FINAL DECISION OF COMMISSIONER FOR CROWN LANDS ON APPLICATION FOR REHEARING OF DECISION IN RELATION TO AWATAHA MARAE INCORPORATED SOCIETY

Dated 22 April 2024

Introduction

1. On 3 July 2020, the Group Manager Land and Property for Toitū te Whenua Land Information New Zealand (Toitū te Whenua), Stephanie Forrest, issued a memorandum of decision (**the First Decision**) in relation to a lease of Crown land (**the Lease**) to Awataha Marae Incorporated (**Awataha**). In making her decision, Ms Forrest was acting as the lessor of the Land, in her capacity as my delegate.[1] The Memorandum of Decision related to the following matters:

    1.1 Whether Awataha had breached the terms of the Lease and, if so, what steps should be taken in respect of those breaches, including whether to engage the process for lease forfeiture under s 146 of the Land Act 1948;

    1.2 How to respond to Awataha's request to transfer the Deed of Lease to a charitable trust board established by members of Awataha; and

    1.3 Renewal of the Deed of Lease at the expiry of the then-current 33-year term at the close of 31 December 2020.

2. On 27 July 2020, Te Rūnanga o Ngāti Whātua (**Ngāti Whātua**) lodged an application for a rehearing of the First Decision under s 17 of the Land Act in respect of the findings regarding breach and the decision not to engage the lease forfeiture process ([1.1] above). I granted the application for a rehearing on 27 August 2020.

3. This is my final decision resulting from the rehearing regarding:

    3.1 whether Awataha has breached certain terms of the Lease; and

    3.2 if I find there have been breaches of the Lease, whether to engage the process for lease forfeiture under s 146 of the Land Act.

Summary of decision

4. My findings on the issues above are as follows:

    4.1 Awataha is in breach of clause (h) of the Lease in respect of the failure to ensure that the marae is regularly available for tangihanga as a priority.

    4.2 Awataha is in breach of clause (p) of the Lease by failing to provide adequate opportunities for eligible persons to join the incorporated society.

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[1] Pursuant to s 24AB of the Land Act 1948 and Clause 2, Schedule 6, Public Service Act 2020 (formerly, s 41 of the State Sector Act 1988).

4.3 I do not commence the process towards exercising my discretion to forfeit the Lease under s 146 of the Land Act at the present time. I consider the breaches are serious, but can be remedied, and that the community benefits from the presence of the marae and the many services it offers. I have taken into account Awataha's stated willingness to change the way it operates, which is necessary in order to remedy the breaches.

5. I cannot tell Awataha how to remedy its breaches of the Lease as I do not have the power to do so. Nor can I pre-empt any future decision I may make regarding Lease breach. However, in the course of my decision, I set out suggestions that I strongly recommend Awataha consider.

6. Forfeiture remains available to me should the breaches continue or should there be fresh breaches of the Lease.

7. I note that, at the end of the decision, I briefly address:

7.1 Awataha's request to move to a charitable trust model (see [1.2] above); and

7.2 various matters brought up during the course of this matter but that are not part of the rehearing and have no bearing on the decision-making.

8. I have already separately re-determined the issue of renewal of the Lease (set out at [1.3] above), the details of which are summarised in **Appendix One**.

Background context

The Land

9. The land covered by the Lease is a 3.7ha property located at 58 Akoranga Drive, Northcote, Tāmaki Makaurau (**the Land**). The Crown acquired the parcels that make up the Land in the 1950s and 1960s. From the 1970s, there were discussions between members of the local Māori community, the polytechnic operating on the Land and the Crown about creating a marae on the Land. In 1985, the Land was declared to be Crown land under the Land Act 1948 ("the **Land Act**") to enable it to be leased out for the purpose of establishing a marae.

The Lease

10. Crown land is administered by the Commissioner of Crown Lands (the Commissioner), who exercises the powers of a landowner on behalf of the Crown for Crown land held under the Land Act. This includes acting as lessor in respect of leases of Crown land.[2] Awataha is an incorporated society that was established in 1986. Awataha has leased the Land from the Commissioner since 1988 under a perpetually renewable lease.[3] Among other requirements, the Lease requires Awataha to

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2 Section 24 of the Land Act 1948.

3 Clause (c): When the Lease expires, the Lessee has the right to acquire a new Lease for 33 years from expiry on the same covenants and provisions. I note, for completeness, that Landcorp administered the land under delegation from the Commissioner until 1995, and that Awataha originally entered into a lease with Landcorp in 1987. Administration of the Lease and the Crown land was re-transferred to the Commissioner in 1996.

operate a marae on the site and to use the land for marae activities, including tangihanga.[4] It also contains requirements relating to membership of Awataha.[5]

11. Since leasing the Land, Awataha has installed marae buildings, a health centre for the local community (operating under a Deed of Licence granted by Awataha[6]), and housing for kaumātua on the Land.

12. A summary of the Lease, incorporated society constitution and statutory framework is attached as **Appendix Two**.

The First Decision

13. Ms Forrest's decision addressed various alleged breaches of the Lease. Of relevance to the present decision, these included:

    13.1 Allegations that various members of the community had not been permitted to join Awataha as members (contrary to clause (p)). Ms Forrest found that this was in breach of clause (p). She then determined that she would not exercise her discretion to forfeit the Lease in respect of this breach because this "would not be in the interests of either the existing or prospective members of Awataha", noting that she was unable to prejudge "whether, and to whom, any lease or other arrangement would be granted if the existing lease were forfeit".

    13.2 Allegations that Awataha did not operate a "functioning marae" (contrary to clause 4). Ms Forrest determined that the obligation under clause 4 of the Lease was to "make sufficient progress" such that there was a "functioning marae" by 31 December 1993, which did not create an ongoing obligation but a construction obligation. In any event, a claim relating to this clause was "out of time", whether under the Limitation Act 1950 or "on the basis that the same policy reasons which underpin limitation statutes apply equally to this claim".

    13.3 Allegations that Awataha was not using the Land "for the purposes set out in the objects of the Society, and also for traditional marae activities where the tangihanga and accommodation for mourners may take precedence over all other activities" (contrary to clause (h)). Ms Forrest found there was no breach of clause (h).

14. A more detailed summary of the First Decision is attached as **Appendix Three**.

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4 Clauses 4 and (h), which are elaborated on below.

5 Clauses (p) and (q).

6 To my knowledge, the Deed of Licence expired in December 2020.

Ngāti Whātua's challenge to the First Decision

15. Section 17 of the Land Act enables "aggrieved" persons to make applications for rehearings of decisions of the Commissioner.[7]

16. On 27 July 2020, Ngāti Whātua applied for a rehearing of the decision regarding the Lease to Awataha on various grounds.[8]

17. On 27 August 2020, I granted a rehearing, taking into consideration the significant interest Ngāti Whātua has in the land and the broader public interest in ensuring that appropriate decisions are made in relation to leases of Crown land.

18. On 8 October 2020, in response to concerns raised by Awataha, I advised both parties that I considered Ngāti Whātua was an "aggrieved person" under s 17 of the Land Act on the basis that the Crown has included the Land as a potential commercial redress property in an Agreement In Principle with Ngāti Whātua in relation to its Treaty claims.[9] This means Ngāti Whātua has an interest in decisions affecting the land beyond that of an ordinary member of the public, including because it could become the future lessor of the property. Ngāti Whātua was therefore entitled to apply for a rehearing.

Grounds for rehearing

19. Under s 17 of the Land Act, I may "reverse, alter, modify, or confirm" Ms Forrest's decision.

20. Ngāti Whātua sought a rehearing on the following grounds:

    20.1 The decision is ultra vires to the Commissioner's role because it fails to act in the interests of the Crown in leasing or licencing Crown lands. Acting in the interests of the Crown in this situation includes achieving the purpose of the Lease, which is that a functioning marae is available to the North Shore Māori community so that traditional Māori marae activities, including tangihanga, may take place.

    20.2 The decision-maker failed to act in accordance with the Commissioner's statutory role to enforce leases of which he is the Lessor, and his role as a Treaty partner.

    20.3 The decision-maker made an error of law in her interpretation of clause 4 of the Lease, which requires there to be a "functioning marae". This error included a failure to obtain tikanga Māori advice, which is critical to determining the meaning of the term "functioning marae".

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7 While s 17 refers to decisions of the "Board", s 2 of the Act sets out that "Board" means the Commissioner of Crown Lands.

8 I note that the application was made within the 21-day timeframe for applications for rehearings, as required by s 17 of the Land Act.

9 Te Rūnanga o Ngāti Whātua and The Crown: Agreement in Principle to Settle Historical Claims, 18 August 2017 at [6.4].

20.4 The decision-maker made an error of law in her interpretation of clause (h) of the Lease as not requiring prioritisation of tangihanga.

