature and extent of the Māori Land Development schemes in Te Rohe Pōtae?

795. Schemes in Rohe Pōtae extended throughout the period in which development schemes operated.

796. The nature of the schemes in Rohe Pōtae was consistent generally with schemes elsewhere in New Zealand.

Issue 13.2 What were the factors underlying the Crown's decision to implement Māori Land Development Schemes in Te Rohe Pōtae?

797. The factors were the same as for elsewhere in New Zealand. Development schemes were intended as assistance to increase the use of and return from selected Māori land for its owners and occupiers.

Issue 13.3 What were the initial aims of the Māori Land Development schemes? Did these aims change over time and, if so, what was the nature of these changes? Were any of the Māori Land Development Schemes in Te Rohe Pōtae successful? By which

it is meant:

- (a) The Crown consulted the owners of any land to be included in a Māori Land Development Scheme;
- (b) The Crown clearly set out the potential risks and benefits of including land in a Māori Land Development Scheme;
- (c) The Crown did not include land in a development scheme without the consent of the owners of that land;
- (d) The owners, or people nominated by the owners, played an active role in the development of their land under a Māori Land Development Scheme;
- (e) The Crown provided farming and skills training for the owners of the land;
- (f) The land was returned to the owners within a timely manner, free from debt, and capable of producing sustainable economic returns.

798. The basic and initial aim of providing assistance to increase the use of and return from selected Māori land for its owners and occupiers remained constant.

799. Operational policy on land development changed over time as the Crown reviewed accumulated experience and as the scale and operation of the development assistance to schemes grew larger.

800. The criteria suggested as indicia of success overstate what the schemes could realistically deliver for the land's owners and occupiers. The schemes in Rohe Pōtae were successful because they led, on the whole, to the outcome of developed land being returned to the control of owners and occupiers. Such developed land was, on the whole, capable of producing greater economic returns than when it was committed to development.

Issue 13.4 Overall, how effective were the Māori Land Development Schemes in providing for the development of Māori Land in Te Rohe Pōtae?

801. The Crown's position is that the schemes were both effective and a success in Rohe Pōtae in providing for the development of Māori

land. No credible alternative existed. On the whole, the land made subject to schemes remained Māori land.

Consultation

Issue 13.5 To what extent, if any, were Rohe Pōtae Māori consulted prior to the introduction of the Māori Land Development schemes?

802. Native Minister Ngata toured and consulted with communities of Rohe Pōtae Māori about issues including greater development of Māori-owned land in what became the Māori land development schemes. In 1930 Ngata recorded the majority of owners in the first schemes established in the district were willing to subject their lands to the new scheme.

Issue 13.6 Did the Crown effectively convey to Rohe Pōtae Māori the objectives and methodology of the Māori Land Development schemes, and the implications in terms of land loss and loss of owner control over the land; such as to ensure that Rohe Pōtae Māori understood the potential effects of the Māori Land Development schemes?

803. The objectives, method and risks appear to have been communicated well on the whole on the basis of the evidence reviewed to date.

Issue 13.7 What commitments did the Crown make to Rohe Pōtae Māori in respect of the Māori Land Development schemes? Did the Crown meet these commitments? If not, why not?

804. The primary question is too large to answer in light of the evolving nature of the schemes and policy settings underpinning Crown support for the schemes. In summary, the Crown offered financial and technical assistance but did not guarantee outcomes for the schemes. In general, these commitments were met.

Issue 13.8 To what extent, if any, were individual owners consulted prior to the inclusion of their land in a Māori Land Development schemes?

805. Consultation practices changed over time towards greater consultation with individual owners in place of arrangements to

consult with communities of owners. In general, schemes initiated after 1949 followed processes to consult with individual owners.

Implementation

Issue 13.9 Which Crown bodies or representatives were responsible for the introduction, implementation, and/or operation of the Māori Land Development schemes in Te Rohe Pōtae?

806. The Department of Native/Māori Affairs was the main Crown body responsible for delivery of the schemes. At the closing period of the schemes the Iwi Transition Agency played a role.

807. The Department of Lands and Survey took a lesser role in scheme delivery.

808. The Board of Native/Māori Affairs was given a governance and management role as the scope and operation of the schemes expanded.

Issue 13.10 What impact did the intervention of these bodies have on achieving the overall aims of the Māori Land Development schemes?

809. The impact was in delivering the services and support under the schemes to achieve the overall aim of assistance to increase the use of and return from selected Māori land for its owners and occupiers.

Scheme Administration

Issue 13.11 To what extent, if any, were the owners of land included in a Māori Land Development Scheme consulted over, or in any way involved in, the ongoing administration of a scheme?

810. In general, owner involvement in schemes operations was not systematically provided for by the Crown until use of advisory or land development committees representing owners became routine. Up to that point, owners may have been involved as scheme workers and informal advisory committees of owners may have liaised with Crown officials. Owners remained free, however, throughout the

operation of the schemes to organise as they saw fit in dealing with the Crown in relation to the operation of any scheme.

Issue 13.12 **How effective was the Crown in forecasting the financial performance of an individual scheme, including the ongoing cost of the scheme and the debt required? How did this impact on the owners' ability to retain [sic regain?] possession of their land in a timely manner?**

811. There appears to be no evidence available to date in this inquiry addressing this question. At the individual scheme level, the reasonableness or otherwise of financial planning for the development phase needs to be assessed against changing market conditions for the land's produce, changes in science and technology (including mechanisation and labour inputs) for farm land development and actual accumulated experience where development on such a scale was previously untried.

Issue 13.13 **To what degree, if at all, did the Crown support and develop the ability and competency for Māori to sustainably manage these development schemes? What examples are there and how effective were they for Māori?**

812. The question applies to the selection and training of unit occupiers as well as the transition back to owner control of schemes being released from development for future corporate farming.

813. Unitised schemes involved a process of support from the Crown in establishing occupiers/lessees as farmers and managers of developed land. This took the form of human and financial resources to assist the unit to operate for a period once settled. In a number of cases committees of owners were formed to nominate or select unit occupiers.

814. Scheme lands returned to trustee ownership or incorporations of owners (corporate farming) involved, in a number of cases, a transition period ahead of a scheme's formal conclusion in which representatives of owners became involved in both negotiating the terms of a scheme's conclusion as well as scheme management.

Issue 13.14 Following the completion of Crown involvement, the land was returned to owners provided that there was a suitable management structure (either a trust or an incorporation) in place. To what extent did trusts and incorporations provide a solution to existing title difficulties and facilitate development by Māori of their lands?

815. Many schemes in the Rohe Pōtae were concluded and returned to the control of communities of owners as beneficial owners represented by trustees as legal owners or to incorporated communities of owners. Such communities of owners also regularly acquired interests in the land that either the Crown or the Māori Trustee owned. The land subject to the scheme might have been amalgamated or consolidated over the life of the scheme from previously partitioned interests for the purposes of aggregating a land area of sufficient scale for the farming enterprise undertaken in the course of the scheme's operation.

Environmental Impacts

Issue 13.15 What was the impact of the Māori Land Development Schemes on the environment of the rohe and on the wāhi tapu, urupā, and other taonga sites, of Rohe Pōtae Māori.

816. There appear to be no particular claims that the Crown's policies for schemes had a detrimental impact on the environment or taonga sites in breach of the principles of the Treaty and causing prejudice to claimants.⁴⁸⁰ Therefore, it appears the issue does not arise for inquiry in this district.

Māori Attitudes toward the Land Development Schemes

Issue 13.16 What was the response of Rohe Pōtae Māori to the Māori Land Development schemes? How did the Crown respond to any protest against the schemes made by Rohe Pōtae Māori?

817. There does not appear to have been general protest by Rohe Pōtae Māori as a collective to the schemes. Concerns raised by groups of owners about individual schemes were addressed in the context of

⁴⁸⁰ Wai 1993, p 4 (dating from 2008) contains a general allegation without particulars of any scheme.

those schemes. Policy innovation for development schemes over time took account of accumulated experience including owners' preferences.

Māori Trustee

Issue 13.17 What role did the Māori Trustee play in Te Rohe Pōtae and how did its operations, policies, and practices and statutory rules affect Māori?

Issue 13.18 Did the Crown engage Rohe Pōtae Māori in effective consultation prior to the introduction of the Māori Trustee to the region?

818. These two questions are grouped together on the basis that they frame very general issues broader than the establishment and operation of development schemes. This response is focussed on development schemes.

Issue 13.19 To what extent did the Māori Trustee consult with the owners of land vested in it?

819. This would be a question for the Māori Trustee to address. The Māori Trustee, acting as trustee, did not act on behalf of the Crown in terms of the Treaty of Waitangi Act 1975.

Issue 13.20 To what extent did legislation provide for the safeguarding of Māori land vested in the Māori Trustee? How effective was the Māori Trustee in fulfilling the duties as a trustee when dealing with the leasing of land vested in it?

820. The general framework of legislation governing the Māori Trustee along with principles of equity applicable to trustees was to act for the beneficiaries' interests, including land interests. The legislation can be addressed in legal submissions.

821. It would be for the Māori Trustee to address the effectiveness of current and predecessor office holders in fulfilling trustee obligations if this fell within the Tribunal's jurisdiction.

Issue 13.21 To what extent did legislation allow for the appropriation, by the Māori Trustee of money owed to beneficial owners of land vested in the Māori Trustee?

822. Presumably this question relates to use of trust funds to pay for trustee services. The legislation can be addressed in legal submissions.

Issue 13.22 To what extent did legislation and Crown regulations allow for the appropriation, by the Māori Trustee of money owed to beneficial owners through the combined interest earnings of the funds operated by the Māori Trustee?

823. The legislation, primary and subsidiary, can be addressed in legal submissions. To the extent that the regulatory environment might have modified normal equitable obligations on the Trustee to account for all sums earned from beneficiaries' funds and to allow provision for more general purposes, such a setting was not of itself an appropriation and was not necessarily in breach of the principles of the Treaty of Waitangi resulting in prejudice.

Conversion

Issue 13.23 Was the legislation enabling the acquisition of shares in Māori land through compulsory purchase, taking and live buying (conversion) by the Māori Trustee introduced in the best interests of Māori?

Issue 13.24 Was conversion carried out in the best interests of Māori?

Issue 13.25 What steps were taken to ensure that traditional ownership was maintained?

Issue 13.26 Why was compulsory conversion introduced?

Issue 13.27 To what extent was the Crown responsible through amalgamation and partition for the creation of uneconomic shares?

Issue 13.28 What was the economic benefit or loss to Māori of the uneconomic shares acquired and held by the Māori Trustee? How did the acquisition and resale of shares by the Trustee affect ownership on return of the shares to owners?

824. These questions are grouped together in advance of a single response.

825. Between 1953 and 1974 the Māori Trustee was empowered to compulsorily acquire any interests in Māori land which were deemed

to be uneconomic. A substantial number of such “uneconomic” interests were acquired in the Rohe Pōtae inquiry district, and some Māori were deprived of their last connections to ancestral lands.

826. The Crown acknowledges that between 1953 and 1974 the Māori Trustee was empowered to compulsorily acquire what were legally deemed to be “uneconomic interests”. This resulted in some Rohe Pōtae Māori being deprived of their tūrangawaewae, and was a breach of the Treaty of Waitangi and its principles.

Returned Soldier Settlement Scheme

Introduction

827. There appear to be no particular claims that the Crown’s policies for resettlement of soldiers resulted in breaches of the principles of the Treaty causing prejudice to claimants.⁴⁸¹ Therefore, it appears the issue does not arise for inquiry in this district. The Crown’s position on this issue generally is that the Crown made adequate and equal provision for the rehabilitation of Māori returned servicemen. Official policy expressly required equal treatment of Māori and Pākehā servicemen after both World Wars.

World War II

828. In order to satisfy the need for land for servicemen returning from World War II, the Servicemen’s Settlement and Land Sales Act 1943 allowed for the compulsory acquisition of land by the Minister for the settlement of discharged servicemen. If, in the opinion of a local Land Sales Committee, a property was able to be subdivided into two or more economic holdings, the Minister could acquire those parts of the land surplus to the economic requirements of the landowner. Section 23 of the Servicemen’s Settlement and Land Act 1943 explicitly prevented three categories of Māori land from being

⁴⁸¹ Wai 1898 on p 6 mentions a Crown purchasing issue (labelled as relating to soldier settlement) but in fact preceding any Crown use of the land. Wai 2076 para 5.4 alleges without particulars that soldier settlement schemes dispossessed Ngāti Tukorehe of land. Presumably this issue relates to Crown purchasing as well.

acquired in this way. This exclusion of Māori land protected it from potential alienation away from Māori through the operation of ballots.

829. Both Māori and Pākehā returned servicemen were provided with equal opportunity to the forms of rehabilitation available after World War II. Indeed, Crown officials appear to have taken particular care to ensure that Māori returned servicemen received rehabilitation assistance. While officials were clear that rehabilitation would apply equally to Pākehā and Māori, it was acknowledged that greater effort and expenditure would likely be required in the case of Māori returned servicemen, in order to achieve a balanced result with Pākehā.
830. The resettlement of returned servicemen on land was just one of the many forms of rehabilitation assistance provided. Other forms of assistance included training, education, loans, grants for education and tools of trade, and special assistance for disabled servicemen.
831. The agency responsible for administering the settlement on any land they were allocated through a ballot was different for Māori and European. Either the Māori Affairs Department or the Māori Rehabilitation Finance Committee (a sub-committee of the Rehabilitation Board) was responsible depending on the grading of the particular Māori serviceman. This system was established in order to take advantage of the Māori Affairs Department's experience in managing issues relating to Māori. Māori Rehabilitation Officers were appointed to regions considered to be centres of Māori population. Some minor differences in procedure arose where applications were dealt with by these special mechanisms, but there was no distinction in eligibility and terms for assistance.
832. The grading policy that emerged reflected the education and previous experience of the returned servicemen. Māori returned

servicemen graded 'A' were entitled to and did access normal ballots for farms under the general scheme. Where men so graded were successful in a ballot the section of Crown land was handed over to the Department of Māori Affairs for subsequent administration.

833. Those Māori returned servicemen with a proven lesser capacity were given a special designation under Māori Affairs management referred to as a tagged 'A' designation. This equated to a 'B' grade in the general scheme, which required further training and experience for those men. Special farms and agricultural colleges provided training for those servicemen graded 'B' or 'C' who were interested in the farm resettlement scheme. Some blocks administered by the Department of Māori Affairs were tagged specifically for training Māori who lived in the area and had not yet attained an 'A' grading.
834. The existence of Māori land and the special supervision and expertise of the Department of Māori Affairs gave those returned servicemen access to farms, which would have been denied them under the general scheme.
835. The adjusted grading policy for Māori was paternalistic in that it recognised only a small proportion of returned Māori men could be accommodated under the general rehabilitation scheme, for reasons of education and previous experience. However, this policy was neither separatist nor racist: ultimately Māori and non-Māori were assessed equally in terms of their eligibility for assistance.
836. Māori were given the additional opportunity, not available to European returned servicemen, to be allocated land on Māori freehold land that Māori owners wished to offer. This protected its status as Māori land and provided some opportunity for Māori returned servicemen to settle in their tribal area.
837. Gould notes that some 6,000 Māori served with 28th Māori Battalion. By 1953, 228 Māori returned service personnel had been assisted to acquire farms as a result of cooperation between the Māori

Rehabilitation Finance Committee and the State Advances Department, or had been assisted directly by the Department of Māori Affairs under the Native Land Amendment Act 1936. Gould further indicated that those 228 represented two percent of the 11,268 returned servicemen assisted on to the land by 1953, while Māori made up 2.7 percent of the 220,000 New Zealanders who served.⁴⁸²

Particular allegations relating to development schemes

838. Specific grievances pleaded about the schemes including consultation, implementation, scheme administration and environmental impact are addressed in summary fashion below. Specific grievances against the Māori Trustee and in relation to conversion of interests, so far as these issues intersect with the establishment and operations of the development schemes, are not addressed at this stage.

Wai 1499

839. The Crown denies that consultation and consent processes were not followed in decisions that led to land at Taharoa being made subject to Part 24 of the Māori Affairs Act 1953 in 1979 or that the owners were prejudiced by those actions.⁴⁸³

Wai 1147 and Wai 1203

840. To the extent that the issues raised may relate to development schemes the Crown denies that it made and broke a promise to assist with soldier resettlement in Mangapehi at Rangitoto Tuhua.⁴⁸⁴

Wai 1448 paragraphs 875-950

⁴⁸² Ashley Gould, Māori land development 1929-1954: an introductory overview with representative case studies. Wellington, 1996, p 63.

⁴⁸³ Wai 1499, paras 276-284.

⁴⁸⁴ Wai 1147 and 1203, paras 76-79.

841. The Crown denies that acts or omissions by or on behalf of the Crown in the establishment and operation of the Okapu development scheme breached Treaty principles causing prejudice.⁴⁸⁵
842. Beyond identifying generic issues associated with development schemes, the pleadings do not set out sufficient factual particulars of exactly what is said to have ultimately caused prejudice in breach of Treaty principles in relation to this scheme to enable a detailed response.

Wai 1448 paragraphs 1226-1338

843. The Crown denies that acts or omissions by or on behalf of the Crown in the establishment and operation of the Okapu F2 development scheme breached Treaty principles causing prejudice.⁴⁸⁶
844. Beyond identifying generic issues associated with development schemes, the pleadings do not set out sufficient factual particulars of exactly what is said to have ultimately caused prejudice in breach of Treaty principles in relation to this scheme to enable a detailed response.

Wai 1962 paragraphs 104-114

845. The Crown denies that acts or omissions by or on behalf of the Crown in the establishment and operation of the Mahoenui development scheme breached Treaty principles causing prejudice.⁴⁸⁷
846. Beyond identifying generic issues associated with development schemes, the pleadings do not set out sufficient factual particulars of exactly what is said to have ultimately caused prejudice in breach of Treaty principles in relation to the inclusion in this scheme of 94 acres from Mahoenui 2 section 2B to enable a detailed response.

⁴⁸⁵ Wai 1448 paras 875-950.

⁴⁸⁶ Wai 1448 paras 1226-1338.

⁴⁸⁷ Wai 1962 paras 104-114.

Wai 616 paragraphs 136-148

847. The Crown notes that while these paragraphs contain an allegation that returns were low from development scheme lands at Pukenui and that Te Kuiti Base Farm was sold by 1951, no particularised allegations of breach of Treaty principles causing prejudice are made.⁴⁸⁸

Wai 1481 paragraphs 55-58

848. The Crown notes that these paragraphs contain no particularised allegations concerning the establishment and operation of development schemes.⁴⁸⁹

Wai 753 paragraphs 46-48

849. The Crown denies that acts or omissions by or on behalf of the Crown in the establishment and operation of the Oparure development scheme breached Treaty principles causing prejudice.⁴⁹⁰

850. Beyond identifying generic issues associated with development schemes, the pleadings do not set out sufficient factual particulars of exactly what is said to have ultimately caused prejudice in breach of Treaty principles in relation to the establishment and operation of this scheme to enable a detailed response. An allegation of high debt levels is made without identifying outcomes or particular resulting prejudice allegedly linked to debt levels.

Wai 1387 paragraphs 14-33

851. The Crown states that the particular allegations made in the Wai 1387 amended statement of claim⁴⁹¹ about the Arapae station development scheme concerning the following issues will be addressed by the Crown in this inquiry through questions of

⁴⁸⁸ Wai 616 paras 136-148.

⁴⁸⁹ Wai 1481 paras 55-58.

⁴⁹⁰ Wai 753 paras 46-48 and in particular paras 47.16-47.20.

⁴⁹¹ Wai 1387 paras 14-33.

witnesses, both experts, those called for the claimants and possibly Crown evidence:

- 851.1 Consultation to obtain owners' views about making the land subject to a development scheme from 1936;⁴⁹²
 - 851.2 Accounting for owners' interests in land blocks consolidated for the scheme.⁴⁹³
 - 851.3 Whether representations were made unreasonably on the issue of whether the land would be developed beyond the station stage;⁴⁹⁴
 - 851.4 Whether administration of the land by the Crown or on behalf of the Crown was ineffective or unreasonably lengthy;⁴⁹⁵ and
 - 851.5 Debt levels and debt write-off in the lead up to management vesting in the incorporated owners.⁴⁹⁶
852. An issue remaining at large is whether any of the particular issues listed above caused prejudice ultimately to the land owners.
853. The remaining allegations about ongoing challenges for the incorporation in managing this land after it was no longer subject to a development scheme are not addressed here.

Wai 1439 paragraphs 10-20

854. The Crown states that the particular allegations made in the Wai 1439 amended statement of claim⁴⁹⁷ about acts or omissions by the Crown or on behalf of the Crown in relation to the Oparau station

⁴⁹² Wai 1387 paras 21-22.

⁴⁹³ Wai 1387 para 22.

⁴⁹⁴ Wai 1387 paras 21.1 and 27.1

⁴⁹⁵ Wai 1387 paras 27-29.

⁴⁹⁶ Wai 1387 paras 23.3, 24, 28 and 30.

⁴⁹⁷ Wai 1439 paras 10-20.

development scheme concerning the following issues will be addressed by the Crown in this inquiry through questions of witnesses, both experts, those called for the claimants and possibly Crown evidence:

854.1 Consultation to obtain owners' views about making the land subject to a development scheme commencing from 1955;⁴⁹⁸

854.2 Whether administration of the land by the Crown or on behalf of the Crown was ineffective or unreasonably lengthy.⁴⁹⁹

Wai 1593 #1.1.1 paragraphs 83-86

855. This non-particularised pleading does not raise issues specific to any scheme.

⁴⁹⁸ Wai 1439 para 18.2(e).

⁴⁹⁹ Wai 1439 paras 18.2(g) and 18.3(j).

NORTH ISLAND MAIN TRUNK RAILWAY

Did the Crown breach the principles of the Treaty of Waitangi through the way in which it dealt with Rohe Pōtae Māori and their interests when it acquired land for the North Island Main Trunk Railway?

Crown and Rōhe Pōtae Māori Agreements

Issue 14.1 **What agreements were reached between Rohe Pōtae Māori and the Crown when the Crown sought agreement / permission for the construction of the North Island Main Trunk Railway?**

(a) **What were Rohe Pōtae Māori and the Crown’s understandings of the agreements reached or assurances given concerning the North Island Main Trunk Railway?**

856. At Kihikihi on 26 February 1885, leaders of Rohe Pōtae Māori met and agreed to allow the construction of the North Island main trunk railway through their district on a strip of land one chain wide and paid for by the Crown.⁵⁰⁰

857. On 27 February 1885, John Ormsby telegraphed Native Minister Ballance as to the decision that the Rohe Pōtae leadership had reached. He advised the Minister that, “subject to the proposals ‘given at last meeting at which you were present’”, it was agreed that the Crown would pay for a railway corridor one chain wide and fenced on both sides.⁵⁰¹

858. Wahanui conveyed the decision of 26 February 1885 formally to Native Minister Ballance by letter dated 4 March 1885. In doing so, Wahanui recorded that Rohe Pōtae Māori had agreed that:⁵⁰²

858.1 A railway would be allowed to proceed;

⁵⁰⁰ Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, pp 165-177.

⁵⁰¹ Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, p 176.

⁵⁰² Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, p 176.

858.2 They would allow land a chain wide to be taken; and

858.3 “The consideration of the question of the land required for the railway, the land on either side of the railway, and that required for stations” would be deferred until the Native Minister’s next visit.

859. In his letter, Wahanui also recorded that Rohe Pōtae Māori wished to turn the first sod for the railway themselves, and he asked Native Minister Ballance to take the strongest measures possible to prevent Europeans from prospecting for gold on their land.⁵⁰³

860. That agreement of Rohe Pōtae Māori on 26 February 1885 followed a meeting that Native Minister Ballance had had with Rohe Pōtae Māori leaders at Kihikihi from 3 to 5 February 1885.⁵⁰⁴ At that meeting, a wide range of subjects had been canvassed including the native land system and the title ascertainment process. The Native Minister had set out a number of proposals that he intended to take to Parliament. He envisaged that:

860.1 Future alienations would take place within a new structure, with block committees issuing instructions for sales and leases to district Native Land Boards on which Māori landowners would be represented;

860.2 The Native Land Boards would dispose of lands at public auctions, administer leases and pass revenue back to the block committees;

860.3 The Crown’s right of pre-emption would apply over the whole country in order to stop private dealings other than those made through Native Land Boards; and

⁵⁰³ Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, p 177.

⁵⁰⁴ Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, pp 165-177.

- 860.4 The Crown would retain the ability to make direct purchases, but this power was expected to be used sparingly.⁵⁰⁵
861. The Crown notes that Native Minister Ballance had explained that these were his proposals and Parliament had not yet accepted them.⁵⁰⁶
862. At the Kihikihi meeting of 3-5 February 1885, the Native Minister also made statements that:
- 862.1 Roads and railways through the land would increase its value.⁵⁰⁷
- 862.2 Unused lands along the line of the railway, or along the roads leading to the railway, should not be liable to rates. However, rates should apply when the land is sold or leased.⁵⁰⁸
- 862.3 He had received engineering advice that a corridor one chain in width was necessary in order to construct the railway, “except where it runs along the side of hills where cuttings are made, where a little more will be required – perhaps two chains”.⁵⁰⁹
- 862.4 As to stations, the engineering advice was that “perhaps five acres, or, for some stations where there is likely to be a large settlement, ten acres, for each station” were required.⁵¹⁰

⁵⁰⁵ Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, p 186

⁵⁰⁶ Dr D Loveridge, “The Crown and the Opening of the King Country 1882-1885”, (February 2006), Wai 898, A41, p 186.

⁵⁰⁷ “Notes of Native Meetings”, AHJR 1885, G-1, pp 17, 26.

⁵⁰⁸ “Notes of Native Meetings”, AHJR 1885, G-1, pp 17, 19.

⁵⁰⁹ “Notes of Native Meetings”, AHJR 1885, G-1, p 22.

⁵¹⁰ “Notes of Native Meetings”, AHJR 1885, G-1, p 22.

- 862.5 Landowners would get the value of timber cut down in construction of the railway.⁵¹¹
- 862.6 The railway required the best route possible through the district.⁵¹²
- 862.7 The Crown would pay a fair price for the land it took and the price would depend on the value of the land.⁵¹³
- 862.8 There would be no distinction between Māori and Europeans in paying for the land.⁵¹⁴
- 862.9 The Crown would pay for the land it had taken when “the owners are found and the title is determined”.⁵¹⁵
- 862.10 Bridges and culverts would be built to avoid interference with watercourses.⁵¹⁶
- 862.11 The Government proposed to let contracts in such a way that Māori would be able to take them: “That is to say, a portion of the line would be let in small contracts, so that the Natives themselves may contract and make the line”, allowing “a large amount of the money for the construction of this line” to go to Māori.⁵¹⁷
863. The Crown says that Native Minister Ballance’s statements at Kihikihi accord in general terms with those he had made earlier at a meeting with Whanganui Māori at Ranana on 7 January 1885. The

⁵¹¹ “Notes of Native Meetings”, AHJR 1885, G-1, p 23.

⁵¹² “Notes of Native Meetings”, AHJR 1885, G-1, p 23.

⁵¹³ “Notes of Native Meetings”, AHJR 1885, G-1, p 23.

⁵¹⁴ “Notes of Native Meetings”, AHJR 1885, G-1, p 23.

⁵¹⁵ “Notes of Native Meetings”, AHJR 1885, G-1, p 22.

⁵¹⁶ “Notes of Native Meetings”, AHJR 1885, G-1, p 24.

⁵¹⁷ “Notes of Native Meetings”, AHJR 1885, G-1, p 24.

Crown notes, however, that at Ranana the Native Minister stated:⁵¹⁸

The only land they want is just sufficient for the railway to run upon – two chains, or three or four chains, or it sometimes may be a little more when it has to pass through cuttings, etc.

864. The decision of the Rohe Pōtae Māori leaders of 26 February 1885, and communicated in Wahanui's letter of 4 March 1885 to the Native Minister, was made in light of these statements that Native Minister Ballance had made to them. The Crown says that the Native Minister's statements did not amount to legally binding agreements but were general statements or expressions of intent or of expectation as to the benefits the railway would bring to communities.

865. However, the Crown acknowledges that there were some core elements to the arrangement reached in February 1885. The Crown says that these were its commitment to pay compensation for the land it took for the railway, to limit takings to that which was reasonably required for a safe and efficient railway, to discuss with Rohe Pōtae Māori the local details of lands taken for the railway corridor, to minimise harm the railway might cause to Rohe Pōtae resources and that Rohe Pōtae Māori would derive some economic benefit from the railway through contracts associated with the railway's construction.

(b) What advantages did Rohe Pōtae Māori seek from the construction of the North Island Main Trunk Railway?

866. Rohe Pōtae Māori recognised that a railway through their district would facilitate their ability to enter the settler economy and undertake commercial activity, and that it would enhance the value of their lands. It would provide a modern means of travel, thereby facilitating their engagement in commercial activity. The Crown notes evidence on the record of inquiry that some Rohe Pōtae

⁵¹⁸ “Notes of Native Meetings”, AHJR 1885, G-1, p 4.

Māori were already engaged in agriculture, and from the latter part or the 1870s there was growing pressure within Rohe Pōtae Māori to develop new economic opportunities and provide wage labour.⁵¹⁹

(c) What advantages did the Crown seek from the construction of the North Island Main Trunk Railway?

867. The Crown considered railways to be essential infrastructure for the economic development of the colony, and it regarded a link between the two main centers in the North Island to be particularly important. It had already started to build a main trunk railway line from Auckland to Wellington and it wished to complete it. The Crown also sought to have the King Country integrated into the economy after decades of isolation, and it saw the construction of the main trunk line as a way to facilitate that.

868. More generally, the Crown also notes that the construction of the North Island main trunk line was part of the Crown's strategy to stimulate a depressed economy by way of significant expenditure on a major infrastructure project.

(d) What obligations were there, if any, on the Crown to ensure that the interests of Rohe Pōtae Māori were protected in negotiations over the North Island Main Trunk Railway?

869. The Crown accepts that, in its negotiations with Rohe Pōtae Māori concerning the main trunk railway, the Treaty and its principles required it to treat with them honourably, fairly and in good faith.

Issue 14.2 If agreements were reached, to what extent were those agreements and assurances upheld by Rohe Pōtae Māori and the Crown?

870. As noted in response to issue 14.1, the Crown says that the agreements and undertakings relating to the main trunk railway through the Rohe Pōtae district did not amount to a rigid legal

⁵¹⁹ P Cleaver and J Sarich "Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008" (November 2009) Wai 898, A20, pp 40-41.

contract. There were inevitably at that stage many changeable and unknown factors that would affect how the railway would need to be constructed.

871. The Crown's position is that it kept largely to the core elements of the arrangement it agreed with Rohe Pōtae Māori. Put broadly, the Crown constructed the railway through the Rohe Pōtae, as it agreed to do, and Rohe Pōtae Māori co-operated in the venture, as they agreed to do.

872. The Crown acknowledges that the amount of land taken for the railway corridor may have at times exceeded one chain in width. However, with the exception of land that was definitely gifted and subject to further inquiry with respect to the Rangitoto-Tuhua block lands, the Crown understands that it paid compensation for land that it took in excess of one chain in width. Further, the Crown is making the following concession in this inquiry:

The Crown concedes that a number of owners in the Rangitoto Tuhua block never received compensation for the land the Crown took from this block for the construction of the North Island Main Trunk Railway, and that, unless this land was gifted to the Crown, the failure to pay compensation was a breach of the Treaty of Waitangi and its principles.

873. The Crown says that it is a matter for inquiry as to whether any other core elements of the arrangement between the Crown and Rohe Pōtae Māori in relation to the railway were not upheld and, if so, what the particular circumstances were. The Crown repeats, however, that statements that Native Minister Ballance made to Rohe Pōtae Māori did not amount to legally binding agreements but were statements or expressions of expectation as to the benefits the railway would bring to communities.

Fencing

874. As to fencing along the main trunk railway, the Crown notes evidence on the record of inquiry that, during the discussions with Native Minister Ballance, Rohe Pōtae Māori requested that the line

be fenced. In his telegraph to the Native Minister on 27 February 1885, John Ormsby had stated that a condition of the agreement of Rohe Pōtae Māori to the construction of the railway through their district was that it be fenced. The following day Native Agent, George Wilkinson, advised Native Minister Ballance of the same condition,⁵²⁰ although there appears to be no record of Native Minister Ballance having made or agreed to such an undertaking.

875. The Crown planned from the beginning to fence the main trunk line, and did so during the 1880s from Te Awamutu to the Mokau/Puketutu Station. However for reasons which are not clear, when construction was resumed in 1897-1903, provision was not made for fencing.⁵²¹ After many complaints were received from Māori and other residents adjacent to the line, fencing was resumed and by 1909 was nearly completed.⁵²²

Issue 14.3 To what extent did the Crown consult with and act in good faith towards Rohe Pōtae Māori when it restructured New Zealand Railways?

Issue 14.4 What effect did the privatisation of the New Zealand Railways have on Rohe Pōtae Māori?

876. The Crown notes evidence on the record of inquiry states that the restructuring of the New Zealand railway system between 1986 and 2008 occurred without consultation with, and had a number of adverse effects on, Rohe Pōtae Māori.⁵²³ The Crown says that the Treaty does not impose on it an absolute obligation to consult, but does require the Crown to make informed decisions on matters

⁵²⁰ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 115.

⁵²¹ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, pp 116-117.

⁵²² P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, pp 117-122.

⁵²³ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, ch 6 generally.

affecting the Māori interest.⁵²⁴ The Crown says that the restructuring of the New Zealand railway system was not a breach of good faith towards Rohe Pōtae Māori.

877. In assessing the way in which the New Zealand railway system was restructured, it is important to have regard to the wider economic changes occurring in New Zealand at that time. The period from the early 1980s to the late 1990s saw a significant shift in economic policy in response to the worsening performance of New Zealand's economy and resulted in radical reforms. Those reforms included the removal of foreign exchange controls, the deregulation of the financial market, the removal of industry subsidies, tax reductions and the implementation of a goods and services tax. In addition, the size and role of the state was reduced, and some government departments were restructured, corporatised and privatised. As part of those wider economic reforms, the way in which New Zealand's railway system was managed also underwent a number of changes from the early 1980s.
878. The Crown notes evidence on the record of inquiry that, between 1982 and 1990, the economic performance of the New Zealand Railway Corporation was poor, and at the close of the 1980s it was "on the verge of technical bankruptcy".⁵²⁵ The restructuring of the Corporation, beginning in the early 1980s, was a response to this deteriorating economic performance,⁵²⁶ and was considered necessary to protect the national interest in having an economically viable railway system.
879. The Crown acknowledges that, since the 1980s, the number of persons employed in New Zealand's railway system has reduced

⁵²⁴ *NZ Maori Council v A-G* [1987] 1 NZLR 641, per Richardson J at 683. See also Cooke P at 665.

⁵²⁵ P Cleaver and J Sarich "Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008" (November 2009) Wai 898, A20, pp 231-232.

⁵²⁶ P Cleaver and J Sarich "Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008" (November 2009) Wai 898, A20, p 225.

significantly, and notes evidence on the record of inquiry that staff reductions affected some Rohe Pōtae Māori.⁵²⁷ However, staff reductions were not limited to the Rohe Pōtae, but affected railway communities of all ethnicities throughout New Zealand, and the Crown notes that the extent of railway staff reductions in the district was consistent with railway staff reductions nationwide.⁵²⁸ The Crown notes further that reductions in staff numbers occurred for a number of reasons, including normal attrition up to 1986 and voluntary redundancies.⁵²⁹

880. The New Zealand railway system was privatised in 1990, and remained in private ownership until it was re-nationalised in 2008. The Crown is not responsible for any acts or omissions of the private owners during that period.

881. The Crown has addressed matters relating to the return of railway land to Rohe Pōtae Māori in its response to issue 14.10.

Acquisition of Land for the North Island Main Trunk Railway

Issue 14.5 How did the Crown deal with Rohe Pōtae Māori interests in its acquisition of lands for the North Island Main Trunk Railway in the the Rohe Pōtae inquiry district?

(a) Why was the survey and construction of the North Island Main Trunk Railway undertaken?

(b) What means did the Crown use to acquire land from Rohe Pōtae Māori for the purposes of the North Island Main Trunk Railway?

882. The Crown has responded to issue 14.5(a) at issue 14.1.

883. The legal process by which the Crown acquired land for the main trunk line through the Rohe Pōtae began on 2 April 1885 when,

⁵²⁷ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 242.

⁵²⁸ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 242.

⁵²⁹ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 243.

under the Public Works Act 1882, the Governor issued an Order in Council that declared that a railway of average width of 300 links from the Puniu River south to the connection with the Foxton to New Plymouth Railway would be constructed over Māori land.⁵³⁰

884. The same day, a proclamation pursuant to section 8 of the Railways Authorization Act 1884 and sections 129 and 130 of the Public Works Act 1882 was signed. It defined the middle line of a section of the “North Island Main Trunk Line of Railway” for 14 miles 67 chains southward from just north of the Puniu River.⁵³¹ A series of middle line proclamations defining further sections of the railway southward were issued later as construction progressed.

885. Soon after the issue of each middle line proclamation, proclamations taking land for the railway within each middle line proclamation were issued. These proclamations included reference to plans that defined the actual land being taken. Sometimes more than one ‘taking’ proclamation covered the land within individual middle line proclamations. Over time, the legislation under which the ‘taking’ proclamations issued changed. The taking proclamations within the Rohe Pōtae before 1903 included:

885.1 *New Zealand Gazette* 1886, p 596 (Public Works Act 1882);

885.2 *New Zealand Gazette* 1888, p 455 (Public Works Act 1882);

885.3 *New Zealand Gazette* 1888, p 386 (Public Works Act 1882);

885.4 *New Zealand Gazette* 1888, pp 386-387 (Public Works Act 1882);

885.5 *New Zealand Gazette* 1888, p 1281 (Public Works Act 1882);

885.6 *New Zealand Gazette* 1895, p 1448 (sections 28 and 167 of the Public Works Act 1894);

⁵³⁰ *New Zealand Gazette* 1885, pp 407-408.

⁵³¹ *New Zealand Gazette* 1885 p 402.

885.7 *New Zealand Gazette* 1899, p 1121 (sections 166 and 167 of the Public Works Act 1894);

885.8 *New Zealand Gazette* 1902, pp 2420-2421 (section 167 of the Public Works Act 1894); and

885.9 *New Zealand Gazette* 1902, p 2618 (sections 28 and 167 of the Public Works Act 1894).

886. Where Rohe Pōtae gifted land to the Crown, the Crown nevertheless used public works legislation to ‘acquire’ that land as a means to ensure that it had certainty of title.

Acquisition of Land for the North Island Main Trunk Railway

Issue 14.6 How much land did the Crown acquire through:

(a) Purchase?

(b) Rohe Pōtae Māori gifting their lands?

(c) Compulsory acquisitions?

