MEMORANDUM OF DECISIONS OF THE COMMISSIONER OF CROWN LANDS

IN THE MATTER	of the Land Act 1948
AND	
IN THE MATTER	of a section 67 'special lease' dated 1 January 1988 between **HER MAJESTY THE QUEEN** acting by and through the **COMMISSIONER OF CROWN LANDS** as Lessor and **AWATAHA MARAE INCORPORATED** as Lessee

TO: Dr Maria Amoamo, Chairperson, **AWATAHA MARAE INCORPORATED**

COPY TO:

- Grant Sidnam, Special Counsel, Anderson Creagh Lai – Solicitor for the Lessee
- Dame Rangimarie Naida Glavish DNZM, Chairperson, Te Rūnanga o Ngāti Whātua
- Raewyn Harrison, Member, Te Raki Paewhenua Māori Committee
- Lil Anderson, Tumu Whakarae, Te Arawhiti / the Office for Māori Crown Relations
- Gaye Searancke, Chief Executive, Land Information New Zealand / Toitū te Whenua
- Hon. Eugenie Sage, Minister for Land Information
- Dan Bidois, Member of Parliament for Northcote

Ki nga rangatira, tēnā koutou,

1. This memorandum of decision sets out various decisions I have made in relation to a special lease of Crown Land to Awataha Marae Incorporated (**Awataha).** This memorandum also sets out the reasons for my decision, which has been a matter of public interest.
2. On account of the public interest in this matter, I have decided to provide copies of this decision to the parties listed on the cover page and also to publish this decision on the Land Information New Zealand / Toitū Te Whenua (**LINZ**) website.
3. Broadly, I have considered the following issues:
    a. The rates arrears which Awataha has failed to pay to Auckland Council in breach of the Deed of Lease;
    b. Other alleged breaches of the Deed of Lease, brought to my attention by various members of te Raki Paewhenua community, including allegations that Awataha does not operate a "functioning marae" and that various members of the community have not been permitted to join Awataha as members;
    c. The renewal of the Deed of Lease at the expiry of the current 33-year term at the close of 31 December 2020; and
    d. The transfer of the Deed of Lease to a charitable trust board established by members of Awataha.
4. I acknowledge that for some, or potentially all, of the interested parties, my decision will not be the decision they had hoped for. Those parties have raised concerns with me, with LINZ and with the Minister for Land Information. I have not taken those concerns lightly.
5. I have carefully considered what the Commissioner's role, as a Crown landlord, is (and can) be in relation to the disputes between the parties. As part of that, I have considered the Commissioner's obligations as (via the Crown) a treaty partner. I am particularly conscious that my decision does not resolve the concerns raised by Te Rūnanga o Ngāti Whātua and Te Komiti Māori o te Raki Paewhenua. I have endeavoured to give effect to my duties under Te Tiriti while also making a decision grounded in the landlord's rights and duties under the Deed of Lease, the Land Act 1948 and the law of landlord and tenant.

6. Specifically, I have considered whether to raise with the parties the possibility of resolving their concerns by way of a mediated discussion or hui. I have decided that the parties' concerns are much broader than the issues I can consider in my role as the landlord, and I have therefore decided that it would not be appropriate for the Commissioner to facilitate such a process. However, I encourage each party to consider whether some form of discussion or hui, with or without an independent mediator, might help them to address some of their concerns.