20.5 The decision-maker made an error of law in finding that clause 4 is subject to a limitation period, and policy considerations do not warrant acting as if a limitation period applies.

20.6 By declining to exercise her discretion to commence the lease forfeiture process, the decision-maker failed to exercise her statutory enforcement role for a breach of clause (p) of the Lease.

21. Ngāti Whātua submitted that the overall issue is that Awataha is "acting in contravention of the purpose of the Lease which was to provide a community marae for North Shore Māori which could hold tangihanga" and that the above grounds for challenge, taken together, demonstrate that the purpose of the Lease has been "completely undermined" by Awataha's breaches of the Lease, such that I should exercise my discretion under s 146 of the Land Act to have the Lease forfeited.

22. Ngāti Whātua claimed that this exercise of discretion would be consistent with my statutory role under section 24(1)(f) of the Land Act to enforce leases of Crown land; my obligations as a statutory officer of the Crown under Te Tiriti o Waitangi; and the terms of the Lease.

23. In this decision, I consider the alleged breaches of the Lease that are at issue – namely, of clause 4, clause (h) and clause (p).

24. I then consider whether I should exercise my discretion to forfeit the Lease under s 146 of the Land Act.

25. I then set out my findings and decision on the rehearing, and how this applies to the matters raised by Ngāti Whātua in the application for rehearing.

26. Finally, I address governance issues and other matters that arose within the course of the rehearing process, but which are not relevant to or in any way affected by my findings and decision on the rehearing.

Alleged breaches of the Lease

Interpretation of clause 4

27. Clause 4 provides that the Society "undertakes 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."

28. I consider that the obligation under clause 4 was to make "sufficient progress… such that the site as a whole represents a functioning Marae" by 31 December 1993, which is when any breach of that requirement would have crystallised (as set out below, I do, however, consider that clause 4 remains relevant to the interpretation of the

Lease as a whole, and in particular, the primary purpose of the Lease to use the site for the purpose of a marae).

29. I consider, on the evidence that I have, that sufficient progress was made such that the site as a whole represented a "functioning Marae" by 31 December 1993. The Lease was signed on 1 January 1988. Between that date and 31 December 1993, Awataha constructed a range of buildings on the land, including the wharenui (although the carvings on the wharenui were – and still are – outstanding). The Society was operating on the land during this period. This included entering into arrangements with the Housing Corporation to build kaumātua housing on the Land. I have not found any evidence of concerns raised with Landcorp about whether the Land was operating as a functioning marae by 31 December 1993 or any other evidence that the site was not operating as a functioning marae at that point.

30. Furthermore, a review of the historic files held by Toitū te Whenua indicates the Crown 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 and has received rent from Awataha and otherwise acted as though the Lease was in order in the intervening years.[10] In these circumstances, I consider that it would be unreasonable to proceed to lease forfeiture on the basis of any breach from December 1993 or earlier.[11] For the reasons set out above, I consider there is no breach of clause 4. However, I consider its wording is relevant to the interpretation of the Lease as a whole because it demonstrates that the fundamental purpose of the Lease, and the intention of the parties in agreeing to the terms of the Lease, was to establish and maintain a functioning marae. To that extent, I take its wording into account in making my decision.

Interpretation of clause (h)

31. Clause (h) of the Lease requires Awataha to "use the land for the purposes set out in the objects of the Society, and also for traditional marae activities where the tangihanga and accommodation for mourners may take precedence over all other activities". This is an ongoing obligation. It reflects the fundamental purpose of the Lease, which – as set out above – was to establish and maintain a functioning marae.

Purposes

32. Ngāti Whātua allege that Awataha is in breach of the requirement to use the Land for the purposes set out in the objects of the Society due to inadequate community

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10 See *McDrury v Luporini* [2000] 1 NZLR 652, in which the Court of Appeal states (at [45]): "The proper approach is to examine the lessor's conduct prior to the issue of the statutory notice in terms of estoppel. If the lessor has delayed the issue of the statutory notice for an unreasonable length of time, and has accepted rent in the meantime, it may well be appropriate for the Court to hold that the lessor is estopped from proceeding on the notice, and correspondingly estopped from forfeiture and re-entry. All the circumstances of the case would have to be considered, including such other conduct of the parties as may be relevant. What the Court is in essence examining is whether the lessor has acquiesced in the breach in such a way that it would be unconscionable for the lessor to be allowed to proceed to forfeiture."

11 For the avoidance of doubt, I do not consider the Limitation Act 1950 prevents me from taking action to recover land until 60 years after the cause of action accrues: Limitation Act 1950, s 7(1).

service provision. The current constitution of the Society (which was last updated in 2018) is set out in **Appendix Two**.

33. Relevantly, the Society's objects include promoting, establishing and advancing "programmes relating to self-sustainability, health, education, employment, tikanga Māori, resources and economic development and arts and culture", promoting, developing, and encouraging a "better understanding of tikanga Māori in the wider community" and promoting a "centre for recreational, social, cultural, educational and spiritual activities that advance the social welfare of Māori". I consider that these objects require Awataha to provide a range of programmes and services to Māori in the community.

34. I received comments from members of the community concerned over programmes that had operated on the Land but have now ended. This included te reo courses, school visit programmes and a kura kaupapa. Ngāti Whātua and members of the local community were clear that they are distressed about these previous services having ended. They see the marae as underutilised and not catering to the needs of the Māori community as a result of services ending.

35. There is also strong concern about the stories of the community on the North Shore being lost because there is no place for the community to come together to share these stories. There were also claims that some children in the community have never set foot on the marae; schools wish to visit but have not been able to.

36. Awataha considers that it is delivering on its objectives by providing a range of services on the Land, including traditional marae activities. It advised me that it continues to provide many of the services that have ended but through different providers than those that had operated on the Land in the past. Services currently provided include a private school, youth mentoring and veteran services, te reo courses and day wānanga. This is in addition to the operation of the health centre on the Land and the housing that is located on the property.[12] There is also a library operating out of the administration building that I was advised contains material relating to the local Māori community that cannot be accessed elsewhere. Awataha further advised that during the COVID-19 pandemic in 2020, Māori Wardens used the administration building to prepare and deliver care packages. I also understand that the health centre located on the Land continued to operate during COVID-19. Awataha also advised that it has recommenced visits from and engagement with schools following COVID-19 concerns and restrictions easing. Awataha has also provided commercial tourism opportunities and see this as a way of funding future development of the Land, including completion of the wharenui.

37. As noted above, I consider Awataha is required, under the Lease, to provide a range of programmes and services to Māori in the community, including services that

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12 This housing used to be administered by Kainga Ora, but the buildings are now owned and run directly by Awataha, who advised that they want to run a new programme, including a care provider for those living in the houses.

promote an understanding of tikanga Māori and that advance the social welfare of Māori.

38. I have concluded that overall, on the evidence before me, the marae is providing a range of services across the property that are consistent with Awataha's objectives as an incorporated society. I note, in particular, the availability of te reo courses and day wānanga, and the availability of housing on the Land for kaumātua. On this basis, again on the facts before me, I am not satisfied that Awataha is currently in breach of clause (h) of the Lease in relation to the requirement that it use the Land for the purposes set out in the objects of the Society.

39. However, the complaints I have received as outlined above indicate that the operation of the marae is not meeting the expectations of members of the community, who consider aspects of the Society's objectives are not being met, or not being met adequately.

40. It is not clear how Awataha selects the programmes that it runs or how it partners with providers.

41. In addition, many of these services do not appear to be well known by the community. For example, the calendar of events on the Awataha website has not been updated for some years.

42. To avoid potential for further allegations, and potential future findings of breach, I strongly recommend that Awataha address these concerns.

43. It is my understanding that Awataha has agreed to work with Te Puni Kōkiri on a community engagement plan. I strongly advise Awataha to specifically identify the needs of the community, how it has ascertained these and how it proposes to provide for these in any community engagement plan they prepare. This will help to ensure that Awataha is meeting its objective of advancing the social welfare of Māori.

Tangihanga

44. Clause (h) of the Lease sets out that the Land must be used for traditional marae activities "where tangihanga and accommodation for mourners may take precedence over all other activities".

45. Ngāti Whātua submits that Ms Forrest made an error of law in interpreting the clause as not requiring tangihanga to take precedence over other activities and that Ms Forrest ought to have obtained tikanga advice on this issue.

46. The sub issues I consider under this heading include:

    46.1 Whether Awataha is required to prioritise tangihanga;

    46.2 Whether Awataha is meeting its obligations relating to tangihanga; and

    46.3 The relevance of the incomplete wharenui to any assessment of breach.

Is Awataha required to prioritise tangihanga?

