Te Hunga Roia Māori o Aotearoa

(New Zealand Māori Law Society Incorporated)

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The Māori Law Society Inc.

Submission on review of

Te Ture Whenua Māori Act 1993

14 JUNE 2013

TE HUNGA ROIA MĀORI O AOTEAROA

SUBMISSION ON

REVIEW OF TE TURE WHENUA MĀORI ACT 1993

1. INTRODUCTION

1.1 This submission is made for and on behalf of Te Hunga Roia Māori o Aotearoa (**THRMOA**), also known as the New Zealand Māori Law Society Incorporated.

1.2 THRMOA has a membership of approximately 350 Māori lawyers. In addition to these members, THRMOA also includes membership of Māori students studying towards a Bachelor of Laws or taking law related papers offered at wānanga throughout Aotearoa.

1.3 THRMOA encourages the effective networking of members, makes submissions on a range of proposed legislation, facilitates representation of its membership on selected committees, and organises regular national hui which provide opportunities for Māori to discuss and debate legal issues relevant to Māori.

1.4 When making submissions on law reform, THRMOA does not attempt to provide a unified voice for its members, or to usurp the authorities and responsibilities of whānau, hapū and iwi, but rather seeks to highlight areas of concern, and suggest further reform options where appropriate.

1.5 The current co-presidents of THRMOA are Spencer Webster and Ani Bennett.

1.6 This submission is made on the review of Te Ture Whenua Maori Act 1993 as presented in the discussion document dated March 2013 and prepared by the Review Panel.

1.7 The structure of the submission follows the structure of the Discussion Document.

CONTACT PERSON REGARDING THIS SUBMISSION

Spencer Webster/Ani Bennett
Co-Presidents
Te Hunga Roia Māori o Aotearoa
C/- New Zealand Law Society
PO Box 5041
WELLINGTON

Email: maorilawsociety@lawsociety.org.nz Attention: Spencer Webster/Ani Bennett

TE HUNGA ROIA MĀORI O AOTEAROA

2. PRELIMINARY COMMENTS

Review process

2.1 The discussion document appropriately records that Maori land is a taonga tuku iho. It has a cultural and spiritual dimension that must be acknowledged. Iwi, hapu and whanau locate their identity by their whenua and their sites of significance that carry the imprint of their tupuna. To a large extent, that connection to their identity is manifested today through their ownership in Maori land. Therefore, the legislation applying to Maori land is important in respect of the connection of people to their land.

2.2 Consequently, it is no surprise that the legislation applying to Maori land since 1862 has had a profound and significant impact on iwi, hapu and whanau mostly in a negative way.

2.3 In that context, Te Ture Whenua Maori Act 1993 ("Act") was a long overdue response to a groundswell of concern and frustration resulting from the experience with previous legislative regimes and policies applying to Maori land. The Te Ture Whenua Maori bill took more than ten years to pass through the various stages of law-making. This reflects the delicate nature of the issues involved in proposing substantive changes to the relationship between Maori and their lands.

2.4 It cannot be said that there is a groundswell from iwi, hapu and whanau seeking any substantive amendment to the Act at this time. In our view, any changes to the Act, beyond mere technical changes, ought to be proposed and supported by iwi, hapu, and whanau to ensure sustainable outcomes. That does not appear to be the case in this review. While there is reference on page 5 of the discussion document to an owner aspirations report that has formed the basis for the review, the propositions from the Review Panel do not appear to align with the stated summary of the aspirations expressed by the contributing land owners. The reference at page 5 quickly turns from the owner aspirations of a balanced approach to Maori land to a discussion on economic returns and productivity. Therefore, the alignment of the propositions with owner aspirations needs to be tested more rigorously and widely.

2.5 In the history of Maori land legislation and policy, Government led and imposed initiatives have led to calamitous results, loss, grievance and bitterness. This Government should be careful not to tread in that same path. Unilateral action will lead to bad law and further grievances. Certain of the propositions advanced by the Review Panel will almost certainly lead to further grievances. Some are eerily similar to past failed policies imposed by previous Governments such as the uneconomic shares regime and the taking or compulsory management of lands for "better utilisation". On the other hand, there are some changes that will assist the engagement of land owners with the Maori Land Court.

2.6 In any event, a longer conversation is required about the needs of owners and the various interventions required to facilitate the retention and utilisation of Maori land. We are concerned by the process adopted for this review. The Review Panel has unilaterally prepared a discussion document that has been circulated for submissions. A series of hui have been held to inform people of the review and the content of the discussion document. With respect, this process is not sufficient to proceed with many of the changes contemplated by the discussion document. Much broader discussion and input is required from iwi, hapu and whanau. The

discussion document merely records that the Government will consider submissions received on the discussion document. It does not state what will occur following the consideration of the submissions. We urge caution against proceeding with any significant changes unless they are supported by all stakeholders through a robust and thorough process and research/evidence that such changes are even necessary.

2.7 It must also be remembered that the owners and managers of Maori land are a wide and diverse group. It is necessary to understand the impact of any legislative changes on all of the stakeholders and not just sections. While changes may assist one section of stakeholders, it may be detrimental to others. Therefore, there needs to be a balanced approach to proposing any changes to the Act.

2.8 Accordingly, we recommend that the Government facilitate a broader discussion with all stakeholders that ensures iwi, hapu and whanau are leading any propositions for change to the Act. Ultimately, it is these stakeholders that will be affected by any legislative changes not the Government.

