INITIATION, CONSULTATION, AND CONSENT

INITIATION, CONSULTATION, AND CONSENT

Chapter 3 of Report into Claims concerning

Proposed Reforms to Te Ture Whenua Maori Act 1993

Pre-publication Version

WAI 2478

WAITANGI TRIBUNAL REPORT 2016

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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

The Honourable Christopher Finlayson
Associate Minister for Māori Development

Parliament Buildings
WELLINGTON

5 February 2016

Kei ngā Minita, tēnā kōrua

Keokeo ana te tangi o ngā manu i te ngarona o ngā tini rangatira o te ao Māori i ngā marama kua pahure ake nei. Ka noho pani ngā waihotanga iho i te rironga o rātou mā ki tua o pae maumahara. Ko rātau ki a rātau, ko tātou ki a tātou, ka titoko ko te ao mārama. Tēnei te reo rāhiri ki a kōrua i tēnei wā ka raumahara ake i te rā i waitohua ai Te Tiriti o Waitangi. Nā te waingarahu te tino rangatiratanga o ngā whenua, o ngā kāinga, o ngā taonga katoa i whakaū. Nō konei, tūtū ana te puehu i roto i ngā tau – ko te whenua te take, ā, tae rawa mai ki ēnei rā, ko te whenua anō te take. Heoi, ka tukuna atu ki a kōrua tēnei wāhanga o 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. Nā ngā āhuatanga o te wā, ka puta ohorere mai tēnei kōrero kua rere atu nei ki a kōrua, ki te Karauna, ki ngā iwi, ki ngā hapū, ki ngā whānau, ki te motu whānui. 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.

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MINISTRY OF JUSTICE
Tāhū o te Ture

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

The Tribunal suddenly faces the situation that the Crown has decided to embark on a further series of 'informational hui' on 9 February 2016 only weeks before our full report was to be released. The Tribunal has reached conclusions on the Treaty implications of the process of the review and the consultation undertaken by the Crown with Māori.

Because of the importance of those conclusions, we consider it is very important for the Crown and the February hui participants to at least have some opportunity to be informed as to the Tribunal's views on the Treaty implications of the review process and consultation methods utilised now, rather than after those hui conclude.

For that purpose we have in the face of the urgency now imposed upon us decided to release to you a draft of our chapter on the review process and its related consultation processes.

Although this chapter is a draft, the Tribunal does not expect to receive from submissions from parties about its contents.

Kia tīkina ake te whakataukī hai whakakapi ake i ēnei kōrero i maiohatia i roto i ngā tau: 'Whatungarongaro te tangata, toitū te whenua'.

Ngā mihi, nā

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

PREFACE

This chapter is a preliminary draft, released in pre-publication form for the assistance of parties.

Macrons will be added, references will be checked and adjusted, images may be added, and the text may differ from that released in final form. Parties should not rely on this draft chapter after the publication of the final version of our report.

The Wai 2478 Te Ture Whenua Maori Act Tribunal
5 February 2016

ABBREVIATIONS

app	appendix
CA	Court of Appeal
ch	chapter
comp	compiler
doc	document
ed	edition, editor
fol	folio
FOMA	Federation of Maori Authorities
IAG	Iwi Advisers' Group
ILG	Iwi Leaders' Group
ltd	limited
MAF	Ministry of Agriculture and Fisheries
MAG	Ministerial Advisory Group
n	note
no	number
NZLR	*New Zealand Law Reports*
NZMC	New Zealand Maori Council
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
pt	part
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
sec	section (of this report, a book, etc)
TPK	Te Puni Kōkiri
vol	volume
Wai	Waitangi Tribunal claim

CHAPTER 3

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 Maori support for and approval of the changes has been achieved. [emphasis in original]

Kerensa Johnston, 16 December 2015 (doc A36), p 19

> 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.

Crown counsel, 18 December 2015 (paper 3.3.6), p 33

3.1 INTRODUCTION

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

Repealing this Act is no small matter. The Act represents a historic and broadly-based consensus between Maori and the Crown as to how Maori 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.

At issue is whenua Maori, a taonga tuku iho, an ancestral treasure that the present generation holds as a trust for generations as yet unborn. Maori 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 Maori and the Crown in the nineteenth century. Whenua is a central source of identity for Maori. 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 Maori 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 Maori 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 Maori. The claimants call for consensus as in 1993, arguing, too, that the reforms will do nothing to solve the real barriers to Maori utilising their land. Those barriers, they told us, are historical in origin, often arising from Crown Treaty breaches, and include rating, improper valuation of Maori land, lack of legal and physical access to landlocked land (possibly as much as one fifth to one third of Maori land has no access), and other issues that the Crown's reforms will not solve.

The Crown, on the other hand, says that Maori generally support the reforms, which originated in debate within Maoridom from almost the time of the Act's passage. Since at least 1998, Maori 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 Maori 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 Maori Affairs on the outcome of the independent review panel's review and the government's legislative intentions, four workshops in 2014 with the technical advisers appointed by the Iwi Leaders Te Ture Whenua Maori 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.[1]

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 Maori 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 Maori Treaty partner's sphere of authority to review the Act and decide what, if any, changes should be made to the law governing Maori land.

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[1] John Alexander Grant, fifth brief of evidence, 3 November 2015 (doc A21), pp 2-3

The Crown does not accept the claimants' position that Treaty principles require it to obtain full, free, and informed Maori consent to legislative change. Even for such an important Act for Maori as Te Ture Whenua Maori 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 Maori 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 Maori 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 Maori, or both?
- How were the 2013 review panel's high-level principles translated into a Bill?
- How have Maori 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 Maori 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 sub-section 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, Mrs Nellie Rata.

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

(1) The Crown's case

According to the Crown, the current reform process has come about as a result of 'Maori-instigated debate and reviews of the 1993 Act'. The Government responded to 'Maori-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 Maori.[2] 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.[3]

Thus, the Crown's view is that the reform process was 'Maori-instigated', based on 'Maori-initiated' reports, and the resultant reform 'proposals reflect Maori instigated debate, not unilateral Crown policy'.[4]

In particular, the Crown emphasises a report by the Maori Land Investment Group in 1996, a Federation of Maori Authorities (FOMA) survey of Maori land owners in 1997, TPK consultation hui in 1998, a Hui Taumata report in 2006, and a TPK-commissioned 'Owners' Aspirations Report' in 2011.[5] 'Ultimately,' Crown counsel submits, 'the Owners' Aspirations Report and the reports that preceded it led to the current review and proposed reforms'.[6] Crown counsel stresses that:

> The reforms reflect the view that Maori 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 Maori initiated reports, panels and submissions since 1993.[7]

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 Maori agreement or approval'.[8] Nor do Treaty principles 'oblige the Executive to transfer legislative drafting to any

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[2] Crown counsel, opening submissions, 6 November 2015 (paper 3.3.3), p 4
[3] Crown counsel, opening submissions (paper 3.3.3), pp 4-5
[4] Crown counsel, opening submissions (paper 3.3.3), pp 2, 9
[5] Crown counsel, closing submissions, 14 December 2015 (paper 3.3.6), pp 7-10
[6] Crown counsel, closing submissions (paper 3.3.6), p 10
[7] Crown counsel, closing submissions (paper 3.3.6), p 4
[8] Crown counsel, closing submissions (paper 3.3.6), p 17

particular Maori group or to any particular Maori institution'.[9] The Crown rejects the claimants' views that:

- the Treaty 'guaranteed Maori "a right to determine for themselves" the regulations relating to Maori 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'.[10]

The Crown also qualifies its view, expressed in the Maori Community Development Act inquiry, that Maori '"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"'.[11] 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 Maori, not the Crown.[12]

As a matter of Treaty principle, the Crown holds that it is required to engage with Maori in good faith at the appropriate level for any particular issue but is otherwise free to develop policy as it sees fit.[13] There are a number of other interests that the Crown must balance with the Maori interest, '[p]rovided the Crown engages with Maori in a manner that reflects the importance of the Maori issues and authority involved'.[14] 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'.[15]

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

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[9] Crown counsel, closing submissions (paper 3.3.6), p 20
[10] Crown counsel, closing submissions (paper 3.3.6), p 15
[11] Crown counsel, closing submissions (paper 3.3.6), p 21
[12] Crown counsel, closing submissions (paper 3.3.6), pp 3-10, 17, 21-22
[13] Crown counsel, closing submissions (paper 3.3.6), pp 16-18
[14] Crown counsel, closing submissions (paper 3.3.6), p 18
[15] Crown counsel, closing submissions (paper 3.3.6), p 18

Maori 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.[16]

(2) The claimants' case

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

First, the claimants deny that the reform proposals were initiated by Maori debate and reports, or that the reforms reflect Maori views and concerns as expressed from 1996 to 2011.[17] They also reject the Crown's argument that the 2013 review panel was independent and that its 'recommendations evolved from Maori aspirations independent of the Crown'.[18] In their view, the panel followed 'Crown-commissioned economic development reports'[19] and the review 'was premised on a Crown agenda of economic utilisation of under-developed Maori land, and rationalisation of the Maori Land Court's functions'.[20] The claimants stress 'a range of departmental initiatives, including (but not limited to) Te Puni Kokiri, Ministry of Primary Industries, Ministry of Business Innovation and Employment and Land Information New Zealand'.[21] The information generated by these agencies has been strongly criticised.[22] According to the claimants, the Crown's proposed reforms are based on very little empirical research or reliable data.[23] There has been no investigation of what actually works and does not work in the present Act.[24] Further, if the reforms truly reflected Maori aspirations for land retention and development, they would have included what Maori 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.[25]

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

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[16] Crown counsel, closing submissions (paper 3.3.6), p 20
[17] Claimant counsel (Watson), closing submissions, 20 December 2015 (paper 3.3.8), pp 11-13, 23, 29-31
[18] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 33
[19] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 33
[20] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 4
[21] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 12-13
[22] See, for example, claimant counsel (Thornton), closing submissions, 18 December 2015 (paper 3.3.10), pp 24-32, where the 2013 Price Waterhouse Cooper report for the Ministry for Primary Industries, 'Growing the Productive Base of Maori Land', comes in for particular criticism.
[23] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 25–26
[24] Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 15
[25] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 4

> 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.[26]

The claimants 'challenge the constitutional right of the Crown to make laws in relation to taonga tuku iho of such significance as is Maori land'. In their view, kawanatanga 'does not extend to the power to decide how Maori will govern themselves in terms of their Maori 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 Maori taonga, as long as it does so on an "informed basis"'. Maori 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'.[27]

The claimants 'contend that the Treaty of Waitangi guaranteed to Maori their right to determine for themselves the rules, regulations and policies relating to their taonga'; in this case, a 'taonga tuku iho (being Maori land)'.[28] They disagree with the Crown that this is an impractical position. They rely instead on the guidance of the Tribunal's report, *Whaia 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 Maori'.[29] The 'appropriate' approach to be pursued is illustrated in the claimants' proposed remedies,[30] and it requires the Crown to 'empower Maori to develop their own reform proposals'.[31] The Crown's view that 'broader policy considerations' have to be taken into account can be accommodated by a Crown '"audit" function once Maori had determined their reform proposals'.[32]

The Wai 2478 claimants' proposal for Maori-led 'land tenure reform' is that Maori landowners should nominate representatives to 'develop parameters for the reform, including the necessary research required into existing legislation (not limited to Te Ture Whenua Maori Act) where there are constraints on Maori land retention and development'.[33] The Crown would fund and support that process until Maori are ready to engage with the Crown as Treaty partners 'on the

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[26] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 26
[27] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 3
[28] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 14
[29] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 15
[30] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 28
[31] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 34
[32] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 34
[33] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 38-39

implications of any reform proposals for the wider legislative context and the public interest'.[34]

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

3.2.2 Consultation vis-a-vis consent

(1) The Crown's case

The Crown argues that it has an obligation to address concerns expressed by Maori 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 Maori initiated reports, panels and submissions since 1993'.[35] In responding to these 'repeated calls for reform of the Act', the Crown has created proposals that it says reflect the views of Maori land owners. In particular, the reforms address 'long-standing demands from Maori 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 Maori land owners' decisions about their land should not, in a range of situations, be subject to the paternalistic oversight of Crown-appointed judges'.[36]

Although the Crown thus says that its proposed reforms do in fact reflect Maori 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 Maori taonga'. These obligations require the Crown to 'take reasonable steps in all the circumstances, assessed in light of the historical relationship between Crown and Maori 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 Maori landowners and stakeholders to understand and contribute to the reforms'. The Crown has also had the benefit of 'independent [Maori] advice on possible

[34] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 39
[35] Crown counsel, closing submissions (paper 3.3.6), pp 3, 4
[36] Crown counsel, closing submissions (paper 3.3.6), pp 3-4

reforms'. This consultation process 'meets the Treaty standard and has informed the Crown's development of the current draft Bill'.[37]

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 Maori, 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'.[38] The Crown accepts that 'the present circumstances, involving the regulation of Maori land, require robust consultation with Maori in order to meet the Crown's obligation to make an informed decision'.[39] It rejects the claimants' view that law reform in respect of such a taonga as Maori land should be led by Maori or requires '"agreement" from Maori before proposing any legislation'.[40] In the Crown's view, this is an 'inapt description of the Treaty relationship that fails to give practical effect to Treaty principles'.[41]

Rather, 'Treaty principles require balancing and weighing of interests'. Where Maori interests are 'engaged at the requisite level' (that is, have sufficient weight to require consultation), 'Maori engagement and opinion must be sought'.[42] The steps required vary according to the strength of the Maori interest, but the Crown always 'retains a responsibility to govern'.[43] 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.[44] The partnership principle entails the Crown and Maori 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'.[45]

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'.[46] 'Regulation of title to land', in the Crown's submission, 'is a core governmental and judicial function, and the relationship between Maori land tenure and the Land Transfer Act 1952 more

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[37] Crown counsel, closing submissions (paper 3.3.6), p 4
[38] Crown counsel, closing submissions (paper 3.3.6), pp 23-24
[39] Crown counsel, closing submissions (paper 3.3.6), p 24
[40] Crown counsel, closing submissions (paper 3.3.6), p 15
[41] Crown counsel, closing submissions (paper 3.3.6), p 15
[42] Crown counsel, closing submissions (paper 3.3.6), p 15
[43] Crown counsel, closing submissions (paper 3.3.6), pp 15-16
[44] Crown counsel, closing submissions (paper 3.3.6), p 16
[45] Crown counsel, closing submissions (paper 3.3.6), p 16
[46] Crown counsel, closing submissions (paper 3.3.6), pp 15, 18, 21

broadly is therefore significant to the public interest generally.'[47] Other matters for the Crown to consider include 'broader economic, social and financial considerations',[48] which is presumably a reference to how Maori and the economy more generally would benefit from greater, more 'effective' utilisation of Maori land.

All these factors mean that the Crown's interest in Te Ture Whenua Maori is not 'weak' as compared to the weight of the Maori interest, and the Act for the regulation of Maori land is not a 'stand-alone system' about which Maori should make the decisions.[49]

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 Maori authority but, equally, a duly elected Government cannot be unreasonably restricted in the conduct of its policy"'.[50] This means that the 'nature and recognition of Maori 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'.[51] Its proposed reforms respond to and reflect Maori concerns. Its process of consultation, including the use of independent Maori advice, has been 'high quality, extensive and novel'.[52]

Given the Maori 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 Maori have been '"a junior partner" to the process':

> Provided the Crown engages with Maori in a manner that reflects the importance of the Maori 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.[53]

On the more particular question of whether the Crown needs Maori consent to introduce its Te Ture Whenua Maori Bill in March 2016, Crown counsel accepts that there is an issue as to whether (or how far) the Crown should act without

[47] Crown counsel, closing submissions (paper 3.3.6), p 21
[48] Crown counsel, closing submissions (paper 3.3.6), p 18
[49] Crown counsel, closing submissions (paper 3.3.6), p 21
[50] Crown counsel, closing submissions (paper 3.3.6), p 17
[51] Crown counsel, closing submissions (paper 3.3.6), p 17
[52] Crown counsel, closing submissions (paper 3.3.6), pp 17-18
[53] Crown counsel, closing submissions (paper 3.3.6), p 18

broad Maori support. Crown counsel also accepts that 'the Crown's assessment of the degree of Maori 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'.[54] The Crown suggests that, in judging the degree of Maori 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'.[55] 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.[56] 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).[57]

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 Maori support for the proposed reforms, and whether further consultation is in fact required.*[58] [emphasis added]

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.'[59]

The Crown also denies that it needs a 'comprehensive mandate' from Maori, 'even for a topic as significant as land legislation'.[60] In reaching this view, the Crown rejects the findings of the Wai 262 Tribunal that there is 'an obligation to seek "agreement" with Maori, and that the undoubted "right to govern" may only

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[54] Crown counsel, closing submissions (paper 3.3.6), p 20
[55] Crown counsel, closing submissions (paper 3.3.6), p 19
[56] Crown counsel, closing submissions (paper 3.3.6), pp 34-35
[57] Crown counsel, closing submissions (paper 3.3.6), pp 33-35
[58] Crown counsel, closing submissions (paper 3.3.6), p 33
[59] Crown counsel, closing submissions (paper 3.3.6), p 18
[60] Crown counsel, closing submissions (paper 3.3.6), p 19

be relied on once government has taken extensive efforts to reach agreement with Maori'.[61] The Crown also says that the findings of the Tribunal in its report *Whaia Te Mana Motuhake* are not relevant because that report was specific to an institution created by Maori and then accorded statutory recognition.[62] More generally,

> To the extent that the *Whaia Te Mana Motuhake* finds that Treaty principles require that the Crown must reach agreement with Maori 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.[63]

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 Maori. The Declaration's requirement for consent to legislation is 'aspirational' and not binding on the Crown.[64] 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.[65]

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 Maori interests', there is nothing in principle to now prevent the Crown from proceeding to 'the point of making final decisions'.[66]

(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 Maori taonga'. Maori, they say, are not just a 'stakeholder group, whose perspectives are to be considered or engaged with'.[67] As noted above, the claimants consider that Maori themselves should initiate and lead any reforms about such an important taonga tuku iho as Maori land. They also believe that the Treaty principles require 'a higher standard of Maori decision-making and participation' than that allowed for by the

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[61] Crown counsel, closing submissions (paper 3.3.6), p 19
[62] Crown counsel, closing submissions (paper 3.3.6), pp 20-21
[63] Crown counsel, closing submissions (paper 3.3.6), p 22
[64] Crown counsel, closing submissions (paper 3.3.6), pp 22-23
[65] Crown counsel, closing submissions (paper 3.3.6), pp 22-23
[66] Crown counsel, closing submissions (paper 3.3.6), pp 18-19
[67] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 3

Crown.[68] In particular, relying on the Wai 262 report, the claimants argue that negotiation between the Treaty partners to obtain consent is necessary 'where the Maori Treaty interest is so central', as it is for their taonga tuku iho, Maori land.[69] They disagree with the Crown that the UNDRIP requirement for consent is 'aspirational'.[70]

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 Maori' – is that 'the Crown should obtain the full, informed, and free consent of Maori during the consultation process, which has not occurred'.[71]

On this matter, the claimants draw a strong contrast between the current reforms and the evolution and passage of Te Ture Whenua Maori 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 Maori land within the overall objective of retention. The proposed legislation garnered widespread support among Maori landowners at the time. It was introduced to the House of Representatives because of that support.[72]

By contrast, the present reforms lack 'the strong consensus among Maori landowners for the introduction of the new legislation'.[73]

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 Maori concerns.[74] 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*[75] case.[76]

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[68] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 4
[69] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 14-15; claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 10-13
[70] Claimant counsel (Ertel), closing submissions, 18 December 2015 (paper 3.3.9), p 8
[71] Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 3
[72] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 9
[73] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 13-14
[74] 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
[75] *Wellington International Airport and others v Air New Zealand* [1993] 1 NZLR 671
[76] Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), pp 3-4

Common law principles for consultation: the *Wellington Airport* case as quoted by the claimants

Consultation must allow sufficient time, and a genuine effort must be made. It is 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:

'Consultation 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.

(Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), pp 3-4; *Wellington International Airport and others v Air New Zealand* [1993] 1 NZLR 671, 675)

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'.[77] In the claimants' view, 'the Crown has conducted a hurried process to develop a proposed Bill, presented it to Maori as a fait accompli, and now refuses to pause prior to introduction of the bill to allow Maori the time to review, to consider, to korero, *and to consent or not*' (emphasis added).[78]

Claimant counsel submits:

[77] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 5
[78] Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 8

> The low level of Maori whanau, hapu 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 Maori landowners on the changes.[79]

The claimants conclude that:

> There is a worrying lack of evidence of support from Maoridom for this Bill. The New Zealand Maori Council has not endorsed the Bill. The Maori 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 Maori, 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). Whanau, hapu 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.[80]

On the matter of the Maori Land Service, and the administrative arrangements which will underpin the reforms once the Bill is enacted, the claimants say that there has been 'little or no engagement with Maori landowners' to ensure that the proposed new services will be robust.[81] It is 'not sufficient to respond that the legislative framework must be enacted before the Maori Land Service work can be progressed'.[82] The claimants point out that the risks are high for Maori 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.[83]

(3) The interested party's case

Counsel for Mrs Nellie Rata submits that the Crown must obtain the prior, free, and fully informed consent of Maori before any repeal or reform of 'legislation such as the Maori Land Act 1993'. Maori 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'.[84] The

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[79] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 26
[80] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 35
[81] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 36
[82] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 37
[83] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 37
[84] Counsel for the interested party, closing submissions, 18 December 2015 (paper 3.3.7), p 6

Crown's process to date has not enabled Maori to arrive at a consensus on reform of the Act, and thus Maori consent has not been obtained:

> This process is, I am instructed, anything but Maori, in that there has not been the due time accorded informed *whakawhiti whiti korero (ie informed debate and discussion)* from which consensus might arise, and through which a rangatira might gauge the people's views.[85] [emphasis in original]

The preceding material has been concerned with the process to decide whether Te Ture Whenua Maori 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.[86] Nonetheless, the claimants maintain that the proposed contents of the new Bill are not consistent with Treaty principles.[87] We address the substance of the reforms, and the claimants' allegations that serious prejudice will occur to Maori 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 Maori, or both?

3.3 WHO INITIATED AND SHAPED THE REFORMS – THE CROWN OR MAORI, 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 Maori society'.[88] The main thrust of these calls was understood to be the removal of barriers to the utilisation of Maori land, including the 'burdens and uncertainties in decision-making processes, the further uncertainties implicit in the Maori Land Court's various areas of discretionary review and supervision, and lack of access to development finance'.[89] 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

[85] Counsel for the interested party, closing submissions (paper 3.3.7), p 7
[86] Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 2
[87] Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 2
[88] Crown counsel, closing submissions (paper 3.3.6), p 3
[89] Crown counsel, closing submissions (paper 3.3.6), p 3

within the 1993 Act';[90] that is, the decision-making arrangements and Maori 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 Maori land.[91] In doing so, the Crown submits that it will be providing for Maori land owners' 'exercise of their rangatiratanga'.[92]

The claimants, on the other hand, deny that the present reforms originated from Maori concerns and aspirations. In their view, the reform proposals ignore the genuine Maori concerns about barriers to utilisation (such as rating and finance). Instead, the 'underlying objectives for reform are driven by Crown policies, not Maori aspirations'.[93] 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 Maori land in production is the true driver of the reforms, which demonstrably represent Crown priorities, not Maori aspirations.[94]

We have already summarised the parties' arguments on these issues in the preceding section. In this section of our chapter, we examine the origins of the 2013 reform proposals in some detail, so as to assess whether they were initiated and shaped by Maori 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 2012-2013, whether Maori 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 Maori 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 Maori landowners for the detailed proposals' that followed in 2014-2015.[95] That latter point will be the subject of discussion in later sections of this chapter.

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[90] Crown counsel, closing submissions (paper 3.3.6), p 3
[91] Crown counsel, closing submissions (paper 3.3.6), p 4
[92] Crown counsel, closing submissions (paper 3.3.6), p 4
[93] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 12
[94] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 12-13
[95] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 13

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 Maori land owners for more control in the decision making over their land'.[96] He provided the Tribunal with a series of reports from the 1990s and 2000s in support of his position.[97] Claimant counsel questioned Mr Dewes and other Crown witnesses closely as to whether these reports were really 'Maori material' or 'Crown generated material about Maori issues'.[98] 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'.[99]

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 Maori concerns and reflect Maori views, or whether the nature of and impetus for the reforms comes from the Crown, relying (as claimant counsel put it) on 'selected Maori advice'.[100] In the claimants' view, the Crown greatly overstates the degree of Maori concern that the discretionary powers of the Maori Land Court interfere with owners' aspirations, for which there is no empirical evidence, and that constraints on development that *have* been identified in the past by Maori are not included in the Crown's reforms.[101]

The first major review of Te Ture Whenua Maori 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 Maori concerns about an imbalance in the Act between retention and utilisation. The concerns identified by Maori included owner autonomy, 'pro forma constitutions', whangai successions, and Maori Land Court discretions – concerns which the Crown says have remained unresolved since at least 1998.[102] 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

[96] Whaimutu Dewes, first brief of evidence, 2 November 2015 (doc A22), p 1
[97] Whaimutu Dewes, papers in support of first brief of evidence (doc A22(a))
[98] See, for example, Transcript 4.1.2, pp 339-343
[99] Transcript 4.1.2, p 341
[100] Transcript 4.1.2, p 267
[101] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 29-30
[102] Crown counsel, closing submissions (paper 3.3.6), pp 7-8, 36

Crown is correct that these matters reflected grave Maori concerns (then and now), why were they not enacted in 2002?[103]

The Crown's submissions emphasise the importance of two reports that preceded the review, a 1996 report from the Maori Land Investment Group and a 1997 FOMA-commissioned survey of Maori landowners.[104] We discuss each of these briefly in turn.

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

The Maori 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 Maori land'.[105] This group of six Maori 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'. Maori owners, in their view, were currently too constrained by the paternalistic restrictions of the 1993 Act.[106] The evidence relied on for this point was that iwi were not choosing to have Treaty settlement assets made Maori freehold land under the Act. This appeared to show 'the concerns landowners have with current Maori land legislation and the role of the Maori Land Court'.[107] The Maori 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 Maori 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.[108]

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 Maori land'.[109] By far the biggest problem identified by the group, however,

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[103] Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 9

[104] Crown counsel, closing submissions (paper 3.3.6), pp 3, 7

[105] Maori Land Investment Group, 'Securing Finance on Multiple-Owned Maori Land: Options for Government', March 1996 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 45)

[106] Maori Land Investment Group, 'Securing Finance on Multiple-Owned Maori Land: Options for Government', March 1996 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 46)

[107] Maori Land Investment Group, 'Securing Finance on Multiple-Owned Maori Land: Options for Government', March 1996 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 49)

[108] Maori Land Investment Group, 'Securing Finance on Multiple-Owned Maori Land: Options for Government', March 1996 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 49)

[109] Maori Land Investment Group, 'Securing Finance on Multiple-Owned Maori Land: Options for Government', March 1996 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 50)

was that one-fifth of Maori 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 Maori owners to incorporate, provide for improved management structures, and ensure that governors of Maori land were upskilled. The Crown also needed to provide for a more commercially realistic form of security for mortgaging Maori land.[110]

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 Maori landowners'.[111] More specifically though, and presumably following on from the issues identified by the Maori 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'.[112]

The report was compiled by FOMA chair Paul Morgan from personal or phone interviews with 100 members, their business advisors, and lawyers practising in Maori land law: 'The respondents interviewed are collectively very experienced in Maori land management and the use of TTWM'.[113] In cross-examination, Mr Dewes accepted that this 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'.[114]

The FOMA report concluded that 'Maori 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'.[115] 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

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[110] Maori Land Investment Group, 'Securing Finance on Multiple-Owned Maori Land: Options for Government', March 1996 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 51-56, 59)
[111] Paul Morgan, FOMA, 'Maori Land Court and Land Utilisation Options under Te Ture Whenua Maori Act 1993', July 1997 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 66)
[112] Morgan, 'Maori Land Court and Land Utilisation Options under Te Ture Whenua Maori Act 1993', July 1997 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 66-67)
[113] Morgan, 'Maori Land Court and Land Utilisation Options under Te Ture Whenua Maori Act 1993', July 1997 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 63)
[114] Transcript 4.1.2, p 267
[115] Morgan, 'Maori Land Court and Land Utilisation Options under Te Ture Whenua Maori Act 1993', July 1997 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 63)

have no jurisdiction over land utilisation or the owners commercial affairs'.[116] Nonetheless, the Maori Land Court's discretion was seen as 'only one part, albeit a significant part, of the problem of Maori land utilisation by its owners'. Fundamental problems included fragmentation, access to finance, governance training, business capability, and access to other specialist skills 'as Maori seek to develop themselves economically'.[117]

The Maori Land Investment Group and FOMA reports were followed by the report of the Maori 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 Maori Multiple Owned Land Development Committee (1998)

The Maori 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 Maori Affairs (Tau Henare) about Maori land development.[118] Its members were Maori 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 Maori land, land valuation, Maori land processes and judicial decision-making.[119] One member, Tina Ngatai, was a Maori 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.[120] The Government specified that the committee's recommendations had to be commercially viable, 'generally acceptable to Maori', and 'consistent with the Crown's Treaty obligations'.[121] The committee defined the Crown's Treaty obligations in respect of Maori land as 'to actively protect Maori interests in

[116] Morgan, 'Maori Land Court and Land Utilisation Options under Te Ture Whenua Maori Act 1993', July 1997 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 63-64)
[117] Morgan, 'Maori Land Court and Land Utilisation Options under Te Ture Whenua Maori Act 1993', July 1997 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 65)
[118] Maori Multiple Owned Land Development Committee, 'Maori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 131)
[119] Maori Multiple Owned Land Development Committee, 'Maori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), pp 135, 171)
[120] Maori Multiple Owned Land Development Committee, 'Maori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 171)
[121] Maori Multiple Owned Land Development Committee, 'Maori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 135)

land'.[122] Its information came mostly from TPK, and it did not conduct consultation with Maori.

The committee was tasked with assessing issues identified by TPK, 'which it considers need addressing before Maori land owners can realise greater control over decisions relating to their land, and be more proactive in identifying and progressing development options'.[123] 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 Maori land was estimated as under-utilised and under-developed.[124]

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 Maori landowners, increasing their management capabilities, and researching potential land uses on a local and national scale.[125] 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 Maori land. Before or as part of the wider review of the 1993 Act that was planned, there should also be qualitative analysis of Maori Land Court decisisons 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 Maori land) were a priority.[126] The committee's view of the court seems to have been strongly influenced by TPK, the Maori Land Investment Group report of 1996, and the FOMA survey of 1997.[127]

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[122] Maori Multiple Owned Land Development Committee, 'Maori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 133)
[123] Maori Multiple Owned Land Development Committee, 'Maori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 135)
[124] Maori Multiple Owned Land Development Committee, 'Maori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 131)
[125] Maori Multiple Owned Land Development Committee, 'Maori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), pp 133-134)
[126] Maori Multiple Owned Land Development Committee, 'Maori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), p 134)
[127] Maori Multiple Owned Land Development Committee, 'Maori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), pp 144, 174-175)

(4) The 1998 review of Te Ture Whenua Maori 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'.[128] The proposed review would be undertaken and led by Te Puni Kokiri, honouring Sir Douglas' '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 Maori land'.[129]

TPK called for submissions in July and August 1998, and Cabinet approved terms of reference for the review in August.[130] 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 co-exist in a complementary fashion';
- Examine the powers, duties and discretions conferred by the Act;
- Review the role of the Maori Land Court in assisting the implementation of the Act's principles;
- Examine specific Maori 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

[128] TPK, 'Review of Te Ture Whenua Maori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 72)
[129] TPK, 'Review of Te Ture Whenua Maori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 72)
[130] Dr Ngatata Love, briefing paper for Minister of Maori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), p 59)

- Recommend any necessary or desirable legislative or other changes to enhance the effectiveness of the Act in facilitating the occupation, development, and utilisation of Maori land.[131]

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'.[132] 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.[133]

All Maori were invited to the hui because the Act 'affects everyone who owns or who will inherit Maori land'.[134]

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.[135] TPK also noted that '[v]arious reports' had identified a number of problems for Maori wanting to develop their land, including access to finance, the problems of using Maori 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).[136] The discussion paper elaborated on concerns about trusts (and

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[131] TPK, 'Review of Te Ture Whenua Maori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 74)
[132] TPK, 'Review of Te Ture Whenua Maori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 84)
[133] TPK, 'Review of Te Ture Whenua Maori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 72)
[134] TPK, 'Review of Te Ture Whenua Maori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 72)
[135] TPK, 'Review of Te Ture Whenua Maori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 76)
[136] TPK, 'Review of Te Ture Whenua Maori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 77)

trustees), successions and whangai, paper roads, landlocked lands, occupation orders, rating and valuation, and title registration.[137]

TPK summarised the outcomes of the hui for Cabinet in late 1998. This served Ministers as a snapshot of Maori views on Maori 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.[138] 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 Maori 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.[139]

Some hui participants had called for a return to customary tenure and an end to individual shareholdings in Maori 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 Maori were unhappy about their ability to get development finance from banks, and called for the Crown to resume assisting Maori land development, especially with development loans.[140] 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.[141] On the issue of succession, hui participants wanted succession rules to continue to reflect the retention principle and

[137] TPK, 'Review of Te Ture Whenua Maori Act 1993: A Background Paper for Consultation Hui', October 1998 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 78-83)
[138] TPK, 'Extract from report to Cabinet on Te Ture Whenua Maori Act Review Consultation Hui', undated (1998) (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 135)
[139] TPK, 'Extract from report to Cabinet on Te Ture Whenua Maori Act Review Consultation Hui', undated (1998) (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 135-136)
[140] TPK, 'Extract from report to Cabinet on Te Ture Whenua Maori Act Review Consultation Hui', undated (1998) (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 136-137)
[141] TPK, 'Extract from report to Cabinet on Te Ture Whenua Maori Act Review Consultation Hui', undated (1998) (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), p 137)

whakapapa. They opposed allowing whangai to succeed without a bloodline connection.[142]

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 Maori (and its principles) to become the 'one-stop shop' for all matters that affected Maori land.[143] This was to remain a strong message from Maori 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 Maori people independent of the Crown, to follow up on matters raised at the hui, to hold more indepth 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 Maori land development, and to seek advice on technical, legal issues from external advisers, including the Law Commission.[144] A national wananga of kaumatua and others was planned, to consider the principles underlying Maori land law for the twenty-first century, just as had happened in the early 1980s.[145]

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

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[142] TPK, 'Extract from report to Cabinet on Te Ture Whenua Maori Act Review Consultation Hui', undated (1998) (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 137-138)

[143] TPK, 'Extract from report to Cabinet on Te Ture Whenua Maori Act Review Consultation Hui', undated (1998) (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 138-140); Dr Ngatata Love, briefing paper for Minister of Maori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), pp 59-60, 63, 64)

[144] Dr Ngatata Love, briefing paper for Minister of Maori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), p 60)

[145] Dr Ngatata Love, briefing paper for Minister of Maori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), p 56)

> that trustees should continue to be responsible to the Court and that the Court be able to review trusts under certain circumstances...[146]

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'.[147]

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 Maori Act Amendment Bill by October 1999. We do know, however, that a 'Maori Land Development Group' of external Maori 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 Maori land development, which had been identified in the 1998 review of Te Ture Whenua Maori 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'.[148]

This group believed that as part of Maori empowerment ('mana Maori whakahaere'), there must be 'more Maori involvement and control over their own assets'. Where constitutions allowed Maori managers and trustees to undertake various roles and responsibilities, the Maori Land Court and other Te Ture Whenua Maori mechanisms should increasingly simply record their decisions.[149] The Maori Land Development Group recommended reducing the discretionary role of the Court, aligning the powers of trustees/managers of Maori 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.[150] The group also supported a universal Maori theme in 1998 that all

[146] Dr Ngatata Love, briefing paper for Minister of Maori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), p 74)
[147] Dr Ngatata Love, briefing paper for Minister of Maori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), p 74)
[148] Maori Land Development Group, 'Interim/Transitional Report', 1 June 1999 (Crown counsel, second disclosure bundle (doc A28), p 177)
[149] Maori Land Development Group, 'Interim/Transitional Report', 1 June 1999 (Crown counsel, second disclosure bundle (doc A28), p 179)
[150] Maori Land Development Group, 'Interim/Transitional Report', 1 June 1999 (Crown counsel, second disclosure bundle (doc A28), pp 185-187)

other legislation which had effects on Maori land should be made subservient to Te Ture Whenua Maori and its dual goals of retention and utilisation.[151]

In addition to the work of this group, the national wananga went ahead as planned in 1999[152] 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 Maori 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 whangai; (6) requiring Maori Land Court Judges to have knowledge of te reo and tikanga; and (7) allowing the Judges to correct names on Maori land blocks.[153]

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 (ota 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.[154]

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,[155] and this duly happened (as Marise Lant's evidence shows).[156] 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 Maori 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 Maori land. Particularly important to that request was the idea of making all such

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[151] Maori Land Development Group, 'Interim/Transitional Report', 1 June 1999 (Crown counsel, second disclosure bundle (doc A28), p 185)

[152] TPK, 'Report of the National Wananga held to discuss the principles to underpin Maori land legislation', June 1999 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 176-209)

[153] Crown counsel, closing submissions (paper 3.3.6), p 8

[154] Hui Taumata Maori Land Tenure Review Group, Supporting Paper, 23 June 2006 (Dewes, supporting papers to first brief of evidence (doc A22(a)), p 266)

[155] Dr Ngatata Love, briefing paper for Minister of Maori Affairs, 15 March 1999 (Grant, papers in support of fifth brief of evidence (doc A21(a)), pp 62, 72)

[156] Marise Lant, first brief of evidence, September 2014 (doc A4), pp 2-3

matters subject to the principles of the Act (especially the Treaty principles), and the jurisdiction of the Maori Land Court.