47. The use of the word "may" in clause (h) of the Lease leaves some ambiguity regarding whether tangihanga and accommodation for mourners are required to take priority over all other activities.

48. The operational manual of the Department of Lands and Survey in the 1980s, when it was considering granting the use of Crown land for marae, set out that: [13]

> "To the Maori the Marae is regarded as a unit or complex of land and buildings where "tangihanga" (mourning) and associated activities take precedence over all other functions, and where mourners, and on other occasions, visitors, can be accommodated."

49. This explains the policy basis for the Land Settlement Board at the time specifically providing for tangihanga in the terms of the Lease. Despite the use of the word "may" in the Lease, the underlying policy is that "tangihanga… take precedence over all other activities". In light of this, I consider the word "may" merely reflects that it cannot be sensibly discounted that there may be rare occasions in which some activity might appropriately have to take precedence over tangi. But the word does not displace the general position that tangi should take precedence over all other activities.

50. Following submissions on my draft decision, I agreed with Ngāti Whātua's submission that I should acquire expert tikanga advice in relation to the meaning of this clause. I accordingly engaged Mr Bob Newsom, kaumātua at Auckland War Memorial Museum – Tāmaki Paenga Hira, and former cultural advisor at Auckland Council, to provide me with tikanga advice regarding the importance of tangihanga within a marae setting (among other matters). Mr Newsom advised me that tangihanga are "the last "bastion" of Māori tikanga" and that "tangihanga must take priority over other functions" on the marae.

51. In light of the departmental policy at the time and the tikanga advice I have received, I interpret clause (h) as meaning that where there is a conflict between tangihanga being requested to be held and other activities that the marae has scheduled for that time, that tangihanga must take precedence, and must be provided for on the marae wherever possible. I therefore confirm that I agree with Ngāti Whātua's submission that Ms Forrest made an error in her interpretation of clause (h) regarding the obligation to host tangihanga.

Is Awataha meeting its obligations in respect of tangihanga?

52. Ngāti Whātua considers that the tangihanga held on the marae to date are infrequent and restricted by Awataha according to its own preferences. Its view is that this amounts to a breach of the Lease.

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[13] Department of Lands and Survey Manual 1982.

53. Members of the local Māori community advised me that tangihanga were being held in private homes and garages due to their inability to access the marae at various times over the last few years. This has clearly led to sorrow and anger within the community.

54. Ngāti Whātua provided an affidavit from Lyvia Marsden (sworn 22 October 2020) regarding the role the health centre, Te Puna Hauora, has had to play as a de facto marae for tangihanga for the North Shore community, the unsatisfactory nature of that arrangement, and the end of that arrangement due to the Te Puna Hauora licence expiring on 30 December 2020.

55. In response, Awataha advised that it understood that Te Puna Hauora only held one tangihanga in the health centre, and that this occurred before December 2020. It has advised Te Puna Hauora that it should not hold tangihanga in the health centre going forward.

56. At my site visit on 19 July 2022, I was advised that a tangihanga had been held at the marae approximately three weeks beforehand, and Awataha advised me that it had previously held other tangihanga on the property. These had been held in the administration building in a conference/meeting room, which included a raised area. While Awataha acknowledged that there was a limit on the number of people that could be accommodated (up to 100), it considered it was fulfilling its obligations to hold tangihanga under the Lease.

57. During the visit Awataha advised me that it had been approached to hold other tangihanga, but these were not able to be accommodated as the marae was hosting other functions at that time which could not be relocated. Later, in its comments on my draft decision, Awataha set out that it considers that a higher priority has always been given to tangihanga even though that has resulted in a financial cost to Awataha and an inconvenience to third parties who may have booked facilities at the marae. Awataha also suggested that funeral practices have changed, and that marae were being used less frequently for tangihanga.

58. On the basis of the evidence set out above, I accept that tangihanga are occurring on the property, albeit infrequently. I am mindful of Awataha's response that it is providing for tangihanga and that it seeks to accommodate and prioritise these. However, this is clearly not the experience of many in the community to the point that members are seeking alternative sites, such as the health centre, and it was clear to me that Awataha has sometimes declined to accommodate tangi due to the marae being used for other functions.

59. While decisions about tangihanga are decided by those managing the marae (as they come with a financial cost), the Lease requires tangihanga to be provided for as a priority function of the marae. The occasional holding or hosting of tangihanga does not in my view meet the requirement to provide for traditional marae activities under the Lease, more specifically the clear requirement that tangi must take precedence over other activities.

60. I therefore conclude that Awataha is in breach of clause (h) of the Lease requiring the Land to be used as a marae and accordingly being used for tangihanga. I note, for completeness, that this finding differs from that in my draft final decision.

Relevance of the incomplete wharenui to the assessment of breach

61. Although the wharenui is still used for functions, Awataha takes the position that a rāhui over the wharenui prevents its use for tangihanga until the internal and external carvings have been completed, installed and dedicated,[14] and that the rāhui will be lifted once that has occurred.

62. I do not consider that the fact of the rāhui on the wharenui provides any defence for the breach of the Lease's requirement regarding tangihanga.

63. In my view the position is that either the Society is required to provide alternative arrangements for the holding of tangihanga as a priority function of the marae, or to the extent the marae is not able to be used for tangihanga owing to the rāhui on the wharenui, this itself is inconsistent with, and a breach of, clause (h).

64. I further note that on the evidence before me, I have doubts about whether the rāhui is still appropriate. It was put in place when the construction of the wharenui began in the late 1980s and has been in place ever since. Mr Newsom (independent tikanga adviser) advised me that rāhui are sometimes placed on a wharenui while it is under construction, particularly when carvings and Tukutuku panels are being completed in the wharenui. This is often at the request of the master carvers or weavers. However, in discussions with both Mr Newsom and Te Puni Kōkiri I understand that rāhui are usually applied only as a *temporary* restriction on the use of a site.

65. Ngāti Whātua also provided several affidavits setting out that such a rāhui was inappropriate according to the tikanga of Ngāti Whātua, and that wharenui can be used for tangihanga without the carvings being present. I understand that this has occurred on other marae in the region. In discussions with Te Puni Kōkiri I understand that urban marae sometimes operate according to their own rules and practices, but that in many cases, urban marae observe the tikanga of mana whenua.

66. While there is clearly scope for Awataha to operate according to its own tikanga, on the facts before me, I consider it is reasonable to conclude that Awataha did not anticipate it would take so long (more than 30 years, so far) to complete the wharenui when the rāhui was put in place. Nor was this anticipated by the terms of the Lease.

67. To avoid future allegations of breach and potential future findings of breach, I strongly suggest that Awataha carefully reconsider whether the rāhui is still required

[14] During my site inspection, I saw the carvings for both the interior and exterior of wharenui. Many are still to be completed. Awataha advised that completing the carvings was beyond its capacity in terms of cost and resources, such as access to carvers. Awataha advised me that it was seeking funding to complete the carvings but had not been able to secure this to date. Awataha estimated that should funding be obtained, it would take approximately 18 months to complete the carvings. I was also advised by Awataha during my site visit that some engineering work on the building may also be required, particularly to strengthen beams to accommodate the internal carvings. It is quite a large structure and is now around thirty years old.

and/or urgently prioritise the completion of the carvings on the wharenui and the lifting of the rāhui.

Membership (clause (p) of the Lease)

68. Clause (p) sets out that any person of good repute and eligible for membership of the Lessee may join the Lessee upon paying the necessary fee (if any) and complying with the Lessee's usual rules.

69. Awataha has advised that there are approximately 350 members in its incorporated society. Membership has not changed over the last few years as Awataha has been seeking to move to a charitable trust governance model. It does not appear that there have been recent votes or application processes run for the incorporated society.

70. In her decision, Ms Forrest declined to transfer the Lease to a charitable trust governance model. Awataha has advised that it still considers that a charitable trust is an appropriate structure and wishes to further explore this with the Crown. As such, it does not wish to develop a membership plan at this time.

71. In his advice, Mr Newsom considered that it was disappointing that membership of the marae was limited and not promoted within the wider community. He considered that questions of whakapapa, contribution to the marae and contribution to the community needed to be debated on and decisions made within the marae.

72. There are clearly members of the community who want to play a role in running the marae and have ideas for other activities that could be undertaken or reinstate some that have ceased to operate. Becoming members of the incorporated society is a way to have a voice in the operation of the marae. I understand members of the community have been denied membership of the incorporated society, yet when it was created as an urban marae, the intention was for it to be as inclusive as possible with a wide range of members.

73. I further note that any change to a charitable trust governance model as sought by Awataha would take time, and there is no guarantee that this would be realised.