887. Evidence on the record of inquiry states that:

887.1 Up to November 1902, almost 1,100 acres of Māori land was taken through public works legislation for the construction of the main trunk railway in the Rohe Pōtae inquiry district⁵³²

887.2 Between 1903 and 1990, an additional 192 acres was acquired;⁵³³ and

888. The amount of land gifted to the Crown for the railway corridor was “significant”.⁵³⁴

⁵³² P Cleaver and J Sarich *Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008* (November 2009) Wai 898, A20, p 148.

⁵³³ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, pp 161-163.

⁵³⁴ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 230.

889. The Crown is not aware of land acquired through purchase for the railway corridor.

Issue 14.7 Did the Crown provide adequate payment or compensation to Rohe Pōtae Māori when it purchased or compulsorily acquired Rohe Pōtae Māori lands for the purposes of the North Island Main Trunk Railway?

890. In 1890, the Native Land Court heard a number of applications from the Public Works Department for the assessment of compensation for the initial takings of land for the main trunk railway within Te Rohe Potae.⁵³⁵

891. During that hearing a number of Māori indicated that:

891.1 they wanted compensation for the land taken for the railway corridor and stations; or

891.2 they wanted to gift the land for the corridor and stations; or

891.3 they wanted compensation or to gift the land that was taken in excess of land one-chain in width.⁵³⁶

892. Where appropriate, the Court then made orders determining the amount of compensation the Crown was to pay to those people who requested compensation.⁵³⁷ The Crown believes that it subsequently paid that compensation. The Crown is aware that in at least one case the compensation money was used to repay survey costs at the request of the owners.⁵³⁸

⁵³⁵ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p p.154-155 and *New Zealand Gazette* 1890 p.1102

⁵³⁶ Otorohanga Minute Book 10, pp 248-345.

⁵³⁷ Otorohanga Minute Book 10, pp 248-345.

⁵³⁸ P Berghan, *Block Research Narratives* Wai 898, A60(a), pp 10451-10454.

893. It appears that the Crown provided compensation for all of the takings for the main trunk railway that occurred after 1903.⁵³⁹
894. The Crown has already noted in response to issue 14.2 the concession it is making in this inquiry regarding compensation for takings in the Rangitoto Tuhua block, unless those lands were gifted.
895. The Crown notes the pleading that, until 1887, the Public Works Act 1882 provided that compensation for the taking of customary land differed from compensation for taking land that had a Crown-derived title,⁵⁴⁰ the Crown acknowledges that the effect, if any, this provision had in respect of the compensation awarded may be an issue for inquiry.
896. The Crown does not accept that the evidence on the record of inquiry is sufficient for the Tribunal to make findings in relation to the pleading that

Issue 14.8 Did the Crown take into account the agreements made with Rohe Pōtae Māori before acquiring the land?

897. The Crown states that in general, before it acquired land for the main trunk railway, it took into account the agreements it had made with Rohe Pōtae Māori.
898. The Crown acknowledges that in some places a railway corridor of more than one-chain's width was taken but says that this was necessary to allow a railway to function safely and efficiently and that the possibility that additional land would be needed in some cases was signalled clearly in advance by the Native Minister.

Issue 14.9 What was the nature of the negotiation/acquisition process adopted by the Crown in respect of lands for the North Island Main Trunk line?

⁵³⁹ P Cleaver and J Sarich "Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008" (November 2009) Wai 898, A20, pp 161-163.

⁵⁴⁰ Generic Pleadings for Amended Statements of Claim: Railways, 9 December 2011, paras 5.1-5.2 and see also P Cleaver and J Sarich "Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008" (November 2009) Wai 898, A20, pp 153-154.

(a) Did the Crown purchase more land along the route of the North Island Main Trunk Railway than was strictly necessary for its construction? If so, why?

899. The Crown notes that, as stated in its response to issue 14.5, it did not purchase land for the main trunk line but acquired the land under public works legislation (even where the land was gifted).

900. The Crown acknowledges that certain initial takings of land for the main trunk railway included a corridor more than one-chain wide. Native Minister Ballance made it clear in 1885 that the Crown would compensate Rohe Pōtae Māori fairly for any land taken for the construction of the main trunk railway (whether one chain or more).

901. In relation to the area in the inquiry district north of Te Kuiti, the Crown believes that Māori agreed either to gift that land or to receive compensation for the area in excess of one chain in width.⁵⁴¹ The Crown has acknowledged that, in relation to the Rangitoto Tuhua block, it does not appear that compensation was paid but there remains a question of whether that land was gifted or not. In that respect, the Crown repeats the concession it is making that:

a number of owners in the Rangitoto Tuhua block never received compensation for the land the Crown took from this block for the construction of the North Island Main Trunk Railway, and that, unless this land was gifted to the Crown, the failure to pay compensation was a breach of the Treaty of Waitangi and its principles.

902. The Crown also notes that it was sometimes necessary to take land in excess of one-chain in width, especially where the railway corridor was not straight (as bends often require more land than straight tracks), or it passed through hilly terrain where there was danger of slips or subsidence and cuttings were required.

⁵⁴¹ Otorohanga Minute Book 10, pp 248-345.

903. Evidence on the record of inquiry states that the fact that the Department of Railways leased some railway land to private interests:⁵⁴²

indicates that the amount of land taken for railways in the Te Rohe Pōtae inquiry district was greater than what was required for immediate operational requirements, something that appears to have been standard practice.

904. The same evidence draws on a New Zealand Railways publication to explain that:⁵⁴³

the amount of land taken for a railway was determined by an assessment of the area required to meet existing demand and an estimate of what would be required to meet future increases in traffic. Additional land would sometimes also be taken upstream of railway bridges, enabling the Department to protect these structures. Ballast pits ... were acquired to meet future supply needs and, where a line severed a property, the severance might sometimes be acquired to avoid a claim for damages.

905. In the Crown's view, this evidence suggests that, in the Rohe Pōtae district, good grounds may have existed for it to have acquired more land than was "strictly necessary" for the construction of the main trunk railway's tracks. The Crown says that the issue may be one for further inquiry by the Tribunal but it considers that further evidence would be required including, for example, any 19th century reports on the amount of land required for the corridor, the reasons given for the amount required and changes to railway land use over time.

(b) If excess land was acquired, what effects did this have for Rohe Pōtae Māori?

906. The Crown understands issue 14.9(b) relates in part to the initial takings exceeding "the limited area that Ballance had stated would be required" and in part to the Crown's acquisition of "excess lands

⁵⁴² P Cleaver and J Sarich "Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008" (November 2009) Wai 898, A20, p 176.

⁵⁴³ P Cleaver and J Sarich "Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008" (November 2009) Wai 898, A20, p 176.

to ensure there would be sufficient land for future increases in traffic”.⁵⁴⁴

907. The Crown says that Ballance’s statement at Kihikihi in February 1885 that the railway corridor would require land one chain in width and five to ten acres for stations must be taken to be estimates of what was required, rather than rigid undertakings as to the precise quantities of land that would be taken. There were inevitably at that stage many changeable and unknown factors that would affect how the railway would need to be constructed. For the Crown to have taken less land than it did for the railway corridor, and to have stuck rigidly to taking land one chain in width for the tracks, may have had prejudicial effects on Rohe Pōtae Māori by compromising the safety or efficiency of the railway.

908. Insofar as it is claimed that the Crown took more land than was needed for immediate operational needs and that this deprived Māori of their lands and potential for economic development,⁵⁴⁵ there is insufficient evidence on the record of inquiry that enables an adequate assessment of the allegation.

(c) How much land did the Crown include in the railway exclusion zone? How was this figure determined, and what input, if any, did Rohe Pōtae Māori have into decisions taken in creating a railway exclusion zone? What duties did the Crown have in this regard, and how were they discharged?

909. The Crown addresses first the reference in the issue to the “railway exclusion zone”. Certain legislation enacted between 1884 and 1894 provided the Crown with pre-emptive powers in relation to particular areas of land. Those areas of land are referred to in the evidence as railway exclusion zones. Issue 14.9(c) assumes that there was one railway exclusion zone. In fact, the ‘zone’ varied

⁵⁴⁴ Generic Pleadings for Amended Statements of Claim: Railways, Wai 898, doc 1.5.7, paras 3.3 and 3.7.

⁵⁴⁵ Generic Pleadings for Amended Statements of Claim: Railways, Wai 898, doc 1.5.7, para 3.7

under different legislation. The nature of the Crown's pre-emptive powers also varied. Some legislation provided for blanket restrictions that applied to all land within a 'railway restriction zone' (for example, the Native Land Alienation Restriction Act 1884), while other pre-emptive restrictions were available to the Crown to be applied on a case by case basis within a 'restriction zone' (such as under section 14 of the Native Land Purchases Act 1892).

910. The size of the various zones may be an issue for inquiry, but the salient points appear to be that:

910.1 Overall, restrictions were imposed or available to the Crown over a significant part of the inquiry district for the greater part of the final decades of the 19th century; and

910.2 The evidence on the record of inquiry does not address squarely whether Rohe Pōtae Māori had input into deciding the size or boundaries of the land area that was to be covered by pre-emptive restrictions. The implication is that they did not have the opportunity to do so. However, the evidence on the record of inquiry provides examples of the Crown considering Māori perspectives in the development of legislation that made pre-emptive powers available to the Crown; see the Crown's responses to issue 7.34 and section 8, relating to Crown purchasing policy and practice, of the amended claimant statement of issues.

911. The Crown notes that it is not under an absolute duty to consult with Māori. However, it is required to make informed decisions on matters affecting Māori interests.⁵⁴⁶ The Crown accepts that decisions to impose pre-emptive restrictions over Rohe Pōtae Māori land are matters in respect of which the Crown was required at least to make an informed decision. The extent to which the Crown fulfilled this duty is a matter for inquiry. The Crown notes that the

⁵⁴⁶ See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, per Richardson J, p 683.

standard against which the Crown's actions are to be tested needs to be appropriate to the context of the time. Today's standards should not necessarily be imposed on historical actions.

Disposal / Return of Lands

Issue 14.10 Did the Crown dispose of lands it had acquired for the purpose of the North Island Main Trunk Railway? In particular:

- (a) Was surplus land offered back, and if so, how much?
- (b) Should more land have been offered back than in fact was, and if so, why was more land not offered back to Rohe Pōtae Māori?
- (c) Did the Crown consult with the original owners prior to disposing of lands acquired for the North Island Main Trunk Railway?
- (d) Did the Crown have a duty or obligation to consult with the original owners prior to disposing of lands acquired for the North Island Main Trunk Railway?
- (e) Did the Crown have a duty or an obligation to offer back lands to the original Māori owners? Were the Crown's policies, legislation and actions in relation to offering back lands acquired for the North Island Main Trunk Railway fair and reasonable?

912. Evidence on the record of inquiry refers to difficulties in making a “detailed examination of the process by which surplus railway land has been disposed of in the Rohe Pōtae inquiry district”.⁵⁴⁷ As a result of these difficulties, the Crown is not able, on the evidence available, to respond to issue 14.10 with great particularity. However, the Crown notes that:⁵⁴⁸

912.1 Up to 1982, about 67 acres of railway land in the inquiry district was disposed of.

912.2 It appears that the Crown had acquired less than 20 of those 67 acres from Māori owners.

⁵⁴⁷ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 264.

⁵⁴⁸ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, pp 179-180 and 249.

913. It appears that the Crown had acquired less than 20 of those 67 acres from Māori owners.
914. The land was disposed of in accordance with the specific legislative provisions that applied (which did not provide for the land to be offered back to former owners).
915. Since 1982, around 137 hectares of railway land, comprising both urban and rural land that had been used for a range of purposes, has been disposed of in the inquiry district.
916. Before the enactment of the Public Works Act 1981, public works legislation did not require the Crown to offer back compulsorily acquired land that was no longer required for public work purposes.
917. The Crown does not recognise the failure to offer back surplus land before 1 February 1982, when the Public Works Act 1981 came into force, to be a breach of the Treaty or its principles.
918. However, since 1 February 1982, the Crown has been obliged under the Public Works Act 1981 to offer back land previously acquired for a public work to the former owners or their successors unless a statutory exemption applied. The Crown considers that it has a Treaty duty to comply with this statutory duty and recognises that a well-founded Treaty claim may exist where it has failed to do so.
919. Similarly, failure to consider an offer-back of surplus public works land where there was a statutory discretion to do so may not have been Treaty compliant
920. The Crown says that claims that the Crown's disposal of railway lands has not been Treaty compliant would need to be assessed on a case by case basis and in light of the prevailing circumstances.

Resources

Issue 14.11 **What was the nature of the negotiation / acquisition process adopted by Crown agents in respect of resources required for**

the North Island Main Trunk Railway? In particular:

- (a) What were Rohe Pōtae Māori and Crown understandings of the agreements reached with or assurances concerning the use of resources required for the North Island Main Trunk Railway?
- (b) Did the Crown act in accordance with those agreements and assurances?
- (c) What resources did the Crown acquire for the North Island Main Trunk Railway from Rohe Pōtae Māori?
- (d) How did the Crown acquire the resources it required for the North Island Main Trunk Railway?
- (e) Were Rohe Pōtae Māori consulted about the acquisition of their resources?
- (f) Were Rohe Pōtae Māori adequately compensated for the acquisition and/or use of their resources?

921. There appears to be no evidence on the record of inquiry that, at the Kihikihi meeting on 3 to 5 February 1885, the Crown and Rohe Pōtae Māori discussed the supply or use of resources for the main trunk line. The evidence suggests that the discussion was limited to the effect that the construction of the railway would have on trees directly in the line of the railway.

922. In response to that matter, the Crown notes that Native Minister Ballance stated that where the railway “injures the bush ... the owners will get the value of the timber cut down”.⁵⁴⁹ Further, evidence on the record of inquiry states that “[i]t appears that Rohe Pōtae Māori later waived any claim for trees that lay in the path of the track”.⁵⁵⁰

923. Evidence on the record of inquiry states that:

During the first stage of construction up to 1889, the Kawhia Native Committee negotiated directly with contractors for payment for

⁵⁴⁹ “Notes of Native Meetings”, AHJR 1885, G-1, p 23.

⁵⁵⁰ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 103.

timber, stone resources and earth belonging to Māori, securing at times above-standard rates.⁵⁵¹

924. During the second stage:

924.1 Owners received a royalty for timber cut from their land and the Public Works Department contracted some individual Māori to supply sleepers from locations within the inquiry district.⁵⁵²

924.2 In the southern part of the inquiry district, the amount of money Māori earned through sleeper contracts, directly and through royalty payments, “may not have been insignificant”.⁵⁵³

924.3 The Public Works Department may have extracted metal from certain Māori-owned lands without negotiating with the owners or paying royalties.⁵⁵⁴

924.4 The Public Works Department and the Railways Department used public works legislation to acquire from Māori land for the supply of rock or ballast for the railway.⁵⁵⁵

Environmental Issues

Issue 14.12 How did the Crown deal with and manage Rohe Pōtae Māori concerns about the environment and wahi tapu?

Issue 14.13 What were Rohe Pōtae Māori and Crown understandings of the agreements reached, or assurances given concerning the effect that the North Island Main Trunk Railway would have on the

⁵⁵¹ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 104.

⁵⁵² P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 108.

⁵⁵³ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 109.

⁵⁵⁴ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 109.

⁵⁵⁵ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, pp 109-111.

environment and wahi tapu?**Issue 14.14 Did the Crown act in a manner that was consistent with the agreements reached?**

925. Evidence on the record of inquiry records that, as early as March 1884, the Crown considered Rohe Pōtae Māori concerns about the environmental effects of the railway.⁵⁵⁶ At the Kihikihi meeting in early February 1885, Native Minister Ballance addressed concerns that Rohe Pōtae Māori had as to the effect the main trunk line might have on their forests and customary food supplies. In response, the Native Minister stated that care would be taken to avoid interference with water courses, that bridges and culverts would be built and that “[n]o injury whatever will be done to Native land”.⁵⁵⁷

The Crown says that there is no substantial evidence on the record of inquiry as to detrimental environmental effects on Rohe Pōtae Māori as a result of the construction of the main trunk line through their district. However, the Crown notes evidence that, in one instance, at least, the line of the railway was altered at the request or Māori to prevent damage to an extensive area of kahikatea trees.⁵⁵⁸

Issue 14.15 Did the Crown adequately consult with Māori when it was adopting policies, legislation or a cause of action that was inconsistent with the agreements reached?

926. The Crown requires further particulars in order to respond to this issue.

Economic Benefits**Issue 14.16 What were Rohe Pōtae Māori and Crown understandings of the agreements reached with or assurances given concerning the economic benefits that would result from the North Island Main Trunk Railway?**

⁵⁵⁶ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 112.

⁵⁵⁷ “Notes of Native Meetings”, AHJR 1885, G-1, p 24; see also P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 112.

⁵⁵⁸ P Cleaver and J Sarich “Turongo: The North Island Main Trunk Railway and the Rohe Potae, 1870-2008” (November 2009) Wai 898, A20, p 114.

927. The Crown acknowledges that, at the Kihikihi meeting of 3 to 5 February 1885, Native Minister Ballance made statements that the construction of the railway through the Rohe Pōtae district would bring economic benefits to local Māori.

928. As noted in response to issue 14.1, the Crown says that such statements did not amount to legally binding agreements but were statements of expectation as to the benefits the railway would bring to communities.

Issue 14.17 Did Māori receive economic benefits (whether promised or not) from the North Island Main Trunk Railway?

929. Rohe Pōtae Māori received a variety of economic benefits from the construction of the main trunk railway through their district. These ranged from revenue from the supply of timber, stone and other resources, the increase in value to their lands along the line of the railway, employment and business opportunities, easier access to a greater number of markets for the sale and purchase of goods and services, including the large Auckland market, and the efficiencies that the modern railway provided in terms of more frequent, faster and reliable travel.

Issue 14.18 Did Rohe Pōtae Māori suffer from any economic deprivation caused by the North Island Main Trunk Railway?

930. The Crown acknowledges that some Rohe Pōtae Māori may have been disappointed with the economic benefits that accrued to them as a result of the main trunk line being constructed the Rohe Pōtae district. However, it says that the railway did not cause them economic deprivation. The dictionary definition of “deprivation” is “the damaging lack of material benefits considered to be basic necessities in a society”.⁵⁵⁹

931. The Crown says that a failure to have built the main trunk line through the Rohe Pōtae district is likely to have contributed to

⁵⁵⁹ *Oxford Dictionary of English* (2nd ed, revised, 2005).

economic deprivation, as it would have left the region physically isolated and ‘behind the times’ in terms of modern travel and communication networks and the ability to maximise commercial opportunities.

Prejudice

Issue 14.19 Did Rohe Pōtae Māori suffer prejudice as a result of Crown purchasing of land for the North Island Main Trunk Railway?

932. The Crown responds to this issue on the understanding that it relates to whether Rohe Pōtae Māori suffered prejudice because of purchases in the Rohe Pōtae inquiry district (and specifically in relation to lands affected by pre-emptive restrictions) rather than in relation to land taken specifically for the railway corridor.

933. The Crown agrees that an issue for inquiry is whether Rohe Pōtae Māori suffered prejudice in these circumstances.

934. The Crown notes that the issues raised here have largely been addressed in the Crown’s response to section 8, relating to Crown purchasing policy and practice, of the claimant amended statement of issues.

(a) Was the price of Rohe Pōtae Māori land depressed because of the Crown's monopoly on purchasing?

935. The Crown has accepted, as noted in its response to issue 8.41, that the availability and use of pre-emptive powers informed the context for price negotiations within the inquiry district. the Rohe Pōtae Māori were left with little option but to sell their land or shares in land even when they, and other observers, considered that the prices offered represented less than the market value of their land.

936. It is difficult for the Crown to respond to the specific question as to whether the Crown’s monopoly on purchasing caused the price of Rohe Pōtae Māori land to be depressed. There is very little evidence on the record of inquiry about the price finally paid for land; whether the Crown on-sold the land, and if so, the price received for

any land on-sold; the costs the Crown incurred in putting the land on the market; and the costs to the Crown for acquiring title and paying for its necessary expenses such as roads and public works within the inquiry district.

937. The Crown agrees that an issue for inquiry is the extent to which prices of Rohe Pōtae Māori land were depressed because of the Crown's monopoly on purchasing, and whether the Crown paid a fair price for land. The Crown notes that to respond to the issue, comparative data and a case by case assessment would be required.

(b) Were Rohe Pōtae Māori effectively made to pay for, or subsidise, the North Island Main Trunk Railway through the Crown policy of on-selling land at prices in excess of those paid for the land?

938. The Crown agrees that there is an issue for inquiry as to whether the Crown's disposal of lands in the Rohe Pōtae effectively made Rohe Pōtae Māori pay for, or subsidise, the North Island main trunk railway through their district. The Crown has acknowledged in its response to issue 8.40 that it led the iwi and hapū of the Rohe Pōtae to believe reasonably, when they agreed to the passage of the main trunk railway through their territory in 1885, that, if they wished to sell their land, the Crown intended to establish a free market, regulated by a land board system, in which they could do so. It appears that an additional issue relating to price arises: whether, against that background, pre-emption purchasing had the effect of extracting from Rohe Pōtae Māori an unfair contribution toward the cost of building the railway.

(c) Did the Crown ensure that Rohe Pōtae Māori were able to utilise and benefit from their remaining lands?

939. The reference to "remaining lands" requires further particularisation. (The Crown notes that it has raised a similar issue – with a similar requirement for further particulars – in response to issue 8.51.)

(d) Were Rohe Pōtae Māori left with insufficient lands under their control to enable them to benefit from the North Island Main Trunk Railway?

940. Issues of sufficiency are addressed in the Crown's response to section 3, relating to protection of land and resources, of the claimant amended statement of issues.

(e) Did Rohe Pōtae Māori benefit from the proceeds that the Crown received from on-selling land for profit?

941. Crown purchasing in the Rohe Pōtae was conducted to further the Crown's policy of facilitating economic development and the creation and growth of viable and prosperous settlements and associated infrastructure. Such endeavours were conducted for the benefit of all Māori and non-Māori. The Crown does not consider that the broad query posed in issue 14.19(e) justifies inquiry.

(f) Were lands retained by Rohe Pōtae Māori enhanced in value as a consequence of their proximity to the North Island Main Trunk Railway, and if so, were the owners able to reap such benefits and by what means?

942. The lack of a comprehensive record as to prices paid in the inquiry district, or of the valuation given to lands across the district, prevents the Crown from answering this issue.

PUBLIC WORKS TAKINGS

Did the Crown breach the principles of the Treaty by introducing and operating the public works legislative regime (including large takings eg Tokanui, small takings eg schools, quarry sites and scenic takings eg glow worm caves)? What duties did the Crown have towards Rohe Pōtae Māori when acquiring land for the purpose of public works? To what extent did the Crown fulfil these duties?

Introduction

943. This section of the Crown’s statement of position and concessions excludes consideration of public works takings for the North Island main trunk railway line.
944. The Crown does not accept that public works acquisition powers are inherently inconsistent with the Treaty. The Crown’s position is that the power to acquire land compulsorily in the public interest in order to provide public works is a legitimate function of responsible government.
945. The Crown accepts, however, that there may be specific factual situations where the Crown has breached the Treaty of Waitangi when it has compulsorily acquired land. The facts of any particular acquisition would need to be assessed to identify such a breach.
946. The Crown notes evidence on the record of inquiry that public works takings first occurred in the Rohe Pōtae inquiry district in 1888 and that there were 5,634 takings between 1888-2009 under a variety of legislation.⁵⁶⁰ Of the 4,124 takings under the public works legislation, approximately 20 per cent were takings of Māori-owned land; 52 per cent were takings of European-owned land; 20 per cent were takings of Crown-owned and local authority owned land; and eight per cent were takings where prior ownership had not been

⁵⁶⁰ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 pp 109.

identified.⁵⁶¹ The Crown has not verified the accuracy of these figures. Further analysis needs to be undertaken to determine the actual area of Māori-owned land taken for public works purposes.

The Legislative Regime

Issue 15.1 Was public works legislation used to facilitate the transfer of Māori land to the Crown?

947. The Crown denies that it has used public works legislation as a means to facilitate the transfer of Māori land to the Crown generally and other than for public purposes.

948. The purpose of scenery preservation legislation, for example, was to acquire and reserve land of scenic or historical interest for the public interest. The Scenery Preservation Act 1903 was not introduced as a means to acquire land from Māori. It was a response to environmental destruction, particularly the clearing of forest. It is a function of government to provide for the preservation of land that, for a variety of reasons, is significant. However, the Crown notes that the legislation may have applied disproportionately to Māori land given its location and scenic or historic interest.

Issues 15.2 Did the Crown consult with Māori about the public works legislation prior to it being passed?

949. The Crown acknowledges that early public works statutes in the 1840s and 1850s were enacted before Māori gained parliamentary representation and there was likely to have been little or no consultation with Māori leadership. However, it does not necessarily follow that legislators, or those giving effect to legislation, ignored Māori interests. The New Zealand Constitution Act 1852, for example, exempted Māori customary land from takings under the Act⁵⁶² and the British Colonial Office disallowed the Provincial

⁵⁶¹ Dr D Alexander, "Public Works and Other Takings in Te Rohe Pōtae District", Wai 898, A63 pp 106-107.

⁵⁶² Professor A Ward, National Overview, Volume II, Waitangi Tribunal Rangahaua Whanui Series (Waitangi Tribunal, 1997) at 306.

Compulsory Land Taking Act 1863 on the basis that it was “repugnant to the spirit of English law’ in that it applied to Native land over which customary title had not been extinguished”.⁵⁶³

950. The Crown acknowledges that later 19th and 20th century public works legislation, including the Native land legislation, which from 1865 included provisions for the taking of up to five per cent of any land granted for roads without compensation, was enacted without general consultation with Māori, although from 1867 onwards the Māori electoral seats in Parliament provided some opportunity for Māori concerns to be voiced and considered.
951. The Crown notes that legislative changes from the 1950s onwards have benefitted Māori in a number of ways.⁵⁶⁴ For example, the Public Works Amendment Act 1962 gave Māori the ability to negotiate compensation themselves;⁵⁶⁵ the Māori Affairs Amendment Act 1974 extended the period of notice required for multiply-owned lands⁵⁶⁶ and, perhaps most notably, the Public Works Act 1981 introduced mandatory ‘offer-back’ provisions in respect of former Māori land that is no longer required for a public work.⁵⁶⁷
952. The Crown also notes that examples of Māori gifting land for roading or other requirements⁵⁶⁸ indicate a degree of Māori understanding of and co-operation with public works requirements.
953. More particularly, in the Rohe Pōtae, the Four-Tribe’s petition of 1883 gave qualified support to public works, including the making of roads, in the district. The petitioners stated:

⁵⁶³ Professor A Ward, National Overview, Volume II (Waitangi Tribunal Rangahaua Whanui Series, Waitangi Tribunal, 1997) at 307.

⁵⁶⁴ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 pp 78-80

⁵⁶⁵ Public Works Amendment Act 1962 s 6.

⁵⁶⁶ Maori Affairs Amendment Act 1974, s 71.

⁵⁶⁷ Public Works Act 1981, s 41.

⁵⁶⁸ Professor A Ward, National Overview, Volume II, Waitangi Tribunal Rangahaua Whanui Series (Waitangi Tribunal, 1997) at 306, 309.

There is no desire on our part to keep the lands within the boundaries described in this petition locked up from Europeans, or to prevent leasing, or roads from being made therein, or other public works being constructed, but it is our desire that the present practices that are being carried out at the Land Courts should be abolished.⁵⁶⁹

Issues 15.3 Did the public works legislation require that Māori be left with sufficient land for their needs and did this occur?

954. The Crown acknowledges that public works legislation has not contained an express requirement that decision-makers under the legislation consider whether Māori would be left with sufficient land for their needs if a proposed public works taking proceeded.
955. The Crown accepts that there may be an issue as to whether it should have sought to include in public works legislation such a requirement.
956. Nevertheless, from the enactment of the Public Works Act 1908, a process existed by which Māori affected by a proposed taking or public work could object.⁵⁷⁰ The objection process provided an avenue whereby Māori could raise issues as to the sufficiency of remaining land.
957. This occurred, for example, in the taking of the Tokanui blocks for the Tokanui Mental Hospital when, at a hearing convened on 26 and 27 July 1910, Judge Rawson heard objections based, amongst other things, on the potential landlessness of the owners. However, the Crown notes that Judge Rawson's terms of reference required him to report his "opinion whether or not any private injury will be done by the taking ... for which due compensation is not provided by the said Act" and that he concluded that, as no owners were living on the land or deriving income from it, their objections were not well-

⁵⁶⁹ Petition of the Maniapoto, Raukawa, Tūwharetoa and Whanganui Tribes 1883, cited in Waitangi Tribunal *Pouakani Report 1993*, Wai 33, appendix 6.

⁵⁷⁰ See, for example, Public Works Act 1908 s 18(f).

founded according to those terms.⁵⁷¹ It is an issue for inquiry as to whether a Treaty breach occurred in this instance.

958. Whether Māori were left with sufficient land in the context of public works takings would need to be assessed on a case by case basis.

Issue 15.4 To what extent was the Crown responsible for the actions of local authorities in relation to land acquired under public works legislation? Did the Crown discharge any responsibility in respect of local authorities which acquired land in Te Rohe Pōtae?

959. The Crown does not accept that it is responsible for the actions or omissions of local authorities in the course of carrying out their functions. It accepts that there may be an issue as to whether it should have sought to impose additional restrictions on local authorities in the legislation that conferred on them powers to acquire land for public works purposes.

Consultation and Compensation

Issue 15.5 Did the Crown pay equitable compensation to Rohe Pōtae Māori for public works takings?

960. The Crown does not accept that the assessment of compensation by the Native Land Court necessarily resulted in inappropriate awards. The adequacy or fairness of compensation to Rohe Pōtae Māori for public works takings would need to be assessed on a case by case basis.

961. Compensation provisions have changed over time. For example, the Crown notes that under the Public Works Act 1894 compensation was considered by the Native Land Court.⁵⁷² The Public Works Amendment Act 1962 introduced provision for compensation to be negotiated between the Crown and the landowner and provided

⁵⁷¹ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 pp 597-602.

⁵⁷² Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 75.

arbitration and appeal mechanisms in the same manner as for European owned land.⁵⁷³

Issue 15.6 Did the Crown give adequate notice that land was being taken?

962. The Crown says that, unless there is evidence to prove otherwise, it is to be assumed that the Crown complied with the statutory requirements for notice in respect of public works takings where it was required to give notice.

963. The statutory requirements for notice of public works takings developed over time. For example, the Crown notes that, under the Public Works Act 1894, notification of the taking of non-registered Māori land would be published in the *Gazette* and a forty day notice period was given.⁵⁷⁴ The Public Works Amendment Act 1909 brought the *Gazette* notification mechanism for multiply-owned land into the same provision as all other forms of notification.⁵⁷⁵ Today, under the Public Works Act 1981, section 18(5) provides for a process whereby notice to owners of Māori freehold land may be given by serving notice on the Registrar of the Māori Land Court for the district in which the land is situated.⁵⁷⁶

964. Evidence on the record of inquiry identifies that the major difference for Māori landowners in the notification process was that Māori were not required to have a registered title, and, even if they did, they may have been multiple owners, making them difficult to notify personally. By contrast, non-Māori landowners generally did not hold land in multiple ownership, making identification and

⁵⁷³ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 pp 78-79.

⁵⁷⁴ Public Works Act 1984, s 88.

⁵⁷⁵ Public Works Amendment Act 1909, s 4.

⁵⁷⁶ Public Works Act 1981, s 18(5). This provision is derived from the Maori Affairs Amendment Act 1974, s 71. Both the 1974 provision and the 1981 provision extended the notice periods substantially.

notification relatively easy as owners' names were registered in the Land Registry.⁵⁷⁷

965. The Crown says that notice provisions in public works legislation were adequate in the circumstances of the times, and provision made for notification in respect of land held in multiple ownership has strengthened over time. Whether adequate notice was given in accordance with the provisions of public works legislation in force at the particular time needs to be assessed on a case by case basis.

Issue 15.7 Did the Crown consult with Rohe Pōtae Māori landowners before land was taken?

966. The Crown acknowledges that it acquired a range of properties for public works purposes in the inquiry district. The Crown is not in a position to plead to allegations of a general nature as to lack of consultation. The Crown says that such allegations would need to be considered on a case by case basis.

967. The Crown accepts that consultation with the owners should have occurred in respect of each public works taking. The Crown's policy on Treaty claims involving public works acquisitions states:⁵⁷⁸

The Crown considers that a well-founded public works grievance may exist where the Crown acquired land for a public work without affording Māori land owners an appropriate level of consultation namely by:

- i. Not providing Māori with relevant information, such as information about the nature of the public work and the extent and timing of the acquisition;
- ii. Not giving Māori adequate time and opportunity to fully discuss a public work proposal prior to any decision being made; and
- iii. Not genuinely and conscientiously considering points made by Māori prior to any decision being made, and willingly considering alternatives.

⁵⁷⁷ Dr D Alexander, "Public Works and Other Takings in Te Rohe Pōtae District", Wai 898, A63 p 34.

⁵⁷⁸ Minister in Charge of Treaty of Waitangi Negotiations "The Crown's Policy on Treaty Claims Involving Public Works Acquisitions" (1996) at 2.

968. The Crown considers that the views of owners of the Tokanui blocks that were taken for the Tokanui Mental Hospital were aired at a hearing convened for that purpose on 26 and 27 July 1910.⁵⁷⁹

Issue 15.8 Did Rohe Pōtae Māori oppose the takings and how did the Crown regard their correspondence and opposition?

969. The Crown acknowledges that, in particular cases, some owners raised objections to public works takings by the Crown. The adequacy of the Crown's response to any objections raised with it would need to be assessed on a case by case basis.

970. In relation to the Tokanui Mental Hospital, some Māori owners objected on the basis that monetary compensation would not, in some respects, be appropriate. The Crown provided a hearing of those objections and ultimately adopted the recommendation of Judge Rawson that the objections were not well founded.⁵⁸⁰

Issue 15.9 How extensively was the Five Percent Rule, which allowed the Crown to take Rohe Pōtae Māori land without compensation, used in the Inquiry District?

971. From 1865 until 1927, when a title was issued by the Native Land Court under the various native land Acts, up to five percent of a block could be set aside for roads. Compensation was not required to be paid for land set aside as a road under those provisions.⁵⁸¹

972. The power to set apart road lines was considered important policy. As part of its role in facilitating settlement and development, the Crown was responsible for ensuring that adequate access to land existed. The use of up to five percent of land brought into the title

⁵⁷⁹ Dr D Alexander, "Public Works and Other Takings in Te Rohe Pōtae District", Wai 898, A63 pp 597-602.

⁵⁸⁰ Dr D Alexander, "Public Works and Other Takings in Te Rohe Pōtae District", Wai 898, A63 pp 597-603.

⁵⁸¹ Dr D Alexander, "Public Works and Other Takings in Te Rohe Pōtae District", Wai 898, A63 p 62. See also Native Lands Act 1865 s 76 and Native Land Amendment Act and Native Land Claims Adjustment 1927 Act 1927 s 30.

system was a reasonable means of providing for future legal access to and across the land.

973. The ‘five-percent rule’ also affected non-Māori, as Crown-granted land was also subject to the taking of up to five percent for roads without compensation. However, the time period during which land could be acquired under these provisions was extended for Māori land from five years to ten and then 15 under section 14 of the Native Land Act Amendment Act (No.2) 1878. It remained at five years for ordinary, Crown-granted land.
974. The Crown acknowledges that there is an issue as to differential treatment likely to prejudice Māori owners. The Crown intends to consider the evidence further as to how this policy operated in this inquiry district, and the extent to which it may have prejudiced Rohe Pōtae Māori.

Issue 15.10 Was the Native/Māori Land Court properly equipped to assess compensation for the taking of Māori land?

975. The public works generic pleadings state that the Native Land Court was not suited to assessing compensation as it relied almost completely on the testimony of witnesses to decide how much land was worth and Māori land required a specialised court that understood land valuation, Māori cultural values, and the takings process.⁵⁸² They state further that while European landowners were able to have their land valued by two assessors and their compensation claims heard by a Supreme Court judge, Māori landowners were not.
976. The Crown says that the Native/Māori Land Court was properly equipped to assess compensation for the taking of Māori land.
977. The Crown notes that the Public Works Act 1894, which empowered the Native Land Court to assess compensation, also

⁵⁸² Generic Pleadings for Amended Statements of Claim: *Public Works Takings* (Wai 898, 1.5.1, 6 December 2011) at [50].

provided at section 90(3) that the Court had all the powers and authority of the Compensation Court. This provision was repeated in the 1928 legislation at section 104(1)(c).

978. The Crown notes evidence on the record of inquiry that the Native Land Court considered it had insight into Māori matters that the “eurocentric Compensation Court” could not have and that the Native Land Court judges were careful to act reasonably and took into account advances in compensation law that were developing in the Compensation Courts for European-owned land.⁵⁸³
979. The Crown says that it was appropriate that the Native Land Court considered witnesses testimony in deciding compensation. The role of a court is generally to make a judgement based on evidence presented to it. Furthermore there is evidence on the record of inquiry that the Court adjourned hearings so it could assess the land itself.⁵⁸⁴
980. The Crown notes that it is not a straightforward matter to compare compensation payments to different claimants and the evidence on the record of inquiry lacks sufficient detail for other than very general comments.⁵⁸⁵

Issue 15.11 Was the assessment of the value of Rohe Pōtae Māori land for compensation different to the assessment of the value of general land for compensation?

981. Until 1962, compensation in the case of Māori-owned land was assessed by the Native/Māori Land Court while the Compensation

⁵⁸³ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 300.

⁵⁸⁴ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 299.

⁵⁸⁵ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 301.

Court/Valuation Tribunal assessed compensation for European-owned land.⁵⁸⁶

982. The Crown notes evidence on the record of inquiry that, while compensation amounts for Māori and European land were determined through different processes, the amounts paid were probably comparable and that the amounts were probably within the range of what was considered fair in terms of that comparison.⁵⁸⁷
983. The Crown notes that it is not a straightforward matter to compare compensation payments to different claimants and the evidence on the record of inquiry lacks sufficient detail for other than very general comments.⁵⁸⁸

Preference for Māori Land

Issue 15.12 Did the Crown use the same system for acquiring Rohe Pōtae Māori land as for acquiring general land through the public works legislation?

984. The Crown denies that Māori land was targeted for public works acquisition.
985. The public works legislation was not targeted at Māori land, although it may have applied disproportionately to Māori land given the location and ownership of land with scenic or historical interest within this inquiry district.

Issue 15.13 Did the Crown explore alternatives to compulsory acquisition, such as leasing?

986. No formal assessment of alternatives was required by legislation. Leasehold interests could be compulsorily acquired under public

⁵⁸⁶ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 297.

⁵⁸⁷ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 40.