Scope of review

2.9 The Review Panel notes that it was restricted to considering legislative change. In our submission, this is too limited a scope for a review of the utilisation of Maori land. If the Government wishes to assist in the effective utilisation of Maori land, a much broader lens is required. The effect of the Act on the utilisation of land is often negligible or not an issue at all. Many successful Maori land entities, small and large, flourish under the existing legislation. That some do not flourish or have greater productivity, is not necessarily a result of the legislation.

2.10 The foreword of the discussion document records that "through this review, we have the chance to put hundreds of millions of dollars extra into the hands of whanau, hapu and iwi…". With respect, the propositions will not necessarily lead to that outcome. Legislative change on its own is not simply going to result in hundreds of millions of dollars in new revenue. Economic utilisation is the result of a number of factors such as:

(a) The significance of the land;

(b) Owner aspirations;

(c) The size, location and quality of the land;

(d) Access to human resources, capital and finance;

(e) Zoning and other regulatory rules that apply to the land;

(f) Proximity to infrastructure and markets; and

(g) The availability of suitably qualified governors and managers.

2.11 This Review and the discussion document does not address those factors yet these may have a more significant impact on utilisation than any limitations imposed by the governing statute.

2.12 There is also a risk that the Government in setting a limited scope for the review will lose an opportunity to achieve broader improvements in the legislation. It is clear

that the Review Panel, and by extension the Government, are only considering the propositions in the discussion document. However, land owners, iwi, hapu, whanau, the Maori Land Court and the legal profession will have many examples of matters that could improve the Act. These improvements may not fall within the utilisation focus of the review; however, they will make a difference to the owners of Maori land and ought to be considered.

2.13 We now turn to our submissions on each of the propositions posed by the Review Panel.

3. PROPOSITION 1: UTILISATION OF MĀORI LAND SHOULD BE ABLE TO BE DETERMINED BY A MAJORITY OF ENGAGED OWNERS

General comment

3.1 There is no quantifiable basis provided for the mischief the report says that Proposition 1 is trying to address, and therefore there is no evidence that such a radical change in reducing the Courts supervisory role is warranted, particularly where decisions can already be made by a majority.

3.2 As a matter of general law, for multiply owned general land, one owner in common is unable to bind another owner in common to a matter of land use without their consent. This stems directly from their unity of possession. The obvious example is that of the grant of possession (or a possessory right) to a third party by one owner, which absent the consent of the other owner, can be determined at will by that other owner. The current Act however uniquely empowers the Court to effectively circumvent that general law and to order such arrangements, provided the Court is satisfied that there is a sufficient degree of support amongst the owners.

3.3 What that means in terms of numbers is not prescribed. Rather, it is left to the discretion of the Court, an independent expert, looking at the schema of the Act as a whole, to objectively decide such a proposal. Inherently therefore, there is protection for all owners, in the form of the Court, acting judicially. What remains unknown is how many proposals for use are being unduly scuttled in this present schema. It is assumed that such instances would be atypical, but there is no data to know this for sure.

3.4 Before "lowering the bar" again for consent, and thereby exposing all owners to decisions they may not know about, or ultimately agree with, there needs to be a proper, well informed rationale for so doing. While on many occasions the lack of speed with which the Court processes such applications is extremely frustrating for owners, that is not a fault in the legislative schema.

3.5 Secondly, it is not clear how Proposition 1 may be effected (or effective) in practice. For instance in determining whether a majority of owner support has been reached, would the focus be on share quantum, or numbers of owners, or a combination of the two? Would a right to test such decisions by dissenting owners be maintained, and if so on what basis? There is also the possibility that creating such a distinction could legitimately lead to calls for partitions between "the engaged" and "the disengaged" (see the comments below).

Definition of an engaged owner

3.6 The Discussion Document proposes that decision-making under the Act (with the exception of alienation) be by a majority vote of "engaged owners." An "engaged" owner is a person who has "actively demonstrated their commitment to their ownership by exercising a vote either in person or by proxy or nominee."

3.7 THRMOA is concerned that there is insufficient consideration and analysis in the Discussion Document to allow a full understanding of what is proposed and how it will work in practice. It is unclear if the Panel's proposal means that, in the case of any Māori land proposal, anyone who chooses to vote is thereby automatically regarded as "engaged", and all that is required for any proposal to be activated is that it be agreed to by simple majority of owners who choose to participate. It is implied that by voting, owners are deemed to be "engaged." If so, the proposal implies that all decisions, alienation aside, are to be made by a simple majority of whoever votes.

3.8 It is unclear whether an owner must have participated by voting on earlier occasions to retain the right to vote on later occasions – that is, that owners of any particular block become differentiated into two categories, i.e. the "engaged" and the "disengaged", with the latter becoming in effect disenfranchised.

3.9 If this is what is intended, then numerous problems might arise. For example, does such a change mean that even if a particular proposal is opposed by a majority of owners it can still nevertheless proceed if acceptable to a majority of "engaged" owners (those who voted on former occasions)? Is it intended to create, in effect, a body of disfranchised owners who remain permanently unable to be involved in land management decisions if they have not bothered to exercise their rights on former occasions? Shareholdings in most blocks are not equal, and such a change might mean that large shareholders, who are more likely to be those who are "engaged" in the management of any particular block, may gain an enhanced ability to control the management of a block. The Discussion Document does not indicate whether consideration was given to the impact of an imbalance in power and control between categories of owners and what is required to encourage so-called "disengaged" owners to become engaged in decisions to do with their whenua. These matters require more thought before embarking on the current proposals.