74. I consider that under clause (p) of the Lease, Awataha is required to enable eligible persons to join the incorporated society and that Awataha's failure to provide opportunities to join the society is a breach of that clause. I consider that Awataha's desire to move to a charitable trust governance model is irrelevant to and does not excuse the failure to offer such opportunities.

Decision on whether to exercise my discretion to forfeit the Lease

75. As set out above, I have found Awataha to have breached the Lease as follows:

    75.1 Awataha is in breach of clause (h) of the Lease in respect of the failure to ensure that the marae is providing for tangihanga as a priority.

    75.2 Awataha is in breach of clause (p) of the Lease by failing to regularly provide opportunities for members to join the incorporated society.

76. Under s 24(1) of the Land Act, I am responsible for enforcing contracts regarding "sales, leases, licences, or other disposition of Crown land". With regard to leases of Crown land, I may recommend forfeiture where there is a breach of lease conditions. I have no other powers of "enforcement" under the Land Act with respect to non-pastoral Crown land, such as the ability to issue infringement notices or enter into enforceable undertakings.[15]

77. Section 146 provides as follows:

> **Lease or licence may be forfeited**
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> Where the Board has reason to believe that any lessee or licensee is not fulfilling the conditions of his lease or licence in a bona fide manner according to their true intent and purport, the Board, after holding an inquiry into the case and giving the lessee or licensee an opportunity of explaining the non-fulfilment of the conditions, and being satisfied that any one of the grounds specified in the next succeeding subsection has been established may, with the approval of the Minister, by resolution declare the lease or licence to be forfeited.
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> The grounds on which a lease or licence may be declared forfeit may be any one of the following:
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> […]
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> I that the lessee or licensee has not complied with the conditions implied in his lease or licence by this Act or any former Land Act relating to residence, the proper management of the land, and the effecting of improvements, or with any other conditions expressed or implied in his lease or licence:
>
> Subject to the right of appeal under section 18, the right, title, and interest of a lessee or licensee under any lease or licence declared to be forfeited under this section shall absolutely cease and determine as at the date of that declaration, and the land comprised in the lease or licence, with all improvements thereon, shall revert to [His] Majesty, and, save as provided in section 150 or section 151, the lessee or licensee shall not be entitled to any compensation.

78. When making my decision regarding whether to commence the lease forfeiture process for breaches of the Lease, s 146 provides for three key steps:

78.1 Inquiring into the case, including giving the lessee (Awataha) an opportunity to explain any alleged breaches;

78.2 Making findings as to whether there has been a breach of a term or terms of the lease; and

78.3 Only if I make a finding of breach, deciding whether to commence the process towards exercising my discretion to forfeit the lease under s 146. Doing so is discretionary on the basis that the clause does not compel me to

[15] I note that I do now have this ability for pastoral leases under the Crown Pastoral Land Act 1998, but these do not extend to non-pastoral Crown land.

forfeit the lease in the circumstances set out in s 146, but instead gives me permission to do so in those circumstances.

79. In the case *Feary v Commissioner of Crown Lands*, the High Court observed that s 146 expresses the power to declare that a lease or licence is forfeited as discretionary: "a decision is to be made, after due process has been followed, and in a context where the establishment of grounds does not result in an automatic response. Rather the Commissioner "may" forfeit if he so resolves and has the approval of the Minister."[16]

80. The Court further stated that "the element of discretion, which is reserved must, I think, enable the decision maker to bring to account, for example, the magnitude of the breach, and the ability of the lessee/licensee to remedy it, as factors relevant to the exercise of the discretion. That is, to look at similar considerations as influence this Court when relief against forfeiture is sought. However, and this may be the significant difference, the decision maker need not approach the task upon the basis of a presumption, or leaning, in favour of the lessee."[17]

81. Beyond the considerations set out in *Feary*, I accept that my decision needs to be informed by Treaty considerations. This means making a reasonable decision in good faith, that is properly informed by any relevant Māori interests. My analysis of key considerations is set out below.

Gravity of the breaches

82. The community's inability to access membership of the marae and to use the marae for tangihanga in the manner and to the extent that is expected of an urban marae is clearly causing significant frustration and distress.

83. I understand that some tangihanga have taken place on the marae, albeit not in the wharenui, but irregular, limited provision for tangihanga does not meet the requirement under clause (h) of the Lease. Certainly, tangihanga should take priority over commercial and social uses of the marae. Failure to regularly provide for and prioritise tangihanga as a key function of the marae constitutes a serious breach of the Lease.

84. I note that recent stagnation in seeking new members may be attributable, in part, to the push to move to a new governance model, but a proposed change in governance does not excuse Awataha from the requirements of the Lease. The Crown leases the land to Awataha for the purpose of a community marae. Failing to provide opportunities for community members to join the Society constitutes a serious breach of the Lease.

85. I further note that the Land is public land, for which Awataha is paying only a peppercorn rent on a perpetual lease on the basis that Awataha was to provide the community with a marae. It must be used for the purposes for which it was leased.

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[16] *Feary v Commissioner of Crown Lands* [2001] 1 NZLR 704, at [27].

[17] At [28].

Awataha's ability and willingness to remedy the breaches

86. In respect of the use of the Land for tangihanga (clause (h)), Awataha advised me, on 9 November 2022, that it will dedicate one of the existing buildings on the site to hold tangihanga. Awataha has also advised me that it will update its website to enable members of the community to book tangihanga and to read the terms and conditions that will apply. I consider these undertakings demonstrate an intention to fulfil the terms of the Lease and a willingness to change current practices.

87. In respect of the failure to provide regular opportunities for new members to join Awataha (clause (p)), I have not received any undertakings from Awataha. To date, Awataha has been focused on a change in governance model instead of adding more members to the existing incorporated society. However, I have the ability, under clause (q), to require Awataha to hold a special general meeting after calling for applications for membership.

Relevant interests

88. As set out above, the breaches are clearly causing significant frustration and distress to Ngāti Whātua and members of the local Māori and wider community. I have received independent tikanga advice that spoke to the importance of tangihanga within a marae context and of the need for marae to be a place where issues are debated.

89. On the other hand, I am aware of the valuable services that Awataha is currently providing to the local community. The community is deriving benefit from the marae and there is the potential for this benefit to the community to increase. I am aware of Awataha's undertakings to the effect that it would dedicate a building to tangihanga and improve the information available on its website, and take these undertakings as evidence of a good faith intention to operate differently.

90. I take into account that forfeiture of the Lease would cease Awataha's operations on the Land and would have a potential impact on third party occupiers (i.e. those kaumātua living in housing on the Land and those who run and use the health centre). I further note that, where a lease is forfeited, there is no requirement on the Crown to re-lease the land or to issue any lease for the same purpose or on the same conditions.

Decision

91. Taking all of the above considerations into account, I do not consider that forfeiture is the best course of action at this time. I consider the breaches are serious, but can be remedied, and that the community benefits from the presence of the marae and the many services it offers. I have taken into account Awataha's willingness to change the way it operates, which is necessary in order to remedy the breaches.

92. I cannot tell Awataha how to remedy its breaches of the Lease as I do not have the power to do so. Nor can I pre-empt any future decision I may make regarding Lease breach. However, below, I set out suggestions that I strongly recommend Awataha consider.

93. In respect of clause (h):

93.1 I consider that Awataha dedicating one of the existing buildings on the site to hold tangihanga is an appropriate interim action while the wharenui remains unavailable, that properly addresses the immediate concerns of Ngāti Whātua and other local Māori.

93.2 However, clause (h) of the Lease also refers to providing accommodation for mourners during tangihanga. I consider that this would include mourners having access to food and ablutions facilities, as well as places for people to sleep. I suggest that Awataha identify and set aside specific areas for mourners to be accommodated as needed, and include this in the information available for potential users of the Land.

93.3 While the marae website includes an explanation of the rāhui and Awataha's view on how tangihanga can be held, it is silent on how members of the community can ask to hold tangihanga and the facilities that are available for this. Awataha has advised me that it will update its website to enable members of the community to book tangihanga and to read the terms and conditions that will apply. I suggest that Awataha:

93.3.1 publicly advertise that the site is available for use,

93.3.2 provide information to the public regarding how decisions about booking and usage for tangihanga will be made,

93.3.3 develop and publish a clear policy for how tangihanga will take priority to the other operations of the marae, including setting out the circumstances where they could not be held, and

93.3.4 provide a rationale to the requestor if requests are turned down.

93.4 While tangihanga can be accommodated in buildings other than the wharenui, I am aware that the wider community wishes to have the rāhui lifted on the wharenui. I suggest that Awataha reconsider the ongoing necessity of the rāhui and/or prioritise completion of the wharenui as a way to help restore the community's faith and to make clear that the marae is functioning.