⁵⁸⁸ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 301.

works legislation, but this provision was used only rarely and was not favoured by the Crown.⁵⁸⁹

987. The Crown accepts that its preferred mode of acquisition was to purchase Māori land rather than to lease it, as it was generally considered that land had to be in State ownership before public funds could be expended to improve that property. The Crown further states that settler society evolved from a belief that the separation of landlord and farmer, which existed in much of England, was undesirable. There was, amongst settler society, widespread opposition to leasing.
988. Nevertheless, evidence on the record of inquiry shows that alternatives to compulsory takings were considered in some instances. For example, in the accommodation house at the Waitomo Caves, the land was first used by way of lease, and later acquired as a freehold interest. There is no evidence on the record of inquiry as to why the Crown wished to change from a leasehold to a freehold title and evidence shows that notice of intention to take the land was given and no objections were received. It is suggested that a freehold title was preferred as it offered a more secure form of tenure.⁵⁹⁰
989. Furthermore, natural gas pipelines in the inquiry district were laid without acquiring land but through the use of easements.⁵⁹¹ These examples indicate that the Crown was willing and did at times consider alternatives to compulsory acquisition.

Issue 15.14 Did the Crown acquire excessive amounts of Rohe Pōtae Māori land using this process?

⁵⁸⁹ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 37-38

⁵⁹⁰ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 218-219.

⁵⁹¹ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 224.

990. The Crown understands this issue to refer to the allegation that it often took more land than was required for a particular public work.
991. Any allegation of excess in public works takings need to be considered on a case by case basis. The Crown acknowledges that, in some cases, including the Tokanui Mental Hospital and Waikeria Prison, it may have taken a greater area of land than was in fact needed. The reason for the taking of excess amounts of land (if any) is a matter for inquiry.
- Issue 15.15 Did the Crown offer excess land back to the original owners?**
- Issue 15.16 Did the Crown on sell land that they had acquired for Public Works but found was no longer needed for that purpose?**
- Issue 15.17 Did the Crown have a duty to ensure compulsorily acquired land is returned when it is no longer required for public works purposes?**
992. Before the enactment of the Public Works Act 1981, public works legislation did not require the Crown to offer back compulsorily acquired land that was no longer required for public work purposes.
993. The Crown does not recognise the failure to offer back surplus land before 1 February 1982, when the Public Works Act 1981 came into force, to be a Treaty breach.
994. However, since 1 February 1982, the Crown has been obliged under the Public Works Act 1981 to offer back land previously acquired for a public work to the former owners or their successors unless a statutory exemption applied. The Crown considers that it has a Treaty duty to comply with this statutory duty and recognises that a well-founded Treaty claim may exist where it has failed to do so.
995. Similarly, failure to consider an offer-back of surplus public works land where there was a statutory discretion to do so may not have been Treaty-compliant.

996. The evidence on the record of inquiry sets out several examples of the Crown offering back land despite not being under a statutory duty to do so. These include the Raglan golf course⁵⁹² and lands used for native schools.⁵⁹³
997. The Crown also notes that proclamations of takings could be revoked up until the time that compensation was paid. The evidence on the record of inquiry shows that revocation occurred on at least seven occasions and land was returned to its original owners.⁵⁹⁴
998. Evidence on the record of inquiry indicates that in the Rohe Pōtae inquiry district there were sales of lands that were no longer required for the public works purpose they were taken for.⁵⁹⁵
999. Section 35 of the Public Works Act 1928 allowed land, which was no longer required for the purpose for which it was taken or any other public work purpose, to be sold or declared Crown land which may then be sold pursuant to the Land Act 1924. This remained in place until the offer-back provisions of the Public Works Act 1981 were introduced.⁵⁹⁶
1000. Whether or not surplus land was on sold, and whether that sale was a Treaty breach needs to be considered on a case-by-case basis with particular regard to the statutory regime at the time of sale.

⁵⁹² Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 49 and p 729.

⁵⁹³ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 52.

⁵⁹⁴ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 p 323.

⁵⁹⁵ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 pp 325-326

⁵⁹⁶ Dr D Alexander, “Public Works and Other Takings in Te Rohe Pōtae District”, Wai 898, A63 pp 81-82.

LOCAL GOVERNMENT

Does the Crown have a duty to take practical and legal steps to uphold local self management and te tino Rangatiratanga of Rohe Pōtae Māori in local government structure and processes?

To what extent does the Crown have a duty to ensure that local government bodies observe and give effect to Treaty principles?

Issue 16.1 To what extent has the Crown recognised and upheld te tino rangatiratanga in relation to self-government for Rohe Pōtae Māori?

Issue 16.2 Did Rohe Pōtae Māori ask for self management? When, how often, and what was the nature of those requests in terms of the degree of self management asked for?

Issue 16.3 Did the Crown give any indication that it would recognise or grant such self management in response to those requests?

Issue 16.4 Were there any practical or legal impediments to recognise or provide for self management as sought by Māori?

1001. The Crown notes that neither the amended claimant statement of issues nor the “Local Government and Rating” generic pleadings defines the term “self-government” used in issue 16.1. The generic pleadings also use the terminology “local self-government”, and it is not clear whether that term denotes something different from “self-government”. Further, the term “self-management” in issues 16.2 to 16.4 is not defined and the difference between “self-management” and “self-government” or “local self-government” is not explained.

1002. Against that background, the Crown has grouped issues 16.1 to 16.4 for a collective response. The Crown also notes that issues 16.1 to 16.4 are addressed to some extent in the Crown’s response to other issues, including those in the “War and Raupatu” and “Te Rohe Pōtae Compact” sections of this statement of position and concessions.

1003. The Crown notes that, for practical purposes, Rohe Pōtae Māori managed their own affairs until close to the end of the 19th century.

The history of the political engagement between the Crown and Rohe Pōtae during that period evinces both tensions, which to some extent waxed and waned, and efforts by one or other or both parties to find a means to accommodate the other's point of view and aspirations.

1004. The tension the Crown has faced in calls to recognise and uphold *te tino rangatiratanga* in relation to self-government (or self-management) for Rohe Pōtae Māori centres on how it should balance that outcome against its duty to govern for all New Zealanders.
1005. The Crown recognises that there have been consistent, but not always unanimous, calls amongst Rohe Pōtae Māori for at least a degree of self-government (or local self-government or self management); a wish to exercise control over key aspects of their affairs. Such calls were, for example, a focus of the discussions and interactions between the Crown and Rohe Pōtae Māori in the 1870s and the 1880s.
1006. For its part, the Crown acknowledges that it has often considered that the better approach, for both Rohe Pōtae Māori and the national interest, has been to draw all its citizens under the same institutions and rules. Despite that approach, the Crown has at times sought to accommodate a degree of *te tino rangatiratanga* in relation to the governance or management by Rohe Pōtae Māori of their own affairs. The measures by which the Crown has sought to achieve this include, but are not limited to:
- 1006.1 Governor Browne's Kohimarama conference in 1860, which the Governor and chiefs who attended wished to become a permanent event.⁵⁹⁷

⁵⁹⁷ Dr V O'Malley "Te Rohe Potae Political Engagement, 1840-1863" (December 2010), Wai 898, A23, p 295.

- 1006.2 Governor Grey’s development in the early 1860s of the ‘new institutions’ policy, with village rūnanga under the direction of resident magistrates, and district rūnanga under the direction of Civil Commissioners, who were empowered to make by-laws.⁵⁹⁸
- 1006.3 Governor Grey’s discussion in January 1863 with Kingitanga leaders in the Waikato regarding the governance of the Waikato-Maniapoto area.⁵⁹⁹
- 1006.4 The establishment of the Kawhia Native Committee under the Native Committees Act 1883, enacted in part as a response to the Rohe Pōtae petition of 1883. The Crown notes that the Kawhia Committee functioned for a number of years.
- 1006.5 The establishment of Māori Councils under the Māori Councils Act 1900.⁶⁰⁰
1007. The establishment of Māori Land Councils under the Native Land Administration Act 1900.
1008. The establishment of Māori Health Councils under the Native Land Amendment and Native Land Claims Adjustment Act 1919;601
1009. The establishment of the Māori War Effort Organisation;602
1010. The establishment of bodies under the Maori Social and Economic Advancement Act 1945;603 and

598 Dr V O’Malley “Te Rohe Potae Political Engagement, 1840-1863” (December 2010), Wai 898, A23, pp 406-414.

599 Dr D Loveridge “The Development and Introduction of Institutions for the Governance of Maori, 1852-1865” (September 2007), Wai 903, A143, pp 198-200.

600 J Sarich “An Overview of Political Engagement between Hapu and Iwi of the Te Rohe Pōtae inquiry district and the Crown, 1914-c.1939” (March 2011), Wai 898, A29, pp 13, 66.

601 J Sarich “An Overview of Political Engagement between Hapu and Iwi of the Te Rohe Pōtae inquiry district and the Crown, 1914-c.1939” (March 2011), Wai 898, A29, p 70.

602 A Francis and J Sarich “Aspects of Te Rohe Pōtae Political Engagement, 1939-c.1975” (August 2011), Wai 898, A72, ch 2.

1011. Legislation such as the Local Government Act 2002, which provides for Māori input into decision-making.

1012. The introduction to the House of Representatives of the Nga Wai o Maniapoto (Waipa River) Bill, which recognises the kaitiakitanga of Ngāti Maniapoto in respect of the Waipa River and provides that:⁶⁰⁴

A guiding principle [of interpretation] is co-governance and co-management, as Maniapoto and the Crown have committed to a new approach involving co-governance and co-management through a collaborative approach that reflects partnership, the highest level of good faith engagement, and consensus decision-making as a general rule, while having regard to statutory frameworks and kaitiakitanga responsibilities of Maniapoto.

1013. In general terms, the Crown is not aware of legal impediments that would affect its ability to provide for te tino rangatiratanga of Rohe Pōtae Māori over their own affairs, provided any such recognition is within New Zealand's legal framework, which includes the recognition of the sovereignty of the Crown in Parliament.

1014. Practical impediments would need to be assessed in light of the particular circumstances that applied at the relevant time. For example, the New Zealand wars, the existence of the aukati, financial conditions, the internal politics of Rohe Pōtae and broader national politics are some factors that might have affected, from time to time, the approach adopted by the Crown.

Issue 16.5 Have there been any references to the Treaty or its principles or to requirements equivalent to those matters in local government legislation prior to the passing of the Resource Management Act 1991 and Local Government Act 2002?

1015. The inclusion in local government legislation of an express acknowledgement of the Crown's Treaty obligations is a development that has occurred in the later part of the 20th century.

⁶⁰³ A Francis and J Sarich "Aspects of Te Rohe Pōtae Political Engagement, 1939-c.1975" (August 2011), Wai 898, A72, ch 3.

⁶⁰⁴ Nga Wai o Maniapoto (Waipa River) Bill, cl 14(14).

However, the absence of such provisions from local government legislation before the enactment of the Resource Management Act 1991 does not mean that the Crown has acted inconsistently with the Treaty in terms of that legislation.

Issue 16.6 What delegations of power have occurred?

Issue 16.7 Were Rohe Pōtae Māori ever consulted about these delegations?

Issue 16.8 To what extent have any delegated powers or functions of local authorities in the Rohe Pōtae inquiry district impeded customary forms of authority and self government among Rohe Pōtae Māori communities? Were these delegations justifiable in te Tiriti terms?

1016. Over time, the Crown has authorised other bodies, most notably local authorities, to exercise powers and functions in relation to a range of matters. It is beyond the scope of this statement of position and concessions to detail all the instances where this has occurred.⁶⁰⁵

1017. The Crown's Treaty responsibilities are to ensure that that statutory framework within which local authorities operate is consistent with the principles of the Treaty. The Crown does not exercise control over local authorities and is not responsible for the particular decisions that they make. Parliament has created and vested local authorities with their own powers. This reflects the philosophy that it is preferable for decisions affecting the local community to be made by that community. This philosophy is articulated explicitly in section 10 of the Local Government Act 2002, which provides:

10 Purpose of local government

The purpose of local government is—

(a) to enable democratic local decision-making and action by, and on behalf of, communities; and

⁶⁰⁵ Some examples in the context of environmental management are cited in the Crown's response to issue 17.10.

(b) to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.

1018. The Crown does not accept a generalised claim that the enactment of legislation authorising local bodies to exercise particular powers and functions is a breach of the Treaty and its principles. The introduction of such legislation is a legitimate exercise of the Crown's governance and regulatory functions. The Crown says that claims that such legislation has had a prejudicial effect on customary forms of authority and self government among Rohe Pōtae Māori communities would need to be assessed on a case-by-case basis and in light of the prevailing circumstances.

1019. The Crown notes that the Treaty does not impose on it an absolute obligation to consult, but it does require the Crown to make informed decisions on matters affecting the Māori interest.⁶⁰⁶ The Crown says that claims that legislation authorising local bodies to exercise particular powers and functions was enacted without considering, or without adequately considering, the interests of Rohe Pōtae Māori would have to be assessed on a case-by-case basis having regard to prevailing circumstances.

Issue 16.9 What effects, if any, did council boundaries have on Māori communities?

1020. The Crown notes that, over time, changes have been made to various Rohe Pōtae county boundaries. Some of these boundary changes were made by the Governor and given effect by national legislation.⁶⁰⁷

1021. However, the Crown is not aware of any particularised claim relating to the effect of council boundaries on Rohe Pōtae Māori communities and does not consider that it is an issue for inquiry.

Issue 16.10 How did rating laws affect Māori participation in local body

⁶⁰⁶ New Zealand Māori Council v A-G [1987] 1 NZLR 641, per Richardson J at p 683. See also Cooke P at p 665.

⁶⁰⁷ J Luiten "Local Government in Te Rohe Pōtae" (January 2011), Wai 898, A24, pp 12-14.

elections?

Issue 16.11 Why was there low Māori participation after voting law changed in 1944 to allow for a simple residential qualification?

1022. Until 1944, voting in local body elections was based on a ‘ratepayer qualification’, and any landowner who defaulted on the payment of rates could be disqualified from voting while their rates remained in arrears.⁶⁰⁸ The Crown notes evidence on the record of inquiry that Rohe Pōtae Māori were affected by the ratepayer qualification because Māori customary land and certain categories of Māori freehold land were exempt from rating liability at certain periods during the 19th and 20th centuries, and rates defaults by Māori landowners were a problem within the Rohe Pōtae inquiry district.⁶⁰⁹ Although the ratepayer qualification applied to all landowners, regardless of their ethnicity, the Crown accepts that its effect on Rohe Pōtae Māori participation in local body elections is a matter for inquiry.
1023. Section 3 of the Local Elections and Polls Amendment Act 1944 introduced a residential qualification for voting in local body elections.⁶¹⁰ The Crown notes there is limited evidence on the record of inquiry concerning the effect that the introduction of a residential qualification had on Rohe Pōtae Māori participation in local body elections.

Issue 16.12 What measures have there been in the district for self management by Māori? What was the nature of the powers conferred? How did they compare to local government powers? How far did they meet the requirements of Māori communities?

1024. As noted in the Crown’s response to issues 16.1 to 16.4, in the 19th and much of the 20th centuries, the Crown followed a policy that

⁶⁰⁸ J Luiten “Local Government in Te Rohe Pōtae” (January 2011), Wai 898, A24, pp 31-32.

⁶⁰⁹ J Luiten “Local Government in Te Rohe Pōtae” (January 2011), Wai 898, A24, p 32.

⁶¹⁰ Section 3 provided that every person over the age of 21 shall be qualified to be an elector in any riding of a country who possesses residential qualifications; namely – was a British subject, had resided in New Zealand for one year and had resided in the riding district for not less than three months.

focused primarily on bringing all New Zealanders under the same governance and regulatory structures, rather than separate systems of self-management. Despite this, over time the Crown has undertaken a range of initiatives to provide some degree of self-management (or self-government) to Rohe Pōtae Māori.

1025. The Crown does not accept that it has a Treaty duty to provide for self-management, or the resources for self-management, outside existing local government structures. However, the Crown accepts that the Treaty principle of equality requires it to take reasonable steps to ensure that Rohe Pōtae Māori have the same opportunities to participate in local government as non-Māori.

1026. The Crown considers that any assessment of the extent to which measures the Crown has provided for self-management by Rohe Pōtae Māori have been inconsistent with the Treaty and its principles would have to be considered on a case-by-case basis having regard to the prevailing circumstances.

Issue 16.13 **Historically and today, have Rohe Pōtae Māori been provided with any resourcing to enable their exercise of local self-government for example through dog tax? Should they have been? How did the resourcing for Rohe Pōtae Māori self-government compare to resourcing for non-Māori local government?**

1027. The Crown does not accept that it has a duty to resource Rohe Pōtae Māori self-government outside the structures provided for in legislation.

1028. In some instances, the Crown has provided a framework by which Rohe Pōtae Māori obtain resources to assist the exercise of powers of local self-government. For example, in 1900 the authority to collect dog tax was transferred from local government to Māori Councils under section 16(7) of the Māori Councils Act 1900, allowing the Councils to collect fines and taxes for breaches of the

Dog Registration Act 1880. The Maniapoto Māori Council was also able to collect certain fines under bylaws.⁶¹¹

1029. The extent to which the legislative framework has ensured that Rohe Pōtae Māori have had a reasonable level of resourcing to carry out powers under legislation may be an issue for inquiry.

Issue 16.14 **Has the Crown provided for Rohe Pōtae Māori representation in local government bodies over time? Should the Crown provide for such representation? If so, how adequate and appropriate has any such provision been, and what were the outcomes for Rohe Pōtae Māori? If not, what prejudice, if any, has resulted for Rohe Pōtae Māori?**

Issue 16.15 **Has the Crown provided resources to ensure that Rohe Pōtae Māori communities have adequate opportunity to participate in local government decision-making? If so, how? If not, have Rohe Pōtae Māori been prejudiced?**

1030. The Crown’s responsibility under the Treaty lies with the statutory framework within which local authorities operate and in ensuring that that framework is consistent with the Treaty and its principles.

1031. The Crown accepts that the Treaty principle of equality requires it to ensure that Māori have the same opportunities to participate in local government decision-making as non-Māori.

1032. The Crown acknowledges that local government legislation in the 19th and 20th centuries generally did not contain provisions for specific Māori representation in local government.⁶¹² The Crown does not accept a generalised claim that the absence of provisions for specific Māori representation, on its own, caused prejudice to Rohe Pōtae Māori or prevented them from participating in local government decision-making. The Crown also notes that

⁶¹¹ For example, see J Sarich “An Overview of Political Engagement between Hapu and Iwi of the Te Rohe Pōtae inquiry district and the Crown, 1914-c.1939” (March 2011), Wai 898, A29, p 84.

⁶¹² Although there are exception to this, such as section 3 of the Native Townships Local Government Act 1905, which required a Maori Councillor to be appointed by the Crown in the first election of a native township’s local council.

participation in local government decision-making is affected by a wide range of factors.

1033. The Crown considers that the current legislative regime concerning local government is Treaty compliant and provides adequate mechanisms to help ensure that Māori have the same opportunities to participate in local government decision-making as non-Māori. These include, but are not limited to:

1033.1 Sections 19Z to 19ZH of the Local Electoral Act 2001, which provides for local authorities to resolve to introduce Māori wards or constituencies if designated representation of Māori is sought;

1033.2 Section 4 of the Local Government Act 2002, which states that a number of principles and requirements have been incorporated into the Act to “recognise and respect the Crown’s responsibility to take appropriate account of the principles of the Treaty of Waitangi”;

1033.3 Section 14 of the Local Government Act 2002, which provides that, in performing its role, a local authority must act in accordance with listed principles, including the principle that a local authority “should provide opportunities for Māori to contribute to its decision-making processes”;⁶¹³

1033.4 Section 81 of the Local Government Act 2002, which requires a local authority to establish and maintain processes to provide opportunities for Māori to contribute to decision-making processes;

1033.5 Section 82 of the Local Government Act 2002, which sets out principles governing consultation and requires a local

⁶¹³ Local Government Act 2002, s 14(1)(d).

authority to have in place processes for consulting Māori in accordance with these principles; and

1033.6 Schedule 10 of the Local Government Act 2002, which requires that a local authority's long-term plan must include a description of how it will work with Māori to further community outcomes, and what steps it intends to take, having considered ways in which it might foster the development of Māori capacity to contribute to decision-making processes.

1034. The Crown considers that any assessment of the extent to which its acts, omissions, policies or practices may have adversely affected the ability of Rohe Pōtae Māori to participate in local body decision-making, and any prejudice that Rohe Pōtae Māori may have suffered, must be considered on a case-by-case basis having regard to prevailing circumstances.

RATING

Did the Crown breach the principles of the Treaty by imposing rating regimes on Māori land?

Introduction

The rating regime is consistent with the Crown's Treaty obligations

1035. The principle of rating Māori land is not inconsistent with the Treaty and its principles.
1036. Provision for the levying of rates is a reasonable exercise of the Crown's right to govern, and an aspect of the sovereign right to impose reasonable taxation.
1037. Since the 1840s, the Crown has authorised various bodies to carry out a range of activities, including the power to impose reasonable rates on land within the local body district. This reflects the view that it is preferable for decisions affecting local communities to be made by those communities.
1038. The Crown's responsibility in a Treaty context lies with the statutory framework within which local authorities operate and, in the context of local government rating, with ensuring that the legislative regime applicable to local government rating is consistent with the principles of the Treaty.
1039. The legislative history of the various rating regimes applicable to Māori land reflects a consistent recognition by the Crown that the rating of Māori land requires a careful consideration because of the particular situation of Māori,⁶¹⁴ and the special circumstances

⁶¹⁴ T Bennion, "Māori and Rating Law" (Waitangi Tribunal, Rangahaua Whanui National Overview 1997), vol 2, ch 19, p 455.

applying to Māori land, especially the various impediments to generating income from Māori land.⁶¹⁵

1040. From 1871,⁶¹⁶ there has been a gradual expansion of categories of Māori land liable for rates. However, the Crown notes that certain categories of land have been exempted from rates to prevent an unfair burden falling on Māori. For example:

1040.1 In recognition of the particular problems facing Māori in the use of their land, the rating legislation exempted customary Māori land (if not occupied by a European) from rating at all times.⁶¹⁷ The Rating Amendment Act 1893 provided that all Māori land occupied by Māori (outside boroughs or towns) could be rated at half rates and be exempt from any special rates.⁶¹⁸

1040.2 Under the Rating Acts Amendment Act 1893 no rates were to be levied if the land in question was situated more than five miles from any public road or highway (s 18(1)). The Rating Acts Amendment Act 1893, the Native Land Rating Act 1904 and the Rating Amendment Act 1924 empowered the Governor to declare land exempt from rating owing to

⁶¹⁵ As stated by the Waitangi Tribunal in the *Turanganui-a-Kiwa* Report, “we are aware of the crippling effect on production and utility on Māori land as a result of the fragmentation of title and fractionation of ownership”. (Waitangi Tribunal, *Turanga Tangata Turanga Whenua, The Report on the Turanganui a Kiwa Claims* (2004)) p 653).

⁶¹⁶ In “Māori and Rating Law”, (Waitangi Tribunal, Rangahaua Whanui National Theme I, First Release, July 1997) Tom Bennion discusses the various national and provincial rating regimes enacted prior to 1871. Although Bennion notes that the earliest local body rating laws, the Municipal Corporations Ordinance of 1842 and 1844, “appear not to have exempted Māori land”, it is not clear whether such Ordinances were applied to make Māori land within Rohe Pōtae liable to rates in the 1840s. Bennion states that it doubtful if any of the early provincial statutes (including those adopted in the Canterbury, Dunedin, Auckland, Wellington, New Plymouth, Marlborough and Nelson provinces) could have included Māori land anyway, since the Constitution Act 1852 (s 19(10)) provided that provincial councils could not make laws ‘Affecting lands of the Crown, or Lands to which the Title of the aboriginal native Owners has never been extinguished’. The Highway Boards Empowering Act 1871 provided that owners and occupiers of Native lands would be liable to rates only if a Native Land Court certificate of title had been issued or, if the Native title remained unextinguished, when the occupier was someone other than a Māori (s 5) (see pp 3-4, 8).

⁶¹⁷ Waitangi Tribunal, *Turanga Tangata Turanga Whenua, The Report on the Turanganui a Kiwa Claims* (2004) p 650. See Rating Acts Amendment Act 1893, s 18(4); Native Land Rating Act 1904, s 2(2); The Rating Amendment Act 1910, s 3(1); the Native Land Rating Act 1924, s 4(a); the Rating Powers Act 1988 (s 6 and Part II of the First Schedule, cl 15); Local Government (Rating) Act 2002 (Schedule 1, clause 11).

⁶¹⁸ Ratings Act Amendment Act 1893 (s 17).

the indigent circumstances of the occupiers, or for other special reason.

1040.3 The Rating Amendment Act 1924, the Rating Powers Act 1988 and the Local Government (Rating) Act 2002 contained provisions exempting land occupied by Māori burial grounds, meeting houses and marae.⁶¹⁹

1040.4 The Rating Powers Act 1988, now substituted by the Local Government (Rating) Act 2002, with associated amendments to the Local Government Act 1974, has a number of mechanisms in which rating relief can be obtained in respect of Māori land which is being used for customary purposes, landlocked, and land that receives no services have access to rating relief.

1041. The Crown submits that the history of rating legislation reflects a cautious approach to the rating of Māori land, a view which has been endorsed by the Waitangi Tribunal in the *Hauraki Report*.⁶²⁰

1042. Successive governments have given careful consideration to ensuring that a balance is struck between the need to impose reasonable taxation and the particular difficulties relating to Māori land.

1043. The Crown says that the balance struck between these two competing tensions has been appropriate.

1044. In this respect, we note the statement of the Tribunal which concluded in the *Turanganui-a-Kiwa Report* that “Māori land should bear a fair share of the district’s rates burden”.⁶²¹

Limited evidence on the record

⁶¹⁹ See for instance, Local Government (Rating) Act 2002, Schedule 1, clause 10, 12 and 13.

⁶²⁰ See Waitangi Tribunal, *The Hauraki Report* (2006), p 1018. The Tribunal stated “We acknowledge that the Crown has wrestled with this question since the mid-nineteenth century, and has approached the rating of Māori land with great caution.”

⁶²¹ Waitangi Tribunal, *Turanga Tangata Turanga Whenua, The Report on the Turanganui a Kiwa Claims* (2004), p 653.

1045. There appears to be limited evidence on the record of inquiry that deals with the specific application of rating policies and legislation to Māori land within the inquiry district.
1046. Only one report on the record of inquiry deals in any detail with the application of rating legislation to Rohe Pōtae Māori land.⁶²²
1047. The Crown submits that this lack of evidence makes it difficult, if not impossible, to draw conclusions with respect to how the rating regime affected Rohe Pōtae Māori. In particular, the limited evidence may make it “difficult to quantify the impact of the legislation in terms of alienation”.⁶²³

The Claimant Statement of Issues

Issue 16.16 What is the nature of rating? How does it relate to the Treaty guarantee in Article 2 of undisturbed possession of property so long as Māori collectives and individuals wish to retain it?

Nature of rating

1048. In the Rangahaua Whanui report, “Māori and Rating Law”, it is stated that rates, in broad terms, are a tax based on ownership of property, levied by a local authority and applied to services at a local level.⁶²⁴ Similarly Professor Kenneth Palmer states that “[r]ating constitutes a levy on land holdings, assessed against the legal occupier, for the purpose of raising revenue for one or more local authorities”.⁶²⁵

⁶²² J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898.

⁶²³ J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, p 289.

⁶²⁴ T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997), p 1.

⁶²⁵ K Palmer, *Local Government Law in New Zealand* (2nd ed) (The Law Book Company Limited, 1993), p 362. Palmer notes that “[h]istorically the system [of rates] can be traced back to the Poor Relief Act 1601 of the United Kingdom. That Act was directed towards imposing a local tax on all inhabitants to provide relief funds for persons suffering from poverty and ill health” (p 362).

1049. The Crown accepts that was a basic financial tool of local government, used to fund goods and services it provided for the benefit of its constituents.⁶²⁶

Consistency with the Treaty guarantees

1050. As noted in the introduction to this section, the principle of rating Māori land is not inconsistent with the Treaty and its principles. In and of itself, rating does not interfere with the undisturbed possession of property that Māori hold. The Crown has taken a cautious approach to the rating of Māori land by local authorities.

1051. The Crown says that the various provisions in place over time to provide for the recovery of outstanding rates arrears did not amount to a breach of the Treaty.

1052. The Crown accepts that in certain cases, Māori land with rates in arrears could be subject to charging orders, vested in the Māori Trustee or managed by a receiver and, potentially, leased or (in exceptional situations) sold to pay for the arrears.

1053. The Crown says that in relation to the enforcement of rates, there have always been special considerations relating to Māori land to mitigate hardship. For example:

1053.1 Prior to 1893 it was not possible to recover unpaid rates from Māori land. If rates were not paid by Māori prior to 1893, they were paid by the Crown.⁶²⁷

1053.2 Where the legislation provided for the sale of Māori land subject to unpaid rates, sale could only occur with the consent of the Native Minister.⁶²⁸

⁶²⁶ See T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, 1997), p 1. Kenneth Palmer also notes that “[r]ating provides the main source of revenue for the authorities” (Palmer, *Local Government Law in New Zealand* (2nd ed), p 377).

⁶²⁷ T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997), p 17.

1054. The Crown notes that the Crown’s policy was, generally, not to permit the sale of Māori land for the payment of rates.⁶²⁹

Issue 16.17 Was there any consultation with Rohe Pōtae Māori over rating legislation from 1882 or any consent?

Issue 16.18 Did Rohe Pōtae Māori complain about that? In other words, did they indicate that they did not consent? If yes, what did they not consent to?

1055. The Crown’s position is that any obligation to consult with Māori would depend on the circumstances surrounding a proposed rating regime.

1056. The Crown is not aware of any evidence on the record of inquiry of specific consultation with Rohe Pōtae Māori with respect to rating laws.

1057. However, the Crown was sufficiently informed about Māori views on the extension of rating liability and the particular situation of Māori landowners and Māori land, through:⁶³⁰

1057.1 Debates in Parliament in which Members of Parliament for the Māori seats and Māori Members of Parliament took an active role.⁶³¹

1057.2 Petitions to Members of Parliament;⁶³²

⁶²⁸ T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997), pp 61, 63.

⁶²⁹ In “Māori and Rating Law”, Tom Bennion notes the Ministerial veto remained a clear block to the forced sale of land through rate arrears, and that the policy of successive Ministers was to refuse consent, and that “it is unlikely that the formal procedure of a sale following Ministerial approval was exercised very often” (T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997), pp 61, 63).

⁶³⁰ See *New Zealand Māori Council v Attorney-General* - [1987] 1 NZLR 641, per Richardson J, p 683.

⁶³¹ See J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, pp 37-39. The Crown notes that Māori members of Parliament agreed with principle that Māori land should be rated. T Bennion notes that “Māori speakers generally tended not to question the principle of paying rates, but pleaded for exemptions for various reasons” and that “It was a minority who went further than this and said the Treaty of Waitangi meant that rates did not have to be paid” (T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, 1997), p 60).

- 1057.3 Native Minister Ballance’s discussion with the Chairman of the Kawhia Native Committee, John Ormsby, on the issue of rating at the Kihikihi hui in February 1885.
1058. The Crown is aware of the evidence on the record of inquiry indicating that those Māori, including Rohe Pōtae Māori, opposed to the imposition of the rating regime on Māori land, expressed such opposition directly to Parliament.⁶³³
1059. The Crown says that the fact of Māori opposition to the imposition of rates does not in itself mean that the Crown’s actions in providing for the levying of rates on Māori land by local authorities was inconsistent with the Treaty.

Issue 16.19 In what ways did Māori land contribute to settlement in the district?

1060. The Crown notes that Māori contributed to settlement in the district through the selling of land to the Crown during the Crown pre-emptive periods and later through the selling of land to private settlers.
1061. Irrespective of such contributions, the Crown says that it was still reasonable for Māori land within Rohe Pōtae to be rated.⁶³⁴
1062. The Crown notes that in the Turanganui-a-Kiwa inquiry, the Waitangi Tribunal concluded:⁶³⁵

Māori land should bear a fair share of the district’s rates burden.

⁶³² See for example, 22 August petition regarding the rating of Māori land within Te Rohe Poate in J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, p 130.

⁶³³ See J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, pp 37-39, 48-52, 65-69, 72-73; see T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997), pp 17-19.

⁶³⁴ Similarly, Native Minister Ngata considered that “... rates from all land in use was required to finance local infrastructure, regardless of ownership”. (J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, p 139 citing A Ngata, King Country Chronicle, 14 April 1928).

⁶³⁵ Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui-a-Kiwa Claims* (2004), p 653.

Issue 16.20 How much Māori land was taken without compensation?

1063. The Crown understands that this issue relates to Māori land taken for the purposes of public works. In doing so, it notes that the generic pleadings state that “Native land legislation allowed up to 5% of Māori freehold land to be taken for public works purposes without compensation”.⁶³⁶

1064. The Crown has addressed this issue in its response to issue 15.9.

Issue 16.21 What rating accommodations or exemptions if any were provided for lands not owned and controlled by Māori?

1065. The Crown responds to this issue on the understanding that it refers to the exemptions to rating provided for lands owned and controlled by non-Māori settlers.

1066. The Crown accepts that there were exemptions to rating provided for land owned and controlled by non-Māori settlers. For example, at various times, lands used or occupied by or for purposes such as churches, chapels, cemeteries, public schools, hospitals, lighthouses and charitable institutions were excluded from the definition of “Rateable Property” in the applicable rating legislation.⁶³⁷

1067. As with the exemptions applied to certain Māori land (as outlined in the introduction to this section), the Crown says that the exemptions were appropriate.

Issue 16.22 What were the rating laws governing unoccupied Crown lands?

1068. Under the various rating regimes, unoccupied Crown lands were excluded from the definition of “rateable property”.⁶³⁸

⁶³⁶ See Generic Pleading Re: Local Government and Rating, Wai 898, 1.5.15, para 2.10.

⁶³⁷ See for instance, Rating Act 1882, s 2; Rating Act 1894, s 2.

⁶³⁸ See for instance, Rating Act 1894, s 2.

1069. Kenneth Palmer notes the exclusion of Crown lands from rating liability derives from the Crown prerogative that resulted in no Crown land being rateable.⁶³⁹

Issue 16.23 What were the rating laws governing soldier settlements?

1070. The Crown is not aware of any evidence on the record of inquiry delineating which, if any, rating laws applied to New Zealand returned or discharged soldier settlements (Māori and non-Māori).

1071. There appear to be no particular claims that the Crown's policies for the treatment of soldier settlements under the various rating regimes resulted in breaches of the principles of the Treaty causing prejudice to claimants. Therefore, it appears the issue does not arise for inquiry in this district.

Issue 16.24 What did Native Minister Ballance promise in February 1885? How formal was the undertaking?

1072. The Crown accepts that at the Kihikihi hui on 4 February 1885, Native Minister Ballance responded to a number of concerns stated by John Ormsby, the chairman of the Kawhia committee (established under the Native Committees Act 1883), that the construction of the railway and road would lead to rating of their lands.

1073. On the matter of rating, Ballance stated:⁶⁴⁰

“... I have learnt from the speeches that were made today by the more responsible speakers that no one objects to the roads and railways. What they object to is that the land should be rated on account of these roads and railways. I object to this Rating Act as much as Mr Ormsby and any other Native present. *I think it is unfair to rate land that is not in the condition of being used.* The Government have the power of proclaiming Native lands subject to the Rating Act, and of course they may abstain from proclaiming land under the Act. *I do not think any land along the line of the railway, or along the roads leading up the*

⁶³⁹ K Palmer, *Local Government Law in New Zealand* (2nd ed), p 368.

⁶⁴⁰ AJHR, 1885 G-1, p 17.

railway, should be proclaimed under the Act. When the land has been leased or sold, then the time will come for putting on rates; and I infer that no Native will object to pay rates when the land has been leased or is being cultivated, for the rates are put on for the benefit of the roads, and roads cannot be made without them.” (emphasis added)

1074. The Crown says that Ballance’s statements were limited both in terms of the type of land to be exempted and the length of time any exemption would be in place. Ballance’s statements related solely to the lands within five miles of the railway (and any road built to service the railway) that would otherwise be liable, and did not extend to all land within the Rohe Pōtae or to all Māori owned land more generally. Ballance did not promise that rates would never be charged. He stated that Māori land should be “used” before being liable for rates.

Issue 16.25 Was that promise kept? Were Māori correct when they said it was not?

1075. The Crown is unaware of evidence on the record demonstrating whether or not rates were actually levied on Māori lands within five miles of the railway (and any road built to service the railway) and, if so, whether such land was alienated for the non-payment of rates. This is a matter for further inquiry.

1076. The Crown is aware of evidence on the record that Native Minister Ballance’s statements formed the subject of subsequent Māori petitions and concerns expressed to the government.⁶⁴¹

Issue 16.26 Did Rohe Pōtae Māori make requests for local self governance that expressly or impliedly included revenue gathering?

Issue 16.27 What was the Crown response to those requests?

1077. The Crown accepts that there is evidence on the record of inquiry that Rohe Pōtae Māori made requests for local self governance that

⁶⁴¹ See J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, pp 130, 138-139.

expressly or impliedly included revenue gathering, and that such requests were declined.⁶⁴²

1078. The Crown does not accept any action of the Crown to refuse such requests by Rohe Pōtae Māori was inconsistent with the Treaty.⁶⁴³

1079. The Crown does not accept that it had a duty to provide for local Māori self-governance that expressly or impliedly included revenue gathering.

Issue 16.28 What were the features of the rates compromise? Were the terms of the rates compromise clear?

1080. In 1928, following negotiation with Ngāti Maniapoto, compromises were reached between the Native Lands Consolidation Commission (chaired by Sir Apirana Ngata) and various Rohe Pōtae local bodies, in relation to the settlement of outstanding rates on Māori land. These compromises were approved by Cabinet on 8 September 1928.⁶⁴⁴

1081. The key element of the rates compromise were that:

1081.1.1 The Crown would pay sums of money (totalling £16,630) to eight local bodies and the Mangapu Drainage Board out of the Native Land Settlement Account.

1081.1.2 These sums were in exchange for local body agreement to write off outstanding rates (totalling £63,941)

⁶⁴² See J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, p 111; and C Marr, “Te Rohe Pōtae Political Engagement, 1864-1886”: Part Two 1882-1886” (2011), Wai 898, A78, p 1038.

⁶⁴³ The Crown notes that example of request for local self governance, including local revenue gathering, paras 2.18-2.21 of the Claimant Generic Pleading Re: Local Government and Rating (Wai 898, 1.5.15).

⁶⁴⁴ AJHR, 1932-33, G-10, p 17

associated with Māori lands within the local districts for the period up to 31 March 1928.⁶⁴⁵

1081.1.3 The local bodies would be reimbursed the sum of £1,332, being costs they had incurred in seeking orders in respect of unpaid rates on lands owned by Māori.

