Downloaded from www.waitangitribunal.govt.nz

He Kura Whenua ka Rokohanga

Report on Claims about the Reform of Te Ture Whenua Māori Act 1993

WAI 2478

WAITANGI TRIBUNAL REPORT 2016

The cover photograph shows Whina Cooper (later Dame Whina Cooper) and her mokopuna Irenee leading off the Māori land march from Te Hapua on 14 September 1975. The marchers covered 1,100 kilometres in 30 days, and when they reached the steps of Parliament Buildings they were 5,000 strong. The photograph was taken by Michael Tubberty and is reproduced by permission of the *New Zealand Herald*.

The photograph of Kathy Ertel on page v is reproduced courtesy of Kathy Ertel & Co.

National Library of New Zealand Cataloguing-in-Publication Data

New Zealand. Waitangi Tribunal.
He kura whenua ka rokohanga: report on claims about the reform of Te Ture Whenua Māori Act 1993 / Waitangi Tribunal.
(Waitangi Tribunal report 2016)
ISBN 978-1-86956-319-6 (pbk)—ISBN 978-1-86956-320-2 (online PDF)
1. New Zealand. Te Ture Whenua Māori Act 1993. 2. Māori (New Zealand people)—Legal status, laws, etc. 3. Māori (New Zealand people)—Land tenure—Law and legislation. [1. Ture. 2. Whenua. 3. Kerēme.]
I. Title. II. Series.
346.930432—dc 23

www.waitangitribunal.govt.nz
Typeset by the Waitangi Tribunal
This report was previously released on the internet in 2016 as a pre-publication PDF file entitled *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993 – Pre-publication Version*
This edition published 2016 by Legislation Direct, Lower Hutt, New Zealand
Printed by Printlink, Lower Hutt, New Zealand
20 19 18 17 16 5 4 3 2 1
Set in Adobe Minion Pro and Cronos Pro Opticals

E te manu taikō o te ture
Kua mū te wao i tō rironga
Moe mai rā i te kōpū o Papatūānuku, te kaupapa i pakangahia e koe
Nei rā te tuku maioha ki a koe

Kathy Lee-Ann Ertel passed away on 24 February 2016. She was counsel for Maanu Paul in this inquiry. Ms Ertel was a passionate and dedicated advocate for justice. Over the past quarter century, she represented claimants in multiple Tribunal inquiries, including urgencies and district inquiries. Among her notable achievements was her lead role in the Te Ika Whenua Rivers inquiry, which led to ground-breaking findings in Māori river claims. Ms Ertel's contribution to Tribunal inquiries was such that she leaves a gap which will be very difficult to fill.

Downloaded from www.waitangitribunal.govt.nz

CONTENTS

LIST OF MAPS

LIST OF TABLES

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

The Honourable Te Ururoa Flavell
Minister for Māori Development

and

The Honourable Christopher Finlayson
Associate Minister for Māori Development

Parliament Buildings
WELLINGTON

30 June 2016

Kei ngā Minita, tēnā kōrua

Haruru ana te wao tapu nui a Tāne i te hinganga o ngā tōtara o te wao. Tangi kau ana ki a rātou kua huri ki tua o pae maumahara. Ka titoko ko te ao mārama. Tēnei te reo rāhiri ki a kōrua i tēnei wā, ā, ka tukuna atu ki a kōrua te pūrongo a Te Rōpū Whakamana i te Tiriti o Waitangi e pā ana ki te Pire mō Te Ture Whenua hou e whaia nei e te Karauna. Koinei te roanga atu o ā mātou whakakitenga hei tāpiri atu ki tērā wāhanga i puta ohorere mai i tērā marama. Nō reira, tēnei ka mihi ki a kōrua, otirā ki a koutou, tēnā koutou katoa.

This letter relates to three claims filed under section 6(1) of the Treaty of Waitangi Act 1975 alleging that the Crown, through Te Puni Kōkiri, in reviewing Te Ture Whenua Māori Act 1993 has acted in a manner inconsistent with the principles of the Treaty of Waitangi.

The first claim, Wai 2478, was filed by Marise Lant on behalf of herself and her whānau. The second claim, Wai 2480, was filed by Cletus Maanu Paul on behalf of the Mataatua District Māori Council and his hapū. The final claim, Wai 2512, was filed by Lorraine Norris, Michael Beazley, William Kapea, Owen Kingi, Ani Taniwha, Justyne Te Tana, Pouri Harris, Vivienne Taueki, and Tamati Reid on behalf of themselves and their hapū.

Level 7, 141 The Terrace, Wellington, New Zealand. Postal: DX SX11237
Fujitsu Tower, 141 The Terrace, Te Whanganui-ā-Tara, Aotearoa. Pouaka Poutāpeta: DX SX11237
Phone/Waea: 04 914 3000 Fax/Waea Whakaahua: 04 914 3001
Email/E-mēra: information@waitangitribunal.govt.nz Web/Ipurangi: www.waitangitribunal.govt.nz

MINISTRY OF JUSTICE
Tāhū o te Ture

We heard evidence into these claims over two hearings held in Wellington in November and December 2015.

The report now forwarded to you comprises five chapters with chapter 5 providing a succinct summary of the report findings and concluding with our recommendations.

Kia tīkina ake te whakataukī hai whakakapi ake i ēnei kōrero i maiohatia i roto i ngā tau: 'He kura tangata, e kore e rokohanga; he kura whenua ka rokohanga'. E haere nei ngā kōrero mō te kura whenua.

Ngā mihi, nā

Ron Crosby
Presiding Officer
Nā Te Rōpū Whakamana i te Tiriti o Waitangi

ABBREVIATIONS

app	appendix
CA	Court of Appeal
ch	chapter
cl	clause
comp	compiler
doc	document
ed	edition, editor
fol	folio
FOMA	Federation of Māori Authorities
GDP	gross domestic product
IAG	Iwi Advisers' Group
ICF	Iwi Chairs Forum
ILF	Iwi Leaders Forum
ILG	Iwi Leaders Group
LGA	Local Government Act 2002
LINZ	Land Information New Zealand
ltd	limited
MAF	Ministry of Agriculture and Fisheries
MAG	Ministerial Advisory Group
MB	minute book
MLC	Māori Land Court
MLS	Māori Land Service
MPI	Ministry for Primary Industries
n	note
no	number
NZLR	*New Zealand Law Reports*
NZIER	New Zealand Institute for Economic Research
NZMC	New Zealand Māori Council
OMA	Organisation of Māori Authorities
p, pp	page, pages
para	paragraph
PSGE	post-settlement governance entity
pt	part
PWA	Public Works Act 1981
QC	Queen's Counsel
r, rr	rule, rules
reg	regulation
RMA	Resource Management Act 1991
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
sch	schedule
sec	section (of a report or book)
TPK	Te Puni Kōkiri
TTWM	Te Ture Whenua Māori
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, endnote references to claims, documents, memoranda, papers, transcripts, and submissions are to the Wai 2478 record of inquiry, a select copy of which is reproduced in appendix 1. A full copy is available on request from the Waitangi Tribunal.

Downloaded from www.waitangitribunal.govt.nz

CHAPTER 1

HE KUPU WHAKATAKI / INTRODUCTION TO THE URGENT INQUIRY

1.1 Introduction

This report is the result of an urgent inquiry into claims about the Crown's proposed repeal and reform of Te Ture Whenua Māori Act 1993 (the 1993 Act). That Act was a milestone in the history of Māori land legislation in New Zealand. It marked the first time that retention, rather than alienation, was a central objective of the legislation governing Māori freehold land. At the same time, the Act also encouraged the utilisation by Māori of their land for the benefit of Māori and their whānau and hapū. This dual kaupapa – of retention and utilisation – was to be upheld by a refocused Māori Land Court, which would enforce strong protections to ensure the retention of Māori land and to protect the interests of all owners.

In June 2012, the Associate Minister of Māori Affairs announced the formation of an independent review panel tasked with reviewing the 1993 Act. In their report, delivered to the Minister in July 2013, the review panel recommended that the 1993 Act be repealed and replaced by a new legislative regime with owner autonomy as the central focus. The Associate Minister accepted the review panel's findings and in September 2013, Cabinet approved the development of a new Te Ture Whenua Māori Bill. After nearly two years of development, the Crown released an exposure draft of the new Bill in May 2015 and invited submissions. The Crown's current intention is to introduce the new Bill to Parliament in March 2016.

On 1 August 2014, Marise Lant filed the Wai 2478 claim with the Waitangi Tribunal. Her claim is supported by Te Whānau a Kai.[1] Ms Lant was followed on 21 August 2014 by Cletus Maanu Paul, who filed a claim (Wai 2480) on behalf of the New Zealand Māori Council (later on behalf of his hapū and the Mataatua District Māori Council). On 2 October 2014, Lorraine Norris and eight others filed a claim (Wai 2512) on behalf of themselves and their hapū.[2]

The claimants' position in this inquiry is two-fold. First, they argue that only Māori, and not the Crown, can initiate a review into the legislation governing Māori land, a significant taonga tuku iho. They say that the Treaty of Waitangi guaranteed Māori the right to control their taonga, including land. The claimants do not accept that the current review process was initiated by Māori and instead argue that it has been led by the Crown, and is pursuing the Crown's policy objectives rather than the aspirations of Māori land owners. They say that the Crown's approach to the current review and reform, in

which Māori have been reduced to stakeholder status, is inconsistent with the Treaty's guarantee of tino rangatiratanga. The claimants consider that the Crown instead requires the full, informed, and free consent of Māori before introducing the Bill. Secondly, the claimants argue that the provisions of the exposure draft of the new Bill (as well as subsequent drafts) are prejudicial to Māori and in breach of Treaty principles. They consider that the provisions of the draft Bill weaken the fundamental objective of land retention, and the protections afforded to Māori landowners (particularly those who are unable to participate in decisions or who hold minority interests). The claimants further consider that the Bill fails to address a number of real barriers to the utilisation of Māori land, including resourcing, governance training, landlocked land, and rating.

By contrast, the Crown does not agree that only Māori can lead a review into the 1993 Act. Nor does it accept that Treaty principles require it to obtain consent from Māori before introducing the Bill to the House. Instead, the Crown argues that it must make an informed decision. In these circumstances, where Māori land is the central issue, the Crown accepts that robust consultation is required in order for it to make such an informed decision. The Crown considers that the current review process was Māori-instigated and responded to concerns expressed by Māori with the operation of the 1993 Act over the past 20 years. As for the draft Bill itself, the Crown says that it is Treaty compliant, and that its provisions are the result of extensive consultation with Māori. The Bill's two central reforms – the participating owners model and the new governance models – are intended to enhance owner autonomy while also facilitating greater utilisation of Māori land. The Crown considers that the new Bill offers at least the same, and in some cases greater, protections against alienation as the 1993 Act.

1.2 The Parties in this Inquiry

The claimants in our inquiry are all Māori landowners. Marise Lant, the named claimant for Wai 2478, is a former Māori Land Court staffer. As noted, her claim is supported by Te Whānau a Kai. Cletus Maanu Paul, the named claimant for Wai 2480, is the co-chair of the New Zealand Māori Council and the chair of the Mataatua District Māori Council. The Wai 2512 claimants are Lorraine Norris, Michael Beazley, William Kapea, Owen Kingi, Ani Taniwha, Justyne Te Tana, Pouri Harris, Vivienne Taueki, and Tamati Reid. They have submitted their claim on behalf of a range of hapū from around the North Island.

There are also interested parties to our inquiry. On 16 September 2015, the presiding officer granted interested party status to Nellie Rata, and to Pita Tipene, Rudolph Taylor, and Te Hapae Ashby on behalf of Te Kotahitanga o Nga Hapū Ngāpuhi.[3]

The claimants and the interested parties in our inquiry were represented by Leo Watson, the late Kathy Ertel, Robyn Zwaan, Linda Thornton, Bryce Lyall, Paul Harman, and Annette Sykes.

The main Crown agency in our inquiry is Te Puni Kōkiri (TPK). It is the agency responsible for the administration of Te Ture Whenua Māori Act 1993 and has been responsible for leading the Crown's work in the review and reform process. The Crown was represented in hearings by the Solicitor General, Michael Heron QC, and also by Dr Damen Ward, Caitlin McKay, and Gillian Gillies.

1.3 The Events Leading to the Urgent Inquiry

Following the 2011 general election, the Honourable Christopher Finlayson was appointed as the Associate Minister of Māori Affairs. In January 2012, he was delegated responsibility for conducting a review of Te Ture Whenua Māori Act 1993.[4]

In June 2012, the Associate Minister of Māori Affairs appointed an independent panel of experts to review the 1993 Act and to recommend legislative interventions to help Māori landowners achieve their aspirations. The panel first conducted a review of existing literature on the Act and also met with 'selected stakeholders', including the judges of the Māori Land Court, the Māori Trustee, and representatives of major banks. In March 2013, the panel published a discussion document based on five key propositions for reform:

- utilisation of Māori land should be able to be determined by a majority of engaged owners;
- all Māori land should be capable of utilisation and effective administration;
- Māori land should have effective, fit for purpose, governance;
- there should be an enabling institutional framework to support owners of Māori land to make decisions and resolve any disputes; and
- excessive fragmentation of Māori land should be discouraged.[5]

Following the release of their discussion document, the review panel held 20 consultation hui with Māori nationwide between April and June 2013. They also invited written submissions, of which 189 were received. After analysing the feedback they had received during the consultation process, the review panel submitted their final report to the Associate Minister in July 2013.[6] They recommended a series of changes to the legislation governing Māori land, which we consider in more detail in chapter 3. The panel concluded that new legislation, rather than amendments to the existing Act, was required to best give effect to their recommendations. The panel's report was released publicly in April 2014.

The Associate Minister accepted the review panel's findings and in September 2013, Cabinet agreed in principle to a proposal for a new Te Ture Whenua Māori Bill which would implement the review panel's recommendations. The Associate Minister of Māori Affairs was invited to issue drafting instructions to the Parliamentary Counsel Office.[7]

Following Cabinet's decision, a technical panel was formed to commence policy work for a new Bill. Around the same time, the Associate Minister of Māori Affairs began holding a series of presentations on the outcome of the review and the Government's legislative intentions to groups of Māori land owners and administrators. These hui continued until April 2014. He told attendees that he proposed to introduce a new Bill to replace the 1993 Act which would allow for:

- engaged owners to make decisions without requiring endorsement from the Māori Land Court;
- continued protections to facilitate the retention of land;
- the appointment of external managers for under-utilised blocks;
- a clear framework for Māori land governance entities;
- more mediation, with fewer matters requiring the involvement of the Māori Land Court; and
- the ability to convert Māori freehold land to collective ownership.[8]

Once policy work had progressed further, more consultation occurred in the first half of August 2014. Approximately 1,100 people attended hui conducted by Te Puni Kōkiri and the technical panel. These hui were held in collaboration with the Te Ture Whenua Māori Iwi Leaders Group (established by the Iwi Chairs Forum) and the Federation of Māori Authorities (FOMA).[9] The hui were intended 'to inform people of the thinking to date, . . . to seek feedback and to test if there were other ideas or matters that had not occurred to the advisers'.[10]

After the September 2014 general election, ministerial responsibility for the reform of Te Ture Whenua Māori passed to the Honourable Te Ururoa Flavell, Te Minita Whanaketanga Māori (the Minister for Māori Development). In February 2015, he announced the appointment of a Ministerial Advisory Group (MAG) 'to provide independent advice . . . on the development of an exposure draft of Te Ture Whenua Māori Bill and the Māori Land Service from the perspective of those who operate within the Māori land regime'.[11] The 'Māori Land Service' was the title given to a proposed new multi-agency body, which was intended to provide enhanced delivery of the Crown's administrative services in respect of Māori land.

Following the release of a preliminary discussion paper on 16 April 2015, the MAG conducted 'pre-consultation' with a range of Māori leadership groups. On 13 May, the MAG submitted a progress report to the Minister, outlining the work they had undertaken and making recommendations for changes to the Bill.[12]

On 27 May 2015, the Government released an exposure draft of the new Te Ture Whenua Māori Bill along with a

consultation document explaining the proposed reforms (we summarise the exposure draft in the next section). The Minister also announced that 23 regional consultation hui would be held in June 2015.[13] Māori land owners were given until 3 July 2015 to make oral and written submissions. In a media statement, the Minister stressed that it was 'essential that iwi, hapū and whānau Māori are informed and engaged in this reform' and provided feedback both on the Bill's workability and whether it reflected their aspirations.[14] On 15 June, the Minister announced that, after requests from Māori during the consultation hui, he had extended the deadline for submissions on the exposure draft until 7 August.[15] In all, 1,270 people filled out attendance forms at the consultation hui, though actual attendance was possibly higher, and 392 individuals and groups filed written submissions.[16]

1.4 The Exposure Draft of Te Ture Whenua Māori Bill

Because of its importance to our report, it is necessary for us to briefly summarise the content of the May 2015 exposure draft of the new Te Ture Whenua Māori Bill, with a particular focus on the areas where the most significant changes to the current regime are proposed.

This summary does not incorporate any changes that the Crown has subsequently made to the draft Bill. We deal with those changes in chapters 3 and 4 of our report.

The consultation document released to explain the exposure draft stated that: 'The purpose of this reform of Māori land law and administration is to recognise the significance of Māori land and to create a more workable set of rules and practical supports.'[17] According to the document, the reform would result in four outcomes for Māori land owners:

- 'More autonomy over their whenua';
- 'Greater ability to utilise their whenua';
- 'Greater simplicity and efficiency working with Māori land'; and
- 'Safeguarding whenua for current and future generations.'[18]

The key proposals by which the exposure draft was to achieve these outcomes included a refocused Māori Land Court, increased powers for participating owners to make land utilisation decisions, the appointment of external managers (managing kaiwhakarite) for unutilised blocks, new governance mechanisms and standards, proposals to address fragmentation, and continued protections to ensure the retention of Māori land.

Alongside the exposure draft, the Crown also released information about a proposed Māori Land Service which was intended to undertake various functions envisaged by the Bill and to provide a one-stop-shop for Māori land owners. We discuss the Māori Land Service in chapter 4.

1.4.1 A changed role for the Māori Land Court

The most dramatic changes proposed by the exposure draft Bill concerned the role of the Māori Land Court. The consultation paper suggested that, while the court would retain the discretion to consider the merits of decisions which would permanently affect ownership interests, such as dispositions and the collectivisation of interests, it would have less of a role in 'decisions that reflect the land owners exercising autonomy/rangatiratanga'.[19] In those instances, which include decisions relating to governance agreements and asset management plans, the court's power of review would be confined to procedural grounds.

The exposure draft also proposed a new compulsory alternative dispute resolution mechanism. Rather than go to the court in the first instance, parties would instead be required to first take their disputes through an alternative dispute resolution process. On receipt of a notice of dispute from either a concerned party or the Māori Land Court, the Māori Land Service would be responsible for appointing a qualified kaitakawaenga (mediator) to assist the parties to resolve the dispute. Parties would be able to elect to give the kaitakawaenga the power to make written recommendations or to make a binding decision on the dispute. Disputes would only go to court if they were unable to be resolved.[20]

In addition, the exposure draft proposed the transfer of

several functions currently exercised by the court to the Māori Land Service. The most notable of these functions included registering the appointment of governance bodies (see section 1.4.4) and the processing of successions, both of which were to become administrative matters.

1.4.2 The participating owners model

In addition to the diminished role for the court to confirm decisions made by owners, the exposure draft also proposed that owners who participate in decisions (participating owners) would have more ability to make decisions to use or develop land without requiring approval from all owners. This proposal, the consultation document suggested, was intended to overcome the practical impossibility of getting 'enough landowners to participate in and approve decisions about the use and development of Māori land'.[21]

In the exposure draft of the Bill, some of the decisions covered by the participating owners model included:

- those relating to the establishment and dissolution of rangatōpū (the new governance entities), including the approval and amendment of governance agreements and land management plans;
- aggregations and amalgamations;
- granting of leases up to 52 years; and
- establishing a whenua tāpui.[22]

The approval of either 50 per cent or 75 per cent of participating owners would be required for these decisions. In addition, owners would also have to meet 'participation thresholds' (quorums, essentially) which would vary depending on the number of owners of the block. If a meeting failed to meet the participation threshold in the first instance, the Bill provided that a second meeting could be held at which no participation threshold was necessary. The decisions made by the owners attending and participating in the decisions at a second meeting, therefore, would become binding on all owners.[23] To ensure the interests of owners were protected, this process would be subject to notice requirements and a review by the Māori Land Court of the procedure that had been followed.

1.4.3 The managing kaiwhakarite regime

To facilitate utilisation where land blocks are unutilised, have no governance body, and the owners are not able to be located, the exposure draft proposed that external managers (known as managing kaiwhakarite) could be appointed by the Māori Land Service to develop the block and generate a return for the owners. In doing so, the managing kaiwhakarite would be responsible for applying best practice management, protecting known wāhi tapu, taking cultural values into account, improving the engagement of owners, and maximising the profit for the benefit of the owners. The managing kaiwhakarite would not acquire ownership of the block, nor would they be able to use the land as security. They would, however, be able to deduct their fees or reimbursements from any proceeds.[24] By default, kaiwhakarite would be appointed for a minimum seven-year term.[25] Their appointment could also terminate either when 'a governance body is established; the MLS is satisfied that the kaiwhakarite has breached a statutory obligation or term of appointment; [or] the kaiwhakarite wishes to resign from the position'.[26]

1.4.4 New governance structures and standards

The exposure draft also proposed several significant changes to the governance structures available to Māori owners, and also to governance standards.

First, whereas under the 1993 Act trusts and incorporations are established with the approval of the Māori Land Court, the exposure draft proposed that participating owners would be able to form governance bodies without involving the court. The process would instead be administrative and handled by the new Māori Land Service.[27]

Secondly, the exposure draft proposed a new governance structure called rangatōpū. As explained by the MAG, this

> is both a new class of legal body and a specific body that Māori land owners can form. It is a class of legal body in the sense that existing types of legal body (eg private trust, limited liability company etc) can become a rangatōpū under the new Bill. In this case, the rangatōpū is like a cloak that

sits around the existing body, requiring that the body satisfy standards and processes under the new Bill.[28]

The Bill proposed that all existing Māori trusts and incorporations would be required to transition to rangatōpū within three years. This requirement was intended to provide 'greater clarity for owners on duties and responsibilities for governors, as well as increasing certainty for third parties'.[29] As a result of this transition, incorporations and trusts would become subject to the duties and obligations of rangatōpū and 'kaitiaki' (the name to be given to Māori land governors), as well as to requirements for asset management plans and allocation schemes.[30]

Finally, the exposure draft of the Bill also proposed new governance standards, imposing '[s]tatutory duties and obligations . . . on governance bodies and on the kaitiaki (governors) of those entities'.[31] These standards were intended to be more closely aligned with general law. The responsibilities of rangatōpū would be to:

- manage the asset base according to the vision and objectives of the governance agreement;
- not create substantial risk or loss to owners;
- endeavour to keep owners informed about the asset base and activities; and
- endeavour to improve the level of owner participation with the governance body.[32]

Kaitiaki would be appointed for three years and would have to meet statutory eligibility criteria. Their responsibilities would include:

- act honestly and in good faith;
- act in accordance with the governance agreement; and
- exercise reasonable degree of care and diligence.[33]

The Māori Land Court would have jurisdiction to 'enforce obligations of governance bodies; investigate governance bodies; disqualify kaitiaki; and approve allocation and distribution schemes'. It would also continue to have jurisdiction under the Trustee Act 1956.[34]

1.4.5 Proposals to address fragmentation

The exposure draft also included new measures to address fragmentation of ownership interests in Māori land blocks. Block owners were to be given an option to collectivise their ownership interests, with the result that individuals would no longer hold separate shares. The exposure draft also proposed that, where a Māori land owner died intestate (that is, without a will), their interests would automatically be vested in a whānau trust, rather than distributed individually to their descendants.[35]

1.4.6 Protections against alienation

As discussed above, the exposure draft alters the jurisdiction of the Māori Land Court, making it 'responsible for approving disposal on the grounds that due process has been followed'. The 1993 Act's thresholds for selling land are maintained – 75 per cent of all owners (by share) for sales, gifts, exchanges, and long-term leases, and 50 per cent of all owners (by share) for partitions.[36]

To account for the changed jurisdiction of the court, the Bill contemplated a range of '[p]rocedural safeguards to protect interests of current and future owners', including:

- All owners need to be notified about potential decisions
- More ways for owners to participate in decision making, including by phone and internet
- Clear decision making thresholds
- Māori Land Court has the jurisdiction to review decisions to make sure good processes were followed
- Greater clarity of obligations on governance bodies and kaitiaki
- Continued role for Māori Land Court to remove kaitiaki.[37]

As a further protection, the exposure draft proposed a new preferred recipient tender process that was intended to 'increase the likelihood that land offered for sale will be retained by those with whakapapa connections to it'. It also proposed 'a second tier of preferred recipient that allows whānau, hapū or iwi groups with whakapapa connections to the land to put in an offer to buy the land through the preferred tender process'.[38]

1.5 The Inquiry Process

In mid-2014, the Tribunal received three claims relating to the Crown's proposed reform of the 1993 Act. First, on 1 August 2014, the Tribunal received a statement of claim and an application for an urgent hearing from Marise Lant in relation to the proposed repeal of Te Ture Whenua Māori Act 1993. The claim was registered as Wai 2478. On 21 August 2014, the Tribunal received a claim from Cletus Maanu Paul on behalf of the New Zealand Māori Council (registered as Wai 2480). We note that this claim was amended in October 2015 to be filed on behalf of the Mataatua District Māori Council and Moewhare. Finally, on 2 October 2014, the Tribunal received a statement of claim and an application for an urgent hearing from Lorraine Norris, Michael Beazley, William Kapea, Owen Kingi, Ani Taniwha, Justyne Te Tana, Pouri Harris, Vivienne Taueki, and Tamati Reid on behalf of themselves and their hapū. The claim was registered as Wai 2512.

The deputy chairperson directed the Crown and interested parties to file submissions and evidence in response to the Wai 2478 urgency application by 15 August 2014, and the applicant to file reply submissions and evidence by 20 August 2014.[39] On 14 August 2014, the chairperson appointed Tim Castle as presiding officer for the Wai 2478 claim and Professor Rawinia Higgins and Professor Sir Hirini Mead as members of the Tribunal panel.[40] On 21 August, the chairperson consolidated the Wai 2480 claim with Wai 2478 for the purposes of the inquiry.[41] The presiding officer directed the Crown and any interested parties to file submissions and evidence in response to the Wai 2480 urgency application by 10 September 2014, and the applicants to file reply submissions and evidence by 17 September.[42] On 16 December 2014, the New Zealand Māori Council advised the Tribunal that it wished to adjourn its application for an urgent hearing. The presiding officer adjourned the Wai 2480 claim on 9 June 2015 for three months.[43]

At an early stage in the urgency proceedings, Crown counsel raised questions about the validity of Mr Castle's appointment as presiding officer. They submitted that his warrant had expired before any proceedings had commenced, leaving him without jurisdiction to serve as presiding officer.[44] The chairperson did not agree with the submissions of Crown counsel and was satisfied that the presiding officer had the authority to hear the application for urgency.[45]

However, following the filing of an amended statement of claim by the Wai 2478 claimant and the consolidation of the Wai 2480 claim, the Crown again raised questions about Mr Castle's appointment. Crown counsel argued that these two actions constituted new proceedings, both of which occurred after the expiry of Mr Castle's warrant.[46] The claimants responded that the Crown was attempting to relitigate a matter already determined by the chairperson and that, in any case, the appointment of Mr Castle as presiding officer was valid.[47] After being directed to do so by the presiding officer, the Crown filed a memorandum in response to the claimants on 29 May 2015.[48] Following discussion of the issue at a judicial conference on 9 June, the parties filed a joint memorandum requesting that the Wai 2478 and Wai 2512 claims be heard together, with a joint record of inquiry. This, counsel noted, would necessitate that the chairperson appoint a new presiding officer, as Wai 2512 had been filed after the expiry of Mr Castle's warrant.[49]

Mr Castle subsequently stood down as presiding officer. The chairperson then appointed Ronald Crosby as presiding officer on 19 June 2015. He also appointed Tureiti Moxon as a member of the panel and confirmed the appointments of Professor Rawinia Higgins and Professor Sir Hirini Mead.[50] Due to unforeseen circumstances, Mrs Moxon later stood down from the panel and on 24 July 2015 Miriama Evans was appointed to the panel.[51]

After updated pleadings were filed in July and August, 2015, the Tribunal held a judicial conference at the Waitangi Tribunal offices in Wellington on 17 September 2015 to consider the applications for an urgent hearing. The Tribunal granted the claimants' applications for urgency in a decision released on 30 September 2015. The Tribunal was satisfied that the Crown's proposed repeal and reform of the 1993 Act warranted 'a full and proper consideration as to whether those proposed Crown actions and policies

are in breach of the Treaty' and whether Māori would thereby suffer prejudice, particularly land losses.[52] The Tribunal considered that the Crown's and claimants' competing arguments into the Treaty compliance of the review and reform process, as well as the significant potential prejudice alleged by the claimants, required a substantive hearing into the claims.[53]

Following the Tribunal's decision to grant urgency, the chairperson appointed Dr Grant Phillipson as a member of the Tribunal panel.[54] On 23 October 2015, after being directed to update the Tribunal on the status of the Wai 2480 claim, the New Zealand Māori Council advised that it did not wish to continue as a claimant. However, the named Wai 2480 claimant, Mr Paul, advised that he wished to proceed on behalf of the Mataatua Māori District Council and Moewhare, and filed an amended statement of claim.[55]

The claimants and Crown conferred on the development of a statement of issues, but were unable to reach complete agreement. After this, the Tribunal amended and finalised the statement of issues on 30 October 2015.[56] The Tribunal's inquiry was confined to three substantive issues: the Treaty standards for the Crown and Māori for the repeal and/or reform of legislation concerning taonga Māori; whether the review process and the proposed repeal and reform of the 1993 Act has been conducted in a manner inconsistent with the Treaty; and whether the proposals contained in the exposure draft of the new Bill are inconsistent with the principles of the Treaty.[57]

After finalisation of the issues, a hearing was set for 11–13 November 2015. On 9 November 2015, two days before the hearing was due to begin, the Crown submitted a revised draft of the new Bill, incorporating changes arising from the June to August 2015 consultation process. In response, the claimants called on the Tribunal to delay its hearing so as to allow the parties time to consider the revisions made to the Bill.[58]

After considering the claimants' request, the Tribunal proceeded to hold its hearing at the Waitangi Tribunal offices in Wellington on 11–13 November 2015 as scheduled. However, the claimants' concerns were accommodated by granting an additional day of hearing, held on 9 December 2015, to deal with changes in the new, revised draft of the Bill.

Due to the urgent nature of the inquiry, the Tribunal reversed the usual order by which written closing submissions were filed. The Crown was directed to file its closing submissions first by 14 December 2015. The claimants were directed to then file their closing submissions by 18 December 2015.[59]

On 29 January 2016, the Crown advised the Tribunal that it had released a new version of Te Ture Whenua Māori Bill in advance of a further round of 'public information hui', which would commence on 9 February.[60] On 3 February, we issued a memorandum stating that, for the assistance of parties, we would make an early, interim draft of chapter 3 of our report available before the hui.[61] The interim draft of chapter 3, dealing with the review and reform process, and the associated consultation processes undertaken by the Crown, was released on 5 February 2016. It contained a finding that the Crown would be in breach of Treaty principles if it did not ensure that there was properly informed, broad-based support from Māori for the Bill to proceed. Māori landowners, and their whānau, hapū, and iwi, would be prejudiced if the 1993 Act were repealed 'against their wishes, and without ensuring adequate and appropriate arrangements for all the matters governed by that Act'. We recommended that the Crown avoid prejudice to Māori by further engagement nationally via hui and written submissions, after ensuring that Māori were properly informed by means of empirical research. We also recommended, among other things, that – if consultation showed broad Māori support for the Bill to proceed – further engagement take place to refine and revise the Bill before its introduction to the House.[62]

After release of our draft chapter 3, we continued with our report, advising parties on 29 February 2016 that the full report would be released in pre-publication form on 11 March 2016.[63]

Because the new draft of the Bill arrived too late in our inquiry for the parties to make submissions on its provisions, we have not considered it in our deliberations. Instead, we are reporting on a draft of the Bill submitted to our inquiry by the Crown in November 2015.[64] The

Crown advised that it considered this was 'an appropriate approach' given the time constraints.[65]

1.6 The Structure of this Report

Our report is structured as follows:

- In chapter 2, we discuss the history of the legislation governing Māori land and the origins of the 1993 Act.
- In chapter 3, we consider questions about the review and reform process, including who was responsible for initiating the review, whether the consultation undertaken by the Crown has been adequate, and whether the level of support from Māori is sufficient for the Bill to proceed.
- In chapter 4, we consider the substance of the Crown's reform proposals. We address the changes to the May 2015 exposure draft made by the Crown in response to Māori concerns, the Treaty compliance of other provisions of the revised November 2015 draft Bill, and the other parts of the Crown's reform package.
- In chapter 5, we summarise our findings from chapters 3 and 4 and set out our recommendations to the Crown.

We note that revisions have been made to chapter 3 since we released it in draft form in February 2016.

Notes

1. Dave Hawea to Leo Watson, no date (Marise Lant, papers in support of second brief of evidence (doc A6(a)), p 462)
2. As we explain further in section 1.5, Mr Paul's claim was later amended, so that it was no longer on behalf of the New Zealand Māori Council, but is now on behalf of Moewhare and the Mataatua District Māori Council.
3. Waitangi Tribunal, memorandum of the presiding officer, 16 September 2015 (paper 2.5.20)
4. Te Puni Kōkiri, briefing for Minister for Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 164)
5. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (John Alexander Grant, papers in support of first brief of evidence (doc A1(a)), p 169)
6. John Alexander Grant, first brief of evidence, 21 August 2014 (doc A1), p 7
7. Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', Cabinet minute, 5 September 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 42–44)
8. 'Review of Te Ture Whenua Māori Act: presentation', no date, powerpoint presentation to hui, September 2013 – April 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 269)
9. Grant, first brief of evidence (doc A1), pp 13–14
10. Grant, first brief of evidence (doc A1), p 13
11. 'Terms of Reference: Te Ture Whenua Māori Ministerial Advisory Group', no date (John Alexander Grant, papers in support of fourth brief of evidence (doc A5(a)), p 16)
12. John Alexander Grant, fourth brief of evidence, 3 August 2015 (doc A5), p 4; 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 112–127)
13. Grant, fourth brief of evidence (doc A5), pp 4–6
14. Minister for Māori Development, 'Consultation on Māori land law announced', 27 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 486)
15. Minister for Māori Development, 'More time given for submissions on Māori land Bill', 15 June 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 561)
16. Grant, fourth brief of evidence (doc A5), pp 4–6; Crown counsel, first disclosure bundle (doc A8), pp 1–3030
17. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 426)
18. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 427)
19. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 62)
20. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 467)
21. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 443)
22. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 443)
23. Te Ture Whenua Māori Draft Exposure Bill 2015, cls 45(5), 51 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 183–184, 186)
24. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 59)
25. Te Ture Whenua Māori Draft Exposure Bill 2015, cl 152 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 243)
26. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April

2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 59)
27. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 447)
28. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 51)
29. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 43)
30. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 58)
31. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 452)
32. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 460)
33. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 460)
34. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 461)
35. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 38); Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 448)
36. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 451)
37. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 449)
38. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 452)
39. Waitangi Tribunal, memorandum of the deputy chairperson, 11 August 2014 (paper 2.5.1)
40. Waitangi Tribunal, memorandum of the chairperson, 14 August 2014 (paper 2.5.2)
41. Waitangi Tribunal, memorandum of the chairperson, 21 August 2014 (paper 2.5.7)
42. Waitangi Tribunal, memorandum of the presiding officer, 29 August 2014 (paper 2.5.8)
43. Waitangi Tribunal, memorandum of the presiding officer, 13 October 2015 (paper 2.5.23), p 2
44. Crown counsel, memorandum, 18 August 2014 (paper 3.1.3), pp 1–2; Crown counsel, memorandum, 20 August 2014 (paper 3.1.5), pp 1–4
45. Waitangi Tribunal, memorandum of the chairperson, 20 August 2014 (paper 2.5.5), p [3]
46. Crown counsel, memorandum, 6 October 2014 (paper 3.1.13), p 3
47. Claimant counsel (Ertel), joint memorandum, 21 October 2014 (paper 3.1.14), pp 3–5
48. Crown counsel, memorandum, 29 May 2015 (paper 3.1.15)
49. Crown counsel and claimant counsel (Watson), joint memorandum, 15 June 2015 (paper 3.1.16), p 2
50. Waitangi Tribunal, memorandum of the chairperson, 19 June 2015 (paper 2.5.12)
51. Waitangi Tribunal, memorandum of the chairperson, 24 July 2015 (paper 2.5.15)
52. Waitangi Tribunal, memorandum of the presiding officer, 30 September 2015 (paper 2.5.21), pp 9–10
53. Waitangi Tribunal, memorandum of the presiding officer, 30 September 2015 (paper 2.5.21), pp 10–11
54. Waitangi Tribunal, memorandum of the chairperson, 7 October 2015 (paper 2.5.22)
55. Claimant counsel (Ertel), memorandum, 23 October 2015 (paper 3.1.48)
56. Waitangi Tribunal, memorandum of the presiding officer, 30 October 2015 (paper 2.5.29)
57. Wai 2478, statement of issues (paper 1.4.1)
58. Claimant counsel (Thornton), memorandum, 10 November 2015 (paper 3.1.71)
59. Waitangi Tribunal, memorandum of the presiding officer, 16 November 2015 (paper 2.5.35), p 3
60. Crown counsel, memorandum, 29 January 2016 (paper 3.4.11)
61. Waitangi Tribunal, memorandum of the presiding officer, 3 February 2016 (paper 2.7.3)
62. Waitangi Tribunal, *Initiation, Consultation, and Consent: Chapter 3 of Report into Claims concerning Proposed Reforms to Te Ture Whenua Māori Act 1993, Pre-publication Version* (Wellington: Waitangi Tribunal, February 2016), pp 182–183
63. Waitangi Tribunal, memorandum of the presiding officer, 29 February 2016 (paper 2.7.4)
64. Waitangi Tribunal, memorandum of the presiding officer, 3 February 2016 (paper 2.7.3)
65. Crown counsel, memorandum, 29 January 2016 (paper 3.4.11), p 1

CHAPTER 2

HĀHĀ TE WHENUA, HĀHĀ TE TANGATA / THE ESSENTIAL CONTEXT: FROM THE NINETEENTH-CENTURY NATIVE LAND LAWS TO TE TURE WHENUA MĀORI ACT 1993

> Puritia te whenua, hei taonga mō te ao hou. The law must provide for the retention of Māori land to the fullest extent possible.[1]
>
> —New Zealand Māori Council, 1980

2.1 Introduction

2.1.1 What this chapter is about

The immediate origins of Te Ture Whenua Māori Act can be traced to reform proposals that came from within Maoridom in the 1970s and 1980s. These proposals were followed by a Crown–Māori dialogue in the decade prior to the passing of the Act in 1993. During that period, Māori communities and leaders, land court judges, Ministers of the Crown, and officials discussed how best to enact a modernised form of Māori land management – one that Māori hoped would more closely reflect their beliefs, their values, their tikanga, and their aspirations for their surviving lands.

At a much deeper level, however, the Act emerged from the long evolution of Māori land legislation, dating back to the mid-nineteenth century and – in particular – the way in which that legislation for many decades facilitated the alienation of Māori land to the Crown and settlers. A generation of Māori claimants, historians, and the Waitangi Tribunal itself – in its historical district inquiries – have shown how the legislation affected Māori in the nineteenth and twentieth centuries. Of particular and lasting importance was the nature of the new, individualised titles that emerged from the Native Land Court process. This form of title, coupled with the Crown's determination to open Māori land for settlement, helped facilitate the large-scale alienation of land in many parts of the country. Even in the early twentieth century, when only a relatively small proportion of the original holdings remained in Māori ownership, legislative amendments continued to promote alienation over retention.

This history is marked by occasional attempts to provide Māori with mechanisms for a more collective form of managing their new titles, and to protect retention of a minimum quantity of Māori land. These mechanisms often, however, proved ineffective or were dismantled in favour of fresh initiatives for settlement. It was not until the 1970s that Māori succeeded in impressing their case for 'not one more acre' upon the national consciousness. Under Matiu Rata's ministerial leadership, the Crown came to consider a more thorough overhaul of Māori land legislation, so that the focus was no longer on alienation and more on enabling retention coupled with utilisation. The lead within Maoridom was taken at that time by the New Zealand Māori Council (NZMC), which, from 1980, took up the challenge of drafting a new Bill.

In this chapter, we summarise how legislation affecting Māori land developed from the mid-nineteenth century onwards. This provides the essential context for understanding why the particular arrangements established under Te Ture Whenua Māori Act 1993 were set in place, how those arrangements were the culmination of a century of struggle between Māori and the Crown, and why preserving key features of the Act is of such vital importance to the claimants.

We focus in particular on:

- the balance between alienation and protective mechanisms for retention;
- title and governance arrangements;
- the role of the land court, particularly the balance between the court's role and owner control.

Although the historical dimensions of these matters were not argued before us in any detail, the issues raised in this inquiry can only be adequately addressed with some understanding of the Act's origins and its purposes. As this chapter is contextual, however, we not have not engaged with differences of opinion between the parties as to any of the events described. Our account draws in particular on the findings of the Waitangi Tribunal in its historical inquiries, as well as the work of other historians of note. Inevitably, many important details will be omitted as not strictly relevant to the present case. On the more recent origins of the Act, we were assisted by the Crown, which submitted a range of relevant documents, as well as the evidence of Whaimutu Dewes and a research report by Professor Michael Belgrave, Anna Deason, and Dr Grant Young.

Before looking at the legislation, we begin with a brief discussion of how Māori conceive of their relationships with land.

2.1.2 Māori customary tenure

In our urgent hearings, Moana Jackson stressed the fundamental importance of whenua to the identity and the cultural, social, and economic well-being of tangata whenua.[2] Kaumatua Derek Te Ariki Morehu described land as 'tūrangawaewae', a 'place to stand', without which 'the strength of our people has been diminished and the process of dislocation devastating in its impact on our language and Tikanga Māori'. 'I therefore fight', he told us, 'as my ancestors did to hold on to the remaining interests in lands we have for the protection of the cultural and economic integrity of our iwi, and for the benefit of the generations to come after me.'[3] Professor Whatarangi Winiata emphasised that for Māori, land is a taonga tuku iho, an ancestral treasure.[4]

Profound concepts underlie these views of Māori land. Although a contrast is sometimes drawn with western views of land as a 'commodity', this over-simplifies how land is seen in Pākehā cultural terms, and it can also be used to suggest that Māori do not value their land in an economic sense. The truth is that both the Māori and Pākehā of today have inherited world views from their forbears. The relationship of Māori with their land can only be understood in light of their distinctive world view.

The Muriwhenua Tribunal summarised matters in this way:

> The Māori feeling for the land has often been remarked on, and should need no more elaboration than an outline of the philosophical underpinning of land related values. In terms of those values, it appears to us, Māori saw themselves as users of the land rather than its owners. While their use must equate with ownership for the purposes of English law, they saw themselves not as owning the land but as being owned

> by it. They were born out of it, for the land was Papatuanuku, the mother earth who conceived the ancestors of the Māori people. Similarly, whenua, or land, meant also the placenta, and the people were the tangata whenua, which term captured their view that they came from the earth's womb. As users of the earth's resources rather than its owners, they were required to propitiate the earth's protective deities. This, coincidentally, placed a constraint on greed.
>
> Attachment to the land was reinforced by the stories of the land, and by a preoccupation with the accounts of ancestors, whose admonitions and examples provided the basis for law and a fertile field for its development. As demonstrated to us in numerous sayings, tribal pride and landmarks were connected and, as with other tribal societies, tribe and tribal lands were sources of self-esteem. In all, the essential Māori value of land, as we see it, was that lands were associated with particular communities and, save for violence, could not pass outside the descent group. That land descends from ancestors is pivotal to understanding the Māori land-tenure system. Such was the association between land and particular kin groups that to prove an interest in land, in Māori law, people had only to say who they were. While that is not the legal position today, the ethic is still remembered and upheld on marae.[5]

Clearly, the Crown's imposition of a title system consisting of individual, disposable interests in Māori land, without legal community sanctions or controls, had a profound effect on Māori land tenure. It also had a profound effect on the ability of Māori communities to ensure the retention of their primary cultural and economic 'asset'. Māori 'did not think in terms of "ownership" at English common law, with its rights of use and alienation independent of the local community'.[6] This was the antithesis of custom, in which the rights of individuals or whānau to use resources were sourced in whakapapa, and were not absolute. Their use was conditional upon contribution to the hapū.[7]

Such matters were regulated by hapū leaders, rangatira, meaning 'weaver of people'.[8] The authority of rangatira did not 'belong to them as individuals. Rather, they embodied the mana of their atua, the ancestor-gods from whom the other members of their hapū also descended.'[9] But leadership also had to be earned, and the respect of the hapū retained. Continuing leadership depended on how successful rangatira were in protecting the mana of the hapū, its lands and its people, and as kaitiaki – caring for resources 'to preserve their mauri and keep them available for future use'.[10] 'Rangatira', as John Rangihau of Tuhoe put it many years ago, was 'people bestowed'.[11]

It is necessary to understand these things because, as the Muriwhenua Tribunal put it, the tikanga relating to land are still 'remembered and upheld'; they remain a vital concern for Māori today. And Māori want the statute law relating to how their land is owned and managed to reflect tikanga. Mr Morehu believes that, although there are problems with its administration, the current statute has at last achieved a better reflection of tikanga after decades of struggle:

> The ways in which Māori relate, use, and succeed to our lands is not consistent with a Western Pākehā view, and the 1993 Act has allowed us to pursue our relationship to our lands in line with Māori custom and protocol in ways that the earlier Māori Land Legislation did not.[12]

We turn next to consider the content of that earlier native land legislation, which brought about, as David Williams described it, a 'tenure revolution'.[13]

2.2 Native Land Laws, 1862–1952: An Overview

2.2.1 Introduction

In this section, we provide a brief overview of how legislation relating to Māori land tenure and its administration developed over the course of the second half of the nineteenth century and in the first half of the twentieth century. In particular, we look at the extent to which legislation afforded Māori communities the opportunity to manage and develop their own land, and the extent to which it facilitated the alienation of Māori land to the Crown or settlers.

Broadly speaking, Parliament had two main purposes in passing the nineteenth-century native land laws. One

was to give Māori land a form of title that gave purchasers, lessees, and lenders security, and thus made it usable in the colonial economy. The other was to give Māori land a form of title that facilitated its large-scale transfer to settlers or the Crown. While historians disagree as to whether individualised title was *designed* to achieve that second purpose, the *effects* were clear within at least 10 years of the passage of the first Act.[14] As a Supreme Court judge put it in 1873, the legislation impacted on hapū like breaking the band holding a bundle of sticks together, enabling each individual stick to be snapped one by one.[15] This effect of individualised title was observed again by commissions of inquiry in 1891 and 1907,[16] but the Crown did not alter this fundamental purpose of the native land laws until the 1950s. In the meantime, the Crown took advantage of it to circumvent hapū leaders and obtain as much Māori land as possible, as cheaply as possible, as the Stout–Ngata royal commission noted and condemned in 1907.[17]

The foundation for the legislation was laid in the first two Acts of 1862 and 1865. The Native Lands Act 1862 was largely a dead letter, but it set out the principle that the Crown recognised Māori customary rights. A Native Land Court was established to ascertain those rights and transform them into Crown-derived certificates of title. The court would be made up of local chiefs, with a neutral Pākehā chair. Crown pre-emption was abolished, and private purchasers could now buy directly from the Māori holders of certificates of title. Due largely to circumstances of war, the Act was not fully brought into effect and was replaced in 1865. But the war was in many ways responsible for the Native Land Court's creation. After the well-known Waitara dispute and the outbreak of war in Taranaki, many among both settlers and Māori agreed that the pre-1862 process of the Crown picking owners and dealing with them was no longer viable. But the Crown did not consult Māori about the kind of independent body that might replace that system, and Māori were not represented in the settler Parliament at the time either Act was passed.[18]

The Native Lands Act 1865 (drafted by Chief Judge Francis Dart Fenton) maintained most of these concepts, but it reconstructed the land court as a formal court of record. Māori rangatira would sit with judges as 'assessors'.[19] As well as ascertaining and transforming title, the court had to determine a system of succession for owners who died intestate. The court's jurisdiction over successions, as Professor Boast notes, gave it an ongoing role after the initial title investigation which would greatly expand in subsequent years.[20]

Fundamentally, however, it was the form of individualised title created by the 1865 Act – specifically intended to end Māori 'communism' – which was its most important innovation.[21] Another important innovation was that this introduced form of title did not provide properly for Māori rights and authority in respect of their water bodies, which has generated significant Māori grievance and has been much commented on by the Waitangi Tribunal.[22]

Further, the Crown had maintained from the time of Lord Normanby's instructions to the first Governor in 1839 that Māori must be protected in land transactions, and not allowed to enter into contracts that might prove to be to their detriment. Crown pre-emption was supposed to have been the guarantee of that protection. Now that it was removed from 1862 (however little it might have worked protectively in practice), another mechanism was required. Hence, the first Native Lands Frauds Prevention Act was passed in 1870. Increasingly, the native land laws were required to perform the uncomfortable dual roles of protection and the facilitation of land alienation for colonisation.

2.2.2 The first 40 years of native land legislation, 1865–1905

(1) *Title and governance arrangements*

(a) *1865–73: the '10-owner rule'*

Under the 1865 Act, the court awarded land to 10 or fewer individuals, who in law became its absolute owners. This was called the 10-owner system. Crucially, there was no provision in the 1865 Act for the land awarded in this way to be held in trust for the rest of the hapū. There was a short-lived provision for blocks over 5000 acres to be awarded a tribal (hapū) title, but blocks under 5000 acres were to have no more than 10 owners. The practice of the

court generally under the 1865 Act was to award all blocks to 10 or fewer owners, regardless of their size.[23] We are not aware of any blocks awarded a tribal title,[24] a provision that disappeared in 1873 and did not really recur until the possibility of whenua tōpū trusts was introduced in 1993.

Māori cooperated at first with the 1865 Act, wanting to develop and use their lands in the colonial economy, and understanding that the selected rangatira who went into the titles would continue to act as traditional, community 'trustees'. But the law provided these communities with no protections. Rangatira could and did sell their individual interests, often to satisfy debts incurred by or for the tribe, or to find much-needed cash in the money economy. Nothing in the law protected their disinherited communities.[25]

Concern among both Māori and the Crown led to an amendment Act in 1867. This provided that henceforth the rest of the owners' names could be listed on the back of the certificate, and the land would be inalienable except by lease until it was partitioned (and there were genuinely only 10 owners of each partitioned piece of land). Use of this provision was not compulsory – the new Act gave the court discretion to award title on this basis, or to continue to apply the 1865 provisions.[26] Chief Judge Fenton was reluctant to apply this part of the 1867 Act since, in his view, the whole point of the native land legislation was 'the putting to an end to Māori communal ownership [*sic*]'.[27] The court was able to, and did, ignore the intended safeguard.[28]

(b) *The 1873 regime: all individuals listed, no community controls*

In 1873, a major new Act was passed. It did away with the 10-owner system, and substituted a new arrangement. The court was required to list all owners in a 'memorial of ownership'. Title was not individualised in the true sense of the term, but rather individuals were awarded an undivided interest in land. That is, the land was not physically divided into lots in which a whānau might establish a farm on a delineated section of ground. The Turanga Tribunal described the outcome as 'a kind of virtual individual title'.[29] On the other hand, there was no provision in the legislation for a hapū or 'corporate' management structure, through which Māori communities could make legally enforceable decisions about their land. In the absence of such a structure, and without any real means to raise development finance, individual owners could do virtually nothing with their undivided interests except sell them. The whole system was geared to ensure that they did so.[30]

The individualisation of title was perpetuated by Chief Judge Fenton's Papakura decision in 1867 that each owner's interest would be shared individually and equally among all children upon succession. Individualisation largely paralysed the attempts of Māori to engage with the new economy and develop their land, and the succession rules cemented this problem.[31] The impact of the new system of successions was far-reaching, as every generation saw continually enlarging bodies of owners in what were often shrinking blocks of land.

(c) *The Crown re-enters the land market*

By far the greatest beneficiary of title individualisation was the Crown, which re-entered the land market in the 1870s. It often used the law to give itself monopoly advantages over Māori vendors, shutting out private purchasers and imposing its own prices. The Crown also undermined tribal leaders' aspirations to lease their lands instead of selling them absolutely. Tribunal inquiries have found that the Crown's 'predatory' land purchase machine acquired individual interests outside the control of hapū leaders, in an unfair manner and for paltry consideration.[32] As a royal commission found in 1891:

> The alienation of Native land under this law took its very worst form and its most disastrous tendency. It was obtained from a helpless people. . . . The strength which lies in union was taken from them.[33]

A Pākehā lawyer, Cecil de Latour, aptly told the 1891 commission:

> Nor am I aware . . . that the individualisation of Native title was at all sought for by the Natives themselves. As far as I can

> judge, it has been forced on them with a view to purchasing from them. I have never been able to understand why the Natives should not be allowed the fullest freedom of decision as to what lands should be sold or reserved . . . Of course it may be a matter of individual right, if you apply our theories and English law, that every Native should be the arbiter of his own destiny, but I venture to say that is not in accordance with Native custom and usage, which is more inclined to act with the tribe or family than act under the English law, of which they have very little knowledge.[34]

In 1894, the Crown's right of pre-emption was restored nationally, except for certain expressly excluded blocks, and for the next few years the Liberal Government embarked on a massive purchase exercise in parts of the North Island. Throughout the period from the 1870s to the 1890s, Governments were anxious to maintain the flow of land to settlers, for the success of the colony. Historian Angela Ballara suggested in the Central North Island inquiry that the Crown could still have lived up to its own promises to Māori in the Treaty. But this might have required a slower rate of colonisation (and certainly more leasehold, a tenure which the Liberals themselves favoured in the 1890s).[35]

Māori leaders were very critical of the Government, and in 1899 – under pressure from the national Kotahitanga or Māori parliament movement – the Crown agreed to cease purchase altogether. This was a short-lived respite; purchase would begin again in 1905.[36]

(2) *Protective mechanisms provided by the Crown*

From 1865 on, the Crown always recognised in its native land laws that it had a duty to protect Māori and their lands. The degree and effectiveness of the protection varied over time, as did the degree of 'paternalism' in the modes of protection. In the nineteenth century, Māori individuals were empowered for the first time to hold and sell interests in land without legally-enforceable community controls or a legal mechanism for community decisions. Individuals were also placed under great pressure to alienate their undivided interests, often for small amounts suitable only for short-term consumption.

In those circumstances, what protection mechanisms did the Crown provide?

The key mechanisms were:

- *Standard restrictions applied on memorials of ownership:* The 1873 Act restricted sale of land under all memorials as a safeguard, which was subverted by other provisions in the Act (allowing a majority to partition). Crown and private purchasers routinely bought up individual interests and forced a partition when sufficient had been acquired. From 1882, any individual could partition their interest, rendering the restriction on alienation moot.[37]
- *Court-imposed restrictions on alienation:* This was the Crown's main mechanism for protecting retention from 1878.[38]

  At first, restrictions were entirely at the court's discretion. From 1880, however, it had a duty to inquire in every case (either title investigation or partition) whether restrictions should be placed on alienation. Only the Governor in council could remove these restrictions.[39] From 1888, the court also had to inquire whether each owner had sufficient inalienable land for their support. If not, the judge had to place restrictions on the titles. Tribal leaders could also apply for restrictions themselves, even if the court thought them unnecessary, but granting them was at the court's discretion.[40] Between 1870 and 1886, titles to over 1,230,000 acres of land in the North Island were made inalienable via restrictions.[41]

  In the 1890s, restrictions on alienation were made easier to remove. The court was empowered to cancel them on the application of just one-third (rather than a majority) of the owners.[42] Finally, the restrictions were cancelled on all blocks by the Native Land Act 1909, as we discuss below.
- *Mechanisms for the vetting of purchases, to safeguard Māori from transactions that were unfair to them:* As noted above, a Native Lands Frauds Prevention Act was passed in 1870. From then until 1894, commissioners were charged with checking and confirming that private land transactions were fraud-free, were not contrary to 'equity and good conscience', did not

contravene any trusts (express or implied), and had not included alcohol or guns in the payment. The Crown's purchases (as confirmed by statute in 1888)[43] were not subject to the commissioners' scrutiny. The commissioners were under-resourced for such a large task. They were instructed not to inquire into implied trusts, and were condemned by the Native Minister himself in the 1880s for 'perfunctory' checks and systematic approval of too-low prices. The system was a 'formality' by the time it was abolished in 1894 (along with the private purchases it was supposed to scrutinise).[44]

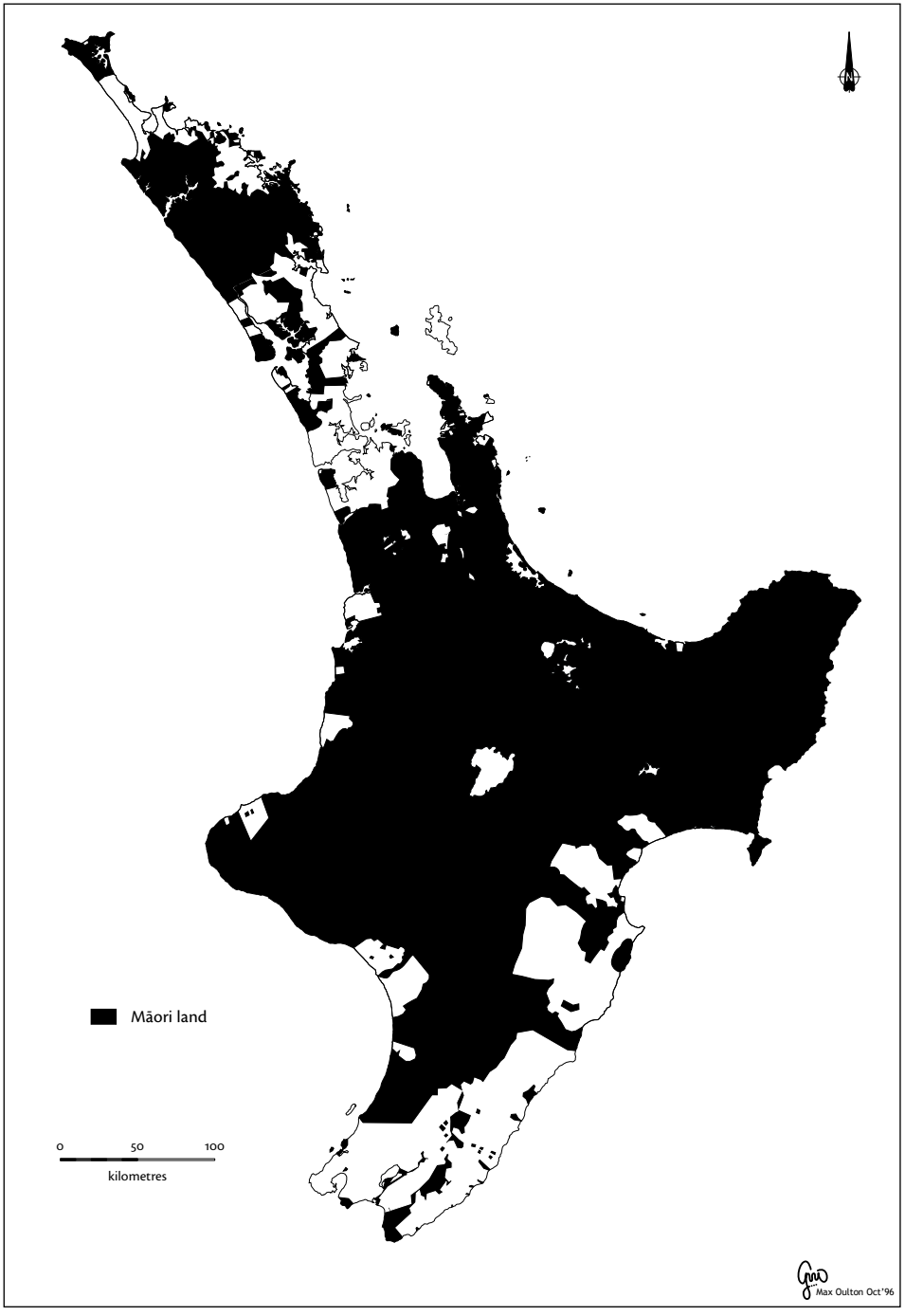
- *Restriction of alienation through the creation of specially designated reserves:* the 1873 Act was supposed to 'settle upon the Natives themselves, in the first instance, a certain sufficient quantity of land which would be a permanent home for them . . . land . . . to be held as an ancestral patrimony'.[45] This was the task of officials called district officers, who were to apply to the court for reservation of 50 acres per man, woman, and child. These reserves would not, however, be made inalienable.[46] The Tribunal has concluded that this system, supposed to ensure Māori at least retained a bare minimum in the face of Crown and private purchasing, was hardly implemented by the time it was abolished in 1886. Alternatively, starting in 1882, the commissioner of native reserves was supposed to attend court and monitor retention, recommending restrictions where owners might 'retain insufficient [land] for their support and maintenance'. But there had been no commissioner in office since 1884. This protection, too, was a formality. Thus, after 1886, the Crown no longer had an active role in preventing landlessness; this was left entirely to the one remaining protection, the court's duty to impose restrictions on alienation.[47]

In 1900, however, Māori won a landmark victory through their concerted opposition in the form of Kotahitanga. Under the Māori Lands Administration Act of that year, land councils (with elected Māori representatives) were charged with establishing what land each man, woman, and child had, suitable for their occupation and support, and to determine how much of this land was 'necessary' to be designated a papakainga. Such land was to be absolutely inalienable. The provisions were thus still based on individual rather than community provision. But the new law also allowed for reservation of traditional food sources. Also, if Māori chose to vest land in the councils for leasing, the owners could ask for part of it to be reserved for their support. The assumption underlying the 1900 Act was that Māori owners should retain their land, and should be able to lease, not sell, as the land was 'opened up' for settlement.[48] These promising reserve provisions, however, were abolished in 1905 and 1909, along with many of the other 1900 reforms, after Kotahitanga had disbanded.

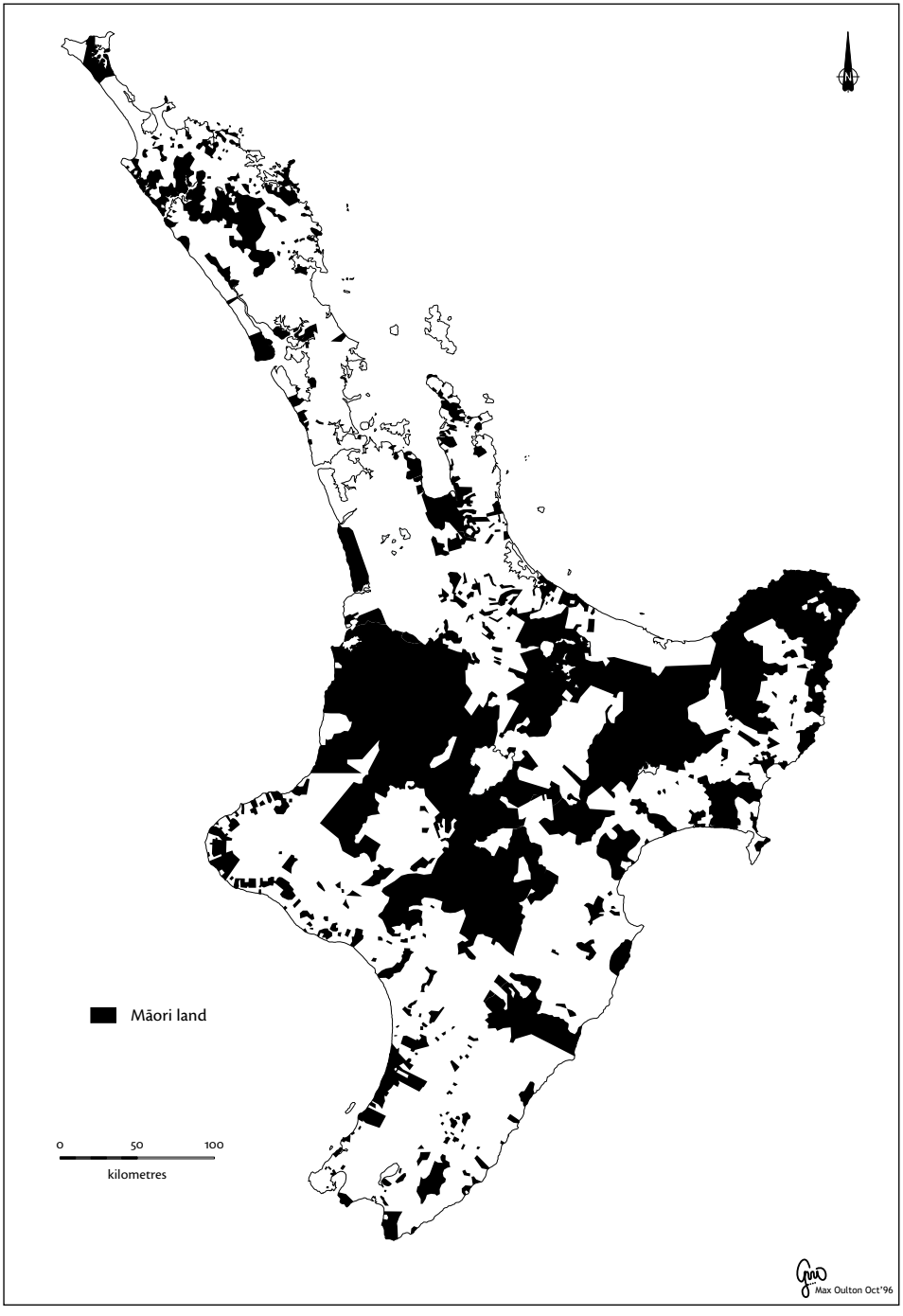
(3) *Māori protest and the introduction of provisions for collective management of Māori land*

From the 1860s to the 1890s, Māori leaders sought to slow the pace of alienation and engage in the colonial economy on their own terms. They often tried to get legal powers for their tribal committees or rūnanga as a key strategy, to restore community sanctions and hapū control over land. Legislation to give effect to these aspirations was rejected in the colonial Parliament in the 1870s and early 1880s.[49] When a Native Committees Act finally made it through in 1883, it conferred too little power to be much more than, in the words of the 1891 royal commission, a 'hollow shell'.[50] Te Keepa Rangihiwinui's trust in Whanganui, Te Arawa's Rotorua Komiti Nui, Tuhoe's Te Whitu Tekau, the Rees–Pere trusts on the East Coast, and others all sought to control tribal lands and obtain the legal authority to do so from the Crown. And all of them failed because the Crown would not agree or actively undermined them.[51]

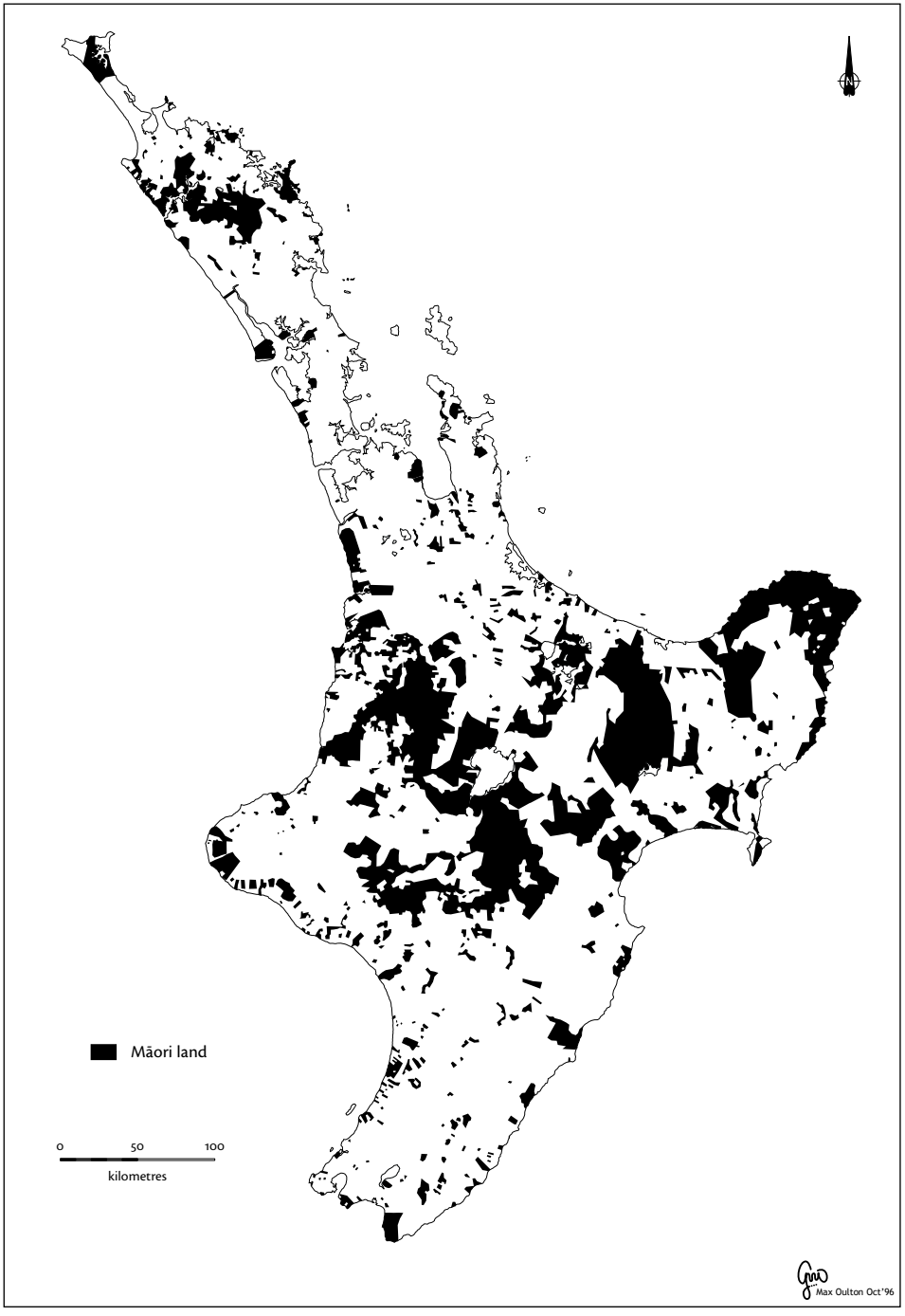
Despite the strength of Māori protest, and the range of alternative solutions that were put forward, very little was achieved to reverse the general trend in the law towards facilitating the individualisation of title and the progressive alienation of Māori land. Perhaps the most promising experiment was Native Minister Ballance's 1886 Native Land Administration Act, which would have enabled Māori to establish a management committee for



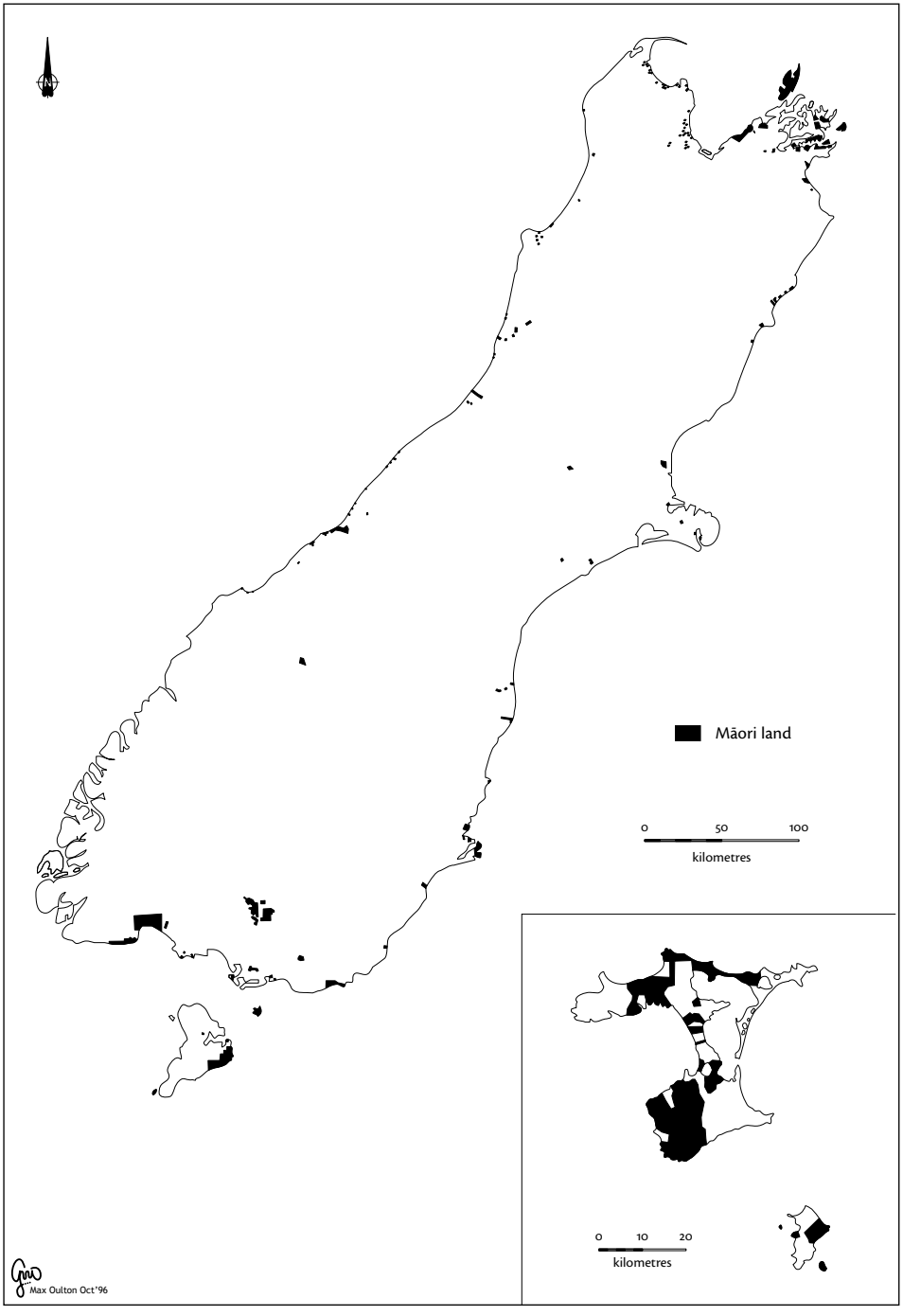
Māori land in the North Island as at 1860



Māori land in the North Island as at 1890



Māori land in the North Island as at 1910



Māori land in the South Island as at 1910

each block (instead of their preferred hapū committees). But the committees could only act in conjunction with a Crown commissioner, and Māori lacked confidence in the Act.[52]

The one successful attempt at securing the recognition of a collective form of Māori land management emerged on the East Coast. Other attempts to establish trusts there had failed because the court would not recognise them, and the Government would not legislate for them.[53] But in 1881 two sympathetic land court judges agreed to a voluntary deed of trust for the 100,000-acre Mangatū 1 block, which was made inalienable (that is, restrictions were put on the title). Technically the 12 named on the title were in fact absolute owners (as in 1865), and this created an anomalous situation which was problematic for later judges. Nonetheless, Bills with a wider application having failed, Wi Pere managed to get a private member's Bill passed in 1893 'before sales could erode titles or debts reduce management options'.[54] The Act created the Mangatū Incorporation, the first Māori incorporation. The owners would hold the land in common, and a committee of seven would manage the block.[55]

In 1894, the Liberal Government's new Native Land Court Act made wider provision for Māori owners throughout the country to establish incorporations and elect committees of management, both of which had to be approved by the court upon application by the owners. Legislation expanded the powers of the committees over the next two decades. It was envisaged that incorporations would manage and commercially utilise their lands – especially in 'remote' areas, and lands with poor soil which might not be suitable for small settler family farms. On the other hand, it seemed the Government also saw incorporations as useful for facilitating purchase, because the law provided an owners' body which was sometimes easier to deal with than the painstaking acquisition of individual signatures. Under the 1894 Act the committee could alienate without gaining the consent of even a majority of owners. And the Crown could also continue to buy individual interests in incorporation land from owners who, at law, did not need the consent of others, or the committee.[56]

These early provisions for incorporations and also for trusts did not meet with much Māori enthusiasm. The Crown passed legislation in 1897 to enable Māori landowners, or incorporations, to vest land in trust in the local commissioner of Crown lands or the surveyor-general, or the Public Trustee, so it could be used as security for loans for surveying, opening up, or improving the land. These were not popular measures, evidently because Māori feared losing control of their lands to Crown officials.[57] In 1907, the Stout–Ngata commission reported that '[v]ery little land has been conveyed to trustees in accordance with' the provisions of the 1897 Act. 'It is practically a dead-letter.'[58]

Incorporations were well-received in Turanga, where Rees and Pere took the initiative.[59] Elsewhere, interest seems to have been sporadic for various reasons, including owner uncertainty about bodies which were quite unfamiliar to them, nervousness about the powers bestowed on the commissioner of Crown lands and the Public Trustee, and anxiety about the expenses that incorporation might incur when it was not clear at all what financial benefit would return.[60]

The land councils referred to above, set up under the Māori Lands Administration Act 1900, might well have provided a form of workable corporate management for Māori land. The Act did not provide for total Māori control, but it 'did provide for joint Crown–Māori administrative bodies which might have played a useful role in Māori land management'.[61] Māori communities elected representatives to the councils, while the Government nominated the president and two to three other members, depending on the size of the council. The Act provided for Māori owners to convey their land in trust to the councils, for leasing only, and the councils could borrow on the security of the land from the Public Trust Office or certain Government departments. The terms of the trust were to be agreed between the owners and the council and might include reservation of part of the land for the owners, to

be inalienable. Alternatively, owners could seek council administration of their land so it could be leased or mortgaged, in which case the council was deemed to be owner of the land.[62]

In the event, the councils were slow to become operational, and Māori were nervous about surrendering their title to these new bodies.[63] According to a judge who chaired one of the councils, Europeans were, 'for reasons of personal interest', generally hostile.[64] The councils, and the policies laid out in the 1900 legislation – despite the great political importance attached to them both by Māori leaderships and by the Crown – would in fact have a short life. For the Crown, their raison d'etre was to provide land for settlers to lease. When the experiment seemed slow to achieve this, the Crown abandoned it in 1905, once Kotahitanga was no longer a political force. Legislation based on retention and corporate management of Māori land for that purpose was repealed. The Crown resumed purchasing, aggressively so after the Reform Government took office in 1912.[65]

(4) *Māori land alienation: the situation by 1909*

By 1865, the vast majority of the South Island and 9,982,532 million acres of the North Island had passed from Māori to the Crown. Six million acres were transferred by means of Crown pre-emption, and 3,508,532 acres by raupatu.[66]

Between 1865 and 1909, the outcome of the native land laws' processes for alienation, protection, and retention was the sale of a further 10,709,254 acres of Māori land in the North Island, and the leasing of 3,047,098 acres. Most of the leased lands were 'effectively removed from Māori control' and had become 'illusory assets' for Māori.[67] This outcome had been achieved despite determined Māori resistance to the court and sales, and tribal leaders' preference for leasing over sales. The great majority of alienated land had been purchased by the Crown, which picked off individual owners for often derisory amounts. This meant that, on the whole, Māori had not been able to accumulate development capital from sales to use for farming the surviving land. David Williams noted that, by 1909, Māori land in the North Island exceeded seven million acres but only 360,000 acres of it was in use for papakainga and farming.[68]

2.2.3 The balance changes from purchase towards retention: realignments of land legislation, 1905–52

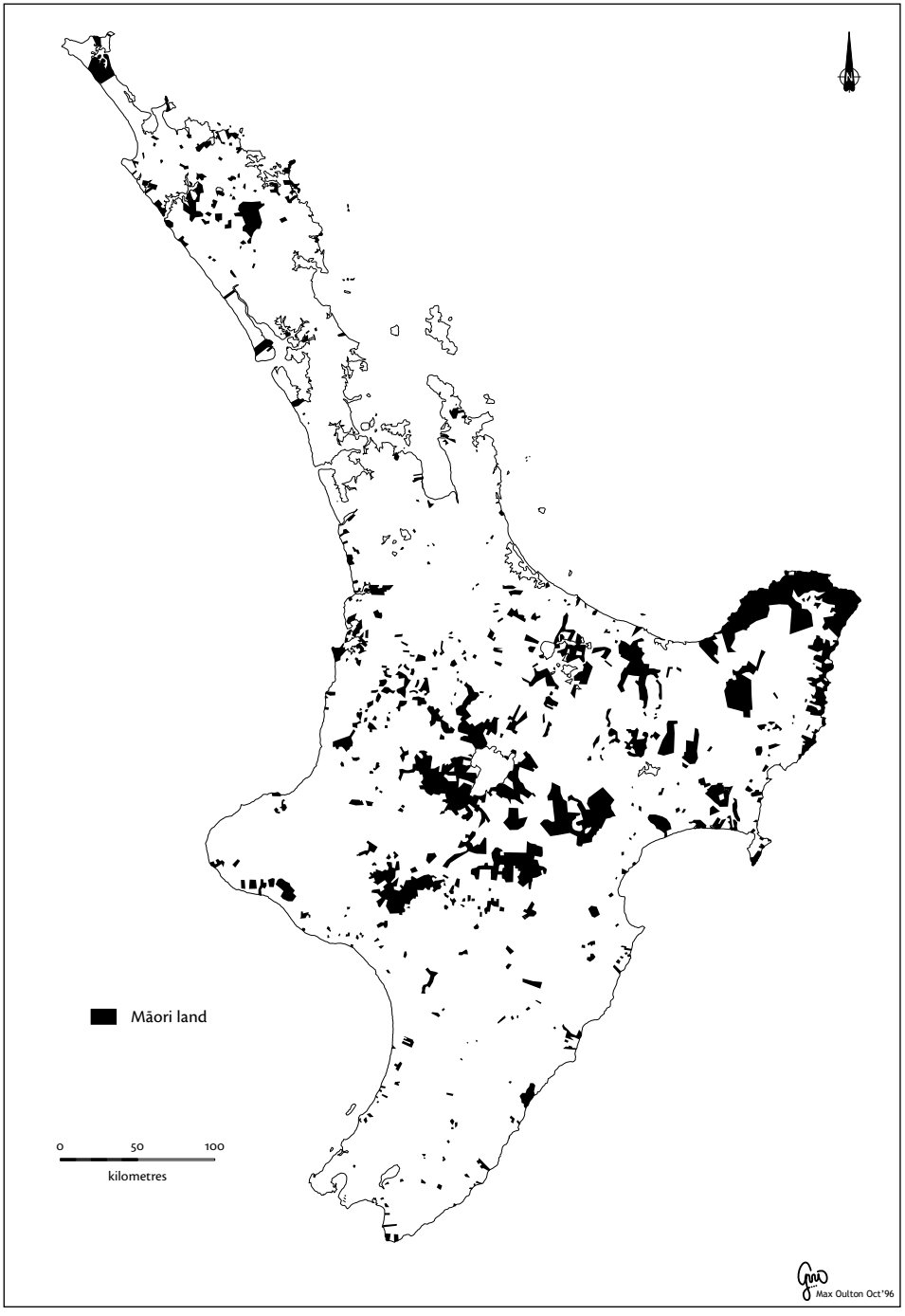
(1) *Introduction*

Over the first 50 years of the twentieth century, two major policy developments affected Māori owners and their land.

The first was a further period of sustained land purchase, from 1905, by both the Crown and private purchasers. This was accompanied by reduced protections for Māori who wished to retain land or interests in it, and the management of Māori land by new land boards on which Māori representation was quickly removed. The second development, however, was a growing Government concern from the 1920s to ensure that Māori kept their remaining lands – initially, lest they become a burden on the State. This resulted in the Crown's support for title simplification measures which might assist Māori to achieve this end.

(2) *Resumption of Māori land purchase; reduction in protections for owners*

As noted, the representative land councils were abolished in 1905. Some of their functions were taken over by Crown-appointed land boards. At first the boards had to have a (non-elected) Māori member but that requirement was soon dropped. The boards' functions were a strange mix of acting as agent for, safeguard for, and sometimes controller of, the Māori owners. Most unacceptable to Māori were the elements of compulsion in the land board system. The Native Minister was empowered to vest land in the boards without owner consent for various purposes. In the Tairawhiti and Tai Tokerau districts, this was tried as an experiment instead of renewed Crown purchase in those districts. The Minister would vest land in the boards for lease or sale if, in his opinion, it was not required or not suitable for occupation by the Māori



Māori land in the North Island as at 1939

owners.[69] Further compulsory provisions followed in all districts for land that was considered to be not properly cleared of noxious weeds or was 'not properly occupied by its Māori owners'.[70]

In 1913, the personnel and functions of the land board and the land court were 'effectively amalgamated'. The judge and registrar of the court became the chairman and registrar of the board for each district. The court remained formally responsible for questions of title and succession, and the boards for land administration, including confirming alienations (until 1932). But both functions were now fulfilled by the same officers, who rarely included Māori until the 1960s.[71] (Māori assessors' powers had been abolished back in 1894, after which their presence was gradually dispensed with.[72]) The Central North Island Tribunal was sceptical that boards were protecting the interests of Māori alienating; in fact the boards 'saw their job as processing alienations smoothly and efficiently'.[73] And the reduced membership of the boards denied Māori owners any representation in administering their own land, which was the antithesis of the negotiated 1900 land councils.[74] The boards would have a long life, till 1952, when they were abolished and all their powers and duties were transferred to the Māori Trustee.[75]

The Māori Land Settlement Act 1905 also reinstated Crown purchase in all districts, except in Tai Tokerau and Tairawhiti where compulsory vesting was trialled. After a brief moratorium from 1899 to 1905, the Government once again intended to buy 'surplus Native lands' vigorously, and ensure that private buyers could as well. There was one new protection for Māori. For the first time, Government Valuation became the minimum price. This led to a substantial increase in prices offered for Māori land. The Crown, however, continued to abuse its powers as monopoly purchaser, using prohibition orders to exclude private alienations, and repeatedly extending these orders.[76]

In 1905, all restrictions on alienation by lease, whether statutory or recorded on the title, were deemed to be removed. Then, under the Native Land Act 1909, all restrictions were removed from titles and Māori were deemed free to deal with their land 'in the same manner as if it were European land', subject to land board checks.[77] The 'paternalism' of restrictions was thus abolished, even though tribal leaders had themselves applied for restrictions to be imposed, and Māori owners had had the power to have them removed if they wished.

A range of major changes were made in the Native Land Act 1909. The Act was a consolidating one, but it also laid down the main legal and administrative regime for the next 50 years.[78] It made alienation of Māori land easier. Private individuals could now freely purchase again, but there were two new mechanisms to avoid the difficulties that had arisen from buyers dealing directly with the owners of undivided shares. The first was the role of the new Māori Land Boards; the second was provision for 'meetings of assembled owners', where there were more than 10 owners.

The Government of the day argued that the system of assembled owners' meetings restored 'communal' control of Māori land through the traditional rūnanga system, but the Central North Island Tribunal did not agree.[79] The assembled owners' meetings had to be summoned by the land board on the application of 'any person interested', and could vote only on certain specified matters, mainly:

- vesting land in a land board for sale or lease;
- leasing land through a board for Māori settlement purposes;
- incorporation; and
- accepting a Crown offer for purchase or lease, or any other offer to purchase land.[80]

There was a very small quorum requirement for meetings of assembled owners: only five owners needed to be 'present or represented', and a resolution could be carried if owners voting in favour owned a larger aggregate share than those voting against. The land board could confirm or disallow a resolution; it then became the agent of the owners to see the alienation through.[81] Owners who voted unsuccessfully against a resolution and signed a memorial of dissent could have their interests partitioned out if the court agreed, so that they could retain their ownership rights when the majority at a meeting voted to sell or lease.[82] Despite its limitations and flaws, this system of one-off meetings of assembled owners persisted as the

main form of 'collective' decision-making for Māori land from 1909 to the 1950s. In the 1953 Act, the quorum was just three owners but they had to be present (proxies had counted for quorum purposes under the 1909 and 1931 Acts).[83]

For those alienations that required the board's approval, it had to satisfy itself that the transaction was not fraudulent or 'contrary to equity or good faith or the interests of the Native alienating', that the amount paid was 'adequate', and that the transaction would not leave any individual sellers landless.[84] Thus, the protective role formerly entrusted to commissioners until 1894 was to be performed by the boards, but it was more broadly defined. Much had depended previously on a commissioner's interpretation of whether a transaction was 'contrary to equity and good conscience'. The boards had to specifically consider the adequacy of price, and whether the transaction was in the best interests of the Māori vendors. As in the nineteenth century, though, the system was paternalistic. Māori were not represented on the boards and had no control over the mode or effectiveness of the protection. Owners at the one-off meetings could make decisions but they had no legal mechanism for collective management of their lands, or for managing how transactions impacted upon communities, unless they formed incorporations. They had no legal mechanism for collective farming either, unless they set up incorporations. But, as we have seen, these were not generally popular at all among Māori in this period.

The Native Land Amendment Act 1913 made crucial changes to increase the Crown's purchasing power. In addition to its power to prohibit private competition, the Crown now returned to the old system of purchase of interests from an individual, or indeed a trustee; it no longer had to deal with meetings of assembled owners. Following the passage of the Act, Crown purchase agents often embarked on determined campaigns in areas which still offered scope for acquisition of sizeable blocks, targeting individual owners. Lands that had been vested in a land board 'without power of sale' could also now be sold by either an individual owner or a meeting of owners. The Crown could apply to the court at any time to partition out the interests it had purchased.[85] Tribunal inquiries have shown that Māori leaders and communities continued to resist land sales in this period, as they had in the nineteenth century, but their resistance was often overborn by a mix of coercion and the pressure of economic circumstances on owners who often saw little hope of any other return from their small interest in a block.[86]

During the same period, protections for owners to ensure land retention were progressively reduced.

First, under the 1905 Act, the land boards vetted leasing, considering whether the lease would benefit the owners, whether enough land had been reserved from the lease for papakainga, and whether owners had land for agricultural purposes. But there was also a hint of moving away from ensuring minimum land retention; it might be sufficient to show that owners had 'income'.[87] Where the Crown was buying from Māori, the Governor had to be satisfied that Māori owners had sufficient other land for their maintenance. The 1905 Act defined 'sufficient' acreages: not less than 25 acres of first class land for each man, woman, and child; 50 acres of second class land; or 100 acres of third class land.[88]

But in the Native Land Act 1909 there was no longer a provision relating to Māori retaining 'sufficient' land; instead a land board or the land court could not confirm an alienation unless satisfied that no Māori would become 'landless' by reason of that alienation.[89] Nonetheless, the court or board could recommend to the Governor that an alienation (including those to the Crown) could proceed even if a Māori did become 'landless' as a result of it. The Governor in Council could then confirm the alienation if satisfied that the person could maintain himself 'by his own means or labour' and that the transaction was not 'contrary to the public interest'.[90] As from 1909, therefore, retention of even just a minimum of Māori land could now be waived in exceptional circumstances.

The provisions in the 1909 Act for reserves were confined to those for community uses. They enabled native reservations to be set aside for 'common use of the owners', including villages, fishing grounds, landing places,

springs, wells, and church sites. Reservations might be vested in a Māori Land Board or in the Public Trustee or in any other body corporate. These were to be inalienable.[91]

The 1913 amendment to the Act weakened the land retention provision even further. A board could set aside the concern for potential landlessness if it considered the land in question was not 'likely to be a material means of support', or if the seller 'is qualified to pursue some avocation, trade, or profession, or is otherwise sufficiently provided with a means of livelihood'.[92] This provision was repeated in the Native Land Act 1931. Again, these decisions were to be made by bodies that had no owner representation. Thus land boards (and then the court from 1932) could exercise considerable discretion in deciding whether alienations might proceed. Retention of at least some Māori land was no longer a mandatory requirement.[93] In 1909, the requirement had been waived in exceptional circumstances, needing the agreement of the Governor in Council. But from 1913, it could be waived as a matter of routine in all confirmation decisions.

Thus, Crown purchasing resumed in 1905, while protections for retention were reduced from 1905 to 1913. Between 1910 and 1933, another 2,375,717 acres of Māori land were sold through the land boards, and 1,929,659 acres was leased.[94]

(3) *Growing Government concern to ensure Māori land retention, and title simplification, 1920s–40s*

Given Crown enthusiasm for facilitating both Crown and private purchase of Māori land well into the 1920s, and the success of the measures it adopted to achieve this, it is somewhat surprising – at one level – to find a new caution on the part of the Crown by the end of that decade. In part this was conditioned by the economic turbulence of the interwar years and the hardships of the Great Depression, with the rate of both Government and private purchasing of Māori land falling sharply. But it can also be understood in terms of the Government's perception of the vulnerability of a still overwhelmingly rural Māori population. By this period, there was a growing realisation that the amount of land Māori retained had dwindled at a remarkable rate and, at the same time, that the censuses were recording an unexpected, sustained rise in the Māori population. Government apprehension that Māori might become a 'charge on the state' because they could not support themselves on the land was often expressed. Māori members of Parliament had been trying for many years to put the brakes on the alienation of Māori land, and pointing to the intractable problems Māori owners faced in retaining and developing their land as a result of the Crown's title system.

By the 1890s, the Crown had begun to realise something of the extent of the title problems. From 1894 there had been provision for Māori owners to exchange land, and by 1909 the court had wide powers to exchange or partition at the point of succession. It did not require the owners' consent to do so. From 1913 the court could determine that owners' interests were so small there was no point in partitioning them – in effect encouraging them to apply to a land board to sell or lease their land.[95] As the Central North Island Tribunal pointed out, the results of the problematic nature of individualisation were becoming increasingly evident:

> Problems in succession were encountered as early as the second generation of owners. Even at the beginning of the twentieth century it was considered that the Court might need to act coercively to bring some order to title dilemmas, and the sale of small interests was already considered a solution.[96]

Leading Māori politicians James Carroll and Apirana Ngata both favoured consolidation schemes as a remedial tool – that is, exchange of owners' interests on a large scale. Consolidation schemes were established by the Native Land Act 1909. These schemes involved the simultaneous grouping of owners' interests in a number of blocks so that their scattered interests were transformed into workable pieces of land. The court was eventually given a major role in planning consolidation schemes, and making partitions and succession orders as necessary.[97] The initiative in such schemes, it may be noted, lay with the Native Minister or

the court, not the owners; the schemes were approved and confirmed by the executive, without the consent of the owners being needed. In practice, however, consolidation commissioners worked closely with the owners to prepare schemes. The Central North Island Tribunal concluded that the court's inquisitorial role in the schemes was 'deemed to be the best approach in dealing with large groups of owners who had to agree to redistribution of their interests on a substantial scale', with the Minister's oversight 'considered a safeguard'. The 'unusual nature of the process, in judicial terms, underlines the remarkable title problems which it was designed to address'.[98]

Ngata hoped that consolidation would enable whānau to farm land, but also to deal with other problems that were becoming a major headache for owners, and for local authorities: namely, rates arrears, unpaid survey charges, and out-of-date titles because so many successors did not go to court to succeed to their interests. All this pointed to a tenure and administration system that was not working for Māori owners, as well as the extent of mounting charges on Māori land which many owners, living in communities which lacked any viable economic base, could not pay.[99]

By the late 1920s, Ngata was turning to land development schemes as a way of sidestepping intractable title problems (at least in the short term), and bringing remaining Māori land, much of it marginal, into production.

Māori opportunities for farm development were by this time 40 years behind the rest of the nation in terms of access to development skills, experience, and capital. The private sector would not lend on the security of multiply owned land, and owners could not bear the costs of farm development themselves.[100] The very titles that were supposed to make Māori land usable in the economy were inhibiting owners' access to private finance. Yet Māori were shut out of the massive amount of Government finance that had been made available to struggling settlers since 1894. It was not until the 1930s that the Crown also began to provide cheap finance for Māori land development through Ngata's schemes.[101]

Ngata was well aware of the urgency by that time. When he became Native Minister in 1928 he was able to piggyback on a Government scheme to develop marginal Crown land for settlement. He won support for a similar scheme for Māori, many of whom also only retained marginal lands. The essence of Ngata's schemes was that the Crown would leapfrog title problems by taking over Māori land and developing it. The Crown provided loans and expertise to create large farm blocks which could be divided into economically viable family units. Thus Māori would give up control of their land (for an unspecified period), but Ngata's quid pro quo was that the land should be administered in the interests of the owners and 'in general accord with their wishes and aspirations'.[102]

Initially the schemes were planned with wide hapū development in mind, and significant involvement of owners and tribal leaders. But this was an aspect of the schemes which was not maintained. As the Government made changes to the oversight and planning of the schemes, placing them under the control of central boards, the rights of owners to be consulted and participate in decision-making became more limited.[103]

In the meantime, work on consolidation schemes had slowed. Ngata himself was ready to accept the limitations of consolidation by the mid-1930s. He had hoped that conferring certainty of title would assist whānau to farm, and thus ultimately protect tribal lands because the farms were producing an income. In practice – given limited good quality lands, the hard decisions Māori owners were asked to make in giving up ancestral land for exchange, and the small number of individual holdings that resulted from the process – the results were not encouraging. Owners had to give up interests in land they were legally entitled to, and had particular association with; they had to spend a great deal of their own time involved in the consolidation process to ensure it worked at all; and they had no right of appeal in respect of the decisions made about their property rights.[104] By the 1950s, the schemes were being criticised both within and outside the department, though it would not be until 1974 that consolidation provisions were finally removed from the statute books.

Ultimately, 28 schemes were carried out throughout the country up to the 1950s, but they were largely unsuccessful. The process of consolidation was slow yet ultimately

pointless; because successions continued, it did little more than postpone title fractionation.[105]

Consolidation schemes, and their fate, highlight the magnitude of the title problems visited on Māori owners by the Crown's nineteenth-century land laws. The Māori land development schemes illustrate how difficult it was for owners to overcome title barriers to use their land for development. By the late 1920s, Māori leaders seem to have become resigned 'to agreeing to significant Government intervention, supported by legislation and requiring significant infringement of ordinary ownership rights, to set land aside in viable blocks and undertake farming development'.[106]

In the post-war years, there would be new Government policies aimed at Māori land title difficulties and Māori land development.

2.3 A New Era, 1953–74

2.3.1 Introduction

During the 1950s and 1960s, though the Government stated its determination that Māori land should remain Māori-owned and farmed by Māori, its policies were shaped within two major contexts. The first was the importance placed on bringing Māori land into production given the overall growth of the economy and sustained British demand for New Zealand agricultural produce. The second was the rapidly growing and urbanising Māori population which, to the bureaucratic eye, seemed remote from their rural homelands. Māori urbanisation coincided with the welfare state and full employment after the Second World War. Governments of the 1950s and 1960s ceased to worry that Māori would not retain enough land for their own support. Rather, they worried about bringing Māori land into production for the sake of exports.[107] Belgrave, Deason, and Young described the Government's imperatives in this era as: 'Unproductive Māori land was an evil to be eradicated by all means possible. Reforming the title system, by assimilating it into the European title system as much as possible, became the prime objective.'[108]

One result of these developments was a substantial Māori population in the cities which nonetheless wished to maintain its ties to the land. For many, this took the form of determined retention of their individual titles, no matter how small, as a foundation for their tūrangawaewae, their place to stand, their cultural identity. Their perspective was under-estimated, perhaps even unanticipated, by the Government. Ministers and officials expected urban Māori to integrate (virtually assimilate) with Pākehā. For rural Māori communities, ownership of Māori land continued to be fundamental to their economic survival as well as their cultural identity and well-being. As Belgrave et al note, Māori agreed with the Crown in the 1950s that their lands should be developed – they wanted more development, not less, but they also wanted control of their lands returned to them.[109]

The Government's focus on Māori land titles, particularly the exponential growth of small shares in Māori blocks, led it to adopt policies that over time were increasingly criticised by Māori. Titles were deemed 'crowded', and the Government was determined to improve them by stemming the continued fractionation of shares. Major official reports were produced at this time, notably the Hunn report in 1960, a broad inquiry into Māori affairs, which included a discussion of land titles. This was followed by the Prichard–Waetford report (1965), which focused on the impact on titles and land administration of 'absentee' Māori, who had moved to towns and cities; the importance of integrating Māori and Pākehā land ownership; and the need to reduce the number of owners on titles and thus relieve the administrative burden of the Department of Māori Affairs (in recording them).[110] Within the bureaucracy also, there was continuous discussion of how to address perceived title problems: multiple ownership of land, tiny interests which were not economically viable, and continuing successions which were making the problems worse.[111]

The first outcome was the Māori Affairs Act 1953, which the Minister of Māori Affairs, Ernest Corbett, called a 'rewrite' of all Māori land legislation; it embodied new title reforms, and introduced a coercive element into processes for removing potential successors from the titles.[112] The second was the Māori Affairs Amendment Act 1967,

which extended the reforms to enable the Māori Trustee to acquire small interests when Māori land was before the court for certain title purposes, thus divesting Māori owners and their descendants of their shares in a block. Major changes affecting the interests of incorporated owners in their land were also enacted. This Act would meet with considerable Māori protest. Some of these measures were reversed by the Labour Government in a further amending Act of 1974, as Māori opposition to such policies and their underlying philosophy grew. With Matiu Rata as Minister, the 1974 Act also put much stronger restraints on the permanent alienation of Māori land.[113]

We consider each of these measures in turn. As we are now moving into the modern period, and the more immediate origins of Te Ture Whenua Māori Act 1993, we discuss these measures in greater detail. The Māori land laws of the 1950s and 1960s were in force to 1974 and beyond, and are recalled by the Māori elders of today. The claimants say that they see a worrying parallel between those laws and the present reforms; a return to the 'bad old days', as they put it.[114] We make no comment on that, but lay out the information available to us as context for the consideration of the parties.

2.3.2 The Māori Affairs Act 1953

The 1953 Act embodied major new initiatives for title improvement and land administration. Corbett, the Minister of Māori Affairs, wrote that the Act was based on three principles: that the land should remain in Māori ownership; that multiple ownership should continue; but that the number of owners in a title should be reduced so that only major owners remained.[115] The Act would be complemented by the Māori Trustee Act 1953, following the abolition of the land boards in 1952 and the transfer of most of the boards' functions to it. The Māori Trustee was amalgamated into the Department of Māori Affairs and, Belgrave, Deason, and Young suggest, was 'turned . . . into a different creature'.[116] As well as taking over the collection and distribution of rent of leased lands, it had a greater obligation to accept administration of uneconomic properties, and it became the primary agent in the Government's conversion programme (outlined below), with a statutory role in title improvement policy.[117]

(1) *Retention versus facilitation of alienation*

The balance in the Act between retention and facilitation of alienation of Māori land was an interesting one, given Corbett's three principles. It introduced what Boast describes as a 'somewhat coercive' method of dealing with the accelerating fractionation of owners' interests.[118] The court was given wide powers to help achieve the Government's programme of title improvement. The Act contained several key measures in this respect.

(a) *'Conversion'*

A crucial and controversial measure aimed at reducing the number of owners on a title was 'conversion'. When the owner of a freehold interest in Māori land died, the court was given power to vest 'uneconomic' interests in the Māori Trustee instead of the beneficiaries. An 'uneconomic' interest was defined in the Act as one which, in the court's opinion, did not exceed £25 in value.[119] In 1957 the court's options for dealing with the freehold interests of Māori owners at succession were expanded. For instance, the court could vest all of the deceased's interests in one or more beneficiaries, excluding others without their consent (or compensation, unless their interest exceeded £10 in value). Belgrave et al described these measures as 'particularly draconian and they certainly would never have been tolerated in Pākehā society'.[120]

(b) *'Live Buying'*

A second part of the 'conversion' programme related to buying shares from owners who were not deceased. One difference was that 'live buying' was voluntary; another was that the Māori Trustee could buy any Māori freehold land, or any interest in land (not just an 'uneconomic' interest) with the owner's consent, and secure a court order vesting it in the Trustee.[121] A conversion fund of £50,000 (comprising the reserves of the Māori Trustee and the profits derived from the Trustee and the former Māori Land Boards) was established to fund the acquisition of

interests in Māori land by the Trustee. The fund was not financed by Government appropriations until 1967.[122] In 1957, the Māori Trustee was empowered to use the fund to buy interests in European (general) land held by Māori. This was an unusual targeting of Māori owners rather than Māori land.[123]

(c) *Other discretionary powers*

Further discretionary powers were given to the land court to assist title 'improvement'. They included intervention by the court either when it undertook the making of consolidated orders, or if owners applied for a partition:

- Consolidated orders gave the court power to update lists of owners and their shares as at the date of the order; they were thus a short-cut to updating titles. But such orders were also designed to unearth 'uneconomic' interests, so that the court could recommend those interests be acquired by the Māori Trustee. The court would fix a price. The measure was also designed to ensure that the Trustee acquired such interests quickly and unproblematically; for instance, the court was not specifically required to notify the owners of a recommendation to vest in the Trustee.[124]
- Owner applications for partition also enabled the court to take a proactive role in disposing of 'uneconomic' interests. If it considered any partition would be 'impracticable', it might direct that the land be sold, and appoint the Māori Trustee to be the agent for the owner in the sale. If the Trustee were unable to achieve a sale to other owners, or to 'Māoris or the descendants of Māoris', he might, with the court's consent, sell to a non-Māori, and if any 'uneconomic' interest were not involved in the final arrangement, the court was to recommend that it be acquired by the Trustee.[125]

All these measures reflected a determined effort on the part of the Crown to reduce the number of owners on a title, by greatly increasing the opportunities for transfer of small interests to the Māori Trustee rather than leaving them in the hands of the owners or their descendants. Thus the owners of 'uneconomic' interests were, within the conditions laid down in the Act, to be encouraged and even compelled to accept alienation of them. How, then, could the Crown have seen its title provisions as facilitating retention? We discuss that question next.

(d) *How the Crown saw the title provisions as facilitating retention*

Māori Affairs Minister Corbett's stated intention to keep Māori land in Māori hands was evident:

- first, in provisions to rationalise titles to farming lands, increase the size of holdings so that farms were an economic size, and assist Māori farmers to develop their land and learn 'modern methods';[126] and,
- secondly, in provisions about the disposal of 'uneconomic' interests acquired by the Māori Trustee. For instance, where the Trustee acquired shares in a Māori incorporation, he had to offer them to other owners in the incorporation, or to the body corporate itself. In the case of other land or interests, he might offer them to any Māori, or descendant of a Māori, to any Māori incorporation, or to the Crown, for purposes of Māori housing or for any land development scheme.[127]

In other words, as the Central North Island Tribunal put it,

> the process enabled a sale, Maori to Maori, by the Maori Trustee (except in the case of sales to the Crown). But it did not require that such interests be sold to Maori, except in the case of interests in an incorporation . . . And it did not specify that land or interests in a block should be offered to another owner in that block, or a relative of the owner. It specified only that the purchaser be 'Maori'.[128]

(2) *Protective mechanisms*

The court had to confirm all sales and leases of Māori land, except for the Māori Trustee's acquisitions through the conversion fund.[129] The court was not to confirm any alienation unless satisfied that it was properly executed,

was not contrary to equity or good faith or to the interests of the Māori alienating, that the price was adequate, and that the sale was not in breach of any trust to which the land was subject. The court also had power to amend the terms of a transaction if justice to Māori required it (although the purchaser or lessee could then decline to proceed).[130]

These were essentially the same criteria as used in 1909 and 1931 (see above), except in respect of landlessness. As we discussed earlier, the system before 1953 had been focused not on communities but on individuals and the piecemeal alienation of their undivided interests. As a result, no alienation could be confirmed if it would render an individual landless, unless the land was not actually capable of providing for the individual's support, or the individual had some other means of support. These requirements were not carried over into the 1953 Act.