(5) A change of course: the Te Ture Whenua Maori 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 Maori policy'.[157] 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 Maori Land Court more specific jurisdiction in matters of landlocked Maori land.[158]

Crown counsel also noted that the scope of the Bill had been 'significantly reduced' and the 'provisions regarding the Maori Land Court's discretionary powers had been removed'.[159]

We need to consider why, as claimant counsel submitted, reforms of such apparently grave concern to Maori 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 Maori in 1998.[160] 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 Maori Land Court bench, and two specially commissioned reports on papakainga 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.[161]

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[157] Grant, first brief of evidence (doc A1), p 4
[158] Grant, first brief of evidence (doc A1), p 4
[159] Crown counsel, closing submissions (paper 3.3.6), p 8
[160] John Alexander Grant, fifth brief of evidence, 3 November 2015 (doc A21), p 3
[161] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 216)

The select committee described the Consultation Committee as made up of 'key interest group representatives'.[162]

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 whangai, the planned changes to the role of the Maori Land Court in respect of alienations, trustees, trust orders, and the constitution of trusts, and the provisions for access to landlocked land.[163]

In line with the submissions from Maori to the select committee, TPK recommended that provisions to extend the ability of whangai to succeed to interests under wills 'not proceed'.[164]

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.[165] The Maori 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'.[166] 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'.[167] Officials were clearly unhappy accepting the opposition of Maori 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'.[168]

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[162] 'Te Ture Whenua Maori Amendment Bill/Maori Land Amendment Bill, as reported from the Maori Affairs Committee', 2000 (Crown counsel, second disclosure bundle (doc A28), p 205)
[163] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 216)
[164] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), pp 231-233)
[165] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 237)
[166] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 240)
[167] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 241)
[168] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 242)

Nonetheless, TPK also recommended removing clauses 27-30, 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'.[169] The Maori 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.[170]

TPK accepted the reasoning of the judges and the Consultation Committee, recommending that the clauses not proceed.[171]

Clause 32 repealed section 219 of the Act and provided for ota 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.[172] TPK recommended against the clause proceeding, noting once again that there 'appears to be a clear consensus' against the suggested changes to trusts.[173] Clause 35 reduced the power of the Court over appointment of trustees – this clause was also recommended against, given the consensus of opposition.[174]

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[169] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 246)
[170] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), pp 246-247)
[171] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 247)
[172] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 248)
[173] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 249)
[174] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 254)

Another major issue which had provoked much opposition was the provisions relating to landlocked land. Maori submitters and the Consultation Committee supported the changes, but with a right of appeal to the Maori 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 Maori submitters and the Consultation Committee).[175]

The Maori 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.[176] (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 Maori Act Amendment Act in 2002, was reduced to mainly technical amendments except for the provisions concerning landlocked land.

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 Maori who are dissatisfied with the current proposed reforms.[177] Certainly, it seemed as if many of the changes sought by the 1996 Maori Land Investment Group, the 1997 FOMA report, the 1998 McCabe report, the 1999 Maori 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'[178] occurred because of submissions from Maori to the select committee, and the deliberations and advice of an independent committee of (in the Maori Affairs Committee's words) 'key [Maori] interest group representatives'.[179] TPK's advice was that there was a consensus against making the proposed changes.[180] 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

[175] TPK, 'Te Puni Kokiri Report to the Maori Affairs Select Committee: Te Ture Whenua Amendment Bill 1999', 3 October 2000 (Crown counsel, second disclosure bundle (doc A28), p 271)
[176] 'Te Ture Whenua Maori Amendment Bill/Maori Land Amendment Bill, as reported from the Maori Affairs Committee', 2000 (Crown counsel, second disclosure bundle (doc A28), pp 204-209)
[177] Grant, fifth brief of evidence (doc A21), pp 6-7
[178] Grant, fifth brief of evidence (doc A21), p 7
[179] 'Te Ture Whenua Maori Amendment Bill/Maori Land Amendment Bill, as reported from the Maori Affairs Committee', 2000 (Crown counsel, second disclosure bundle (doc A28), p 205)
[180] 'Te Ture Whenua Maori Amendment Bill/Maori Land Amendment Bill, as reported from the Maori Affairs Committee', 2000 (Crown counsel, second disclosure bundle (doc A28))

practical',[181] but this interpretation is not supported by the TPK report to the select committee.

3.3.3 Crown and Maori research and reports, 2006-2011

(1) Maori land reform goes off the agenda

The issues raised by Maori 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 Maori land tenure'.[182] 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 Maori land information, and title improvement.[183]

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

(2) The Hui Taumata (2005-2006)

The second Hui Taumata was a Maori economic development summit, chaired by Sir Paul Reeves. It focused on how to 'accelerate economic development for Maori'.[184] 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 'Tapuia hei Whakatupu', concerned with 'increasing the utilisation and development of our collectively owned assets'.[185] Whaimutu Dewes was appointed to chair a Maori Land Tenure

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[181] Hui Taumata Maori Land Tenure Review Group, Supporting Paper, 23 June 2006 (Dewes, supporting papers to first brief of evidence (doc A22(a)), p 266)

[182] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 161)

[183] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 161)

[184] Dewes, first brief of evidence (doc A22), p 3

[185] Whaimutu Dewes, 'Maori Land Tenure Review: Report on Issues', undated (2006) (Dewes, papers in support of first brief of evidence (doc A22(a), p 240)

Review Group, which would assess whether 'current Maori land tenure practices' were still appropriate in twenty-first century economic circumstances.[186]

Mr Dewes explained: 'The panel's purpose was to review the literature and consult with stakeholders on the barriers faced by owners of Maori land.'[187] In particular, the group relied on reports discussed above (the Maori Land Investment Group (1996) and FOMA (1997)), and a more recent report from the New Zealand Institute for Economic Research (2003).[188] We note that the McCabe report's recommendation for detailed research and analysis (including the Maori 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, 'Maori development experts', and a steering group convened by TPK, comprising June McCabe, Paul Morgan, Professor Mason Durie, Te Kani Kingi, and officials Chris Pinefield, Hauraki Greenland, Brian Pink, Lewis Holden, and Alison Dalziel.[189] The report recommended that Maori re-evaluate 'how their social and cultural institutions contribute to attitudes'. This was because 'Maori 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'.[190]

The report also recommended that the governance of Maori 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'.[191] The Government could assist by helping Maori develop 'institutional frameworks' for better governance. The report also suggested that a Maori financial institution be established to

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[186] Whaimutu Dewes, 'Maori Land Tenure Review: Report on Issues', undated (2006) (Dewes, papers in support of first brief of evidence (doc A22(a), p 240)
[187] Dewes, first brief of evidence (doc A22), p 3
[188] Dewes, first brief of evidence (doc A22), p 3
[189] NZIER, 'Maori Economic Development: Te Ohanga Whanaketanga Maori', 2003 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 111-114)
[190] NZIER, 'Maori Economic Development: Te Ohanga Whanaketanga Maori', 2003 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 222-223)
[191] NZIER, 'Maori Economic Development: Te Ohanga Whanaketanga Maori', 2003 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 223)

cooperate with mainstream banks, rather than – as in the past – setting up a Government-funded Maori investment body.[192]

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 Maori land. This included alternatives beyond trusts.[193] 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 Maori 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 Maori 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 Maori 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 Maori 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.[194]

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

- facilitate access to finance by making it easier to use Maori 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

[192] NZIER, 'Maori Economic Development: Te Ohanga Whanaketanga Maori', 2003 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 223-224)
[193] Dewes, first brief of evidence (doc A22), p 3
[194] Dewes, first brief of evidence (doc A22), p 4

- increase owner autonomy by reducing the Maori Land Court's ability to 'intervene in operational and commercial matters'.[195]

The group's discussion of the Maori 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 Maori Land Court'.[196] The situation was less clear cut, however, for other Maori 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 Maori Land Court oversight might still be considered to be necessary.[197]

It would be necessary, it was said, for governance bodies to 'prove their competence and ability' before court oversight could be reduced.[198] Improving the capacity and capability of Maori 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 Maori 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.[199] 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 ka 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

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[195] Dewes, first brief of evidence (doc A22), p 4

[196] Whaimutu Dewes, 'Maori Land Tenure Review: Report on Issues', undated (2006) (Dewes, papers in support of first brief of evidence (doc A22(a)), p 231)

[197] Whaimutu Dewes, 'Maori Land Tenure Review: Report on Issues', undated (2006) (Dewes, papers in support of first brief of evidence (doc A22(a)), p 231)

[198] Whaimutu Dewes, 'Maori Land Tenure Review: Report on Issues', undated (2006) (Dewes, papers in support of first brief of evidence (doc A22(a)), p 235)

[199] See, for example, Maori Multiple Owned Land Development Committee, 'Maori Land Development', February 1998 (Crown counsel, second disclosure bundle (doc A28), pp 138, 141)

district.[200] The group asked: 'Should there be a weighting to recognise ahi ka roa?'[201] It was noted that Maori 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'.[202]

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'.[203] 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 Maori development directly.[204] Also, the group noted that landlocked land remained a crucial constraint despite the 2002 law reform, with an estimated *one-third* of Maori land having no access.[205]

The Maori 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 Maori 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 Maori Land Tenure Review Group.'[206]

As in 2000-2002 (by Parliament) and 2003 (by TPK), the possibility of tenure reform was abandoned, this time because a Maori 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.

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[200] Whaimutu Dewes, 'Maori Land Tenure Review: Report on Issues', undated (2006) (Dewes, papers in support of first brief of evidence (doc A22(a), p 230); 'Hui Taumata Maori Land Tenure Review Group, Discussion Paper', 23 June 2006 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 247)

[201] Whaimutu Dewes, 'Maori Land Tenure Review: Report on Issues', undated (2006) (Dewes, papers in support of first brief of evidence (doc A22(a)), p 236)

[202] 'Hui Taumata Maori Land Tenure Review Group, Discussion Paper', 23 June 2006 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 264)

[203] 'Hui Taumata Maori Land Tenure Review Group, Discussion Paper', 23 June 2006 (Dewes, papers in support of first brief of evidence (doc A22(a)), p 242)

[204] 'Hui Taumata Maori Land Tenure Review Group, Discussion Paper', 23 June 2006 (Dewes, papers in support of first brief of evidence (doc A22(a)), pp 251-252)

[205] 'Hui Taumata Maori 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 Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 125)

[206] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 162)

For the next four years, reforming Maori 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 Maori Land'.[207]

(3) TPK's Maori owners' aspirations report (2011)

TPK's owners' aspirations project was described as a 'further step in the consideration of issues associated with Maori land arising from the Maori Land Tenure Review undertaken by Hui Taumata in 2005'.[208] 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'.[209] Six hui were held with 81 Maori landowners to find out their aspirations for their lands, and the 'barriers and enablers to their realisation'.[210]

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'.[211] 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.[212]

Mr Dewes conceded that the 'sample was too small to be statistically authoritative'.[213] This concession was also made by Crown counsel and noted by claimant counsel.[214] Mr Dewes added, however, that the information from the six hui was

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[207] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 162)

[208] Whaimutu Dewes, Tony Walzl, and Doug Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), p 6)

[209] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', foreword by Hon Dr Pita Sharples, April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), p 5)

[210] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), pp 6, 14)

[211] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), p 6)

[212] 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.

[213] Dewes, first brief of evidence (doc A22), p 5

[214] Crown counsel, closing submissions (paper 3.3.6), p 10, n 23; claimant counsel (Watson), closing submissions (paper 3.3.8), p 30

> 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.[215]

Crown counsel reinforced this point: 'it remains an important source of qualitative information and echoes findings of various previous reports and surveys'.[216]

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 Maori to achieve those dual aspirations. One key finding was that the Maori 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 Maori 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 Maori land owners to develop and implement solutions.[217]

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.[218] [emphasis added]

In the Hui Taumata review of 2006, the review group had suggested that the development aspirations of the home people (ahi ka 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 Maori 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

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[215] Dewes, first brief of evidence (doc A22), p 5
[216] Crown counsel, closing submissions (paper 3.3.6) p 10, n 23
[217] Dewes, first brief of evidence (doc A22), p 5
[218] Crown counsel, closing submissions (paper 3.3.6), p 10

gain in terms of returns from development, and could too easily outvote the 'ahi ka' or tie them up in the Maori 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'.[219]

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.[220] 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.[221]

If all those difficulties were overcome and a consensus achieved, the 2011 researchers suggested that the Maori 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'[222]):

> 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 [Taupo] 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 Maori Land Court Judge checked the ownership listing it was noted that there were 2,800 owners and the matter did not go ahead.

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[219] 'Hui Taumata Maori 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 Maori Land Tenure Review Group, Supporting Paper, 23 June 2006 (Dewes, supporting papers to first brief of evidence (doc A22(a)), pp 262-263)

[220] Crown counsel, closing submissions (paper 3.3.6), p 10

[221] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), pp 23-26)

[222] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 25

> 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.[223]

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.[224] 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.[225]

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'.[226] 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).[227]

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.[228] Another was to consider how to stop the proliferation of ownership

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[223] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), pp 35-36)
[224] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), pp 55-56)
[225] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), p 56)
[226] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), p 56)
[227] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), pp 56-57
[228] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), pp 56-59)

interests, although noting that collectivisation through whenua topu trusts had not proved popular.[229]

In addition to regulatory matters (including owner participation and Maori 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 Maori owners developing and utilising their lands.[230]

Other familiar themes were the need to upskill Maori 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'.[231]

(4) 'Maori' 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 Maori Land Court discretions. The Maori 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 MLCt from [achieving] their objectives, even though less than 50% of Maori land owners entitled to vote attended the meeting'.[232] 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 as 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 Maori Land Court's protection of the 'silent majority' became core issues in the second major review of Te Ture Whenua Maori Act 1993.

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[229] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), p 66)

[230] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), pp 38-41)

[231] Dewes, Walzl, and Martin, 'Owner Aspirations Regarding the Utilisation of Maori Land', April 2011 (Grant, supporting papers to first brief of evidence (doc A1(a)), pp 65-66)

[232] Maori Land Development Group, 'Interim/Transitional Report', 1 June 1999 (Crown counsel, second disclosure bundle (doc A28) p 187)

The 2011 report has a very clear whakapapa. The 1996 Maori Land Investment Group report, the 1997 FOMA survey, the 1998 McCabe report, the 1998 review hui and 1999 Amendment Bill, and the 1999 Maori 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 Maori. Everyone agreed on that. In that context, Maori wanted and needed economic development – including, if feasible and appropriate for the particular site, development of their lands. Many Maori, 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 Maori freehold title. Also, much Maori land was remote, inaccessible, and incapable of commercial use – but no one was sure how much.

Thus far, issues that had clearly emerged in Maori 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 kaa', 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 Maori land (with a 'warrant of fitness' for governance bodies, as recommended in 2011);

- How to balance owner autonomy (including the autonomy of Maori land governors once appointed) with the protective mechanisms necessary to ensure retention; and

- As an aspect of the above issues, whether the Maori Land Court's discretionary powers were still needed or appropriate.

Also, while regulatory constraints under Te Ture Whenua Maori 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 Maori 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.[233] The claimants, however, emphasised the importance of two other reports in 2011 and early 2013.[234] 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.[235] The first was a Ministry of Agriculture and Forestry report entitled 'Maori Agribusiness in New Zealand: A Study of the Maori Freehold Land Resource'. The second was a Ministry of Primary Industries report called 'Growing the Productive Base of Maori Freehold Land', which was prepared by PricewaterhouseCoopers and completed in February 2013. We discuss the 'Maori Agribusiness' report next, before proceeding to consider the appointment of the independent review panel in 2012.