94. In respect of Awataha's breach of clause (p):

94.1 I exercise my power as lessor under clause (q) of the Lease to require Awataha to hold a special general meeting to consider applications for membership. I recognise that any special meeting will be undertaken after calling for applications, and in accordance with Awataha's rules.

94.2 Toitū Te Whenua attended the last such meeting in 2017, and I will ask for a representative of the department to attend on my behalf to observe and report back to me on the proceedings. I cannot direct the outcome of such

a special general meeting, but I would expect to see an open and transparent decision-making process, with the goal of welcoming new members to the society, in accordance with the requirements of the Lease. In particular, Awataha should not be waiting until a change in governance structure before seeking new members. This should be a regular and fluid action in providing for new members in accordance with the terms of the Lease and so as to be consistent with the purpose of the Lease that Awataha operate a functioning marae.

95. While I cannot insist on this as lessor, I also think that Awataha needs to engage more fully with Ngāti Whātua, other local iwi with interests in the Land and members of the community. This could be through facilitated hui or mediation.

Summary of findings on rehearing grounds

96. This is a rehearing, rather than an appeal, so I do not need to set out where I disagree with Ms Forrest's decision. However, for completeness, I summarise here my decision as it relates to Ms Forrest's decision and Ngāti Whātua's objections to that decision in seeking a rehearing.

Claim that decision is ultra vires / decision maker acted outside statutory role

97. Under the Act the Commissioner is responsible for enforcing leases of Crown land. As part of this, the Commissioner has the discretion to recommend lease forfeiture in certain circumstances. As set out above, there are a number of relevant considerations when determining whether the discretion ought to be exercised.

98. In the present instance, I consider that, on balance, the discretion to commence lease forfeiture should not be exercised at this time. Although I understand the frustrations and distress associated with Awataha's non-compliance with aspects of the Lease, I consider that it is, on balance, appropriate to offer a further opportunity to Awataha to comply with those aspects of the Lease. In reaching my decision, I have taken into account the gravity of the breaches, the likelihood of remedying the breaches, and relevant interests including Māori interests.

99. I note that the power to recommend forfeiture under s 146 remains open to me should compliance with the terms of the Lease not occur following this decision.

Interpretation of clause 4

100. I consider clause 4 required a functioning marae to be in place by 31 December 1993. I do not consider there is any basis for concluding that there was a breach of clause 4 as of 31 December 1993. In any event, I consider it would be inappropriate for me to move to lease forfeiture resulting from any breaches of the Lease as of 31 December 1993 due to the Crown accepting rent from Awataha in the intervening period, among other actions.

Interpretation of clause (h)

101. Awataha is not sufficiently providing for tangihanga as a key function of the marae and is therefore in breach of clause (h) of the Lease. I note this finding departs from Ms Forrest's decision.

Limitation period

102. In terms of Ms Forrest's finding that clause 4 is subject to a limitation period, I note that my finding that there was no breach as of 31 December 1993 means I do not need to consider whether a limitation period applies in respect of this clause. For completeness, however, I consider s 7(1) of the Limitation Act applies in the context of leases of Crown land, meaning the limitation period for lease forfeiture resulting from a breach of the Lease is 60 years from 31 December 1993 (not 6 years, as Ms Forrest had found).

Clause (p)

103. In terms of clause (p), relating to membership of the Society, I consider that Awataha has breached this clause and have determined that the appropriate remedy is to call for a special general meeting under clause (q) for the consideration of applications for membership of the incorporated society.

Future Governance

104. In parallel to the rehearing, I have also reviewed a presentation that Awataha commissioned from Deloitte that set out high-level options for future governance structures of the marae. This included options such as creating a trust, including with possible Māori Authority status, to replace the incorporated society. Awataha advised that it was willing to engage with Te Puni Kōkiri and consult with members of the community on any proposal or options for changing its structure.

105. After engaging with Te Puni Kōkiri I understand that there are examples of other marae in the Auckland area that are run under a charitable trust governance model. I am also aware of the new Incorporated Societies Act 2022, which recognises the role of tikanga in the administration of a society[18] and more modernised rules about the operation of the society.

106. In my role as lessor, my concern with any change in the governance structure or entity that holds the Lease is to ensure that the local community can participate and become part of the governance structure for the marae. I am concerned that the membership of the incorporated society is low, given the size of the Māori community on the North Shore (around 8,000 people). There is clearly a pool of people who wish to be involved in the running of the marae but feel marginalised or excluded from doing so. It does not appear that Awataha have sought to address this. There is also a concern about the future of the incorporated society and succession planning, and scope for it to realise its intended development plans.

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[18] See s3(d)(iii) of the Act.

107. It is clear members of the community wish to be involved with the running of the marae but have not been able to become members of the incorporated society. The small size of membership appears to be adding to the perception amongst some in the wider community that Awataha is operating within its current membership with little involvement of others, by excluding a range of people who have wanted to be involved.

108. Any transfer of the Lease to a new body such as a charitable trust would require my consent under s 89 of the Land Act. This would provide the Crown with the opportunity to consider the proposal, and whether any further conditions need to be put in place. I anticipate that this may also necessitate variations to the Lease, as parts of the Lease refer specifically to the incorporated society status. An alternative may be for the parties to agree to cancel the Lease and move to a new lease instrument that reflects the situation. Either option is still to be considered should it become necessary.

109. I am prepared to consider any future new application to transfer the Lease to a different governance model, such as a charitable trust. However, as part of that consideration Awataha would need to:

109.1 undertake a public consultation process to gauge support from the local community on such a move and on any objectives of the governance body, and the outcome of this to be provided to me,

109.2 engage with Te Puni Kōkiri in the development of any proposal, and provide the views of Te Puni Kōkiri as part of any transfer application,

109.3 Set out clear terms in the governance instrument that:

109.3.1 enable any member of the local community to put themselves forward and be considered/elected to the Board or as Trustees,

109.3.2 provides for as wide a range of interests to be identified and as broad participation as possible,

109.3.3 provides for mana whenua to have a voice in the running of the marae.

109.4 compliance with any other Toitū Te Whenua requirements.

110. Should I receive an application for a change of governance, I would also seek to consult with the community on such a proposal before making a decision. As the Crown provided the Land as a site for a local marae, I consider that there would be public interest in such a change of governance. The Crown provided the Land, now at a peppercorn rental, on lease terms to an incorporated society that would have a clear process for allowing changes in membership over time. In addition, any change to a different structure would require a variation to the Lease, as it was written specifically to reflect that the lessee was an incorporated society. I consider that it is

appropriate that, as lessor, I gauge the community's interest in such a change directly to inform my decision.

111. I am not predetermining whether such an application would be successful, as I still retain discretion on whether to approve a transfer of the Lease under the Land Act. The above simply sets out the information I would require to support any application to transfer the Lease.

Other issues raised during the rehearing in respect of which I do not have any powers or duties

112. Ngāti Whātua raised various additional concerns during the rehearing, namely the running of the marae by certain families, fencing and subsidence. I also became aware of an issue regarding the filing of financial documents required of incorporated societies.

113. These issues are outside the scope of my functions as Commissioner and Lessor for reasons set out below. However, I have set out the concerns and make some comments where appropriate.

Running of marae

114. There were concerns about individuals involved in the running the marae and the concern that it was being run by certain families, including those who may have pecuniary interests in the operations that occur on the property. As an incorporated society Awataha can appoint whoever it chooses to operate or elect board members in compliance with its rules. I cannot determine which individuals should be involved in the day-to-day running of the property.

115. I received comments about the governance of Awataha and the ability of board members to participate in the dealings with the marae. The operation of Awataha and whether it is complying with its rules as an incorporated society for things such as board meetings are not matters that I can address.

Fencing

116. One of the concerns that had been raised by members of Te Raki Paewhenua community was the erection of new fencing between the marae administration block and the health centre car park. I noted this fence on my visit, and the presence of no trespassing signs at points along the fence, which was approximately 1.9m tall. Awataha verbally advised that the fence around the administration block was built to delineate the marae from the health centre and prevent people wandering into the area where pōwhiri are undertaken. Awataha also advised its intention to move the entrance back to its previous location.

117. I understand the view from some in the community that the fence presents a barrier to visitors and may be perceived as unwelcoming – the fence is the first visible indication of the marae when a visitor comes down the driveway. While I also accept the need to delineate the marae buildings from the rest of the site, I understand that Awataha is looking to relocate the entrance and replace the fencing with alternative

fencing to delineate the marae space. I encourage Awataha to prioritise and expedite this work.

Subsidence

118. During the site visit I observed an area of subsidence at the front of the wharenui, between the marae buildings and the boundary of the Lease adjoining the northern motorway. This appeared to be an area of land that had dropped to be around 20-50 centimetres below the surrounding land. Awataha has advised that due to the potential hazard this creates, it has not been possible to make full use of the marae ātea for speeches and welcoming guests. This was also raised in correspondence subsequently received from Awataha.

