

Office of Te Minita Whanaketanga Māori

Chair

Cabinet Māori Crown Relations: Te Arawhiti Committee

Ngāti Rārua Ātiawa Iwi Trust: Resolution of the perpetual lease issues relating to Whakarewa lands in Motueka

Proposal

1. I am seeking agreement to a series of proposals that will enable me to resume and conclude negotiations with Ngāti Rārua Ātiawa Iwi Trust (NRAIT) and its beneficiaries for the resolution of all NRAIT's perpetual lease issues and claims at Whakarewa.
2. I seek delegated authority for the Minister for Māori Development and the Attorney-General to approve the negotiated resolution agreement for ratification and the proposed ratification process, and to determine whether the results support ratification by the beneficiaries. I also seek delegated authority to enter into the final agreement on behalf of the Crown subject to the ratification by the beneficiaries.

Relation to Government Priorities

3. This proposal aligns with the Government's priority: Making New Zealand Proud: Build closer partnerships with Māori: Building new partnerships with Māori for the future.

Executive Summary

4. Cabinet has considered a number of proposals to resolve an outstanding claim by NRAIT that their perpetual lease Whakarewa lands should have been accorded the same or equivalent treatment to that provided by the Crown to Māori reserved land owners under the Māori Reserved Land Amendment Act (the 1997 Act).
5. The current position is that negotiations have stalled after NRAIT advised that it would not accept resolution if it included the settlement of any claims it may have in relation to the Whakarewa lands under the Wakatū proceedings. NRAIT has indicated however, that it would accept a payment of \$8.0 million to resolve the perpetual lease issues for which negotiations were approved by Cabinet in late 2016. These comprise in the main, rental losses from 1 January 1998 out into the future and NRAIT not having the benefit of a right of first refusal over lessee sales or transfers from the same date.
6. I seek approval to resume and conclude negotiations with NRAIT and its beneficiaries to resolve its outstanding perpetual lease issues at Whakarewa on the basis of:
 - a. an ex-gratia payment of \$8.0 million (plus any tax);
 - b. a written assurance that should the Crown negotiate further remedies in favour of owners whose land is subject to the MRLA, consideration will be given to whether NRAIT is likewise affected and should receive comparable intervention; and
 - c. an agreed position on the relationship between the resolution of the NRAIT issues and the on-going Wakatū proceedings, being:
 - i. the resolution of the NRAIT issues will not preclude any NRAIT beneficiaries from accessing benefits from the Wakatū proceedings to which they might be entitled;
 - ii. NRAIT and its beneficiaries will not, however, be able to obtain benefits for the matters to which the resolution agreement relates; and

- iii. the Crown may produce the resolution agreement as evidence of such matters in any court or tribunal proceedings.

Background

7. The Crown is engaged in negotiations with NRAIT on the grounds of fairness and that there is a moral and a contemporary Treaty of Waitangi basis for the Crown taking action to accord the owners of the Whakarewa lands the same or equivalent treatment to that provided for owners of Māori reserved land under the lease reforms effected by the 1997 Act.
8. There are several sets of considerations in this proposal:
 - i. Contrasts in treatment between the NRAIT's Whakarewa lands and those included in the 1997 Act.
 - ii. Treaty settlements in the northern South Island.
 - iii. The Wakatū proceedings¹ and the Supreme Court decision that the Crown owed fiduciary duties in relation to an area of land that includes the Whakarewa lands.