RATES ARREARS

7. Awataha has, for a sustained period of time, failed to pay Auckland Council rates in breach of clause 1 of the Deed of Lease and section 111 of the Land Act 1948.
8. On 1 May 2020, the Commissioner's delegate issued a notice under section 246 of the Property Law Act 2007 requiring Awataha to remedy this breach by 15 June 2020.
9. On 11 June 2020, Mr. Sidnam wrote to the Commissioner's solicitor advising that Awataha had remedied the breach by entering into an agreement with Auckland Council for the payment of rates.
10. The offer by Auckland Council was that "historic rates and penalty charges" will be remitted provided that the 2019/20 rates are paid no later than 30 June 2020 and thereafter that the rates for the next two rating periods (2020/21 and 2021/22) are paid by the due dates without default. That is to say that three years of on-time rates payment are required before the Council will remit the arrears.
11. I am pleased to note that Auckland Council received a rates payment of $7,102.38 on the 26th June 2020.
12. I do not agree with Mr. Sidnam's claim that the breach of lease has been remedied. Auckland Council's terms for the remission of rates appear to be conditions precedent, not conditions subsequent. As the rates have not yet been remitted, I consider that Awataha is still in breach of its obligations under clause 1 and section 111, but also that a satisfactory arrangement is in place to remedy this breach.
13. I expect that the notice will be withdrawn once Awataha demonstrates that the rates have been remitted.
14. **I have decided not to engage the forfeiture process in section 146 at this time.**
15. I have made this decision because:

a. Awataha has agreed a plan to clear the rates arrears with Auckland Council and, as such, the breach could reasonably be viewed as being 'substantially remedied'; and
b. I consider it is likely that Awataha would be granted relief from forfeiture if it made such an application to the High Court.

16. However, my decision will not prevent the Commissioner from engaging the forfeiture process if Awataha defaults on its arrangement with Auckland Council before the rates are remitted.

ALLEGED BREACH - MEMBERSHIP

17. Clauses (p) and (q) of the Deed of Lease provide the Commissioner with substantive and procedural rights relating to applications by third parties to join Awataha. I note at the outset that clauses (p) and (q) appear to be intended to be read together.
18. Clause (p) provides the Commissioner with the benefit of a substantive, *contractual* covenant that any person may join Awataha if that person:
    a. Is of good repute;
    b. Is eligible for membership of Awataha;
    c. Pays the necessary fees (if any); and
    d. Complies with the "usual rules" of Awataha.
19. People from the Te Raki Paewhenua community have raised with me and/or LINZ their concerns that they (or others) have been denied membership.
20. If I consider that any person has been denied membership in breach of clause (p), it may be open to me to serve Awataha with a notice under section 246 of the Property Law Act requiring Awataha to remedy the breach by admitting that prospective member.
21. However, I do not have any right to directly compel Awataha to admit that prospective member or to approve their membership myself. My primary remedy if Awataha did not comply would be to engage the procedure in clause (q) and, if that were to fail to resolve the matter, the section 146 forfeiture process.
22. The Commissioner is not required to enforce any rights the Commissioner has under clause (p). As a matter of good administrative decision-making, I must consider whether it would be appropriate and desirable for me to enforce the Commissioner's rights under this clause before I do so.

23. I consider that it is **not** appropriate for me to exercise this right, and so **I have decided not to exercise my right under clause (p) at this time** in respect of the denial of membership to applicants who have been referred to the society under clause (q).

24. I have made this decision because

    a. The issue of denial of access to membership arises out of the exercise of a public or quasi-public function, whereas the Commissioner's rights are purely contractual;

    b. Any person denied membership can apply for judicial review, and to require the society to make a particular decision on a membership application risks displacing the role of the Court in relation to this public or quasi-public function. I have had particular regard to the judgment of Kós J in *Tamaki v The Māori Women's Welfare League Incorporated.*[1]

    c. The Commissioner's ultimate remedy to resolve an unremedied breach of clause (p) would be the forfeiture of the lease. Although there are currently unresolved concerns relating to access to membership of the society (even after having engaged clause (q)), I consider that this remedy would not be in the interests of either the existing or the prospective members of Awataha (noting that I am unable to prejudge whether, and to whom, any lease or other arrangement would be granted if the existing lease were forfeit).

25. It is not for the Commissioner to encourage any person to take any particular proceedings. However, the Commissioner notes that it is open to the members of Te Komiti Māori o te Raki Paewhenua (or any other declined applicant for membership of Awataha) to seek a judicial review of that decision. The Commissioner notes that:

    a. a member of Te Komiti Māori o te Raki Paewhenua previously filed such a claim, but that the claim was subsequently withdrawn; and

    b. Te Komiti Māori o te Raki Paewhenua has previously received legal advice from Kit Littlejohn, Barrister (which was shared with the Office of the Minister of Land Information on 10 August 2017) noting that one suitable remedy for the denial of membership was a "Direct judicial

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[1] [2011] NZAR 605.

review of AMI's 'decision' in the High Court for failing to follow a proper and lawful process."