119. Because this subsidence may have an ongoing impact on the future use of the marae ātea I asked Toitū Te Whenua to investigate further. An engineering report has been commissioned and Toitū Te Whenua will advise Awataha directly, including what further action if any needs to be taken.

Financial statements

120. As part of the rehearing consideration, I note that Awataha has not filed any financial statements as required as an incorporated society since at least 2018. I consider that this should be addressed directly by Awataha as a matter of urgency. If not, this may lead to action by the Registrar of Incorporated Societies ("the **Registrar**") that would affect its status, and therefore its ability to hold the Lease.

121. I acknowledge I do not have any ability to look at the filings by Awataha or address any breach of the requirements of the relevant legislation applying to incorporated societies, or the veracity of the financial information that has been filed. Those are matters for the Registrar.[19]

122. However, as the Lease is with the incorporated society, I do have an interest in ensuring that the Lease remains current with a valid legal entity. I consider that the filing of returns should be rectified as a matter of urgency.[20]

Other matters that are not relevant to my decision

123. In the interests of transparency, I note that I am aware that in 2023 the then local MP and the Minister for Māori Development visited the Land together and discussed matters with Awataha, including asking Awataha to develop a community engagement plan to engage with leaders of the local community and seek to address some of their concerns. This decision is independent of that work.

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19 I note that there have been filings from the Te Whānau o Awataha Trust ("the Trust") in compliance with the requirements of the Charities Act 2005. However, I have not identified that the Trust has a control relationship in terms of the incorporated society and the performance report of the Trust is silent on any relationship with the incorporated society.

20 I understand that land held by an incorporated society that ceases to exist (or is removed from the Incorporated Society register) may pass to the Crown bona vacantia. In this case the Lease could be resumed and merge back to the underlying Crown land estate.

124. I am also aware that the Land has been included in the Agreement-In-Principle between the Crown and Ngāti Whātua to settle its Treaty settlement claims, and that the Crown is negotiating a deed of settlement. While that may result in a change of ownership of the Land (with the Land transferring subject to the Lease), this is not a matter that is relevant to my decision.

Final observations

125. I recognise that it has taken some time to reach a final decision, and that both parties and the local community have wished to arrive at an outcome. It has, however, been important for me to gather all relevant information regarding the meaning and effect of the terms of the Lease and events that have taken place in fulfilment of and / or in breach of those terms. It has also been important for me to seek independent and internal advice as needed.

126. I also recognise that concerns about bias have been raised with me. I acknowledge and am alive to these concerns but reject any allegation of bias (apparent or perceived). I consider that I have made decisions to date following appropriate consultation with both parties and based on the evidence before me. In the interests of transparency, I have set out the key events in the rehearing process as **Appendix Four**.

APPENDIX ONE: RENEWAL OF LEASE

1. Awataha has a contractual right to a renewal on the same terms and conditions every 33 years. The Commissioner has no discretion to refuse or delay a renewal. Consequently, on 14 December 2020, I issued a Memorandum of Renewal in respect of the Lease, confirming that the Lease was renewed for a further 33 years (until 2053). I advised the parties that I was addressing the lease renewal separately from the other issues (which are all addressed in this decision).

2. As part of that renewal, I confirmed that the rental was a peppercorn rental, consistent with the Crown's agreement in 2005 that this would be the basis of the rental going forward.

3. I consider that the renewal did not create a new Lease but was a renewal of the original Lease. This is in line with the relevant provisions of the Land Act and the wording of the Lease. Section 170 of the Land Act provides that a memorandum of renewal can be signed and registered. The memorandum was signed in December 2020 by both parties and states that the term of the Lease is "renewed for a term of 33 years commencing on the 1st day of January 2021." I consider that the renewal did not create a new Lease but rather continued the existing Lease on the same agreed terms for a further period of time (in this case 33 years). The terms, including the obligations on Awataha as lessee, continue uninterrupted. As a result, I have the authority to consider any matters that occurred before January 2021.

4. Awataha disputes this view, relying on the *Honeybees* Court decision, which held that a renewal of the lease in question resulted in a new lease taking effect at the date of the renewal. While I acknowledge their view, I nonetheless consider that the above position is correct. The situation with the renewal of leases over Crown land is different from the above case. Section 170 of the Land Act applies to the renewal of Awataha's lease. This provides that on renewal, the Commissioner may, instead of issuing a new lease, prepare a memorandum of renewal or variation, containing the details of the renewed lease. My decision to renew the Lease provided that it was renewed for a term of 33 years, and to document this is issued a memorandum of renewal in terms of section 170. I do not consider that it created a new lease, but renewed the existing Lease.

5. I also note that the concerns about breaches of the Lease relating to membership and the holding of tangihanga have continued to be made since the renewal of the lease. In any case, even if the renewal created a new lease, the breaches of the Lease, if made out, are ongoing so would apply to any new lease if any such was created.

APPENDIX TWO: LEASE, INCORPORATED SOCIETY CONSTITUTION AND STATUTORY SCHEME

The Lease

1. The Lease is contained in a Deed of Lease dated 1 January 1988 between Her Majesty the Queen as Lessor, and Awataha Marae Incorporated Society as Lessee. The terms of the Lease are summarised below as follows:

    1.1 Clause 1: The Lessee to pay the rent reserved at all times, and also to pay all rates, taxes, assessments and outgoings.

    1.2 Clause 2: The Lessee to hold and use the Land for the Lessee's own use and benefit and will not assign, sublet, charge or otherwise part with possession of all or part of the Land (other than by subletting for not more than three months in the aggregate in any one year) without the previous approval in writing of the Lessor.

    1.3 Clause 3: The Lessee will cut and trim all live hedges and clear and keep clear the Land from noxious weeds throughout the term of the Lease.

    1.4 Clause 4: The Lessee acknowledges that the Land has been available by the Lessor as a site for a marae. The Lessee accordingly undertakes 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 31 December 1993.

    1.5 Clause 5: Before making improvements to the Land, the Lessee must obtain the consent in writing of the Regional Manager. If consent is not obtained, the Lessor may require the Lessee to remove the improvements.

    1.6 Clause 6: The Lessee throughout the term of the Lease to keep all buildings, fences, gates and other structures in good repair, order and condition, and yield them at the expiration of the Lease.

    1.7 Clause 7: The Lessee at its own expense to make proper sanitary arrangements as required by the Regional Manager or other competent authority and at reasonable periods will remove and destroy all rubbish on the Land.

    1.8 Clause 8: The Regional Manager and his agents may at all reasonable times enter the Land to inspect it and the improvements, and may by notice in writing require repairs etc.

    1.9 Clause 9: The Lessee not to engage in any noxious, noisome or offensive trade or business upon the Land, which may be a nuisance to the neighbourhood.

    1.10 Clause 10: Subject to clause 3, the Lessee will not cut, harm, remove or destroy any tree or shrub, or use or remove any gravel or sand or otherwise

injure the surface of the Land, without the written consent of the Regional Manager.

1.10.1 Clause (a): The Crown to retain the right to minerals etc on or under the Land.

1.10.2 Clause (b): The Lessee has no right to acquire the fee simple of the Land.

1.10.3 Clause (c): When the Lease expires, the Lessee has the right to acquire a new Lease for 33 years from expiry on the same covenants and provisions.

1.10.4 Clause (d): No less than six months prior to the expiry of the Lease, the Regional Manager must deliver to the Lessee a renewal notice in writing, and the Lessee must advise the Regional Manager within three months of receipt whether it accepts the renewed Lease.

1.10.5 Clause (e): if the Lessee does not accept the renewed Lease, then a new Lease of the Land to be offered in accordance with the provisions of section 67(2), 136 and 137 of the Act.

1.10.6 Clause (f): if the Lessee leaves New Zealand or abandons the Land or cannot be found or neglects or refuses or fails to comply with the covenants and conditions of the Lease, or defaults on rent or other payments for six months, then the Lessor may declare the Lease to be forfeited under section 146 of the Act.

1.10.7 Clause (g): The Lease to take effect as a Lease under section 67(2) of the Act.

1.10.8 Clause (h): The Lessee must use the Land for the purposes set out in the objects of the Society[21], and also for traditional marae activities where tangihanga and accommodation for mourners may take precedence over all other activities.

1.10.9 Clause (i): The Lessee may apply to the Māori Land Court to have the Land reserved as a Māori reservation for marae purposes.

1.10.10 Clause (j): The Lessee has insurance obligations.

1.10.11 Clause (k): The Lessee must not do or cause or suffer or permit to be done anything to prejudice the Lessor in its tenure or control of the Land or render the Lessor liable for any action, claim, demand or proceedings, and the Lessee indemnifies the Lessor against loss or damage arising from such claim, demand or proceedings.