(5) MAF's Maori agribusiness report (2011)

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

> This report concludes that approximately 40% of Maori 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 Maori 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 Maori Land Court impact on all these categories of land; and there should be a review of the current Act.[236]

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,[237] as recommended by both the owners' aspirations report (April 2011) and the Maori agribusiness report (March 2011). It is certainly the case that the

[233] Crown counsel, closing submissions (paper 3.3.6), pp 3, 7-10
[234] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 30-31
[235] Grant, first brief of evidence (doc A1), p 6
[236] Grant, first brief of evidence (doc A1), p 6
[237] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 30-31

agribusiness report was the one cited publicly by the Crown in 2012 as the reason for carrying out the review.[238]

One of the report's key contributions to the debate is that it asked not just what Maori land development could do for Maori 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 Maori 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 Maori as well as the New Zealand economy as a whole.[239]

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 Maori land law.[240] This 'pressure for production and performance', the claimants say, was unfair and was not applied to general land.[241]

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'.[242] He explained that home communities, which maintain marae and the presence of hapu and whanau in their rohe, can only survive if jobs and opportunities are created. Otherwise, migration and the eventual death of those communities will occur. Maori land management has to promote utilisation as well as retention to meet the essential needs of the owners and their communities.[243]

Before drawing conclusions about the parties' arguments that the current reforms were Maori-instigated and reflect Maori 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 2012-2013. 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.

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[238] Associate Minister of Maori Affairs, press release, 'Te Ture Whenua Maori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 69)
[239] Te Ture Whenua Maori Review Panel, 'Discussion Paper', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 171)
[240] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 12-13, 30-31
[241] Claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 4-5
[242] Matanuku Mahuika, first brief of evidence, 3 November 2015 (doc A23), p 10
[243] Mahuika, first brief of evidence (doc A23), p 5

3.3.4 The Independent Review Panel, 2012-2013

(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 Maori Act and replace it with an entirely new law, and the panel was created to progress this objective (in order to force Maori land into production);[244]

- the panel's members were chosen ('handpicked') by the Crown with no Maori input, and thus represented the Crown, not Maori;[245]

- the panel's Maori members were chosen for their 'commercial or business background', and were 'not representative of Maori in general, and that is why the Crown has not obtained a Maori perspective'[246] – including the lack of any kaumatua members;[247]

- 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;[248] and

- the panel's process was flawed because it took a 'green fields' approach and consulted Maori on very broad, theoretical propositions, which no

[244] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 11; claimant counsel (Thornton), closing submissions (paper 3.3.10), p 9
[245] Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 13
[246] Claimant counsel (Ertel), closing submissions (paper 3.3.9), p 11
[247] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 35
[248] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 11-12, 24-25

> one could really object to or imagine would result in the complete repeal of Te Ture Whenua Maori Act 1993.[249]

The Crown, on the other hand, argues that the law reform process was driven by debates within Maoridom. In response to Maori calls for reform, it appointed an independent panel which conducted a national consultation with Maori 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 Maori.

(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'.[250] The review of Te Ture Whenua Maori 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 Maori land institutional framework to best support the achievement of Maori aspirations and land utilisation'.[251] 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 Maori land owners in reaching their aspirations, while enabling the better utilisation of their land'.[252] 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'.[253]

On the basis of the owners' aspirations report, TPK had concluded that owners wanted to retain the land handed down from tipuna, 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),

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[249] Claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 15-16; Kerensa Johnston, first brief of evidence, 30 October 2015 (doc A13)

[250] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 8)

[251] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 8)

[252] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 8)

[253] Crown counsel, closing submissions (paper 3.3.6), p 48

and balance the latter with the former. The messages of the 2011 'Maori Agribusiness' report were that only 20 per cent of Maori 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 Maori 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'.[254]

Following on from this research, TPK advised the incoming Minister in 2011, the Hon Dr Pita Sharples, that it was scoping a review of the Act in order to 'empower Maori land owners to achieve their aspirations with regards to their land'. Officials decided that what was required in this review was a 'fresh approach',[255] a point emphasised by claimant counsel.[256] 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'.[257]

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).

Maori owners needed sufficient capability (skills and knowledge) to overcome these three barriers to the use of their land. TPK prepared review scoping papers

[254] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (A29(a)), pp 162-163)
[255] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 163)
[256] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 30-32
[257] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 163)

on each of these three areas, and then draft terms of reference for an independent panel to carry it out.[258] 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 Maori Affairs, the Hon 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.[259]

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 Maori land for its beneficiaries, while preserving its cultural significance for future generations'.[260] 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 Maori 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 Maori 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.[261]

The panel was instructed to focus on legislative interventions to achieve these ends. Non-legislative options would be considered in two other processes: the Maori Economic Development Panel (which later produced the strategy 'He Kai Kei Aku Ringa' in November 2012) and the Maori Land Advisory Group (which was not actually constituted).[262]

In terms of process, the Associate Minister announced that the panel would 'draw on existing research and conduct additional research and consultation as

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[258] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 163-164)

[259] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 164)

[260] Associate Minister of Maori Affairs, press release, 'Te Ture Whenua Maori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 69)

[261] Associate Minister of Maori Affairs, press release, 'Te Ture Whenua Maori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 69-70)

[262] Associate Minister of Maori Affairs, press release, 'Te Ture Whenua Maori 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 Maori Land Advisory Group was not actually created: Crown counsel, memorandum, 27 November 2015 (paper 3.1.79), p 2

required'. Next, it would assess the extent to which the 'current regulatory environment is enabling or inhibiting the achievement of Maori 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.[263] These tasks were to be performed within eight months, with a report to the Minister by December 2012.

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 Maori land'

October-November 2012: panel to undertake consultation on 'possible options for the better utilisation of Maori land'

December 2012: panel to report to Associate Minister of Maori Affairs

(Associate Minister of Maori Affairs, press release, 'Te Ture Whenua Maori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 71))

The Associate Minister appointed Matanuku Mahuika to chair the independent review panel. Mr Mahuika, of Ngati Porou and Ngati Raukawa, was described in the press release as a practising lawyer with experience as a company chairman and board member.[264] In his evidence to the Tribunal, Mr Mahuika explained his extensive experience representing and working with Maori groups and Maori land.[265] The other members were:

- Tokorangi Kapea, of Ngati Apa ki Rangitikei, Taranaki whanui, Te Atihaunui-a-Paparangi, and Ngapuhi, who was a commercial lawyer and company director, as well as a committee member for Parininihi ki Waitotara incorporation;

[263] Associate Minister of Maori Affairs, press release, 'Te Ture Whenua Maori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 70-71)
[264] Associate Minister of Maori Affairs, press release, 'Te Ture Whenua Maori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 69)
[265] Mahuika, first brief of evidence (doc A23), pp 1-2

- Patsy Reddy, a 'professional director, consultant, barrister and solicitor', and Crown Treaty negotiator, with corporate governance experience and non-profit sector experience; and

- Dion Tuuta, of Ngati Mutunga and Ngati Tama, the chief executive of Parininihi ki Waitotara incorporation and the chairperson of Te Runanga o Ngati Mutunga, with 'extensive experience in the Maori sector'.[266]

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 Maori 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 Maori land owners and a superficial fix-up will not suffice. I want fundamental change.[267]

Te Runanga o Ngati Porou reminded the review panel of this in November 2012, stating its support for this view of matters.[268]

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 Maori land and Maori land tenure. I was only interested in being involved in something that might address those issues and lead to change.[269]

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.[270] In his evidence, he and other panel members entered the process with open minds.[271]

Mr Mahuika also denied that a Maori-appointed panel would have been more independent. He suggested that it would possibly have had different members,

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[266] Associate Minister of Maori Affairs, press release, 'Te Ture Whenua Maori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 69-70)
[267] Te Runanga o Ngati Porou, submission to TTWM Review Panel, 23 November 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 82)
[268] Te Runanga o Ngati Porou, submission to TTWM Review Panel, 23 November 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 82-83)
[269] Mahuika, first brief of evidence (doc A23), p 5
[270] Transcript 4.1.2, p 433; claimant counsel (Thornton), closing submissions (paper 3.3.10), p 14
[271] Mahuika, first brief of evidence (doc A23), p 5

but that his own panel was no less independent simply because it was Crown-appointed.[272] He told the Tribunal:

> I have always seen my involvement in the proposed reforms as being consistent with my work representing Maori interests against the Crown in an effort to assist in securing better outcomes for Maori. 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 Maori land.[273]

Crown counsel noted that the Crown 'put no proposals to the Panel but asked it to generate its own ideas'.[274] 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.[275]

(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 Maori. In the latter category, Mr Mahuika included work by the New Zealand Maori Council (the 'Brown paper'), FOMA, and the Hui Taumata.[276] In its report, the panel stated that the two most important studies were the 2011 reports: the owners' aspirations report and the Maori Agribusiness report.[277] The former was commissioned by the Crown but it 'captured owner aspirations'.[278] Having reviewed the literature, the panel decided that 'Maori 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'.[279]

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 Maori Act'.[280] As Mr Mahuika put it in

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[272] Transcript 4.1.2, p 434
[273] Mahuika, first brief of evidence (doc A23), p 3
[274] Crown counsel, closing submissions (paper 3.3.6), p 11
[275] Mahuika, first brief of evidence (doc A23), p 6
[276] Mahuika, first brief of evidence (doc A23), p 6
[277] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 245)
[278] Transcript 4.1.2, p 436
[279] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 245)
[280] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 261)

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 Maori land?'[281] Hence, the panel did not, as its terms of reference required, 'assess the extent to which the current regulatory environment is enabling or inhibiting the achievement of Maori land owner aspirations in general as well as specifically in the cases of ownership, governance, and access to resources').[282]

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.[283] We note in particular that the research on Maori Land Court decisions called for by the McCabe report in 1998 had still not been carried out. Marise Lant suggested that there has only ever been an 'assumption that the Maori Land Court is restricting or hampering Maori decision-making authority and utilisation of our land'.[284] In response, Crown witnesses could not point to any empirical research on this question.

On the issue of the 'green fields' 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.[285]

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.[286] 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 Maori. It also carried out preliminary consultation with 'selected stakeholders'. In its report, the panel cited the Maori Land Court

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[281] Mahuika, first brief of evidence (doc A23), p 6

[282] Associate Minister of Maori Affairs, press release, 'Te Ture Whenua Maori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 70)

[283] See, for example, claimant counsel (Watson), closing submissions

[284] Marise Land, fifth brief of evidence, undated (6 November 2015) (doc A26), pp 2, 4

[285] Prudence Jane Tamatekapua, brief of evidence, 30 October 2015 (doc A14), p 3

[286] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013; TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 8-9, 165)

judges, the Maori Trustee, and representatives of major banks.[287] It also communicated with a number of iwi and other Maori organisations and received initial submissions from some of them, including from FOMA, the Wakatu Incorporation and, as noted above, Te Runanganui o Ngati Porou.[288] 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.[289]

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 longstanding issue for Maori land – could be improved.[290]

- The Maori 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 Maori land governors, and a lack of access to finance.[291] 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.[292] 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'.[293] 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

[287] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 246)
[288] See submissions to the review panel (Crown counsel, third disclosure bundle, vol 1 (doc A29).
[289] Mahuika, first brief of evidence (doc A23), p 6
[290] Mahuika, first brief of evidence (doc A23), p 10
[291] Maori Land Court judges, submission to review panel, 26 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 18, 25)
[292] Maori Land Court judges, submission to review panel, 26 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 23, 28-30)
[293] Maori Land Court judges, submission to review panel, 26 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 23)

an independent Court to review the actions of the land's governors.[294] The judges suggested that the Act could help halt fragmentation by more actively getting Maori to form whanau trusts. The judges also recommended other amendments, including greater use of mediation, and Government assistance for training trustees and developing land.[295]

- FOMA only suggested minor changes, including that Court services needed streamlining, Maori land governors be upskilled and assisted by an advisory service, and ways found to stop fragmentation.[296]

- Te Runanganui o Ngati Porou stated that the under-performance of Maori land was a 'blight on New Zealand's landscape', the result of 'an overly regulated and flawed Maori land legislation regime and Maori Land Court process'.[297] 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.[298] 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 Ngati Porou's submission was on giving iwi (via post-settlement governance entities) powers and facilities to buy Maori land interests, without requiring Maori Land Court approval.[299] Te Runanganui also called for the Crown to resume financing Maori land development.[300]

- The Wakatu 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

[294] Maori Land Court judges, submission to review panel, 26 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 29)
[295] Maori 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)
[296] FOMA, oral submissions to review panel, October 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 62-74)
[297] Te Runanga o Ngati Porou, submission to TTWM Review Panel, 23 November 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 82)
[298] Te Runanga o Ngati Porou, submission to TTWM Review Panel, 23 November 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 84-85)
[299] Te Runanga o Ngati Porou, submission to TTWM Review Panel, 23 November 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 86-94)
[300] Te Runanga o Ngati Porou, submission to TTWM Review Panel, 23 November 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 98-99)

Wakatu' should progress to self-regulation, reducing the Maori Land Court's role in the 'administration and management of land'.[301]

- Nga Hapu 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 hapu should become preferred alienees, and that the review should be conducted according to UNDRIP principles, requiring Maori consent to legislative changes.[302]

After considering these submissions, the existing reports, and discussions with stakeholders, the panel developed a discussion paper for wider consultation. This paper was crucial because its contents shaped the response from Maori at hui and in submissions, as well as the reform proposals that – in the panel's conclusion – Maori generally supported. The paper was drafted by TPK and was released at the beginning of April 2013.[303] In the meantime, a further influential report had been issued by the Ministry of Primary Industries (MPI) in February of that year. This report, entitled *Growing the Productive Base of Maori 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 Maori land into production has the potential to realise an additional $8 billion in gross output over a 10 year period'.[304]

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

The review panel's discussion document put five key propositions to Maori for their consideration and feedback. The propositions were designed to 'improve the likelihood of utilisation of Maori land'.[305] The panel's focus on utilisation caused it to advance some contradictory positions. On the one hand, its main emphasis

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[301] Wakatu Incorporation, 'Preliminary Report on the Te Ture Whenua Maori Act 1993 Review 2012', July/August 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 567-568)

[302] Nga Hapu o Poutama, submission to review panel, 10 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 13-16)

[303] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 164)

[304] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 164)

[305] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 169)

was on owner empowerment, which it equated with tino rangatiratanga.[306] 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'.[307] This led to the idea that 'there may be a case for an external administrator to manage the land on their behalf'[308] – 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 Maori 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 Maori Land Court.[309]

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

> The current regime governing Maori land is structured so that many decisions cannot be taken by Maori 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.[310]

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'.[311]

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[306] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 175)
[307] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 172)
[308] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 170, 174)
[309] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 169)
[310] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 183)
[311] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 183)

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'.[312] For long-term leases, however, 75 per cent of engaged owners might be more appropriate.[313]

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 Maori land. The present system relied on the Maori 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 kaa' to make decisions and look after the interests of their whanaunga.[314] We will return 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* Maori land to be utilised:

> *Proposition 2: All Maori 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 Maori land. The Maori Land Court should have a role in approving the appointment and retaining oversight of external administrators.[315]

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

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[312] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 184-185)
[313] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 185)
[314] Mahuika, first brief of evidence (doc A23), p 4
[315] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 169)

engagement by owners' was mostly to blame.[316] The panel sought feedback on the suggestion that external administrators should be appointed to manage under-utilised Maori land 'when owners are either not engaged or unable to be located'. The Maori 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.[317]

The third proposition related to the often-identified concerns about a lack of skill or capability among Maori land governors:[318]

> *Proposition 3: Maori land should have effective, fit for purpose, governance*
>
> The duties and obligations of trustees and other governance bodies who administer or manage Maori 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.[319]

In the panel's view, better governance would 'drive greater utilisation of Maori land'.[320] The Court's role from now on should simply be to record the appointment of trustees. The governors of Maori 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 Maori 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 Maori Land Court approval.[321]

For its fourth proposition, the panel suggested:

> *Proposition 4: There should be an enabling institutional framework to support owners of Maori land to make decisions and resolve any disputes*

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[316] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 186-187)
[317] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 189-192)
[318] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 187)
[319] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 169)
[320] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 192)
[321] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 192-196)

> Disputes relating to Maori land should be referred to mediation in the first instance. Where the dispute remains unresolved following mediation, it may be determined by the Maori Land Court.[322]

The panel proposed the creation of an 'independent mediation service' to give effect to their proposition.[323]

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:[324]

> *Proposition 5: Excessive fragmentation of Maori land should be discouraged*
>
> Succession to Maori land should be simplified. A register should be maintained to record the names and whakapapa of all interests in Maori land, regardless of size.[325]

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.[326] 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.[327]

(5) The review panel consults Maori, April to 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 Maori land and Maori land development'.[328] 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.

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[322] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 169)
[323] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 199)
[324] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 199)
[325] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 169)
[326] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 202)
[327] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 203, 207)
[328] TPK, 'Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel', March 2013 (Grant, papers in support of first brief of evidence (doc A1(a)), p 168

The independent review panel's consultation hui, 29 April to 13 June 2013

Tokomaru Bay (Pakirikiri Marae)	29 April	Invercargill (Te Tomairangi 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 Hou Marae)	2 May	Kaikohe (Mid North Motor Inn)	17 May
Waitara (Owae 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
Taupo (Great Lakes Centre)	10 May	Gisborne (Mangatu Incorporation)	11 June
Te Kuiti (Te Tokanganui a Noho Marae)	13 May	Hamilton (Kingsgate Hotel)	12 June
Christchurch (Chateau on the Park)	14 May	Whangarei (Whangarei Terenga Paraoa Marae)	13 June

The key point about this consultation is that there was general support from Maori for almost all of the review panel's propositions.[329] This meant that those Maori who participated generally said that they supported the concepts of engaged owners making decisions without Maori Land Court oversight, realigning governance models with general law, specifying and standardising governance arrangements, appointment of external managers to bring unutilised Maori land into use, introducing mediation as the primary method for dispute resolution, and simplifying the successions process.[330]

Maori 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

[329] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 165)
[330] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 234-243, 252-257)

> instance, we had originally made proposals to deal with excessive fragmentation of interests, i.e. trying to create incentives to aggregate Maori 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.[331]

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.[332] 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'.[333] 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.[334] 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.'[335]

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 Maori 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 Maori 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.[336]

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[331] Mahuika, first brief of evidence (doc A23), p 7

[332] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 234-243, 252-257)

[333] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 258)

[334] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 257-258)

[335] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 258)

[336] Maori Land Court judges' submission to review panel, 12 April 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 101-126)

The New Zealand Law Society and Te Hunga Roia Maori o Aotearoa disagreed with the panel's process and many of its ideas. Te Hunga Roia Maori argued that there did not appear to be a groundswell of popular Maori 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 Maori, and work to ensure that any law changes would assist all owners. What might assist one section of owners could be 'detrimental to others'.[337]

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 Maori 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 Maori saw the detail of what the reforms would really mean in practice that significant opposition began to develop;[338]

- The information put to Maori 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;[339]

- The hui did not constitute meaningful consultation because they were 'geared towards achieving a desired result of support for the kaupapa';[340] and

- The reform propositions did not address longstanding Maori concerns, which included compulsory acquisitions, rating, landlocked lands, lack of

[337] Te Hunga Roia Maori o Aotearoa, submission to review panel, 14 June 2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 670-671)
[338] 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
[339] Lant, first brief of evidence (doc A4), pp 6-8, 10
[340] Claimant counsel (Thornton), closing submissions (paper 3.3.10), p 18

finance and resources, and other factors that were both threats to retention and barriers to utilisation.[341]

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 below.