The Act protected interests in Māori land against bankruptcy: under section 455, no interest in Māori customary or freehold land (including interests in timber and flax) could be taken for debt or counted as assets in case of bankruptcy.[131] This section also applied to land vested in a Māori incorporation, and to the debts of that incorporation. It applied to money or investments which were the proceeds of an alienation of Māori land, and were held in trust by the Public Trustee or the Māori Trustee on behalf of Māori.[132]

(3) *Title and governance arrangements*

Title and governance arrangements embodied in the 1953 Act included:

- provision for land trusts under sections 438 and 439; and
- significant changes to the provisions relating to incorporations.

(a) *Provision for land trusts under sections 438 and 439*

Though trusts were not immediately used to any great extent, their introduction in the 1953 Act was an important development. By the mid-1960s and 1970s, the court was making hundreds of trust orders every year.[133]

Section 438 was not presented as a key provision in the legislation; it was in fact inserted only into the final version of the Bill. It empowered the land court to vest Māori land in trustees for the benefit of Māori or their descendants, 'or for any specified class or group of Māoris or their descendants'. The Māori Trustee, or any other persons might be appointed trustees, with power to administer the trust property. In fact the powers of trustees were specified only in relation to the alienation of land.[134]

Section 439 allowed land to be vested in trustees for a 'Māori reservation for communal purposes' – such as a meeting place, marae, urupa, or fishing ground – by the Governor-General on the recommendation of the land court. The court might vest such a reservation in a Māori incorporation or in any two or more persons in trust, and might appoint a new trustee or trustees or additional trustees as it thought fit. While the land was a reservation it was inalienable, though the trustees might grant a lease or occupation order for the reservation for up to seven years, with the consent of the court, and subject to such terms as the court thought fit. Existing Māori reserves made under any former Native Land Act were deemed to be Māori reservations under this section of the Act.[135]

(b) *Changes to the provisions relating to incorporations*

The Act set out a comprehensive system for the operation of incorporations (part XXII). Corbett told Parliament that the provisions relating to incorporations included 'very substantial amendments' because the 'old legislation', meaning the Native Land Act 1931 and some earlier enactments, was 'quite inadequate to deal with the extension of that aspect of Māori administration'. A complete review had been undertaken.[136]

The court could incorporate any three or more owners of Māori freehold land. The court's order of incorporation might set out the objects of incorporation, that is: farming or any agricultural or pastoral business; growing, felling, milling and marketing of timber; coal mining or granting of leases for this purpose; alienation by sale or lease of the land or part of it; or 'any other enterprise' specified in the order.[137] (This extended considerably the activities in which incorporations could engage, which had previously been more restricted by legislation.)

Committees of management might exercise the powers and functions of a body corporate on its behalf. The Act allowed a committee to exercise its powers by a majority, though at least three members had to concur in every action they took. The committee was also empowered to regulate its procedures as it wished, except for restrictions imposed by owners' resolutions and regulations under the Act.[138] Of particular importance in respect of developing land and resources, incorporations gained complete control of loan money.[139] Previously, loan money had been controlled by the Māori Land Boards, which had been abolished in 1952.

(4) *Balance between statutory coercion and owner autonomy*

It is evident that owner autonomy was gravely compromised by the 1953 legislation and the powers given to the court and the Māori Trustee.

Graham and Susan Butterworth, in their history of the Māori Trustee, called the Act's conversion programme 'the most controversial and deeply resented of all postwar Government attempts to deal with the problems of Māori land' – because it deprived Māori of the interests in land, however small, 'that proved their kinship connections and gave them . . . tūrangawaewae'.[140] The extension of the programme in 1967 was to be even more controversial. The conversion programme, the Butterworths suggested, could not cure title problems dating back to the nineteenth-century legislation, but legal thinking and Government policy at the time had not gone beyond 'tidying up a flawed system'. One outcome was that the 'association of the Māori Trustee with the Conversion Programme left a sour taste which has persisted to the present in the mouths of many Māori. Not only was it felt to be unfair but it did not work either and was later abandoned.'[141]

Māori opposition to the 1953 Bill was focused particularly on the conversion provisions. The Government had distributed the Bill to a group including tribal executives and District Māori Councils, and had publicised it through the broadcasting system and *Te Ao Hou*. In response, the Government had received representations and, in some cases, deputations from the 'principal tribal districts'.[142] According to J K Hunn, Corbett was so annoyed at the District Māori Councils' responses that he turned against the whole idea of having a New Zealand Māori Council.[143]

Three Māori members of Parliament expressed strong reservations about aspects of the Bill during debates in the House, particularly about the disposal of 'uneconomic' interests, and its cultural impact on those affected: 'the total loss of land rights, of mana, and connection with the tribe'.[144] They were pleased that Māori opposition had succeeded in reducing the value of an 'uneconomic' land interest from £50 (as originally proposed) to £25, but they had wanted the figure to be reduced still further. The Government, however, would not concede on the principle of its wish to reduce the number of small interests in Māori land.[145] Its focus on retention and production proved almost as controversial as the earlier focus on alienation, because its effect was that many owners would lose their property rights in Māori land.

Tiaki Omana, the member for Eastern Māori, called the Act 'a first class disinheritance Act', which would render many Māori landless.[146] And Eruera Tirikatene, the member for Southern Māori, had impressed on the Crown from the time of an earlier proposal that compulsory taking of what seemed to others as 'small' interests would hit 'right into the heart and soul of Māori mental sentiment and Mana'. Māori would see it as a violation of the Treaty of Waitangi.[147]

The 1953 conversion provisions that applied on succession, the Central North Island Tribunal found, resulted in the 'disinheritance of individuals and families who had thus far succeeded in retaining their interests in land'.[148]

In addition to the conversion programme, the 1953 Act gave the Māori Trustee special powers to take over unproductive Māori land and develop it. In doing so, the Trustee could even sell the land. Under part XXV, the court could order any freehold Māori land or general land owned by Māori to be vested in the Māori Trustee which (a) the court considered was unoccupied, or (b) was not being kept properly cleared of noxious weeds, or (c) had unpaid rates charged against it, or (d) which the owners had 'neglected to farm or otherwise manage . . . with due

diligence'. The application for a vesting order of this kind could be made by a local authority or 'any person interested'.[149] The Trustee had power, in bringing the land into production, to alienate it. If a Māori offered to buy or lease the land, the Trustee was to accept this offer before any other.[150] According to Belgrave et al, the court and the Trustee were given these extraordinary powers because '[b]ringing unproductive Māori land into production was a key policy of the National Government in the 1950s'.[151]

We are not aware of how far these drastic provisions were used, but there were 119 part XXV leases in existence in 1977, covering a total of 4500 hectares.[152] Although that was not a great quantity, it should be remembered that development schemes continued after 1953 (under part XXIV), and they accounted for significantly more Māori land. These schemes were managed by the Māori Affairs Department, and the owners had little say in them by this time, as we discussed above.

As we noted at the beginning of this section, the 1953 Act compromised owner autonomy in very significant ways.

(5) *Balance between court powers and owner autonomy*

Some of the court's more significant powers of intervention or compulsion have already been outlined, for example in respect of confirming alienations. In addition, part XXVIII of the Act specified 'special powers of the Court'. It provided that the court might take the initiative in some title matters, including:

- If any European (general) land were owned in common by Māori, and the court considered that for any reason the land could not 'conveniently' be dealt with as general land, it might recommend that the land be declared Māori land, and the Governor-General, by Order in Council, could declare it to be Māori freehold land (section 434).
- Where the court was satisfied that a continuous area of Māori freehold land comprising two or more areas under separate titles could be 'more conveniently or economically worked' if it were under common ownership under one title, the court could cancel the titles under which the land was held and substitute one title to the whole of the land, and set out the relative interests of the various owners of the land, calculated from the cancelled titles. While lessees and mortgagees had to agree, owner consent was not required.[153]

Perhaps the most important issue is the question of owner autonomy in respect of section 438 trusts. The Act gave the court itself, or if an application came before it, power to make an order vesting any customary or freehold land in any trustee or trustees, to be held upon or subject to such trusts as the court might declare. The Māori Trustee or any other person or incorporation might be appointed trustee or trustees. The court might also decline to make an order if any of the beneficial owners had a 'meritorious objection' to its doing so. There was provision for appeal against a vesting order to be determined by the Appellate Court, but the court's decision had to be approved by the Minister. The land court's order might confer powers on the trustees which the court deemed necessary for the proper administration of the trust property; it could also, with the approval of the Minister, vary the order, or cancel it. The trustees might alienate the land, or part of it, comprised in the trust, though the court had to approve every alienation by sale or otherwise unless the land was vested in the Māori Trustee.[154] Thus, the legislation gave both the court and the Minister significant power over key aspects of the new trusts.

In the event, the section 438 trust turned out to be the most important and empowering provision of the 1953 Act for Māori owners. Looking back on it from the vantage point of 1983, the NZMC saw the court as

> the only forum with the experience and understanding to properly facilitate Maoridom's aspirations for its land . . . its primary role must be to ensure that all Māori land has effective administrative bodies charged with the dual responsibility of retention of Māori land in Māori ownership and its proper utilisation.[155]

Section 438 trusts were seen by the council as

> examples of rangatiratanga in action 'by the authority and rangatiratanga vested in them by the trust order, approved by the Māori Land Court in terms of the statute'. Māori incorporations 'also obtain their authority by virtue of an order of the Māori Land Court' and 'their authority comes from both the people they represent and from the Māori Land Court acting in terms of the statutes'.[156]

The NZMC's favourable judgement of the court and of section 438 trusts and incorporations came about in part because the court had assumed a more protective stance towards Māori land and its retention from the 1960s on. The court was seen by many as quite different from the body which had played such a leading role before that in the alienation of Māori land.

Also, the land court judges 'breathed life' into section 438 of the Act.[157] As historian Aroha Harris has noted, the Māori Affairs Department was opposed to the trusts at first, but the judges promoted them because they held the view that owners, not the department, should manage Māori land. The trusts provided a structure for this.[158] The same point was observed by the royal commission in 1980, which understood that the court had been very successful in promoting trusts as a vehicle for collective land management.[159] The Central North Island Tribunal, in considering the rapid growth in numbers of new trusts since 1967, concluded that 'what made the difference in terms of owner engagement with the new structures was the assistance and advice a specialist institution [the court] was able to provide'.[160] This is not to say, of course, that Māori owners were not sometimes discontented with the extent of the court's powers over their trusts, or the fact that the responsible trustee was often a commercial entity or the Māori Trustee, with owners involved only as advisory trustees.[161]

2.3.3 The Māori Affairs Amendment Act 1967

(1) *The 1967 Amendment Bill*

The 1967 Bill, introduced in the wake of the Hunn report (1960) and its discussion of the title system, and the Prichard–Waetford report (1965), was a direct result of the recommendations of the latter. The Minister of Māori Affairs, Ralph Hanan, considered that the time had come for a 'drastic approach to some basic Māori land problems' – that is, fragmentation, multiple ownership, and land not in full production.[162] There was little official acknowledgement of the fact that many of these problems had been created by the Crown's title system. As Boast notes, the origins of the system had been forgotten by the 1960s, and the system of Māori land law was perceived as a 'reflection of Māori customary practice'.[163] Hanan for instance referred to difficulties arising from the system 'whereby much Māori land is owned in common by a number of owners in varying and often very small shares'.[164] And turning Māori land into 'European land', considered an answer to some of the problems, was based on the concept of integration, which was much discussed in the 1960s: Māori should march forward beside Pākehā as equal citizens, unhindered by the barrier of different laws.[165]

Belgrave et al point out that 'in many ways, the legislation did little that was not already a key element of the 1953 legislation'.[166] But aspects of compulsion went further. Some of the key provisions of the controversial Bill related to title 'improvement', and to measures to speed up the process of conversion.

The Bill was controversial not only in its content, but in the process that led to its passage through Parliament. The question of consultation was much more contested than in 1953. The Government had intended to invite the NZMC (established in 1961) to appoint a member of the committee of inquiry into Māori land titles, ownership, and utilisation (the Prichard-Waetford committee). But by this time, the council was already firmly committed to a policy of ensuring that Māori land remained in Māori ownership, and that if it was to be developed, it should be by Māori for Māori. This sat uneasily with the thrust of official policy, and the Government changed its mind about inviting a council representative onto the committee. Ivor Prichard, former chief judge of the Māori Land Court seems to have begun the hearings with his own clear agenda. While the NZMC was deeply opposed to conversion, Prichard regarded the council as out of touch,

considering that it evidently envisaged 'the indefinite continuation of the separation in law of the two races'.[167]

There was widespread Māori opposition to the Bill, and extensive engagement with it, and some of the features of the Bill the Māori Council had been most unhappy with were removed. But the NZMC did welcome Government statements about the importance of Māori land development and the financing of incorporations. The passing of the Bill, however, was a very divisive exercise.

(2) *Title and governance provisions of the 1967 Amendment Act*

The Europeanisation of title under part 1 of the 1967 Act was a new and coercive provision. Māori land owned by not more than four owners was to be compulsorily changed from Māori freehold land to 'European land'. The registrar was to take a proactive role in ascertaining from court records which blocks the Act applied to and, once satisfied that certain conditions were fulfilled, declare a change in the status of the land. The land would then cease to be Māori land. There were no limits on the size of the block that could be Europeanised.[168] Owners did not have to be consulted, and were not given the opportunity to choose what status their land should have. The registrar forwarded an appropriate status declaration to the district land registrar, and was then required to notify owners in writing that the land had ceased to be Māori land.[169]

In a radical change to the law, Māori freehold land vested in incorporations ceased to be Māori land. The incorporation became the legal owner of the land in fee simple, and owners ceased to have any interest in land at that point.[170] The court would fix the total number of shares in the body corporate, related to the total value of its land and other assets. Former owners now became shareholders. Thus incorporations came to resemble commercial or limited liability companies. It was thought, Belgrave et al stated, that the terms 'would help Māori landowners to preserve their tribal lands'. Because 'the land owned by an incorporation was Europeanised the provisions in the Act gave the incorporation a relatively free reign in the conduct of their business and administration of the incorporation'.[171] In addition, there was provision to set a minimum share value and remove the owners of small shares from the list of shareholders in the incorporation.[172] Incorporations were also empowered to borrow on the security of the land, and sell land – but sales had to be put to a general meeting of shareholders.[173]

(3) *Retention versus alienation facilitation*

Changes to the system of conversion were designed to increase its pace. The value of an uneconomic interest remained the same ($50 in the new decimal currency). The Minister had wanted to double this figure but, after strong tribal representations that his figure would result in 'the dispossession of far too many people', he agreed that it should remain at its existing level.[174] Two amendments were made, however, to allow the Māori Trustee 'to cast the net of acquisition wider'. First, he could now acquire interests when Māori land was before the court for partition, consolidation, amalgamation, or for the issue of consolidated orders. The trustee could require the court to determine what interests in any land before it were of a value of $50 or less; and the court was then required to vest the interests he wanted in the Trustee. Secondly, the conversion fund would for the first time receive Government funding, rather than being funded from the Trustee's own accounts. Thus, the previous financial limit on the Trustee's acquisition of interests was removed.[175]

(4) *Protection mechanisms*

The 1967 Amendment Act significantly reduced the court's protective powers to review and confirm alienations. The court, it was said, was 'not there to help the owner keep his land; its sole job for the Māori owner is to see that he gets a fair price'.[176] That summarises the change very succinctly. Opponents of the Bill condemned the change for that very reason, as facilitating the alienation of Māori land.[177]

Under part XIX of the 1953 Act, the court could not confirm an alienation unless it was satisfied that the transaction was not 'contrary to equity or good faith, or to the interests of the Māori alienating', that it did not breach a trust, and that the 'consideration (if any) for the alienation

is adequate'.[178] On hearing the application for confirmation, the court could make any modification whatsoever to any aspect of the alienation, if it seemed that 'some modification in favour of the Māori owners should in justice be made'. This could include increasing the rent or purchase price. If the buyer or lessee did not agree to the changes, the court could withhold confirmation.[179]

The 1967 amendments reduced the grounds on which the court could refuse to confirm alienation to two: the inadequacy of the consideration or the undue aggregation of farmland. Otherwise, the court had to confirm alienations 'as a matter of right'.[180] Also, the 1953 Act was amended so that the only term of an alienation that the court could modify was the purchase price, which it could increase.[181] This removed the court's 'previous broad discretion to modify the terms in any way whatsoever' that seemed required in justice to the owners.[182]

In addition, the 1953 Act's restriction on permanent alienation by lease (capped at 50 years, including any renewals to which the lessee was entitled) was removed. A new cap of 42 years was introduced, but a meeting of assembled owners could resolve to lease for longer than 42 years (with no upper limit).[183]

As with the Europeanisation provisions, the Crown at the time saw the removal of court protections as providing equal rights with Pākehā citizens and the power of owners to make their own decisions about sale or lease.[184] Māori saw the changes as facilitating alienation. Their opposition was fierce and, as we shall see, saw the reversal of these provisions in 1973–74.

2.3.4 Māori Affairs Amendment Act 1974

The 1974 Act was a measure of the Labour Government introduced by the Minister of Māori Affairs, Matiu Rata – the first Māori to hold the portfolio in many years. He had been a strong critic of the 1967 Amendment Act, and led a review of it, resulting in the White Paper of 1973. Belgrave et al state that the Government now 'began to recognise that Māori relationships with the land could not be reduced to individual interests', and that 'the emphasis on retention and cultural attachment became important'.[185] Rata also turned his back on a policy of 'negative integration'; and whereas Māori relationships with their land had been characterised in preceding years as 'sentimental attachment', the White Paper couched those relationships in quite different terms:

> Land to the Māori is no less a part of his heritage than it is of any other indigenous people. Without some interest in, claim on, or the recognition of his right on what is called his hereditary lands the Māori is a person who may well feel he is without standing in his own area or district and, more important, a person without a sense of constructive direction.[186]

The White Paper reflected the Labour Party's belief in 'the retention of Māori land in Māori ownership'. Rata stated that the Government recognised 'the right of kin-groups to remain proprietors of their land', though with ownership came 'the responsibility of ensuring the effective use of land', which the Government was determined to achieve.[187]

The new amendment Act introduced as a result was 'an attempt to reverse some of the more contentious provisions' of the 1967 Act.[188]

One of the most urgent changes was to remove the Crown's powers to compulsorily Europeanise Māori land. This was done in the Māori Purposes Act (No 2) 1973, the year before Rata introduced his principal Act. Part 1 of the 1967 Act (providing for those powers) was repealed in its entirety.[189]

Part IV of the 1974 Act replaced the central Board of Māori Affairs with a new Māori Land Board which had similar powers and functions to those of its predecessor but now included Māori representation. The board was required to give effect to the policies of the Government. Its members were the Minister, the secretary of the department, the director-general of lands, the valuer–general, a member of Parliament representing a Māori electorate, a nominee of the Māori Council, and three other Māori appointed by the Minister. Alongside the new body, Māori land advisory committees were established to exercise powers delegated to them by the Māori Land Board,

which would include title improvement proposals and any change or use of Māori land. Among their members were officials and up to four representatives of local Māori, so that Māori could have a voice in their own affairs at local level.[190]

Having introduced Māori representation into land administration, the 1974 Act also repealed all of the provisions for compulsory acquisition of 'uneconomic interests'. Nor was the Māori Trustee to try to buy such interests – the conversion fund was effectively wound up, although it continued to exist into the 1980s.[191]

There were changes to the procedures for alienation as well, designed to give owners 'a greater say' in any proposal to sell or lease their land, or anything that affected it.[192] In his 1973 White Paper, Rata had 'promised limits to curb alienations by minority owners and to enhance the jurisdiction of the Court in dealing with alienations'.[193] The statutory provisions for retention were greatly strengthened in 1974. Leases could no longer include an option to purchase, and the quorum for a meeting of owners to grant long-term leases (more than 42 years) was increased from three owners under the 1953 Act to 75 per cent of owners (by share value). The quorum for sales was similarly increased from three owners to 75 per cent of all owners by share value.[194] Thus, the 1974 Act introduced a significant statutory restriction on permanent alienation, whether by lease or sale. For shorter-term leases, the quorum was on a sliding scale according to the length of the term.[195] This marked the first time that the quorum and voting thresholds in the meetings of owners system were used protectively.

In addition, some of the court's broader confirmation jurisdiction was reintroduced. While the court retained the duty to consider the adequacy of the price or rent, as in 1967, and to ensure that an alienation did not lead to undue aggregation of farmland, it could also consider whether a trust was involved and whether a special relationship existed that might impact upon the price. The court was specifically directed to ensure that the value of any millable timber or minerals had been included in the price. The very broad discretion under the 1953 Act was not restored.[196]

In another reversal of the 1967 amendments, Māori landowners could apply to have their land – if compulsorily changed to 'European' – restored as Māori land.[197] Incorporations were also enabled to change the status of their land from European land back to Māori land, on application to the court.[198] The following year, the Māori Purposes Act 1975 automatically restored the status of all former Māori land held by incorporations.[199] But Māori shareholders were not to become owners again until 1993.[200] In 1975, the category 'European land' was itself abolished, to be replaced by 'general land'.[201]

Thus, the 1974 Act removed or reversed some of the features of the 1953 and 1967 Acts that Māori had most opposed, and it had also recognised Māori aspirations by greatly strengthening the restrictions on alienation. Even in 1974, a quorum of 75 per cent would be prohibitive for the blocks with large numbers of dispersed owners. The following year, Dame Whina Cooper was to lead the land march to Wellington, and the cry of 'not one more acre' would galvanise Maoridom.

2.3.5 The period in perspective

The 1953 Act and its 1967 amendment had incorporated the most determined attempts of the Crown to repair Māori land titles – a project it had embarked on earlier in the century. It did try to address the problems its title system had created, providing for exchange of interests, amalgamation, consolidation, and then conversion. But for much of the century its main solution was to complete the process of individualisation; that is, to clear 'small' owners from crowded titles so that the others could establish small family farms, and would possess a title more likely to attract finance. The forced removal in favour of larger shareholders ran quite counter to the system of Māori property rights which were held collectively on the basis of kinship. By the late 1970s, development had had to be refocused from small, individual farms to 'station farming'.[202] In any case, the dispossession of owners from titles was a drastic solution, which would impact on the rights of subsequent generations too.

The Central North Island Tribunal found that this history made sobering reading:

> From the early decades of the twentieth century, for whatever reason, owners either made decisions – or were called on to make them (if required by the court) – to sacrifice the individualised rights to which at the outset the court had not only said they were entitled, but which they must have. These, we underline, were the rights which replaced the community-held and community-protected rights of the pre-Native Land Court era. The new tenure system had required Maori to surrender the protection of the community . . .
> . . . Maori owners had the right not to be divested of the property rights with which the . . . system had provided them in place of customary titles without their consent.[203]

The Crown's alternative approach to title difficulties in this period, to try to restore the ability of Māori owners to manage their land collectively through incorporations and trusts, would become more important from the mid- to the late-twentieth century. As we noted earlier, section 438 trusts were being created rapidly from the mid-1960s on, and proved to be one of the most important innovations of the 1953 Act. Matiu Rata hoped to encourage this process in 1973, noting that the trusts had

> proved remarkably acceptable to the Māori owners generally, affording them responsibility in dealing with their own lands, also involvement and identification therewith. Many, many thousands of acres of land have been so put to use with resultant productivity as a consequence.[204]

The Crown's imperative to get land into production was accompanied by assistance in the form of development schemes, with a growing emphasis on forestry as well as farming. The 1960s and 1970s saw the negotiation of important forestry leases. Development assistance (and a guarantee that land would not be lost because of State loans) was accompanied by direct Crown control of Māori farming on the schemes. As was said in Parliament in 1967, the Government had to see that the land was put 'into a state in which it can be of real benefit to the owners, and not merely incur rating liabilities'.[205] Matiu Rata hoped to greatly increase development assistance to Māori in the 1970s, and also to do something about landlocked land, which had been identified as a key Māori concern by the select committee's inquiry on the 1967 Bill.[206] But he was not really successful in achieving either of these objectives.

We turn next to the immediate origins of Te Ture Whenua Māori Act 1993, in the period of the Māori protest movement, Treaty claims, and the corporatisation of the State, diverse forces which all impacted on the watershed law change in 1993.

2.4 The Genesis of the 1993 Act

2.4.1 Introduction

By the 1970s, the Māori Affairs Act 1953 was looking 'increasingly out of date'.[207] This was both because of the nature of Māori protests in the 1970s, which highlighted Māori dissatisfaction with lack of accountability in administration of Māori land, and its lack of cultural appropriateness – as well as rejection of the paternalist nature of Māori policy of the 1940s and 1950s.[208]

The National Government introduced a substantial Māori Affairs Bill into Parliament in 1978. The Royal Commission on the Māori Land Court had just been established. But the Government stated that the Bill was being introduced quickly precisely so the royal commission could study it and make suggestions. In 1979, following major objections to the Bill by the Māori Council, the Government withdrew it, asking the Māori Council to prepare a paper which might form the basis of a new Māori Affairs policy.[209] The council responded with a policy paper *Kaupapa: Te Wahanga Tuatahi*, released in 1983, which would be vital in 'framing the conceptual structure of the new Act'.[210] The council's paper was the result of an 'extensive discussion and consultation process' within Maoridom.[211]

A new Māori Affairs Bill was prepared. But it would be 10 years before it was amended and passed as Te Ture Whenua Māori Act 1993. Initially, this was because the Māori Council's blueprint and the resulting Bill were overwhelmed by the massive restructuring of the fourth Labour Government. The Department of Māori Affairs was itself restructured, the Iwi Transition Agency (Te Tira

Ahu Iwi) and the Ministry of Māori Affairs (Te Manatu Māori) were established, and land reform was pushed off the agenda. At the same time, Māori became preoccupied with another raft of changes, as their Treaty claims assumed prominence with the extension of the Tribunal's jurisdiction to historical breaches in 1985. Major issues were also raised about the protection of the Māori language, the rights of Māori in Crown lands made over to

Landlocked Lands

Many owners of Māori land have no legal access to their lands. These blocks of land are commonly referred to as being 'landlocked', and resulted from processes of sale and partitioning in which no provision was made for access to land remaining in Māori ownership.

In some cases, these land sales and partitions were instigated by Māori. Often they were undertaken as a means to pay debts that the landowners incurred when securing title to the land through the Native Land Court. Crown-initiated partitioning also led to the creation of landlocked blocks. From 1877, the Crown could apply to the court to partition out any interests it had purchased in land owned by Māori. Where the Crown acquired interests in a land block over many years, that block could be subject to multiple partition processes. Each set of partitions raised the possibility that land remaining in Māori ownership could become landlocked.[1]

As we have discussed, Māori communities could not control or make strategic choices about what land would be sold or retained. The Central North Island Tribunal found that non-sellers, surrounded by repeated partitions and sales, could be left with small, uneconomic, landlocked portions that had been saddled with survey debts (incurred as a result of sales by others). Owners in such situations often had little choice but to sell in their turn.[2] From 1909, the court ordered ever-smaller partitions, often without regard to whether their size or shape enabled them to be used, and often without access.[3]

Whatever the genesis of the landlocked nature of their land, affected Māori owners are dependent upon the goodwill of neighbouring landowners for access to their land. For many this means that access to their land is restricted, uncertain, and subject to change at short notice. For others, an absence of neighbourly goodwill has left them unable to utilise their land for cultural or economic purposes. They are unable to fulfil their duties as kaitiaki to safeguard and care for wāhi tapu, urupā and other sites and resources of importance, and cannot develop land for economic purposes. In some cases neighbouring owners treat landlocked Māori land as their own, denying the owners access while utilising the land for their own purposes.

The frustration and difficulties suffered by the owners of landlocked lands have led many to consider the sale of their land. The Wairarapa Tribunal reported on the plight of the owners of Pūkaroro reserve on the Wairarapa coast. Landlocked within Te Awaiti Station (a large farming operation), the reserve is unable to be managed by its owners. Haami Te Whaiti of Ngāti Hinewaka told the Tribunal:

> The lack of legal access to these reserves has meant that the reservation of these lands has been meaningless. They are token reservations. In practical terms we are not able to get access to the land, we are not able to use the land, and we are not able to prevent trespassers from trespassing on the land. Yet these lands are some of the last remnants of our tribal estate on the coast.[4]

Mr Te Whaiti stated that the fight to gain access and control of their lands was a drain on Ngāti Hinewaka and made the desire to sell the land understandable. He believed that the answer to the problem was for the Crown and local council to provide legal access to landlocked blocks.[5]

State-owned eenterprises, and about the rights of Māori under the Treaty in the commercial fishing industry.

By then, Māori policy concerns were being articulated 'more and more within the language of iwi and hapū'. Māori were demanding increasing control over policy making, and the recognition of Māori values and practices in a range of Government policies, including environmental management. This gained gradual acceptance during the 1980s, reflected partly in the terms of the Resource Management Act 1991.[212]

The Māori Affairs Bill resurfaced in 1987. Most of the provisions of the first part of the 1983 Bill were brought forward into the 1987 Bill, as were most of the provisions of the second part of the Bill, which was ready for introduction in 1984 but which had never made it into the House.[213] Some of the recommendations of the Royal Commission of Inquiry into the Māori Courts were also implemented in the 1987 Bill.

We begin with the report of this latter commission, often referred to as the McCarthy report.

2.4.2 Royal Commission on Māori Courts, 1980

The establishment of the commission followed the recommendation of the Royal Commission on Courts that an investigation of the Māori Land Court take place. The land court had not been included in the terms of reference of the commission on courts. Sir Thaddeus McCarthy was appointed chair of the new commission, and the members were Whakaari Mete-Kingi and Marcus Poole. The terms of reference stated that the commission should inquire into the structure and operation of the Māori Land Court and the Māori Appellate Court and what changes were necessary to provide for the

> just, humane, prompt, efficient, and economic disposal of the business of the Māori Courts and to ensure the ready access of the Māori people and other claimants to those Courts for the determination of their rights now and in the future.[214]

It thus focused on the court, rather than on the laws governing the Māori land system and, it stressed in its report, especially not on Government policy 'towards Maoridom'; nevertheless it felt obliged to comment on aspects of Māori land law insofar as it affected operations of the court.[215]

The commission reported in May 1980. Its report pointed to the 'extraordinary complexity of Māori land law' (which it suggested the Māori Affairs Bill 1978 would have done little to remedy).[216]

In keeping with its terms of reference, the commission considered in detail the practice and procedure of the court. But it also included sections in its report on some of the key issues for Māori owners that had inevitably surfaced during its inquiry. These included incorporations and trusts; fragmentation of interests in Māori land; and recording title to Māori land. We summarise each of these in turn.

On incorporations and trusts, the commission noted that there had been a steady growth in the area of land under incorporations since 1965. Another feature was the growth in recent years of a 'more popular' form of management by section 438 trusts. Increasingly, single trusts were covering numerous blocks, and there had also been moves to form more tribal trusts.[217] The commission felt that the successful establishment of these entities showed that, 'contrary to a view widely held in the early 1960s', multiple ownership was not necessarily a bar to the economic use of land.[218] In fact 'fragmented incorporation and trust ownership [could] contribute to the gross national product just as efficiently as land that is individually owned'.[219]

The increased willingness of owners to use incorporations and trusts had had a marked impact on the work of the court, which was involved in setting up forms of management for what, in some cases, might be very large commercial undertakings. Judge Durie had explained that the court itself was largely responsible for promoting the formation of trusts, a point we noted earlier. The court was also involved in reconciling differences among factions of owners. The commission noted that, given the role of the court in promoting the formation of trusts, it was in a 'powerful position' to influence the form and extent of corporate land management.[220]

On fragmentation of shares, the commission detailed

the origin of the problem in the nineteenth-century laws for Māori land, the unpopularity of more recent legislation to address the problem by compulsory purchase of uneconomic interests, and the even greater hostility, by the time of its inquiry, to compulsory disinheritance. It noted, however, that not all Māori wanted to move to communal ownership; many preferred to retain individual ownership.[221] The commission thought that the problem of fragmentation was more an administrative than judicial issue, and suggested that the Government had 'perhaps the greatest role' to play in tackling it.[222]

On the records of the Māori Land Court, the commission noted the court's separate system of recording ownership of Māori land, and the fact that large areas of Māori land had not been brought under the land transfer system because of significant obstacles: the large numbers of partition orders which had never been surveyed, the multiple ownership of most blocks of Māori land, and incomplete ownership lists. The result was that many Māori owners had no indefeasible title, and thus found it difficult to mortgage property. The commission urged that Māori would derive real benefits from a State-guaranteed system of title under the control of the Land Registry Office, and that despite the size of the problem (in respect of both surveys and bringing ownership lists up to date), it must be tackled so that it did not continue to get worse.[223]

The commission cited on a number of occasions the submission of Judge ETJ Durie (who would soon be appointed chief judge), which has been much cited since, and which counsel for the interested party appended to his submissions.[224] Judge Durie spelt out the core purpose of the court in 1980 as being 'to assist the retention of Māori Land in Māori ownership by facilitating its better use and management'. Among the duties of the court which he listed were:

> To provide a means whereby owners might know of what is happening to their lands, and a forum in which they might discuss it;
>
> To determine or settle disputes within the body of owners, simply and efficiently;
>
> To protect minority interests against an oppressive majority, and to protect the majority against a vociferous minority;
>
> To ensure fair play when Crown or non-owners seek to treat with Māori lands in multiple ownership;
>
> To see practical results, and promote better use and management of lands;
>
> To protect individuals and groups in the administration of their assets by Incorporations, Trusts and the Department, and to afford protection of Incorporations, Trusts and the Department in the administration of those assets;
>
> To keep proper records so that there might be some certainty in Māori land affairs.[225]

The judge explained the nature of the Māori Land Court to the commission; it was a somewhat unusual body, both a 'Court of Law' and a 'Court of Social Purpose'.[226] As he put it:

> But as distinct from most Courts of Law, it could be said that the main function of the Māori Land Court is not to find for one side or the other, but to find social solutions for the problems that come before it; to settle differences of opinion so that co-owners might co-exist with a measure of harmony, to seek a consensus viewpoint rather than to find in favour of one, to pinpoint areas of accord, and to reconcile family groups. The social purpose appears to require that the Court should strive always to achieve some practical result that will advance the interests of the owners and the better use of the land in a manner compatible with both Māori aspirations as well as the national endeavour.[227]

The commission, however, was doubtful about a court playing such a role, stressing that it should be a '*Court of justice*' (emphasis in original), and should strive to be 'predominantly a judicial and less of an administrative body' – while retaining its role as a court of social purpose 'with sympathy for and knowledge of Māori needs and aspirations'.[228] The commission feared that involvement in administrative action might lead to conflict between the courts and the 'machinery of State'. It argued that the Department of Māori Affairs was now 'large [and]

sophisticated' and ought to step up and use the powers available to it in Part II of the Māori Affairs Amendment Act 1967, to promote the better use of land and its administration – which it had been told had not really been done. (Because the powers of title improvement under this part of the Act were rarely used, we did not discuss them in section 2.3.3 above.[229])

Such was the long and deep involvement of the court, the commission acknowledged, in administrative actions relating to Māori land – in maintaining records of Māori land, of its ownership, of Māori family histories, and in the development and better use of land – that the commission did not see that it was possible to completely remove all its administrative functions immediately. But once the court's title and record matters were attended to, the court should confine itself to judicial functions.[230] The commission's stance – which Professor Boast has described as 'somewhat extraordinary'[231] – was that ultimately there would be no real need for a separate Māori Land Court. This was despite its awareness that this would not be acceptable to most of those Māori and tribal groups with whom it had come into contact (while adding that it had not had much contact with 'younger . . . urban Māoris'):

> Notwithstanding their numerous complaints concerning the Court's inefficiency, they seemed to us to have a deep love and respect for it, its judges, and its staffs. They wished it retained as 'our Court', and made clear that its abolition would inflict a deep emotional blow.[232]

2.4.3 The Māori Council's 'brown paper' *Kaupapa: Te Wahanga Tuatahi* (1983)

In September 1980, following the release of the commission's report, the Government invited the NZMC to prepare a paper to form the basis of new Māori Affairs legislation. The council had been critical of the Government Bill introduced into Parliament in the late 1970s. The paper would play an important part in framing the new Act.[233] According to Whaimutu Dewes' evidence, almost all of its recommendations were included.[234]

The Māori Council committee was chaired by Sir Graham Latimer, and among its members were John Bennett, Henry Ngata, Dr Pat Hohepa, and Ken Hingston as well as the Deputy Secretary for Māori Affairs. Chief Judge Durie was invited to attend ex officio, so that he might absent himself as necessary to avoid conflict of interest.[235]

The council issued a preliminary report in December 1980, applauding the role Minister Ben Couch had bestowed upon it: 'That decision is one of historic importance. It is the first opportunity that Māori people have had to initiate the preparation of a complete legislative statement on their own affairs.'[236]

This initial report was focused on restructuring and empowering the New Zealand Māori Council system, and devolution of Government resources and programmes to tribal rūnanga, in pursuit of mana motuhake ('whaia te mana motuhake').[237] The report ended with a section proposing changes to Māori land legislation, based on the principle: 'Puritia te whenua, hei taonga mō te ao hou. The law must provide for the retention of Māori land to the fullest extent possible.'[238]

The Minister was not impressed, asking the NZMC to produce another paper; one with proposals that he could actually 'get through the House'. As a result, the NZMC recast its focus on the Māori Affairs Acts and Māori land reform.[239]

Subsequently, the council spent two years meeting with Māori and others knowledgeable about Māori land issues. Its report *Kaupapa, Te Wahanga Tuatahi* was published in February 1983.

(1) *General principles*

The report began with the Treaty, set out in both languages, and the key expectations of each of the parties to it:

> The Māori expected his 'Rangatiratanga' to be protected; the Crown expected to gain sovereignty over New Zealand . . . But it was also the case that ideas of ceding sovereignty and of guaranteeing rangatiratanga were not accompanied by any means that were to give them substance.[240]

'It is beyond dispute', wrote the council, 'that the Crown has well and truly established its sovereignty; but what of the Māori's rangatiratanga?'[241]

The council noted Queen Elizabeth's visits to Waitangi as indicating her mindfulness of the word of her ancestor, Queen Victoria, and emphasised that 'ancestral initiative is tapu to the Māori and that it lies at the heart of their mana and self respect as Māori New Zealanders'. Rangatiratanga meant not just possession, but

> In its essence . . . the working out of a moral contract between a leader, his people, and his god. . . . In pragmatic terms, it means the wise administration of all the assets possessed by a group for that group's benefit; in a word, trusteeship. And it was this trusteeship that was to be given protection, a trusteeship in whatever form Māori deemed relevant.[242]

'Rangatiratanga', the council said, 'takes many forms today'. It went on to refer to some of the

> better known modes of rangatiratanga . . . each is rooted in a pre-European tradition where those who lead have obligations as well as rights, where, irrespective of lineage, they have to prove themselves in service, and where they are at all times accountable to those for whom they are trustees.

Those modes, it stated, included the kaumatua, male and female elders on the marae; the Māori War Effort Organisation and its committees (continued under the NZMC's legislation); the Māori Women's Welfare League; trusts (Māori Trust Boards and section 438 trustees); incorporations and their committees of management; and political leaders. These were all supported by various statutory agencies: the Department of Māori Affairs, the Board of Māori Affairs and Māori Trustee, the Māori Land Court, and the Waitangi Tribunal.[243]

The importance of land to Māori, the report stressed, lay in its 'link with the ancestors of our past, and with the generations to come. It is an assurance that we shall forever exist as a people'.[244] The continued erosion of the land must not continue; the law must encourage the retention and use of Māori land by the tribal group, for its benefit. Management structures must permit maximum owner participation and control.

Thus the council sought to stop any more compulsory takings of Māori land for public works. Rather, leasing or some other arrangement should be used where Māori land was truly essential for the national interest, with the final decision to be made by the Māori Land Court.[245] In addition, the NZMC wanted to change the law that presently allowed a simple majority (by share value) to decide to sell, so long as a quorum of 75 per cent of shares was represented at the assembled owners' meeting. If, at such a meeting, a majority voted in favour of alienation, it would mean that owners holding as few as 38 per cent of the shares could decide to sell and dispossess the remaining owners. Yet in general law all joint owners must agree to sell. The same was sought for Māori land: agreement of 100 per cent of ownership interests before sale.[246]

And kin group ownership should be protected to the fullest extent, without outsiders – Māori or Pākehā – impinging on it, and without the fear that outsiders might take over the land. The strengths, not the weakness, of multiple ownership should be recognised. Thus, arrangements for succession and the fragmentation of shares were of great importance.

These, then, were the principles on which the NZMC made its recommendations for a new Māori land law. We turn next to outline those recommendations

(2) *The NZMC's particular recommendations*

(a) *Successions*

The NZMC recommended:

- No provision in a will should have force unless it vested Māori freehold land interests in one or more direct descendants, or a relative in the kin group line, or another owner in the block.[247]
- Successions should be effected only by a vesting order of the court, whether or not there was a will.
- Rights of intestate succession should be determined in accordance with Māori custom.
- Legally adopted children might succeed to the shares

on their adoptive parents; in the case of whāngai, the court might include them where there was evidence that they should succeed to their adoptive parents. Alternatively, the court could exclude them from succession to their birth parents where there was evidence indicating an intention that they should succeed to their adoptive parents.

- The court might effect family arrangements on successions, but no successor should be excluded from any interest without his or her consent.[248]

(b) *Fragmentation of shares*

The NZMC recommended:

- Replacement of payments of the proceeds of 'uneconomic shares' by the Māori Trustee to the Māori Education Foundation, by a system whereby shares were held and combined in a trust, so that owners' connections with their ancestral lands would not be severed.
- Use of the combined income of trust shares for the benefit of the owners, their marae, or for assistance to individual beneficiaries.
- Hence, elimination of the high administrative cost of recording of increasing numbers of fractional shares.
- On application, the court might order the shares, or any part of them, of a deceased owner to be held unsucceeded as 'whānau shares' in the name of that deceased, or that any part of the shares be held as 'whānau shares' in the name of a partial successor to the deceased, as a tūrangawaewae for the issue (eventually became whānau trusts under the 1993 Act).[249]

Provisions were suggested to protect successors who objected to such an application; to allow the court to order from time to time how income received from whānau shares should be paid over, and to whom (with regard to the known preferences of the owners as a whole); to protect the interests of missing or absent owners who subsequently returned to file a claim of entitlement; and to allow owners to propose a minimum share figure for approval by the court, below which interests should be established as whānau shares.

In addition, where legislative and judicial policy had prevented kin group members from taking or holding interests in an attempt to overcome the 'presumed difficulties of fragmentation', the court might order that any person excluded from land as a result of an arrangement made without sufficient consent should be included in the court's records. And the court should have jurisdiction to increase the total shareholding if necessary to include the former owner. Similarly, former owners excluded by compulsory conversion should have the right to come back in as owners.

Shares in Māori incorporations should be treated on the same basis, according to the same principles, once incorporation shares were classed in amending legislation as real property, or beneficial freehold interests in common in the incorporation.[250] This recommendation was to result in incorporation 'shareholders' once again becoming the owners of Māori land.

(c) *Group ownership*

The council made it clear that no law was proposed for the abolition of individual ownership in favour of group ownership. (It was clear by now how much Māori valued and clung to their individual interests in Māori land.) The NZMC did propose, however, that owners or incorporation shareholders should be able to apply to have their land changed so that it was held for tribal purposes. The vehicle for this could either be a meeting of assembled owners or a court sitting, so long as there was a mechanism for the owners to reach agreement. If they did agree, then the court might appoint trustees or a tribal authority or a trust board, define its powers and duties, and set out how its income or assets might be applied. Successions to the land would cease, and the land would be vested in the trustees. But the interests of any major owners should be protected.[251] (This concept was eventually provided for in the 1993 Act in the form of whenua tōpū trusts.)

(d) *Title orders*

The council was emphatic that all Māori Land Court title orders must be registered in the Land Transfer Office so

that they would be guaranteed by the Crown like other registered titles. Māori owners must have secure title. Survey would be required in many cases.[252]

(e) *Section 438 trusts*

The Māori Trustee, Māori trust boards, trustee companies, and incorporations should all be empowered to hold Māori freehold land as responsible trustee, custodian trustee, or as agent for the owners. No trust order should be made by the court providing for the sale of the fee simple of Māori land in the trust unless the beneficial owners had all agreed to the sale. In making orders establishing trusts, the court must make provision for reporting to beneficiaries and the court by trustees, and ensure accountability to beneficiaries.[253]

(f) *Incorporations*

There should be more flexibility for incorporations: for instance, they should be able to produce their own constitution to the court when applying for an order of incorporation, which the court might amend; shares should be treated as though they were interests in land so that they could be passed to future generations in the customary manner. Small family incorporations might be permitted to adopt less formal and less expensive proceedings. Provision should be made for the objects of incorporation to be broadened.[254]

(g) *Land-use, development, and Māori occupation of their land*

It is clear that the council was thinking both of future economic development and of the rights of Māori owners to occupy their land.

Thus the NZMC suggested that new legislation governing land-use should be 'permissive rather than restrictive'. Given the increasing speed of changes in land-use in recent years, it seemed sensible to avoid being overly specific in legislation; rather, the legislation should authorise a wide range of activities, so that any particular decision might be left to owners or the court.

In respect of leases, the council argued that it should not be forgotten that the use and occupation of land by the Māori owners was of equal importance to its retention. There should be a new procedure for granting of leases, so that owners were not always on the back foot by having to respond to a proposal by a prospective lessee. Instead the court or 'any interested party' might take the initiative by calling for a meeting of owners to seek a feasibility study of potential uses of the land, and appoint trustees to take the matter further, including investigating the availability of finance. The Board of Māori Affairs must be relied on for providing finance, and increasing the finance it made available, since it was the only lending organisation which placed a high priority on the occupation of Māori land by Māori owners. For that reason, the land development provisions of part XXIV of the 1953 Act must be extended to provide a mortgage guarantee service, and so tap other financial sources.[255]

(h) *Town and Country Planning and Māori Housing*

The council included a long section in its report on issues relating to the Town and Country Planning Act 1977 and Māori housing. The NZMC was alarmed that the court had lost its power to partition land to provide for the housing and settlement of Māori, and the control of traditional rights of occupation was vested in local authorities. The Māori Land Court, it said, 'has an intimate knowledge of the complexities of Māori titles and owner groupings', and it was anomalous that its jurisdiction was subject to the 'prior scrutiny of local authorities and planning tribunals with no specialist knowledge in these areas'.[256] Town planning, over the past 29 years, had inhibited the development of rural settlement on Māori lands. The barriers to rural resettlement under existing laws must be overcome, and the council submitted a number of proposals as to how this might be achieved. In particular, it was concerned to enable the settlement of individuals on the land, where this was sought, through court issue of an occupation order for a delineated house site and surrounding area (which was carried out in the 1993 Act). A restriction

would be placed on the alienation of that land. The court, the NZMC recommended, should have powers to hear local authorities on the need for provision of services, to impose conditions relative to services, and to determine occupancy and other rights in the event of dispute.[257]

(i) *Servicing organisations*

Some comment was made on the future roles envisaged for a range of servicing organisations, of which two are noted here. The NZMC recommended that the Māori Affairs Department should have new functions and objectives, including the development of the Māori people through their tribal authorities, and the allocation of resources to such authorities; and the provision of funds and advice to individuals for housing, farming, business, and similar purposes. It was also suggested that the Māori Land Court must be adequately staffed with trained personnel, and where necessary must be an 'innovator and catalyst in respect of administration and utilisation of Māori land'. The court, it stated 'is the only forum with the experience and understanding to properly facilitate Maoridom's aspirations for its land'. Its role had changed over time, and for the 1980s and beyond

> its primary role must be to ensure that all Māori land has effective administration bodies charged with the dual responsibility of retention of Māori land in Māori ownership and its proper utilisation. Trust and Incorporation legislation must be adapted to further these purposes.[258]

2.4.4 Government's response to the *Kaupapa* report: new Māori Affairs Bills, 1983–84, and 1987

In the wake of the Government's receipt of the *Kaupapa* report in February 1983, things moved quickly. The report formed the basis of new legislation, a Māori Affairs Bill, which was to be introduced into the House in two stages: the first in December 1983, the second in the first half of 1984. The Minister, Ben Couch, made it clear at the outset that he intended to adopt 'as many as possible' of the council's recommendations, and to introduce legislation by the end of 1983, so the Bill could be reviewed by the select committee over the recess, and passed into law early in 1984. This meant, the deputy secretary pointed out, an 'extremely tight deadline' for drafting the legislation.[259]

The Department of Māori Affairs responded with an extensive commentary on the NZMC's 'brown paper'. Belgrave, Deason, and Young analysed the commentary, noting that the department divided it into three parts: first, the proposals of the council that it agreed with; secondly, those that it did not support; and thirdly, its own additional proposals.

The department, officials said, supported the Treaty as the foundation of the legislation and the report's promotion of the retention of Māori land, its occupation, use and administration for the benefit of owners; it strongly supported the philosophy behind the legislation. Its support for various proposals of the council was tempered by some cautions. For instance, the department:

- saw merit in the suggestion that a block of land could be sold only with 100 per cent agreement by the owners, but considered the court must have flexibility to approve a sale where that had not been achieved, in circumstances where objections were not well founded, or 'ridiculous results' might occur if a sale could not proceed;
- backed drawing fractional interests together in whānau trusts, and that shares in Māori incorporations be treated on the same basis as beneficial interests in Māori land; and
- agreed with the proposal that landowners should decide the order of priority in granting new leases, and that as a matter of course leases should first be offered to members of the group of owners.[260]

The department suggested that the question of leases, and their terms, should be considered outside of the review of the Māori Affairs Act. Likewise the council's proposals for Māori owners to be able to build on their own land, without being constrained by planning restrictions and local authorities, cut across other legislation and required consultation with the responsible Ministers.

The First Version of the Preamble, 1983

On the basis of the NZMC's *Kaupapa*, the Māori Affairs Department proposed that the preamble of the 1983 Bill would state:

> Whereas the Treaty of Waitangi symbolizes the special relationship between the Māori people and the Crown and other subjects;
>
> And whereas it is desirable that the spirit of the exchange of sovereignty for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed;
>
> And whereas rangatiratanga in the context of this Act means the custody and care of matters significant to the cultural identity of the Māori people of New Zealand in trust for future generations;
>
> And whereas in particular, it is desirable to recognise the special relationship of Māori people to their land and for that reason to promote the retention of that land in the hands of Māori people according to their customs, and to facilitate the occupation and utilisation of that land for the benefit of the Māori people;
>
> And whereas it is desirable to establish agencies to assist the Māori people achieve the implementation of these principles.[1]

A working party should be set up, but should not aim at inclusion of such measures in the 1983 legislation.

The department's own, additional proposals included: empowering the court to authorise trusts for ventures not relating to land, such as marine farming; that use of partitions be reviewed; and that the conversion fund be formally abolished.[261]

The Minister of Māori Affairs then took his final advice for progressing the Māori Affairs Bill to Cabinet: that the majority of the council's proposals – along with reforms suggested by the department, the community, and the Royal Commission on Māori Courts – be put into the Bill, to allow public discussion and detailed examination of the issues by the select committee. The Cabinet Committee on Legislation and Parliamentary Questions:

- approved the retention of Māori land by Māori owners (it thought 100 per cent agreement was too extreme, but thought that the existing threshold for agreement should be tightened);
- considered more detail was needed on proposals to allow Māori to acquire an interest in a block of land from which they had been dispossessed, and on the operation of whānau trusts;
- approved the determination of succession on intestacy according to Māori custom, and that succession be effected only by vesting order of the Māori Land Court;
- approved the proposal that all Māori Land Court titles be registered in the Land Transfer Office;
- was concerned that in priorities for leasing, a distinction was made between Māori and non-Māori, which used 'race' as its justification, and might pose a human rights issue; and
- deferred a decision on the proposal that the Board of Māori Affairs be empowered to provide mortgage guarantees.[262]

The committee agreed on 2 June 1983 that the NZMC provisions which were not supported by the department should be left out of the new Māori Affairs Bill. It recommended to Cabinet that the minimum percentage of consent required for a sale be 75 per cent. It also recommended, however, that the court have power to still confirm a sale if this threshold was not reached, based on a range of specified grounds that the court had to consider. The Cabinet committee also recommended some relief for former owners or their descendants who had been dispossessed by compulsory conversion (or at the time of succession, without their consent). Those people should be entitled to *buy* undivided interests in Māori land. Belgrave et al commented: 'The council's proposals

for the establishment of whānau trusts and pūtea shares were supported by the committee as a way of dealing with uneconomic interests in land.'[263]

Treasury, asked to report on the resource implications of the proposals, concluded that those regarding approval of successions, scrutiny of trustees, and other matters would have substantial financial implications and staffing requirements. It did not support the Board of Māori Affairs being empowered to give Crown guarantees on mortgages, suggesting that the Rural Bank, the Finance Corporation, and the Housing Corporation already had such a power, and should be used instead.[264]

Cabinet approved the recommendations of the committee on 20 June 1983 and gave priority to the drafting of a Bill to be introduced into the House later in the year. The first stage was introduced in December, not all parts being ready by then. It gave effect to some of the recommendations of the council's report dealing primarily with the court and the general principles that were to apply in interpretation and application of the legislation. The second part of the legislation had the short title 'the Māori Affairs Act (Parts VI to XIII (1984))'. According to that Bill's explanatory note, it 'was the most important part of the legislation in terms of the spirit and intent of the proposals in the Kaupapa'.[265] It covered the 'vital questions' of the ownership and utilisation of Māori land in the best interests of the owners.[266]

According to Whaimutu Dewes' evidence, only six of the NZMC's specific recommendations had been left out of these two Bills. The most important of these was the requirement for 100 per cent agreement to sales, which we have already noted. The other five were:

- Providing the Court with power to abridge quorum;
- Abolishing the statutory maximum term for leases;
- Eliminating the power of agents to settle public works acquisitions;
- Providing the New Zealand Māori Council with power to appoint persons to the [district] Māori Land Advisory Committee; and
- Changing the jurisdiction of the Waitangi Tribunal.[267]

The Bill was left in mid-air when the Prime Minister Robert Muldoon called a snap election for 14 June 1984; it was ready for introduction, but was not in fact introduced.[268] A copy of the Bill had been sent to the NZMC for their response by August 1984, but that process, too, was overtaken by the election.[269]

Muldoon's Government lost the election. The incoming Labour Government had its own agenda of radical economic and social reform. As Belgrave et al point out, it would transform the State sector.[270] In Māori affairs, the new Government's concern was with Treaty claims, including extending the Tribunal's jurisdiction to hear historical claims, dealing with fisheries claims, and protecting te reo Māori as an official language. The 'reform of Māori land law was stalled' and 'there was little done by way of consultation or development on the reforms' in the interim.[271]

Thus, the Māori Affairs Bill was not a priority, and it was 1987 before the Labour Government introduced a new Bill.[272] Belgrave et al point out that 'most of the provisions' of the 1983–84 Bill were 'brought forward into' the Māori Affairs Bill 1987, and thence into Te Ture Whenua Māori in 1993.[273] Labour's Bill was introduced into the House on 29 April 1987 by the Minister, Koro Wetere, who pronounced it a

> very auspicious day for Māori people, because the Bill has been a long time in gestation, I know that Maoridom will greet it with praise and a big sigh of relief . . . For many years Māori people have called for a revision not only of the [Māori Affairs] Act [1953] and its many amendments but also of the very principles on which the 1953 Act was based.[274]

After its first reading, the Bill was referred to the Māori Affairs Committee, which heard submissions on it. Whaimutu Dewes' evidence recalled that the select committee 'received written and oral submissions and held, to the best of my memory, six hearings in communities

around the country'.[275] Māori incorporations were among those which made representations in 1988–89.[276] In 1989, the Department of Māori Affairs made recommendations to the committee, which were accepted; these would be drawn on in 1992, when Te Puni Kōkiri (the Ministry of Māori Development) made its own report as the Bill was prepared for return to the House.[277] Te Puni Kōkiri (TPK) had replaced both the Ministry of Māori Affairs and the Iwi Transition Agency on 1 January 1992.)

According to a ministerial taskforce report in 1992, the outcome of the submissions and select committee hearings in 1987 was favourable. The Bill and its kaupapa of Māori land retention 'received widespread support from Māori organisations and individuals'.[278] Thus, the support garnered by the NZMC's discussions and consultation between 1980 and 1983 had not dissipated in the interim.

2.4.5 The Māori Affairs Bill stalls again

(1) *The fourth Labour Government restructures the Māori affairs sector*

The 1987 Bill, in its turn, came to a standstill in 1989. As the Government's devolution policies unfolded, the Department of Māori Affairs was not immune. During the restructuring of Māori Affairs, the Bill 'dropped from the legislative agenda'.[279] In the discussion paper 'He Tirohanga Rangapu' (1988), the Government accepted its responsibility to honour the principles of the Treaty, to better accommodate Māori values and institutions within the process of Government administration and within New Zealand society, and to eliminate the gaps between the well-being of Māori – educational, personal, social, economic, and cultural – and that of other New Zealanders. The essence of the Government's proposed new policies was devolution to iwi, with a policy ministry and Māori programmes administered through mainstream departments and agencies.[280] Consultation showed Māori supported devolution to iwi but also retaining the Māori Affairs Department rather than using other departments which might not 'respond sensitively' to Māori issues.

As is well known, the Government went ahead with devolution to iwi authorities, abolished the department, and reviewed the Māori Trustee.[281] As part of this restructuring, the Government began the work of divesting itself of any remaining responsibilities for Māori land development schemes.[282]

(2) *The approach of the National Government: Ka Awatea, 1991*

In 1990 the National Party returned to power. The new Government was not willing to recognise iwi authorities, and intended to return to a more centralised Department of Māori Affairs. Services were to be devolved not to iwi authorities but through mainstream Government departments and local communities. Winston Peters was the new Minister. He commissioned a ministerial inquiry to review Māori Affairs policy, which resulted in the *Ka Awatea* report in 1991.

In respect of Māori land, the review committee (Denese Henare, Mary Anne Thompson, and Leith Comer) noted barriers to Māori economic development. Māori were unable to raise capital on multiply owned land, and they lacked the requisite training, skills, collateral, and information. The committee criticised the Māori Affairs Act because it lacked effective mechanisms to protect owner interests. The Act was seen as outdated and 'the greatest impediment to the management and utilisation of Māori land'. Likewise, the Māori Land Court was considered a legislative impediment to Māori land development. The court's jurisdiction did not extend to leasehold interests, and was limited both in terms of estate administration and in the range of land management and ownership options available. There was also inadequate maintenance or protection of court records, and no effective link between titles held in the court and the Land Transfer Office.[283]

Māori property rights, in comparison with other tenure, according to the *Ka Awatea* report, were highly regulated. Land management options were limited: either a section 438 trust or an incorporation. There was only one concept of trust available to landowners, with no capacity to consolidate family interests. The concept of Māori incorporation, on the other hand, was 'severely regulated and overly restrictive in terms of current management

practices'.[284] Nonetheless, the committee noted that Māori land retention was Government policy, which meant a totally deregulated approach – the policy preference of the day – could not be pursued.[285]

Ka Awatea recommended that the (1987) Māori Affairs Bill before Parliament be passed with urgency, and that the Government consider new initiatives to develop Māori land. In addition, resource management laws should be reviewed to ensure they did not impede Māori land and would foster Māori development.[286]

As part of the *Ka Awatea* review, another committee (Richard Charters, Annette Sykes, and Tama Nikora) advised that the Māori Trustee should continue, but that it was in 'disarray'. A number of criticisms were made which do not concern us here, except to note the recommendation that the Trustee should no longer fund his activities from Māori owners' funds (which should be disbursed), and that development and other services provided by the Trustee should be funded by the Crown.[287] It was also recommended that the Trustee actively facilitate the return of leases and trusts that it administered to the beneficial owners. But it should offer practical advisory and administrative services to Māori whose lands were returned to their control; otherwise the owners might find it difficult to raise finance, and might jeopardise the investment already made in initial development of the blocks.[288]

In the wake of *Ka Awatea*, the Government repealed Labour's Rūnanga Iwi Act, which provided a process of devolution of services to iwi, and, as noted above, established the new Ministry of Māori Development (TPK) in 1992. The Māori Trustee continued to exist and its operations were transferred to the new Ministry. Also, the Government went ahead with the recommendation that the Māori Affairs Bill should be enacted, which finally came to fruition two years later as Te Ture Whenua Māori Act 1993.

2.4.6 Reflections on this period

The NZMC's *Kaupapa* was the foundation of the Bills introduced to Parliament in the 1980s. Those Bills also contained some additions and modifications from the Māori Affairs Department. In order to develop a Māori position by 1983, the council had held what Mr Dewes called 'an extensive discussion and consultation' within Maoridom.[289] As far as we are aware, it is not disputed that the council's reform recommendations came from a broad consensus among Māori at that time. According to the submissions and select committee hearings process in 1987, there was still widespread Māori support for the proposed changes four years later. The Bills did not fail to proceed because they lacked Māori support.

Only part of the first Bill was put before the House in 1983. The most substantial part of the Bill had not been introduced when the snap election in 1984 resulted in a change of Government. Māori land law reform was not an immediate priority for the new Government. By the time it had become a legislative priority, resulting in a Bill and select committee hearings in 1987, the reforms were overtaken by the restructuring of the Māori affairs sector. The restructure was still in transition when, again, a change of Government took place and the sector was restructured afresh. Only after that did Māori land law reform become a priority, in the wake of the recommendation in *Ka Awatea* that Labour's 1987 Bill be urgently progressed.

Both Labour and National thus supported the original kaupapa of the NZMC, and could even pursue passage of the same Bill in 1987 and 1992. But did the council's reforms still command widespread Māori support by 1992?[290] That question had to be asked when the Bill once again obtained priority in 1992.

2.5 Te Ture Whenua Māori Act 1993

2.5.1 The process for finalising the new legislation

Formally, the Māori Affairs Bill was still before the House, and the select committee had already made changes to it back in 1989. A new Minister of Māori Affairs, Sir Douglas Kidd, had been appointed in October 1991. He later noted that the Bill 'went into a deep parliamentary sleep until I took charge of it on taking office'.[291] In January 1992, the Māori Land Court judges were invited to review the Bill and comment on technical matters.[292] TPK officials began

work on the Bill early in the year to review and update it. Many months of 'arduous' effort followed. In May 1992, the new select committee agreed to the Minister's request that officials hold a 'working group hui' to assist with updating the Bill.[293] This was attended by former Māori Affairs officials, representatives of the staff and judges of the Māori Land Court, and representatives of the NZMC and FOMA. The Māori Congress was also invited.[294] Ian Peters, chair of the select committee, later noted the assistance of the Māori Lawyers Association too.[295]

As a result, TPK prepared a supplementary report on the Bill, which incorporated matters needing updating or change arising out of the department's original report to the former select committee in 1989, comments of the Māori Land Court judges, comments of the working group hui, and subsequent submissions to the Minister of Māori Affairs. The supplementary report, officials explained, made as few major changes as possible to the previous recommendations of 1989, since the earlier select committee had already accepted those.[296]

In August 1992, a ministerial advisory team was set up to 'make a final push to get the Bill through the Select Committee process and passed into law'. It comprised Whaimutu Dewes, Joe Williams (now Justice Williams), and Annette Sykes. This external advisory group reviewed the departmental work completed earlier and, in particular, advised on the application of the principles of the NZMC's *Kaupapa*.[297] The ministerial advisory team worked with TPK's team throughout August 1992, and held meetings with a Māori Land Owners Group, and Māori Land Court judges and registrars. It reported back to the chief executive on parts of the Bill that were in dispute and made recommendations about whether or not to keep them. It also assisted TPK to prepare its report to the select committee.[298]

On 8 September, the advisory team (apparently with a title of 'review task force')[299] wrote a report requested by the Minister. This report gave a 'single coherent description' of the law that would result from the enactment of the Bill. The report noted that there were no major policy changes to be made to the Bill since it had been introduced and submissions heard by the select committee in 1987–88. The Ministry was anxious now that, after so long a delay, the Bill be passed with some speed. And, in the view of ministerial advisers Whaimutu Dewes, Joe Williams, and Annette Sykes,

> radical departures from the policy of the Bill would be inconsistent with the substantial approval that the Bill has received in the very wide consultation that has gone into its formulation.[300]

TPK's report was delivered to the select committee on 16 September 1992. Whaimutu Dewes stated that members of the Minister's advisory team attended the committee's hearing to support the report and the Bill, and made presentations on various parts.[301]

The Bill was reported back to the House from the select committee on 14 November 1992. The Minister, Sir Douglas Kidd, told the House that the Bill would 'allow this Parliament to face Māori with a clear conscience, having put in place provisions that are anxiously awaited, and that will encourage rather than stymie Māori development'.[302]

At that point in the parliamentary process, the Minister sent 600 copies of the Bill out to iwi authorities, Māori organisations, and individuals for comment. Minister Kidd told Parliament in March 1993 that this process had generated 'much attention from owners of Māori land, in particular', resulting in 'a great many comments from owners, managers, and administrators of Māori land'. They requested amendments, almost all of which were aimed at 'greater owner participation in decisions relating to their land'.[303] According to TPK, the distribution of the Bill was followed by 'extensive consultation' with Māori, led by the Minister and TPK's legislative team, between December 1992 and February 1993.[304] The requested amendments were incorporated in the Bill by way of a supplementary order paper.[305] Mr Dewes suggested that these were a small number of changes of a technical nature, made in response to the submissions received.[306] It was clear from this final check back with the people, Ian Peters believed, that 'the Bill in its final form is very much the legislation that Māori people have been asking for'.[307]

At the third reading in March 1993, Minister Kidd told the House:

> Retention of Māori land in Māori ownership is at the heart of this Bill. Retention has, however, been reconciled where necessary with the need to operate in a modern context. The Bill empowers Māori landowners with the means to decide upon and facilitate the retention, development, use, and occupation of their lands. Te Ture Whenua Māori is the first major legislation framed according to what Māori have said they need. It has as its foundation the Treaty of Waitangi, and reflects the Māori philosophy that land is a treasure, a taonga tuku iho, to be preserved and passed on to future generations and that it should remain within whānau, hapū, and iwi structures.[308]

As Belgrave et al note, there was an 'overall consensus' in support of the Bill in Parliament, with the exception of Sir Peter Tapsell.[309] Koro Wetere, whose Bill it had been in 1987, was very enthusiastic in his support.[310] The Bill was passed into law on 21 March 1993.

2.5.2 Provisions of the Te Ture Whenua Māori Act 1993

The new Act heralded a series of major changes to the management of Māori-owned land. As Belgrave et al explain, the Act did not just reflect the views of those who had contributed to the process of reform over the past decade, such as the New Zealand Māori Council, it also 'represented the extensive rethinking about the role of the state in dealing with Māori land that had begun with the Hunn report a generation earlier'. In particular,

> the Act contained a completely different philosophy, recognising Māori values in the management of Māori land and providing an extensive system for the operation of trusts and incorporations to administer Māori land. It was designed to give Māori land owners greater flexibility in this administration as well as recognising a number of different land uses, not just those with the sole aim of economic development.[311]

We note that our brief summary is of the Act as passed in 1993; we have not included subsequent amendments.

(1) *The kaupapa of the Act*

The preamble to the Act made particular reference to the Treaty of Waitangi and outlined the philosophy underlying the legislation: first, the retention of Māori land in Māori ownership and, secondly, to facilitate the use, development, and occupation of Māori land by its owners.[312] The preamble stated:

> Nā te mea i riro nā te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: ā, nā te mea e tika ana kia whakaūtia anō te wairua o te wā i riro atu ai te kāwanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: ā, nā te mea e tika ana kia marama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, ā, nā tērā he whakahau kia mau tonu taua whenua ki te iwi nōna, ki o rātou whānau, hapū hoki, a, a ki te whakangungu i ngā wāhi tapu hei whakamama i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mō te hunga nōna, mō o rātou whānau, hapū hoki: ā, nā te mea e tika ana kia tū tonu he Te Kooti, a, kia whakatakototia he tikanga hei āwhina i te iwi Māori kia taea ai ēnei kaupapa te whakatinana:
>
> Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whānau, and their hapū, and to protect wāhi tapu; and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whānau, and their hapū: And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles . . .[313]

The Act, in the words of the 'review task force', recognised the 'real difficulties' being experienced by many owners of Māori land, and their long wait for a 'coherent, modern statement of the law'. In particular, retention of Māori land in Māori ownership was the kaupapa of the

Act; yet retention had to be 'reconciled with the need to operate in a modern context so as to empower the owners of Māori land to realise its full value potential'.[314]

The task force pointed to the potential conflicting pressures on the kaupapa:

> On the one hand, an increased desire by Māori to make their own choices in respect of Māori resources with minimal state intervention. On the other hand, a strong reaffirmation that tikanga Māori continues to be a potent force in the collective life of Māori people.[315]

But they concluded that the tension was 'not irreconcilable'. There had been many changes since 1987, when the Bill was introduced – including the growth of Treaty claims, increased Māori participation in the general economy, a significant increase in the range and nature of Māori land-based enterprises, and continued development of successful Māori commercial land-based enterprises. There had also been an increasing demand by Māori for the recognition of tikanga Māori in Government and in the wider community, and growing sensitivity by both to tikanga Māori. Another key factor was the 'substantial reduction in the scope of Government intervention in enterprise'.[316]

The kaupapa of the Bill, when it was introduced in 1987, had received 'widespread support' from Māori organisations and individuals, and the changes since 1987 confirmed that Māori continued to perceive their land as taonga tuku iho (an inherited treasure of incalculable cultural and spiritual value) – indeed there was a heightened awareness. Thus land retention should remain as the primary goal of the legislation. But Māori also expected a 'maximisation of choices for use, development and occupation of Māori land within the constraints imposed by Māori cultural imperatives of the significance of that land'.[317]

The Bill as recommended to Parliament, the task force concluded, successfully struck that balance.[318]

These principles were to be implemented through a series of measures providing for:

- new types of restrictions on alienation;
- new provisions for land management, utilisation, and control through trusts and incorporations; and
- an enhanced role for the Māori Land Court in providing for these measures, particularly in assisting owners with the effective use, management, and development of their land.

(2) *Restrictions on alienation*

Under the Act, owners must consent to any sale of Māori land, and there were minimum quorum and consent thresholds to ensure that decisions as important as alienation took account of the views of as large a proportion of the land-owning group as possible. Depending on the nature of the alienation envisaged, the threshold of owner consent was higher.[319] In the case of sale by trustees, consent was required from at least three-quarters of the owners, where shares in the land were undefined, or the persons who together owned at least 75 per cent of the freehold interests.[320] Land court confirmation was then required for such alienations.

And the Act introduced the concept of a preferred class of alienees, who were essentially the descent group associated with the land, so as to ensure that Māori land remained in the hands of the whānau and hapū of the person or people wishing to sell. This meant that when an owner wished to sell or otherwise alienate undivided interests, those interests could only be alienated to preferred alienees.[321] If owners wanted to sell a whole block or part of a block, they would need to give a right of first refusal to prospective purchasers who belonged to one or more of the following categories:

- descendants of the alienating owners;
- relatives of the alienating owner associated with land according to tikanga Māori;
- other owners of the land who were members of the same hapū;
- trustees of the owners; and
- descendants of any former owner who was a member of the hapū associated with the land.[322]

Group interests in Māori land 'can only be set aside for people with whakapapa links to the land' except where shares in a Māori incorporation were involved.[323] Where

shares in a Māori incorporation were being sold, and no members of preferred classes offered to buy, the incorporation itself might take up the shares.[324]

In the case of incorporations, the ministerial task force pointed to these as a good example of the 'tensions that exist between maintaining the integrity of the kaupapa of this legislation and the need to operate commercially in order to sustain the underlying asset base'.[325] The incorporations' concerns were evident before the select committee in 1988–89, and since: they were apprehensive of restrictions on their power of sale and of alienation short of sale, and for requirements to have documents noted by the court registry. Ultimately the Act required that an incorporation grant a lease or license for a term of more than 21 years only after a special resolution; and that it sell or gift land only when shareholders holding not less than 75 per cent of the total shares had voted in favour of a special resolution authorising sale or gift.[326] Court confirmation was required for all alienations by sale or gift.

(3) *Title and governance arrangements*

According to the Minister's advisory team in 1992, the trust concept of English law 'most closely approximates the tikanga Māori attaching to taonga tuku iho such as land'. It 'includes the right to participate in the benefits conferred by land ownership and carries the reciprocal obligation of stewardship of the inheritance of future generations'.[327] Trusts had, however, been dealt with by a single principal section of the 1953 Act, section 438. The ministerial advisory team considered the section had generally proved successful, but had not met Māori expectations in three areas: it could be applied only at block level, and was not available for the maintenance and management of undivided interests; it lacked transparent accountability as between trustees and owners; and it was not available to organise and manage disparate tribal interests on a tribal basis.[328]

The Act set out extensive provisions for the formation, purpose, and operation of land-owning trusts and incorporations.

Five different types of trusts were created:

- *Ahu Whenua trusts:* These were designed to facilitate and promote the use and administration of land in the interests of beneficial owners. Ahu whenua trusts replaced section 438 trusts; existing section 438 trusts continued under new the Act as Ahu Whenua trusts. This trust option was expected to have the widest impact on land ownership and management. The trusts were given freedom to conduct business at their own discretion provided it was in keeping with the principles of the Act. Individuals' rights to succession would continue, and the court would review each trust every 20 years.
- *Whenua Tōpū trusts:* These were a new type of trust created under the Act, also designed to facilitate the use and administration of land, but for all or part of the land owned by members of an iwi or hapū. They were similar to Ahu Whenua trusts in the extent of freedom granted to them. The assets and income of a trust would be held for Māori community purposes, for the general benefit of members of the iwi or hapū. Individual succession would not continue. But holders of large interests in lands put into such a trust might apply to the court to have those interests held for particular people, and income from those interests might be paid to those people and their successors.
- *Kai Tiaki trusts:* These were designed for individuals unable to manage their own affairs (either minors or those with a disability). Kai Tiaki trusts replaced trusts created under section 93 of the Māori Affairs Act 1953. A trust could be established for any interests in Māori land or general land, any shares in a Māori incorporation, or any personal property to which the person was entitled. Rights of succession to property held by such a trust were preserved.
- *Whānau trusts:* These were designed to allow whānau to bring together all their land interests and shareholdings, if all owners consented (except in special circumstances). A whānau trust could be established in the name of a tipuna of the owners, and income and assets would be used for the benefit of descendants of that tipuna. Successions would stop, individual interests in the land would be cancelled,

and their tūrangawaewae preserved. This was a new type of trust created under the Act. Whānau trusts could hold shares in other trusts or incorporations.

- *Putea trusts:* These allowed for the pooling of small interests in Māori land or general land owned by Māori which would otherwise be difficult to administer, or whose owners could not be identified or located. Those wishing to form such a trust must attempt to inform the owners of the land first. This was another new type of trust created under the Act. Succession would not continue, thus avoiding ongoing fragmentation. The assets and income of the trust would be held for community purposes.[329]

The Act also contained detailed provisions for Māori incorporations, acknowledging their continuing role in the management, use, and development of Māori land. The main effect was 'to take the basic concept of Māori Incorporations back to the situation where the owners hold a beneficial interest in the land and not just personalty in incorporation shares'. The 'personal property aspect', the ministerial task force stated, 'is inconsistent with the kaupapa'.[330] As noted earlier, incorporation shareholders once again became owners of Māori land.

The 1993 Act set out terms on which new incorporations could be created by the court.[331] Owners of land in a new incorporation would become shareholders in it.[332] The incorporation would become the legal owner of land vested in it, but owners would retain their beneficial interests, and thus maintain their link to the land.[333] The management committee would continue to exercise stewardship on behalf of the beneficial owners.[334]

As noted above, the Act restricted an incorporation's power to sell or gift land vested in it by the voting requirements laid down. But incorporations did acquire a new flexibility in deciding how to categorise land. If they had obtained land after their establishment, and it was not land that had once been part of the incorporation's assets, it could be classified as investment land. The court could make an order authorising the incorporation to hold the whole or any part of that land as an investment, and declaring that it should not form part of the corpus of the incorporation and should cease to be Māori freehold land. This would mean that in dealing with investment land, the incorporation would not be bound by the restrictions on alienation imposed by the Act.[335]

And incorporations were no longer restricted to limited activities; they might 'undertake any business or activity' in the best interests of the shareholders.[336]

The 1993 Act also kept the meetings of assembled owners' system so that decisions could be made where there was no trust or incorporation in existence. In 1992, when the Bill was still before Parliament, the ministerial advisory team explained:

> The Bill generally re-enacts the current law in respect of meetings of owners although it does provide for owners to consider any matter of common interest to them and to consider any matter on which their opinion is sought by the Court. In addition the Bill is more user friendly than the current law in that the Court may confirm a resolution passed at a family gathering rather than a formal meeting of assembled owners.[337] It is designed to deal with cases where the owners are members of the same family and to take the opportunity afforded by a family gathering to discuss matters of mutual interest.
>
> The owners' interests are safeguarded against oppression by dominant individuals or groups by a power in the Court to review the manner in which the meeting was called and conducted and direct that the meeting be recalled if there was any unfairness perpetrated on any of the owners.[338]

Thus, the revamped meetings of assembled owners' system was more flexible and could consider a more significant range of matters than before.[339] Quorum and voting thresholds at meetings of assembled owners were set by regulation.[340] The 1995 regulations provided that the quorum for most matters would be the persons owning or representing at least 40 per cent of the interests in a block. By numbers of owners, this also had to include at least 10 owners or one-quarter of the owners (whichever figure was lower).[341] The quorum was higher for alienations: at least 75 per cent of ownership interests for a resolution to

sell, and a sliding scale for resolutions to lease.[342] But 75 per cent of ownership interests had to *agree* to a sale.[343] For leases, the voting thresholds required the agreement of:

- 75 per cent of all owners (by shares) for leases of more than 42 years;
- 50 per cent of all owners (by shares) for a lease of more than 21 but not more than 42 years;
- 40 per cent of all owners (by shares) for a lease of more than 15 but not more than 21 years;
- 30 per cent of all owners (by shares) for a lease of more than seven but not more than 15 years; and
- 20 per cent of all owners (by shares) for a lease of not more than seven years.[344]

These thresholds were later altered by a statutory amendment in 2002, which we discuss in chapter 3.

(4) *Balance between court supervision and owner autonomy*

The court was tasked with promoting the retention of Māori land and assisting its use, management, and development by the owners. Its role was a core one in achieving the purpose of the Act. The Minister's advisory team noted that for the first time the legislation would include a general statement of objectives to provide guidelines for 'the exercise of the potentially intrusive powers' of the Māori Land Court.[345]

In performing its duties under the Act, the court had to seek to achieve the following further objectives:

- to find out and follow the wishes of landowners in proceedings before them;
- to let people know of proposals about their land and provide a forum in which owners might discuss such proposals;
- to assist owners to settle their disputes;
- 'To protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority';
- to ensure fairness in dealings with the owners of any land in multiple ownership; and
- to promote practical solutions to problems arising in the use or management of any land.[346]

The court's jurisdiction included:

- hearing and determining claims to Māori freehold land, or interests in it;
- determining the relative interests of owners in common of any Māori land;
- hearing and determining claims to recover damages for trespass on Māori land, and any proceeding founded on contract or on tort in relation to Māori land;
- to determine whether a person was Māori or a descendant of a Māori;
- to determine whether any person was a member of any of the preferred classes of alienees;
- to determine whether any land to which section 8A or section 8HB of the Treaty of Waitangi Act 1975[347] applied should be set aside as a reservation;
- to determine whether any specified land was or was not Māori customary land or Māori freehold land or general land owned by Māori or Crown land; and
- to determine whether any specified land was or was not held by any person in a fiduciary capacity and, if it was, to make a vesting order.[348]

The court's powers in respect of meetings of assembled owners were broad. In addition to a review of the meetings' procedure, which could be invoked by the owners or the registrar, the court could recall a meeting of owners if further information about a proposal had come to light since the owners had made their decision. It could also reconvene a meeting for any reason at all if such a recall would be in 'the best interests of the owners'.[349] Thus, the court had broad protective powers but the final decision would still be made by the owners at a recalled meeting. All resolutions, however, still required court confirmation, and were assessed against a number of criteria, including (for resolutions to sell or lease) the usual criteria by which the court had to assess long-term or permanent alienations.[350]

The court's jurisdiction in respect of trusts was also broad. The Act gave the court exclusive jurisdiction to constitute the five kinds of trusts outlined above.[351] It might also make an order for the amalgamation of any

two or more trusts, if it was satisfied that amalgamation was in the interests of the beneficiaries.[352] The court could authorise an extension of the activities of a trust, but not unless it was satisfied that the beneficial owners had had sufficient opportunity to consider the proposal and that there was a sufficient degree of support among the owners.[353] The court might also make an order to change the status of Māori land where alienation was 'clearly desirable' in order to rationalise the land base or any commercial operation of trustees.[354]

In addition, all alienations of land had to be confirmed by the court. The court's jurisdiction in this respect had largely been removed in 1967 and then partially restored in 1974, and the 1993 Act largely repeated the criteria of the 1974 legislation. In addition to those criteria, the court now had to satisfy itself that the alienee was a member of the preferred class, and that a lease of 42 years or longer was warranted by the 'special circumstances' of the case.[355] The court's 1953 jurisdiction to make conditions or alter terms was reintroduced.[356] And it was given a new, important jurisdiction to refuse confirmation if satisfied that the alienation was inconsistent with the principles of the Act. A number of significant criteria were specified to assist the court to decide this matter.[357] In the ministerial advisory team's 1992 report, the court's powers were seen as 'safeguards' which, 'while potentially intrusive, clearly embody the kaupapa of the legislation and are supported'.[358]

(5) *New provisions to enable Māori occupation of their land*

A new part (part XV) was added to the Bill in 1992–93 to enable papakainga housing, on the recommendation of the Māori Land Court judges (and as called for by the NZMC). As matters stood under the previous legislation, the court had no power to grant occupation orders to assist Māori owners with housing, unless the owners established a section 438 trust, and the trustees issued occupation orders. The judges had proposed that the court be empowered to make occupation orders,[359] and the Act provided for this in sections 328 to 331. An order might vest in any owner or a person entitled to succeed exclusive use and occupation of the whole or any part of that land as a site for a house. The court had to consider the opinions of the owners and the effect on their interests and had to be satisfied that they had had sufficient opportunity to discuss the proposal and that there was sufficient support for it among them.[360]

2.6 Reflections on Process to Develop 1993 Act

In sections 2.4 and 2.5, we have set out what is known about the process to develop and enact Te Ture Whenua Māori Act 1993. From the evidence available to us, the 14-year process involved:

- *1980–83:* At the request of the Crown, and with its financial assistance, the NZMC consulted widely within Maoridom and developed a Māori position, detailing the proposed contents of a new Act.
- *1983–84 and 1987:* The Māori Affairs Department translated the NZMC's proposals into a Bill, modifying and adding to those proposals as necessary. Whaimutu Dewes' evidence is that only a very few of the NZMC's proposals were not included in the Bill.
- *1987–89:* No nationwide hui were held before the Bill was introduced to Parliament in 1987, presumably on the basis that Māori views were already known from the NZMC's work in 1980–83. The Māori Affairs select committee held hearings around the country in 1987–88 and received written submissions, in response to which the Bill was amended and approved by the select committee in 1989.
- *1992–93:* Because the 1987 select committee had held hearings, received submissions, and approved the Bill, the full process was not repeated when the Bill was taken up again by Minister Kidd in 1992. Instead, a ministerial advisory team of Māori experts was appointed to help update the Bill, a process which also involved consultation with a Māori Land Owners Group, the Māori Land Court judges, the NZMC, and FOMA. After the new select committee approved the updated Bill, the Minister took the unusual step of sending 600 copies to Māori leaders and organisations to check that Māori still supported its revised contents. The submissions in response

suggested that they did. After what TPK called 'extensive consultation' between December 1992 and February 1993,[361] the Bill was enacted in March 1993, incorporating amendments arising from that final check with Māori.

Overall, Belgrave et al suggest, the new Act 'realised the Māori desire for self-management of resources but within relatively strict parameters'. A 'transforming ideology' in Māori affairs over recent decades meant that the Crown now recognised a long-term responsibility to maintain, for cultural reasons, Māori relationships with their land for future generations. Thus, in order to ensure retention, there were limits to Māori control over their land and resources.[362]

We turn in the next chapter to discuss the current process for review and reform of the Act, which Crown counsel suggests arose because:

> Almost immediately after Te Ture Whenua Māori Act 1993 . . . was passed into law, significant voices within Māori society began expressing concern about the barriers that it imposed on Māori land owners.[363]

Notes

1. Waitangi Tribunal, *Whaia te Mana Motuhake / In Pursuit of Mana Motuhake: Report on the Maori Community Development Act Claim* (Wellington: Legislation Direct, 2015), p 159
2. Moana Jackson, brief of evidence, no date (October 2015) (doc A11), p 5
3. Derek Te Ariki Morehu, brief of evidence, 30 October 2015 (doc A25), p 3
4. Whatarangi Winiata, brief of evidence, 30 October 2015 (doc A12), p 3
5. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), pp 23–24
6. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 49
7. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 16; Waitangi Tribunal, *The Whanganui River Report*, p 48
8. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wellington: Legislation Direct, 2014), p 30
9. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 31
10. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 32
11. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 187
12. Morehu, brief of evidence (doc A25), p 4
13. David V Williams, *'Te Kooti Tango Whenua': The Native Land Court, 1864–1909* (Wellington: Huia, 1999), p 53
14. Waitangi Tribunal, *Te Urewera, Pre-publication, Part II* (Wellington: Waitangi Tribunal, 2010), pp 500–501, 513
15. Waitangi Tribunal, *Te Urewera, Pre-publication, Part II*, p 513. Justice C W Richmond, chair of the Hawke's Bay Native Lands Alienation Commission, stated in his 1873 commission report, 'the procedure of the Court has snapped the faggot band, and left the separate sticks to be broken one by one': see Waitangi Tribunal, *Te Urewera, Pre-publication, Part II*, p 513.
16. Waitangi Tribunal, *Te Urewera, Pre-publication, Part II*, pp 621, 673–674
17. Waitangi Tribunal, *Te Urewera, Pre-publication, Part II*, pp 665–666, 673
18. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, pp 662–678
19. Richard Boast, 'The Evolution of Māori Land Law 1865–1993' in Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith, *Māori Land Law* (Wellington: LexisNexis, 2nd ed, 2004), p 71
20. Boast, 'The Evolution of Māori Land Law', p 74
21. Waitangi Tribunal, *The Hauraki Report*, vol 2, pp 683–687
22. Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wellington: GP Publications, 1998), p 124; Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), p 80; Waitangi Tribunal, *Te Urewera, Pre-publication, Part VI* (Wellington: Waitangi Tribunal, 2015), pp 242–245, 332
23. Waitangi Tribunal, *The Hauraki Report*, vol 2, pp 683–685
24. When asked decades later (by the 1891 royal commission) whether any titles had ever been granted under this provision, former Chief Judge Fenton replied, 'I think there were two': AJHR, 1891, sess 2, G-1, 'Minutes of Evidence', p 46.
25. Waitangi Tribunal, *The Hauraki Report*, vol 2, pp 683–687, 693–702; Alan Ward, *National Overview*, 3 vols, Waitangi Tribunal Rangahaua Whanui Series (Wellington: GP Publications, 1997), vol 2, pp 219–234
26. Waitangi Tribunal, *The Hauraki Report*, vol 2, pp 697–702
27. Cited in Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 523
28. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 523
29. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, p 441
30. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, pp xxiii-xxiv
31. Waitangi Tribunal, *The Hauraki Report*, vol 2, pp 687–692
32. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 624–625; Waitangi Tribunal, *Te Urewera, Pre-publication, Part II*, pp 674–675

33. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1, p x (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 625)
34. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1, pp 7–8 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 631)
35. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 180, 235
36. Waitangi Tribunal, *Te Urewera, Pre-publication*, *Part II*, p 621
37. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, pp 457–463
38. For an overview of legislative provisions in respect of restrictions, see Waitangi Tribunal, *Te Urewera, Pre-publication*, *Part II*, pp 771–772.
39. Waitangi Tribunal, *Te Urewera, Pre-publication*, *Part II*, p 767
40. Waitangi Tribunal, *Te Urewera, Pre-publication*, *Part II*, p 769; J E Murray, *Crown Policy on Māori Reserved Lands, 1840–65, and Lands Restricted from Alienation, 1865–1900*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 53
41. Murray, *Crown Policy on Māori Reserved Lands*, p 53
42. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 768
43. Native Lands Frauds Prevention Act 1881 Amendment Act 1888, s 8
44. Waitangi Tribunal, *The Hauraki Report*, vol 2, pp 704–708; Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 628
45. Donald McLean, 25 August 1873, NZPD, 1873, vol 14, p 604 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 439)
46. Waitangi Tribunal, *Te Urewera, Pre-publication*, *Part II*, p 767; Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, p 399
47. Waitangi Tribunal, *Te Urewera, Pre-publication*, *Part II*, vol 2, pp 778–779; Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, pp 530–531
48. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 690
49. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 306–316
50. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 316–319
51. Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Wellington: Legislation Direct, 2015), vol 1, pp 395–398, 405–413 (for 'Kemp's Trust'); Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 284–300, vol 2, p 467 (for Te Komiti Nui); Waitangi Tribunal, *Te Urewera, Pre-publication*, *Part II*, ch 8 (for Te Whitu Tekau); Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, ch 9 (for the Rees–Pere trusts)
52. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, p 458; Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 347–354
53. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, pp 539, 552
54. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, p 525
55. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, pp 492–494
56. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 777–779
57. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 980–983
58. 'Native Lands and Native-Land Tenure: General Report on Lands Already Dealt with and Covered by Interim Reports', AJHR, 1907, G-1C, p 14
59. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, pp 503–504
60. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 779
61. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 680
62. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 672–673
63. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 672–675
64. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 674
65. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 675, 676–682
66. Williams, *'Te Kooti Tango Whenua'*, p 54
67. Williams, *'Te Kooti Tango Whenua'*, pp 58–59
68. Williams, *'Te Kooti Tango Whenua'*, p 59
69. Waitangi Tribunal, *He Whiritaunoka*, vol 2, pp 674–675; Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 675–676; Māori Land Settlement Act 1905, s 8
70. Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 999
71. Waitangi Tribunal, *The Hauraki Report*, vol 2, pp 859–860; Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 666
72. Waitangi Tribunal, *He Whiritaunoka*, vol 1, pp 385–386
73. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 718
74. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 680–681
75. Waitangi Tribunal, *He Whiritaunoka*, vol 2, p 681
76. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 675–676; Waitangi Tribunal, *Te Urewera, Pre-publication*, *Part II*, pp 603–604, 648–650, 661–675
77. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 857
78. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 857
79. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 426, 688
80. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 686
81. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 685–686
82. Waitangi Tribunal, *Te Urewera, Pre-publication*, *Part II*, pp 639–640. This was carried over from 1909 into the 1931 and 1953 Acts: see Native Land Act 1909, ss 344, 345, 348; Native Land Act 1931, ss 425–426; Māori Affairs Act 1953, ss 313, 320. Under the 1953 Act, the ability under section 320 to apply for partition during the confirmation process seems no longer confined to those who signed a memorial of dissent.
83. Native Land Act 1909, s 342(5); Native Land Act 1931, s 417(7); Māori Affairs Act 1953, s 309(1)
84. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 857
85. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 686–687
86. Waitangi Tribunal, *Te Urewera, Pre-publication*, *Part II*, pp 634–650
87. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 690–691
88. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 690
89. Landless was defined as 'a Native whose total beneficial interests in Native freehold land . . . are insufficient for his adequate maintenance': Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 691. The Native Land Court had jurisdiction to confirm alienations in the South Island, or for any land outside a formal Māori Land District. Otherwise, power of confirmation lay with the board for that Māori Land District: Native Land Act 1909, s 217.

90. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 691
91. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 691
92. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 691
93. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 691
94. Michael Belgrave, Anna Deason, and Grant Young, 'Crown Policy with Respect to Māori Land, 1953–1999', 2004 (doc A35), p 45
95. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 727–728
96. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 728
97. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 728–729
98. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 729–730
99. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 730–732
100. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 1042
101. Waitangi Tribunal, *Te Urewera, Pre-publication, Part IV* (Wellington: Waitangi Tribunal, 2012), pp 114–115, 118–120
102. Waitangi Tribunal, *Te Urewera, Pre-publication, Part IV*, p 115
103. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 1018–1020
104. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 736–739
105. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 728, 737–738
106. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 1032
107. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 8
108. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 8
109. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 8–9
110. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 740–743
111. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 742–743
112. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 745
113. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 750, 762
114. Claimant counsel (Thornton), closing submissions, 18 December 2015 (paper 3.3.10), p 8
115. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 745
116. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 70–71
117. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 70–71
118. Boast, 'The evolution of Māori Land Law', p 109
119. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 64–67
120. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 80
121. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 746
122. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 66
123. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 80
124. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 746–747
125. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 747
126. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 60, 75–76
127. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 746
128. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 746
129. Māori Affairs Act 1953, s 151(1)
130. Māori Affairs Act 1953, ss 224, 226–227, 229
131. The section, however, was not to be construed to affect the operation of a mortgage or charges to which Māori land was subject; nor would it apply to the recovery of rates or taxes payable.
132. Māori Affairs Act 1953, ss 455–456
133. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Wellington: Government Printer, 1980) (Crown counsel, second disclosure bundle (doc A28), p 21)
134. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 783
135. Māori Affairs Act 1953, s 439
136. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 785
137. Māori Affairs Act 1953, ss 269–270
138. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 788
139. Māori Affairs Act 1953, s 288
140. Graham V Butterworth and Susan M Butterworth, *The Māori Trustee* (Wellington: Māori Trustee, 1991), pp 84–85
141. Butterworth and Butterworth, *The Māori Trustee*, pp 85, 86
142. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 751
143. Waitangi Tribunal, *Whaia te Mana Motuhake*, p 68
144. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 751
145. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 752
146. NZPD, 1954, vol 304, p 1573 (Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 67
147. E Tirikatene on behalf of Māori members of Parliament, 'Māori Purposes Bill', 30 November 1945 (Waitangi Tribunal, He Maunga Rongo, vol 2, p 757)
148. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 773
149. Māori Affairs Act 1953, s 387
150. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 69
151. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 69
152. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 222
153. Māori Affairs Act 1953, s 435
154. Māori Affairs Act 1953, s 438
155. Claimant counsel (Watson), closing submissions, 20 December 2015 (paper 3.3.8), p 28. This is a quotation from the NZMC's 1983 *Kaupapa* paper.
156. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 27–28. Quotations are from the NZMC's 1983 *Kaupapa* paper.
157. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 784
158. Aroha Harris, 'Māori Land Title Improvement Since 1945: Communal Ownership and Economic Use', *New Zealand Journal of History*, vol 31(1), 1997, p 150
159. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 784
160. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 784
161. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 430, 775, 781–782, 784–785
162. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 151
163. Boast, 'Evolution of Māori Land Law', p 118
164. NZPD, 1967, vol 350, pp 46–47 (Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 152)
165. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 152
166. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 150
167. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 752–753
168. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 750
169. Māori Affairs Amendment Act 1967, s 11
170. Māori Affairs Amendment Act 1967, s 31
171. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 154

172. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 791
173. Māori Affairs Amendment Act 1967, s 48
174. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 750–751
175. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 751
176. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 169
177. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 166–169
178. Māori Affairs Act 1953, s 227
179. Māori Affairs Act 1953, s 229
180. Māori Affairs Amendment Act 1967, s 100
181. Māori Affairs Amendment Act 1967, s 102
182. Waitangi Tribunal, *Te Urewera, Pre-publication*, *Part v* (Wellington: Waitangi Tribunal, 2014), p 256
183. Māori Affairs Amendment Act 1967, s 108
184. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 152–154
185. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 177, 179
186. 'Government White Paper on Proposed Amendments to the Māori Affairs Act 1953, the Māori Affairs Amendment Act 1967, and Other Related Acts', 21 November 1973 (Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 181)
187. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 181–183
188. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 185
189. Māori Purposes Act (No 2) 1973, s 13(3)
190. Belgrave, Deason and Young, 'Crown Policy' (doc A35), p 186
191. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 266
192. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 187
193. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 184
194. Māori Affairs Amendment Act 1974, ss 33, 36(1)
195. Māori Affairs Amendment Act 1974, s 36(1)
196. Māori Affairs Amendment Act 1974, s 40
197. Māori Affairs Amendment Act 1974, s 57
198. Māori Affairs Amendment Act 1974, s 77
199. Māori Purposes Act 1975, s 17
200. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 790
201. Māori Purposes Act 1975, s 16
202. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 199
203. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 772
204. 'Government White Paper on Proposed Amendments to the Māori Affairs Act 1953, the Māori Affairs Amendment Act 1967, and Other Related Acts', 21 November 1973 (Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 182)
205. NZPD, 1967, vol 354, p 4007 (Belgrave, Deason and Young, 'Crown Policy' (doc A35), p 153)
206. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 162, 184, 185
207. Belgrave, Deason and Young, 'Crown Policy' (doc A35), p 233
208. Belgrave, Deason and Young, 'Crown Policy' (doc A35), pp 235–236
209. Belgrave, Deason and Young, 'Crown Policy' (doc A35), pp 233–234
210. Boast, 'The Evolution of Māori Land Law', p 116
211. Whaimutu Dewes, first brief of evidence, 2 November 2015 (doc A22), p 2
212. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 236–239
213. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 323
214. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Crown counsel, second disclosure bundle (doc A28), p 4)
215. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Crown counsel, second disclosure bundle (doc A28), pp 8–9)
216. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Crown counsel, second disclosure bundle (doc A28), p 15
217. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Crown counsel, second disclosure bundle (doc A28), p 21)
218. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Crown counsel, second disclosure bundle (doc A28), p 21)
219. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Crown counsel, second disclosure bundle (doc A28), p 26)
220. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Crown counsel, second disclosure bundle (doc A28), p 21)
221. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Crown counsel, second disclosure bundle (doc A28), p 26)
222. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Crown counsel, second disclosure bundle (doc A28), p 26)
223. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Crown counsel, second disclosure bundle (doc A28), pp 27–31)
224. 'Royal Commission on the Māori Courts: Submissions presented by Judge Durie', 1979 (papers in support of counsel for the interested party (paper 3.3.7(a)))
225. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry*, p 80 (Crown counsel, second disclosure bundle (doc A28), p 48)
226. 'Royal Commission on the Māori Courts: Submissions presented by Judge Durie', 1979, p 47 (papers in support of counsel for the interested party (paper 3.3.7(a)))
227. 'Royal Commission on the Māori Courts: Submissions presented by Judge Durie', 1979, p 48 (papers in support of counsel for the interested party (paper 3.3.7(a)))
228. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Crown counsel, second disclosure bundle (doc A28), pp 48–49)

229. Under part II of the Māori Affairs Amendment Act 1967, Crown 'improvement officers' were tasked with identifying land they believed was too fragmented for efficient use, consulting the owners, and then recommending action to the court. The court could then carry out a range of significant actions, including amalgamations or partitions, boundary surveys, vesting land in trustees for alienation, setting up an incorporation, or calling a meeting of owners for the purpose of alienation. Owner consent was not required – indeed, the court could order any action to take place even if the owners were opposed, although the consent of any lessee or mortgagee was required.
230. Royal Commission on the Maori Land Courts, *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Crown counsel, second disclosure bundle (doc A28), p 49)
231. Boast, 'The Evolution of Māori Land Law', p 116
232. *The Maori Land Courts: Report of the Royal Commission of Inquiry*, 1980 (Crown counsel, second disclosure bundle (doc A28), p 44)
233. Boast, 'The Evolution of Māori Land Law', p 116
234. Whaimutu Dewes, second brief of evidence, 27 November 2015 (doc A34), pp 1–3
235. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 280
236. New Zealand Māori Council, 'A Discussion Paper on Future Māori Development and Legislation', 1980 (Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 281)
237. Waitangi Tribunal, *Whaia te Mana Motuhake*, pp 157–159
238. New Zealand Māori Council, 'A Discussion Paper on Future Māori Development and Legislation', 1980 (Waitangi Tribunal, *Whaia te Mana Motuhake*, p 159)
239. Waitangi Tribunal, *Whaia te Mana Motuhake*, p 159
240. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Whaimutu Dewes, papers in support of first brief of evidence (doc A22(a)), p 7)
241. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 7)
242. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 8)
243. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 9–11)
244. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 13)
245. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 32)
246. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 14)
247. Testators, however, might still give or devise interests for life or until remarriage in respect of any such interests, or might create family trusts in respect of their interests: New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 16).
248. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 16–17)
249. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 17–18)
250. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 18–20)
251. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 23)
252. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 21)
253. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 23)
254. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 22)
255. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 24–26)
256. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 27)
257. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 27–31)
258. New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 33–34, 37)
259. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 286–287
260. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 287–288
261. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 289
262. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 291–292
263. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 293
264. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 294
265. Cited in Māori Affairs Bill, 1987, Explanatory note, p ii
266. Māori Affairs Bill 1987, Explanatory note, p ii
267. Dewes, second brief of evidence (doc A34), p 1
268. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 296–297
269. Waitangi Tribunal, *Whaia te Mana Motuhake*, p 160
270. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 297
271. Dewes, second brief of evidence (doc A34), p 2

272. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 296–297
273. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 323
274. NZPD, 1987, vol 480, p 8609 (Crown counsel, second disclosure bundle (doc A28), p 84)
275. Dewes, second brief of evidence (doc A34), p 2
276. Te Puni Kōkiri, 'Te Ture Whenua Māori / The Māori Affairs Bill: Report to the Māori Affairs Select Committee', 16 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29 (b)), p 388)
277. Te Puni Kōkiri, 'The Māori Affairs Bill, Summary of Recommendations to the Māori Affairs Select Committee', September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 303)
278. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 282–283)
279. Dewes, second brief of evidence (doc A34), p 2
280. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 298–299
281. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 299–303
282. Waitangi Tribunal, *Te Urewera, Pre-publication*, *Part IV*, pp 145–147
283. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 314–315
284. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 315
285. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 314
286. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 315–316
287. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 316–318
288. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 318–319
289. Dewes, first brief of evidence (doc A22), p 2
290. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 325
291. NZPD, 1993, vol 533, p 13,657 (Crown counsel, second disclosure bundle (doc A28), p 115)
292. Dewes, second brief of evidence (doc A34), p 2
293. Dewes, second brief of evidence (doc A34), p 2
294. Te Puni Kōkiri, 'Te Ture Whenua Māori: The Māori Affairs Bill, Report to the Māori Affairs Select Committee', September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 329)
295. NZPD, 1992, vol 531, p 12,237 (Crown counsel, second disclosure bundle (doc A28), p 91)
296. Te Puni Kōkiri, 'Te Ture Whenua Māori: The Māori Affairs Bill, Report to the Māori Affairs Select Committee', September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 329)
297. Dewes, second brief of evidence (doc A34), pp 2–3
298. Dewes, second brief of evidence (doc A34), p 3
299. Although the members of the task force are not identified in its report, it is clear from statements made in the September 1992 TPK report that the ministerial advisory team wrote the 'task force' report: see Te Puni Kōkiri, 'Te Ture Whenua Māori: The Māori Affairs Bill, Report to the Māori Affairs Select Committee', September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 346–347)
300. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 277, 278)
301. Dewes, second brief of evidence (doc A34), p 3
302. NZPD, 1992, vol 531, p 12,367 (Crown counsel, second disclosure bundle (doc A28), p 98)
303. NZPD, 1993, vol 533, p 13,658 (Crown counsel, second disclosure bundle (doc A28), p 116)
304. Te Puni Kōkiri, *Te Ture Whenua Māori Act 1993: An Introduction* (Wellington: Te Puni Kōkiri, 1993), p 14. We have no details about this consultation.
305. NZPD, 1993, vol 533, p 13,658 (Crown counsel, second disclosure bundle (doc A28), p 116)
306. Dewes, second brief of evidence (doc A34), p 3
307. NZPD, 1993, vol 533, p 13,662 (Crown counsel, second disclosure bundle (doc A28), p 118)
308. NZPD, 1993, vol 533, p 13,656 (Crown counsel, second disclosure bundle (doc A28), p 115)
309. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 325
310. NZPD, 1992, vol 531, pp 12,238–12,240 (Crown counsel, second disclosure bundle (doc A28), pp 92–93)
311. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 323
312. Ian Peters, 12 November 1992, NZPD, 1992, vol 531, p 12,237 (Crown counsel, second disclosure bundle (doc A28), p 91)
313. Te Ture Whenua Māori Act 1993, preamble. The words 'a ki te whakangungu i nga wāhi tapu' / 'and to protect wāhi tapu' were inserted by Te Ture Whenua Māori Amendment Act 2002.
314. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 277)
315. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 283)
316. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 283)
317. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 282–284)
318. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 284)
319. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 327; 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 287, 289)
320. Te Ture Whenua Māori Act 1993, s 228

321. Te Ture Whenua Māori Act 1993, s 148; Te Puni Kōkiri, *Te Ture Whenua Māori Act 1993: A Technical Discussion* (Wellington: Te Puni Kōkiri, 1993), pp 19–20
322. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 326
323. Te Puni Kōkiri, *Te Ture Whenua Māori Act 1993: A Summary* (Wellington: Te Puni Kōkiri, 1993), p 6
324. Te Puni Kōkiri, *Te Ture Whenua Māori Act 1993: A Technical Discussion*, pp 20, 44
325. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 296)
326. Te Ture Whenua Māori Act 1993, s 254. Such a special resolution was not necessary where the court was satisfied that it was necessary for the incorporation to sell the land in order to effect minor boundary adjustments.
327. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 293)
328. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 293–294)
329. Te Ture Whenua Māori Act 1993, pt XII; Belgrave, Deason, and Young, 'Crown Policy' (doc A35), pp 328–330; Te Puni Kōkiri, *Te Ture Whenua Māori Act 1993: A Summary*, pp 7–8; Te Puni Kōkiri, *Te Ture Whenua Māori Act 1993: A Technical Discussion*, pp 31–34; 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 293–295)
330. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 296)
331. Te Ture Whenua Māori Act 1993, pt XIII
332. Te Ture Whenua Māori Act 1993, s 248(2)
333. Te Ture Whenua Māori Act 1993, s 250(2)
334. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 295)
335. Te Ture Whenua Māori Act 1993, ss 357, 358
336. Te Ture Whenua Māori Act 1993, s 253; Te Puni Kōkiri, *Te Ture Whenua Māori Act 1993: A Summary*, p 9
337. This was given effect in Te Ture Whenua Māori Act 1993, s 176
338. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 292–293)
339. See Te Ture Whenua Māori Act 1993, pt IX.
340. Te Ture Whenua Māori Act 1993, s 179(f)-(h)
341. Māori Assembled Owners Regulations 1995, reg 32
342. Māori Assembled Owners Regulations 1995, regs 33–34
343. Māori Assembled Owners Regulations 1995, reg 45(3)
344. Māori Assembled Owners Regulations 1995, reg 45(4)
345. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 285)
346. Te Ture Whenua Māori Act 1993, s 17; Te Puni Kōkiri, *Te Ture Whenua Māori Act 1993: A Summary*, p 5
347. These sections of the Treaty of Waitangi Act 1975 refer to the Waitangi Tribunal's binding powers to recommend the return of land to Māori in certain circumstances.
348. Te Ture Whenua Māori Act 1993, s 18
349. Te Ture Whenua Māori Act 1993, s 178
350. Te Ture Whenua Māori Act 1993, ss 17, 152–154, 175
351. Te Ture Whenua Māori Act 1993, s 211
352. Te Ture Whenua Māori Act 1993, s 221
353. Te Ture Whenua Māori Act 1993, s 229
354. Te Ture Whenua Māori Act 1993, s 137
355. Te Ture Whenua Māori Act 1993, s 152
356. Te Ture Whenua Māori Act 1993, s 153
357. Te Ture Whenua Māori Act 1993, s 154
358. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 288–289)
359. Te Puni Kōkiri, 'Te Ture Whenua Māori: The Māori Affairs Bill, Report to the Māori Affairs Select Committee', September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 404–406)
360. Te Ture Whenua Māori Act 1993, pt XV; Te Puni Kōkiri, *Te Ture Whenua Māori Act 1993: A Working Guide to the Act* (Wellington: Te Puni Kōkiri, 1993), p 16
361. Te Puni Kōkiri, *Te Ture Whenua Māori Act 1993: An Introduction*, p 14
362. Belgrave, Deason, and Young, 'Crown Policy' (doc A35), p 323
363. Crown counsel, closing submissions, 14 December 2015 (paper 3.3.6), p 3

Landlocked Lands

1. Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Wellington: Legislation Direct, 2015), vol 1, pp 456–460, 492–495
2. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage 1*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 615
3. David Alexander, 'East Coast Survey Issues', 2003 (Wai 900 R01, doc A64), p 212
4. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, p 624
5. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 622–624

The First Version of the Preamble, 1983

1. Belgrave, Deason and Young, 'Crown Policy with Respect to Māori Land, 1953–1999', 2004 (doc A35), p 287

Downloaded from www.waitangitribunal.govt.nz

CHAPTER 3

TE TĪMATANGA, TE WĀNANGA, ME TE WHAKAAETANGA / INITIATION, CONSULTATION, AND CONSENT

> In such an important area of our law and constitutional framework, where so much has gone wrong in the past, there is no need to rush now and introduce new rules and changes until their meaning and impact is very clear and a *demonstrable and sufficient* level of Māori support for and approval of the changes has been achieved. [Emphasis in original.][1]
>
> —Kerensa Johnston, 16 December 2015

> The Crown has not closed its mind to substantive changes, including whether to proceed with a Bill at all. At present, the Crown is satisfied that the revised draft Bill has sufficient support.[2]
>
> —Crown counsel, 14 December 2015

3.1 Introduction

In this chapter, we consider fundamental questions about the process for reviewing and reforming Te Ture Whenua Māori Act 1993.