3.10 The second point on which comment is sought is whether "utilisation decisions" can be challenged only if there is an issue as to whether fair value has been obtained or where there has been a conflict of interest or other breach of duty. The discussion here is too brief to provide further comment. Is it intended that there be a restriction on the ability of owners to challenge any particular decision in the Māori Land Court?

3.11 An example of the possible unintended consequences resulting from an under informed or unduly narrow review process is that the distinction between "engaged" and "disengaged" owners might also require further thought to be given to who is the "occupier" under the Local Government (Rating) Act 2002, and bears consequent liability to pay rates. If this occurs, might there be an unintended impact on owners' "engagement" levels as rates bills become more personally targeted.

3.12 A further practical result of making such a distinction between owners is that some owners might seek deliberately to disengage from their kinfolk, because they simply do not like the direction in which their "engaged" relations are heading. This is not unlike the minority bail out provisions for shareholders under the Companies Act 1993. This could lead to the very legitimate request for orders by "disengaged owners" to further partition and subdivide, which would actually appear to be the very antithesis of what the Panel is trying to do by its proposals under Proposition 5.

The Māori Land Court's role

3.13 The proposals exclude the Court as a check on land uses that are not sales or permanent dispositions. It proposes a simple majority threshold requiring 50 percent or more, regulated by the owners, provided there has been full and timely disclosure of the proposal to all registered owners. This is not unlike the rules for shareholders under the Companies Act 1993.

3.14 THRMOA agrees with the proposition that is perhaps implied herein - that if all owners consent or agree, then no Court endorsement ought to be required. This is consistent with the law applicable to non-Māori land land. To that extent, this proposal, if it is also intended, has merit.

3.15 However, the proposal to lower the requirement for consent, in the event that unanimity is not possible, will be problematic, particularly when coupled with the proposal to excise the Court's ability to exercise judicial oversight. Further:

(a) The Panel does not explain the extent of the problem that lowering the threshold for consent will address, nor does it explain how the protection formerly provided by the Court to all owners will be alternatively covered. If ancestral or indigenous private rights are to be affected, an evidential basis is required.

(b) Ultimately reconciling the provisions of s 17(2)(d) of the Te Ture Whenua Māori Land Act (which is the articulation of the key objectives of the schema) with such a proposal is likely to prove difficult, if those key objectives are to stay. However, the Panel did not elaborate as to how these may be reconciled.

(c) It is dangerous to borrow other co-owner models (like shareholdings under the Companies Act 1993) and apply them to multiply owned ancestral land, and its uses by kin-group owners, without further provision for the different subject matter. Predominantly, in this context ownership is hereditary, rather than by choice or consent as in the case of company shareholders. The land is held as a taonga tuku iho handed down from owners' tupuna and is not bought and sold in the nature of general land. The owners have no choice about where this land is located or how it came to be held by the forebears. It is theirs by birthright. Therefore an economic ownership model alone, based on the pursuit of economic outcomes and founded on individuals' financial choices, is in itself inadequate to deal with the cultural and spiritual connections and obligations inherent in the concept of whenua tuku iho for Māori owners. Indeed, "ownership" per se is arguably an inadequate methodology of tangata whenua dealing with such whenua tuku iho.

(d) Logically, if the threshold for consent is lowered, then the corresponding protection for owners must be increased. It is assumed that Māori will want

to ensure that their ancestral hereditaments are not prejudiced in any way and therefore that where retention is the owners' wish, their ability to retain their turangawaewae should not be undermined. It is noted that, of course, not all Māori freehold land is in reality whenua tuku iho, but has been acquired and held for purely economic reasons, so perhaps a more economic ownership model is appropriate in such cases.

All other utilisation decisions should require the approval of at least 50% of engaged owners

3.16 To some extent our view on this issue is covered in the preceding paragraph. In addition, there is no suggestion as to what the minimum requirements might be for "engaged" owners to attain this bare majority. It would be useful for the Panel to provide detail as to what they think that process might look like, together with the rationale for that detail and development of appropriate protections for those either "disengaged" or in the minority of the "engaged." THRMOA considers that the issue of interface between the concept of quantum of share and of number of owners will be fundamental.

4. PROPOSITION 2: ALL MAORI LAND SHOULD BE CAPABLE OF UTILISATION AND EFFECTIVE ADMINISTRATION

Outline of issue

4.1 The discussion document has identified a lack of governance structures as an issue for the utilisation and effective administration of Maori land. It is proposed that an external administrator(s) be appointed where there is significant potential in under-utilised land and the owners are not engaged or are unable to be identified. This administrator would then take various steps to maintain or develop the land, identify potential owners, and, where possible, return the land.

4.2 The intent is to improve utilisation of land when owners are very unlikely to or will never engage.

What is your view on an external administrator being appointed to manage under-utilised Maori land titles when owners are either not engaged or unable to be located?

4.3 It is noted in the problem definition that "only 41 percent of Maori land titles have a governance structure and of those that do have a governance structure, the governance capability can vary." However, there is no indication from this statistic as to how many hectares of Maori land are currently governed by existing governance structures.