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21 The Awataha Marae Incorporated Society.

1.10.12 Clause (l): The Lessee must ensure it organises and plans its activities and use of buildings so as not to adversely affect the public and nearby inhabitants and properties.

1.10.13 Clause (m): The Lessee will comply with specified noise levels.

1.10.14 Clause (n): The Lessee may from time to time hire buildings on the Land for a charge to any responsible and respectable person.

1.10.15 Clause (o): The Lessee to carry out to the Lessor's satisfaction any landscaping of the Land required to screen the Leased area from adjacent properties.

1.10.16 Clause (p): Any person of good repute and eligible for membership of the Lessee may join the Lessee upon paying the necessary fee (if any) and complying with the Lessee's usual rules.

1.10.17 Clause (q): Notwithstanding anything to the contrary in the Lessee's rules, if a person is denied membership, the Lessee if requested by the Lessor shall call a special meeting of members of the Lessee and take a vote on the election of the person, and if 2/3 of the voters are in favour of the person's admission, then the person will be entitled to all privileges, and subject to all duties, incidental to membership of the Lessee.

1.10.18 Clause (r): On expiration or termination of the Lease, the Lessee must remove all improvements and leave the Land in the same condition as the commencement of the Lease. If not done within six months of termination, the improvements will be deemed to have been abandoned and will revert to the Lessor without compensation.

The Constitution

2. The Lease is unusual in that it incorporates reference to the objects of the Lessee (the Awataha Marae Society Incorporated, the **Society**), and to membership of such, directly into its terms and conditions (see clauses (h), (p) and (q) of the Lease).

3. Key clauses of the Constitution are as follows:

3.1 There are 8 objects of the Society set out in clause 2 namely (in summary):

3.1.1 To express the holistic concept of Wairua Māori/spirituality, with the guiding values of manaakitanga, whakawhanaungatanga, kaitiakitanga, tino rangatiratanga and Te Tiriti o Waitangi.

3.1.2 To promote, establish and advance the aims of the Society which includes programmes related to self-sustainability, health,

education, employment, tikanga Māori, resources and economic development, arts and culture.

3.1.3 To promote, develop and encourage better understanding of tikanga Māori to the wider community.

3.1.4 To provide a centre for recreational, social, cultural, educational and spiritual activities that advance the social welfare of Māori.

3.1.5 To promote the construction, establishment and maintenance of a marae and ancillary building at Akoranga Drive, Northcote.

3.1.6 To provide a safe environment and user friendly atmosphere at Awataha Marae.

3.1.7 To acquire, sell, improve, manage, develop, exchange, Lease, mortgage or otherwise deal with real and personal property and borrow or raise moneys.

3.1.8 Such other activities as the Marae Society of the Governing Board shall from time to time resolve and prove necessary to obtain the above objectives.

3.2 In clause 3, membership is unlimited (in accordance with the objects of the Society) and includes ordinary members, tangata rongonui, beneficiaries/students, whanau and corporate members.

3.3 The Constitution contains clauses governing membership and its rights and duties, meetings, the structure of the Society, the powers of the Governing Board, meetings of the Governing Board, and other boilerplate Incorporated Society clauses.

The Statutory Scheme

4. Section 17 of the Act is set out in full in the body of the decision. Other relevant provisions are summarised below.

5. Section 18 of the Act allows for appeal to the High Court by any lessee or licensee if it considers itself aggrieved by any decision of the Commissioner affecting the Lease or licence.

6. The Commissioner is appointed under section 24AA and the Public Service Act 2020. He or she must report directly to the Minister of Land on the exercise and performance of the Commissioner's statutory powers and functions (s 24AA(2)). Section 24AB provides that the Commissioner may, under clauses 2 and 3 of Schedule 6 of the Public Service Act 2020, delegate to Toitū te Whenua employees, in the same manner and to the same extent as if the Commissioner were the Toitū te Whenua Chief Executive, any power conferred by statute on the Commissioner, or delegated under statute to the Commissioner by a Minister of the Crown.

7. The powers and duties of the Commissioner are set out in section 24 of the Act and include, for the purposes of this rehearing:

   7.1 Enforcing contracts respecting sales, Leases, licences, or other disposition of Crown land, and to compel payment of money due to the Crown in respect thereof (section 24(1)(f)).

   7.2 Resuming possession of Crown land on non-performance of contracts (section 24(1)(h)).

   7.3 Recovering rents, purchase moneys and other moneys due to the Crown in respect of any sales, Leases, licences, or other disposition of Crown land (section 24(1)(i)).

8. The above powers may be delegated (section 24(2)).

9. I accept that, as pointed out by Ngāti Whātua in its application for rehearing, the Commissioner's section 24 powers have a public law overlay. That must be so, given the Commissioner's statutory role as an officer of the Crown. Ngāti Whātua point to the following statement of the High Court in this regard in *Webster v Auckland Harbour Board* [1983] NZLR 646 at 650:

> "Undoubtedly a public body which has, as here, lawfully entered into a contract is bound by it and has the same powers under it as any other contracting party. But in exercising the contractual powers it may also be restricted by its public law responsibilities. The result may be that a decision taken by the public body cannot be treated as purely in the realm of contract; it may be at the same time a decision governed to some extent by statute."

10. Section 25 addresses recovery of possession of Crown land in the event of, *inter alia*, expiry or forfeiture of a Lease. Section 26 allows for inspection of Crown land.

11. Section 67(2) allows for Crown land, available for disposal under the Act that ought not to be permanently alienated from the Crown by way of sale, to be Leased for any term not exceeding 33 years, with or without a right of renewal, perpetual or otherwise for the same term. Any such Lease and renewal is at such rent and subject to such terms and conditions as the Commissioner in each case determines, but no such Lease and no renewal of such Lease confers any right of acquiring the fee simple.

12. Part 5 of the Act deals with Leases and licences. Part 8 deals with renewals of renewable Leases. Part 9 deals with remissions, revaluations and forfeitures. Under section 146(1), where the Commissioner has reason to believe that any lessee or licensee is not fulfilling the conditions of the Lease or license "*in a bona fide manner according to their true intent and purport*", the Commissioner "*after holding an inquiry into the case and giving the lessee or licensee an opportunity of explaining the non-fulfilment of the conditions*" and being satisfied that any of the grounds specified in s 146(2) have been established may "*with the approval of the Minister, by resolution declare the Lease or licence to be forfeited.*"

13. The grounds on which a Lease or license may be declared forfeit are set out in section 146(2) and may be any one of the following:

    13.1 That the rent or other payments under the Lease or licence have not been paid within 2 months after the time when payment was due.

    13.2 That the lessee or licensee has not occupied the Land comprised in its Lease or licence exclusively for its own use and benefit, or has done so nominally but has permitted other persons to derive the virtual use and benefit thereof.

    13.3 That the lessee or licensee has not complied with the conditions implied in its Lease or licence by the Act relating to residence, the proper management of the Land, and the effecting of improvements, or with any other conditions express or implied in the Lease or licence.

    13.4 That the lessee or licensee has left New Zealand and cannot be found, or has abandoned the Land comprised in its Lease or licence, or is deceased and no claimant for the Lease or licence can be found.

14. Subject to the section 18 right of appeal, in the case of forfeiture the land comprised in the Lease or licence, with all improvements, shall revert to the Crown and, save as provided for in section 150 or section 151, the lessee or licensee shall not be entitled to any compensation (section 146(3)). The lessee remains liable for rent up to forfeiture (section 148).

15. Section 149 provides that, after forfeiture, the Commissioner must cause a valuation to be made of improvements effected or purchased by the lessee and, subject to section 151, as soon as possible after valuation, offer the Land for acquisition under the Act, with improvements to be purchased by the incoming lessee or licensee (section 150).

APPENDIX THREE: SUMMARY OF MS FORREST'S DECISION

1. The reasons for the decision under challenge by Ngāti Whātua are contained in a Memorandum of Decision by Stephanie Forrest, the Toitū te Whenua Group Manager Land and Property[22] dated 3 July 2020.

2. A brief summary of the issues considered in the decision are:

   2.1 The rates arrears which Awataha has failed to pay to Auckland Council in alleged breach of the Deed of Lease.

   2.2 Other alleged breaches of the Deed of Lease, brought to Ms Forrest's 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.

   2.3 The renewal of the Deed of Lease at the expiry of the current 33-year term on 31 December 2020.

   2.4 The transfer of the Deed of Lease to a charitable trust board established by members of Awataha.

3. Ms Forrest recorded at the outset:

> "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.
>
> 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."