Whakarewa lands

9. In 1853, the Crown separated 918 acres (372 hectares) at Whakarewa from reserves set aside for the original owners and gifted it to the Anglican Church to provide funds for a school. The school closed in 1881 and the Church granted perpetual leases to the land similar to the perpetual leases used for other Māori reserve lands in the vicinity. Parliament passed a private members bill in 1993 to transfer the Whakarewa lands from the Church to NRAIT for the benefit of the successors to the original owners. At the time of return, a substantial area continued to be subject to perpetual leases.
10. NRAIT claim that if the Crown had effected the return of the Whakarewa lands in 1881, the land would have been treated like the other reserve blocks in the area such as the Wakatū lands and eventually become Māori reserved land subject to the Māori Reserved Land Act 1955 (the MRLA).
11. On this basis, NRAIT sought to have their land included in the 1997 reform of Māori reserved land perpetual leases effected by the 1997 Act. Notwithstanding strenuous efforts on their part and other significant support, the Whakarewa lands were not included in the 1997 Act, as amongst other things, they were not lands subject to the MRLA or owned by the Crown at the time the leases were entered into.

Māori reserved land, the MRLA and the 1997 Act reforms

12. Māori reserved land has origins in the 19th century when reserves were created for Māori occupation or to generate income. The land was leased by the Crown under what over time, became perpetual lease regimes. In 1955, numerous pieces of legislation were consolidated in the MRLA, which imposed on the lands, leases with a prescribed rent review period of 21 years and a lease term of 21 years, renewable in perpetuity.
13. The 1997 Act came into force on 1 January 1998. It did not change the 21-year lease term or remove the right of lessees to renew their leases in perpetuity. It did however, effect changes to MRLA lease terms to provide for:
 - a. a fair annual rent based on the unimproved value of the land
 - b. rent reviews every 7 years
 - c. a right of first refusal (RFR) in favour of the owners upon assignment of the lessees' interests in the land.
14. The 1997 Act also provided compensation to both lessees and owners for the changes. Lessees received compensation for additional future rentals due to the move to more

¹ *Proprietors of Wakatū v Attorney General* [2017] NZSC 17

frequent 7-year rent reviews. Owners received compensation for a delayed (over 7 years) rather than immediate move to 7-year rent reviews. Both owners and lessees received a RFR over sales/transfers of lease interests by the other.

Schedule 5 of the 1997 Act and the 2002 Settlement

15. The 1997 Act was essentially prospective in nature effecting change for the period from 1 January 1998. However Schedule 5 was also included in the 1997 Act. It provides that '...the present Government recognises that Māori for a number of years have not been obtaining fair market rents for their land' and that this 'was a matter that had to be addressed by the present Government in the future.'
16. In July 2002, the Crown concluded an agreement with Māori reserved land owners to settle 'the Schedule 5 commitment'. Under the settlement, the Crown made ex-gratia payments to the owners for rental losses suffered as a result of their not receiving fair rents before 1 January 1998, for their leased Māori reserved land.

Waitangi Tribunal

17. In 2008, the Waitangi Tribunal (the Tribunal) in its Te Tau Ihu o Te Waka a Maui Report found that the Whakarewa lands were virtually confiscated by the Crown when it granted them to the Church without paying the owners or obtaining their consent and that the Crown was in breach of its Treaty obligations in not returning the land when the school closed in 1881.
18. The Tribunal considered that if the Whakarewa lands had been returned more expeditiously, they would most likely have been vested in the Wakatū Incorporation alongside all other ex-tenths reserves in the area. If that had been the case, the 1997 Act would have applied to the lands. The Tribunal noted that NRAIT had sought to have their lands included in the 1997 Act reforms, but were not successful.
19. The Tribunal found that it would have been reasonable to expect the Crown to intervene with legislation to put the NRAIT land on the same footing as the Wakatū land and that its failure to do so compounded earlier Treaty breaches.

2010 NRAIT ex-Gratia Payment for past losses

20. In December 2010, the Crown entered into a Memorandum of Understanding (MOU) with NRAIT recording that it would make an ex-gratia payment of \$5.0 million to NRAIT for past rental losses suffered as a result of not receiving fair market rents for the perpetually leased Whakarewa lands. The payment was agreed out of a sense of fairness, in recognition of the fact that NRAIT beneficiaries were not included in the 2002 settlement. The payment mirrored the 2002 'Schedule 5' settlement to Māori reserved land owners.
21. The 2010 ex gratia payment was for past rental losses only and the Crown acknowledged in the MOU that NRAIT may, if it chooses, continue to raise with the Crown the question of its omission from the 1997 Act and/or its inability to receive payment under certain provisions of that Act; rental losses for the period from 1 January 1998; and statutory reform of the terms and conditions of the Whakarewa perpetual leases.