4.4 It is suggested that an external administrator would have a similar administrative role as currently undertaken by the Maori Trustee. However, over its history the Maori Trustee has not always served the interests of owners of Maori land.

4.5 The discussion document suggests that an administrator would only be appointed in 'extreme circumstances'. There are a number of concerns as to:

(a) What might be 'extreme circumstances' and what may constitute grounds for the appointment of an administrator;

(b) What capacity the administrator would be appointed whether as responsible trustee, custodian trustee or agent for the owners;

(c) What steps must be taken in order to identify owners or attempt to engage owners before deciding that it is necessary to appoint an administrator, and for how long;

(d) Whether the administrator, once appointed, must continue to make steps to identify owners or seek their engagement;

(e) What level of potential must there be in the land before deciding it is necessary to appoint an administrator;

(f) How this potential is to be determined;

(g) How is the balance to be struck between ensuring the land is utilised for the benefit of the economy and for the benefit of the owners;

(h) Whether the administrator is to profit from their position;

(i) Whether there is a need for the administrator to be independent;

(j) Whether the administrator must reach a certain level of performance;

(k) What liability the administrator might have in their role;

(l) Whether the appointment of an administrator may deter owners from engaging where they know an external administrator will be appointed to fulfil that role;

(m) Whether small groups of owners are able to request that an external administrator be appointed?

4.6 The intended definition of 'under-utilised land' is an issue. This is problematic as each land block will be faced with its own particular issues regarding how it might be effectively utilised, if at all. There are concerns that land perceived as having high economic potential might satisfy the threshold more easily than land that might not have as much potential.

4.7 The range of criteria to assess what is 'under-utilised' land is needed before a full assessment can be made.

4.8 There is also an issue as to what constitutes dis-engaged owners. This issue is covered by the discussion for Proposition 1.

4.9 In a practical sense, many land blocks are too small to be effectively utilised in isolation. In order to utilise the land, it may be necessary for them to function together with adjacent land blocks. However, where the land blocks are each inter-dependent for their effective utilisation, an issue arises if the administration of one of those blocks were to be resumed by the owners and they no longer wished to continue with the purpose to which the land has been put.

4.10 The resources required to identify and determine what is under-utilised land would be significant and is almost certainly to become a charge against the block.

What is your view on the eligibility of certain Mäori entities in addition to the Mäori Trustee; including Post Settlement Governance Entities, Mäori trusts, and incorporations with hapü or iwi affiliation to the particular Mäori land block; undertaking the role of external manager or administrator?

4.11 It is not clear from the discussion document exactly what the authority and role of an "external manager or administrator" Is intended to be.

4.12 Where there is an existing trust or governance structure then an external manager or administrator cannot be appointed. Therefore, such appointments would be where there is no governance structure.

4.13 In preference to these entities being appointed, more effort should be directed at applying Part 9 of the Act as it relates to the powers of assembled owners to manage and utilise their land. Alternatively, there should be greater encouragement and support for owners to constitute trusts under Part 12 of the Act.

4.14 Also, for these types of entities to agree to act as external administrators, there would presumably need to be some element of benefit for them. This raises concerns about administrative charges and levels of returns.

What is your view on the MLC approving the appointment of and retaining oversight over the external administrators of under-utilised Mäori land?

4.15 It is important that the Maori Land Court retains oversight over the administration and management of all Maori land, including those administered by external managers or administrators. It would be an anomaly for the Court to retain oversight over owners and governance structures under the current Act but not over a newly created position of external managers or administrators.

What is your view on the powers of external administrators and the rights of registered owners to resume administration of Mäori land?

Powers of administrators

4.16 The powers of an external administrator would, out of necessity, have to be restricted. Any change to the designation of the land, encumbering the title, entering into a long term agreements, leases, contracts or substantial developments would significantly undermine the ownership rights of the owners.

4.17 Effectively utilising land can be interpreted as receiving the highest possible return. This means that administrators would be looking to utilise the land which is going to provide the greatest financial return. This is turn could see the land put "at risk" by charges, external lending etc, Accordingly, the powers of the administrators must be considered in the context of protecting the long term interests of the owners.

Rights of owners to resume administration

4.18 This raises some questions as to:

(a) What level of engagement must there be before the owners are entitled to resume administration of their land;

(b) What if the owners no longer wish to continue with what purpose the land is being utilised; and

(c) What liability would owners have for improvements when resuming the land.

What is your view on the MLC being given responsibility for approving the appointment and retaining oversight of the external administrators?

4.19 This is the same question as that posed above – see paragraph 4.15.

What is your view on external administrators being required to hold profits and distributions in trust for owners where they are unable to be located?

4.20 It is fundamental that any income received from the land would need to be retained for the benefit of its owners. The underlying principle for the appointment of an administrator must be that it is for the better utilisation of the land for the benefit of its owners.

General comments

4.21 The proposal for appointing an external administrator appears to be premised on the grounds that there are no effective means of dealing with land where owners are either largely or wholly disengaged.

4.22 However, it is likely to be a rare scenario where the owners are wholly disengaged. It is usually the case that there is no trust in place and there are a small number of owners, either by number or according to their aggregate shareholding, who want to utilise the land but are unable to do so due to insufficient owners in support of their proposals.