4. Ms Forrest then went on in the Decision to address each of the issues raised. Her findings are summarised below.

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[22] Acting for and on behalf of the Commissioner pursuant to a delegation under section 41 of the State Sector Act 1988. Note the State Sector Act was repealed by section 132(1) of the Public Service Act 2020, and the Land Act now refers to the latter legislation.

Rates arrears

5. Ms Forrest noted that Awataha has, for a sustained period of time, failed to pay Auckland Council rates (in breach of clause 1 of the Lease and section 111 of the Act).

6. Ms Forrest decided that the breach of Lease had not been remedied by the agreement entered into between the Council and Awataha in June 2020. She noted Auckland Council's terms for the remission of rates appear to be conditions precedent, not conditions subsequent. She held that, as the rates have not yet been remitted, she considers that Awataha is still in breach of its obligations under clause 1 and section 111, but that a satisfactory arrangement is in place to remedy the breach, and therefore decided not to engage the section 146 forfeiture process at this time.

Alleged breach - Membership

7. Ms Forrest decided it was not appropriate for her to exercise her right under clause (p) at this time because:

    7.1 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.

    7.2 Any person denied membership can apply for judicial review.[23]

    7.3 The Commissioner's ultimate remedy to resolve an unremedied breach of clause (p) would be the forfeiture of the Lease. Although unresolved concerns about membership remain, this remedy would not be in the interests of either the existing or prospective members of Awataha.

8. Ms Forrest noted that clause (q) provides the Commissioner with a procedural, contractual right to require Awataha to hold a special meeting of members to consider membership applications. She stated that the Commissioner had exercised this right in the context of the current dispute between members, and some prospective members, in 2018 and that to do so again is unlikely to mean the existing membership would change their decision. Ms Forrest did not rule out exercising this power again in the context of the current dispute, noting she would be willing to require Awataha to call a special meeting if requested to do so by a prospective member declined membership subsequent to her decision.

Alleged breaches – functioning marae, permitted uses and tangihanga

9. On this issue, Ms Forrest stated:

> "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

[23] Relying on the decision of Kós J in *Tamaki v The Māori Women's Welfare League Inc* [2011] NZAR 605.

> 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."

10. In declining to issue a section 246 Property Law Act in respect of clause 4, Ms Forrest noted that she had carefully considered seeking 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 Lease. However she formed the view that, even if she were satisfied on the basis of tikanga advice (noting that such advice might lead her to a conclusion that the term is ambiguous) that there was a breach of Lease at the close of the due date of 31 December 1993, it would not be appropriate for her to attempt to take action in respect of that breach some 26 years later.

11. In considering, and finding no breach of, clause (h) of the Lease, Ms Forrest noted that she is constrained to the current objects of the incorporated society. As landlord, she said, she cannot insist that Awataha adhere to objects specified in a former constitution but no longer contained in the present constitution, nor can she question whether the objects themselves are proper. She went on to state that she had had regard to all 8 of the society's objects listed at clause 2 of its 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 obligations in clause (h) of the Lease.

Alleged breach – unauthorised subleases

12. On this issue, Ms Forrest found there to be no breach, on the grounds that the arrangements entered into are, in fact, contractual licences. She stated that 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.

Alleged breach – unauthorised construction

13. On this issue, Ms Forrest found that, on the information currently available to her, she did not consider that any failures to obtain consent were sufficient to justify serving Awataha with a section 246 notice. She did confirm she may consider this further in due course.

Alleged breach – implied term to comply with Incorporated Societies Act 1908

14. On this issue, Ms Forrest found that, after a period of time where Awataha ceased to be registered as an incorporated society, Awataha was restored to the register and so any breach was now remedied.

Assignment of Lease

15. Ms Forrest declined to agree to Awataha's request for a transfer of the Deed of Lease to a charitable trust board set up to take over Awataha's operations. In so declining,

Ms Forrest stated she was 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. She went on to state, however, that despite the advantages to Awataha of transfer, 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 Land and operates the marae.

16. Ms Forrest noted that the Commissioner would properly consider any future application for a transfer but, at a minimum, would be likely to expect that the allegations regarding the membership processes and decisions be resolved before such a request is granted.

APPENDIX FOUR: KEY EVENTS IN REHEARING PROCESS

Interim decision

1. On 21 September 2020, I received submissions in reply from Awataha and supplementary information from Ngāti Whātua. I then received further submissions from Ngāti Whātua on 23 October 2020.

2. Having considered all submissions and accompanying information, I issued a draft interim decision to the parties on 11 December 2020.

3. I received comments on the draft interim decision from Ngāti Whātua (on 16 December 2020) and Awataha (on 18 December 2020). I received further submissions from Ngāti Whātua on 22 December 2020.

4. Based on the comments received from both parties and additional submissions from Ngāti Whātua, I issued an interim decision on 18 January 2021. In summary, my interim decision reserved my final decision on forfeiture, and proposed to:

    4.1 meet with Awataha to discuss a workable plan for Awataha establishing a functioning marae and thereby achieving compliance with the Lease and with the objectives of the Society,

    4.2 obtain independent tikanga Māori advice as to the functioning of the marae, the holding of tangihanga, and the placement of a rāhui over the wharenui,

    4.3 undertake a property inspection and stocktake of improvements to the Land, and

    4.4 have Awataha set out a detailed process going forward for admitting all members of the North Shore Māori community who wish to become members of the Society and who meet the Society's membership criteria.

Draft final decision

5. In 2021, I continued to gather information to inform my final decision. In particular:

    5.1 I met with Ngāti Whātua on 31 May 2021 via an online meeting to discuss the situation at the marae, and the iwi's request for me to commence forfeiture action.

    5.2 I met with Awataha on 15 July 2021 via an online meeting to discuss Awataha's response to the issues raised by Ngāti Whātua and members of the local community, and for me to hear directly from Awataha as lessee.

    5.3 I met with the Te Puni Kōkiri Regional Manager on 24 August 2021 via an online meeting to discuss the situation at the marae and also to increase my understanding of the role, structure and operations of urban marae

5.4 I met with members of Te Raki Paewhenua, the local Māori community, on 22 September 2021. Te Raki Paewhenua wished to meet with me to outline their concerns about the operation of the marae and its governance, which are expanded on below. I note that I am not limited, under s 17 of the Land Act, to hearing only from parties when undertaking a rehearing into whether there should be a forfeiture of lease.

6. In 2022, I continued to gather relevant information by:

6.1 Obtaining internal advice from Toitū Te Whenua, including support from our Māori-Crown Relations team and the appointment of an advisor to support me on my eventual visit to the marae;[24]

6.2 Meeting with Awataha online on 4 May 2022;

6.3 Meeting with members of the local Māori community on 31 May and 1 July; and

6.4 Undertaking an inspection of the land on 19 July 2022.[25] I was accompanied on my visit by Martin Mariassouce from Te Puni Kōkiri, who supported me by providing a Te Puni Kōkiri perspective on the matters raised, and by Rob Te Moana and Brendan Fanning from Toitū Te Whenua, who took notes and engaged in the inspection. Bob Newsom also provided tikanga support during the inspection. The inspection gave me a greater understanding of the site and the operations of the marae. I was able to walk the whenua; see the buildings, including the wharenui; and discuss the programme of work and services being undertaken by Awataha on the land. Awataha advised that it was seeking to complete the wharenui subject to securing further funding.

6.5 I note that on a phone call with counsel for Ngāti Whātua, I verbally offered to meet with Ngāti Whātua at the same time, but this was declined.

7. Following the site visit, I sought further information from Awataha regarding matters that had been identified during the visit and received that information in September 2022.

8. On 17 October 2022, having considered all the relevant information, I issued a draft decision to the parties.

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[24] In 2021 there was also a Waitangi Tribunal decision to decline an application for an urgent hearing regarding the inclusion of the Land in the proposed agreement-in-principle between the Crown and Ngāti Whātua. I have reviewed this judgement, and while it relates to Treaty settlement matters I note the Court's comments on the Lease as to the status of Ngāti Whātua as mana whenua.

I note that this inspection was delayed due to COVID-19 and the limited availability of key personnel. I understand that this was the first time an employee of Toitū Te Whenua had visited the property since 2017.

Obtaining tikanga advice before making a final decision

9. I received submissions on the draft decision from Awataha on 9 November 2022 and from Ngāti Whātua on 21 November 2022. Both parties took the view that I needed to obtain tikanga advice.

10. On the advice of Te Puni Kōkiri, I then approached Bob Newsom from the Auckland War Memorial Museum – in June 2023 – to ask him to review my draft decision and the submissions I had received from the parties. I have considered both his written advice and answers to several follow-up questions as part of this decision. I provided Mr Newsom's advice to both parties for their consideration and further submissions (which both provided).