Present Negotiations

22. NRAIT has continued to seek resolution of outstanding issues associated with their leases not being included in the 1997 Act reforms.
23. On 9 December 2016, Cabinet agreed to the Crown entering negotiations with NRAIT to agree an ex-gratia payment of up to \$5.0 million to resolve 'the perpetual lease issues for NRAIT at Whakarewa.' Cabinet also specified that any such agreement be in full and final resolution of all outstanding issues in relation to the Whakarewa lands [CAB-16-MIN-0694 and TOW-16-MIN-0025 refer].
24. On 20 June 2017, NRAIT rejected the \$5.0 million offer. NRAIT wrote to the Minister in late October 2017 to discuss the matter further. The funding for the payment was to expire on

1 February 2018 so Cabinet approval was sought for an extension of the funding to ensure any continuing discussions were meaningful.

25. The Crown-Māori Relations Committee² considered the matter on 27 February 2018. The Committee felt that the Crown should seek to resolve matters with NRAIT and the Minister was invited to explore whether additional funding was required to secure resolution. The \$5.0 million tagged contingency earlier set aside was reinstated [CAB-18-MIN-0694 and CMR-18-MIN-0003 refer].
26. The Crown position was that on its assessment of post 1997 rental losses in particular, a settlement sum of up to \$6.5 million could be supported. However NRAIT was seeking considerably more than \$8.0 million, so the parties continued to be some distance apart.
27. By mid 2019, there was a suggestion that NRAIT might be prepared to settle for \$8.0 million. At the same time, departmental officials were examining potential implications of the Wakatū Supreme Court proceedings. The position that evolved was that the Crown would agree to a payment of \$8.0 million to resolve the perpetual lease issues for NRAIT at Whakarewa, but on the basis that it also effect the full and final resolution of all claims NRAIT may have in relation to the Whakarewa lands. Negotiations continued.
28. By the end of 2019, Crown officials were reasonably confident that agreement for resolution would be reached for a payment of \$8.0 million that would resolve not only the NRAIT perpetual lease issues and claims in regard to the Whakarewa lands, but also effect the full and final resolution of any claims NRAIT may have in relation to the Whakarewa lands under the Wakatū proceedings.
29. Cabinet approval to negotiate resolution on this basis was sought and obtained in December 2019 [MCR-19-MIN-0055]. In the early months of negotiation that followed, agreement seemed possible, but in June 2020 NRAIT advised that it would not accept resolution if it included the settlement of any claims NRAIT may have in relation to the Whakarewa lands under the Wakatū proceedings. The Crown proposal was rejected.
30. The current position is that negotiations have stalled, but NRAIT has indicated that resolution for a payment of \$8.0 million could be achievable for the outstanding perpetual leasing issues outlined in the 2010 MoU and referred to in the 2016 Cabinet Treaty of Waitangi Committee Minute.
31. NRAIT say that there was a misunderstanding as to the breadth and wider coverage sought by the Crown in its "...all issues and claims in relation to the Whakarewa lands" resolution proposal. They consider the proposal went beyond the scope of the 2016 Cabinet approval for the negotiations in that the Crown was seeking to extend or broaden the parameters to include any issues or claims NRAIT may have in relation to the Whakarewa lands. Thus its rejection of the proposal. NRAIT is however prepared to enter into a resolution agreement that relates to the matters outlined in the 2016 Cabinet approval.
32. I consider that for reasons of fairness and good faith, the Crown should continue the negotiations.
33. NRAIT has indicated that it is willing to resolve all its perpetual lease issues and claims in regard to the Whakarewa lands including rental losses from 1 January 1998 out into the future and the loss of a statutory RFR in return for a settlement package comprising:
 - a. an ex-gratia payment of \$8.0 million (plus any tax);
 - b. a Crown assurance that NRAIT will be able to benefit from any further relief granted to owners under the MRLA; and
 - c. a clause in the ensuing resolution agreement (to be entered between the parties as to how the payment will be framed), which clarifies the relationship between the payment and the live Wakatū proceedings.