1081.1.4 The local bodies agreed to exempt Māori lands in those districts from the payment of rates until the end of March 1930.⁶⁴⁶ The exemption period was subsequently extended on a number of occasions.⁶⁴⁷

1082. Although the utilisation of consolidation schemes in the Rohe Pōtae were part of the discussion with the local bodies on a rating compromise, they did not form part of the compromise with the local bodies. Specifically, Ngata as Chair of the Commission made no commitments about the timeframe for consolidation, or the outcomes that would be achieved. Rather, the Native Lands Consolidation Commission at a conference with a large representative grouping of the Rohe Pōtae Māori (and representatives of Ngāti Tuwharetoa) at the Te Tokanganui-a-Noho marae, obtained:

1082.1.1 their authority to negotiate rating compromise with the local bodies;

⁶⁴⁵ J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, pp 140-142; AJHR, 1932-33, G-10, p 17.

⁶⁴⁶ The terms of the rates compromise are set out in T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui Series, National Theme I, First Release, July 1997), p 55; and in AJHR, 1932-33, G-10, p 17. Seven Rohe Pōtae local bodies (Otorohanga, Taumarunui (part), Ohura, Te Kuiti Borough, Taumarunui Borough, Waipa (part) and Waitomo) agreed to allow exemptions to the payment of rates from Native lands in those districts to 31 March 1930. Kawhia County Council agreed to exempt Native lands from the payment of rates until 31 March 1931. See also, T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, pp 49-50, Table 1.3. Hearn included a quote from Ngata that the total value of the rates to be written off and exempted was £75,000.

⁶⁴⁷ T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, pp 52-54. The subsequent exemptions were both by voluntary arrangements and by Order in Council.

- 1082.1.2 their agreement to compromising with the Crown over survey liens; and,
- 1082.1.3 an indication they would support consolidation proceedings.
1083. The Commission promoted the consolidation scheme as a means for bringing the lands under the scheme into production and therefore able to bear rates among other things.⁶⁴⁸
1084. The Crown says that the terms of the rate compromise were clear.⁶⁴⁹
1085. The Crown accepts that “Rohe Pōtae Māori were not guaranteed services as a result of the rates compromise”.⁶⁵⁰ However, it was considered that the consolidation proceedings would identify land that should be exempt from rates.
1086. The Crown denies that the consolidation scheme was part of the rates compromise with the local bodies.⁶⁵¹ The proposals to enter into a consolidation scheme were seen as a way to enhance settlement by Māori of economic blocks that would eventually generate income and be able to bear rates. As noted above, it was also anticipated that during the consolidation proceedings land that should be exempted from rates would be identified.
- Issue 16.29 What did Rohe Pōtae Māori want as compared to what the rates compromise provided? What was their compromise? Were there features that were not understood or were patently unfair?**
1087. During the conference at Te Tokanganui-a-Noho marae, the kaumatua of Ngāti Maniapoto were initially opposed to the rates

⁶⁴⁸ T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, pp 47-48.

⁶⁴⁹ T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997), p 55; AJHR, 1932-33, G-10, p 17; and T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, pp 49-50, Table 1.3.

⁶⁵⁰ Generic Pleadings Re: Local Government and Rating, para 2.26.

⁶⁵¹ Generic Pleadings Re: local Government and Rating, para 2.27.

compromise citing the arrangements made with Native Minister Ballance, and raised other issues they had with the Crown. Ngata responded that many of these issues could be addressed by a consolidation scheme. Representatives of Ngāti Maniapoto also proposed alternative terms for the rates compromise.⁶⁵²

1088. The Crown notes that Ngāti Maniapoto’s proposals for rate compromise were considered by members of the Native Lands Consolidation Commission, including Ngata,⁶⁵³ and that agreement on a rate compromise was eventually reached between members of the Commission and Ngāti Maniapoto, albeit on different terms from those originally proposed by Ngāti Maniapoto.⁶⁵⁴

1089. The evidence suggests that the features of the rates compromise, and the other arrangements between the Crown and Ngāti Maniapoto were well understood, and there do not appear to be features that were patently unfair.

Issue 16.30 Given that it involved Crown intervention and action for consolidation and development schemes, was the compromise scheme adequately supported to achieve its outcomes?

1090. There were several key impediments to the early success of the rates compromise, and more particularly the Crown initiatives for Māori land development through consolidation and development schemes:

1090.1 From 1929 the Great Depression began to impact significantly on New Zealand. This was the longest, most

⁶⁵² See J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, pp 138-140. See also, T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997), pp 54-55. See also T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, pp 47-48.

⁶⁵³ See T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997), pp 54-55; J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, p 140.

⁶⁵⁴ See T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997), p 55; T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, pp 47-48.

widespread, and deepest depression of the 20th century. Farming was one of the primary industries most heavily affected by the Depression, and as New Zealand was so heavily dependent on primary industry and export, it was one of the most seriously affected countries in the World.⁶⁵⁵

1090.2 Given the context of this Depression, which affected most countries until the late 1930s, early 1940s, there were significant impediments to success, and significant impediments to government funding support. This is the context for the Crown shifting its resources to development schemes as a means to get financial support to one of the most badly affected sectors in the economy.⁶⁵⁶

1090.3 While criticisms can be made about the under-resourcing (both in terms of the availability of qualified people and lack of funding) of the Maniapoto consolidation scheme,⁶⁵⁷ and these criticisms were made at the time by the Consolidation Officer and other officials,⁶⁵⁸ the Crown was significantly hampered by this economic context and had to make hard decisions about the use of limited resources.

1091. Nevertheless, from 1928 onwards, Māori land within Rohe Pōtae was the subject of a number of initiatives for the development and settlement of lands owned or occupied by Māori.⁶⁵⁹ The Crown says:

1091.1 A scheme for the consolidation of interests in Native land was also applied to Te Rohe Pōtae that would among other

⁶⁵⁵ AJHR, 1932-33, G-10, p 2; Ashley Gould, “Māori Land Development Schemes, Generic Overview, Circa 1920 – 1993”, An Overview Report commissioned by the Crown Forestry Rental Trust, 30 September 2004, p 14.

⁶⁵⁶ Ashley Gould, “Māori Land Development Schemes, Generic Overview, Circa 1920-1993”, An Overview Report commissioned by the Crown Forestry Rental Trust, 30 September 2004, pp 14, 35, 130-131.

⁶⁵⁷ J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, p 154.

⁶⁵⁸ T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, pp 63, 71, 85, 102.

⁶⁵⁹ See AJHR, 1932-33, G-10, pp 3 and 16.

things determine “the net individual freehold value of each native land-owner” and all liabilities, including survey liens and rates (and later mortgages and leasehold interests) and negotiate to reduce those liabilities significantly;⁶⁶⁰

1091.2 Central Government provided financial capital as a component of the consolidation scheme, “to enable Māori to farm their rationalised titles”.⁶⁶¹

1091.3 The Cabinet agreed to substantial remission of survey liens in principle on 19 November 1927. Cabinet again considered the matter of survey lien remissions and on 17th March 1928 agreed to remit the whole or any portion, details being left to the Prime Minister and the Minister of Finance to settle. A compromise was reached with respect to the payment of outstanding survey liens on Rohe Pōtae Māori land and was finalised and approved in June 1939 by the Minister of Lands;⁶⁶² and

1091.4 From 1930 onwards, schemes for the development of Māori land were funded by central government, and during the Depression these schemes became a significant conduit for unemployment relief.⁶⁶³

Issue 16.31 Did any Māori landowners suffer particular unfairness in the implementation of the compromise?

1092. The evidence on the record of inquiry does not disclose any particular unfairness in the implementation of the rates compromise.

⁶⁶⁰ J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, p138; T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, p 48.

⁶⁶¹ J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, p 146.

⁶⁶² AJHR, 1932-33, G-10, p 17; T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, pp 56-57, 85.

⁶⁶³ Ashley Gould, “Māori Land Development Schemes, Generic Overview, Circa 1920-1993”, An Overview Report commissioned by the Crown Forestry Rental Trust, 30 September 2004, pp 14, 130-131.

Some mention is made of particular approaches to discharging the remaining rates liabilities:

1092.1 During the early stage of consolidation, anomalies were identified in the rating of some blocks. This suggests that some thought was given to resolving issues identified with rating practice, and the appropriateness of rating certain lands.⁶⁶⁴

1092.2 Under the rating compromise, local bodies were to identify land that ought to be exempt from rates, and there is some evidence that this occurred.⁶⁶⁵

1092.3 Otherwise, the Crown has insufficient knowledge of the unfairness alleged, and therefore is not in a position to form a final position on this issue.

Issue 16.32 Why did it fail?

1093. The Crown says that the 1928 rates compromise was completed as negotiated with councils. The compromise meant that nearly £60,000 was removed as a liability on Māori land, including the rates that may have been payable in the years subject to exemption. In that sense, it cannot be said to have “failed”. However, the Crown acknowledges that there is evidence on the record highlighting that local bodies continued to have difficulties in recouping rates in arrears after the expiry of the compromise exemption period (that was extended on several occasions). There were a number of reasons for the continuing difficulties, but the most significant was the “prolonged depression with the catastrophic fall in prices for farm-products has introduced an element not contemplated in the original plan of Native-land development.” This significantly

⁶⁶⁴ T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, p 65.

⁶⁶⁵ T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, pp 32, 34-35, 44, 70, footnote 153.

impacted the ability of farmers to bring economic units into production, and therefore to pay rates.⁶⁶⁶

Issue 16.33 What was the position of Māori owners under rates arrears after the end of the compromise period?

1094. The 1928 rates compromise included an agreement by local bodies that Native lands would be exempt from the payment of rates up to either 31 March 1930 or 31 March 1931, and this period was extended. The agreement was not to exempt Native land from the payment of rates indefinitely though some lands subject to the scheme might fit the criteria to be exempt from rates.
1095. Local bodies attempted to negotiate a further rates compromise with the Crown, but were informed that given the financial situation no further rates compromise was possible.⁶⁶⁷
1096. The Crown accepts that after the exemption period had expired, blocks of Rohe Pōtae lands subject to the rates compromise, became liable to rates, and when those rates were not paid could be dealt with by the recovery of rates in arrears processes prescribed by statute.
1097. The Crown notes that there is evidence on the record of inquiry that, once the compromise exemption had expired, lands within the Rohe Pōtae inquiry district became subject to levied rates, and in some cases, applications were made for charging orders where rates were in arrears.⁶⁶⁸ In addition, in the late 1930s local bodies applied

⁶⁶⁶ AJHR, 1932-33, G-10, p 2; T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997), pp 58-60.

⁶⁶⁷ T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, pp 53-54.

⁶⁶⁸ T J Hearn, “Land titles, land development, and returned soldier settlement in Te Rohe Pōtae” (2011), Wai 898, A69, pp 53-54, 108, 259.

for the appointment of receiverships or for the vesting of lands owned by Māori in the Native Trustee for the purposes of sale.⁶⁶⁹

1098. There is insufficient evidence on the record to identify:

1098.1 The extent to which owners and occupiers of land subject to the Maniapoto consolidation scheme were unable to pay their rates; and

1098.2 The outcome of local body moves to recover rates arrears, and the impacts of these actions on owners and occupiers.⁶⁷⁰

Issue 16.34 What was the nature and extent of powers to compulsorily acquire 'underperforming' land from 1931?

Issue 16.35 What was the policy justification for powers to take land which was 'underperforming'?

Issue 16.36 How extensively were these provisions applied in the inquiry district?

Issue 16.37 Did Māori protest about these provisions?

1099. Under section 540 of the Native Land Act 1931, land that was unleased, unoccupied *and* not kept properly clear of noxious weeds could be vested in the Native Trustee.⁶⁷¹ This section also applied to land that was owned by a beneficial owner who was unable to be found. No alienation by way of sale was valid except with the written consent of the Native Minister (section 540).

⁶⁶⁹ See J Luiten, "Local Government in Te Rohe Pōtae" (2011), Wai 898, A24, p 180; T J Hearn, "Land titles, land development, and returned soldier settlement in Te Rohe Pōtae" (2011), Wai 898, A69, pp 83-84.

⁶⁷⁰ T J Hearn, "Land titles, land development, and returned soldier settlement in Te Rohe Pōtae" (2011), Wai 898, A69, pp 83-84.

⁶⁷¹ In his August 1950 decision regarding the use and intent of section 540/1931, Chief Judge Morrison stated that "the Court had to be satisfied as to all of the conditions set out in the legislation...". (See J Luiten, "Local Government in Te Rohe Pōtae" (2011), Wai 898, A24, p 226.)

1100. Section 34 of the Maori Purposes Act 1950 provided that the Land Court could appoint the Māori Trustee as agent for owners to effect alienation, in situations where land:
- 1100.1 was unoccupied or;
 - 1100.2 not cleared of noxious weeds or;
 - 1100.3 the rates have not been paid and the amount of rates had been charged against the land or;
 - 1100.4 the owners had neglected to farm or manage the land diligently or;
 - 1100.5 any beneficial owners could not be found.
1101. No order under section 34 had any force or effect until and unless it had been approved by the Minister of Native Affairs (section 36), while the Court could cancel any order made under section 34 (section 35).
1102. Section 34 was replaced by section 387 of the Māori Affairs Act 1953, which provided that no order could be made unless the Court was satisfied the land was capable by ordinary and reasonable standards of being used for agricultural, pastoral or horticultural purposes (section 387(4)).⁶⁷² The section included a statutory preference for sale to Māori (section 387(5)).
1103. There is limited evidence on the record of inquiry concerning the policy justification for the above sections.⁶⁷³
1104. In his August 1950 ruling regarding the use and intent of section 540/1931, Chief Judge Morrison observed that “The section is not

⁶⁷² J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, p 226.

⁶⁷³ Tom Bennion states that the National Government policy to utilise ‘unproductive Māori land’ (T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997), p 70). Also see J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, pp 226-227, 305-306.

intended to be used mainly as an easy method of acquiring Maori land”.⁶⁷⁴

1105. The Crown says that there is limited evidence on the record concerning the application of the above sections, including the extent to which these sections resulted in the alienation of Māori land.⁶⁷⁵
1106. With respect to the implementation of section 34, Tom Bennion states that “Information from the Waikato–Maniapoto district suggests that the section and its 1953 successor were not often used on the ground of rating alone.”⁶⁷⁶ Bennion also notes in the Aotea Court district, that “the rating question is not very acute in this District” since the lease and sale for rates provisions were used rarely.⁶⁷⁷
1107. From the limited evidence available, the Crown says that the imposition of rates, and the provisions applied to recoup rates in arrears, do not appear to have been a major cause of land loss in the Rohe Pōtae.

Issue 16.38 Did the Crown promote the sale Māori land to the Crown for Pakeha settlement as a means to obtain rates and further development?

⁶⁷⁴ Instead, the Chief Judge stated that “in terms of noxious weeds, the evidence must show that there was a substantial quantity on the land or that it constituted a real danger to adjoining land or that if there was not at present a substantial quantity it was likely to increase” (J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, pp 226-227, citing Decision of Chief Judge Morrison on Taupiri Lot 474C2(parts), 28 August 1950, Mercer MB 32/15).

⁶⁷⁵ The Crown notes that at chapter 6 of her report, Jane Luiten outlines the application Part 3 of the Māori Purposes Act 1950 and Part 25 of the Maori Affairs Act 1953 in the 1950s. J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, ch 6. Luiten states “It is beyond the scope of this report to quantify how much of the land subject to order resulted in permanent alienation ...” (p 229). At p 289, Luiten provides a table with figures for “Properties Alienated in Te Rohe Pōtae, May 1955”. The table suggests that only 123 acres of Māori land was sold either to Māori or Pakeha. The Crown says that it is not clear from this table whether the imposition of rates was the sole or primary cause for such alienation.

⁶⁷⁶ T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997) p 70.

⁶⁷⁷ T Bennion, “Māori and Rating Law” (Waitangi Tribunal, Rangahaua Whanui series, National Theme I, First Release, July 1997) p 67.

1108. The Crown denies that it promoted the sale of Māori land to the Crown for Pakeha settlement as a means to obtain rates and further development.
1109. The Crown is not aware of evidence on the record of inquiry which suggests that the sale of Māori land within the Rohe Pōtae was being explicitly promoted by the Crown for such purposes.
1110. In support of this issue, the Crown notes that the claimants rely on an article contained in the Raglan County newspaper of 2 April 1913.⁶⁷⁸ The Crown denies that any such statement constitutes an act of the Crown explicitly promoting the sale of Māori land as a means to obtain rates and further development.

Issue 16.39 Was it Crown policy not to develop infrastructure near Māori land where this might raise the purchase price?

1111. The Crown denies that it was Crown policy not to develop infrastructure near Māori land where this might raise the purchase price.
1112. The Crown notes that evidence on the record of inquiry on this point is limited.
1113. It notes, however, that evidence on the record of inquiry refers to allegations in 1906 that “the failure to improve road access to the Pakeha enclaves on Crown lands was a deliberate ploy to keep Māori land values down”.⁶⁷⁹ The Crown does not accept these allegations reflect the Crown’s policy for the development of infrastructure near Māori land.

Issue 16.40 Where Māori lands over-valued for rates?

⁶⁷⁸ Generic Pleading Re: Local Government and Rating, Wai 898, 1.5.15, para 2.44. In J Luiten “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, p 64, the following extract from the Raglan County, *Argus* is provided: ‘For both the development of the Dominion as a whole and also for local interests’ ... ‘it is to be hoped that the Government continues with a vigorous policy in regard to the purchase of native lands, as such policy will quickly settle the native rating difficulty, and add considerably to the general revenue of the Dominion.’ (Raglan County, *Argus*, 2 April 1913, in DB:2039).

⁶⁷⁹ See J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, p 76.

1114. The Crown denies that Rohe Pōtae Māori lands were generally overvalued for rates or rates charges.
1115. The evidence on the record of inquiry provides only one example – Part Te Kuiti 2B1B – in support of the contention that Māori land within Rohe Pōtae was over-valued.⁶⁸⁰
1116. The Crown says that one example does not indicate that Rohe Pōtae lands, in general, were overvalued for rates. A case by case analysis is needed.
1117. Further evidence is also required before the Tribunal could make any finding as to whether the government valuation of Part Te Kuiti 2B1B was excessive, and whether the Crown overvalued Rohe Pōtae Māori land for the purposes of rates. For example:
1118. The Crown notes that J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, contains no evidence for why Part Te Kuiti 2B1B was valued at £900, including factors such as the particular features of that block and/or any development or infrastructure reasons which may have influenced the government valuation. Nor is there any evidence of what would have been a reasonable 1917 government valuation for land within Rohe Pōtae.

Issue 16.41 Did the Crown provide very limited funds for development of roads and other infrastructure and services on Māori land?

1119. The Crown says that any assessment of the level of funding it allocated to the development of roads and other infrastructure on Māori land in the Rohe Pōtae must be viewed in historical context, with regard to the wider political, economic and social circumstances in which its decisions were made.
1120. The Crown denies that it provided very limited funds for development of roads and other infrastructure and services on Māori land.

⁶⁸⁰ See J Luiten, “Local Government in Te Rohe Pōtae” (2011), Wai 898, A24, pp 135-136, 157.

1121. Infrastructure such as roads and services were provided for the benefit of both Māori and Pakeha settlers. The Crown's ability to provide of such services was influenced by a range of wider political, economic and social circumstances.
1122. While evidence on the record of inquiry points to examples where it is alleged the Crown failed to provide adequate road access to Māori communities, there is also evidence of Crown expenditure on such infrastructure.⁶⁸¹
1123. The Crown says that further evidence would be required before the Tribunal could make any finding as to the adequacy of the extent of funding it provided for the development of infrastructure in the Rohe Pōtae.
- Issue 16.42 What are current rating laws and how do they affect Māori land?**
- Issue 16.43 What were the findings of the Local Government Rates Inquiry 2007?**
- Issue 16.44 What Crown actions have occurred in light of the Inquiry report?**
1124. The Local Government (Rating) Act 2002 governs the rating of Māori land today. This legislation continues to demonstrate the complexity of rating, and the enforcement of rates on, Māori land.
1125. The Local Government (Rating) Act recognises the cultural significance of Māori land. It provides that the following properties are non-rateable (s 8(1)):
- 1125.1 A Māori burial ground, not exceeding 2 hectares (Schedule 1, clause 10(b));
- 1125.2 Land set apart under section 338 of Te Ture Whenua Māori Act 1993 and used for the purposes of a marae or

⁶⁸¹ J Luiten, "Local Government in Te Rohe Pōtae" (2011), Wai 898, A24, pp 364-369.

meeting place, not exceeding 2 hectares (Schedule 1, clause 12(b));

1125.3 Land set apart under section 338 of Te Ture Whenua Māori Act 1993 that is a Māori reservation, not exceeding 2 hectares (Schedule 1, clause 12(b)).

1125.4 Māori freehold land not exceeding 2 hectares on which a Māori meeting house is erected (Schedule 1, clause 13);

1125.5 Māori freehold land that is, for the time being, non-rateable by virtue of an Order in Council made under section 116 of the Local Government (Rating) Act, to the extent specified in the order (Schedule 1, clause 14);and

1125.6 Māori customary land (Schedule 1, clause 11).

1126. Importantly, unlike general land, Māori land cannot be sold for non-payment of rates (section 66(5)). This has been the case since enactment of the Rating Powers Act 1988 (section 146 (2)).

1127. The Local Government Act 2002 also requires local authorities to adopt a number of financial policies, including a policy on the remission and postponement of rates on Māori freehold land (section 102(4)(f)).

1128. There appears to be no particulars or evidence on the record of inquiry identifying how Rohe Pōtae Māori have suffered prejudice under the Local Government (Rating) Act 2002 or the Local Government Act 2002.

1129. The Crown notes that the Local Government Rates Inquiry 2007 (discussed on the record of inquiry) made specific findings in relation to areas other than the Rohe Pōtae.⁶⁸²

⁶⁸² J Luiten, "Local Government in Te Rohe Pōtae" (2011), Wai 898, A24, pp 336-340.

ENVIRONMENTAL ISSUES

The Environment Generally

Environmental Management, Exotic Species, Water Quality, Drainage

Issue 17.1 **What was the nature and importance of the natural resources of the Inquiry District to Māori? Were any resources of particular importance?**

Issue 17.2 **What were Te Rohe Pōtae iwi and hapū tikanga in relation to the use, possession and care of whenua, ngahere, wai, awa, roto and fisheries?**

1130. The Crown recognises that Rohe Pōtae Māori have a special relationship with the environment and its resources, and acknowledges the importance that the environment and its resources play in Māori culture and the Māori world view.

1131. The Crown accepts that, in some circumstances, particular species of flora and fauna may constitute taonga of specific importance to Rohe Pōtae Māori, and in relation to which the Crown may have duties under Article Two of the Treaty. The Crown also acknowledges that, in some circumstances, Māori may have a relationship of kaitiakitanga with aspects of the environment and its resources.

1132. The Crown notes evidence on the record of inquiry that a number of species of flora and fauna were of particular importance to Rohe Pōtae Māori, such as tuna, some shark species, and paru.⁶⁸³ Furthermore, the Crown recognises that Rohe Pōtae iwi and hapū had many tikanga relating to the use, possession and care of the environment and its resources, and notes evidence on the record of inquiry that they continue to exercise many of those tikanga today.

The Environment and Māori Customary Law

Issue 17.3 **What was the legal effect of the introduction of common law as it affected natural resources?**

⁶⁸³ Dr M Belgrave et al *Te Rohe Pōtae Environmental and Wahi Tapu Report* (Wai 898, A76, Waitangi Tribunal, 2011).

- Issue 17.4** **What provision was made for customary law, if any?**
- Issue 17.5** **Are there examples from cases in the district involving clashes of Māori customary law and common law claims by settlers?**
- Issue 17.6** **What was the legal effect of the introduction of statutes concerning natural and physical resources in the district?**
- Issue 17.7** **What provision was made for customary law, if any?**
- Issue 17.8** **Are there examples from cases in the district involving clashes of Māori customary law and statute law?**
- Issue 17.9** **Where [sic] particular policies under these laws and statutes that impacted on Māori custom law of natural resources?**
1133. Before 1840, Māori had their own systems and practices for the management of the environment and its resources, and some of these systems and practices are still carried out today. The Crown acknowledges that the legal system introduced in New Zealand following the Crown's acquisition of sovereignty brought about change, including change to the way in which the environment and natural resources were managed and controlled. In essence, the ownership and management of the environment and its resources became subject to common law and statute law.
1134. Parliament has exercised its law making powers to enact a wide range of statutes dealing with the management, control, use and protection of the environment and its resources, and this has led to the development of a large body of related case law. The Crown does not accept that the enactment of legislation relating to the protection, management and control of the environment has, by itself, resulted in prejudice to Rohe Pōtae Māori or is a breach of Treaty principles. Rather, the management of the environment is a legitimate governance and regulatory function of the Crown.⁶⁸⁴
1135. There are multiple interests in the environment and natural resources of the Rohe Pōtae that the Crown must weigh up carefully

⁶⁸⁴ See also the comments of the Court of Appeal in *Ngai Tabu Māori Trust Board v Director General of Conservation* [1995] 3 NZLR 553 at 8.

in developing and pursuing its environmental policies. In that exercise, the Crown is entitled to seek to achieve a reasonable balance between its Treaty obligations and the wider national interest. This means that, at times, some interests may be outweighed by others. The Crown recognises that, at times, the customs and practices of Māori in relation to the environment and its resources may have come into conflict with other interests under both statute and common law as part of that balancing exercise. The Crown notes the specific case studies on the record of inquiry, including Te Maika, Oioroa, Ngaroto and Aotea Harbour.⁶⁸⁵

1136. The Crown also notes evidence on the record of inquiry that the introduction of common law did not have an immediate effect on Māori customs in relation to the environment, and many Māori continued to follow their customary practices.⁶⁸⁶ The New Zealand courts also recognised the application of the common law doctrine of native title, and its implications for Māori proprietary rights, early in New Zealand's post-Treaty history.⁶⁸⁷
1137. The Crown considers that the contemporary legislative framework provides for appropriate recognition of Māori interests, as well as significant provision for Māori to express their views and concerns, in relation to the environment. For example, under the Resource Management Act 1991 (the RMA) Māori relationships with the environment and its features are recognised as matters of national importance that those exercising powers and functions under the Act must recognise and provide for.⁶⁸⁸ The Crown considers that the

⁶⁸⁵ Dr M Belgrave et al *Te Rohe Pōtae Environmental and Whāi Tapu Report* (Wai 898, A76, Waitangi Tribunal, 2011).

⁶⁸⁶ Dr M Belgrave et al *Te Rohe Pōtae Harbours and Coast, Inland Waterways, Indigenous Flora and Fauna, Sites of Significance and Environmental Management and Environmental Impacts Scoping Report – A Report Commissioned by the Crown Forestry Rentals Trust for the Waitangi Tribunal's Rohe Pōtae District Inquiry* (Wai 898, A64, Waitangi Tribunal, 2010) at 23.

⁶⁸⁷ For example, see *R v Symonds* (1847) NZPCC 388 and *In Re Landon and Whitaker Claims Act 1871* (1872) 2 NZCA 41.

⁶⁸⁸ Resource Management Act 1991, s 6(e).

RMA strikes an appropriate balance between its regulatory role, and its obligation to recognise and take account of the interests of Māori. While the RMA is part of an ongoing process to develop a proper regime for the management of resources, the Crown accepts that there may be issues as to whether earlier legislation struck this balance. However, the Crown considers that any assessment of its environmental policies and practices, and particularly the extent to which they may have recognised Māori customs and practices, would need to be considered on a case-by-case basis and in light of the prevailing circumstances of the time.

Environmental Management and Control

- Issue 17.10** **What delegations of authority did the Crown make that operated in the district?**
- Issue 17.11** **What consultation occurred with Te Rohe Pōtae Māori when borough councils were delegated the power to manage waterways?**
- Issue 17.12** **When local health boards were given powers to empty sewers, what consultation occurred with Te Rohe [sic] Māori?**
- Issue 17.13** **What role did acclimatisation societies play and what powers did they exercise with respect to Te Rohe Pōtae waterways, flora and fauna?**
- Issue 17.14** **In those delegations, what provision, if any, was made for Māori interests in resources and custom law?**

1138. Over time, the Crown has authorised other bodies, most notably local authorities, to exercise powers and functions in relation to the management, use and protection of the environment and its resources. It would be very difficult, if not impossible, to detail every instance where this has occurred. By way of example, they included the provision of powers under the Municipal Corporations Act 1867 for borough councils to enact certain by-laws relating to water management,⁶⁸⁹ and the establishment of regional Catchment Boards under the Soils Conservation and Rivers Control Act 1941

⁶⁸⁹ Municipal Corporations Act 1867, s 186.

that were empowered to undertake works to prevent and minimise damage caused by floods and erosion.⁶⁹⁰

1139. The Crown is not aware of any evidence on the record of inquiry as to whether it consulted with Māori regarding any powers that borough councils and local health boards may have been authorised to exercise under statute. The Crown notes that the Treaty does not impose an absolute duty of consultation, but does require it to make informed decisions on matters affecting the Māori interest.⁶⁹¹
1140. The authorisation of local government to exercise functions and powers under statute in respect of the environment, such as through the RMA, reflects the philosophy that it is preferable for decisions affecting the local community to be made by that community. This philosophy is also articulated explicitly in section 10 of the Local Government Act 2002.
1141. The Crown does not accept that it has responsibility for the acts or omissions of bodies exercising powers and functions authorised under statute. Local authorities are not part of the Crown but are separate bodies corporate pursuant to section 12 of the Local Government Act 2002. The Crown does not exercise control over local authorities and is not responsible for their particular decisions. Parliament has created and vested local authorities with their own powers.
1142. The Crown notes that within the contemporary legislative framework, there is substantial potential for the views and concerns of Māori to be considered in decision-making processes regarding the environment, including under the RMA, the Local Government Act 2002 and the Conservation Act 1987. In authorising other bodies to exercise functions and responsibilities today, the Crown

⁶⁹⁰ Soils Conservation and Rivers Control Act 1941, s 126.

⁶⁹¹ *NZ Māori Council v A-G* [1987] 1 NZLR 641, per Richardson J at 683. See also Cooke P at 665.

seeks to do so consistently with Treaty principles. For example, section 4 of the Local Government Act 2002 states explicitly that a number of principles have been incorporated into the Act to “recognise and respect the Crown’s responsibility to take appropriate account of the principles of the Treaty of Waitangi”.

1143. While the Crown is not under an absolute duty to consult, it acknowledges that there may have been times when New Zealand’s legislative framework for the management and control of the environment and its resources provided no or limited input for Māori. However, the Crown considers that any assessment of the way in which the views and concerns of Māori have been provided for in the authorisation of other bodies to exercise functions and powers would need to be considered on a case-by-case basis and in light of the prevailing circumstances of the time.
1144. The Crown notes evidence on the record of inquiry concerning the role acclimatisation societies played in the management of the environment, particularly in regard to the control of perceived pest species. It acknowledges that, in some cases, indigenous flora and fauna were affected by the actions of acclimatisation societies.⁶⁹² The Crown also notes that acclimatisation societies have been abolished⁶⁹³ and replaced by Fish and Game Councils under Part 5A of the Conservation Act 1987.
1145. The Crown notes that, over time, there may have been instances where Māori interests in the environment and its resources were not provided for in the authorisation of other bodies to exercise powers and functions to the extent that they are provided for today. While the Crown does not accept that it has responsibility for the actions

⁶⁹² Dr M Belgrave et al Te Rohe Pōtae Harbours and Coast, Inland Waterways, Indigenous Flora and Fauna, Sites of Significance and Environmental Management and Environmental Impacts Scoping Report – A Report Commissioned by the Crown Forestry Rentals Trust for the Waitangi Tribunal’s Rohe Pōtae District Inquiry (Wai 898, A64, Waitangi Tribunal, 2010) at 87-90.

⁶⁹³ Conservation Law Reform Act 1990, s 74.

of bodies exercising powers and functions authorised by statute, it is responsible for the broad policy and legislative framework within which those bodies operate. The Crown recognises that whether or not authorisations were made appropriately in light of the Crown's Treaty obligations may be a matter for inquiry.

Issue 17.15 Have Crown agencies such as the Department of Conservation (“DOC”) and agencies with Crown-delegated duties such as the Environment Waikato regional council met the requirements of their enabling Acts in relation to hapū/iwi?

1146. The Crown notes evidence on the record of inquiry concerning the decisions and actions of Environment Waikato.⁶⁹⁴ However, as noted above, the Crown does not have responsibility for the decisions and actions of local authorities.

1147. The work of the Department of Conservation (DOC) is guided by, and DOC has responsibilities under, a number of statutes and regulations. These include the Conservation Act 1987, the National Parks Act 1980, the Reserves Act 1977, the Marine Reserves Act 1971, the Marine Mammals Protection Act 1978, and the Wildlife Act 1953. DOC also contributes to the conservation and sustainable management of natural and historic heritage in areas for which it is not directly responsible. It does this through its roles under other statutes including the Resource Management Act 1991, the Fisheries Acts 1983 and 1996, the Biosecurity Act 1993, the Forest and Rural Fires Act 1977 and the Crown Pastoral Land Act 1998.

1148. The focus of all of these statutes is on the protection, preservation and/or sustainability of the environment, and each provides for ways in which the interests and views of Māori are to be considered. For example, section 4 of the Conservation Act 1987 provides that the Act is to be interpreted and administered as to give effect to the principles of the Treaty.⁶⁹⁵ DOC's Statement of Intent 2011-2014

⁶⁹⁴ For example, see Dr M Belgrave et al *Te Rohe Pōtae Environmental and Wahi Tapu Report* (Wai 898, A76, Waitangi Tribunal, 2011) at 73 to 106.

⁶⁹⁵ Resource Management Act 1991, s 4.

recognises its obligations in respect of the principles of the Treaty, the importance of engaging with tangata whenua to protect Māori cultural values, supporting Māori communities as kaitiaki of their historic and cultural heritage and taonga, and encouraging Māori participation in conservation delivery.⁶⁹⁶

1149. The Crown is satisfied that DOC's governing legislation provides appropriate recognition of Māori interests in relation to the environment, and that, overall, DOC is fulfilling its obligations under those statutes. DOC reviews periodically the way in which it engages with Māori, and how its engagement processes can be improved.

Issue 17.18 Does the Resource Management Act 1991 today and Local Government Act 2002 make sufficient provision for Māori?

1150. The RMA and the Local Government Act 2002 contain important provisions recognising that weight should be attached to Māori values and interests in environmental decision-making.

1151. In terms of the RMA, the Crown notes that recognition of Māori interests is achieved in a number of ways. Perhaps most importantly, Part 2 of the RMA provides for the purpose and principles of the Act, and states that, in achieving the purpose of sustainable management,⁶⁹⁷ those exercising powers and functions under the Act must:

1151.1 recognise and provide for matters of national importance, including the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga;⁶⁹⁸

⁶⁹⁶ Department of Conservation, *Statement of Intent 2011-2014* (Department of Conservation, Wellington) at 2.1.2.

⁶⁹⁷ Resource Management Act 1991, s 5.

⁶⁹⁸ Resource Management Act 1991, s 6(e).

1151.2 have particular regard to kaitiakitanga;⁶⁹⁹ and

1151.3 take into account the principles of the Treaty.⁷⁰⁰

1152. In relation to the Local Government Act, the Crown notes that the Act provides for, among other things, opportunities for Māori to contribute to local government decision-making,⁷⁰¹ requirements that one member of the Local Government Commission have knowledge of tikanga Māori and be appointed after consultation with the Minister of Māori Affairs,⁷⁰² requirements that Local Government Statements include policies for liaising with Māori (and memoranda or agreements with Māori),⁷⁰³ requirements that, in certain circumstances, local authorities must take into account “the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga”,⁷⁰⁴ and requirements that local authorities have processes in place for consulting with Māori.⁷⁰⁵
1153. The Crown considers that these provisions provide appropriate recognition of Māori interests, and satisfy its Treaty obligations in respect of partnership.

Environmental Degradation

Issue 17.16 Did Rohe Pōtae Māori express concerns about environmental degradation? When? What was the Crown’s response in relation to: fisheries, exotic species, and water quality in lakes, rivers and streams? In relation to: fisheries – including effects of drainage schemes, exotic species, water quality in lakes,

⁶⁹⁹ Resource Management Act 1991 s 7(a). “Kaitiakitanga” is defined in section 2(1) of the RMA as “the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship

⁷⁰⁰ Resource Management Act 1991, s 8.

⁷⁰¹ Resource Management Act 1991, s 14 and s 81.

⁷⁰² Resource Management Act 1991, s 33.

⁷⁰³ Resource Management Act 1991, s 40.

⁷⁰⁴ Resource Management Act 1991, s 77.

⁷⁰⁵ Resource Management Act 1991, s 82.

rivers and streams.

Issue 17.17 Did the Crown allow the degradation of the following inland waterways, including but not limited to: Mangapiko Stream, Waitomo Stream and Waipa River?

1154. The health of the environment and its resources is affected by a wide range of complex factors, many of which are outside of the Crown's control. While the Crown recognises the importance of New Zealand's environment as a significant resource, all ecosystems are susceptible to human activity, and dynamic and natural environmental changes will continue to occur with and without human interference. The Crown denies that it has a general obligation, Treaty or otherwise, to prevent all environmental effects that may be perceived by some groups as adverse. As noted in response to issue 17.9, the Crown develops policy and proposes legislation, and in undertaking these tasks must balance the often competing interests of diverse groups and, at times, the avoidance of potential prejudicial environmental effects may be outweighed by other considerations and interests.
1155. The Crown is not aware of evidence on the record of inquiry as to Rohe Pōtae Māori raising any specific concerns with the Crown regarding environmental degradation in the district. However, the Crown considers that, if any such concerns were raised, any assessment of its response would have to be considered on a case-by-case basis and in light of the prevailing circumstances of the time.
1156. In relation to the introduction of exotic species, the Crown notes that this had begun in New Zealand prior to 1840, and was, at that time and afterwards, generally supported by and of benefit to Māori. The Crown does not accept that the introduction of exotic species amounts to a breach of Treaty obligations. The introduction of exotic species was an incident of colonisation that, to the extent it was specifically authorised or encouraged by the Crown, was reasonably believed to be in the national interest. The Crown notes further that, to the extent to which the continued presence in New

Zealand of certain exotic species is now considered to be detrimental to the environment generally and to indigenous flora and fauna specifically, the Crown is taking reasonable measures to reduce or eradicate those species.

1157. The Crown notes evidence on the record of inquiry concerning environmental effects on Rohe Pōtae waterways, including the Waipa River control schemes,⁷⁰⁶ the discharge of sewerage into the Mokau River,⁷⁰⁷ channel erosion in the Mokoiti Stream,⁷⁰⁸ and the discharge of dairy factory effluent into the Mangapiko Stream.⁷⁰⁹ As with the environment generally, the health of waterways is affected by a wide range of factors, many of which are outside the Crown's control. As outlined earlier, the Crown does not have a duty to prevent all environmental effects that may be considered by some groups as adverse and, in weighing up the many competing interests in waterways, in some cases the national interest may outweigh the interests of others. The Crown considers that any assessment of whether it has caused or allowed any degradation in Rohe Pōtae waterways would need to be undertaken on a case-by-case basis, having regard to the prevailing circumstances of the time.