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 Maori 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 Maori, 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

[341] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 4, 7

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 Maori support for most of the policy headlines.[342] The review panel understood that Maori generally agreed to four of its five propositions.[343] 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.[344] The Maori Land Court judges, as noted above, had suggested that the legislation do more to 'shepherd' Maori towards whanau trusts.

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

On the basis of what it assessed as broad agreement from Maori, 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 Maori land laws:

> 1. be changed and clarified to enable engaged owners of Maori 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 Maori 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 Maori land will have legal and binding effect.[345]

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 Maori had wanted the 'ahi kaa' 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

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[342] See TPK 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, 2012-2013 (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 1-710

[343] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 234-243, 252-257)

[344] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), pp 256-257, 261)

[345] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 259)

decision-making would be determined by the entity's rules. Otherwise, there was wide support for retaining the present restrictions on permanent alienation.[346]

To give effect to Propositions 2 and 3, the panel recommended that the Maori land laws:

> 3. clearly prescribe the duties and obligations of Maori 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 Maori 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 Maori land blocks when there is no engagement by the owners.[347]

The panel noted that Maori 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'.[348]

In respect of governance arrangements, the panel hoped that these recommendations would result in improved governance. This, in turn, would 'drive greater utilisation of Maori land' and create greater confidence among banks and private sector lenders. This was the panel's only recommendation that related to increasing Maori landowners' access to finance.[349] The review panel did not, as Ngati 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 Maori land:

> 6. require disputes relating to Maori land to be referred, in the first instance, to mediation;
>
> 7. contain clear and straightforward provisions and rules to ensure that the Maori 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;

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[346] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 259)
[347] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 259)
[348] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 260)
[349] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 260)

8. provide transparent registration provisions for Maori land titles and assurance of title to reflect the nature of Maori land tenure as a collectively held taonga tuku iho;

9. contain provisions that facilitate succession to Maori 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 Maori land ownership interests.[350]

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 Maori Land Court would need to resolve the dispute.[351]

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 Maori Act 1993 should be repealed. The reason given for this recommendation was that the primary focus of the Act was the Maori 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 Maori land protection and utilisation and empowerment of Maori land owners and their decision-making'.[352] 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.[353]

Before we can fully assess the claimants' criticisms of the review panel's process, and the broader question of whether the proposed reforms reflected Maori 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 Maori 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

[350] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 260)
[351] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 261)
[352] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 261)
[353] Minutes and TPK summary reports for the 2013 hui (Crown counsel, third disclosure bundle, vol 1 (doc A29), pp 711-797)

who have experienced dramatic land losses'.[354] 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'.[355] The Council seems to have thought that the engaged owners' model, the reduction of Maori 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 Maori Councils reserved the right to dissent, as some later did).[356]

Nga Hapu 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 Maori 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.[357]

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

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[354] New Zealand Maori Council, submission to review panel, 20 May 2013 (Crown counsel, third bundle of documents, vol 1 (doc A29), pp 275-276)
[355] New Zealand Maori Council, submission to review panel, 20 May 2013 (Crown counsel, third bundle of documents, vol 1 (doc A29), pp 275-276)
[356] New Zealand Maori Council, submission to review panel, 20 May 2013 (Crown counsel, third bundle of documents, vol 1 (doc A29), pp 276-282)
[357] Nga Hapu o Poutama, submission to review panel, 10 September 2012 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 14)

and future generations would align the law and institutional framework for Maori land more closely with the Treaty.[358]

After receipt of the panel's report in July 2013, 'Minister Finlayson accepted the Panel's recommendations'. He 'directed Te Puni Kokiri officials to develop policy proposals on the basis of the [panel's] propositions to act as the basis for a new Te Ture Whenua Maori Bill'.[359] From July to August 2013, officials developed these proposals for presentation to Cabinet.[360] 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 consultation hui and submissions, the Crown decided to proceed immediately with a new Act.

As the claimants noted, a Te Ture Whenua Maori Bill had already been put on the legislative programme back in February 2013.[361] We do not accept the inference drawn by the claimants, however, that the Crown had decided to repeal the existing Act at that point.[362] 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 Maori Land*. This report was clearly influential in the reasoning put before Cabinet in support of the reforms: 'It is also estimated that Maori land could generate $8 billion in gross output and 3,600 new jobs for the primary sector.'[363] 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 Maori 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 Maori 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 Maori land blocks capable of development. The law reform was supposed to complement this by improving the

[358] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 19)
[359] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 166)
[360] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 166)
[361] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 11
[362] Claimant counsel, closing submissions (paper 3.3.8), p 11
[363] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 7)

legislative and institutional framework for administering the land.[364] It would do so by increasing the 'utilisation of Maori land through empowering Maori land owners and governors to make decisions themselves, supported by an enabling institutional environment, while maintaining protections for the retention of Maori land'.[365]

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 Maori economic development plan for developing natural resources in Maori ownership. The aspirations of Maori landowners – as understood through a series of Crown and Maori 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 Maori aspirations to use and develop their land through improved resources and governance, within the agreed context that protecting retention was still paramount for Maori.[366]

Based in part on the MPI study *Growing the Productive Base of Maori Freehold Land*, the Associate Minister predicted significant benefits for whanau, hapu, 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 Maori 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.[367]

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

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[364] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 6)
[365] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 7)
[366] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 6-16)
[367] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 16)

independent review panel and the 'generally supportive' response of Maori in the April to June consultation.[368] The Associate Minister hoped to be able to draft and introduce a new Te Ture Whenua Maori Bill by November 2013.[369]

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 Maori land owners to make decisions without the need for judicial involvement and continue to include protections for the retention of Maori 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 Maori land'. The risks associated with this proposal would be managed by providing all owners 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.[370]

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 Maori land blocks;
>
> allow Maori land owners to establish governance entities themselves; and
>
> prescribe the duties and obligations of Maori land governance entities and align these with the general law.[371]

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.[372] The Court was not mentioned in the Crown's proposal, which

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[368] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 6)
[369] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 17)
[370] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 11)
[371] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 11)
[372] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 254)

provided instead for the Crown to appoint and oversee external managers.[373] The review panel had noted Maori 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.[374]

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 Maori 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'. Maori 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 Maori land, but information and training would be provided.[375]

The policy proposals to meet the panel's Propositions 4 and 5 were described as a 'significant reform to the institutional framework supporting Maori 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 Maori Land Court's roles was a need for more administrative services. Enabling the empowerment of engaged owners would also require enhanced administrative services.[376]

TPK thus proposed to 'support Maori land owners with administrative services to be provided by an existing government agency'. These services included:

- administering a mediation service;

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[373] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), pp 12-13)
[374] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), pp 11-12)
[375] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), pp 12-13)
[376] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 13)

- appointment and oversight of external managers in appropriate cases;
- managing decision-making processes for owners to establish governance entities;
- maintaining the record of Maori land ownership and titles; and
- providing information and registry services.[377]

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 Maori 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 'Maori 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 Maori land records held under Te Ture Whenua Maori Act 1993. To ensure that Maori land was clearly known and identified as such, work was necessary to better align LINZ and Ministry of Justice records.[378]

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 Maori 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'.[379]

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 Maori land utilisation that the Government is seeking'. It would need to be accompanied by 'a more proactive approach to channelling of resources to this

[377] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 13)
[378] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 13-15)
[379] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), pp 13, 15)

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.[380]

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 further work was necessary to clarify the impacts on the Court's regional staff and their Maori stakeholders. The Ministry reportedly needed to reassess the design of service delivery in the Maori Land Court.[381]

In terms of Treaty implications, it was argued that the TPK proposals would empower Maori landowners to use and develop their lands. The institutional and legislative framework – in achieving this – would be aligned more closely with Treaty principles.[382]

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 Maori Bill, and preparation of an implementation plan by October 2013.[383]

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

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[380] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 15)
[381] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), pp 16, 18)
[382] Associate Minister of Maori Affairs to Chair, Cabinet Economic Growth and Infrastructure Committee, 'Te Ture Whenua Maori Bill: Policy Approvals', 28 August 2013 (doc A29(a)), p 19)
[383] 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)

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 Maori, or both?

It seems clear that both the Crown and Maori instigated and shaped the 2013 reform proposals.

On the one hand, TPK had long been concerned about Maori 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 Maori land was either unutilised or under-utilised, and that some key barriers were regulatory in nature. If those barriers could be removed, and resources channelled into development, then the utilisation of Maori land would greatly benefit Maori, 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'.[384]

On the other hand, it was not only the Crown that wanted Maori land utilised and developed (where appropriate to the group and site). The 'Maori' issues identified in section 3.3.3(4) had clearly emerged by 2011 in debate and discussions among Maori, and between Maori and the Crown. From those debates and discussions, Maori 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 Maori 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, Maori 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

[384] Minister and Associate Minister for Maori 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]

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 ka' community. These were clearly issues and concerns for Maori, 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 Maori-initiated and Maori-controlled. Other reports, such as the Maori agribusiness report, were clearly Crown-generated and had wider priorities than just Maori or Maori land. The 2011 owners' aspirations report fell somewhere between the two, commissioned by TPK but reporting and analysing the results of six hui with Maori landowners. Some reports, such as the 1996 investment group, the 1997 FOMA survey, and the 1999 Maori 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 Maori but appointed by the Crown to give advice independently of officials, reflected Maori 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 Maori Land Court's powers, and its call for 'pre-commercial facilitation', remain largely unfulfilled. (The establishment of the Maori 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 Maori needed (and wanted) reforms to reduce the Maori Land Court's discretionary powers, realign Maori 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 Maori hui participants and submitters told the Crown they wanted.

Nonetheless, in 2000 and 2006 it was Maori who decided not to proceed.

From the evidence available to us, a consensus emerged in 2000 among the Maori 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 Maori 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 Maori 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 Maori land governors. Maori 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 Maori land to the principles of Te Ture Whenua Maori and the jurisdiction of the Maori Land Court. It is not convincing, however, to accept these as authentically Maori concerns raised by Maori (as the claimants do), without also accepting that regulatory restrictions, Maori Land Court discretions, and empowering 'ahi kaa' owners to make decisions, had also been raised by Maori 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 Maori and the Crown, dating back to at least 1998. Equally, the Maori 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 Maori 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 Maori 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 Maori-nominated representatives;

- the panel's membership was skewed towards commercial and business experience and was not more generally representative of Maori 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 Maori landowners;

- the panel's propositions (and supporting documentation) were so one-sided and high-level that a degree of Maori agreement was not surprising – the devil would turn out to be in the detail, as Marise Lant put it;[385] and

- the review did not address the real Maori 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 Maori support for the review panel's propositions was not fully or properly informed. We note that Maori 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 Maori 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 Maori 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'

[385] Lant, first brief of evidence (doc A4), p 7; Marise Lant, second brief of evidence, 15 September 2015 (doc A6), p 29

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 Maori in the first instance, but to appoint an independent panel of (mostly) Maori 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 Maori electoral college, representing a range of involved Maori 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 Maori nationally. In those circumstances, the Tribunal found:

> Where it is found that a Maori 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 Maori expertise be well represented. Secondly, there is an equally important place for 'political' representation in its widest Maori 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 Maori organisations and networks, and a willingness, both in consultation and selection, to go beyond 'the usual suspects'.[386]

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.[387] 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 Maori land administration experience to their work. We accept that the 'relevant field of Maori 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 Maori 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

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[386] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims concerning New Zealand Law and Policy affecting Maori Culture and Identity, Te Taumata Tuarua* (Wellington: Legislation Direct, 2011), vol 2, p 580
[387] Derek Te Ariki Morehu, brief of evidence (doc A25), pp 2-8

'flexibility' that there was no consultation at all on the details.[388] We think this overstates matters. Broad Maori 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 Maori 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). Maori 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 Maori 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 Maori. 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 Maori and our independent thinking on the future administration of Maori 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.[389]

[388] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 4
[389] Mahuika, first brief of evidence (doc A23), pp 7-8

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 Maori who participated in the 2013 consultation broadly agreed. Maori 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 Maori 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 Maori were 'generally supportive of the overall thrust' of the panel's propositions.[390] 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 Maori. There is nothing surprising or sinister in that.

In conclusion, the high-level review proposals of 2013 reflected both Crown and Maori 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 partly on the basis of the 2011 MAF and 2013 MPI reports. But there are doubts as to how well-informed the review proposals and the 'general' Maori agreement to them actually was, raised by the submissions of the Maori Land Court judges and other legal practitioners. 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–Maori dialogue (as it had been to date). We deal with that question in the next section of this chapter.

[390] Cabinet Economic Growth and Infrastructure Committee, Minute of Decision, 4 September 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 42

The issue remains that the claimants feel the reform proposals could not possibly be said to reflect the Maori 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'.[391] 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 Maori 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. Approximately one-third of Maori 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 Maori 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 Maori – was not mentioned 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 Maori, 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 Maori-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 Maori Act 1993 is not 'weak' when compared to its Treaty partner's interest. The Crown has Treaty obligations

[391] TPK, 'Report: Te Ture Whenua Maori Act 1993 Review Panel', March 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 258)

to Maori under the Act, including the active protection of Maori land for present and future generations, and the empowerment of Maori 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 Maori (in this case, of Maori 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 Maori 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 Maori land development.[392]

We agree with the Crown that there is a distinction in this claim between the Maori Community Development Act 1962, which accorded legislative recognition and statutory powers to Maori institutions, and Te Ture Whenua Maori Act 1993, which maintains a national title system and a court of record. Nonetheless, the primary interest in the arrangements for how Maori land is administered, managed, and governed, surely lies with Maori. After all the Treaty has a specific guarantee to Maori 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 Maori in the institutions which Maori have constituted under the Act, such as ahu whenua trusts, incorporations, and whanau trusts, to govern and manage their taonga tuku iho. Maori land is absolutely central to Maori identity and cultural wellbeing. It has the potential to play a greater role than it does at present in the economic wellbeing of Maori 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 Maori 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 Maori interest in their taonga tuku iho, Maori land, is so central to the Maori 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 Maori Community

[392] 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.

Development Act 1962 case, where the Crown interest was found to be 'weak', the Tribunal stated: 'Either the Crown or Maori could initiate conversation reviewing a piece of legislation that is central to Maori interests, but in which the Crown also has an interest.'[393]

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 Maori.

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 Maori 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 Maori on them, and made recommendations on the basis of that consultation, which the Crown accepted. The process was neither Crown-led nor Maori-led, although shaped and influenced by both. It was the Crown which appointed the (mostly Maori) experts, but it was Maori 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, Maori 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. Maori 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 Maori 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.[394]

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 Maori 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

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[393] Waitangi Tribunal, *Whaia Te Mana Motuhake / In Pursuit of Mana Motuhake: Report on the Maori Community Development Act Claim* (Wellington: Legislation Direct, 2015), p 388

[394] Associate Minister of Maori Affairs, press release, 'Te Ture Whenua Maori Act review announced', 3 June 2012 (Grant, papers in support of first brief of evidence (doc A1(a)), p 70)

review the literature and develop [its] own ideas'.[395] 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 Maori and the Crown. We have set out the evidence for this in sections 5.3.2 and 5.3.3. Both Crown-generated and Maori-generated material influenced the panel's discussion paper, as did the members' preliminary consultation with bankers, Maori Land Court judges (past and present), and a variety of iwi and Maori land organisations. The Crown, however, had to approve the contents of the review panel's discussion paper before the next step (nationwide consultation with Maori) 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.

The consultation with Maori 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 Maori support for the propositions, and the various agreements and disagreements on matters of detail, was decided by the panel, not the Crown. If Maori had rejected the reform propositions, the panel would have reported this to the Crown, and the review may or may not have ended there. We cannot say. What we can say is that the review panel's proposals had a great deal of support from Maori 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 Maori seemed to be in agreement on what should happen: the Crown's decision in September 2013 was to accept recommendations that Maori 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

[395] Mahuika, first brief of evidence (doc A23), p 6

officials had come up with their own proposal as to how to deal with fragmentation.

There was, however, one panel recommendation for which Maori approval had not been sought. The review panel recommended that Te Ture Whenua Maori Act 1993 be repealed and replaced by an entirely new Act. This recommendation had not been the subject of consultation with Maori, and the Crown could not have known whether Maori 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 Maori 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 Maori. The outcome of the review, and the Crown's decision to introduce a new Te Ture Whenua Maori 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 Maori 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 Maori, are the subject of this section of our chapter.