Repealing this Act is no small matter. The Act represents a historic and broadly based consensus between Māori and the Crown as to how Māori land is to be owned, used, and governed, and how its retention is to be safeguarded for future generations. We use the word 'historic', for the passage of the Act in 1993 was the first time in New Zealand's history that the Treaty partners had reached a broad, enduring consensus on these important matters (see chapter 2).

At issue is whenua Māori, a taonga tuku iho, an ancestral treasure that the present generation holds as a trust for generations as yet unborn. Māori land, the claimants told us, is not just a taonga, it is *the* taonga. It is no accident that wars have been fought over land since time immemorial, including serious conflicts between Māori and the Crown in the nineteenth century. Whenua is a central source of identity for Māori. It would not be possible to overstate the importance of this taonga, and hence of the consensus reached in

1993 after at least a century of bitter contest between the Treaty partners, and after the unwilling loss of 95 per cent of this treasured ancestral inheritance.

It should come as no surprise that many Māori are fearful of what might transpire if the Act is radically altered or repealed altogether. The claimants say that the Crown's imperative is economic; that the Crown wants to force Māori land into production for the benefit of the wider New Zealand economy. They say that the process by which the Act is to be repealed has been Crown-led, rushed, based on poor information, and does not command the support of Māori. The claimants call for consensus as in 1993, arguing, too, that the reforms will do nothing to solve the real barriers to Māori utilising their land. Those barriers, they told us, are historical in origin, often arising from Crown Treaty breaches, and include rating, improper valuation of Māori land, lack of legal and physical access to landlocked land (possibly as much as one-fifth to one-third of Māori land has no access), and other issues that the Crown's reforms will not solve.

The Crown, on the other hand, says that Māori generally support the reforms, which originated in debate within Maoridom from almost the time of the Act's passage. Since at least 1998, Māori have called for more owner autonomy, less regulation, better land governance, and greater development opportunities. The Crown says that its reforms have been shaped by crucial input from independent Māori advisers, including a review panel in 2013 and a Ministerial Advisory Group in 2015.

The lead Crown official, John Grant, told us that, over the past three years, the Crown has held three rounds of nationwide consultation on the proposed reforms. This consultation involved

> more than 64 primary hui with a combined attendance of approximately 3,200 participants and more than 585 written submissions. In addition, there were 14 hui conducted in 2013 and 2014 by the Associate Minister of Māori Affairs on the outcome of the independent panel's review and the government's legislative intentions, four workshops in 2014 with the technical advisers group appointed by the Iwi Leaders Te Ture Whenua Māori Group, 10 workshops in the regions following the hui on the consultation draft and ongoing hui with key stakeholder groups that began in April this year [2015] and are scheduled to continue.
>
> This level of consultation, including the release of an exposure draft of the proposed Bill, is the most extensive consultation process I have experienced, both in terms of the amount of engagement and the extended period in which consultation rounds have been taking place.[3]

The claimants deny that the consultation referred to was a quality process. They do not accept that the Crown took adequate steps to ensure that Māori were properly informed, or that the Crown has kept an open mind or made appropriate changes (including being prepared to start afresh) in response to the consultation. Nor do the claimants accept the Crown can or should lead a review of the 1993 Act. In their view, it falls within the Māori Treaty partner's sphere of authority to review the Act and decide what, if any, changes should be made to the law governing Māori land.

The Crown does not accept the claimants' position that Treaty principles require it to obtain full, free, and informed Māori consent to legislative change. Even for such an important Act for Māori as Te Ture Whenua Māori Act 1993, the Crown says that Treaty principles do not require it to go so far as that. In the Crown's view, its Treaty duty is to consult Māori where that is required, and then make an informed decision.

Thus, there is virtually no common ground between the Crown and claimants on the process undertaken to review and reform Te Ture Whenua Māori Act 1993.

In this chapter, we focus on issues of process. We reserve for the following chapter our findings on whether the substance of what is proposed is Treaty-compliant. We address a number of issues, focused on the following questions:

- Who initiated and shaped the reforms – the Crown or Māori or both?

- How were the 2013 review panel's high-level principles translated into a Bill?
- How have Māori been consulted on the exposure draft of that Bill?
- Has the Crown's consultation on the Bill met common law and Treaty standards?
- Is there demonstrable and sufficient support from Māori for the Bill to proceed?

We begin by setting out a brief summary of the parties' submissions, to which we turn next.

3.2 Summary of the Parties' Arguments

In this section, we provide a summary of the parties' arguments on the key issues that will be addressed in this chapter. The summary is drawn from the legal submissions of Crown and claimant counsel, principally from their closing submissions. We begin each subsection with a summary of the Crown's case, as Crown counsel provided closing submissions first on 14 December 2015. We then summarise key arguments and responses from the claimants' submissions and any arguments put forward by counsel for the interested party, Nellie Rata.

3.2.1 Who should initiate and lead a reform of the law for the governance and management of Māori land?

(1) *The Crown's case*

According to the Crown, the current reform process has come about as a result of 'Māori-instigated debate and reviews of the 1993 Act'. The Government responded to 'Māori-instigated debate since at least 1996, by establishing the independent review panel' in 2012. Although this independent panel was appointed by the Crown, it 'did not consider Crown proposals' but 'reviewed the existing literature and developed its own views following consultation' with Māori.[4] Once the panel had reported,

> [a] technical panel then developed the review panel's ideas in late 2013. Only at that stage did the Crown begin to develop a draft proposal, and only then with advice from an independent Ministerial Advisory Group. The process has been collaborative, extensive, and novel.[5]

Thus, the Crown's view is that the reform process was 'Māori-instigated', based on 'Māori-initiated' reports, and the resultant reform 'proposals reflect Māori instigated debate, not unilateral Crown policy'.[6]

In particular, the Crown emphasises a report by the Māori Land Investment Group in 1996, a Federation of Māori Authorities (FOMA) survey of its members in 1997, TPK consultation hui in 1998, a Hui Taumata report in 2006, and a TPK-commissioned 'Owners' Aspirations Report' in 2011.[7] 'Ultimately,' Crown counsel submits, 'the Owners' Aspirations Report and the reports that preceded it led to the current review and proposed reforms'.[8] Crown counsel stresses that:

> The reforms reflect the view that Māori land owners' decisions about their land should not, in a range of situations, be subject to the paternalistic oversight of Crown-appointed judges. This view has been put forward to the Crown by a number of Māori initiated reports, panels and submissions since 1993.[9]

In terms of who should lead the reform process, Crown counsel considers that there is no Treaty definition of 'particular spheres that neither the Executive nor Parliament may enter without universal Māori agreement or approval'.[10] Nor do Treaty principles 'oblige the Executive to transfer legislative drafting to any particular Māori group or to any particular Māori institution'.[11] The Crown rejects the claimants' views that:

- the Treaty 'guaranteed Māori "a right to determine for themselves" the regulations relating to Māori law'; and
- it is 'inappropriate for the Crown to "lead" the policy process for the current reforms, as to do so would fail to properly recognise tino rangatiratanga'.[12]

The Crown also qualifies its view, expressed in the Māori Community Development Act inquiry, that Māori

'"should be free to consider for themselves and develop reforms to their own institutions, and to the extent that legislative reform might be required or public funding sought, to come to the Crown as Treaty partner to discuss and negotiate desired reform"'.[13] Crown counsel notes that 'the Crown was recognising this as *an* option, not the *only* option' (emphasis in original), and also submits that the reform proposals in the present case do in fact 'reflect debate within Maoridom' and reforms identified by Māori, not the Crown.[14]

As a matter of Treaty principle, the Crown holds that it is required to engage with Māori in good faith at the appropriate level for any particular issue but is otherwise free to develop policy as it sees fit.[15] There are a number of other interests that the Crown must balance with the Māori interest, '[p]rovided the Crown engages with Māori in a manner that reflects the importance of the Māori issues and authority involved'.[16] In practical terms, the Crown's view is that its resources (including public service advice and finance) and its 'predominate role in shaping the legislative agenda of the House' make a Government Bill 'a far better vehicle for legislation than a private member's Bill or an independent legislative proposal'.[17]

The Crown also says that there is a constitutional issue here: the 'decision on whether to propose legislation to the House is a matter for the elected government to make' and is an 'established part of existing constitutional arrangements'. In the Crown's submission, constitutional issues of this kind – including whether Māori should 'share legislative authority' with Parliament – will be the subject of the Tribunal's kaupapa inquiry on constitutional matters and are not addressed directly in the Crown's submissions.[18]

(2) *The claimants' case*

The claimants believe that any reform of Te Ture Whenua Māori Act 1993 should be initiated and led by Māori.

First, the claimants deny that the reform proposals were initiated by Māori debate and reports, or that the reforms reflect Māori views and concerns as expressed from 1996 to 2011.[19] They also reject the Crown's argument that the 2013 review panel was independent and that its 'recommendations evolved from Māori aspirations independent of the Crown'.[20] In their view, the panel followed 'Crown-commissioned economic development reports'[21] and the review 'was premised on a Crown agenda of economic utilisation of under-developed Māori land, and rationalisation of the Māori Land Court's functions'.[22] The claimants stress 'a range of departmental initiatives, including (but not limited to) Te Puni Kōkiri, Ministry for Primary Industries, Ministry of Business Innovation and Employment and Land Information New Zealand'.[23] The information generated by these agencies has been strongly criticised.[24] According to the claimants, the Crown's proposed reforms are based on very little empirical research or reliable data.[25] There has been no investigation of what actually works and does not work in the present Act.[26] Further, if the reforms truly reflected Māori aspirations for land retention and development, they would have included what Māori had identified as the real constraints, which lie outside the 1993 Act: rating, resource management law, public works takings, landlocked lands, paper roads, and access to development finance.[27]

Secondly, the claimants condemn the reform process as 'Crown-led':

> The consultation process has been flawed from 2012 because the basis for initiating the review of the TTWM 1993 was Crown-led and developed. It has pursued these reforms to progress its own broader policy objectives with an intention at the outset to introduce a new Bill to the select committee.[28]

The claimants 'challenge the constitutional right of the Crown to make laws in relation to taonga tuku iho of such significance as is Māori land'. In their view, kawanatanga 'does not extend to the power to decide how Māori will govern themselves in terms of their Māori land, which is the domain of tino rangatiratanga'. The Crown, they say, 'reduces the Treaty partnership to it having the right to govern, make policy and introduce legislation which impacts centrally on Māori taonga, as long as it does so on an "informed basis"'. Māori are simply treated as another stakeholder group 'whose perspectives are to be considered or engaged with'. In the claimants' view, this leaves 'little place for the full expression of tino rangatiratanga'.[29]

The claimants 'contend that the Treaty of Waitangi guaranteed to Māori their right to determine for themselves the rules, regulations and policies relating to their taonga'; in this case, a 'taonga tuku iho (being Māori land)'.[30] They disagree with the Crown that this is an impractical position. They rely instead on the guidance of the Tribunal's report, *Whāia te Mana Motuhake*, for the 'practical application of the Treaty principles to a situation where the Crown seeks to legislatively reform a statutory scheme of great significance and history to Māori'.[31] The 'appropriate' approach to be pursued is illustrated in the claimants' proposed remedies,[32] and it requires the Crown to 'empower Māori to develop their own reform proposals'.[33] The Crown's view that 'broader policy considerations' have to be taken into account can be accommodated by a Crown '"audit" function once Māori had determined their reform proposals'.[34]

The Wai 2478 claimants' proposal for Māori-led 'land tenure reform' is that Māori landowners should nominate representatives to 'develop parameters for the reform, including the necessary research required into existing legislation (not limited to Te Ture Whenua Māori Act) where there are constraints on Māori land retention and development'.[35] The Crown would fund and support that process until Māori are ready to engage with the Crown as Treaty partners 'on the implications of any reform proposals for the wider legislative context and the public interest'.[36]

We turn next to consider the parties' submissions on the reform process that has taken place to date, and the question of whether Māori agreement is required for a fundamental change to the regime for the governance and management of Māori land.

3.2.2 Consultation vis-à-vis consent

(1) *The Crown's case*

The Crown argues that it has an obligation to address concerns expressed by Māori about 'barriers to utilisation within the 1993 Act'. In doing so, it says that it is responding to views 'put forward to the Crown by a number of Māori initiated reports, panels and submissions since 1993'.[37] In responding to these 'repeated calls for reform of the Act', the Crown has created proposals that it says reflect the views of Māori landowners. In particular, the reforms address 'long-standing demands from Māori land owners for greater decision-making power over their land' through a type of governance entity more responsible to and responsive to owners. The reforms also reflect 'the view that Māori land owners' decisions about their land should not, in a range of situations, be subject to the paternalistic oversight of Crown-appointed judges'.[38]

Although the Crown thus says that its proposed reforms do in fact reflect Māori views, it also submits that 'Treaty principles do not oblige the elected government to secure the claimants' consent to a Bill being introduced to the House'. The 'Crown's Ministers are free to pursue their chosen policies' but 'must do so in a way that respects rangatiratanga, and the Crown's obligation to actively protect Māori taonga'. These obligations require the Crown to 'take reasonable steps in all the circumstances, assessed in light of the historical relationship between Crown and Māori on a particular issue'. Ultimately, the Crown must make an informed decision as to whether or not to enact its reforms. The content of the reforms, in the Crown's submission, has been arrived at by a process of 'extensive consultation involving substantial opportunities for both Māori landowners and stakeholders to understand and contribute to the reforms'. The Crown has also had the benefit of 'independent [Māori] advice on possible reforms'. This consultation process 'meets the Treaty standard and has informed the Crown's development of the current draft Bill'.[39]

Thus, in the Crown's view, what is necessary in Treaty terms is for the Crown to make an informed decision, which may or may not require it to consult Māori, depending on the circumstances of the particular case. If consultation is required, a 'duty to consult is not a duty to reach an agreement that the consultees approve of'.[40] The Crown accepts that 'the present circumstances, involving the regulation of Māori land, require robust consultation with Māori in order to meet the Crown's obligation to make an informed decision'.[41] It rejects the claimants' view that law reform in respect of such a taonga as Māori land should be led by Māori or requires '"agreement" from

Māori before proposing any legislation'.[42] In the Crown's view, this is an 'inapt description of the Treaty relationship that fails to give practical effect to Treaty principles'.[43]

Rather, 'Treaty principles require balancing and weighing of interests'. Where Māori interests are 'engaged at the requisite level' (that is, have sufficient weight to require consultation), 'Māori engagement and opinion must be sought'.[44] The steps required vary according to the strength of the Māori interest, but the Crown always 'retains a responsibility to govern'.[45] Ministers are 'free to develop their policies, for which they are responsible to the House of Representatives' and the electorate, and not (by implication) to the Crown's Treaty partner.[46] The partnership principle entails the Crown and Māori engaging with each other 'in a spirit of cooperation and a willingness to consider compromise', but the Crown's 'obligation to protect rangatiratanga does not mean the Crown cannot consider other factors, broader obligations, or goals'.[47]

In the present case, these 'other factors' include the Crown's responsibility for 'national systems of land tenure' and land transfer, the Crown's guarantee of registered land titles, the role and funding of the civil service, and the role and funding of a 'Crown court of record'.[48] 'Regulation of title to land', in the Crown's submission, 'is a core governmental and judicial function, and the relationship between Māori land tenure and the Land Transfer Act 1952 more broadly is therefore significant to the public interest generally'.[49] Other matters for the Crown to consider include 'broader economic, social and financial considerations',[50] which is presumably a reference to how Māori and the economy more generally would benefit from greater, more 'effective' utilisation of Māori land.

All these factors mean that the Crown's interest in Te Ture Whenua Māori is not 'weak' as compared to the weight of the Māori interest, and the Act for the regulation of Māori land is not a 'stand-alone system' about which Māori should make the decisions.[51]

Crown counsel accepts, however, that kawanatanga is not absolute and 'the Crown's right to govern is "qualified by the Treaty's guarantee of continuing Māori authority but, equally, a duly elected Government cannot be unreasonably restricted in the conduct of its policy"'.[52] This means that the 'nature and recognition of Māori authority must be closely considered in each particular context'. In the present case, Crown counsel submits that '[t]he Crown has not acted unilaterally here'.[53] Its proposed reforms respond to and reflect Māori concerns. Its process of consultation, including the use of independent Māori advice, has been 'high quality, extensive and novel'.[54]

Given the Māori calls for reform, the Crown says that it was incumbent on it to act, especially since there were no practical alternatives to Crown action (given its resources, its access to public service advice, and its role in developing and passing legislation). As noted above, the Crown's view is that a Government Bill was the only practical way to give effect to the necessary reforms. But this does not mean that Māori have been '"a junior partner" to the process':

> Provided the Crown engages with Māori in a manner that reflects the importance of the Māori issues and authority involved, and which is consistent in other respects with Treaty principles and broader governmental considerations (for instance, broader economic, social and financial considerations), the Crown's Treaty obligations will be met.[55]

On the more particular question of whether the Crown needs Māori consent to introduce its Te Ture Whenua Māori Bill in March 2016, Crown counsel accepts that there is an issue as to whether (or how far) the Crown should act without broad Māori support. Crown counsel also accepts that 'the Crown's assessment of the degree of Māori support when deciding whether or not to proceed with a Bill is important in evaluating the reasonableness of its decision-making processes in terms of Treaty principles'.[56] The Crown suggests that, in judging the degree of Māori support for the proposed reforms, 'the Tribunal should not confuse concern with particular aspects of the proposals as opposition to the proposals as a whole'.[57] The Crown says that its 'extensive analysis of the submissions

on the exposure draft' of the Bill has established 'the degree of support and opposition on each key issue'. This exercise was followed by Ministerial Advisory Group advice and a policy response on each of the key matters of concern.[58] In the Crown's view, the question is now focused on this process of amendments in response to consultation, rather than the general question of whether the reforms as a whole should proceed (remembering that the Crown is satisfied the reforms in general have had sufficient support since 2013).[59]

Nonetheless, Crown counsel also submits:

> The Crown has not closed its mind to substantive changes, including whether to proceed with a Bill at all. *At present, the Crown is satisfied that the revised draft Bill has sufficient support*. Consistent with this view, officials are focussed on the structure of the revised draft Bill, rather than revisiting the general policy direction. However, the Crown must keep those directions under review and any significant change might well require reconsideration.
>
> Further, and contrary to the claimants' apparent position, *when Cabinet comes to decide whether or not to introduce a Bill to the House, it will necessarily consider afresh the level of Māori support for the proposed reforms, and whether further consultation is in fact required*. [Emphasis added.][60]

There is no doubt on the part of the Crown, however, that the question of whether to proceed with the Bill is a decision for the Crown alone: 'Whether there is a sufficient "mandate" for the Executive to move to introduce proposed legislation is a political question for political judgement.'[61]

The Crown also denies that it needs a 'comprehensive mandate' from Māori, 'even for a topic as significant as land legislation'.[62] In reaching this view, the Crown rejects the findings of the Wai 262 Tribunal that there is 'an obligation to seek "agreement" with Māori, and that the undoubted "right to govern" may only be relied on once government has taken extensive efforts to reach agreement with Māori'.[63] The Crown also says that the findings of the Tribunal in its report *Whāia te Mana Motuhake* are not relevant because that report was specific to an institution created by Māori and then accorded statutory recognition.[64] More generally,

> [t]o the extent that the *Whāia te Mana Motuhake* [report] finds that Treaty principles require that the Crown must reach agreement with Māori before proposing legislation to the House on certain issues, the Crown does not accept the Tribunal's findings. Rather, the Crown relies on the well-established judicial interpretation of Treaty principles in the courts, which require consultation of varying intensity and degree depending on the issues involved.[65]

Further, the Crown argues that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) does not require the New Zealand Government to go beyond Treaty principles and established processes for engaging with Māori. The Declaration's requirement for consent to legislation is 'aspirational' and not binding on the Crown.[66] Crown counsel also submits:

> UNDRIP does not give indigenous actors a veto right over government policy and does not oblige nation-states to obtain consent or agreement in every situation. By insisting that 'agreement' is a pre-requisite to government action, the claimants mis-state the UNDRIP jurisprudence.[67]

Ultimately, the Crown's view is that, so long as the Crown has made 'informed decisions [along the way] on how best to actively protect affected Māori interests', there is nothing in principle to now prevent the Crown from proceeding to 'the point of making final decisions'.[68]

(2) *The claimants' case*

The claimants reject the view that the Crown's Treaty duty is merely to inform itself on 'legislation which impacts centrally on Māori taonga'. Māori, they say, are not just a 'stakeholder group, whose perspectives are to be considered or engaged with'.[69] As noted above, the claimants

consider that Māori themselves should initiate and lead any reforms about such an important taonga tuku iho as Māori land. They also believe that the Treaty principles require 'a higher standard of Māori decision-making and participation' than that allowed for by the Crown.[70] In particular, relying on the Wai 262 report, the claimants argue that negotiation between the Treaty partners to obtain consent is necessary 'where the Māori Treaty interest is so central', as it is for their taonga tuku iho, Māori land.[71] They disagree with the Crown that the UNDRIP requirement for consent is 'aspirational'.[72]

In the claimants' view, they are not raising a technical or constitutional question as to whether the Crown *can* introduce a Bill without consent. Rather, what Treaty principles require – 'because this is an issue that involves a taonga of such importance to Māori' – is that 'the Crown should obtain the full, informed, and free consent of Māori during the consultation process, which has not occurred'.[73]

On this matter, the claimants draw a strong contrast between the current reforms and the evolution and passage of Te Ture Whenua Māori Act in 1993:

> The claimants say that the evolution of the Act took approximately twenty years of engagement, consultation, and deliberation to ensure that the appropriate balance was achieved for the most effective use of Māori land within the overall objective of retention. The proposed legislation garnered widespread support among Māori landowners at the time. It was introduced to the House of Representatives because of that support.[74]

By contrast, the present reforms lack 'the strong consensus among Māori landowners for the introduction of the new legislation'.[75]

The claimants are very critical of the consultation undertaken from 2013 to 2015. In their view, it has been rushed, based on inadequate research and poor information, and has advanced a Crown agenda without properly listening to or responding effectively to Māori concerns.[76] Quite apart from Treaty standards – which the claimants say the Crown has not met – the claimants submit that the Crown has failed to meet common law standards for consultation, as set out in the *Wellington Airport* case.[77]

The claimants are also critical of the Crown's refusal to take its revised draft Bill back out for further consultation. Decisions 'as to what stayed and what was taken out of the proposals was for the Crown, based on its own policy objectives'.[78] In the claimants' view, 'the Crown has conducted a hurried process to develop a proposed Bill, presented it to Māori as a fait accompli, and now refuses to pause prior to introduction of the bill to allow Māori the time to review, to consider, to kōrero, *and to consent or not*' (emphasis added).[79]

Claimant counsel submits: 'The low level of Māori whānau, hapū and iwi support for the new Bill is extremely concerning, as is the fact that despite substantive amendments to the new version of the Bill, there is no plan to re-engage with the Māori landowners on the changes.'[80]

The claimants conclude that:

> There is a worrying lack of evidence of support from Maoridom for this Bill. The New Zealand Māori Council has not endorsed the Bill. The Māori Women's Welfare League is opposed. The Iwi Leader's Forum has set out its position clearly that the Bill needs to focus on the wider ramifications of development constraints on Māori, which the Bill does not do. The latest 'protocol' between the ILF and the Crown does not indicate support for the Bill, but rather a process of communication (signed 3 years after the Review Panel commenced its work). Whānau, hapū and Iwi and landowners across the spectrum of trusts and incorporations made submissions opposed to the Bill. In addition, Ms Lant's on-line petition mentioned in her further affidavit now sits at 1537 (up from 1386).
>
> The Crown submission . . . illustrate[s] that the Crown will make its own judgment as to whether it has the requisite support to introduce the Bill to the House. It is another example of the institutional arrogance of a Treaty partner who cannot appreciate that such a judgment call reserved solely to itself, leaves no room for the expression of rangatiratanga.[81]

On the matter of the Māori Land Service, and the administrative arrangements which will underpin the

Common Law Principles for Consultation: the *Wellington Airport* Case

'Consultation must be allowed sufficient time, and genuine effort must be made. It is to be a reality, not a charade. The concept is grasped most clearly by an approach in principle. To "consult" is not merely to tell or present. Nor, at the other extreme, is it to agree. Consultation does not necessarily involve negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate situation involving meaningful discussion. Despite its somewhat impromptu nature, I cannot improve on the attempt at description which I made in *West Coast United Council v Prebble* at p 405:

> "Consulting involves the statement of a proposal not yet fully decided upon, listening to what others have to say, considering their responses and then deciding what will be done."

'Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses. It is also implicit that the party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh. Beyond that, there are no universal requirements as to form. Any manner of oral or written interchange which allows adequate expression and consideration of views will suffice. Nor is there any universal requirement as to duration. In some situations adequate consultation could take place in one telephone call. In other contexts it might require years of formal meetings. Generalities are not helpful.'[1]

reforms once the Bill is enacted, the claimants say that there has been 'little or no engagement with Māori landowners' to ensure that the proposed new services will be robust.[82] It is 'not sufficient to respond that the legislative framework must be enacted before the Māori Land Service work can be progressed'.[83] The claimants point out that the risks are high for Māori landowners, and that when the Employment Contracts Act 1991 was replaced with a new Act in 2000, the new mediation service and support systems were introduced at the same time as the legislation.[84]

(3) *The interested party's case*

Counsel for Mrs Rata submits that the Crown must obtain the prior, free, and fully informed consent of Māori before any repeal or reform of 'legislation such as the Māori Land Act 1993'. Māori have a correlative duty to propose reforms and inform the Crown 'in a manner that they best can do', so that Parliament is satisfied the reforms 'have indeed received prior informed consent'. Counsel suggests that this is a 'minimum Treaty of Waitangi principle'.[85] The Crown's process to date has not enabled Māori to arrive at a consensus on reform of the Act, and thus Māori consent has not been obtained:

> This process is, I am instructed, anything but Māori, in that there has not been the due time accorded informed *whakawhiti whiti kōrero* (*ie informed debate and discussion*) from which consensus might arise, and through which a rangatira might gauge the people's views. [Emphasis in original.][86]

(4) *Process versus substance*

The preceding material has been concerned with the process to decide whether Te Ture Whenua Māori Act 1993

should be repealed and, if so, what should replace it. According to the claimants, the Crown's process to date has been so flawed as to be in breach of Treaty principles, regardless of whether its reforms are actually good and Treaty-compliant in substance.[87] Nonetheless, the claimants maintain that the proposed contents of the new Bill are not consistent with Treaty principles.[88] We address the substance of the reforms, and the claimants' allegations that serious prejudice will occur to Māori landowners if the Crown repeals the 1993 Act and enacts its proposed reforms, in chapter 4.

We turn next to assess a key question disputed by the parties: who initiated and shaped the reform proposals, the Crown or Māori or both?

3.3 Who Initiated and Shaped the Reforms – the Crown or Māori or Both?

3.3.1 Introduction

As we have discussed, the Crown submits that its current reform process was initiated in response to 'repeated calls for reform of the Act' from 'significant voices within Māori society'.[89] The main thrust of these calls was understood to be the removal of barriers to the utilisation of Māori land, including the 'burdens and uncertainties in decision-making processes, the further uncertainties implicit in the Māori Land Court's various areas of discretionary review and supervision, and lack of access to development finance'.[90] These problems were confirmed, in the Crown's view, by a series of studies and reports in 1996, 1997, 2003, 2006, and 2011, as well as through hui and submissions during the 1998 review. The Crown's response was to attempt to 'address concerns about barriers to utilisation within the 1993 Act';[91] that is, the decision-making arrangements and Māori Land Court discretions, but not the lack of access to development finance. The aim is new legislation to create 'more autonomous and effective governance entities' for multiply owned Māori land.[92] In doing so, the Crown submits that it will be providing for Māori land owners' 'exercise of their rangatiratanga'.[93]

The claimants, on the other hand, deny that the present reforms originated from Māori concerns and aspirations. In their view, the reform proposals ignore the genuine Māori concerns about barriers to utilisation (such as rating and finance). Instead, the 'underlying objectives for reform are driven by Crown policies, not Māori aspirations'.[94] The claimants reject the statistical validity of such reports as the 2011 owners' aspirations report, and argue that the Crown's true intent is to be found in the MPI reports of 2011 and 2013. The Crown's desire to see more Māori land in production is the true driver of the reforms, which demonstrably represent Crown priorities, not Māori aspirations.[95]

We have already summarised the parties' arguments on these issues in the preceding section. In this section, we examine the origins of the 2013 reform proposals in some detail, so as to assess whether they were initiated and shaped by Māori concerns dating back to 1996 and expressed repeatedly since then (as the Crown says), or instigated and shaped by Crown priorities expressed since 2011 in MPI research and other documents. We also examine how the independent review panel came up with its reform propositions in 2012–13, whether Māori supported those propositions in 2013, and how the decision was made to proceed with the reforms and repeal the 1993 Act.

As part of that analysis, we examine the detail of the claimants' concerns about the review panel's process, which they say was deficient in a number of ways. Although the claimants do not dispute that Māori supported what are called the 'vague and high-level principles in the Review Panel's discussion document', they argue that the Crown 'has failed to show demonstrable support among Māori landowners for the detailed proposals' that followed in 2014–15.[96] That latter point will be the subject of discussion in later sections of this chapter.

3.3.2 The first major review, 1998–2002

(1) *Introduction*

In his evidence for the Crown, Whaimutu Dewes stated that the present reforms reflect 'long-standing aspirations and demands from Māori land owners for more control in the decision making over their land'.[97] He provided the Tribunal with a series of reports from the 1990s and 2000s in support of his position.[98] Claimant counsel

questioned Mr Dewes and other Crown witnesses closely as to whether these reports were really 'Māori material' or 'Crown generated material about Māori issues'.[99] Mr Grant, for example, responded that 'the Crown evidence is that it all adds up to it over time, in a broad sense, evidence that there have been concerns raised and that the origin of those concerns and the analysis of them does come from within Maoridom'.[100]

As noted above, this is a major issue for our inquiry. One of the fundamental differences between the Crown and claimants is whether the reforms were initiated by Māori concerns and reflect Māori views, or whether the nature of and impetus for the reforms comes from the Crown, relying (as claimant counsel put it) on 'selected Māori advice'.[101] In the claimants' view, the Crown greatly overstates the degree of Māori concern that the discretionary powers of the Māori Land Court interfere with owners' aspirations, for which there is no empirical evidence, and the constraints on development that *have* been identified in the past by Māori are not included in the Crown's reforms.[102]

The first major review of Te Ture Whenua Māori took place in 1998, resulting eventually in amending legislation in 2002. In the Crown's submission, reports that preceded the review and the 1998 consultation hui demonstrated serious Māori concerns about an imbalance in the Act between retention and utilisation. The concerns identified by Māori included owner autonomy, 'pro forma constitutions', whāngai successions, and Māori Land Court discretions – concerns which the Crown says have remained unresolved since at least 1998.[103] The claimants, on the other hand, point out that only a few of the proposed changes became law in 2002, and that the 'reduced amendment package suggests that the Crown's version of its position is revisionist' – in other words, if the Crown is correct that these matters reflected grave Māori concerns (then and now), why were they not enacted in 2002?[104]

The Crown's submissions emphasise the importance of two reports that preceded the review, a 1996 report from the Māori Land Investment Group and a 1997 FOMA-commissioned survey of Māori landowners.[105] We discuss each of these briefly in turn.

(2) *The Māori Land Investment Group (1996) and FOMA survey (1997)*

The Māori Land Investment Group was established by TPK in 1996 to 'assist in identifying, and developing policy options for resolving the problems associated with attaining finance for multiple-owned Māori land'.[106] This group of six Māori advisers, including Paul Morgan and Alan Haronga, were called in for discussions with TPK officials, which were then written up as a report. The group considered that 'creating a greater choice for landowners over organisational governance and decision making was paramount'. Māori owners, in their view, were currently too constrained by the paternalistic restrictions of the 1993 Act.[107] The evidence relied on for this point was that iwi were not choosing to have Treaty settlement assets made Māori freehold land under the Act. This appeared to show 'the concerns landowners have with current Māori land legislation and the role of the Māori Land Court'.[108] The Māori Land Investment Group criticised the court as too focused on retention and preventing risks of alienation, and argued that its role in decisions about the economic utilisation of Māori land should be reviewed – in particular, if owners were prepared to risk land loss to secure finance, their mana whenua meant they should be allowed to do so without court interference.[109]

The group recommended that the Government simplify governance structures, bringing them more into line with the Companies Act 1993, and investigate the court's role and discretion in 'ruling on the economic utilisation and governance of Māori land'.[110] By far the biggest problem identified by the group, however, was that one-fifth of Māori land (by area) had no governance structure at all – this was the greatest barrier to getting finance and to seeing land developed and used commercially. It was recommended that the Government help Māori owners to incorporate, provide for improved management structures, and ensure that governors of Māori land were upskilled. The Crown also needed to provide for a more commercially realistic form of security for mortgaging Māori land.[111]

After receipt of this report, TPK commissioned a FOMA survey of its members to consider whether the Act 'has

been successful in meeting its objectives and to identify whether the Act is working for Māori landowners.'[112] More specifically though, and presumably following on from the issues identified by the Māori Land Investment Group, the survey was also targeted at the court's jurisdiction, and finding out from the respondents how 'judicial discretion . . . had affected their plans for utilisation and development of their land.'[113]

The report was compiled by FOMA chair Paul Morgan from personal or phone interviews with 100 members, their business advisers, and lawyers practising in Māori land law: 'The respondents interviewed are collectively very experienced in Māori land management and the use of TTWM.'[114] In cross-examination, Mr Dewes accepted that the report – as with the reports that followed – was not based on empirical research, nor was it 'statistically reliable'; but, he added, 'I wouldn't discount it as being of no use.'[115]

The FOMA report concluded that 'Māori land owners, trustees, committee of management and professional advisers have been concerned at the use of judicial discretion in a number of hearings in various (MLC) districts since the enactment of TTWM.'[116] Thirty-seven per cent of respondents were happy with or neutral in their view of the court. The majority were unhappy with the wide powers given the court in the 1993 Act, or the way in which discretion was actually exercised by the court. The court and the legislation were both seen as paternalistic and as favouring land retention, with insufficient support given to economic utilisation. There was, reported Morgan, a strong 'philosophical view' that the court 'should have no jurisdiction over land utilisation or the owners commercial affairs.'[117] Nonetheless, the Māori Land Court's discretion was seen as 'only one part, albeit a significant part, of the problem of Māori land utilisation by its owners'. Fundamental problems included fragmentation, access to finance, governance training, business capability, and access to other specialist skills 'as Māori seek to develop themselves economically'.[118]

The Māori Land Investment Group and FOMA reports were followed by the report of the Māori Multiple Owned Land Development Committee in February 1998, later known (for its chairperson) as the McCabe report. This report was influential later in the policy-formation which produced the Amendment Bill in 1999. We discuss that report next.

(3) *The Māori Multiple Owned Land Development Committee, 1997–98*

The Māori Multiple Owned Land Development Committee was established in 1997 as part of the Coalition Agreement. Its purpose was to provide independent 'contestable' advice to the Minister of Māori Affairs (Tau Henare) about Māori land development.[119] Its members were Māori selected by the Government for their expertise in land law, central and local government policy making, banking, finance and economics, the management and development of Māori land, land valuation, Māori land processes and judicial decision-making.[120] One member, Tina Ngatai, was a Māori Land Court registrar, the others were from outside Government. The chair was June Ngahiwi McCabe from Westpac, who had an extensive background in public and private sectors of housing and finance.[121] The Government specified that the committee's recommendations had to be commercially viable, 'generally acceptable to Māori', and 'consistent with the Crown's Treaty obligations'.[122] The committee defined the Crown's Treaty obligations in respect of Māori land as 'to actively protect Māori interests in land'.[123] Its information came mostly from TPK, and it did not conduct consultation with Māori.

The committee was tasked with assessing issues identified by TPK, 'which it considers need addressing before Māori land owners can realise greater control over decisions relating to their land, and be more proactive in identifying and progressing development options'.[124] The key issues were access to finance, management capacity, land valuation and rating, pre-commercial facilitation, identification of land use options, successions, and amalgamation of land. Forty per cent of Māori land was estimated as under-utilised and under-developed.[125]

The committee decided that the biggest problem for owners who wanted to develop their land was a lack of information about the steps necessary to do so, and thus it focused on 'pre-commercial facilitation' as its primary solution. This involved the provision of information to Māori landowners, increasing their management capabilities, and researching potential land uses on a local and national scale.[126] The committee thought that there was a serious shortage of hard data, and recommended that '[r]igorous investigation' was needed to ascertain why land was unoccupied or unused – there was not enough detailed knowledge of the ownership and makeup (usability) of Māori land. Before or as part of the wider review of the 1993 Act that was planned, there should also be qualitative analysis of Māori Land Court decisions to determine whether, in fact, 'the impact of judicial discretion is a barrier to the use of land as security'. The committee also thought that alternative security arrangements for borrowing (other than Māori land) were a priority.[127] The committee's view of the court seems to have been strongly influenced by TPK, the Māori Land Investment Group report of 1996, and the FOMA survey of 1997.[128]

(4) *The 1998 review of Te Ture Whenua Māori Act 1993*

As the McCabe committee noted, the Government had already decided to formally review the Act. At the time of its passage in 1993, the Minister, Sir Douglas Kidd, had 'made a promise that it would be monitored and reviewed to assess how well it is working'.[129] The proposed review would be undertaken and led by TPK, honouring Sir Douglas's 'undertaking', but without the detailed research that the McCabe report had recommended. Tau Henare announced the review in May 1998. Its 'key objective' was to 'identify how to make the Act more useful and effective, in particular to make it easier to retain, occupy, develop and use Māori land'.[130]

TPK called for submissions in July and August 1998, and Cabinet approved terms of reference for the review in August.[131] In 'consultation with tangata whenua', TPK was instructed to:

- assess how successful the Act has been in promoting the principles in the preamble: retention; and occupation, utilisation, and development for the benefit of the owners;
- consider the 'remedies that would allow the principles of development/utilisation and retention to coexist in a complementary fashion';
- examine the powers, duties and discretions conferred by the Act;
- review the role of the Māori Land Court in assisting the implementation of the Act's principles;
- examine specific Māori land issues that had been considered by previous review committees, including multiple ownership, fragmentation, access to finance, and successions;
- consider any other relevant matters; and
- recommend any necessary or desirable legislative or other changes to enhance the effectiveness of the Act in facilitating the occupation, development, and utilisation of Māori land.[132]

A paper was issued in October 1998 for discussion around the country at 18 hui. The ultimate purpose of the consultation was described as ensuring that 'the Act, and the Court's role, reflect the views and aspirations of tangata whenua'.[133] According to the wording of the paper, it set out

> some of the areas where tangata whenua, and others, have said that the Act is not working well. No doubt there will be differing views about how to change the Act. The hui provide an opportunity to express these views, to raise issues of concern, and to put forward your ideas about how to make the Act work more effectively.[134]

All Māori were invited to the hui because the Act 'affects everyone who owns or who will inherit Māori land'.[135]

In the discussion paper, TPK noted that there had been 'much discussion about the extent of the Court's discretionary powers'. Issues included whether or not the court was balancing retention and utilisation in a

'complementary fashion', whether the court should have 'more or less' discretion in respect of trusts, whether it should be able to act as a mediator, whether it should be able to review the decisions and performance of trustees and management committees, whether it gave 'undue influence' to minority interests, and whether it recognised tikanga appropriately.[136] TPK also noted that '[v]arious reports' had identified a number of problems for Māori wanting to develop their land, including access to finance, the problems of using Māori land as security, lack of knowledge about development options, fragmentation of title, inadequate management skills and organisational structures, and lack of legal certainty (impacting on business decisions).[137] The discussion paper elaborated on concerns about trusts (and trustees), successions and whāngai, paper roads, landlocked lands, occupation orders, rating and valuation, and title registration.[138]

TPK summarised the outcomes of the hui for Cabinet in late 1998. This served Ministers as a snapshot of Māori views on Māori land issues as raised by TPK in the consultation. TPK observed that there was some concern about conflict between the principles of the Act and their practical implementation, but overall support for the principles, and 'overwhelming support' for the principle of retention. It was felt, however, that the terms of the Act and the Government itself did too little to support the principle of occupation.[139] Mixed views were expressed about whether the court should be retained. There were also suggestions about a need for more consistency in its decisions, 'a curtailing of the Court's discretionary powers', a need for the court to have 'appropriate expertise to scrutinise the activities of trusts and incorporations', and a call for court staff to assist Māori with court processes and applications. There were mixed views about whether the court needed to be more expert in tikanga and te reo, but general support for the court to have a mediation service.[140]

Some hui participants had called for a return to customary tenure and an end to individual shareholdings in Māori land. There was very little support for the idea of adding a 'company-type structure for land management' to the Act (an idea that was to resurface in 2013). Many Māori were unhappy about their ability to get development finance from banks, and called for the Crown to resume assisting Māori land development, especially with development loans.[141] This idea, too, was to return in the 2013 review.

There was also a call for the Government or court to help with training trustees, and to provide model trust orders.[142] On the issue of succession, hui participants wanted succession rules to continue to reflect the retention principle and whakapapa. They opposed allowing whāngai to succeed without a bloodline connection.[143]

Paper roads, rating, land valuations, the RMA, and landlocked lands were all major issues for hui participants, who wanted Crown action on these issues, and for Te Ture Whenua Māori (and its principles) to become the 'one-stop shop' for all matters that affected Māori land.[144] This was to remain a strong message from Māori to the Crown in the 2013 review, as little changed in the interim.

In addition to the consultation hui, TPK received 79 written submissions and held eight focus groups, convened and run by Māori people independent of the Crown, to follow up on matters raised at the hui, to hold more in-depth discussions, and 'test out policy proposals for community reaction'. These focus groups met regularly from December 1998 to February 1999 and reported the results to the Ministry. A national meeting of the independent convenors of the groups was held on 5 March 1999 to discuss an overview of themes, which appear to have been much the same as those recorded at the principal hui. TPK's chief executive reported the results to the Minister in March 1999. At that stage, he also planned to have FOMA convene a group to discuss Māori land development, and to seek advice on legal issues from external advisers, including the Law Commission.[145] A national wānanga of kaumatua and others was planned, to consider the principles underlying Māori land law for the twenty-first century.[146]

Of particular relevance to our inquiry, is TPK's report in March 1999 that:

> Many people were critical of the Court's powers to intervene in the affairs of trusts and landowners. They were concerned

> about the Court disregarding the views of beneficiaries when appointing trustees, and also the Court's discretion to refuse to constitute a trust where the specified criteria . . . had been satisfied. There were mixed views about what the role of the Court should be in overseeing and monitoring trustees and their decisions. In particular, concern was expressed that the Court lacks the required commercial expertise to adequately scrutinise the operations of trusts. Others considered that trustees should continue to be responsible to the Court and that the Court be able to review trusts under certain circumstances . . .[147]

TPK's response on this issue was that officials were 'reviewing the powers of the Court to see where powers are unnecessarily wide, or where matters could be dealt with at a level below that of a judge'.[148]

We do not have evidence of all the work that took place following this report from the chief executive to the Minister, but TPK had developed a Te Ture Whenua Māori Act Amendment Bill by October 1999. We do know, however, that a 'Māori Land Development Group' of external Māori experts was established and provided TPK with an interim report in June 1999. It was chaired by Hemi-Rua Rapata (who was also chair of FOMA at that time). This group was appointed to consider possible solutions to the seemingly intractable problems of Māori land development, which had been identified in the 1998 review of Te Ture Whenua Māori and the recommendations of a FOMA hui of that year. The group was to make recommendations for legislative and non-legislative change, and oversee the 'various reviews'.[149]

This group believed that as part of Māori empowerment ('mana Māori whakahaere'), there must be 'more Māori involvement and control over their own assets'. Where constitutions allowed Māori managers and trustees to undertake various roles and responsibilities, the Māori Land Court and other Te Ture Whenua Māori mechanisms should increasingly simply record their decisions.[150] The Māori Land Development Group recommended reducing the discretionary role of the court, aligning the powers of trustees/managers of Māori land with those of directors under the Companies Act, and empowering owners to proceed without being handicapped by 'absentee owners' or the court (protecting absentees' interests), recommendations that would later be repeated in the 2013 review.[151] The group also supported a universal Māori theme in 1998 that all other legislation which had effects on Māori land should be made subservient to Te Ture Whenua Māori and its dual goals of retention and utilisation.[152]

In addition to the work of this group, the national wānanga went ahead as planned in 1999[153] but we do not have detailed evidence as to how the Amendment Bill was developed. Crown counsel summarised the Bill's main purposes as:

> (1) simplifying the rules for alienations and reducing the Māori Land Court's role with respect to alienations; (2) reducing the Court's discretion in relation to trusts and incorporations; (3) providing model trust orders; (4) providing jurisdiction to the Court to grant access to landlocked land; (5) providing for succession of whāngai; (6) requiring Māori Land Court Judges to have knowledge of te reo and tikanga; and (7) allowing the Judges to correct names on Māori land blocks.[154]

According to the Hui Taumata review group (2006):

> Under the Bill, the MLC would not be able to refuse to set up a trust if all the legal requirements had been met. Under clauses that dealt with model trust orders (ōta kaitiaki), owners would be able to write the terms of their trusts allowing them to include specific provisions in relation to commercial activities such as land development or the establishment of companies. Furthermore, owners would be able to appoint trustees without MLC involvement. As to the MLC's discretionary powers to amalgamate or vary a trust and to review a trust or incorporation, the Bill contained clauses that meant the MLC could only act at the instigation of owners, trustees or an incorporation's management committee.[155]

Although it was not included in the Amendment Bill, TPK had agreed to discuss with the chief registrar the possibility of developing a court staff advisory service,[156] and this

duly happened (as Marise Lant's evidence shows).[157] Other matters may also have been considered for action outside of amending the 1993 Act, but there do not appear to have been major advances at this time on some of the issues identified as constraints on Māori utilising and developing their lands, such as rating, valuation, and credit. The issue of rating, for instance, was left to a more general review of the Rating Act. The Government did not intend, as requested, to make the 1993 Act the 'one-stop shop' for all matters affecting Māori land. Particularly important to that request was the idea of making all such matters subject to the principles of the Act (especially the Treaty principles), and the jurisdiction of the Māori Land Court.

(5) *A change of course: the Te Ture Whenua Māori Amendment Bill is significantly reduced in scope*

The Amendment Bill was introduced in October 1999, shortly before a general election and change of government, after which – as John Grant put it – 'social reform' became the 'primary focus of Māori policy'.[158] Mr Grant noted:

> At the select committee stage the scope of the amendment bill was significantly reduced with the effect that the changes were mainly of a technical nature. The amendments came into effect in 2002 with the main policy change being to give the Māori Land Court more specific jurisdiction in matters of landlocked Māori land.[159]

Crown counsel also noted that the scope of the Bill had been 'significantly reduced' and the 'provisions regarding the Māori Land Court's discretionary powers had been removed'.[160]

We need to consider why, as claimant counsel submitted, reforms of such apparently grave concern to Māori were removed from the Bill. John Grant suggested that the successful amendments 'addressed only a fraction of the issues' that had been identified with the Act during an 'extensive consultation process' with Māori in 1998.[161] But how far did the consultation reflect widely held concerns or solutions about which consensus had been achieved?

When the Amendment Bill was referred to the select committee in October 1999, it called for submissions, due in April 2000. It received 38 submissions, including one from the Māori Land Court bench, and two specially commissioned reports on papakāinga housing and section 30 representation issues. The committee also asked officials

> to convene a meeting/s comprising a cross-section of submitters and practitioners ('the Consultation Committee') to discuss issues of concern arising from the Bill and to report back on the outcome of those discussions in due course. Specifically, it was hoped that the Consultation Committee would identify contentious provisions in the Bill on which conflicting views were held, consider and debate the same and hopefully reach agreement or some other position on the provisions.[162]

The select committee described the Consultation Committee as made up of 'key interest group representatives'.[163]

According to the Consultation Committee, the issues and provisions of most concern included the proposed changes to section 30 (mandate), changes to succession law in respect of whāngai, the planned changes to the role of the Māori Land Court in respect of alienations, trustees, trust orders, and the constitution of trusts, and the provisions for access to landlocked land.[164]

In line with the submissions from Māori to the select committee, TPK recommended that provisions to extend the ability of whāngai to succeed to interests under wills 'not proceed'.[165]

Similarly, officials recommended deleting the clauses simplifying alienation and reducing the court's discretionary powers in respect of alienations. TPK noted that some submitters were opposed to any form of alienation, whereas others resented restrictions on their ability to use their land commercially. Officials suggested that both sides could be accommodated by reducing the restrictions on long-term leasing.[166] The Māori Land Court judges had submitted that the proposed changes were not faithful to the kaupapa of the Act, as the court would no longer be able to safeguard 'the expectation of the children that they will be the owners in their turn of "taonga tuku iho", and

the right of the broader kin group living and unborn to keep the land within the kin group as with normal lines of descent'.[167] As noted, TPK said the conflicting views could be reconciled by confining the relaxation to long-term leases but at the discretion of the court and 'say 50% of the beneficial interest'.[168] Officials were clearly unhappy accepting the opposition of Māori submitters, pointing out that at the 'heart' of the proposals in the Amendment Bill was the 'aim to provide more say to the owners without unnecessary interference by the Court'.[169]

Nonetheless, TPK also recommended removing clauses 27 to 30, which reduced the court's discretions in respect of trusts. The Consultation Committee considered that 'the changes appear to significantly limit the powers of the Court to make trust orders without appropriate safeguards for the silent majority or owners not taking an active interest'. The members of the Consultation Committee were in agreement that 'the Court was not an undue obstacle and that there should be a return to the status quo'.[170] The Māori Land Court judges submitted that the court's powers rarely had to be used but were vital nonetheless, because:

- the majority of owners did not participate, and the court was 'the independent protector of process for the benefit of those not involved in the inner circle of management', with the task of ensuring both that the land was in the hands of a small group of competent trustees, and that the trustees maintained sufficient consultation with the wider group; and
- the court protected the interests of 'inactive owners' from abuse or fraud by applicants or trustees.[171]

TPK accepted the reasoning of the judges and the Consultation Committee, recommending that the clauses not proceed.[172]

Clause 32 repealed section 219 of the Act and provided for ōta kaitiaki trusts, which the judges and other submitters opposed (as removing checks against abuses by trustees), arguing that the court should continue to have the power to set the terms of trusts.[173] TPK recommended against the clause proceeding, noting once again that there 'appears to be a clear consensus' against the suggested changes to trusts.[174] Clause 35 reduced the power of the court over appointment of trustees – this clause was also recommended against, given the consensus of opposition.[175]

Another major issue which had provoked much opposition was the provisions relating to landlocked land. Māori submitters and the Consultation Committee supported the changes, but with a right of appeal to the Māori Appellate Court instead of (as proposed) the High Court. There was, however, strong opposition from local authorities. TPK recommended proceeding with the provisions (along with the change requested by the Māori submitters and the Consultation Committee).[176]

The Māori Affairs Committee received the above report from TPK in October 2000, and also held a one-day hearing at which 15 of the 38 submissions were heard. For the most part, the select committee seems to have followed TPK's recommendations to amend or delete clauses from the Bill, based on officials' analysis of submissions and the Consultation Committee's advice.[177] (Additional advice was provided on housing and section 30 issues, but that does not concern us here.) Thus, the Bill, when it was eventually enacted as Te Ture Whenua Māori Act Amendment Act in 2002, was reduced to mainly technical amendments except for the provisions concerning landlocked land. TPK's recommendation was also adopted for relaxing the restrictions on long-term leasing.[178] As proposed, the court could now approve long-term leases with the agreement of 50 per cent of owners (by share value). Also, the definition of long-term lease was changed ('more than 52 years' became the cut-off for long leases).[179]

John Grant emphasised the importance of what happened to this Bill in the select committee, arguing that the Parliamentary process and the opportunity to make submissions to a select committee is a very real remedy for Māori who are dissatisfied with the current proposed reforms.[180] Certainly, it seemed as if many of the changes sought by the 1996 Māori Land Investment Group, the 1997 FOMA report, the 1998 McCabe report, the 1999 Māori Land Development Group, and some of the speakers at the 1998 consultation hui, either never made it into the Bill or were rejected at the last minute. The removal of the 'majority of the substantive changes'[181] occurred

because of submissions from Māori to the select committee, and the deliberations and advice of an independent committee of (in the Māori Affairs Committee's words) 'key [Māori] interest group representatives.'[182] TPK's advice was that there was a consensus against making the proposed changes.[183] According to the Hui Taumata review group (2006), the Consultation Committee simply 'felt that the clauses needed to be reconsidered in order to ensure that their intent was clear and their operation was more practical',[184] but this interpretation is not supported by the TPK report to the select committee.

3.3.3 Crown and Māori research and reports, 2006–11

(1) *Māori land reform goes off the agenda*

The issues raised by Māori respondents and TPK officials in the 1998 review did not disappear after the passage of the Amendment Act in 2002. On 4 October 2000, the day after the Ministry had delivered its advice to the select committee (recommending that the contentious amendments not proceed), Cabinet approved the establishment of an Officials Working Group. This group would 'pick up the more substantive issues that the law reforms had not addressed' by undertaking a 'fundamental review of the nature and sustainability of Māori land tenure.'[185] This project, however, was abandoned in 2003. It appears that the Ministry decided a more 'pragmatic' approach was required, involving enhancing governance in practical ways, provision of Māori land information, and title improvement.[186]

Thus, in 2003 the Crown gave up its intention to pursue the rejected 1999 reforms. Māori land tenure reform, however, came back onto the agenda in 2005, when the second Hui Taumata was held.

(2) *The Hui Taumata, 2005–06*

The second Hui Taumata was a Māori economic development summit, chaired by Sir Paul Reeves. It focused on how to 'accelerate economic development for Māori'.[187] As part of the follow up to the Hui Taumata, a taskforce was established to initiate research, projects and discussion that would support action in key areas for development. One of the projects was 'Tāpuia hei Whakatupu', concerned with 'increasing the utilisation and development of our collectively owned assets'.[188] Whaimutu Dewes was appointed to chair a Māori Land Tenure Review Group, which would assess whether 'current Māori land tenure practices' were still appropriate in twenty-first century economic circumstances.[189]

Mr Dewes explained: 'The panel's purpose was to review the literature and consult with stakeholders on the barriers faced by owners of Māori land.'[190] In particular, the group relied on reports discussed above (the Māori Land Investment Group (1996) and FOMA (1997)), and a more recent report from the New Zealand Institute for Economic Research (2003).[191] We note that the McCabe report's recommendation for detailed research and analysis (including the Māori Land Court's exercise of its discretions) had not been carried out by this time.

The NZIER report, on which the review group relied, was compiled jointly by the institute and TPK. It was prepared in consultation with other Government agencies, 'Māori development experts', and a steering group convened by TPK, comprising June McCabe, Paul Morgan, Professor Mason Durie, Te Kani Kingi, and officials Chris Pinfield, Hauraki Greenland, Brian Pink, Lewis Holden, and Alison Dalziel.[192] The report recommended that Māori re-evaluate 'how their social and cultural institutions contribute to attitudes'. This was because 'Māori aspire to higher living standards and faster economic development', but their 'cultural attitudes often do not support the activities – such as commercialisation of cultural knowledge – which may be necessary to meet those aspirations.'[193]

The report also recommended that the governance of Māori organisations must be improved. From an economic perspective, many such organisations were 'built around the permanent holding of certain assets, and do not allow free entry and exit of investors'. In that situation, 'clear feedback on organisational performance, and well-articulated accountability arrangements are the only defence against poor sustained under-performance.'[194] The Government could assist by helping Māori develop 'institutional frameworks' for better governance. The report also suggested that a Māori financial institution be established to cooperate with mainstream banks, rather than

– as in the past – setting up a Government-funded Māori investment body.[195]

After reviewing the NZIER material, the earlier reports, and 'drawing on the experience of the group', the 2006 review group considered that it was important for reform to focus on ensuring that any alienations were restricted to a 'preferred class of alienees', and on more flexible governance arrangements for Māori land. This included alternatives beyond trusts.[196] Mr Dewes explained to the Tribunal:

> We concluded that the current regime poses significant transactional barriers and costs to executing decisions, even when a group of owners have informed, empowered management. The potential for challenges to the decisions of owners' representatives is high and, quite appropriately perhaps, it is not the Māori Land Court's practice to dismiss applications as frivolous or vexatious.
>
> In addition, due to the intrinsic nature of the empowering charters (that is generic or/and narrowly drafted trust powers) the statutory regime and its administrative underpinnings frequently require endorsement or sanction by assembled owners and/or the Māori Land Court.
>
> To address these issues, we proposed the concept of 'warrant of fitness'. Representatives could obtain accreditation for satisfactory land management so that in cases where there is no possibility of land-loss, they would not need to go back to the Māori Land Court to confirm their decisions.
>
> What we were searching for was the correct accountability framework. In so doing we had reached the view that the right place for oversight is with landowners themselves, and not the Māori Land Court. Over the centuries the Court has transitioned from an alienation institution to a custodial institution. Now it needs to shift from that custodial role to facilitation, while landowners themselves are empowered to make decisions about the land they own.[197]

The 2006 review group reported back to Sir Paul Reeves and the Hui Taumata Action Taskforce that Te Ture Whenua Māori should be amended to:

- facilitate access to finance by making it easier to use Māori land as security for loans, and reducing the restrictions on how income from that land could be disposed of;
- 'promote governance capability and capacity'; and
- increase owner autonomy by reducing the Māori Land Court's ability to 'intervene in operational and commercial matters'.[198]

The group's discussion of the Māori Land Court distinguished between large, successful trusts and smaller entities. It noted that a number of larger, clearly successful trusts and incorporations had 'proven themselves to their owners' and so should be able to 'continue to act in commercial activities, without continual reference back to the Māori Land Court'.[199] The situation was less clear cut, however, for other Māori land governance bodies. The panel observed:

> There is a question about how standards could be devised to decide when greater autonomy from the Court should occur, given that there are ongoing concerns about the level of competence of management ability of many of the smaller Trusts and Incorporations where Māori Land Court oversight might still be considered to be necessary.[200]

It would be necessary, it was said, for governance bodies to 'prove their competence and ability' before court oversight could be reduced.[201] Improving the capacity and capability of Māori land governors was seen as a major requirement for the future, an issue which had been identified since at least 1996.

Like the McCabe report of 1998, the 2006 review group noted that Māori land was not necessarily capable of development, and that some groups of owners deliberately chose to keep their land in its natural state or use it for residential occupation.[202] Both called for research and assessments as to land capability.

Nonetheless, the 2006 review group operated from the assumption that land that lacked a management structure was incapable of utilisation and development for that reason. Other land was seen as under-developed because of poor or restrictive governance and management arrangements. A lack of surveys and certainty of title was also considered to inhibit development. Another 'common

concern', in the group's view, was that the 'development aspirations of the ahi kā roa home people' were being frustrated by the protection of minority or small shareholders, who were often a majority in numbers and lived outside the district.[203] The group asked: 'Should there be a weighting to recognise ahi kā roa?'[204] It was noted that Māori had opposed such an idea in the 1998 hui, believing that 'all shareholders should have equal rights regardless of whether they were a majority or minority'.[205]

The Hui Taumata review group was driven by the view that without effective utilisation, the overriding imperative of retention was put at risk because 'financial and other pressures will build against land to the point that these will ultimately threaten retention'.[206] It noted that there were barriers to development other than the regulatory ones, including issues of valuation and credit. Unlike the NZIER, the review group called for the Crown to resume funding Māori development directly.[207] Also, the group noted that landlocked land remained a crucial constraint despite the 2002 law reform, with an estimated *one-third* of Māori land having no access.[208]

The Māori Land Tenure Review Group's recommendations were not progressed. The group reported back to the Hui Taumata taskforce in August 2006. According to TPK, the taskforce had prepared a number of other reports on action for Māori economic development and chose to proceed with those instead: 'Given competing priorities, the Hui Taumata Action Taskforce decided not to progress the recommendations of the Māori Land Tenure Review Group.'[209]

As in 2000–02 (by Parliament) and 2003 (by TPK), the possibility of tenure reform was abandoned, this time because a Māori taskforce chose not to pursue it. TPK's reference to 'competing priorities' is rather vague. We have no specific evidence as to why tenure reform was not selected for action, other than that it was by the taskforce's choice.

For the next four years, reforming Māori land law was not on the Government's agenda. In 2010, however, TPK commissioned Whaimutu Dewes, historian Tony Walzl, and Doug Martin to prepare the report 'Owner Aspirations regarding the Utilisation of Māori Land'.[210]

(3) *TPK's Māori owners' aspirations report, 2011*

TPK's owners' aspirations project was described as a 'further step in the consideration of issues associated with Māori land arising from the Māori Land Tenure Review undertaken by Hui Taumata in 2005'.[211] Minister Pita Sharples noted that the report, released in April 2011, represented 'a new approach in that it asks the people what they want to achieve'.[212] Six hui were held with 81 Māori landowners to find out their aspirations for their lands, and the 'barriers and enablers to their realisation'.[213]

After the six hui, the authors analysed the results in light of the 1993 Act, 'in order to inform any future review of the regulatory framework'.[214] Thus, the owners' aspirations report was designed to serve as the basis for what became the current review of the Act. As such, it came in for significant criticism from the claimants, who considered it was based on anecdotal, one-sided, and statistically unreliable evidence.[215]

Mr Dewes conceded that the 'sample was too small to be statistically authoritative'.[216] This concession was also made by Crown counsel and noted by claimant counsel.[217] Mr Dewes added, however, that the information from the six hui was 'sufficiently general, geographically and in terms of types of land uses, that we were confident it was representative of opinions throughout the country. Indeed, we heard a wide range of views and met a variety of landowners, large and small.'[218] Crown counsel reinforced this point: 'it remains an important source of qualitative information and echoes findings of various previous reports and surveys'.[219]

Mr Dewes summarised the results of the 2011 research project as follows:

> The owners' aspirations were clear: to retain and effectively utilise their land. Another generally held opinion was that the existing regulatory environment, namely the current Act and regulations under it, either presented barriers or was failing to enable Māori to achieve those dual aspirations. One key finding was that the Māori Land Court has a legion of discretionary provisions. While this was not a barrier per se, it creates an undeniable level of uncertainty in decision-making. We also heard many examples from the owners of Māori Land

> Court interventions frustrating their intentions vis-a-vis their land.
>
> The Owner Aspirations Report presented the views of the landowners we had met with, and proposed a number of solutions to those issues. When we delivered the report to the Ministry, there was a clear indication to us of an intention that work would be done by the Crown and Māori land owners to develop and implement solutions.[220]

In addition, Crown counsel emphasised the report's findings that

> the regulatory requirements for owner participation in decision-making were out of step with the challenges faced by *engaged* land owners attempting to utilise multiply owned land. It [the report] also concluded that the governance structures available under the 1993 Act were too limited, and that they should be brought more in line with those available to the general public. [Emphasis added.][221]

In the Hui Taumata review of 2006, the review group had suggested that the development aspirations of the home people (ahi kā roa) were being frustrated by small shareholders who lived outside the rohe and held a minority of shares but formed a majority of owners. The 2006 report noted that this issue had not emerged from Māori at the 1998 consultation hui but had been 'picked up' by the review group, and was being raised for the first time in the official reform discourse. At the time of the Hui Taumata review, however, the problem of absentee owners was not seen as one of disengagement or non-participation. Rather, they were seen as actively frustrating the efforts of 'the owners who are resident in the locality of the land and upon whom the weight of maintaining the land typically falls'. This was because these owners of small interests had little to gain in terms of returns from development, and could too easily outvote the 'ahi kā' or tie them up in the Māori Land Court. The absentee owners of small shares were held to bring a 'conservative influence' to bear on economic development proposals. They made risk-averse decisions skewed in favour of retention 'often at the expense of effective utilisation'.[222]

The issue of absentee owners was given greater prominence in the 2011 owners' aspirations report. As Crown counsel noted, the 2011 researchers saw the problem as one of 'engaged' owners not being able to achieve their aspirations.[223] The authors of the report identified an 'absence of commonality' among owners. This, they said, worked against 'unified aspirations and consensus in subsequent decision making', and formed the first listed barrier to utilisation. In the experience of some hui participants, many if not most owners lived out of the district and knew little about their land. Sometimes neither a governance entity nor the individuals themselves knew who the owners were, and – even when owners were known – 'it can be difficult to make contact and get them to attend meetings'. Electronic and paper notifications were both used, but it was often difficult and expensive to get many owners (especially those living away from the land) to attend crucial meetings. Then, '[e]ven if the difficulties in making contact and bringing owners together can be overcome', owners had different views, priorities, and states of knowledge, so that achieving a consensus for action could be difficult.[224]

If all those difficulties were overcome and a consensus achieved, the 2011 researchers suggested that the Māori Land Court's discretionary powers might still defeat the owners' wishes. The researchers noted examples from the hui (which, as noted, claimant counsel characterised as 'anecdotal' and only conveying 'one side of a dispute'[225]):

> The attendance requirements in relation to meetings were noted to be a barrier to moving forward in regards to the land. It was also claimed that judges used their discretion as to whether the attendance requirements were adhered to. In an example given during the [Taupō] meeting it was noted that 100 beneficiaries had attended a meeting, unanimously supported a proposal and that this was recorded in the minutes. However, when the Māori Land Court Judge checked the ownership listing it was noted that there were 2,800 owners and the matter did not go ahead.
>
> Likewise, a speaker from [Whanganui] noted that despite two attempts they had not been able to achieve a quorum in relation to a block involving 1,200 owners and this was

> preventing a decision being made in regards to the lease on the block.[226]

The result was that the authors of the 2011 report interpreted some basic features of the 1993 Act as (unintentional) barriers to owners making their own decisions and using their land.[227] The Act, they said, sought to manage risk of land loss by

> requiring owner participation in decision making at a number of levels or by allowing for owner complaint to be raised leading to review. In the former case, relatively high thresholds are set to minimise risk and in the latter case just a single owner is potentially sufficient to cause investigation.[228]

The Act appeared to rely on the 'assumption' that owners were 'identifiable and locatable', and that 'high thresholds for required owner participation or agreement presumably occurs in the belief that these devices manage risk whilst not setting too great an obstacle to land utilisation'.[229] In the reviewers' analysis, ownership numbers had been constantly increasing since 1993, with the majority living 'some distances from the land', no longer having a common purpose, and many uncontactable, unlocatable, or deceased (with no succession). The authors of the 2011 report called for a review of the Act's thresholds for owner participation or agreement. They also suggested that the 'burden of locating owners' should either be reduced or funded (since the legislation required it).[230]

Further, the researchers queried whether absentee and home interests should have the same weighting in decision-making; those who lived away from the land often had little or no knowledge of it, little involvement in the local community or its leadership, and different aspirations. One solution to the difficulties of owner participation and reaching consensus, in the reviewers' opinion, was to reduce the degree of participation required of owners, giving greater autonomy to governance bodies once appointed, more in line with companies under general law.[231] Another was to consider how to stop the proliferation of ownership interests, although noting that collectivisation through whenua tōpū trusts had not proved popular.[232]

In addition to regulatory matters (including owner participation and Māori Land Court discretions), the 2011 researchers noted the importance of by then often-cited constraints: rating; lack of access to landlocked land; and inability to access finance from private sector lenders. These were seen as major barriers to Māori owners developing and utilising their lands.[233]

Other familiar themes were the need to upskill Māori land governors, and the question of whether a greater variety of governance entities was required than the current trust structures – and perhaps a re-evaluation of the 'concepts and roles associated with owner representatives'.[234]

(4) *'Māori' issues by 2011*

Although the owners' aspirations report dealt with a number of matters, our discussion in this chapter has focused mostly on its treatment of the issue of owner participation; an issue which was to become so contentious in the 2013 review and the claims before us. There had been some limited discussion of absentee interests, 'inactive' owners, and the protection of the 'silent majority' during the 1998 review, mostly in response to the Government's proposals to remove various Māori Land Court discretions. The Māori Land Development Group had recommended in 1999 that

> where there has been adequate public notices of meetings of owners (at least two public notices including a national daily and a regional newspaper), then committees of management/trustees should not be compromised by the [Māori Land Court] from [achieving] their objectives, even though less than 50% of Māori land owners entitled to vote attend[ed] the meeting.[235]

But the issue of absentee, non-participating owners became most prominent in the 2011 report. As we discussed above, the 2006 Hui Taumata report had

considered small, absentee shareholders a problem because they *were* engaged, and their engagement was frustrating the home people's aspirations for development. After 2011, non-participation of owners and the Māori Land Court's protection of the 'silent majority' became core issues in the second major review of Te Ture Whenua Māori Act 1993.

The 2011 report has a very clear whakapapa. The 1996 Māori Land Investment Group report, the 1997 FOMA survey, the 1998 McCabe report, the 1998 review hui and 1999 Amendment Bill, and the 1999 Māori Land Development Group all led to and influenced the Hui Taumata review and report of 2006, which in turn shaped the 2011 research and report.

By that time, some points were not in doubt. Retention of land as a taonga tuku iho was still the overriding imperative for Māori. Everyone agreed on that. In that context, Māori wanted and needed economic development – including, if feasible and appropriate for the particular site, development of their lands. Many Māori, on the other hand, wanted to use their land for housing, for growing food or running stock, for hunting and fishing, or for cultural purposes, rather than have it developed commercially. For those who did want to develop their lands – and there were many – large barriers existed, many of them peculiar to land in Māori freehold title. Also, much Māori land was remote, inaccessible, and incapable of commercial use – but no one was sure how much.

Thus far, issues that had clearly emerged in Māori debate and discussions with each other and with the Crown about the 1993 Act included:

- how to balance the overwhelmingly supported imperative of retention with the risks that utilisation and development could pose to it;
- how to balance the rights, interests, and aspirations of the 'silent majority' and the involved minority, or the absentees and the 'ahi kā', or the unengaged owners and the engaged owners (the terminology changed over time);
- whether more flexible governance and management models were needed or, as suggested by many, it was a matter of training and upskilling the governors and managers of Māori land (with a 'warrant of fitness' for governance bodies, as recommended in 2006);
- how to balance owner autonomy (including the autonomy of Māori land governors once appointed) with the protective mechanisms necessary to ensure retention; and
- as an aspect of the above issues, whether the Māori Land Court's discretionary powers were still needed or appropriate.

Also, while regulatory constraints under Te Ture Whenua Māori had been identified by some as important, everyone agreed that rating, valuation, access to finance, access to landlocked land, paper roads, and other constraints were key barriers to the development of Māori land – many of these constraints having been created or exacerbated by past Crown breaches of the Treaty, as Tribunal reports and Treaty settlements had demonstrated by 2013. 'Pre-commercial facilitation' – that is, assisting owners to organise a governance entity (if they had not already), assess land use capabilities, meet legal requirements, and obtain finance – had also been identified as crucial.

The Crown submitted that the reviews described so far, especially the 2011 owners' aspirations report, led to the 2013 review and its proposed reforms.[236] The claimants, however, emphasised the importance of two other reports in 2011 and early 2013.[237] John Grant noted that both of these reports were relied on by the independent review panel in 2013, rather than carrying out its own research.[238] The first was a Ministry of Agriculture and Forestry report entitled 'Māori Agribusiness in New Zealand: A Study of the Māori Freehold Land Resource'. The second was a Ministry for Primary Industries report called 'Growing the Productive Base of Māori Freehold Land', which was prepared by PricewaterhouseCoopers and completed in February 2013. We discuss the 'Māori Agribusiness' report next, before proceeding to consider the appointment of the independent review panel in 2012.

(5) *MAF's 'Māori agribusiness' report, 2011*

There is no doubting the importance of the 2011 'Māori agribusiness' report. Mr Grant summarised its findings as follows:

> This report concludes that approximately 40% of Māori freehold land (about 600,000 hectares) is under-utilised for a range of reasons including constraints on the physical capacity of the land through [to] a lack of identifiable owners or management entities; another 40% is developed for productive use but is clearly, often markedly, under-performing compared to similar enterprise benchmarks; approximately 20% of Māori freehold land has well-developed businesses with the potential for further growth; the administration and compliance cost impost associated with the current Act and the processes of the Māori Land Court impact on all these categories of land; and there should be a review of the current Act.[239]

It was this report that was available to the Crown in 2012 and which, the claimants argue, influenced the Government's decision to carry out a full review of the Act,[240] as recommended by both the owners' aspirations report (April 2011) and the Māori agribusiness report (March 2011). It is certainly the case that the agribusiness report was the one cited publicly by the Crown in 2012 as the reason for carrying out the review.[241]

One of the report's key contributions to the debate is that it asked not just what Māori land development could do for Māori but what it could do for New Zealand. The 2013 review panel observed:

> This research also estimated that the current capital value, output value and contribution to Gross Domestic Product (GDP) and employment of Māori land could more than double with improvements to management and further development. Increasing the productivity of these assets therefore has the potential to make a significant contribution towards improving the economic wellbeing of Māori as well as the New Zealand economy as a whole.[242]

According to the claimants, this is when the Crown's wider economic growth agenda emerged in the record as a key driver of the review and reform of Māori land law.[243] This 'pressure for production and performance', the claimants say, was unfair and was not applied to general land.[244]

Mr Mahuika, on the other hand, pointed out that an emphasis on utilisation 'did not originate solely from the Crown', but was a 'recurrent theme among landowners who desire to be able to do more with the lands they own'.[245] He explained that home communities, which maintain marae and the presence of hapū and whānau in their rohe, can only survive if jobs and opportunities are created. Otherwise, migration and the eventual death of those communities will occur. Māori land management has to promote utilisation as well as retention to meet the essential needs of the owners and their communities.[246]

Before drawing conclusions about the parties' arguments that the current reforms were Māori-instigated and reflect Māori concerns (the Crown) or were Crown-initiated and reflect Crown priorities (the claimants), we must first examine the independent review panel and its work in 2012–13. Because this panel chose to proceed without conducting fresh research, its recommendations were – in a very real sense – the culmination of all the reviews and reports discussed above.

3.3.4 The Independent Review Panel, 2012–13

(1) *Introduction*

The 2011 owners' aspirations report recommended a full review of the 1993 Act, a review which TPK already had in mind when it commissioned the report, following on from the recommendations of the Hui Taumata review group in 2006. As noted, the Ministry of Agriculture and Forestry report of March 2011 had also recommended that the Act be reviewed.

The mechanism chosen for the review was an independent panel of experts, external to TPK but supported and serviced by the Ministry. The claimants are highly critical of the review panel, largely because its recommendations were immediately adopted as Government policy and the basis for repealing the 1993 Act. In their view:

- the Crown had already decided to repeal Te Ture Whenua Māori Act and replace it with an entirely

new law, and the panel was created to progress this objective (in order to force Māori land into production);[247]

- the panel's members were chosen ('handpicked') by the Crown with no Māori input, and thus represented the Crown, not Māori;[248]
- the panel's Māori members were chosen for their 'commercial or business background', and were 'not representative of Māori in general, and that is why the Crown has not obtained a Māori perspective'[249] – including the lack of any kaumatua members;[250]
- the panel's process was flawed because it failed to conduct research or obtain accurate information on which to base its proposals, which the Crown then adopted wholesale;[251] and
- the panel's process was flawed because it took a 'greenfield' approach and consulted Māori on very broad, theoretical propositions, which no one could really object to or imagine would result in the complete repeal of Te Ture Whenua Māori Act 1993.[252]

The Crown, on the other hand, argues that the law reform process was driven by debates within Maoridom. In response to Māori calls for reform, it appointed an independent panel which conducted a national consultation with Māori and came up with proposed reforms, which the Crown then accepted and adopted as the basis for a Bill. Hui and submissions in 2013 demonstrated that the review panel's proposals were supported by Māori.

(2) *The establishment of the independent review panel*

On 12 March 2012, Cabinet noted four strategic priorities for the Government:

> responsibly managing the Government's finances; building a more productive and competitive economy; delivering better public services within tight fiscal constraints; and rebuilding Christchurch.[253]

The review of Te Ture Whenua Māori Act took place under the second of these two priorities, as 'Action 39 under the Natural Resources component of the Business Growth Agenda'. It was also supposed to help achieve the Government's 'better public services priority' by 'configuring the Māori land institutional framework to best support the achievement of Māori aspirations and land utilisation'.[254] Under these two strategic priorities, Cabinet approved the establishment of a review panel on 21 May 2012. Its purpose was to 'undertake work on what form of legislative interventions might best support Māori land owners in reaching their aspirations, while enabling the better utilisation of their land'.[255] On the one hand, the review was thus clearly designed to achieve Government strategies for economic growth and better public services. On the other hand, as Crown counsel noted, '[a]s in 1993, progress is being made on issues where there is a current political opportunity to make progress'.[256]

On the basis of the owners' aspirations report, TPK had concluded that owners wanted to retain the land handed down from tīpuna, utilise it according to the values associated with land as a taonga tuku iho, achieve the maximum financial return from their land (including jobs and a financial base for future generations), and balance the latter with the former. The messages of the 2011 'Māori Agribusiness' report were that only 20 per cent of Māori land had well-developed businesses, with the remainder under-performing (40 per cent) or unutilised (40 per cent). TPK also understood from this Ministry of Agriculture and Forestry report that the Māori Land Court and the administration and compliance costs of the Act impacted on all land (well-performing and under-performing alike), and that the Act 'needed to be updated'.[257]

Following on from this research, in 2011 TPK advised the incoming Minister, the Honourable Dr Pita Sharples, that it was scoping a review of the Act in order to 'empower Māori land owners to achieve their aspirations with regards to their land'. Officials decided that what was required in the review was a 'fresh approach',[258] a point emphasised by claimant counsel.[259] Rather than starting with the Act or the issues arising from it, officials took a 'first principles' approach based on the owners' aspirations as shown by the research. They began work to identify the issues impacting on those aspirations, and 'what interventions, if any, were necessary to support the realisation of these aspirations'.[260]

Officials understood that owners needed to be able to both make decisions and make *informed* decisions about the use of their land. In making such decisions:

- they were hindered by a fragmented and dispersed ownership base (with many owners unidentified or unlocated);
- they did not necessarily have appropriate governance structures or expert governors fit to make decisions or manage land; and
- they had limited ability to access resources to make or carry out their decisions (including finance).

Māori owners needed sufficient capability (skills and knowledge) to overcome these three barriers to the use of their land. TPK prepared review scoping papers on each of these three areas, and then draft terms of reference for an independent panel to carry it out.[261] We were not provided with this material for our inquiry.

On 31 January 2012, responsibility for the review was delegated to the Associate Minister of Māori Affairs, the Honourable Christopher Finlayson. After consideration of TPK's scoping work, a briefing on previous reviews, and the draft terms of reference, the Associate Minister agreed to the establishment of a panel and sought Cabinet approval in May 2012.[262]

The review was announced formally on 3 June 2012. The Associate Minister's press release stated that an expert panel would review the 1993 Act 'with a view to unlocking the economic potential of Māori land for its beneficiaries, while preserving its cultural significance for future generations'.[263] As noted above, the Government emphasised the Ministry of Agriculture and Forestry's 2011 report in this announcement. Relying on this report, the press release stated that up to 80 per cent of Māori land was under-performing or under-utilised, '[i]n many cases . . . because of structural issues which stemmed from the [1993] legislation'. A panel of experts would review the Act and make practical recommendations for how to enhance it, with the end goal of improving 'the performance and productivity of Māori land'. This would provide 'tremendous economic benefits to its owners and to the country as a whole'. Another key consideration, however, was that land retention must be protected while development took place.[264]

The panel was instructed to focus on legislative interventions to achieve these ends. Non-legislative options would be considered in two other processes: the Māori Economic Development Panel (which later produced the strategy 'He Kai Kei Aku Ringa' in November 2012) and the Māori Land Advisory Group (which was not actually constituted).[265]

In terms of process, the Associate Minister announced that the panel would 'draw on existing research and conduct additional research and consultation as required'. Next, it would assess the extent to which

> the current regulatory environment is enabling or inhibiting the achievement of Māori land owner aspirations in general as well as specifically in the cases of ownership, governance and access to resources.

After that, the panel would undertake a consultation round, and then provide the Associate Minister with recommendations for legislative intervention.[266] These tasks were to be performed within eight months, with a report to the Minister by December 2012.

The Associate Minister appointed Matanuku Mahuika to chair the independent review panel. Mr Mahuika, of Ngāti Porou and Ngāti Raukawa, was described in the press release as a practising lawyer with experience as a company chairman and board member.[267] In his evidence to the Tribunal, Mr Mahuika explained his extensive experience representing and working with Māori groups and Māori land.[268] The other members were:

- Tokorangi Kapea, of Ngāti Apa ki Rangitikei, Taranaki whānui, Te Ātihaunui-ā-Pāpārangi, and Ngāpuhi, who was a commercial lawyer and company director, as well as a committee member for Parininihi ki Waitotara incorporation;
- Patsy Reddy, a 'professional director, consultant, barrister and solicitor', and Crown Treaty negotiator, with corporate governance experience and non-profit sector experience; and

The Proposed Process and Timeline for the Review as at 3 June 2012

May 2012	Panel established
June–July 2012	Panel to identify issues, consulting 'stakeholders' as necessary
August–September 2012	Panel to 'assess options for the better utilisation of Māori land'
October–November 2012	Panel to undertake consultation on 'possible options for the better utilisation of Māori land'
December 2012	Panel to report to Associate Minister of Māori Affairs[1]

- Dion Tuuta, of Ngāti Mutunga and Ngāti Tama, the chief executive of Parininihi ki Waitotara incorporation and the chairperson of Te Rūnanga o Ngāti Mutunga, with 'extensive experience in the Māori sector'.[269]

On 15 June 2012, several days after the press release, the Associate Minister was quoted in the media as saying that 70 per cent of Māori land titles had no governance structure, more and more land was held by absentee owners, and much of this potentially profitable land was unproductive, hence the 'legislation is failing Māori land owners and a superficial fix-up will not suffice. I want fundamental change'.[270] Te Rūnanganui o Ngāti Porou reminded the review panel of this in November 2012, stating its support for this view of matters.[271]

In his evidence to the Tribunal, Mr Mahuika explained that he only agreed to be on the panel if it would actually result in 'some sort of legislative reform':

> In my view, enough reports had already been written about the issues with Māori land and Māori land tenure. I was only interested in being involved in something that might address those issues and lead to change.[272]

Claimant counsel questioned Mr Mahuika closely on this point, but he did not accept that this amounted to a preconception that the Act should be repealed.[273] In his evidence, he and other panel members entered the process with open minds.[274]

Mr Mahuika also denied that a Māori-appointed panel would have been more independent. He suggested that it would possibly have had different members, but that his own panel was no less independent simply because it was Crown-appointed.[275] He told the Tribunal:

> I have always seen my involvement in the proposed reforms as being consistent with my work representing Māori interests against the Crown in an effort to assist in securing better outcomes for Māori. The views that I have taken, and the recommendations to which I have been party, are not Crown views, even though the different panels have been Crown appointed. They are the views of independent parties who are personally and professionally interested in seeing an improvement to the regime that administers Māori land.[276]

Crown counsel noted that the Crown 'put no proposals to the Panel but asked it to generate its own ideas'.[277] Mr Mahuika made this point in his evidence:

> During this process the Crown did not put any specific proposals before the panel. Instead, we were expected to review the literature and develop our own ideas. This is what happened.[278]

(3) *The review panel's initial work in 2012*

The panel's first task was to review the existing reports, some of which were 'generated by Crown ministries' and others by Māori. In the latter category, Mr Mahuika

included work by the New Zealand Māori Council (the 'Brown paper'), FOMA, and the Hui Taumata.[279] In its report, the panel stated that the two most important studies were the 2011 reports: the owners' aspirations report and the Māori Agribusiness report.[280] The former was commissioned by the Crown but it 'captured owner aspirations'.[281] Having reviewed the literature, the panel decided that 'Māori land issues have been well documented over a long period so we were able to draw on relevant material without having to conduct new research ourselves'.[282]

The review panel also decided that its terms of reference permitted it to take a 'first principles' approach rather than 'constraining our thinking by focusing on the specific provisions of Te Ture Whenua Māori Act'.[283] As Mr Mahuika put it in his evidence: 'As a first step we decided we should go back to fundamentals and ask ourselves, in an ideal world, what sort of a regime should we have for the administration of Māori land?'[284] Hence, the panel did not, as its terms of reference required,

> assess the extent to which the current regulatory environment [was] enabling or inhibiting the achievement of Māori land owner aspirations in general as well as specifically in the cases of ownership, governance, and access to resources.[285]

Both of these decisions were strongly criticised by the claimants, who considered that there was insufficient empirical research to underpin the panel's later analysis and recommendations.[286] We note in particular that the research on Māori Land Court decisions called for by the McCabe report in 1998 had still not been carried out. Marise Lant suggested that there had only ever been an 'assumption that the Māori Land Court is restricting or hampering Māori decision-making authority and utilisation of our land'.[287] In response, Crown witnesses could not point to any empirical research on this question.

On the issue of the 'greenfield' approach, witnesses such as Prudence Tamatekapua maintained that the panel never actually analysed what worked (or did not) with the current Act, and so had no rational basis for its high risk recommendation that a whole new Act was needed.[288]

Both decisions – not to conduct fresh research and not to assess the workings of the Act – were stated in the panel's discussion paper, and thus must have been approved by TPK and then Cabinet when the discussion paper was approved for release and consultation.[289] If the Crown had thought the panel was not properly following its terms of reference, the paper would not have been endorsed for release.

We note that the panel did not only rely on existing reports to prepare its initial views for consultation with Māori. It also carried out preliminary consultation with 'selected stakeholders'. In its report, the panel cited the Māori Land Court judges, the Māori Trustee, and representatives of major banks.[290] It also communicated with a number of iwi and other Māori organisations and received initial submissions from some of them, including from FOMA, the Wakatū Incorporation and, as noted above, Te Rūnanganui o Ngāti Porou.[291] Mr Mahuika added that the panel spoke to practitioners and architects of the 1993 Act. He named Whaimutu Dewes, Justice Joe Williams, and Sir Eddie Taihakurei Durie.[292]

Issues raised with the panel at this stage were:

- The 'creditor community told us that they were looking for better governance models and clearer accountabilities, in addition to collateral and cash flow'. By improving governance and governance models, access to finance – a long-standing issue for Māori land – could be improved.[293]
- The Māori Land Court judges considered that owners 'overwhelmingly support the twin aims of the Act of retention and utilisation . . . and do not seek change to the foundations of the Act'. The main barriers to utilisation were the difficulties of 'contacting and consulting an expanding number of owners', a lack of capability and skill among Māori land governors, and a lack of access to finance.[294] In respect of the 2011 reports, the judges suggested that more research was needed, and there was no evidence that the court was inhibiting development.[295] Nor, as claimed in the owners' aspirations report, was the owners' ability to use and develop their land restricted by low owner participation. The answer, in the judges' view, was the owners' ability to form an ahu whenua trust so

long as the court received no 'meritorious objection', for which no threshold was required. With an ahu whenua trust, the land could be developed regardless of a significant number of owners being 'disengaged'.[296] But the 'quid pro quo' of the Act enabling these administrative structures for owners to use as governance entities was that the owners had recourse to an independent court to review the actions of the land's governors.[297] The judges suggested that the Act could help halt fragmentation by more actively getting Māori to form whānau trusts. The judges also recommended other amendments, including greater use of mediation, and Government assistance for training trustees and developing land.[298]

- FOMA only suggested minor changes, including that court services be streamlined, Māori land governors be upskilled and assisted by an advisory service, and ways be found to stop fragmentation.[299]
- Te Rūnanganui o Ngāti Porou stated that the underperformance of Māori land was a 'blight on New Zealand's landscape', the result of 'an overly regulated and flawed Māori land legislation regime and Māori Land Court process'.[300] This situation was seen as the outcome of individualisation of title and other historical processes, which produced a 'paternalistic' system with barriers not applied to general landowners.[301] Control needed to be taken from the court and returned to owners, including allowing owners to opt out of the Act and turn their land into general land. The main focus of Ngāti Porou's submission was on giving iwi (via post-settlement governance entities) powers and facilities to buy Māori land interests, without requiring Māori Land Court approval.[302] Te Rūnanganui also called for the Crown to resume financing Māori land development.[303]
- The Wakatū Incorporation supported retaining the Act's dual focus on retention and utilisation. Its recommendations focused on incorporations, especially that 'modern, sophisticated commercial entities such as Wakatū' should progress to self-regulation, reducing the Māori Land Court's role in the 'administration and management of land'.[304]
- Ngā Hapū o Poutama suggested that economic performance was a poor indicator of success if obtained at high cultural or environmental costs, that owners' autonomy should be enhanced, that rating issues must be addressed, that hapū should become preferred alienees, and that the review should be conducted according to UNDRIP principles, requiring Māori consent to legislative changes.[305]

After considering these submissions, the existing reports, and discussions with stakeholders, the panel developed a discussion paper for wider consultation. It directed TPK officials to draft the paper 'for its consideration on the basis of existing research, its meetings with key stakeholders and its own deliberations'.[306] This paper was crucial because its contents shaped the response from Māori at hui and in submissions, as well as the reform proposals that – in the panel's conclusion – Māori generally supported. The paper was released at the beginning of April 2013.[307]

In the meantime, a further influential report had been issued by the Ministry for Primary Industries (MPI) in February of that year. This report, entitled *Growing the Productive Base of Māori Freehold Land*, was prepared by PricewaterhouseCoopers. It came too late to influence the review panel's discussion paper, but TPK notes that the report was considered by the panel. In our view, the MPI report's impact was probably more on the Crown than on the panel, and so it will be discussed later in this chapter. We simply note here that its main feature, as observed by TPK in relation to the review panel's deliberations, was its conclusion that 'bringing under-utilised Māori land into production has the potential to realise an additional $8 billion in gross output over a 10 year period'.[308]

(4) *The review panel's five propositions for consultation with Māori*

The review panel's discussion document put five key propositions to Māori for their consideration and feedback. The propositions were designed to 'improve the likelihood of utilisation of Māori land'.[309] The panel's focus on utilisation caused it to advance some contradictory positions. On the one hand, its main emphasis was on owner

empowerment, which it equated with tino rangatiratanga.[310] But because of the overriding objective of utilisation, the panel also suggested that where 'owner-driven utilisation is not possible, the institutional framework should still provide for utilisation to occur'.[311] This led to the idea that 'there may be a case for an external administrator to manage the land on their behalf'[312] – the managing kaiwhakarite proposal, which was so controversial in our inquiry. That proposal had the potential to remove utilisation decisions from owners entirely – the direct opposite of tino rangatiratanga or owner empowerment.

We deal with each of the panel's propositions in turn:

> *Proposition 1: Utilisation of Māori land should be able to be determined by a majority of engaged owners*
> An engaged owner is defined as an owner who has actively demonstrated their commitment to their ownership interest by exercising a vote either in person or by proxy or nominee. Engaged owners should be able to make decisions (excluding sale or other permanent disposition) without the need for endorsement by the Māori Land Court.[313]

According to the panel's analysis, the 'problem' that this proposition was designed to solve was:

> The current regime governing Māori land is structured so that many decisions cannot be taken by Māori land owners themselves because they are subject to endorsement by the MLC. Currently this ranges from sale and long term lease decisions to the establishment of trusts and incorporations to ratifying the decisions of assembled owners. This serves to disempower owners and makes decision-making processes unnecessarily complex for the majority of the decisions affected.[314]

The review panel also considered it problematic that '[o]wners' property rights are protected by the MLC, irrespective of whether they exercise them or are even aware of them'. In the panel's view, this protection was a 'disincentive for some to take an active role as they know their interests will be protected'.[315]

The panel suggested for discussion that the threshold of 75 per cent of all owners be retained for sales or permanent dispositions. Otherwise, 50 per cent of 'engaged' owners could make all decisions free of court involvement, so long as proper notice was given. These owners' decisions should only be challenged 'as to whether fair value has been obtained' or there was a 'breach of duty'.[316] For long-term leases, however, 75 per cent of engaged owners might be more appropriate.[317]

In his evidence to the Tribunal, Matanuku Mahuika explained the thinking behind what was to be called the participating owners model. It was impossible to obtain 100 per cent participation in multiply-owned Māori land. The present system relied on the Māori Land Court to act as proxy for uninvolved owners as well as safeguarding their interests. In the panel's view, what was necessary was to shift the proxy to the owners who got involved in decision-making, 'subject to the appropriate checks and balances'. These checks and balances were: sufficient notice to owners; a voting threshold for decisions by those who participated; and reserving decisions about permanent alienation for 75 per cent of all owners. This was held to reflect tino rangatiratanga and collective responsibility, by empowering the 'ahi kā' to make decisions and look after the interests of their whanaunga.[318] We will return to these issues and the participating owners' model in more detail in chapter 4.

The review panel's second proposition was that the law should provide for *all* Māori land to be utilised:

> *Proposition 2: All Māori land should be capable of utilisation and effective administration*
> Where owners are either not engaged or are unable to be located, an external manager or administrator may be appointed to manage under-utilised Māori land. The Māori Land Court should have a role in approving the appointment and retaining oversight of external administrators.[319]

The panel believed that only 41 per cent of titles were covered by governance structures. Reasons varied, including that land was being used for residential housing and so did not need one, but the panel thought it 'likely' that 'a lack of engagement by owners' was mostly to blame.[320]

The panel sought feedback on the suggestion that external administrators should be appointed to manage under-utilised Māori land 'when owners are either not engaged or unable to be located'. The Māori Trustee or iwi organisations might be resourced to carry out this role, but with court oversight and restrictions on longer-term uses of the land. Utilisation might include designation for environmental or cultural purposes, or leasing.[321]

The third proposition related to the often-identified concerns about a lack of skill or capability among Māori land governors.[322] It read:

> *Proposition 3: Māori land should have effective, fit for purpose, governance*
> The duties and obligations of trustees and other governance bodies who administer or manage Māori land should be aligned with the laws that apply to general land and corporate bodies. There should be greater consistency in the rules and processes associated with various types of governance structures.[323]

In the panel's view, better governance would 'drive greater utilisation of Māori land'.[324] The court's role from now on should simply be to record the appointment of trustees. The governors of Māori land could then be incentivised to upskill by having to obtain a certificate of competence, while incompetence could be 'disincentivised' through civil penalties for negligence. The panel also suggested that the duties of Māori land governors should be aligned to the duties of company directors under general law, and that all governance bodies should have similar, consistent rules and processes, specified in the legislation. The establishment and management of these new, more consistent governance structures ought not to need Māori Land Court approval.[325]

For its fourth proposition, the panel suggested:

> *Proposition 4: There should be an enabling institutional framework to support owners of Māori land to make decisions and resolve any disputes*
> Disputes relating to Māori land should be referred to mediation in the first instance. Where the dispute remains unresolved following mediation, it may be determined by the Māori Land Court.[326]

The panel proposed the creation of an 'independent mediation service' to give effect to this proposition.[327]

The fifth proposition related to successions and the proliferation of small interests, and in particular the idea that many successions were not occurring, thereby hampering 'engaged' owners in their efforts to use their land:

> *Proposition 5: Excessive fragmentation of Māori land should be discouraged*
> Succession to Māori land should be simplified. A register should be maintained to record the names and whakapapa of all interests in Māori land, regardless of size.[328]

The panel's suggestion was that successions should no longer require 'endorsement by the MLC'. Instead, the panel proposed a simplified, administrative process for successions.[329] On the issue of fragmentation, it proposed that once interests became too small (at a level to be discussed), successions should no longer be allowed to occur at all. In order to facilitate 'engaged' owners using their lands, the panel also suggested that there be a minimum threshold for engagement. In other words, once interests became too small, owners would no longer be allowed to participate in decision-making.[330]

(5) *The review panel consults Māori, April–June 2013*

In their foreword to the discussion paper, the Minister and Associate Minister explained that the purpose of the consultation was to test the panel's thinking by 'obtaining feedback from landowners themselves, and those with an interest in Māori land and Māori land development'.[331] The review panel held 20 public hui throughout New Zealand between 29 April and 13 June 2013. The call for written submissions resulted in 189 submissions.

The key point about this consultation is that there was general support from Māori for almost all of the review panel's propositions.[332] This meant that those Māori who participated generally said that they supported the concepts of engaged owners making decisions without Māori

Venue	Date	Venue	Date
Tokomaru Bay *(Pakirikiri Marae)*	29 April	Invercargill *(Te Tōmairangi Marae)*	14 May
Wairoa *(Taihoa Marae)*	29 April	Auckland–Mangere *(Te Puea Memorial Marae)*	16 May
Wellington *(Pipitea Marae)*	30 April	Auckland–Oratia *(Hoani Waititi Marae)*	16 May
Whanganui *(Te Ao Hōu Marae)*	2 May	Kaikohe *(Mid North Motor Inn)*	17 May
Waitara *(Ōwae Marae)*	3 May	Kaitaia *(The Main Hall, Te Ahu)*	17 May
Whakatane *(Taiwhakaea Marae)*	9 May	Tauranga *(Classic Flyers Conference Centre)*	6 June
Rotorua *(Distinction Hotel)*	9 May	Hastings *(Te Taiwhenua o Heretaunga)*	10 June
Taupō *(Great Lakes Centre)*	10 May	Gisborne *(Mangatū Incorporation)*	11 June
Te Kuiti *(Te Tokanganui a Noho Marae)*	13 May	Hamilton *(Kingsgate Hotel)*	12 June
Christchurch *(Chateau on the Park)*	14 May	Whangārei *(Whangārei Terenga Paraoa Marae)*	13 June

Table 3.1: The independent review panel's consultation hui, 29 April – 13 June 2013

Land Court oversight, realigning governance models with general law, specifying and standardising governance arrangements, appointment of external managers to bring unutilised Māori land into use, introducing mediation as the primary method for dispute resolution, and simplifying the successions process.[333]

Māori hui participants and submitters did not support all aspects of the review team's propositions, and there was debate and disagreement about the details. According to Matanuku Mahuika, who chaired the review panel:

> From the point of view of the panel, the consultation did achieve its objective and helped us to refine our thinking. We dropped some ideas that clearly had no support. For instance, we had originally made proposals to deal with excessive fragmentation of interests, ie trying to create incentives to aggregate Māori land interests by limiting the size of land parcels that could be inherited, or removing voting rights for those inheriting an interest below a certain size. The response to these proposals at the hui were negative, so they did not form part of our final recommendations to the Minister.[334]

According to the panel's discussion of the feedback from consultation, concerns were raised about various aspects of its propositions, and there was debate about the preferred thresholds for decision-making, whether voting should be by person or by share values, and other issues.[335] Some disagreed that trustees should be required to have a formal qualification. Others thought training should be compulsory. A variety of opinions were expressed on how some of the very broad propositions might work in practice. Some people feared that the review and the reform

propositions heralded a '"land grab" and would result in further loss of land.'[336] Also, a number of barriers to retention and utilisation were raised with the panel, including rating, public works acquisitions, landlocked land, and access to development finance.[337] On these matters, the panel simply observed: 'For the most part these matters fall outside the scope of our consideration but we have noted them to assist future consideration by those concerned with policy in these areas.'[338]

Some submissions to the panel expressed deep concerns and opposition to the way in which the discussion paper had framed the issues, and the ways in which the panel suggested its high level propositions could be achieved. These included the Māori Land Court bench, which felt that the current situation had not been properly understood and that empirical research was still required. In the judges' submission, a great deal more care was necessary to protect the property rights of all Māori landowners, and to remove the true barriers to utilisation (mainly capability of governors and access to finance). According to the judges' information, the Act was working well and it neither prevented engaged owners from achieving their objectives, nor was it a barrier to utilisation.[339]

The New Zealand Law Society and Te Hunga Rōia Māori o Aotearoa disagreed with the panel's process and many of its ideas. Te Hunga Rōia Māori argued that there did not appear to be a groundswell of popular Māori support for substantial changes to the Act, and that any such changes should not be Crown-led. What was required was a much longer conversation with Māori, and work to ensure that any law changes would assist all owners. What might assist one section of owners could be 'detrimental to others.'[340]

At this point in our report, we are not concerned with the substance of the proposed reforms (which will be addressed in chapter 4) but rather whether Māori supported them at the level at which they were pitched. It seems to us that – generally speaking – they did at a high level.

In closing submissions, the claimants have not disputed that there was general support for the reform propositions at this stage of the process. Their arguments are that:

- The review only put 'high-level principles' like 'greater autonomy' or 'increased flexibility' to owners – it was not until Māori saw the detail of what the reforms would really mean in practice that significant opposition began to develop.[341]
- The information put to Māori in the discussion paper was one-sided, was not based on adequate research, had not assessed whether the propositions were already achieved under the current Act, and made no mention of the prospect of repealing the Act.[342]
- The hui did not constitute meaningful consultation because they were 'geared towards achieving a desired result of support for the kaupapa.'[343]
- The reform propositions did not address long-standing Māori concerns, which included compulsory acquisitions, rating, landlocked lands, lack of finance and resources, and other factors that were both threats to retention and barriers to utilisation.[344]

On the question of whether the panel did not consult meaningfully because its hui were geared towards obtaining support, we have no evidence about the manner in which the hui were conducted. The claimants' witnesses did not discuss this particular set of hui in their evidence. While some submitters in 2013 were concerned that too little notice was given for the hui, and too little information provided in the discussion paper, we are not aware of complaints about the conduct of the actual hui. In respect of the discussion paper, we agree with the claimants that it was one-sided. Substantive research on key issues (as called for in 1998 and 2006) had still not been done, and the discussion paper contained virtually no risk analysis. We will return to these issues when we make our findings.

We do not, however, accept that all of the review panel's propositions were so 'high-level' that their import was not readily appreciated. The discussion paper made it very clear that the panel was proposing significant changes, including:

- the reduction of the Māori Land Court's discretionary powers in almost all areas;
- the empowerment of owners who turned up at a meeting to make many decisions that would bind all other owners (with only procedural safeguards);

- the ability of owners to establish governance bodies without court approval;
- the appointment of external managers to bring land into production if owners did not engage; and
- the use of mediation as the primary form of dispute resolution.

But we agree that these proposed changes were essentially conveyed as a series of headlines. There was little detail and no information or assessment provided as to risks. Some of the headlines conveyed clear messages. Hui participants and submitters might debate what kind of mediation service would work best for Māori, but there is little doubt that everyone understood that most disputes would henceforth go to mediation in the first instance instead of to court. Other headlines, such as realigning existing governance arrangements with company law, would have meant little to many people without detailed and specialist explanations. Much depended on the explanations and information given at the hui, but we have no evidence on that point.

Nonetheless, it seems clear from TPK's reports of the hui and from the written submissions, that there was broad Māori support for most of the policy headlines.[345] The review panel understood that Māori generally agreed to four of its five propositions.[346] There was, however, general disagreement with the draconian proposals to limit succession and the rights of owners of small shares. Hui participants and submitters agreed that fragmentation was a significant problem, but no one seemed sure of how to deal with it.[347] The Māori Land Court judges, as noted above, had suggested that the legislation do more to 'shepherd' Māori towards whānau trusts.

(6) *The review panel reports to the Crown, July 2013*

On the basis of what it assessed as broad agreement from Māori, the review panel reported to the Crown in July 2013. As with the panel's initial propositions, its recommendations were made at a high level.

In respect of proposition 1, the panel recommended that the Māori land laws:

1. be changed and clarified to enable engaged owners of Māori land to make governance and utilisation decisions that take effect and bind relevant parties without the need for confirmation, approval or other action by the Māori Land Court or any other supervisory body; and
2. continue to include safeguards requiring a high threshold of owner agreement before decisions to dispose of Māori land will have legal and binding effect.[348]

The panel noted that there was a 'broad level of support' for proposition 1. While land was a taonga tuku iho and 'generally should be retained', the panel believed that these two recommendations would allow a more appropriate balance between retention and utilisation. While some Māori had wanted the 'ahi kā' to be the definition of engagement, there was 'general support' for defining it as participation and voting in a decision-making process. The panel noted that, once engaged owners had established a governance entity, their future involvement in decision-making would be determined by the entity's rules. Otherwise, there was wide support for retaining the present restrictions on permanent alienation.[349]

To give effect to propositions 2 and 3, the panel recommended that the Māori land laws:

3. clearly prescribe the duties and obligations of Māori land governance entities, including their trustees, directors or committee members, and aligns those duties and obligations with the general law applying to similar entities;
4. clarify the jurisdiction of the Māori Land Court to consider alleged breaches of duty and make appropriate orders; and
5. provide clear mechanisms for external managers to be appointed to administer under-utilised Māori land blocks when there is no engagement by the owners.[350]

The panel noted that Māori had many reservations about the appointment of external managers, but there was 'broad support' so long as external management was not permanent but rather 'a transition to, or catalyst for, owner engagement and owner-driven decisions'.[351]

In respect of governance arrangements, the panel hoped that these recommendations would result in improved

governance. This, in turn, would 'drive greater utilisation of Māori land' and create greater confidence among banks and private-sector lenders. This was the panel's only recommendation relating to increasing Māori landowners' access to finance.[352] The panel did not, as Ngāti Porou had suggested it should, recommend reintroducing Government development finance into the Act (see above).

In respect of propositions 4 and 5, the review panel recommended that the laws relating to Māori land:

6. require disputes relating to Māori land to be referred, in the first instance, to mediation;
7. contain clear and straightforward provisions and rules to ensure that the Māori Land Court remains an accessible judicial forum for resolving serious disputes and enabling trustees, directors and committee members of governance entities to be held to account for breaches of duty;
8. provide transparent registration provisions for Māori land titles and assurance of title to reflect the nature of Māori land tenure as a collectively held taonga tuku iho;
9. contain provisions that facilitate succession to Māori land with a minimum of compliance requirements and simple, straightforward administrative, rather than judicial, processes; and
10. contain provisions to address issues caused by excessive fragmentation of Māori land ownership interests.[353]

The panel said that there was 'strong support' for mediation rather than court action as the first means of dispute resolution. It recommended that the Crown establish an 'independent mediation service'. If mediation failed, the Māori Land Court would need to resolve the dispute.[354]

Having made these 10 specific, high-level recommendations, the panel then advised the Government that the changes required the enactment of new legislation: Te Ture Whenua Māori Act 1993 should be repealed. The reason given for this was that the primary focus of the Act was the Māori Land Court and its jurisdiction:

> [This] does not lend itself well to a new framework in which we consider the focus should very clearly be on Māori land protection and utilisation and empowerment of Māori land owners and their decision-making.[355]

As far as we can tell from the TPK minutes and reports of the 20 hui, the panel had not raised the possibility that the 1993 Act would have to be repealed to give effect to its five propositions.[356]

Before we can fully assess the claimants' criticisms of the review panel's process, and the broader question of whether the proposed reforms reflected Māori concerns and views or Crown priorities, we must first consider how the decision was made to proceed with the reforms and repeal the Act.