4.23 There is a means for dealing with this issue under the Maori Assembled Owners Regulations 1995. However, it is a time consuming and relatively complex mechanism which is rarely put to its intended use. As highlighted above, the discussion on Te Ture Whenua Maori Act 1993 should be expanded to also include how these regulations might be better drafted to meet the needs of owners where they are in the minority but wish to utilise their lands.

4.24 The proposition of appointment of an external administrator raises a multitude of issues and would require extensive regulation and supervision.

5. PROPOSITION 3: MAORI LAND SHOULD HAVE EFFECTIVE, FIT FOR PURPOSE, GOVERNANCE

Outline of issue

5.1 The discussion document has identified a need for improved governance which is intended to facilitate greater utilisation of Maori land. It has been suggested that, in order to improve the effective governance of Maori land, that there needs to be greater and more clearly regulated duties, rules and processes. It is also suggested that the governance entities be subject to the same rules and regulations as are applicable in the general law.

What is your view on the duties and obligations of trustees and other governance bodies who administer or manage Mäori land being aligned with the laws that apply to general land and corporate bodies?

Trusts

5.2 At present, the general law of trusts applies to those trusts constituted under Part 12 of the Act. The general law of trusts is modified and extended by the Act to meet the particular needs of Maori land. The real issue is the level of understanding that trustees, and beneficiaries, have of their obligations.

5.3 Trustees need to be better educated as to what the office entails. It is possible that the current model of trustee training provided by the Maori Land Court is not sufficient.

5.4 With some minor exceptions, trustees of trust under Part 12 of the Act have all the same duties and responsibilities as any other trustees of a private trust. Effective governance is not going to be achieved by the addition of further duties and responsibilities as suggested in the discussion document.

5.5 Clearly set out terms of trust will assist trustees greatly in more effectively carrying out their office.

5.6 Trust orders should plainly set out the trustees' roles and responsibilities that are pertinent to the particular trust and also deal with annual general meetings, preparing reports and appointing auditors. A common problem is that Trust orders do not set out these matters clearly enough or are not understood by trustees because they are poorly drafted or out of date.

5.7 It is suggested that a trust order should be produced which can be used as a template. Each trust can then tailor the template to their specific needs, however, there may be some terms of the order which are mandatory such as holding a general meeting, but there could be an option of holding one annually or biennially.

Other governance bodies

5.8 Apart from some exceptions, the internal governance of Maori incorporations are aligned with the laws that apply to corporate bodies through the application of Part 13 of the Act.

5.9 The discussion document does not outline any current issues with other governance bodies that represents a need to amend the laws applicable to these entities.

What is your view on the need to take a balanced approach to the issue of improving governance capability in terms of providing both incentives and disincentives for governors of Mäori land?

5.10 As acknowledged above, it is important that those in governance have a good understanding of what their role entails. However, without further detail on what types of incentives and disincentives might be made available, it is difficult to comment on this particular point.

5.11 At present, there is the general practice of the Court to make the appointment of a trustee conditional upon that trustee's attendance at and completion of trustee

training, if they have not done so already. This is clearly one disincentive which can continue to be applied.

5.12 Apart from providing a certificate of completion for trustee training, it is difficult to see what incentives could be offered. It may limit those who are able to be appointed but the office of chairperson could be restricted to only those who had completed a purposefully designed course run at no or low cost by the Maori Land Court or by Runanga, wananga or private Maori training establishments.

What is your view on specifying in detail the duties, responsibilities, and required competence of governors of Mäori land, including introducing civil penalties for negligence (e.g. not filing returns) and criminal penalties in the case of fraud?

5.13 The duties, responsibilities, and required competence of governors of Mäori land are already included in any trust order or constitution. Criminal or fraudulent conduct by trustees or members of the committee of management is also already caught by the general principles of the common law and the Crimes Act 1961.

What is your view on achieving greater consistency in the rules and processes associated with the various types of governance?

5.14 There should be a certain level of consistency. However, the different types of governance entities are there to provide an option for how land is to be administered. It is, therefore, appropriate that separate rules and processes apply.

What is your view on elections and appointments of trustees and other governance entities being recorded by the Registrar of the MLC with the Court's power to intervene aligned with the powers of the general courts?

5.15 The current process of appointing trustees requires more administrative and judicial oversight by the Maori Land Court than we consider necessary. Whilst the application is simple enough, it takes two to three months to process and, unless issued with immediate effect, the order is subject to the appeal period before being sealed. This means that following the election of a trustee, their appointment may take up to four months. Effective governance could be enhanced by simplifying this procedure.

5.16 It is suggested that the Register, instead of merely recording trustee appointments, should take an active role. Before a trustee is appointed, the Registrar should first be satisfied that the proposed trustee(s):

(a) Has been nominated and elected by way of resolution at a properly convened general meeting of owners;

(b) Has accepted their nomination;

(c) Has already or will attend appropriate trustee training; and

(d) Confirms by way of statutory declaration that they are suitable to be appointed as a trustee (this would include confirmation of criminal convictions, status as a bankrupt and so on).

5.17 If there is a dispute regarding the appointment of a trustee, it should be referred directly to the Maori Land Court. Trustee appointments should be dispensed with

as quickly as possible so that the administration of the land is not delayed which might occur if a dispute were referred to mediation in the first instance.

5.18 The proposal appears to suggest that the Court's discretion should largely be removed, except in the event of a dispute. It is suggested that the appointment of a trustee still remain subject to the confirmation of the Maori Land Court, albeit through a simplified procedure through the Registrar.