Fisheries

Issue 17.19 **What was the nature and importance of the fisheries resource in the Inquiry District and in particular tuna?**

Issue 17.20 **How much was it impacted by the introduction of the Common Law and statutes and policies affecting waterways**

⁷⁰⁶ Dr M Belgrave et al Te Rohe Pōtae Harbours and Coast, Inland Waterways, Indigenous Flora and Fauna, Sites of Significance and Environmental Management and Environmental Impacts Scoping Report – A Report Commissioned by the Crown Forestry Rentals Trust for the Waitangi Tribunal's Rohe Pōtae District Inquiry (Wai 898, A64, Waitangi Tribunal, 2010) at 116.

⁷⁰⁷ Nga Korero Tuku Iho o te Rohe Pōtae – 5th Oral Traditions Hui (Wai 898, 4.1.5) at 63.

⁷⁰⁸ Nga Korero Tuku Iho o te Rohe Pōtae – 5th Oral Traditions Hui (Wai 898, 4.1.5) at 62.

⁷⁰⁹ Dr M Belgrave et al Te Rohe Pōtae Harbours and Coast, Inland Waterways, Indigenous Flora and Fauna, Sites of Significance and Environmental Management and Environmental Impacts Scoping Report – A Report Commissioned by the Crown Forestry Rentals Trust for the Waitangi Tribunal's Rohe Pōtae District Inquiry (Wai 898, A64, Waitangi Tribunal, 2010) at 72.

generally which indigenous fish including tuna use and governing tuna directly? (eg laws and policies encouraging their destruction).

Issue 17.21 Did the Crown consult and properly involve hapū/iwi in the formulation of such legislation and policy and did it provide for proper involvement and decision-making of hapū/iwi in the monitoring, protection, use and management of the fishery itself?

Issue 17.22 Did Māori of the district express concerns about indigenous fish including tuna? When? What was the Crown response?

Issue 17.23 What is the prognosis for indigenous fisheries including tuna in the district today?

1158. The Crown notes that the Waitangi Tribunal has no jurisdiction to inquire, or inquire further into, or make any finding or recommendation in respect of:

1158.1 Commercial fishing or commercial fisheries (within the meaning of the Fisheries Act 1983); or

1158.2 The Deed of Settlement between the Crown and Māori dated 23 September 1992; or

1158.3 Any enactment, to the extent that it relates to such commercial fishing or commercial fisheries.⁷¹⁰

1159. The Crown notes further that the 1992 fisheries Deed of Settlement reflects its recognition of Māori fishing rights and the grievances associated with Treaty breaches in relation to those rights. The recitals in the Deed of Settlement provide, inter alia:

“A. By the Treaty of Waitangi the Crown confirmed and guaranteed to the Chiefs, Tribes and individual Māori full, exclusive and undisturbed possession and te tino rangatiratanga of their fisheries.

B. Section 88(2) of the Fisheries Act 1983 provides: ‘Nothing in this Act shall affect any Māori fishing rights.

C. There has been uncertainty and dispute between the Crown and Māori as to the nature and extent of Māori fishing rights in the

⁷¹⁰ Treaty of Waitangi Act 1975, s 6(7).

modern context as to whether they derive from the Treaty and/or common law (such as by customary law or aboriginal title or otherwise) and as to the import of section 88(2) of the Fisheries Act 1983 and its predecessors.

K. The Crown recognises that traditional fisheries are of importance to Māori and that the Crown's Treaty duty is to develop policies to help recognise use and management practices and provide protection for and scope for exercise of rangatiratanga in respect of traditional fisheries.”

1160. Section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 reflects the 1992 Māori Fisheries settlement and provides for the manner in which Treaty interests in non-commercial fisheries are to be addressed. Section 10(b) and (c) provide:

“(b) The Minister, acting in accordance with the principles of the Treaty of Waitangi, shall—

(i) Consult with tangata whenua about; and

(ii) Develop policies to help recognise—

use and management practices of Māori in the exercise of non-commercial fishing rights; and

(c) The Minister shall recommend to the Governor-General in Council the making of regulations pursuant to section 89 of the Fisheries Act 1983 to recognise and provide for customary food gathering by Māori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade.”

1161. The Fisheries (Kaimoana Customary Fishing) Regulations 1998 were made under the Fisheries Act 1983, and provide for Māori customary food gathering. For certain areas where the Regulations do not yet apply, customary non-commercial fishing is governed by regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986.⁷¹¹

⁷¹¹ Regulation 4(2) of the Fisheries (Kaimoana Customary Fishing) Regulations 1998 provides “Until the Minister confirms a Tangata Kaitiaki/Tiaki for an area/rohe moana in accordance with regulation 9 of these regulations, regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986 apply to the taking of fisheries resources for customary food gathering purposes from that area/rohe moana”. Regulations 5-9 govern the process for the nomination of proposed tangata kaitiaki/tiaki, public notice of nominations, right to make

1162. In light of section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act, the Crown suggests that any inquiry into customary non-commercial fisheries should be focused on experience today so far as the operation of this regime is concerned.
1163. The Crown acknowledges that fisheries resources, including tuna, were important to Rohe Pōtae Māori for both cultural and customary food reasons. The Crown also notes that it has acknowledged in previous inquiries that tuna was a taonga to specific iwi and hapū, and accepts that tuna may also be a taonga to specific Rohe Pōtae iwi and hapū.
1164. The Crown considers that it is impossible to attribute any decline in fisheries resources to a single factor. Rather, like the environment in general, fisheries resources are affected by a range of complex factors, many of which are outside the Crown's control. In particular, the Crown notes that the migratory nature of many ocean species means that their health and abundance locally can be subject to circumstances outside New Zealand waters.
1165. The Crown notes evidence on the record of inquiry that, over time, fisheries resources have declined. The Crown further notes that some anecdotal evidence from claimants concerning the health and availability of fisheries resources is said to be “debatable and contradictory”,⁷¹² while it appears that other evidence has not taken into account all the information available to provide a greater insight into national policy.⁷¹³

submissions on nominations, dispute resolution processes and confirmation of appointment following resolution of disputes.

⁷¹² Dr M Belgrave et al *Te Rohe Pōtae Environmental and Wabi Tapu Report* (Wai 898, A76, Waitangi Tribunal, 2011) at 337.

⁷¹³ Dr M Belgrave et al *Te Rohe Pōtae Harbours and Coast, Inland Waterways, Indigenous Flora and Fauna, Sites of Significance and Environmental Management and Environmental Impacts Scoping Report – A Report Commissioned by the Crown Forestry Rentals Trust for the Waitangi Tribunal's Rohe Pōtae District Inquiry* (Wai 898, A64, Waitangi Tribunal, 2010) at 100.

1166. Over time, the Crown has undertaken a range of initiatives to protect, manage and sustain New Zealand's fisheries resources and Māori interests in them, in addition to those outlined above. For example, before doing certain things under the Fisheries Act 1996, section 12 of that Act requires the Minister to consult with Māori and to provide for the input and participation of tangata whenua with a non-commercial interest in the fish stock concerned or an interest in the effects of fishing on the aquatic environment. In addition the Act provides for the Minister, at the request of Māori, to close areas of customary importance on a temporary basis in order to rebuild fish stocks or prohibit types of fishing that adversely affect customary fishing. The Crown has also taken active steps to protect fisheries through the introduction of the Quota Management System (QMS). Tuna fisheries within the Rohe Pōtae were brought under the QMS on 1 October 2004, after a full range of submissions had been considered by the Minister of Fisheries.
1167. The Crown considers that its current regime for the management of fisheries is Treaty compliant, and that the Ministry of Agriculture and Forestry (MAF), which includes the Ministry of Fisheries, is meeting its obligations under the Fisheries Act 1996. MAF has specific programmes to provide for the input and participation of tangata whenua into fisheries sustainability processes and fisheries planning processes. MAF has provided assistance to tangata whenua to develop their own planning documents to inform the development of national level fisheries plans. In addition, MAF has worked with tangata whenua to develop regional forums of hapū and iwi to enable Māori to work together to advance their interests in fisheries management. In the Rohe Pōtae, MAF has assisted in the establishment of the Nga hapū o Te Uru Forum by marae between Mokau and the Manukau Harbour. Marae in this area have taken up the self-management of customary fishing through the regulatory provisions of fisheries law. They have also established taiapure and mataitai reserves in the Kawhia and Aotea harbours and

adjacent coasts to enable them to manage non-commercial fishing activities in that area. Applications for mataitai reserves are also proceeding in the Marokopa area.

1168. With regard to the management and control of the environment, the Crown denies that the Treaty imposes on it an absolute obligation to consult with Māori, but the Crown is required to make informed decisions on matters affecting the Māori interest. However, the Crown notes that, while the processes through which the environment and its resources are managed today provide significant recognition of Māori interests and views, this may not always have been the case. The Crown considers that any assessment of its decision-making processes would need to be considered on a case-by-case basis and in light of the prevailing circumstances of the time.

1169. The Crown notes evidence on the record of inquiry that, at times, Rohe Pōtae Māori raised concerns regarding the fisheries resources in the district.⁷¹⁴ The Crown considers that its response to any concerns that may have been raised would need to be considered on a case-by-case basis, taking into account the prevailing circumstances of the time.

Issue 17.24 Did the Crown adequately assess the risk of the environmental transformation in Rohe Pōtae, in full consultation with hapū/iwi? Has it adequately monitored the impacts on native freshwater and estuarine species and on hapū/iwi and undertaken adequate measures for the sustainable replenishment and protection of affected species?

1170. While the Crown's ability to assess environmental risks, monitor environmental effects, and take legislative and policy measures to sustain and protect the environment is very strong today, the Crown notes that this was not always the case. In particular, the technology, scientific resources, and academic research that the Crown relies

⁷¹⁴ For example, see Dr M Belgrave et al Te Rohe Pōtae Harbours and Coast, Inland Waterways, Indigenous Flora and Fauna, Sites of Significance and Environmental Management and Environmental Impacts Scoping Report – A Report Commissioned by the Crown Forestry Rentals Trust for the Waitangi Tribunal's Rohe Pōtae District Inquiry (Wai 898, A64, Waitangi Tribunal, 2010) at 90.

upon today in order to carry out environmental assessments has not always been available, particularly during the 19th and early 20th centuries. The Crown notes further that the Treaty does not impose on it an absolute duty of consultation, and environmental monitoring is undertaken by a range of local authorities.

1171. The Crown notes evidence on the record of inquiry concerning the health of native freshwater and estuarine species of flora and fauna.⁷¹⁵ As noted above, the health of the environment and its resources is affected by a wide range of complex factors, many of which are outside the Crown's control. Any assessment of the Crown's monitoring and protection of these species would need to be considered on a case-by-case basis having regard to the prevailing circumstances of the time.

Issue 17.25 Has the Crown adequately protected vulnerable species affected by environmental transformation and/or commercial fishing, including Maui's dolphin; or the peraro, ngorongoro and kaeo which continue to be important to Ngāti Kiriwai and Ngāti Mahuta?

1172. The Crown notes the importance of certain species of flora and fauna to Rohe Pōtae hapū and iwi, including the peraro, ngorongoro and kaeo. The Crown also notes that a number of species of indigenous flora and fauna in New Zealand are threatened, including the Maui's Dolphin. The reasons for this are complex, and the Crown notes it is difficult to attribute a decline in particular flora and fauna to any one factor.

1173. The Crown notes that the Maui's Dolphin faces a number of threats, many of which are outside its control. These include disease, predation by other marine animals, weather and climate change,

⁷¹⁵ For example, see Nga Korero Tuku Iho o te Rohe Pōtae – 3rd Oral Traditions Hui (Wai 898, 4.1.3) at 161-162; Nga Korero Tuku Iho o te Rohe Pōtae – 5th Oral Traditions Hui (Wai 898, 4.1.5) at 10, 60-61, 64 and 75; and Nga Korero Tuku Iho o te Rohe Pōtae – 1st Oral Traditions Hui (Wai 898, 4.1.1) at 91-92.

interaction with boats and pollution.⁷¹⁶ The Maui's dolphin is ranked as 'Nationally Critical' by the New Zealand Threat Classification System and 'Critically Endangered' by the International Union for Conservation of Nature (IUCN). In 2008 DOC and the then Ministry of Fisheries established the Hector's and Maui's Threat Management Plan (TMP). The TMP identifies all human-induced threats to the dolphin populations and outlines strategies to mitigate these threats. As part of the threat mitigation strategies outlined in the TMP, the then Minister of Conservation established four new marine mammal sanctuaries and increased the size of an existing sanctuary. The West Coast North Island Marine Mammal Sanctuary was established specifically to increase the protection of the Maui's dolphin population. Within this sanctuary there are restrictions on seabed mining activities and acoustic seismic surveying. Also in 2008, the then Minister of Fisheries implemented a range of additional fishery restrictions covering parts of the West Coast North Island Marine Mammal Sanctuary. These restrictions include bans on set netting, trawling and drift netting in defined areas. As well as threat mitigation strategies, the TMP also highlights research priorities. It is understood that new research relating to Maui's Dolphin will be published in the near future.

1174. The Crown is not aware of evidence on the record of inquiry in relation to peraro, ngorongoro and kaeo and at this stage of the inquiry is not able to respond further to matters concerning those species.

Issue 17.26 What is the regime governing indigenous fisheries including tuna today in the district and does it make sufficient provision for Māori concerns?

1175. The legislative framework through which indigenous fisheries, including tuna, are currently managed include the Fisheries Act 1996, the Māori Fisheries Act 2004, the QMS, the Marine Reserves Act

⁷¹⁶ Department of Conservation, <http://www.doc.govt.nz/conservation/native-animals/marine-mammals/dolphins/mauis-dolphin/threats/>.

1971, and the Conservation Act 1987 (for species not managed under the Fisheries Act 1996). The 1992 Settlement Act and the Crown’s position on the effect of this legislation is addressed in the Crown’s response to issues 17.19 to 17.23. This framework provides a number of ways through which Māori concerns can be considered and addressed. For example, the Marine Reserves Act 1971 permits the establishment of marine reserves on, inter alia, the application of iwi and hapū who have tangata whenua status in a particular area.⁷¹⁷ The Crown considers that the current regime governing indigenous fisheries makes sufficient provision for Māori concerns regarding the fisheries resource to be considered and addressed.

1176. The Crown considers that the current regime for the management of fisheries is Treaty compliant, and provides a range of opportunities for Rohe Pōtae Māori concerns to be considered and addressed.

Issue 17.27 Does the Crown now owe a duty to hapū/iwi to restore a sustainable environment and ensure intergenerational responsibility for the maintenance of a sustainable environment?

1177. The Crown notes that the Treaty principle of active protection may require it to take steps to protect Māori interests in the environment, but notes that it is only required to take such steps as are reasonable in the prevailing circumstances. As noted in paragraph 4.1, the health of the environment is affected by a wide range of complex factors, many of which are outside of its control. The environment is always susceptible to human actions and development, and the Crown can never guarantee the maintenance and sustainability of the environment and its resources.

1178. Sustainable management is the overarching purpose of decision making under the RMA, and is defined as including “sustaining the potential of natural and physical resources (excluding minerals) to

⁷¹⁷ Marine Reserves Act 1971, ss 4-5.

meet the reasonably foreseeable needs of future generations”.⁷¹⁸ As such, sustainable management under the RMA includes intergenerational responsibility. While responsibility for planning under the RMA is largely devolved to local government, sustainability is also at the forefront of the Crown’s own decision making. In the freshwater context, for example, recent examples of the Crown’s commitment to sustainability span changes to both the substance of, and process for, RMA decision-making, and also include measures to assist with implementation. These include, but are not limited to, the objectives of the National Policy Statement (NPS) for Freshwater Management 2011, the establishment of the Land and Water Forum, the promulgation of the Resource Management (Measurement and Reporting of Water Takes) Regulations 2010, and the provision of funding for the clean-up of degraded water bodies, including through the Fresh Start for Fresh Water Clean-up Fund.

Issue 17.28 To what extent did the creation of in-stream barriers impact on the migration of fish to and from the ocean?

1179. The Crown acknowledges evidence on the record of inquiry concerning the creation of in-stream barriers,⁷¹⁹ and accepts that, at times, these barriers may have had an effect on fish species. However, the Crown is not necessarily responsible for decisions leading to the creation of in-stream barriers, and considers that any assessment of the establishment of in-stream barriers and their possible effects would need to be considered on a case-by-case basis taking into account prevailing circumstances.

1180. As noted above, the Crown denies that it has a duty to prevent all environmental effects that may be perceived by some groups as adverse. There is a range of diverse interests in the environment,

⁷¹⁸ Resource Management Act 1991, s 5(2).

⁷¹⁹ For example, see Nga Korero Tuku Iho o te Rohe Pōtae – 5th Oral Traditions Hui (Wai 898, 4.1.5) at 60-61; and Nga Korero Tuku Iho o te Rohe Pōtae – 6th Oral Traditions Hui (Wai 898, 4.1.6) at 308-309.

and the Crown must carefully balance all those interests in relation to any activities that may have an effect on the environment. This means that, at times, the interests of some may be outweighed by other considerations that are in the national interest, such as the establishment of dams and hydroelectric power stations needed to supply electricity. The Crown also notes that, in fulfilling any obligations it may have under the Treaty, it is only required to take such steps as are reasonable in the prevailing circumstances.

Forestry

Issue 17.29 Did the Crown breach the Treaty of Waitangi by failing to protect Māori indigenous forests?

1181. The Crown acknowledges that the Treaty principle of active protection may require it to take steps to protect Māori interests in New Zealand's indigenous forestry. However, the Crown notes that it is only required to take such steps as are reasonable in the prevailing circumstances, and denies that it has breached Treaty principles in relation to Rohe Pōtae indigenous forests.

1182. The Crown accepts that the Rohe Pōtae had many forest resources, including indigenous forests, and the Crown notes evidence that, over time, some of those resources have been affected by human activity. However, the Crown considers that any assessment of such activity must be considered on a case by case basis and in light of prevailing circumstances. In particular, settlement and an expanding population in the 19th and early 20th centuries placed a number of demands on the environment, including forestry. These demands included the need for timber to build infrastructure, such as houses and schools, and the need to convert some forests to pastoral land to support New Zealand's agriculture industry. This situation was not unique to New Zealand, but was a common feature of emerging settler societies throughout the world. The Crown further notes that not all forestry-related activity had prejudicial effects. Indeed, forestry was a substantial source of employment throughout New

Zealand, including in isolated areas like the Rohe Pōtae, and played a significant part in local economies.

1183. Over time, the Crown has undertaken a range of initiatives to protect and sustain New Zealand's indigenous forests. These include, but are not limited to, the establishment of the Nature Heritage and Nga Whenua Rahui contestable funds in 1990, the enactment of the Forests Amendment Act 1993, and RMA requirements for the maintenance of indigenous biodiversity.⁷²⁰ For example, The Forests Amendment Act 1993 amended the Forests Act 1949 to bring an end to unsustainable harvesting and clear-felling of indigenous forest. The amendment, covers the sustainable management of private indigenous forests and includes any Māori land.⁷²¹ It provides owners options for managing their forests in order to harvest and mill timber, and it places controls on the milling and exporting of timber from indigenous forests. MAF administers the provisions of the Act by registering sawmills, approving sustainable forest management plans and permits and their associated annual logging plans, certifying exports of indigenous timber and timber products and monitoring indigenous forestry activity.

Climate Change

Issue 17.30 What obligations does the Crown have under the Treaty of Waitangi towards Rohe Pōtae Māori in terms of historic and current emissions of greenhouse gases and their anticipated adverse effects?

Issue 17.31 What assistance is the Crown providing Rohe Pōtae Māori in terms of adaptation for expected annual mean temperature rises and their effects on natural and physical resources important to Rohe Pōtae Māori?

1184. The Crown considers that matters concerning greenhouse gas emissions raise kaupapa issues that are unsuitable for inquiry at a district level.

⁷²⁰ Section 30(1)(ga).

⁷²¹ Part 3A of the Forests Amendment Act 1993.

EDUCATION

What were the Crown's duties under the Treaty of Waitangi with respect to educational opportunities for Rohe Pōtae Māori? To what extent did the Crown fulfil these duties?

Access and Funding

Issue 18.1 Has the Crown provided adequate access to education, at all levels, for all Rohe Pōtae Māori?

1185. The Crown acknowledges that, by today's standards, access to education in the Rohe Pōtae was, at times, poor during the 19th and first half of the 20th centuries. The reasons for this include the geographical isolation of the district, disruptions to missionary schools during the Waikato Wars, the existence of the aukati between 1864 and 1885, the consequent late arrival of the Crown and Pakeha into the district, the suspicion that Rohe Pōtae Māori might have had towards Crown and Pakeha institutions, their reluctance to request native schools, the higher cost of providing services in an isolated region and difficulties in recruiting and retaining teaching staff.

1186. The Crown notes evidence on the record of inquiry that these difficulties affected non-Māori as well as Māori. According to evidence on the record of inquiry, most children in the Rohe Pōtae, regardless of ethnicity, had no access to primary education until the 20th century, and no secondary schools were established in the district until 1914.⁷²² However, by the 1920s the Rohe Pōtae district was well equipped with schools in comparison with other rural areas.⁷²³ The Crown notes that Rohe Pōtae officials keenly received Māori requests for native schools during the late 19th century and

⁷²² P Christoffel, "The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010" (Waitangi Tribunal, Wai 898, A27, 2011) at 208-209.

⁷²³ P Christoffel, "The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010" (Waitangi Tribunal, Wai 898, A27, 2011) at 215.

native schools were established promptly in response.⁷²⁴ Furthermore, most native schools also had Pakeha pupils.⁷²⁵

1187. The Crown denies that any inadequacies in the access of Rohe Pōtae Māori to education services was owing to positive neglect, and over time it has undertaken a range of initiatives to enable Rohe Pōtae Māori to access education services. These include, but are not limited to, the provision of financial support for the establishment and operation of missionary schools,⁷²⁶ the provision of grants and scholarships to enable Māori students to attend school, the establishment of public and native schools in and around the district from the late 19th century,⁷²⁷ the establishment of secondary schools, such as district high schools, high schools, and technical high schools from the early 20th century,⁷²⁸ the provision of free education for all up to the age of 19 from 1937,⁷²⁹ and the provision of free bus transport and boarding allowances for children who did not live close to a school.⁷³⁰
1188. The Crown notes that, today, Rohe Pōtae communities have access to a wide range of education facilities within their district. These include, but are not limited to, early childhood education services, kohanga reo and kura kaupapa schools, primary and secondary schools, the New Zealand Correspondence School, the Open Polytech and Te Wananga o Aotearoa, as well as access to tertiary

⁷²⁴ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 62-63.

⁷²⁵ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 25-26.

⁷²⁶ Including at Te Mahoe, Te Kopua, Otawhao, Rangiaowhia, Kawhia and Aotea.

⁷²⁷ Including at Ruapuke, Waitetuna, Alexandra, Te Awamutu, Rangiaowhia, Kihikihi, Rakaunui, Kaharoa, Taharoa, Makomako, Parawera, Raorao, Taumarunui and Te Kopua.

⁷²⁸ Including at Hamilton, Taumarunui, Te Awamutu, Te Kuiti, Otorohanga and Piopio.

⁷²⁹ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 33-34.

⁷³⁰ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 33-34.

education facilities in surrounding areas, such as Waikato University and the Waikato Institute of Technology.

1189. The Crown is unaware of any evidence on the record of inquiry that the provision of schools within the Rohe Pōtae was part of land purchase negotiations in the area.

Issue 18.4 Has the Crown provided adequate funding for Māori education in Te Rohe Pōtae?

1190. When assessing the adequacy of the funding of Māori education in the Rohe Pōtae, the Crown considers that the appropriate focus is whether it has treated Māori fairly and equitably in the prevailing circumstances. As with the provision of any public service, the Crown's ability to fund education services has always been subject to its financial constraints. The Crown does not have unlimited financial resources, and its ability to fund services will always be limited.
1191. The Crown notes evidence on the record of inquiry that the level of financial support provided to some Māori education services within the Rohe Pōtae, such as Māori secondary schooling, at times fell short of contemporary standards.⁷³¹ The Crown denies that this was due to positive neglect; it was, rather, the result of a range of complex factors. These include the per capita funding regime under the Native Schools Act 1858,⁷³² uncertainty as to the viability of schools in rural areas,⁷³³ the cost of establishing schools in rural and isolated areas, financial pressures caused by WWI and WWII,⁷³⁴ the

⁷³¹ P Christoffel, "The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010" (Waitangi Tribunal, Wai 898, A27, 2011) at 171, 212 and 216.

⁷³² P Christoffel, "The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010" (Waitangi Tribunal, Wai 898, A27, 2011) at 16 and 210.

⁷³³ P Christoffel, "The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010" (Waitangi Tribunal, Wai 898, A27, 2011) at 89.

⁷³⁴ P Christoffel, "The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010" (Waitangi Tribunal, Wai 898, A27, 2011) at 160-161.

depression of the 1930s,⁷³⁵ and the fact that native schools were generally more expensive to fund per capita and perhaps less efficient “because factors such as greater Māori mobility lead to school closures”.⁷³⁶ Further, the Crown notes evidence on the record of inquiry that there is no evidence native schools in the Rohe Pōtae were poorly resourced in comparison with general schools, and that communities within the Rohe Pōtae were required to make substantial contributions to the establishment of both native and general schools.⁷³⁷ The Crown does not accept that any disparity in funding for Māori education in the Rohe Pōtae was necessarily a breach of the Treaty or its principles.

1192. Over time, the Crown has provided funding for Māori education in a number of ways including, but not limited to, funding under the Education Ordinance 1847 and the Native Schools Act 1858, grants and scholarships for Māori to access education, and the establishment of the Māori Education Foundation.⁷³⁸ The Crown notes that, in some cases, the financial support offered to Māori was not available to non-Māori, which meant that, at times, Māori had better access to education services than non-Māori.⁷³⁹
1193. The Crown notes that, in the Whanganui district inquiry, it referred to the work of Arthur Butchers,⁷⁴⁰ who stated in 1932 that it had always been the case that the average government expenditure per pupil had been greater on students attending native schools than on

⁷³⁵ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 33-34.

⁷³⁶ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 93.

⁷³⁷ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 227.

⁷³⁸ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 36-37.

⁷³⁹ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 151.

⁷⁴⁰ AG Butchers, “The Education System: A Concise History of the New Zealand Education System” (Auckland, 1932) cited in “Crown Closing Submissions Issue 16: Socio-Economic Issues”, 9 February 2010, Wai 903, 3.3.133, paras 115 and 117.

students at general schools. Students who attended native schools received free text books unlike their counterparts at general schools. In addition, free medicines and such items as sewing machines and prizes were made available to native schools. The isolated location of many native schools together with the low roles meant that governments had to increase their expenditure on these schools. By 1932 the provision of such materials had led to complaints from some non-Māori that the government was pampering students at native schools.⁷⁴¹

1194. Today, funding is provided for education services in the Rohe Pōtae in a number of ways. These include, but are not limited to, funding of early childhood, kohanga reo, kura kaupapa, and primary and secondary schools, funding of tertiary education services such as the Open Polytech and Te Wananga o Aotearoa, financial assistance for tertiary education through the Student Loan and Student Allowance schemes, and the provision of financial support for Māori students through a range of education scholarship and grant programmes. Specific funding is also provided to support te reo Māori provision.

Quality of Education

Issue 18.2 Did the Crown provide an adequate standard of education at all levels for all Rohe Pōtae Māori?

1195. Any assessment of the standard of education provided in the Rohe Pōtae would have to take into account the prevailing circumstances of the time. The standard of education provided in any school is influenced by a range of complex factors and cannot be measured simply in terms of educational achievement.
1196. The Crown notes that the geographical isolation of the Rohe Pōtae has at times made it difficult to attract teaching staff,⁷⁴² while the

⁷⁴¹ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 89.

⁷⁴² P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 201.

relatively small size of native schools generally made it difficult to attract quality teachers who could not expect the career progression opportunities and increased pay that larger schools could offer.⁷⁴³ The Crown notes further that, historically, the standard of education in the Rohe Pōtae was affected by a number of other factors. These include, but are not limited to, disruptions caused by pupil and teacher absences,⁷⁴⁴ the unfamiliarity of Māori children with English, and the limited experience of Rohe Pōtae Māori with the Pakeha world.⁷⁴⁵

1197. Despite these difficulties, the Crown notes that there is little evidence on the record of inquiry that the Rohe Pōtae had poor school facilities,⁷⁴⁶ and that evidence from the early 20th century suggests that the King Country had “some of the most efficient schools” at that time.⁷⁴⁷
1198. The Crown notes that, today, Rohe Pōtae communities have access to a high standard of education, delivered through a range of mechanisms as noted in the Crown’s response to issue 18.1. In addition, the quality of education in the Rohe Pōtae is continuously monitored in a number of ways. For example, the Education Review Office conducts regular reviews of schools, kura, kōhanga reo, and early childhood services, which supports actively the quality of education provided to children and students enrolled at these institutions and especially the delivery of te reo Māori and Māori-medium education.

⁷⁴³ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 201.

⁷⁴⁴ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 204-206.

⁷⁴⁵ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 203.

⁷⁴⁶ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 202.

⁷⁴⁷ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 60.

Issue 18.5 Has the Crown taken an active role in promoting Māori education in Te Rohe Pōtae?

1199. As noted in response to issue 18.1, over time the Crown has undertaken a number of initiatives to promote education in the Rohe Pōtae, including initiatives aimed specifically at Māori. These include, but are not limited to, financial support for the establishment and operation of missionary schools,⁷⁴⁸ the provision of grants and scholarships to enable Māori students to attend school, the establishment of public and native schools in and around the district from the late 19th century,⁷⁴⁹ the establishment of secondary schools, such as district high schools, high schools, and technical high schools from the early 20th century,⁷⁵⁰ the provision of free education for all up to the age of 19 from 1937,⁷⁵¹ and the provision of free bus transport and boarding allowances for children who did not live close to a school.⁷⁵²
1200. Today, the Crown promotes Māori education in a number of ways, including, but not limited to, the Ministry of Education’s Māori Education Strategy and Te Tere Auraki (the Māori in English-medium strategy). A number of initiatives aimed at improving outcomes for Māori learners are also being implemented in schools within the Rohe Pōtae. These include the Student Engagement Initiative (SEI), Student Achievement Function Practitioner (SAFP), He Kakano and Te Kotahitanga. In addition, both the regulatory framework and Ministry of Education policies and processes have been developed to promote consultation and engagement with iwi, whānau and local communities to allow for input on key issues. For example the Ministry collaborates with iwi through its formal

⁷⁴⁸ Including at Te Mahoe, Te Kopua, Otawhao, Rangiaowhia, Kawhia and Aotea.

⁷⁴⁹ Including at Ruapuke, Waitetuna, Alexandra, Te Awamutu, Rangiaowhia, Kihikihi, Rakaunui, Kaharoa, Taharoa, Makomako, Parawera, Raorao, Taumarunui and Te Kopua.

⁷⁵⁰ Including at Hamilton, Taumarunui, Te Awamutu, Te Kuiti, Otorohanga and Piopio.

⁷⁵¹ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 33-34.

⁷⁵² P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 33-34.

Relationship Agreements, which traverse the education spectrum from early childhood to tertiary education policy issues. Further, boards of trustees, early childhood education service providers, and tertiary providers receive input through community representation on governance bodies and regulatory requirements, which place specific obligations on them to consult with their local communities. The development of key policy by the Ministry of Education often includes a consultation process, the purpose of which is to encourage input from groups affected by its decisions.

Issue 18.6 How did the educational opportunities afforded to Rohe Pōtae Māori differ between Māori and non-Māori in Te Rohe Pōtae?

1201. The Crown denies that it had a policy of providing different educational opportunities to Rohe Pōtae Māori on the basis of their ethnicity. It appears that there was little or no substantive difference in the opportunities afforded to Rohe Pōtae Māori when compared with non-Māori students. The Crown notes, however, that the educational opportunities available to Rohe Pōtae Māori may have depended on a number of factors, including, for example, the location of the school attended and the resources provided by the local community.
1202. The Crown notes that the majority of Māori educated within the Rohe Pōtae attended general schools, and there is limited evidence on the record of inquiry concerning general schools in the district.⁷⁵³ This makes it difficult to compare the native and general schools that operated in the Rohe Pōtae.
1203. The Crown notes evidence on the record of inquiry suggesting that the native school system encouraged Māori into vocational and technical training rather than a more academic curriculum, in comparison with the general school system. During the early 20th century, primary schools in general were encouraged to introduce

⁷⁵³ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 7-8.

students to a more practical curriculum.⁷⁵⁴ While, like general primary schools, native schools began to introduce more manual subjects, the primary focus at this time remained on the core subjects of reading, writing and arithmetic.⁷⁵⁵ The Crown also notes that, from 1904, more than half of all Māori primary school students attended general schools rather than native schools.⁷⁵⁶

1204. In terms of post-primary education, the Crown notes that technical and vocational training was considered to best meet the needs of the majority of the growing number of students, regardless of ethnicity, entering the secondary school system after 1901.⁷⁵⁷ As a result, technical and district high schools were opened throughout New Zealand to provide an alternative to traditional secondary schools.⁷⁵⁸ The Crown notes that there is no evidence on the record of inquiry to suggest that this had a greater effect on Māori than it did on New Zealand secondary schooling in general, and notes further that by the 1930s most Māori secondary schools had returned to a more academic curriculum.⁷⁵⁹
1205. The Crown acknowledges that, between 1901 and 1909, the salaries of native school teachers were lower on average than those of general school teachers.⁷⁶⁰ The Crown notes evidence on the record of inquiry that this was primarily because a portion of native school teacher salaries “was at risk, depending on the examination results of

⁷⁵⁴ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 191.

⁷⁵⁵ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 177 and 191.

⁷⁵⁶ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 191.

⁷⁵⁷ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 191-192.

⁷⁵⁸ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 191-192.

⁷⁵⁹ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 192.

⁷⁶⁰ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 92.

their pupils”.⁷⁶¹ However, the Crown also notes that native school teachers received more generous removal and travel expenses,⁷⁶² and that changes to salaries in 1938 placed native school teacher salaries on the same basis as those in public schools.⁷⁶³

1206. The Crown notes that, today, education is compulsory between the ages of six and 16, although this was not always the case. For example, the Education Act 1877 made education compulsory only for children aged seven to 13 years and living within two miles of a school by public road, and even then children were only required to attend school for half of the time it was actually open.⁷⁶⁴ Compulsory education did not apply to Māori until 1894, although Māori were entitled to send their children to any public school.⁷⁶⁵ The Crown notes that the differences in compulsory education for Māori and non-Māori appear to have been related to “perceived Māori sensitivities” and the desire to provide Māori with a degree of choice rather than force school attendance upon them.⁷⁶⁶

Issue 18.12 To what extent did Crown educational policies and practices make provision for Rohe Pōtae Māori te reo and tikanga? To what extent did these policies and practices intend to undermine te reo and tikanga?

1207. The Crown’s position in relation to te reo Māori and tikanga is generally outlined in its response to issues 20.4 to 20.6. The Crown denies that its policies or practices in relation to te reo Māori deliberately sought to undermine te reo Māori kanga. The Crown

⁷⁶¹ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 92.

⁷⁶² P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 92-93.

⁷⁶³ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 92-93.

⁷⁶⁴ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 22.

⁷⁶⁵ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 22.

⁷⁶⁶ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 22-23.

notes that there is consistent evidence of children being banned from speaking te reo Māori in schools during the 19th and 20th centuries. However, the Crown did not have a policy of banning te reo and is unaware of evidence on the record of inquiry that it sought to suppress te reo and tikanga through the education system.⁷⁶⁷ Corporal punishment for speaking te reo contravened both the Native Schools Code and native school regulations.⁷⁶⁸

1208. The Crown notes that te reo Māori continued to be used in native schools into the early 20th century,⁷⁶⁹ and anecdotal evidence suggests “quite a number” of native school teachers were fluent in te reo during the 19th century.⁷⁷⁰ In addition, te reo became a university entrance subject in 1918, and a university subject from 1929.⁷⁷¹
1209. The Crown also notes that, at times, Māori themselves sought to prevent te reo from being used in schools, preferring their children to be taught in English. Examples include Māori petitioning Parliament to have te reo banned in schools,⁷⁷² native school committees banning te reo,⁷⁷³ and complaints from parents regarding the use of te reo in the classroom.⁷⁷⁴

Issue 18.3 What effect did the administration of corporal punishment in Natives schools, as authorised by the Crown, have on Te Rohe Pōtae Māori?

⁷⁶⁷ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 225.

⁷⁶⁸ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 119.

⁷⁶⁹ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 116.

⁷⁷⁰ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 115-116.

⁷⁷¹ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 121.

⁷⁷² P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 115.

⁷⁷³ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 115.

⁷⁷⁴ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 120.

1210. The Crown acknowledges that corporal punishment was used in New Zealand schools, including schools in the Rohe Pōtae, up until 1990. The Crown notes that this not only affected Māori students, but students of all ethnicities who passed through New Zealand's education system up until that time. While the Crown notes that corporal punishment was viewed world-wide as an acceptable form of correction, it acknowledges that the practice is at odds with modern thinking.

Issue 18.13 What prejudicial effects have Rohe Pōtae Māori and their tupuna suffered as a result of Crown acts and omissions regarding educational opportunities, and to what extent does this continue in the present?

1211. The Crown acknowledges that, in general, Māori have had lower rates of educational achievement historically, and that while this situation has improved dramatically in recent decades, some disparity remains today.

1212. However, the education outcomes of Rohe Pōtae Māori (as with any group of people) are the result of a complex array of interrelated factors, not all of which are well-understood. In many cases, it is impossible to determine with any precision the dominant and subsidiary reasons for poor education outcomes. In particular, the Crown notes that it is very difficult to establish causative links between Crown acts or omissions and education trends.

Management and Control of Education

Issue 18.7 What role, if any, did Rohe Pōtae Māori expect to play in the organisation and management of education facilities?

1213. The Crown recognises that, in general, Māori have regarded education as a matter of importance and have wanted to participate in the provision of education services. The Crown acknowledges that the Tribunal's inquiry in 1998-1999 into capital funding of

wananga⁷⁷⁵ and its inquiry in 1999-2000 into the closure of Mokai School⁷⁷⁶ are products of that desire to do so.

1214. The Crown notes, however, that there is limited evidence on the record of inquiry that relates specifically to Rohe Pōtae Māori on their expectation to play a role in the organisation and management of education facilities.

1215. The Crown recognises that, today, there is a range of Treaty-compliant options for the recognition of Māori interests in education, and it currently works in partnership with iwi and hapū in a number of ways in the provision, management and control of education services. These include, but are not limited to, boards of trustees, and formal education relationships with the mandated iwi entities or authorities from Ngāti Maniapoto, Ngāti Raukawa, and Ngāti Tūwharetoa.