3.4.2 Policy decisions and informational presentations, September 2013 to 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 Maori 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 Maori 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'.[396] LINZ's services to Maori landowners would be carried out under six broad headings:

- Supporting owners decision-making processes;
- Appointing and overseeing external managers;
- Maintaining the record of Maori land ownership and titles;
- Providing information services for Maori land ownership and title;
- Providing registry services for Maori land governance entities; and
- Administering a mediation service for Maori land disputes.[397]

This marked a 'fundamental shift in how services will be delivered to Maori 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'.[398] 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: (i) title, ownership or interests in Maori land, (ii) trespass and damages claims, (iii) membership of a class of preferred alienees, (iv) claims that land was held in a fiduciary capacity, (v) allegations of misconduct or breach of duty regarding a Maori land trustee, director or committee member of a governance entity, and (vi) 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.[399]

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[396] Cabinet Economic Growth and Infrastructure Committee, 'Summary of Paper', 29 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 50)

[397] Associate Minister of Maori Affairs to Cabinet Economic Growth and Infrastructure Committee, 29 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 59)

[398] Associate Minister of Maori Affairs to Cabinet Economic Growth and Infrastructure Committee, 29 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 59)

[399] Associate Minister of Maori 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)

In order to prepare LINZ for carrying out these new responsibilities, TPK proposed that the Te Ture Whenua Maori Bill would be introduced in early 2014, but that any matters requiring the new administrative services would not come into effect for another three years.[400] 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 Maori was anticipated, although TPK did recommend 'initial and on-going communications' to 'ensure Maori 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 Maori landowners about the decisions that had been made.[401]

In addition to developing the LINZ proposal, officials had carried out further work on risk assessment. What concerns us mostly 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 Maori 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 Maori 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.[402]

TPK also noted that unengaged owners would always have the option to re-engage, 'simply by participating in decision-making relating to the land'.[403] 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

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[400] Associate Minister of Maori Affairs to Cabinet Economic Growth and Infrastructure Committee, 29 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 60)

[401] Associate Minister of Maori Affairs to Cabinet Economic Growth and Infrastructure Committee, 29 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 63)

[402] TPK, 'Regulatory Impact Statement', 27 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 88)

[403] TPK, 'Regulatory Impact Statement', 27 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 88)

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'.[404] 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'.[405] 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 Maori land utilisation the Government is seeking'. Access of Maori landowners to development finance, building the capability of Maori 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.'[406] 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).[407]

Cabinet accepted TPK's updated proposals and analysis in December 2013.[408] 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 to the [review] panel's recommendations, preparing drafting instructions for the Parliamentary Counsel Office and working with the bill drafters'.[409] 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 Maori land law, and had also been Chief Registrar of the Court, and thus brought expertise to

[404] TPK, 'Regulatory Impact Statement', 27 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 94)
[405] TPK, 'Regulatory Impact Statement', 27 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 94)
[406] TPK, 'Regulatory Impact Statement', 27 November 2013 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 94)
[407] Lillian Anderson, first brief of evidence, 4 November 2015 (doc A24)
[408] Cabinet Economic Growth and Infrastructure Committee, 'Summary of Paper', 27 June 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 97)
[409] Grant, first brief of evidence (doc A1), p 10

the panel's work.[410] 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.[411]

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 Maori land owners and administrators'.[412] The presentations involved 'questions and feedback from participants'.[413]

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 Maori land. But very little was recorded.[414]

Marise Lant observed that the Gisborne presentation in February 2014 was made at the end of a hui about Treaty settlements.[415] 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 Maori 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 Maori or Maori 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'.[416]

[410] Grant, first brief of evidence (doc A1), p 11
[411] Grant, first brief of evidence (doc A1), p 10
[412] Grant, first brief of evidence (doc A1), p 11
[413] Grant, first brief of evidence (doc A1), p 11
[414] John Grant, file notes for meetings, 7 October 2013, 2 December 2013 (Crown counsel, third disclosure bundle, vol 1 (A29), pp 1117-1124)
[415] Lant, first brief of evidence (doc A4), p 9
[416] Lant, first brief of evidence (doc A4), pp 10-11

The Associate Minister's informational hui, September 2013 to April 2014

Napier	21 September 2013	Otaki	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

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.[417] The proposal to use LINZ to deliver the expanded administrative services for Maori 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 Maori 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 Maori owners about the changes. In April 2014, however, the technical panel and officials were joined by external Maori advisers from the Iwi Chairs Forum and FOMA. A 'collaborative' Crown–Maori 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 Maori Bill to 'reform the governance and management of Maori land' based on the panel's

[417] 'Review of Te Ture Whenua Maori Act: presentation', undated, powerpoint presentation to hui, September 2013 – April 2014 (Grant, papers in support of brief of evidence (doc A1(a)), pp 267-270)

recommendations. It was not explicitly stated that the 1993 Act would be repealed.[418]

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 Maori 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 Maori landowners and the Crown had not been properly informed.[419]

3.4.3 'Collaboration': April to 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'.[420] In response, the iwi chairs established a Te Ture Whenua Maori 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' advisory group was led by Willie Te Aho, and included Spencer Webster (co-president of Te Hunga Roia Maori) as well as some FOMA personnel (Tamarapa Lloyd and Kerensa Johnston) and several others (see box).[421] Linda Te Aho, who taught Maori land law as Associate Dean (Maori) in the Waikato University Law Faculty, also joined John Grant, Matanuku Mahuika, and John Stevens on the Crown's technical panel.[422]

[418] Associate Minister of Maori Affairs, press release, 3 April 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 265)
[419] Judge David Ambler, 'Review of Te Ture Whenua Maori Act 1993', 24 June 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(a)), p 3)
[420] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence, 3 August 2015 (doc A5(a)), p 2)
[421] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 170)
[422] Grant, first brief of evidence (doc A1), p 10

Te Ture Whenua Maori Iwi Leaders Group's specialist advisers

Raniera Tau (Ngapuhi) (Chair)

Haami Piripi (Te Rarawa)

Selwyn Parata (Ngati Porou)

Piki Thomas (Te Pumautanga o Te Arawa)

Kemp Dryden (Ngati Rangi)

Che Wilson (Ngati Rangi)

David Jones (Rongowhakaata)

Tamarapa Lloyd (Ngati Tuwharetoa)

John Hooker (Ngaruahine)

Hori Manuirirangi (Ngaruahine)

Te Oti Katene (Ngaruahine)

Donna Flavell (Ngai Tahu)

Sandra Cook (Ngai Tahu)

Spencer Webster (Ngai Te Rangi)

Rikirangi Gage (Te Whanau a Apanui)

Dayle Takitimu (Te Whanau a Apanui)

Kerensa Johnston (FOMA)

Traci Houpapa (FOMA)

Te Horipo Karaitiana (FOMA)

(TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Maori Bill and Related Policy', 1 May 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(b)), p [80])

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.[423] The Crown was not able to provide minutes or an account of what transpired at these workshops.[424] 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',[425] 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 the evidence of Marise Lant.[426] 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 Maori will only have input to the new Bill through the Maori Affairs [Select] Committee process'.[427] 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.'[428] 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.[429] At the same time, the ILG considered it crucial that policy and resources to assist Maori development be worked out at

[423] Grant, first brief of evidence (doc A1), p 11
[424] Crown counsel, memorandum, 20 November 2015 (paper 3.1.76), p 3
[425] Crown counsel, opening submissions (paper 3.3.3), pp 12-13
[426] TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Maori Bill and Related Policy', 1 May 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(b)))
[427] TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Maori Bill and Related Policy', 1 May 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(b)), p [78])
[428] TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Maori Bill and Related Policy', 1 May 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(b)), p [79])
[429] TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Maori Bill and Related Policy', 1 May 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(b)), pp [81]-[82], [84])

the same time as the Bill, so as to achieve the much-discussed $8 billion from increased production.[430]

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.[431]

On 25 June 2014, the Associate Minister and the Minister for Primary Industries met with Raniera Tau and Rikirangi Gage (ILG), Jamie Tuuta (Maori 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 Maori 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 Maori before its introduction to Parliament.[432]

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 Maori Trustee made a joint presentation to the Ministers. The 'iwi view for the new Ture Whenua Maori' 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 Maori land owners – not

[430] TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Maori Bill and Related Policy', 1 May 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(b)) pp [82]-[83])
[431] TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Maori Bill and Related Policy', 1 May 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(b)) p [84])
[432] Grant, first brief of evidence (doc A1), p 16; Associate Minister of Maori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), p 296)

merely move the paternalism from the Court to another government agency'. The improvement should be 'iwi/Maori led with the government as an enabler'.[433]

The two Maori organisations and the Maori Trustee called for the Crown to invest $3 billion over three years in under-performing Maori 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 indepth analysis was also required to identify exactly what the constraints were that prevented the 'optimal' use of Maori land – most research had been very high level to date. Also, resources would be needed to assist Maori 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.[434]

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 Maori Act 1993 and what [they] describe as related policy and resourcing matters'.[435] The Associate Minister responded that there was 'no doubt about the value of continuing to collaborate on what is a key policy issue for Maori 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 Maori 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 Maori, but these would be matters for the incoming Government to decide.[436]

In the meantime, the ILG had also requested that the Crown hold a series of joint hui with 'Maori 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 Maori land owners about key aspects of the proposed Bill and to

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[433] TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Maori Bill and Related Policy', 1 May 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(b)) p [88])

[434] TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Maori Bill and Related Policy', 1 May 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(b)) pp [88]-[92])

[435] Associate Minister of Maori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), p 295)

[436] Associate Minister of Maori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), p 295)

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'.[437]

In addition, the ILG had proposed the creation of a new joint team of ILG, FOMA, Maori Trustee, and Government officials to conduct detailed research. The purpose was to specifically identify all Maori land that had multiple (absentee) owners and no governance entity, and all Maori 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 Iwi Chairs Forum 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.[438]

The Associate Minister responded that a 'stock-take' of Maori 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.[439]

Thus, FOMA and the iwi chairs tried to take control of Maori 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 Maori land law was being led by the Government and that two major things should happen to make it co-led by Maori 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 Maori 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

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[437] Associate Minister of Maori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), p 296)
[438] Associate Minister of Maori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), p 296)
[439] Associate Minister of Maori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), pp 295-296)

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 Maori Land Service.

3.4.4 The Crown decides to establish a Maori Land Service, July 2014

Back in November 2013, Cabinet had agreed that LINZ was the preferred provider for all administrative Maori 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 Maori land owners'.[440]

TPK and LINZ sought Cabinet approval for the development of a Maori Land Service, in which TPK would take the lead in matters that required face to face contact with Maori, LINZ would focus on electronic services, and the Maori Land Court staff would service the Court and maintain its record (including the historical record, which would remain with the Court).[441] 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 Maori Land Court staff would continue to provide existing services while 'systems to support the future state are being designed and tested'.[442]

TPK thus envisaged using its regional offices to provide more local services to Maori communities, while LINZ maintained centralised, electronic information-based services. TPK would provide advice to Maori 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

[440] Cabinet Economic Growth and Infrastructure Committee, 'Summary of Paper', 27 June 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 99)
[441] Associate Minister of Maori 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)
[442] Cabinet Economic Growth and Infrastructure Committee, 'Summary of Paper', 27 June 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 100)

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.[443]

It was 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 Maori Land Service.[444] Nonetheless, the costing of the service relied on Maori owners to 'administer or interact with their land interests primarily through an online channel supplemented by face to face services'.[445]

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' Maori owners, and some Maori 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 Maori 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 Maori mediators that would be required when the majority of dispute resolution would henceforth be compulsory mediation.[446]

As far as we can tell from the evidence before us, these arrangements had not been discussed with Maori 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

[443] Associate Minister of Maori 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)
[444] Associate Minister of Maori 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)
[445] Associate Minister of Maori 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)
[446] TPK, 'Regulatory Impact Statement', undated (June 2014) (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 141-142)

costing of transition to the Maori Land Service, and options for its governance and accountability.[447]

In the meantime, TPK now planned to have the Bill introduced 'later in 2014'.[448]

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 Maori Trustee in June 2014 was an agreement that Maori would be consulted nationally about the proposed contents of the new Bill. The consultation would be co-led by the Crown, the ICF, and FOMA.

TPK prepared a powerpoint presentation for the consultation hui, which was provided to participants on 29 July 2014.[449] This document was the first opportunity for most Maori 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.[450]

Four key aspects of the current Act would be retained in the new Bill:

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[447] Associate Minister of Maori 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)
[448] Associate Minister of Maori 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)
[449] 'Te Ture Whenua Maori Hou Panui – Engagement Hui with Maori Land Owners', 15 July 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 291)
[450] TPK, 'Te Ture Whenua Maori: developing a Bill to restate and reform the law relating to Maori land', powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), p 273)

- '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';[451]

- the high threshold for selling or gifting;

- the Maori Land Court (but with a more 'judicial' role); and

- whanau and kai tiaki trusts (but a Court order would no longer be needed to establish a whanau trust).[452]

Key changes or new features of a 'Te Ture Whenua Maori Hou' would include:

- If any more Maori customary land was converted into freehold tenure, it must remain in collective ownership, with no individual shares.[453]

- An option would be provided for the owners of Maori freehold land to convert to collective ownership with the agreement of 75 per cent of all owners.[454]

- A 'participating owners' model would be established (the terminology had changed from 'engaged' to 'participating').[455] Participating owners would be 'empowered and supported to make key decisions without Court involvement'.[456] Such decisions included long-term leases (75 per cent of participating owners) and establishing a governance entity (50 per cent),

[451] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 169)
[452] Grant, first brief of evidence (doc A1), p 12
[453] TPK, 'Te Ture Whenua Maori: developing a Bill to restate and reform the law relating to Maori 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
[454] TPK, 'Te Ture Whenua Maori: developing a Bill to restate and reform the law relating to Maori 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)
[455] Grant, first brief of evidence (doc A1), p 17
[456] TPK, 'Te Ture Whenua Maori: developing a Bill to restate and reform the law relating to Maori land', powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), p 272)

designing its constitution (75 per cent), and appointing its 'kaitiaki' (50 per cent or as set in the constitution) (see below).[457]

- 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'.[458]

- A new form of governance entity, a 'rangatopu', could now be established (as noted) by a vote of 50 per cent of 'participating owners' without involving the Court. All rangatopu 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 Maori trust board, or the Maori Trustee as their governance body.[459]

- Existing trusts and incorporations (except for whanau trusts) would have to become rangatopu, with a three-year transition period.[460]

- Post-settlement governance entities would be added to the classes of preferred alienees.[461]

- Successions would now take place through an administrative process and most would not go before the Court. Intestate successions would have to be to whanau trusts and not individuals. Succession by will could now be

[457] TPK, 'Te Ture Whenua Maori: developing a Bill to restate and reform the law relating to Maori land', powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), pp 273-274, 278)
[458] TPK, 'Te Ture Whenua Maori: developing a Bill to restate and reform the law relating to Maori land', powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), pp 274, 278, 282)
[459] TPK, 'Te Ture Whenua Maori: developing a Bill to restate and reform the law relating to Maori land', powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), pp 272, 274, 278-280)
[460] TPK, 'Te Ture Whenua Maori: developing a Bill to restate and reform the law relating to Maori land', powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), p 279)
[461] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (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.

to a 'wider preferred class', which included post-settlement governance entities and rangatopu.[462]

- An 'accessible dispute resolution service' would be established to help Maori 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.[463]

- The 'Chief Executive' would appoint external managers to 'manage land pending owner engagement'. Existing provisions for the Court to appoint agents to represent owners in certain circumstances (such as notification of a public works taking) would continue.[464]

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'.[465] 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'.[466] Thus, 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 Maori 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 Maori land, and to receive feedback and submissions from Maori

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[462] TPK, 'Te Ture Whenua Maori: developing a Bill to restate and reform the law relating to Maori land', powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), pp 272, 276, 280, 281)

[463] TPK, 'Te Ture Whenua Maori: developing a Bill to restate and reform the law relating to Maori 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

[464] TPK, 'Te Ture Whenua Maori: developing a Bill to restate and reform the law relating to Maori land', powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), p 276)

[465] John Grant, fourth brief of evidence, 3 August 2015 (doc A5), p 1

[466] Grant, first brief of evidence (doc A1), pp 16-17

land owners on the proposed changes'.[467] In addition, the ILG sought 'explicit support' from hui participants to continue to lead Maori input to the reforms. A draft resolution was circulated:

> That the participants at this Ture Whenua Maori Engagement Hui support the Ture Whenua Maori Iwi Leadership Group, their engagement with the Crown on legislation, policy and resourcing and their next steps for increasing the productivity on Maori land.[468]

In addition to the Crown's powerpoint presentation, which was summarised in section 3.4.5(1) above, 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 Maori'.[469] 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.[470] Rather, FOMA stated more generally that reform 'must enable and deliver benefits for Maori land entities'.[471] FOMA would continue to work with TPK, ILG technical experts, and the Maori 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.[472]

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

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[467] 'Ture Whenua Maori Hou 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)
[468] 'Ture Whenua Maori Hou 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)
[469] FOMA powerpoint presentation, undated (July 2014) (Grant, papers in support of first brief of evidence (doc A1(a)), p 283)
[470] FOMA powerpoint presentation, undated (July 2014) (Grant, papers in support of first brief of evidence (doc A1(a)), pp 283-284)
[471] FOMA powerpoint presentation, undated (July 2014) (Grant, papers in support of first brief of evidence (doc A1(a)), p 283)
[472] FOMA powerpoint presentation, undated (July 2014) (Grant, papers in support of first brief of evidence (doc A1(a)), pp 283-284)

chosen by the land owners)'.[473] More specifically, the ILG wanted the hui to endorse the goals set out in its joint presentation with FOMA and the Maori 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.[474]

The 19 hui to consider and discuss these powerpoint presentations took place from 3–27 August 2014, and were attended by approximately 1,100 people.[475] There was no formal process for written submissions, although participants were provided with an email address to send 'comments and questions'.[476] The presenters at each hui were Matanuku Mahuika, John Grant, Jason Clarke (TPK), Linda Te Aho (in her capacity as ICF technical advisor), and Tamarapa Lloyd (FOMA). Officials remained for the 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.[477]

[473] ILG powerpoint presentation, undated (July 2014) (Grant, papers in support of first brief of evidence (doc A1(a)), p 285)
[474] ILG powerpoint presentation, undated (July 2014) (Grant, papers in support of first brief of evidence (doc A1(a)), pp 286-289)
[475] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 3). Follow-up hui were held in Whangarei on 22 August and in Wairoa on 20 October 2014.
[476] Grant, first brief of evidence (doc A1), p 14
[477] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (doc A5(a)), p 3)