What is your view on providing for any governance disputes to be managed appropriately by disputes resolution in the first instance, with recourse to the MLC?

It may be useful that judicial settlement conferences be encouraged in the first instance. We discuss this matter later in this submission.

General concluding comments on Proposition 3

5.19 Education of trustees is the most important step towards effective governance. The overlay of additional rules and obligation will likely only further decrease the effectiveness of trustees. Various strategies which might improve effective governance are suggested below:

(a) Trust review officers, under the ambit of the Maori Land Court, appointed to attend various trust meetings, at their request or by order of the Court, in order to determine what steps the trustees need to take in order to bring the trust administration up to an acceptable standard.

(b) Governance wananga held at marae in each region throughout the year for trustees would assist in educating trustees as to their roles.

(c) Funding of runanga and similar entities to conduct approved and more comprehensive trustee training.

5.20 One of the biggest issues is that administration of Maori land usually requires those in governance to take time out of their regular lives to attend to administrative matters. There is no easy solution to this issue, however, more accessible training aids presented at times and places more suited to trustees and potential trustees would be of assistance. This initiative may also increase the pool of potential trustees and the skill base of current trustees.

6. PROPOSITION 4: THERE SHOULD BE AN ENABLING INSTITUTIONAL FRAMEWORK TO SUPPORT OWNERS OF MAORI LAND TO MAKE DECISIONS AND RESOLVE ANY DISPUTES

What is your view on all disputes relating to Māori land being referred, in the first instance, to mediation?

6.1 We take the view that the principles of the Act are consistent with the principles that underpin mediation. This relates to mediation as we understand it in the modern context, therefore we support the Court having the power to refer appropriate disputes to mediation. We will discuss the timing of these powers later in our submission.

6.2 We assume when we are referring to mediation, we are talking about the modern professionalised mediation. We raise this in the context that there are various models of mediation including Māori concepts of dispute resolution, although we do take the view that Māori models and modern professionalised models can co-exist. We believe that the mediation process needs to be defined and shaped in accordance with tikanga Māori and the principles of the Act. There is a danger that lumping a generic model into a Māori context without proper thought and review could be counter-productive and a mistake. More work will need to be done to clearly define what type of mediation model would suit the Māori Land Court context.

6.3 Mediation as a tool for resolving disputes has been successful in most other jurisdictions and we see no major issues with it being used in the Māori Land Court. A key issue is whether the Court will have the power to make compulsory referrals to mediation or an agreed option between the parties. This is some downside to compulsory court referred mediations. Unless both parties are committed to the process, it could be seen as a waste of time and exacerbating costs for parties.

6.4 We would encourage the review team to look at the recent example in Samoa, whereby they have just enacted legislation to allow their Supreme Court and District Court judges to compulsorily refer disputes that come before the general courts to mediation. This is a new scheme and it is early days.

6.5 Some relevant observations from the Samoan model are:

(a) The Courts have a pool of local accredited mediators as opposed to using registrars or judges;

(b) Mediation is relatively new to all players, including lawyers, and almost novel in a formal sense. In the Māori Land Court context many players, including lawyers, will have some experience in a mediation process and therefore the transition may not be a great issue;

(c) A more facilitative model of mediation has been pushed in Samoa, that is, as opposed to an approach that allows mediators to give an assessment of the merits of the case or suggest options for resolution. One of the issues required to be addressed in this context is to determine the model of mediation that will apply. Is it to be purely facilitative or more evaluative in nature? Our view at this stage is to suggest a mixed model that is based on a facilitative model but allows the mediators to be more evaluative in appropriate circumstances. Our view is that a mixed facilitative/evaluative model has, at its core, the focus on relationships that is important in Māori terms, but also aims to be pragmatic and solution focussed, which is also an important tikanga in our view.

6.6 We do not see any major issues with disputes being referred to mediation in the first instance. This approach would work best if:

(a) It is the judges that made the assessment of whether a case is suitable for mediation as opposed to registrars or case managers. It was unclear in the discussion document who would have that power;

(b) External mediators are used and not registrars/case managers or judges. We believe the best approach to give the process credibility and best chances of achieving the objective, i.e. settling disputes, is to use

"qualified" mediators. We accept that some work will be needed around defining how one would be considered qualified. You will be aware of the AAMINZ and LEADR accreditation processes. These organisations are a helpful starting point, but we believe this proposed change provides the opportunity to develop a Māori focussed accreditation process. Whatever the process is, matters such as proficiency in te reo, tikanga and formal mediation training would need to be part of the criteria. We would not encourage the appointment of people just because they are kaumatua or have had some facilitation background say at OTS or TPK. To ensure credibility some formal training and experience in mediation is necessary;

(c) The Court fund the mediators;

(d) The Court has the ability to award costs if parties do not participate in a Court referred mediation. We again think this will give the process some teeth and credibility. It would be pointless having an ad-hoc type process whereby people can delay disputes without ramifications.

What is your view on parties to a dispute being required to demonstrate that they have attempted to resolve the dispute themselves before they are able to access mediation?

6.7 We take the view that this matter needs to be a factor that the judges take into account in exercising their discretion to send the parties to mediation. That said, we see no downside in the judges having the ability to make a direction that the parties attempt to resolve matters by their own means. We don't think it is necessary to formally show the Court that attempts have been made. In most cases there will always have been attempts but due to a relationship breakdown, for example, a determination or mediation is required.