Issue 18.8 To what extent did the Crown limit the powers and responsibilities of Native School Committees in comparison to General School Committees?

1216. The Crown acknowledges that the powers and responsibilities of native school committees were not as broad as those of general school committees. Although the Native Schools Act 1867 provided native school committees with the general management of native schools, the Native Schools Code 1880 gave most management responsibilities to teachers.⁷⁷⁷ However, the Crown notes that in practice native school committees were able to exercise some influence over their schools.⁷⁷⁸

Issue 18.9 Has the Crown provided an adequate role for Rohe Pōtae Māori in the design and establishment of educational facilities,

⁷⁷⁵ Waitangi Tribunal, *The Wananga Capital Establishment Report* (1999).

⁷⁷⁶ Waitangi Tribunal, *The Mokai School Report* (2000).

⁷⁷⁷ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 89-90.

⁷⁷⁸ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 91.

institutions and processes intended to serve Rohe Pōtae Māori?

Issue 18.10 Did Rohe Pōtae Māori have any particular concerns or preferences concerning educational facilities and did the Crown recognise and act upon these concerns and preferences?

1217. Evidence on the record of inquiry suggests that Rohe Pōtae Māori may not always have had the same level of input into the establishment of education facilities, institutions and processes that they have today.⁷⁷⁹ The Crown is not aware of any specific policies that prevented Rohe Pōtae Māori from having input into the design and establishment of educational facilities, institutions and processes intended to serve Rohe Pōtae Māori. Any assessment of the way in which Māori were involved in these matters and how the Crown addressed their concerns would need to be considered with regard to the prevailing circumstances of the time.
1218. Evidence on the record of inquiry concerning these matters is limited. However, the Crown notes that, at times, Rohe Pōtae Māori raised concerns in relation to education facilities, including the transfer of the Haua roa and Kawhia native schools to the Auckland Education Board.⁷⁸⁰ The Crown also notes evidence on the record of inquiry that there is no evidence the Crown had consulted with Māori regarding its policy of transferring native schools to general schools once the majority of students were Pakeha.⁷⁸¹
1219. The Crown notes that the Treaty does not impose on it an absolute duty to consult, but the Crown must make informed decisions on matters affecting the Māori interest.⁷⁸² Today, there are a number of opportunities for Rohe Pōtae Māori to participate in the

⁷⁷⁹ For example, see P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 94-102.

⁷⁸⁰ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 94-102.

⁷⁸¹ P Christoffel, “The Provision of Education Services to Māori in Te Rohe Pōtae, 1840-2010” (Waitangi Tribunal, Wai 898, A27, 2011) at 93-94.

⁷⁸² *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, per Richardson J at 683. See also Cooke P at 665.

establishment of education facilities, institutions and processes. The Ministry of Education has relationships with, for example, the Maniapoto Māori Trust Board, the Raukawa Trust Board, and the Tūwharetoa Māori Trust Board. A number of initiatives have resulted from the relationships between the Ministry of Education and Rohe Pōtae iwi, including:

- 1219.1 support to research and produce an iwi profile to use as a basis for discussion and planning with the Ministry to advance the educational and broader aspirations for its Māori learners, whānau, communities and iwi;
- 1219.2 development of wide-ranging education strategies and implementation plans aligned with the key priorities identified by the iwi and/or the Ministry; and
- 1219.3 implementation of community-based language initiatives to strengthen te reo capability of learners, whānau and iwi.

1220. The Ministry of education also assists iwi with the development of education plans.

Issue 18.11 Did the Crown take adequate steps to inform itself in its decision-making and policies regarding educational opportunities for Rohe Pōtae Māori?

1221. While the Crown is not aware of any specific evidence on the record of inquiry that it was not adequately informed in its decision-making and policies regarding educational opportunities for Rohe Pōtae Māori, it notes that the way in which it considers the views of Māori in relation to education opportunities may not always have been as robust as it is today.

1222. The Crown notes that, today, it has robust processes in place to ensure that the views of local communities, such as those in the Rohe Pōtae, can be considered in its decision-making and policies regarding educational opportunities. The regulatory framework and Ministry of Education polices and processes promote consultation

and engagement with iwi, whānau and local communities. These include Ministry of Education collaborations with iwi through formal relationship agreements, and the input received by boards of trustees, early childhood education service providers and tertiary providers through community representation on governance bodies and regulatory requirements, which place specific obligations on those providers to consult with their local communities. The development of key policy by the Ministry of Education often includes a consultation process, the purpose of which is to encourage input from groups affected by its decisions. Rohe Pōtae Māori input into education initiatives can also be facilitated through the iwi entities or authorities with responsibility for education that have a working relationship with the Ministry and, as noted in response to issue 18.9 and 18.10, a number of initiatives have resulted from the relationships between the Ministry of Education and Rohe Pōtae iwi.

1223. The Crown considers that any assessment of the way in which it informed itself in its decision-making and policies regarding educational opportunities for Rohe Pōtae Māori would need to be considered on a case-by-case basis, having regard to the prevailing circumstances of the time.

HEALTH

What were the Crown's duties with respect to health care for Rohe Pōtae Māori? To what extent did the Crown fulfil these duties?

Introduction

1224. The Crown notes that any assessment of the historical provision of health services in the Rohe Pōtae must be considered in light of the state of New Zealand's health system at the time in question and, in particular, the medical knowledge available.

1225. Both historically and today, the health of Rohe Pōtae Māori (as with any group of people) is the result of a highly complex array of interrelated factors, not all of which are known or well-understood.

1226. The Crown notes that it is very difficult to obtain evidence that can support causative links between Crown acts, omissions, practices or policies and health outcomes. The virtual lack of immunity amongst Māori to introduced diseases in the period of first Māori/European contact and throughout the 19th century further complicates the situation.

1227. The Crown notes further that information relating to Māori health in the 19th century is generally limited. In the Rohe Pōtae, this is compounded by the fact that Pākehā and the Crown did not have a significant presence there until the late 19th century. As a result, there is a particularly acute lack of historical information in relation to the area.

1228. For these reasons, it is difficult to make an assessment based solely on health outcomes as to whether the Crown has fulfilled its Treaty obligations in respect of health issues relating to Rohe Pōtae Māori. It is necessary to have regard to the full context and all relevant factors.

Issue 19.1 Did the Crown ensure that Rohe Pōtae Māori had and continue to have access to an appropriate standard of health care?

Issue 19.2 Did the Crown ensure that Rohe Pōtae Māori received and continued to receive an appropriate standard of health care?

1229. The Crown notes that, unlike other parts of New Zealand, there is no evidence on the record of inquiry that the provision of hospitals and medical care was part of land purchase negotiations in the Rohe Pōtae.⁷⁸³
1230. The provision of health services to all New Zealanders during the 19th and early 20th centuries was inadequate by today's standards. For much of the 19th century the provision of such services was not considered a core function of the State, and most non-hospital medical aid was either user-pays or charitable.⁷⁸⁴ As a result, people of all ethnicities who were unable to afford medical attention frequently went without.⁷⁸⁵ Medical knowledge was also limited, and most common diseases had no cure and few effective treatments.⁷⁸⁶
1231. The Crown notes that additional factors constrained the provision of health services by the Crown in the Rohe Pōtae, including the district's geographical isolation, the imposition of the aukati from 1864 to the mid-1880s and the consequentially late development of roads and other infrastructure.⁷⁸⁷
1232. The Crown recognises that over time there have been differences between the health care available to rural and urban populations in New Zealand and that this differential often continues today. The Crown says that, rather than being the subject of positive neglect,

⁷⁸³ H Robinson, Taha Tinana "Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990" (Wai 898, A31, Waitangi Tribunal, 2011) at 59.

⁷⁸⁴ H Robinson, Taha Tinana "Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990" (Wai 898, A31, Waitangi Tribunal, 2011) at 47.

⁷⁸⁵ H Robinson, Taha Tinana "Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990" (Wai 898, A31, Waitangi Tribunal, 2011) at 57.

⁷⁸⁶ H Robinson, Taha Tinana "Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990" (Wai 898, A31, Waitangi Tribunal, 2011) at 47.

⁷⁸⁷ H Robinson, Taha Tinana "Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990" (Wai 898, A31, Waitangi Tribunal, 2011) at 47.

the health care available to Māori living in rural areas reflected their relative isolation and that of all rural communities.

1233. The Crown did take steps to protect actively the health of Rohe Pōtae Māori through a number of initiatives, particularly after the opening of the Rohe Pōtae. These included, but were not limited to, Native Medical Officers,⁷⁸⁸ the establishment of the Department of Public Health, the Native Health Nurse service,⁷⁸⁹ Native Sanitary Inspectors,⁷⁹⁰ the establishment of Māori Councils and Māori Health Councils, legislation controlling alcohol and tobacco consumption,⁷⁹¹ the payment of subsidies to medical professionals to attend to Māori patients, and the construction of hospitals in Hamilton, Te Kuiti, Taumarunui, Kawhia and Tokanui.⁷⁹²
1234. The Crown is well-informed of the contemporary health needs of Māori, and, at a strategic level, it addresses those needs through a range of measures, including the Māori Health Strategy, the Māori Health Action Plan, the New Zealand Health Strategy, and the New Zealand Disability Strategy. Today, Rohe Pōtae Māori are able to access a wide range of health services through New Zealand's public health system, including, but not limited to, hospitals in Hamilton, Te Kuiti and Taumarunui, and health clinics in Te Kuiti and Taumarunui operated through the Toi Ora coalition of primary health organisations.
1235. In various ways, the Crown also supports the private health system to meet the health needs of Rohe Pōtae Māori. This includes, but is

⁷⁸⁸ H Robinson, Taha Tinana "Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990" (Wai 898, A31, Waitangi Tribunal, 2011) at 520.

⁷⁸⁹ H Robinson, Taha Tinana "Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990" (Wai 898, A31, Waitangi Tribunal, 2011) at 111.

⁷⁹⁰ H Robinson, Taha Tinana "Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990" (Wai 898, A31, Waitangi Tribunal, 2011) at 111.

⁷⁹¹ H Robinson, Taha Tinana "Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990" (Wai 898, A31, Waitangi Tribunal, 2011) at 103-106.

⁷⁹² H Robinson, Taha Tinana "Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990" (Wai 898, A31, Waitangi Tribunal, 2011) at 144-146.

not limited to, through service agreements between DHBs and private health providers, such as pharmacies, general practitioners, midwives and independent nursing practices.

Issue 19.3 Did the Crown consult with Rohe Pōtae Māori on matters relating to their health and wellbeing, including the development of policies to protect and improve health and wellbeing of Rohe Pōtae Māori?

1236. The Crown acknowledges that matters related to health and the provision of health care are important to Rohe Pōtae Māori, who, over time, have expressed a desire to participate in the development of health policy and services that affect their people. This is demonstrated, in part, by the range of Māori health providers operating in the district, as noted in the Crown’s response to issue 19.4.

1237. The Crown notes evidence on the record inquiry that Māori may not always have been fully involved in the development of health policies or in determining an implementing their own health priorities.⁷⁹³ The Crown notes further that the Treaty does not impose on it an absolute obligation of consultation, but does require it to make informed decisions on matters affecting the Māori interest.⁷⁹⁴

1238. Today, Māori have significant opportunities for input into matters relating to their health and well-being, including in the development of health policy. For example, in order to recognise and respect the principles of the Treaty, the New Zealand Public Health and Disability Act 2000 provides for a range of mechanisms to enable Māori to contribute to decision-making in relation to, and to

⁷⁹³ H Robinson, Taha Tinana “Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990” (Wai 898, A31, Waitangi Tribunal, 2011) at 255.

⁷⁹⁴ *NZ Māori Council v A-G* [1987] 1 NZLR 641, per Richardson J at 683. See also Cooke P at 665.

participate in the delivery of, health and disability services.⁷⁹⁵ These include:

1238.1 the requirement that every District Health Board (DHB) have at least two Māori members;⁷⁹⁶

1238.2 requirements that DHBs aim to reduce health disparities by improving health outcomes for Māori and other population groups,⁷⁹⁷ and aim to reduce, with a view to eliminating, health outcome disparities between various population groups within New Zealand by developing and implementing, in consultation with the groups concerned, services and programmes designed to raise their health outcomes to those of other New Zealanders;⁷⁹⁸ and

1238.3 the functions of DHBs to, inter alia, establish and maintain processes to enable Māori to participate in, and contribute to, strategies for Māori health improvement,⁷⁹⁹ and to continue to foster the development of Māori capacity for participating in the health and disability sector and for providing for the needs of Māori.⁸⁰⁰

1239. In relation to Rohe Pōtae Māori specifically, there is a range of initiatives that enables them to participate in matters relating to their health and well-being. For example, the Waikato DHB has a governance relationship with Māori through an Iwi Māori Council which includes representatives from Ngāti Maniapoto, Ngāti Tūwharetoa, Raukawa, and Whanganui iwi.⁸⁰¹

⁷⁹⁵ New Zealand Public Health and Disability Act 2000, s 4.

⁷⁹⁶ New Zealand Public Health and Disability Act 2000, s 29.

⁷⁹⁷ New Zealand Public Health and Disability Act 2000, s 22(1)(e).

⁷⁹⁸ New Zealand Public Health and Disability Act 2000, s 22(1)(f).

⁷⁹⁹ New Zealand Public Health and Disability Act 2000, s 23(1)(d).

⁸⁰⁰ New Zealand Public Health and Disability Act 2000, s 23(1)(e).

⁸⁰¹ Waikato District Health Board,
http://www.waikatodhb.govt.nz/page/pageid/2145838647/About_us.

Issue 19.4 Did the Crown ensure that Rohe Pōtae Māori controlled and continue to control health initiatives to protect and improve health and wellbeing of Rohe Pōtae Māori?

1240. The Crown is not aware of any specific evidence on the record of inquiry concerning the way in which Rohe Pōtae Māori may have controlled initiatives to protect and improve their health and well-being. In any case, the Crown considers that the way in which such control may have been provided for must be considered on a case-by-case basis and in light of the prevailing circumstances.
1241. Today Māori have significant opportunities to be involved in the control of initiatives aimed at protecting and improving Māori health. For example, the Māori Provider Development Scheme (MPDS) provides financial support to enable the development of Māori health and disability providers. To be eligible for funding under the MPDS, providers must be owned and governed by Māori, and be providing health and disability services primarily, but not exclusively, for Māori.⁸⁰² In addition, as part of the Crown's Whānau Ora programme, the Ministry of Health will support Māori providers to invest in a range of activities that build whānau capability, strengthen whānau connections, support the development of whānau leadership and enhance best outcomes for whānau.
1242. There are a number of Māori health providers operating in the greater Waikato region, and Rohe Pōtae Māori may receive services from these providers, or may be involved in the delivery or design of these services. Those health providers include, but are not limited to, the Maniapoto Māori Trust Board, the Ngāti Maniapoto Marae Pact Trust, and the Taumarunui Community Kokiri Trust, which have health service contracts with the Waikato DHB and/or the Ministry of Health.

⁸⁰² Ministry of Health, Māori Provider Development Scheme – 2011/12 Purchasing Intentions, <http://www.health.govt.nz/publication/2011-12-purchasing-intentions>.

- Issue 19.5** How has the state provision of health care for Rohe Pōtae Māori differed, if at all, from that provided for non-Māori in the Te Rohe Pōtae Inquiry District over time?
- Issue 19.6** To what extent were there disparities in the health and wellbeing of Rohe Pōtae Māori compared with non-Māori in the district and nationally over time?
- Issue 19.7** To what extent did the Crown have a duty to address and disparities in health and wellbeing and to what extent did the Crown fulfill any such duty?
- Issue 19.8** To what extent did factors such as poverty, housing and living standards impact on the health and wellbeing of Rohe Pōtae Māori? To what extent was the Crown obliged to address these factors and to what extent did the Crown fulfil any such obligations?
1243. It is difficult to determine how the health of Māori within the Rohe Pōtae during the 19th and early 20th centuries compared with that of non-Māori.⁸⁰³ However, the Crown recognises that, historically, there have been health disparities, both generally and in the Rohe Pōtae specifically, and that some disparity persists today.
1244. While the Crown denies that there is any difference in eligibility to state-provided health services based on ethnicity, it acknowledges that the Treaty principle of equality requires it to take steps that are reasonable in the circumstances to reduce disparity between Māori and non-Māori New Zealanders. However, the large number of variables that influence health quality means the Crown cannot guarantee outcomes. In assessing the Crown’s response to health disparity, the primary consideration is whether, in the application of health policy, Rohe Pōtae Māori were treated equitably having regard to all relevant circumstances.
1245. The reasons for disparity are both numerous and complex, but the Crown notes that inadequate healthcare does not appear to have

⁸⁰³ H Robinson, Taha Tinana “Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990” (Wai 898, A31, Waitangi Tribunal, 2011) at 303-304.

been a significant cause of Māori ill-health.⁸⁰⁴ The general immunological isolation of Māori made them more susceptible to introduced disease, while the geographical isolation of the Rohe Pōtae for much of the 19th century made the provision of health services there difficult. Some Māori were suspicious of health services provided by the Crown and were reluctant to use them.⁸⁰⁵ The Crown also acknowledges that economic factors, housing and living standards contribute to health quality, and that these had an effect on the health of Rohe Pōtae Māori.

1246. Over time, the Crown has taken steps to address Māori health disparity. As outlined in the Crown’s response to issues 19.1 and 19.2, initiatives specifically targeting Māori health were undertaken by the Crown and, in some cases, were not available to Pākehā. This means that, at times, healthcare has been more affordable for many Māori than for many Pākehā.
1247. As well as the provision of general health services and initiatives, the Crown has over time undertaken a wide range of social initiatives to help improve the wider determinants of health. These include, but are not limited to, the provision of funds to improve Māori housing, various programmes to improve sanitation and water supply in Māori communities, various mechanisms under the Health Act 1956 to protect public health (including provisions relating to drinking water, infectious and notifiable diseases, and national cervical screening), assistance through the Ministry of Health’s Drinking Water Subsidy Scheme (DWSS)⁸⁰⁶ and Sanitary Works Subsidy Scheme (SWSS).⁸⁰⁷ These initiatives have been rolled out on a

⁸⁰⁴ H Robinson, Taha Tinana “Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990” (Wai 898, A31, Waitangi Tribunal, 2011) at 155.

⁸⁰⁵ H Robinson, Taha Tinana “Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990” (Wai 898, A31, Waitangi Tribunal, 2011) at 113.

⁸⁰⁶ Ministry of Health, <http://www.health.govt.nz/our-work/environmental-health/drinking-water/drinking-water-assistance-programme/drinking-water-subsidy-scheme-0>.

⁸⁰⁷ Ministry of Health, [http://www.moh.govt.nz/notebook/nbbooks.nsf/0/87D47C9968AC8680CC257834000120ED/\\$file/SanitaryWorksSubsidySchemeNov03.pdf](http://www.moh.govt.nz/notebook/nbbooks.nsf/0/87D47C9968AC8680CC257834000120ED/$file/SanitaryWorksSubsidySchemeNov03.pdf).

national scale, and have been available in the Rohe Pōtae. For example, under the DWSS, funding has been provided to improve drinking water quality in the Rohe Pōtae, including in Mokau, Te Kuiti, Bennydale, Piopio, Otorohanga and Ohura. Funding has also been made available under the SWSS to improve sewerage systems in Te Kuiti, Bennydale and Piopio.

- 1248.** The Crown is well-informed about contemporary health disparity between Māori and non-Māori. The New Zealand Public Health and Disability Act 2000 underpins the provision of public health care in New Zealand by providing for the public funding and provision of personal health services, public health services, and disability support services, and the establishment of new publicly-owned health and disability organisations.⁸⁰⁸ The Act aims to, among other things, reduce health disparity by improving the health outcomes of Māori and other population groups and, as outlined above, provides for a number of ways in which Māori can participate in decisions relating to their health and well-being. The Act thus helps to orientate New Zealand's public health system toward improving health outcomes for Māori, and is supported by, among other things, the Māori Health Strategy and the New Zealand Health Strategy.

Issue 19.10 **Did the loss of land, waters and rangatiratanga and the loss of a sustaining and healthy, sustainable environment generally, have consequential negative impacts on the health and wellbeing of hapū/iwi?**

- 1249.** As stated above at paragraph 1, the health and well-being of the individuals who comprise hapū and iwi is the result of a very complex – and not always understood – combination of factors. The Crown accepts that the loss or degradation of physical resources such as land or waterways, and broad social, economic and political factors, including a loss of rangatiratanga, may be such factors. However, it is very difficult if not impossible to determine the extent

⁸⁰⁸ Public Health and Disability Act 2000, s 3.

to which such factors were, or are, primary or dominant causes of Māori ill-health, let alone to determine the extent to which the Crown has been or is responsible for Māori ill-health as a result of such factors.

Issue 19.11 To what extent did Rohe Pōtae Māori seek out Crown assistance in relation to health services?

1250. The Crown is not aware of any evidence on the record of inquiry that highlights the extent to which Rohe Pōtae Māori may have sought out the Crown's assistance in relation to health services. In any case, the Crown repeats the pleading it has made to issues 19.1 and 19.2, and considers that its response to any health assistance that Rohe Pōtae Māori may have sought would have to be considered on a case-by-case basis having regard to prevailing circumstances.

Issue 19.12 What prejudicial effects have Rohe Pōtae Māori and their tupuna suffered as a result of Crown acts and omissions regarding health care, and to what extent does this continue in the present?

1251. The Crown accepts that, over time, there has been disparity between the health of Māori and non-Māori, and some disparity exists today. However, the Crown denies that Māori ill-health is solely a result of any particular act, omission, practice or policy by or on behalf of the Crown.

1252. As noted above, the health of Rohe Pōtae Māori (as with any group of people) is the result of a highly complex array of interrelated factors, not all of which are known or well-understood. In many cases it is impossible to determine with any precision the dominant and subsidiary reasons for Māori ill-health. In particular, the Crown notes that it is very difficult to establish causative links between Crown acts, omissions, practices or policies and health outcomes.

Issue 19.13 Did Te Rohe Pōtae Māori in the Kawhia region have access to proper health care and in particular inoculation against preventable diseases?

1253. The Crown repeats the pleading it has made to issues 19.1 and 19.2. Access to Kawhia was difficult during the 19th and early 20th centuries,⁸⁰⁹ but Kawhia residents were still entitled to access the range of health initiatives outlined above. The Crown notes further that Kawhia Hospital was the first hospital to be opened within the Rohe Pōtae.⁸¹⁰

Issue 19.14 Was the Crown involved in the deliberate introduction of the smallpox disease into the Ngāti Maniapoto population as a form of germ warfare? Following the war, did the Crown have a greater obligation to provide medical assistance in regards to these outbreaks and their effects? What help did it provide?

1254. The Crown notes that some oral history asserts the deliberate introduction of smallpox into Māori communities by way of infected prisoners following the battle of Orakei in 1864.⁸¹¹ The Crown also notes that evidence on the record of inquiry concerning the presence of smallpox in parts of the Rohe Pōtae during the 1860s is inconclusive,⁸¹² but it acknowledges that a smallpox outbreak at some point during that decade is possible.⁸¹³ The Crown denies any claim that it, or its agents, deliberately introduced smallpox into the Ngāti Maniapoto population, whether as a form of germ warfare or otherwise.

1255. The Crown denies that, following the New Zealand Wars, it had an increased obligation to provide medical assistance to Rohe Pōtae Māori in relation to outbreaks of smallpox and their effects.

⁸⁰⁹ H Robinson, “Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990” (Wai 898, A31, Waitangi Tribunal, 2011) at 146.

⁸¹⁰ H Robinson, Taha Tinana: Māori Health and the Crown In Te Rohe Pōtae Inquiry District, (Wai 898, A31, Waitangi Tribunal, 2011) at 143.

⁸¹¹ H Robinson, Taha Tinana: Māori Health and the Crown In Te Rohe Pōtae Inquiry District, (Wai 898, A31, Waitangi Tribunal, 2011) at 19. See also Wai 898, 4.1.1, at 90 and Wai 898, 4.1.6, at 129-131.

⁸¹² H Robinson, Taha Tinana “Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990” (Wai 898, A31, Waitangi Tribunal, 2011) at 20.

⁸¹³ H Robinson, Taha Tinana “Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990” (Wai 898, A31, Waitangi Tribunal, 2011) at 20.

1256. It is difficult to determine what medical assistance may have been provided to Rohe Pōtae Māori immediately after the New Zealand Wars, particularly as most written information concerning the health of Rohe Pōtae Māori dates from the 1870s onwards.⁸¹⁴ However, any medical assistance that may have been provided is likely to have been minimal by today's standards.

Issue 19.15 Is the Crown under a duty to provide appropriate or adequate medical support and care for returned veterans exposed to agent orange? What help has it provided?

1257. The Crown acknowledges that New Zealand Armed Forces personnel who served in the Vietnam War were exposed to a toxic environment, and recognises the health effects that that exposure has had on veterans and their children.

1258. In 2006 the government with the Ex-Vietnam Services' Association, and the Royal New Zealand Returned and Services' Association signed a memorandum of understanding agreeing to a package of measures and actions to address the concerns of Vietnam veterans and their families. These include, but are not limited to, *ex gratia* payments for veterans suffering from certain medical conditions, *ex gratia* payments for the natural children of veterans suffering from certain medical conditions, funding for a one-off comprehensive medical examination which rolled out to an annual medical examination, the monitoring of health trends associated with dioxin exposure and the creation of a register of veterans and their families to collate information to assist in monitoring trends in health and well-being. These measures are in addition to the comprehensive support the Crown provides by way of the War Pension and Veteran's Pension schemes.

1259. The Crown denies it has a Treaty duty to provide such support.

⁸¹⁴ H Robinson, Taha Tinana "Māori Health and the Crown In Te Rohe Pōtae Inquiry District, 1840 to 1990" (Wai 898, A31, Waitangi Tribunal, 2011) at 20.

SOCIAL AND CULTURAL ISSUES

What were the Crown's duties under the Treaty of Waitangi with respect to social and cultural support afforded to Rohe Pōtae Māori? How did any social support afforded of Rohe Pōtae Māori compare to other citizens in Te Rohe Pōtae inquiry district?

Customary Food Resources

Issue 20.1 To what extent, if any, did the Crown have a duty to protect the customary food sources of Rohe Pōtae Māori?

1260. The Crown recognises that Rohe Pōtae Māori had many customary food resources, and notes the anecdotal evidence of some claimants that these resources have been depleted.⁸¹⁵

1261. The Crown accepts that the principle of active protection may require it to take steps to protect and ensure the sufficiency of Māori customary food resources. The Crown notes that in fulfilling its active protection obligations it is required to take such steps as are reasonable in the prevailing circumstances. The Crown considers that any claim that it has breached the Treaty and its principles in respect to the protection of customary food resources would need to be considered on a case-by-case basis, and in light of the prevailing circumstances.

Issue 20.2 Did Rohe Pōtae Māori express any concerns to the Crown regarding the depletion of customary food sources?

1262. The Crown is not aware of any specific evidence on the record of inquiry that Rohe Pōtae Māori brought any concerns they may have had in relation to the depletion of customary food resources to the attention of the Crown. However, the Crown considers that its response to any concerns that may have been expressed must be

⁸¹⁵ For example, see Nga Korero Tuku Iho o Te Rohe Potae – 2nd Oral Traditions Hui (Wai 898, 4.1.2) at 68; Nga Korero Tuku Iho o Te Rohe Potae – 3rd Oral Traditions Hui (Wai 898, 4.1.3) at 161-164, and 287-288; and Dr M Belgrave et al Te Rohe Pōtae Environmental and Wahi Tapu Report (Wai 898, A76, Waitangi Tribunal, 2011) at 205-206 and 219-220.

considered on a case-by-case basis, having regard to the prevailing circumstances.

Issue 20.3 To what extent are the actions, policies and legislation of the Crown attributable to the depletion of customary food resources?

1263. The state of customary food resources is influenced by a complex range of factors and agents, and where changes occur it can be very difficult to ascertain a primary cause or the primary causes. The Crown says that there is insufficient evidence on the record of inquiry upon which to conclude that it is generally responsible for the depletion of customary food resources in the Rohe Pōtae inquiry district. Claims that the Crown has been so responsible would need to be considered on a case-by-case basis and in light of the prevailing circumstances.

Te Reo

Issue 20.4 To what extent are the actions, policies and legislation of the Crown attributable to the decline of Te Reo among Rohe Pōtae Māori?

Issue 20.5 What was the nature of the Crown policy towards Te Reo? To what extent can the actions, policies and legislation of the Crown be seen to be in pursuit of an assimilationist agenda?

Issue 20.6 Could or should the Crown have sought to protect and promote Te Reo among Rohe Pōtae Māori?

1264. The Crown accepts it has a duty to protect and sustain te reo Māori, which it recognises as a taonga of Māori, including the hapū and iwi of the Rohe Pōtae. The Crown's duty is tempered by what is reasonable and practical in the circumstances. The Crown also notes that the Tribunal and the Courts have recognised that the protection of te reo Māori concerns mutual obligations.⁸¹⁶

⁸¹⁶ See generally Report of the Waitangi Tribunal into claims concerning law and policy affecting Māori Culture and Identity (Wai 262, Waitangi Tribunal, 2010) and *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (Broadcasting Assets).

1265. The Crown acknowledges that there is consistent evidence presented in previous inquiries of some Māori children being forbidden from speaking te reo Māori in schools until the late half of the 20th century. The Crown also acknowledges that the English language was promoted in the first half of the 20th century as an important skill for children to acquire, and accepts that the promotion of English may have been at the expense of te reo Māori.
1266. However, the Crown notes that it had no official policy banning the speaking of te reo, or Māori cultural practices in general, in New Zealand schools.⁸¹⁷ The Crown notes further that any decline in the use of te reo Māori amongst Rohe Pōtae Māori is a result of a range of factors.
1267. Over time, and particularly since the latter part of the 20th century, the Crown has undertaken a number of initiatives to protect and revitalise te reo Māori. The Māori Language Act 1987 recognises te reo Māori as both a taonga and an official language of New Zealand, while the Crown's Māori Language Strategy provides a comprehensive 25-year vision for the revitalisation of te reo Māori. Other initiatives include, but are not limited to, the establishment of Te Taura Whiri i te Reo Māori/the Māori Language Commission, the Ministry of Education's 'Te Reo Matatini Māori Medium Literacy Strategy', the funding of iwi radio stations and the Māori Television Service, and iwi education partnerships.

Māori Tribal and Leadership Structures

Issue 20.7 Does the Crown have an obligation to protect the tribal leadership structures of Rohe Pōtae Māori and, if so, has it fulfilled its obligations?

1268. The Crown acknowledges it has a duty to protect tribal structures, including those of Rohe Pōtae Māori, and this generally requires it

⁸¹⁷ P Christoffel "The Provision of Education Services to Maori in Te Rohe Potae, 1840-2010" (Waitangi Tribunal, Wai 898, A27, 2011) at 3-4, 132 and 146.

to respect and not undermine the leadership structures that Rohe Pōtae Māori adopt for themselves.

1269. The Crown accepts that colonisation had major effects on Māori society, including effects on traditional leadership structures. While the Crown recognises that it was a significant force of change in New Zealand society, for Māori and non-Māori communities alike, it is not responsible for all change and it is seldom able to prevent change. Societies are inherently dynamic, and change is both natural and inevitable. There are also many examples of Māori desiring and seeking change.
1270. Over time the Crown has undertaken a number of initiatives to support Rohe Pōtae Māori in rebuilding and strengthening their tribal leadership structures. Recently, for example, Te Puni Kokiri has provided funding to the Maniapoto Māori Trust Board to undertake a rangatahi development programme and training for environmental commissioners. Te Puni Kokiri has also funded the Ngāti Maniapoto Marae Pact Trust to undertake rangatahi development between 2009 and 2012. The Crown considers that assisting tribal leadership in this way to implement their programmes and achieve their goals helps to protect and strengthen tribal leadership structures.
1271. The Crown considers that the extent to which it has fulfilled its obligation to protect the tribal leadership structures of Rohe Pōtae Māori is a matter for inquiry.

Urban Migration and Dispersal from Homelands

- Issue 20.8** To what extent, if any, did the Crown have a duty to acknowledge the significance of turangawaewae to Rohe Pōtae Māori? To what extent is such a duty ongoing?
- Issue 20.9** To what extent, if any, can the urban migration of Rohe Pōtae Māori away from their traditional homelands be attributed to the Crown?

1272. The Crown recognises that the concept of *tūrangawaewae* plays an important part in Māori society and the Māori world view, and that in moving to urban centres some Rohe Pōtae Māori may have lost their connection to their traditional sites.
1273. While the extent to which urbanisation occurred within the Rohe Pōtae inquiry district may be difficult to measure,⁸¹⁸ the Crown acknowledges that, over time, significant numbers of Rohe Pōtae Māori have migrated to urban centres. The Crown denies, however, that it is primarily responsible for the urban migration of Rohe Pōtae Māori.
1274. Urban migration was not confined to New Zealand, but was a complex, global phenomenon that gained pace following World War II. The Crown had little or no ability to control the phenomenon, and did not have the capacity to insulate rural communities completely from socio-economic change.
1275. The sustainability of settlements or the occupation of particular rural areas depended on a range of factors, including the physical nature of those areas and their remoteness from major centres and infrastructure, population increase, the availability of local employment and general economic trends affecting both the local and national economy.
1276. Māori were not merely passive actors in the urbanisation process. Many Māori saw benefits that could be gained for them and their families in moving to urban centres. It was not the role of the Crown to question Māori choices regarding urban migration, and the Crown could not realistically have suppressed or reversed such migration.
1277. Although the Crown recognises that some of its policies may have made urban migration attractive to rural New Zealanders, some

⁸¹⁸ H Robinson *Te Taha Tinana: Maori Health and the Crown in Te Rohe Potae Inquiry District, 1840-1990*, Wai 898, A31, 2011) at 167.

Crown policies may also have assisted Māori to remain in rural areas. For example, in the first half of the 20th century Native land development schemes helped rural Māori communities to develop and strengthen by providing employment in rural areas.⁸¹⁹ Various land development schemes operated in the Rohe Pōtae, including at Mahoenui, Kawhia, Mangaroa, Oparure, Aramiro, Pirongia, and Ngahape.⁸²⁰

Issue 20.10 What effects has urban migration had on Rohe Pōtae Māori and does the Crown have a duty to minimise these effects?

1278. The Crown notes that there is little evidence on the record of inquiry relating to urban migration and its effects on Rohe Pōtae Māori. The Crown is therefore unable to take a position on this matter at this stage of the inquiry. However, the Crown notes that urban migration would have had a range of effects, including both positive and negative effects, for Rohe Pōtae Māori.

1279. The Crown does not consider it has a general Treaty duty to minimise the negative effects on Rohe Pōtae Māori of urban migration *per se*. However, to the extent that Rohe Pōtae Māori will have experienced negative effects as a result of urban migration, the Crown has endeavoured to address some of these through its broad spectrum of socio-economic policies and initiatives.

Employment and Government Benefits

Issue 20.11 What employment opportunities were available to Rohe Pōtae Māori and were these opportunities reasonable and adequate in the context of the time?

1280. The Crown notes that it has limited ability to influence or control employment opportunities, particularly in remote or isolated areas. The Crown cannot guarantee employment, either for individuals or for groups within society, though it endeavours to achieve positive

⁸¹⁹ JR McCreary “Population Growth and Urbanisation” in *The Māori People in the Nineteen-Sixties: A Symposium* E Schwimmer, ed, (Blackwook and Janet Paul Ltd, Auckland, 1968) at 194.

⁸²⁰ T Hearn Land Titles, Land Development, and Returned Soldier Settlement in Te Rohe Potae (Waitangi Tribunal, Wai 898, A69, 2011).

economic and social conditions that maximise employment opportunities for New Zealanders generally.

1281. Over time, Rohe Pōtae Māori have had a range of employment opportunities. Some of these have arisen from their own enterprise, some as a result of settler activity and the establishment of a settler economy, which has developed into the modern economy that exists today. Some Māori have also gained employment as a result of activities of the Crown and its agents. In the Rohe Pōtae, like other largely rural areas, the primary sources of employment have been agriculture and forestry-related industries, as well as fishing, tourism, mining and quarrying. The construction and maintenance of the North Island main trunk railway through the Rohe Pōtae inquiry district also provided a range of employment opportunities.

Issue 20.12 How did employment opportunities afforded to Rohe Pōtae Māori differ between urban and rural contexts, and between themselves and non-Māori?

Issue 20.13 To what extent can any lack of employment opportunities for Rohe Pōtae Māori be attributed to the actions, policies and legislation of the Crown?

1282. The Crown acknowledges that, compared to New Zealand's urban centres, the rural and isolated nature of the Rohe Pōtae has placed inevitable limitations on the types of employment that could be undertaken there. However, these limitations are outside the Crown's control.

1283. The Crown denies that it is generally responsible for any lack of employment opportunities in the Rohe Pōtae.

Issue 20.14 What level of government assistance has been afforded to Rohe Pōtae Māori and has this been reasonable and adequate in the context of the time?

Issue 20.15 Has there been a difference in the level, accessibility and availability of government assistance afforded to Rohe Pōtae Māori and non-Māori?

1284. The Crown notes that during the 19th and early 20th centuries the level of direct State assistance for any sector of the community was limited and there was considerable hardship for many Māori and non-Māori.
1285. Over time, the Crown has provided a range of initiatives to assist Māori, including Rohe Pōtae Māori, with employment. These initiatives include, but are not limited to, Māori land development schemes, work schemes, employment through the establishment and development of native townships, the provision of social welfare assistance, the provision of job seeker support, seasonal work assistance, and financial assistance with the costs of moving into or maintaining employment. The Crown notes that some initiatives made available to Māori, such as development schemes, were not available to non-Māori.
1286. The Crown accepts that claims that the level of assistance the Crown has given to Rohe Pōtae Māori in respect of employment opportunities has been unreasonable or inadequate, or claims that there has been a difference in the level, accessibility and availability of assistance to Rohe Pōtae Māori compared with non-Māori is a matter for inquiry.

Housing

Issue 20.16 Did the Crown have a duty to provide Rohe Pōtae Māori with the same opportunity to access housing assistance as non-Māori?

Issues 20.17 To what extent did the Crown discharge such a duty?

1287. The Crown accepts that the principle of equality means that, generally, it is required to provide Rohe Pōtae Māori with the same opportunity to access housing assistance as non-Māori. While the Crown notes evidence on the record of inquiry that, at times, housing in the Rohe Pōtae has been poor for both Māori and non-

Māori,⁸²¹ it does not accept that Māori have been denied the same opportunities to access housing assistance as non-Māori. In fact, as outlined below, over time the Crown has provided a range of housing assistance to Māori, some of which has not been available to non-Māori.

1288. Over time, the Crown has undertaken a range of initiatives to improve Māori access to housing. These include, but are not limited to, Māori Development Schemes, housing loans provided under the Native Housing Act 1935 and the Native Housing Amendment Act 1938, state housing, the Kainga Whenua Loan programme provided by the Housing New Zealand Corporation, funding provided by the Social Housing Unit through the Māori Fund (Pūtea Māori) and Rural Fund (Pūtea Taiwhenua), and social welfare assistance, such as the Accommodation Supplement.