The 19 Crown, ILG and FOMA hui, August 2014

Location	Date	No attending	Location	Date	No attending
Auckland	3 August	50	Wellington	12 August	40
Whangarei	3 August	100	Invercargill	13 August	20
Kaikohe	4 August	80	Christchurch	13 August	35
Hamilton	4 August	120	Taupo	14August	55
Rotorua	7 August	110	Tauranga	14 August	50
Gisborne	10 August	80	Whakatane	14 August	25
Hastings	10 August	50	Te Kaha	15 August	20
New Plymouth	11 August	40	Tokomaru Bay	15 August	70
Whanganui	11 August	80	Dunedin	27 August	50
Nelson	12 August	35			

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'.[478] As a result, little information was provided and

> Maori 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 Maori land will remain.[479]

In addition, Marise Lant told the Tribunal that incorrect messages were conveyed, including that the 'Maori 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 Maori. 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[480] – at that stage (August 2014), the Crown intended that the '[f]inal draft of [the] Bill' would be completed by the end of the

[478] Lant, first brief of evidence (doc A4), pp 10, 11
[479] Lant, first brief of evidence (doc A4), p 10
[480] Lant, first brief of evidence (doc A4), p 11

year.[481] Ms Lant also stated that the Gisborne hui reached no decision on the reforms, and the views at Rotorua and Tokomaru Bay were 'varied'.[482]

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 Maori land owners.... Many participants support a greater emphasis on tikanga Maori, including the potential for collective ownership. However, tension remains evident between those who regard their interests in Maori 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.[483]

After further analysis, this remained TPK's view of the general outcome of the hui.[484]

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 Maori 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.[485]

In particular, hui participants identified the impact of landlocked land, rates arrears, local government planning, and RMA constraints as legislative regimes which impacted on Maori land development (and which required legislative

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[481] TPK, 'Te Ture Whenua Maori: developing a Bill to restate and reform the law relating to Maori land', powerpoint presentation to August 2014 hui (Grant, papers in support of first brief of evidence (doc A1(a)), p 282)

[482] Lant, first brief of evidence (doc A4), p 11

[483] Grant, first brief of evidence (doc A1), pp 14-15

[484] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 171); TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 5)

[485] Grant, first brief of evidence (doc A1), p 15

remedies). The Crown's response at the hui was to note these 'as issues' but also as 'outside the scope of the reform'.[486] There was also a view that paper roads should be removed from all Maori land (which would require legislative action).[487]

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.[488] 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'.[489] 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'.[490]

- The view was expressed that land ownership and decisions were a matter for hapu 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 Maori land. Equally, hui participants were worried about the inclusion of the Maori Trustee, Maori trust boards, and the Public Trustee as potential governance bodies.[491]

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[486] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 8)
[487] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 172)
[488] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 5)
[489] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 171); TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 5)
[490] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 5)
[491] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 6); TPK, briefing for Minister of Maori

- Hui participants considered that the emphasis should be on getting governance structures created for blocks which had none, rather than changing existing entities into rangatopu. 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 rangatopu. 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' Maori land governors to improve competence. Officials acknowledged this as 'an issue that will require further support'.[492] As far as we are aware, the fact and detail of the Crown's recent decision to establish a Maori 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'. Maori 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.[493]

- There was general support at the hui for land interests 'passing into a whanau collective on intestacy'. As noted above, there was support for a number of initiatives to recollectivise the ownership of Maori land, of which this was one. Officials noted that 'one or two' were concerned that intestate successions to whanau 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'.[494] 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 Maori Land Service (and its division of responsibilities) was not discussed. Hui participants also feared that the new arrangements would enable people to submit false whakapapa and succeed to interests to

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Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (A29(a)), p 171); Grant, first brief of evidence (doc A1), p 19

[492] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (doc A5(a)), p 6)

[493] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 7)

[494] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 7)

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.[495] Officials noted this concern.[496]

- Hui participants insisted that the proposed mediation service would have to have 'no or minimal costs' to be effective and accessible for Maori 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.[497]

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 Maori were concerned about aspects of them, including whether the participating owners' model would have sufficient safeguards; and

- enabling Maori to use their lands required the solution of a number of key, longstanding 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.[498]

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 Maori landowners: 'Increasing choices for

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[495] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 7)
[496] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 172)
[497] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 8
[498] 'Ture Whenua Maori Hou 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)

Maori land owners is at the heart of the proposed changes coupled with reduced judicial administration and discretion.'[499]

In Mr Te Aho's report, opposition was limited to 'the few who are against any change' and 'a few participants at different hui'.[500] 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 Maori 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.[501]

Thus, the iwi advisers' report of the hui was that Maori 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.

While the iwi advisers supported the empowerment of Maori 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 Maori 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.[502]

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 Maori ILG and the Crown on the following matters:

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[499] 'Ture Whenua Maori Hou 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)
[500] 'Ture Whenua Maori Hou 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)
[501] 'Ture Whenua Maori Hou 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)
[502] 'Ture Whenua Maori Hou 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)

- Strengthening the reference to Te Tiriti beyond the current preamble, and the unique status of Maori land as taonga tuku iho, by making Te Ture Whenua Hou the 'tuakana of all legislation' that affected Maori land;

- Tackling the laws relating to rating, valuation, and access at the same time as Te Ture Hou, as well as local government authority to restrict Maori land development under the RMA;

- Including in Te Ture Whenua Hou a greatly increased jurisdiction for the Maori Land Court to deal with all matters relating to Maori and their land, including making it the Land Valuation Tribunal for Maori 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 Maori land);

- Including in Te Ture Whenua Hou a provision for all Maori landowners in a hapu or rohe to make their own laws;

- Restructuring the Maori Trustee, giving it an iwi-appointed Board to repatriate its resources, and making it the Government agency to implement the Ture 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 Maori land development.[503]

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'.[504]

Thus, three distinct impressions of the 2014 hui emerged. Marise Lant's evidence does not dispute that there was majority support for the reforms, but she considered that Maori 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 Maori Land Court's

[503] 'Ture Whenua Maori Hou 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)
[504] 'Ture Whenua Maori Hou 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)

discretions, but that the majority supported collaborative reform by the Crown and the ILG to empower Maori landowners to make decisions about (and develop) their lands. The Crown's view was that Maori 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 longstanding barriers to Maori 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 28–29 August 2014. The Forum unanimously adopted the iwi advisers' proposed resolutions (described above) in toto. 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 Maori.[505] The ICF wanted reform that would tackle rating and other barriers to utilisation, make Te Ture Whenua the supreme Act for all matters affecting Maori land (including the RMA), and a commitment for zero cost services and development finance. 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 Marise Lant.[506] As she noted, the ICF had not yet formally agreed to the particular reforms proposed by the Crown.[507] Whereas 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.[508] 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

[505] 'Unanimous Resolutions passed by Iwi Chairs Forum, 28 August 2014 (Crown counsel, third disclosure bundle, vol 1 (doc A29), p 847)
[506] Lant, second brief of evidence (doc A6), pp 15-17
[507] Lant, first brief of evidence (doc A4), p 8
[508] Claimant counsel (Thornton), closing submissions (paper 3.3.10), pp 18, 32

> allowed Maori 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.[509]

Crown counsel quoted Mr Mahuika's evidence that '[p]eople were offered an opportunity to express their opinions on all of these iterations'.[510] 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.[511] 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 Maori whether the Crown had 'got this right'.[512]

The Crown denies the claimants' allegations that its consultation has been 'rushed, uninformed, or not carried out in good faith'.[513]

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.[514]

[509] Crown counsel, closing submissions (paper 3.3.6), pp 30-31
[510] Crown counsel, closing submissions (paper 3.3.6), p 27
[511] Crown counsel, closing submissions (paper 3.3.6), p 30
[512] Crown counsel, closing submissions (paper 3.3.6), p 28
[513] Crown counsel, closing submissions (paper 3.3.6), p 26
[514] Crown counsel, closing submissions (paper 3.3.6), p 25

The Crown also noted that it is 'required to ensure that Maori are "adequately informed so as to be able to make intelligent and useful responses", as was found in the Wellington Airport case'.[515]

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'.[516] 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 *Whaia 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 Maori in certain settings. Where the respective spheres of authority held by the Crown and Maori 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 Maori authority.[517]

The claimants say that the proposed reforms of Te Ture Whenua Maori Act 1993 is a 'case whereby the Crown is required to obtain the full, free, and informed consent of Maori'.[518]

(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 that the information provided before and at hui has been 'in no way adequate'.[519] 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 Maori Act 1993'.[520] This meant, they submit, that Maori people attending hui were only provided with a 'brief overview of the changes', and

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[515] Crown counsel, closing submissions (paper 3.3.6), p 25
[516] Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 3
[517] Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 2; Waitangi Tribunal, *Whaia te Mana Motuhake / In Pursuit of Mana Motuhake: Report on the Maori Community Development Act Claim* (Wellington: Legislation Direct, 2015), p 31
[518] Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 2
[519] Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), pp 4-5
[520] Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 5

were not provided with the information necessary to make 'fully informed decisions'.[521]

The claimants' evidence does not dispute or rebut the Crown's evidence that Maori 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.[522]

Of these three documents, the powerpoint slides were provided less than a week before the first set of hui in August 2014.[523] 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 Maori Land Court). In his article, Judge Ambler made the point that Maori bodies and legal commentators had not engaged in public debate on the review panel's report,[524] 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, Maori landowners and administrators brought their own experiences to the hui of how the system functioned. Knowledgeable people, including Marise Lant at four of the hui, shared their information and perspectives.

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[521] Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 5

[522] 'Ture Whenua Maori Hou 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)

[523] 'Te Ture Whenua Maori Hou Panui – Engagement Hui with Maori Land Owners', 15 July 2014 (Grant, papers in support of first brief of evidence (doc A1(a)), p 291)

[524] Judge David Ambler, 'Review of Te Ture Whenua Maori Act 1993', 24 June 2014 (Marise Lant, papers in support of first brief of evidence (doc A4(a)), p 1)

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 Maori 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 Marise 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 rangatopu.[525] 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.'[526]

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 Maori 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 – Maori 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 Maori disagreement with some key features, such as external managers and compulsory

[525] Wai 2478, amended statement of claim, 11 August 2014 (paper 1.1.1), para 19
[526] Te Ture Whenua Maori Reform: Consultation Document, May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 431)

whanau trusts, would have become clear earlier. On the other hand, Maori at the 2014 hui do seem to have supported using whanau trusts for intestate successions (as a means of recollectivising Maori land), even though this concept aroused significant opposition in 2015.

A final point to note about the 2014 hui is that longstanding Maori 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.[527]

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 Maori. Officials supported this approach but the final decision depended on the outcome of the 2014 general election.[528]

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.[529] 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.[530]

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 actioned: upskilling Maori land governors is one of the functions of the proposed Maori Land Service.[531] Officials took on board worries about transition costs and fees,

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[527] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 119)

[528] TPK, briefing for Minister of Maori Development on review of Te Ture Whenua Maori Act 1993, 16 October 2014 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 172-173

[529] TPK, 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 37)

[530] Grant, first brief of evidence (doc A1), p 19; 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 117)

[531] TPK, 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 53)

and the owners' aspirations for zero-cost services, but the resolution of these concerns depends on decisions yet to be made about the Maori 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 Maori '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 Maori 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 Maori Land Court discretions as a protective mechanism. On the other side, there was broad Maori 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 longstanding 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 Maori Council (August 2014), and by nine Maori persons on behalf of a number of hapu (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 billion over 10 years, requiring a Crown investment of $825 million over 3 years before it could be achieved.[532]

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 Maori Council and the New Zealand Maori Women's Welfare League'. Nonetheless, TPK expected to

[532] Lant, second brief of evidence (doc A6), pp 7-8; Ministry for Primary Industries, *Growing the Productive Base of Maori Freehold Land – Further Evidence and Analysis*, December 2014 (Marise Lant, papers in support of second brief of evidence (doc A6(a)))

continue to collaborate with the FOMA and ILG technical advisers and their appointers in developing the Bill.[533]

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 Maori Development, Te Ururoa Flavell, had to be briefed and 'Ministerial responsibilities ... put in place'. Responsibility for reform of Te Ture Whenua Maori was resumed by the Minister, who had in mind a different process for engagement with Maori.[534] 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 below.

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 Maori Act 1993 was initiated by both the Crown and Maori. Although the Crown rightly claimed to be responding to calls from within Maoridom, and to be following up on previous Crown–Maori 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 Maori 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

[533] Grant, first brief of evidence (doc A1), pp 15-16
[534] Transcript 4.1.2, pp 364-365

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'.[535] 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.[536] 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.[537]

In addition to experts' workshops on the Bill, the Crown had agreed to joint research on exactly which Maori land could be developed, and to a series of nationwide hui co-led by the Crown, FOMA, and the ILG 'in collaboration'.[538] 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 Maori 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 Maori 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 Maori organisations, such as the New Zealand Maori Council and the Maori 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 Maori Treaty interest is so central and compelling that engagement should go beyond consultation to negotiation aimed at achieving consensus,

[535] FOMA, 'Submission on Exposure Draft of the Te Ture Whenua Maori Bill and the Maori Land Service', undated (submissions on the exposure draft of Te Ture Whenua Maori Bill (doc A8), p 736)
[536] TTWM Iwi Leaders Group, 'The Agreed Parameters for Iwi engagement on the development of the new Ture Whenua Maori Bill and Related Policy', 1 May 2014 (Lant, papers in support of first brief of evidence (doc A4(b)) p 84)
[537] Associate Minister of Maori Affairs to Raniera Tau, 1 August 2014 (Grant, papers in support of brief of evidence (doc A1(a)), pp 295-296)
[538] TPK, 'Summary of key themes from Ture Whenua Maori Hou Hui – August 2014', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 2)

acquiescence or consent'.[539] In the Maori Community Development Act inquiry, the Crown agreed with the claimants that the review of that Act should be led by Maori, and that Maori should develop reforms to their own institutions. Maori 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.[540] 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 Maori.[541]

In the present inquiry, the Crown does not make the same concession that it did in the Maori 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 Maori 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 Maori 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 Maori.

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 Maori leadership organisations, involving collaborative consultation with Maori generally, became its chosen path. This was not inconsistent with Treaty principles but it was only a beginning.

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[539] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, p 682

[540] Waitangi Tribunal, *Whaia te Mana Motuhake / In Pursuit of Mana Motuhake: Report on the Maori Community Development Act Claim* (Wellington: Legislation Direct, 2015), pp 28, 34,

[541] Waitangi Tribunal, *Whaia te Mana Motuhake / In Pursuit of Mana Motuhake: Report on the Maori Community Development Act Claim* (Wellington: Legislation Direct, 2015), pp 41–43

3.5 HOW HAVE MAORI BEEN CONSULTED ON THE EXPOSURE BILL, AND IS THERE 'DEMONSTRABLE AND SUFFICIENT' MAORI SUPPORT FOR THE BILL TO PROCEED?

3.5.1 The Crown's new choice of mechanism for engagement with Maori

(1) The appointment of a Ministerial Advisory Group

In 2015, the new Minister for Maori 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 Maori 'advisory group'. A formal response was not provided to the ICF on their August 2014 resolutions until later in the year, in July 2015.[542]

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 Maori Bill and the development of the Maori Land Service, from the perspective of those who operate within the Maori land regime'.[543] Thus, consultation was widened at this point to include the Maori 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 Maori. 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 Maori in June 2015.[544] In July 2015, the group held a second round of meetings with key stakeholders.[545] 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 Maori land law and Maori land administration,

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[542] Te Minita Whanaketanga Maori to Sonny Tau, ICF, undated (July 2015) (Marise Lant, papers in support of second brief of evidence (doc A6(a)), pp 431-435)
[543] Grant, fourth brief of evidence (doc A5), p 3
[544] 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
[545] Grant, fourth brief of evidence (doc A5), p 3

Maori land owner perspectives and academic and practical expertise'.[546] 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 Maori lawyer and co-president of Te Hunga Roia Maori, 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 Mangatu Incorporation;
- Traci Houpapa, the chair of FOMA, who held a number of directorships and ministerial appointments;
- Sacha McMeeking, a Maori law lecturer, a former general manager of Te Runanga o Ngai Tahu, and indigenous rights expert; and
- Dr Tanira Kingi, a leading expert in Maori land development.[547]

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 advisors. 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. 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 Maori 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;

[546] Grant, fifth brief of evidence (doc A21), p 4

[547] 'Te Ture Whenua Maori Ministerial Advisory Group Members', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 15)

- Use of te reo Maori in the Bill; and
- Maori Land Court jurisdiction to advise on or determine representation of Maori groups (section 30 of the current Act).[548]

The MAG received briefings and information from officials and held meetings on 19 February, 2 March, and 26 March 2015.[549] As a result of those meetings, the MAG provided advice which resulted in some 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.[550]

Secondly, a 'substantive change to the Bill' was made to 'allow existing bodies to grandparent their constitutions into the new framework'.[551] This would 'mitigate the transitional burdens' on the 6000 or so bodies that would have to become rangatopu, 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.[552]

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 hapu organisations with whakapapa connections to the land in question.[553]

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[548] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 112-113)
[549] Grant, fourth brief of evidence (doc A5), p 3
[550] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 115); TPK, 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 50)
[551] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 116); TPK, 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 58)
[552] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 116-117)
[553] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 117)

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.[554]

Fifthly, the question was put to the MAG of whether the Court should retain its section 30 jurisdiction to decide Maori 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.[555] It is not clear at what point the Crown decided not to include section 30, but this particular role was not mentioned among the Maori Land Court's powers in the April 2015 discussion paper.[556]

We turn next to consider the MAG's consultation with what John Grant called 'key stakeholder groups'.[557]

3.5.2 Consultation with 'key stakeholder groups'

(1) Introduction

On 21–22 April, the Ministerial Advisory Group consulted five Maori 'leadership groups',[558] in which the Maori Trustee was included:

- the New Zealand Maori Council (21 April);
- FOMA (21 April);
- Te Tumu Paeroa (the Maori Trustee) (21 April);
- the ILG's technical advisors (22 April); and
- the Maori Women's Welfare League (22 April).

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[554] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 117)
[555] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 118)
[556] TPK, '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)
[557] Grant, fifth brief of evidence (doc A21), p 2
[558] TPK, 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 30)

A month later, on 22 May 2015, the advisory group met with a sixth group of key stakeholders, the judges of the Maori Land Court.[559]

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'.[560] 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 Maori Development'.[561] 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'.[562]

We begin our analysis with a brief consideration of this pre-consultation document.