26. I acknowledge that bringing such proceedings may be a costly and difficult exercise for the committee or any individual person denied membership. However, my decision cannot turn on this factor.
27. Clause (q) of the Deed of Lease provides the Commissioner with a procedural right (again, contractual) to require Awataha to hold a special meeting of members to consider membership applications.
28. The Commissioner has already exercised this right in the context of the current dispute between members and some prospective members, in 2018. My current understanding is that, as a general statement, the existing members of Awataha are broadly in consensus that the prospective members not be admitted. Without forming any view on the correctness of that decision under Awataha's constitution, **I have therefore decided not to exercise my right under clause (q) to require Awataha to call a special meeting of members** as I consider there is little prospect of the existing membership changing their decision as a direct result of me exercising this power.
29. I am not ruling out exercising this power under clause (q) again in the context of the current dispute, however. I would be willing to require Awataha to call a special meeting if requested to do so by a prospective member who has been declined membership subsequent to this decision.

ALLEGED BREACHES – "FUNCTIONING MARAE", PERMITTED USES AND TANGIHANGA

30. Clauses 4 of the Deed of Lease requires Awataha to "make sufficient progress with a staged development of a Marae on the land (including the construction of a meeting house) such that the site as a whole represents a functioning Marae not later than the 31st Day of December 1993"
31. Clause (h) of the Deed of Lease says that Awataha "shall use the land for the purposes set out in the objects of the Society, and also for traditional Maori Marae activities where the Tangihanga and accommodation for mourners may take precedence over all other activities."

32. Members of Te Komiti Māori o te Raki Paewhenua have raised with me and/or LINZ their concerns that the marae is not actually a "functioning marae" and that it is not available for tangihanga.
33. Solicitors for the Commissioner wrote to Awataha in July 2017 expressing concerns that, among other things, Awataha had failed to ensure the site operated as a whole as a functioning marae by 31 December 1993.
34. Awataha responded to that allegation by saying that tangihanga are sometimes held in the auditorium area of the marae headquarters building, but that there are complex tikanga issues which made it impossible at that time to hold tangihanga in the existing wharenui/meeting house building.
35. I acknowledge that a central function of a marae in tikanga Māori is as a place to, in the words of one member of the Te Raki Paewhenua community, "just be, learn, celebrate and share all things Māori". I am cautious not to make or appear to make pronouncements on tikanga Māori, but I acknowledge that farewelling the dead through tangihanga may be an important aspect of that. I also note the writing of Sir Dr. Sidney Hirini Moko Mead KNZM, who writes in respect of urban marae that "the tikanga have been modified and accommodated in different ways", but also that, as a general observation, urban marae might "accommodate all the functions of a traditional marae" and that "The marae are made available to the clients and are used as places where visitors are welcomed, meetings are convened and more tapu ceremonies such as tangihanga are held."[2]

Clause 4 of the Deed of Lease

36. I carefully considered obtaining tikanga Māori advice to determine whether matters including holding tangihanga were necessary elements of a "functioning marae" in the sense of clause 4 of the Deed of Lease.
37. However, I have formed a view that even if I were satisfied on the basis of that tikanga advice[3] that there was a breach of lease as at the close of the due date of 31 December 1993, it would not be appropriate for me to attempt to take action in respect of that breach of lease some twenty-six years later in July 2020 (or, for

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[2] Mead, H. M. *Tikanga Māori: Living by Māori Values*. Wellington: Huia Publishers, 2nd ed. 2016.
[3] And I note that there is a reasonable prospect that the tikanga advice would lead me to conclude that the term "functioning marae" is ambiguous or imposes a lower standard than is claimed by some of the parties alleging a breach.