² Currently, the Cabinet Māori-Crown Relations Committee.

34. Crown advisers and officials have considered the proposed \$8.0 million quantum in light of a recently completed review and re-assessment of earlier Crown assessments of post 1997 and future rental losses. The new assessment has benefitted from the availability of additional real information and data on NRAIT's leases for the 23 years since January 1998. This has enabled a more accurate and robust assessment to be made. The revised assessment for such rental losses exceeds \$8.0 million by some margin without taking interest into account. The significant loss of a statutory RFR over all post-1997 lessee sales and transfers also has to be factored in.

The assurance as to parity with the Māori Reserved Land lands

35. I do not intend to promote any changes to the MRLA at this time. I propose however that a written assurance be given to NRAIT that should the Crown negotiate further reform or other relief in favour of owners whose land is subject to the MRLA, consideration will be given to whether NRAIT is likewise affected and should receive comparable intervention.

Relationship with the Wakatū proceedings

36. NRAIT is seeking assurance that the resolution or settlement of their issues and claims in regard to the Whakarewa lands will not limit the right of their beneficiaries to access any benefits that might ensue from the ongoing Wakatū proceedings.

37. In the Wakatū judgment, the Supreme Court held that the Crown owed fiduciary duties to reserve 15,100 acres in the Nelson, Motueka, and Golden Bay areas for the benefit of the customary owners, and to exclude pā, urupā and cultivations from the land ultimately obtained by the Crown (the 'Tenths reserves' regime). The Supreme Court referred the matters of whether the Crown breached those duties, defences and relief, back to the High Court. [REDACTED]

38. [REDACTED]

39. [REDACTED]

How to address overlap with Wakatū proceedings

40. NRAIT have indicated informally that they accept that any resolution agreement should ensure that NRAIT beneficiaries would not be able to receive a double payment or benefit for matters for which the resolution payment and other provision has been made.

41. There is a conceptual difference between the NRAIT issue and the Wakatū proceedings. [REDACTED]

42. I propose that terms of resolution be concluded by way of a written agreement to be negotiated with NRAIT (the 'resolution agreement') which will make explicit:

- a. what the payment and other provisions are for, and the basis upon which they are made (the 'resolution offer');

- b. that the resolution agreement will not preclude NRAIT beneficiaries from accessing benefits from the Wakatū proceedings to which they may be entitled, but will prevent access to any benefits for matters in respect of which the resolution agreement is entered (the Whakarewa lands); and
- c. that the parties agree that the resolution agreement can be taken into account in any court proceedings where the losses and other impacts under consideration are the same as or overlap those in respect of which the agreement was entered.

43. [REDACTED]
[REDACTED]
[REDACTED]

Proposed Package

44. [REDACTED], resolution of NRAIT's outstanding perpetual lease issues at Whakarewa, can properly be concluded at this time through the terms of a resolution agreement.

45. I am advised that a payment of \$8.0 million together with assurances sought, will resolve the outstanding perpetual lease issues for NRAIT at Whakarewa and I am seeking agreement for officials to negotiate a resolution agreement on this basis.