What is your view on Māori Land Court judges being empowered to conduct judicial settlement conferences and refer all disputes to mediation?

6.8 We support the idea that judges conduct settlement conferences as judges in other jurisdictions. One practical consideration is the fact that there is a small pool of judges, usually at least two in each district and of course, if the matters fails to settle at the settlement conference, then the judge presiding would be unable to make the final determination of the matter. This may create capacity difficulties and delay.

6.9 We think that the judges have powers to compel parties to mediation, but perhaps after the Court hears from both parties and takes into account the nature of the dispute, the views of the parties and any other considerations relevant to the objectives the Preamble and section 17 of the Act. This would at the very least ensure a robust exercise is gone through before matters are referred. This again will be a filtering process and bring some more credibility to the process. We take the view that mediation as a tool can be effective to resolve all types of disputes and it would therefore not be necessary to define a certain category of disputes to mediation. The usefulness of mediation to the issue at hand could be one of the factors the Court takes into account when exercising its discretion to refer the matter to mediation.

What is your view on the Māori Land Court being able to determine the dispute if the dispute remains unresolved following mediation?

6.10 It makes sense that matters not resolved via mediation are referred back to the Court for determination. This is on the assumption that external mediators are used and not judges, given that judges who are mediators of an unresolved mediation cannot again hear the matter.

6.11 On a related matter we would encourage consideration of including a requirement that all new trust deeds for Māori land trusts and incorporations have clear dispute resolution clauses, not too dissimilar to those found in PSGEs. In respect of mediations, the trust deeds/constitutions could allow the Court to appoint mediators where agreement is not found and it may save the matter coming formally before the Court.

What is your view on the Māori Land Court having a general role for matters of process and points of law?

6.12 We support the continued role of the Court in this area. Having matters determined by the superior courts would create access to justice issues for many Māori.

7. PROPOSITION 5: EXCESSIVE FRAGMENTATION OF MÄORI LAND SHOULD BE DISCOURAGED

7.1 Proposition 5 in the discussion document is that excessive fragmentation of Maori land should be discouraged. Within this proposition are three proposed principles. These are:

(a) Succession to Mäori land should be simplified;

(b) A register should be maintained to record the names and whakapapa of all interests in Mäori land, regardless of size;

(c) The rights of decision making in respect of Mäori land should be limited to those owners with minimum threshold interests.

7.2 The discussion document addresses proposition 5, and these principles, at pages 3, 13, 36, 37 and 41.

Succession / register

7.3 At page 36 of the discussion document the Review Panel addresses the substance of this proposition. They state that succession to Maori land should be able to occur without endorsement by the Maori Land Court while providing for any disputes to be managed appropriately. The intent is to streamline the process of succession as much as possible to encourage engagement with Maori land.

7.4 The Panel further state that the key issue is multiple (or fragmented) ownership which increases with each generation. They state that this trend is resulting in greater disassociation of owners from their land as well as presenting issues regarding administration and decision making.

7.5 To address this, the Panel proposes that any changes in ownership should be recorded by the ownership group (or their nominated governors) and passed on to a central registry (such as the Maori Land Court) that records Maori ownership interests.

7.6 The issue of land interests that have not been succeeded to are a common and real issue for many blocks of Maori land and their administrators. As such identifying the issue itself is positive. However, there is no indication that the current proposal to 'streamline' succession will be any more effective or efficient. In fact there is a very real risk that the proposed action could make the issue worse.

7.7 Firstly, while lack of succession is a problem, the act of applying to succeed to shares in land is already a fairly simple and straightforward process. In particular:

(a) The Court has pre-printed forms that are straight forward and easy to use;

(b) Most applicants do not require a lawyer to apply for succession. They are able to fill in the forms themselves with the assistance of Court staff;

(c) The filing fee is low;

(d) Orders for probate or letters of administration are not required;

(e) Judges often take a very 'user friendly' approach in such cases and so legal representation is not required at the hearing of the application.

7.8 It is accepted that there is a delay between filing the application with the Court and the date of the hearing. Despite that, the delay is usually fairly nominal (two to three months).

7.9 There are also some cases of succession which raise complex legal or factual issues and legal representation is required. However, those are fairly rare and the majority of succession cases are dealt with by the applicant.

7.10 Practitioners who regularly practise in this area have advised that the biggest obstacle in dealing with lack of succession is motivating successors to succeed. The vast majority of cases involve successors who either don't know that they are entitled to succeed, don't know how to do it, or they are not motivated to apply for succession.

7.11 The current proposal is that ownership should be recorded by the owners, or their nominated governors (such as an Ahu Whenua Trust). Imposing this requirement on the owners or their administrators is going to require a huge increase in their workload and responsibilities. This will require those persons to upskill on matters of succession. There will also be a large increase in the administration required to deal with succession issues. This will increase administration costs reducing profit available for investment or distribution to owners.

7.12 Moving succession to the owners also increases the likelihood of decisions being made around succession that are not robust. By having succession regulated by the Court, every decision is vetted by a Maori Land Court judge who has a high level of expertise on such matters. It is not clear who, within the ownership or governance group, would fulfil this role. Clearly there will be some cases where the group will have highly qualified and suitable people who could discharge the role satisfactorily. But there will undoubtedly be groups who do not have that expertise. If such a

group does not have sufficient funds to pay for such expertise, this would result in an unqualified person fulfilling this role which could lead to very flimsy or reviewable decisions being made. Such an approach may well increase the work of the Court in having to review such decisions.