that matter, when the first allegations of this nature were brought to LINZ's attention in 2016). I have formed this view because:

a. the primary obligation imposed by clause 4 is to "make sufficient progress with a staged development of a Marae on the land" by 31 December 1993, and the reference to a "functioning marae" is 'merely' the standard by which sufficient progress is to be measured in respect of the construction project;

b. the clause as drafted does not create an ongoing duty; rather, it sets out a standard by which the construction of what was referred to in historic correspondence as the "marae proper" (as opposed to the kaumatua housing, which was constructed earlier) could be deemed (and a due date by which it should be) complete;

c. from a review of the historic files held by LINZ, it appears the Landlord (Landcorp and, later, the Commissioner) was aware at various points in the years following December 1993 of the degree to which the marae (and, in particular, the wharenui) had been constructed;

d. there is a non-negligible risk that the Landlord has either impliedly waived part of the requirement to construct a functioning marae or that the Landlord has affirmed the Deed of Lease notwithstanding the alleged breach; and

e. in any event, a claim that Awataha is in breach of its construction obligation in clause 4 is either:

    i. out of time in terms of section 4 the Limitation Act 1950; or

    ii. not out of time for technical reasons, but open to be treated by me as though it were out of time on the basis that the same policy reasons which underpin limitation statutes apply equally to this claim.[4]

38. I have decided:

a. In respect of allegations of an historic breach of clause 4, not to attempt to issue a notice under section 246 of the Property Law Act some twenty-six years later requiring Awataha to remedy the alleged breach;

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[4] I had regard to the decision of Edwards J in *Thomas v Morrhall* [2016] NZHC 2853.

b. That the acts or omissions (and the manner in which the marae is operated) in more recent times cannot be the basis for a claim that Awataha is in breach of clause 4.

Clause (h) of the Deed of Lease

39. In considering this clause, I am constrained to the current objects of the incorporated society. As landlord, I cannot insist that Awataha adhere to objects specified in a former constitution but no longer contained in the present constitution, nor can I question whether the objects themselves are proper.
40. I have had regard to all eight of the objects listed at clause 2 of the society's constitution (and to the guiding values in (a) and the programme aims in (b)) and cannot conclude that the lessee is in breach of its obligation under clause (h).
41. I do appreciate that members of the community who are dissatisfied with the operation of the society may well consider that Awataha is failing to adhere to these objects. Many allegations have been made relating to the competence of the management of the society, and it is plausible that the community members making those allegations could go on to say that Awataha has failed to observe the guiding value of kaitiakitanga in clause 2(a) of the constitution.
42. However, I also consider that clause (h) of the Deed of Lease is restrictive but not prescriptive. The use of the land for any one particular purpose of the society is permitted, but not required. The clause does not require Awataha to use the land to further any particular object of the incorporated society, but rather to abstain from using the land for an entirely unrelated purpose. I note that clause 2 of the lease works in a similar manner.
43. I consider that the words "and also for traditional Maori Marae activities" work in a similar way, conferring an option on Awataha to use the land for such activities in its discretion. This is particularly the case in relation to the holding of tangihanga, which "may" (but is not required to) "take precedence over all other activities".
44. I have therefore decided on the basis of the information available to me that Awataha is not in breach of clause (h).

ALLEGED BREACH – UNAUTHORISED SUBLEASES

45. All subleases of the land leased in the Deed of Lease require the Commissioner's permission.
46. Members of the Te Raki Paewhenua community, including Dan Bidois MP, have raised with me and/or LINZ that Awataha has entered into unauthorised subleases.
47. I understand that the arrangements referred to are, in fact, contractual licences. A licence does not confer possession, and granting a licence does not therefore involve parting with possession in a manner that would require the Commissioner's permission.
48. I have therefore decided on the basis of the information available to me that Awataha is not in breach of this obligation.