(7) *How was the decision made to proceed with the reforms?*

The New Zealand Māori Council, in its submission in 2013, urged the panel to proceed to the next stage, and not to be discouraged by criticism of its discussion document. Such criticism was 'likely to reflect the natural caution of a people who have experienced dramatic land losses'.[357] The council's support of the panel's propositions was based on the Treaty principle of 'rangatiratanga or self-determination', and

> the right of indigenous peoples to govern themselves through institutions of their own choosing as expressed in those parts of the UN Declaration on the Rights of Indigenous Peoples to which New Zealand has subscribed.[358]

The council seems to have thought that the engaged owners' model, the reduction of Māori Land Court discretions, and owner-designed governance arrangements (without the need for court approval) met these criteria. In particular, the council suggested that the Declaration recognised the right of indigenous groups to define their memberships and the duties of those members – which, it was said, fitted well with the reform propositions. But the submission noted that this was a 'perceived mood' of the council, which was not unanimous (and District Māori Councils reserved the right to dissent, as some later did).[359]

Ngā Hapū o Poutama presented the panel with a different perspective of what the Treaty required, related to the process of the review and changing the Act:

> Internationally the Crown has accepted its obligations toward Māori with the signing of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The review of the Te Ture Whenua is the first major opportunity for the Crown to give actual effect to those indigenous rights. Articles 18 and 19 refer to the right to participate and that the Crown shall consult and cooperate in good faith to obtain free prior and informed consent before adopting and implementing the legislative or administrative measures. The current process does not meet this obligation as the Crown has only appointed and resourced its own panel. Consultation on its own does not meet this obligation.[360]

In the event, the panel followed the submission of the New Zealand Māori Council, proceeding with its recommendations and highlighting the view that the engaged owners' model provided for the tino rangatiratanga of Māori landowners.

The Crown accepted this view. In his assessment of the Treaty implications of enacting the reforms, the Associate Minister advised Cabinet that the proposal to empower owners so that they could use their land for the benefit of their whānau and future generations would align the law and institutional framework for Māori land more closely with the Treaty.[361]

After receipt of the panel's report in July 2013, 'Minister Finlayson accepted the Panel's recommendations'. He 'directed Te Puni Kōkiri officials to develop policy proposals on the basis of the [panel's] propositions to act as the basis for a new Te Ture Whenua Māori Bill'.[362] From July to August 2013, officials developed these proposals for presentation to Cabinet.[363] We have no information as to whether or not the review panel was involved in this work. Thus, on the basis of general support from the April to June 2013 consultation hui and submissions, the Crown decided to proceed immediately with a new Act. The panel's report was not made public for the meantime; it was not released until 3 April 2014.[364]

As the claimants noted, a Te Ture Whenua Māori Bill had already been put on the legislative programme back in February 2013.[365] We do not accept the inference drawn by the claimants, however, that the Crown had decided to repeal the existing Act at that point.[366] Clearly, some legislative change was anticipated (everyone wanted at least some amendments), and the intention could have been to bring in an Amendment Bill – the evidence available to the Tribunal is not conclusive that repeal only was proposed at that early date.

Another development in February 2013 was the Ministry for Primary Industries' report *Growing the Productive Base of Māori Freehold Land*. This report was clearly influential in the reasoning put before Cabinet in support of the reforms: 'It is also estimated that Māori land could generate $8 billion in gross output and 3,600 new jobs for the primary sector.'[367] As noted earlier, TPK's proposals had to fit into one of Cabinet's four strategic priority areas, and the review of Te Ture Whenua Māori was action 39 under 'the Natural Resources component of the Business Growth Agenda'. TPK's policy proposals also had to dovetail with the Government's Māori Economic Development Strategy and Action Plan ('He Kai Kei Aku Ringa'), agreed in November 2012. Under the action plan, the Crown would identify and target resources for Māori land blocks capable of development. The law reform was supposed to complement this by improving the legislative and institutional framework for administering the land.[368] It would do so by increasing the 'utilisation of Māori land through empowering Māori land owners and governors to make decisions themselves, supported by an enabling institutional environment, while maintaining protections for the retention of Māori land'.[369]

Thus, the reform proposals were seen as part of Cabinet's strategic priority for building a more productive and competitive economy, and as part of the Māori economic development plan for developing natural resources in Māori ownership. The aspirations of Māori landowners

– as understood through a series of Crown and Māori studies from 1996 to 2011 – were not seen as in any way incompatible with these priorities. Rather, the Crown saw itself as giving effect to Māori aspirations to use and develop their land through improved resources and governance, within the agreed context that protecting retention was still paramount for Māori.[370]

Based in part on the MPI study *Growing the Productive Base of Māori Freehold Land*, the Associate Minister predicted significant benefits for whānau, hapū, iwi, regional economies, and the New Zealand economy:

> Direct benefits from freeing up the system have been conservatively estimated to be an immediate uplift in the economic utilisation of approximately 300 currently under or not fully utilised land blocks when compared with the status quo. This will initially enhance regional economies through employment opportunities (for example an estimated uplift in compensation for employees directly involved in the utilisation of the land of $800,000 per annum) and to owners of land through the profits of the businesses operating on the land (for example an estimated uplift of $3 million per annum in profits returned to owners of the land). Wider benefits are more difficult to quantify given that it is difficult to predict how owners' behaviour and decision-making may change as a result of increased choice and flexibility. It is also difficult to directly attribute legislative change with wider benefits given the contribution of other factors to improvements in Māori land utilisation. However, recent research provides an estimate of the ceiling that could be reached with the appropriate mix of policy and legislative settings: $8 billion in gross output and 3,600 new jobs for the primary sector.[371]

This was the basis on which Cabinet was asked to consider adopting the policy proposals developed by TPK, which were sourced to the recommendations of the independent review panel and the 'generally supportive' response of Māori in the April to June consultation.[372] The Associate Minister hoped to be able to draft and introduce a new Te Ture Whenua Māori Bill by November 2013.[373]

TPK's proposals translated the review panel's recommendations into a more detailed form (but still mostly headlines at this point). As part of the process, officials interpreted, expanded upon, and modified some of the detail underlying the high-level recommendations.

Reflecting the panel's first two recommendations, TPK proposed that a new Bill would 'enable engaged Māori land owners to make decisions without the need for judicial involvement and continue to include protections for the retention of Māori land'. The current rules restricting sales would be retained. Otherwise, engaged owners, defined as those who 'exercised that interest by voting', would be able to make decisions that would bind all owners. This would reduce 'compliance and transaction costs thereby encouraging greater decision-making and utilisation of Māori land'. The risks associated with this proposal would be managed by providing all owners with the opportunity to participate, providing procedural safeguards, and using proxy and electronic voting. No details were given at this stage as to what the procedural safeguards might be.[374]

The review panel's three recommendations relating to propositions 2 and 3 were reflected in the following policy proposals:

- improve the mechanisms for the appointment of external managers to administer under-utilised Māori land blocks;
- allow Māori land owners to establish governance entities themselves; and
- prescribe the duties and obligations of Māori land governance entities and align these with the general law.[375]

The review panel had reported mixed views as to whether or not the court should approve the appointment of external managers and supervise their performance.[376] The court was not mentioned in the Crown's proposal, which provided instead for the Crown to appoint and oversee external managers.[377] The review panel had noted Māori concerns about such appointments. TPK suggested that the risks could be managed by providing strict

criteria and accountability for managers, and restricting their ability to load costs or charges onto the land.[378]

Regarding governance arrangements, the policy proposal was that a majority of engaged owners would be able to establish a governance entity without judicial involvement. At present, legislation prescribed the types of governance entities that could be established. Owners would now become 'free to choose how they wish to structure their governance entity', but those who wished to 'maintain their existing arrangements will be able to do so'. The new process for forming a governance entity would be administrative and carried out 'under general law such as deeds of trust'. Removing all judicial involvement carried a 'risk of poor decision-making', which would be managed by clearly prescribing all the duties and obligations of Māori land governors, and preventing them from selling the land. These prescribed duties and obligations would be aligned with 'the general law applying to similar entities'. Māori land governors would be upskilled; they would have to meet certain criteria before they could be appointed, and would also face prescribed penalties for breaches of duty. The risk with this approach was that it might exacerbate difficulties with getting people to be governors of Māori land, but information and training would be provided.[379]

The policy proposals to meet the panel's propositions 4 and 5 were described as a 'significant reform to the institutional framework supporting Māori land'. The institutional environment needed to become more streamlined and 'enabling', so as to support empowered owners. At the same time, the inevitable consequence of reducing the Māori Land Court's roles was a need for more administrative services. Enabling the empowerment of engaged owners would also require enhanced administrative services.[380]

TPK thus proposed to 'support Māori land owners with administrative services to be provided by an existing government agency'. These services included:

- administering a mediation service;
- appointment and oversight of external managers in appropriate cases;
- managing decision-making processes for owners to establish governance entities;
- maintaining the record of Māori land ownership and titles; and
- providing information and registry services.[381]

The Associate Minister, who delivered the Ministry's policy proposals to Cabinet at the end of August 2013, suggested that providing these enhanced services administratively would reduce processing costs and times, while also providing an 'independent mediation service' (as recommended by the panel). The disputes resolution service would be modelled on employment law or arrangements in other jurisdictions.

As part of this reform of the institutional framework for Māori land, the Crown proposed to 'refocus the jurisdiction of the MLC to retention decisions, complex disputes and existing specialised areas'. Alongside this 'refocusing', there was a detailed policy proposal in respect of ensuring that 'Māori land is correctly identified'. This does not appear to have been based on review panel recommendations but rather concerns about the relationship between the land transfer system and the Māori land records held under Te Ture Whenua Māori Act 1993. To ensure that Māori land was clearly known and identified as such, work was necessary to better align LINZ and Ministry of Justice records.[382]

Finally, given that the panel had not come up with an option for combating fragmentation, TPK proposed that the legislation 'provide an option to transition to collective ownership'. This was based on observation of Māori preferences in Treaty settlements, where land returned to iwi was 'held collectively', with no individual interests. The new law would provide for owners to opt to stop all successions, with their names to be entered into a register of beneficial owners instead. Shares would be 'converted to undefined interests over time'.[383]

In addition to these proposals, the Associate Minister advised Cabinet that legislative reform on its own would not suffice to 'achieve the step change in Māori land utilisation that the Government is seeking'. It would need to be accompanied by 'a more proactive approach to

channelling of resources to this sector'. Treaty settlements and the work of He Kai Kei Aku Ringa was already helping with this, but more was needed:

> There is also a need to separately address other long standing issues such as building capability, improving access to finance, reducing debt (including rates arrears) and providing robust information and data.[384]

This was an important statement, although some long-standing issues (especially landlocked lands) were not mentioned.

The TPK policy proposals were presented as requiring an initial investment, after which they would be fiscally neutral. According to TPK, a mediation service and other administrative services would be less expensive than the court, and there would be greater emphasis on 'automation'. Treasury, however, expressed doubts as there was 'little evidence to support this'. The Ministry of Justice supported the proposals but considered further work was necessary to clarify the impacts on the court's regional staff and their Māori stakeholders. The Ministry reportedly needed to reassess the design of service delivery in the Māori Land Court.[385]

In terms of Treaty implications, it was argued that the TPK proposals would empower Māori landowners to use and develop their lands. The institutional and legislative framework – in achieving this – would be aligned more closely with Treaty principles.[386]

On 4 September 2013, Cabinet noted that the feedback from the consultation hui and submissions was 'generally supportive of the overall thrust' of the review panel's propositions. It approved TPK's proposed policy changes, the issuing of instructions to the Parliamentary Counsel Office for drafting of a new Te Ture Whenua Māori Bill, and the preparation of an implementation plan by October 2013.[387]

Thus, TPK's policy proposals closely reflected the review panel's recommendations, with two notable additions: the collectivisation option as a means to address fragmentation and the consequential roles that the Crown might play in delivering services to empower engaged landowners, including a Crown 'independent mediation service' and Crown appointment and control of external managers. The Crown had begun the work of translating headline propositions into detailed policies.

3.3.5 The Tribunal's findings

(1) *Who initiated and shaped the reforms – the Crown or Māori or both?*

It seems clear that both the Crown and Māori instigated and shaped the 2013 reform proposals.

On the one hand, TPK had long been concerned about Māori owners' aspirations to use and develop as well as retain their lands, and that significant barriers existed for those who wished to do so. More broadly, the Government accepted a report in 2011 that 80 per cent of Māori land was either unutilised or underutilised and that some key barriers were regulatory in nature. If those barriers could be removed and resources channelled into development, then the utilisation of Māori land would greatly benefit Māori, regional economies, and the New Zealand economy. New Zealand, it seemed, was sitting on an untapped gold mine. After the February 2013 *Growing the Productive Base* report, the figures of $8 billion and 3,600 new jobs became persuasive within Government. By 2015, the proposed new Bill had come to represent 'a key component of the Government's economic development programme'.[388]

On the other hand, it was not only the Crown that wanted Māori land utilised and developed (where appropriate to the group and site). The 'Māori' issues identified in section 3.3.3(4) had clearly emerged by 2011 in debate and discussions among Māori, and between Māori and the Crown. From those debates and discussions, Māori clearly wanted to retain their land as taonga tuku iho, to maintain their cultural connections to their land (including through ownership, no matter how small the share), and to use their land for culturally appropriate purposes. These included commercial development, for the financial benefit of present and future generations. Many Māori were frustrated by what seemed insuperable barriers to development of their lands, especially because such barriers had often been created by past Crown Treaty breaches.

Within that context of retention and development,

Māori and the Crown had discussed and debated a number of issues since at least 1996, including whether the Act balanced retention and utilisation appropriately, whether the balance between owner autonomy and protective mechanisms was right, and whether the individual rights and interests of absentees did or should outweigh those of the 'ahi kā' community. These were clearly issues and concerns for Māori, on which they engaged with the Crown, and – as we might expect – different voices and perspectives emerged in the various studies undertaken as a result of the concerns raised.

The Hui Taumata's review in 2006 was Māori-initiated and Māori-controlled. Other reports, such as the Māori agribusiness report, were clearly Crown-generated and had wider priorities than just Māori or Māori land. The 2011 owners' aspirations report fell somewhere between the two, commissioned by TPK but reporting and analysing the results of six hui with Māori landowners. Some reports, such as the 1996 investment group, the 1997 FOMA survey, and the 1999 Māori Land Development Group (chaired by the FOMA chair), brought a commercial voice and perspective within Maoridom to bear upon the Crown. The 1998 McCabe committee, made up of Māori but appointed by the Crown to give advice independently of officials, reflected Māori views and concerns as fairly and honestly as it could. Its focus on the need for empirical research into land use capability, barriers to utilisation, and the Māori Land Court's powers, and its call for 'precommercial facilitation', remain largely unfulfilled. (The establishment of the Māori Land Court's existing advisory service was an important step towards the latter.)

Most importantly, the 18 nationwide hui and 79 submissions generated by the 1998 review convinced the Government of the day that Māori needed (and wanted) reforms to reduce the Māori Land Court's discretionary powers, realign Māori land trusts with general law, and free owners to make decisions regardless of the 'silent majority'. We do not think it possible to deny that the proposed reforms in 1999 arose, at least in part, from what Māori hui participants and submitters told the Crown they wanted. Nonetheless, in 2000 and 2006 it was Māori who decided not to proceed.

From the evidence available to us, a consensus emerged in 2000 among the Māori submitters to the select committee and the Consultation Committee. This consensus (the word was used by TPK at the time) stopped the proposed reforms from going ahead. The Māori Land Court judges were among these submitters in 2000. Their knowledge and perspective informed and influenced TPK and the select committee, but it was not the only or the predominant voice. In 2006, it was the Hui Taumata's taskforce that chose not to pursue similar reforms. While such proposals had been deliberately rejected in 2000, we cannot be certain of why the Hui Taumata taskforce chose to put them aside in 2006.

Another crucial point is that Māori had frequently complained to the Crown of a series of barriers to utilisation. These included access to finance, valuation, rating, landlocked land, paper roads, the RMA's effects, and deficiencies in the skills and capability of Māori land governors. Māori demanded Crown action on these issues, including a reform of rating law, a return to the provision of Crown development finance, and the subordination of all legislation affecting Māori land to the principles of Te Ture Whenua Māori and the jurisdiction of the Māori Land Court. It is not convincing, however, to accept these as authentically Māori concerns raised by Māori (as the claimants do) without also accepting that regulatory restrictions, Māori Land Court discretions, and empowering 'ahi kā' owners to make decisions, had also been raised by Māori through the same processes and in the same reports.

What is clear from the above discussion is that the 2013 review panel's reform propositions did not arise out of thin air but rather from a debate within Maoridom, and dialogue between Māori and the Crown, dating back to at least 1998. Equally, the Māori Land Court judges' concern in 2013 to protect the 'silent majority', and their call for empirical research, reflected elements of the same debate – in particular the consensus of Māori submitters and the Consultation Committee against the proposed reforms in 2000.

But might it be suggested that a new consensus emerged in 2013 in the 'general support' of Māori hui

participants and submitters for four of the review panel's five propositions?

This is a major issue for our inquiry.

The claimants' position can be summarised in five main objections to the review panel and its work:

- the panel was Crown-appointed, with no Māori-nominated representatives;
- the panel's membership was skewed towards commercial and business experience and was not more generally representative of Māori views;
- the panel did not follow its terms of reference and conduct research into or evaluate whether the current regulatory environment was in fact enabling or inhibiting the aspirations of Māori landowners;
- the panel's propositions (and supporting documentation) were so one-sided and high-level that a degree of Māori agreement was not surprising – the devil would turn out to be in the detail, as Marise Lant put it;[389] and
- the review did not address the real Māori aspirations and concerns about long-standing barriers to utilisation (including access to finance, rating, landlocked land, and many others).

We accept some of the claimants' concerns about the review panel and its process.

First, we think that the panel's decision to proceed without empirical research or an assessment of the existing Act meant that it proceeded on the basis of inadequate information. Further, its discussion paper was one-sided and provided very little in the way of risk assessment. Both the content of the discussion paper, and the decision recorded in it not to conduct fresh research or examine the Act, were approved by the Crown before the consultation proceeded.

As a result of these flaws, we think that the broad Māori support for the review panel's propositions was not fully or properly informed. We note that Māori landowners and organisations brought their own knowledge of the Act (and how it affected them) into the consultation process. It is not our intention to denigrate that knowledge, but we think all hui participants and submitters needed an independent, empirical analysis of the Act and whether it imposed barriers to Māori land utilisation, and expert technical advice on these points, to make fully informed decisions. Their individual experiences were not balanced by a wider view of how the system was working, which, as noted, the panel did not provide.

The need for more information should have become clear to the review panel and the Crown after receipt of submissions from those with the closest knowledge of the Act and its operations, the Māori Land Court judges. The judges' perspective was that the Act was achieving both retention and utilisation, that engaged owners were not disempowered or prevented from utilising their land by its mechanisms and were successful in that utilisation when ahu whenua trusts were appointed, and that the barriers to utilisation lay elsewhere. This information required a full evaluation and an authoritative response, so that the review panel (and the Crown) could be confident in proceeding. Such a response could only come from empirical research, which had been called for in the past but never carried out. As it happened, the information and perspective offered in the judges' submission, and the submissions of other legal practitioners who questioned whether the Act was in fact a barrier to utilisation, was not mentioned in the review panel's report.

Secondly, we agree with the claimants that the panel was not fully representative. The Crown's intention, which was laudable, was not to develop Crown proposals and consult with Māori in the first instance, but to appoint an independent panel of (mostly) Māori experts to do both of these tasks; the Crown would abide the outcome. It seems to us that that was a Treaty-consistent approach. But was the independent panel properly constituted?

In some sectors, it is practicable for a Māori electoral college, representing a range of involved Māori organisations, to select a panel of this kind. The Wai 262 Tribunal found, however, that that is not always feasible or desirable where an issue affects all Māori nationally. In those circumstances, the Tribunal found:

> Where it is found that a Māori electoral college, or some other representative model, is impractical, we offer the following guiding principles for developing partnerships. First,

> it is important that the relevant field of Māori expertise be well represented. Secondly, there is an equally important place for 'political' representation in its widest Māori sense. In considering invitations to tribal or community leaders, the agency must ensure there is a spectrum of views at the table and avoid grooming selections in the hope of producing acceptable results. Thirdly, as in all things, there should be wide consultation with relevant Māori organisations and networks, and a willingness, both in consultation and selection, to go beyond 'the usual suspects'.[390]

Kaumatua Derek Te Ariki Morehu, in his evidence for the claimants, expressed a fear that the review had been captured by young persons, who did not properly appreciate the hard-won nature of the 1993 Act and its essential protections.[391] It was certainly the case that there were no kaumatua on the review panel, nor any tribal or community leaders. On the other hand, the panel members did bring a range of commercial, legal, and Māori land administration experience to their work. We accept that the 'relevant field of Māori expertise' was represented on the panel, but are concerned that wider community and kaumatua perspectives were not included.

Although the panel was not fully representative, this flaw was not necessarily fatal to the conduct of the consultation. Nor do we accept the claimants' view that Māori support for the review team's propositions – which the claimants do not deny – was at such a high level for principles of 'greater autonomy' and increased 'flexibility' that there was no consultation at all on the details.[392] We think this overstates matters. Broad Māori support was obtained at that time for some significant propositions, which – as has been explained earlier – had been debated in Maoridom and in dialogue with the Crown since the late 1990s. The support was qualified, however, in that it was mainly at a headline level. The New Zealand Māori Council and other submitters said that they would want to be heard again on the details at the next stage of developing the proposals.

Some of the panel's headlines were clear, concise, and cannot be explained away simply as high-sounding generalities, as we set out above in section 3.3.4(5). Māori said that they preferred mediation as the primary form of dispute resolution, with resort to the court if the dispute could not be settled in that way. The questions of who would deliver the mediation service, what it would cost, and whether it would be tikanga-based, were matters that did not negate the general agreement that mediation was preferred. There was also broad support of this kind for reducing the Māori Land Court's discretionary powers, for engaged owners being able to make decisions short of permanent alienation, and for other propositions which had been aired previously in debate and discussion by Māori. Hui participants and submitters even gave general but caveated support for external managers to bring land into production where *all* owners were unengaged, which shows the degree to which development (a Treaty right and a necessity for survival) was in the forefront of the people's thinking at that time.

It follows that we do not accept the claimants' argument that the 2013 review process was entirely Crown-led or directed solely at achieving a Crown priority (bringing under-utilised land into production for the benefit of the New Zealand economy). Rather, the review was led by a panel of experts who were appointed by the Crown but were not officials and were independent of it. Matanuku Mahuika told us:

> I disagree with the claimants' suggestion that these [the panel's recommendations] were Crown initiated ideas. Of course, the independent review panel was created by the Minister because any change would require legislation, which is the responsibility of the Crown. But our recommendations were based on discussion and consultations with Māori and our independent thinking on the future administration of Māori land. Our review and recommendations were not about giving effect to Crown policy; in fact, there was no specific Crown policy to speak of and no specific proposals were put before us by the Crown. Our review and recommendations were aimed at shaping the final policy and were informed by our consultations.[393]

While the review panel's analysis was clearly informed by the 2011 MAF report, and its focus on utilisation was

required by its terms of reference, we accept that – to a significant degree – the panel mostly stated and reflected views that had been discussed within Maoridom for some time, and with which Māori who participated in the 2013 consultation broadly agreed. Māori want economic development, including the development of their lands where appropriate, as they have been saying to the Waitangi Tribunal for many years. But, as we have also said, we consider that both the review panel's thinking and the consultation that followed on the panel's discussion paper were not fully and properly informed.

We ourselves do not claim to be fully and properly informed as to the facts either. The judges' 2013 submission raised doubts about some commonly held perceptions of how the Act works, and those doubts have since been greatly reinforced by the responses of Māori to the Crown's more detailed proposals in 2014 (and eventually the Exposure Bill in 2015). But the research which was called for by the McCabe report and others has still not been carried out, and the truth of whether the present Act and its mechanisms inhibit utilisation has not been demonstrated either way.

Nonetheless, the Crown chose to proceed with the reforms in 2013, relying on the review panel's recommendations and the indication from consultation that Māori were 'generally supportive of the overall thrust' of the panel's propositions.[394] The reforms were packaged as part of the Government's business growth agenda, and there is no doubting that the Crown's decision to proceed was influenced by the potential economic benefits to the wider economy, as well as the predicted benefits for Māori. There is nothing surprising or sinister in that.

In conclusion, the high-level review proposals of 2013 reflected both Crown and Māori views and priorities. Otherwise there would not have been broad support for them among the 2013 hui participants and submitters, and the Crown would not have agreed to them, partly on the basis of the 2011 MAF and 2013 MPI reports. But the 2013 submissions of the Māori Land Court judges and other legal practitioners raised doubts as to whether the review proposals and the 'general' Māori agreement to them were well-informed. There was also a question as to whether the development of the reforms at the next stage would continue to be on the basis of a Crown–Māori dialogue (as it had been to date). We deal with that question in the next section of this chapter.

The issue remains that the claimants feel the reform proposals could not possibly be said to reflect the Māori aspirations and concerns of the time since they omitted such barriers to utilisation as rating, landlocked land, and others which an amended 1993 Act might address. The review panel considered such matters to be outside its terms of reference, but, as we stated in section 3.3.4(5), it 'noted them to assist future consideration by those concerned with policy in these areas'.[395] The point was not lost on TPK that regulatory reform would not assist owners to achieve their aspirations, or the Crown to achieve regional and national economic growth, if these other factors rendered it ineffective. The Ministry's Cabinet paper on the reform proposals in August 2013 noted that other issues would have to be addressed, especially the channelling of financial resources for economic development. These issues were thus on the Crown's radar in 2013, but there seems to have been no thought of attempting to deal with any of them in the proposed Te Ture Whenua Māori Bill.

This is an instance where the review panel's decision not to assess the workability of the current Act, but to look at 'first principles', clearly failed to fulfil its terms of reference. An estimated one-fifth to one-third of Māori land has no access. This is clearly an important barrier to utilisation. Equally clearly, the 2002 Amendment Act has failed to rectify the problem. Yet the review panel somehow considered the issue outside its remit. Also, the issue had very clearly been raised before by Māori owners in the reports that preceded the review, and on which the panel had relied. Its failure to address this and other barriers which require a legislative remedy is puzzling. Nonetheless, the Crown stated in August–September 2013 that it was aware action was needed on some of these issues when it made its decision to proceed with repealing the 1993 Act. It is notable that landlocked land – which was clearly a matter for legislative intervention through Te Ture Whenua Māori – was not mentioned then by the Crown in its list of issues.

(2) *In Treaty terms, who should have led the review and developed any reform proposals – the Crown or Māori or both in partnership?*

The claimants have condemned the review as Crown-led and dominated by Crown priorities. Under Treaty principles, they say, it should have been Māori-led. The Crown, on the other hand, does not agree that Treaty principles prevent it from leading a review to reform a piece of legislation in which the Crown's interest is so substantial.

The Crown says that its interest in Te Ture Whenua Māori Act 1993 is not 'weak' when compared to its Treaty partner's interest. The Crown has Treaty obligations to Māori under the Act, including the active protection of Māori land for present and future generations, and the empowerment of Māori landowners. The Crown is also responsible for maintaining a national system of land titles, a court of record, and the administrative services that support both (and assist 'users'). It has to carry out these tasks within fiscally responsible bounds. More broadly, the Crown has a duty to recognise and protect te tino rangatiratanga of Māori (in this case, of Māori landowners and the entities which they have constituted to govern their lands). Also, as the Tribunal has found in previous reports, the Crown has a Treaty obligation to assist with the removal of barriers to Māori development that the Crown itself has created. This includes, for example, the effects of the Crown's title system in discouraging banks and other lenders from advancing finance for Māori land development.[396]

We agree with the Crown that there is a distinction in this claim between the Māori Community Development Act 1962, which accorded legislative recognition and statutory powers to Māori institutions, and Te Ture Whenua Māori Act 1993, which maintains a national title system and a court of record. Nonetheless, the primary interest in the arrangements for how Māori land is administered, managed, and governed, surely lies with Māori. After all the Treaty has a specific guarantee to Māori that they would retain tino rangatiratanga or utmost authority over their lands. We do not accept that the Crown has an interest as great as Māori in the institutions which Māori have constituted under the Act, such as ahu whenua trusts, incorporations, and whānau trusts, to govern and manage their taonga tuku iho. Māori land is absolutely central to Māori identity and cultural well-being. It has the potential to play a greater role than it does at present in the economic well-being of Māori communities, and in sustaining the continuing survival of those communities in their traditional rohe.

This brings us to the Crown's arguments that it is entitled to initiate and lead a reform of legislation, that it is obliged to consult Māori in certain circumstances, but that the Treaty principles do not unreasonably restrict an elected Government from following its chosen policy. In this particular case, our finding is that the Māori interest in their taonga tuku iho, Māori land, is so central to the Māori Treaty partner that the Crown is restricted (and not unreasonably so) from simply following whatever policy it chooses.

We also find, however, that the Crown does have a substantial interest in the 1993 Act, sufficient to justify its initiation of a formal review. The Treaty principles do not restrict either partner from doing so. Even in the Māori Community Development Act 1962 case, where the Crown interest was found to be 'weak', the Tribunal stated: 'Either the Crown or Māori could initiate conversation reviewing a piece of legislation that is central to Māori interests, but in which the Crown also has an interest.'[397]

And this is exactly what the Crown did in 2013: it initiated a specific review but the 'conversation' in reviewing the 1993 Act was not held between the Crown and Māori.

In our view, the particular dispute here between the parties is largely academic for the independent panel stage of the review. Neither the Crown nor Māori led the review and developed the reform proposals in 2013. It was done by an independent panel of experts, which came up with its own ideas, consulted Māori on them, and made recommendations on the basis of that consultation, which the Crown accepted. The process was neither Crown-led nor Māori-led, although shaped and influenced by both. It was the Crown which appointed the (mostly Māori) experts, but it was Māori who said 'yes' or 'no' to the experts' propositions.

The issue of whether or not a review was necessary does

not seem to be disputed, as all parties accept that some amendments are required to the 1993 Act – for example, to deal more effectively with landlocked land. As far as we can tell from the evidence available to us, Māori were not consulted about what form the review should take or its terms of reference, but that does not seem to us to have been a fatal flaw in Treaty terms. Māori concerns (it was believed at the time) were well known and reflected in the terms of reference. It was the way in which the panel interpreted those terms, including its decision not to assess the Act and not to conduct thorough research on its operation, with which the claimants take issue. Further, the terms of reference focused on utilisation but that does not seem problematic to us, as the Māori Treaty development right demands such a focus – so long as retention of the taonga was protected, and development was 'owner-driven', both of which the terms of reference required.[398]

As already noted, the review was led by an independent panel of experts. The panel was not a Crown agent. Its members were not Crown officials. Three of its four members were Māori subject experts. The terms of reference were drafted by the Crown, but, as noted, the panel appears to have departed from them with impunity. It was serviced by the appointing agency, TPK, but it was 'expected to review the literature and develop [its] own ideas'.[399] There is little doubt that the panel's ideas and propositions were sourced in a lengthy debate within Maoridom and a long-running dialogue between Māori and the Crown. We have set out the evidence for this in sections 3.3.2 and 3.3.3. Both Crown-generated and Māori-generated material influenced the panel's discussion paper, as did the members' preliminary consultation with bankers, Māori Land Court judges (past and present), and a variety of iwi and Māori land organisations. The Crown, however, had to approve the contents of the review panel's discussion paper before the next step (nationwide consultation with Māori) took place. In the event, Crown approval was forthcoming. As far as we can tell, that was the only exercise of control over the review panel's process until the time came to decide whether or not to accept its recommendations. It was, however, important because in approving consultation on the basis of the review panel's discussion paper, the Crown accepted the panel's decisions not to conduct research of its own before proceeding and not to assess the workings of the Act.

After the decision to go ahead was made, the consultation with Māori on the review panel's propositions was conducted by the panel, not the Crown. TPK assisted at and provided reports on the hui (and presumably on the submissions, although we did not receive those). But the degree of Māori support for the propositions, and the various agreements and disagreements on matters of detail, was decided by the panel, not the Crown. If Māori had rejected the reform propositions, the panel would have reported this to the Crown, and the review might have ended there. We cannot say. What we can say is that the review panel's proposals had a great deal of support from Māori hui participants and submitters, but its consultation was carried out in such a way that the support was not fully and properly informed.

Again, it is somewhat academic to pose the question as to which Treaty partner should have decided whether the review panel's recommendations should go ahead. At that time the Crown and Māori seemed to be in agreement on what should happen: the Crown's decision in September 2013 was to accept recommendations that Māori were generally understood to support. Both Treaty partners in effect decided the outcome.

To that extent, this aspect of the difference between the Crown and claimants is not a real or practical difference. The question ceases to be academic, of course, once the Crown began to translate the high-level recommendations into a Bill, which we discuss later. As we explained in section 3.3.4(7), a start had already been made in July to August 2013, when TPK prepared policy proposals for Cabinet. The review panel's recommendations had to be fleshed out, and the means of giving them practical effect had to be considered. By September 2013, TPK's initial policy recommendations mostly reflected the panel's headlines, but officials had come up with their own proposal as to how to deal with fragmentation.

There was, however, one panel recommendation for which Māori approval had not been sought. The review panel recommended that Te Ture Whenua Māori Act 1993

be repealed and replaced by an entirely new Act. This recommendation had not been the subject of consultation with Māori, and the Crown could not have known whether Māori agreed with it.

The Crown's decision in 2013 to repeal the Act is crucial. Soon after it was made in September of that year, the Crown began a series of informational presentations at hui to test Māori opinion, which ultimately led to the 2014 co-consultation with FOMA and the Iwi Leaders Group, and the filing of the present claims. For that reason, we postpone consideration of this question – who ought to decide whether the Act should be repealed, and whether its repeal needs the consent of both Treaty partners – to later in the chapter.

3.4 How Were the High-Level Reform Principles Translated into a Bill?

3.4.1 Introduction

Once Cabinet had accepted the review panel's recommendations for reform, work began on developing a Bill. This process was overseen by a technical panel of experts, chaired by John Grant. While this work was in its early stages, the Associate Minister attended hui between September 2013 and April 2014, at which he explained the panel's recommendations and the Crown's intention to repeal and replace Te Ture Whenua Māori. The outcome of the review, and the Crown's decision to introduce a new Te Ture Whenua Māori Bill, was not formally announced until early April 2014. On 3 April 2014, the review panel's July 2013 report was made public.

In response to an invitation from the Associate Minister at Waitangi on 5 February 2014, the Iwi Chairs Forum established an Iwi Leaders Group (ILG) to work with the Crown on the reforms. In conjunction with experts from FOMA, technical workshops were held from April onwards, and the work of developing the Bill continued. By August 2014, Associate Minister Finlayson had agreed to the ILG's request for joint nationwide hui with Māori about the proposed Bill, and to a 'collaborative approach' in finalising the Bill. At this stage, however, a general election was pending in September 2014, raising a question mark over the reform process. These matters, and the issues raised in respect of the August 2014 consultation with Māori, are the subject of this section of our chapter.

3.4.2 Policy decisions and informational presentations, September 2013 – April 2014

After Cabinet agreed in principle to TPK's policy proposals, the Ministry worked on developing policy in respect of how to deliver revamped administrative services for Māori landowners. The result was an implementation plan, which the Associate Minister presented to Cabinet in late November 2013. In essence, TPK proposed that Ministry of Justice staff would continue to service the Māori Land Court in its refocused (and reduced) roles. Otherwise, all administrative services would be delivered by LINZ, 'primarily through an online channel (Landonline) supplemented by face to face services'.[400] LINZ's services to Māori landowners would be carried out under six broad headings:

- Supporting owners decision-making processes;
- Appointing and overseeing external managers;
- Maintaining the record of Māori land ownership and titles;
- Providing information services for Māori land ownership and title;
- Providing registry services for Māori land governance entities; and
- Administering a mediation service for Māori land disputes.[401]

This marked a 'fundamental shift in how services will be delivered to Māori land owners'. TPK estimated that 70 per cent of the applications that presently came before the court would in future be dealt with as 'an administrative process'.[402] This included successions, which would be recorded by officials. Compulsory mediation would account for many other matters that currently went before the court. The new compulsory mediation service would deal with disputes about: title, ownership or interests in Māori land; trespass and damages claims; membership of a class of preferred alienees; claims that land was held in a fiduciary capacity; allegations of misconduct or breach

of duty regarding a Māori land trustee, director or committee member of a governance entity; and partitions and easements. It was not yet decided, however, whether LINZ would train and employ mediators or whether this service would be conducted by an accredited pool of external mediators.[403]

In order to prepare LINZ for carrying out these new responsibilities, TPK proposed that the Te Ture Whenua Māori Bill would be introduced in early 2014, but that any matters requiring the new administrative services would be phased in over a three-year transition period.[404] Cabinet agreed to this proposal, dependent on a more detailed implementation plan (to be provided by June 2014) and a final decision on LINZ as the preferred provider (also to be made in June 2014). No further consultation with Māori was anticipated, although TPK did recommend 'initial and on-going communications' to 'ensure Māori land owners are informed so that the transition is as seamless as possible'. TPK would develop a communications plan for 'stakeholder engagement'. Thus, the Crown's intention in late 2013 was to introduce a new Bill in early 2014 with no more consultation, only the communication of information to Māori landowners about the decisions that had been made.[405]

In addition to presenting the LINZ proposal, the Cabinet paper repeated earlier risk assessments. What concerns us here is two particular topics that had been raised with the review panel: the risks for 'unengaged' owners if 'engaged' owners were empowered to make decisions with only procedural safeguards; and the risks for achieving Māori land utilisation if matters such as access to finance were not addressed. On the former point, TPK predicted only positive advantages for unengaged owners:

> Unengaged owners of Māori land are also likely to be impacted. Unengaged owners may be incentivised to become engaged with their land and participate in decision-making due to reduced transaction costs and easier engagement processes (such as enabled absentee voting). Their land will be more likely to be utilised, either through the decisions of engaged owners, or through the appointment of external managers. The proposal to broaden the range of organisations eligible for appointment as external managers will create competition (in both cost and quality of service), which is expected to provide further benefit to unengaged owners.[406]

TPK also noted that unengaged owners would always have the option to re-engage, 'simply by participating in decision-making relating to the land'.[407] There was no acknowledgement of the factors – many of them beyond owners' control or the responsibility of past Crown actions in breach of the Treaty – that had disconnected so many 'unengaged' owners from their lands. TPK noted that there was a 'risk that the proposal to reduce the onus on engaged owners to obtain the approval of unengaged owners in decisions (except in the case of sale) will be perceived as disempowering unengaged owners'.[408] Officials rejected this 'risk' on the basis that there would continue to be a 'minimum notice period', and owners 'will always be free to engage or re-engage, simply by participating in decisions relating to the land'.[409] Again, there was no acknowledgement that disconnection from the land was not always (or even mostly) a matter of choice for many owners. Even if they were to engage or re-engage later, decisions might have been made that committed them in absentia to significant alienations, such as a 50-year lease or residential leases of the only suitable building sites.

Another important risk, which Cabinet had acknowledged in September 2013, was that 'legislative change alone will not be sufficient to achieve the step change in Māori land utilisation the Government is seeking'. Access of Māori landowners to development finance, building the capability of Māori land governors, and the 'provision of robust data' were included in the category of 'other issues' that would have to be addressed. 'This risk can be managed', reported TPK, 'by continuing to consider policy options to address these issues.'[410] In 2015, the 'Te Ture Whenua Enablers' workstream was established in TPK to begin work on some of these issues, but nothing definite has as yet emerged from that (see section 3.5.6).[411]

Cabinet accepted TPK's updated proposals and analysis in December 2013.[412] In the meantime, TPK had established a 'technical panel' to lead the process of 'developing the more detailed policy required for a bill giving effect

Venue	Date	Venue	Date
Napier	21 September 2013	Ōtaki	28 February 2014
New Plymouth	3 October 2013	New Plymouth	21 March 2014
Wellington *(ICF reps)*	7 October 2013	Te Kuiti	22 March 2014
Wellington *(Maniapoto reps)*	25 November 2013	Rotorua	25 March 2014
Chatham Islands	16 January 2014	National Park	27 March 2014
Waitangi *(ICF)*	5 February 2014	Whanganui	28 March 2014
Gisborne	27 February 2014	Chatham Islands	30 April 2014

Table 3.2: The Associate Minister's informational hui, September 2013 to April 2014

to the [review] panel's recommendations, preparing drafting instructions for the Parliamentary Counsel Office and working with the bill drafters'.[413] The technical panel was chaired by John Grant, a senior Ministry of Justice official who had been seconded to TPK back in April 2013. He had then provided technical services to the review panel, and now chaired the panel to implement its recommendations. Mr Grant had 20 years of experience practising in Māori land law and had also been chief registrar of the court, and thus brought expertise to the panel's work.[414] The other panel members were Matanuku Mahuika, who had chaired the review panel and was one of the primary architects of the reforms, and John Stevens, who had been involved in the process to develop the 1993 Act.[415]

While the technical panel and TPK officials worked on developing a draft Bill, the Associate Minister began to communicate the Crown's initial decisions at a number of hui. John Grant described these hui (from September 2013 to April 2014) as a series of 'presentations on the outcome of the review and the government's legislative intentions', made to 'groups of Māori land owners and administrators'.[416] The presentations involved 'questions and feedback from participants'.[417]

We know little about these hui. The Crown provided us with TPK file notes for the four hui that took place at the end of 2013. These notes are very brief. They record that the presentations were generally part of meetings on a range of matters, including Treaty settlements, and that participants indicated support for the Crown's intentions. The brief notes also mention related concerns, such as the RMA's effects on Māori land. But very little was recorded.[418]

Marise Lant observed that the Gisborne presentation in February 2014 was made at the end of a hui about Treaty settlements.[419] Ms Lant was worried by the proposal that LINZ would 'hold the Court records and undertake the search functions of the Registry'. The transfer of records and functions to LINZ, she feared, would disadvantage Māori owners. Their financial and other circumstances made it difficult for them to access services, and many of them had no internet access. It would also bring in an agency which was not experienced in dealing with Māori or Māori land. Fees, affordability, and access appeared to be issues that the Crown had not given consideration or weight. These matters were raised at the February 2014 hui, where the details seemed 'sketchy'.[420]

Mr Grant spoke at almost all of these hui, and he provided us with the Powerpoint presentation that was delivered by the Crown. This presentation focused on key headlines, which summarised the 2013 review and the Crown's intentions for its new Bill at a very high level.[421] The proposal to use LINZ to deliver the expanded administrative services for Māori land was not mentioned in the Powerpoint, although Ms Lant's evidence is that it was

discussed at the February 2014 hui. The oral part of the presentation no doubt expanded on the detail not provided in the Powerpoint.

In any case, TPK moved away from its recommendation in 2013 that LINZ take on this role. Whether this decision was influenced by the September–April round of informational hui is not known. We discuss TPK's changed position in the next section. What did arise from the hui was a new approach towards the involvement of Māori in the development of the Bill. Hitherto, as noted, the Crown's original plan was to develop and introduce a Bill, and conduct a 'publicity' campaign to inform Māori owners about the changes. In April 2014, however, the technical panel and officials were joined by external Māori advisers from the Iwi Chairs Forum and FOMA. A 'collaborative' Crown–Māori approach to developing the Bill was about to begin.

Before we discuss this new approach, we note that the review panel's July 2013 report was released in early April 2014, before the final informational hui at the end of that month. The release was accompanied by the Crown's formal announcement that it was drafting a Te Ture Whenua Māori Bill to 'reform the governance and management of Māori land' based on the panel's recommendations. It was not explicitly stated that the 1993 Act would be repealed.[422]

This was the first time that Māori as a whole (and the public) were notified of the Government's intentions and the basis of those intentions in the panel's report, or provided with the report itself. However justified the Crown was in initiating a review, a lot of policy development had by now taken place without representative participation of the substantial Māori interest previously identified.

The public release of the review panel's report was followed in June 2014 by a commentary on the report from Judge David Ambler of the Māori Land Court. This article, published in 'Judges' Corner', became one of the pieces of information considered during the August 2014 hui, which are discussed later in the chapter. In brief, the judge repeated some of the concerns raised with the panel in 2013, including that the panel had not carried out a 'rigorous evaluation' of the Act. In the judge's view, this crucial failing led to significant flaws in the panel's analysis and recommendations, which meant that Māori landowners and the Crown had not been properly informed.[423]

3.4.3 'Collaboration', April–August 2014

The new 'collaborative approach' adopted by the Crown in April 2014 came about as a result of the Associate Minister's presentation to the Iwi Chairs Forum on 5 February 2014. Associate Minister Finlayson told the ICF that his preference was to 'engage with iwi in the development of the bill'.[424] In response, the iwi chairs established a Te Ture Whenua Māori Iwi Leaders Group, chaired by Raniera (Sonny) Tau. This group appointed a 'wider group of advisers' to assist it, and to work with the Crown's technical panel in developing the Bill. The iwi leaders' advisers were led by Willie Te Aho, and included Spencer Webster (co-president of Te Hunga Rōia Māori) as well as some FOMA personnel (Tamarapa Lloyd and Kerensa Johnston) and several others (see sidebar).[425] Linda Te Aho, who

Te Ture Whenua Māori Iwi Leaders Group, 2014

The members of Te Ture Whenua Māori Iwi Leaders Group in 2014 were: Raniera Tau (Ngāpuhi) (chair); Haami Piripi (Te Rarawa); Selwyn Parata (Ngāti Porou); Piki Thomas (Te Pumautanga o Te Arawa); Kemp Dryden (Ngāti Rangi); Che Wilson (Ngāti Rangi); David Jones (Rongowhakaata); Tamarapa Lloyd (Ngāti Tūwharetoa); John Hooker (Ngāruahine); Hori Manuirirangi (Ngāruahine); Te Oti Katene (Ngāruahine); Donna Flavell (Ngāi Tahu); Sandra Cook (Ngāi Tahu); Spencer Webster (Ngāi Te Rangi); Rikirangi Gage (Te Whānau ā Apanui); Dayle Takitimu (Te Whānau ā Apanui); Kerensa Johnston (FOMA); Traci Houpapa (FOMA); and Te Horipo Karaitiana (FOMA).

Specialist advisers to Te Ture Whenua Māori Iwi Leaders Group in 2014 were: Willie Te Aho; Linda Te Aho; John Hooker; Donna Flavell; Kerensa Johnston; Tamarapa Lloyd; and Spencer Webster.[1]

taught Māori land law as Associate Dean (Māori) in the Waikato University Law Faculty, also joined John Grant, Matanuku Mahuika, and John Stevens on the Crown's technical panel.[426]

The Crown's technical panel, TPK officials, and the ILG's advisers held four workshops to help develop the Bill on 1 April 2014, 9 June 2014, 11 June 2014, and 22 July 2014.[427] The Crown was not able to provide minutes or an account of what transpired at these workshops.[428] Whether this process amounted to 'co-drafting' (as the ILG hoped, discussed below) is not known. Crown counsel submitted that the external advisers 'had an important impact on many aspects of the draft Bill',[429] but we have no way of verifying this submission.

On 1 May 2014, the Te Ture Whenua ILG produced a paper setting out what the ICF hoped to achieve from its perspective. This paper was provided to us in Marise Lant's evidence.[430] In the informational presentation at Waitangi on 5 February 2014, the Associate Minister had told iwi chairs that the 1993 Act would be repealed and replaced with a new Act. It was clear to the ICF that, '[u]nless otherwise agreed, all Māori will only have input to the new Bill through the Māori Affairs [Select] Committee process'.[431] As a result, the ICF obtained agreement from the Crown that it should establish its own technical team to work with officials. Ministers' agreement to this approach was secured by 14 February 2014. The ILG commented: 'This proposed approach by Crown officials to co draft legislation from inception with an Iwi technical team is a first for the Iwi Chairs Forum.'[432] It was expected that the iwi technical team would receive all drafts of the Bill, circulate those drafts to the ILG, and provide agreed feedback to the Crown. The end goal was for the Crown and the ILG to reach complete agreement on the contents of the Bill.[433] At the same time, the ILG considered it crucial that policy and resources to assist Māori development be worked out at the same time as the Bill, so as to achieve the much-discussed $8 billion from increased production.[434]

The overall approach was summarised as co-drafting by the Crown and iwi technical teams, co-direction from the ILG and senior officials, and co-decisions by the ICF and Ministers (acknowledging that Cabinet would make the final decisions).[435]

On 25 June 2014, the Associate Minister and the Minister for Primary Industries met with Raniera Tau and Rikirangi Gage (ILG), Jamie Tuuta (Māori Trustee), and Te Horipo Karaitiana (FOMA) to discuss the review. As a result of this meeting, the Crown, the ILG, and FOMA agreed to:

- a 'collaborative approach' to develop the Bill;
- the holding of a joint national round of consultation immediately to inform Māori landowners and seek their 'feedback and suggestions' on the proposed contents of the Bill; and
- the release of an exposure draft of the Bill for further consultation with Māori before its introduction to Parliament.[436]

This was a significant departure from the Crown's original intentions in late 2013, when it had seemed that a Bill would be prepared and introduced quickly in response to the review panel's consultation earlier that year.

At the 25 June 2014 meeting, the ILG, FOMA, and the Māori Trustee made a joint presentation to the Ministers. The 'iwi view for the new Ture Whenua Māori' characterised the previous law as 'alienation' (1800s–1992), and 'retention and paternalism' (1993–2014). The new law must represent 'retention and self-determination'. The three groups supported the passage of a new Act, but noted that it must 'dramatically improve the situation for Māori land owners – not merely move the paternalism from the Court to another government agency'. The improvement should be 'iwi/Māori led with the government as an enabler'.[437]

The two Māori organisations and the Māori Trustee called for the Crown to invest $3 billion over three years in under-performing Māori land (as the 2013 MPI report had said was necessary). They also asked for this investment to be underpinned by research to identify exactly which land would benefit from it. More in-depth analysis was also required to identify exactly what the constraints were that prevented the 'optimal' use of Māori land – most research had been very high level to date. Also, resources would be needed to assist Māori to transition from the old Act to

the new, and collaborative research should determine all of these matters for co-decision-making by iwi chairs and the Crown.[438]

Associate Minister Finlayson replied formally to the Iwi Leaders Group on 1 August 2014. He noted that, at the meeting, the ILG had sought

> agreement to a continuation of the collaborative approach between iwi and the Crown on the review of Te Ture Whenua Māori Act 1993 and what [they] describe as related policy and resourcing matters.[439]

The Associate Minister responded that there was 'no doubt about the value of continuing to collaborate on what is a key policy issue for Māori land owners'. The ILG's technical advisers had already been assisting the Crown to develop the Bill, and, the Associate Minister noted, Linda Te Aho had been a very useful addition to the technical panel. Engagement with FOMA and the Māori Trustee had also been useful. While the September 2014 general election loomed, the Associate Minister hoped that this approach would continue and noted his intention to take an exposure draft of the Bill out for consultation with Māori, but these would be matters for the incoming Government to decide.[440]

In the meantime, the ILG had also requested that the Crown hold a series of joint hui with 'Māori land owners in the regions' before the stage of an Exposure Bill was reached. In response to that request, the Crown had agreed to '19 regional hui to inform Māori land owners about key aspects of the proposed Bill and to obtain their feedback and suggestions'. The Associate Minister acknowledged this initiative of the ILG and stated that the iwi leaders' 'participation with officials in these hui is appreciated'.[441]

In addition, the ILG had proposed the creation of a new joint team of ILG, FOMA, Māori Trustee, and Government officials to conduct detailed research. The purpose was to specifically identify all Māori land that had multiple (absentee) owners and no governance entity and all Māori land that MPI had said was unproductive or under-utilised. The ILG wanted this new joint team to also 'work on implementation policy and resourcing needs', which the ILG suggested should then be put to the full ICF for agreement. Then, the team could develop joint recommendations for the approval of the ICF and Ministers at the Forum at Waitangi on 5 February 2015.[442]

The Associate Minister responded that a 'stock-take' of Māori land had been agreed, and that it would be 'helpful' if the Crown could reach a position on policy and resourcing that 'has the support of the Iwi Chairs Forum'. Nonetheless, he maintained that the final decisions would be for the Crown to make.[443]

Thus, FOMA and the iwi chairs tried to take control of Māori land development and ensure that it happened. They sought joint research and policy development so as to channel the necessary development capital to the right lands where it would make a real difference. They also considered that the reform of Māori land law was being led by the Government and that two major things should happen to make it co-led by Māori and the Crown. The first was collaboration between the iwi chairs' representatives (the ILG), FOMA, and the Crown in the drafting of the Bill and any decisions about its content – acknowledging that Cabinet and Parliament would have to make the final decisions. The second was an immediate, nationwide consultation with Māori landowners to inform them of the proposed contents of the Bill at the drafting stage and get their views on it. The consultation, like the drafting, would be co-led.

The Crown had invited the ICF to engage with it in the development of the Bill, had involved FOMA and ILG experts in drafting workshops, had agreed to co-led hui (and also proposed to release an exposure draft of the Bill later), and had agreed to more research on land use. The Crown wanted to continue the 'collaborative approach' but it had not agreed to joint research, joint policy making to direct $3 billion of investment, or co-decision-making.

We will discuss the resultant August 2014 consultation hui in a later section. First, we need to pause and discuss the Crown's decision in July 2014 to establish a Māori Land Service.

3.4.4 The Crown decides to establish a Māori Land Service, July 2014

Back in November 2013, Cabinet had agreed that LINZ was the preferred provider for all administrative Māori land services, with a final decision to be made after a report back from officials in June 2014. When that report came, however, it recommended a 'multi-agency approach, aligning services with agency core business', which would result in 'a better service for Māori land owners'.[444]

TPK and LINZ sought Cabinet approval for the development of a Māori Land Service, in which TPK would take the lead in matters that required face-to-face contact with Māori, LINZ would focus on electronic services, and the Māori Land Court staff would service the court and maintain its record (including the historical record, which would remain with the court).[445] The development of this new service might now take an extra two years from the November 2013 estimate (originally three years, now three to five years). The Māori Land Court staff would continue to provide existing services while 'systems to support the future state are being designed and tested'.[446]

TPK thus envisaged using its regional offices to provide more local services to Māori communities, while LINZ maintained centralised, electronic information-based services. TPK would provide advice to Māori owners on governance structures and how to establish them, appoint and oversee external managers, respond to direct information inquiries with assistance (including referral to LINZ), administer owners' hui and ensure their decisions were recorded, and run the mediation service. LINZ, on the other hand, would maintain electronic title records and a register of title and beneficial interests, deal with applications for succession (and transmit the information to the court), provide access to searchable title records, and record governance entity information. The Ministry of Justice would service the court in its reduced role, and 'continue to provide access to Court records, including historic title and ownership records', maintain the court record, and transmit court orders to LINZ for registration.[447]

Officials hoped that the new service would eventually align with the Crown's target to deliver its most common transactions with 70 per cent of its citizens online by 2017, although this was more of a 'long-term aspirational target' for the Māori Land Service.[448] Nonetheless, the costing of the service relied on Māori owners to 'administer or interact with their land interests primarily through an online channel supplemented by face to face services'.[449]

In the risk analysis accompanying the Cabinet paper, officials noted that the preference was for the primary service delivery channel to be Landonline, but there were limits to how far this could be achieved. Some of the required services were not suitable for an online delivery, online access was unavailable or limited for 'some' Māori owners, and some Māori preferred to engage face to face. The Crown might establish a 'community outreach programme', with contracted providers going out to provide information and help directly to Māori owners at marae or other venues. As well as this form of information provision, support for owner decision-making could not be done online, nor could the work of mediators or external managers of unutilised land. There was also a risk that the sector could not provide the number of skilled Māori mediators that would be required when the majority of dispute resolution would henceforth be compulsory mediation.[450]

As far as we can tell from the evidence before us, these arrangements had not been discussed with Māori at this time, nor were they made the subject of consultation during the forthcoming August 2014 hui. Officials were to report back by December 2014 with more detailed information on the design, plan, and costing of transition to the Māori Land Service, and options for its governance and accountability.[451]

In the meantime, TPK now planned to have the Bill introduced 'later in 2014'.[452]

3.4.5 Joint consultation hui conducted by the Crown, the Iwi Leaders Group, and FOMA, August 2014

(1) *Key features of the proposed Bill in August 2014*

As noted above, one outcome of the Crown's meeting with the ICF, FOMA, and the Māori Trustee in June 2014 was an agreement that Māori would be consulted nationally about the proposed contents of the new Bill. The

consultation would be co-led by the Crown, the ILG, and FOMA.

TPK prepared a Powerpoint presentation for the consultation hui, which was provided to participants on 29 July 2014.[453] This document was the first opportunity for most Māori to find out about the major features of the proposed Bill (other than the review panel's recommendations, which had been published in April). It was after discovery of the detail of what was planned that Marise Lant filed a claim with the Tribunal and applied for an urgent hearing. The information provided for the August 2014 hui is the first piece of documentary information available to the Tribunal that shows the outcome of the work being done on the Bill between September 2013 and July 2014.

The Bill's purpose was described as to empower and assist owners to utilise their land for whatever uses they chose (including but not limited to economic uses). Tikanga and the concept of land as taonga tuku iho would guide the provisions of the Bill, but owners had a development right in respect of their land, and would be enabled to exercise that right.[454]

Four key aspects of the current Act would be retained in the new Bill:

- 'key elements of the Preamble of the current Act, particularly the reference to the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi';[455]
- the high threshold for selling or gifting;
- the Māori Land Court (but with a more 'judicial' role); and
- whānau and kai tiaki trusts (but a court order would no longer be needed to establish a whānau trust).[456]

Key changes or new features of a 'Te Ture Whenua Māori Hou' would include:

- If any more Māori customary land was converted into freehold tenure, it must remain in collective ownership, with no individual shares.[457]
- An option would be provided for the owners of Māori freehold land to convert to collective ownership with the agreement of 75 per cent of all owners.[458]
- A 'participating owners' model would be established (the terminology had changed from 'engaged' to 'participating').[459] Participating owners would be 'empowered and supported to make key decisions without Court involvement'.[460] Such decisions included long-term leases (75 per cent of participating owners) and establishing a governance entity (50 per cent), designing its constitution (75 per cent), and appointing its 'kaitiaki' (50 per cent or as set in the constitution) (see below).[461]
- Partitions, amalgamations, and aggregations would now be decided by participating owners. The court's role would be to 'confirm due process and [approve] allocation agreements'.[462]
- A new form of governance entity, a 'rangatōpū', could now be established (as noted) by a vote of 50 per cent of 'participating owners' without involving the court. All rangatōpū would be bodies corporate, and their trustees or committee members would be called 'kaitiaki'. Owners would be able to design their own constitution. Alternatively, owners would be able to choose a post-settlement governance entity, a Māori trust board, or the Māori Trustee as their governance body.[463]
- Existing trusts and incorporations (except for whānau trusts) would have to become rangatōpū, with a three-year transition period.[464]
- Post-settlement governance entities would be added to the classes of preferred alienees.[465]
- Successions would now take place through an administrative process and most would not go before the court. Intestate successions would have to be to whānau trusts and not individuals. Succession by will could now be to a 'wider preferred class', which included post-settlement governance entities and rangatōpū.[466]
- An 'accessible dispute resolution service' would be established to help Māori resolve disputes about their land quickly, efficiently, and in accordance with tikanga. Mediation would be compulsory – most disputes would only reach the court if not resolved.[467]
- In addition to the court's existing powers to appoint agents to represent owners in certain circumstances (such as notification of a public works taking), the

'Chief Executive' would be able to appoint external managers to 'manage land pending owner engagement'.[468]

These were the key features of the new Bill as presented by the Crown at the August 2014 hui.

(2) *The outcome of consultation in August 2014*

For the Crown, the purpose of the 2014 consultation hui was to 'inform people of the thinking around the reforms at that date, to seek feedback and to test if there were other ideas or matters that had not been considered'.[469] The Crown was 'transparent at the recent hui about what is under consideration' so as to 'elicit responses to gauge how much support might exist for the proposals and enable decisions to be made about whether, or how, to proceed with them'.[470] By implication, the Crown seems to have accepted in 2014 that the reforms should not proceed if the hui participants rejected them. This is an important point to note in the debate between Crown and claimants as to whether or not Māori agreement is now required for the reforms to proceed to the next stage (introduction of a Bill to Parliament).

For the ILG, the purpose of the hui was to 'discuss the proposed changes to the law relating to Māori land, and to receive feedback and submissions from Māori land owners on the proposed changes'.[471] In addition, the ILG sought 'explicit support' from hui participants to continue to lead Māori input to the reforms. A draft resolution was circulated:

> That the participants at this Ture Whenua Māori Engagement Hui support the Ture Whenua Māori Iwi Leadership Group, their engagement with the Crown on legislation, policy and resourcing and their next steps for increasing the productivity on Māori land.[472]

In addition to the Crown's Powerpoint presentation, which was summarised in section 3.4.5(1), FOMA and the ILG also had Powerpoint slides that were circulated before the hui.

FOMA's presentation was brief. It indicated that 'FOMA supports the amendment of Te Ture Whenua Māori'.[473] This was ambiguous and we do not know what explanation was given at the hui. The FOMA Powerpoint slides do not clarify whether FOMA supported the actual elements of the Bill that the Crown had revealed in its presentation, or whether FOMA supported the complete repeal of the Act.[474] Rather, FOMA stated more generally that reform 'must enable and deliver benefits for Māori land entities'.[475] FOMA would continue to work with TPK, ILG technical experts, and the Māori Trustee. In the meantime, it would send out a survey and hold regional hui to engage with its members and develop a policy position on the Bill, and then advocate that position to Ministers, the ILG, the expert advisers, and officials. It would also prepare a briefing paper for members and facilitate their making of submissions to the select committee.[476]

The iwi leaders' presentation also made no mention of any of the features proposed for the Bill. At a high level, the ILG said that it sought legislation, policy, and resources to empower owners (especially where there were absentees and land was under-utilised or under-performing) and to support owners to 'achieve industry benchmarks for productivity on their lands (for the industry chosen by the land owners)'.[477] More specifically, the ILG wanted the hui to endorse the goals set out in its joint presentation with FOMA and the Māori Trustee to Ministers on 1 June 2014, which is summarised above (see section 3.4.3). This involved securing joint research and policy to invest $3 billion in the correct lands so as to increase productivity. It also involved working with the Crown to co-draft (experts), co-direct (the ILG) and co-decide (the ICF) the contents of the Bill.[478]

The 19 hui to consider and discuss these Powerpoint presentations took place from 3 to 27 August 2014, and were attended by approximately 1,100 people.[479] There was no formal process for written submissions, although participants were provided with an email address to send 'comments and questions'.[480] The presenters at each hui were Matanuku Mahuika, John Grant, Jason Clarke (TPK), Linda Te Aho (in her capacity as ICF technical adviser), and Tamarapa Lloyd (FOMA). Officials remained for the

Hui venue	Date	Number attending
Auckland	3 August	50
Whangārei	3 August	100
Kaikohe	4 August	80
Hamilton	4 August	120
Rotorua	7 August	110
Gisborne	10 August	80
Hastings	10 August	50
New Plymouth	11 August	40
Whanganui	11 August	80
Nelson	12 August	35
Wellington	12 August	40
Invercargill	13 August	20
Christchurch	13 August	35
Taupō	14 August	55
Tauranga	14 August	50
Whakatāne	14 August	25
Te Kaha	15 August	20
Tokomaru Bay	15 August	70
Dunedin	27 August	50

Table 3.3: The 19 Crown, ILG, and FOMA hui, August 2014

presentations made by FOMA and the ILG, but did not record that part of the discussion. They were mostly not present when the ILG resolution was put to the hui. Thus, the Crown's analysis of (and response to) the consultation was based solely on its own session in respect of the Bill.[481]

According to the claimants' evidence, the information supplied to the 2014 hui was 'sketchy'. The headlines in the Crown's Powerpoint presentation were 'not discussed in any great detail at the hui . . . regarding what they actually mean'.[482] As a result, little information was provided, and

> Māori owners who do not fully understand what they are being asked, have been beguiled into believing reform is necessary when there is limited justification for what could be the wholesale corporatisation of our land, leading to land loss and scaled down services so that this Government can reduce its own administrative costs whilst the problem of under-performing Māori land will remain.[483]

In addition, Marise Lant told the Tribunal that incorrect messages were conveyed, including that the 'Māori Land Court judges make all the decisions for your land under TTWM'. She also felt that the proposals were unrealistic: owners needed the court's help to carry out complex technical work such as partitions, and could face mediation and reduced services from a Government agency unused to dealing with Māori. In Ms Lant's evidence, 'much concern' was expressed at the four hui she attended, in respect of the 'indecent haste and speed' with which the reforms were being pushed through[484] – at that stage (August 2014), the Crown intended that the '[f]inal draft of [the] Bill' would be completed by the end of the year.[485] Ms Lant also stated that the Gisborne hui reached no decision on the reforms, and the views at Rotorua and Tokomaru Bay were 'varied'.[486]

The Crown's analysis of the hui did not note any opposition to the reforms as a whole (or strong opposition to any of the reforms), nor any opposition to repealing the 1993 Act. According to John Grant's evidence on 21 August 2014:

> At this point it can generally be said that the hui were supportive of the overall direction of the reforms, with a clear mandate for new measures that remove the more paternalistic characteristics of the current Act and that promote the exercise of rangatiratanga by Māori land owners . . . Many participants support a greater emphasis on tikanga Māori, including the potential for collective ownership. However, tension remains evident between those who regard their interests in Māori land as economic assets or property rights, particularly large shareholders, and those who lean more towards a cultural asset model which is more about kaitiakitanga than

> 'ownership'. Retention of the high threshold for sales is widely supported, as is the retention of key elements of the Preamble to the current Act so long as the concepts of land retention and development can be expressed as complementary rather than as a conflicting hierarchy.[487]

After further analysis, this remained TPK's view of the general outcome of the hui.[488]

As in 2013 (and in the research and reviews leading up to it), many people raised the issue of barriers to development that had not been addressed by the Crown and that were not the subject of the proposed reforms:

> There is a clear view among hui participants that the success of any reforms does not rest on legislation alone but also needs to be backed with access to resources such as fresh water and financial support. At almost every hui we heard significant concerns about landlocked Māori land and the impact of other legislation, particularly the Resource Management Act 1991, the Local Government (Rating) Act 2002, and the Public Works Act 1981.[489]

In particular, hui participants identified the impact of landlocked land, rates arrears, local government planning, and RMA constraints as legislative regimes which impacted on Māori land development (and which required legislative remedies). The Crown's response at the hui was to note these 'as issues' but also as 'outside the scope of the reform'.[490] There was also a view that paper roads should be removed from all Māori land (which would require legislative action).[491]

In terms of the Crown's specific proposals, there were concerns which officials considered sufficiently widespread or weighty to note:

- People were concerned that the rights of owners 'who do not live close to the whenua' would be reduced by the participating owners model, to which officials responded that owners would be able to vote regardless of where they lived. There were differing views about whether voting should be by person or shareholding.[492] The main concern, however, was that having a small group making decisions carried a risk of capture by minority interests unless there were 'adequate safeguards and decision thresholds'.[493] The problem was that hui participants did not consider that there were sufficient protections. In the Crown's assessment, they 'highlighted a need for appropriate quorum provisions'.[494]
- The view was expressed that land ownership and decisions were a matter for hapū and iwi. There was 'more opposition than agreement' to the inclusion of post-settlement governance entities in the preferred class of alienees. Discussion focused on the possibility of giving these entities a second right of refusal instead. Hui participants were also concerned about post-settlement governance entities becoming governance bodies for Māori land. Equally, hui participants were worried about the inclusion of the Māori Trustee, Māori trust boards, and the Public Trustee as potential governance bodies.[495]
- Hui participants considered that the emphasis should be on getting governance structures created for blocks which had none, rather than changing existing entities into rangatōpū. There was also concern about transition costs for existing entities, to which officials responded that a 'separate stream of work is being undertaken to support the implementation of the new bill'. There is no mention in the officials' summary of any objections to the fact that existing trusts and incorporations would have to become rangatōpū. A key issue raised with officials, and which had been a perennial theme of previous research and reviews, was the need to 'upskill and educate' Māori land governors to improve competence. Officials acknowledged this as 'an issue that will require further support'.[496] As far as we are aware, the fact and detail of the Crown's recent decision to establish a Māori Land Service was not discussed by officials.
- Hui participants were concerned about the proposal to appoint external managers, and the 'potential for them to put the land at risk', to which officials

responded that such managers would be 'appointed in limited circumstances and with appropriate safeguards in place'. Māori were also concerned that the choice not to develop their land might be interpreted as non-engagement, and that external managers could be appointed to force the utilisation of land against their will, but officials assured hui that this could not happen.[497]

- There was general support at the hui for land interests 'passing into a whānau collective on intestacy'. As noted above, there was support for a number of initiatives to recollectivise the ownership of Māori land, of which this was one. Officials noted that 'one or two' were concerned that intestate successions to whānau trusts might be 'inconsistent with the property rights' of those who, under the current Act, could expect to inherit an individual interest. Officials' response to this was that people could still make wills to pass their interests to individuals 'if that was their preference'.[498] The proposed transfer of successions from the court to the Crown also concerned 'some', who doubted that the 'responsible agency' would be competent to manage successions. Again, the Crown's decisions about the Māori Land Service (and its division of responsibilities) were not discussed. Hui participants also feared that the new arrangements would enable people to submit false whakapapa and succeed to interests to which they were not entitled, to which officials responded that the court would still have jurisdiction to correct errors. One 'frequently stated' concern was that fees deterred many owners from applying for succession.[499] Officials noted this concern.[500]
- Hui participants insisted that the proposed mediation service would have to have 'no or minimal costs' to be effective and accessible for Māori owners. They sought clarification of whether it would be mandatory, and what it might cost in terms of fees. Officials' response on these concerns was not recorded in the summary of key themes.[501]

The Crown took on board some of the principal concerns it noted from the 2014 hui. Matters such as quorums for meetings of participating owners were later included in the Bill. The key messages that the Crown took from the hui were that:

- the Crown had a 'mandate' for its reforms, but Māori were concerned about aspects of them, including whether the participating owners' model would have sufficient safeguards; and
- enabling Māori to use their lands required the solution of a number of key, long-standing issues not covered in the reforms, including the impacts of rating and landlocked land.

The iwi technical advisers' report to the Iwi Chairs Forum agreed that there was general support for the direction of the reforms.[502]

The iwi advisers' report was prepared by the chair of the technical advisory team, Willie Te Aho. He told the Forum that the 'change to [Te] Ture Whenua is being driven by the government', but it did not matter that 'the government instigated this change' as it would empower Māori landowners: 'Increasing choices for Māori land owners is at the heart of the proposed changes coupled with reduced judicial administration and discretion.'[503]

In Mr Te Aho's report, opposition was limited to 'the few who are against any change' and 'a few participants at different hui'.[504] For the opponents at the hui, Judge Ambler's commentary on the review panel's report had become a 'rallying point'. Willie Te Aho reported that the 'few' opponents called for the court's discretions to be retained, citing 'worst case scenarios like Matauri x Incorporation or unaccountable or fraudulent trustees suddenly becoming rampant without the Court'. In the iwi technical advisers' view, the duties of land governors would 'align to generic company director duties', and Māori were 'ready to take our destiny, our lands in to our own hands'. Fraud could never be prevented altogether, as the South Canterbury Finance example showed.[505]

Thus, the iwi advisers' report of the hui was that Māori generally supported the reforms, with a 'few' in opposition and wanting to retain judicial discretions. Importantly, this minority view at the hui (as Mr Te Aho characterised

it) was not reported by the Crown at all in its summary of key themes.

While the iwi advisers supported the empowerment of Māori landowners (as it was termed), no specific view of any particular aspects of the reforms was advanced.

On the one hand, iwi advisers saw the reform process as an opportunity for Māori landowners to get what MPI said they needed: $3 billion to bring their lands into production. To that end, they sought support from the hui for the ILG to continue to work collaboratively with the Crown on the Bill and on policy and resourcing to get that money where it would do the most good. From Mr Te Aho's report, the resolution to that effect (quoted above) was endorsed by a majority vote at all the hui.[506]

On the other hand, iwi advisers considered that the reforms did not go far enough. They recommended that the ICF should support a brief for discussions between the Te Ture Whenua Māori ILG and the Crown on the following matters:

- strengthening the reference to Te Tiriti beyond the current preamble, and the unique status of Māori land as taonga tuku iho, by making Te Ture Whenua Hou the 'tuakana of all legislation' that affected Māori land;
- tackling the laws relating to rating, valuation, and access at the same time as Te Ture Whenua Hou, as well as local government authority to restrict Māori land development under the RMA;
- including in Te Ture Whenua Hou a greatly increased jurisdiction for the Māori Land Court to deal with all matters relating to Māori and their land, including making it the Land Valuation Tribunal for Māori land, giving it greater powers to enforce access for landlocked land and to remove paper roads, and giving it concurrent jurisdiction with the Environment Court for resource consents, the Family Court (for wills and personal property), and the District Court (where a dispute related to Māori land);
- including in Te Ture Whenua Hou a provision for all Māori landowners in a hapū or rohe to make their own laws;
- restructuring the Māori Trustee, giving it an iwi-appointed Board to repatriate its resources, and making it the Government agency to implement Te Ture Whenua Hou; and
- a commitment from the Crown to a zero-cost transition process and zero-cost services (especially for successions), for real action on landlocked lands and paper roads, and for $3 billion over three years for Māori land development.[507]

More broadly, the iwi advisers recommended that the Constitutional Iwi Leaders Group should challenge the Crown's right to make laws, and request an independent panel of experts to examine what the Treaty means for 'how law should be made in this country'.[508]

Thus, three distinct impressions of the 2014 hui emerged. Ms Lant's evidence does not dispute that there was majority support for the reforms, but she considered that Māori had been 'beguiled' into believing that reform was needed, based on poor or misleading information. The iwi advisers' view was that there was minority opposition focused on the need to retain the Māori Land Court's discretions, but that the majority supported collaborative reform by the Crown and the ILG to empower Māori landowners to make decisions about (and develop) their lands. The Crown's view was that Māori supported the reforms generally but were concerned about aspects of the specific proposals, including the need for more safeguards around the decision-making of participating owners.

All three viewpoints, however, coincided on one point: that there were long-standing barriers to Māori land development which the proposed reforms would not address, including rating, RMA issues, and landlocked land.

This was underlined by the Iwi Chairs Forum's resolutions at Tuahiwi Marae on 28 and 29 August 2014. The Forum unanimously adopted the iwi advisers' proposed resolutions (described above) in full. Thus, the Forum authorised the ILG to raise and discuss all of those matters with the Crown as part of the reform of Te Ture Whenua Māori.[509] The ICF wanted reform that would tackle rating and other barriers to utilisation, make Te Ture Whenua the supreme Act for all matters affecting Māori land (including the RMA), and a commitment to development

finance and zero-cost services. The challenge to the Crown's right to make laws, and the changes and commitments sought by the ICF to be added to the reforms, were endorsed by Ms Lant.[510] As she noted, the ICF had not yet formally agreed to the particular reforms proposed by the Crown.[511] Rather, the Forum was seeking action on matters which Ms Lant considered needed to be addressed.

(3) *Standards for consultation*

The process of 'collaboration' between the Crown, the ILG, and FOMA, as well as the August 2014 hui that resulted, are addressed only briefly in the claimants' closing submissions. In their view, the Crown gave inadequate notice of the hui, and the hui themselves were also inadequate.[512] The claimants have also made some general submissions about consultation, which need to be considered in respect of the 2014 consultation round.

The Crown's submissions argue that the August 2014 consultation hui were a key part of an 'iterative process of engagement' which has 'allowed Māori to engage with the reforms in increasing levels of detail. Each stage of consultation has included specific explanation in written materials of the proposal for consultation, together with face-to-face hui.'[513]

Crown counsel quoted Mr Mahuika's evidence that '[p]eople were offered an opportunity to express their opinions on all of these iterations'.[514] The 19 nationwide hui in 2014 were held at an 'intermediate' stage, between the review panel's high-level propositions in 2013 and the detail of the Exposure Bill in 2015.[515] They were held to

> inform people of the thinking at that stage, seek feedback and to test if there were other ideas or matters that had not occurred to the advisers. The hui were to ask Māori whether the Crown had 'got this right'.[516]

The Crown denies the claimants' allegations that its consultation has been 'rushed, uninformed, or not carried out in good faith'.[517]

The parties appear to agree on significant points in respect of what consultation requires in a general or common law sense (although not necessarily in Treaty terms). The Crown and claimants rely on the *Wellington Airport* case, from which Crown counsel draws the following points:

> Consultation does not mean to tell or present. Consultation must be a reality, not a charade.
>
> Consultation cannot be equated to negotiation. Rather, it is an intermediate situation involving meaningful discussion.
>
> The party consulting must keep an open mind and, while entitled to have a work plan in mind, must be ready to change and even start afresh.
>
> Any manner of oral or written interchange which allows adequate expression and consideration of views will suffice. What is essential is that the consultation is fair and enables an informed decision to be made.
>
> There is no universal requirement as to duration of consultation, but sufficient time must be allowed and a genuine effort to consult made.
>
> Those being consulted must know what is being proposed, and have a reasonable and sufficient opportunity to respond to the proposal.[518]

The Crown also noted that it is 'required to ensure that Māori are "adequately informed so as to be able to make intelligent and useful responses", as was found in the *Wellington Airport* case'.[519]

The claimants' summary has noted a point not included in the Crown's summary, which is the court's statement that consultation 'does not necessarily involve negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus'.[520] In addition, the claimants noted that consultation before making a decision – even if open and meaningful – is not necessarily sufficient in Treaty terms where taonga are concerned. Quoting the Tribunal's report *Whāia te Mana Motuhake*:

> In some instances, the Crown may have sufficient information in its possession to adhere to the Treaty principles without any other specific consultation. But in other instances, the principle of active protection has been extended by the Waitangi Tribunal to include the duty to obtain the full, free,

> and informed consent of Māori in certain settings. Where the respective spheres of authority held by the Crown and Māori overlap, the extent of what is needed to actively protect Treaty rights may need to be the subject of negotiation and compromise. The principle of active protection should be applied so as to reflect the appropriate level of Māori authority.[521]

The claimants say that the proposed reform of Te Ture Whenua Māori Act 1993 is a 'case whereby the Crown is required to obtain the full, free, and informed consent of Māori.'[522]

(4) *Did the August 2014 hui meet the standards for consultation?*

In the claimants' view, all of the Crown's consultation hui have been rushed, not allowing sufficient time for meaningful consultation, and the information provided before and at hui has been 'in no way adequate'.[523] Rather, the claimants say that the Crown 'limited the information provided to the information that suited the Crown's end goal of gaining approval to reform the Te Ture Whenua Māori Act 1993'.[524] This meant, they submit, that Māori people attending hui were only provided with a 'brief overview of the changes', and were not provided with the information necessary to make 'fully informed decisions'.[525]

The claimants' evidence does not dispute or rebut the Crown's evidence that Māori generally agreed with the Crown's proposals at the 2014 hui (although, of course, some significant concerns were expressed about aspects of the proposals). The ILG's technical advisers suggested that the opposing preference to maintain the status quo was limited to a 'few' people at these hui.

In terms of information, hui participants had available to them three key documents:

- the Powerpoint slides setting out the main features of the reform at a relatively high level (but sufficient to generate debate about some of the detail);
- the review panel's report; and
- Judge Ambler's critique of the panel's report and recommendations.

The ILG's technical advisers noted that opponents of the reforms relied on Judge Ambler's critique.[526]

Of these three documents, the Powerpoint slides were provided less than a week before the first set of hui in August 2014.[527] The review panel's report and Judge Ambler's article had been available on the internet for some time (we are not aware of the paper circulation of 'Judge's Corner' but presume it was widely available to users of the Māori Land Court). In his article, Judge Ambler made the point that Māori bodies and legal commentators had not engaged in public debate on the review panel's report,[528] but the release of his paper in the public arena made a wider range of information and views available to hui participants in August 2014. This helped to inform the consultation. In addition, of course, Māori landowners and administrators brought their own experiences to the hui of how the system functioned. Knowledgeable people, including Ms Lant at four of the hui, shared their information and perspectives.

We agree, however, that the Crown's provision of information was deficient for the August 2014 hui. The Powerpoint slides were sent out only four days before the first hui on 3 August 2014. Unlike the 2013 and 2015 consultation rounds, the Crown did not prepare and circulate a proper discussion paper. We question whether brief Powerpoint slides were a sufficient information base for nationwide consultation on such complex, important matters. The FOMA presentation conveyed no information about the reforms, but rather FOMA's plan to consult its members and participate in further consultation. The ILG presentation similarly did not address the particulars of the reform proposals, but rather the iwi leaders' own plan for engagement, and what they hoped to achieve in respect of Māori land development.

On the other hand, there was clearly enough material to generate discussion about defects (such as the lack of safeguards in the participating owners model). Also, there was enough information to lead Ms Lant and others to file claims objecting to the detail of the Crown's proposals, including the compulsion for existing trusts and

incorporations to become rangatōpū.[529] Hui participants around the country expected further consultation on the details, and this was clearly communicated to the Crown: 'There was also a strong expectation that more detail would be provided on the specifics of the Bill and the supporting institutional arrangements.'[530]

On balance, we accept that the flaw in this consultation round was not fatal to the achievement of its purpose, which was to get feedback and test Māori opinion on some of the more specific aspects of the reform proposals, but with the intention of taking an Exposure Bill out for more detailed consultation in the future. The majority of participants still seemed to support the general direction of the reforms but a level of opposition had now emerged – still a minority at this stage of the process, as the Crown and ILG reports agreed. There was no call for written submissions, which would have helped confirm what – and to what extent – Māori generally supported.

We suspect that preparation for these hui was rushed because they occurred as a result of a very recent agreement between the Crown and the ILG, and had to take place before the general election in September 2014. This may also explain why no opportunity was provided for written submissions.

Had more information and time been provided, it is possible that Māori disagreement with some key features, such as external managers and compulsory whānau trusts, would have become clear earlier. On the other hand, Māori at the 2014 hui do seem to have supported using whānau trusts for intestate successions (as a means of recollectivising Māori land), even though this concept aroused significant opposition in 2015.

A final point to note about the 2014 hui is that long-standing Māori concerns about rating, landlocked land, and other issues excluded from the reforms had once again been raised, and had made it onto the ILG's post-hui agenda for collaborative engagement with the Crown.[531]

In any event, the Crown and the ILG both believed that they had a mandate from these hui to proceed with their respective reform platforms. But the hui were not intended as the final step in nationwide consultation. The Associate Minister had promised to release an Exposure draft of the Bill for further consultation with Māori. Officials supported this approach but the final decision depended on the outcome of the 2014 general election.[532]

Finally, we note that some changes were made as a result of feedback from the hui. When consultation resumed in April 2015, quorum requirements had been introduced into the participating owners model to strengthen safeguards.[533] Post-settlement governance entities were no longer to be added to the class of preferred alienees, but rather to be given a second right of refusal *after* the preferred alienees, as discussed at the hui.[534]

Many of the concerns expressed at the hui had been about the possible administrative arrangements. In particular, participants queried the handling of successions by a Government agency instead of the court. Concerns of this nature have not been acted upon. The plan is for successions to remain an administrative process. One request from hui participants was certainly accepted: upskilling Māori land governors is one of the functions of the proposed Māori Land Service.[535] Officials took on board worries about transition costs and fees, and the owners' aspirations for zero-cost services, but the resolution of these concerns depends on decisions yet to be made about the Māori Land Service.

Similarly, the demand at the 2014 hui that the reforms tackle such barriers to utilisation as rates, finance, and lack of access may or may not be addressed as a result of the Māori 'enablers' work stream. It does seem to us that early opportunities were ignored in 2013 and 2014 to have included paper roads, landlocked lands, and other barriers to utilisation that might naturally have been the subject of Te Ture Whenua Māori reform in the present Bill.

3.4.6 The end of 'collaboration' with FOMA and the ILG: a new approach

The position at the end of August 2014 was clearly going to be a challenging one for the Crown. On one side, there was (largely unacknowledged) some minority support for

retaining the Act as it was, including Māori Land Court discretions as a protective mechanism. On the other side, there was broad Māori support for the ILG's plan to collaborate with the Crown on the basis of a platform of massive Government investment of $3 billion (to get the predicted $8 billion returns), zero-cost services, and refocusing the reforms to encompass long-standing barriers to utilisation. The ICF's premise was that the Crown should not necessarily be making the laws at all.

At the same time, urgent claims had been filed with the Tribunal by Marise Lant (August 2014), the New Zealand Māori Council (August 2014), and by nine Māori persons on behalf of a number of hapū (October 2014). The claims alleged flaws in the Crown's consultation process and the substance of the proposed reforms.

Also, the latest MPI report in December 2014 revised productivity estimates downwards from $8 billion to $3.5 billion over 10 years, requiring an investment of $905 million before it could be achieved.[536]

The reform process thus faced some challenges by the end of 2014. As it turned out, urgency was not granted by the Tribunal to any of the claims at that point. But John Grant's evidence in August 2014 suggested that the Crown accepted it would have to broaden its collaborative approach beyond FOMA and the ILG. It needed to include 'others such as the New Zealand Māori Council and the New Zealand Māori Women's Welfare League'. Nonetheless, TPK expected to continue to collaborate with the FOMA and ILG technical advisers and their appointers in developing the Bill.[537]

In the event, the challenging task of collaborating with the ILG on their platform for reform did not take place. Mr Grant told the Tribunal that this specific collaborative process was stopped after August 2014 to await the outcome of the general election in September of that year. Then, following the election, the new Minister for Māori Development, Te Ururoa Flavell, had to be briefed and 'Ministerial responsibilities . . . put in place'. Responsibility for reform of Te Ture Whenua Māori was resumed by the Minister, who had in mind a different process for engagement with Māori.[538] He appointed a Ministerial Advisory Group to carry out intensive work with stakeholders, advise the Crown, and lead a new round of consultation on a draft Exposure Bill.

We deal with that new approach in section 3.5.

3.4.7 What was the significance of the 'collaborative approach' in Treaty terms?

As we found in section 3.3.5, the reform of Te Ture Whenua Māori Act 1993 was initiated by both the Crown and Māori. Although the Crown rightly claimed to be responding to calls from within Maoridom, and to be following up on previous Crown–Māori dialogue from the late 1990s, the Crown also had its own objectives. These included the expansion of regional economies and the national economy by bringing more land into production. The review that resulted in mid-2013 was not led by either Treaty partner. An independent panel led the review. It developed reform propositions, consulted Māori nationwide on those propositions, and advised the Crown to act on those which seemed to have general support from hui participants and submitters – as the Crown agreed to do. From that point, however, the Crown assumed leadership of the reform process. TPK began to develop policy positions and translate the panel's high-level propositions into a Bill. Government departments also began work to decide how revamped administrative services would be provided to support the reforms, and a decision point had been reached by July 2014.

Although the review was Crown-led at this stage, the Associate Minister invited iwi leaders to engage with the Crown in developing the Bill. At first, this engagement took the form of adding the ILG's nominee to the technical panel, and a series of workshops between technical advisers (ILG and FOMA experts and the Crown's experts). The inclusion of FOMA advisers meant the involvement of a body representing a large number of 'landowner groups affected by the reforms'.[539] The iwi leaders hoped that the 'collaborative approach' to the reforms would result in co-drafting by Crown, iwi, and FOMA experts, co-direction by senior officials and the ILG, and co-decision-making by Ministers and the wider ICF. The iwi leaders accepted (at that point) that the final decisions would rest with Ministers and Parliament.[540] The Crown agreed that it

would be 'helpful' if it could reach a position on policy and resourcing that 'has the support of the Iwi Chairs Forum', but that the final decisions would be for the Crown.[541]

In addition to experts' workshops on the Bill, the Crown had agreed to joint research on exactly which Māori land could be developed, and to a series of nationwide hui co-led by the Crown, FOMA, and the ILG 'in collaboration'.[542] From these hui, the Crown believed that it had a mandate to proceed with the reforms. The ILG believed that it had a mandate from hui participants to continue to lead Māori collaboration with the Crown on the development of the reforms. The ICF adopted an ambitious programme for negotiation with the Crown, including seeking the injection of large resources into Māori land development and the tackling of key barriers to utilisation that had been left out of the reforms. The Crown, on the other hand, was aware by the end of the hui that it would need to extend its collaborative approach beyond FOMA and the ILG to include other Māori organisations, such as the New Zealand Māori Council and the Māori Women's Welfare League.

In Treaty terms, these were promising developments.

As has been noted, the Wai 262 Tribunal found in 2011 that decision-making under the Treaty should take place on a sliding scale, depending on the nature and extent of the Treaty partners' respective interests in the issue at hand. On some occasions 'the Māori Treaty interest is so central and compelling that engagement should go beyond consultation to negotiation aimed at achieving consensus, acquiescence or consent'.[543] In the Māori Community Development Act inquiry, the Crown agreed with the claimants that the review of that Act should be led by Māori, and that Māori should develop reforms to their own institutions. Māori should then negotiate those reforms with the Crown if public resources or legislation was required to give effect to them. The Crown accepted that collaboration was called for in that particular case.[544] The Tribunal agreed, finding that the need for 'collaborative agreement' between the Treaty partners in certain circumstances was a Treaty principle, an essential part of the Treaty partnership between Crown and Māori.[545]

In the present inquiry, the Crown does not make the same concession that it did in the Māori Community Development Act case, for the reasons set out in section 3.2 above. We will return to those reasons later in the chapter. But we note here that the Crown did agree in 2014 to a 'collaborative approach' with the ILG and FOMA, and had accepted by August of that year that more Māori organisations would need to be included. It was promising in Treaty terms that the Crown and the ILG agreed loosely to what the ILG characterised as co-drafting, co-direction, and co-decisions; both parties noted that the final decision would rest with Ministers. The Crown's statement that reaching agreement with iwi would be 'helpful' was its opening position in response to the formal approach of iwi leaders and FOMA in June 2014. Had the collaboration continued as planned after the August hui, the Crown, the ILG, FOMA, and other Māori institutions would have engaged on the Bill and the ILG's platform for reform, before the proposed release of an Exposure Draft for nationwide consultation with Māori.

It is not possible to say what the outcome of continued collaboration on this particular basis would have been. But we do note that the Crown's acceptance by its conduct that it could not simply introduce its own Bill (as planned for the end of 2013) was important in Treaty terms, as it collaborated with FOMA and the ILG. Regardless of its position in closing submissions, the reality is that the Crown accepted in 2014 that it could not proceed unilaterally. Collaboration with select Māori leadership organisations, involving collaborative consultation with Māori generally, became its chosen path. This was not inconsistent with Treaty principles but it was only a beginning.

3.5 How Have Māori Been Consulted on the Exposure Bill and Is There 'Demonstrable and Sufficient' Māori Support for the Bill to Proceed?

3.5.1 The Crown's new choice of mechanism for engagement with Māori

(1) *The appointment of a Ministerial Advisory Group*

At the beginning of 2015, the new Minister for Māori Development decided not to continue with the process

of direct collaboration between Ministers and officials on one side, and the ILG and FOMA on the other. Instead, Minister Flavell opted for a different partnership mechanism, a Māori 'advisory group'. A formal response was not provided to the ICF on their August 2014 resolutions until later in the year, in July 2015.[546]

We were not provided with the policy advice or Cabinet papers for this change of direction. According to John Grant, the Minister appointed his advisory group 'to provide him with independent advice on the development of an exposure draft of Te Ture Whenua Māori Bill and the development of the Māori Land Service, from the perspective of those who operate within the Māori land regime'.[547] Thus, consultation was widened at this point to include the Māori Land Service, about which decisions had been made in mid-2014 but no consultation had taken place. In addition, the advisory group became the mechanism through which the Crown engaged with Māori. It met and consulted with six 'key stakeholder groups' in April and May 2015, after which it provided advice to the Minister about possible changes to the contents of the Bill. After the Exposure Bill was released, the advisory group played a leading role in nationwide consultation with Māori in June 2015.[548] In July 2015, the group held a second round of meetings with key stakeholders.[549] Whether the Ministerial Advisory Group has also led post-consultation 'engagement' since then is not entirely clear.

The members of the Ministerial Advisory Group (MAG) were chosen 'to provide a mix of skills and experience, including continuity with those previously involved in the work, expertise in Māori land law and Māori land administration, Māori land owner perspectives and academic and practical expertise'.[550] Matanuku Mahuika was transferred from the technical panel to the advisory group, as was Linda Te Aho, the ILG nominee on that panel. Spencer Webster, a Māori lawyer and co-president of Te Hunga Rōia Māori, had been a member of the ILG's technical experts in 2014. The other members of the group were:

- Kingi Smiler (chair), a farmer, accountant, and director of the Mangatū Incorporation;
- Traci Houpapa, the chair of FOMA, who held a number of directorships and ministerial appointments;
- Sacha McMeeking, a Māori law lecturer, a former general manager of Te Rūnanga o Ngāi Tahu, and indigenous rights expert; and
- Dr Tanira Kingi, a leading expert in Māori land development.[551]

Thus, the MAG was more 'representative' than the 2013 review panel, in that it contained three members who might be considered representatives of the two bodies with which the Crown had collaborated in 2014: the chair of FOMA, the ILG's nominee to the technical panel, and one of the ILG's technical advisers. It did not, however, include general community leaders or kaumatua, nor were any of its members formally nominated by anyone other than the Crown.

(2) *Early changes made in response to the MAG's advice*

Officials identified 'substantial changes brought about by the Bill', on which the MAG focused in its deliberations (but beyond which it went as necessary). These were:

- New regulations on governance agreements for trust and incorporations providing greater autonomy for owners;
- Decision making thresholds for owners;
- Transitional arrangements for existing Māori land trusts and incorporations;
- Role of post-settlement governance entities (PSGEs);
- Unclaimed and retained distributions;
- Appointing external managers (kaiwhakarite) for unutilised land;
- Collective ownership;
- Dispute resolution;
- Use of te reo Māori in the Bill; and
- Māori Land Court jurisdiction to advise on or determine representation of Māori groups (section 30 of the current Act).[552]

The MAG received briefings and information from officials and held meetings on 19 February, 2 March, and 26 March 2015.[553] As a result of those meetings, the MAG

provided advice which resulted in the following changes to the Bill before 'pre-consultation' with key stakeholders.

First, the threshold of agreement for partitions was changed from 50 per cent of participating owners to 50 per cent of *all* owners. The majority of the MAG were concerned that making partitions too easy would result in alienations, and some even wanted to increase the threshold to 75 per cent of all owners. Others were worried that a threshold of 50 per cent of all owners would make it too hard and might prevent partitions altogether, except in the case of blocks with a small number of owners.[554]

Secondly, a 'substantive change to the Bill' was made to 'allow existing bodies to grandparent their constitutions into the new framework.'[555] This would 'mitigate the transitional burdens' on the 6000 or so bodies that would have to become rangatōpū, and hopefully minimise the disruption for those that were already performing well under the current Act. Even so, the MAG noted that these existing trusts and incorporations would face significant transition costs.[556]

Thirdly, rather than giving post-settlement governance entities a sole right of second refusal (an outcome of the 2014 hui), the MAG recommended expanding this category to include all iwi or hapū organisations with whakapapa connections to the land in question.[557]

Fourthly, the MAG simplified the arrangements for unclaimed dividends so that they would be classified as a liability and could be used for operational purposes after three months.[558]

Fifthly, the question was put to the MAG of whether the court should retain its section 30 jurisdiction to decide Māori representation and mandate issues. The majority of the MAG took the view that section 30 should not be transferred into the new Bill, and that issues of mandate and representation should be resolved by the proposed mediation process.[559] It is not clear at what point the Crown decided not to include section 30, but this particular role was not mentioned among the Māori Land Court's powers in the MAG's April 2015 discussion paper.[560]

We turn next to consider the MAG's consultation with what John Grant called 'key stakeholder groups.'[561]

3.5.2 Consultation with 'key stakeholder groups'

(1) *Introduction*

On 21 and 22 April 2015, the Ministerial Advisory Group consulted five Māori 'leadership groups,'[562] in which the Māori Trustee was included:

- the New Zealand Māori Council (21 April);
- FOMA (21 April);
- Te Tumu Paeroa (the Māori Trustee) (21 April);
- the ILG's technical advisors (22 April); and
- the Māori Women's Welfare League (22 April).

A month later, on 22 May 2015, the advisory group met with a sixth group of key stakeholders, the judges of the Māori Land Court.[563]

The purpose of consulting these groups in advance of the nationwide consultation on the Exposure Bill was to provide them with 'information about the way in which the proposed reforms were being incorporated into the bill, solicit feedback and create awareness of the process and timeline.'[564] TPK stated that the discussions would 'shape the content of the draft Bill that is released for public consultation and the content of the advice that the MAG provide to the Minister for Māori Development.'[565] To enable 'informed discussion', the MAG provided stakeholders with a 'pre-consultation document'. An exposure draft of the Bill was not yet ready. Nonetheless, John Grant told us, 'the pre-consultation document provided significant detail of the proposed reforms at that time.'[566]

We begin our analysis with a brief consideration of this pre-consultation document, which was entitled 'Preliminary Discussion Paper: Te Ture Whenua Reform.'[567]

(2) *The April 2015 discussion paper*

On 16 April 2015, TPK sent a 65-page preliminary discussion paper to the 'leadership groups', which officials had drafted on behalf of the MAG. The paper was confidential and stated that it 'does not yet represent Government policy.'[568]

In terms of the chronology of our documentation, the discussion paper contains the first substantial detail about what would be in the proposed Bill, and also the intended

functions of the Māori Land Service. There was not much detail, however, about how the services would be provided, by whom, or for how much. For the information of stakeholders, TPK's paper included the ICF's August 2014 resolutions.

The paper was clearly written and conveyed significant information beyond the headlines of the 2014 hui Powerpoint, although many features remained the same. In particular, some of the proposed processes were set out in step-by-step detail, without altering the essential characteristics as described in 2014. The paper also contained an overview of the parts of the Bill, in lieu of providing the draft Bill to the key stakeholders at that stage (for a summary of the exposure draft, see chapter 1).

Key points to note here are:

- Although quorums for participating owners' meetings were now mentioned as a possible safeguard,[569] no information about quorums was provided.
- Improved access to finance would be provided by three means – making governance arrangements more consistent with wider law on corporate bodies (which would help with securing finance), allowing governance bodies to 'create a leasehold interest in the land which can be secured without putting the actual land at risk', and a 'more explicit and expansive' approach to using fixtures for security.[570]
- Decision-making thresholds for all owners and for participating owners were set out in detail, and the debate between deciding by shareholding or by one vote per owner was mostly decided in favour of shareholdings (see table 3.4).[571]
- The proposal that Māori reservations would become 'whenua tāpui', and how to establish new whenua tāpui (including on Crown land), was set out for the first time.[572]
- The functions that would be performed by the Māori Land Service were now described, as we set out in more detail below.

The Bill's intention was to give Māori landowners control over decisions about their lands, mostly through their ability to set up and control a governance body, but also through default decision-making processes that empowered 'participating owners' with procedural safeguards. A key aspect of improving governance and empowering owners was the Bill's provision for 'end-to-end' services to be delivered by a new Māori Land Service. These included:

- Practical support to owners wanting to set up a governance body, by providing a template governance agreement and advice about options and statutory requirements.
- After a governance body is established, the MLS would register the agreement and issue a certificate, provide information resources as well as training for kaitiaki, record unclaimed or retained distributions on the governance register, and provide 'support to process' if the governance body wanted to sell or dispose of land.
- For owners wanting to make decisions without a governance body, the MLS would be responsible for notifying owners, helping to manage or facilitate the meeting of owners (including practical help with phone or internet participation), appointing a returning officer to receive and count the votes, and notifying owners of the outcome.
- For trusts and incorporations that had to transition to rangatōpū, the role of the MLS was 'to be further scoped'.
- For unutilised land, the MLS could appoint a managing kaiwhakarite after first attempting to 'activate' owners through direct and public notice, and ensuring that there was 'reasonable potential for the land to generate return', not enough owners could be found to do anything, and development would not be incompatible with an 'existing lawful use'.
- Having appointed a managing kaiwhakarite, the appointment would be registered (detailing fees and reimbursements), and any income generated (after deducting fees, reimbursements, and income for operations) would be transferred to the MLS, which would hold it in trust for the owners.
- A managing kaiwhakarite arrangement could be

	All owners		Participating owners		
	By shares 75 per cent	By shares 50 per cent	By shares 75 per cent	By shares 50 per cent	By numbers 50 per cent
Removing status of Māori freehold land	x				
Converting to collective ownership	x				
Selling Māori freehold land	x				
Gifting Māori freehold land	x				
Exchanging freehold land	x				
Partitioning		x			
Leasing for 52 years or more			x		
Aggregating			x		
Cancelling aggregation			x		
Approving asset management plan			x		
Amalgamating				x	
Establishing a rangatōpū				x	
Approving a governance agreement				x	
Joining an existing rangatōpū				x	
Appointing another entity as governance body				x	
Changing a governance agreement				x	
Revoking appointment of governance body				x	
Changing name of land					x
Establishing a whenua tāpui					x
Change of status to Māori freehold land					x

Table 3.4: Decision-making thresholds as set out in the April 2015 discussion paper

terminated by the MLS (for a breach of a statutory obligation or term of appointment), or by the owners establishing a governance body.

- For intestate succession, the MLS could help prepare the application to establish a whānau trust, notify the application, refer any dispute to mediation, and certify and register the trust.
- For succession with a will, the MLS would register beneficial interests (if probate had been granted and the executor applied to the MLS to do so) or (if probate had not been applied for) register beneficial interests after the court made a decision.
- For disputes, the MLS would employ or contract kaitakawaenga, refer disputes to the kaitakawaenga, notify parties, record any agreement reached, and – if the dispute was not resolved – refer parties to 'further dispute resolution' or to the Māori Land Court.[573]

As noted above, the paper fleshed out what the Māori Land Service might do, but not how the services would be

provided, which agency or agencies might provide them, and what it might cost 'users'.

(3) *The 'key stakeholders' responses*

The stakeholder groups received the preliminary discussion paper on a confidential basis, only a few days before their meetings with the MAG on 21–22 April 2015. At least one organisation, the Māori Women's Welfare League, noted that this was insufficient time to prepare.[574] We note that, in respect of Maanu Paul's claim (at that time on behalf of the NZMC but adjourned), Mr Paul was not able to be at the meeting. The NZMC was represented by only one co-chair, Sir Edward Taihakurei Durie, and by Donna Hall and Steven Michener.[575]

In terms of the overall direction of the reforms, the NZMC, Te Tumu Paeroa, and the iwi leaders' technical advisers were broadly in support, although the NZMC felt that more needed to be done to support the 'ahi kā' and move Māori back to hapū ownership of land. As a result, the NZMC supported a greater role for post-settlement governance entities, which FOMA did not. FOMA was, however, in support of the reforms but felt that the 'current Act generally enables their members to meet their aspirations for their land' (which seems like a significant shift in position). FOMA considered that the reforms were more of a 'refinement' which would – hopefully – improve the administrative support and services provided by the Crown. The Māori Women's Welfare League felt that the 2013 review panel's five propositions were already being met under the current Act, and argued that repeal was unnecessary. In the League's view, it was still necessary to do a proper assessment of the Act. The ILG advisers repeated the ILG's earlier view that the new Act should become the 'tuakana' legislation for all matters affecting Māori land.[576]

All the organisations supported retaining the current thresholds for permanent alienation of Māori land. Support for the participating owners' model, however, was not unanimous. The League warned that it might empower a 'vocal few' to capture decisions about the future use of Māori land, and suggested that the safeguards were not sufficient. The NZMC considered that quorums – in the form of minimum numbers or a spread of whānau – would certainly be required. FOMA stated that non-participating owners were not in fact a barrier to land utilisation for its members, but supported 'initiatives to improve shareholder connectivity'.[577] FOMA also supported clearer and improved duties and accountabilities for governance bodies, as well as funding for training and capacity building. The NZMC agreed that owners should be able to make their own rules and governance arrangements.[578] FOMA objected, however, to the likely costs of existing trusts and incorporations having to transition to rangatōpū, and argued that the transition should be Crown-funded. The Māori Trustee and the ILG's advisers agreed with that point.[579]

According to TPK's minutes, only the League considered the managing kaiwhakarite problematic as a substitute for owner-appointed governance bodies.[580] The iwi advisers thought that it would depend on the external managers' terms of reference, and that more detail was necessary on this question, especially if forced alienations of Māori land might result.[581]

On the issue of mandatory mediation, the NZMC agreed that commercial matters were increasingly subject to specialist arbitrators rather than courts, and that 'state funded arbitration is the best option for the future'. The League agreed that a mediation service would be useful but could be established under the current Act. FOMA was concerned about 'what programme, resources, skills and timeline are required to implement the Māori Land Service', including the dispute resolution service.[582] FOMA feared that the Crown would not provide sufficient resources or effective implementation, and that the MLS might fail in all its crucial roles. Reservations were expressed about LINZ's ability to deal with Māori land and owners. FOMA stressed that the current court processes were affordable, and the MLS's enhanced services needed to be just as affordable for Māori owners. The ILG's technical advisers agreed that more information was vital as to how the MLS would work and be resourced. This seemed to be a weak point or possible risk with the reforms.[583]

In regard to the Māori Land Court's role, the NZMC suggested that the court's current jurisdiction had been necessary because of past lack of good governance arrangements – 'but that time had passed'. The court should be the guardian of process, not the decision maker. FOMA agreed that the court should have less of a role so that owners' tino rangatiratanga could be exercised, so long as 'best practice' governance prevailed, with the court focused on judicial matters. The League, on the other hand, expressed concern about removing the court's 'oversight'.[584]

According to TPK's minutes, the Māori organisations did not highlight any concerns about the proposed arrangements for successions, although FOMA thought that more options were needed to prevent fragmentation.[585]

Going beyond the Bill, the Māori 'leadership groups' raised the long-standing issues of valuation, rating, landlocked land, the RMA, public works takings, and local government processes. The ILG's advisers

> strongly recommended that the scope of the reform be expanded to include all matters that affect holding, using and developing Māori land. The 2014 resolutions of the Iwi Chairs Forum were tabled. It was also emphasised that in the August 2014 joint consultation by the IAG and TPK that Māori land owners consistently requested that the reform include all issues which affect their land holdings, including: rating, Public Works Act (PWA), Local Government Act (LGA) and Resource Management Act (RMA).[586]

The ILG recommended that rates should not accrue if Māori land was not being used, and that valuation for rating purposes should take account of the actual use of the land, not its 'theoretical highest and best use'.[587]

In respect of financial matters, FOMA raised the issue of taxation, and the effects the changes might have on tax liabilities. This was an important issue that did not appear to have been considered.[588] The Māori Trustee's concern about finance was that the Bill would not really improve the access of Māori landowners to development capital, yet the finance would have to come from somewhere.[589]

As a final point, we note that consultation with the sixth key stakeholder group, the Māori Land Court judges, did not happen until 22 May 2015. It thus came after the MAG had formally reported to the Minister with its advice, and just five days before the Exposure Bill was released. Apart from some indirect references made later in their formal written submission, we have no information as to what feedback the judges gave, or whether any changes were made as a response.