46. I seek approval to resume and conclude negotiations with NRAIT and its beneficiaries to resolve its outstanding perpetual lease issues at Whakarewa on the basis of:

- a. an ex-gratia payment of \$8.0 million (plus any tax);
- b. a written assurance that should the Crown negotiate further remedies in favour of owners whose land is subject to the MRLA, consideration will be given to whether NRAIT is likewise affected and should receive comparable intervention; and
- c. an agreed position on the relationship between the resolution of the NRAIT issues and the on-going Wakatū proceedings, being:
 - i. the resolution of the NRAIT issues will not preclude any NRAIT beneficiaries from accessing benefits from the Wakatū proceedings to which they might be entitled;
 - ii. NRAIT and its beneficiaries will not, however, be able to obtain benefits for the matters to which the resolution agreement relates; and
 - iii. the Crown may produce the resolution agreement as evidence of such matters in any court or tribunal proceedings.

Tax Indemnity

47. It is not intended that any tax be payable by NRAIT on the ex-gratia payment. I propose that when the negotiated resolution agreement is referred to joint Ministers for approval for ratification, agreement also be sought for the Minister of Finance to grant an indemnity to NRAIT for any goods and services tax (GST) and/or income tax that may be charged or assessed in regard to the payment.

Next Steps

48. The resolution agreement and the process for ratification will be negotiated and agreed between NRAIT and the Crown, and I seek delegated authority for the Minister for Māori Development and the Attorney-General to approve the negotiated resolution agreement for ratification and the proposed ratification process, and to determine whether the results support ratification by the beneficiaries. I also seek delegated authority for the Minister for Māori Development to enter into the resolution agreement on behalf of the Crown subject to the ratification by beneficiaries.

49. I consider that resolution of this longstanding matter has become urgent. Owners of MRLA land had issues with their leases addressed more than 20 years ago through the 1997 Act. Completion is long overdue.

Consultation

50. The Crown Law Office has been consulted and has provided advice on the proposals outlined in this paper. Crown Law is comfortable with the proposals. Te Arawhiti and the Treasury have also been consulted. The Department of the Prime Minister and Cabinet has been informed.

Financial Implications

51. In December 2016, the previous government agreed to set aside \$5.0 million as a tagged contingency for purpose of a one-off ex-gratia payment to NRAIT [CAB-16-MIN 0694]. This contingency was established against Budget 2017 and is currently included in fiscal forecasts.

52. In December 2019, Cabinet Māori Crown Relations: Te Arawhiti Committee agreed in principle, subject to a Budget 2020 bid to increase the tagged contingency from \$5.0 million to \$8.0 million. The Committee also agreed that the Minister for Māori Development and the Minister of Finance be authorised to jointly drawdown the contingency fund upon the successful conclusion of negotiations and to establish any related appropriations [MCR-19-MIN-0055].

53. In March 2020, the Māori Crown Relations: Te Arawhiti Committee agreed to increase the then current tagged operating contingency by \$3.0 million (from \$5.0 million to \$8.0 million) and that the contingency increase be charged against the between-Budget contingency. The Committee also noted that a tax indemnity would be sought from the Minister of Finance for the settlement payment to NRAIT [MCR-20-MIN-0009].

54. The total \$8.0 million operating contingency has been extended to 30 June 2021. We will also seek joint Minister's approval to extend the Contingency Fund if more time is likely to be needed for resolution.

Human Rights

55. This paper has no human rights implications.

Legislative Implications

56. This paper has no legislative implications.

Regulatory Impact Analysis

57. A regulatory impact analysis is not required.

Gender Implications

58. This paper has no gender implications.

Disability Perspective

59. This paper has no implications for people with disabilities.

Publicity

60. I do not propose to release any media statements in relation to these negotiations.

Proactive Release

61. This paper is both negotiations and budget sensitive. I do not propose to release the Cabinet Paper, Minute and any related material, with any necessary redactions, until a settlement of all NRAIT's issues and claims in relation to the Whakarewas lands has been successfully concluded.