ALLEGED BREACH – UNAUTHORISED CONSTRUCTION

49. Clause 5 of the Deed of Lease requires Awataha to obtain the Commissioner's consent to any "improvement".
50. On the information currently available to me**, I do not consider that any failures to obtain consent are sufficient to justify serving Awataha with a notice** under section 246 of the Property Law Act requiring Awataha to remedy the breach.
51. I may consider this further in due course.

ALLEGED BREACH – IMPLIED TERM TO COMPLY WITH INCORPORATED SOCIETIES ACT 1908

52. For a period of time Awataha ceased to be registered as an incorporated society.
53. Awataha was restored to the register, and so any breach in this regard has now been remedied.

RENEWAL OF LEASE

54. The Deed of Lease is effectively perpetually renewable; Awataha has a contractual right to a renewal on the same terms every 33 years.
55. The Commissioner has no discretion to refuse – or to delay – a renewal. Any renewal would be tantamount to the termination of the lease, and could therefore only be on grounds that would justify forfeiture under section 146 of the Land Act.

56. The Commissioner must, no later than six months prior to the expiry of the lease, deliver to the Lessee a notice in writing offering renewal by the Commissioner. This is that notice. LINZ will be in contact with Awataha's solicitor in due course with the necessary paperwork.

ASSIGNMENT OF LEASE

57. Awataha proposes that the Deed of Lease be transferred to a charitable trust board set up to take over its operations. It has noted that it expects to receive financial or taxation advantages by shifting to a charitable trust structure.
58. I have carefully considered Awataha's request and, on balance, have declined to agree to the transfer.
59. I am mindful of the Commissioner's duty as a landlord not to unreasonably withhold consent in terms of section 226(2) of the Property Law Act 2007. I consider that, despite the advantages to Awataha, the proposed transfer at this time would undermine the ability of members of the Te Raki Paewhenua community to challenge the membership processes and decisions of the legal entity that leases the marae land and operates the marae.
60. The Commissioner will, in line with section 226, properly consider any future application for a transfer. However, on the information currently available, the Commissioner is likely to expect at a minimum that the allegations regarding the membership processes and decisions be resolved before such a request is granted.
61. Although my decision on this point did not turn on it, I also note that the intent of the lease (and especially clauses (p) and (q)) is that the lessee remains an incorporated society with members and a membership process. A charitable trust, in contrast, has a class or classes of beneficiaries of the trust.

DECISION MADE UNDER DELEGATION

62. I have made these decisions for the Commissioner of Crown Lands under delegation. That delegation is permitted by section 24AB of the Land Act 1948 and section 41 of the State Sector Act 1988.

REHEARING

63. Any person aggrieved by any of these decisions or determinations may, within 21 days of being notified of the decisions apply to the Commissioner of Crown Lands for a rehearing in accordance with section 17 of the Land Act 1948.

64. This memorandum will be sent to the parties listed on the cover page at or around 9.00 am on Monday, 6 July. Accordingly, the final day for an application for rehearing is **27 July 2020**.

65. For the purposes of applying for a rehearing, please send:

    a. Any application by email to me, Stephanie Forrest, at stforrest@linz.govt.nz, copying in the Commissioner's solicitor Tyrone Barugh at tbarugh@linz.govt.nz; and

    b. Any application by post to:

        Land Information New Zealand
        PO Box 5501
        Wellington 6145
        Attn: Stephanie Forrest

    c. Any application by courier to:

        Land Information New Zealand
        Level 7, Radio New Zealand House
        155 The Terrace
        Wellington 6011

66. If, as noted in paragraph 5 of this decision, some or all of the parties decide to enter into discussion or mediation, the fact that they are doing so **does not** extend the deadline for a rehearing application. Any person who wishes to apply for a rehearing must do so within 21 days notwithstanding the fact that consultation is occurring or is expected to occur. **However,** the Commissioner may, in his discretion, grant a rehearing but delay the rehearing date to allow time for consultation to proceed.

Dated this 3rd day of July 2020

Stephanie Forrest

Group Manager Land and Property

Land Information New Zealand / Toitū te Whenua

Acting for and on behalf of the Commissioner of Crown Lands pursuant to a delegation under section 41 of the State Sector Act 1988.