(4) *The Ministerial Advisory Group's report and advice – what changes were recommended?*

The MAG clearly appreciated and shared stakeholders' concerns about whether the MLS would be able to perform all its functions, whether it would be properly resourced, and what it might cost 'users'. The MAG also agreed that barriers to utilisation, such as rating and landlocked land, needed to be dealt with *now* as part of the current reforms. And the MAG certainly took on board the concern about what transitioning to rangatōpū might cost trusts and incorporations, which FOMA had estimated at between $12 and $60 million.[590]

On the basis of official advice and consultation with the five Māori 'leadership groups', the MAG reported its recommendations to the Minister on 13 May 2015. Some of its recommendations had already been incorporated in the Bill by the Crown, as noted above in section 3.5.1, and will not be repeated here.

In general, the MAG agreed with the 'overall philosophy of increasing land owner autonomy', and it supported the proposed reforms – as did the NZMC, the iwi advisers, FOMA, and Te Tumu Paeroa.[591] In particular, the MAG supported the participating owners' model as the 'key intervention made by the Bill to enable the use and development of Māori land to make decision making more practicable and achievable'.[592] Nonetheless, the MAG agreed that quorums would be a necessary safeguard, and recommended a sliding scale depending on the number of owners in a block:

- with 10 or fewer owners, all must participate;
- with between 10 and 100 owners, at least 10 owners and 25 per cent of the shareholding must participate;

- with between 100 and 500 owners, at least 20 owners and 25 per cent of the shareholding must participate; and
- with more than 500 owners, at least 50 owners and 10 per cent of the shareholding must participate.[593]

The other critical aspect of the Bill was its reliance in so many areas on the services to be provided by the MLS: 'the MAG considers that the MLS is critical to the ultimate success and perception of this reform effort'.[594] On the basis of the information provided so far, the advisory group was not confident that 'the breadth of services by, and timeline for delivery of, the MLS will meet land owner expectations'. The MLS would need to provide a single entry point to all relevant services and information, and it would also need to provide practical help to owners with respect to development opportunities for under-developed land. The MAG understood these functions to be 'currently out of scope', and was clearly concerned that the MLS would not be fit for purpose.[595]

Further, the MAG identified the need for the Crown to provide resources to 'build governance and leadership capability for Māori land owners'. Without such resources, the reforms would fail. 'We believe', reported the MAG, 'that the Crown will need to embark on a major programme to support such an initiative.'[596] Further, the MAG recommended the Crown to provide development funding and services. TPK and MPI had both identified the opportunity for development, and such programmes would help meet the Crown's regional and national economic growth objectives.[597]

As noted, the MAG shared concerns about the transitional costs that might be forced on blocks with current governance entities. It recommended that the Crown provide both transition funding and advisory support, and make this a public commitment before the wider consultation.[598] It also sought information from officials as to whether the proposed changes to governance entities would 'create significant tax implications'.[599]

One part of the proposed Bill was unanimously rejected by the MAG.[600] 'Feedback received to date', advised the group, indicated that the managing kaiwhakarite model was 'inconsistent with land owner expectations'. The MAG recommended that 'the provisions in the Bill that provide for external managers who are appointed without owner consent as currently proposed either be removed, or be significantly narrowed'.[601]

The MAG was not, however, able to reach unanimous agreement on the collectivising provisions. The majority supported the 'somewhat controversial' proposals that Māori customary land could not be converted to individual freehold shares, that whānau trusts would be compulsory in cases of intestacy, and that owners could convert freehold land to collective title.[602]

Importantly, the MAG was strongly supportive of stakeholders' requests that the Bill include practical legislative solutions to a number of outstanding barriers to using Māori land.

In particular, it had been 'widely recognised that rates arrears are the most significant disincentive for the development of Māori land'.[603] The MAG recommended that the Crown include a rating exemption where Māori land was unutilised, and it provided a model clause for this from the Orakei Act 1991. Another option was a development incentive in the form of rates holidays. Other possibilities were the cancellation of all rates arrears on Māori land, the use of the Māori Land Court or another special body to act as the valuation authority for Māori land, and the development of a unique methodology for valuing Māori land.[604]

In respect of landlocked land, the MAG recommended giving the Māori Land Court, the MLS, or iwi and hapū authorities the power to enforce access to landlocked land. The Crown could create a fund to compensate adjoining landowners. In particular, many Māori land blocks are landlocked by Crown lands, and the Crown could insert a clause in the Bill to grant 'enduring access' across Crown lands 'through a simple process'.[605] At the same time, paper roads and unused designations, which were 'practical barriers to pursuing development opportunities', could be removed by granting the court power to do so. Such a clause (and one for enabling access via Crown land) would not be 'technically difficult to draft'.[606]

Finally, the MAG recommended that the Crown provide national direction to local government on RMA planning

in respect of Māori land, and anticipated making future recommendations about the effects of the RMA.[607]

(5) *How many of the MAG's recommendations were adopted?*

When the Exposure draft of the Bill was released at the end of May 2015, clauses giving effect to the MAG's recommendations about landlocked land, paper roads, and rating had not been included.

TPK advised hui participants that the 'legal aspects' of landlocked land would be 'addressed through the Bill with the assistance of expert legal advice'. But the 'practical steps' to address the problem would be tackled by the new Te Ture Whenua Māori Network over the next four years. It is not at all clear what this meant.[608] The simple clause to ensure access across Crown land was not difficult to draft, the MAG had suggested, but was not included in the Bill.

Rating and valuation was described as 'on the current work programme for Te Puni Kōkiri', and work would be 'progressed in parallel' with the Bill so as to have 'an agreed solution by the time the new legislation comes into force'.[609] The MAG had proposed a number of remedies of varying effect, ranging from a rates holiday to the wiping of all arrears to a whole new system of valuation. One solution, a clause modelled on the Orakei Act 1991, was not – as recommended – included in the Bill. TPK did not describe these options or advise which, if any, of them were the subject of parallel development.

TPK's consultation material in May 2015 also noted that the Public Works Act and RMA needed to be considered, but those issues fell outside the Māori development portfolio. Hence, TPK was 'not in a position to put timeframes on the consideration of this issue'.[610] This did not amount to an undertaking that there would be any progress on urgent matters identified by the MAG, and by Māori during consultation in 2013 and 2014 (and, indeed, much earlier). The MAG's recommendation of a simple clause giving the court power to remove unused designations (including paper roads) was not mentioned.

Also important, the Crown had not removed the arrangements for managing kaiwhakarite, as the MAG had unanimously recommended.

While the MAG was providing advice, the Crown was making the decisions. The process was Crown-led at this point, despite the reliance on an independent panel of experts to consult stakeholders and give advice. In 2013, the independent review panel had come up with its own proposals, which it then consulted on publicly with Māori, receiving feedback at hui and from written submissions, before providing advice to the Crown as to what Māori wanted. The Crown accepted that advice in toto. In 2015, the MAG responded to a draft Bill and well-advanced policy by consultation restricted to the leaders of key stakeholder groups on a confidential basis, and then provided its advice. The Crown accepted and rejected that advice as it saw fit. We do not consider, therefore, that the use of an independent advisory group in early 2015 meant that the process was not Crown-led. We distinguish it from the independent review panel process in 2013.

The MAG's recommended quorums for participating owners were accepted by the Crown and inserted in the Bill.[611] In addition, however, there was a further clause allowing the process to be rerun, waiving the quorum requirements altogether, if the quorum could not be reached at the first meeting.[612] This was not a possibility contemplated in the MAG's report of 15 May 2015. John Grant told us that the 'second chance provision came from discussion with the Ministerial Advisory Group when they were considering, as they have done now several times, the thresholds'.[613]

Satisfying the MAG's concerns about the MLS was not possible at that time, as so many decisions about the MLS were yet to be made. Nor could the taxation implications of the new governance bodies be resolved quickly, but reassurance was given that the MAG's concern was being addressed. The May 2015 consultation document stated that TPK was working with the Inland Revenue Department to ensure that 'Māori Authority tax status is not affected by the reforms'.[614]

No assurance was given, as recommended, that the Crown would fund or even assist with the transition costs for the 6000 or so entities that would have to become rangatōpū.[615] Nor did the May consultation document promise funding for the training of Māori land governors,

as the MAG had recommended. Training had been mentioned as an MLS role in the April pre-consultation material, but it was left out of the May public consultation documents.

The Government did promise development funding. It said it was 'committed to providing tangible support to Māori land owners', so as to 'increase the capability of Māori land owners to realise their aspirations for their land'. The Minister had just announced that $12.8 million would be provided to a new Te Ture Whenua Māori Network over four years, to help improve the productivity of Māori land.[616] This was a start towards meeting the MAG's recommendation about development finance but it fell short of what the 2014 MPI report had said was needed. Marise Lant commented:

> I cannot help but notice that no $825 million has been transferred from Government or announced on budget night for investment in our land and yet this is the major problem for the development of our land – lack of capital.[617]

Overall, some of the MAG's key recommendations had not been actioned when the Crown took its Exposure Bill out for consultation at the end of May 2015. The managing kaiwhakarite provisions, and the lack of any solution to long-standing problems such as landlocked land, were to provoke much concern among Māori participants in the 2015 consultation. Indeed, the claimants in our inquiry argued that the Crown's reforms had missed the entire point of what was stopping Māori from developing their lands.[618]

3.5.3 Nationwide consultation with Māori: the June 2015 hui and call for submissions

On 27 May 2015, the Crown released the exposure draft of the Bill to the public, accompanied by a consultation document 'describing the reform proposals'.[619] On 29 May 2015, a hui consultation pack was finalised with a copy of the Crown's presentation, and materials for workshop discussions. It is not clear when the consultation pack was provided to hui participants. The draft Bill itself was the primary source of information, and we have summarised its contents in chapter 1. The consultation material provided a useful overview, and the 'frequently asked questions' addressed some key concerns.[620]

The hui were led by members of the Ministerial Advisory Group, assisted by officials and workshop facilitators. A total of 23 hui were held in two streams (see table 3.5).[621]

The first point to note about the consultation is the astonishing speed with which it took place. The Exposure Bill and consultation document were released on 27 May 2015. All 23 hui were held within three-and-a-half weeks from that date. More than half had been held less than a fortnight after the release. The first six were held within a week of the release. This is not a sound basis for informed consultation, especially given the length and complexity of the released materials, and the importance of the subject matter.

Crown counsel was critical of the claimants' view that the exposure draft 'came a little bit out of nowhere', arguing that this was not sustainable in light of the 'iterative process' that had taken place since 2013.[622] But the April 2015 discussion paper and pre-consultation process had been restricted to the leaders of five key stakeholder groups and had been confidential. Māori in general had received *no information* since the high-level Powerpoint slides at the hui back in August 2014. And suddenly they were confronted at the end of May 2015 with a 282-page Bill, a 65-page discussion document, and a 42-page information pack. They had very little time to read and assimilate this material, take professional advice, hui among themselves, and prepare for the consultation hui – some had less than a week.

In our view, the Crown is not consulting in good faith if it limits the Treaty partner's ability to respond in this way. We set out the *Wellington Airport* case's standards for consultation in section 3.4.5(3). As Crown counsel noted: 'Those being consulted must know what is being proposed, and have a reasonable and sufficient opportunity to respond to the proposal.'[623] The Crown is 'required to ensure that Māori are "adequately informed so as to be able to make intelligent and useful responses", as was found in the *Wellington Airport* case'.[624] The Crown's June 2015 consultation hui do not meet these standards.

Hui venue	Date	Number attending
Stream 1: Northland, Auckland, and Central North Island		
Tāmaki Makaurau	2 June	21
Tāmaki Makaurau	2 June	34
Tauranga	3 June	41
Whakatāne	3 June	51
Whangārei	4 June	62
Kaikohe	5 June	48
Kaitaia	5 June	34
Hamilton	8 June	85
New Plymouth	17 June	94
Wanganui	18 June	87
Taupō	22 June	57
Rotorua	22 June	83
Stream 2: South Island and East Coast		
Nelson	2 June	34
Christchurch	3 June	31
Hokitika	4 June	13
Invercargill	5 June	12
Wellington	8 June	88
Te Kaha	15 June	52
Tokomaru Bay	16 June	71
Gisborne	16 June	122
Wairoa	17 June	80
Hastings	17 June	71
Dunedin	19 June	19

Table 3.5: Hui led by members of the Ministerial Advisory Group

We are baffled as to why so little time was given. Mr Grant suggested that the hui were

> held early in the consultation process in order to give people a better appreciation of the reforms and the bill and better to inform those who wish to make a [written] submission in advance of completing those submissions.[625]

This statement does not really explain the *timeframe*, which gave attendants at the first six hui less than a week to consider around 400 pages of highly technical information. The remainder of hui participants only had up to an extra fortnight or so, with written submissions due just nine working days after the final hui.

A redeeming feature, however, is that a longer time period was allowed for Māori groups, organisations, and individuals to come to grips with the material and seek professional advice before making considered written submissions. This only happened after protest from Māori. Initially, submissions were to be filed by 3 July 2015, some five weeks after the release of the Exposure Bill. John Grant noted: 'Early in the consultation process there was a call from a number of participants for more time to consider the Bill and complete a submission.'[626] The Minister agreed on 15 June to extend the period for submissions to 7 August 2015, allowing an extra month to prepare submissions. While this was still only just over two months in total from the public release of the Bill, it was certainly better than the original timeframe.

Crown counsel submitted:

> The evidence demonstrates that the claimants' concerns regarding the 2015 consultation hui, in particular that the hui were rushed and Māori were not sufficiently informed of the proposals, are unfounded.[627]

The evidence relied upon by the Crown for this point is that:

- hui participants broke out into workshops so that feedback about the dense Bill could be obtained on a range of specific features;
- the hui were well-attended, there was considerable discussion, and the small groups generated 3,477 written comments; and
- holding the hui 'early' meant better informed written submissions, demonstrated by the filing of 392 such submissions.[628]

We accept that holding the hui well before written submissions were due would make for better informed submissions. But the original timeframe for written

submissions meant that insufficient time was set for *both* the hui and the submissions. It was only after a change to the timetable (as a result of protest) that the holding of the hui could be described as 'early' in respect of the due date for written submissions.

Nor do we accept that the structuring of the hui into general sessions and workshops, which generated a large number of comments for the Crown and the MAG to consider, meant that hui participants were properly informed and enabled to participate in meaningful consultation. It simply meant that the hui were structured in such a way as to obtain feedback across a number of topics in relation to a wide-ranging Bill. That is a good thing in itself – about three hours were provided for each hui, so a way had to be found to ensure that feedback was not restricted to just a few of the relevant matters. But this does not mean hui participants had a fair opportunity to give properly informed feedback or take part in the hui with sufficient knowledge and understanding of the draft Bill and its implications for their taonga tuku iho.

Claimant witnesses who participated in the hui, including Marise Lant, Owen Lloyd, and Kerensa Johnston, were very critical of the consultation process.

Kerensa Johnston, for example, noted that significant problems were identified even on the basis of what was known at the time of the hui. In particular, the compulsion for thousands of Māori entities to change their governance structures was completely out of step with the ideal of promoting 'owner autonomy'. Ms Johnston told us: 'This raises the question – what other changes are out of step with the objectives, which have yet to be identified through the current process?'[629]

Ms Johnston argued that the problem with forcing trusts and incorporations to become rangatōpū was relatively obvious to the larger, comparatively well-resourced organisations, which were

> better placed to identify problems with the bill and advocate for change. This is not the case for many land owners, especially owners of land that is unmanaged with no legal or governance structure in place or for those owners who have limited or no access to expert advice or a means to make submissions. Given more time and a robust and genuine consultation process with a broader range of owners, other problems with the bill, and alternative solutions are likely to emerge.[630]

Ms Lant told us that concern was widespread at the hui, especially about the compressed timeframe and the fact that hui participants were under-prepared and lacked independent advice to inform their participation:

> I also know that the time frames caused huge concern up and down the country as did the content of the Bill. Many people at different hui argued they needed more time, but particularly more support to properly engage with the proposed changes. I know this because I had friends, former colleagues or family at most of these hui.[631]

In addition to this large-scale problem with the hui, Ms Lant was also critical of the lack of detail provided about the Māori Land Service and the Te Ture Whenua networks. In a rare agreement between Crown and claimant witnesses, Ms Lant and Matanuku Mahuika both observed that the MLS was absolutely critical to the success of what was being proposed in the Bill. Yet it remained, as Mr Mahuika put it, 'an area of uncertainty and people are rightly concerned that the support aspect of the new regime is not yet clear enough'.[632]

Ninety submissions in August 2015, from 23 Māori land trusts, 11 incorporations, three iwi organisations, four national Māori organisations, six local Māori organisations, two professional associations, two councils, one other organisation, and 38 individuals, were almost all critical of the consultation hui. They felt that the process was too rushed and that it was still not supported by the kind of research and analysis that would justify such a 'large-scale overhaul of the legislation'. In the view of these submitters, the 'lack of a proper consultation process' was 'a violation of the Treaty of Waitangi'.[633]

Ms Lant's evidence contained a number of criticisms about how the MAG and officials conducted individual hui.[634] We do not need to consider those. The main problem was that Māori had too little time and too few

resources to come to grips with the details and implications of the Exposure Bill, and this prevented fully informed and meaningful consultation. Even so, Māori did bring their own knowledge and experience to the hui and took the opportunity to express their views on some of the headline issues. These included the merits of Crown-appointed managing kaiwhakarite and the proposed dispute resolution service. We will consider that feedback shortly. For many issues of practical implementation, however, the consultation process ran up against the insuperable problem that no one knew (including the MAG and officials) how the MLS would really work or what it might cost Māori. In one sense, this, too, provided hui participants with an opportunity for input to the design of the MLS. But an evaluation of the key features of the Bill required information about the MLS that simply was not available.

In our view, what rescued the 2015 consultation to a significant extent is the extra time that the Minister allowed for written submissions and the opportunity taken by many Māori land trusts, incorporations, organisations, and leadership groups to make submissions. Ms Lant also assisted organisations and individuals to have their say by providing her template submission and online petition, which, at the time of closing submissions, had attracted 1,537 signatures.[635] As a result, some 3,000 pages worth of submissions were made, providing vital Māori input on the proposed reforms and the details of the Exposure Bill.[636]

We turn next to consider the responses of Māori to the consultation materials provided in 2015, including the Exposure Bill.

3.5.4 What were the responses of Māori?

(1) *What messages did the Crown take from the June 2015 hui?*

According to John Grant's evidence on 3 November 2015:

> Overall, the hui were well-attended, face-to-face, open and informative. They provided forums in which there was a great deal of discussion and debate and, despite the concern about the small-group workshops raised by Marise Lant, those facilitated workshops generated 3,477 written comments extensively covering the topics under discussion.[637]

As outlined above, each consultation hui began with participants being broken into workshops to consider questions on three aspects of the reform. Participants were asked:

- How effective do you think the new governance arrangements are?[638]
- How appropriate and effective do you think the participating owner concept will be?[639]
- What should the Māori Land Service: Keep doing? Stop doing? Start doing?[640]

These workshops were followed by an open floor session, where participants could raise their own particular issues.

On the effectiveness of the Bill's new governance arrangements, some hui participants considered that the new provisions would provide greater autonomy for owners compared to the current 'patronising' process. They acknowledged that 'for the new model to be effective, owners would require assistance' and that its success would also 'depend on the effectiveness, skills and expertise of the kaitiaki'. Other participants were concerned, however, that there seemed to be no basis for the proposed changes and considered that the current system was working well. They raised concerns about the corporate nature of the new governance models and questioned their suitability for the Māori context. Hui participants were also concerned about the complexity and cost of the new regime. TPK noted that '[s]ome people wanted the Māori Land Court to continue its involvement as it was working well' but also noted that others wanted less court involvement in decision-making, particularly because of time and cost.[641]

Hui participants also raised a number of other issues about the new governance arrangements, including:

- While some hui participants supported not having to go to the court to have their governance bodies registered, 'others wanted the Court to continue to be involved to ensure that governance bodies were set up properly.'[642]
- On the Bill's provisions relating to kaitiaki, hui

participants emphasised the importance of the Bill setting out minimum competency criteria, but differed in their views on who should be eligible to serve as a kaitiaki. Hui participants expressed concerns about the adequacy of governance training, and called for the Crown to meet the costs of an improved course. There was a call for 'a process that enabled owners to remove ineffective or absent/inactive kaitiaki easily', though disagreement about the extent to which the Māori Land Court should be involved in that process.[643]

- The transition process was a point of concern for several hui participants, who questioned whether the three-year transition period was realistic and also called for the Crown to cover the costs of transition.[644]

On the appropriateness and effectiveness of the participating owners model, some hui participants expressed the view that the current decision-making process was not working, particularly for under-utilised blocks, and that non-participating owners held too much power. They called for the Māori Land Court's involvement to be limited to process, rather than assessing the merits of owner decisions. Hui participants acknowledged that there were risks with the model and called for appropriate safeguards to be in place. Others, however, thought that the participating owners model was little different to the current decision-making system. Several were concerned that 'whānau groups with larger shares will dominate decision making'. There were also concerns about how the model would work for blocks with large numbers of owners.[645]

In addition, hui participants discussed a number of other elements of the participating owners model, including:

- Hui participants emphasised that the difficulty of identifying and contacting owners was currently one of the biggest hurdles for successful land management, and would also impact the success of the participating owners model. There was a view that the Māori Land Service needed to support governance bodies to identify and locate owners.[646]
- There was general support for quorum and decision-making thresholds, though there were differing views as to whether the Bill's thresholds were set at the right level, particularly for establishing a governance entity, land management plans, and dispositions.[647]
- TPK reported that '[a]lmost everyone agreed the key to the success of this aspect of the reform was the high level of safeguards provided to protect the interests of non-participating owners and avoid the underhand tactics of some owners'. Some hui participants suggested that 'participating owners should be accountable for their actions, particularly to non-participating owners' or that the Māori Land Court be given a power of review.[648]

On the Māori Land Service, TPK recorded that '[m]ost people were supportive' of the proposed service. Hui participants 'liked that there would now be a dedicated entity for Māori land owners that would advocate on their behalf' and expressed 'a strong view that Māori need a single, separate body to look after their land interests: the current multi-agency approach is not working'. Hui participants were concerned about the funding and costs of the service, and thought that its services needed to be cheaper than the current system. Others were concerned that the service would duplicate services already in place and were uncertain about the roles and accountabilities of the agencies involved in delivering the Māori Land Service. Hui participants were divided about the quality of the services provided by the Māori Land Court, with some calling for the court to be better resourced by the Crown.[649]

Hui participants also raised a number of specific issues with the Māori Land Service and its potential scope, including:

- TPK reported that '[t]here was a high degree of support for the Māori Land Service to provide dispute resolution services' and 'a strong view that these services need to be free'. Some hui participants were concerned about the process being compulsory and 'recommended that, in appropriate cases, parties should be given the option of' going straight to court.[650]

- Beyond its core duties, hui participants also considered that the Māori Land Service should provide 'social support (employment training, social services and housing), economic development, legal advice and training and education'.[651]
- Hui participants were concerned about the location of the Māori Land Service and suggested that it 'needs greater coverage than that currently provided by the Māori Land Court and Te Puni Kōkiri'. The service should be regionally based but also mobile, and co-location with the Māori Land Court should be an option. Hui participants were also concerned that: 'The institutional knowledge of the current arrangement should not be lost.' Services should be provided face to face, by telephone, and online.[652]

In addition to the three main topics under discussion, hui participants addressed some of the other major elements of the exposure draft. 'A number of people', TPK noted, had called for the preamble from the 1993 Act to be retained in the new Bill.[653] On the Bill's provisions for succession, hui participants generally supported the proposed process. The compulsory whānau trusts on intestacy, however, were viewed as taking 'away a person's choice to succeed and, more importantly, were inconsistent with the notion of whānau'.[654] As for the managing kaiwhakarite regime, TPK noted that while there was 'some support' for the proposal, 'people were generally against this idea'. Hui participants considered the proposal would undermine the tino rangatiratanga of owners. If the proposal were to go ahead, it would need tighter safeguards.[655]

As they had in 2013 and 2014, hui participants again raised the barriers to development which were not being addressed by the new Bill. These barriers included rates and valuations, landlocked land, and the Bill's interaction with other legislation.[656]

(2) *What were the responses of Māori in the written submissions?*

As we noted above, the extreme lack of time given to Māori hui participants to consider and understand the ramifications of the Exposure Bill was mitigated by the Crown's agreement to provide a longer timeframe for written submissions. In the event, the Crown received 392 submissions from Māori individuals, groups and organisations, which were provided to the Tribunal and claimants as part of the discovery process. These submissions really mark a turning point in the process of review and reform of the 1993 Act.

In the 2013 and 2014 consultation rounds, it appeared that Māori were generally in support of what the review panel and then the Crown, FOMA, and ILG were proposing. Cracks started to appear when the ICF's ambitious resolutions were passed at the end of August 2014, and when the MAG consulted key Māori leadership groups in April 2015. But it seemed at that stage that only the Māori Women's Welfare League was strongly opposed to the reforms. Further cracks emerged in the June 2015 hui, when a significant number of hui participants were either opposed (as at the Gisborne hui) or expressed concerns about the MLS and key features of the Bill.[657] But it was in the August submissions from such bodies as FOMA, OMA (the Organisation of Māori Authorities) and others that widespread opposition to at least aspects of the reforms was revealed, after opportunity to study the Bill in detail. At the same time, Marise Lant and the Wai 2512 claimants pursued an urgent hearing from the Tribunal, which was granted on 30 September 2015 (see chapter 1).

In her evidence to the Tribunal, Marise Lant provided her assessment of the submissions, suggesting that 'opposition to the Bill was voiced from Muriwhenua to Murihiku, and from Taranaki to Wharekauri-Rekohu'.[658] She also suggested that the Crown could not point to any iwi who were formally in support of the Bill, whereas at least five iwi organisations had opposed the Bill in their submissions: Ngāti Mutunga (Wharekauri–Rekohu), Muriwhenua Hapū, Te Rūnanga o Te Rarawa, Te Huinga o Ngā Hapū o Whangarei Terenga Paraoa, Te Whānau ā Apanui, and Te Rūnanga o Ngāti Awa. A series of 'Māori representative organisations' either opposed or did not support the Bill, including FOMA, OMA (representing some of the largest Māori trusts and incorporations), the Tairāwhiti and Taitokerau District Māori Councils, the

Māori Women's Welfare League, and the Taheke Māori Committee.[659]

'Most damning', Ms Lant added, were the number of Māori landowner trusts and incorporations who opposed the Bill or at least did not support it (or aspects of it). She listed 28 major trusts and incorporations whose submissions fell into this category. Finally, Ms Lant argued that the 'overwhelming' view of Māori legal or Māori Land Court practitioners was in opposition. Under that heading, she noted Te Hunga Rōia Māori o Aotearoa, various prominent Māori lawyers, and the Māori Land Court judges and staff.[660]

Thus, the claimant's analysis of the submissions was based on the weight within Maoridom (and the Māori landowner constituency) of those who said they either opposed or did not support the Bill or key aspects of it. From this analysis, Ms Lant concluded that the 'significant majority of us oppose[d] this draft Bill'.[661]

The Crown's analysis of the submissions focused more on issues than representivity. Marise Lant's template submission, which was filed by 141 individuals, nine Māori land trusts, and three members of a whānau group, was counted as a single submission.[662]

TPK judged that there was 'support for the aims and aspirations of the reform, which was perceived to overcome numerous difficulties of the current Act'.[663] There were, however, many who expressed that support with reservations or a need for more information, and also many opposed to the reforms who wanted to keep the current Act. Opponents stressed that problems like rating were worse than those addressed by the Bill, which, they said, could be managed by more robust administration and building owner capability.[664] Some submitters supported the reforms' focus on land development, others noted that not all owners wanted to develop their taonga tuku iho, and there was a cultural tension between what Māori wanted and what the Bill facilitated.[665] Perhaps reflecting that tension, some submitters were concerned at the disappearance of the 1993 Act's preamble, and felt that the proposed Bill did not capture its important guiding principles – in particular, the importance of tino rangatiratanga was reduced.[666]

The most important aspect of the reform was, as the MAG noted in its May 2015 report, the participating owners model, and the freedom which this was designed to give Māori owners to make their own decisions.[667] On this key part of the reform, however, TPK observed that '[v]iews on the participating owners model were mixed, with slightly more support than opposition'.[668] This was a significant reversal of the situation prior to 2015, based on considered analysis of the Bill and its ramifications for owners.

Supporters continued to believe that the participating owners model would 'put decision-making back in the hands of owners allowing them to make effective decisions about their land'. But, on the Crown's own analysis of the submissions, support and opposition to replacing Māori Land Court safeguards in this way was evenly split. One reason for this was:

> The potential for minority groups to hijack the decision-making process was seen as a serious issue. This may lead to conflict between owners, disempower some whānau members and alienate them from their whenua.[669]

Many submitters wanted Māori Land Court protections restored to the Bill, and the deletion of the 'ability to hold a second meeting if the required quorum of participating owners was not met'. This latter provision in the Bill seemed to make the participation safeguards pointless.[670]

TPK reported that the Bill's 'proposals around disposition were seen as easing the ability to sell land, especially when combined with the removal of the court's ability to consider the merits of the sale and status change, and the shift of power to majority shareholders'.[671] This was a vital matter. Support and opposition were at 'similar levels': 23 per cent in support and 27 per cent opposed (with another 51 per cent expressing concern).[672] Views were also 'polarised' in respect of the model's thresholds for decision making. Some were concerned and wanted higher thresholds, while others 'agreed with them in principle'. Concerns were also raised about 'the length of time for which Māori land could be leased', and about how exchanges and amalgamations would be decided.[673] The ability of 75 per cent

of participating owners to make long-term leases was seen as a way of making virtual alienation easier.[674]

Thus, submitters appeared evenly split between support and opposition in respect of the participating owners model, the arrangements for disposition and sale, and the thresholds for decision-making. Another element, as important as this even split between support and opposition, was the other submitters who expressed concern about the proposals – a point to which we will return shortly.

There was, however, general disagreement with the managing kaiwhakarite proposal. TPK did not mention any support for Crown-appointed external managers. This proposal was seen as 'patronising', and concerns were raised about the powers of kaiwhakarite, the lack of oversight by the Māori Land Court, the length of their appointment, and the general fear that land alienations would result. Submitters also noted that the imposition of external managers to develop land was contrary to the whole idea of supporting or empowering Māori owners to be 'independent and self-sufficient'. There were many reasons why owners did not or could not engage, and so submitters called for the kaiwhakarite provisions to be removed from the Bill.[675]

TPK recorded significantly greater support than opposition for the proposed new administrative process for successions, but also noted fears that treating successions administratively might disenfranchise some owners. The 'one size fits all' approach might not be appropriate, and some submitters wanted the Māori Land Court to continue to deal with successions (but with more resources). Again, submitters were concerned that the Bill actually undermined its avowed aim of owner autonomy, this time in connection with the compulsory establishment of whānau trusts if an owner died without a will.[676] There was disagreement over whether whāngai should be able to succeed in cases of intestacy.[677]

Thus far, on TPK's analysis, there had been significant opposition to the central concept of the participating owners model, general concern or disagreement with arrangements for disposition, polarised views on decision-making thresholds, general opposition to compulsory measures (managing kaiwhakarite and 'forced' whānau trusts), and significant concern about losing Māori Land Court protections in respect of both dispositions and successions.

Submitters were also generally opposed to key features of the new governance model. The idea of best practice governance structures and a model governance agreement would, it was felt, help more whānau to engage with their lands. So would simplifying the process for establishing a governance body. But the proposal for a 'one size fits all' rangatōpū was viewed as 'too assimilatory in nature'.[678] It failed to distinguish between the different requirements of large and small blocks, and did not allow for the fact that there were well-functioning trusts and incorporations already operating successfully under the current Act. In particular, the element of compulsion was resisted as 'unfair' and in breach of the 'mana whenua and tino rangatiratanga of those entities'. At the least, many submitters wanted the Crown to cover the costs of enforced transition to the new governance model.[679] It was also 'widely considered' that changing the structure of governance bodies would do nothing to actually achieve good governance. The true solution was seen as '[e]xtensive training schemes' for Māori land governors.[680]

Feedback was mixed on the proposal to refocus the Māori Land Court: approximately equal levels of support and opposition (with many also expressing concern, as we discuss below). Some submitters supported the proposal, and considered that approval in Māori land matters should come from the marae, not the court. Others felt that the court was an independent and impartial body which provided essential safeguards, and which was already able to carry out the roles envisaged for the MLS (with better resourcing). Those submitters argued that using the court would be a better, more efficient alternative to creating a whole new service. TPK noted overwhelming support for the court continuing to hold responsibility for the minute books.[681]

On the other hand, TPK identified that submitters were 'generally supportive' of the proposal for a dispute resolution process that empowered owners to settle their own disputes and that recognised tikanga in helping them to do so. But there were also calls for the court to have a

greater role in overseeing and coordinating the new dispute resolution process, as in the Environment Court. A minority of submitters preferred to keep the current court process.[682]

TPK also found that submitters were in general supportive of the MLS proposal, as it would provide greater infrastructural support for owners. But they only supported it if it would in fact make processes 'easier, cheaper to access and less time-consuming'. On the other hand, 'many' submitters thought that the court was already providing a similar service, that the 'case for change had not been made out', and that owners 'could not afford to lose the court and the protection it offers'. While the court was seen as providing certainty, the proposed MLS was uncertain: how would it operate in practice, and what level of funding would it have? Officials noted that submitters saw the structure and establishment of the MLS as 'critical to the implementation of the objectives of the Bill'. This was one reason why the level of uncertainty about how it might operate and what it might cost was so worrying to submitters, 'many' of whom preferred to have the court in this role.[683]

Whether it be the court or the MLS, there was a view that the service provided should be regional, face-to-face where needed, zero cost, and include training, education (of governors and owners), and development finance.[684]

Finally, echoing many earlier calls for action, submitters raised issues impacting on the development of Māori land that were not covered by the Bill: landlocked land, rating, public works, paper roads, and local government processes. A range of other relevant issues included industry levies, Treaty settlements, and the roles of the Māori Trustee.[685] TPK summarised:

> There was a view that undertaking reform in these areas would positively align with the overarching objectives of the proposed Bill and assist with achieving a more productive and innovative Māori economy.[686]

In particular, submitters felt that issues which were legislative in nature needed to be addressed, and should be addressed in the current reform process. This might include extending the court's jurisdiction to deal with probate and other matters relating to Māori land.[687]

Thus, the written submissions process revealed substantial opposition to the reforms or disagreement with key features of the proposed Bill. There was also, however, still a significant degree of Māori support for most aspects of the proposed Bill. There was a consensus of views, perhaps, about the need to remove managing kaiwhakarite and forced succession to whānau trusts, and to allow existing trusts and incorporations the freedom to retain their present (successful) arrangements if the owners wished. Support and opposition to other key features, according to the submissions, was about even, especially in terms of participating owners making decisions with the safeguards as currently proposed. Māori supported an alternative dispute resolution process and significantly enhanced services, but differed as to what the court's involvement should be. Submitters agreed that the services proposed for delivery by the MLS would be crucial to the success of the Bill; concern was widespread about how effective or costly that might be. And, as so often, there was a significant view that rating and other barriers to utilisation must be addressed as part of the reforms.

Percentages of support, opposition, and 'concern' were tabulated (see table 3.6). Matanuku Mahuika, Crown witness and member of the MAG, took the view that the crucial element in table 3.6 was the level of 'concern' about each key feature of the proposed reforms, rather than the degree of opposition. If the very substantial level of concern could be resolved by changes to the Bill, then the Crown might not need to consult further.[688] This was essentially the strategy that the Crown adopted in response to the high level of opposition or concern about the Exposure Bill and the proposed MLS.

(3) *How did the 'key stakeholder groups' of April and May 2015 respond?*

(a) *The iwi leaders' position*

Some submitters expressed their support for the ICF's 2014 resolutions and the need to give effect to them.[689] The ICF's resolutions also played a prominent part in the template submission. The ILG did not make a submission itself, nor

Category	Support (%)	Opposition (%)	Concern (%)
Whenua tāpui	50	10	40
Owner decision-making regime	32	27	41
Disposition of Māori freehold land	23	27	51
Administrative kaiwhakarite	17	58	25
Managing kaiwhakarite	18	55	27
New governance model	25	35	41
Successions	42	15	44
Disputes resolution	52	17	31
Refocusing the Māori Land Court's jurisdiction	33	34	32
Māori Land Service	30	10	60

Table 3.6: Te Puni Kōkiri's tabulation of submitters' support, opposition, and concern

did the ICF reach a position on the Bill. It intended to do so after the ICF hui in August 2015,[690] but the planned submission at the end of that month was never made.[691] The ILG held its own hui and sought direct collaboration with the Crown, as in 2014.[692]

On 20 July 2015, the Minister for Māori Development made a formal response to the ICF's resolutions of the previous year.[693] The Minister supported many of the iwi leaders' goals but noted the difficulty of addressing in Te Ture Whenua matters which came under the portfolios of other Ministers and would need wide discussions with local government and the general public.[694]

Transition costs and the crucial need for development finance had been raised 'a number of times in the consultation process to date', as well as by the iwi leaders, and the Minister would address those issues in his submission to Cabinet, prior to the Bill's introduction. Issues relating to landlocked land, rating, and valuation were complex and required advice from a range of experts, as well as discussions across central and local government. Nonetheless, the Minister hoped to have options for change to present to Cabinet while the Bill was still under discussion. He also wanted to try to deal with paper roads and the possibility of the Māori Land Court valuing Māori land (to address rating issues) in the present Bill if feasible.[695]

Thus, the ICF's constitutional position about who should make laws in relation to Māori land was not accepted. But the Minister assured iwi leaders that action would be taken if possible on rating, valuation, landlocked lands, paper roads, transition costs, and the provision of development finance, and that he looked forward to 'dialogue and cooperation' with the ICF.[696]

(b) *FOMA*

FOMA represented the 'largest collaboration of Māori landowner groups affected by the reforms'.[697] Its position therefore carried considerable weight. FOMA advised the Crown that it did not support the Bill in its current form, and feared that the Bill would not achieve the stated aims of the reform. Instead, FOMA's 'emerging' view was that amending the 1993 Act might achieve the intent of the reforms 'more easily and cost-effectively than the wholesale changes being proposed'.[698] If the reforms were to go ahead, they *might* achieve some of the desired ends, but only if properly resourced and implemented.[699] Importantly, FOMA also considered that without capability building on a major scale for Māori land governors, the Māori Land Court's protective jurisdiction was still required at present.[700] The Māori Land Court might also prove more effective than a split-agency MLS at delivering the enhanced services needed by Māori landowners.[701]

In particular, FOMA criticised:

- high compliance and implementation costs for all Māori landowners;
- insufficient certainty and lack of information in relation to the MLS;
- lack of clarity about the role of 'Chief Executive';
- the transition processes for existing trusts and incorporations;
- failure of the reforms to engage with the real issues (such as investment in capacity and capability building, and the need for long-term Crown financial investment in Māori land development);
- an increase in scope of political interference in the control and administration of Māori land;

- erosion and revocation of Māori property rights (in respect of the proposed decision-making thresholds and voting rights);
- the impact of the Bill on tikanga Māori;
- the reforms were not user friendly or easily understood and accessible by Māori landowners; and
- the impact of the Bill on Māori property rights (including where the Bill did not enable beneficial owners to have a choice about how their interests were dealt with).[702]

(c) *The Māori Women's Welfare League*

The Māori Women's Welfare League remained opposed to the reforms. The League's submission, as summarised by Prudence Tamatekapua in our inquiry, was:

- there was no rational basis for repealing the 1993 Act, and no proper or sufficient research had been undertaken into what worked and what did not in the current regime;
- repeal would undermine the experience Māori landowners had gained since 1993 in operating the Act, and the jurisprudence that had developed;
- independent court oversight was necessary to protect owners' rights and land retention, but was being replaced by a system that empowered Crown agents and certain owners to make decisions that could disenfranchise others; and
- other, more important reforms are required, such as changing the RMA.[703]

(d) *The New Zealand Māori Council*

As foreshadowed in the 2013 submission of the NZMC to the review panel, the District Māori Councils were not unanimous as to the position the NZMC should take. The NZMC, newly elected in July 2015 as a result of triennial elections, did not make a submission. Two of the District Māori Councils, Raukawa and Aotea, made submissions supporting the Bill. Two other councils, Te Taitokerau and Te Tairawhiti, made submissions in opposition.[704] The chairpersons of those councils, Rihari Takuira and Owen Lloyd, gave evidence for the claimants in our inquiry. Maanu Paul, co-chair of the NZMC and chairperson of the Mataatua District Māori Council, pursued a claim in this Tribunal, although his district council did not make a submission as part of the June–August 2015 consultation.

(e) *The Māori Trustee and the Māori Land Court judges*

Although the Māori Trustee and the Māori Land Court judges have been identified as key stakeholders by the Crown, the views of those bodies are not 'Māori' views in the sense of consultation between the Crown and its Māori Treaty partner. We do not, therefore, consider their positions here.

3.5.5 What changes did the Crown make in response to the consultation?

By July 2015, the Minister's formal response to the ICF showed that officials were already working on rating, valuation, and landlocked land, with a view towards having options to put to Cabinet along with the Bill (to be introduced in October 2015). But the obstacle of getting agreement from other Ministers and across central and local government was a serious one and still had to be faced. Paper roads would be added to this work, but the Minister expected that little would or could be done about most of these problems in the Bill itself.[705]

By the beginning of August 2015, the Minister had decided that more time was needed to 'ensure the work on developing and designing the Māori Land Service and the Māori Land Networks is more advanced before the Bill is introduced'.[706] The introduction of the Bill was postponed from October 2015 (the plan at the beginning of the consultation process) to early 2016.[707] This decision also gave the MAG and officials time to analyse the hui feedback and submissions, and to recommend what, if any, changes they thought should be made to the Bill. On 3 August 2015, John Grant advised the Tribunal that the Crown would also take into account evidence and submissions for the urgency proceedings:

> The amended statements of claim and applications for urgency raise issues that are the subject of the current

> consultation process, at the conclusion of which submissions will be carefully analysed in conjunction with the Ministerial Advisory Group.
>
> Following full consideration of submissions, provisions within the draft bill may be changed or refined before the bill is introduced to reflect points raised in submissions, after which Māori land owners will have a further opportunity for input through the select committee process.[708]

By the time evidence was filed in the first week of November, in preparation for our urgent hearing, this process was still in progress. The Crown did not provide us with any MAG reports, other than its first report from May 2015, so we are not able to say with any clarity what role the MAG played in this process.

Mr Mahuika advised in his 3 November 2015 brief that the group was working towards removing transition costs for trusts and incorporations, and making it 'easier for existing entities to continue with what they are doing'. He noted that the managing kaiwhakarite issue would not be resolved 'unless and until Cabinet alter it'. The MLS was another area of uncertainty about which Māori were 'rightly concerned', and the MAG was 'seeking clarity as to how the Crown thinks this regime might work'.[709] Mr Mahuika noted that provisions to deal with rating, landlocked lands, and extending the Māori Land Court's jurisdiction on such matters, were being considered as a result of consultation on the Exposure Bill, but 'these all remain subject to Cabinet approval'.[710]

The outcome of one part of this process occurred on 9 November 2015, two days before the opening of our hearing, when Cabinet approved publication of a revised exposure draft of the Bill, incorporating some significant changes.

On 14 October 2015, the Cabinet Economic Growth and Infrastructure Committee had agreed to amend the MAG's terms of reference to include advice on the Whenua Māori Fund (the $12.8 million over four years) and a new 'Whenua Māori Enablers' work stream.[711] This would facilitate advice from the MAG on a 'total package of initiatives', not just the Bill and the MLS.[712] The Cabinet paper also summarised the outcome of the consultation, advising that submissions were 'generally supportive of the proposals for: clear obligations for kaitiaki (governors); dispute resolution; and the participating owners' model'.[713] While we agree with the first two points, we are concerned at the characterisation of the third point, given that TPK's summary of submissions had reported 'slightly more support than opposition', with support for the Bill's decision-making arrangements at 32 per cent, opposition at 27 per cent, and 'concern' at 41 per cent.[714]

TPK also reported to Cabinet in October that 'issues' were raised regarding managing kaiwhakarite, mandatory whānau trusts for intestate successions, and transition for trusts and incorporations to rangatōpū. These three matters would be addressed through revising the Bill, with approvals sought in November 2015.[715]

As noted, Cabinet approved revisions to the Bill as planned on 9 November 2015. John Grant summarised the changes for the Tribunal in his evidence of the same date. We quote this important evidence in full.

> Pursuant to Cabinet's decision, the draft Bill will be amended:
>
> - to redraft the purpose and principles sections to more clearly reflect features of the preamble of Te Ture Whenua Māori Act 1993, including the existing emphasis on the Treaty of Waitangi and its principles;
> - to give greater discretion to the Māori Land Court when considering applications to remove the status of Māori freehold land;
> - to remove the managing kaiwhakarite regime;
> - to provide whānau with an option of obtaining succession by individuals instead of forming a whānau trust on intestate succession;
> - to provide that existing incorporations and trusts do not need to become rangatōpū unless they opt to do so; and
> - to provide further flexibility in transitional provisions.[716]

Mr Grant added that work would continue on procedural matters, and further changes would likely be made as a result.[717] This work addressed a number of significant

concerns raised during the consultation, some of them by the Māori Land Court judges. A selection of decision-making thresholds would be changed: the court would have jurisdiction over partitions, which 'will only be permitted if it assists owners to retain, occupy and develop their land for the benefit of the owners or their whānau'; the threshold for revoking appointment of a governance body would be increased; and the threshold for reserving land as a marae or urupa would also be raised.[718] The occupation lease provisions would be 'substantially rewritten'. The provision in the current Act making Māori reservations inalienable (including by taking for public works) would be carried over for whenua tāpui. Changes would also be made to the definition of whāngai, and to the rules about who could succeed. Any provisions implying that the chief executive (of the MLS, presumably) had a semi-judicial rather than administrative role would be rectified.[719] A number of important amendments to specific provisions were thus planned or had already been made in the revised drafts issued on 9 November and (track-changed) 16 November 2015.[720]

John Grant's conclusion was that the Crown was 'endeavouring in good faith to address concerns raised and to arrive at a policy balance that achieves the government's stated policy aims'.[721] Matanuku Mahuika's evidence was that the changes would strengthen safeguards but within limits: 'It is a balance because every time you restrict an activity you are therefore taking away a discretion from the owners.'[722]

Because the revisions to the Bill were filed with claimants and the Tribunal just before our November hearing, we provided an extra hearing day on 9 December 2015 to enable parties to consider them more fully. Claimant counsel were not persuaded that the unilateral revisions to the Exposure Bill reflected a quality consultation process.[723] Counsel submitted:

- Clauses 3 and 4 tampered with the cornerstone principles of the existing legislation and as Prudence Tamatekapua has explained, the further amendments and attempts at rewording is happening in isolation from Māori landowners with no plan to widely re-engage;
- The managing kaiwhakarite concept was so anathema to tikanga Māori that it would not have seen the light of day had advice from kaumatua been available;
- The whānau trust on intestacy was a breach of property rights and ran contrary to rangatiratanga, but other examples remain which have not been removed from the Bill; and
- Existing trusts and incorporations may now be able to continue, but in reality they will be subject to the requirements on governance entities in any case. The transactional and compliance headaches will apply, regardless of the 'opt-in' scheme.[724]

Crown counsel disagreed, pointing to these changes as evidence that consultation had been 'a reality, not a charade'.[725] In the Crown's submission,

> extensive analysis of the submissions on the exposure draft, including the degree of support and opposition on each key issue, and discussion of those matters with the Ministerial Advisory Group, has informed and led to recommendations about policy responses to those key issues. The Ministerial Advisory Group has had a significant impact on amendments to the exposure draft Bill, notably around simplifying transitional arrangements and the removal of the managing kaiwhakarite regime.[726]

As noted above, TPK's analysis classified submitters as supporting, opposing, or having concerns. For the new governance body model, for example, support was at 25 per cent, opposition at 35 per cent, and 'concern' at 41 per cent. Crown counsel noted that officials and the MAG considered 'the degree of support and opposition on each key issue' before deciding whether changes should be made. As we see it, this must have involved officials and the Crown's advisory group making three separate judgement calls. In respect of the governance model, for example, they had to decide, first, whether a change to the model would still achieve the reform's goals; secondly, whether a change (in this case, to the requirement for mandatory transition and other transition arrangements) would remove the concerns of 41 per cent of submitters; and,

thirdly, whether the removal of those concerns would mean that those submitters would then support the governance model.

Only by making a series of such judgement calls on each of the key issues could the Crown be satisfied, as Crown counsel says it is, that 'the revised draft Bill has sufficient support.'[727]

The MAG and officials, however, did not make these calls entirely without additional engagement. Before deciding whether the Crown's November 2015 revisions to the Exposure Bill dealt fairly with the concerns raised in consultation (and in our inquiry process), we must first consider briefly the Crown's post-consultation engagement with stakeholders.

3.5.6 What engagement has occurred post-consultation, and what is planned?

Starting in September 2015, the MAG and officials have been holding meetings with 'key stakeholders' to workshop issues about the Bill, the MLS, and the new 'enablers' work stream. According to the claimant witnesses who have participated, including Kerensa Johnston and Prue Tamatekapua, information was presented at or very close to the meetings, to test reactions and obtain initial rather than informed feedback. We do not have a complete record of how many meetings have occurred or what impact they had on the Crown's policy development. Nor do we have a record of what the MAG was doing, what advice it gave to the Minister, or whether that advice was taken. We cannot, therefore, assess the MAG's post-August 2015 role in the way that we are able to do for the period leading up to the consultation in June of that year. Although the Crown has rightly said that it has had access to independent advice, we are unable to judge with what effect.

Kerensa Johnston was critical of the approach taken by TPK in the post-consultation workshops. She was invited to a hui on 10 November 2015 where a copy of the revised Exposure Bill was provided: 'I don't think anyone present at that hui had the opportunity to digest the changes that had been made, and what the implications were.'[728] A hui was then called on 26 November 2015 to give a presentation about the MLS. Ms Johnston was unable to attend. A third hui was called for 8 December 2015, for which the information was provided the day before. The purpose of that hui was to look at governance agreement templates and to hear more about the MLS.[729]

Ms Johnston commented:

> where possible, I have participated in hui arranged by Te Puni Kōkiri on the Bill. The usual practice of Te Puni Kōkiri at these hui has been to supply an agenda and a summary of information relating to the subject matter of the particular hui, usually a day or two before the hui. As far as I am aware, the parameters of the hui are set by the Crown officials. I am not sure how the Māori participants are selected to attend or how widely invitations are circulated.
>
> The hui are in the style of presentations by officials, mini-workshops and discussions. Assurances are given that the views of the participants are being considered and may have an impact on the Bill. Unfortunately, the integrity of the hui and therefore the consultation process as a whole, has been undermined by a lack of quality detailed information on the bill and the associated changes provided to the participants in advance of the hui. Information has not made available in a reasonable and timely manner and as a result there is very little time to properly consider, analyse and respond to the information in a meaningful and useful way.
>
> At the hui itself, there is an emphasis on discussions which tend to be wide-ranging and high level. I am not sure this type of engagement is particularly helpful from a technical and drafting perspective, especially as the bill is presumably in its final stages. There is a sense at the hui that the participants and officials are talking past each other, as some participants continue to question the key policy drivers underpinning the bill, such as the changes to the role of the Māori Land Court. Concerns are also raised about the viability and durability of the changes proposed, especially considering the lack of detail on the financial commitment and resourcing. Some participants indicate their support for aspects of the bill.
>
> In comparison, the officials seem to be proceeding on the basis that the bill and the associated policy and structural changes are a 'done deal' and that they are engaging in genuine consultation. In my view, genuine consultation requires

> a willingness to listen and change, which in this case could mean that the Bill is abandoned altogether. It also requires full, free and informed consent to any changes which affect Māori land owners. Full, free and informed consent can only be given if Māori land owners are aware of the implications, risks and consequences of the changes and there is clarity on how the new rules will operate.[730]

It is clear from the Crown's evidence that when the MAG and officials consulted in this way, what they wanted was input from key stakeholders about how things might work in practice, what improvements could be made, and whether particular changes of detail might be needed or acceptable.[731] At the 16 September hui, officials made statements such as 'everything about the reforms is an if' and 'nothing is set in concrete'.[732] The operative assumption, however, at this and later meetings was clearly that the reforms would proceed. This is not surprising, given the purpose of the workshops was to inform, revise, and refine. Lillian Anderson explained: 'Drafting the Bill is an ongoing process of revision and refinement, informed by ongoing engagement with key stakeholders.'[733] The Crown also sought information about how matters were being viewed out on the marae. One of the questions for workshop participants on 10 November 2015 was: '[w]hat are you hearing out on the kumara vine about these reforms?'[734]

The post-consultation engagement has focused on the key 'leadership groups' consulted in April 2015; that is, the ILG's advisors, FOMA, the NZMC, and sometimes the Māori Women's Welfare League.[735] There has been post-consultation engagement with the Māori Land Court judges as a key stakeholder group, but information from that consultation was kept confidential.[736] Meetings have also been held with the representatives of certain land trusts.[737]

According to Lillian Anderson's evidence, three workshops have taken place since the Tribunal's hearing in mid-November 2015. On 26 November, the workshop focused on the MLS. The second hui was on 8 December, the day before our 9 December hearing. At that meeting, the topics were the revised Bill, the MLS, and the 'Enablers work'. Stakeholder groups ('now called the "Treaty partner" or "partners" group' at their request, said Ms Anderson) were invited to give any final feedback on the Bill by 16 December. This was so that the Crown could include 'any matters in the final 2015 [drafting] instructions on the Bill'.[738] There was a follow-up meeting with FOMA on 15 December to 'go through relevant aspects of the draft Bill', with FOMA's written feedback expected by 18 December.[739] Ms Anderson envisaged that this process of refining the Bill, with input from stakeholders, would continue until its introduction in early 2016. Further engagement would also occur on the development of the MLS and 'enabler' strategies, which would involve wider consultation with Māori.[740]

One of the difficulties of this approach was that the three matters for engagement – the Bill, the MLS, and work on the 'enablers' – were at very different stages. This meant that different kinds of engagement were taking place in the same meetings, from the details on what the Crown considered settled matters to the beginnings of working out what to do about such issues as development capital and rating. The Bill was to be introduced in early 2016, whereas the prediction for bringing the MLS into operation was still three to five years, and no one was sure whether 'enabler' issues like rating, landlocked land, and finance would or could be addressed in the Bill.

At the 16 September 2015 hui with stakeholders, Kingi Smiler, chair of the MAG, advised that the advisory group's role had changed. Instead of focusing on the Bill, it now gave advice on all three 'inter-connected issues – the enablers, the Māori Land Service, and the Bill'. The 'change programme timetable now reflects the three inter-connected sets of issues' so that 'progress on all of them will be happening on the one timeline'. There would nonetheless come a point where 'decisions will be required on what can be achieved within this reform process and what might have to be promoted over a longer timeframe' – namely, the 'enabler issues'.[741]

This is where we lack sufficient detail in terms of what work is happening within Government. Lillian Anderson told the 16 September engagement hui that the present Bill could still be the vehicle for amending rating legislation

and tackling landlocked land.[742] At a meeting a month later, John Grant told ILG advisers that enabling provisions in the Bill might allow practical solutions for landlocked land to be worked out in the future.[743] Crown counsel, in closing submissions on 14 December 2015, told us that rating 'might' be addressed in the Bill due for early 2016.[744]

But we received little evidence from the Crown on the Enablers work stream, its parameters, and its progress to date. Much of the detail that we have came from the minutes of post-consultation stakeholder engagement, some parts of which (to do with the enablers work stream) were blanked out as confidential.[745] One or two points seem clear. The Crown is considering, for example, a provision in the Bill that Māori land placed under Ngā Whenua Rāhui[746] would not be rated. It is also considering a scheme to provide easements where access to Māori land is prevented by Crown land.[747] Clearly, significant work is underway in response to the 2015 consultation. We received no evidence at all, however, about whether or how stakeholder input has impacted upon the enablers' work stream.

Thus, work was near final on the Bill by the end of December 2015, with further 'refinement' expected in early 2016. Post-consultation engagement on the Bill was important because it provided for input from key Māori 'leadership groups', and it was focused on revision of details. We received an outline of some of what was said at the workshops. But without evidence as to exactly what details of the Bill were changed in response to input at these workshops, we have no concrete information as to their effectiveness or what (if any) changes were made in response to stakeholders' input. The Crown provided no evidence on this crucial point. From FOMA's 18 December 2015 submission to the Crown, we have ascertained that the Crown has now promised to fund the 'compliance costs associated with the transition process'.[748] This is an important development, but we have no evidence as to how, when, or why this promise was made. Nor did we receive any evidence as to what (if any) impact the stakeholder engagement has had on the design of the MLS or the development of solutions to such issues as rating and valuation. This makes it impossible to evaluate the effectiveness or quality of recent stakeholder engagement as a form of consultation, as we discuss in the next section.

We turn next to make our findings as to whether the Crown's consultation with Māori has met common law and Treaty standards.

3.5.7 Has the Crown's consultation on the Bill met common law and Treaty standards?

(1) *Common law standards*

Common law standards for consultation are an important tool in assisting the Tribunal to judge whether the Crown has consulted its Treaty partner in a fair manner.

The parties in our inquiry broadly agreed on the common law standards, as we explained in section 3.4.5(3). For ease of reference, we repeat the Crown's summary of the Court of Appeal's decision in *Wellington Airport*:

> Consultation does not mean to tell or present. Consultation must be a reality, not a charade.
>
> Consultation cannot be equated to negotiation. Rather, it is an intermediate situation involving meaningful discussion.
>
> The party consulting must keep an open mind and, while entitled to have a work plan in mind, must be ready to change and even start afresh.
>
> Any manner of oral or written interchange which allows adequate expression and consideration of views will suffice. What is essential is that the consultation is fair and enables an informed decision to be made.
>
> There is no universal requirement as to duration of consultation, but sufficient time must be allowed and a genuine effort to consult made.
>
> Those being consulted must know what is being proposed, and have a reasonable and sufficient opportunity to respond to the proposal.[749]

The Crown's submission also quoted the Tribunal's MV *Rena* report to the effect that the Crown is 'required to ensure that Māori are "adequately informed so as to be able to make intelligent and useful responses", as was found in the *Wellington Airport* case'.[750]

To this summary of common law principles as expressed by the court in that case, the claimants added

a point omitted by the Crown: while consultation 'does not necessarily involve negotiation toward an agreement,' the 'latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus.'[751]

The Crown's consultation on the Exposure Bill began in 2015 with the appointment of Māori experts to an independent advisory group. As we discussed in section 3.5.1, some early changes were made as a result of advice from this group. Then, as set out in section 3.5.2, the MAG conducted 'pre-consultation' with 'key stakeholders' in April and May 2015. The Bill itself was not made available but a high quality discussion paper enabled stakeholder groups to engage on some of the details. Some additional changes were made in response to this early consultation round, but the recommendation to remove the managing kaiwhakarite provisions was not adopted. Nor did the Crown take action on the repeated message from virtually every consultation round, including this one in April and May 2015, that key barriers to utilisation had been left out of the reforms. Had the Crown begun serious work on rating, landlocked land, paper roads, and other such issues in 2013, that work might have kept better step with the development of the proposed Bill.

Thus, the Crown's consultation on the Bill up to May 2015 took a selective form, involving the initial advice of its chosen experts (the MAG), and then the MAG's meetings with Māori 'leadership groups'. Changes were made in response to both. At the end of May, the Crown followed this 'pre-consultation' with a nationwide consultation round involving 23 hui and an invitation for written submissions (to be filed by 3 July 2015). TPK advised Cabinet in its 'risk mitigation strategy':

> Firstly, the consultation process may raise stakeholder expectations that the key policy settings of the Bill are open to re-litigation. To mitigate this concern, the [consultation] document explains the exposure draft is intended to test whether the proposed reforms achieve the outcomes agreed to by Cabinet. It should not be seen as an opportunity to challenge these decisions, which is the role of the select committee process.[752]

Thus, it would be difficult to argue that the Crown went into the 2015 consultation prepared to start afresh. On the other hand, Crown witness John Grant emphasised (as the Cabinet paper did) that the select committee was seen as the opportunity for reappraisal – as, indeed, happened in 2000 (see section 3.3.2(5)).

As we set out in section 3.5.3, the June 2015 hui process was extremely compressed. Participants at the first six hui were given less than a week to read, assimilate, debate, and seek professional advice on about 400 pages of dense, complex material, including the 282-page draft Bill. The hui process was completed within just over three-and-a-half weeks of the release of this material. Participants at the majority of hui had less than a fortnight to consider the Bill, consultation document, and information pack. The Crown's explanation for this – that the hui were held early to enable better-informed written submissions – is unconvincing. When the hui were planned, the Crown's timeframe required the filing of all written submissions within just a few weeks of the release of the consultation material, and only two weeks after the final hui. It was not until protest from hui participants that the time for written submissions was extended.

Given the grave importance of the subject matter to Māori, and the length and complexity of the consultation materials, we find that the Crown's June 2015 consultation hui breached the requisite standards for consultation. The Crown did not allow sufficient time. Māori did not have an opportunity for properly informed and meaningful participation. Many hui participants, of course, brought their own knowledge and experiences to bear. Some, such as members of key stakeholder groups, had a greater knowledge of the reform proposals. But Māori landowners in general were not enabled to provide a full and properly informed response to the concepts and details of the Exposure Bill, which was the purpose of the consultation.

The situation was somewhat redeemed by the extension of time for written submissions. Well-resourced entities such as FOMA were able to commission research and participate fully. Many whānau and Māori landowners relied on Marise Lant's template submission, 'Not One Acre

More', to make their views known. On balance, our review of the 392 submissions convinces us that quality engagement occurred through the written submissions process.

In addition to the necessity for informed engagement, the other main requirement for quality consultation was the Crown's obligation to listen with an open mind and be 'ready to change and even start afresh'.[753] Crown counsel submitted that the Crown 'has not closed its mind to substantive changes, including whether to proceed with a Bill at all',[754] but, as we discussed above, the 2015 consultation was not carried out with that possibility in mind. The Crown has been determined to proceed with the reforms since 2013, in no small part because it sees them as meeting long-expressed aspirations of Māori owners for more autonomy, less regulation, better governance, and increased land development. The Crown also wanted the increased benefits that it believed would follow for the national economy. It was not deterred by the fact that it only obtained support from a majority of submitters on two issues: whenua tāpui and the establishment of an alternative dispute resolution process.

In Crown counsel's submission, the 2015 consultation process should not be reviewed on its own but as part of an iterative process of consultation on increasingly familiar proposals in ever greater detail. Consultation was thus a genuine and extensive process.[755] In particular:

> The review process has included extensive consultation involving substantial opportunities for both Māori landowners and stakeholders to understand and contribute to the reforms, as well as opportunities for the Crown to receive independent advice on the reforms. The process has been a quality process. . . .
>
> The three main rounds of consultation during those stages have involved more than 64 hui with a combined attendance of approximately 3,200 participants and more than 585 written submissions. There have also been various other hui and workshops with land owners, technical advisers and key stakeholder groups.
>
> Or course, mere quantity alone is not sufficient. But the Crown's processes, and the way each part of the process has provided more specific detail as work has developed, reflects the good faith and open nature of Crown engagement. Each part has built on the other, contributing to the quality of the process.[756]

We accept that, from the nationwide hui in 2013 and 2014, the Crown understood there was general support for the independent review panel's propositions and the headlines of the Crown's work in translating those propositions into a Bill (in collaboration with FOMA and the ILG). But, as we found in section 3.3.5, support from Māori in 2013 was not properly informed because of the failure to carry out the necessary research on the 1993 Act. Key propositions, including the participating owners' model, fewer discretionary powers for the Māori Land Court (especially in establishing trusts and appointing trustees), and a preference for mediation over litigation, were certainly supported at a high level. Some reservations were expressed by the time that the Crown, FOMA, and the ILG held joint hui in 2014. In particular, Māori at the 2014 hui convinced the Crown that the participating owners' model required greater safeguards, especially quorums. But the 2014 hui gave participants little detail – just a few Powerpoint slides, as we explained in section 3.4.5. The reforms were still essentially headlines at that time. The MAG's pre-consultation with selected stakeholders in April 2015 had been on a confidential basis. The claimants could be forgiven, therefore, for thinking the Exposure Bill came out of nowhere at the end of May 2015, almost a year after the 2014 hui.

Nonetheless, even though key aspects of the reforms had been debated since 2013 (and earlier in some cases), the 2015 consultation round clearly showed that Māori support for the reforms was materially reduced, now that landowners and key stakeholders had to grapple with the details and implications of the Exposure Bill. This posed a significant dilemma for the Crown and the MAG, both of whom were convinced that the reforms were in the best interests of Māori and the national economy.

In response to the 2015 consultation, the Crown took advice from the MAG. It was certainly prepared to make

significant changes to key features of the Bill, as the common law standards for consultation require. We set out those changes in section 3.5.5. In brief, they included removing much of the compulsion from the Bill, which many Māori saw as inconsistent with the stated aim of owner autonomy. The managing kaiwhakarite system, the forced transition of some 6,000 trusts and incorporations to rangatōpū, and the mandatory whānau trusts, were all deleted. Some parts of the Bill's principal mechanism, the participating owners' model, were adjusted. A major change was made to tighten up safeguards for disposition of Māori land. Court oversight was restored for partitions. In our view, the Crown (in conjunction with the MAG) made a good faith attempt to improve the Bill in response to many of the concerns raised in consultation. Not all concerns were addressed – and, given the level of opposition and concern vis-a-vis support among submitters, it is difficult to see how they could be without more radical changes to the Bill than the Crown was prepared to contemplate.

Thirty-four per cent of submitters, for example, opposed the fundamental changes to the Māori Land Court's jurisdiction, and another 32 per cent expressed 'concerns' about those changes, with only 33 per cent of submitters in support. The MAG and officials, therefore, had to consider the question of whether restoring aspects of the court's protective jurisdiction, in respect of partitions and dispositions, was enough to allay the concerns of one-third of submitters and perhaps win their support. If not, the Crown was clearly not prepared to give up this fundamental aspect of its reforms. It is possible that the Crown obtained further guidance on these questions from its engagement with select Māori stakeholder groups, which took place after the consultation round. But, as we noted in section 3.5.6, we are unable to verify what, if any, changes have been made as a result of that engagement. All we can be sure of is that engagement happened.

One of the most important achievements of the 2015 consultation round, however, was the Crown's decision to finally act on long-standing barriers to utilisation. This decision has been welcomed by Māori. As we saw in section 3.5.6, post-consultation engagement has now occurred on the 'enablers' work stream. The Minister is attempting to work within Government and with Māori stakeholders to develop solutions which might or might not be included in the Bill, but which – it is hoped – will enable substantial progress on rating, landlocked land, and paper roads (among others). As we have said, the evidence does not permit us to evaluate the role or input of the MAG and Māori stakeholder groups in this process. We do know that back in May 2015, the MAG recommended some legislative solutions for inclusion in the Bill (see section 3.5.1).

Another feature of the Crown's response to the consultation, which is outside changing the terms of the Bill itself, is that the Crown has not acted on concerns that the Bill will proceed without any surety that its lynchpin, the MLS, will be effectively implemented and resourced. Those concerns were shared by the MAG (in Mr Mahuika's evidence), claimants, and Māori submitters.

In the claimants' view, the Crown has changed some of the Bill's most obviously flawed aspects in response to consultation, but its principal architecture remains intact and is still fundamentally flawed. In other words, the Crown's changes fall far short of what is required. They see this as one symptom of a poor quality consultation process, which was based on inadequate information at every stage.

We agree with the claimants that the Crown's consultation was flawed in 2013 because it failed to properly inform Māori. The necessary research had not been done to ensure that the reform propositions were sound, and Māori sufficiently informed as to risks and consequences. The same flaw was magnified in 2015 by holding hui within a very short timeframe from the release of the Exposure Bill. There was no sound justification for the rushed process that occurred.

But in both cases the Crown's failure to ensure that Māori were properly informed was mitigated by two factors. The first was that the review panel's propositions did

arise from a significant debate within Māoridom, and clearly had support at that stage, as did the Crown's imperative to see more Māori land in production. The second is that the extension of time for written submissions in 2015 enabled Māori to make better-informed and considered submissions on the Exposure Bill. The 2015 consultation process thus enabled Māori to provide a considered, in-depth response to the Crown's proposals. The Crown then made changes so that its policies could still be achieved but with significant modifications so as to meet some of the concerns raised in consultation. In particular, the Crown is at last taking action on the frequently expressed concerns about rating, landlocked land, and other barriers to utilisation.

Thus, we consider that the Crown failed to meet basic standards of consultation in its conduct of the hui in June 2015, but that the situation was partly rectified by extending the timeframe to enable better-informed responses by way of written submissions.

We rely on the considered views of those submitters, representative as they were of a wide spread of Māori landowners. TPK noted that submissions were received from many owners (individuals and whānau) using Marise Lant's submission 'Not One Acre More'. In addition, 96 Māori land trusts, 16 incorporations, 29 local Māori organisations, six national Māori organisations, and six iwi organisations made submissions.[757] We also rely on TPK's own analysis of the levels of support, opposition, and concern from these submitters, to determine whether Māori generally agreed with the Crown's proposals in 2015 – as they had in 2013 and 2014. We pursue this issue in the next section.

In sum, we note that the flaws in the Crown's consultation in 2015 were mitigated, and the Crown made significant changes in response to consultation. Broadly speaking, the Crown was saved by its decision (after protest from hui participants) to extend the time for written submissions, and the quality of the submissions that the process generated. We do not, however, consider that the Crown should generally save failings in the kanohi-ki-te-kanohi process by extending timeframes for written submissions, because Māori still place a high value on face-to-face consultation.

(2) *Treaty standards*

As noted above, claimant counsel noted another aspect of the *Wellington Airport* case, which was the court's statement that the 'tendency in consultation is to seek at least consensus'. Thus, even though consultation does not *require* 'negotiation toward an agreement . . . the latter not uncommonly can follow'.[758] The claimants go further and submit that Treaty principles *require* negotiated agreement in the present case. As we discussed above in sections 3.2.2 and 3.4.5, the claimants rely on the Tribunal's Wai 262 and *Whāia te Mana Motuhake* reports in support of this submission. The Crown, on the other hand, argues that the Treaty principles do not unreasonably restrict an elected Government from pursuing its policies. In the Crown's view, its obligation is to consult in the present case, and then to make an informed decision. We set out the parties' arguments in some detail above in section 3.2.2.

We agree with the claimants that the 'full, free, and informed consent' of Māori is required when a legislative change substantially affects or even controls a matter squarely under their authority. The governance and management of Māori land, a taonga tuku iho, is one such matter. We agree with Professor Whatarangi Winiata's evidence that 'land as taonga tuku iho falls directly into the "sphere of authority" of the Māori Treaty partner'.[759] Professor Winiata also quoted the Tribunal's *Report on the Motunui–Waitara Claim*: '"Rangatiratanga" denotes the mana not only to possess what is yours, but to control and manage it in accordance with your own preferences.'[760] This is fundamental to Māori identity and well-being, and to the continued existence of Māori as a people. As Moana Jackson put it:

> One cannot fully be tangata whenua without a whenua to be tangata upon, and one cannot be a tangata whenua exercising the mana and rangatira handed down by the tīpuna

without the authority to determine what happens to and with the whenua.[761]

The Crown relies on the *Lands* case but the essential qualification in the sentence quoted by the Crown is that the 'principles of the Treaty do not authorise *unreasonable* restrictions on the right of a duly elected Government to follow its chosen policy' (emphasis added).[762] We see nothing unreasonable in the proposition that broadly based, informed Māori support is required to change how Māori land is governed and controlled. This does not mean that all aspects of the 1993 Act would require such a level of agreement.

We note in that respect that the process for reforming Te Ture Whenua Māori has been largely Crown-led since 2014, despite the promising beginning of 'collaboration' with FOMA and the ILG, and the advisory role of the independent MAG. We do not consider that this is inconsistent with Treaty principles.

As we discussed earlier, there is a substantial component of the Act which deeply concerns the Crown: the national title system (which the Crown is responsible for); a court of record; and the administrative services that the Crown provides its Māori landowner citizens. The Crown also has a Treaty duty to protect Māori, their authority (tino rangatiratanga), and their land – especially from any further unwilling land loss. The Crown is to blame for many of the current problems facing Māori landowners, and it has an obligation to fix the system (insofar as a system of individual titles for Māori land can be fixed).[763] 'And we should not let them off the hook', Mr Dewes said at our hearing, 'but we should make sure they get it right.'[764]

Thus, a statute like Te Ture Whenua Māori Act 1993 differs from the Māori Community Development Act 1962, in that aspects of it fall into both Treaty partners' spheres of authority. Either Treaty partner, in our view, could initiate and lead a review of Te Ture Whenua Māori Act 1993, in consultation with the other and working towards their mutual benefit. Importantly, the review in this case was initiated in response to both long-standing Māori concerns and Crown imperatives for development. It was led by an independent panel, and the resulting reform proposals were agreed to in 2013 by both Māori and the Crown (see section 3.3.5).

Key elements of the reforms, however, fall within the Māori sphere of authority (tino rangatiratanga). As noted, that encompasses such fundamentals as how Māori land is to be owned, used, governed, and retained (including what Māori bodies will govern it and how they are to be constituted). We agree with Professor Winiata that the Crown's Treaty duty in that circumstance is to 'ensure the full expression of tino rangatiratanga in relation to our taonga, including our right to exercise decision making and control of our whenua and taonga'.[765] Broad Māori support is essential in Treaty terms for significant changes to such matters as how Māori legally make decisions about and control their whenua and taonga. It is clear to us from the Crown's evidence and submissions that it does not *wish* to proceed without Māori support, even though it does not accept that the Treaty restrains it from doing so.

Some questions about the 1993 Act, such as how the Crown's duty of active protection is to be carried out, are matters that fall within the spheres of both Treaty partners. If Māori, for example, want an independent court to continue to play a protective role, then that is their choice. Equally, if they do not, then that, too, is their choice. We agree with the Central North Island Tribunal when it observed that – when it came to Māori land – '[t]rue active protection required the Crown to protect the interests of Māori not unilaterally, but in the manner in which they wanted them protected'.[766] Nonetheless, the Crown, as a Treaty partner and with the responsibility of actively protecting Māori land and Māori authority, has its own share in deciding what form protection should take. Matters of affordability, practicability, effectiveness, accountabilities, and the like will need to be considered. These issues, like others, can only be resolved by dialogue between the Treaty partners, each acting reasonably, cooperatively, and in good faith.

As to which particular aspects of the 1993 Act require the support of both Treaty partners for significant changes, we do not wish to be too prescriptive. That is a matter for the Crown and Māori to consider. But we urge that consensus be sought and found, as it was leading up to the passage of the 1993 Act itself.

In making this finding, we agree with the Tribunal in its Wai 262 report, where it found:

> There can be no 'one size fits all' approach. Rather, the Treaty standard for Crown engagement with Māori operates along a sliding scale. Sometimes, it may be sufficient to inform or seek opinion . . . But there will also be occasions in which the Māori Treaty interest is so central and compelling that engagement should go beyond consultation to negotiation aimed at achieving consensus, acquiescence or consent. . . . There may even be times when the Māori interest is so overwhelming, and other interests by comparison so narrow or limited, that the Crown should contemplate delegation of its role as New Zealand's 'one voice' in international affairs; negotiations over the repatriation of taonga might be an example.
>
> The Treaty partners need to be open to all of these possibilities, not just some, and to decide which applies on the basis of the duties of good faith, cooperation, and reasonableness that each owes the other.[767]

It is our finding that the reform of Te Ture Whenua Māori Act 1993 is an instance where the Māori interest is so central and so compelling that the Crown cannot proceed without an indication of broad, fully informed support from Māori. Matters of detail, perhaps, could then be worked out by engagement with key leadership groups, but the final package must again be shown to have broadly based, properly informed support. We accept the Crown's view that a referendum or an attempt to gain the consent of every Māori landowner is not feasible. But that does not make it reasonable for the Crown to pursue its policy, justified by broad Māori agreement in 2013, if that agreement is no longer there.

This brings us to one of the most important disputes between the Crown and claimants in our inquiry: the Crown says that it does have sufficient support to proceed; the claimants say that it does not. We turn to that question next.

3.5.8 Is there 'demonstrable and sufficient' support for the Bill to proceed?

Kerensa Johnston, in her evidence for the claimants, told us:

> I do wish to acknowledge that steps have been taken to engage with Māori owners and there has been a demonstration of good faith on the part of Crown officials in some important respects. But there is much more work to do on the consultation process, the bill and the fundamental changes associated with it, in order to demonstrate a true partnership approach as envisaged by the Treaty of Waitangi/Te Tiriti o Waitangi. In such an important area of our law and constitutional framework, where so much has gone wrong in the past, there is no need to rush now and introduce new rules and changes until their meaning and impact is very clear and a *demonstrable and sufficient* level of Māori support for and approval of the changes has been achieved. [Emphasis in original.][768]

We agree.

The Crown believes that it has sufficient support to introduce the Bill. Crown counsel told us:

> The Crown has not closed its mind to substantive changes, including whether to proceed with a Bill at all. At present, the Crown is satisfied that the revised draft Bill has sufficient support. Consistent with this view, officials are focussed on the structure of the revised draft Bill, rather than revisiting the general policy direction. However, the Crown must keep those directions under review and any significant change might well require consideration.
>
> Further, and contrary to the claimants' apparent position, when Cabinet comes to decide whether or not to introduce a

> Bill to the House, it will necessarily consider afresh the level of Māori support for the proposed reforms, and whether further consultation is in fact required.[769]

How is such support to be judged?

In the claimants' view, the 2015 consultation round demonstrated conclusively that Māori do not support the proposed reforms:

> There is a worrying lack of evidence of support from Māoridom for this Bill. The New Zealand Māori Council has not endorsed the Bill. The Māori Women's Welfare League is opposed. The Iwi Leader's Forum has set out its position clearly that the Bill needs to focus on the wider ramifications of development constraints on Māori, which the Bill does not do. The latest 'protocol' between the ILF and the Crown does not indicate support for the Bill, but rather a process of communication (signed 3 years after the Review Panel commenced its work). Whānau, hapū and Iwi and landowners across the spectrum of trusts and incorporations made submissions opposed to the Bill. In addition, Ms Lant's on-line petition mentioned in her further affidavit now sits at 1537 (up from 1,386).
>
> The Crown submission . . . illustrates that the Crown will make its own judgment as to whether it has the requisite support to introduce the Bill to the House. It is another example of the institutional arrogance of a Treaty partner who cannot appreciate that such a judgment call reserved solely to itself, leaves no room for the expression of rangatiratanga.[770]

There is a degree of agreement between the parties here, because the Crown also argues that the level of support for the reforms should be assessed on the basis of the 2015 consultation. The Crown submits that its 'extensive analysis of the submissions on the exposure draft' has established 'the degree of support and opposition on each key issue'.[771] Crown counsel also argues that 'the Tribunal should not confuse concern with particular aspects of the proposals as opposition to the proposals as a whole'.[772] We take this to be a reference to the category 'concern' in TPK's analysis of the submissions. As we noted earlier, the Crown's crucial response to the consultation was to judge whether its changes in policy or the provisions of the Bill were sufficient to allay concern or remove opposition. In its closing submissions, the Crown accepts that its 'assessment of the degree of Māori support when deciding whether or not to proceed with a Bill is important in evaluating the reasonableness of its decision-making processes in terms of Treaty principles'.[773]

In our view, the answer to this question rests in part with TPK's tabulation of the results of the submissions from trusts, incorporations, Māori organisations, and individuals (remembering that Ms Lant's template submission, which was filed by many, was only counted as one submission when calculating the results).[774] For ease of reference, we reproduce the results here (table 3.7).

Clearly, there was majority support for two aspects of the reforms: an alternative disputes resolution process (52 per cent), and the arrangements for whenua tāpui (50 per cent). For everything else, there were high levels of concern or opposition.

This is not to say that the reforms as a whole did not have their enthusiastic supporters, as demonstrated by the submission of the Raukawa District Māori Council.[775] But the largest organisation representing Māori land trusts and incorporations, FOMA, was strongly opposed to or concerned about many aspects of the Bill (see section 3.5.4). The other leadership group in collaboration with the Crown in 2014, the ILG, had also come out in opposition to the Bill by the time of our hearing in November 2015.[776] This was followed, as claimant counsel noted, by the development of a protocol for further engagement between the Crown and the ILG in December.[777] Nonetheless, by November 2015 the Crown's key stakeholder groups from April 2015 were either opposed (the ILG), had made submissions in opposition (FOMA), had continued their earlier and determined opposition (the Māori Women's Welfare League), or had not come forward with a position (the NZMC).[778]

FOMA's 18 December 2015 submission indicated that its members still had significant concerns at that point, many of them very specific but including their disagreement with the whole proposed dispute resolution process.[779]

It is not possible to say whether the Crown's changes to

Category	Support (%)	Opposition (%)	Concern (%)
Whenua tāpui	50	10	40
Owner decision-making regime	32	27	41
Disposition of Māori freehold land	23	27	51
Administrative kaiwhakarite	17	58	25
Managing kaiwhakarite	18	55	27
New governance model	25	35	41
Successions	42	15	44
Disputes resolution	52	17	31
Refocusing the Māori Land Court's jurisdiction	33	34	32
Māori Land Service	30	10	60

Table 3.7: Te Puni Kōkiri's tabulation of submitters' support, opposition, and concern

the Bill since consultation on the original exposure draft (in May 2015), and its further work on the MLS and 'enablers', have been sufficient to remove submitters' concerns or opposition. That is unknown. We are not certain, therefore, why the Crown is so confident in its closing submissions that it has sufficient support to proceed with the Bill.

3.6 Overall Finding

We have found that the Crown will be in breach of Treaty principles if it does not ensure that there is properly informed, broad-based support for the Te Ture Whenua Māori Bill to proceed. Māori landowners, and Māori whānau, hapū, and iwi generally, will be prejudiced if the 1993 Act is repealed against their wishes, and without ensuring adequate and appropriate arrangements for all the matters governed by that Act.

As we understand the Crown's position, it does not in fact wish to proceed without sufficient Māori support, but argues that it has sufficient support and that Treaty principles, rightly understood, do not restrain it in any case.

We disagree with both propositions, for the reasons given above.

In the 5 February 2016 draft of this chapter, released early in pre-publication form, we made the following recommendations:

> We recommend that the Crown avoids prejudice to Māori by further engagement nationally with Māori landowners, through a process of hui and written submissions, after reasonable steps have been taken to ensure that Māori landowners are properly informed by the necessary empirical research, funded by the Crown.
>
> If such a consultation shows broad Māori support for the Bill to proceed, then we recommend further engagement with Māori stakeholders and leadership groups to make any final refinements and revisions, with an agreed process for those groups to consult their constituencies and confirm that broad support for the Bill remains.
>
> If properly informed, broad-based support is not forthcoming, then we recommend that the Crown follow the same process in order to determine appropriate amendments to the current Act (as all parties appear to agree that at least some significant amendments are required).
>
> We also recommend that the Crown continue to take advice from independent Māori experts, and to accord a leadership role to a representative advisory group in its engagement with Māori.[780]

We do not resile from those recommendations, which are now made formally in chapter 5, along with our other recommendations for the prevention of prejudice.

We turn next to consider claims about the substance of the Te Ture Whenua Māori Bill, and the features of that Bill which the claimants consider are inconsistent with Treaty principles.

Notes

1. Kerensa Johnston, second brief of evidence, 16 December 2015 (doc A36), p 19
2. Crown counsel, closing submissions, 14 December 2015 (paper 3.3.6), p 33
3. John Alexander Grant, fifth brief of evidence, 3 November 2015 (doc A21), pp 2–3
4. Crown counsel, opening submissions, 6 November 2015 (paper 3.3.3), p 4

5. Crown counsel, opening submissions (paper 3.3.3), pp 4–5
6. Crown counsel, opening submissions (paper 3.3.3), pp 2, 9
7. Crown counsel, closing submissions (paper 3.3.6), pp 7–10
8. Crown counsel, closing submissions (paper 3.3.6), p 10
9. Crown counsel, closing submissions (paper 3.3.6), p 4
10. Crown counsel, closing submissions (paper 3.3.6), p 17
11. Crown counsel, closing submissions (paper 3.3.6), p 20
12. Crown counsel, closing submissions (paper 3.3.6), p 15
13. Crown counsel, closing submissions (paper 3.3.6), p 21
14. Crown counsel, closing submissions (paper 3.3.6), pp 3–10, 17, 21–22
15. Crown counsel, closing submissions (paper 3.3.6), pp 16–18
16. Crown counsel, closing submissions (paper 3.3.6), p 18
17. Crown counsel, closing submissions (paper 3.3.6), p 18
18. Crown counsel, closing submissions (paper 3.3.6), p 20
19. Claimant counsel (Watson), closing submissions, 20 December 2015 (paper 3.3.8), pp 11–13, 23, 29–31
20. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 33
21. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 33
22. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 4
23. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 12–13
24. See, for example, claimant counsel (Thornton), closing submissions, 18 December 2015 (paper 3.3.10), pp 24–32, where the 2013 PricewaterhouseCoopers report for the Ministry for Primary Industries, *Growing the Productive Base of Māori Freehold Land*, comes in for particular criticism.
25. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 25–26
26. Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 15
27. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 4
28. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 26
29. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 3
30. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 14
31. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 15
32. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 28
33. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 34
34. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 34
35. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 38–39
36. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 39
37. Crown counsel, closing submissions (paper 3.3.6), pp 3, 4
38. Crown counsel, closing submissions (paper 3.3.6), pp 3–4
39. Crown counsel, closing submissions (paper 3.3.6), p 4
40. Crown counsel, closing submissions (paper 3.3.6), pp 23–24
41. Crown counsel, closing submissions (paper 3.3.6), p 24
42. Crown counsel, closing submissions (paper 3.3.6), p 15
43. Crown counsel, closing submissions (paper 3.3.6), p 15
44. Crown counsel, closing submissions (paper 3.3.6), p 15
45. Crown counsel, closing submissions (paper 3.3.6), pp 15–16
46. Crown counsel, closing submissions (paper 3.3.6), p 16
47. Crown counsel, closing submissions (paper 3.3.6), p 16
48. Crown counsel, closing submissions (paper 3.3.6), pp 15, 18, 21
49. Crown counsel, closing submissions (paper 3.3.6), p 21
50. Crown counsel, closing submissions (paper 3.3.6), p 18
51. Crown counsel, closing submissions (paper 3.3.6), p 21
52. Crown counsel, closing submissions (paper 3.3.6), p 17
53. Crown counsel, closing submissions (paper 3.3.6), p 17
54. Crown counsel, closing submissions (paper 3.3.6), pp 17–18
55. Crown counsel, closing submissions (paper 3.3.6), p 18
56. Crown counsel, closing submissions (paper 3.3.6), p 20
57. Crown counsel, closing submissions (paper 3.3.6), p 19
58. Crown counsel, closing submissions (paper 3.3.6), pp 34–35
59. Crown counsel, closing submissions (paper 3.3.6), pp 33–35
60. Crown counsel, closing submissions (paper 3.3.6), p 33
61. Crown counsel, closing submissions (paper 3.3.6), p 18
62. Crown counsel, closing submissions (paper 3.3.6), p 19
63. Crown counsel, closing submissions (paper 3.3.6), p 19
64. Crown counsel, closing submissions (paper 3.3.6), pp 20–21
65. Crown counsel, closing submissions (paper 3.3.6), p 22
66. Crown counsel, closing submissions (paper 3.3.6), pp 22–23
67. Crown counsel, closing submissions (paper 3.3.6), pp 22–23
68. Crown counsel, closing submissions (paper 3.3.6), pp 18–19
69. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 3
70. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 4
71. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 14–15; claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 10–13
72. Claimant counsel (Ertel), closing submissions, 18 December 2015 (paper 3.3.9), p 8
73. Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 3
74. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 9
75. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 13–14
76. Claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 13–18, 33–34, 49–50; claimant counsel (Ertel), closing submissions (paper 3.3.9), pp 8–13; claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), pp 4–7
77. Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), pp 3–4; *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671 (CA)
78. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 5
79. Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 8
80. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 26
81. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 35
82. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 36
83. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 37
84. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 37
85. Counsel for the interested party, closing submissions, 18 December 2015 (paper 3.3.7), p 6
86. Counsel for the interested party, closing submissions (paper 3.3.7), p 7

87. Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 2
88. Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 2
89. Crown counsel, closing submissions (paper 3.3.6), p 3
90. Crown counsel, closing submissions (paper 3.3.6), p 3
91. Crown counsel, closing submissions (paper 3.3.6), p 3
92. Crown counsel, closing submissions (paper 3.3.6), p 4
93. Crown counsel, closing submissions (paper 3.3.6), p 4
94. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 12
95. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 12–13
96. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 13
97. Whaimutu Dewes, first brief of evidence, 2 November 2015 (doc A22), p 1
98. Whaimutu Dewes, papers in support of first brief of evidence (doc A22(a))
99. See, for example, transcript 4.1.2, pp 265–269, 339–343.
100. Transcript 4.1.2, p 341
101. Transcript 4.1.2, p 267
102. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 29–30
103. Crown counsel, closing submissions (paper 3.3.6), pp 7–8, 36
104. Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 9
105. Crown counsel, closing submissions (paper 3.3.6), pp 3, 7
106. Māori Land Investment Group, 'Securing Finance on Multiple-Owned Māori Land: Options for Government', March 1996 (Whaimutu Dewes, papers in support of first brief of evidence (doc A22(a)), p 46)
107. Māori Land Investment Group, 'Securing Finance on Multiple-Owned Māori Land: Options for Government', March 1996 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 46)
108. Māori Land Investment Group, 'Securing Finance on Multiple-Owned Māori Land: Options for Government', March 1996 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 49)
109. Māori Land Investment Group, 'Securing Finance on Multiple-Owned Māori Land: Options for Government', March 1996 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 49)
110. Māori Land Investment Group, 'Securing Finance on Multiple-Owned Māori Land: Options for Government', March 1996 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 48, 50)
111. Māori Land Investment Group, 'Securing Finance on Multiple-Owned Māori Land: Options for Government', March 1996 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 51–56, 59)
112. Paul Morgan, Federation of Māori Authorities, 'Māori Land Court and Land Utilisation Options under Te Ture Whenua Māori Act 1993', July 1997 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 66)
113. Morgan, 'Māori Land Court and Land Utilisation Options under Te Ture Whenua Māori Act 1993', July 1997 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 66–67)
114. Morgan, 'Māori Land Court and Land Utilisation Options under Te Ture Whenua Māori Act 1993', July 1997 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 63)
115. Transcript 4.1.2, p 267
116. Morgan, 'Māori Land Court and Land Utilisation Options under Te Ture Whenua Māori Act 1993', July 1997 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 63)
117. Morgan, 'Māori Land Court and Land Utilisation Options under Te Ture Whenua Māori Act 1993', July 1997 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 63–64)
118. Morgan, 'Māori Land Court and Land Utilisation Options under Te Ture Whenua Māori Act 1993', July 1997 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 65)
119. Māori Multiple Owned Land Development Committee, 'Māori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 131)
120. Māori Multiple Owned Land Development Committee, 'Māori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), pp 135, 171)
121. Māori Multiple Owned Land Development Committee, 'Māori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 171)
122. Māori Multiple Owned Land Development Committee, 'Māori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 135)
123. Māori Multiple Owned Land Development Committee, 'Māori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 133)
124. Māori Multiple Owned Land Development Committee, 'Māori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 135)
125. Māori Multiple Owned Land Development Committee, 'Māori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 131)
126. Māori Multiple Owned Land Development Committee, 'Māori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), pp 133–134)
127. Māori Multiple Owned Land Development Committee, 'Māori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 134)
128. Māori Multiple Owned Land Development Committee, 'Māori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), pp 144, 174–175)
129. Te Puni Kōkiri, 'Review of Te Ture Whenua Māori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 72)
130. Te Puni Kōkiri, 'Review of Te Ture Whenua Māori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 72)
131. Dr Ngatata Love, briefing paper for Minister of Māori Affairs, 15 March 1999 (John Alexander Grant, papers in support of fifth brief of evidence (doc A21(a)), p 59)

132. Te Puni Kōkiri, 'Review of Te Ture Whenua Māori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 74)
133. Te Puni Kōkiri, 'Review of Te Ture Whenua Māori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 84)
134. Te Puni Kōkiri, 'Review of Te Ture Whenua Māori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 72)
135. Te Puni Kōkiri, 'Review of Te Ture Whenua Māori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 72)
136. Te Puni Kōkiri, 'Review of Te Ture Whenua Māori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 76)
137. Te Puni Kōkiri, 'Review of Te Ture Whenua Māori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 77)
138. Te Puni Kōkiri, 'Review of Te Ture Whenua Māori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 78–83)
139. Te Puni Kōkiri, 'Extract from report to Cabinet on Te Ture Whenua Māori Act Review Consultation Hui', no date (1998) (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 135)
140. Te Puni Kōkiri, 'Extract from report to Cabinet on Te Ture Whenua Māori Act Review Consultation Hui', no date (1998) (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 135–136)
141. Te Puni Kōkiri, 'Extract from report to Cabinet on Te Ture Whenua Māori Act Review Consultation Hui', no date (1998) (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 136–137)
142. Te Puni Kōkiri, 'Extract from report to Cabinet on Te Ture Whenua Māori Act Review Consultation Hui', no date (1998) (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 137)
143. Te Puni Kōkiri, 'Extract from report to Cabinet on Te Ture Whenua Māori Act Review Consultation Hui', no date (1998) (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 137–138)
144. Te Puni Kōkiri, 'Extract from report to Cabinet on Te Ture Whenua Māori Act Review Consultation Hui', no date (1998) (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 138–140); Dr Ngatata Love, briefing paper for Minister of Māori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), pp 59–60, 63, 64)
145. Dr Ngatata Love, briefing paper for Minister of Māori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), p 60)
146. Dr Ngatata Love, briefing paper for Minister of Māori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), p 56)
147. Dr Ngatata Love, briefing paper for Minister of Māori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), p 74)
148. Dr Ngatata Love, briefing paper for Minister of Māori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), p 74)
149. Māori Land Development Group, 'Interim/Transitional Report', 1 June 1999 (Crown counsel, second disclosure bundle (doc A28), p 177)
150. Māori Land Development Group, 'Interim/Transitional Report', 1 June 1999 (Crown counsel, second disclosure bundle (doc A28), p 179)
151. Māori Land Development Group, 'Interim/Transitional Report', 1 June 1999 (Crown counsel, second disclosure bundle (doc A28), pp 185–187)
152. Māori Land Development Group, 'Interim/Transitional Report', 1 June 1999 (Crown counsel, second disclosure bundle (doc A28), p 185)
153. Te Puni Kōkiri, 'Report of the National Wānanga held to discuss the principles to underpin Māori land legislation', June 1999 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 176–209)
154. Crown counsel, closing submissions (paper 3.3.6), p 8
155. Hui Taumata Māori Land Tenure Review Group, Supporting Paper, 23 June 2006 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 266)
156. Dr Ngatata Love, briefing paper for Minister of Māori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), pp 62, 72)
157. Marise Lant, first brief of evidence, September 2014 (doc A4), pp 2–3
158. Grant, first brief of evidence (doc A1), p 4
159. Grant, first brief of evidence (doc A1), p 4
160. Crown counsel, closing submissions (paper 3.3.6), p 8
161. John Alexander Grant, fifth brief of evidence, 3 November 2015 (doc A21), p 3
162. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 216)
163. 'Te Ture Whenua Māori Amendment Bill/Māori Land Amendment Bill, as reported from the Māori Affairs Committee', 2000 (Crown counsel, second disclosure bundle (doc A28), p 205)
164. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 216)
165. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), pp 231–233)
166. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 237)
167. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 240)
168. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 241)
169. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 242)

170. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 246)
171. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), pp 246–247)
172. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 247)
173. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 248)
174. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 249)
175. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 254)
176. Te Puni Kōkiri, 'Te Puni Kōkiri Report to the Māori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 271)
177. 'Te Ture Whenua Māori Amendment Bill/Māori Land Amendment Bill, as reported from the Māori Affairs Committee', 2000 (Crown counsel, second disclosure bundle (doc A28), pp 204–209)
178. 'Te Ture Whenua Māori Amendment Bill/Māori Land Amendment Bill, as reported from the Māori Affairs Committee', 2000 (Crown counsel, second disclosure bundle (doc A28), p 216)
179. Te Ture Whenua Māori Amendment Act 2002, s 4 (definition of 'long-term lease'), s 24 (inserting ss 150A–150C into the 1993 Act)
180. Grant, fifth brief of evidence (doc A21), pp 6–7
181. Grant, fifth brief of evidence (doc A21), p 7
182. 'Te Ture Whenua Māori Amendment Bill/Māori Land Amendment Bill, as reported from the Māori Affairs Committee', 2000 (Crown counsel, second disclosure bundle (doc A28), p 205)
183. 'Te Ture Whenua Māori Amendment Bill/Māori Land Amendment Bill, as reported from the Māori Affairs Committee', 2000 (Crown counsel, second disclosure bundle (doc A28))
184. Hui Taumata Māori Land Tenure Review Group, Supporting Paper, 23 June 2006 (Dewes, supporting papers to first brief of evidence (doc A22(a)), p 266)
185. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 161)
186. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 161)
187. Dewes, first brief of evidence (doc A22), p 3
188. Whaimutu Dewes, 'Māori Land Tenure Review: Report on Issues', no date (2006) (Dewes, papers in support of first brief of evidence (doc A22(a)), p 240)
189. Whaimutu Dewes, 'Māori Land Tenure Review: Report on Issues', no date (2006) (Dewes, papers in support of first brief of evidence (doc A22(a)), p 240)
190. Dewes, first brief of evidence (doc A22), p 3
191. Dewes, first brief of evidence (doc A22), p 3
192. New Zealand Institute for Economic Research, 'Māori Economic Development: Te Ōhanga Whanaketanga Māori', 2003 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 111–114)
193. New Zealand Institute for Economic Research, 'Māori Economic Development: Te Ōhanga Whanaketanga Māori', 2003 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 222–223)
194. New Zealand Institute for Economic Research, 'Māori Economic Development: Te Ōhanga Whanaketanga Māori', 2003 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 223)
195. New Zealand Institute for Economic Research, 'Māori Economic Development: Te Ōhanga Whanaketanga Māori', 2003 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 223–224)
196. Dewes, first brief of evidence (doc A22), p 3
197. Dewes, first brief of evidence (doc A22), p 4
198. Dewes, first brief of evidence (doc A22), p 4
199. Whaimutu Dewes, 'Māori Land Tenure Review: Report on Issues', no date (2006) (Dewes, papers in support of first brief of evidence (doc A22(a)), p 231)
200. Whaimutu Dewes, 'Māori Land Tenure Review: Report on Issues', no date (2006) (Dewes, papers in support of first brief of evidence (doc A22(a)), p 231)
201. Whaimutu Dewes, 'Māori Land Tenure Review: Report on Issues', no date (2006) (Dewes, papers in support of first brief of evidence (doc A22(a)), p 235)
202. See, for example, Māori Multiple Owned Land Development Committee, 'Māori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), pp 138, 141).
203. Whaimutu Dewes, 'Māori Land Tenure Review: Report on Issues', no date (2006) (Dewes, papers in support of first brief of evidence (doc A22(a)), p 230); 'Hui Taumata Māori Land Tenure Review Group, Discussion Paper', 23 June 2006 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 247)
204. Whaimutu Dewes, 'Māori Land Tenure Review: Report on Issues', no date (2006) (Dewes, papers in support of first brief of evidence (doc A22(a)), p 236)
205. 'Hui Taumata Māori Land Tenure Review Group, Discussion Paper', 23 June 2006 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 264)
206. 'Hui Taumata Māori Land Tenure Review Group, Discussion Paper', 23 June 2006 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 242)
207. 'Hui Taumata Māori Land Tenure Review Group, Discussion Paper', 23 June 2006 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 251–252)
208. 'Hui Taumata Māori Land Tenure Review Group, Discussion Paper', 23 June 2006 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 244). We note that the Ministerial Advisory

Group later estimated the figure at 15 to 25 per cent: 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 125)
209. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 162)
210. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 162)
211. Whaimutu Dewes, Tony Walzl, and Doug Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), p 6)
212. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', foreword by Hon Dr Pita Sharples, April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), p 5)
213. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 6, 14)
214. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), p 6)
215. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 25; see also claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 21–24
216. Dewes, first brief of evidence (doc A22), p 5
217. Crown counsel, closing submissions (paper 3.3.6), p 10, n 23; claimant counsel (Watson), closing submissions (paper 3.3.8), p 30
218. Dewes, first brief of evidence (doc A22), p 5
219. Crown counsel, closing submissions (paper 3.3.6), p 10, n 23
220. Dewes, first brief of evidence (doc A22), p 5
221. Crown counsel, closing submissions (paper 3.3.6), p 10
222. 'Hui Taumata Māori Land Tenure Review Group, Discussion Paper', 23 June 2006 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 247); Hui Taumata Māori Land Tenure Review Group, Supporting Paper, 23 June 2006 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 262–263)
223. Crown counsel, closing submissions (paper 3.3.6), p 10
224. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 23–26)
225. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 25
226. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 35–36)
227. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 55–56)
228. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), p 56)
229. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), p 56)
230. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 56–57)
231. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 56–59)
232. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), p 66)
233. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 38–41)
234. Dewes, Walzl, and Martin, 'Owner Aspirations regarding the Utilisation of Māori Land', April 2011 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 65–66)
235. Māori Land Development Group, 'Interim/Transitional Report', 1 June 1999 (Crown counsel, second disclosure bundle (doc A28), p 187)
236. Crown counsel, closing submissions (paper 3.3.6), pp 3, 7–10
237. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 30–31
238. Grant, first brief of evidence (doc A1), p 6
239. Grant, first brief of evidence (doc A1), p 6
240. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 30–31
241. Associate Minister of Māori Affairs, press release, 'Te Ture Whenua Māori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 69)
242. Te Ture Whenua Māori Review Panel, 'Discussion Paper', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 171)
243. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 12–13, 30–31
244. Claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 4–5
245. Matanuku Mahuika, first brief of evidence, 3 November 2015 (doc A23), p 10
246. Mahuika, first brief of evidence (doc A23), p 5
247. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 11; claimant counsel (Thornton), closing submissions (paper 3.3.10), p 9
248. Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 13
249. Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 11
250. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 35

251. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 11–12, 24–25
252. Claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 15–16; Kerensa Johnston, first brief of evidence, 30 October 2015 (doc A13). A 'greenfield' approach means to build literally on a green field, where no previous buildings have been erected.
253. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 8)
254. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 8)
255. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 8)
256. Crown counsel, closing submissions (paper 3.3.6), p 48
257. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 162–163)
258. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 163)
259. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 30–32
260. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 163)
261. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 163–164)
262. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 164)
263. Associate Minister of Māori Affairs, press release, 'Te Ture Whenua Māori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 69)
264. Associate Minister of Māori Affairs, press release, 'Te Ture Whenua Māori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 69–70)
265. Associate Minister of Māori Affairs, press release, 'Te Ture Whenua Māori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 70). Crown counsel advised that the Māori Land Advisory Group was not actually created: Crown counsel, memorandum, 27 November 2015 (paper 3.1.79), p 2
266. Associate Minister of Māori Affairs, press release, 'Te Ture Whenua Māori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 70–71)
267. Associate Minister of Māori Affairs, press release, 'Te Ture Whenua Māori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 69)
268. Mahuika, first brief of evidence (doc A23), pp 1–2
269. Associate Minister of Māori Affairs, press release, 'Te Ture Whenua Māori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 69–70)
270. Te Rūnanganui o Ngāti Porou, submission to TTWM Review Panel, 23 November 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 82)
271. Te Rūnanganui o Ngāti Porou, submission to TTWM Review Panel, 23 November 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 82–83)
272. Mahuika, first brief of evidence (doc A23), p 5
273. Transcript 4.1.2, p 433; claimant counsel (Thornton), closing submissions (paper 3.3.10), p 14
274. Mahuika, first brief of evidence (doc A23), p 5
275. Transcript 4.1.2, p 434
276. Mahuika, first brief of evidence (doc A23), p 3
277. Crown counsel, closing submissions (paper 3.3.6), p 11
278. Mahuika, first brief of evidence (doc A23), p 6
279. Mahuika, first brief of evidence (doc A23), p 6
280. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 245)
281. Transcript 4.1.2, p 436
282. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 245)
283. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 261)
284. Mahuika, first brief of evidence (doc A23), p 6
285. Associate Minister of Māori Affairs, press release, 'Te Ture Whenua Māori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 70)
286. See, for example, claimant counsel (Watson), closing submissions, pp 11–12.
287. Marise Lant, fifth brief of evidence, no date (6 November 2015) (doc A26), pp 2, 4
288. Prudence Jane Tamatekapua, brief of evidence, 30 October 2015 (doc A14), p 3
289. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013; Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 8–9, 165)
290. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 246)
291. See submissions to the review panel (Crown counsel, third disclosure bundle, vol 1 (doc A29).