Issue 20.18 To what extent can poor housing for Rohe Pōtae Māori be attributed to the actions, policies and legislation of the Crown?

1289. The Crown denies that it is responsible for the state of Māori housing in the Rohe Pōtae.
1290. The Crown notes that evidence on the record of inquiry concerning early Māori housing conditions in the Rohe Pōtae is limited,⁸²² but acknowledges that the condition of early 20th century Māori housing was comparatively very poor throughout the country.
1291. The evidence on the record of inquiry suggests that a number of factors have affected the state of housing in the Rohe Pōtae. Housing was not generally considered part of the Crown's role until the 1880s and, even then, improvement in the quality of houses was considered the responsibility of individuals and families while the

⁸²¹ For example, see H Robinson *Te Taha Tinana: Maori Health and the Crown in Te Rohe Potae Inquiry District, 1840-1990*, Wai 898, A31, 2011) at 97.

⁸²² H Robinson *Te Taha Tinana: Maori Health and the Crown in Te Rohe Potae Inquiry District, 1840-1990*, Wai 898, A31, 2011) at 95.

Crown simply provided assistance to acquire land.⁸²³ Housing was also a lower priority than productive developments on farms. During the 19th century many Māori communities were transient and migrated frequently, which inhibited the construction of permanent housing.⁸²⁴ European housing was also unsuitable in some respects.⁸²⁵

⁸²³ H Robinson *Te Taha Tinana: Maori Health and the Crown in Te Rohe Potae Inquiry District, 1840-1990*, Wai 898, A31, 2011) at 42.

⁸²⁴ H Robinson *Te Taha Tinana: Maori Health and the Crown in Te Rohe Potae Inquiry District, 1840-1990*, Wai 898, A31, 2011) at 41.

⁸²⁵ H Robinson *Te Taha Tinana: Maori Health and the Crown in Te Rohe Potae Inquiry District, 1840-1990*, Wai 898, A31, 2011) at 42.

ECONOMIC DEVELOPMENT

What were the Crown's duties under the Treaty of Waitangi with respect to economic opportunities for Rohe Pōtae Māori? To what extent did the Crown fulfil these?

Economic Development Generally

1292. With regard to economic development generally, the Crown relies on the following propositions from evidence it presented in the Whanganui inquiry:

1292.1 Economic development involves change and the replacement of existing activities by new activities which generate higher standards of living;

1292.2 While we might wish that it were possible to manage economic development so that all would benefit immediately, this has not been the general experience anywhere;

1292.3 Nineteenth century governments concerned themselves with setting the framework of economic activity rather than engaging directly in the economy;

1292.4 The ability to participate in economic development depended heavily on learning, which, in the 19th century, was a mostly private endeavour and the role of government was a very limited one;

1292.5 Land ownership is not a simple vehicle for Māori to achieve material prosperity;

1292.6 In earlier times, governments had much less ability to monitor what was happening to specific groups and fewer mechanism with which to effect an adjustment path to assist those adversely affected by economic change; and

1292.7 It is wrong to assume that simply because some were adversely affected that there was necessarily some failure by somebody.⁸²⁶

1293. The Crown acknowledges that land loss has had a significant effect on the social, cultural and economic well-being of Māori across the Rohe Pōtae inquiry district. The tenure system for Māori land has, at various times, meant it has been difficult for Māori to derive full economic benefits from their land.

1294. The Crown notes that its position in relation to the Tribunal's jurisdiction to inquire into claims concerning the Waitomo Caves is outlined in the introduction.

Issue 21.1 Did the Crown ensure that Te Rohe Pōtae Māori had and continued to have access to economic opportunities?

1295. The Crown does not accept that it has a duty, in either a Treaty or legal sense, to create or provide Rohe Pōtae Māori with economic opportunities, but accepts that the Treaty principle of equality requires it to treat Māori equitably in the implementation of its economic development policies. The Crown considers that the appropriate focus in any assessment of its acts, omissions, policies and practices in relation to access to economic opportunities is therefore whether it has treated Māori equitably and reasonably in the prevailing circumstances.

1296. Access to economic opportunities has always been affected by a wide range of complex factors, many of which are outside the Crown's control. These factors include, but are not limited to, geographic location, individual skill and ability, personal choice, the financial circumstances of overseas trading markets, local and international financial events, and the decisions that others in the market make (or do not make). The Crown's ability to influence

⁸²⁶ Brief of Evidence of Professor Gary Hawke on behalf of the Crown (Wai 903, A84). See in particular pp 3-5.

access to economic opportunities is therefore limited, and has always been so.

1297. The Crown considers that claims that it treated Māori inequitably in relation to access to economic opportunities would have to be considered on a case-by-case basis having regard to all of the prevailing circumstances.

Issue 21.1 (a) Did the Crown fail to actively monitor and protect Te Rohe Pōtae Māori ownership of their lands, forests and other resources?

1298. The Crown's position in relation to the protection of Māori lands and other resources is provided in its response to Issue 3.

Issue 21.1 (b) Did the Crown ensure that Rohe Pōtae Māori had the ability to utilise their lands, forests and other resources in a way consistent with their tikanga and traditions?

1299. Generally, Rohe Pōtae Māori have been free to use the lands, forests and other resources they have retained in accordance with their tikanga and traditions, provided their doing so has been within the bounds of New Zealand law. The Crown acknowledges, however, that in some instances Rohe Pōtae Māori have retained ownership of their lands and resources but not the ability to manage the land themselves.

1300. Any assessment of the way in which the Crown has inhibited Rohe Pōtae Māori in their ability to use their lands, forests and other resources consistently with their tikanga and traditions would need to be considered on a case-by-case basis and having regard to the prevailing circumstances.

Issue 21.2 How did the economic opportunities afforded to Rohe Pōtae Māori compare with those afforded to other citizens in the Te Rohe Pōtae inquiry district? In particular:

(a) Did the Crown provide for equal economic development opportunities between Rohe Pōtae Māori and non-Māori in the Te Rohe Pōtae inquiry district? If not, in what way did the opportunities differ?

1301. The Crown accepts that the Treaty requires it to ensure that Māori share equitably with non-Māori in development opportunities when these are initiated by the Crown. In meeting that duty, the Crown is required to take such steps as are reasonable in the prevailing circumstances. The Crown says that the appropriate focus in any assessment of its acts, omissions, practices and policies in relation to the provision of equal economic opportunities is whether it has treated Māori equitably and reasonably in the prevailing circumstances.

1302. As noted in response to issue 21.1, access to economic opportunities is affected by a wide range of complex factors, many of which are outside the Crown's control. The range of economic opportunities that may be available to particular groups or in specific parts of New Zealand is subject to a similar range of complex factors. This means that the Crown cannot guarantee that particular outcomes will flow from the economic development opportunities that it provides or that the benefits of economic development will always flow equally to all groups in society

1303. The Crown notes evidence on the record of inquiry that, at times, Māori and non-Māori in the Rohe Pōtae have benefitted differently from the economic opportunities that arose in the district, and may have played different roles in the development of those activities.⁸²⁷ The Crown says the extent to which it may have provided unequal economic opportunities to Māori would need to be assessed on a case-by-case basis and having regard to the prevailing circumstances.

Issue 21.3 To what extent were Rohe Pōtae Māori in a position to access economic opportunities provided by the Crown?

1304. The Crown acknowledges evidence on the record of inquiry that Rohe Pōtae Māori played a significant part in the economic development of the district and New Zealand, and accessed many

⁸²⁷ See generally P Cleaver Māori and the Forestry, Mining, Fishing, and Tourism Industries of the Rohe Pōtae Inquiry District, 1880-2000 (Wai 898, A25, Waitangi Tribunal, 2011).

economic opportunities that arose.⁸²⁸ These include, but are not limited to, fisheries, forestry, and trading in goods both in New Zealand and overseas. This demonstrates a degree of adaptability amongst Rohe Pōtae Māori to New Zealand's changing economic landscape, and an ability to take advantage of new economic opportunities as they arose.

1305. The Crown acknowledges, however, that, at times, Rohe Pōtae Māori may not have benefitted from some economic opportunities to the extent that they did from others. The reasons for this are both numerous and complex and include the prevailing national and international economic circumstances, the geographical isolation of the Rohe Pōtae and the increased costs this created for business, the demand at any particular time for goods and services, and the skills and abilities of those seeking to take advantage of the economic opportunities on offer. Many of these factors were outside the Crown's control.

Issue 21.4 To what extent, if any, was the Crown responsible for any impediments, including

- (a) The loss and/or landlocking of land and resources?**
- (b) Creating expectations in relation to fishing/tourism/forestry and mining?**
- (c) Insufficient reserves, inadequate infrastructure, quality of lands returned to Māori and Māori land tenure system?**

1306. Although there is some evidence on the record of inquiry concerning landlocked land,⁸²⁹ the Crown is not aware of evidence as

⁸²⁸ See generally P Cleaver Māori and the Forestry, Mining, Fishing, and Tourism Industries of the Rohe Pōtae Inquiry District, 1880-2000 (Wai 898, A25, Waitangi Tribunal, 2011) and A Francis The Rohe Pōtae Commercial Economy in the Mid-Nineteenth Century, c. 1830-1886 (Wai 898, A26, Waitangi Tribunal, 2011).

⁸²⁹ For example, see Nga Korero Tuku Iho o Te Rohe Pōtae – 1st Oral Traditions Hui (Wai 898, 4.1.3) at 115; Nga Korero Tuku Iho o Te Rohe Pōtae – 4th Oral Traditions Hui (Wai 898, 4.1.4) at 183 and 232; Nga Korero Tuku Iho o Te Rohe Pōtae – 5th Oral Traditions Hui (Wai 898, 4.1.5) at 228-230; and Nga Korero Tuku Iho o Te Rohe Pōtae – 6th Oral Traditions Hui (Wai 898, 4.1.6) at 68.

to the effect that landlocked land may have had on the ability of Rohe Pōtae Māori to access economic opportunities.

1307. The Crown notes that the creation of landlocked land was a result of a number of factors, and accepts that landlocked lands have been a matter of concern for Māori generally over time. The Crown has taken steps to address this issue. Section 129B of the Property Law Act 1952 provided that the High Court could order access to landlocked land, including Māori land, while sections 315-326 of Te Ture Whenua Māori Act 1993 provides that the Māori Land Court can, in certain circumstances, order roadway access. In addition, in 2002 Te Ture Whenua Māori Act 1993 was amended⁸³⁰ and the Māori Land Court given the ability to order reasonable access to landlocked Māori land.⁸³¹
1308. Whether, over time, the Crown's response to issues relating to landlocked land has been consistent with the Treaty and its principles may be an appropriate matter for inquiry.
1309. The Crown is unsure as to the meaning of issue 21.4(b) and is unable to respond to it.
1310. The Crown has responded to issues relating to reserves at section 3 and issues 8.57-8.62.
1311. The Crown notes that, over time, it has taken steps to provide a wide range of infrastructure to Rohe Pōtae communities. These include, but are not limited to, the construction of roads, the North Island main trunk railway, postal and telegraph facilities, schools and hospitals. The Crown's ability to provide infrastructure is affected by a wide range of factors, including its financial resources and the competing interests of other regions and communities. Such constraints have affected everyone in the area and not just Māori.

⁸³⁰ Te Ture Whenua Māori Amendment Act 2002, s 51.

⁸³¹ Te Ture Whenua Act 1993, ss 326A to 326D.

1312. The Crown's response in relation to issues involving the sufficiency of land, the quality of land returned to Māori, and the Māori land tenure system is provided in sections 3 and 8.

1313. The Crown considers that any assessment in this inquiry as to whether it has impeded the ability of Rohe Pōtae Māori to access economic opportunities would have to be undertaken on a case-by-case basis having regard to prevailing circumstances.

Issue 21.5 Did these impediments affect the ability of Rohe Pōtae Māori to access such economic opportunities?

(a) Did the Crown fail to take into account the Rohe Pōtae Māori system of land tenure when forming policy and legislation, effectively excluding Rohe Pōtae Māori from access to economic development opportunities?

(b) Did Crown valuation of agricultural and pastoral leases fail to value native timber as an asset of the land?

1314. The Crown considers that the effects of any impediments it is claimed the Crown has caused in relation to Rohe Pōtae Māori access to economic opportunities are matters for inquiry but, in any case, would have to be considered on a case-by-case basis having regard to prevailing circumstances.

1315. The Crown notes evidence on the record of inquiry that the Advances to Settlers Scheme established by the Government Advances to Settlers Act 1894 to provide credit to small landowners on reasonable terms was incompatible with Māori land tenure.⁸³² The Crown notes further that Māori were not excluded from the scheme, but acknowledges that, for various reasons, including restrictions on attaching debt to Māori land and sufficiency requirements, Māori would have found it harder to access finance under the scheme than non-Māori. However, it is important not to overstate the scope or the number of advances under the Advances to Settlers Scheme. The Scheme did not involve the establishment of an unlimited pool

⁸³² P Cleaver Māori and the Forestry, Mining, Fishing, and Tourism Industries of the Rohe Pōtae Inquiry District, 1880-2000 (Wai 898, A25, Waitangi Tribunal, 2011) at 170.

of development funds from which farmers were able to draw at will for any development they chose. On the contrary, lending was tightly constrained. The Scheme was not the panacea for farm development needs that it is sometimes portrayed as, but, rather, a limited source of funds extended on strict criteria.

1316. The Crown notes that claimants have referred to timber being “valued negatively” when determining agricultural and pastoral leases.⁸³³ The Crown is not aware of any evidence on the record of inquiry that relates to the way in which the value of native timber was considered in the valuation of agricultural and pastoral leases.

Issue 21.6 In what ways did Māori try to participate in and prosper from the settler economy and how did they seek assistance from the Crown to do that?

1317. As noted in response to issue 21.3, Rohe Pōtae Māori played a significant part in the economic development of the district, and New Zealand generally, and took advantage of many of the economic opportunities that arose. The Crown notes evidence on the record of inquiry that Rohe Pōtae Māori were involved in various ways in the industries that operated in the district, including forestry, mining and fishing.⁸³⁴ It must also be acknowledged that the Crown’s ability to intervene actively in the economy for the benefit of particular groups was very limited in comparison to today. The perceived role of the Crown in the economy has also changed over time, and the Crown says it is important not to judge the actions of the 19th and early 20th centuries by present day standards.

1318. The Crown notes that there is limited evidence on the record of inquiry that Rohe Pōtae Māori sought its assistance in order to participate in the settler economy. In any case, the Crown considers that any assessment of its response to any requests that Rohe Pōtae

⁸³³ Generic Pleadings for Amended Statements of Claim: Economic Development (Wai 898, 1.5.8, 9 December 2011) at 8.

⁸³⁴ See generally, P Cleaver Māori and the Forestry, Mining, Fishing, and Tourism Industries of the Rohe Pōtae Inquiry District, 1880-2000 (Wai 898, A25, Waitangi Tribunal, 2011).

Māori may have made would need to be considered on a case-by-case basis and having regard to prevailing circumstances.

Issue 21.7 Did Crown policy and practice favour private enterprises and/or interests over Rohe Pōtae Māori enterprises and/or interests? If so, when, how and why?

1319. The Crown responds to this issue on the understanding that the reference to “private enterprises and/or interests” means non-Māori enterprises and interests.

1320. As outlined in response to issue 21.3, over time, Rohe Pōtae Māori were able to take advantage of the economic opportunities that arose during the development of New Zealand’s economy, and did take advantage of those opportunities. The Crown notes further that Māori received many benefits as a result of this, including employment and an increase in personal wealth and living standards.

1321. At this stage of the inquiry, the Crown does not accept that through its policies and practices it favoured non-Māori enterprises or interests over those of Rohe Pōtae Māori. The Crown says that any claim that it has done so would need to be considered on a case-by-case basis having regard to the prevailing circumstances.

Ownership of Underground Resources

Has the Crown interrupted or usurped the right and ability of Rohe Pōtae Māori to use and enjoy all precious and semi precious stones, metals and minerals such as petroleum, oil, natural gas and condensate (in whatever state or form), iron sands coal, magnesite, iridium, sulphur (including sulphuric gas emissions) and lime and other natural underground resources? If so, how?

Issue 21.8 Did the Crown breach the articles and principles of the Treaty of Waitangi when it enacted legislation, policies and regulations which affected Te Rohe Pōtae Māori interests in underground resources?

Issue 21.9 What is the nature and extent of Rohe Pōtae Māori relationships with underground resources?

Issue 21.10 How did the Crown recognise and protect Rohe Pōtae Māori rights, relationships and interests when the Crown sought to control the ownership and use of such resources? Was this adequate, appropriate or fair having regard to the principles of the Treaty?

1322. Over time, Parliament has exercised its lawmaking powers to enact a wide range of legislation, and the Crown has adopted a number of policies, practices and other initiatives, relating to the management and control of underground resources, such as coal, petroleum and other minerals. The Crown does not accept that the enactment of legislation, or the adoption of policies and practices, relating to the management and control of these resources has by itself resulted in prejudice to Rohe Pōtae Māori or is a breach of Treaty principles. Rather, the management of underground resources is a legitimate governance and regulatory function of the Crown. Further, by virtue of its sovereignty, the Crown is entitled to seek to achieve a reasonable balance between its Treaty obligations and the wider national interest in relation to underground resources.

1323. The current regime for the management and control of petroleum, coal and other minerals consists of both legislative and policy measures. These include, but are not limited to, the Crown Minerals Act 1991, the Crown Minerals (Petroleum) Regulations 2007, the Crown Minerals (Minerals and Coal) Regulations 2007, the Minerals Programme for Petroleum 2005, and the Minerals Programme for Minerals (Excluding Petroleum) (2008). The Crown Minerals Act 1991 sets the broad legislative policy for prospecting, exploration and mining of Crown-owned minerals in New Zealand.

1324. The Crown considers that the current regime for the management of underground resources is Treaty compliant and provides a number of opportunities for the Māori interest to be protected. For example, the Crown Minerals Act 1991 provides that those exercising functions and powers under it must have regard to the

principles of the Treaty,⁸³⁵ while section 15(3) reflects the Treaty principle of active protection by providing for defined areas of land of particular importance to the mana of iwi “to be excluded from the operation of the minerals programme or not included in any permit”.⁸³⁶ Similarly, both the Minerals Programme for Petroleum 2005 and the Minerals Programme for Minerals (Excluding Petroleum) (2008) include provisions specifically targeted to recognise and respect the Crown’s responsibility to have regard to the principles of the Treaty.⁸³⁷

⁸³⁵ Crown Minerals Act 1991, s 4.

⁸³⁶ Wai 796, Petroleum Claim, E30, p 2.

⁸³⁷ Clause 1.11 of the Minerals Programme for Minerals (Excluding Petroleum) (2008), and Chapter 3 of the Minerals Programme for Petroleum 2005.

TIKANGA

Does the Crown have a duty under the Treaty of Waitangi to recognise and protect Rohe Pōtae tikanga? To what extent has the Crown fulfilled this duty?

Tikanga Generally

Issue 22.1 **Has the Crown introduced its own institutions and governance entities into Te Rohe Pōtae contrary to the wishes of nga hapū of Te Rohe Pōtae? If so, how? If Rohe Pōtae Māori expressed their opposition to such institutions, was the Crown response consistent with its Treaty obligations?**

1325. The Crown acknowledges that, over time, it has sought to establish a range of institutions in the Rohe Pōtae inquiry district, as it did in other areas of New Zealand. These include, but are not limited to, the Native Land Court, various Crown departments and agencies, Māori Land Boards, Māori Land Councils, and local government structures. In doing so, the general purpose has been to assist both Māori and non-Māori with the settlement and development of New Zealand, and to enable the Crown to carry out its governance responsibilities effectively and efficiently.

1326. The Crown notes that there was a range of views among Māori as to the introduction of these institutions and governance entities, and the Crown acknowledges that in establishing these institutions and entities it did not always consult specifically with Māori. However, Māori attitudes and ideas did influence the Crown's decision-making.

1327. The Crown considers that any assessment of the way in which it may have responded to any concerns raised by Rohe Pōtae Māori regarding the establishment of institutions and governance entities in the district would have to be considered on a case-by-case basis having regard to prevailing circumstances.

1328. The Crown has provided more specific responses to issues concerning the Native Land Court and the administration of Māori

land by way of Māori Land Boards, Māori Land Councils and the Māori Trustee in its response to issue 6 and 12.

Taonga and Wahi Tapu

Issue 22.2 **How did the Native Land Court system impact on Te Rohe Pōtae Māori, on their traditional connections to their taonga including: Hā; Mātauranga; Whakapapa; Kawa; Tikanga; Wairuatanga; Mana motuhake – kaitiakitanga; Ka eke ki tona taumata; Te Reinga; Te Tikitiki o nga Rangi; Lands forestry wetlands, the foreshore and seabed; Water; the rivers the lakes, artesian water, the waterfalls, the saltwater over the foreshore and seabed; Material tāonga, mere pounamu and other; Wāhi tapu; Tupāpaku; Ohāki a nga tūpuna; Te Nehenehenui; Anga; Manga.**

1329. The Crown notes that there is insufficient evidence on the record of inquiry for it to provide a response to this issue, and considers that it is more appropriate for claimants to address these matters in evidence during the inquiry.

1330. The Crown notes that there is insufficient evidence on the record of inquiry for it to provide a response to most of the particular matters listed in this issue, and considers that it is more appropriate for claimants to address these matters in evidence during the inquiry.

1331. The Crown's position in relation to matters concerning the protection of land and resources and the Native Land Court generally is provided in its responses to issues 3 and 6, respectively.

1332. Further, the Crown reiterates the following concession relating to the effect that the individualisation of Māori land tenure through the Native Land Court system had on Rohe Pōtae tribal structures:

The Crown accepts that the individualisation of Māori land tenure provided for by the Native land laws made the lands of Rohe Pōtae iwi and hapu more susceptible to fragmentation, alienation and partition, and that this contributed to the undermining of tribal structures in the Rohe Pōtae. The Crown concedes that its failure to protect these tribal structures was a breach of the Treaty of Waitangi and its principles.

Issue 22.3 **What steps, if any, did Rohe Pōtae Māori take to ensure protection of taonga? What is the significance of Te Ohaki**

Tapu in terms of protecting taonga?

1333. The Crown understands “taonga” to mean those things of special or particular importance to Rohe Pōtae Māori, and includes taonga tuku iho and taonga tūturu.
1334. The Crown notes that Rohe Pōtae Māori have many taonga, including land, tuna and te reo Māori. The Crown also notes evidence on the record of inquiry that, over time, Rohe Pōtae Māori have taken a number of steps to protect those taonga, including the use of rahui and tapu,⁸³⁸ and have raised concerns about them with local authorities.⁸³⁹
1335. The Crown’s position in relation to matters concerning Te Ohaki Tapu is provided generally in the Crown’s response to issue 7. The Crown does not accept the claimants’ contention that the Crown and Rohe Pōtae Māori entered into Te Ohaki Tapu, though it does accept that in the mid-1880s it reached agreements with Rohe Pōtae Māori on a number of matters, including agreements that allowed surveys for the North Island main trunk railway through their district and the construction of the railway.
1336. The Crown notes evidence on the record of inquiry that, in December 1884, during negotiations leading up to Rohe Pōtae Māori agreeing to construction of the railway through their district, Native Minister Ballance gave directions for a letter to be circulated to Rohe Pōtae leaders in which the Minister outlined a procedure for dealing with any human remains or Māori artefacts that contractors found during the construction of the railway.⁸⁴⁰

Issue 22.4 To what extent has the Crown actively provided for the protection and preservation of taonga?

⁸³⁸ For example, see Wai898, 4.1.2, p 84, and Wai 898, 4.1.3, p 242.

⁸³⁹ For example, see Wai 898, 4.1.1, p at 79 and pp 176-177, and Wai 898, 4.1.6, p 402.

⁸⁴⁰ P Cleaver and J Sarich “Turongo: the North Island Main Trunk Railway and the Rohe Pōtae, 1870-2008”, (November 2009), Wai 898, A20, p 114.

1337. The Crown accepts that the principle of active protection may require it to take steps to protect the taonga of Rohe Pōtae Māori. However, such steps are limited to those that are reasonable in the prevailing circumstances. The Crown also notes that, while its duty of active protection may include legislation and policies to prevent the loss, modification or destruction of the taonga of Rohe Pōtae Māori, such provisions can go only so far to prevent interference with them. This is particularly the case when taonga are located on Māori-owned or other privately-owned land, or when their location has not been revealed to the Crown.
1338. Over time, the Crown has undertaken a range of initiatives to help protect and preserve taonga. These initiatives include, but are not limited to, the Māori Antiquities Act 1901 and its amendments, the Historical Articles Act 1962, the Antiquities Act 1975, the Protected Objects Act 1975, the Resource Management Act 1991, and the establishment of the Ministry for Culture and Heritage. New Zealand is also a signatory to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property 1970 and the Convention on Stolen or Illegally Exported Cultural Objects 1995.

Māori Antiquities Act 1901

1339. The Māori Antiquities Act 1901 was the Crown's first legislative response to concerns that Māori artefacts were being exported from New Zealand. The Act stated that no Māori antiquity was to be removed from New Zealand without first being offered for sale to the Crown. Breach of the provision could result in seizure of the item. In 1904, amendments were made to the Act to stipulate a £100 fine where items covered by the Act were exported without the express permission in writing of the Colonial Secretary. The definition of "antiquities" was also clarified during that amendment.

Historical Articles Act 1962

1340. The Historical Articles Act 1962 replaced the 1901 Act and its amendments. The new Act made it unlawful for any such articles to be exported from New Zealand without permission from the Minister of Internal Affairs. Breach of this provision attracted a £200 fine.

Antiquities Act 1975

1341. The Antiquities Act 1975 introduced significant changes to the way moveable cultural property was protected by legislation. The main purposes of the Act were to provide for the better protection of antiquities by regulating their export from New Zealand, to establish and record the ownership of Māori artefacts and to control the sale of artefacts within New Zealand. It also addressed the issue of newly-found historical artefacts. Under the Act:

1341.1 Prima facie Crown ownership prevented the common law ownership rights of finders or land owners being vested in the finder of an artefact or the landowner. Rights to claim actual or traditional ownership of the artefact were protected; and

1341.2 The Māori Land Court had the jurisdiction to determine found artefacts' actual or traditional ownership following application by any person.

1342. There were, however, few applications to the Māori Land Court to determine the actual or traditional ownership following the commencement of the Antiquities Act on 1 April 1976. The Protected Objects Amendment Act 2006, discussed below, was designed to change this by enhancing the procedures for determining actual or traditional ownership.

The Protected Objects Act 1975

1343. The Protected Objects Amendment Act 2006 renamed the Antiquities Act 1975 as the Protected Objects Act 1975.

1344. The purpose of the Protected Objects Act is to provide for the better protection of certain objects by:
- 1344.1 regulating the export of protected New Zealand objects;
 - 1344.2 prohibiting the import of unlawfully exported protected foreign objects and stolen protected foreign objects;
 - 1344.3 providing for the return of unlawfully exported protected foreign objects and stolen protected foreign objects;
 - 1344.4 providing compensation, in certain circumstances, for the return of unlawfully exported protected foreign objects;
 - 1344.5 enabling New Zealand's participation in the UNESCO Convention and the UNIDROIT Convention;
 - 1344.6 establishing and recording the ownership of ngā taonga tūturu; and
 - 1344.7 controlling the sale of ngā taonga tūturu within New Zealand.
1345. To facilitate obtaining determinations of ownership, the Protected Objects Amendment Act 2006 established a new administrative process to establish ownership over newly-found artefacts (renamed taonga tūturu). When a taonga tūturu is found, the finder is required to notify the Chief Executive or the nearest public museum within 28 days. The Chief Executive of the Ministry for Culture and Heritage is required to publicly notify the find, receive ownership and custody claims and provide for the care of the object. Where there is more than one ownership claim, the Chief Executive is required to consult with the claimants in order to try to resolve the competing claims.
1346. Where there is only one claim or any competing claims have been resolved to the satisfaction of the Chief Executive, and the Chief

Executive is satisfied as to that claim's validity, the Chief Executive applies to the Māori Land Court, on behalf of the parties, for an order as to ownership.

1347. Competing claims of ownership are determined by the Māori Land Court. The Chief Executive may facilitate claimants' applications, where requested. To aid resolution of these claims, the Act is linked to section 30 and other relevant provisions of Te Ture Whenua Māori Act 1993. Section 30 provides for Court jurisdiction to advise on or determine representation of Māori groups.
1348. The Act provides that traditional ownership of a Māori object may include collective ownership. This recognises that traditional ownership of taonga tūturu is likely to have been with iwi, hapū, or whānau. A right of appeal is available on all ownership determinations. Grants of custody can be made where there are no ownership claims.
1349. Since the 2006 amendments came into force, the Ministry has publicly notified 186 cases of taonga tūturu found under the Protected Objects Act 1975 (some cases include multiple finds). The Ministry has filed 68 cases to the Māori Land Court for determination of ownership. The Court has made 47 orders determining ownership with Māori.
1350. Section 13 of the Act limits the ways in which cultural taonga in private possession may be sold or otherwise disposed of. The Act provides for the registration of collectors of taonga tūturu, and the licensing of auctioneers and second-hand dealers who wish to trade in taonga tūturu. Taonga tūturu can only be sold to public museums, registered collectors or through the offices of licensed second-hand dealers and auctioneers.

UNESCO and UNIDROIT Conventions

1351. Sections 10A to 10F of the Protected Objects Act enable New Zealand's participation in the UNESCO and UNIDROIT

Conventions, noted above. Implementation of these international instruments gained this country reciprocal protection overseas for stolen or illegally imported New Zealand heritage items.

1352. Taonga tūturu, as protected New Zealand objects, can only be exported with permission from the Chief Executive of the Ministry for Culture and Heritage. The Act aims to ensure that permanent export will be refused for movable cultural and heritage objects that are of such significance to New Zealand, or part of New Zealand, that their export would substantially diminish New Zealand's cultural heritage.
1353. Items illegally exported from New Zealand may be returned through the provisions of the UNESCO and UNIDROIT Conventions. Likewise, the Act prohibits the import into New Zealand of unlawfully exported protected foreign objects.

Issue 22.9 To what extent if any have legislative arrangements been sufficient in providing for active protection of wahi tapu for Rohe Pōtae Māori?

1354. The Crown accepts that the principle of active protection may require it to take steps to protect the wahi tapu of Rohe Pōtae Māori. However, such steps are limited to those that are reasonable in the prevailing circumstances. The Crown also notes that, while its duty of active protection may include legislation and policies to prevent the loss, modification or destruction of wahi tapu of Rohe Pōtae Māori, such provisions can only go so far to prevent interference with them. This is particularly the case when wahi tapu are located on Māori-owned or other privately-owned land, or when their location has not been revealed to the Crown.
1355. The Crown acknowledges that, over time, both Māori and non-Māori have expressed a range of concerns regarding the effectiveness of legislative provisions for the protection of wāhi tapu. The Crown has responded to concerns about the sale and desecration of wāhi tapu through a series of legislative enactments,

commencing in the early 1900s, as described below. The Crown has continued to develop policy and promote new legislation in consultation with Māori.

1356. Over time, the Crown has undertaken a range of initiatives to protect wahi tapu. These include, but are not limited to:

1356.1 Section 29(1) of the Māori Land Administration Act 1900, which made provision for the creation of inalienable urupa reserves.

1356.2 The Māori Councils Act 1900, which assigned responsibility to Māori Councils for the protection and control of burial grounds.

1356.3 The Māori Councils Amendment Act 1903, which made it an offence to desecrate or otherwise interfere with any Māori grave.

1356.4 Section 232 of the Native Land Act 1909, which provided for the inalienable reservation of Māori land owned by more than ten owners for their common use as, among other things, 'a burial ground' or 'a place of historical or scenic interest'.

1356.5 Section 274 of the Native Land Act 1931, which required the Native Land Court to ensure that urupa were not included in sales.

1356.6 Section 472 of the Native Land Act 1931, which provided for the re-vesting of burial grounds on Crown land in Māori ownership. These reserves were absolutely inalienable without the consent of the Governor-General in Council.

1356.7 Section 5 of the Native Purposes Act 1937, under which an application could be made to the Native Land Court to declare land to be a burial ground.

1356.8 Section 439 of the Māori Affairs Act 1953, which provided for the Governor-General, on the recommendation of the Māori Land Court, to set apart any Māori freehold land or general land owned by Māori as a Māori reservation for the purposes of, among other things, burial grounds or places of ‘historical or scenic interest’.

1356.9 The Historic Places Act 1954, which constituted the National Historic Places Trust.

Issue 22.10 Did the Crown have a duty to acknowledge the significance of various sites before acquiring such sites under Public Works legislation? If so, did they?

Issue 22.11 Did the Crown have a duty to acknowledge the significance of various sites before acquiring such lands by various methods? If so, did they? Does the Crown’s duty extend to protecting sites of significance that have not yet been offered protections?

1357. The Crown’s position in relation to matters concerning the acquisition of land under public works legislation is outlined in the Crown’s response to issue 15. Although the Crown did not have a policy of specifically acquiring sites of significance from Rohe Pōtae Māori, it acknowledges that some sites of significance may have been acquired.

1358. The Crown accepts that before it acquired lands under public works legislation or otherwise it was generally required to inform itself of the significance to Māori of that site.

1359. The Crown considers that claims that it has acquired sites of significance to Rohe Pōtae Māori must be assessed on a case-by-case basis having regard to the prevailing circumstances.

Issue 22.12 Did the Crown fail to protect wahi tapu of Rohe Pōtae Māori?

Issue 22.13 Did the Crown fail to protect taonga and wahi tapu of Rohe Pōtae Māori?

1360. The Crown acknowledges that the Treaty principle of active protection may require it to take steps to protect the taonga and wahi tapu of Rohe Pōtae Māori, but such steps are limited to those that are reasonable in the prevailing circumstances. The Crown considers that claims that it has failed to protect the taonga and wahi tapu of Rohe Pōtae Māori would therefore have to be considered on a case-by-case basis having regard to prevailing circumstances.

1361. The Crown notes that, while its duty of active protection may include the promotion of legislation and policies to prevent the loss, modification or destruction of taonga and wahi tapu of Rohe Pōtae Māori, such provisions can go only so far to prevent individuals from interfering with them. This is particularly the case when taonga and wāhi tapu are located on Māori-owned or other privately-owned land, or when the Crown is not aware of their location.

1362. As outlined in response to issues 22.4 and 22.8, over time the Crown has undertaken a number of initiatives to protect the taonga and wahi tapu of Rohe Pōtae Māori. However, the Crown also notes that it cannot guarantee the success of such initiatives, or that the taonga and wahi tapu of Rohe Pōtae Māori will not be disturbed or lost.

1363. In addition, the Crown accepts a responsibility to protect wahi tapu and other sites of historical, spiritual and cultural significance to Māori on surplus Crown land. This responsibility is administered by Te Puni Kokiri, through a “Sites of Significance” process.⁸⁴¹

Issue 22.14 To what extent did Crown legislation such as The Protected Objects Act/Antiquities Act 1975, Historic Places Act 1993 and the Resource Management Act 1991 meet the Crown’s Treaty obligations in respect of protection of the wahi tapu and taonga of Rohe Pōtae groups?

⁸⁴¹ Office of Treaty Settlements, <http://www.ots.govt.nz/>.

1364. While the Crown acknowledges its duty of active protection, it notes that its obligations extend only to taking steps that are reasonable in the prevailing circumstances. As such, the reasonableness of any legislative measure would have to be considered on a case-by-case basis, having particular regard to the circumstances surrounding its enactment.

1365. The Crown considers that legislation such as the Protected Objects Act 1975, the Resource Management Act 1991 and the Historic Places Act 1993 provide adequate protection for taonga and wahi tapu, and satisfies the Crown's active protection obligations.

Issue 22.15 Did the Crown fail to provide for adequate consultation with Māori in relation to alienation of significant land sites?

1366. The Crown notes evidence on the record of inquiry that, at times, it may not have consulted adequately with Rohe Pōtae Māori before acquiring sites of significance to them.

1367. The Crown notes that the Treaty does not impose an absolute duty of consultation on it, but generally the Crown is required to inform itself of the significance of such sites to Māori before acquiring them.

1368. The Crown considers that each acquisition would have to be considered on a case-by-case basis, having regard to prevailing circumstances.

Tikanga and Kaitiakitanga

Issue 22.5 Has the Crown attempted to give effect to tikanga in its relationship with Rohe Pōtae Māori? If not, is the Crown's denial of tikanga justifiable in terms of the Treaty principles?

1369. The Crown considers that Māori are primarily responsible for the development, regulation, control and use of their tikanga and matauranga Māori.

1370. However, the Crown has attempted to assist Māori in this task. Although the ways in which the Crown has done this are broad, some contemporary examples include:

1370.1 Te Papa: for example, through the manner of taonga care and display, and iwi exhibitions.

1370.2 Archives and National Library: for example, through consultation with Māori about appropriate use of materials, access restrictions are possible.

1370.3 Creative New Zealand: for example, its funding mechanisms and strategies for Māori artists.

1370.4 The New Zealand Qualifications Authority: for example, the creation of a specific field (called Field Māori) within the national qualifications framework to cater for Māori pedagogy, knowledge and skills; the work of the Māori Qualifications Services and Whakaruruhau (Māori advisory groups) to develop unit standards and national qualifications for Field Māori.

1370.5 The Ministry of Education: for example, the learning philosophy of Kohanga Reo is based on tikanga Māori; Māori pedagogy and mātauranga Māori is integral to kura kaupapa; wananga have, as one of three key characteristics, that the protection and advancement of mātauranga Māori is central to its activities.

Issue 22.7 Has the Crown attempted to give effect to kaitiakitanga in its relationship with Rohe Pōtae Māori?

Issue 22.8 To what extent if any have legislative arrangements been sufficient in providing for active protection of kaitiakitanga for Rohe Pōtae Māori?

1371. The Crown acknowledges the Treaty principle of partnership, as well as its obligation to act reasonably and in good faith in its relationship with Māori. The Crown also accepts that Rohe Pōtae Māori have a

relationship of kaitiakitanga with their taonga, wahi tapu, and aspects of the environment and its resources.