Recommendations

62. I recommend that the Cabinet Māori Crown Relations: Te Arawhiti Committee:

1. **note** that in 2016, Cabinet agreed to the Crown entering into negotiations with the Ngāti Rārua Ātiawa Iwi Trust (NRAIT) to agree an ex-gratia cash payment of up to \$5.0 million to resolve perpetual lease issues at Whakarewa and agreed to set aside \$5.0 million as tagged contingency [CAB-16-MIN-0694 and TOW-16-MIN-0025];
2. **note** that the intention was that the ex-gratia payment agreed to by Cabinet in 2016, would be for post-1997 rental losses and other impacts arising from NRAIT not receiving changes to the terms and conditions of their perpetual leases, akin to those provided for owners of land under the Māori Reserved Land Act 1955 (MRLA);
3. [REDACTED]
4. **note** that on 20 June 2017, NRAIT rejected the \$5.0 million offer and the Minister for Māori Development was invited by Cabinet to explore whether additional funding is required for resolution [CAB-18-MIN-0694 and CMR-18-MIN-0003];
5. **note** that in December 2019, Cabinet approved negotiations with NRAIT for the resolution of all issues and claims in relation to the Whakarewa lands for a payment of \$8.0 million on the basis that resolution would effect the full and final resolution of all issues and claims in relation to the Whakarewa lands [MCR-19-MIN-0055];
6. **note** that negotiations continued but subsequently stalled when NRAIT rejected the resolution proposal, advising that it would not accept resolution if it included the settlement of any claims NRAIT may have in relation to the Whakarewa lands under the Wakatū proceedings;
7. **agree** that the Crown Negotiator be authorised to resume and conclude negotiations with NRAIT and its beneficiaries for the resolution of all NRAIT's perpetual lease issues and claims at Whakarewa, on the basis of:
 - 7.1. an ex-gratia payment of \$8.0 million (plus any tax);
 - 7.2. a written assurance that should the Crown negotiate further remedies in favour of owners whose lands are subject to the MRLA, consideration will be given to whether NRAIT is likewise affected and should receive comparable intervention; and
 - 7.3. an agreed position on the relationship between the resolution of the NRAIT issues and the on-going Wakatū proceedings, being:
 - i. the resolution of the NRAIT issues will not preclude any NRAIT beneficiaries from accessing benefits from the Wakatū proceedings to which they might be entitled;
 - ii. NRAIT and its beneficiaries will not, however, be able to obtain benefits for the matters to which the resolution agreement relates; and
 - iii. the Crown may produce the resolution agreement as evidence of such matters in any court or tribunal proceedings;
8. **authorise** the Minister for Māori Development and the Attorney-General to:
 - 8.1. approve the negotiated resolution agreement for ratification;
 - 8.2. approve the ratification process to ascertain whether the NRAIT beneficiaries to the Whakarewa lands accept the resolution agreement; and
 - 8.3. determine whether the results support ratification by the NRAIT beneficiaries;

9. **note** that a tax indemnity for the settlement payment to NRAIT will be sought from the Minister of Finance when the negotiated resolution agreement is referred to joint Ministers for approval for ratification;
10. **authorise** the Minister for Māori Development to enter into the resolution agreement on behalf of the Crown, subject to delegated joint Ministers being satisfied that the results support ratification of the resolution agreement by the beneficiaries;
11. **agree** that the Minister for Māori Development and Minister of Finance be authorised to jointly drawdown the Contingency Fund upon the successful conclusion of negotiations between the Crown and NRAIT and to establish any related appropriations;
12. **note** that an \$8.0 million operating tagged Contingency Fund currently exists for the resolution payment [MCR-20-MIN-0009];
13. **note** that the expiry date for the NRAIT Contingency Fund is 30 June 2021; and
14. **note** that joint Minister's approval to extend the Contingency Fund beyond 30 June 2021 will be sought if more time is likely to be needed for resolution.

Authorised for lodgement

Hon Willie Jackson

Te Minita Whanaketanga Māori

____/____/2021