292. Mahuika, first brief of evidence (doc A23), p 6
293. Mahuika, first brief of evidence (doc A23), p 10
294. Māori Land Court judges, submission to review panel, 26 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 18, 25)
295. Māori Land Court judges, submission to review panel, 26 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 23, 28–30)
296. Māori Land Court judges, submission to review panel, 26 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 23)
297. Māori Land Court judges, submission to review panel, 26 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 29)
298. Māori Land Court judges, submission to review panel, 26 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 32–33, 37, 42–46)
299. Federation of Māori Authorities, oral submissions to review panel, October 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 62–74)
300. Te Rūnanganui o Ngāti Porou, submission to TTWM Review Panel, 23 November 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 82)
301. Te Rūnanganui o Ngāti Porou, submission to TTWM Review Panel, 23 November 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 84–85)
302. Te Rūnanganui o Ngāti Porou, submission to TTWM Review Panel, 23 November 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 86–94)
303. Te Rūnanganui o Ngāti Porou, submission to TTWM Review Panel, 23 November 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 98–99)
304. Wakatū Incorporation, 'Preliminary Report on the Te Ture Whenua Māori Act 1993 Review 2012', July/August 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 567–568)
305. Ngā Hapū o Poutama, submission to review panel, 10 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 13–16)
306. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 164)
307. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 164)
308. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 164)
309. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 169)
310. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 175)
311. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 172)
312. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 170, 174)
313. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 169)
314. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 183)
315. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 183)
316. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 184–185)
317. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 185)
318. Mahuika, first brief of evidence (doc A23), p 4
319. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 169)
320. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 186–187)
321. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 189–192)
322. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 187)
323. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 169)
324. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 192)
325. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 192–196)
326. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 169)
327. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 199)

328. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 169, 199)
329. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 202)
330. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 203, 207)
331. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 168
332. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 165)
333. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 234–243, 252–257)
334. Mahuika, first brief of evidence (doc A23), p 7
335. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 234–243, 252–257)
336. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 258)
337. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 257–258)
338. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 258)
339. Māori Land Court judges, submission to review panel, 12 April 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 101–126)
340. Te Hunga Rōia Māori o Aotearoa, submission to review panel, 14 June 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 670–671)
341. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 4; claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 17–18; Lant, first brief of evidence (doc A4), p 7
342. Lant, first brief of evidence (doc A4), pp 6–8, 10
343. Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 18
344. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 4, 7
345. See Te Puni Kōkiri reports of April to June 2013 hui (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 711–797); submissions of named organisations to the review panel, 2012–13 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 1–710)
346. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 234–243, 252–257)
347. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 256–257, 261)
348. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 259)
349. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 259)
350. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 259)
351. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 260)
352. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 260)
353. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 260)
354. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 261)
355. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 261)
356. Minutes and Te Puni Kōkiri summary reports for the 2013 hui (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 711–797)
357. New Zealand Māori Council, submission to review panel, 20 May 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 275–276)
358. New Zealand Māori Council, submission to review panel, 20 May 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 275–276)
359. New Zealand Māori Council, submission to review panel, 20 May 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 276–282)
360. Ngā Hapū o Poutama, submission to review panel, 10 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 14)
361. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 19)
362. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 166)
363. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 166)
364. Associate Minister of Māori Affairs, press release, 'Te Ture Whena Māori Act review report released', 3 April 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 265)

365. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 11
366. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 11
367. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 7)
368. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 6)
369. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 7)
370. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 6–16)
371. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 16)
372. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 6)
373. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 17)
374. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 11)
375. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 11)
376. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 254)
377. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 12–13)
378. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 11–12)
379. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 12–13)
380. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 13)
381. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 13)
382. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 13–15)
383. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 13, 15)
384. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 15)
385. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 16, 18)
386. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 19)
387. Cabinet Economic Growth and Infrastructure Committee, Minute of Decision, 4 September 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 42–45)
388. Minister and Associate Minister for Māori Development to Cabinet Economic Growth and Infrastructure Committee, 14 May 2015 (claimant counsel (Watson), documents released under the Official Information Act (doc A38), p [275])
389. Lant, first brief of evidence (doc A4), p 7; Marise Lant, second brief of evidence, 15 September 2015 (doc A6), p 29
390. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, p 580
391. Derek Te Ariki Morehu, brief of evidence (doc A25), pp 2–8
392. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 4
393. Mahuika, first brief of evidence (doc A23), pp 7–8
394. Cabinet Economic Growth and Infrastructure Committee, Minute of Decision, 4 September 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 42)

395. 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 258)
396. See, for example, Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, 4 vols (Wellington: Legislation Direct, 2008), vol 3, chapters 13–16.
397. Waitangi Tribunal, *Whāia te Mana Motuhake / In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wellington: Legislation Direct, 2015), p 388
398. Associate Minister of Māori Affairs, press release, 'Te Ture Whenua Māori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 70)
399. Mahuika, first brief of evidence (doc A23), p 6
400. Cabinet Economic Growth and Infrastructure Committee, 'Summary of Paper', 29 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 50)
401. Associate Minister of Māori Affairs to Cabinet Economic Growth and Infrastructure Committee, 29 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 59)
402. Associate Minister of Māori Affairs to Cabinet Economic Growth and Infrastructure Committee, 29 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 59)
403. Associate Minister of Māori Affairs to Cabinet Economic Growth and Infrastructure Committee, 29 November 2013, appendix 1 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 69)
404. Associate Minister of Māori Affairs to Cabinet Economic Growth and Infrastructure Committee, 29 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 60)
405. Associate Minister of Māori Affairs to Cabinet Economic Growth and Infrastructure Committee, 29 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 63)
406. Te Puni Kōkiri, 'Regulatory Impact Statement', 27 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 88)
407. Te Puni Kōkiri, 'Regulatory Impact Statement', 27 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 88)
408. Te Puni Kōkiri, 'Regulatory Impact Statement', 27 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 94)
409. Te Puni Kōkiri, 'Regulatory Impact Statement', 27 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 94)
410. Te Puni Kōkiri, 'Regulatory Impact Statement', 27 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 94)
411. Lillian Anderson, first brief of evidence, 4 November 2015 (doc A24)
412. Cabinet Economic Growth and Infrastructure Committee, 'Summary of Paper', 27 June 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 97)
413. Grant, first brief of evidence (doc A1), p 10
414. Grant, first brief of evidence (doc A1), p 11
415. Grant, first brief of evidence (doc A1), p 10
416. Grant, first brief of evidence (doc A1), p 11
417. Grant, first brief of evidence (doc A1), p 11
418. John Grant, file notes for meetings, 7 October 2013, 2 December 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 1117–1124)
419. Lant, first brief of evidence (doc A4), p 9
420. Lant, first brief of evidence (doc A4), pp 10–11
421. 'Review of Te Ture Whenua Māori Act: presentation', no date, Powerpoint presentation to hui, September 2013 – April 2014 (Grant, papers in support of brief of evidence (doc A1(a)), pp 267–270)
422. Associate Minister of Māori Affairs, press release, 3 April 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 265)
423. Judge David Ambler, 'Review of Te Ture Whenua Māori Act 1993', 24 June 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(a)), p 3)
424. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence, 3 August 2015 (doc A5(a)), p 2)
425. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 170)
426. Grant, first brief of evidence (doc A1), p 10
427. Grant, first brief of evidence (doc A1), p 11
428. Crown counsel, memorandum, 20 November 2015 (paper 3.1.76), p 3
429. Crown counsel, opening submissions (paper 3.3.3), pp 12–13
430. TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Māori Bill and Related Policy', 1 May 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(b)))
431. TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Māori Bill and Related Policy', 1 May 2014 (Lant, papers in support of first brief of evidence (doc A4(b)), p [78])
432. TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Māori Bill and Related Policy', 1 May 2014 (Lant, papers in support of first brief of evidence (doc A4(b)), p [79])
433. TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Māori Bill and Related Policy', 1 May 2014 (Lant, papers in support of first brief of evidence (doc A4(b)), pp [81]-[82], [84])
434. TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Māori Bill and Related Policy', 1 May 2014 (Lant, papers in support of first brief of evidence (doc A4(b)) pp [82]-[83])
435. TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Māori Bill and Related Policy', 1 May 2014 (Lant, papers in support of first brief of evidence (doc A4(b)) p [84])
436. Grant, first brief of evidence (doc A1), p 16; Associate Minister of Māori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), p 296)

437. TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Māori Bill and Related Policy', 1 May 2014 (Lant, papers in support of first brief of evidence (doc A4(b)), p [88])
438. TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Māori Bill and Related Policy', 1 May 2014 (Lant, papers in support of first brief of evidence (doc A4(b)), pp [88]-[92])
439. Associate Minister of Māori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), p 295)
440. Associate Minister of Māori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), p 295)
441. Associate Minister of Māori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), p 296)
442. Associate Minister of Māori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), p 296)
443. Associate Minister of Māori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), pp 295–296)
444. Cabinet Economic Growth and Infrastructure Committee, 'Summary of Paper', 27 June 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 99)
445. Associate Minister of Māori Affairs and Minister for Land Information to Cabinet Economic Growth and Infrastructure Committee, 26 June 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 106–108)
446. Cabinet Economic Growth and Infrastructure Committee, 'Summary of Paper', 27 June 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 100)
447. Associate Minister of Māori Affairs and Minister for Land Information to Cabinet Economic Growth and Infrastructure Committee, 26 June 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 105–108)
448. Associate Minister of Māori Affairs and Minister for Land Information to Cabinet Economic Growth and Infrastructure Committee, 26 June 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 109)
449. Associate Minister of Māori Affairs and Minister for Land Information to Cabinet Economic Growth and Infrastructure Committee, 26 June 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 111)
450. Te Puni Kōkiri, 'Regulatory Impact Statement', no date (June 2014) (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 141–142)
451. Associate Minister of Māori Affairs and Minister for Land Information to Cabinet Economic Growth and Infrastructure Committee, 26 June 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 115)
452. Associate Minister of Māori Affairs and Minister for Land Information to Cabinet Economic Growth and Infrastructure Committee, 26 June 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 115)
453. Raniera Tau, 'Te Ture Whenua Māori Hōu Panui – Engagement Hui with Māori Land Owners', 15 July 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 291)
454. Te Puni Kōkiri, 'Te Ture Whenua Māori: developing a Bill to restate and reform the law relating to Māori land', Powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), p 273)
455. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 169)
456. Grant, first brief of evidence (doc A1), p 12
457. Te Puni Kōkiri, 'Te Ture Whenua Māori: developing a Bill to restate and reform the law relating to Māori land', Powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), p 277); Grant, first brief of evidence (doc A1), p 12
458. Te Puni Kōkiri, 'Te Ture Whenua Māori: developing a Bill to restate and reform the law relating to Māori land', Powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), pp 277, 280). John Grant clarified that the 75 per cent of owners referred to *all* owners, not participating owners, which was not clear in the Powerpoint presentation: Grant, first brief of evidence (doc A1), p 17.
459. Grant, first brief of evidence (doc A1), p 17
460. Te Puni Kōkiri, 'Te Ture Whenua Māori: developing a Bill to restate and reform the law relating to Māori land', Powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), p 272)
461. Te Puni Kōkiri, 'Te Ture Whenua Māori: developing a Bill to restate and reform the law relating to Māori land', Powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), pp 273–274, 278)
462. Te Puni Kōkiri, 'Te Ture Whenua Māori: developing a Bill to restate and reform the law relating to Māori land', Powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), pp 274, 278, 282)
463. Te Puni Kōkiri, 'Te Ture Whenua Māori: developing a Bill to restate and reform the law relating to Māori land', Powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), pp 272, 274, 278–280)
464. Te Puni Kōkiri, 'Te Ture Whenua Māori: developing a Bill to restate and reform the law relating to Māori land', Powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), p 279)
465. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 5). This was not mentioned in the Powerpoint but was included in the oral presentations at the hui.
466. Te Puni Kōkiri, 'Te Ture Whenua Māori: developing a Bill to restate and reform the law relating to Māori land', Powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), pp 272, 276, 280, 281)

467. Te Puni Kōkiri, 'Te Ture Whenua Māori: developing a Bill to restate and reform the law relating to Māori land', Powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), pp 275, 281); Grant, first brief of evidence (doc A1), p 13
468. Te Puni Kōkiri, 'Te Ture Whenua Māori: developing a Bill to restate and reform the law relating to Māori land', Powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), p 276)
469. John Grant, fourth brief of evidence, 3 August 2015 (doc A5), p 1
470. Grant, first brief of evidence (doc A1), pp 16–17
471. 'Ture Whenua Māori Hōu Report by Willie Te Aho to the Iwi Chairs Forum, Tuahiwi Marae', 28 August 2014 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 835)
472. 'Ture Whenua Māori Hōu Report by Willie Te Aho to the Iwi Chairs Forum, Tuahiwi Marae', 28 August 2014 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 837)
473. Federation of Māori Authorities Powerpoint presentation, no date (July 2014) (Grant, papers in support of first brief of evidence (doc A1(a)), p 283)
474. Federation of Māori Authorities Powerpoint presentation, no date (July 2014) (Grant, papers in support of first brief of evidence (doc A1(a)), pp 283–284)
475. Federation of Māori Authorities Powerpoint presentation, no date (July 2014) (Grant, papers in support of first brief of evidence (doc A1(a)), p 283)
476. Federation of Māori Authorities Powerpoint presentation, no date (July 2014) (Grant, papers in support of first brief of evidence (doc A1(a)), pp 283–284)
477. ILG Powerpoint presentation, no date (July 2014) (Grant, papers in support of first brief of evidence (doc A1(a)), p 285)
478. ILG Powerpoint presentation, no date (July 2014) (Grant, papers in support of first brief of evidence (doc A1(a)), pp 286–289)
479. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 3). Follow-up hui were held in Whangārei on 22 August and in Wairoa on 20 October 2014.
480. Grant, first brief of evidence (doc A1), p 14
481. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 3)
482. Lant, first brief of evidence (doc A4), pp 10, 11
483. Lant, first brief of evidence (doc A4), p 10
484. Lant, first brief of evidence (doc A4), p 11
485. Te Puni Kōkiri, 'Te Ture Whenua Māori: developing a Bill to restate and reform the law relating to Māori land', Powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), p 282)
486. Lant, first brief of evidence (doc A4), p 11
487. Grant, first brief of evidence (doc A1), pp 14–15
488. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 171); Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 5)
489. Grant, first brief of evidence (doc A1), p 15
490. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 8)
491. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 172)
492. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 5)
493. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 171); Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 5)
494. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 5)
495. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 6); Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 171); Grant, first brief of evidence (doc A1), p 19
496. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 6)
497. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 7)
498. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 7)
499. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 7)
500. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 172)
501. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 8)
502. 'Ture Whenua Māori Hōu Report by Willie Te Aho to the Iwi Chairs Forum, Tuahiwi Marae', 28 August 2014 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 835)

503. 'Ture Whenua Māori Hōu Report by Willie Te Aho to the Iwi Chairs Forum, Tuahiwi Marae', 28 August 2014 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 835)
504. 'Ture Whenua Māori Hōu Report by Willie Te Aho to the Iwi Chairs Forum, Tuahiwi Marae', 28 August 2014 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 835)
505. 'Ture Whenua Māori Hōu Report by Willie Te Aho to the Iwi Chairs Forum, Tuahiwi Marae', 28 August 2014 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 835)
506. 'Ture Whenua Māori Hōu Report by Willie Te Aho to the Iwi Chairs Forum, Tuahiwi Marae', 28 August 2014 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 837–842)
507. 'Ture Whenua Māori Hōu Report by Willie Te Aho to the Iwi Chairs Forum, Tuahiwi Marae', 28 August 2014 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 836, 843)
508. 'Ture Whenua Māori Hōu Report by Willie Te Aho to the Iwi Chairs Forum, Tuahiwi Marae', 28 August 2014 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 836)
509. 'Unanimous Resolutions passed by Iwi Chairs Forum, 28 August 2014 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 847)
510. Lant, second brief of evidence (doc A6), pp 15–17
511. Lant, first brief of evidence (doc A4), p 8
512. Claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 18, 32
513. Crown counsel, closing submissions (paper 3.3.6), pp 30–31
514. Crown counsel, closing submissions (paper 3.3.6), p 27
515. Crown counsel, closing submissions (paper 3.3.6), p 30
516. Crown counsel, closing submissions (paper 3.3.6), p 28
517. Crown counsel, closing submissions (paper 3.3.6), p 26
518. Crown counsel, closing submissions (paper 3.3.6), p 25
519. Crown counsel, closing submissions (paper 3.3.6), p 25
520. Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 3
521. Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 2; Waitangi Tribunal, *Whāia te Mana Motuhake*, p 31
522. Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 2
523. Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), pp 4–5
524. Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 5
525. Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 5
526. 'Ture Whenua Māori Hōu Report by Willie Te Aho to the Iwi Chairs Forum, Tuahiwi Marae', 28 August 2014 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 835)
527. 'Te Ture Whenua Māori Hōu Panui – Engagement Hui with Māori Land Owners', 15 July 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 291)
528. Judge David Ambler, 'Review of Te Ture Whenua Māori Act 1993', 24 June 2014 (Lant, papers in support of first brief of evidence (doc A4(a)), p 1)
529. Wai 2478, amended statement of claim, 11 August 2014 (paper 1.1.1), para 19
530. 'Te Ture Whenua Māori Reform: Consultation Document', May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 431)
531. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 119)
532. Te Puni Kōkiri, briefing for Minister of Māori Development on review of Te Ture Whenua Māori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 172–173
533. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 37)
534. Grant, first brief of evidence (doc A1), p 19; 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 117)
535. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 53)
536. Lant, second brief of evidence (doc A6), pp 7–8; Ministry for Primary Industries, *Growing the Productive Base of Māori Freehold Land – Further Evidence and Analysis*, December 2014 (Marise Lant, papers in support of second brief of evidence (doc A6(a)), pp 236–238, 264–269)
537. Grant, first brief of evidence (doc A1), pp 15–16
538. Transcript 4.1.2, pp 364–365
539. Federation of Māori Authorities, 'Submission on Exposure Draft of the Te Ture Whenua Māori Bill and the Māori Land Service', no date (Crown counsel, first disclosure bundle (doc A8), p 736)
540. TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Māori Bill and Related Policy', 1 May 2014 (Lant, papers in support of first brief of evidence (doc A4(b)) p 84)
541. Associate Minister of Māori Affairs to Raniera (Sonny) Tau, 1 August 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 295–296)
542. Te Puni Kōkiri, 'Summary of key themes from Ture Whenua Māori Hōu Hui – August 2014', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 2)
543. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, p 682
544. Waitangi Tribunal, *Whāia te Mana Motuhake*, pp 28, 34
545. Waitangi Tribunal, *Whāia te Mana Motuhake*, pp 41–43
546. Te Minita Whanaketanga Māori to Raniera (Sonny) Tau, ICF, no date (July 2015) (Lant, papers in support of second brief of evidence (doc A6(a)), pp 431–435)
547. Grant, fourth brief of evidence (doc A5), p 3

548. Grant, fourth brief of evidence (doc A5), pp 3–7; John Grant, fifth brief of evidence, 3 November 2015 (doc A21), pp 2, 4–5
549. Grant, fourth brief of evidence (doc A5), p 3
550. Grant, fifth brief of evidence (doc A21), p 4
551. 'Te Ture Whenua Māori Ministerial Advisory Group Members', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 15)
552. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 112–113)
553. Grant, fourth brief of evidence (doc A5), p 3
554. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 115); 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 50)
555. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 116); 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 58)
556. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 116–117)
557. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 117)
558. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 117)
559. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 118)
560. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 62–63)
561. Grant, fifth brief of evidence (doc A21), p 2
562. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 30)
563. Grant, fourth brief of evidence (doc A5), p 3
564. Grant, fourth brief of evidence (doc A5), p 3
565. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 78)
566. Grant, fourth brief of evidence (doc A5), pp 3–4
567. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)))
568. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 22)
569. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 37)
570. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 36, 43)
571. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 50)
572. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 66)
573. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 48–61)
574. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 92)
575. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 99)
576. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 91–92, 95)
577. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 92–93)
578. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 94)
579. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 95)
580. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 94)
581. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 108)
582. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 93)
583. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 93–94)
584. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 93–94)
585. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 95)

586. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 119)
587. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 119)
588. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 96–97, 104)
589. Te Puni Kōkiri, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 105)
590. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 121)
591. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 112–113)
592. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 115–116)
593. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 116)
594. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 118)
595. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 118)
596. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 114)
597. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 114)
598. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 113, 116–117)
599. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 113)
600. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 113)
601. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 117)
602. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 117–118)
603. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 123)
604. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 124–125)
605. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 125–126)
606. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 126)
607. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 126–127)
608. Te Puni Kōkiri, 'Te Ture Whenua Māori Consultation Hui Information Pack', 29 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 525)
609. Te Puni Kōkiri, 'Te Ture Whenua Māori Consultation Hui Information Pack', 29 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 525)
610. Te Puni Kōkiri, 'Te Ture Whenua Māori Consultation Hui Information Pack', 29 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 525)
611. Te Ture Whenua Māori Draft Exposure Bill 2015, cl 45(4) (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 183)
612. Te Ture Whenua Māori Draft Exposure Bill 2015, cl 45(5) (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 183–184)
613. Transcript 4.1.2, p 369
614. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 477)
615. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 418–485)
616. Minister for Māori Development, press release, '$12.8 million for new Te Ture Whenua Māori Network', 21 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 128); Te Puni Kōkiri, 'Te Ture Whenua Māori Consultation Hui Information Pack', 29 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 525)
617. Lant, second brief of evidence (doc A6), p 8. The figure of $825 million was the total figure estimated by PriceWaterhouseCooper as necessary for investment in agricultural development.
618. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 4
619. Grant, fourth brief of evidence (doc A5), p 4
620. Te Puni Kōkiri, 'Te Ture Whenua Māori Consultation Hui Information Pack', 29 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 517–523); Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 475–479)

621. Te Puni Kōkiri, 'Te Ture Whenua Māori Consultation Hui Information Pack', 29 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 531)
622. Crown counsel, closing submissions (paper 3.3.6), p 30
623. Crown counsel, closing submissions (paper 3.3.6), p 25
624. Crown counsel, closing submissions (paper 3.3.6), p 25
625. Grant, fourth brief of evidence (doc A5), p 6
626. Grant, fourth brief of evidence (doc A5), p 6
627. Crown counsel, closing submissions (paper 3.3.6), p 31
628. Crown counsel, closing submissions (paper 3.3.6), p 32
629. Kerensa Johnston, second brief of evidence, 16 December 2015 (doc A36), p 13
630. Johnston, second brief of evidence (doc A36), p 13
631. Lant, second brief of evidence (doc A6), p 20
632. Mahuika, brief of evidence (doc A23), p 9; transcript 4.1.3, p 18; Lant, second brief of evidence (doc A6), p 22
633. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 224)
634. Lant, second brief of evidence (doc A6), pp 22–24
635. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 35
636. Crown counsel, first disclosure bundle (doc A8), pp 1–3030; 'Te Ture Whenua Māori Bill: Submission of the Judges of the Māori Land Court', 7 August 2015 (doc A20)
637. Grant, fifth brief of evidence (doc A21), p 5
638. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 533)
639. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 541)
640. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 547)
641. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 533–534)
642. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 536)
643. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 537–539)
644. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 540)
645. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 541–542)
646. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 542)
647. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 543–544)
648. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 546)
649. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 547–548)
650. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 550)
651. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 553)
652. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 554–555)
653. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 557)
654. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 545)
655. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 552, 560)
656. Te Puni Kōkiri, 'Te Ture Whenua Māori Bill: Thematic summary bullet points', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 558)
657. For the Gisborne hui on 16 June 2015, see Lant, second brief of evidence (doc A6), p 24, and Te Puni Kōkiri, 'Consultation hui on Te Ture Whenua Māori Reform, Holy Trinity Hall, Gisborne, 16 June 2015' (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 1057–1072). A motion opposing the Bill was passed with 55 for, 10 against, and 17 abstentions (40 attendees did not vote): see Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 1070.
658. Marise Lant, fourth brief of evidence, 30 October 2015 (doc A9), p 9
659. Lant, fourth brief of evidence (doc A9), pp 8–10
660. Lant, fourth brief of evidence (doc A9), pp 10–12
661. Lant, fourth brief of evidence (doc A9), p 12
662. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 217)
663. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 212)
664. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of

Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 219–220)

665. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 220, 222)

666. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 220, 225–228)

667. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 113–114)

668. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 212). The figures were 32 per cent in support and 27 per cent opposed, with 41 per cent 'concern': see Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions' (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 243).

669. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 212, 243)

670. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 221, 243–245)

671. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 213)

672. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 250)

673. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 213)

674. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 221, 257–258)

675. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 213, 262)

676. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 214, 289–290)

677. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 229–230)

678. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 213)

679. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 213, 271–272)

680. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 272)

681. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 308–309)

682. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 214, 299–307)

683. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 215)

684. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 215)

685. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 329–334)

686. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 215)

687. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 215)

688. Transcript 4.1.3, pp 19–21

689. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 224)

690. Rahui Papa, chair, Waikato-Tainui Te Arataua, submission on Exposure Bill, 8 June 2015 (Crown counsel, first disclosure bundle (doc A8), pp 2284–2285)

691. Crown counsel, memorandum, 20 November 2015 (paper 3.1.76), p 2

692. 'Te Ture Whenua Māori Iwi Leadership Group, Position on the Ture Whenua Māori', 2 June 2015 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 845–851)

693. Minister for Māori Development to Raniera (Sonny) Tau, no date (20 July 2015) (Lant, papers in support of second brief of evidence (doc A6(a)), pp 431–435)

694. Minister for Māori Development to Raniera (Sonny) Tau, no date (20 July 2015) (Lant, papers in support of second brief of evidence (doc A6(a)), pp 432, 434)

695. Minister for Māori Development to Raniera (Sonny) Tau, no date (20 July 2015) (Lant, papers in support of second brief of evidence (doc A6(a)), pp 433–435)

696. Minister for Māori Development to Raniera (Sonny) Tau, no date (20 July 2015) (Lant, papers in support of second brief of evidence (doc A6(a)), p 435)

697. Federation of Māori Authorities, submission, no date (August 2015) (Crown counsel, first disclosure bundle (doc A8), p 736)

698. Federation of Māori Authorities, submission, no date (August 2015) (Crown counsel, first disclosure bundle (doc A8), p 748)

699. Federation of Māori Authorities, submission, no date (August 2015) (Crown counsel, first disclosure bundle (doc A8), p 748)
700. Federation of Māori Authorities, submission, no date (August 2015) (Crown counsel, first disclosure bundle (doc A8), p 741)
701. Federation of Māori Authorities, submission, no date (August 2015) (Crown counsel, first disclosure bundle (doc A8), p 744)
702. Federation of Māori Authorities, submission, no date (August 2015) (Crown counsel, first disclosure bundle (doc A8), pp 737–739)
703. Prudence Tamatekapua, brief of evidence, 30 October 2015 (doc A14), pp 3–4
704. See Crown counsel, first disclosure bundle (doc A8), pp 359–366, 2207–2209, 2210–2216, 2999–3001.
705. Minister for Māori Development to Raniera (Sonny) Tau, no date (20 July 2015) (Lant, papers in support of second brief of evidence (doc A6(a)), pp 432–435)
706. Grant, fourth brief of evidence (doc A5), pp 7–8
707. Grant, fourth brief of evidence (doc A5), pp 7–8
708. Grant, fourth brief of evidence (doc A5), p 8
709. Mahuika, brief of evidence (doc A23), p 9
710. Mahuika, brief of evidence (doc A23), pp 9–10
711. We do not have a precise date for the beginning of the Te Ture Whenua Enablers' work stream but we understand it to have been established around this time.
712. Minister and Associate Minister for Māori Development to Cabinet Economic Growth and Infrastructure Committee, 13 October 2015, p 5 (claimant counsel, OIA papers (doc A38), p [296])
713. Minister and Associate Minister for Māori Development to Cabinet Economic Growth and Infrastructure Committee, 13 October 2015, p 3 (claimant counsel, OIA papers (doc A38), p [294])
714. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 213, 242, 243)
715. Minister and Associate Minister for Māori Development to Cabinet Economic Growth and Infrastructure Committee, 13 October 2015, p 3 (claimant counsel, OIA papers (doc A38), p [294])
716. John Grant, sixth brief of evidence, 9 November 2015 (doc A27), pp 1–2
717. Grant, sixth brief of evidence (doc A27), p 2
718. John Grant, 'Te Ture Whenua Māori Bill – Summary of main points of change following consultation' (no date) (doc A27(a))
719. Grant, 'Summary of main points of change' (doc A27(a))
720. See, for example, the court's jurisdiction in respect of partition: Te Ture Whenua Māori Draft Exposure Bill 2015, revised draft, 9 November 2015, cl 94(6) (paper 3.1.69(a)), p 84.
721. Grant, sixth brief of evidence (doc A27), p 2
722. Transcript 4.1.3, p 15
723. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 34
724. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 34–35
725. Crown counsel, closing submissions (paper 3.3.6), p 29
726. Crown counsel, closing submissions (paper 3.3.6), pp 34–35
727. Crown counsel, closing submissions (paper 3.3.6), p 33
728. Kerensa Johnston, second brief of evidence, 16 December 2015 (doc A36), pp 2–3
729. Johnston, second brief of evidence (doc A36), p 3
730. Johnston, second brief of evidence (doc A36), pp 3–4
731. See minutes and hui notes, 16 September to 10 November 2015 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 1–70).
732. 'Unconfirmed Minutes of Stakeholder Hui', 16 September 2015 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 5)
733. Lillian Anderson, second brief of evidence, 18 December 2015 (doc A40), p 3
734. 'Group feedback from Te Puni Kōkiri (Te Puni Kōkiri) hui held 10 November 2015' (Kerensa Johnston, papers in support of second brief of evidence (doc A36(a)), p 1)
735. Anderson, second brief of evidence (doc A40), pp 2–3
736. John Grant, answers to questions in writing, 27 November 2015 (doc A32), p 13
737. Anderson, second brief of evidence (doc A40), p 2
738. Anderson, second brief of evidence (doc A40), pp 1, 2
739. Anderson, second brief of evidence (doc A40), p 3
740. Anderson, second brief of evidence (doc A40), pp 2–4
741. 'Unconfirmed Minutes of Stakeholder Hui', 16 September 2015 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 2)
742. 'Unconfirmed Minutes of Stakeholder Hui', 16 September 2015 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 2)
743. 'Unconfirmed Minutes of TPK Workshop with Iwi Leaders Group Advisors', 15 October 2015 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 22)
744. Crown counsel, closing submissions (paper 3.3.6), p 49
745. See minutes and hui notes, 16 September to 10 November 2015 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 1–70). Material shared with stakeholders about the 'enablers' was blanked out on pp 9, 25–26, 36–37.
746. Conservation covenants
747. 'Unconfirmed Minutes of TPK Workshop with Iwi Leaders Group Advisors', 15 October 2015 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 22); Te Puni Kōkiri, 'Whenua Māori Enablers', Powerpoint presentation, no date (Crown counsel, third disclosure bundle, vol 3 (doc A29(a)), p 55)
748. Federation of Māori Authorities, submission to the Crown, 18 December 2015 (paper 3.1.95(a)), p 7
749. Crown counsel, closing submissions (paper 3.3.6), p 25
750. Crown counsel, closing submissions (paper 3.3.6), p 25
751. Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 3
752. Minister and Associate Minister for Māori Development to Cabinet Economic Growth and Infrastructure Committee, 14 May 2015, p 7 (claimant counsel (Watson), documents released under the Official Information Act (doc A38), p [279])
753. Crown counsel, closing submissions (paper 3.3.6), p 25

754. Crown counsel, closing submissions (paper 3.3.6), p 33
755. Crown counsel, closing submissions (paper 3.3.6), pp 26–28, 30–33
756. Crown counsel, closing submissions (paper 3.3.6), pp 27–28
757. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 217–218)
758. Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 3
759. Whatarangi Winiata, brief of evidence, 30 October 2015 (doc A12), p 3
760. Winiata, brief of evidence (doc A12), p 3; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim* (Wellington: Waitangi Tribunal, 1983), p 51
761. Moana Jackson, brief of evidence, no date (October 2015) (doc A11), p 5
762. Crown counsel, closing submissions (paper 3.3.6), p 17
763. Transcript 4.1.2, p 245
764. Transcript 4.1.2, p 245
765. Winiata, brief of evidence (doc A12), pp 5–6
766. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 183
767. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 237
768. Johnston, second brief of evidence (doc A36), pp 18–19
769. Crown counsel, closing submissions (paper 3.3.6), p 33
770. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 35
771. Crown counsel, closing submissions (paper 3.3.6), p 34
772. Crown counsel, closing submissions (paper 3.3.6), p 19
773. Crown counsel, closing submissions (paper 3.3.6), p 20
774. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 217)
775. Raukawa District Māori Council, submission, no date (Lant, papers in support of second brief of evidence (doc A6(a)), pp 455–461)
776. Freshwater and Conservation Iwi Leaders Group, panui, November 2015 (doc A31)
777. 'Protocol between the Crown and Te Ture Whenua Māori Iwi Leaders Group for the Sharing of Information, Policy Advice and Communications in relation to Te Ture Whenua Māori Issues', December 2015 (Crown counsel, third disclosure bundle, vol 4 (doc A39), pp 7–15)
778. As noted earlier, we do not count the submissions of Te Tumu Paeroa or the Māori Land Court judges, as they were consulted as stakeholders but not as part of the Treaty partner (that is, as 'Māori').
779. Federation of Māori Authorities, submission to the Crown, 18 December 2015 (paper 3.1.95(a))
780. Waitangi Tribunal, *Initiation, Consultation, and Consent: Chapter 3 of Report into Claims concerning Proposed Reforms to Te Ture Whenua Māori Act 1993, Pre-publication Version* (Wellington: Waitangi Tribunal, 2016), p 183

Common Law Principles for Consultation: the *Wellington Airport* Case

1. *Air New Zealand v Wellington International Airport Ltd* High Court Wellington CP403/91, 6 January 1992, p 8; see also *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 675); claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), pp 3–4

The Proposed Process and Timeline for the Review as at 3 June 2012

1. Associate Minister of Māori Affairs, 'Te Ture Whenua Māori Act Review Announced', press release, 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 71))

Te Ture Whenua Māori Iwi Leaders Group, 2014

1. TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the Development of the New Ture Whenua Māori Bill and Related Policy', 1 May 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(b)), pp [80]–[81])

Tables

Table 3.6: Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 237, 243, 250, 262, 271, 289, 299, 308, 324)
Table 3.7: Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 237, 243, 250, 262, 271, 289, 299, 308, 324)

CHAPTER 4

TE WHAKAHOU I TE TURE WHENUA MĀORI / THE PROPOSED TE TURE WHENUA MĀORI BILL

4.1 Introduction

In this chapter, we turn our attention to the substantive proposals contained in the May and November 2015 drafts of Te Ture Whenua Māori Bill, and assess whether they are consistent with the principles of the Treaty of Waitangi. After setting out the parties' arguments, we consider the current state of the Crown's proposal as at November–December 2015, identifying Māori concerns with the exposure draft released in May 2015 and then examining how the revised draft Bill, released in November 2015, proposed to address those concerns. We next consider whether the remaining concerns have merit in Treaty terms. We finally move on to consider two other aspects of the reform of Te Ture Whenua Māori: the extent to which other barriers to the development and utilisation of Māori land will be dealt with by the Bill and reform process, and the proposed Māori Land Service.

It is necessary at the outset to explain the difference between the two draft copies of the Bill which we are discussing in this chapter. When we refer to the 'exposure draft', we are referring to the draft Te Ture Whenua Māori Bill released by the Crown to the public in late May 2015. This was the draft on which Māori were consulted from June to mid-November 2015.[1] When we refer to the 'revised draft', we are referring to the tracked changes version of the draft Bill submitted to our inquiry by the Crown in mid-November 2015.[2] This draft followed Cabinet's decision to amend a number of aspects of the Bill as a result of concerns expressed by Māori during the consultation process. For the most part, we are concerned with the provisions of the revised draft of the Bill, as it is closer in form to the Bill which the Crown intends to submit to the House in March 2016.

We note that in late January 2016 the Crown released a further draft of the Bill for its February 2016 informational hui. As this draft arrived too late in our inquiry for the parties to make submissions on its provisions, we have not considered it in the course of our deliberations.

4.2 The Parties' Arguments

4.2.1 The Crown's case

The Crown argues that 'the proposals set out in the revised draft Bill are consistent with Treaty principles, and enhances [*sic*] owners' rangatiratanga'.[3] It says that: 'The current reform seeks to rebalance the twin objectives of retention and utilisation by empowering

landowners to utilise their land as they wish to do so.'[4] The 1993 Act, the Crown argues, is skewed towards retention. This focus impedes utilisation and potentially places the land at risk from a range of problems that emerge from under-performing blocks, such as increasing owner disengagement and debt. The draft Bill retains protections against alienation, but 'would also empower owners to make decisions about land-use short of alienation and to create their own governance structures to further these uses, without having to involve the Māori Land Court'.[5]

The Crown argues that: 'The Māori Land Court will remain a fundamental part of the Māori land law system and will have an important ongoing role.'[6] However, its jurisdiction will change. Crown counsel submit that:

> The proposals represent an intentional shift away from an historic and outdated system of significant judicial oversight of administrative matters to a more modern system where administrative services are not delivered judicially. This reflects the aims of the proposals to empower Māori land owners to themselves make decisions about the management of their land.[7]

One of the key elements of the draft Bill, in the Crown's submission, is the participating owner model. This model, the Crown says, 'attempts to address long-standing demands from Māori land owners for greater decision-making power over their land'.[8] It is not a Crown creation but was 'developed in consultation' with Māori.[9] The Crown argues that:

> Giving participating owners more autonomy is not only a matter of practicality; it is also a matter of principle. It means that those who choose to involve themselves in the decision-making process can make decisions about their land and execute them. Land owners will be able to participate through a number of means, including digitally, if that is what the group wants.[10]

The participating owner model, in the Crown's view, is consistent with traditional Māori decision-making relating to land and has parallels to the concept of ahi kā. The model does 'not prevent participation, but incentivises it', nor does it create ahi mātaotao, as it 'will not cause Māori to become disconnected from their land'.[11]

The Crown says that 'the participating owner provisions are consistent with collective management of land and provide a reasonable policy response to long-identified management issues regarding non-participation, and demands for increased owner autonomy'. They do not confiscate property rights, but simply allow for participating owners to make management decisions, provided 'certain procedural safeguards are met'. Other owners can choose to participate in the decision-making process and have the ability to challenge an infringement of their rights in the Māori Land Court or High Court.[12]

The Crown argues that the draft Bill's 'protections against alienation of Māori land would be either as good as or better than the safeguards in the 1993 Act'. The Bill sets basic minimum levels for owner agreement, but owners can set higher decision-making thresholds if they wish.[13] Other provisions, such as those deeming Iwi entities as preferred entities with a second right of refusal, are intended to defer the sale of Māori land on the open market for as long as possible, reflecting 'the goal of retaining Māori land in Māori hands'.[14]

While the Bill does provide for a 'second chance' where a first meeting fails to meet participation thresholds, the Crown emphasises that this 'relates only to the participation levels required for decisions. It does not alter the minimum level of owner (or participating owner, if applicable) agreement that is required for that decision.' This, the Crown says, 'is an important safeguard'.[15]

The Crown acknowledges that clause 20 of the revised draft Bill reverses the presumption in the 1993 Act that 'all dispositions . . . [are] prohibited unless expressly permitted'. It says that the effect of the presumption in the 1993 Act 'was that novel dispositions would be presumptively prohibited'. Clause 20, which holds that all dispositions are permissible unless expressly prohibited, is intended 'to create more flexibility for changing circumstances'. The Crown says that this approach is consistent with the views

expressed by the New Zealand Māori Council in its 1983 report *Kaupapa* (as discussed in chapter 2), 'which recommended a flexible and permissive regulatory regime which would allow Māori land owners to adapt their land-use practices and governance structures to changing circumstances'. The Crown argues that the 1993 Act failed to create such a regime, thus necessitating a different approach.[16]

The second key element of the draft Bill, the Crown submits, is the 'greater flexibility in the types of governance models available to Māori land owners'.[17] It says that, under the proposals, Māori would have more say in the creation and form of the entities managing their land with less oversight by the Māori Land Court. In the Crown's submission, 'the creation of more autonomous and effective governance entities is consistent with Māori land owners' exercise of their rangatiratanga'. The proposals are also 'consistent with the principle of options'.[18] The Crown emphasises that owners are not required to appoint a governance body.[19]

In the Crown's view, the 1993 Act does not provide Māori landowners with the necessary level of autonomy or governance standards. It accepts that some trusts have been successful under the current regime, but notes that even successful trusts still face the costs and delays associated with a system involving significant court oversight. Crown counsel also argue that 'the fact that a high proportion of Māori land does not have a governance structure itself indicates the current regime may not present a suitable vehicle for those blocks to adopt governance measures'. The proposals, the Crown says, 'seek to provide for a broader range of options to meet' the different circumstances of different parcels of land.[20]

The new, flexible governance arrangements would also be accompanied by improved governance standards. The Crown submits that: 'Under the proposals, the responsibilities of governance bodies and kaitiaki are aligned with those of equivalent governors, such as directors. The revised draft Bill outlines expressly the powers, duties and responsibilities of governance bodies and kaitiaki.' The Māori Land Court would retain a supervisory role, as would the High Court.[21] Crown counsel emphasise that 'entities would remain responsible to the owners, and any decision to alienate the land would still go to all of the owners'.[22]

A further key element of the reform is the creation of a new service structure, the Māori Land Service. The Crown submits that it has responsibilities to ensure that 'the law that applies to Māori land is good law that is practical, fit for purpose and future focused' and that 'information held by the Crown relevant to Māori land is accurate, comprehensive and accessible'. As such, the proposed reform package is of both legislation, in the form of a new Te Ture Whenua Māori Bill, and administration, in the form of the new Māori Land Service.[23] The Crown accepts that work on the Māori Land Service 'is not as advanced as the legislative workstream' but argues that this is because the service 'can only be fully developed after the legal framework is set'.[24]

The Māori Land Service is necessary, in the Crown's view, because the current service structure is not comprehensive. It submits that, at present: 'Information and administrative services in relation to Māori land are spread across multiple agencies, such as the Māori Trustee, Te Puni Kōkiri and Land Information New Zealand (LINZ).'[25] The Crown submits that the claimants have misconceived the structure of the existing services available to Māori landowners and have overstated the range of services available, particularly through the Māori Land Court.[26] It cites a 2004 report by the controller and auditor-general into Māori land administration which 'highlighted the lack of coordination and formal communication between the multiple agencies involved in the administration of Māori land', as well as the negative effects caused by 'the lack of a central body with responsibility for Māori land development'.[27] The Crown's 'intention is for the Māori Land Service to draw the currently fragmented Māori land sector into a cohesive whole', as well as provide a wider range of services, such as dispute resolution.[28]

The Crown points out that, in response to concerns raised by submitters during the consultation process,

several provisions have been amended or removed from the draft Bill. The Crown argues that the original exposure draft of the Bill did not reduce the emphasis on the Treaty of Waitangi compared to the preamble of the 1993 Act. However, because of concerns raised by 'a number of stakeholders and submitters', it nonetheless inserted new language into the Bill 'intended to reaffirm the centrality of the Treaty to laws affecting Māori land, and to reaffirm retention and utilisation as foundational concepts in the Bill'.[29] Similarly, the Crown did not believe that the exposure draft's provisions relating to partitions exposed land to a significant risk of alienation. However, to address submitters' concerns, the revised draft Bill grants the Māori Land Court a discretion to assess the merits of the partition.[30]

Other changes made in response to submitters' concerns include:

- The removal of the managing kaiwhakarite provisions.[31]
- Existing trusts and incorporations will no longer be required to transition to rangatōpū.[32]
- Whānau will now be able to choose whether to succeed individually on intestate succession.[33]
- The amendment and removal of several provisions related to whenua tāpui.[34]
- The amendment of provisions relating to whāngai, including a change so 'that a whāngai descendant can only be an eligible beneficiary of an estate if that would be consistent with the tikanga of the iwi or hapū'.[35]

Finally, the Crown submits that work on both the Bill and other issues relating to Māori land governance and utilisation is ongoing. As part of the Māori enablers workstream, the Crown is actively working on 'key capacity and regulatory issues such as landlocked land, Public Works Act matters, and rating'. The Crown submits that it 'is well aware that addressing these issues will enable and empower Māori to better achieve their own aspirations and goals by removing identified impediments to retention and utilisation'. Government will consider addressing those issues through legislative reform if possible, but other issues may be addressed in different ways.[36] The Crown is also continuing to consider other issues, such as whether clause 286 of the draft Bill should allow the Māori Land Court to grant equitable relief (as section 237 of the 1993 Act does).[37]

The Crown notes that the claimants seek work on other issues impacting on participation rates, such as lack of resources, lack of information, and lack of capacity. It argues, however, that 'the Tribunal is simply not in a position to determine whether a particular level of funding is Treaty consistent' and notes that resourcing levels are yet to be determined. Crown counsel argues that:

> The revised draft Bill is not rendered Treaty inconsistent simply because there are other issues that are pressing and which impact on Māori land. The Crown is considering pursuing particular reforms given the potential space in the legislative timetable, the progression of consultation and policy development, and Ministerial endorsement for reforms. Work is ongoing on other issues.

This, the Crown submits, is a reasonable and Treaty consistent approach.[38]

4.2.2 The claimants' case

The claimants submit that 'The substantive proposals in the draft Bill are likely to prejudice Māori landowners.'[39]

The claimants have raised a number of concerns about the participating owners model. They argue that '[b]y allowing participating owners to make binding decisions on all other owners', the participating owners model constitutes 'a clear interference of property rights'. They submit that: 'No other current piece of legislation allows for some owners to make decisions that bind all other owners, and nor should it occur with Māori land.'[40] The claimants point out that, under the proposals, participating owners will be able to make decisions on major transactions (which constitute more than half of an asset base) and on leases up to 52 years in duration. Such decisions, they submit, can have inter-generational impacts on landowners.[41]

The claimants are particularly concerned by the draft Bill's 'second chance' provisions. They say that it is not just

alienation of land that is of concern, but the 'unjustified reduction in the protections afforded to minority shareholders in land'.[42] Claimant counsel argue that the definition of a participating owner is:

> so broad that it could potentially result in a second meeting being held where 4 people turn up, when the normal quorum is 50 owners (when land has more than 500 owners). Those four owners are now viewed under the Bill as the 'participating owners' and can make a binding decision on all the remaining 496 owners.[43]

The claimants suggest it would be better for the Māori Land Court to assess the merits of a proposal if the first decision-making process fails.[44] Ultimately, they argue, the second chance provisions are 'an example of the Crown failing to take an opportunity to actively protect and promote Māori interests,' because the focus is 'on the ability to run a process a second time around with no need to meet the participation threshold, instead of a focus on how to promote active participation by owners'.[45]

The claimants argue that such a system does not incentivise owners to participate, but rather requires them to be 'hyper-vigilant over what is occurring on their land to ensure their rights are being protected'.[46] This is particularly the case because, they submit, the protections for non-participating owners are inadequate. Claimant counsel note the Crown's suggestion that non-participating owners 'are "free to challenge any improper or unauthorised infringement of their rights through the courts"'. In counsel's submission, however: 'It is not reasonable to argue that owners restricted for any number of reasons in being able to participate in decisions can then realistically exercise rights of challenge in the general courts.'[47]

The claimants also question whether the participating owners model is necessary, saying that the proposal 'seeks to address an issue that does not exist'.[48] They argue that: 'Under the existing legislation, owners who attend meetings already make decisions concerning their land. The courts do not make decisions on behalf of owners.'[49] Rather, the court protects non-participating owners 'should the trustees act without consent'.[50]

In the claimants' view, the main issues affecting participation rates are the capacity and resourcing of owners. These issues, however, are 'simply not addressed in the new Bill'.[51] This is particularly important because, in the claimants' submission, '[t]he participating owners model is dependent on ensuring that owners have the capacity and opportunity to engage'.[52] Claimant counsel argue that: 'One of the major barriers currently in relation to Māori land, is being able to contact the owners.' They note that the Crown has suggested 'the revised draft makes it easier to contact owners, and include them in a decision making process', but argue that the Crown has not demonstrated how the Bill will do this or what resourcing will be provided to facilitate it.[53]

The claimants take issue with the Crown's submission that the draft Bill maintains or enhances existing protections against alienation.[54] They note that clause 20 of the draft Bill reverses the presumption contained in the 1993 Act that alienation is prohibited unless expressly authorised. In their submission, 'this permissive approach means there are a number of changes to the way in which Māori land can be disposed of which increase the likelihood of alienation'.[55] These changes include provisions relating to change of land status, easements over whenua tāpui, 99 year leases for residential housing, sale of Māori land by kaiwhakahaere, and major transactions (when more than half of the asset base is being sold).[56] In other areas, such as the provisions relating to land exchanges or long-term leases, the claimants say that the Māori Land Court's discretion to assess the merits of a proposal has been removed.[57] Although the revised draft Bill has reinstated the court's discretion to consider the merits of proposals for partition, the claimants argue that the new language is not as protective as the 1993 Act.[58]

As for the new governance structures created by the draft Bill, the claimants argue that it is not clear why they are necessary or how they will encourage greater utilisation. Claimant counsel point out that 'there has been no investigation of why Māori land is un-utilised or underperforming', and as such, there is no basis for the Crown's argument that the new governance mechanisms will be more likely to put land into production.[59] The claimants

argue that 'the Crown has not provided any evidence of what the proposed Trust structures will be able to offer that are not currently available under the 1993 Act'. To them, '[i]t appears . . . that the only change is the removal of the discretionary power of the MLC over management decisions'.[60]

The claimants also argue that '[g]reater flexibility in the choice of corporate structure does not equate to an exercise of rangatiratanga, if the owners are hampered by compliance and transactional costs'.[61] They say that governance bodies 'will be required to assess the new legislation, obtain professional advice as to their options, develop governance agreements, allocation schemes and land management plans'. They also point to a variety of transactional costs once the Bill is in place, 'as compared to the current system where all costs are limited to the small filing fee' in the Māori Land Court.[62]

In the claimants' submission, the draft Bill's new duties for governors of Māori land are also problematic and fail to actively protect Māori interests. They argue:

> Those who govern Māori land are not in positions equivalent to directors. Their roles are not restricted to managing a commercial asset as is the case for most directors. Rather they must do so in a manner that accommodates tikanga and which acknowledges land as a taonga tuku iho. They will inevitably have whānau relationships with the owners and will have customary obligations that directors do not have. This is the primary reason why the trust model is the preferred model of Māori land management – a trustee is more analogous to a kaitiaki. The introduction of the 'director' analogy and the 'body corporate' is in keeping with the commercial and economic ideology underpinning these reforms, and removes the management of Māori land away from its cultural underpinnings.[63]

The claimants emphasise the importance of the Māori Land Court and its oversight role under the 1993 Act. The claimants say that, in calling the court's current role 'paternalistic', 'the Crown is manipulating the depiction of the Māori Land Court'. They prefer to describe the court's current role as protective.[64] They say that,

> In practice today, the Māori Land Court provides the forum whereby alternatives to sale are discussed and tested, and where owners who have not had the capacity or opportunity to participate in the sale process have their interests considered by an independent court.[65]

Through its oversight of governance bodies, the court plays a key role in 'avoiding problems before they get entrenched' and in balancing retention and utilisation.[66]

For these reasons, the claimants are extremely concerned about the reduction in the Māori Land Court's jurisdiction as proposed in the draft Bill. They argue that the Crown has not undertaken any analysis which suggests that Māori Land Court decisions constrain owner decision-making and which justifies the reduction in the court's jurisdiction.[67] The reduction in the court's jurisdiction, they argue, 'is at the expense of owners who do not have the capacity to engage or who happen to miss a public notice'.[68]

Similarly, the claimants are concerned about the proposals and planning for the new Māori Land Service, which will take over several administrative roles currently situated within the Māori Land Court system. They argue that, because 'the success of the new Bill would be entirely dependent on the success of the proposed Māori Land Service, it would seem critical that the Service be properly costed and budgeted'. However, that work has not yet been done.[69] The claimants are also concerned that the Māori Land Service will not be phased in until three to five years after the passage of the new Bill, and about the potential for loss of human resource and institutional knowledge from the court's staff.[70]

The claimants argue that the Māori Land Court is much better placed to provide the services envisaged for the Māori Land Service. Indeed, the court is already 'the service that provides the face-to-face support that Māori Land owners require, and it appears sensible to have this

remain, and to incorporate the other Māori Land Services into the MLC'.[71] The claimants say that Te Puni Kōkiri and Land Information New Zealand, the two agencies proposed to play the major role in delivering the Māori Land Service, currently have very little or no involvement with Māori landowners.[72] Further, claimant counsel point out that the draft Bill transfers many powers to Crown-appointed officials who 'will not operate under the convention of the separation of powers between judiciary and the executive, nor are they subject to appeal/review as the Judges are'.[73]

Finally, the claimants raise a number of other issues that they say the Crown is failing to adequately address in its reform proposals, including landlocked land, Public Works Act issues, and rating. The Bill also fails, in the claimants' submission, to 'address the lack of Māori Land Court jurisdiction in the areas of compulsory acquisition, the Resource Management Act, and the Family Protection Act'.[74] They say that the issues like landlocked land 'are of importance to all Māori Land owners, regardless of what they wish to do with their land' and should therefore be dealt with first. Claimant counsel argue that '[i]t appears counter intuitive to deal with matters of economic development first, if Māori Land owners cannot even access their land'.[75]

4.2.3 The interested party's case

Counsel for Mrs Nellie Rata submits that there continue to be a number of concerning aspects to the draft Bill. In particular, counsel draws attention to the proposed repeal of section 237 of the 1993 Act, which confers jurisdiction to grant equitable relief on the Māori Land Court. Counsel notes the Crown now appears to be considering a provision similar to section 34 of the District Courts Act, but argues that this would still be 'a significant loss . . . to the jurisdictional toolbox that the Māori Land Court Bench can reach for when confronted with "governance entity" abuses of power'.[76] Landowners will instead have to resort to the High Court, with its prohibitive costs and lack of familiarity with te reo, for relief.[77] Counsel also expresses concern about the revised Treaty text of clauses 3 and 4 and whether the te reo Māori terms used are sufficiently strong.[78]

4.3 How Has the Crown Responded to Māori Concerns with the May 2015 Exposure Draft?

4.3.1 What concerns did Māori have with the May 2015 exposure draft?

In their opening submissions to our inquiry, filed before the Crown submitted a revised draft of the new Bill with the Tribunal, the claimants set out their concerns with the May 2015 exposure draft. They said that the draft Bill would 'prejudice Māori landowners and their whānau and hapū by':

- '[f]ailing to provide for the expression of rangatiratanga';
- '[f]ailing to uphold the principle of active protection of taonga, being the retention of Māori land in Māori hands';
- '[f]ailing to uphold the active protection of taonga, being tikanga Māori as it applies to Māori land'; and
- '[f]ailing to uphold the principle of development, being the ability to effectively develop and utilise Māori land'.[79]

The claimants' concerns were evidently shared by many other Māori. As we outlined in chapter 3, Māori raised a number of concerns about the May 2015 exposure draft during the consultation hui and later in their written submissions on the draft Bill. These concerns were pitched both at a high level and at specific provisions of the Bill.

We begin with the four principles that were intended as the foundation of the reforms: autonomy, utilisation, simplicity, and safeguards.[80] TPK noted that several submitters raised questions about whether the Bill would achieve its aims and whether its provisions were consistent with the principles underpinning the reform. In particular, submitters 'expressed concern around how the reforms could potentially undermine autonomy'. They believed that the reforms would transfer 'decision making to government',

encourage utilisation contrary to the aspirations of Māori landowners, and potentially place too much power 'in the hands of a few, at the possible expense of others.'[81] On the principle of utilisation, some submitters were concerned that the reform was advancing the government's business growth agenda while not properly recognising Māori land as a taonga tuku iho. They considered that the Bill might exacerbate problems with resourcing, governance, and the quality of surviving Māori land, rather than improve the situation. Despite the fact the reform was intended to be underpinned by the principle of simplicity, some submitters thought that 'the Bill was far from simple', as it 'would require owners to prepare governance agreements, land management plans, allocation schemes and distribution schemes'. This, they pointed out, was more (and more difficult) than what is required under the 1993 Act. Finally, on the principle of safeguards, submitters were concerned that the Bill in fact lessened safeguards, particularly for minority owners.[82] TPK further noted that its

> review of the submissions identified significant tensions between cultural perspectives, particularly as they relate to understanding of Māori and their relationships with the land, and the economic drivers behind the reforms. This economic versus cultural tension was prevalent through many of the responses.[83]

In addition to these high-level concerns, Māori raised a substantial number of issues with specific proposals in the exposure draft. As we noted in chapter 3, TPK's own analysis of the submissions made on the exposure draft indicated that there was majority support for just two aspects of the reform: the alternative dispute resolution process (52 per cent), and the arrangements for whenua tāpui (50 per cent). On all other issues, submitters were either opposed or had concerns, with only a minority supporting the Bill's proposals. We deal with some of their most significant concerns with specific provisions of the exposure draft – and the Crown's response to those concerns – in the following sections.

4.3.2 What aspects of the draft Bill changed as a result of Māori concerns?

As a result of their analysis and consideration of the comments and submissions received on the exposure draft, TPK officials suggested that a number of changes be made to the draft Bill. Several of the proposed amendments to Te Ture Whenua Māori Bill were considered significant enough to require Cabinet approval. As discussed in chapter 3, the changes were approved by Cabinet on 9 November 2015 and included revisions:

- to redraft the purpose and principles sections to more clearly reflect features of the preamble of Te Ture Whenua Māori Act 1993, including the existing emphasis on the Treaty of Waitangi and its principles;
- to give greater discretion to the Māori Land Court when considering applications to remove the status of Māori freehold land;
- to remove the managing kaiwhakarite scheme;
- to provide whānau with an option of obtaining succession by individuals instead of forming a whānau trust on intestate succession;
- to provide that existing incorporations and trusts do not need to become rangatōpū unless they opt to do so; and
- to provide further flexibility in transitional provisions.[84]

In addition, Mr Grant informed us, various other technical or procedural changes were also made in response to the views expressed by Māori during the consultation period.[85]

In this section, we describe some of the major changes that have been made as a result of the consultation process. For the most part, however, we reserve judgment as to whether these changes have addressed Māori concerns until later in the chapter.

(1) *Purpose and principles provisions*

One area of common concern among both the claimants and Māori submitting on the exposure draft released in May 2015 was the expression of its purpose and principles.

Unlike the 1993 Act, the exposure draft did not have a preamble (the 1993 preamble is quoted in full in section 4.4.1(2)). Instead, clauses 3 and 4 set out the Bill's purpose and principles:

3 Aronga/Purpose

Māori version

(1) Ko te aronga o tēnei Ture ko te hāpai me te āwhina i ngā kaipupuri whenua Māori kia mau tonu ai i a rātou ō rātou whenua kia whakamahi rawatia mō tā rātou e whiriwhiri ai.

English version

(2) The purpose of this Act is to empower and assist owners of Māori land to retain their land for what they determine is its optimum utilisation.

Māori version prevails

(3) The English version explains the purpose of this Act in English, but the Māori version prevails and is not affected by the explanation.

4 Achieving purpose and recognising principles of Act

(1) A person who exercises a power or performs a function or duty under this Act must do so, as far as possible, to achieve the purpose of this Act.

(2) In seeking to achieve that purpose, the person must recognise the principles of this Act.

Māori version

(3) Ko ngā mātāpono o tēnei Ture ko—

- (a) ka whakatū te Tiriti o Waitangi i tētahi hononga motuhake i waenga i te Māori me te Karauna e whakatinanahia ai hoki te wairua whakawhiti o te kāwanatanga me te tiaki i te rangatiratanga kua taurangitia i te wahanga tuarua o te Tiriti o Waitangi:
- (b) ka ārahi te tikanga Māori i ngā āhuatanga whai pānga ki te whenua Māori:
- (c) mā te whakapapa te whenua Māori e whakauka ai hei taonga tuku iho:
- (d) he mōtika tā ngā kaipupuri whenua Māori ki te whakawhanake, ki te whai mea angitū hei whakawhanake i ō rātou whenua hoki.

English version

(4) The principles of this Act are—

- (a) the Treaty of Waitangi establishes a special relationship between Māori and the Crown and embodies the spirit of exchange of kāwanatanga for the protection of rangatiratanga:
- (b) tikanga Māori guides matters involving Māori land:
- (c) Māori land endures as taonga tuku iho by virtue of whakapapa:
- (d) owners of Māori land have a right to develop their land and to take advantage of opportunities to develop their land.

Māori version prevails

(5) The English version explains the principles of this Act in English, but the Māori version prevails and is not affected by the explanation.[86]

Māori raised several concerns with these provisions. The claimants in our inquiry, for example, submitted that '[c]lauses 3 and 4 tampered with the cornerstone principles of the existing legislation'.[87] They were concerned that

> The reference to Te Tiriti/the Treaty in the existing Preamble has been removed in the Consultation Draft Bill and is not referred to in the new 'purpose' provision. Te Tiriti is relegated to one of four principles (clause 4).[88]

Marise Lant told us that this reminded her of the Resource Management Act 1991, which utilises a similar scheme and which, in her view, relegates the Treaty to secondary importance below the RMA's sustainable management purpose.[89]

The Māori Land Court judges also expressed concern in their submission to the Ministerial Advisory Group (MAG) that the status of the Treaty had been diminished in the new provisions.[90] Other submitters noted the significance of the preamble of the 1993 Act and called for its retention in the new Bill. One submitter noted that the preamble was

> revolutionary for its time entrenching via statute the constitutional significance of Te Tiriti o Waitangi and recognising the fundamental tensions that arise from the competing objectives of development of Māori land for commercial benefit and the need to retain and protect Māori land as a living mechanism for the crystallisation of whakapapa and the enduring uninterrupted assertion of mana rangatiratanga by owners and their whānau. It provided a tūāpapa, the overarching philosophical base from which all other sections in the Act would operate.[91]

Submitters were concerned that the provisions in the exposure draft had failed to properly express the concepts captured by the preamble to the 1993 Act.[92] Others were concerned about the phrase 'optimum utilisation', which was seen to link 'the retention of land solely to its economic utility'.[93]

In response to these criticisms, Cabinet agreed in November 2015 to redraft the Bill's purpose and principles sections to

> better reflect the concepts expressed in the preamble to the current Act, such as the references to owners' whānau and hapū, and to strengthen the statements about Te Tiriti o Waitangi.[94]

Officials noted that many submitters had requested that the 1993 preamble be retained, but noted that 'the contemporary drafting style of the Parliamentary Counsel Office is not to use preambles but, where clear direction is required, to use purpose statements instead'.[95]

The purpose and principles section of the November draft of the Bill, which incorporates these changes, reads:

> **3 Aronga me ngā mātāpono o tēnei Ture/Purpose and principles of Act**
>
> *Māori version*
>
> (1) Ko te aronga o tēnei Ture ko te whakatūturu anō i te wairua whakawhiti i te kāwanatanga me te whakapūmau i te rangatiratanga ka whakatinanahia i roto i te Tiriti o Waitangi me te whakaū i te mōtika a ngā kaipupuri whenua Māori ki te mau tonu, ki te whakahaere, ki te whakanoho ki te whakawhanake hoki i ō rātou whenua hei taonga tuku iho mō te painga o ngā kaipupuri, o ō rātou whānau, o ō rātou hapū hoki.
>
> (2) Ko ngā mātāpono o tēnei Ture ko—
>
> (a) Te Tiriti o Waitangi te tūāpapa o te whakamahinga o ngā ture ka pā atu ki te whenua Māori:
>
> (b) ko ngā tikanga Māori te tūāpapa o ngā āhuatanga whai pānga ki te whenua Māori:
>
> (c) mā te whakapapa te whenua Māori e whakauka ai hei taonga tuku iho:
>
> (d) he mōtika tā ngā kaipupuri whenua Māori ki te whakawhanake, ki te whai mea angitu hei whakawhanake i ō rātou whenua hoki.
>
> *English version*
>
> (3) The purpose of this Act is to reaffirm the spirit of the exchange of kāwanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi and to recognise the right of owners of Māori land to retain, control, occupy, and develop their land as a taonga tuku iho for the benefit of the owners, their whānau, and their hapū.
>
> (4) The principles of this Act are—
>
> (a) the Treaty of Waitangi is central to the application of laws affecting Māori land:
>
> (b) tikanga Māori is central to matters involving Māori land:
>
> (c) Māori land endures as a taonga tuku iho by virtue of whakapapa:
>
> (d) owners of Māori land have a right to develop their land and to take advantage of opportunities to develop their land.
>
> *Māori version prevails*
>
> (5) The English version explains the purpose and principles of this Act in English, but the Māori version prevails and is not affected by the explanation.[96]

The purpose and principles are given effect by clause 4, which requires that 'A person who exercises a power or performs a function or duty under this Act must do so, as far as possible, to achieve the purpose of this Act.' They must also 'recognise the principles of this Act' in 'seeking to achieve that purpose'.

Due to the centrality of these changes to interpreting

the retained parts of the Bill, we discuss whether these changes were sufficient to rectify matters in section 4.4.1.

(2) *Removal of the managing kaiwhakarite regime*

In line with the review panel's 2013 recommendations, the May 2015 exposure draft included a regime to allow the chief executive of the Māori Land Service, in certain circumstances, to appoint an external manager to manage Māori freehold land. Those circumstances would be:

> where the land is not currently managed under a governance agreement, it would be impracticable for the owners to appoint a governance body within the next 12 months and there is a reasonable potential for the land to generate 'a net return' for the owners.[97]

The managing kaiwhakarite were to be appointed for a minimum term of seven years and given wide powers 'to do anything necessary for the purpose of carrying out' their responsibilities.[98] Other than their term ending, their appointment could also terminate either when:

> a governance body is established; the MLS is satisfied that the kaiwhakarite has breached a statutory obligation or term of appointment; [or] the kaiwhakarite wishes to resign from the position.[99]

The managing kaiwhakarite regime was sharply criticised by both the claimants and many submitters on the exposure draft. In our inquiry, the claimants considered that the 'concept was so anathema to tikanga Māori that it would not have seen the light of day had advice from kaumatua been available'.[100] They raised specific concerns about the role of the chief executive in appointing external administrators, the loss of owner control during the period of administration, and the costs of the regime to owners.[101] Officials noted in their advice to Cabinet that 'submitters feared this regime would be used to facilitate the alienation of Māori land' and had also questioned the rationale for the proposal.[102] In addition, some submitters contended that the regime was inconsistent with the aims of the reform. Te Rūnanga o Ngāi Tahu, for example, was 'of the view that having an individual appointed to manage whānau land without whānau consent is contrary to the "autonomy principle" that the Bill is promoting'.[103]

In response to these concerns, in November 2015 Cabinet approved the removal of the managing kaiwhakarite regime from the Bill. It has not been replaced by any similar provisions.

(3) *Option for individual succession on intestacy*

In an effort to deal with fragmentation, the exposure draft proposed that, where a person died intestate, a whānau trust would automatically be created. The claimants considered that this proposal 'was a breach of property rights and ran contrary to rangatiratanga'.[104] They were particularly concerned that this would occur 'in circumstances where requirements for adequate notice of the succession are limited, and where search functionality currently with Māori Land Court registry staff to ensure the accurate derivation of interests, is to be dismantled'.[105]

While this proposal garnered support from some submitters in the 2015 consultation round, as it did during the August 2014 round of hui, others were concerned that it 'would undermine the concept of autonomy'.[106] The Ngāi Tahu Māori Law Centre, for instance, considered that the proposal amounted to a breach of article 2 of the Treaty. It argued that 'Owners are prevented from exercising "Te tino rangatiratanga" or having "full and exclusive and undisturbed possession" of their lands if forced to form a whānau trust simply because their parent died without a will.'[107] The Māori Land Court judges were also critical of the proposal, which they described as akin to the compulsory acquisition of uneconomic interests under the Māori Affairs Act 1953 and the Māori Affairs Amendment Act 1967, as well as to the latter Act's compulsory conversion of Māori freehold land to general land (see chapter 2).[108] They considered that the proposal was inconsistent with general law and also created

> a two-class system in Māori land tenure, where those who can afford to have a will prepared can leave interests to multiple beneficiaries personally, but those who cannot will have whānau trusts imposed on their successors.[109]

Other submitters raised practical issues with the proposal, including the availability of trustees, the suitability of whānau trusts in situations where whānau relationships were poor, and the possibility that the proposal would discourage successors from applying for succession.[110]

In response to these concerns, the provisions imposing mandatory whānau trusts on intestacy have been amended to include an opt-out provision, giving whānau the option to succeed individually if they wish. We discuss the operation of the revised provisions in section 4.4.7(2).

(4) *Transition to rangatōpū made optional for existing trusts and incorporations*

A further controversial aspect of the May 2015 exposure draft was its proposal to mandatorily transition existing trusts and incorporations to the new rangatōpū governance model. As discussed in chapter 3, this proposal did not emerge from the 2013 review, but rather the subsequent work by the Crown to translate the review panel's recommendations into a new Bill.

The claimants and several submitters on the exposure draft, particularly existing trusts and incorporations, raised serious concerns about the proposed transition to rangatōpū. Kerensa Johnston from Wakatū Incorporation, who gave evidence in our inquiry, was concerned that:

> The cost of compliance with the proposed legislation is likely to be considerable and may create uncertainty for existing business partners, banks and other key investors and commercial partners.

Ms Johnston noted that the proposal was 'out of step with the initial driver for the reform, which focused on uneconomic and unmanaged blocks of Māori land'.[111] In its submission on the exposure draft, Wakatū Incorporation expressed concerns about the necessity and cost of the transition, and called instead for existing trusts and incorporations to be able to opt-in to the rangatōpū model.[112] Ātihau Incorporation also saw 'no good reason why existing well-performing Māori incorporations and trusts should be forced to fit in to the new rangatōpū governance model'. It described the proposal as 'unduly paternalistic' and as interfering with its mana.[113] The Ngāi Tahu Māori Law Centre did not believe that the change to rangatōpū would improve access to finance, pointing out that: 'It is the fact the land has the status of Māori freehold land, and is held by collective tenants in common, that is of concern to financial institutions.'[114] Like Ms Johnston, other submitters were also concerned about the potential costs of the transition process.[115] Te Tumu Paeroa, for instance, estimated that it would cost $12.5 million to transition its 1,420 entities to the new provisions.[116]

In response to these concerns, Cabinet approved amending the Bill 'to provide that existing incorporations and trusts do not need to become rangatōpū unless they opt to do so'.[117] In advising Cabinet to make these changes, officials cautioned that the concerns raised by submitters needed 'to be weighed against the underlying principles of the rangatōpū model, which need to be adhered to if the anticipated benefits of the reform are to be achieved'. They noted that they had considered a range of options to meet the concerns expressed by submitters, but had dismissed them as going against owner autonomy or due to prohibitive costs. An opt-in system was seen as still providing 'the benefits envisaged through the reforms', particularly as it would still require existing bodies to 'comply with the powers, duties and responsibilities of governance bodies set out in the Bill'.[118] This means that trust orders and constitutions would be deemed to be governance agreements, and would be subject to the requirements of the Bill for such agreements. Trustees and members of committees of management would also be required to abide by all provisions relating to kaitiaki. We note, however, from FOMA's 18 December 2015 submission to the Crown about revisions to the Bill, that the Crown has undertaken to fund transition costs.[119]

(5) *Treatment of whāngai*

Māori also raised concerns about the exposure draft's treatment of whāngai and their eligibility to succeed. Under the exposure draft, an individual was to be considered a whāngai if one member of a hapū or an iwi made a

statutory declaration to that effect. The Bill also provided that whāngai descendants were automatically included in the definition of a descendant.[120]

The claimants were concerned these provisions 'run contrary to established tikanga' and were 'inconsistent with the exercise of tino rangatiratanga of hapū and iwi Māori'.[121] Submitting on the exposure draft, Te Rūnanga o Ngāi Tahu called for whāngai to be removed from the definition of descendant, and for the Māori Land Court to be given the power to determine whether an individual is a whāngai.[122] The Māori Land Court judges considered that the process for declaring individuals as whāngai would be subject to abuse, and that the automatic eligibility to then succeed was inconsistent with well-established tikanga.[123]

The provisions relating to whāngai and their eligibility to succeed have since changed, and now involve two separate processes. Under the revised draft Bill, whāngai are only eligible to be considered descendants 'if it is consistent with the tikanga of the relevant iwi or hapū to do so'.[124] The process for determining who is considered a whāngai descendant has also been strengthened, and requires five hapū or iwi members to make 'a statutory declaration declaring that the individual has been adopted in accordance with the tikanga of that hapū or iwi'.[125] In closing submissions, the Crown noted that officials are currently reconsidering whether the use of statutory declarations in this context is appropriate.[126]

(6) *Court discretion to approve status changes and partitions*

Under the 1993 Act, the Māori Land Court has the discretion, when considering applications to partition land or convert Māori freehold land to general land, to evaluate whether the proposal would assist the utilisation of the land. The May 2015 exposure draft, however, proposed removing this discretion. In the case of an application to change the status of Māori freehold land to general land, the draft provided that the court must make a status change order if it was satisfied that the land was not held by a class of collective owners, was not managed under a governance agreement, did not contain any wāhi tapu or wāhi tūpuna, and that 75 per cent of all owners agreed to the status change.[127] In the case of a partition application, the court's role was confined to confirming procedural compliance and the fairness of the allocation scheme to the owners.

Both the claimants and submitters in the consultation process raised a number of concerns with these provisions. The claimants were concerned that '[t]hresholds for status changes from Māori land to general land are lowered' in the exposure draft.[128] Officials noted that, although the court retained a role in approving status changes, submitters in the consultation viewed the exposure draft's provisions for status changes as more permissive than the 1993 Act, increasing 'the possibility of Māori land being sold off once its status is changed'.[129] In particular, submitters were concerned that under the Bill the court 'must' change the status of land if certain requirements were met. By contrast, under the 1993 Act, the court had a discretion to consider other matters before making such an order.[130]

The claimants were also concerned about the removal of the court's discretion over partitions, particularly that

> Partition decisions have lower thresholds, do not require the partition to better the effective utilisation of the land, and even participation thresholds can be bypassed through a second hui being called.[131]

Submitters on the exposure draft believed that, along with a lower threshold than for alienation, the new provisions for partitions could be used to circumvent alienation restrictions.[132] The Māori Land Court judges considered that the removal of its jurisdiction in regard to partitions would be a return to the pre-1993 regime which 'contributed significantly to further loss of Māori land from Māori ownership' and 'led to title configurations that had little practical purpose'.[133]

In November 2015, Cabinet approved amendments to the Bill 'to give greater discretion to the Māori Land Court when considering applications to remove the status of Māori freehold land'.[134] Now, when faced with a status change application, 'the court must not make an order

unless it is satisfied that' certain conditions (the same as in the May 2015 draft, as set out above) are met.[135] We address later in chapter 4 in the discussion of clause 100 whether this style of statutory amendment provides the court with a broad discretion. The Crown has also amended the provisions relating to partitions, reintroducing a discretion for the court to consider whether a proposed partition would 'assist the owners to retain, occupy, and develop their land for the benefit of the owners and their whānau'.[136] In addition, survey plans must now ensure that 'no new parcel becomes landlocked land'.[137] We address these issues later in this chapter in more detail.

(7) *Other changes*

As noted above, the Crown has also made a range of other technical and procedural changes to the draft Bill (outlined in appendix 11 to our report). We do not propose to examine all of these changes in detail. However, some appear to respond to significant concerns expressed by Māori.

Submitters had raised concerns, for instance, that the exposure draft potentially exposed whenua tāpui to compulsory acquisition under the Public Works Act. This, they pointed out, was inconsistent with the Māori Land Court's recent decision in *Grace*.[138] The Crown has now amended the relevant provisions so that 'Public Works Act taking of land reserved as whenua tāpui will be prohibited'.[139] Submitters had also been concerned that some of the powers conferred on the chief executive by the exposure draft appeared to be judicial, rather than administrative.[140] In response, the Crown has amended several parts of the Bill to change the role of the chief executive or to clarify that their functions, powers, and duties will be administrative.[141] For instance, clauses 267 and 268 of the revised draft Bill clarify that the chief executive does not have 'the power to change the status of land'.[142] Further, although it was not reflected in the revised draft Bill we received in November 2015, the Crown also advised that a change will be made to ensure that '[o]nly the court (not the chief executive) will be able to refer an unresolved dispute back for further dispute resolution'.[143] We address the efficacy of these changes later in the chapter.

4.3.3 What aspects of the draft Bill did not change?

While the Crown has made a number of changes – some very significant – in response to concerns expressed by Māori during the consultation process, several aspects of the Bill which are of concern to the claimants have not substantively changed. These include:

- the participating owners regime;
- the new governance mechanisms and standards;
- the adequacy of the Bill's protection mechanisms;
- most of the changes to the jurisdiction of the Māori Land Court;
- the compulsory alternative dispute resolution provisions;
- the accompanying Māori Land Service, including its powers and resourcing;
- the extent to which the Bill addresses other constraints to Māori land development and utilisation; and
- other issues, such as the complexity of the draft and the costs of transition to the new regime.

These issues, as well as those we have identified above as requiring further consideration, are the focus of the remainder of this chapter. We first deal with the issues concerning the draft Bill directly, then consider those relating to other aspects of the Crown's reform package.

4.4 Do the Remaining Concerns Have Merit in Treaty Terms?

4.4.1 Treatment of Treaty principles in the existing Act and in the proposed Bill

(1) *Is a broad assessment required?*

Issue 3.1 of the Tribunal's statement of issues posed the question: 'Do the proposals amend the emphasis in Te Ture Whenua Māori Act 1993 to the Treaty of Waitangi and if so, are these amendments inconsistent with the principles of the Treaty?'[144] That issue question requires a consideration of both the objectives and operational provisions in the Bill on a reasonably broad basis, and not by a process of attempting to make an assessment against each individual provision in the Bill. The initial and prime focus must be on the manner in which the purpose and

principles part of the Bill specifically provides for Treaty principles, and then on considering how the operative provisions succeed or otherwise in achieving consistency with Treaty principles. We will return at the conclusion of this chapter to make a broad basis assessment after considering in greater detail how the Bill's operative provisions work, and their consistency or otherwise with general law in similar fields.

That latter consideration arises because of article 3 of the Treaty. Article 3, and the principle of equity that derives from it, require this country's land laws to provide fairly and equitably for the property rights of citizens who are the owners of Māori freehold land, as for the owners of general land. While it does not mean that the arrangements for the two forms of property rights must be the same, of course, it does mean that Māori property rights should not receive any lesser protection than those of the owners of general land. We agree, too, with the Te Tau Ihu Tribunal, which found that,

> Where Māori have been disadvantaged, the principle of equity – in conjunction with the principles of active protection and redress – requires that active measure be taken to restore the balance.[145]

We begin by considering the purpose and principles clause of the Bill, and its treatment of Treaty principles. As outlined in section 4.3.2(1), during the consultation process in 2015, many submitters were concerned about the purpose and principles clauses of the original exposure draft. Many of those concerns must have been accepted as having been addressed by the November 2015 version, as the closing submissions of most counsel for claimants and interested parties did not dwell on the wording of the purpose and principles, other than in very general terms.

Counsel for the interested party did, however, continue to maintain that both the prevailing Māori version and the English explanatory translation were inconsistent with the principles of the Treaty.[146] Prudence Tamatekapua, speaking as a witness on behalf of the Māori Women's Welfare League, also expressed concerns as to how subsequent courts might interpret changes to the purpose provisions, and what inferences might be drawn as to the intent underlying the change from the use of a preamble.[147]

We therefore commence our consideration of the operative parts of the November 2015 version of the Bill by addressing those very important provisions.

In doing so, it is most convenient to compare the Bill's proposed treatment of those principles with the existing Act's treatment of Treaty principles. That approach is warranted because, as we have observed in chapter 2, the kaupapa of the 1993 Act emanated from Māori. The preamble expressed a broad-based consensus between Māori and the Crown at that time, as to the Treaty requirements for a new legal system for Māori land and its owners.

(2) *The Treaty outcome in statutory terms in the 1993 Act*

The prime focus of the 1993 Act was to bring the Treaty to the fore. That was done right at the start of the Act by having a preamble, which made strong statements about the Treaty. It recognised the importance of Māori land as a taonga tuku iho. It also recognised the Treaty guarantee to Māori of tino rangatiratanga in respect of their lands, as part of a special relationship between Māori and the Crown established by the Treaty. Even the subtitle to the Act specifically emphasised the importance of the preamble: 'An Act to reform the laws relating to Māori land in accordance with the principles set out in the Preamble'.

The preamble itself stated:

> Nā te mea i riro nā te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: ā, nā te mea e tika ana kia whakaūtia anō te wairua o te wā i riro atu ai te kāwanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: ā, nā te mea e tika ana kia mārama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, ā, nā tērā he whakahau kia mau tonu taua whenua ki te iwi nōna, ki ō rātou whānau, hapū hoki, a, a ki te whakangungu i ngā wāhi tapu hei whakamāmā i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mō te hunga nōna, mō ō rātou whānau, hapū hoki: ā, nā te mea e tika ana kia tū tonu he Te Kooti, ā, kia whakatakototia he tikanga hei āwhina i te iwi Māori kia taea ai ēnei kaupapa te whakatinana:

> Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kāwanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whānau, and their hapū, and to protect wāhi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whānau, and their hapū: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles.

The preamble thus emphasised the importance of promoting the retention of Māori lands as a taonga tuku iho of special significance, and the importance of facilitating the occupation, development, and utilisation of the land for the benefit of its owners, their whānau and hapū, and of protecting wāhi tapu.

As to practical mechanisms for giving effect to the Act's objectives, the preamble emphasised that it was desirable 'to maintain a court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles'.

The mechanisms utilised in the Act to attain those preamble objectives included:

- *As to retention:* specific statutory provisions in sections 2 and 17 which required as a mandatory matter the interpretation and application of the Act's provisions so as to give effect to the preamble's principles of retention, use, development, and control of Māori land as a taonga tuku iho, and the protection of wāhi tapu (section 2). Section 17(1) specifically reiterated the preamble principles as the primary objective.
- *As to occupation, development, and utilisation:* section 17(2) applied those primary objectives by requiring the court to also seek to achieve a further list of objectives, including:
  - ascertaining and giving effect to the wishes of owners;
  - keeping them informed as to proposals for the land;
  - providing for the settlement of their disputes;
  - protecting minority interests against an oppressive majority and majority interests against an unreasonable minority;
  - ensuring fairness in dealings with multiple owners; and
  - providing practical solutions to problems as to use or management of land.

The combined tools of the preamble and sections 2 and 17, together with the functions that the court would exercise under the 1993 Act as a result of a broad consensus between Māori and the Crown, have provided a governance 'umbrella' of protection for Māori lands and their owners.

(3) *The treatment of Treaty principles in the November 2015 version of the Bill*

The November version of the Exposure Bill responded to earlier criticisms as to the initial failure to utilise the preamble approach of the existing Act or to repeat sections 2 and 17 of the Act by more closely aligning the new proposed provisions with recognised Treaty principles.

The result is seen in clauses 3 and 4 of the revised Bill, set out above in section 4.3.2(1), which provide specific recognition of the central role of the Treaty underpinning laws affecting Māori land and its owners. It also defines the principles of the Act in Treaty and tikanga terms and specifies how those principles are to be given effect. As noted above, the Crown explained to us that the 1993 preamble has been omitted because the use of preambles in that way is not a part of modern statutory drafting practice. Crown counsel submitted that nothing nefarious should be read into that approach.[148] We accept that submission and turn to address whether, as the claimants say, the ordering of the provisions specifically referring to the Treaty and its principles in any way detracts from their significance.

However, before addressing those issues in the English version of the purpose and principles, we need to address a concern about the Māori version of those clauses. As the

Māori version of the purpose and principles section of the new Bill prevails over the English version, it is necessary to consider the Māori text closely. As a general comment, we note that, in both the May and November versions of the draft Exposure Bill, the te reo Māori clauses have been translated literally from the English. The Māori text is unclear and grammatically incorrect with the result that whole sentences do not make sense. For example, in the November draft Bill, the Māori translation of 'The principles of this Act are' – 'Ko ngā mātapono o tēnei Ture ko' – suggests that the following list will complete this phrase. However, when read together the full sentences do not make sense, as it reads continuously 'Ko ngā mātapono o tēnei Ture ko ko ngā tikanga Māori' (clause 3(2)(b)).

Some effort has been made to provide further context in the Māori translation, which does not appear in the English, thus the interpretation of the text is inconsistently applied. In the May draft of the Exposure Bill, for example, it appears that clause (3)(a) makes specific reference to article 2 of the Treaty of Waitangi which is not evident in the English equivalent. The very literal translations of the other subclauses were somewhat problematic with respect to the interpretations of their meaning so that without the English translation it was very difficult to comprehend, such as clause (3)(b): 'ka ārahi te tikanga Māori i ngā āhuatanga whai pānga ki te whenua Māori'. By contrast, in the November draft of the Exposure Bill some translation issues have been addressed, including the aforementioned example, which has been reframed as 'ko ngā tikanga Māori te tūāpapa o ngā āhuatanga whai pānga ki te whenua Māori'. Problems persist, however, such as 'mā te whakapapa te whenua Māori e whakauka ai hei taonga tuku iho' (clause 3(2)(c)), which is not correct Māori idiom.

It is our view that the quality of the Māori text is problematic and it is evident that it is primarily a literal translation of the English. A literal translation is not appropriate. A way must be found to properly express the clause's important concepts and values in both languages.

We return then to address the English version issues. The 1993 purpose expressed in the preamble started from a base of the desirability of reaffirming the special relationship derived from the Treaty and its spirit of the exchange of kāwanatanga for 'for the protection of rangatiratanga'. It then continued with an express statement that, as land was a taonga tuku iho of special significance for Māori, it was desirable 'to promote the retention of that land in the hands of its owners, their whānau, and their hapū, and to protect wāhi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whānau, and their hapū'.

By contrast, the exposure draft of the new Bill took an entirely different approach in May 2015. It essentially framed the purpose as solely 'to empower and assist owners of Māori land to retain their land for what they determine is its optimum utilisation'.

The specific references then to the Treaty, rangatiratanga, the special significance of the taonga tuku iho concept, and the facilitation of occupation and development, had disappeared; all that was left was retention for 'optimum utilisation' as determined by the owners. Although some of those references re-appeared as principles in clause 4, they did not appear in the purpose clause.

The principles clause did still refer to the spirit of the exchange of kāwanatanga for the protection of rangatiratanga in the Treaty. However, while the clause recorded that Māori land was a taonga tuku iho, its 'special significance' as a consequence to Māori was no longer stated. Similarly, while the principles referred to the right to develop, they did not refer to the right to occupy, control, or otherwise utilise the land. Nor did the principles clause provide for a specific purpose of protection of wāhi tapu as the preamble did, other than by reference to the general principle of tikanga Māori 'guiding' matters involving Māori lands.

Had those changes from purpose status to principle status, and their more limited expression as principles remained in that form in the proposed Bill we would have had considerable concerns as to whether the changes were consistent with the principles of the Treaty.

That change in focus of the purpose of a piece of legislation governing Māori land caused a major reaction in the submissions about the initial Bill. The strength of that reaction resulted in major changes in wording in the

November 2015 amendments as to the Bill's purpose. The result is that the following concepts were introduced in a renumbered clause 3(3):

- the reaffirmation of the spirit of the exchange of kāwanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi;
- the right of owners of Māori land to retain, control, occupy, and develop their land as a taonga tuku iho; and
- the purpose of that being for the benefit of the owners, their whānau, and their hapū.

The following aspects also need consideration:

- the re-ordering and merging of the concepts of special significance of Māori land as a taonga tuku iho; and
- the change in focus from 'retention' so as 'to facilitate' the 'occupation, development, and utilisation' of land, to a situation where the terms 'occupy, use and develop' are now equated with 'retention'.

The concept of tino rangatiratanga does allow for Māori landowners to decide what is to be done with their own lands for their own benefit, for the benefit of their whānau and hapū, and for the benefit of future generations. Owners have the right to decide to retain, or to control, occupy, use or develop. We do not think it is inconsistent with the principles of the Treaty for a piece of legislation to say that rights to 'control, occupy and develop' fall within the concept of Māori land as a taonga tuku iho; it is not only retention that falls within the exercise of tino rangatiratanga over land as taonga tuku iho. Our view in that regard is supported by the fact that the existing 1993 Act in section 2 similarly lists all those concepts together with 'retention' in much the same way as occurs now in the amended proposals:

> (2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Māori land as taonga tuku iho by Māori owners, their whānau, their hapū, and their descendants, and that protects wāhi tapu.

The failure to have specific protection for wāhi tapu (as previously mentioned in the preamble) has been noted earlier, but we take into account that the principles as now expressed in clause 3(4)(b) have been strengthened. Instead of the initial exposure draft phrase about tikanga Māori 'guiding' matters involving Māori lands, the revised exposure draft now states that 'tikanga Māori is central to matters involving Māori land'. We are of the view that it is not possible to say that such a method of dealing with matters such as wāhi tapu status is inconsistent with Treaty principles, particularly when one has regard to clause 8 which specifically provides as follows:

> **8. Evidence of applicable tikanga Māori**
> In any proceedings under this Act, any question as to the tikanga Māori that applies in a particular situation must be determined on the basis of evidence.

The amendments made in November 2015 have in our view reinserted the range of Treaty values identified in the 1993 preamble albeit in a different order, and we do not consider the different method of expression of those to have major significance, particularly as the proposed method of expression closely resembles that already found in section 2 of the existing Act.

We do not find that the wording proposed in November 2015 is inconsistent with the principles of the Treaty.

We turn now to address the principles subclause – subclause (4) of clause 3 – in the revised November draft, which states:

> (4) The principles of this Act are—
> (a) the Treaty of Waitangi is central to the application of laws affecting Māori land:
> (b) tikanga Māori is central to matters involving Māori land:
> (c) Māori land endures as a taonga tuku iho by virtue of whakapapa:

(d) owners of Māori land have a right to develop their land and to take advantage of opportunities to develop their land.

Some concern may remain because the statement that the Treaty 'is central' does not come until the principles subclause and is placed at the same level as the right to develop land. We do not view the matter that way.

For a start, the Treaty is now referred to specifically in clause 3, the purpose clause, as is the concept of Māori land being a taonga tuku iho.

The first principle in clause 3(4)(a) also differentiates it from the reference to development in subclause (d) because it expressly states the Treaty is '*central*' to the application of laws affecting Māori land. We regard that emphasis, coupled now with the specific reference to the Treaty in clause 3, as consistent with Treaty principles. Further, the right of development is a Treaty right, and it is part of why the Treaty is central to the application of laws affecting Māori land. As the Central North Island Tribunal put it:

> At its most fundamental, this right of development is recognised as inherent to the property guarantees of the Treaty, because a right of development is part of the full rights of property ownership.[149]

The reference only to the right to develop in clause 3(4)(d) was also criticised because it did not refer to control or occupation, or other cultural enjoyment of land. However, that criticism overlooks the reference now since the November 2015 amendments to those rights to 'control, occupy and develop' in the purpose subclause. We do agree that it would be preferable nonetheless if clause 3(4)(d) referred to the full range of possible utilisation as involving occupation, control and utilisation as well as development. We find, however, that, viewed as a whole, clause 3 of the proposed November 2015 version of the Bill is now not inconsistent with Treaty principles.

Finally, before moving on, we note that the preamble of the 1993 Act had one other piece which was part, as the Act's title said, of '[a]n Act to reform the laws relating to Māori land in accordance with the principles set out in the Preamble'. This was the provision in the preamble for a court and mechanisms to 'assist the Māori people to achieve the implementation' of the principles. Because the removal of this part of the preamble is so central to the proposed reforms, we consider this issue more generally in our analysis below.

We now turn to address the other operative provisions in the Bill.

4.4.2 The challenges in changing the decision-making regimes

(1) *The goal of enhancing the exercise of tino rangatiratanga*

The Bill's proponents have cast the fundamental advantage conferred on Māori by the Bill as being the ability it provides Māori landowners to exercise their article 2 Treaty right of tino rangatiratanga in respect of decisions affecting the utilisation of their own lands, rather than having to seek discretionary approval of such decisions from the Māori Land Court. In his evidence for the Crown, Matanuku Mahuika described the purpose of this change as follows:

> In [today's] changed circumstances a significant challenge has become how to make decisions among the increasingly large and disparate groups of owners. A regime that requires all owners to participate is therefore almost certainly impractical and will stifle the use and development of Māori land by the owners. The alternative therefore is a regime that allows for decisions by a proportion of the landowners with some form of proxy for those who do not participate. Essentially, there are two options for this proxy. Either the Māori Land Court acts as a proxy for those who do not participate in decision-making, or authority is given to those who do participate, subject to the appropriate checks and balances. With the latter option, those who participate become the proxy, and the role of the Court is to ensure that safeguards are followed and legal requirements are met.
>
> On balance, it has been proposed to give the

> decision-making power and accompanying proxy to participating owners. Giving decision-making power to 'participating owners' – the people who actually participate in the decision-making process – was not intended to and does not exclude people. It simply allows decisions to be made on behalf of all owners by those who decide to be involved.[150]

As outlined in section 4.2 above, Crown counsel submitted that this change was something Māori had sought for a long time, and represented a modern form of expressing 'notions concerned with ahi kaa'.[151] The Crown further submitted that '[g]iving participating owners more autonomy is not only a matter of practicality' but of principle, designed to incentivise participation.[152] By contrast, the claimants argued that the participating owners model was 'a clear interference with property rights'.[153] They suggested that the regime unjustifiably reduces 'the protections afforded to minority shareholders in land' and that it was, in any case, unnecessary.[154] In her evidence for the claimants, Prudence Tamatekapua suggested that the participating owners model 'will result in disenfranchising some owners and allowing some landowners to make decisions about land without the agreement of other landowners'.[155]

As described in chapter 3, at a high concept level, these propositions garnered considerable support among many Māori responders when first advanced as part of the review panel's 2013 consultation. That is not too surprising at a level of principle, given the explicit guarantee by the Crown to Māori in article 2:

> Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.

The high level 2013 propositions promised a reality to the Treaty guarantee of *tino rangatiratanga o o ratou whenua*. In the review panel's opinion, that guarantee did not sit well with a requirement for reference to a Māori Land Court in respect of Māori owners' decisions about their land. However, while the very concept of tino rangatiratanga envisages the utmost or untrammelled authority in decision-making, the correlative obligation of Crown protection of Māori rights in land could not be ignored.

In practical terms, the discretionary oversight of the Māori Land Court was proposed to be replaced by a combination of owner decisions with an administrative support mechanism and procedural checks. Initially as 'engaged' owners, and later as 'participating' owners, the concept arose of enabling utilisation decisions by those engaging or participating in a decision-making meeting. As Mr Mahuika explained (above), the idea was that the 'proxy' for absent co-owners would no longer be the court – with a duty to protect the rights of majorities from minorities (and vice versa), to consider 'meritorious' objections, and to assist owners to retain and use their lands – but rather the 'proxy' would become those owners who were able or willing to participate in a meeting of owners.

The definition of 'participating owners' in clause 5 of the November 2015 draft is succinct: '"participating owners" means the owners of land who participate in making a decision'.

As we have seen in chapter 3, the 2013 and 2014 consultation rounds were generally informed as a high-level concept that the participating owners regime would enable decision-making by Māori landowners and remove the 'barrier' to their decision-making constituted by absentee or non-engaged owners, and the Māori Land Court's discretionary decision-making. Thresholds for decision-making would be specified to protect against abuse or capture by a minority, and the current requirement for 75 per cent of all owners for permanent alienations would be retained. Also, the Māori Land Court would still have a role, but one restricted to ensuring the decision was reached in accordance with processes laid down in the statute and (if there was one) the governance agreement. Thus, there would still be protection for the rights of non-participating co-owners but such protection would become procedural (and therefore predictable in all circumstances): first, there would be thresholds for

decision-making (both in respect of quorum and voting thresholds); and, secondly, the court could check that the notification and meeting procedures had been followed correctly. In the Crown's submission, because permanent alienation would still have to meet the 1993 Act's threshold, participating owners would have greater autonomy to use their land without jeopardising the ownership group's connections to their taonga.[156]

However, for a variety of reasons, when the manner of addressing that high-end objective came to be applied in a detailed statutory manner to individual proprietary interests in Māori land, other practical considerations in Treaty terms also had to be addressed. Foremost amongst those were:

- The reality that as a consequence of previous history only approximately five per cent of New Zealand's land remained in Māori ownership and Māori had strongly advocated that 'not one more acre' was to be lost. As part of the Crown's obligation of active protection of rangatiratanga retention was still crucial, but it became clear that it was not just the direct decision to sell or gift (requiring 75 per cent of all owners) that could lead to alienation.
- Again as a consequence of the history of past Treaty breaches by Crown legislative actions, for well over 100 years Māori now held property interests in their lands individually.
- Those individual property interests in Māori land are defined and firmly bound in tikanga terms by whakapapa relationships between the current owners or uri and their tīpuna.
- As a consequence of the passage of four or more generations, individual Māori ownership interests have become increasingly fragmented – a situation complicated and exacerbated by the common situation of succession orders not having been sought in many estates, and the increasingly high level of minors entitled to ownership interests.
- As a result of major social and economic pressures on Māori, particularly urban migration following the Second World War, and more latterly overseas migration, have meant many Māori owners are disconnected from any direct personal involvement with the lands in which they hold ownership interests.
- As a consequence of those factors of fragmentation and disconnection, readily co-ordinated decision-making by all owners has commonly become very difficult, if not totally impractical, and attempts to arrange meetings of assembled owners and other such decision-making hui have become very costly.
- In 1993, the Māori Land Court had been charged by Te Ture Whenua Māori Act with a protective statutory role both to ensure retention in Māori ownership of Māori and general lands owned by Māori, and to ensure an impartial means existed 'to protect minority interests in any land against an oppressive majority' and also 'to protect majority interests in the land against an unreasonable minority'.[157]
- In addition to the protective roles of the Māori Land Court under the 1993 Act, the court was also charged with a role of enabling the 'effective use, management, and development, by or on behalf of the owners, of Māori land and General land owned by Māori'.[158] In excess of 1,550 ahu whenua trusts had been created since 1993 by the Māori Land Court as part of that role.[159]

Any detailed statutory proposal to give effect to the high end proposition of increased tino rangatiratanga in respect of decision-making about Māori land had therefore, of necessity, to address what Treaty-compliant options were available to address those practical considerations that had arisen since the passage of the first Native Lands Act back in 1862.

Those considerations could not simply be ignored by the Crown or Māori as the 1993 Act's Māori Land Court solution had eventuated from a Treaty-based dialogue, in which the NZMC consulted Māori and led the development of critical reforms (including using the court as a key protective and facilitative mechanism). The Crown then largely acceded to the Māori Treaty partner's proposals, developing them in the form of two Bills. The second Bill

was enacted after consultation (in 1987 and 1993) showed broad agreement between Māori and the Crown. That agreement or consensus within Māoridom and between the Treaty partners is reflected in the key elements of Te Ture Whenua Māori Act 1993, as described in chapter 2.

The aim of that 1993 legislation was to try to address the type of considerations outlined in the bullet-point text above. In ensuring the passage of that 1993 legislation with its protective and enabling provisions, the Crown was discharging its broader Treaty obligations. It achieved that by the Act ensuring the retention of Māori land in Māori ownership while also facilitating the use, management, and development of Māori land by its owners, as well as by the Crown undertaking the funding of the Māori Land Court system. The passage of the Act also ensured a sound national system was in place to record Māori ownership interests or titles. This has involved a great deal of work, culminating in the court's Māori Freehold Land Registration Project.[160]

The challenge in proposing any significant changes from that system was going to be identifying what Treaty principles had to be addressed and what mechanism in practical terms could do that: would it be the Māori Land Court; or a statutorily-set threshold of participating owners as 'proxy' for their co-owners; or some other mechanism? As we found in chapter 3, no one particular mechanism is required in Treaty terms so long as the chosen mechanism or mechanisms have broad Māori support and meets tests of effectiveness and accountability.

(2) *Crown Treaty obligations in respect of decision-making mechanisms in relation to Māori land*

The Crown's Treaty duties in 1993 were complex in relation to Māori land because of the considerations listed above. The Crown's obligations under the Treaty in respect of Māori land could not be limited solely to giving effect to the guarantee of tino rangatiratanga in respect of Māori lands. Māori wanted retention to be an overriding value in respect of their lands. Consequently, no system could provide for untrammelled owner decision-making. As we noted in chapter 2, the 1992 ministerial advisory team considered the court's powers 'safeguards' which, 'while potentially intrusive, clearly embody the kaupapa of the legislation and are supported'.[161] Further, as described in chapter 2, the level of fragmentation of title and of owner disconnection had become such that the Crown had to also take into account and give effect more generally to its Treaty obligations and duties. In relation to Māori land they encompassed:

- the duty of active protection of Māori, their rights, and their taonga – particularly to be able to retain their own lands (as guaranteed in the English version of article 2), but also to be able to occupy, use, manage and develop them as they saw fit;
- the obligations to ensure good government for a national system of individualised Māori title which the Crown's own earlier statutes had imposed on Māori;
- the article 3 obligations to ensure equity in laws affecting Māori land title in comparison to the law applying to general land titles in New Zealand, as noted above;
- the special relationship in the nature of a partnership between Māori and the Crown, which, as described in chapter 3, imposed on the Crown a duty not only to consult with Māori as to the governance of their lands, but required Māori agreement in respect to changing the law as to how they are to own, manage and control their lands under the law; and
- the principle of redress, to limit or mitigate the prejudice caused by past Treaty breaches, which (in the case of Māori land administration, as the Tribunal has found in many reports), had resulted in the dispossession of Māori of almost all their lands, as well as creating the individualised land title system giving rise to the complications of fragmentation and disconnection (see chapter 2).

All of those Treaty obligations, and the practical complexities bearing upon their performance, remained, and remain, as important in the period we have to consider from 2013 to 2016 as they did in 1993. In fact in some respects the processes of fragmentation and disconnection

for many Māori whānau has increased since 1993, as a further generation has passed on, leading to increased fragmentation, and migration has continued or gathered pace, particularly from rural provinces.[162]

On the positive side, the Māori Land Court bench has emphasised in its various submissions to the review panel and the Ministerial Advisory Group that many Māori landowners since 1993 have taken advantage of the mechanisms available to them of halting or circumventing the fragmentation process; many whānau trusts and ahu whenua trusts have been established.

Once these trusts are created, the judges assert, the processes of fragmentation of interests and disconnection become irrelevant to decision-making in respect of the land. The judges' submission was supported by counsel for the claimants in saying that trustees, as the new title holders, have the sole power of operational decision-making on behalf of the beneficiaries of the trust.[163] Once the trust is created, it was asserted that the Māori Land Court has no involvement in the operational decision-making processes by the trustees as to the use, management, and development of the land. The trustees solely have those decision-making powers, although, as we address later in this chapter, the court controls the appointment of trustees, the terms of the trusts and has powers to review trustee actions. Beneficiaries can apply to the Māori Land Court to review the trustees' personal performance, but the court's powers are limited to the conduct of the trustees themselves. The court cannot substitute its own decisions as to use, management and development of the land for the decisions of the trustees. We consider the role of the court in the creation and asserted 'supervision' of trusts further below.

Methods of ensuring capacity, competence, and honesty of trustees of Māori land, therefore, are obviously issues of increasing significance to the good governance of Māori land, particularly if the removal or reduction of the Māori Land Court's supervisory role of the appointment or possible removal of trustees is to be considered. As we noted in chapter 3, one of the constant refrains over the past two decades has been the need for training, and for capability and skills enhancement. FOMA, in its 2015 submission, for example, argued that the court's jurisdiction could not be removed with capability levels as they currently are.[164] The significance of the court's current role is reflected in the number of applications it receives annually, which as at 2012 was at a level of 1,600 applications a year 'in relation to the establishment and management of trusts and incorporations'.[165]

As discussed in chapter 3, the review panel decided not to carry out any empirical assessment of how the Act was actually working, including the outcome of these kinds of applications or their effectiveness in halting or circumventing fragmentation and enabling effective land governance. The need for empirical research should have been clear, as it had been sought as long ago as 1998 by the McCabe report as described in chapter 3. Moreover, the judges' April 2013 submission asserted that 'the best method' of dealing with fragmentation already existed: the whānau trust. The judges also asserted in the same submission that:

> The primary means for engaged owners to advance proposals where there are substantial unengaged owners, as discussed in our previous paper, is the ahu whenua trust. The role of the engaged owners in deciding to create a trust is critical and, provided the notice requirements have been satisfied and the prospective trustees comply with s 222 of the Act, such trusts are easily implemented.[166]

Neither of those submissions led to the empirical research which the Judges urged on the review panel:

> Insufficient research is available on the actual barriers to effective Māori land utilisation, and in particular into the barriers posed by the legislative framework. Developing remedies to this complex problem in advance of fully understanding its causes creates risks. Accordingly, our view is that empirical research into the issues posed by the legal framework regulating Māori land tenure, as well as the barriers to utilisation generally, should be undertaken before detailed legislative solutions to these barriers are progressed.[167]

That lack of empirical research has been strongly criticised throughout the closing submissions of counsel for the claimants.[168] We will return to it as necessary, because it arises in a number of areas.

4.4.3 Practical application of Treaty principles in the existing Act

(1) *Governance entities and the role of the Māori Land Court*

The scene for a consideration of the nature of governance entities is possibly best set by quoting from the evidence of Mr Mahuika:

> So looking at all of those different considerations and also considering the state of Māori land and the state of the communities in which those lands are situated, it was decided that you needed to have a model which facilitated decision-making by the owners, gave them greater say and greater control over what should happen with their land, that responded to the desire to remove the Court from an administrative function, but still had some safeguards around it.
>
> So what we came to was the idea that okay let's – within some parameters look at the idea of engaged owners [which] became participating owners . . . The ultimate thinking behind it was that there was a call from Parliament and for landowners to have greater control and greater say and now that necessarily involves removing actually one of the arms of Government, in other words the judicial arm of Government from having a say and it does involve devolving some power to the landowners but in a way which enables decisions to still be made.[169]

We commence our consideration of this issue by looking at what the existing Act provides in respect of governance entities and their supervision by the Māori Land Court (themes which we introduced in section 2.5.2 of chapter 2). An examination of the application of Treaty principles in the existing Act cannot be taken as setting an immutable default standard, as both Māori and the Crown are entitled to propose improvements over time. However, the existing Act's framework can be of assistance to identify potential weaknesses in any reform proposals. We turn then to address that framework in Treaty terms.

The practical legal mechanisms provided in the Act for Māori landowners to enable retention on the one hand, and utilisation or development on the other, have been a range of governing entities. In respect of the creation of the range of the various trust entities provided for by the Act, the Māori Land Court by virtue of section 211 has exclusive jurisdiction: 'The Māori Land Court shall have exclusive jurisdiction to constitute pūtea trusts, whānau trusts, ahu whenua trusts, whenua tōpū trusts, and kai tiaki trusts in accordance with this Part.'

Pūtea trusts are trusts only suitable for particularly limited factual circumstances where the end benefit is for community purposes (sections 212 and 213); whānau trusts are created to provide a range of benefits for the descendants of a particular named tipuna (ancestor) named in the trust order (section 214); ahu whenua trusts provide a mechanism for use and development of land and are for the benefit of persons beneficially entitled to the land in proportion to their interests in the land (section 215); whenua tōpū trusts provide a collective ownership option for hapū and are generally for Māori community purposes; and kaitiaki trusts are for the protection and benefit generally of persons under a disability.

By virtue of part 13 of the Act, Māori incorporations could also be constituted, amalgamated, or wound up but once again only by order of the Māori Land Court. (Shares in an incorporation are different in nature than ordinary shares in a company at general law. Shares in a Māori incorporation are deemed by statute to be undivided interests in Māori freehold land – section 260.) Shareholders meetings by special resolutions have substantial control of a committee of management and even of variations to the incorporation's constitution (see section 268(3)). While provision is made for the acts of the incorporation to be managed by a committee of management (sections 269 and 270), and its decisions are untrammelled by the necessity of court oversight, other provisions of Part 13 still vest

significant supervisory powers in the court on application by one-tenth of the shareholders (section 280).

Under sections 280 and 281, the Māori Land Court has broad remedial powers if an incorporation's officers or committee of management do not comply with the constitution, special resolutions, or statutory duties. The court can even order fresh committee elections or wind up the incorporation. The level of accountability to the court is clear even from the base requirement to file the accounts of an incorporation with the court.

Given the broad range of trust entities available in the Act, Māori have not preferred the more company-like option of incorporation. The Māori Land Court judges have recorded that since 1993 only one application has been made for a new incorporation, with only one other application to amalgamate two existing incorporations. A number of other incorporations have been terminated or converted into ahu whenua trusts, whereas 1,553 new ahu whenua trusts have been formed since 1993.[170] (The review panel did not appear to have ascertained the number of whānau trusts that have been formed, presumably as it elected not to investigate the operation or effectiveness of the 1993 Act's mechanisms.)

The Māori Land Court judges' April 2013 submission to the review panel asserted that the establishment of an ahu whenua trust was 'a simple, timely and inexpensive process', that it was a mechanism included in the Act 'to address the issue of unengaged owners', and that once established the trusts operate by majority decision among the trustees without need for court endorsement. The result, claimed the judges, was that the 'greatest advances in Māori land utilisation over the past 20 years have been primarily through ahu whenua trusts'. Their submission on the issue summarised the outcome as being that:

> The trust model has many advantages:
>
> a. It is easy and cost effective to establish;
> b. It is a simple governance model;
> c. There is a clear separation of legal and beneficial ownership;
> d. Trustees have broad powers subject to the limitations that the engaged owners stipulate;
> e. The imposition of trustee duties is appropriate;
> f. The beneficial owners have access to the Court where trustees act in breach of their duties.[171]

However, what that summary was describing were the advantages of trusts once established. It did not summarise the various statutory requirements for earlier involvement of the court. Some important mandatory roles or powers include:

- the creation or constitution of the statutory trusts (sections 211 to 217);
- the fixing of the terms of the trust by court order (section 219);
- appointment of trustees (section 222);
- amalgamation of trusts (section 221); and
- authorisation of new ventures if they are not provided for in powers contained in the trust order (section 229).

Furthermore, the court has significant supervisory powers over the conduct of the trustees or trusts where its involvement is required by the Act. Some of the more significant include:

- power to call on trustees to report in writing or appear in person on any matter relating to the trust or his or her performance of their duties (section 238);
- addition, reduction, or replacement of trustees (section 239);
- removal of trustees (section 240);
- termination of trusts (section 241);
- orders for payment of sums of money to those beneficially entitled (section 242); and
- variation of trusts (section 244).