7.13 The current proposal does not refer to any system of review or appeal against a succession decision which had been made by the owners or their governors. If this approach was adopted there would need to be some form of review or appeal process to ensure that the system is robust. This may fall under the general dispute resolution process of mandatory mediation and then litigation.

7.14 Apart from the increase in workload, and risk of error, by moving succession to the ownership group**,** there is no clear indication that this will increase succession. Whether succession is to be made through the Maori Land Court or the ownership group, in either case this will require a successor to:

(a) Advise of the death of the current owner;

(b) Advise who the entitled successors are; and

(c) Provide any evidence necessary such as a Will, death certificate, statutory declaration etc.

7.15 Encouraging the successor to take those steps is the ultimate challenge. It is not clear how, or why, such successors will be more encouraged to do that with the new proposed register.

7.16 It is also noted that this process is currently adopted by Maori Incorporations who maintain their own share register under s 263 of TTWMA. The advice received from several solicitors who act for Maori Incorporations is that they also have a long list of unclaimed dividends, and shares not succeeded to. This illustrates that moving this role to the ownership group will not address the problem of engaging the successor to succeed.

7.17 If this proposal was going to be advanced, at a minimum the Panel should conduct extensive consultation with the Committees of Management of Maori Incorporations to assess their experience of maintaining a share register. Relevant questions for such consultation would include:

(a) The amount of unclaimed dividends they hold;

(b) The number of shares in the Incorporation that have not been succeeded to;

(c) Problems they face in administering their own share register;

(d) Advantages they have over Ahu Whenua Trusts who do not administer their own share register;

(e) The amount of time, cost, and level of skill required to administer the share register.

Decision making

7.18 The Panel also proposes that to prevent further excessive fragmentation a threshold should be introduced under which an ownership interest cannot be divided any further. The decision making rights of owners would then be limited to those engaged owners with minimum threshold interests.

7.19 This proposition is problematic.

7.20 Firstly, it is not clear exactly what will happen if one has interests that are less than the required threshold. Does that mean that the affected owner cannot succeed, or simply that he or she cannot vote? If the former, similar legislation was introduced in early Maori land laws about uneconomic shares. This resulted in people being denied their interests in land and becoming alienated from that land permanently. Not surprisingly this legislation has received much attention by both claimants and Panel in the Waitangi Tribunal. A return to such legislation should not be encouraged.

7.21 If the proposal is only that the affected owner cannot vote, it is not clear what the basis of this is or how this will help prevent further excessive fragmentation.

7.22 One of the overriding principles of the discussion document is to encourage owner engagement. If an owner has succeeded to shares, and attends a meeting to vote on issues is that owner not already engaged? How is preventing that person from voting going to encourage owner engagement? Ironically this proposal appears to be counter-productive and at odds with one of the core principles of the discussion document and of the Act. The rights of decision making in respect of Maori land should not be limited to those engaged owners with minimum threshold interests. Section (17)2 of the Act specifically protects minority interests and promotes fairness in dealings between owners. We consider that this proposal is an interference with owners' property rights and their taonga tuku iho that cannot be justified. As noted above, it is also a proposition that requires an evidential or statistical basis before it could be considered necessary or reasonable to implement. On the basis of the evidence presented in the Discussion Document we do not consider there is sufficient justification to interfere with owners' property rights.

7.23 It is accepted that there can be issues with owners having relatively small shareholdings taking control of meetings or decisions where a vote is taken by a show of hands. On the other hand, voting by a show of hands where each owner has one vote regardless of shareholding could also be said to encourage owner engagement as each owner has a say but must be present to do so (subject to the rights of voting by proxy or post).

7.24 In cases where this is counter-productive, there are already existing provisions in many trust orders which allow a poll vote to be taken so that voting is by shares rather than by hand. Poll voting can also be controversial as it can allow large shareholders to dictate to the numerical majority of owners. Despite this, it can and is used to address difficulties of minor shareholders holding too much influence.

7.25 It is also unclear how the threshold level would be set. Current shareholding in Maori land is completely different for each block. In certain blocks one share could represent a significant area of land (sometimes the whole block). In other blocks of land one share could represent a very small area of land. Setting a threshold by

percentages also poses problems. For example a two percent interest in a very large block with a large number of owners may represent a similar or larger area than a five percent interest in a much smaller block of land.

7.26 The proposal also raises practical matters. For example, what would the definition of “minimum threshold interests” be and how would that be determined? Is it based on shareholdings or percentages? Would this proposal not become unnecessarily complicated to implement?

7.27 For these reasons it would be very difficult to set the threshold unless this was done on a block by block basis. That would be very time consuming, difficult and could produce inconsistent and uncertain results.

7.28 The best option available to prevent further fragmentation of shares is the use of a Whanau Trust. Once a Whanau Trust is constituted the shares are held there and no further succession orders are required. The trustees of the Whanau Trust can then engage in any required decision making alleviating the need of a number of smaller beneficial owners attending.

7.29 Promoting, educating and encouraging owners to succeed and use Whanau Trusts may well be more effective under the current regime than proposing what may be unnecessary and ineffectual change.