1372. The Crown notes that, at times, legislative arrangements may not have provided for kaitiakitanga to the extent that they do today. However, today the Crown gives effect to kaitiakitanga in its relationship with Māori in a number of ways. These include, but are not limited to, provisions recognising kaitiakitanga in legislation, such as the Resource Management Act 1991, the Historic Places Act 1993 and the Fisheries Act 1996, those policies outlined in response to issue 22.5, and the Department of Conservation’s Statement of Intent 2011-2014, which notes the importance of, inter alia, “supporting Māori communities as kaitiaki of their historic and cultural heritage and taonga”.⁸⁴²
1373. The Crown notes that Māori have a range of concerns in respect of the way in which legislative arrangements give effect to kaitiakitanga. The Crown continues to seek ways in which those arrangements can be improved or kaitiakitanga recognised in new ways. An example of this is the Nga Wai o Maniapoto (Waipa River) Bill currently before the House,⁸⁴³ which contains a number of provisions recognising the kaitiakitanga of Ngāti Maniapoto in respect of the Waipa River.⁸⁴⁴
1374. The Crown notes further that the enactment and implementation of legislation and policy relating to the protection of taonga and wahi tapu outlined in response to issues 20.4 and 20.5 has also, over time, enhanced the ability of Māori to exercise kaitiakitanga in respect of those taonga and wahi tapu.
1375. The Crown considers that claims that it has not provided sufficient protection or acknowledgement of the kaitiakitanga of Rohe Pōtae

⁸⁴² Department of Conservation, *Statement of Intent 2011-2014* (Department of Conservation, Wellington) at 2.1.2.

⁸⁴³ Nga Wai o Maniapoto (Waipa River) Bill, 231-3 (2010).

⁸⁴⁴ For example, see clause 14(13) of the Nga Wai o Maniapoto (Waipa River) Bill.

Māori must be considered on a case-by-case basis, having regard to prevailing circumstances.

Issue 22.6 Does the Crown have a duty to protect the relationships between the hapū and iwi of Rohe Pōtae Māori? If so, have Crown acts and omissions impacted on these relationships?

1376. While the Crown acknowledges that the duty of active protection may require it to take steps that are reasonable in the circumstances to protect the relationships between hapū and iwi, it considers that the management of such relationships is primarily the responsibility of Māori.

1377. The Crown notes evidence on the record of inquiry that, at times, its acts, omissions, policies or practices may have affected relationships between the iwi and hapū of the Rohe Pōtae.⁸⁴⁵ This includes, by way of example, through the Crown's acts, omissions, policies and practices during the New Zealand Wars.

1378. The Crown notes again the following concession it has made in this inquiry relating to the effect that the individualisation of Māori land tenure through the Native Land Court system had on Rohe Pōtae tribal structures:

The Crown accepts that the individualisation of Māori land tenure provided for by the native land laws made the lands of Rohe Pōtae iwi and hapū more susceptible to fragmentation, alienation and partition, and that this contributed to the undermining of tribal structures in the Rohe Pōtae. The Crown concedes that its failure to protect these tribal structures was a breach of the Treaty of Waitangi and its principles.

Issues 22.16 Did the Crown at any point in time over the history of Te Rohe Pōtae, apologise for enacting the Tohunga Suppression Act 1907 and what (if any) processes have been implemented to alleviate the gap (or loss of knowledge) that the Act created within Tikanga, Rongoa and Healing?

⁸⁴⁵ For example, see V O'Malley *Te Rohe Pōtae War and Raupatu* (Wai 898, A22, Waitangi Tribunal, 2010) at 753; Wai 898, 4.1.3, pp 65-67; Wai 898, 4.1.5, p 43, Wai 898, 4.1.6, p 134.

1379. The Crown notes that issues concerning the Tohunga Suppression Act 1907 were considered in depth in the Waitangi Tribunal's Wai 262 inquiry, and in the Tribunal's subsequent report.
1380. The Crown recognises the importance of rongoā to Māori, and has undertaken a number of initiatives to support Māori in the use of these traditional practices. These initiatives include, but are not limited to, the Ministry of Health's Rongoā Development Plan and funding from the Māori Health Innovations Fund to support and improve the sustainability of rongoā resources.⁸⁴⁶

⁸⁴⁶ Ministry of Health, <http://www.health.govt.nz/our-work/populations/Māori-health/te-ao-auahatanga-hauora-Māori-Māori-health-innovation-fund>.

TAKUTAI MOANA

What were the Crown's duties and/or obligations under the Treaty of Waitangi in terms of the takutai moana in Te Rohe Pōtae? To what extent did the Crown fulfil these duties/obligations? What if any steps did Te Rohe Pōtae Māori take to ensure the protection of their mana and rangatiratanga over the takutai moana and was the Crown response fair in Treaty terms?

Issue 23.1 Did Te Rohe Pōtae Māori exercise mana and tino rangatiratanga over the entirety of their rohe as at 1840? In particular, did Te Rohe Pōtae Māori exercise rangatiratanga over the takutai moana of Te Rohe Pōtae?

1381. It is unclear on the evidence available that in 1840 the Rohe Pōtae Māori exercised rangatiratanga over the foreshore and seabed of the Rohe Pōtae. This needs to be established through evidence and in respect of particular areas of foreshore and seabed.

Issue 23.2 Did the Treaty of Waitangi ensure the protections of the full, exclusive and undisturbed possession of takutai moana for Te Rohe Pōtae Māori and if so, did Te Rohe Pōtae Māori ever extinguish or waive these protections?

1382. Article II in English made express reference to Māori fisheries interests. In article II the Crown agreed to confirm and guarantee:

the full exclusive and undisturbed possession of their Lands and Estates Forests *Fisheries* and other properties ...

1383. The Crown accepts that the reference to “fisheries” would have been included within the term “o ratou taonga katoa” in the Māori equivalent of article II:⁸⁴⁷

te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.

1384. Article II did not, however, make express reference to foreshore and seabed either in English or in Māori. It is literally tenable that both English and Māori texts of article II can be read as extending to

⁸⁴⁷ See the Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22, 1988), para 10.3.2.

Māori property claims to the foreshore and seabed. The Crown is unaware of any evidence of any discussion at the time that the Treaty would protect such rights over and above rights to fisheries. There is an argument that the express reference to fisheries and the absence of any express reference to the foreshore and seabed could be taken as meaning that Māori property interests in the foreshore and seabed were beyond the contemplation of article II.

1385. The Crown is unaware of any evidence that Crown officials considered article II's guarantees would have extended to the foreshore and seabed. It is likely that Crown officials would have considered, consistent with their views of the common law, that article II did not apply to:

1385.1 foreshore, because that property was *prima facie* vested in the Crown; and

1385.2 seabed, because that property was the Crown's.

1386. The Waitangi Tribunal, in its *Report on the Crown's Foreshore and Seabed Policy*, has, however, found that the Treaty recognised, protected and guaranteed te tino rangatiratanga over the foreshore and seabed.⁸⁴⁸

1387. Today, the Crown accepts that to the extent foreshore and seabed is within the boundaries of New Zealand and to the extent that foreshore and seabed is properly the subject of extant Māori property rights, article II of the Treaty applies to it such that the Crown has a duty to confirm and guarantee those property rights.

1388. It is unclear whether the Rohe Pōtae held customary title to particular areas of foreshore and seabed as at 1840 and whether, since then, they have let that title lapse.

⁸⁴⁸ Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004), para 2.1.8.

Issue 23.3 Did the Crown assume control over the takutai moana in Te Rohe Pōtae?

- (a) If so, did this assertion of control and/or ownership breach the duties relating to the takutai moana imposed on the Crown by the Treaty?**
- (b) Did Te Rohe Pōtae Māori consent to Crown control and/or ownership of the takutai moana?**
- (c) What prejudice was caused to Te Rohe Pōtae Māori as a result of this assumed control and/or ownership by the Crown?**

1389. The Crown’s assumptions of property rights in the foreshore and seabed in New Zealand have stemmed from the Crown’s understanding of the application of the common law of England to New Zealand.

1390. In terms of the foreshore – that is, the area between mean high and mean low water marks – it was a rule of the common law that the Crown had title to the foreshore of England unless the contrary could be proved (for example, by an express grant by the Crown of foreshore). This rule was established prior to 1840.⁸⁴⁹ In the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, the Tribunal stated:⁸⁵⁰

Thus the English of 1840 considered that the Crown owned the foreshore but that its title was rebuttable by evidence of long term contrary user.

1391. The Crown accepts that this would have been the view of Crown officials at 1840.

1392. In terms of the seabed beyond the foreshore, by 1840 it was assumed that the Crown had both sovereignty over and property in the seabed surrounding the British Isles. The authoritative view of Hale (*De Jure Maris*, 1789) was that the “narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions

⁸⁴⁹ See, for example, *Attorney-General v Parmeter* (1811) 10 Price 378, 147 (ER) 345, p 352.

⁸⁵⁰ Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22, 1988), para 10.3.1(c).

of the king of England”.⁸⁵¹ Authorities distinguished between the sea on the open coast and the sea *inter fauces terrae*, that is, within the jaws of the land. Hale, for instance, described these seas as those “where a man may reasonably discern between shore and shore”.⁸⁵² The seabed to these waters, including the bed of channels, creeks and navigable rivers, bays and estuaries, as far as the tide flows was treated the same as the foreshore: the Crown was presumed to have *prima facie* ownership of it.⁸⁵³

1393. Prior to 1840, commentators continued to assert the Crown’s property right to the seabed, applying these claims to the “British seas” (those surrounding Britain and including those *inter fauces terrae*). For instance, Chitty (in 1820) said this title to seabed could be appropriated by the Crown, subject to the *jus publicum* (the public rights at common law of navigation).⁸⁵⁴ Hall (in 1830) said the Crown’s property to the seabed of the British seas stemmed from the principle that all lands in the realm once originally belonged to the King and that, while the *terra firma* of England had almost entirely been granted, “the *terra aqua maris cooperta* still remains to the King in wide and barren ownership”.⁸⁵⁵
1394. This is the position that Crown officials would have considered applied in New Zealand following 1840.
1395. Since 1840, the Crown has enacted legislation that has been premised on its understanding that it is the *prima facie* owner of all foreshore and is the owner of all seabed in New Zealand.

⁸⁵¹ See Stuart A Moore *A History of the Foreshore and the Law Relating Thereto* (Stevens and Hayes, London, 1888), p 376.

⁸⁵² Moore *A History of the Foreshore*, p 376.

⁸⁵³ See *Halsbury’s Laws of England* (4th ed, reissue, 1998) vol 12(1) Crown Property at [242] and (5th ed, 2009) vol 100 Water and Waterways at [32].

⁸⁵⁴ Chitty *Law of the Prerogatives of the Crown* (London, 1820) at 206, cited in Marston *The Marginal Seabed* at 19-20.

⁸⁵⁵ Robert Gream Hall “On the Rights of the Crown and the Privileges of the Subject in the Sea-Shore of the Realm” in Moore *A History of the Foreshore* at 671-672.

1396. More recently, the Court of Appeal in *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 has found that various Acts of Parliament have not had the effect of extinguishing any extant customary title in the foreshore and seabed.

1397. The Marine and Coastal Area (Takutai Moana) Act 2011 currently provides mechanisms to recognise extant customary interests in the foreshore and seabed, that is customary marine title and protected customary rights. The 2011 Act expressly restored any customary title that was extinguished through the Foreshore and Seabed Act 2004.

Issue 23.4 Was the legislation and/or policies implemented by the Crown in relation to the takutai moana from 1854 onwards, in breach of the duties imposed by the Treaty?

- (a) **What prejudice was caused to Rohe Pōtae Māori as a result of the introduction of the legislation and/or policies relating to takutai moana?**
- (b) **Is the Marine and Coastal Area (Takutai Moana) Act 2011 compliant with the Treaty?**

Since 1854 and prior to the *Ngāti Apa v Attorney-General* decision (of 2003), some key provisions concerning ownership of the foreshore and seabed have included:

1397.1 a series of enactments concerning harbours: the Marine Act 1866, the Marine Act 1867, the Harbour Works Act 1874, Marine Act 1867 Amendment Act 1877, the Harbours Act 1878, Harbours Act 1878 Amendment Act 1883, the Harbours Act 1923 and the Harbours Act 1950;

1397.2 the Crown Grants Acts of 1866, 1883 and 1908;

1397.3 a proclamation in 1872 suspending jurisdiction of the Native Land Court in respect of foreshore and seabed in the province of Auckland;

1397.4 the Territorial Sea and Fishing Zone Act 1965 and the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977;

1397.5 the Resource Management Act 1991, and section 12 in particular; and

1397.6 the Foreshore and Seabed Endowment Revesting Act 1991.

1398. The Crown accepts that the legislation above was premised on the understanding that the Crown was the *prima facie* owner of all foreshore, was the owner of all seabed and that Māori did not hold property to the seabed. It appears, however, from the Court of Appeal's decision in Ngāti Apa decision, that not only were these assumptions incorrect, but that the legislation above did not have the effect of extinguishing whatever customary title Māori may have had (and still have) in the foreshore and seabed.

1399. The Crown considers the Marine and Coastal Area (Takutai Moana) Act 2011 to be compliant with Treaty principles. The Crown considers that the Act sets an appropriate balance between recognition of Māori and public interests in the foreshore and seabed.

1400. Amongst other things, the Marine and Coastal Area (Takutai Moana) Act 2011:

1400.1 repeals the Foreshore and Seabed Act 2004;⁸⁵⁶

1400.2 expressly restores any customary interests that were extinguished by the Foreshore and Seabed Act 2004;⁸⁵⁷

⁸⁵⁶ Marine and Coastal Area (Takutai Moana) Act 2011, s 5.

⁸⁵⁷ Marine and Coastal Area (Takutai Moana) Act 2011, s 6.

- 1400.3 establishes a new area known as the common marine and coastal area (essentially all foreshore and seabed not held in private title);
- 1400.4 declares that neither the Crown nor any other person owns, or is capable of owning, the common marine and coastal area;⁸⁵⁸
- 1400.5 provides for the recognition of two forms of customary interest: customary marine title⁸⁵⁹ and protected customary rights;⁸⁶⁰
- 1400.6 provides that customary marine title and protected customary rights may be recognised through agreement with the Crown⁸⁶¹ or through applications to the High Court;⁸⁶² and
- 1400.7 sets out the consequences of customary marine title and protected customary rights.
1401. Customary marine title provides an interest in land, but does not include the right to alienate or otherwise dispose of the land in question.⁸⁶³ Customary marine title may, however, be transferred in accordance with tikanga and the rights conferred by it may also be delegated in accordance with tikanga.⁸⁶⁴
1402. The other consequences of customary marine title are:

⁸⁵⁸ Marine and Coastal Area (Takutai Moana) Act 2011, s 11(2).

⁸⁵⁹ See section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011.

⁸⁶⁰ See section 51 of the Marine and Coastal Area (Takutai Moana) Act 2011.

⁸⁶¹ See subpart 1 of Part 4 of the Marine and Coastal Area (Takutai Moana) Act 2011

⁸⁶² See subpart 2 of Part 4 of the Marine and Coastal Area (Takutai Moana) Act 2011.

⁸⁶³ Marine and Coastal Area (Takutai Moana) Act 2011, s 60(1)(a)

⁸⁶⁴ Marine and Coastal Area (Takutai Moana) Act 2011, s 60(3) and s 61.

- 1402.1 the right to use, benefit from or develop a customary marine title area including the right to derive commercial benefit;⁸⁶⁵
- 1402.2 the exemption from payment of coastal occupation charges;⁸⁶⁶
- 1402.3 the exemption from payment of royalties for sand and shingle;⁸⁶⁷
- 1402.4 the ‘RMA permission right’ – essentially the right to give or decline permission, on any grounds, for an application for resource consent;⁸⁶⁸
- 1402.5 the conservation permission right – essentially the right to give or decline permission, on any grounds, for the Minister of Conservation or Director-General of Conservation to consider applications or proposals for marine reserves, conservation protected areas and concessions;⁸⁶⁹
- 1402.6 a right to protect wahi tapu and wahi tapu areas;⁸⁷⁰
- 1402.7 rights in relation to marine mammal watching permits;⁸⁷¹
- 1402.8 rights in relation to the process for preparing, issuing, changing, reviewing or revoking a New Zealand coastal policy statement;⁸⁷²

⁸⁶⁵ Marine and Coastal Area (Takutai Moana) Act 2011, s 60(2)(a).

⁸⁶⁶ Marine and Coastal Area (Takutai Moana) Act 2011, s 60(2)(b)(i).

⁸⁶⁷ Marine and Coastal Area (Takutai Moana) Act 2011, s 60(2)(b)(ii).

⁸⁶⁸ See section 62(1)(a) and sections 66-70 of the Marine and Coastal Area (Takutai Moana) Act 2011.

⁸⁶⁹ See section 62(1)(b) and sections 71-75 of the Marine and Coastal Area (Takutai Moana) Act 2011 of the Marine and Coastal Area (Takutai Moana) Act 2011.

⁸⁷⁰ See section 62(1)(c) and sections 78-81 of the Marine and Coastal Area (Takutai Moana) Act 2011.

⁸⁷¹ See sections 62(2)(d)(i) and 76 of the Marine and Coastal Area (Takutai Moana) Act 2011.

- 1402.9 the prima facie ownership of newly found taonga tuturu;⁸⁷³
- 1402.10 the ownership of certain minerals;⁸⁷⁴ and
- 1402.11 the right to create a planning document.⁸⁷⁵
1403. Planning documents place the following duties on the following authorities:
- 1403.1 A local authority must take the planning document into account when making any decision under the Local Government Act 2002 in relation to the relevant customary marine title area.⁸⁷⁶
- 1403.2 The New Zealand Historic Places Trust must have particular regard to the matters set out in a planning document that relate to the functions of the Trust when considering an application under section 14 of the Historic Places Act 1993 to destroy, damage, or modify an archaeological site within the customary marine title area of the group.⁸⁷⁷
- 1403.3 In any appeal against a decision of the Trust under section 14, the Environment Court must have particular regard to the planning document.⁸⁷⁸
- 1403.4 The Director-General of Conservation must take into account the relevant matters set out in a planning

⁸⁷² See sections 62(1)(d)(ii) and 77 of the Marine and Coastal Area (Takutai Moana) Act 2011.

⁸⁷³ See sections 62(1)(e) and 82 of the Marine and Coastal Area (Takutai Moana) Act 2011.

⁸⁷⁴ See sections 62(1)(f) and 83 of the Marine and Coastal Area (Takutai Moana) Act 2011. The minerals that are excluded are: petroleum, gold, silver, uranium and any pounamu to which section 3 of the Ngai Tahu (Pounamu Vesting) Act 1997 applies.

⁸⁷⁵ See section 62(1)(g) and sections 85 to 93 of the Marine and Coastal Area (Takutai Moana) Act 2011.

⁸⁷⁶ Marine and Coastal Area (Takutai Moana) Act 2011, s88.

⁸⁷⁷ Marine and Coastal Area (Takutai Moana) Act 2011, s 89(a)

⁸⁷⁸ Marine and Coastal Area (Takutai Moana) Act 2011, s 89(b)

document when reviewing or amending a conservation management strategy that directly affects the customary marine title area of the group that lodged the planning document.⁸⁷⁹

1403.5 The Minister of Fisheries must have regard to a planning document to the extent that it is relevant to fisheries management when setting or varying sustainability measures under section 11(1) of the Fisheries Act 1996 if these measures apply to an area that includes, wholly or in part, the customary marine title area of the group.⁸⁸⁰

1404. Once a planning document is lodged with a regional council, certain duties fall on the regional council that allow customary marine title groups to influence how documents such as regional coastal plans are drafted. A summary of the duties is as follows:⁸⁸¹

1404.1 A regional council with functions in a region where one or more planning documents are registered must, until the regional council has completed a process for determining whether or not to alter its regional documents,⁸⁸² attach the planning documents to copies of its relevant regional documents that it makes publicly available.⁸⁸³

1404.2 A regional council must identify the matters in the planning document that relate to resource management issues within its functions under the Resource Management Act 1991.⁸⁸⁴

⁸⁷⁹ Marine and Coastal Area (Takutai Moana) Act 2011, s 90.

⁸⁸⁰ Marine and Coastal Area (Takutai Moana) Act 2011, s 91.

⁸⁸¹ See section 93 of the Marine and Coastal Area (Takutai Moana) Act 2011.

⁸⁸² A regional document is defined in section 92 to mean a regional plan, a regional policy statement, a proposed regional plan or a proposed policy statement.

⁸⁸³ Marine and Coastal Area (Takutai Moana) Act 2011, s 93(1).

⁸⁸⁴ Marine and Coastal Area (Takutai Moana) Act 2011, s 93(2).

1404.3 When considering a resource consent application for an activity that would, if the consent were granted, directly affect, wholly or in part, the area to which the planning document applies, a consent authority of a regional council must have regard to any matters identified under the preceding paragraph.⁸⁸⁵

1404.4 A regional council must initiate a process to determine whether to alter its relevant regional documents in order to—⁸⁸⁶

1404.4.1 recognise and provide for any matters identified as being relevant to the customary marine area to which the planning document relates; and

1404.4.2 take into account any matters identified as being relevant to any parts of the common marine and coastal area to which the planning document relates other than the customary marine title area.

Issue 23.5 **What was the significance of Te Ōhākī Tapu in terms of the takutai moana? Did Te Ōhākī Tapu impose further duties/obligations on the Crown to protect the takutai moana of Te Rohe Pōtae?**

Issue 23.6 **If so, did the Crown breach those further duties by implementing legislation / policies which assumed Crown control over the takutai moana in Te Rohe Pōtae?**

Issue 23.7 **If so, what prejudice was caused to Te Rohe Pōtae Māori as a result?**

1405. The Crown’s response in relation to matters concerning Te Ohaki Tapu is provided generally in the “Te Rohe Pōtae Compact” section of this statement of position and concessions.

⁸⁸⁵ Marine and Coastal Area (Takutai Moana) Act 2011, s 93(3).

⁸⁸⁶ Marine and Coastal Area (Takutai Moana) Act 2011, s 93(6).

1406. The Crown is not aware of evidence on the record of inquiry that addresses directly the significance of Te Ohaki Tapu in terms of the takutai moana for Rohe Pōtae Māori. Insofar as the Crown is aware, matters relating to the takutai moana were not part of discussions that occurred between the Crown and Rohe Pōtae Māori between 1883 and 1885.

1407. The Crown denies that the agreements of 1883 to 1885 between Rohe Pōtae Māori and the Crown imposed on the Crown obligations to protect the takutai moana of the Rohe Pōtae that were additional to any obligations already in existence.

Issue 23.8 **Has the Crown fully consulted hapū/iwi and involved them in decision making about the large scale environmental transformations and the commercial resource extraction (including commercial fishing by local and foreign fleets, and the fishing techniques used) before these activities were instigated?**

1408. This issue is stated broadly. At a high level, the Resource Management Act 1991, through which certain decision-making processes occur in respect of the marine environment, currently requires consultation with tangata whenua.

1409. The Tribunal lacks jurisdiction to inquire into claims concerning Māori commercial fishing rights: the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s9. To the extent that this issue is premised on such rights, the Crown says the Tribunal lacks the jurisdiction to inquire.

Issue 23.9 **Has the Crown also fully consulted hapū/iwi in decision making about monitoring and restoration of affected marine species (including fish species and Maui's dolphin), to sustainable levels?**

1410. The Crown notes the importance of certain marine species to Rohe Pōtae hapū and iwi. The Crown also notes that a number of marine species in New Zealand are threatened, including the Maui's dolphin.

The reasons for this are complex, and it is difficult to attribute a decline in particular marine species to any one factor.

1411. The Crown's position in relation to Maui's dolphin, including the initiatives it is undertaking to help ensure its survival, are provided generally in the Crown's response to issue 17.25. However, the Crown acknowledges that the Treaty principle of partnership may require it to work with Māori with regard to initiatives concerning certain marine species. Further, while the Crown notes that the Treaty does not impose on it an absolute duty of consultation, it does require the Crown to make informed decisions on matters affecting the Māori interest.
1412. In carrying out its policies and practices relating to marine species, the Crown has sought input from Rohe Pōtae Māori in a number of ways. For example, the Department of Conservation (DoC) and the Ministry of Fisheries sought input from tangata whenua and other stakeholders in the development of the Maui's dolphin Threat Management Plan (TMP) by way of an advisory group that included Māori representation. DoC also sought submissions in relation to the proposed West Coast North Island marine mammal sanctuary, and received written submissions on the sanctuary proposal from iwi and hapū, including Ngāti Hikairo. In addition, in 2010 DoC undertook an iwi liaison boat charter from Raglan to view Maui's dolphin and observe biopsy techniques, in 2009 DoC consulted with Kawhia, Raglan and Port Waikato iwi regarding a biopsy programme communications plan, and in 2007 DoC consulted with coastal iwi regarding the Maui's dolphin TMP and the installation of acoustic recorders in Raglan, Aotea and Kawhia harbours.

HARBOURS

Does the Crown have a duty under the Treaty of Waitangi to manage the Harbours in Te Rohe Pōtae? If so, what is the nature and extent of that duty[?] In assuming that duty what are the Treaty obligations of the Crown?

Did the Crown breach the principles of the Treaty of Waitangi when it enacted legislation, policies and regulations which affected Rohe Pōtae Māori interests in the Harbours at Kawhia, Aotea and Whaingaroa?

1413. The Treaty does not impose a duty on the Crown to manage natural resources, including harbours, within New Zealand. It is consistent with the Crown's kawanatanga roles for it to decide from time to time that it ought to take some role in managing natural resources, such as harbours.

1414. Just as the Crown has enacted various regimes that regulate the use of privately owned dry lands (such as, for example, through the legislative regime leading to and including the Resource Management Act 1991), where Māori retain extant customary title to harbours, it is not inconsistent with that customary title (recognised through article II of the Treaty for the Crown to regulate that area (through article I).

1415. At a national level, the general legislative regime that has related to harbours in New Zealand has included the following key enactments: the Marine Act 1866, the Marine Act 1867, the Harbour Works Act 1874, the Marine Act 1867 Amendment Act 1877, the Harbours Act 1878, Harbours Act 1878 Amendment Act 1883, the Harbours Act 1923 and the Harbours Act 1950.

1416. These Acts established harbour boards, authorised the Crown to deal with land in the foreshore and seabed (including grants of land to harbour boards), set out certain powers to control the use and management of harbours, and provided for ownership of foreshore and seabed to revert to the Crown in some circumstances. Notably:

- 1416.1 The Governor was to define the limits of harbours.⁸⁸⁷
- 1416.2 The Governor in Council could exercise powers and duties of a harbour board where there was no board.⁸⁸⁸
- 1416.3 The Governor retained the power to make regulations in respect of harbours.⁸⁸⁹
- 1416.4 Structures and other harbour works (including reclamation) were not to be constructed without authorisation from the Governor.⁸⁹⁰
- 1416.5 Harbour boards were required to seek the permission of the Governor in Council before placing a structure or pile in, on, across, over, or through the seabed of a harbour.⁸⁹¹
- 1416.6 The Governor in Council could authorise any local body or person to construct a wharf for the benefit and use of the public and to use and occupy such part of the foreshore of any lake, river, tidal land, or tidal water as was necessary for the construction of such wharf.⁸⁹²
- 1416.7 There was to be no reclaiming of land in harbours without parliamentary authority.⁸⁹³
- 1416.8 There could be no grant of the foreshore or seabed without parliamentary authority.⁸⁹⁴ The Court of Appeal later held

⁸⁸⁷ Section 7 of the Marine Act 1866; section 7 of the Marine Act 1867, and section 3 of the Harbours Act 1950.

⁸⁸⁸ Sections 12-18 of the Harbours Act 1878; section 2 of the Harbours Act 1878 Amendment Act 1883; sections 9-10, 12-13 of the Harbours Act 1923 and sections 6, 9-13 of the Harbours Act 1950.

⁸⁸⁹ Section 212 of the Harbours Act 1878; section 234 of the Harbours Act 1923, and section 241 of the Harbours Act 1950.

⁸⁹⁰ Sections 2 and 3 of the Harbour Works Act 1874.

⁸⁹¹ Section 154 of the Harbours Act 1878; section 169 of the Harbours Act 1923 and section 176 of the Harbours Act 1950.

⁸⁹² Section 6 of the Marine Act 1867 Amendment Act 1877.

⁸⁹³ Section 148 of the Harbours Act 1878; section 168 of the Harbours Act 1923; section 175 of the Harbours Act 1950.

in *Ngāti Apa v Attorney-General* that this provision did not have the effect of confiscating any customary title in the foreshore and seabed.⁸⁹⁵

1416.9 Where foreshore outside a harbour was not vested in a harbour board or other authority, the Governor-General in Council could grant a local authority control of it for up to 21 years.⁸⁹⁶

1416.10 The Governor-General by Order in Council was able to revoke endowments of land or control management of that land if a harbour board was neglectful.⁸⁹⁷

1416.11 The Governor-General in Council or a harbour board could lease mudflats,⁸⁹⁸ not needed for a harbour, for pastoral or agricultural purposes.⁸⁹⁹

1416.12 If land was reclaimed as an incidental effect of harbour works on adjoining land, the Crown was deemed to be the owner of the reclaimed land, not the owner of the adjoining land.⁹⁰⁰

⁸⁹⁴ Section 147 of the Harbours Act 1878; section 144 of the Harbours Act 1923, and section 150 of the Harbours Act 1950.

⁸⁹⁵ *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 at [60] per the Chief Justice; [154] per Keith and Anderson JJ; and [197] per Tipping J. The provisions considered by the Court of Appeal was section 150 of the Harbours Act 1950.

⁸⁹⁶ Section 158 of the Harbours Act 1923; section 165 of 1950 Act.

⁸⁹⁷ Section 141 of the Harbours Act 1878; section 131 of the Harbours Act 1923, and section 139 of the Harbours Act 1950.

⁸⁹⁸ "... foreshore lands between high and low-water marks or lands below low-water mark the depth of water on which is not sufficient at high water, spring tides, for the purposes of navigation ...": sections 146(1) and 147(1) of the Harbours Act 1923 and sections 152(1) and 153(1) of the Harbours Act 1950.

⁸⁹⁹ Sections 146-147 of the Harbours Act 1923; sections 152-153 of the Harbours Act 1950.

⁹⁰⁰ Sections 22 and 23 of the Harbours Act 1878 Amendment Act 1883, Section 161 of the Harbours Act 1923, and section 168 of the Harbours Act 1950.

1416.13 If land of foreshore or seabed⁹⁰¹ was reclaimed in the course of harbour works, the land was generally deemed to belong to the Crown and no other person had rights to the land or to enter, take, use, or interfere with the land without the consent of the Governor in Council.⁹⁰²

1416.14 Harbour boards could not lease or otherwise part with possession without parliamentary authority.⁹⁰³

1417. The only technical evidence currently on the Tribunal's record of inquiry in respect of the Aotea and Kawhia Harbours is the report by Professor Michael Belgrave (and various others), *Te Robe Pōtae Environmental and Wahi Tapu Report* Wai 898 A76, chapter B (which concerns the Aotea Harbour) and chapter E (which concerns the Kawhia Harbour). There is also the map of Kawhia Harbour at Wai 898 G25. There is no technical evidence concerning the Whaingaroa Harbour, although the Crown notes that “environmental research for Whaingaroa” may occur.⁹⁰⁴

1418. The Crown makes the following broad comments about chapters B and E in the *Te Robe Pōtae Environmental and Wahi Tapu Report*:

1418.1 The evidence does not focus on the actual harbours in question. Rather, the evidence is concerned more with planning associated with land development around the harbours. For example, there is detailed evidence concerning applications for resource consent and authorities under the Historic Places Act 1993 that concern dry land near the Aotea Harbour, but not the actual

⁹⁰¹ “... any part of the shores or bed of any harbour or tidal water, or of the sea, beyond the mouth or entrance thereof ...”, section 24 of the Harbours Act 1878 Amendment Act 1883.

⁹⁰² Section 24 of the Harbours Act 1878 Amendment Act 1883; section 162 of the Harbours Act 1923, and section 169 of the Harbours Act 1950.

⁹⁰³ Sections 8 and 9 of the Harbours Act 1878 Amendment Act 1883; section 145 of the Harbours Act 1923, and section 151 of the Harbours Act 1950.

⁹⁰⁴ Wai 898, 6.2.42.

harbour itself.⁹⁰⁵ This comment is not made by way of a criticism of the report writers but to alert the Tribunal to the fact that there exists little evidence at all concerning issues 24.1-24.6.

1418.2 To a large extent the evidence comes from one point of view only. The authors of the report, or at least some of them – though it is not said which ones – say they accompanied claimants of Ngāti Te Wehi on a site visit around Aotea Harbour.⁹⁰⁶ There is no suggestion that various statements made throughout the report that could be considered adverse towards other parties, such as local authorities and developers, were referred to those parties for comment. For instance, the report records the claimants' view that they were not consulted about the construction of roads near the marae of Whatihua.⁹⁰⁷ No effort appears to have been made to test this statement against records or to discuss the issue with any relevant authority, such as the Otorohanga District Council. The report also acknowledges that claimants committed “a great deal of their time to assist in having their perspectives on these issues recorded and in helping the research team”.⁹⁰⁸ Various adverse comments are made about the actions of certain developers, who are alleged to have damaged or destroyed archaeological sites, therefore in breach of various planning regimes. There has been no apparent effort to ask those developers, who are named, for comment.

⁹⁰⁵ See Wai 898, A76, pp 73-106.

⁹⁰⁶ See Wai 898, A76, para 120, p 56.

⁹⁰⁷ See Wai 898, A76, para 121, p 57.

⁹⁰⁸ See Wai 898, A76, para 16, p 12.

1418.3 In places, the evidence is incomplete. For instance, the report records that Ngai Te Wehi agreed to a mediation process in mid-2004 in respect of an appeal to the Environment Court.⁹⁰⁹ The appeal concerned the granting of an authority, subject to conditions, to destroy, damage or modify an archaeological site. The conditions required an archaeological investigation. No detail at all is provided of the outcome of the mediation and/or the appeal and the position that Ngāti Te Wehi eventually took in the appeal.

Issue 24.1 What is the nature and extent of the relationships between Rohe Pōtae and the harbours?

1419. This is primarily a matter about which the claimants should provide evidence. The Crown notes that some evidence was presented to the Tribunal in the course of the oral traditions hui, especially in terms of the harbours being an important source of food for Rohe Pōtae Māori.

Issue 24.2 How did the Crown recognise and protect Rohe Pōtae Māori relationships and interests when the Crown sought access and control over harbour lands and waters?

1420. It is far from clear from the evidence on the record of inquiry as to how the Crown “sought access and control” over any of the three harbours in question, if it did at all. The Crown has set out above the legislative framework that related and relates to harbours generally.

Issue 24.3 How did the Crown recognise and protect Rohe Pōtae Māori ancestral landscape in and around the lands and waters of the harbours?

1421. The Crown apprehends that the term “ancestral landscape” is the same term as discussed and defined in the *Te Rohe Pōtae Environmental and Wahi Tapu Report* at pages 55-56.⁹¹⁰ It appears that one reason for

⁹⁰⁹ See Wai 898, A76, para 238, p 97.

⁹¹⁰ Wai 898, A76.

the term – as a sub-category of UNESCO’s definition of “associative cultural landscape” – is that the term emphasises intangible, rather than material cultural aspects, particularly the centrality of ancestors as original trustees.⁹¹¹

1422. To a large extent, there is little evidence at all concerning the “lands and waters” of the three harbours in question.
1423. At a general level, the Crown refers to its position on issue 22 in terms of how there is statutory protection afforded to wahi tapu and cultural values.
1424. The Crown considers that the *Te Rohe Pōtae Environmental and Wahi Tapu Report* does not provide evidence that there are flaws in legislative processes. In terms, for instance, of the Aotea subdivision,⁹¹² the evidence tends to show that:
- 1424.1 The relevant planning provisions include (amongst various other things) objectives and policies about consultation with tangata whenua, the promotion of kaitiakitanga, the protection of areas of importance to tangata whenua, recognition and provision for the mauri of water, protection of cultural heritage resources and the protection of Māori heritage.⁹¹³
- 1424.2 Tangata whenua were consulted throughout the processes.
- 1424.3 Consents were issued subject to conditions seeking to protect wahi tapu. For instance, the subdivision consent was granted subject to conditions that:⁹¹⁴

⁹¹¹ See the discussion of the term “associative cultural landscape” and “ancestral landscape” in Wai 898, A76, pp 55-56.

⁹¹² Discussed at Wai 898, A76, pp 73-106.

⁹¹³ See Wai 898, A76, pp 80-81.

⁹¹⁴ See Wai 898, A76, para 188, p 78.

- 1424.3.1 any newly discovered archaeological sites be preserved until work was permitted by the New Zealand Historic Places Trust;
- 1424.3.2 if work had the potential to endanger any unmapped sites then work had to cease and the New Zealand Historic Places Trust, the New Zealand Archaeological Association and the Tainui Māori Trust Board had to be informed;
- 1424.3.3 work could not be resumed until permitted by the New Zealand Historic Places Trust; and
- 1424.3.4 no earthworks could be undertaken within ten metres of the four identified archaeological sites.
- 1424.4 The New Zealand Historic Places Trust monitored the development. The Trust identified that the developers had uncovered archaeological sites and had continued work in breach of the conditions. Action was taken by the Trust immediately to warn the developers of their responsibilities. It was (apparently agreed) that the archaeological sites were to be fenced off with no other work to occur until the Trust gave authority.⁹¹⁵
- 1424.5 An application to the Trust for authority was made.⁹¹⁶ The process included an assessment of the sites' archaeological values.⁹¹⁷ The process included consultation with Māori.⁹¹⁸
- 1424.6 The Historic Places Trust, acting as an advocate for historic heritage, tried to halt the destruction of a pa site.⁹¹⁹

⁹¹⁵ See Wai 898, A76, paras 201-203, pp 84-85.

⁹¹⁶ Wai 898, A76, para 215, p 89.

⁹¹⁷ Wai 898, A76, para 218, p 90.

⁹¹⁸ Wai 898, A76, paras 221-225, pp 91-92.

1425. The Crown is concerned wherever people, such as developers, breach conditions that require work to stop where archaeological sites are uncovered. The Crown is not, of course, at fault for the breaches of conditions by developers. The Crown says that there are reasonable safeguards that seek to protect archaeological sites, where they may be uncovered. All such sites are important, though not all will necessarily be wahi tapu. That one situation exists where a site was damaged despite the acknowledged best efforts of the New Zealand Historic Places Trust does not mean the legislative framework is inherently flawed.

Issue 24.4 Did the Crown take adequate steps to recognise and protect the kaitiakitanga of Rohe Pōtae Māori in the lands and waters of the harbours?

1426. As noted above, there is little, if any, evidence on the record of inquiry about the lands and waters of the three harbours in question.

1427. Also as noted above, planning frameworks include recognition of kaitiakitanga. As an example, section 7(a) of the Resource Management Act 1991 requires, in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, to have particular regard to kaitiakitanga, amongst other things.

Issue 24.5 Did the Crown ensure that environmental legislation provided for adequate protection of the harbours from pollution and degradation so as to ensure their economic and cultural value to Rohe Pōtae Māori was not diminished?

1428. There is no evidence on the record of inquiry on this issue. The Crown refers generally to its response on issue 22.

Issue 24.6 What provision was made by the Crown for Rohe Pōtae representation on bodies or authorities dealing with the harbours?

⁹¹⁹ Wai 898, A76, para 135, p 60.

1429. There is no evidence on the record of inquiry on this issue.