Most if not all of those mandatory roles and powers are in place to ensure that sound effective governance is in place, and that the interests of all owners are protected – whether engaged or participating, or disengaged or disconnected with the land. Given that 100 per cent

participation by Māori landowners is virtually impossible for blocks with a large number of owners, the interests have to be protected of those not closely engaged or disconnected entirely from the land by distance, passing circumstance, or other more legal incapacity (such as minors or those who have not yet succeeded to their interests). All these interests are currently protected by virtue of the existence of the impartial decision-maker in the form of the Māori Land Court (with rights of appeal to the Māori Appellate Court), which was the form of protection proposed by the NZMC and endorsed by consensus in 1993. We have already addressed in chapter 3 the question of whether a clear consensus for change has emerged since then.

The flexibility of discretions vested in the court in respect of its protective supervisory functions may lend some support to the proposition that the Act can constitute a 'barrier' to decision-making in respect of utilisation.

A different nature of protection exists for the creation of ahu whenua trusts, where not all owners' consent to a trust's creation can be obtained, in that no threshold of owner consent has to be met. Rather, the tests the court must consider before creating an ahu whenua trust are limited to whether:

- the owners of the land or lands 'to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it'; and
- 'there is no meritorious objection to the application among the owners having regard to the nature and importance of the matter'.[172]

That approach ensures that an unreasonable minority cannot frustrate a worthwhile purpose in creation of the ahu whenua trust, and that the court is satisfied proper notice and opportunity for involvement has occurred for owners affected. It also ensures that, if a majority of owners are unengaged, a trust can be formed anyway so long as there is no 'meritorious objection', which enables impartial consideration and protection of the unengaged majority's interests.

Another example of a broad discretionary power of that nature is found when trustees under section 243 apply to the court for an order that land newly acquired from trust revenues should form part of the trust assets. That section provides that the court must be 'satisfied that the land can be properly used and managed as part of the undertaking of the trust and that it is in the best interests of the beneficiaries to make such an order'. The exercise of that discretion is not guided by any specific criteria other than the 'best interests of the beneficiaries'.

When considering, then, strong assertions that once trusts are established the trustees already exercise tino rangatiratanga,[173] we must not lose sight of the reality that the control of the very powers of creation, settlement of terms, variation or termination of trusts, and addition of land assets in respect of Māori land trusts lie with the court, as does the appointment, control and removal of trustees. It is important to remember, however, that these arrangements were put in place to ensure the cultural imperative of retention of Māori land, to assist the owners, and for the protection of all owners' rights (in the form of an impartial court). This is not necessarily how co-owners' or beneficiaries' interests are protected at general law. In considering the application of the Treaty principle of equity, or equitable treatment, it is of assistance to examine arrangements under the general law for private trusts and for co-owned interests in respect of general land.

We now turn to address the issue of private trusts at general law first.

(2) *Comparison with private trusts in respect of general land*

We begin with a caveat, noting that it would not be appropriate in Treaty terms (and nor do Māori wish it) for the arrangements to be exactly the same. Māori land is a taonga tuku iho; rights, uses, and governance should approximate as closely as possible to tikanga.

While the differences between arrangements for Māori land trusts and general private trusts are significant in some respects, there is also a significant amount of commonality.

At general law, the processes of creating and terminating

a private trust can be provided for in the originating trust document by those who settle the form of the trust at the time of its creation. The High Court has both an inherent supervisory role and a statutory supervisory role under the Trustee Act 1956 over trustees of private trusts and their administration of trusts. Notwithstanding, subject to the existence of those inherent and statutory powers of court intervention or control, a relatively broad authority exists for people to create and shape the form of their own trusts in respect of general lands to whatever level of detail they wish. No court involvement is required for the creation and settlement of the terms of the trust. Even some significant variations of a trust document can be enabled by the underlying trust document without court approval being required. The powers of trustees and all other terms of the trust are set out in the originating document without recourse to or involvement of a court. The appointment, addition, reduction, replacement, and removal of trustees can also be provided for in the trust document without court involvement.

However, numerous statutory provisions do exist in the Trustee Act, giving the High Court powers in respect of the terms of trusts. These are predominantly designed to empower the court to cope with situations that fall outside the scope of the originating trust documentation, by empowering it to approve variations of trusts (sections 64 and 64A), or particularly where law or equity in the past has imposed limitations on trustees' powers.

In controlling the accountability of trustees for their actions in respect of the trust, the Trustee Act 1956 has similar provisions to Te Ture Whenua Māori Act 1993. The High Court, on application usually of a beneficiary, can call on trustees to report and account (sections 67 and 68). Trustees themselves also have the power in limited circumstances to seek court approval for the exercise of any discretionary power vested in the trustee (section 66). We return later to address the significance in detail of these supervisory powers under Te Ture Whenua Māori Act 1993 as compared to the new proposals.

Thus there are significant differences between Māori land trusts and general land trusts, as to the level of freedom to create and set the terms of trusts, and to appoint and remove trustees. But there are similar levels of power for court control and oversight if the originating instrument creating the trust does not make specific provision for what is proposed.

Moreover, in respect of the control and supervision of trustees, the High Court and Māori Land Court have broadly similar powers. This is emphasised by the provisions of section 237(1) of Te Ture Whenua Māori Act 1993, which provides:

> the Māori Land Court shall have and may exercise all the same powers and authorities as the High Court has (whether by statute or by any rule of law or by virtue of its inherent jurisdiction) in respect of trusts generally.

The similarities in supervision and control are such that the main difference lies in the lack of freedom for Māori landowners to control and fix the terms upon which a trust is to be created. Nor can they control the appointment and replacement, or removal of trustees, or the addition of land assets to the trust. In the Māori land sphere, those decisions are vested in the court. At general law, private trusts can be controlled by the terms of the instrument creating the trust, which is framed by the landowners themselves.

(3) *Comparison with co-owned land interests in respect of general land*

However, a significant aspect of distinction between the two land regimes, which is very important in the context of the Tribunal's present deliberations, relates to the rights of co-owners of Māori land. The question that arises is the ability of some owners to make decisions for all and to utilise others' individual interests without their knowledge or consent.

At general law, the situation is basic and powerfully simple. No other co-owner or trustee can use another co-owner's interest without their agreement unless a statute provides otherwise. The principal statutory provisions in respect of co-owned land are to be found in the Property

Law Act 2007, at section 339 and the related section 343. In the event of disagreement between co-owners, this Act empowers a court to make orders for sale or division, but on terms that ensure reasonable outcomes in price terms if one co-owner is required to buy the other out. The aim of those provisions then is to ensure a means is available through court order for the relationship to be severed, one or other co-owner or sets of co-owners to be bought out with compensation, or for the land to be sold. Section 343 contains further provisions empowering the court to fix reserve prices, the reasonable terms of sale, and how the proceeds are to be divided and costs of sale apportioned. Other statutes such as the Partnership Act 1908 and the Property (Relationships) Act 1976 also have essentially a similar approach of empowering courts, whether specialist family courts for the latter, or general courts for the former, to exercise powers of division or sale so as to sever relationships and enable co-owners to get on with their lives.

However, aside from those statutory mechanisms which all utilise court involvement, at general law no co-owner can utilise another co-owner's interest in land without his or her agreement. And importantly in each of those situations recourse can only be had to utilise the court's power where the joint relationship that has led to the agreement to enter co-ownership has broken down, resulting in an inability to reach agreement between co-owners. The purpose then of the court involvement is to sever the relationship.

However, the situation with Māori land co-ownership is fundamentally different. For a start, the relationship that has given rise to the co-ownership is not one of agreement. It is one of whakapapa linking all co-owners to the whenua involved. Furthermore some of the most common barriers to the ability to reach agreement in respect of the land are not matters necessarily of active disagreement between co-owners, although obviously that too can be as common among Māori as with the general community.

Rather the common barriers to reaching agreement nowadays arise from a range of factors. They include disconnection, or lack of engagement with the land, or the difficulties or inabilities of even contacting all owners. Even if contact can be made, because of the numbers often involved, getting them all assembled at the same time to make decisions can be a major hurdle. Added to those practical problems is the reality that as a result of fragmentation it is difficult or impossible to obtain unanimous or majority agreement between often scores, or hundreds or even thousands of owners, even if they could be assembled. Added to those problems is the fact that some, perhaps many, owners have not succeeded to their interests and have no voice. Finally, in common with general co-owners, sometimes a breakdown in relationships or fundamentally different approaches to particular decisions frustrate effective decision-making.

We acknowledge the reality that absolute unanimity is all but impossible to achieve as between co-owners of interests in Māori lands. This means that in the absence of a governing entity, some voting mechanism controlled by thresholds as a base is the only feasible way of ensuring decision-making of the whole body of owners can occur. Once an operating entity is created, whether it be in the form of a trust, incorporation, or other legal structure, decision-making on behalf of owners is enabled much more readily. The supporters of the present proposal can, of course, point to the fact that the existing 1993 Act already has that essential underlying system of thresholds and provisions for governing entities such as trusts and incorporations.

However, where the essential difference lies is that the present 1993 regime does not leave the situation there. Instead there is a series of safeguards in place utilising the impartial involvement of the Māori Land Court. The first of those is that, for alienation decisions, court confirmation is required. That has to be considered against the principle of retention to facilitate occupation, use and development. The next is that the court also has the discretionary power to protect the minority against the oppression of the majority and to protect the majority against an unreasonable minority. In relation to governing entities, the court has the power to appoint or not appoint suggested trustees, and to set the framework of the terms

under which a trust or incorporation is to operate. None of those protective features exist at all in the current reform proposals.

Before 1993, when the retention guarantee was strengthened, it was relatively straightforward for dissentients to partition their interests, so that co-owners' decisions did not necessarily bind those who disagreed with the majority at a meeting of owners (see chapter 2). This enabled dissentients to retain their land but could also result in small, unusable, landlocked partitions. This solution of severing the rights (and relationships) of co-owners is no longer so readily available under the 1993 Act, principally because of the stringent criteria the court must consider before agreeing to a partition. More importantly, because of the whakapapa relationship underlying the co-ownership of Māori land, the concept utilised at general law of enabling an impartial court to sever the relationship is not available under the 1993 Act. Nor should it be. The Act does not give the court, in protecting the interests of minorities from majorities (and vice versa) the ability to order a sale or division, each of which would be counter to the retention of land guarantee in the Treaty.

Perhaps the most important arrangement under the current Act, in this respect, is the ability of owners to have an ahu whenua trust created and trustees appointed. This can be done without the knowledge or agreement of co-owners, so long as the specialist court is satisfied that certain criteria have been met, including that there is no meritorious objection. Such an arrangement would not be tolerated under general law, unless the co-owners were under some form of disability, and it underlines the need for special arrangements not just because Māori land is a taonga tuku iho, but because of the significant title problems that have been inherited from the past (as discussed in chapter 2).

In balancing tino rangatiratanga and active protection, we accept that a range of possible protections exist in this situation that Māori now find themselves in. As noted earlier, what matters is that the form of protection chosen be effective, and that it have general support from Māori. As we discussed in chapter 3, the Crown does not currently have sufficient, demonstrable support to remove the fundamental protections in the present Act, which balance the rights of co-owners with the need for decisions to be made, through the mechanism of a court that is required to both protect and facilitate.

Nor is there sufficient empirical information for an informed choice to be made, as we found in chapter 3. Here, having outlined some of the key issues in respect of the substance of the proposed legislative changes, we turn to the question of what kind of empirical information is required.

(4) *What empirical information is required about the question of 'barriers to utilisation' in the existing Act?*

As earlier observed, the claimants' closing submissions stressed the failure of the Crown to ensure any analysis was made of the success or otherwise of the procedures under the existing Act. Claimant counsel put the issue succinctly:

> Māori Land Court judges are now being referred to in the Crown's submissions as 'paternalistic' and 'Crown-appointed'. However:
>
> - There is no evidence to support an analysis of Māori Land Court decisions constraining owner decision-making, and the Crown has not sought to undertake such an analysis;
> - The 'Māori Aspirations' document relied on by the Crown admitted that its statistical data was too small to be relied on, and its commentary on Māori Land Court decisions was anecdotal, and only recorded one side of a dispute . . .[174]

Under Te Ture Whenua Māori Act 1993 the solution adopted to cope with the raft of inherent attributes attaching to Māori land had been to turn to the Māori Land Court to enable decisions to be made or confirmed by an impartial decision-maker, particularly in situations involving decisions affecting potential alienation. The court was required to make its decisions in accordance with the principles and objectives contained in the

preamble, and in accordance with sections 2 and 17. In terms of the ability to enable utilisation and development of the land, the ahu whenua trust mechanism, as outlined above, can be used by the owners provided the court is satisfied the owners have all had 'sufficient notice of the application and sufficient opportunity to discuss and consider it' and 'there is no meritorious objection to the application among the owners having regard to the nature and importance of the matter'.[175]

We have seen above that the judges have strongly asserted that once those trusts are created the court plays no role in operational decision-making which is solely in the hands of the trustees. That was echoed by counsel for the Wai 2478 claimants:

> The Crown submits the key proposals (participating owners' regime and greater flexibility in governance models) enhances owners' rangatiratanga, and are therefore consistent with Treaty principles. However, as the Māori Land Court Judges' submission elucidates:
>
> - Under the existing legislation, owners who attend meetings already make decisions concerning their land. The Courts do not make decisions on behalf of owners. The real issue is ensuring that owners have the capacity and opportunity to participate, and that is simply not addressed in the new Bill . . .[176]

On our interpretation of the Act, whilst that may in general terms be accurate, it overlooks some particular powers the court retains over utilisation decisions such as in respect of the acquisition of additional land for the trust assets under section 243, and in relation to some aspects of alienations. The question that arises is that if those controls exist, and are significant in practice, do they add to the perception of court involvement being a 'barrier' to effective decision-making? Empirical research may have detailed the extent to which those limited powers have acted as a genuine 'barrier' to decision-making.

However, despite research being initially required of them in their terms of reference, the review panel elected not to carry out any empirical research to validate or otherwise the judges' assertions that the ahu whenua and whānau trust mechanisms were working successfully, and were reducing fragmentation or mitigating its effects significantly.

That lack of research has had a number of consequences. As outlined in chapter 3 it has meant that a proper factual basis was never laid for the conclusion reached by the independent review panel, and accepted without challenge by the Crown, that repeal was required of the current Act rather than amendment of it.

There are a wide range of possibilities that might flow from carefully conducted impartial empirical research as to the operation of the Māori Land Court. One or other of the views of the Māori Land Court judges or of the independent review panel may be found to be totally accurate. However, we suspect a range of other outcomes could also potentially occur.

It may well be found, for example, that the reality is far more complex than either the judges or the independent review panel postulate. It may be found that the court's role is that of an enabler of decision-making through governance entity creation, or that its discretions as to how those are formed is a 'barrier'. A possible midway point may be that the court involvement may have been a 'barrier' at some level, but not a significant one at all in practice, with other causes such as lack of finance, landlocked lands or rating arrears being much greater in reality as 'barriers' to utilisation. It is clear, for example, from our analysis in chapter 3 that all dialogue and discussion among Māori and with the Crown has highlighted rating and landlocked lands; that those are serious barriers to utilisation is not disputed. We return to those matters later in the chapter.

Another potential outcome of empirical research may well be that Māori Land Court involvement is found to be a barrier, but a necessarily protective one where there is no governance entity such as a trust or incorporation in place, but that where such governance entities are in place court involvement is not a 'barrier' except in very limited circumstances.

Another possibility may well be that it is found on careful assessment that governance entities are in place for over 80 per cent of the total Māori freehold land area (as

has been advanced recently in evidential reports for two district inquiries).[177] If that were to prove to be so, it would paint a much different picture as to the significance of the asserted 'barrier' to decision-making affecting the utilisation of Māori land, than the statistic that only 41 per cent of blocks are under some form of governance entity (by title), referred to in consultation (see section 3.3.5(4)). If it was found that once governance entities were in place the Māori Land Court is not a 'barrier' at all to decision-making for land utilisation, then if that 80 per cent figure was to prove to be accurate as to the amount of land covered by governance entities, the problem immediately reduces to one potentially affecting only 20 per cent of Māori freehold land. That would result in a significantly different view of the size of the problem of potential decision-making 'barriers', as contrasted with just using a figure of 59 per cent by number of blocks. If that were to prove to be the case, then further it may also be that the 20 per cent of total land area not held under governance entities occurs because those blocks are too small for economic utilisation warranting a governance entity being formed, or that their owners are content to hold such small blocks unoccupied for cultural reasons, or for potential residential occupation in the long term.

But the point is that no one can know the correct factual position without empirical research being carried out.

In that situation, where significant Māori Treaty rights are at stake, the Crown has to ensure that its legislative reform is based on definite fact, not conjecture.

4.4.4 The new Bill's governance mechanisms and standards

(1) *Threshold levels for participation and decision-making*

By contrast to the 1993 Act, the new Bill's proposals focus almost predominantly on the Treaty right of tino rangatiratanga enjoyed by Māori landowners. The review panel and the Crown's closing submissions have each emphasised that the intent is to give practical effect to that Treaty guarantee. The review panel made that plain in its 2013 discussion document on the proposals, as well as in its final report to the Associate Minister.[178] The Crown's closing submissions emphasised that 'the proposals set out in the revised draft Bill are consistent with Treaty principles and enhance owners' rangatiratanga'.[179] The intent then is that the Treaty guarantee will be met by the Bill ensuring all decision-making, both as to the title-holding entities to be created and their kaitiaki, and the decisions they make as to use, management, and development, will be in the hands of the owners.

It seems to us that the chosen mechanism for this kind of decision-making, the participating owners model, is an attempt to both revive and empower the meetings of assembled owners system, first created in 1909 (see chapter 2). The assembled owners' system seems to have become obsolete since 1993. The Māori Land Court judges observed that it has been very little used, but the reasons for that have not been fully researched.[180] They suggested that the current Assembled Owners regulations, which date from 1995, had quickly been rendered 'irrelevant to the majority of owners, once the effects of succession and fragmentation had taken hold'. The quorums set in those regulations, they noted, are frequently unattainable.[181] In this section, we examine some of the contrasting features of the assembled owners' system (as it is supposed to operate under the current Act) and the participating owners model.

To reduce the practical problems for decision-making arising from fragmentation and disconnection, governance entities or bodies will be able to be created in any form the participating owners decide, and need not be in the prescribed forms of trusts or incorporations as provided for in the 1993 Act. As noted in chapter 3, the review panel's intention was to enable the adoption of company structures as so commonly used at general law, and this remained a key feature in consultation through to 2015.[182] The purpose of the proposed reform is to enable autonomous owner decision-making, with the court supervising solely procedural correctness as to the type of entities used, their powers and the appointment of their kaitiaki. Once created, those entities will be able to make any decisions they see fit for the use, management or development of the lands vested in them.

However, the Bill still had to provide for decisions to be made by landowners where a governance agreement had

not been entered into, and also for the initial decision-making process to form a governance body and its associated governance agreement. To address the problems of disconnection and the likely practical inability to obtain agreement of all owners to such an entity being formed, a combination of participation thresholds (essentially quorum requirements) and voting thresholds for decisions are prescribed. The thresholds vary depending on the nature of the decisions being reached and their direct relationship to alienation. The Crown's case was that the closer the decisions may be to alienation, either in legal or practical terms, the higher the participation quorum and/or voting threshold is set.

However, both in the original form of the Exposure Bill, and as a result of changes made in November 2015, it has been difficult to achieve in practical terms any consistent logical approach. The November 2015 amendments did not remove or reduce all the inconsistencies or complexities inherent in the proposed system. It can even be difficult to ascertain if quorum/threshold levels in any particular factual situation are readily identified, as some are specified in the body of the statute itself, some in schedule 4 and others in schedule 3. Furthermore, precise care is required to check whether a particular decision involves a threshold of a percentage of *all* owners, or only a percentage of *participating* owners, or for participation thresholds, a combination of both. At present, Māori landowners mostly appear in the court without representation, and we do not envisage that changing in the foreseeable future, so their ability to operate under a new Act depends on the clarity of the statute and the advice of the as-yet amorphous Māori Land Service (a point we return to later in the chapter).

The quorum levels set by clause 48 add to the complexity, in that clause 48(6) stipulates minimum 'participation thresholds' as follows:

> (6) If a decision is about a parcel owned by tenants in common,—
>
> (a) and there are 10 or fewer owners, all of the owners must participate; or
>
> (b) and there are more than 10 but not more than 100 owners, there must be participation by at least 10 owners whose individual freehold interests total a 25% or more share in the parcel; or
>
> (c) and there are more than 100 but not more than 500 owners, there must be participation by at least 20 owners whose individual freehold interest total a 25% or more share in the parcel; or
>
> (d) and there are more than 500 owners, there must be participation by at least 50 owners whose individual interests total a 10% or more share in the parcel.

The consequence is that the protective mechanism proposed is an unduly complex set of statutory levels and rules for owner meetings to substitute for any discretionary decisions by the Māori Land Court. We acknowledge that the Māori Assembled Owners Regulations 1995 also contain quorum and voting requirements set in percentage terms.[183] Those, too, we acknowledge can be described as complex and to an extent inherently arbitrary, as all threshold limits must be. However, the difference in terms of final decision outcomes, lies in the fact that discretionary supervisory powers given to the Māori Land Court under the existing Act enable more flexibility than solely the application of complex thresholds.

For example, under section 178 of the existing Act the court can review a meeting of assembled owners if it is satisfied the meeting was called or conducted in any way unfair to any owner or group of owners. If it is satisfied as to unfairness it has the power to set aside any resolution passed. Moreover, by virtue of section 176 of the Act the court even has power to confirm a resolution passed at an informal family gathering such as a tangi, wedding or reunion.

The decision to remove the supervisory powers of the court in the November 2015 exposure draft means that flexibility would disappear and be replaced by a single protection: the requirement for minimum numbers of owners to form a quorum and then to vote in favour of a decision. But the threshold requirements are complex. On closer examination, the proposed participation thresholds

appear to lack logic or consistency in closely similar factual situations, and potentially open the door to control being gained by relatively small groups of participating landowners. Three straightforward examples of the operation of the proposed provisions as to governance body, lease, and amalgamation/aggregation/partition situations will suffice to demonstrate that latter point.

(a) *Governance body example*

The most important decision for owners is usually going to be whether to create a governance body, which requires as a related matter approval of the terms of a governance agreement. That process is provided for by clause 166. It is a very important process because it effectively transfers the land interests of non-participating owners into the legal ownership of the governance body for all future decision-making. Clause 54 makes that significance explicit:

> A decision made in accordance with this subpart binds all of the owners of the land to which the decision relates, whether or not all of the owners participated in making the decision.

By virtue of clause 5(3) of schedule 3, the threshold for agreement to the provisions of a governance agreement is only a bare majority of the participating owners (more than 50 per cent).[184] (To be able to attain a qualifying quorum level or 'participation threshold', the numbers at a meeting must comply with the numbers and ownership share levels set by clause 48(6).) A notable point is that the threshold for an owners' decision to revoke the governance body's appointment is 75 per cent of participating owners.[185] So only 50 per cent of participating owners are required for the appointment of a governance body, but 75 per cent of participating owners are needed to revoke that appointment. The reason for the difference is not readily gleaned from the statute.

(As will be discussed later in more detail, the power of the court to review the decision to appoint a governance body under clause 167 is unlikely to be utilised much in practical terms. The reason for that is that the court has no discretionary decision making role on the merits of the decision, and is mandatorily required to confirm the decision, unless the process followed was incorrect, or one of the proposed kaitiaki is not eligible.)

(b) *Lease example*

Other important examples of differing thresholds requiring reference back and forth between the schedules to the Bill and the substantive provisions of the Bill, are the decisions to lease. A differentiation is made in the Bill between what are termed long-term leases of more than 52 years and short-term leases of 52 years or less. While a similar distinction occurred under the 1993 Act, again the difference lay in the court's discretionary power of confirmation in section 152 to ensure that matters such as retention, sufficient consideration (namely, the price), and trust obligations were addressed. As part of that latter issue the interests of all owners were protected. With the removal of the court's discretion in the new proposals, the thresholds are strict in their application leading to starker outcomes.

In reality, of course, once a lease is entered into then for all practical purposes, apart from the enjoyment of rentals and obligations as lessor, other incidents of ownership such as the ability to occupy or physically enjoy the land are handed over to the lessee. In legal and practical terms, an alienation occurs. Even 50 years might be thought in demographic terms to equate to the practical alienation of two generations from their lands. That latter observation aside, the thresholds require reference to clause 7(3) of schedule 4, which has a table of what are termed 'a minimum level of owner agreement' for a number of different types of decision – but not all of them.

For example, in clause 7(3) of the fourth schedule for long-term leases of more than 52 years, where there is no governance agreement in place, more than 50 per cent of *all* owners (by share) are required to make a decision. Yet, to find the same level for short-term leases of 52 years or less, reference has to be made to clause 125(5) of the main body of the Bill, where the percentage is fixed at 75 per cent of the *participating* owners' share. Obviously the 50 per cent of all owners is likely to be much harder to achieve

than 75 per cent of participating owners, but as with all of these fixed percentage thresholds, the consequence is a starkly different outcome in practical terms, particularly for factual settings close to the specified threshold.

In another example, if a land parcel had 100 owners, then to enter a lease for 55 years would require the agreement of owners holding 50 per cent of the beneficial interest in the land – clause 7(3) of schedule 4 and clause 125(6) of the main Bill. Yet a lease for 50 years binding all owners of the same block could be entered into at a meeting where only 10 owners participated, provided their individual freehold interests totalled a 25 per cent share of the parcel (clause 48(6)). In that event, the approval of only 75 per cent of the participating owner interests would be needed for the lease to be binding. There is therefore a stark contrast between the level of agreement required for a lease of 55 years compared to a lease for the minimally lesser period of 50 years.

Mr Grant argued that while 52 years was 'an arbitrary cut off . . . you've got to put the cut off somewhere'. He further explained that the Crown had 'not tried to reinvent that [cut-off] but carry forward the one that's in the current Act'.[186] We accept there has to be a cut-off somewhere, but the point is that there is an extreme difference in how these decisions are made under the revised draft Bill.

(c) *Amalgamation, aggregation, and partition proposal example*

If there is no governance body, a proposal for amalgamation (with an accompanying allocation scheme) requires the agreement of 50 per cent of *participating* owners (by share). Any such agreement requires confirmation from the court, which has to satisfy itself that the allocation scheme is 'fair and equitable to all owners'.[187] The court has the same discretionary powers in respect of aggregations and cancellation of aggregations (which have an agreement threshold of 75 per cent of *all* owners by share).[188] Thus, the court retains a discretion in these cases, and there are no specific criteria in the Bill against which the court is to decide whether allocation schemes are fair and equitable.

Importantly, too, for partition proposals (which are required to meet a threshold of 50 per cent of *all* owners), the court has an identical discretion as to whether the allocation scheme is 'fair and equitable to all owners'.[189] However, for partition proposals, the court also retains a discretionary decision as to the merits. That discretion differs significantly from the existing Act's criteria, which require the court to be satisfied that the orders sought would meet the purpose of the Act, 'to facilitate the use and occupation by the owners of land owned by Māori by rationalising particular landholdings and providing access or additional or improved access to the land'. The Act also requires the court to conclude that the partition is necessary 'to facilitate the effective operation, development, and utilisation of the land'.[190]

Nonetheless, clause 109 of the new proposed Bill still provides the court with the discretion as to whether or not the partition 'will assist the owners to retain, occupy, and develop their land for the benefit of the owners and their whānau'. That criterion was inserted in November 2015, in response to concerns expressed in some submissions to the MAG that the partition process could result in unnecessary fragmentation of the land, and facilitate alienation without court control.

The result of these provisions then as to amalgamations, aggregations and cancellations of aggregations is that the new Bill has reduced discretionary court decision-making, restricting it to the fairness and equity of the allocation scheme, but it has not removed it.

In respect of partitions, both the merits of a partition proposal and the allocation scheme's equity and fairness are subject to the discretionary approval of the court.

To those limited extents, then, the participating owners do not have 'pure' tino rangatiratanga over those decisions.

The thrust of the Crown's presentations had been that the Bill was necessary to remove the 'barrier' to Māori landowner decision-making posed by the court's discretionary powers, and that instead the Bill's participation and qualifying voting thresholds provide the protective mechanisms. The end result of the amendments, though, has been a mix of threshold outcomes and limited court involvement which paints a very different picture to

the 'participating owners' tino rangatiratanga regime described in much of the earlier 2013–14 consultation documentation and hui. (It should be recalled that there were no quorum thresholds at all before the 2014 consultation, after which they were added to the model in response to the consultation.) These examples of arbitrariness in inflexible quorum thresholds with their complexity, and the reinstated court control of partitions, may have only limited scope as 'barriers' to effective decision-making, but that is solely speculation.

(2) *Participation threshold levels as a protective mechanism*

(a) *Governance agreements*

The rationale underlying the thresholds approach to protection was succinctly expressed by Mr Mahuika:

> So you know would it be 50% or 75% of participating owners and – or should it actually be a decision of all owners and so the approach that was taken is that the more significant decisions should be made by all owners and not just by the participating owners and in particular anything that might potentially result in an alienation should have a high threshold . . .[191]

However, the statutory participation threshold levels in clause 48(6) cannot always be relied upon as a fixed protective mechanism, other than for the initial decision as to the terms of a governance agreement, or where the Bill contains specific provisions laid down as a minimum level. That is because clause 48(5) provides that, 'if the parcel is managed under a governance agreement that provides for other participation thresholds or exceptions, those other thresholds or exceptions apply instead'.

In other words, a small number of participating owners, who have to initially meet the general participation threshold of 50 per cent of participating owners for the decision to adopt a governance agreement in clause 48(6), can provide in the proposed governance agreement for their own intended lesser participating thresholds for subsequent decisions. That is so unless those participation levels are set in clause 7(3) of schedule 4 as minimum levels, which governance agreements cannot change. The thresholds set in schedule 4 cannot be reduced in a governance agreement.

Apart from those set minimums, if the governance agreement is approved by 50 per cent of participating owners and lowers the thresholds, then the statutory thresholds are no safeguard at all once the governance agreement is adopted.

An important example of a participation level that is left to be fixed in a governance agreement is the level for decisions as to appointment and removal of kaitiaki or trustees. Clause 14(1) of schedule 4 states:

> (1) A governance agreement to which a rangātopū is a party must specify, or be read as if it specified, a process for appointing a kaitiaki in the event of a vacancy (see section 220) that complies with subclauses (2) and (3).

(Neither clause 220 nor subclauses (2) or (3) contain any mechanism for minimum participation levels as to decisions appointing trustees.)

Moreover, clause 14 of schedule 4 also enables an appointment process by nomination, and that if there is not more than one eligible person nominated 'the vacancies being filled by the nominated persons without a vote being held'.

Clause 219 does stipulate that a governance body must always have three kaitiaki and specifies eligibility criteria. It also specifies disqualifying conduct which includes not only the expected types of disqualifying conduct such as some criminal convictions and insolvency, but also aspects of professional incompetence and personal incapacity.

Clauses 221 and 222 continue some role for the Māori Land Court in limited circumstances. Clause 221 provides jurisdiction to the court to investigate appointments as to eligibility, but otherwise if an application is made to review an appointment, unless the court is satisfied the appointment process is invalid, it must confirm the appointment. That review power then is purely process oriented. Clause 222, however, does provide for a residual discretion in the court to make a kaitiaki appointment, but only where a vacancy has not been filled as required by clause 14 of the

fourth schedule. In those circumstances on the application of any owner of the land managed by the governance body, or a creditor of the governance body, the court may appoint one or more kaitiaki, but only if it 'is satisfied that it is not practicable for kaitiaki to be appointed in accordance with the governance agreement'.[192] Interestingly, not only are no criteria stipulated in that event, but subclause (3) specifically leaves the discretion completely open for the court: 'The court may make an appointment subject to any terms and conditions the court thinks fit.'

(b) *Second chance meeting exceptions*

Even if the statutory thresholds are not reduced by the governance agreement, the apparent protective device of the participation (quorum) thresholds is undermined by the provisions of clause 48(8). It provides an exception in the event that the statutory participation threshold cannot be reached:

> (8) However, if the participation threshold for a decision is not satisfied,—
>
> (a) a second decision-making process for the decision may be commenced within 20 working days after the day on which the level of owner participation in the first decision-making process was calculated (which may be the day on which voting on the proposal closes or the day on which owners consider the proposal, if the proposal does not proceed to a vote because the required quorum of owners is not present); and
>
> (b) there is no participation threshold for the second decision-making process, as long as—
>
> (i) the applicable decision-making process is followed as if the decision were a new decision; and
>
> (ii) the second decision-making process is notified to owners in a way that clearly explains that the resulting decision will be valid if it is agreed to by the required majority of the participating owners, irrespective of how many owners participate in making the decision; and
>
> (c) if the applicable decision-making process includes a separate quorum requirement, a failure to satisfy the quorum requirement does not invalidate the decision.

In summary, as clause 48(8)(c) makes explicit, no qualifying quorum applies at all to this 'second meeting' mechanism. That means that for decisions made by participating owners, there is no protection at all in terms of a minimum number of owners (holding a minimum percentage of interests) having to participate before a decision binding all owners can be made. As outlined in section 4.2.2, the claimants were particularly concerned by the second chance provision. They argued it was 'an example of the Crown failing to take an opportunity to actively protect and promote Māori interests'.[193] (We consider the Crown's arguments concerning the second chance provisions below.)

Examples of the types of decisions covered by the second meeting exception include:

- appointing a governance body (50 per cent of participating owners required);
- leases of up to 52 years' duration (75 per cent of participating owners required);
- setting a management plan for an asset base (75 per cent of participating owners required);
- applying for an order to change the name of a parcel of Māori freehold land (50 per cent of participating owners required);
- aggregations of Māori freehold land or cancellation of aggregations (75 per cent of participating owners required);
- amalgamations of Māori freehold land (50 per cent of participating owners required); and
- approval of land management plans (75 per cent of participating owners required).

All of these decisions can be made by half or three-quarters of whoever turns up at a second meeting. This removes virtually all protections for co-owners.

The first of the decisions listed above is critical to the future decision-making processes for any parcel of Māori freehold land. The next two of those decisions are also

very likely to be important decisions about practical day-by-day operations. The fourth as to changing the name of a block, is likely to have significant cultural implications, as well as to impact on deeply felt connections between Māori owners and their taonga tuku iho. Finally, aggregations and amalgamations can both potentially affect the significance of ownership share percentages, but for some reason differing percentages apply in the decision-making thresholds. Land management plans, as we will shortly see, are crucial to the ability of a governance body to effect a sale.

Yet, for each of these decisions no qualifying quorum applies at all in the event of a second meeting, as to either the number or shareholding level of participating owners. While there is still a measure of court discretion as to whether allocation schemes are fair and equitable, that does not enable the court to protect the interests of all owners by assessing whether decision such as aggregation or amalgamation have merit or may be prejudicial to the interests of non-participating owners. An example of that may be an intention to link with other lands held by participating owners, resulting in those participating owners gaining greater effective control, or (in the case of a lease) an inadequate rent because that happens to favour other interests of the participating owners.

Even for the very important step of appointing a governance body and agreeing to a governance agreement, if the second meeting mechanism is used and only four owners attend the second meeting, so long as more than 50 per cent (by share value) vote for the proposal, it would be binding on all owners, even if they number 100 or more. The statutory threshold in clause 48(6) by way of comparison would have required a quorum of 10, holding a 25 per cent share of the interests in the land parcel, which may have needed more than 10.

For the next two types of decisions – to lease for up to 52 years, or to set a land management plan – a 75 per cent vote (by share value) of those participating is required for a decision. In the example of a 50-year lease for a block with 100 or more owners, even if only four owners attend a second meeting, owning perhaps 2 per cent of the interests in a block, they can make a decision that previously would have required at least 10 people holding at least 25 per cent of the shares before a vote could be taken. The same is true for the very important decision of adopting a land management plan.

In respect of decisions requiring a set percentage of *all* owners of land to agree, then the Crown closing submission points out that in a governance agreement, 'owners are free to set their own participation thresholds, or make exceptions for those participation thresholds instead of those under the Bill (cl 48(5))'.[194] The Crown added:

> However, owners cannot alter the minimum levels of owner agreement for alienations and certain other decisions (including partitions). Even if a 'second round' of decision-making was used, that second round is only free of the participation threshold: the minimum level of owner agreement would still apply. The relevant sections are listed in the table in Appendix 1, and apply to all governance bodies through sch 4, cl 7(3).[195]

Each governance agreement 'must be read as if it requires the level of owner agreement' referred to in the Crown's submission.

The statutory range of all owner decision percentages required is from 75 per cent of all owners for the following decisions:

- removing status of Māori freehold land (clause 26);
- sales (clause 97(4));
- gifts of land (clause 102(3)); and
- mortgages (clause 130(2)).

That reduces to a percentage of 50 per cent of all owners for the following decisions:

- long-term leases (more than 52 years) (clause 125(6));
- partitions (clause 110(4)(b));
- exchanging Māori freehold land for something else (clause 7(3) of schedule 4);
- easements (clause 132(2)(b));
- agreeing to a boundary adjustment of more than 2 per cent of the land area (clause 107(4)(a)(ii)); and
- a licence or profit à prendre[196] for 52 years or less or a forestry right of 99 years or less (clause 129).

It is important to note, though, that for most of those decisions if a governance agreement exists then the

governance body has to make the decision, but it requires owner agreement at those percentages also.

In fact, as fragmentation and disconnection continue to mount, the voting thresholds are such that it is probably going to be difficult for participating owners to exercise the tino rangatiratanga that they may have expected from the consultation, despite having appointed a governance body.

As Mr Mahuika told us, decisions more likely to result in alienation, either in strict legal or practical terms, will be tightly restricted.[197] The Crown's submission in closing made that very point in presenting the appendix of all-owner decisions.[198]

The irony, though, of using such a non-discretionary method of protection is that participating owners seeking to utilise their lands may well find that the percentages required of *all* owners for these types of decisions will be greater barriers to utilisation than endeavouring to persuade an impartial court. And, as the years advance, and fragmentation of interests and disconnection of owners grow exponentially, the barriers of achieving the percentage of all-owner decisions will become greater.

(3) *Decision-making by governance bodies*

Once a governance body is appointed the decision-making power of the governance body is still limited then by the need for owner support in respect of those decisions where statutory minima require certain percentages of owners' or participating owners' decisions. In addition, decisions as to revocation of the governance body's appointment or for a major transaction require agreement of 75 per cent of participating owners (clause 7(1) of schedule 4). (A major transaction is defined in clause 8 of the fourth schedule as including acquisitions, dispositions or the incurring of liabilities of more than half the value of the asset base.)

Clause 9 of schedule 4 provides a specific list of matters the governance body can decide without agreement of the owners, unless the governance agreement has provisions requiring their agreement. Those matters include a lease of up to 52 years' duration, an easement, licences to occupy or profits à prendre, residential leases, and mortgages, to mention but some of the more significant matters.

The result of clause 9, then, is that unless a governance agreement specifies a percentage threshold of owner agreement, a governance entity can decide on its own to lease land for up to 52 years, grant occupational residential leases which last a lifetime, grant profits à prendre – to emphasise the most significant decisions in practical terms akin to alienation of part or the whole of a block of Māori land. As the appointment of a rangatōpū and related governance agreement can occur with the agreement of only 50 per cent of participating owners, and if a second meeting process is used without any quorum requirement, then even quite small numbers of owners can conceivably 'capture' and pass on control of decisions like those. Yet such decisions can affect and utilise the land interests of others for long periods, without having to gain their agreement or even the agreement of a reasonable percentage of them, or without an independent check, which was the alternative preferred by Māori in 1993.

In relation to the exercise of tino rangatiratanga in respect of the land, those participating owners involved either in the decision to constitute the governance body and its related governance agreement, or if they become kaitiaki of the new rangatōpū, are very plainly exercising autonomy in those respects. The same observation can be made about any governance body for participating owner decisions affecting practical alienation impacts such as 51-year leases, residential leases up to 99 years, profits à prendre, or forestry rights.

The crucial point from a Treaty perspective, though, is that while they may be exercising tino rangatiratanga over their own land interests, they are also exercising it in respect of land interests they do not own, and do not necessarily *represent*, as the ahi kā or home people would in customary terms.

In terms of the Treaty, Māori may one day be comfortable about accepting that outcome, but they were not of that view in 1993 when for most situations involving either

setting up governance bodies such as trusts and incorporations or appointment of trustees, court approval was also required.

For the reasons set out in chapter 3, we are not at all satisfied that the Crown has been able to demonstrate that Māori landowners have on a properly informed basis agreed to the removal of court oversight of the effects of decision-making by participating owners on the interests of non-participating owners. Indeed, on the face of TPK's analysis, this change to the 1993 Act did not have sufficient support at the time submissions were made in August 2015, and no one could be sure at the close of our hearings as to whether the changes to the Bill were sufficient to allay concerns or remove opposition.

Our concerns that Māori must be properly informed before the level of their support or otherwise is truly apparent are furthered the more we look closely at the potential workings of the proposed Bill's provisions as to governance and decision-making.

Subpart 2 of part 5 of the Bill, and part 6 are the main statutory provisions in relation to governance bodies. They operate alongside the Bill's schedules 2 to 4, and together they contain a raft of detailed provisions setting out the authority and powers of governance bodies. They specify the processes under which kaitiaki and governance bodies are appointed, how they operate, and the manner in which their appointment can be revoked. The principal detailed percentages of owner or participating owner agreement required for those aspects have already been described.

As can be seen from the descriptions above, the Bill's provisions are highly complex, and require constant cross-reference between various clauses in the body of the Bill and in the schedules. The complexity of that outcome has arisen from the need to somehow endeavour to craft protective mechanisms to replace the impartial oversight of the Māori Land Court as to the merits of decisions which Te Ture Whenua Māori Act 1993 provided in those cases where trusts or incorporations were not in place. The mechanisms utilised for owner and participating owner decisions in the new Bill have been a combination of participating and voting thresholds in differing circumstances. As we have seen, even where a governance body exists, some of those thresholds, or variants of them, apply also to some specified decisions, sometimes depending on the terms of the actual governance agreement, and in other settings as fixed by the proposed statutory provisions, particularly in clause 7 of schedule 4.

It is not the role of the Tribunal to reach conclusions as to whether as a matter of legal process or merit as to utilisation those outcomes are better or worse than the processes contained in Te Ture Whenua Māori Act 1993, largely based as it is around the protective and enabling roles of the Māori Land Court and the Act's trust and incorporation mechanisms. Those value assessments are decisions for Māori landowners generally to make and for the select committee process to explore.

However, the Tribunal is bound to address the complex issue of whether in Treaty terms the outcome of these new proposals in the Bill, and their protective mechanisms, do indeed protect in an active manner the rights of all Māori owners, and not just those owners who can be regarded as participating owners. We also need to consider whether the proposed regime provides lesser protection for owners of Māori land than that available to owners of general land. In doing so, we recognise that forms of protection and decision-making will differ due to cultural differences and the Māori imperative to retain Māori land in Māori ownership. In closing submissions, the Crown cited the review panel's recommendation that laws relating to Māori land should equate more to the laws in respect of general land, especially in terms of the duties and obligations of Māori land governors.[199] Certainly, *participating* Māori owners would be given the power to decide many matters by the ability to establish a rangatōpū and draw up their own governance agreement, without the need for co-owner or court approval. Whether that is fair to all owners or protects property and Treaty rights within the prescribed schema – retention and utilisation of Māori land for the benefit of whānau and hapū – is an important

question. We draw our conclusions on these matters at the end of the chapter.

(4) *Protections against alienation*

As outlined in section 4.2, the Crown and the claimants disagree over the strength of the revised draft Bill's protections against alienation. The Crown submitted that these protections 'would either be as good as or better than the safeguards in the 1993 Act'.[200] The claimants, however, disputed the Crown's characterisation of the draft Bill's protections. They argued that clause 20 of the Bill reverses the 1993 Act's presumption against alienation, and that other aspects of the Bill reduce the discretion that the Māori Land Court can exercise in the case of dispositions.[201]

In terms of the most obvious method of alienation by proposed sale, the November version of the Bill has a very important and complex distinction between proposed sales where there is no governance body, and proposed sales where a governance body has been appointed. Clause 97 governs the former and where the land is not managed under a governance agreement requires a 75 per cent agreement of all owners (by share value).

However, if a governance body is appointed and the sale falls under a governance agreement the situation is far more complex and seems open to circumvention by participating owners. In the first place, the governance body must itself agree to the sale and also seek to obtain agreement of 75 per cent of all owners, as required by clause 7 of schedule 4. Before it can make any offer to sell, clause 101 requires that the governance body have in place a land management plan authorising the sale (approved under clause 199 by 75 per cent of participating owners), identification of replacement land or the improvements to other existing lands (to which the proceeds of sale will be applied), and an allocation scheme for the interests in the replacement land. Finally, clause 101(3)(c) requires the governance body to obtain an order of the court changing the status of the replacement land to Māori freehold land and confirming the allocation scheme.

If, however, the governance body cannot obtain the 75 per cent agreement of all owners, it can still apply under clause 100 to the court for an order declaring the land will cease to be Māori freehold land, so long as the governance body has complied with clause 101. The wording of clause 100(1) is:

> **100. Order declaring that land ceases to be Māori freehold land on sale or exchange by governance body**
>
> (1) This section applies if a governance body—
>
> (a) wants to sell or exchange a parcel of Māori freehold land; and
>
> (b) has tried but failed to obtain the level of owner agreement required by the governance agreement for the land to be sold or exchanged as Māori freehold land; and
>
> (c) is satisfied that there is no reasonable prospect of obtaining the required level of owner agreement.

Importantly, this is an avenue for the governance body to effect a sale where it cannot gain the 'all-owner' percentage of approval required by the governance agreement.

Mr Mahuika emphasised that in this situation the court retained a discretion:

> So you still need a vote of 75% of all owners in order to alienate Māori land. There is still a process that involves all owners in order to partition or to change status. Judges still will have a discretion to exercise in relation to a status order. So it's not like the Court is being removed entirely.[202]

The assertion of that extra layer of protection through a discretionary court decision, which is repeated in the Crown closing submissions, requires close examination. The provisions of clause 100(5) importantly state: 'If an order is made, the governance body may sell or exchange the parcel of land without complying with section 97 or 99.'

What this amounts to is that the court has the power to approve a sale or exchange, even without the agreement of 75 per cent of all owners, if there is a land management

plan providing for the sale. Such plans only have to be approved by 75 per cent of participating owners. Further, the process of approving a land management plan is subject to the second meeting provision in clause 48(8), which sets aside the quorum protection.

The appendix to the Crown's closing submissions compared the protections against alienation in the 1993 Act with those in the new Bill. But the Crown's summary did not refer to this complex process of alienation by governance bodies, which can be done on the basis of land management plans approved by 75 per cent of *participating* owners, and which might even have been approved at a second-chance meeting. In our view, a sale in these circumstances is a potential outcome, undermining the protective thresholds that stop alienation by sale without three-quarters of ownership interests' agreement.

That undermining seems able to occur by the outcome of a successful application under clause 100 because the court has no real discretion other than in respect of allocation schemes. Under that provision, provided the processes as to land management plans, replacement land or improvements to existing land, and allocation schemes confirmed by court orders are in place, a sale can occur by the governance body. All of those processes, other than the court's limited review of the fairness and equity of the allocation scheme, are required to be covered by the land management plan, the approval of which is within the control of 75 per cent of the participating owners.

In closing submissions, Crown counsel argued that clause 100 was 'intended to facilitate rationalisation of land holdings of governance bodies'. They pointed out that the clause 'carries forward s137 of the 1993 Act, in similar but not identical form'.[203] Section 137 of the 1993 Act, however, specifically provides that the court be satisfied that 'the alienation of the land is clearly desirable for the purpose of a rationalisation of the land base'. Clause 100, by contrast, does not make it explicit that the alienation should be for the purposes of rationalisation. Conceivably, then, clause 100 could be utilised in a much wider range of circumstances than section 137 of the 1993 Act.

Crown counsel further submitted that, in considering whether to make an order under clause 100(3), the court would have to achieve the purpose of the Bill and to recognise the principles of the Bill. This would involve consideration of the land's status as taonga tuku iho. On that basis, in the Crown submission, the decision was discretionary. In particular, Crown counsel relied on the opening words in clause 100(5): '*If* the order is made . . .' (Crown counsel's emphasis).[204]

The Crown's submission overlooks the important difference, emphasised in claimant counsels' arguments, that the whole underlying approach in the new proposed legislation as to alienation is changed in this Bill as compared to the 1993 Act.

The 1993 Act imposes a regime as to alienation from a start-point in section 146, prohibiting alienation unless the Act specifically allows it: 'No person has the capacity to alienate any interest in Māori freehold land otherwise than in accordance with this Act.'

By contrast, the new proposed Bill has a start-point in clause 20 which is enabling of alienation, unless the Act prevents it:

> **20 Māori freehold land may be disposed of in certain ways**
>
> An estate or interest in Māori freehold land may be disposed of in the same way as private land that is not Māori land unless the disposition is prohibited or restricted by this Act or another enactment.

The Crown's argument about clauses 100(3) and 100(5), considered against those provisions, seems to us to be weak. We certainly do not regard this power vested by clause 100(3) as containing an open-ended discretion for the court. We regard it as requiring the court to consider the only matter specified in the subsection, that is, that it is 'satisfied that the governance body has complied with section 101 in relation to the sale or exchange'.

More significantly, if it were intended for clause 100 to confer on the court a genuine open discretion on the

merits, we would have expected to see an express wording as to that general discretion, much the same as exists for the partition approval by the court in clause 110(6)(b). The latter clause expressly requires the court to be satisfied that the partition would 'assist the owners to retain, occupy, and develop their land for the benefit of the owners and their whānau'. No such wording as to a general discretion being conferred in clause 100 appears other than the word 'If' in clause 100(5). Yet that is the very provision which states a governance body armed with such an order 'may sell or exchange the parcel of land without complying with section 97 or 99 (as the case may be)'.

Finally, given this argument by the Crown we find it surprising that this asserted general court discretion in clause 100(3) did not appear at all in an Appendix to the Crown closing submission that was headed 'Appendix 1: Protections against alienation in the revised draft Bill compared to the 1993 Act.' If clause 100(3) were genuinely providing an unencumbered general discretion in the court to review and refuse consent to proposed sales by a governance body, we would have expected that to be one of the first protective mechanisms to be listed in the Crown's comparative Appendix. Instead, it does not appear there at all.

We do not accept, therefore, the Crown's submission that clause 100(3) is a fully discretionary control or protection by the court against alienation by a governance body where 75 per cent of owners have not agreed to the alienation. After all clause 100(1)(b) expressly enables the governance body to seek the clause 100 order because it has 'failed to obtain the level of owner agreement required by the governance agreement for the land to be sold'.

However, the proposed Bill does utilise a further range of provisions to safeguard against legal and practical alienation. In the November version of the Bill, those tools include:

- The various complex threshold regimes of percentages of all-owner and participatory owner regimes outlined above.
- The requirement that for many decisions involving any form of long term alienation, the Māori Land Court confirm that the disposition process complies with the requirements of the Act and any governance agreement, before the instrument of disposition can be registered. (Given the wording of clause 20 expressly enabling sales unless the disposition is prohibited or restricted in the Bill, this power to supervise process requirements does not confer a general discretion on the court to refuse consent to a sale.)
- The requirement that alienation be to preferred recipients or preferred entities, which keeps Māori land within the descent group if it is alienated.
- The statutory requirements in clause 101(2) and clause 199 that before an agreement can be made to offer a parcel for sale or exchange, there must be in place a land management plan. The land management plan has to identify a replacement parcel of Māori freehold land (that will be acquired with the proceeds of sale or the exchange), authorise the specific sale and exchange, or identify the existing land that would be improved with the proceeds of the sale.
- The allocation scheme requirements in clause 101(3)(b) for interests in replacement land.
- Requirements that the allocation scheme for any replacement land:
  - must be in accordance with relative shareholding interests in existing land in the rangatōpū asset base; or
  - must be in accord with an agreement between the owners as to the allocation scheme proposals (with no threshold percentage specified for that agreement); and
  - must satisfy the court that the scheme is 'fair and equitable to all owners' before it makes an order revoking the status of Māori freehold land and confirms the allocation scheme.
- Leases for occupation for residential housing rent-free for up to 99 years may only be granted to an owner of the land or beneficiary of a whānau trust that has an interest in the land (clause 127(5)). Rights to gift that lease are restricted by clause 128(2) to a child or grandchild of the lessee, or to the grantee's

spouse, civil union partner or de facto partner for their lifetime, and with their having no rights of disposal of that interest.

All of these various mechanisms are intended to ensure that practical or legal alienation will not be able to occur to any significant extent, or will occur within the descent group.

Moreover, the overall purpose of these restrictions is also to satisfy the retention principle by ensuring that, in the event of sale, replacement Māori freehold land has to be acquired or existing land improved with the proceeds.

However, the significant weakness in tikanga terms as to the replacement land is that there does not appear to be any requirement for the replacement land to be linked by whakapapa with the owners, or even to be located in their rohe. That position was accepted as 'theoretically possible' by the Crown's witness, Mr Grant, in cross-examination:

> Q. So it's foreseeable isn't it that replacement land may well be acquired in areas quite unrelated by way of derivation of title to the original block?
>
> A. That's theoretically possible.[205]

Other measures to try to meet various concerns which have in the past been regarded as inconsistent with Treaty principles include:

- the requirement for land acquired by exchange to be of the same status as the land exchanged (clause 99);
- a requirement for survey plans for such activities as boundary adjustments and partitions to ensure 'no new parcel becomes landlocked land' (see clauses 107(2) and 110(2));
- for partitions, the provisions of clause 110, which include the need for an allocation plan and a land management plan authorising the partition, and significantly now a statutory condition in clause 110(6) that the Māori Land Court 'is satisfied that the partition will assist the owners to retain, occupy, and develop their land for the benefit of the owners and their whānau';
- for an amalgamation, an allocation scheme so that 'as nearly as practicable, the value of [the] owners' interests in the land overall does not change on amalgamation' (clause 116(5)); and
- for amalgamations and aggregations, the statutory condition in clauses 115(6) and 118(4)) respectively that the Māori Land Court must be 'satisfied that the allocation scheme is fair and equitable to all owners'.

The outcome of the changes made in the November version of the proposed Bill has meant that alienation, both legal and practical, through sales, long-term leases, or partitions has been guarded against more strongly, but in respect of proposed sales only until a governance body has been appointed. As outlined above, once a governance body has been appointed alienation by sale, while convoluted, procedurally taxing and time-consuming, still seems possible at the hands of 75 per cent of participating owners.

The Tribunal accepts that in general terms the 'all owner' threshold percentages assist in meeting the Treaty duty of ensuring retention of Māori freehold land for the benefit of owners and their whānau. It is of interest to observe, however, that that result has not come about because of the 'participating owners' regime enabling participating owners to make final decisions. Rather it has resulted from strengthening of the 'all owner' thresholds to a level that ensures greater protection against alienation and, with the exception of possible sales by the governance entity, it reflects the same or similar owner percentages as are required under the 1993 Act. We remain concerned, however, at the ease with which a lease of up to 52 years may be granted, especially given the lack of safeguards around the 'second chance' provision. To all intents and purposes, leases at the upper end of that category will alienate the land for two generations. We note, on this point, that such leases will also have to meet a much lower threshold of owner agreement than at present.

The voting thresholds for all leases were originally set by the Māori Assembled Owners Regulations 1995. For leases more than 52 years, these regulations have since been superseded by the 2002 amendment to the 1993 Act, which introduced a new category of long-term lease

requiring the approval of 50 per cent of all owners.[206] For leases up to 52 years, the 1995 regulations' sliding scale of voting thresholds remains. Currently, leases of between 21 and 52 years require the authority of 50 per cent of all owners (by share).[207] Under the Bill, by contrast, those leases will only require the consent of 75 per cent of *participating* owners (by share).

Under the assembled owners regime, leases for more than 15 years but not more than 21 require the agreement of 40 per cent of all owners. Thirty per cent of all owners must agree to a lease of more than seven years but not more than 15 years. And, at the bottom of the scale, 20 per cent of owners must agree for a lease of up to seven years.[208] In all these cases, the threshold under the Bill will change to 75 per cent of participating owners, and – as noted – second-chance meetings with no quorum requirements are possible for leasing decisions.

As the claimants suggested, alienation by shorter-term lease will thus be much easier under the Bill.[209] Voting thresholds would be dramatically reduced, but those thresholds would also provide the main form of protection (alongside the court's review of procedural requirements). The Crown did not note this change in its appendix,[210] which only referred to the Act and not the 1995 regulations.

Again, the question of making alienation easier by way of shorter term lease with few protections is one for Māori to decide, but they must make that decision fully informed as to the changes and their potential consequences.

Also, the provision of a procedurally complex method of achieving sales by a governance body without the 'all owner' percentage having to be met undermines the alienation protections. That will become increasingly important, particularly when the whole aim of the legislation is to have more governance entities appointed and operating.

An irony of the November version lies in the greater protection provided against partition, as contrasted to sales by a governance body, in that for partitions the court has been re-introduced with a discretion in clause 110(6)(b) that it must be satisfied 'that the partition will assist the owners to retain, occupy, and develop their land for the benefit of the owners and their whānau'. That level of protection for the interests of all owners is plainly consistent with the principle of active protection in relation to partitions.

4.4.5 Comparison of methods of court supervision of governance bodies

(1) *Ex post facto supervision – an ambulance at the foot of the cliff?*

There are a number of ways in which protective mechanisms can be used for decision-making, achieving the Treaty-consistent aim of ensuring that non-participating members' interests are not 'captured' by, or prejudiced by, the actions of a wayward minority of participating owners, making decisions in their own interests rather than in the interests of all owners.

A number of different protective mechanisms can be used. One is to have an impartial decision-maker exercising a discretion protective of all owners in a balanced manner having regard to the purpose of the legislation. This is the mechanism utilised by the existing 1993 Act, although coupled with some thresholds or requirements of reasonable support amongst all owners for alienation decisions. A method of reducing the breadth of the discretionary decision-making power of the impartial body was always open by crafting statutory criteria in a particular confined way, against which that discretion was to be exercised. However, the Crown did not explore that option, preferring to accept the review panel's advice to repeal and replace the Act. In accepting that advice and acting on it, the Crown effectively accepted that court involvement was a 'barrier' to Māori landowner decision-making, without the benefit of a body of researched facts on which to base that decision.

Another is the method proposed in the new Exposure Bill of setting thresholds with all their complexity, both as to quorum requirements, and as to voting. However, recognising the difficulty of achieving the quorum thresholds of participating owners for decision-making, the Bill allows for a second-round exception for hui where the quorum threshold cannot be met for participating owners. At that second meeting, the quorum requirements do not apply.

Both of those methods are protective in nature and are intended to apply as a fence at the top of the cliff so as to avoid decisions being made which are not in the interests of all owners or which do not have a reasonable level of support.

Another protective method is to attempt to place an ambulance at the foot of the cliff so as to enable review of decisions already made. That method as a further protective back-up is utilised in both the existing Act and in the new proposed Bill. To a greater or lesser extent, both enable a court review of decisions after they have been made – predominantly by the Māori Land Court, but also in limited circumstances by the High Court (in respect of trusts.) That option was responded to in claimant closing submissions in the following terms:

> The Crown relies on the fact that owners are able to challenge any decisions they see as improper through the MLC, or High Court. This will obviously involve costs to the owners, and should not be the only recourse available to them to protect their interests. Owners should not have to actively patrol to ensure their rights are not compromised.[211]

In Treaty terms, it is obviously necessary to avoid other owners' interests being prejudiced by practical or legal alienation, or 'captured' by a few wayward participating owners. Before reaching a conclusion as to whether the Bill's protective mechanisms meet that Treaty standard, we must first consider the detailed nature of the protective mechanisms in place to review wayward trustee, kaitiaki or governance body decisions, once participating owners have put a governance entity in place.

(2) *Supervision of trustees and governance bodies under the 1993 Act*

Under the existing Act, the effect of the Māori Land Court's orders in respect of all owners is found in section 76 which provides:

> **76 Persons bound by orders affecting land**
>
> Every order of the Court affecting the title to Māori land or any interest in any such land shall bind all persons having any estate or interest in that land, whether or not they were parties to or had notice of the proceedings in which the order was made, and whether or not they are subject to any disability.

The next question to consider is to what extent the court has discretion to intervene after a decision on utilising land has been made by owners or by their governance entities in the form of the trustees of whānau or ahu whenua trusts or incorporations. We will deal with each in turn.

(a) *Review of trustee decisions or actions*

Once a trust has been formed then in respect of the right to the vesting of assets, and the right to make decisions affecting them, the relevant provisions of the existing Act provide:

> **220 Vesting order**
>
> (1) On constituting any trust under this Part, the court may, by order, vest the land and other assets in respect of which the trust is constituted in the responsible trustees or a custodian trustee upon and subject to the trusts declared by the court in a separate trust order.

The consequence of that vesting is given in more detail in section 220(2), that the 'vesting order shall take effect according to its terms to vest the land or other assets in the person or persons named in the order'.

Section 223 as to the general functions of trustees and section 226 as to their general powers give further statutory effect to the vesting of the assets in them. By virtue of section 227, trustees are able to make majority decisions where there are three or more trustees. However, notwithstanding the ability of the trustees to make decisions without court approval, the underlying powers of the trustees are ultimately being set by the court:

> **226 General powers of trustees**
>
> (1) The court may, in the trust order, confer on the trustees such powers, whether absolute or conditional, as the court thinks appropriate having regard to the nature and purposes of the trust.

The decisions as to any extension of the trustees' powers to undertake new ventures is also vested in the court by section 229, although beneficial owner involvement occurs in that the court must be satisfied that the beneficial owners have had sufficient opportunity to consider the proposal to extend the trustees' powers for any new venture and that there is a sufficient degree of support.

Thus while the court initially sets the trustees' powers, and also has control with owner support over any extension of those powers for new ventures, the overall operational decision-making power on utilisation of the land is vested in the trustees, who do not need to seek court approval for any matters covered in the trust order. (We will return shortly to the broader powers the court has to vary the terms of trusts.)

However, a series of provisions provide the court with the power to review the terms of a trust or the operation of the trust, that is, inclusive of the actions and utilisation decisions of trustees.

The first of those is section 231, which enables a general court review either on application by the trustees themselves or any beneficiary of the trust:

> **231 Review of trusts**
> (1) The trustees or a beneficiary of a trust (other than a kai tiaki trust) constituted under this Part may apply to the court to review the terms, operation, or other aspect of the trust.
> (2) There can be no more than 1 review of a trust within a period of 24 consecutive months.
> (3) The court may, on any review,—
> (a) confirm the trust order for the trust without variation; or
> (b) exercise its powers under section 244; or
> (c) terminate the trust if the court is satisfied that there is a sufficient degree of support for termination among the beneficiaries.

As can be seen, the powers open to the court are very significant, even enabling it to terminate the trust but, again, only if there is a sufficient degree of support among the beneficiaries for that course to be taken.

It is notable from that section that one of the powers conferred is the ability of the court to exercise its powers to vary a trust under section 244, which once again involves an assessment of the owners' views, as the court can only make a variation order if it is satisfied:

> (a) that the beneficiaries of the trust have had sufficient notice of the application by the trustees to vary the trust and sufficient opportunity to discuss and consider it; and
> (b) that there is a sufficient degree of support for the variation among the beneficiaries.

However, section 244 requires an application from the trustees (not beneficiaries) before the court can vary the trust, unless the court is acting under section 231(3)(b).

The most direct provisions as to review powers of the court are found in sections 236 to 242. These commence by section 237 providing the court with a general jurisdiction in respect of any trust to exercise 'all the same powers and authorities as the High Court has (whether by statute or by any rule of law or by virtue of its inherent jurisdiction) in respect of trusts generally'. That general provision is then complemented by a raft of specific supervisory powers vested in the Māori Land Court. Among those are:

- under section 238(1), the power to require a trustee to file a written report and appear before the court for questioning on the report or on any aspect of the administration or operation of the trust or their performance as a trustee;
- the power under section 238(2) to enforce trustee obligations by injunction 'or otherwise';
- the power in section 239 to add to or reduce the number of trustees or replace one or more;
- under section 240, the power to remove a trustee on the grounds of failure to carry out trustee's duties

'satisfactorily' or because of lack of competence or prolonged absence;

- under section 241, the power to terminate a trust; and
- the power under section 242 to make orders for payment of moneys to the person beneficially entitled with power for the court to order moneys to be used wholly or partly for specific beneficial purposes such as the maintenance, education, or advancement of any person entitled to the money.

As can be seen, the court's powers are extensive on an ex post facto basis, after trustee decisions are made, but they do not generally enable it to 'unpick' trustee decisions. Rather, the court is enabled to hold trustees to account for the decisions they make and, as at general law, trustees are required to act at a high standard as 'prudent' trustees.

While much of the law relating to the 'prudent trustee' test is found at common law in past decisions of the courts laid down over the centuries, a helpful relatively recent statutory expression of some of those principles can be found in the 1988 amendment to the Trustee Act 1956. This amendment inserted various specific duties for trustees involved in investment activities. Section 13F provided that the following basic principles at law still applied:

> (a) any duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries of the trust:
> (b) any duty to act impartially towards beneficiaries and between different classes of beneficiaries:
> (c) any duty to take advice,—

Section 13B imposed the following duty in terms of investment activity: 'a trustee exercising any power of investment shall exercise the care, diligence, and skill that a prudent person of business would exercise in managing the affairs of others'.

For trustees, then, the liabilities are significant and are owed to the beneficiaries as contrasted to the duties of company directors which are owed to the company. Section 131 of the Companies Act 1993 makes that difference very plain in a succinct statement as to the responsibilities of a company director:

> **131 Duty of directors to act in good faith and in best interests of company**
> (1) Subject to this section, a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company . . .

A further distinction between the duties of a trustee and a company director is that in the Māori land sphere the exercise of a prudent trustee function would be expected to also involve considerations of tikanga and a deep awareness of the cultural significance underlying the concept of taonga tuku iho. Company directors owe no such duties – their duty being to the company.

We will return to the significance of that difference when discussing the new Bill's supervisory mechanisms.

(b) *Review of decisions or actions of incorporations*

In summary, the powers of supervision of existing incorporations on an ex post facto basis again are extensive as we outlined when discussing the existing Act's protective mechanisms earlier. Although obviously the wording has to be different to deal with the different form and nature of operation of incorporations through committees of management, in essence the court's supervisory powers over incorporations are as broad as they are over trusts.

The court's investigative powers under sections 280 and 281 were briefly described earlier at section 4.4.3(1). The section 280 investigation process includes the power to appoint examining officers, and sweeping powers if necessary for the court to remove members of an incorporation or the secretary, to suspend the powers of the committee of management, or even wind up an incorporation. That substantive jurisdiction can only be exercised on

an application by shareholders holding not less than one tenth of the shares, or 'pursuant to a special resolution' of a general meeting of shareholders that such an investigation should occur. By contrast, the section 281 jurisdiction is more related to statutory reporting and accounting matters, and seems to be available to the court of its own motion at any time.

We turn then to address the supervisory mechanisms for the actions of governance entities and their kaitiaki under the new proposed Bill.

(3) *Supervision mechanisms under the proposed Bill*

Because the central thrust of the new proposed Bill is to remove a perceived 'barrier' which the involvement of the Māori Land Court is asserted to carry with it, the Bill reduces the role of the court significantly. As we have seen, the appointment of kaitiaki occurs as part of the participating owners' decision to create a governance body and the terms of the governance agreement. Their replacement and removal are left to be controlled by the terms of the governance agreement. The appointment of the governance body with its associated governance agreement and the settling of its terms are also participating owner decisions. However, the proposed Bill does still retain some residual involvement of the court in respect of some owner decisions.

As has also been noted earlier in section 4.4.3(1), the main example of this review power is found in clause 167. From its heading and opening provisions, it appears to enable the court to 'review certain decisions of owners relating to governance bodies'. The provision goes on to provide that, if there are 10 owners, one or more can apply for a review, and if there are more than 10 owners, at least five owners must join in seeking a review. However, the matters the court can review are strictly limited by subclause (5) to matters of checking process only, as subclause (4) states: 'The court *must* confirm the decision unless subsection (5) applies' (emphasis added).

The limitation in subclause (5) is expressed in terms that the court must set aside the decision if it is satisfied that

(a) the decision was not made in accordance with this Act or the governance agreement (as applicable); or
(b) in the case of the appointment of a kaitiaki, the person appointed is not eligible under section 219 to hold that position.

As we observed earlier, it seems unlikely that clause 167 would see much use, being limited as it is to a process checking exercise. It does not enable the court to consider or reject a governance entity or agreement for failings on the merits, in its view, as to the protection afforded to the interests of all owners.

Other supervisory powers as to the registration of governance agreements are not vested in the court but in the new entity called the chief executive. (Under the Bill, governance agreements are registered by the chief executive – the details about whom are unsettled as yet.) Clause 176(1) provides a list of criteria which if not met mean the chief executive is required to reject the application for registration. Those grounds are limited to checking matters of record or process (other than a discretionary decision as to whether the name might cause confusion with the name of another rangatōpū, trust, or incorporation). Once again, then, this power of 'review' is one of checking process only and not the merits of the decision to appoint a governance entity, or as to the merits of the terms of the governance agreement itself. This change is, of course, the deliberate intent of the reform proposals.

Once a governance body is appointed, it is subject to a level of review by the Māori Land Court. The provisions of clause 205 introduced in the November amendments do provide such a power in wide terms, not too dissimilar to those in the current Act applicable to trusts and trustees:

205 Court may make orders or investigate governance bodies

(1) This section applies if the court is satisfied that a governance body is or may be operating in a manner that creates, or is likely to create, a substantial risk of serious loss to the owners of the Māori freehold land managed under the governance agreement.

An application for the court to utilise those very broad powers of investigation which could involve a consideration of the whole of the operations of a governance body or any part of it on the merits, is able to be made under subclause (5):

> (5) The court's jurisdiction under this section may be exercised—
>
> (a) on the application of—
>
> (i) at least 15 of the owners of the Māori freehold land within the body's asset base; or
>
> (ii) the owners who collectively hold at least 5% of the beneficial interest in the freehold estate in the Māori freehold land within the body's asset base; or
>
> (iii) the governance body; or
>
> (b) on the court's own initiative, if the court is considering whether to issue an injunction under section 389 in relation to the Māori freehold land managed by the governance body.

It may be difficult to gather sufficient owners to take action, for example, 15 owners in a small block, or five per cent of the diffuse ownership interests in a block with say 1,500 owners. Nonetheless, the court itself can invoke the clause 205 powers if it is considering whether to issue an injunction under clause 389. Under the latter clause, an injunction can be sought by '*any person interested*' or by the court '*on its own initiative*'. It is possible, therefore, for this clause 205 power to be utilised in a range of circumstances, and it is a very powerful means of review of the actions of governance bodies and the kaitiaki.

The review power extends in clause 205(2) to kaitiaki in the following way:

> (2) The court may make an order requiring a kaitiaki, or any officer or employee of a governance body, to do 1 or more of the following:
>
> (a) file in the court a written report on any matter relating to the governance body's management of Māori freehold land or operations under the governance agreement that concern or affect Māori freehold land:
>
> (b) produce any papers, documents, records, or things in that person's possession or under that person's control that are relevant to the governance body's management of Māori freehold land or operations under the governance agreement that concern or affect Māori freehold land:
>
> (c) appear before the court—
>
> (i) for questioning on a report filed under paragraph (a); or
>
> (ii) for questioning on anything produced under paragraph (b); or
>
> (iii) to explain any failure of the governance body or its kaitiaki to comply with an obligation under this Act in respect of Māori freehold land.

In addition to those powers, the court can make its own detailed independent investigations, using clause 205(3) to appoint examining officers who can investigate the affairs of the governance body and report to the court.

Even the compulsory mediation provisions, which we address soon, are not invoked automatically in relation to this clause 205 process, as it appears to remain within the court's discretion whether to refer any such matter to the dispute resolution process:

> (4) However, if the court is satisfied that there is a matter in dispute that the parties should attempt to resolve themselves, the court must first—
>
> (a) adjourn the matter to allow any dispute resolution process set out in the governance agreement to be carried out; or
>
> (b) refer the dispute to the chief executive to initiate a dispute resolution process (see section 310).

This supervisory power may not only be available at the foot of the cliff. By virtue of its combination in clause 205(5)(b) with clause 389 as described above, it could conceivably be utilised as an investigatory part of considering

an injunction. The injunction can prohibit proposed future events because of clause 389(2):

> (2) The court may, on application by a governance body, katiaki [*sic*], or owner, make an order restraining a governance body or katiaki [*sic*] who proposes to engage in conduct that would contravene a governance agreement or Parts 1 to 10 [of the Bill] from engaging in that conduct.

However, because of the limitation in clause 389(2) to only a consideration of whether a proposed act would breach the governance agreement or parts 1 to 10 of the Bill, it may be that difficulties might still exist in bringing the broader clause 205 powers into play. The Bill's provisions leave an uncertainty in that respect.

However, if a clause 205 inquiry process can occur, then under clause 207 there are even broader powers for the court to be able to conduct a deeper inquiry into any 'question affecting the governance body'. And under clause 208 there are broad powers for disqualifying kaitiaki who have been shown to be ineligible under the statute or for persistent failure to comply with the governance agreement or any rule of law, or been guilty of fraud or importantly who have acted in a 'reckless or incompetent manner'. Exposure to disqualification for incompetence in such a complex way does make kaitiaki accountable to the court's review of their past actions on the merits. What does not seem at all clear, though, is whether, if the kaitiaki are appointed as company directors of a governance body in the form of a company, the court would be able to hold them accountable to exercise their decision-making in accordance with tikanga, or to require them to place any weight on the concept of the land under the company's management being a taonga tuku iho. It would seem unlikely when the legislation does not provide for that duty expressly.

Furthermore, with the possible exception of the limited availability of the use of clause 389(2), all these powers are of course predominantly ex post facto, and only applicable after a significant mishap or disaster of some kind has occurred.

Again as earlier noted the basic power to revoke appointments of governance entities is an owners' decision under clause 179, requiring agreement of a 75 per cent majority of participating owners. However, under clause 180 the court does have power to make an order to start the owners' process of revocation of appointments in circumstances which can involve considerable discretionary decision-making for the court. Clause 180(2) provides:

> (2) The court may make an order to start the process of cancelling a governance agreement if the court is satisfied, in respect of the governance body that is party to the agreement, that—
>
> (a) the body is insolvent; or
>
> (b) the body has failed to comply with a statutory duty or obligation; or
>
> (c) the continuing appointment of the body will materially prejudice the owners of the Māori freehold land managed under the agreement.

Each of those criteria, but particularly the last one, will require a discretionary decision by the court after hearing evidence on the facts, and the order itself and its consequences are significant. If the court does make such an order then it also has power under clause 180(3) to appoint a kaiwhakahaere to 'oversee the governance body's preparation and implementation of a full distribution scheme under section 209'. However, while this is a significant discretionary power for the court, it is protective only in the sense of it being very much an ambulance at the bottom of the cliff after sufficiently serious misconduct or incompetence has led to a serious situation or a disaster for the rangatōpū.

There is provision in clauses 181 and 182 declaring that, once such an order appointing a kaiwhakahaere is made, only the kaiwhakahaere has power to make or authorise transactions until the governance agreement is cancelled. Further, the kaitiaki are made personally liable for void transactions in that period, entered into without the authority of the kaiwhakahaere. The court has power to make orders against kaitiaki, requiring them to compensate the governance entity or any other person for

entering such a void transaction. However, that is a very limited period of time in respect of which that liability can be imposed by the court. Clause 184 does provide that any liability of a kaitiaki does subsist after cancellation of a governance agreement.

The issue is: what is the extent of such liability? For that we need to address the responsibilities and liabilities of kaitiaki in Part 6 of the Bill.

Part 6 is a major part of the Bill providing for the range of powers, responsibilities, and operational requirements vested in or imposed on governance bodies and kaitiaki. The base obligations imposed on the governance body are to comply with the governance agreement, and to ensure liabilities can be met before entering into them. A further obligation of particular relevance to the question of responsibilities to owners, is that a governance body:

> (e) must endeavour to keep the owners informed about the asset base and activities relating to the asset base; and
> (f) must endeavour to maximise the level of engagement of the owners with the governance body.[212]

The Crown's closing submissions[213] also drew our attention to the fact that clause 164(3)(b) of the proposed Bill provides that a governance body 'holds an asset base on trust for the owners of the Māori freehold land that is within the asset base, in proportion to the owners' relative interests in that land'.

We accept the point then, made strongly by the Crown, that that means that the governance body holds assets on trust for the beneficial owners and as such owes them fiduciary duties.

The Crown submission must also be accepted when it makes the point that the High Court still has supervisory jurisdiction as well as the Māori Land Court.[214] However, it is still the case that such avenues of supervision normally only arise after some mishap of a serious nature has already occurred, unless owners somehow fortuitously come to appreciate a looming problem which may involve a breach of the governance agreement and seek injunctive relief in respect of it under clause 389. Furthermore, High Court civil litigation costs levels and the possibility of being ordered to pay costs are such nowadays that Māori landowners could be forgiven for thinking that those costs risks and exposure may well constitute a significant 'barrier' of its own to their seeking relief in that forum.

(4) *Power to grant equitable remedies*

Counsel for Mrs Rata, Mr Harman, was particularly concerned that the equitable remedies available to the Māori Land Court under section 237 of the existing Act were not available under the Exposure Bill. He asserted that that lack of jurisdiction was inconsistent with Treaty principles, which require the Crown to properly equip the decision-making court for Māori land issues.[215] In that submission, he was supported by Mr Watson for the Wai 2478 claimants who observed that the proposed replacement provision 'waters down the scope of equitable remedies available to the Court. It is the owners who suffer when a specialist Court such as the Māori Land Court does not have the tools with which to provide assistance and solutions'.[216]

The Crown's closing submissions[217] drew our attention to clause 286 of the Bill, which provides:

> **286 Jurisdiction in respect of certain trusts**
> (1) This section applies in respect of—
> (a) any rangatōpū in the form of a private trust; and
> (b) any other trust constituted in respect of Māori freehold land.
> (2) The court has, in respect of the trust, all the powers and authorities of the High Court under the Trustee Act 1956 in respect of trusts generally.
> (3) Subsection (2) does not limit or affect the jurisdiction of the High Court.

We accept Mr Harman's point that, by contrast, there is express reference in section 237 of the existing Act to the Māori Land Court having the same powers as the High Court in respect of trusts, regardless of whether those powers were statutory, or inherent, or existed by operation of any rule of law. We also accept his point that the absence of specific reference to inherent powers in the Bill means it is highly likely that clause 286 will be interpreted

as having purposefully left that power out, intending that the Māori Land Court should not be able to exercise anything other than explicit statutory powers in respect of trusts. The Crown's closing submission on the issue was particularly unhelpful, merely stating: 'Counsel is instructed that officials are currently considering whether these provisions should also confer on the Māori Land Court jurisdiction to grant equitable relief. Any decision will be for Cabinet.'[218]

Given that the jurisdiction to grant equitable relief had previously been given to the Māori Land Court as long ago as a 1994 amendment, we would have expected there to be some logical reason advanced by the Crown as to why the jurisdiction was proposed to be removed from the Māori Land Court in 2016, because that was what was proposed in the Exposure Bill.

In the absence of any reason being advanced by the Crown for that proposed action, reducing a significant protective mechanism of equitable relief for Māori landowners, we find that there is a prospective valid concern in Treaty terms if Cabinet does not authorise an amendment reinstating that jurisdiction. Otherwise, the very court charged with providing a cost-effective and available protection in respect of trust assets, including Māori land, would for no apparent reason have had its equitable relief powers significantly reduced in a manner that is not consistent with Treaty duties on the Crown of providing a court of relief for Māori landowners.

In making that finding we observe that the preamble to the existing Act, which the Crown agreed to in 1993, made the very point that 'it is desirable to maintain a court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles'.

It cannot be consistent with those principles to remove without logical reason a jurisdiction from the Māori Land Court to grant equitable relief which it has enjoyed for over 20 years. The purpose of the Bill is said to be to remove 'barriers' to decision-making in respect of the utilisation of Māori land. We have seen no evidence at all suggesting that the court's power to grant equitable relief causes any 'barrier' to that decision-making process. Yet it is plain that it may well be necessary to ensure the court can provide equitable relief to Māori beneficiaries in case of wayward actions by kaitiaki or governance bodies, which may fall outside the strict wording of the statutory relief jurisdiction available under the Bill or the Trustee Act 1956.

(5) *Conclusions on supervisory protection mechanisms in respect of kaitiaki*

There has been considerable criticism from the claimants that the responsibilities of kaitiaki in the new Bill are more akin to those of a company director than to those of a trustee. In closing submissions, claimant counsel made the following points:

> The proposal to re-create a directorship regime for 'kaitiaki' appointed to administer and manage Māori land is not accepted by the claimants as actively protecting Māori interests. Those who govern Māori land are not in positions equivalent to directors. Their roles are not restricted to managing a commercial asset as is the case for most directors. Rather they must do so in a manner that accommodates tikanga and which acknowledges land as a taonga tuku iho. They will inevitably have whānau relationships with the owners and will have customary obligations that directors do not have. This is the primary reason why the trust model is the preferred model of Māori land management – a trustee is more analogous to a kaitiaki. The introduction of the 'director' analogy and the 'body corporate' is in keeping with the commercial and economic ideology underpinning these reforms, and removes the management of Māori land away from its cultural underpinnings.[219]

As we observed earlier, there is a considerable difference between the responsibilities of a prudent trustee to beneficiaries under the existing Te Ture Whenua Māori Act 1993 as compared to the responsibilities of directors under the Companies Act 1993, which is limited to a duty to 'act in good faith and in what the director believes to be the best interests of the company'. For kaitiaki, clause 187 imposes direct personal responsibilities:

187 Powers, duties, and responsibilities of kaitiaki

A kaitiaki of a governance body must, in his or her role as a kaitiaki,—

(a) act honestly and in good faith; and

(b) act, and ensure that the governance body acts, in accordance with the governance agreement and the requirements of this Act; and

(c) exercise the degree of care and diligence that a reasonable person with the same responsibilities would exercise in the circumstances.

These responsibilities are still far less than those of a prudent trustee as discussed earlier. While in the long run it is for Māori landowners to really decide what is acceptable to them as appropriate protective mechanisms, and not for the Tribunal to venture its opinion as to which has the most merit, it is our role to identify at this stage that the new Bill does not have the same safeguards in respect of kaitiaki or trustees as the existing Act. To that extent, then, the present Act's protection of owners will be reduced somewhat by the new Bill's provisions. Having said that, though, the court can – in the complex manner described above, and in limited circumstances – disqualify a kaitiaki if he or she has acted in a 'reckless or incompetent manner in the performance' of their duties. We will return later to address the broader issue of whether we find that such a reduction in protection is consistent with Treaty principles.

Other provisions in Part 6 also enable some further court involvement, albeit at a reduced level in relation to the actions of kaitiaki. We have already referred to the provisions in clauses 205 and 208. The eligibility criteria for kaitiaki are extensive, and clause 219 states that kaitiaki can be disqualified for criminal history, personal insolvency, and professional incompetence. Under clause 221, the court is empowered to investigate kaitiaki eligibility, but only on application by the governance body or by (again) at least 15 owners or 5 per cent of the owners holding beneficial interests in a block in the asset base. However, once more this is a process check only as to whether the statutory eligibility criteria are met. It is, therefore, once more a reduction on the protective role the court plays with trustee appointments under the existing Act. Again we will return later to a consideration of whether that reduction is such as to be regarded as being inconsistent with the principles of the Treaty.

In section 4.4.3(2), we have already commented on the court's power under clause 222 in limited circumstances to appoint kaitiaki, where replacements have not occurred as they should have under a governance agreement. We will not repeat that discussion. That limited power for that unusual situation does not materially alter the general provision in the Bill that kaitiaki appointments will be by participating owners without the protective supervision of the Māori Land Court. The court is provided only with a power of review of the process of kaitiaki appointment which includes confirmation that kaitiaki are not disqualified by the legislation from holding office.[220]

(6) *Conclusions as to protection for all Māori owners*

The concentration in Treaty principle terms has to be on what protective mechanisms are in place to protect the interests both of non-participating owners, whose interests will be subsumed by the decisions of participating owners, and of participating minorities, whose rights may be affected against their wishes as a result of the decisions of a majority on the day.

The most exposed non-participating owners in the whole of these new proposals are persons suffering from legal or practical incapacities. Those suffering from legal incapacity include minors, and those suffering incapacity in some mental health or advanced senility form. Others affected are those who have no extant strict formal legal rights recorded. Predominantly they will be uri who have not formally succeeded yet to land interests (which is a major problem among Māori because of intestacy, and sometimes means that no formal successions have taken place for generations). Others falling into a similar state of legal limbo will be those whose deteriorating health is such that in practical terms they cannot participate, but managers or kaiwhakamarumaru have not yet been appointed for their land interests.

The Bill contains powers for the court to appoint kaiwhakamarumaru to cope with the latter group but, as observed above, there will be a lacuna period as deterioration occurs where their participation ability will be negligible.

For minors, their incapacity is particularly left devoid of protection in the voting thresholds. Clause 49 specifically provides as follows for owners of freehold Māori land who are less than 18 and who do not have a kaiwhakamarumaru appointed for their interests:

> (2) The owner —
>
> (a) may participate in a meeting of owners about any decision relating to the land; but
>
> (b) cannot vote on the decision and is not counted as an owner under any provision of this subpart.

Needless to say the ability to 'participate' is somewhat illusory if one cannot vote, and furthermore, a minor is apparently not counted as a participating owner under the sub-part relating to threshold requirements. Mr Mahuika very fairly acknowledged this as an issue of concern in answer to a panel question:

> **Q.** Because at general law that is where a Court plays usually a protective role, is it not?
>
> **A.** Yes that's right and in fact there are – you know there are prohibitions against minors entering into contracts and those sorts of thing as well. So you know there is a presumption that the law makes about whether you have the requisite legal capacity to you know to participate in and make decisions. I mean we do it for general elections and you do it for elections for the iwi organisations, but you know I still think it's a fairly raised point as to actually what should your age threshold be for voting in Māori land given the nature of the population. So I don't have an answer for it other than to acknowledge that you know it's a point that's worth considering.[221]

It is unclear whether those who have not formally succeeded, whether pursuant to a will or on intestacies, will count as owners for threshold quorum or voting purposes because clause 7 defines owners in terms that may well prove to be a source of potential dispute at an owners' hui:

> **7 Meaning of owner**
>
> (1) In this Act, owner means,—
>
> (a) for Māori customary land, each member of the class of persons who hold a parcel of land in accordance with tikanga Māori:
>
> (b) for a parcel of Māori freehold land or private land that is not Māori land,—
>
> (i) the sole owner of the beneficial interest in the freehold estate in the parcel; or
>
> (ii) each of the multiple owners (including each member of a class of collective owners) of the beneficial interest in the freehold estate in the parcel:
>
> (c) for one of the individual freehold interests in a parcel of Māori freehold land or private land that is not Māori land, the individual or the joint tenants who own the interest.

When decisions as to entitlement to attend or vote depend on tikanga, uncertainty can arise. So, too can uncertainty arise as to whether people hold 'beneficial' interests. As a consequence of all these potential pitfalls to participation or voting, as well as the much more common consequences of fragmentation, disconnection and migration, it is crucial for any system of voting to be able to provide protection for those non-participating owners' interests.

The response in the Bill, particularly in the schedules, has been to try to ensure that opportunities for participation are enhanced. Examples of that occur in schedule 2 which in clause 11 as to notice procedures, and clause 13 as to voting utilise references to the internet and email votes. We note, too, that the proposed Māori Land Service is to play a major role in assisting owners to participate, and in attempting to enhance participation levels. Clause 203 also addresses the ability of owners generally to seek information from governance bodies. Those types of provisions are to be commended. (Although an unscrupulous governance body could abuse clause 204 as to the reasons

for withholding information, with little opportunity for the non-participating owner to redress that other than through complex court applications.)

However, the main problem remains that the basic threshold to protect the interests of these non-participating members are the quorum and voting threshold mechanisms described above. For the reasons outlined earlier, we are not at all confident that the threshold mechanisms will provide secure protection of non-participating owners' interests, because the second meeting process removes the quorum requirement altogether for meetings of participating owners at which crucial decisions can be made.

There is the possibility of referring 'second chance' decisions to an impartial review authority, such as the court, with tighter criteria than at present as to what is to be taken into account, if Māori generally wish to see participating owners' utilisation decisions given effect. That would depend on further dialogue and agreement between the Treaty partners. As clause 48 stands at the moment, though, we find that the second chance provision negates the Bill's principal protective mechanism and is inconsistent with the property rights of non-participating owners. Protection of those owners and their property rights is guaranteed in the Treaty.

We have found that the ex post facto supervisory powers vested in the Māori Land Court and High Court are not an adequate protective response as they only generally have application after the rights of non-participating owners have already been prejudiced in some significant way.

4.4.6 Compulsory alternative dispute resolution

A further set of the operative provisions we need to address are those in part 9 containing the compulsory alternative dispute resolution procedures. These are a new mechanism providing essentially a compulsory mediation system for disputes between Māori landowners or between Māori landowners and their governance bodies, or any dispute arising in respect of Māori land issues. The purpose of the mechanism is succinctly stated in clause 307: 'The purpose of this Part is to assist Māori land owners and other parties to quickly and effectively resolve between themselves disputes about Māori land in a way that is consistent with the concept of mātauranga takawaenga.'

The claimants submitted that these provisions would potentially 'insert expense and delay when a decision is needed'. They were also concerned about the role and skills of the kaitakawaenga and chief executive.[222]

As the proposal for mediation garnered support at the initial 'high level' concept stage of consultation, and was assessed by the TPK analysis of submissions on the Exposure Bill as having support at 52 per cent, opposition at 17 per cent, and 'concern' at 31 per cent (see section 3.5.4(2)), we accept that there is significant support for a mediation process as an alternative to litigation. In fact, the judges' submissions stressed they had been requesting for some time an amendment and resourcing for such a process (for appropriate cases).[223] The potential advantages were outlined to us by Mr Grant:

> The rationale for this is that in most cases, parties will have some relationship with each other that will be of a continuing nature and a dispute resolution process, particularly one that is based on tikanga Māori and empowers parties to reach their own resolution, is more likely to facilitate a durable resolution with less relationship damage.[224]

Where the issue arises for us is that the Bill provides in clause 321 that mediation of disputes is compulsory for all cases not involving pure points of law, rather than leaving it to the discretion of the Māori Land Court as to whether or not any particular dispute is likely to be assisted by mediation. The other issue is whether the approach in the Bill of involving the chief executive and/or the Māori Land Service in the basic administration of the whole mediation process, rather than placing it with the Māori Land Court to be administered by the judges in conjunction with their registrars, is inconsistent with the Treaty.

From the particular viewpoint of Treaty principles that we are required to consider, the issues are:

- whether compulsory mediation is the preference of Māori and more suited to preserving relationships among whanaunga;
- whether the compulsory new mediation service as

proposed by the Crown is part of a sound exercise of the duty of active protection, ensuring that proper means of resolving disputes are available; and

- whether the compulsory element is consistent with the Bill's stated aim of enhancing owner autonomy.

An additional issue is whether the availability and administration of mediation needs to be placed with the Māori Land Court as a part of the Crown discharging its duty of active protection.

Clause 321 makes it plain that the compulsory aspect does not relate to points of law. The immediate problem is that many of the types of proceeding covered by clause 321 will potentially involve mixed points of fact and law. The very decision then on whether a proceeding under that section must be referred to mediation as required by clause 321(3) is a vexed question requiring legal experience and expertise best provided by the judges. As part of making that decision, the judges would need to consider the wishes of those involved in the dispute.

Other alternatives would have been to enable the judges to decide which cases involve solely points of law and also to decide to refer any proceedings they thought appropriate to mediation. Further, any party to proceedings should have the power to seek reference to mediation, and if all parties agreed then mediation would as a matter of course ensue.

While we appreciate that alternative dispute resolution may well be the general preference of many Māori, there will doubtless be many situations of dispute between owners or beneficiaries and governance bodies where feelings have so deteriorated, or where such serious or urgent issues are raised, that it is obvious speedy resolution of the dispute requires urgent hearing. The compulsory requirement then for mediation in most cases not involving a point of law raises three further concerns which we will address next. However, before doing so we need to also record that, under the November draft of the Bill, if mediation has failed or only partially succeeded then either the chief executive under clause 316(4) or the dispute resolution service under clause 320(2) has to decide whether to refer the dispute back to a kaitakawaenga for further mediation or to refer the unresolved issues to the court for hearing and determination. Those actually involved in the dispute have no say in which of the two courses is chosen.

The first of the three concerns mentioned above is that the proposed Bill will result in two different regimes for mediated dispute resolution. The court has been left with the power to refer matters to mediation in its jurisdiction under the Māori Fisheries Act 2004 and the Māori Commercial Aquaculture Claims Settlement Act 2004. In those jurisdictions it seems to be accepted by the Crown that the court has the requisite experience and ability to be able to both decide and administer the mediation process, but not now for disputes about Māori land.

The second concern is that we, and all Māori landowners, know nothing about the expertise of the officials who will be responsible for deciding whether a dispute contains a point of law, or whether it is capable of settlement by a second round of mediation. Similar comments can be made at this stage as to the dispute resolution service, details of which were not available to us. The nature of the concerns that raises were outlined to us by Derek Te Ariki Morehu:

> The proposed dispute resolution method likely would have benefits but needs to be further refined and developed. The appointment of a kaitakawaenga may reduce litigation and time spent in the Court, but the people providing this assistance must have sufficient knowledge and understanding of Māori land law. They must also have a particular expertise of the Tikanga of those involved in the dispute. Avoiding recourse to the Courts for resolution is usually desirable but it must be remembered that the level of expertise found in the Court is unlikely to be rivalled with respect to the interface of Māori land law and values with the general law.[225]

Those types of concern are emphasised by the fact that the decisions required by clause 316(4) and clause 320(2), after receipt of a report from a kaitakawaenga on the failure of mediation, preferably require judicial skills and experience, or a deep knowledge of Māori land issues. For at that stage of a dispute process those decisions are proposed to be placed with the chief executive or the dispute resolution service as to whether to refer some or all of

the unresolved issues back for further dispute resolution, or to refer the unresolved issues to the court for hearing and determination. Decisions on that matter should also, as a matter of course, take account of the wishes of those involved in the dispute. As noted in section 4.3.2(7), John Grant's evidence in November 2015 was that a change is to be made to the Bill. This change would ensure that the court, not the chief executive, makes the decision as to whether an unresolved dispute should go back for further dispute resolution. That change was not reflected in the revised draft Bill we received.[226]

The third concern is a combination of possible added cost, stress, and delay arising in those cases where it may be obvious to an experienced judge that mediation will not work and where for particular reasons an urgent hearing is the only realistic answer.

Again we were not given any particular compelling logical reason at all as to why the Māori Land Court judges and registrars could not have performed this function.

We are not satisfied on the evidence and submissions received from the Crown thus far that what the Crown proposes in the reform on this issue is consistent with the Treaty principles applicable. While it is plainly consistent with Treaty principles to provide mediation or dispute resolution processes alongside a court hearing process, it may not be consistent with those same principles to carry that provision out in the manner proposed. It seems to us inevitable that in many cases the compulsory aspect may delay resolution, and frustrate and cost those parties who have to undergo it unnecessarily in those cases where a court hearing is more appropriate. Moreover, a fundamental aspect of the decision-making as to how a dispute proceeding is to be resolved when initial mediation has failed, is that it is currently proposed not to be given to those judges and registrars who have the experience and detailed knowledge of Māori land issues to fulfil that role.

For those reasons, we find that it would be inconsistent with Treaty principles to continue with the compulsory aspect of mediation and to not utilise the qualified, experienced, and knowledgeable resource available already in the Māori Land Court judges in conjunction with their registrars.

The other issue of administration of a mediation service being placed with a new entity in the form of the chief executive and a dispute resolution service, rather than being added to the existing Māori Land Court registrars' role, bemuses us. It is inconsistent with the way mediation is dealt with under the same Bill in respect of two other Acts the Māori Fisheries Act 2004 and the Māori Commercial Aquaculture Claims Settlement Act 2004.

On the issue of owner autonomy, our view is that – as with the retention principle – if Māori generally consider that alternative dispute resolution by kaitakawaenga is more in keeping with tikanga than litigation, then some owner autonomy must be sacrificed to meet that general preference. But, if the key consideration within that kaupapa becomes the nature of the particular dispute and the mix of facts and law, whoever decides between court hearings and mediation should, as far as possible, take the wishes of those involved in the dispute into account. While the Crown has provided us with significant literature about compulsory dispute resolution,[227] it is our view that Treaty principles require Māori in the first place to have their cultural preference met, and then affected owners' particular wishes to be consulted within that broader framework.

4.4.7 Succession and estate administration

(1) *Estate administration at general law and under the existing Act*

The Tribunal's statement of issues at paragraph 3.8 asked: 'Is the system for succession in the proposals inconsistent with the principles of the Treaty?'[228]

While this issue received little attention in closing submissions, it does fall within the general thrust of claimant concerns that the jurisdiction of the Māori Land Court is being eroded by the reform proposals. There were a number of witnesses, though, who expressed concerns on the issue. One of the foremost of those was Kerensa Johnston who addressed the issue on a number of occasions, first in general terms:

> The reduction in the jurisdiction of the Māori Land Court (for example in relation to succession applications and the

> oversight of succession matters) is opposed, especially given the proposal for tasks to be undertaken by a 'chief executive' of an unknown government department. In our experience, succession applications are complex and are rarely straightforward or purely administrative in nature.[229]

Then, specifically in relation to incorporations:

> The changes to the administration of estates provisions prejudice Māori owners because the changes remove the control and autonomy Māori owners have over succession matters via the committee of management of incorporations under the 1993 Act. This flies in the face of the key objective of the bill which is to promote owner autonomy.[230]

Once again, this issue requires some background as to the situation at general law and under the existing Act, before addressing the impact of the proposals.

At general law, if significant property interests such as land are to be dealt with in an estate, a grant of probate by the High Court of any will dealing with the land is required, or if there is no will application has to be made for a grant of letters of administration by the High Court. The jurisdiction in that regard is conferred by section 5 of the Administration Act 1969. The underlying reasons are that it is essential to have impartial court control of the process of conveyance of any property interest from a deceased's estate to the correct beneficiary held to be entitled to succeed to that interest. The Administration Act in part 3 lays down the succession rights for intestate estates where no will exists.

However, in recent years the process of grants of probate or letters of administration has undergone significant delegation from judges to registrars. Since 2007, the High Court Rules have enabled a wide range of actual grants of probate or administration in uncontested cases to be delegated to certain registrars of the High Court, as had been the practice for many years.[231] The jurisdiction has remained a court-administered jurisdiction, with the registrar in Wellington having the predominant role as all applications for grants have to be filed in that registry.[232] Even if judges become involved in more complex cases, they now have the statutory ability to refer matters to the registrar for inquiry report. The registrar under that process even has the power now to hear evidence.[233]

At general law, by a combination of the Adoption Act 1955 and the Administration Act 1969, adopted children are (for all legal purposes) deemed to be the natural children of the adoptive parent[234] and hence have the same succession rights as natural children. Section 19(1) of the Adoption Act 1955, however, excludes the application of the Act to whāngai: 'no adoption in accordance with Māori custom shall be of any force or effect, whether in respect of intestate succession to Māori land or otherwise'.

In Te Ture Whenua Māori Act 1993, estate administration of Māori land through the succession order process remains in judicial hands. One of the judges' submissions in the 2013 review process[235] stressed the fact that the successions process was in most cases straightforward, and that an administrator or executor does not have to be appointed for succession to occur. Costs for succession applications are low at present ($60 to file an application). The hearings are notified by panui and generally are short, with exceptions where complexities or disputes arise. The judges also stressed that the very fact of that process occurring meant that often the opportunity for parties to create a whānau trust could be raised in cases with no will, meaning fragmentation could sometimes be reduced.

The judges' submission continued to address the reasons for more complex cases:

> There are, however, complexities that are inherent with succession to Māori land:
>
> - Interests may have been left unsucceeded for several generations, posing significant evidential issues;
> - Owners' interests are often listed under various names;
> - The question of whāngai children may need to be addressed and can be contested;
> - Disputes over wills can only be adjudicated on by the Family or High Courts.

The first two of these issues obviously are either uncommon or rarely encountered at general law.

The whāngai issue itself has caused considerable submission during the consultation process, particularly as the initial exposure draft proposed a solution whereby whāngai were to be treated as part of the class of 'eligible beneficiaries' as deemed 'descendants' of the intestate owner – a measure opposed by many Māori as being in conflict with the long-standing tikanga of many hapū.[236] As discussed in section 4.3.2(5), that has now been changed in the November version to only deem whāngai to be descendants 'if it is consistent with the tikanga of the relevant iwi or hapū to do so.'[237]

The importance of research as to whether succession processes under the existing Act are a barrier to utilisation, requiring repeal and replacement, was highlighted in the judges' further comments:

> In the absence of empirical data it is difficult to respond to the claim that successions take too long, are too complicated and too costly. The only Court cost to parties is the filing fee of $60, which can be waived on request. Our Court records show that a succession application involving intestacy, once filed, will usually be completed within a short time-frame. Succession orders are generally made for immediate release at the hearing. Where delays occur they are generally the result of applicants failing to provide sufficient information when they file their application, or if the parties themselves request an adjournment to discuss either challenging a will, creating a whānau trust or some form of family arrangement.[238]

As noted in chapter 3, however, no empirical research was carried out by the review panel and the Crown accepted that situation.

(2) *New Bill's proposals for estate administration*

The review panel advocated a more administrative approach to successions, with judges only being involved in cases of dispute (and, then, only after an alternative dispute resolution process). There is nothing inherently inconsistent with Treaty principles in adopting an administrative rather than judicial approach, so long as owners' rights to succeed have effective protection. The comparison with general law suggests that a delegation from judges to registrars, with judges dealing with difficult or disputed cases, may provide greater protection. A purely administrative system, on the other hand, controlled by the chief executive, and with an administrative decision as to whether disputes should be resolved by mediation or the court, could provide less protection for Māori owners than a court-administered system (as under general law). The proposal is, on the face of it, inconsistent with the principle of equity.

Two other significant new approaches were also included in the initial Exposure Bill in May 2015 which, as outlined in chapter 3, drew significant submission in opposition. The first of those was that in intestacies a whānau trust had to be created, and the second was that whāngai were recognised as having succession rights.

These two approaches were significantly altered in the November 2015 amendments, as we explained in sections 4.3.2(3) and 4.3.2(5). First, whāngai no longer have automatic rights of succession.

Secondly, as to intestacies, the November version of the Bill proposed a major change to enable an 'opt-out' from the statutory requirement of a whānau trust. The purpose of still providing for a statutory requirement of a whānau trust, subject to an opt-out provision, is the understandable aim of endeavouring to reduce the ongoing process of fragmentation of ownership interests. However, the opt-in approach is effectively what the Māori Land Court judges have been endeavouring to pursue and encourage, as they have 'shepherded' the beneficiaries to consider that path when succession cases come before them.

There appear to us to be considerations both ways in terms of the Treaty principles relevant to this issue. On the one hand, tino rangatiratanga seems to be unduly trammelled if the interests of those entitled to succeed are compulsorily absorbed in a whānau trust without their agreement. On the other hand, good government and the

assistance in the long term of decision-making by landowners favour an approach to fragmentation that is inclusive, not exclusive, in its treatment of Māori relationships and ownership rights. The whānau trust is the antithesis of the measures used between 1953 and 1974 to reduce fractionation of titles, where owners of small interests were simply removed without consent from the ownership group (see chapter 2).

A further consideration is that, rather than being a 'barrier' to assisting effective succession processes in intestate estates, the processes of Judges 'shepherding' whānau under the 1993 Act mechanisms to opt in to a whānau trust may be efficacious.

The decision by the Crown to accept the review panel's decision not to carry out the research into the operation of the existing Act meant it was not properly informed as to the efficacy of the succession processes as well. That Crown decision was made despite the assertions of the judges that succession processes under the Act were not 'barriers' to effective succession outcomes, and importantly that the use of whānau trusts was assisted by the involvement of the judges in 'shepherding' Māori landowners to choose that course. We remain concerned that the outcome of the proposed Bill's amendments to offer an 'opt-out' solution is vexed in practical terms. That arises because the Bill in clause 236 provides a default setting whereby a whānau trust 'must be established' in a situation of intestacy where there is more than one eligible beneficiary. (That will almost always be the case.)

The 'opt-out' mechanism requires one or more of the affected owners to make an application to the court 'to confirm a family arrangement', under which all the land, or a beneficial interest in the land, is to vest in an eligible beneficiary or beneficiaries rather than in the trustees of the whānau trust. The court has the power to 'include any terms that the court thinks necessary to give effect to the family arrangement'. Then to compound the complexity, if any dispute between owners arises, as to whether any land should be excluded from a whānau trust, or as to the terms of the family arrangement, then that dispute must be referred to the chief executive and go to dispute resolution as a compulsory process. Thus any Māori beneficiary seeking to avoid the compulsion of a whānau trust must incur the cost of calling a meeting of eligible beneficiaries to see if they can agree on a 'family arrangement'. If such a family arrangement is agreed by some beneficiaries then an application has to be made to the court. The court has discretionary decision-making vested in it to confirm such a family arrangement. The possibility exists of having to undertake dispute resolution through the chief executive if a dispute arises as to either the family arrangement or any interests being part of it. We cannot imagine that process, and/or the potential for such dispute processes, being regarded as anything other than a barrier to the exercise of that choice of 'opting-out'.

However, the consideration of that opt-out scenario also raises the need to assess the practical tasks imposed on eligible beneficiaries faced with this new provision requiring the creation of a whānau trust. The practical steps required for that process are equally onerous. Clause 237 requires either an eligible beneficiary, a parent of the deceased, or the administrator of the estate to provide a declaration of trust to the chief executive. Under clause 237(3)(f), that declaration of trust must include all the details, including contact details, of each beneficiary who is alive, the 'conditions or restrictions in relation to the manner in which the trustees may deal with the beneficial interest', details of the trustees and declarations signed by each of them as to their eligibility as trustees, and their willingness to be appointed. In short all the elements of the trust must be set up for the whānau trust, with all the attendant cost implications involved in drawing up a trust document and carrying out the statutory processes to ensure its acceptance by the chief executive. In its consultation document on the exposure draft, the Crown proposed that the 'Māori Land Service can provide assistance preparing the application.'[239] No further detail currently exists as to what form this might take. The chief executive is required to publicly notify the application. Objections can be made which the chief executive must refer to the court for decision.

It appears quite inconsistent that under clause 236 objections to a 'family arrangement', or 'over whether any land or beneficial interest should be excluded from a

whānau trust', must go from the court to compulsory dispute resolution, whereas under clause 239, where objections to a succession application to the chief executive are made, the chief executive is required to refer those objections to the court to be resolved.

We have concluded that the default setting in relation to the whānau trust in practical terms is likely to result in what amounts to an effectively compulsory regime. That is because the opt-out solution is complex and will be costly to utilise. On the other hand, the complexity and cost is also increased for eligible beneficiaries or the administrator of the estate, who are required to form a whānau trust to even enable succession to be concluded. As a result of these two factors, there is a real risk that intestate successions will face barriers of cost and complexity that leave a growing body of land interests without timely, or possibly any, succession processes completed.

We do not regard the creation of those potential barriers as meeting the duty of active protection by the Crown of the rights of all Māori landowners to expect that the Crown has in place a straightforward legal means of ensuring succession occurs readily, in the form desired by Māori beneficiaries. We find it is highly likely that succession processes for intestate estates under the proposed Bill will involve complex and costly mechanisms which will be a barrier to efficacious succession processes. That outcome would be inconsistent with the Crown's duty of active protection and will cause significant prejudice.

4.5 Other Aspects of the Reform

4.5.1 Does the Bill deal with long-standing constraints on Māori land development and utilisation?

As discussed in chapter 3, both before and throughout the current review process Māori have consistently identified a range of constraints on land development and utilisation. These constraints include lack of finance, landlocked land, rating (and associated valuations), the Public Works Act, the Resource Management Act, and paper roads.

The claimants in our inquiry strongly argued that these issues – rather than absentee owners or the role of the Māori Land Court – are the main impediments to the effective development and utilisation of Māori land. As outlined in section 4.2.2, the claimants have submitted that these issues should take priority in any reform of Māori land law as they are of relevance to all Māori landowners.

The claimants told us about how development of their lands had been impacted by these issues. Rihari Takuira, for instance, gave evidence about a block – Matangirau – in which he is a beneficial owner. Despite being managed by an ahu whenua trust, the block's development has been hampered by the impact of rating, landlocked land, and the Resource Management Act:

> With the local District Council maintaining continuous observation of the Trust's activities caution is our motto as we do not wish to expose ourselves to the potential for loss of this land – our taonga tuku iho. For this reason, we have avoided any kind of development that would subject us to rates and therefore rates arrears.
>
> There are four (4) papakāinga on this property, and it has the ability to build up to a maximum of 30 papakāinga. There are so many restrictions and requirements of the Council that it would be very expensive to build upon notwithstanding the only access is by sea, because the land is land locked from the main Road.
>
> Moreover, papakāinga development would expose us to RMA consents which inevitably will conclude in higher rates and again the risk of loss. We cannot take such a risk with this land.[240]

Some of the land is forested, and is now mature enough to be harvested. However, Mr Takuira told us, 'if we deforest and . . . sell off the logs that's a one-off payment, but rates will come back again and again. So we let the trees stand'. In addition, the owners' attempts to negotiate access to the block through neighbouring land 'have been unsuccessful with the [private] land owner seeking $500,000 for legal survey, fencing, and compensation'. In Mr Takuira's view, 'If the Crown really wanted to help Māori make use of their lands (for whatever purpose they want), they should pay the expenses of un-landlocking our land. After all, we didn't develop blocks that were inaccessible.'[241]

Maanu Paul, meanwhile, spoke of the difficulties Māori landowners face in developing their land without adequate capital or capacity, and said that he did not see such assistance provided in the Bill:

> He maha ngā taumahatanga ka pā mai mēnā ka rīhi ki waho. He aha ai? Ka pātai koe ki te whānau, 'Ko wai o koutou ka taea te rīhi?' Kore, kore, kore rawa rātou e taea nā te mea kāore he huruhuru hei āwhina i a rātou, nā reira ka riro kē i te kaipāmu Pākehā, i a wai rā hoki, ā ngaro tonu atu te rīhi, ngaro tonu atu te whenua. Koinei tāku, ko tā te Māori, ki te hiahia ia kia noho ora tonu mai tōna whanaungatanga ki tōna whenua me pūmau tonu ki roto i ōna ringa, kaua e tuku. . . . Ki te kore he huruhuru, ki te kore he āwhina pēnei i ngā akoranga a ngā whare wānanga ahu whenua kei hea; kei hea te mema o te whānau e taea ai te mahi i te whenua mō tōna ake whānau; kāore e taea. Ahakoa pēhea te tika o te Pire i runga i te pepa mō te ture kore, kore, tino kore rawa atu e taea te ahu i te whenua.
>
> [Interpreter at hearing: There are many burdens that come with leasing to others/outsiders. Because when you ask the whānau, you ask them, 'Who of you whānau can lease the land off us?' and most will say no, none of them can because they do not have the capital, they do not have the capacity. So in the end the land will end up being leased by the neighbouring Pākehā farmer or someone else and so the lease is gone, the land is gone. The Māori view, a Māori person wants to maintain their connection to their land, that they must keep that land in their hands. Do not give it/cede it. . . . However, if Māori do not have the capacity, the funds, they do not have the expertise from agricultural colleges, invariably who of the whānau has the ability or capacity to work their own lands? Impossible, very few. No matter what the legislation says, whānau will never be able to work their own land.][242]

Despite the consistent calls from Māori for action to address these constraints, they were largely outside the scope of the Crown's Te Ture Whenua Māori reform until 2015. Mostly in response to consultation on the Exposure Bill, the Crown's reform agenda was changed to include work dedicated to addressing some of these constraints on utilisation. The first step in this direction came in May 2015, shortly before the release of the exposure draft. On 21 May 2015, the Minister for Māori Development announced a new Te Ture Whenua Māori Network to 'help Māori land owners improve the productivity of their land'. It was assigned $12.8 million in the 2015 Budget, to be spread over four years. The funding was intended to 'support targeted initiatives to improve the productivity of Māori land in areas such as Northland, East Coast, Bay of Plenty, Manawatū and Whanganui'.[243] Lillian Anderson told us that this funding 'is largely aimed at research tools and interventions in respect of' what she termed 'enabling issues' (referring to issues such as landlocked land and rating).[244]

Following feedback from Māori during the consultation process on the exposure draft, the Crown initiated a new workstream called 'Whenua Māori Enablers'. This includes the previously announced Te Ture Whenua Māori Network (now called the Whenua Māori Fund). Ms Anderson told us:

> The Enablers is a set of workstreams which are aimed at looking at some of the other legislation that impacts on Māori land. So throughout the consultation hui and through the submissions process, Māori land owners and others have raised issues such as ratings, such as valuations, such as papakāinga development, such as landlocked land, RMA issues and Public Works Act issues. Our approach to it has been really to try and prioritise what we thought were the most important of those issues to address alongside the reforms.[245]

As we explained in chapter 3, Cabinet revised the MAG's terms of reference in October 2015 'to include provision of advice on improving the utilisation of Māori land', particularly on the enablers workstream and the Whenua Māori Fund.[246] Cabinet also noted that the Minister had extended 'the timeline for the introduction of the Bill to March 2016 to allow time for initiatives to improve the utilisation of Māori land to be developed as an integrated package'.[247]

As a result of the enablers workstream, it appears that some of these issues may be addressed in the Bill,

pending Cabinet approval. A document presented to the Cabinet Strategy Committee in October 2015 identified the valuation of Māori land, the rating of Māori land, and papakāinga housing as issues which could be addressed in Te Ture Whenua Māori Bill.[248] Cabinet was to consider proposals to address these issues in December 2015.[249] Ms Anderson told us that once those decisions were made, provisions could be inserted into the Bill before March 2016. She acknowledged that this would be late in the process, but considered that those provisions would be unlikely to surprise Māori. She thought that the issue would instead be 'whether they go far enough'.[250]

The remaining constraints, however, are to be dealt with later, with issues and solutions to be reported back to Cabinet's Economic Growth and Infrastructure Committee in 2016.[251] Ms Anderson told us that issues which also impact general land – such as landlocked land, the Public Works Act, and paper roads – will take more time to work through.[252] Issues arising from the operation of the Resource Management Act are currently being considered by the Ministry for the Environment. If legislative change is required to address RMA issues, 'that would be pursued through another legislative process'.[253] More broadly, Mr Grant argued that not all problems could be solved by allocating more funding and resourcing, and that there were 'structural, regulatory and a range of different issues, all of which need to be addressed in this overall drive to try and improve outcomes for Māori land owners'.[254]

We described in chapter 3 some of the Crown's post-consultation engagement with Māori leadership groups on these issues. Where access to Māori land is required across Crown land, for example, it seemed that not legislation but Crown action was required. In his evidence for our inquiry, John Grant maintained that landlocked land is one issue which might be more appropriately addressed through non-legislative means. He told us that Sir Peter Blanchard (former judge of the New Zealand Supreme Court) was of the view 'that the legislative provisions in the Bill are actually appropriate for the purpose'. There are a range of issues, however, which make it difficult and expensive for Māori landowners to use the legislative provisions to unlock their land. These include 'the cost of finding the causes, the cost of negotiating or pursuing remedies, the cost of fencing off an access way and forming it, and the ability to facilitate discussions between neighbours when relationships might be in the way'.[255]

Both Mr Grant and Ms Anderson admitted that the Crown currently has limited information as to the nature and extent of the landlocked land problem. Ms Anderson, for instance, told us: 'We have really good evidence in the Wairarapa, we have really good evidence in probably two or three other areas but there's no coverage across the whole of New Zealand that says how big the landlocked land problem is, although we all hear it.'[256]

Because of this lack of information, the Crown's current work 'is not simply focused on what might be in legislation, but focused on that broader issue of trying to understand exactly what the problem is and then targeting the solutions to that problem'.[257] This includes seeking to understand who owns the land adjacent to landlocked blocks (in some cases, as noted, it is the Crown), as well as identifying other practical constraints.[258] Ms Anderson suggested that the Whenua Māori Fund would be used to conduct research into landlocked land and possibly to intervene in situations where a solution can be identified.[259]

In terms of access to finance, the Crown has suggested that the present Bill will improve the situation in three ways. First, the new governance bodies and standards, and their closer alignment to general law, are intended to create greater certainty for lenders and commercial partners. Secondly, the Bill allows governance bodies to create a leasehold interest in land to be used as security for loans, thus preventing land being put at risk. Finally, the Bill also allows governance bodies to use fixtures – such as buildings and other improvements on the land – as security for mortgages.[260] Mr Mahuika gave evidence that the review panel's

> consultations with the creditor community told us that they were looking for better governance models and clearer accountabilities, in addition to collateral and cash flow. By improving the standard of governance models and

governance itself, the reforms should improve their access to credit.[261]

However, the claimants and submitters on the exposure draft expressed doubt that the Bill's provisions would improve access to finance. The claimants considered that the Bill 'fails completely' to address access to finance.[262] As mentioned in section 4.3.2(4), the Ngāi Tahu Māori Law Centre did not consider that the rangatōpū model would improve access to finance because it is 'the fact the land has the status of Māori freehold land, and is held by collective tenants in common, that is of concern to financial institutions'. The change in governance structures would not address that fundamental problem.[263] Another submitter noted that the provisions in the new Bill cited by the Crown as improving access to finance were 'in fact not new', as '[u]nder the current Act leases are able to be mortgaged and buildings used as security'.[264]

Beyond these provisions in the Bill, development finance does not seem to presently be a focus of the Crown's reform package. There is, as mentioned above, the Whenua Māori Fund, though it appears to be targeted mostly towards research. It is also a rather small fund at just $12.8 million over four years. That amount falls far short of the investment cited as necessary in the two reports produced by MPI in 2013 and 2014 ($3 billion and $950 million respectively). As we saw in chapter 3, those reports – and their promise of significant increases in gross output from Māori freehold land – were influential in the Crown's decision to proceed with the reform of Te Ture Whenua Māori.

The Māori enablers workstream was still in its early stages when we held our hearings in November and December of 2015. Mr Grant told us that the Crown had 'recently been holding workshops around the country with groups of Māori land owners as they are developing the policy thinking around the enabler areas'.[265] It was his expectation that there would be more detail in early 2016 about both the Māori enablers workstream and the Māori Land Service.[266]

As such, there is very little we can say at this stage about the Crown's proposed responses to these long-standing constraints on land development and utilisation, which Māori have identified throughout the review process. Mr Grant told us that it was 'satisfying' to him that these issues 'have finally got fairly and squarely on the policy agenda and are part of that workstream and that in itself has been quite an involved task'.[267] We share this sentiment. Issues like rating, valuation, and landlocked land are all impediments to the effective utilisation of Māori freehold land and have long been identified as such. The MAG had proposed many solutions back in May 2015, including clauses for the Bill granting rating exemptions, access across Crown land 'through a simple process', and giving the court enhanced powers to deal with paper roads and unused designations. The MAG had also proposed making the Māori Land Court the valuation authority for Māori land.[268] Whether covered in the Bill or not, these issues clearly need to be addressed if Māori landowners are to be able to make the most of their lands. We encourage the Crown to continue its work to address these issues.

As part of that work, there is clearly a need for further investigation and research into some of the constraints to land utilisation that Māori have identified. We have already commented to some extent in chapter 3 on the failure to carry out empirical research as to the operation of the existing Act before proposing its repeal, and return to address the issue of research again later in this chapter. In this context, the Crown is also limited by an inadequate understanding of the extent of these problems. As we saw above, Crown witnesses conceded that the Crown has very little information about the extent of the landlocked land problem, including how much of its own land is impeding access to Māori land blocks. This kind of information is obviously essential before any real solution to these constraints can be found.

In addition, we consider that the Crown needs to begin to seriously grapple with the need for development finance. While we welcome the draft Bill's introduction of new tools that aim to improve access to finance while also protecting the land, we do not consider that those provisions go far enough to address the very serious difficulties that Māori landowners face in gaining development finance. As has been found in various Tribunal reports,

barriers to obtaining finance are, to a large extent, the creation of the Crown's imposed title system. It has a Treaty duty to remedy that situation. The Crown is not unaware of those difficulties. Its closing submissions in our inquiry referred to access to finance as a 'perennial issue' for Māori landowners.[269] Further, as we noted in chapter 3, the Associate Minister of Māori Affairs informed Cabinet in August 2013 that legislative reform on its own would not suffice to 'achieve the step change in Māori land utilisation that the Government is seeking'. It would need to be accompanied by 'a more proactive approach to channelling of resources to this sector'. He highlighted access to finance as one issue which would need to be addressed in order to gain the wider economic benefits sought for Māori and for the economy more generally by the Crown.[270]

4.5.2 The Māori Land Service

The other major workstream associated with the reform of Te Ture Whenua Māori is the Māori Land Service. As discussed in chapter 3, officials advised Cabinet in mid-2013 that meeting the review panel's recommendations would require a 'significant reform to the institutional framework supporting Māori land'. They proposed to 'support Māori land owners with administrative services to be provided by an existing government agency'.[271] After further policy development, this concept eventually became a multi-agency Māori Land Service, the development of which Cabinet approved in July 2014. The proposed Māori Land Service was not discussed with Māori on any substantive basis, however, until the 2015 consultation on the exposure draft. During that consultation process, Māori raised a number of concerns about the Māori Land Service, particularly regarding the lack of detail provided by the Crown in respect of its proposed services and what they might cost.

As outlined in section 4.2.2, the claimants in our inquiry have been highly critical of the level of detail provided by the Crown about the role, powers, and potential costs of the Māori Land Service, and have also questioned the need for the service at all. Kerensa Johnston thought there was 'significant uncertainty' around the Māori Land Service, and questioned the need for the court's existing services to be transferred to the new structure. 'Current deficiencies' in those services, she argued, were 'a result of inadequate resourcing and capacity-building'. Despite that, 'there is no indication of resourcing being made available to make these reforms work for landowners and [to] ensure successful and on-going implementation and development'.[272] She worried 'that the service is being set up to fail without a clear commitment from the Crown to fund it'.[273] Marise Lant also questioned the necessity of the new Service. She considered that the proposed role of the Māori Land Service 'smacks of replication of services already offered through the Māori Land Court', including recording of ownership interests and advisory services.[274]

According to the Crown, the Māori Land Service is intended to act as a one-stop-shop for Māori landowners, providing a front-end for services offered by TPK and Land Information New Zealand (LINZ). Ms Anderson told us that '[t]he vision for the Māori Land Service is to support Māori land owners to achieve their aspirations for retention and better use of their land'.[275] It will provide both the existing administrative functions of the Māori Land Court as well as the new services created in the new Te Ture Whenua Māori Bill.[276] These services will include supporting owner decision-making processes (when no governance body is in place), processing successions, maintaining and managing the Māori Land Register, managing the dispute resolution service, and providing information relating to ownership and title.[277] In addition, it will offer 'online self-help information, tools and guidance; and support to understand the types of governance bodies available to Māori land owners and assistance with establishing and registering a governance body'. Its services will be offered 'online, face-to-face or over the phone'.[278]

Beyond this broad vision, however, many elements of the Māori Land Service have not yet been planned in detail. The reason for this, the Crown submits, is that '[t]he Māori Land Service will provide the infrastructure to support the implementation and operation of the proposed reforms', which 'can only be fully developed after the legal framework is set'.[279] That is, the Crown will not know what

services the Māori Land Service will need to provide until the final shape of the new Act is known. Nonetheless, some planning has already occurred. In early November 2015, Ms Anderson informed us that '[c]onceptual design is largely progressed; [and] planning for the detailed design of the Service is underway'.[280] Detailed design work is expected to take most of 2016.[281]

As a result, even at the time of our hearings in late 2015 there was still very little certainty about how the Māori Land Service – a key element of the reform of Te Ture Whenua Māori – would work in practice. The location of the Māori Land Service, for instance, has not yet been decided, though the Crown has suggested that it could be co-located with regional Māori Land Court and Te Puni Kōkiri offices.[282]

As to the costs of the new service, Ms Anderson told us that Ministers have indicated that costs 'for Māori land owners should be no greater, and preferably less than, current compliance costs'. She stressed 'that the reform is not about cost-cutting, but rather, about improving services and supporting Māori land owners'.[283] But she acknowledged that there was a risk that Cabinet could refuse to fund the Māori Land Service at the level requested by officials.[284]

There is similar uncertainty about how the Crown will manage the transition from the current regime to the Māori Land Service. The Crown is anticipating that the Māori Land Service will be implemented over a three to five year period after the Bill's passage. However, '[o]fficials are still considering how the commencement of the Bill and the implementation of the Service will be synchronised'.[285]

In short, there is a lot of work still to be done. The parties to our inquiry agreed that the Māori Land Service is essential to the success of the new Bill and the wider reforms. Prudence Tamatekapua, for instance, described the service as playing 'an integral role' in the reform.[286] Ms Johnston thought that it would be

> difficult to support the introduction of the Bill without having some certainty about the Māori Land Service. I think they do go hand-in-hand and the success of the Bill will be determined by the health, if you like, of that Māori Land Service and administrators and owners having security about the rights and the powers of that service and the Chief Executive.[287]

It is apparent that several key aspects of the Bill are dependent upon the effective operation of the Māori Land Service. Matanuku Mahuika, for instance, considered that the effectiveness of the participating owners model and the Bill's decision-making processes were *dependent on* the effectiveness of the mechanisms in place to encourage and support owner participation – mechanisms which will be provided by the Māori Land Service.[288] It is intended, for instance, that the Māori Land Service will assist owners of unmanaged blocks to organise and to hold meetings for establishing governance bodies. As part of this, the service is to offer a digital platform for notifications and voting in order to encourage as many owners as possible to take part in decision-making processes.[289] Mr Grant noted that the service would have 'a duty to try and contact as many owners as possible'.[290] In addition, the Māori Land Register – also the responsibility of the Māori Land Service – is intended to provide an accurate and comprehensive record of ownership interests so as to facilitate owner participation and land utilisation.[291]

The Bill also proposes to refer most disputes to alternative dispute resolution in the first instance, with the Māori Land Service responsible for the referrals and for the provision and management of that service. The Māori Land Service will be responsible, for instance, for ensuring that kaitakawaenga (mediators) have 'appropriate cultural knowledge and practical dispute resolution skills'.[292] Given the compulsory nature of the dispute resolution service, the infrastructure that will support it will obviously need to be in place once the new legislation comes into effect, unless the unsatisfactory option is taken of not providing any mediation service until the MLS is established. That course would be to the prejudice of Māori landowners, who have been pressing for a mediation service – if not a compulsory one. Yet key decisions about who will provide the dispute resolution service, how it will operate, or how it will be funded have yet to be made. Ms Anderson told

us, for instance, that it had not been decided whether the dispute resolution service would be offered in-house or would be an external service.[293]

Furthermore, successions, currently the responsibility of the Māori Land Court, will largely become an administrative process managed by the Māori Land Service. Administrators or executors (where a will exists), or eligible beneficiaries (in the case of intestacy), will need to apply to the Māori Land Service for succession to commence. In the case of intestacy, the Māori Land Service will assume a particularly prominent role. It will be responsible for ensuring the accuracy of any succession application, referring applications to the Māori Land Court where there are doubts about the accuracy of an application, and publicising the details of accurate succession applications before they are registered.[294] The efficiency with which the Māori Land Service performs these functions will be critical to ensuring that successions can occur promptly and fairly.

These are all central aspects of the reform and its 'intentional shift away from', as the Crown puts it, 'an historic and outdated system of significant judicial oversight of administrative matters to a more modern system where administrative services are not delivered judicially'.[295] A large part of their success will depend on how the Māori Land Service delivers its services to Māori landowners.

We consider that more certainty around the Māori Land Service is needed before the Bill is introduced to Parliament. Although any legislative reform brings a measure of uncertainty, we agree with Ms Johnston that 'in this case the uncertainty is compounded because a large, a significant part of the success of the Bill is predicated on the Māori Land Service'. We also agree with her assessment that, as at the time of our final hearing in December 2015, the level of uncertainty about the service was 'unacceptable'.[296] This was particularly so given that, since the release of the exposure draft in May 2015, Māori had consistently been calling for further detail on the Māori Land Service. It is incumbent upon the Crown to provide Māori with that detail as early as possible, and to be able to do so in advance of the Bill being finalised for introduction. Mr Mahuika seems to have agreed, stating that a well-resourced service was crucial to whether or not the reforms should proceed,[297] and yet 'the Māori Land Service proposals remain an area of uncertainty and people are rightly concerned that the support aspect of the new regime is not yet clear enough'.[298]

In particular, the Crown needs to make a firm commitment to fully and properly fund the Māori Land Service, as this seems to be one issue which Māori are especially concerned about. The Crown's current indication that costs 'for Māori land owners should be no greater, and preferably less than, current compliance costs' is a step in the right direction. On the basis of current planning progress, this is probably as far as the Crown can go. But Māori landowners clearly want – and need – more detail about the extent of the Crown's funding commitment before they can make any informed comment about the proposed service, and therefore the wider Te Ture Whenua Māori reform.

4.6 Tribunal Findings

4.6.1 Summary statement of findings as to Treaty implications in respect of operative provisions of the Bill

We now turn to address our broad findings in respect of the operative aspects of the proposed Bill.

(1) *The purpose and principles clause*

As we stated in section 4.4.1(3), the full range of Treaty values in the 1993 preamble has been reinserted in the purpose and principles clause of the revised Bill. We do not consider that the wording now proposed in the English-language version of that clause is inconsistent with the principles of the Treaty. The reo Māori version of the clause, however, we find to be incorrect in its grammar and idiom, making its meaning difficult to understand. We have serious concerns about its inclusion in the Bill in its current form. This is particularly important because the Bill provides that the Māori version is to prevail.

(2) *Decision-making and protection mechanisms*

A fundamental premise in both the 1993 Act and the present Bill is that 100 per cent participation by Māori owners

is virtually impossible; even 50 per cent participation is difficult to achieve in many cases. This means that the principle at general law, where co-owners cannot alienate or control the property rights of other co-owners, must be compromised in the case of Māori land. This is necessary to enable decisions to be made, so that the taonga tuku iho can be both retained and used in the best interests of all owners, and of their whānau, hapū, and iwi. Where necessary, the 1993 Act makes the Māori Land Court the primary mechanism for enabling decisions to be made, such as forming an ahu whenua trust, after ensuring that there is 'sufficient' support or no 'meritorious' objections. The court is also the primary mechanism for ensuring that the rights and interests of all owners are considered and protected. The court protects minorities from oppressive majorities, and majorities from unreasonable minorities. Its supervisory powers provide a 'fence at the top of the cliff' to prevent decisions that might result in harm to the Māori owners.

One of the most important changes in the Bill is that it removes these roles from the court. From now on, meetings of participating owners will be able to make such decisions, and there is no protection for the rights of absent or dissenting co-owners other than quorum and voting thresholds (to ensure that there is a basic degree of support) or a procedural check.

We fear that the proposed thresholds are complex and somewhat arbitrary, and may turn out to reduce the flexibility available under the present system, where the court assists owners. The thresholds may also enable capture of decision-making by small minorities; we return to that point below. For the most part, however, permanent alienation (by sale, gift, or long-term lease) will still require a high threshold of owners' support: 75 per cent of all owners for sale or gift; and 50 per cent of all owners for long-term leases. In our view, that continued protection for retention is Treaty-consistent.

We also find that changes designed to empower owners to make decisions (without the court) are not inconsistent with Treaty principles, so long as there is properly-informed, broad-based support from Māori for the changes. We do not believe, as we explained in section 4.4.3(4), that the empirical research necessary for properly-informed agreement has as yet been carried out.

We note, too, that Treaty principles do not require any one particular form of protective mechanism, so long as the Crown's duty of active protection is provided for in a form that is effective and is acceptable to Māori. Thus, if Māori generally wish to substitute quorum and voting thresholds for court protections, that is their choice. We find, however, that before the current protective powers of the court can be removed, properly-informed, broad-based support from Māori would be essential.

This is also the case for many other aspects of the Bill. They will be Treaty compliant only if Māori agree to them.

For example, the Bill will significantly lower the threshold of owner agreement required at present for shorter-term leases (up to 52 years). That would be acceptable only if consultation demonstrates a sufficient degree of properly-informed Māori support.

Another example is the proposed change to Māori land governance, the rangatōpū, in which governors will no longer be trustees owing duties directly to beneficiaries, but will become company directors owing duties to a company. This change may not have been fully appreciated by Māori landowners at the consultation rounds. Moreover, we have reservations as to the level of training or capability of potential 'kaitiaki', and again cite the lack of research in that regard as inhibiting our ability to conclude that removal of the court's protective role is consistent with the Crown's duty to ensure a system is in place for the sound governance of Māori land. We reiterate our view that properly-informed, broad-based Māori support is required for these changes.

We note, however, that there are several important features of the Bill which actually strip Māori of its intended protections, and thus undermine the purpose and principles of the Bill. They are not Treaty compliant, and we would not expect Māori to agree to them once properly-informed. These include:

- *Second-chance meetings without adequate protections:* Many important decisions may be taken by

participating owners. These include the ability to enter into leases for up to 52 years, for example, which – at the higher end – can alienate all owners from their land for two generations. Participating owners can also approve a governance agreement, appoint kaitiaki, set or approve a land management plan, and aggregate or disaggregate lands. As we have said, these decision-making powers will not be inconsistent with Treaty principles if Māori give properly-informed, broad-based support to them. But the Bill also provides the second-chance provision, which we discussed in section 4.4.4(2). Crucially, this provision allows a second meeting to be held without any quorum requirements, and thus removes one of the Bill's key protections.

This opens up the serious possibility of important decisions being captured by perhaps tiny minorities, including a 50-year lease or creating a governance body, to the potential prejudice of all other owners. We find this clause (48(8)) inconsistent with Treaty principles as it currently stands. Without such a clause, decisions may never be made, so some such provision is needed. But a purely procedural check of notification and meeting process is not an adequate form of protection. The absence in the second-chance clause of independent, impartial protection of all owners' rights, in the form of a court, is in breach of the principle of active protection. It is also a breach of the non-participating owners' property and Treaty rights. It provides far less protection for the rights of co-owners than is available under the general law, and is a breach of the principle of equity. Those owners will be significantly prejudiced if no adequate protection is provided in the second-chance clause. The reinsertion of the court's discretionary powers, possibly limited by stated criteria in the Bill, needs to be urgently put to Māori for their consideration as part of this second chance process.

- *Sale of land on the agreement of 75 per cent of participating owners:* Of particular concern to the Tribunal is the apparent ability of governance bodies to sell land on the basis that 75 per cent of *participating* owners have approved a land management plan that authorises sale. If the governance body cannot obtain the agreement of 75 per cent of *all* owners to such a sale, clause 100 of the Bill provides for application to the court to approve the sale anyway (so long as the participating owners had agreed to the land management plan). We do not accept the Crown's submission that the court has discretionary powers in this instance. The proposed statutory language is not at all clear on that point. If the statuory language *does* provide the court with a discretion, then that runs counter to what Māori have been told in consultation about the intent and provisions of the Bill. We find that the Crown will be in breach of the principle of active protection if the court's discretion in such cases is not properly and unambiguously restored. The tino rangatiratanga guarantee in the Treaty will also be breached if Māori land can be sold in this way with only 75 per cent of participating owners' agreement, and possibly even after a second-chance meeting where there is not even the protection of any quorum at all. Māori owners will be significantly prejudiced if these provisions are retained in their present form.
- *The Bill's removal of thresholds once a governance agreement is in place:* Quorum and voting thresholds are intended to replace the protective mechanisms in the 1993 Act (principally the court). The Bill, however, allows governance bodies, elected by (and carrying out governance agreements set by) 50 per cent of *participating* owners, to enter into or grant: a lease for up to 52 years; an easement; licences to occupy; profits à prendre; residential leases up to 99 years; and mortgages. Owners will not be consulted or have a vote in any of these decisions unless the governance agreement requires it. This is because clause 7(3) of schedule 4 states that only certain of the Bill's thresholds of owner agreement apply to governance bodies.

If, however, quorum and voting thresholds are to form the primary protection for owners, then it

would breach the principle of active protection if the Bill's thresholds for owner agreement are set aside in this way. While we accept the necessity of second-chance meetings (so long as a court discretion is restored), we see no Treaty justification for enabling governance bodies to make such major decisions without consulting owners or obtaining their agreement. Owner autonomy is not given effect if decisions are made or endorsed by fewer than the minimum numbers agreed to by Māori in the Bill.

- *No protections for those who are not legally allowed to participate:* Some owners will have no opportunity to participate in the Bill's empowering of decision-makers, with no compensating court protections if decisions affect their interests. These include minors or sick persons without kaiwhakamarumaru, and people who have not yet succeeded to their interests – of whom there are often very many, perhaps stretching back for generations. These owners or putative owners will likely have no rights of participation, either for quorum or voting purposes.

With the proposed removal of the court's discretionary powers, the protection of owners' interests under the Bill comes mainly from their ability to participate in decision-making processes, with the additional power to have notification and meeting procedures reviewed by the court. We find that no adequate protection will exist for these persons if they are excluded from voting. They will no longer have recourse to an impartial court to review and confirm whether decisions are in the overall interests of the owners (including those who have not yet succeeded). This constitutes a breach of the Crown's Treaty duty of active protection. The prejudicial effects could well be serious, affecting multiple generations.

- *The ambulance at the bottom of the cliff:* After governance bodies have been appointed and problems occur, the court will provide an ambulance at the bottom of the cliff (as it does under the current Act). As discussed in section 4.4.5, the court will still have significant discretionary powers in the event of disaster or mishap, although it is not clear that the court can require kaitiaki (as company directors) to act in accordance with tikanga or place proper weight on the land under their control as being taonga tuku iho. Nonetheless, Māori owners will have to rely on the Māori Land Court because the High Court is only a theoretical source of remedy for them. It is too expensive (and there is the additional possibility of an award of costs). We find, however, that the Māori Land Court will no longer have power to grant equitable remedies under the new Bill. We see no Treaty-consistent reason to remove this power, which the Māori Land Court has had for the past 20 years. We find that this aspect of the Bill is not consistent with the principle of active protection, and Māori will be prejudiced if they cannot obtain the same remedies from the court in future as they can at present.

(3) *Successions*

As set out in section 4.4.7, we find that the Crown's proposal to institute a purely administrative system for successions could provide less protection for Māori owners than a court-administered system (as under general law). That proposal is, on the face of it, inconsistent with the principle of equity.

We also find that, in practical terms, the Crown's proposal to allow Māori to opt-out of the automatic creation of whānau trusts on intestacy is likely to result in a regime that is, in effect, compulsory. Such an outcome would be inconsistent with the owners' rights of tino rangatiratanga. It would also be inconsistent with the Crown's duty of active protection of Māori landowners and their property rights, which include their rights of succession.

Further, the complex and costly procedures imposed on successors to establish a whānau trust for registration may form a further barrier to successions, and is also not consistent with the Crown's duty of active protection.

In sum, we fear that it will be harder, not easier, for Māori to succeed to their rightful interests under the proposed regime, and that the element of compulsion has not truly been removed from succession processes. Māori will be prejudiced thereby. Such prejudice will likely include

the exclusion of ever-greater numbers from the decision-making of participating owners, and from their rightful connection to their taonga tuku iho.

(4) *Compulsory alternative dispute resolution*

As discussed in section 4.4.6, it appears from the consultation to date that Māori generally want a system in which their disputes are resolved by mediation rather than litigation. Taking that general preference into account, it is not inconsistent with Treaty principles for the law to require most disputes to go first through an alternative dispute resolution process, if they are of a nature that mediation is the most appropriate course. What concerns us is the means by which that decision will be made.

The Bill proposes that all disputes which do not involve a point of law will be referred compulsorily by the chief executive or delegates to dispute resolution. We do not think this is consistent with owner autonomy or the principle of active protection. Nor is it consistent with how we understand such matters are dealt with in other courts. In our view, it is the Māori Land Court (judges in conjunction with registrars) which has the legal experience and expertise to decide whether a point of law is crucial to deciding a case, whether a case involves mixed points of law and fact, whether the case is amenable to settlement through mediation, and whether a case is of such a nature that immediate, urgent hearing is required. In making this kind of decision, the court should consider the wishes of the disputing parties as far as possible, so that their preferences may be taken into account.

It follows that it is also inconsistent with Treaty principles for the chief executive and delegates to decide whether, mediation having failed, a case should go to hearing or a second round of mediation. We acknowledge that this latter point may be under reconsideration by the Crown.

In sum, it is not inconsistent with Treaty principles for the law to provide for alternative dispute resolution as the pathway for settling disputes, if that is the Māori preference and disputes are appropriate for mediation. But we do not think Māori interests will receive adequate protection if the decision between mediation and hearing is made outside of the court (judges and registrars), and without consulting the wishes of those involved in the dispute. We find, therefore, that the proposal in the Bill is inconsistent with the Crown's duty of active protection, and with the tino rangatiratanga of Māori landowners.

Prejudice could include cost, stress and crucial delay in cases where it may be obvious to an experienced judge that mediation will not work and where, for particular reasons, an urgent hearing is necessary.

We make recommendations for the removal of this and other prejudice in chapter 5.

4.6.2 Is there any need for the Bill to proceed urgently?

As discussed in section 4.5, the new Te Ture Whenua Māori Bill is just one component of the Crown's wider reform package. It is also proposing to introduce a new administrative framework for Māori land in the form of the Māori Land Service, and to address a range of other long-standing constraints on the utilisation and development of Māori land through the enablers workstream. The Bill, however, has been the Crown's priority and the focus of much of its work in the two and a half years since Cabinet decided to proceed with the reform in late 2013. By contrast, at the time of our hearings in late 2015, work on the Māori Land Service and the Māori enablers was only at an early stage. It was evident that those workstreams were unlikely to be much further advanced by the time the Crown introduces the Bill to the House in March 2016.

A significant aspect of both claimant and submitter concern during the reform process has been the apparent 'rush' by the Crown, particularly since the release of the exposure draft. That atmosphere of pressured haste has also been very apparent to us during the urgent hearing process of this inquiry.

We were suddenly presented in November 2015, immediately before our urgent hearing, with a completely new form of the Bill, initially without even the assistance of tracked changes. (The Crown did when requested urgently provide such a version, for which we are grateful.) Then throughout the hearing process we were advised the Crown intended to present a Bill to Parliament in March

2016, which provided us with a very short time frame for preparing our report, which has had to be done in great urgency. Particularly when the size of the documentation that had to be considered was taken into account, that pressure for an urgent outcome has been significant.

Then even during the deliberation and report preparation process the Crown has issued another version of the Bill in January 2016, again without tracked changes to assist Māori landowners, and commenced a fresh set of what were described as informational hui within a very short time frame of its release. In doing so it has reaffirmed its intent to present the Bill to Parliament in March 2016.

We have not received any compelling or persuasive logical reason as to why there is such haste to introduce the Bill, particularly in the absence of more detailed work having been done on the other components of the reform.

We are particularly concerned about the lack of the detail available about the proposed Māori Land Service. As we outlined in section 4.5.2, many aspects of the Bill are dependent upon the effective operation of the Māori Land Service. Mr Mahuika, for instance, acknowledged that the Service would be vital to the operation of the participating owners regime, and that Māori needed greater certainty about it before the Bill proceeded. The Service will also assume important responsibilities relating to successions, dispute resolution, and the Māori Land Register.

Yet, at the time of our hearings, very little information was available to Māori about the Māori Land Service. Indeed, only very broad planning for the Service seems to have occurred. Importantly, other than an expressed desire that costs 'for Māori land owners should be no greater, and preferably less than, current compliance costs', the Crown has made no decisions about how the Māori Land Service will be funded. This lack of detail has persisted despite the concerns expressed by Māori following the release of the exposure draft that further information about the Māori Land Service was necessary before proceeding with the reform.

We consider that this lack of detail about the Māori Land Service has created an unacceptable level of uncertainty for Māori landowners. We find that, as a result, there is insufficient information to ensure properly informed, broad-based support from Māori for the Bill to proceed, as Treaty principles require.

There is a similar lack of detail about the Māori enablers workstream. We accept the Crown's submission that 'the revised draft Bill is not rendered Treaty inconsistent simply because there are other issues that are pressing and which impact on Māori land'.[299] Nonetheless, we do consider that issues such as landlocked land and rating and valuation require urgent consideration as part of the Bill. These issues have arisen as a result of past Treaty breaches by the Crown, and it has a Treaty duty to remedy them. We commend the Crown for now recognising that these issues need to be addressed. Investigation of and research into these issues is warranted as part of the broader goal of endeavouring to assist Māori landowners develop and utilise their lands, unencumbered by barriers created by past actions of the Crown. We encourage the Crown to continue its work on these enabler issues, and to address them where possible in the draft Bill.

There is also a need for the Crown to seriously confront the difficulties that Māori face in accessing development finance. The Crown, in proceeding with the reform of Te Ture Whenua Māori, has clearly been influenced by the potential economic gain to be had from removing the barriers to decision-making on the utilisation of Māori land – originally an $8 billion return over 10 years on an investment of $3 billion over three years, subsequently reducing to $3.5 billion on an investment of $905 million, as we described in chapter 3. This gain depends, however, on investment funds on this scale being found.

Yet the Tribunal has not received any significant evidence as to where that major funding resource is expected to be found – other than the vague implication that if decision-making 'barriers' were removed from governance entities for Māori, banks would be more willing to lend to Māori. Mr Mahuika put it this way:

> The reforms also address one of the perennial issues for Māori land-owners: access to finance. In short, our consultations with the creditor community told us that they were looking for better governance models and clearer accountabilities,

in addition to collateral and cash flow. By improving the standard of governance models and governance itself, the reforms should improve their access to credit.[300]

As we discussed above in section 4.5.1, we struggle to accept that expression of hope as a pressing reality demanding an urgent reform of the existing Act. That is because Mr Mahuika's evidence further made clear that the creditor community were also seeking greater collateral and more solid cash flows. Once again the failure to carry out research as to what are the real 'barriers' to utilisation of Māori land means no-one can be sure of all that is required to bring under-utilised land into production.

In sum, we consider that such a fundamental reform of the Māori land regime is too important to proceed with without further certainty on all of its components. The Bill which the Crown proposes to introduce to Parliament in March 2016 depends, in particular, on the Māori Land Service. The Bill's proposals cannot be fairly assessed by Māori without much more detail about how the Crown will operate and fund the Māori Land Service, and how it will respond to the long-standing constraints to land utilisation which are the subject of the Māori enablers workstream.

We appreciate all that will take time. But there is time – a protective regime is in place which has functioned for over 20 years as a result of an accord between Māori and the Crown. If that accord is to be changed, it needs to be changed with Māori support, informed by proper research.

Notes

1. Te Ture Whenua Māori Draft Exposure Bill 2015 (John Alexander Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 129–417)
2. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015 (paper 3.1.74(a)). The Crown first submitted a draft without tracked changes in which the section numbering was incorrect; as the tracked changes version fixed these inconsistencies, we have relied on the tracked changes version for our analysis.
3. Crown counsel, closing submissions, 14 December 2015 (paper 3.3.6), p 3
4. Crown counsel, closing submissions (paper 3.3.6), p 42
5. Crown counsel, closing submissions (paper 3.3.6), p 43
6. Crown counsel, closing submissions (paper 3.3.6), p 60
7. Crown counsel, closing submissions (paper 3.3.6), p 60
8. Crown counsel, closing submissions (paper 3.3.6), p 3
9. Crown counsel, closing submissions (paper 3.3.6), p 44
10. Crown counsel, closing submissions (paper 3.3.6), p 45
11. Crown counsel, closing submissions (paper 3.3.6), pp 45–46
12. Crown counsel, closing submissions (paper 3.3.6), p 47
13. Crown counsel, closing submissions (paper 3.3.6), p 38
14. Crown counsel, closing submissions (paper 3.3.6), p 42
15. Crown counsel, closing submissions (paper 3.3.6), p 39
16. Crown counsel, closing submissions (paper 3.3.6), p 44
17. Crown counsel, closing submissions (paper 3.3.6), p 3
18. Crown counsel, closing submissions (paper 3.3.6), p 51
19. Crown counsel, closing submissions (paper 3.3.6), p 54
20. Crown counsel, closing submissions (paper 3.3.6), pp 52–53
21. Crown counsel, closing submissions (paper 3.3.6), pp 55–56
22. Crown counsel, closing submissions (paper 3.3.6), p 3
23. Crown counsel, closing submissions (paper 3.3.6), p 62
24. Crown counsel, closing submissions (paper 3.3.6), p 63
25. Crown counsel, closing submissions (paper 3.3.6), p 63
26. Crown counsel, closing submissions (paper 3.3.6), pp 63–64
27. Crown counsel, closing submissions (paper 3.3.6), p 64
28. Crown counsel, closing submissions (paper 3.3.6), p 65
29. Crown counsel, closing submissions (paper 3.3.6), pp 36–37
30. Crown counsel, closing submissions (paper 3.3.6), pp 41–42
31. Crown counsel, closing submissions (paper 3.3.6), p 35
32. Crown counsel, closing submissions (paper 3.3.6), pp 54–55
33. Crown counsel, closing submissions (paper 3.3.6), p 56
34. Crown counsel, closing submissions (paper 3.3.6), p 58
35. Crown counsel, closing submissions (paper 3.3.6), p 57
36. Crown counsel, closing submissions (paper 3.3.6), pp 48–49
37. Crown counsel, closing submissions (paper 3.3.6), p 60
38. Crown counsel, closing submissions (paper 3.3.6), pp 47–48
39. Claimant counsel (Watson), closing submissions, 20 December 2015 (paper 3.3.8), p 5
40. Claimant counsel (Ertel), closing submissions, 18 December 2015 (paper 3.3.9), p 15
41. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 17–19
42. Claimant counsel (Thornton), closing submissions, 18 December 2015 (paper 3.3.10), p 20
43. Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 14
44. Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 20
45. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 20–21
46. Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 14
47. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 24
48. Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 19

49. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 24
50. Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 19
51. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 24
52. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 5
53. Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 15
54. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 15
55. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 6, 15
56. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 16–17
57. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 18–19
58. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 18–19
59. Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 37
60. Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 17
61. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 24
62. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 20
63. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 22
64. Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 41
65. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 17
66. Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 41
67. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 25
68. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 6
69. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 20
70. Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 44; claimant counsel (Ertel), closing submissions (paper 3.3.9), p 18; claimant counsel (Watson), closing submissions (paper 3.3.8), p 37
71. Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 18
72. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 36
73. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 25
74. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 6
75. Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 16; claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 28–29
76. Counsel for the interested party, closing submissions, 18 December 2015 (paper 3.3.7), p 3
77. Counsel for the interested party, closing submissions (paper 3.3.7), p 4
78. Counsel for the interested party, closing submissions (paper 3.3.7), pp 7–8
79. Claimant counsel (Watson), opening submissions, 6 November 2015 (paper 3.3.2), pp 8–9
80. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 220)
81. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 220)
82. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 220–221)
83. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 222)
84. John Alexander Grant, sixth brief of evidence, 9 November 2015 (doc A27), pp 1–2
85. Grant, sixth brief of evidence (doc A27), pp 1–2
86. Te Ture Whenua Māori Draft Exposure Bill 2015, cls 3, 4 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 152–153).
87. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 34–35
88. Marise Lant, third amended statement of claim, 16 July 2015 (claim 1.1.1(b)), p 9
89. Marise Lant, second brief of evidence, 15 September 2015 (doc A6), pp 26–27
90. 'Te Ture Whenua Māori Bill: Submission of the Judges of the Māori Land Court', 7 August 2015 (doc A20), pp 35–36
91. Submission 218, Kathy Ertel & Co, 7 August 2015 (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 1973)
92. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 225)
93. Submission 171, Ngatira Lands Trust, 6 August 2015 (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 1574)
94. 'Te Ture Whenua Māori Bill: Further Policy Decisions', no date (Crown counsel, second disclosure bundle, vol 2 (doc A29(a)), p 186)
95. 'Te Ture Whenua Māori Bill: Further Policy Decisions', no date (Crown counsel, second disclosure bundle, vol 2 (doc A29(a)), p 186)
96. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cl 3 (paper 3.1.74(a))
97. 'Te Ture Whenua Māori Bill: Further Policy Decisions', no date (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 187)
98. Te Ture Whenua Māori Draft Exposure Bill 2015, cls 150, 152 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 242–244)
99. 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 59)
100. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 35
101. Lant, third amended statement of claim (claim 1.1.1(b)), p 9
102. 'Te Ture Whenua Māori Bill: Further Policy Decisions', no date (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 187–188)

103. Submission 172, Te Rūnanga o Ngāi Tahu, August 2015 (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 1591)
104. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 35
105. Lant, third amended statement of claim (claim 1.1.1(b)), p 10
106. 'Te Ture Whenua Māori Bill: Further Policy Decisions', no date (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 188)
107. Submission 46, Ngāi Tahu Māori Law Centre, no date (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 408)
108. 'Te Ture Whenua Māori Bill: Submission of the Judges of the Māori Land Court', 7 August 2015 (doc A20), p 7
109. 'Te Ture Whenua Māori Bill: Submission of the Judges of the Māori Land Court', 7 August 2015 (doc A20), p 24
110. Submission 138, no date (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 1240); submission 241, Te Rua o te Moko 2B Trust, no date (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 2187); submission 249, Te Hunga Rōia Māori o Aotearoa – Māori Law Society Incorporated, August 2015 (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), pp 2243–2244)
111. Kerensa Johnston, first brief of evidence, no date (October 2015) (doc A13), p 6
112. Submission 108, Wakatū Incorporation, no date (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 943)
113. Submission 19, Ātihau Whanganui Incorporation, 1 July 2015 (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), pp 174–175)
114. Submission 46, Ngāi Tahu Māori Law Centre, no date (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 399)
115. Submission 85, Federation of Māori Authorities, no date (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 746); submission 108, Wakatū Incorporation, no date (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 944)
116. Submission 206, Te Tumu Paeroa, 7 August 2015 (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 1898)
117. Grant, sixth brief of evidence (doc A27), pp 1–2
118. 'Te Ture Whenua Māori Bill: Further Policy Decisions', no date (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 190–192)
119. FOMA, submission to the Crown, 18 December 2015 (paper 3.1.95(a)), p 7
120. Te Ture Whenua Māori Draft Exposure Bill 2015, cl 5 (John Alexander Grant, papers in support of fourth brief of evidence (doc A5(a)), p 158). A whāngai descendant was defined to mean 'a child, grandchild, or other descendant of the individual who is related by Māori customary adoption but only if the manner of the adoption is consistent with the tikanga of the relevant iwi, hapū, or whānau'.
121. Claimant counsel (Watson), opening submissions, 6 November 2015 (paper 3.3.2), p 9; Lant, third amended statement of claim (paper 1.1.1(b)), p 10
122. Submission 172, Te Rūnanga o Ngāi Tahu, August 2015 (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 1587)
123. 'Te Ture Whenua Māori Bill: Submission of the Judges of the Māori Land Court', 7 August 2015 (doc A20), pp 17, 38–39
124. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cl 5(1) (paper 3.1.74(a))
125. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cl 5(1) (paper 3.1.74(a))
126. Crown counsel, closing submissions (paper 3.3.6), p 57
127. Te Ture Whenua Māori Draft Exposure Bill 2015, cl 26(3) (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 168)
128. Claimant counsel (Watson), opening submissions (paper 3.3.2), p 8
129. 'Te Ture Whenua Māori Bill: Further Policy Decisions', no date (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 186–187)
130. Submission 188, Wackrow Williams & Davies Limited, 7 August 2015 (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 1729)
131. Claimant counsel (Watson), opening submissions (paper 3.3.2), p 8
132. Submission 194, New Zealand Public Service Association, 7 August 2015 (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), pp 1779–1780); submission 209, Cara Bennett, 7 August 2015 (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 1917)
133. 'Te Ture Whenua Māori Bill: Submission of the Judges of the Māori Land Court', 7 August 2015 (doc A20), pp 6, 16
134. Grant, sixth brief of evidence (doc A27), p 1
135. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cl 26(3) (paper 3.1.74(a))
136. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cl 110(6)(b) (paper 3.1.74(a))
137. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cl 110(2)(b) (paper 3.1.74(a))
138. Submission 194, New Zealand Public Service Association, 7 August 2015 (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 1789); *Grace – Ngarara West* A55B2A (2014) 217 Aotea MB 268

139. 'Te Ture Whenua Māori Bill – Summary of main points of change following consultation' (Grant, papers in support of sixth brief of evidence (doc A27(a)))
140. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 229)
141. 'Te Ture Whenua Māori Bill – Summary of main points of change following consultation' (Grant, papers in support of sixth brief of evidence (doc A27(a)))
142. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cls 267, 268 (paper 3.1.74(a))
143. 'Te Ture Whenua Māori Bill – Summary of main points of change following consultation' (Grant, papers in support of sixth brief of evidence (doc A27(a)))
144. Waitangi Tribunal, Wai 2478 statement of issues, no date (paper 1.4.1)
145. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 5
146. Counsel for the interested party, closing submissions (paper 3.3.7), pp 7–8
147. Transcript 4.1.3, pp 54–55
148. Crown counsel, closing submissions (paper 3.3.6), pp 36–37
149. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, 4 vols (Wellington: Legislation Direct, 2008), vol 3, p 891
150. Matanuku Mahuika, brief of evidence, 3 November 2015 (doc A23), pp 3–4
151. Crown counsel, closing submissions (paper 3.3.6), p 45
152. Crown counsel, closing submissions (paper 3.3.6), pp 45–46
153. Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 15
154. Claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 19–20
155. Prudence Tamatekapua, first brief of evidence, 30 October 2015 (doc A14), p 3
156. Crown counsel, closing submissions (paper 3.3.6), p 46
157. Te Ture Whenua Māori Act 1993, s 17(2)(d)
158. Te Ture Whenua Māori Act 1993, s 17(1)(b)
159. Judges of the Māori Land Court, submission to TTWM Review Panel, 12 April 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 115)
160. Deputy Chief Judge Caren J Fox, 'Māori Freehold Land Registration Project', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 563–565)
161. 'Māori Affairs Bill: Report of the Ministry of Māori Development Review Taskforce', 8 September 1992 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 288–289)
162. See Mahuika, brief of evidence (doc A23), pp 3–4
163. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 24; claimant counsel (Thornton), closing submissions (paper 3.3.10), p 19
164. Submission 85, Federation of Māori Authorities, no date (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 741)
165. Judges of the Māori Land Court, submission to TTWM Review Panel, 26 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 39)
166. Judges of the Māori Land Court, submission to TTWM Review Panel, 12 April 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 106, 124)
167. Judges of the Māori Land Court, submission to TTWM Review Panel, 12 April 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 125)
168. In particular, see claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 15–17; claimant counsel (Watson), closing submissions (paper 3.3.8), p 25.
169. Transcript 4.1.2, p 428
170. Judges of the Māori Land Court, submission to TTWM Review Panel, 12 April 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 115)
171. Judges of the Māori Land Court, submission to TTWM Review Panel, 12 April 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 107–109)
172. Te Ture Whenua Māori Act 1993, s 215(4)(a)-(b)
173. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 24; claimant counsel (Thornton), closing submissions (paper 3.3.10), p 19
174. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 25
175. Te Ture Whenua Māori Act 1993, s 215(4)(a)-(b)
176. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 24
177. Tony Walzl, 'Twentieth Century Overview Part II, 1935–2006' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2009) (Wai 1040 RO1, doc A38), pp 1458–1460; Tony Walzl, 'East Coast Lands: Twentieth Century Overview', 3 vols (commissioned research report, Wellington: Crown Forestry Rental Trust, 2010) (Wai 900 RO1, doc A76), vol 3, p 191
178. 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 175); 'Report: Te Ture Whenua Māori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 247)
179. Crown counsel, closing submissions (paper 3.3.6), p 3
180. 'Te Ture Whenua Māori Bill: Submission of the Judges of the Māori Land Court', 7 August 2015 (doc A20), p 20
181. 'Te Ture Whenua Māori Bill: Submission of the Judges of the Māori Land Court', 7 August 2015 (doc A20), pp 95–96
182. The possibility of the use of company structures was canvassed as early as March 2013 by the review panel, see 'Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 192–196);

'Te Ture Whenua Māori Reform: Consultation Document', May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 440, 459).

183. Māori Assembled Owners Regulations 1995, regs 32–35, 45

184. The revised draft Bill defines thresholds as requiring 'more than' 50 per cent of a defined group of owners – that is, a bare majority. However, for the sake of simplicity, we largely refer in our text to these thresholds as requiring the approval of 50 per cent of owners.

185. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, sch 4, cl 7(1) (paper 3.1.74(a)

186. Transcript 4.1.3, p 93

187. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cl 115(6)(b) (paper 3.1.74(a))

188. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cls 119(3)(b) and 122(3)(b) (paper 3.1.74(a))

189. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cls 110(4)(b) and 110(6)(c) (paper 3.1.74(a))

190. Te Ture Whenua Māori Act 1993, ss 286, 288

191. Transcript 4.1.3, pp 16–17

192. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cl 221(2) (paper 3.1.74(a))

193. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 20–21

194. Crown counsel, closing submissions (paper 3.3.6), p 39

195. Crown counsel, closing submissions (paper 3.3.6), pp 39–40

196. The ability to take profit from the land but not arising from any possessory right such as ownership or a lease.

197. Transcript 4.1.3, p 16

198. Crown counsel, app 1: 'Protections against Alienation in the Revised Draft Bill compared to the 1993 Act' (paper 3.3.6(a))

199. Crown counsel, closing submissions (paper 3.3.6), p 52

200. Crown counsel, closing submissions (paper 3.3.6), p 38

201. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 6, 15, 18–19

202. Transcript 4.1.3, pp 24–25

203. Crown counsel, closing submissions (paper 3.3.6), p 40

204. Crown counsel, closing submissions (paper 3.3.6), pp 40–41

205. Transcript 4.1.3, p 85

206. See Te Ture Whenua Māori Act 1993, ss 4, 150A–150C. The definition of 'long-term lease' also includes leases 'for a term that would be more than 52 years if 1 or more rights of renewal were exercised': s 4. This amendment appears to have introduced an inconsistency in the level of support required for leases between 42 years and 52 years.

207. Māori Assembled Owners Regulations 1995, reg 45(4)

208. Māori Assembled Owners Regulations 1995, reg 45(4)

209. Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 15, 19

210. Crown counsel, app 1: 'Protections against Alienation in the Revised Draft Bill compared to the 1993 Act' (paper 3.3.6(a))

211. Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 15

212. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cl 186(1) (paper 3.1.74(a))

213. Crown counsel, closing submissions (paper 3.3.6), p 56

214. Crown counsel, closing submissions (paper 3.3.6), p 47

215. Counsel for the interested party, closing submissions (paper 3.3.7), pp 2–5

216. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 21

217. Crown counsel, closing submissions (paper 3.3.6), p 60

218. Crown counsel, closing submissions (paper 3.3.6), p 60

219. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 22

220. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cl 221 (paper 3.1.74(a))

221. Transcript 4.1.3, pp 18–19

222. Claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 39–40

223. 'Te Ture Whenua Māori Bill: Submission of the Judges of the Māori Land Court', 7 August 2015 (doc A20), p 146

224. John Alexander Grant, fourth brief of evidence, 3 August 2015 (doc A5), p 10

225. Derek Te Ariki Morehu, brief of evidence, 30 October 2015 (doc A25), p 6

226. 'Te Ture Whenua Māori Bill – Summary of main points of change following consultation' (Grant, papers in support of sixth brief of evidence (doc A27(a)))

227. Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 410–1136

228. Waitangi Tribunal, Wai 2478 statement of issues, no date (paper 1.4.1), p 1

229. Johnston, first brief of evidence (doc A13), p 7

230. Kerensa Johnston, second brief of evidence, 16 December 2015 (doc A36), p 9

231. Judicature Act 1908, sch 2

232. High Court Rules, r 27.10

233. See High Court Rules, rr 27.41, 27.43

234. Adoption Act 1955, s 16

235. Judges of the Māori Land Court, submission to TTWM Review Panel, 12 April 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 122–123)

236. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 229)

237. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cl 5(1) (paper 3.1.74(a))

238. Judges of the Māori Land Court, submission to TTWM Review Panel, 12 April 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 123)

239. 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 466)

240. Rihari Takuira, brief of evidence, 30 October 2015 (doc A17), p 2

241. Takuira, brief of evidence (doc A17), pp 2–4
242. Transcript 4.1.2, pp 191–192
243. Minister for Māori Development, '$12.8m for new Te Ture Whenua Māori Network', 21 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 128)
244. Transcript 4.1.2, p 378
245. Transcript 4.1.2, pp 377–378
246. 'Te Ture Whenau Māori: Work Streams and Next Steps', 13 October 2015 (claimant counsel (Watson), documents released under the Official Information Act (doc A38)), p [288]
247. Cabinet Economic Growth and Infrastructure Committee, minute of decision, 15 October 2015 (claimant counsel (Watson), documents released under the Official Information Act (doc A38)), p [308]
248. 'Most fundamental Māori land reform in decades . . .', no date (Crown counsel, third disclosure bundle, vol 4 (doc A39), p 2)
249. 'Te Ture Whenua Māori Bill: Further Policy Decisions', no date (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 180)
250. Transcript 4.1.2, p 380
251. 'Most fundamental Māori land reform in decades . . .', no date (Crown counsel, third disclosure bundle, vol 4 (doc A39), p 2)
252. Transcript 4.1.2, pp 377–378
253. Transcript 4.1.2, p 327
254. Transcript 4.1.2, p 329
255. Transcript 4.1.2, pp 360–361
256. Transcript 4.1.2, p 378
257. Transcript 4.1.2, pp 359–361
258. Transcript 4.1.2, p 373
259. Transcript 4.1.2, p 378
260. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 444)
261. Mahuika, brief of evidence (doc A23), p 10
262. Claimant counsel (Watson), closing submissions (paper 3.3.8), p 4
263. Submission 46, Ngāi Tahu Māori Law Centre, no date (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 399)
264. Submission 194, New Zealand Public Service Association, 7 August 2015 (Crown counsel, first disclosure bundle, submissions on Te Ture Whenua Māori Draft Exposure Bill 2015 (doc A8), p 1787)
265. Transcript 4.1.2, p 293
266. Transcript 4.1.2, p 294
267. Transcript 4.1.2, pp 295–296
268. 'Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 123–126)
269. Crown counsel, closing submissions (paper 3.3.6), p 7
270. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 15)
271. Associate Minister of Māori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Māori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 13)
272. Johnston, first brief of evidence (doc A13), pp 6–7
273. Transcript 4.1.2, p 199
274. Marise Lant, fourth brief of evidence, 30 October 2015 (doc A9), pp 3–5
275. Lillian Anderson, first brief of evidence, 4 November 2015 (doc A24), p 8
276. Anderson, first brief of evidence (doc A24), p 2
277. Anderson, first brief of evidence (doc A24), p 3
278. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 470)
279. Crown counsel, closing submissions (paper 3.3.6), p 63
280. Anderson, first brief of evidence (doc A24), p 2
281. Te Puni Kōkiri, 'Māori Land Service: Stakeholder discussion document', 26 November 2015 (Kerensa Johnston, papers in support of second brief of evidence (doc A36(a)), p 8)
282. Anderson, first brief of evidence (doc A24), p 9
283. Anderson, first brief of evidence (doc A24), pp 10–11
284. Transcript 4.1.2, p 401
285. Anderson, first brief of evidence (doc A24), p 2
286. Transcript 4.1.2, p 129
287. Transcript 4.1.3, pp 50–51
288. Transcript 4.1.3, pp 17–18
289. Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015, cl 238(3), sch 2, clause 11(3) (paper 3.1.74(a))
290. Transcript 4.1.3, p 94
291. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 471)
292. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 471)
293. Transcript 4.1.2, p 398
294. Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Consultation Document', no date (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 466)
295. Crown counsel, closing submissions (paper 3.3.6), p 60
296. Transcript 4.1.3, pp 46–47
297. Transcript 4.1.3, p 18
298. Mahuika, brief of evidence (doc A23), p 9
299. Crown counsel, closing submissions (paper 3.3.6), pp 47–48
300. Mahuika, brief of evidence (doc A23), p 10

CHAPTER 5

NGĀ WHAKAKITENGA ME NGĀ TŪTOHINGA / SUMMARY OF FINDINGS AND RECOMMENDATIONS

He kura tangata, e kore e rokohanga;
he kura whenua ka rokohanga.

A treasured person will not always be there for you to meet,
but treasured land is always there for you.

5.1 Introduction

In this chapter, we summarise the principal findings that we have made in our report, and make recommendations for the prevention of prejudice to Māori landowners and their whānau, hapū and iwi.

5.2 The Essential Context

Chapter 2 explains the essential nineteenth-century context for the claims: the massive loss of Māori land as a result of a system of individualised titles imposed on Māori by the Crown. Māori elders today grew up with laws still geared to facilitate alienation of individual interests in Māori land for Pākehā settlement. Protections were weak, paternalistic, and provided little in the way of owner input, let alone autonomy. In the 1950s, the system was reoriented more towards retention of Māori land for the owners of larger interests, but at the cost of forcible dispossession of 'small' owners and enforced 'Europeanisation' of Māori land. Māori opposition won significant changes in the mid-1970s. Retention for all owners became the official goal, and owner autonomy was facilitated through the burgeoning section 438 trusts.

By the time of the royal commission in 1980, the Māori Land Court was a 'court of social purpose', assisting Māori owners to retain and use their land, and promoting owner autonomy through the establishment of trusts. It was at this point that the Crown asked the New Zealand Māori Council to develop policies for a new Act that would cement and extend these developments. The end results were a Crown-Māori consensus and a watershed piece of legislation in 1993, Te Ture Whenua Māori Act, which seemed to many to

be the culmination of a century of struggle between Māori and the Crown. Treaty values were set out in the preamble and infused the Act's provisions. Trusts and incorporations, as vehicles for owner autonomy, were retained in the Act and significantly enhanced. The Act also entrenched principles and protections for Māori land retention, and its use, occupation, and development, with the court as a mechanism to assist the owners and protect their interests. As a result, the prospect of significant change to the Act – even its complete repeal – has been greeted by some Māori with suspicion and concern, leading to the filing of the present claims with this Tribunal.

5.3 Chapter 3: Principal Findings in Sections 3.3 and 3.4

In sections 3.3–3.4, we traced the origins of the first review of the current Act up until the end of 2014, when responsibility for the reform of Te Ture Whenua Māori passed to the new Minister for Māori Development. In doing so, we considered two issues:

- Who initiated and shaped the reforms – the Crown or Māori, or both?
- How were the review panel's high-level reform principles translated into a Bill?

We found that both the Crown and Māori instigated and shaped the 2013 reform proposals. Those proposals did not arise out of thin air but rather from a debate within Maoridom, and dialogue between Māori and the Crown, dating back to at least 1998.

We accepted some of the claimants' concerns about the review panel and its process.

First, we thought that the panel's decision to proceed without empirical research or an assessment of the existing Act meant that it proceeded on the basis of inadequate information; this came to light when the Māori Land Court judges and other practitioners suggested in response to the review panel that the Act was not in fact a barrier to utilisation, and that additional research was essential. As a result, we thought that the broad Māori support for the review panel's propositions was not fully or properly informed. Although those individual Māori landowners and organisations brought their own knowledge of the Act into the consultation process, we considered that an independent, empirical analysis of the Act and its effect on Māori land utilisation was needed to provide a wider view of the Act's operation.

Secondly, we agreed with the claimants that the panel was not fully representative. We did not dispute the Crown's approach in appointing an independent panel of (mostly) Māori experts to develop proposals and consult with Māori. However, we noted our concern that, while the 'relevant field of Māori expertise' was represented on the panel, wider community and kaumatua perspectives were not included. We did not consider that this issue was fatal to the conduct of the review panel's consultation.

We did not accept the claimants' view that Māori support for the review panel's propositions – which the claimants did not deny – was at such a high level for principles of 'greater autonomy' and increased 'flexibility' that there was no consultation at all on the details. Broad Māori support was obtained for some significant propositions, though mainly at a headline level. But some of the panel's headlines were clear, concise, and cannot be explained away simply as high-sounding generalities.

We also did not accept the claimants' argument that the 2013 review process was entirely Crown-led or directed solely at achieving a Crown priority of bringing underutilised land into production for the benefit of the New Zealand economy. Rather, the review was led by a panel of experts who were appointed by the Crown but were not officials and were independent of it. We found that the review panel mostly stated and reflected views that had been discussed within Maoridom for some time, and with which Māori who participated in the 2013 consultation broadly agreed.

A significant issue in our inquiry was who, in Treaty terms, was able to lead the review of Te Ture Whenua Māori and to develop reform proposals.

We agreed with the Crown that there was a distinction in this claim between the Māori Community Development Act 1962, which accorded legislative recognition

and statutory powers to Māori institutions, and Te Ture Whenua Māori Act 1993, which maintains a national title system and a court of record. But we did not accept that the Crown has an interest as great as Māori in the institutions which Māori have constituted under the 1993 Act to govern and manage their taonga tuku iho.

Indeed, in this particular case, we found that the Māori interest in their taonga tuku iho, Māori land, is so central to the Māori Treaty partner that the Crown is restricted (and not unreasonably so) from simply following whatever policy it chooses. However, we also found that the Crown has a substantial interest in the 1993 Act, sufficient to justify its initiation of a formal review.

We found that the 2013 review was led by neither the Crown nor Māori, though it was shaped and influenced by both. The review was done by an independent panel of experts, which came up with its own ideas, consulted Māori on them, and made recommendations on the basis of that consultation, which the Crown accepted.

We found that, at the time the Crown decided in September 2013 to accept the review panel's recommendations, both Māori and the Crown seemed to be in agreement on what should happen. In effect, we found that both Treaty partners decided the outcome.

We also found, however, that neither Treaty partner was properly informed because of the failure to conduct the necessary empirical research on the Act and barriers to the utilisation of Māori land. The Crown's agreement to the review panel's decision to proceed without fresh research or assessment of the Act was not consistent with Treaty principles, and has remained a persistent flaw in the consultation which followed later in 2014 and 2015.

After the Crown decided in September 2013 to repeal the Act, it began work on developing a Bill. From February 2014, a 'collaborative approach' was adopted to developing the Bill, working with FOMA and a leadership group appointed by the Iwi Chairs Forum. One outcome was the joint consultation round in August 2014, led by the Crown in conjunction with FOMA and the Iwi Leaders Group.

We agreed with the claimants that the Crown's provision of information was deficient for the August 2014 hui. But on balance we accepted that this flaw in the consultation round was not fatal to the achievement of its purpose, which was to get feedback and test Māori opinion on some of the more specific aspects of the reform proposals, with the intention of taking an Exposure Bill out for more detailed consultation in the future. The Iwi Leaders Group also obtained endorsement from the hui for continuing the collaborative approach, and developed a platform for negotiation – significantly, including long-standing barriers to utilisation such as rating and lack of access, which had largely been ignored by the review panel and the Crown in 2013.

But this specific collaboration ended after the general election in September 2014, and a new approach was adopted by the incoming Minister.

5.4 Chapter 3: Principal Findings in Section 3.5

In section 3.5, we considered the events of 2015, including the formation of the Ministerial Advisory Group, the release of an exposure draft Bill and the associated consultation process, and the subsequent changes made to the draft Bill. In doing so, we considered two issues:

- Has the Crown's consultation on the Bill met common law and Treaty standards?
- Is there 'demonstrable and sufficient' support for the Bill to proceed?

We found that, given the grave importance of the subject matter to Māori, and the length and complexity of the consultation materials, the Crown's June 2015 consultation hui breached the requisite common law standards for consultation. The Crown did not allow sufficient time for properly informed and meaningful participation by Māori. But we also found that the situation was mitigated by the extension of time for written submissions. Quality engagement did occur through the written submissions process.

In response to the 2015 consultation, the Crown took advice from the Ministerial Advisory Group. It was certainly prepared to – and indeed did – make significant changes to key features of the Bill, as the common

Category	Support (%)	Oppose (%)	Concern (%)
Whenua tāpui	50	10	40
Owner decision-making regime	32	27	41
Disposition of Māori freehold land	23	27	51
Administrative kaiwhakarite	17	58	25
Managing kaiwhakarite	18	55	27
New governance model	25	35	41
Successions	42	15	44
Disputes resolution	52	17	31
Refocusing the Māori Land Court's jurisdiction	33	34	32
Māori Land Service	30	10	60

Table 5.1: Te Puni Kōkiri's tabulation of submitters' support, opposition, and concern

law standards for consultation require. The Crown also decided to take action on long-standing barriers to Māori land utilisation, which is to be commended.

In terms of Treaty standards, we agreed with the claimants that the 'free, full and informed consent' of Māori is required when a legislative change substantially affects or even controls a matter squarely under their authority. We found that the legal arrangements for the governance and management of Māori land, a taonga tuku iho, are such a matter.

Even though key aspects of the reforms had been debated since 2013 (and earlier in some cases), the 2015 consultation round clearly showed that Māori support for the reforms was materially reduced, now that landowners and key stakeholders had to grapple with the details and implications of the Exposure Bill. TPK's own analysis of the submissions received on the exposure draft showed majority support for just two aspects of the reform. For everything else, there were high levels of concern or opposition. We reproduce TPK's tabulation from chapter 3 to illustrate this point.

We thought that it was not possible to say whether the Crown's changes to the Bill since consultation on the original exposure draft, and its further work on the Māori Land Service and 'enablers workstream', have been sufficient to remove submitters' concerns or opposition.

We found that the Crown will be in breach of Treaty principles if it does not ensure that there is properly informed, broad-based support for Te Ture Whenua Māori Bill to proceed. Māori landowners, and Māori whānau, hapū, and iwi generally, will be prejudiced if the 1993 Act is repealed against their wishes, and without ensuring adequate and appropriate arrangements for all the matters governed by the Act. Empirical research on the Act and the barriers to utilisation will be an essential component in obtaining properly informed support.

The Crown's position, as we understood it, was that it does not wish to proceed without sufficient support, but it argued that it has sufficient support and that Treaty principles, rightly understood, do not restrain it in any case. We did not agree with those propositions, for the reasons given above.

5.5 Summary of Findings in Chapter 4

In chapter 4, we considered the question of whether the substance of the Crown's proposed reforms is consistent with Treaty principles. This involved a close analysis of the

Bill's provisions, the proposed administrative support for Māori landowners (the Māori Land Service), and the 'enablers workstream'. We made findings about each of those in turn.

5.5.1 The Bill's provisions

To evaluate the Bill, we first examined the 1993 Act and its mechanisms for the exercise of tino rangatiratanga in respect of Māori land (principally trusts and incorporations). We also considered the Act's provision for the Crown's duty of active protection of Māori landowners, their property rights, and their Treaty rights – mostly exercised through the protective powers of the Māori Land Court. We found that the 1993 preamble recognised the importance of Māori land as taonga tuku iho, and that it recognised the protection of rangatiratanga as part of the special relationship created between Crown and Māori by the Treaty. For those reasons, the preamble emphasised that retention of Māori land must be promoted, and its occupation, use and development facilitated, for the benefit of the owners and their whānau, hapū and iwi.

It is fundamental in Treaty terms that the new Bill provides protection for both the retention of Māori land, as a taonga tuku iho, and for the effective authority (tino rangatiratanga) of its owners so that they may occupy, use, and develop the land as appropriate for the benefit of present and future generations. We found that this range of Treaty values is now reflected in the November revision of the new Bill's 'purpose and principles' clause. But only in its explanatory English version; the Māori-language version which prevails is flawed and, in our view, cannot be adopted in its present form.

We then explored the question of whether the range of Treaty values is reflected in the rest of the Bill's provisions. The substance of the new Bill is designed to replace Māori Land Court protections with a different 'proxy' for absent or dissentient owners. The old meetings of assembled owners' provisions, largely obsolete since 1993, are to be revived and empowered in the form of a 'participating owners model'. Quorums and voting thresholds will guarantee a basic level of support for decisions. Notification and meeting procedures will be subject to review in the Māori Land Court. But the court will no longer have its present power to review the merits of certain decisions against the 1993 Act's criteria. Owner autonomy is instead to be empowered by reducing the court's role to procedural checks only.

The primary purpose of participating owners' meetings, it is intended, will be to appoint governance bodies. The rangatōpū is designed so that Māori land governors ('kaitiaki') can be company directors rather than trustees, and will owe duties to the company, not landowners. Once governance bodies have been established, court protections will be 'ex post facto': the court will have some remedial powers if a mishap or problem occurs.

We noted the claimants' many concerns about these proposals and about the loss of the court's discretionary powers to protect the rights and interests of all owners, including protection of minorities against oppressive majorities and majorities against unreasonable minorities. We understood the claimants' reservations and concerns. The Bill requires Māori to relinquish a well-understood system of protections, which have guaranteed land retention over the past two decades. The empirical research to establish whether or not the present Act is in fact a barrier to land-use has not yet been carried out.

We found, however, that protection against sale will remain strong through its all-owner agreement threshold (75 per cent), with one exception, which is set out below.

We also found that Treaty principles do not require any one specific form of protection mechanism. So long as a protection mechanism is effective and has the properly-informed, broad-based support of Māori, then its introduction in the new Bill will not be inconsistent with Treaty principles. We noted many doubts, however, that empirical research exists that would allow a properly-informed choice to be made.

Similarly, the change in governance mechanism is not inconsistent with the Treaty, provided Māori are enabled to give properly-informed agreement to that proposal. We have reservations as to the level of training or capability of potential 'kaitiaki', and again cite the lack of research

in that regard as inhibiting our ability to conclude that removal of the court's protective role is consistent with the Crown's duty to ensure a system is in place for the sound governance of Māori land.

We also found that a number of the Bill's features actually nullify or weaken its intended protection mechanisms:

- Minorities of owners will be able to hold second-chance meetings if the first meeting of participating owners fails to reach a quorum. There will be no quorum requirements at all for the second meeting, but also no other form of protection for the rights and interests of absent or dissentient owners. This is in breach of the Crown's Treaty duty of active protection, and of the property and Treaty rights of those owners. Our view is that the possibility of holding such meetings may be the only way to enable decision-making, but the quid pro quo must be restoration of the court's discretionary powers with appropriate criteria acceptable to both the Crown and Māori. This needs to be put to Māori with some urgency.
- Clause 100 of the Bill appears in a complex manner to allow governance bodies to sell Māori land because 75 per cent of *participating* owners only have agreed to a land management plan. The Crown's argument is unconvincing that the Bill's wording gives the court discretionary powers to reject such a sale. This provision is in breach of the principle of active protection, and of the rangatiratanga guarantee in the Treaty that Māori will retain their lands for so long as they wish to do so.
- The Bill only requires governance bodies to meet thresholds of owner agreement in select cases; other important thresholds in the Bill will be non-binding unless included in the governance agreement when it is approved by the participating owners. Allowing governance bodies to make decisions without owner agreement (even if only from participating owners) contradicts the Bill's intended empowerment of owners and breaches the Crown's duty of active protection.
- Owners under some form of incapacity (minors or sick persons without kaiwhakamarumaru) or putative owners who have not succeeded will have no voting rights in the participating owners system. Since voting and quorum thresholds are the main protection for owners, and the court will no longer ensure that non-participating owners' interests are protected, these persons are left with no protection at all. This is a breach of the Crown's duty of active protection.
- In the case of ex post facto remedies, the High Court is out of reach for most Māori owners due to its expense. The Māori Land Court is intended to provide the 'ambulance at the bottom of the cliff', but its power to do so will be reduced under the Bill. The removal of the court's power to grant equitable remedies is a breach of the Crown's duty of active protection.

In addition, we found in chapter 4 that two of the Bill's prospective regimes – for successions and compulsory dispute resolution – are not consistent with Treaty principles in their present form.

We noted that a purely administrative system for successions would provide Māori with less protection than that afforded to landowners under general law, in breach of the principle of equity. We also found that the provisions for opting out of the automatic creation of whānau trusts will likely form a practical barrier to those who wish to exercise this right. Hence, the Crown has not fully removed the element of compulsion in the formation of whānau trusts upon intestate succession. Further, the processes for preparing a whānau trust for registration will also likely prove more difficult and costly than the present system. We found these aspects of the Crown's proposals in breach of Treaty principles.

For compulsory dispute resolution, we found it difficult to understand why the court would not administer the mediation system. It has the legal experience and expertise to decide when cases will benefit from mediation or require hearing. The Bill inconsistently proposes two different mediation processes – one involves court control for aquaculture and fisheries matters, and yet the other excludes court control for land matters. We accepted that

Māori have expressed a general preference for mediation, and we expect the system to reflect that, but in a reasonable and consistent manner that provides for disputes to be directed into the appropriate path by the court, and which takes some account of the wishes of parties to the dispute. Otherwise, the system will not be consistent with the Crown's duty of active protection or the tino rangatiratanga of Māori landowners.

Finally, we found that Māori landowners would be prejudiced if the Bill goes ahead with these Treaty-deficient provisions.

5.5.2 The Māori Land Service and the enablers

We then evaluated the other two components of the Crown's reform of Te Ture Whenua Māori: the Māori Land Service and the Māori enablers workstream. We concluded that the Crown is not driven to introduce the Bill urgently.

The Māori Land Service will provide a new administrative framework for Māori land, performing existing services for Māori landowners and assuming important responsibilities under the new Bill. The service is clearly critical to the effective operation of several important aspects of the Bill, including the participating owners regime, successions, dispute resolution, and the Māori Land Register, but little is known or decided about it as yet.

The relatively new Māori enablers workstream is intended to address a range of long-standing constraints on the utilisation and development of Māori land. These issues – such as landlocked land, and rating and valuation – have long been raised by Māori as serious barriers to the effective use of their land. Moreover, these issues have arisen as a result of past Treaty breaches by the Crown; it therefore has a Treaty duty to remedy them. We have commended the Crown for now recognising – if belatedly – that these issues need to be urgently addressed. We also encouraged the Crown to broaden the scope of this workstream to include access to development finance, a serious issue for Māori landowners and one which will have to be resolved if the goals of the reform are to be realised.

Despite their importance, however, planning for both the Māori Land Service and the Māori enablers was only at an early stage by the time of our hearings in late 2015. This is because the Bill has been the Crown's priority and the focus of much of its work for the past two and a half years. By contrast, the Crown has made very few decisions relating to the Māori Land Service and the enablers, and has been able to offer Māori very little detail about them. It was evident that these workstreams were unlikely to be much further advanced by the time the Crown introduces the Bill into the House in March 2016.

We found that such a fundamental reform of the Māori land regime is too important to proceed with without further certainty on all of its components. The Bill which the Crown proposes to introduce to Parliament in March 2016 depends, in particular, on the Māori Land Service. We considered that the Bill's proposals cannot be fairly assessed by Māori without much more detail about how the Crown will operate and fund the Māori Land Service, and how it will respond to the long-standing constraints to land utilisation which are the subject of the Māori enablers workstream. As a result of this unacceptable level of uncertainty, we found that Māori will be unable to offer properly informed, broad-based support for the Bill to proceed, as Treaty principles require.

5.6 Recommendations

The preamble to the Treaty of Waitangi Act 1975 states 'it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty'. Section 6(3), (4) of our Act enables the Tribunal, if it thinks fit having regard to all the circumstances of the case, to recommend that the Crown take action to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future. A recommendation may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

Although the Wai 2478 inquiry is not an historical inquiry, we are mindful of the long history that lies behind the current Te Ture Whenua Māori Act and the claimants' concerns about its repeal. We are also aware

that the replacement of that historic Act would likely be irreversible, and the 1993 Act's gains for Māori need to be preserved and enhanced in any new legislation. Caution is required on the part of the Crown and – as we have found – the properly informed, broad-based support of Māori is required for any replacement legislation. Further, there is a lack of empirical evidence available to us (as to the parties) on which to make specific recommendations on a number of matters. For those reasons, we have made both general and specific recommendations for the prevention of prejudice.

5.6.1 Process

We recommend that the Crown:

- Avoids prejudice to Māori by further engagement nationally with Māori landowners, through a process of hui and written submissions, after reasonable steps have been taken to ensure that Māori landowners are properly informed by the necessary empirical research, funded by the Crown.
- If such a consultation shows broad Māori support for the Bill to proceed, then we recommend further engagement with Māori stakeholders and leadership groups to make any final refinements and revisions, with an agreed process for those groups to consult their constituencies and confirm that broad support for the Bill remains.
- If properly informed, broad-based support is not forthcoming, then we recommend that the Crown follow the same process in order to determine appropriate amendments to the current Act (as all parties appear to agree that at least some significant amendments are required).

We also recommend that the Crown continues to take advice from independent Māori experts, and to accord a leadership role to a representative advisory group in its engagement with Māori.

5.6.2 The Māori Land Service and the enablers

In respect of the Māori Land Service, we recommend that the Crown develop the methods of administrative support for the operation of Te Ture Whenua collaboratively, with the broad support of Māori landowners. We also recommend that this be done at the same time as consultation (recommended above in section 5.6.1), so that there is more certainty on administrative support before any Bill is enacted.

In respect of the enablers workstream, we recommend that work continue urgently on such matters as rating, valuation, landlocked land, paper roads, and all other matters encompassed in that workstream, in satisfaction of the Crown's Treaty duty to remedy past breaches. We also recommend that access to finance be made a matter of urgent attention, and that work on the 'enablers' keep step with the wider reform package. This is necessary so that Māori may make informed choices on the basis of a concerted strategy to remedy the barriers to utilisation and development of Māori land (where utilisation and development is the choice of the Māori owners and their kin groups).

5.6.3 The Bill and its specific provisions

In general terms, we recommend that the Crown avoids legislative solutions which enable, in legal or practical terms, small groups of participating Māori landowners to effectively alienate the interests of other Māori landowners, including those under some legal or practical incapacity, with no impartial method of control of that outcome. We also recommend that the Crown avoids compulsory solutions, even default ones, in any drafting or redrafting of provisions.

More specifically, we recommend that the Crown ensures that:

- the Māori version of the purpose and principles clause is redrafted in consultation with Māori language experts to adequately and fully express the extremely important concepts to be conveyed in that clause;
- the Māori Land Court's discretionary powers are restored in respect of any second-chance provision, for the protection of all owners' interests, and in accordance with any statutory criteria for the court's review that the Crown and Māori both support;
- a loophole does not allow governance bodies to sell

land on the basis that 75 per cent of participating owners have agreed to a land management plan;
- the Bill requires governance bodies to abide by every owner-agreement threshold in the Bill;
- there are mechanisms to protect the interests of putative owners (who have not yet succeeded) and all owners under incapacity;
- decisions about whether disputes should go to alternative dispute resolution or hearing are left to the qualified discretion of judicial officers in conjunction with their registrars, and not placed in the hands of administrative officers;
- succession processes in case of intestacy are provided for in a practical and inexpensive manner, are dealt with primarily by the court in conjunction with its staff and – if it proceeds as planned – the Māori Land Service, and Māori are assisted to form whānau trusts if that is their wish.

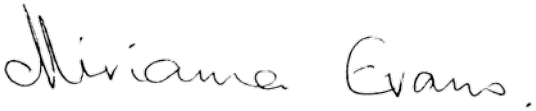
Tables

Table 5.1: Te Puni Kōkiri, 'Te Ture Whenua Māori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 237, 243, 250, 262, 271, 289, 299, 308, 324)

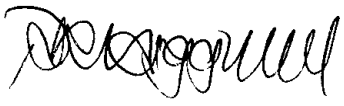
Downloaded from www.waitangitribunal.govt.nz

Dated at Wellington this 30th day of June 2016

Ron Crosby, presiding officer

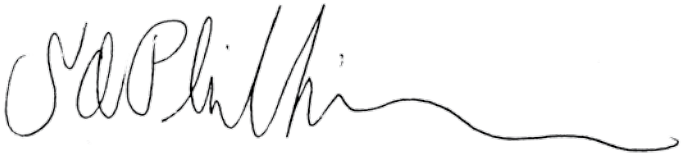


Miriama Evans, member



Professor Rawinia Higgins, member

Professor Sir Hirini Mead KNZM, member



Dr Grant Phillipson, member

Downloaded from www.waitangitribunal.govt.nz

APPENDIX I

WAI 2478 SELECT RECORD OF INQUIRY

Record of Hearings

The Tribunal

The Tribunal constituted to hear the Wai 2478 urgency claim comprised Ronald Crosby (presiding officer), Miriama Evans, Professor Rawinia Higgins, Professor Sir Hirini Mead KNZM, and Dr Grant Phillipson. Tim Castle was initially the presiding officer, before stepping down and being replaced by Ronald Crosby. Tureiti Moxon was also a panel member before withdrawing; she was replaced by Miriama Evans.

The hearings

Two hearings were held at the Waitangi Tribunal's offices in Wellington from 11 to 13 November 2015, and on 9 December 2015.

Record of Proceedings

Statements of claim

1.1.1 Marise Lant, amended statement of claim for Wai 2478, identifying prejudice suffered, 11 August 2014
(a) Marise Lant, second amended statement of claim for Wai 2478, 23 September 2014
(b) Marise Lant, third amended statement of claim for Wai 2478, 16 July 2015

1.1.2 Cletus Maanu Paul, statement of claim for Wai 2480, 21 August 2014

1.1.3 Lorraine Norris et al, statement of claim for Wai 2512, 2 October 2014
(a) Lorraine Norris et al, amended statement of claim for Wai 2512, 17 July 2015

Statement of issues

1.4.1 Waitangi Tribunal, statement of issues for Wai 2478, 30 October 2015

Tribunal memoranda and directions

2.5.1 Waitangi Tribunal, memorandum of the deputy chairperson directing interested parties to file submissions and evidence in response to application for urgent hearing, 11 August 2014

2.5.2 Waitangi Tribunal, memorandum of the chairperson appointing the presiding officer and panel members, and directing them to determine the application for an urgent hearing, 14 August 2014

2.5.5 Waitangi Tribunal, memorandum of the chairperson regarding the appointment of Tim Castle as presiding officer, 20 August 2014

2.5.7 Waitangi Tribunal, memorandum of the chairperson consolidating Wai 2478 and Wai 2480, and directing the panel to determine the application for an urgent hearing, 21 August 2014

2.5.8 Waitangi Tribunal, memorandum of the presiding officer directing the Crown, applicant and interested parties to file submissions and evidence in response to the Wai 2480 urgency application, and directing the applicant to file submissions and evidence in reply to those of the Crown in the Wai 2478 urgency application, 29 August 2014

2.5.12 Waitangi Tribunal, memorandum of the chairperson noting Tim Castle's decision to stand down as presiding officer and appointing Ronald Crosby in his place, as well as appointing Tureiti Moxon as a member of the Tribunal panel, and ordering the consolidation of the Wai 2478 and Wai 2512 claims for record of inquiry purposes, 19 June 2015

2.5.15 Waitangi Tribunal, memorandum of the chairperson noting that Tureiti Moxon has stepped down from the panel, and replacing her with Miriama Evans, 24 July 2015

2.5.20 Waitangi Tribunal, memorandum of the presiding officer granting Nellie Rata and Te Kotahitanga o Nga Hapu Ngapuhi interested party status in Wai 2478, 16 September 2015

2.5.21 Waitangi Tribunal, memorandum of the presiding officer granting urgency to the hearing of the Wai 2478 and 2512 claimants' substantive claims, 30 September 2015

2.5.22 Waitangi Tribunal, memorandum of the chairperson appointing Dr Grant Phillipson to the panel, 7 October 2015

2.5.23 Waitangi Tribunal, memorandum of the presiding officer granting the Crown leave to file a further submission in the Wai 2478 inquiry, and directing the New Zealand Māori Council to advise whether it will participate in the consolidated inquiry, 13 October 2015

2.5.29 Waitangi Tribunal, memorandum of the presiding officer releasing the final Tribunal Statement of Issues, 30 October 2015

2.5.35 Waitangi Tribunal, memorandum of the presiding officer confirming the Tribunal's oral directions at hearings on 11 to 13 November 2015, including the decision to hold an additional hearing on 9 December, 16 November 2015

2.7.3 Waitangi Tribunal, memorandum of the presiding officer addressing the Crown's release of a new draft Bill and announcement of a public information hui, 3 February 2016

2.7.4 Waitangi Tribunal, memorandum of the presiding officer announcing the forthcoming release of the Tribunal's final pre-publication report, 29 February 2016

Submissions and memoranda of parties

3.1.3 Crown counsel for Wai 2478, memorandum contending that clause one of the second schedule to the Treaty of Waitangi Act 1975 does not permit Tim Castle to remain presiding officer in this inquiry, 18 August 2014

3.1.5 Crown counsel for Wai 2478, memorandum recording oral submissions made in teleconference regarding the expiry of Tim Castle's term as presiding officer, 20 August 2014

3.1.13 Crown counsel for Wai 2478, memorandum regarding the second amended statement of claim, and the amended application for urgency filed by counsel for the applicant, 6 October 2014

3.1.14 Claimant counsel (Ertel) for Wai 2478 and 2480, memorandum informing the Tribunal of counsel's intention to seek the consolidation of Wai 2478 and 2480, and addressing the role of Tim Castle as presiding officer, 21 October 2014

3.1.15 Crown counsel for Wai 2478, memorandum responding to the presiding officer's direction to reply to claimant counsel memorandum of 21 October 2014, and arguing that a new presiding officer should be appointed, 29 May 2015

3.1.16 Crown counsel and claimant counsel (Watson) for Wai 2478 and 2512, joint memorandum seeking the consolidation of Wai 2478 and 2512 into one record of inquiry and urging the chairperson of the Waitangi Tribunal to appoint a new presiding officer to hear the consolidated claim, 15 June 2015

3.1.22 Crown counsel for Wai 2478, memorandum of the Crown opposing applications for urgent hearing, 3 August 2015

3.1.48 Claimant counsel (Ertel) for Wai 2478, memorandum regarding the claimants in these proceedings, 23 October 2015

3.1.69 Crown counsel for Wai 2478, memorandum filing affidavit of John Grant and revised draft Te Ture Whenua Māori Draft Exposure Bill, 9 November 2015
(a) Te Ture Whenua Māori Draft Exposure Bill 2015, revised draft, 9 November 2015

3.1.71 Claimant counsel (Thornton) for Wai 2478 and Wai 2512, memorandum requesting the postponement of hearings, 10 November 2015

3.1.74 Crown counsel for Wai 2478, memorandum filing revised, track-changed draft of Te Ture Whenua Māori Draft Exposure Bill, 16 November 2015
(a) Te Ture Whenua Māori Draft Exposure Bill 2015, revised, track-changed draft, 16 November 2015

3.1.76 Crown counsel for Wai 2478, memorandum accompanying the release of a document bundle, 20 November 2015

3.1.79 Crown counsel for Wai 2478, memorandum accompanying the release of a document bundle, 27 November 2015

3.1.95 Crown counsel for Wai 2478, memorandum filing submission received from the Federation of Māori Authorities, 24 December 2015
(a) Federation of Māori Authorities, submission to the Crown on changes to the draft Te Ture Whenua Māori Bill, 18 December 2015

3.4.11 Crown counsel for Wai 2478, memorandum advising that a new draft of Te Ture Whenua Māori Bill is available and that further public information hui about the reforms will be held, 29 January 2016

Opening submissions

3.3.1 Counsel for the interested party, opening submissions, 5 November 2015

3.3.2 Claimant counsel (Watson), opening submissions for Wai 2478, 6 November 2015

3.3.3 Crown counsel, opening submissions for Wai 2478, 6 November 2015

3.3.4 Claimant counsel (Ertel), opening submissions for Wai 2480, 6 November 2015

3.3.5 Claimant counsel (Thornton), opening submissions for Wai 2512, 6 November 2015

Closing submissions

3.3.6 Crown counsel, closing submissions for Wai 2478, 14 December 2015
(a) Crown counsel, appendix one to closing submissions for Wai 2478: 'Protections against Alienation in the Revised Draft Bill Compared to the 1993 Act', 14 December 2015

3.3.7 Counsel for interested party, closing submissions for Wai 2478, 18 December 2015
(a) Counsel for interested party, supporting document filed in support of closing submission s for Wai 2478, 18 December 2015

3.3.8 Claimant counsel (Watson), closing submissions for Wai 2478, 20 December 2015

3.3.9 Claimant counsel (Ertel), closing submissions for Wai 2478, 18 December 2015
(a) Claimant counsel (Ertel), oral closing submissions for Wai 2478, 8 December 2015

3.3.10 Claimant counsel (Thornton), closing submissions for Wai 2512, 18 December 2015

Transcripts

4.1.2 National Transcription Service, draft transcript of hearing, Waitangi Tribunal Offices, Wellington, 11–13 November 2015

4.1.3 National Transcription Service, draft transcript of hearing, Waitangi Tribunal Offices, Wellington, 9 December 2015

Record of Documents

A1 John Alexander Grant, first brief of evidence, 21 August 2014
(a) John Alexander Grant, papers in support of first brief of evidence, 21 August 2014

A4 Marise Lant, first brief of evidence, September 2014

(a) Marise Lant, papers in support of first brief of evidence, September 2014
(b) Marise Lant, papers in support of first brief of evidence, September 2014

A5 John Alexander Grant, fourth brief of evidence, 3 August 2015
(a) John Alexander Grant, papers in support of fourth brief of evidence, 3 August 2015

A6 Marise Lant, second brief of evidence, 15 September 2015
(a) Marise Lant, papers in support of second brief of evidence, 10 September 2015

A8 Crown counsel, first disclosure bundle, no date

A9 Marise Lant, fourth brief of evidence, 30 October 2015

A11 Moana Jackson, brief of evidence, 2015

A12 Whatarangi Winiata, brief of evidence, 30 October 2015

A13 Kerensa Johnston, first brief of evidence, 30 October 2015

A14 Prudence Jane Tamatekapua, brief of evidence, 30 October 2015

A17 Rihari Takuira, brief of evidence, 30 October 2015

A20 Māori Land Court Judges, 'Te Ture Whenua Māori Bill: Submission of the Judges of the Māori Land Court', 7 August 2015

A21 John Alexander Grant, fifth brief of evidence, 3 November 2015
(a) John Alexander Grant, papers in support of fifth brief of evidence, 3 November 2015

A22 Whaimutu Dewes, first brief of evidence, 2 November 2015
(a) Whaimutu Dewes, papers in support of first brief of evidence, 2 November 2015

A23 Matanuku Mahuika, first brief of evidence, 3 November 2015

A24 Lillian Anderson, first brief of evidence, 4 November 2015

A25 Derek Te Ariki Morehu, brief of evidence, 30 October 2015

A26 Marise Lant, fifth brief of evidence, 2015

A27 John Alexander Grant, sixth brief of evidence, 9 November 2015
(a) 'Te Ture Whenua Māori Bill – Summary of Main Points of Change following Consultation', no date

A28 Crown counsel, second disclosure bundle, 10 November 2015

A29 Crown counsel, third disclosure bundle, volume 1, no date
(a) Crown counsel, third disclosure bundle, volume 2, no date
(b) Crown counsel, third disclosure bundle, volume 3, no date

A31 Freshwater and Conservation Iwi Leaders Groups, panui, no date

A32 John Alexander Grant, answers to questions in writing, 27 November 2015

A34 Whaimutu Dewes, second brief of evidence, 27 November 2015

A35 Michael Belgrave, Anna Deason, and Grant Young, 'Crown Policy with Respect to Māori Land, 1953–1999', September 2004

A36 Kerensa Johnston, second brief of evidence, 16 December 2015
(a) Kerensa Johnston, papers in support of second brief of evidence, 16 December 2015

A38 Claimant counsel (Watson), documents released under the Official Information Act, 7 December 2015

A39 Crown counsel, third disclosure bundle, volume 4, no date

A40 Lillian Anderson, second brief of evidence, 18 December 2015

APPENDIX II

TE TURE WHENUA MĀORI BILL – MAIN POINTS OF CHANGE FOLLOWING CONSULTATION

The table on the following pages summarises the main points of change to Te Ture Whenua Māori Bill following consultation. It is copied from John Alexander Grant, 'Te Ture Whenua Māori Bill – Summary of Main Points of Change following Consultation', 9 November 2015 (doc A27(a)).

Te Ture Whenua Māori Bill – Summary of Main Points of Change following Consultation

	Part 1: Preliminary provisions	Part 2: Whenua Māori/ whenua tāpui	Part 3: Ownership interests	Part 4: Dispositions	Part 5: Authority to act	Part 6: Governance bodies	Part 7: Administration of estates
Exposure draft	Sets out purpose and principles. Defines terms used in the Bill. Explains Māori terms. Binds the Crown.	Defines 'Māori customary land' and 'Māori freehold land'. Prohibits or restricts dispositions. Provides for reservation of whenua tāpui.	Specifies rights of owners. Collective ownership option. Specifies decision-making requirements. Whānau trust provisions. Kaiwhakamarumaru regime.	Regulates dispositions. Sets out role of Māori Land Court for dispositions. Establishes a preferred recipient tender process. Provides for occupation leases.	Provides for: Administrative kaiwhakarite. Managing kaiwhakarite. Appointment of governance bodies.	Specifies powers, duties, and responsibilities of governance bodies, rangatōpū, and their kaitiaki.	Distribution of beneficial interests in Māori land when an owner dieswithout a will. Vesting of beneficial interests in Māori land that are gifted by will.
Points of change	The purpose and principles will be restructured and redrafted with stronger references to Te Tiriti o Waitangi. The 'explanation' of Māori terms will be moved from the bill clauses and inserted, instead, in the explanatory note. The requirements to establish whāngai status will be changed and the right of whāngai to succeed will be treated as a separate matter.	It will be clarified that the chief executive will not be given power to determine the status of land. The court's discretion to decline removal of Māori freehold land status will be restored. Public Works Act taking of land reserved as whenua tāpui will be prohibited. The decision threshold to reserve land as marae or urupa with changed ownership will be raised.	There will be clarity that collective owners are 'owners' with a beneficial interest. Improvements will be made to the decision-making process. There will be greater flexibility for family members to combine their interests in a whānau trust. 'Immediate family' will be removed from the purpose of whānau trusts.	'Immediate family' will no longer form part of the definition of 'preferred recipient' but grandparents, parents, uncles, aunts, siblings, nieces, nephews, and first cousins will be. Partition will only be permitted if it assists owners to retain, occupy and develop their land forthe benefit ofthe owners, their whānau. The occupation lease provisions are to besubstantially rewritten.	The managing kaiwhakarite regime will be removed. Existing trusts and incorporations will not be required to become rangatōpū. Provisions will be added to deal with simultaneous orcompeting proposals to appoint a governance body. The threshold for an owners' decision to revoke the appointment of a governance body will be increased.	The chief executive will not have an adjudicatory function. The Māori Land Court will be given jurisdiction to investigate alleged irregularities in the appointment of kaitiaki. The obligation to notify the Māori Land Service of unclaimed distributions will be removed. If the owners decide to replace an existing governance body with a new one, a full distribution scheme will not be required.	Whānau will be provided with an option to obtain succession by individuals instead of forming a whānau trust on intestate succession. The chief executive's role will be administrative only. Processing requirements will be improved.

	Part 8: Registers, jurisdiction, etc	Part 9: Dispute resolution	Part 10: Repeals etc	Parts 11–16: Te Kooti Whenua Māori	Schedule 1: Transitional provisions	Schedule 2: Decision-making process	Schedule 3: Governance agreements
Exposure draft	Māori land register and registration. Jurisdiction of court forcertain land matters including landlocked land. Notice to owners of Māori freehold land.	Establishes a dispute resolution service for matters relating to Māori land.	Repeal of current Act and regulations. 112 Acts and 13 regulations amended.	Māori Land Court and Māori Appellate Land Court continued. Updated provisions arising from Judicature Modernisation Bill.	Transitions existing entities into the new regime.	Sets out a default decisionmaking process for owners.	Sets out the requirementsfor governance agreements.
Points of change	The Bill will clarify that the functions, powers and duties of a Māori Land Service chief executive will be administrative, not judicial. Information in the Māori Land Register will be subjectto the special powers of the Chief Judge to correct errors and omissions. Further policy work on landlocked land is in progress.	Kaitakawaenga will be required to 'possess suitable skills and attributes to support the parties to resolve the dispute'. Only the court (not the chief executive) will be able to refer an unresolved dispute back for further dispute resolution. The matters that must go to dispute resolution before the court can deal with them will be changed to ensure they do not include disputes involving points of law.	The consequential amendments were not included in the exposure draft of the Bill and are still being developed.	Failure to answer to a summons will be made a ground for contempt.	The transition process for existing Māori incorporations and ahu whenua/ whenua tōpū trusts will be significantly simplified.	The requirement for newspaper advertising will be replaced with a requirement to give notice using an internet site and any other method reasonably likely to bring the matter to the notice of owners. There will be new powers to deal with frivolous or vexatious proposals.	It is intended to maintain fixed terms for kaitiaki but to give owners greater flexibility to set the length of the term themselves. There will be a standard governance agreement with appropriate provisions and existing trusts will be able to continue with their existing trust orders.

Downloaded from www.waitangitribunal.govt.nz

BIBLIOGRAPHY

Articles, Books, Commissioned Reports

Alexander, David. 'East Coast Survey Issues'. Commissioned research report, Wellington: Crown Forestry Rental Trust in association with Te Kura Takai Puni Claims Committee, 2003

Boast, Richard. 'The Evolution of Māori Land Law 1865–1993'. In *Māori Land Law*. Edited by Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith, pp 65–120. 2nd ed. Wellington: LexisNexis, 2004

Butterworth, Graham V, and Susan M Butterworth. *The Māori Trustee*. Wellington: Māori Trustee, 1991

Harris, Aroha, 'Māori Land Title Improvement since 1945: Communal Ownership and Economic Use', *New Zealand Journal of History*, vol 31, no 1 (1997), pp 132–152

'Minutes of Evidence', *Appendix to the Journal of the House of Representatives*, 1891, session 2, G-1

Murray, J E. *Crown Policy on Māori Reserved Lands, 1840–65, and Lands Restricted from Alienation, 1865–1900*. Waitangi Tribunal Rangahaua Whanui Series. Wellington: Waitangi Tribunal, 1997

'Native Lands and Native-Land Tenure: General Report on Lands Already Dealt with and Covered by Interim Reports'. *Appendix to the Journal of the House of Representatives*, 1907, G-1C

New Zealand Parliamentary Debates, vol 14

'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', 1891. *Appendix to the Journal of the House of Representatives*, 1891, session 2, G-1

Te Puni Kōkiri. *Te Ture Whenua Māori Act 1993: An Introduction*. Wellington: Te Puni Kōkiri, 1993

———. *Te Ture Whenua Māori Act 1993: A Summary*. Wellington: Te Puni Kōkiri, 1993

———. *Te Ture Whenua Māori Act 1993: A Technical Discussion*. Wellington : Te Puni Kōkiri, 1993

———. *Te Ture Whenua Māori Act 1993: A Working Guide to the Act*. Wellington: Te Puni Kōkiri, 1993

Ward, Alan. *National Overview*. 3 vols. Waitangi Tribunal Rangahaua Whanui Series. Wellington: GP Publications, 1997

Walzl, Tony. 'East Coast Lands: Twentieth Century Overview'. 3 vols. Commissioned research report, Wellington: Crown Forestry Rental Trust, 2010

———. 'Twentieth Century Overview Part II, 1935–2006'. Commissioned research report, Wellington: Crown Forestry Rental Trust, 2009

Williams, David V. '*Te Kooti Tango Whenua*': *The Native Land Court, 1864–1909*. Wellington: Huia, 1999

Waitangi Tribunal Reports

Waitangi Tribunal. *The Hauraki Report*. 3 vols. Wellington: Legislation Direct, 2006

———. *He Maunga Rongo: Report on Central North Island Claims, Stage One*. Rev ed. 4 vols. Wellington: Legislation Direct, 2008

———. *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*. Wellington: Legislation Direct, 2014

———. *He Whiritaunoka: The Whanganui Land Report*. 3 vols. Wellington: Legislation Direct, 2015

———. *Initiation, Consultation, and Consent : Chapter 3 of Report into Claims concerning Proposed Reforms to Te Ture Whenua Māori Act 1993, Pre-publication Version*. Wellington : Waitangi Tribunal, 2016
———. *Ko Aotearoa Tēnei : A Report into Claims concerning New Zealand Law and Policy affecting Māori Culture and Identity, Te Taumata Tuarua*. 2 vols. Wellington : Legislation Direct, 2011
———. *Muriwhenua Land Report*. Wellington : GP Publications, 1997
———. *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*. Wellington : Waitangi Tribunal, 1983
———. *Report of the Waitangi Tribunal on the Orakei Claim*. 2nd ed Wellington : Brooker and Friend Ltd, 1991
———. *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*. Wellington : Legislation Direct, 2012
———. *Te Ika Whenua Rivers Report*. Wellington : GP Publications, 1998
———. *Te Tau Ihu o te Waka a Maui : Report on Northern South Island Claims*. 3 vols. Wellington : Legislation Direct, 2008
———. *Te Urewera, Pre-publication, Part II*. Wellington : Waitangi Tribunal, 2010
———. *Te Urewera, Pre-publication, Part IV*. Wellington : Waitangi Tribunal, 2012
———. *Te Urewera, Pre-publication, Part V*. Wellington : Waitangi Tribunal, 2014
———. *Te Urewera, Pre-publication, Part VI*. Wellington : Waitangi Tribunal, 2015
———. *Turanga Tangata Turanga Whenua : The Report on the Turanganui a Kiwa Claims*. 2 vols. Wellington : Legislation Direct, 2004
———. *The Wairarapa ki Tararua Report*. 3 vols. Wellington : Legislation Direct, 2010
———. *Whaia te Mana Motuhake / In Pursuit of Mana Motuhake : Report on the Maori Community Development Act Claim*. Wellington : Legislation Direct, 2015
———. *The Whanganui River Report*. Wellington : Legislation Direct, 1999

Legal Cases

Air New Zealand v Wellington International Airport Ltd High Court Wellington CP403/91, 6 January 1992
Grace – Ngarara West AS5B2A (2014) 217 Aotea MB 268
Wellington International Airport v Air New Zealand [1993] 1 NZLR 671 (CA)

Legislation

Adoption Act 1955
High Court Rules
Judicature Act 1908
Māori Affairs Act 1953
Māori Affairs Amendment Act 1967
Māori Affairs Amendment Act 1974
Māori Affairs Bill 1987
Māori Assembled Owners Regulations 1995

Māori Land Settlement Act 1905
Māori Purposes Act 1975
Māori Purposes Act (No 2) 1973
Native Land Act 1909
Native Land Act 1931
Native Lands Frauds Prevention Act 1881 Amendment Act 1888
Te Ture Whenua Māori Act 1993
Te Ture Whenua Māori Amendment Act 2002

ACKNOWLEDGEMENTS

The Wai 2478 Tribunal would like to thank the following people who provided us with valuable support during the preparation of the inquiry, the hearing of the claims, and the preparation of this report. Among them were Paige Bradey and Sarah Gwynn (registrarial assistance); Toni-Faith Temaru (claims coordination); Tara Hauraki and Jenna-Faith Allan (inquiry facilitation); Rangi McGarvey (simultaneous interpretation); Carl Blackmun, Dr Ann Parsonson, Richard Towers, and Michael Allen (report-writing assistance); Max Oulton (mapping); Dominic Hurley (typesetting and editorial assistance); and Jane Latchem, Kate Geange, and Andrew McIndoe (reference checking, image location, and other assistance).