(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'.[563]

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 Maori 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

[559] Grant, fourth brief of evidence (doc A5), p 3
[560] Grant, fourth brief of evidence (doc A5), p 3
[561] TPK, 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 78)
[562] Grant, fourth brief of evidence (doc A5), pp 3-4
[563] TPK, 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 22)

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,[564] 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;[565]

- 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);[566]

- The proposal that Maori reservations would become 'whenua tapui', and how to establish new whenua tapui (including on Crown land), was set out for the first time;[567] and

- The functions that would be performed by the Maori Land Service were now described, as we set out in more detail below.

Decision-making thresholds as set out in the April 2015 discussion paper

	All owners By shares 75%	All owners By shares 50%	Participating owners By shares 75%	Participating owners By shares 50%	Participating owners By numbers 50%

[564] TPK, 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 37)
[565] TPK, '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
[566] TPK, 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 50)
[567] TPK, 'Preliminary Discussion Paper: Te Ture Whenua Reform', 16 April 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 66)

Removing status of Maori freehold land	X				
Converting to collective ownership	X				
Selling Maori freehold land	X				
Gifting Maori 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 rangatopu				X	
Approving a governance agreement				X	
Joining an existing rangatopu				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					X

whenua tapui					
Change of status to Maori freehold land					X

The Bill's intention was to give Maori 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 Maori 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/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 rangatopu, 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 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 whanau 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 has been granted and the executor applies to the MLS to do so) or (if probate has not been applied for) register beneficial interests after the Court has made a decision; and

- for disputes, the MLS would employ or contract kaitakawaenga, refer to 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 Maori Land Court.[568]

As noted above, the paper fleshed out what the Maori 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 Maori Women's Welfare League, noted that this was insufficient time to prepare.[569] We note that, in respect of Manu 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.[570]

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 ka' and move Maori back to hapu 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

[568] TPK, '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)
[569] TPK, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 92)
[570] TPK, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 99)

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 Maori 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 Maori land.[571]

All the organisations supported retaining the current thresholds for permanent alienation of Maori 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 Maori land, and suggested that the safeguards were not sufficient. The NZMC considered that quorums – in the form of minimum numbers or a spread of whanau – 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'.[572] 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.[573] FOMA objected, however, to the likely costs of existing trusts and incorporations having to transition to rangatopu, and argued that the transition should be Crown-funded. The Maori Trustee and the ILG's advisers agreed with that point.[574]

According to TPK's minutes, only the League considered the managing kaiwhakarite problematic as a substitute for owner-appointed governance bodies.[575] The iwi advisers thought that it would depend on the external

[571] TPK, '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)
[572] TPK, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 92-93)
[573] TPK, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 94)
[574] TPK, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 95)
[575] TPK, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 94)

managers' terms of reference, and that more detail was necessary on this question, especially if forced alienations of Maori land might result.[576]

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 Maori Land Service', including the dispute resolution service.[577] 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 Maori land and owners. FOMA stressed that the current Court processes were affordable, and the MLS' enhanced services needed to be just as affordable for Maori 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.[578]

In regard to the Maori 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'.[579]

According to TPK's minutes, the Maori organisations did not highlight any concerns about the proposed arrangements for successions, although FOMA thought that more options were needed to prevent fragmentation.[580]

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[576] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 108)
[577] TPK, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 93)
[578] TPK, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 93-94)
[579] TPK, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 93-94)
[580] TPK, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 95)

Going beyond the Bill, the Maori 'leadership groups' raised the longstanding issues of valuation, rating, landlocked land, the RMA, public works takings, and local government processes. The ILG's advisers

> The IAG [iwi advisers' group] strongly recommended that the scope of the reform be expanded to include all matters that affect holding, using and developing Maori 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 Maori 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).[581]

The ILG recommended that rates should not accrue if Maori 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'.[582]

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.[583] The Maori Trustee's concern about finance was that the Bill would not really improve the access of Maori landowners to development capital, yet the finance would have to come from somewhere.[584]

As a final point, we note that consultation with the six key stakeholder group, the Maori 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

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[581] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 119)
[582] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 119)
[583] TPK, '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)
[584] TPK, 'Pre Consultation Hui: Summary of Discussions', 1 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 105)

about what transitioning to rangatopu might cost trusts and incorporations, which FOMA had estimated at between $12–60 million.[585]

On the basis of official advice and consultation with the five Maori 'leadership groups', the MAG reported its recommendations to the Minister on 15 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 the Te Tumu Paeroa.[586] In particular, the MAG supported the participating owners' model as the 'key intervention made by the Bill to enable the use and development of Maori land to make decision making more practicable and achievable'.[587] 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 ten per cent of the shareholding must participate.[588]

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'.[589] 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

[585] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 121)
[586] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 112-113)
[587] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 115-116)
[588] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 116)
[589] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 118)

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.[590]

Further, the MAG identified the need for the Crown to provide resources to 'build governance and leadership capability for Maori 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.'[591] 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.[592]

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.[593] It also sought information from officials as to whether the proposed changes to governance entities would 'create significant tax implications'.[594]

One part of the proposed Bill was unanimously rejected by the MAG.[595] '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'.[596]

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[590] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 118)
[591] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 114)
[592] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 114)
[593] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 113, 116-117)
[594] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 113)
[595] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 113)
[596] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 117)

The MAG was not, however, able to reach unanimous agreement on the collectivising provisions. The majority supported the 'somewhat controversial' proposals that Maori customary land could not be converted to individual freehold shares, that whanau trusts would be compulsory in cases of intestacy, and that owners could convert freehold land to collective title.[597]

Importantly, the MAG was strongly supportive of stakeholders' requests that the Bill include practical legislative solutions to a number of outstanding barriers to using Maori land.

In particular, it had been 'widely recognised that rates arrears are the most significant disincentive for the development of Maori land'.[598] The MAG recommended that the Crown include a rating exemption where Maori 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 Maori land, the use of the Maori Land Court or another special body to act as the valuation authority for Maori land, and the development of a unique methodology for valuing Maori land.[599]

In respect of landlocked land, the MAG recommended giving the Maori Land Court, the MLS, or iwi and hapu authorities the power to enforce access to landlocked land. The Crown could create a fund to compensate adjoining landowners. In particular, many Maori 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'.[600] 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'.[601]

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[597] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 117-118)
[598] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 123)
[599] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 124-125)
[600] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 125-126)
[601] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 126)

Finally, the MAG recommended that the Crown provide national direction to local government on RMA planning in respect of Maori land, and anticipated making future recommendations about the effects of the RMA.[602]

(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 Maori Network over the next four years. It is not at all clear what this meant.[603] The simple clause to ensure access across Crown land was not difficult to the 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 Kokiri', 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'.[604] 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 Maori development portfolio. Hence, TPK was 'not in a position to put timeframes on the consideration of this issue'.[605] This did not amount to an undertaking that there would be any progress on urgent matters identified by the MAG, and by Maori 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.

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[602] 'Report by the Ministerial Advisory Group on Te Ture Whenua Maori Reform', 13 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 126-127)

[603] TPK, 'Te Ture Whenua Maori Consultation Hui Information Pack', 29 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 525)

[604] TPK, 'Te Ture Whenua Maori Consultation Hui Information Pack', 29 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 525)

[605] TPK, 'Te Ture Whenua Maori Consultation Hui Information Pack', 29 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 525)

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 Maori, receiving feedback at hui and from written submissions, before providing advice to the Crown as to what Maori 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.[606] 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.[607] 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'.[608]

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 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 'Maori Authority tax status is not affected by the reforms'.[609]

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

[606] Te Ture Whenua Maori Draft Exposure Bill 2015, cl 45(4) (Grant, papers in support of fourth brief of evidence (doc A5(a), p 183)
[607] Te Ture Whenua Maori Draft Exposure Bill 2015, cl 45(5) (Grant, papers in support of fourth brief of evidence (doc A5(a), pp 183-184)
[608] Transcript 4.1.2, p 369
[609] TPK, 'Te Ture Whenua Maori Reform: Consultation Document', May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 477)

become rangatopu.[610] Nor did the May consultation document promise funding for the training of Maori land governors, as the MAG had recommended. Training had been mentioned as a MLS role in the April pre-consultation material, but it seems to have been left out of the May public consultation documents.

The Government did promise development funding. It said it was 'committed to providing tangible support to Maori land owners', so as to 'increase the capability of Maori 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 Maori Network over four years, to help improve the productivity of Maori land.[611] 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.[612]

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 longstanding problems such as landlocked land, were to provoke much concern among Maori 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 Maori from developing their lands.[613]

3.5.3 Nationwide consultation with Maori: 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'.[614] 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

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[610] TPK, 'Te Ture Whenua Maori Reform: Consultation Document', May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a))

[611] Minister for Maori Development, press release, '$12.8 million for new Te Ture Whenua Maori Network', 21 May 2015 (doc A5(a)), p 128); TPK, 'Te Ture Whenua Maori Consultation Hui Information Pack', 29 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 525)

[612] Lant, second brief of evidence (doc A6), p 8

[613] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 4

[614] Grant, fourth brief of evidence (doc A5), p 4

was the primary source of information, and we have summarised its contents in chapter 1. The consultation material provided a useful overview, and the FAQ (frequently asked questions) addressed some key concerns.[615]

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).[616]

Stream 1: Northland, Auckland, and CNI			**Stream 2: South Island and East Coast**		
Tamaki Makaurau	2 June	21	Nelson	2 June	34
Tamaki Makaurau	2 June	34	Christchurch	3 June	31
Tauranga	3 June	41	Hokitika	4 June	13
Whakatane	3 June	51	Invercargill	5 June	12
Whangarei	4 June	62	Wellington	8 June	88
Kaikohe	5 June	48	Te Kaha	15 June	52
Kaitaia	5 June	34	Tokomaru Bay	16 June	71
Hamilton	8 June	85	Gisborne	16 June	122
New Plymouth	17 June	94	Wairoa	17 June	80
Wanganui	18 June	87	Hastings	17 June	71
Taupo	22 June	57	Dunedin	19 June	19
Rotorua	22 June	83			

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.

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[615] TPK, 'Te Ture Whenua Maori Consultation Hui Information Pack', 29 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 517-523); TPK, 'Te Ture Whenua Maori Reform: Consultation Document', May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 475-479)

[616] TPK, 'Te Ture Whenua Maori Consultation Hui Information Pack', 29 May 2015 (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 531)

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.[617] 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. Maori 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 300-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) above. 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.'[618] The Crown is 'required to ensure that Maori are "adequately informed so as to be able to make intelligent and useful responses", as was found in the Wellington Airport case'.[619] The Crown's June 2015 consultation hui do not meet these standards.

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'.[620] This statement does not really explain the *timeframe*, which gave attendants at the first six hui less than a week to consider over 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 Maori 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 Maori. 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.'[621] The

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[617] Crown counsel, closing submissions (paper 3.3.6), p 30
[618] Crown counsel, closing submissions (paper 3.3.6), p 25
[619] Crown counsel, closing submissions (paper 3.3.6), p 25
[620] Grant, fourth brief of evidence (doc A5), p 6
[621] Grant, fourth brief of evidence (doc A5), p 6

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 Maori were not sufficiently informed of the proposals, are unfounded.'[622] 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.[623]

We accept that holding the hui well before written submissions were due would make for better informed submissions. But the original time frame 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.

[622] Crown counsel, closing submissions (paper 3.3.6), p 31
[623] Crown counsel, closing submissions (paper 3.3.6), p 32

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 Maori 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?'[624]

Ms Johnston argued that the problem with forcing trusts and incorporations to become rangatopu 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.[625]

Marise 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.[626]

In addition to this large-scale problem with the hui, Ms Lant was also critical of the lack of detail provided about the Maori 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'.[627]

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[624] Kerensa Johnston, second brief of evidence, 16 December 2015 (doc A36), p 13
[625] Johnston, second brief of evidence (doc A36), p 13
[626] Lant, second brief of evidence (doc A6), p 20
[627] Mahuika, brief of evidence (doc A23), p 9; transcript 4.1.3, p 18; Lant, second brief of evidence (doc A6), p 22

Ninety submissions in August 2015, from 23 Maori land trusts, 11 incorporations, three iwi organisations, four national Maori organisations, six local Maori 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'.[628]

Ms Lant's evidence contained a number of criticisms about how the MAG and officials conducted individual hui.[629] We do not need to consider those. The main problem was that Maori 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, Maori 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 Maori. In one sense, this, too, provided hui participants with an opportunity for input to the design of the MLS. But evaluation of 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 Maori 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.[630] As a result, some 3000 pages worth of submissions were made, providing vital Maori input on the proposed reforms and the details of the Exposure Bill.[631]

We turn next to consider the responses of Maori to the consultation materials provided in 2015, including the Exposure Bill.

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[628] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 224)
[629] Lant, second brief of evidence (doc A6), pp 22-24
[630] Claimant counsel (Watson), closing submissions (paper 3.3.6), p 35
[631] Crown counsel, first disclosure bundle (doc A8), pp 1-3030; 'Te Ture Whenua Maori Bill: Submission of the Judges of the Maori Land Court', 7 August 2015 (doc A20)

3.5.4 What were the responses of Maori?

(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.[632]

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?[633]
- How appropriate and effective do you think the participating owner concept will be?[634]
- What should the Maori Land Service: Keep doing? Stop doing? Start doing?[635]

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 Maori context. Hui participants were also concerned about the complexity and cost of the new regime. TPK noted that '[s]ome people wanted the Maori Land Court to continue

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[632] Grant, fifth brief of evidence (doc A21), p 5

[633] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 533)

[634] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 541

[635] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 547

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.[636]

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'.[637]

- 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 Maori Land Court should be involved in that process.[638]

- 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.[639]

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 Maori 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 'whanau groups with larger shares will

[636] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 533-534
[637] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 536
[638] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 537-539
[639] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 540

dominate decision making'. There were also concerns about how the model would work for blocks with large numbers of owners.[640]

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 Maori Land Service needed to support governance bodies identify and locate owners.[641]

- 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.[642]

- 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 Maori Land Court be given a power of review.[643]

On the Maori 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 Maori land owners that would advocate on their behalf' and expressed 'a strong view that Maori 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 Maori Land Service. Hui participants were divided about the

[640] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 541-542
[641] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 542
[642] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 543-544
[643] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 546

quality of the services provided by the Maori Land Court, with some calling for the court to be better resourced by the Crown.[644]

Hui participants also raised a number of specific issues with the Maori Land Service and its potential scope, including:

- TPK reported that '[t]here was a high degree of support for the Maori 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.[645]

- Beyond its core duties, hui participants also considered that the Maori Land Service should provide 'social support (employment training, social services and housing), economic development, legal advice and training and education'.[646]

- Hui participants were concerned about the location of the Maori Land Service and suggested that it 'needs greater coverage than that currently provided by the Maori Land Court and Te Puni Kokiri'. The service should be regionally based but also mobile, and co-location with the Maori 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.[647]

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.[648] On the Bill's provisions for succession, hui participants generally supported the proposed process. The compulsory whanau trusts on intestacy, however, were viewed as taking 'away a person's choice to succeed and, more

[644] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 547-548
[645] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 550
[646] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 553
[647] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 554-555
[648] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 557

importantly, were inconsistent with the notion of whanau'.[649] 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 ahead, it would need tighter safeguards.[650]

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.[651]

(2) What were the responses of Maori in the written submissions?

As we noted above, the extreme lack of time given to Maori hui participants to consider and understand the ramifications of the Exposure Bill was mitigated to some extent by the Crown's agreement to provide a longer timeframe for written submissions. In the event, the Crown received 392 submissions from Maori 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 Maori were generally in support of what the review panel and then the Crown/FOMA/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 Maori leadership groups in April 2015. But it seemed at that stage that only the Maori 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. But it was in the August submissions from such bodies as FOMA, OMA (the Organisation of Maori 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).

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[649] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 545

[650] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), pp 552, 560

[651] TPK, 'Te Ture Whenua Maori Bill: Thematic summary bullet points', undated (Grant, papers in support of fourth brief of evidence (doc A5(a)), p 558

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'.[652] 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: Ngati Mutunga (Wharekauri-Rekohu), Muriwhenua Hapu, Te Runanga o Te Rarawa, Te Huinga o Nga Hapu o Whangarei Terenga Paraoa, Te Whanau a Apanui, and Te Runanga o Ngati Awa. A series of 'Maori representative organisations' either opposed or did not support the Bill, including FOMA, OMA (representing some of the largest Maori trusts and incorporations), the Tairawhiti and Taitokerau District Maori Councils, the Maori Women's Welfare League, and the Taheke Maori Committee.[653]

'Most damning', Ms Lant added, were the number of Maori 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 Maori legal or Land Court practitioners was in opposition. Under that heading, she noted Te Hunga Roia Maori o Aotearoa, various prominent Maori lawyers, and the Maori Land Court judges and staff.[654]

Thus, the claimant's analysis of the submissions was based on the weight within Maoridom (and the Maori 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'.[655]

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 Maori land trusts, and three members of a whanau group, was counted as a single submission.[656]

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'.[657] 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

[652] Marise Lant, fourth brief of evidence, 30 October 2015 (doc A9), p 9
[653] Lant, fourth brief of evidence (doc A9), pp 8-10
[654] Lant, fourth brief of evidence (doc A9), pp 10-12
[655] Lant, fourth brief of evidence (doc A9), p 12
[656] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 217)
[657] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 212)

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.[658] 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 Maori wanted and what the Bill facilitated.[659] 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.[660]

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 Maori owners to make their own decisions. 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'.[661] 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, virtually half of submitters were opposed to replacing Maori Land Court safeguards in this way:

> 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 whanau members and alienate them from their whenua.[662]

Many submitters wanted Maori Land Court protections restored to the Bill, and the deletion of the 'ability to hold a second meeting if the required quorum of

[658] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 219-220)
[659] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 220, 222)
[660] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 227)
[661] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 212)
[662] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 212, 243)

participating owners was not met'. This provision seemed to make the participation safeguards pointless.[663]

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'.[664] This was a vital matter. Support and opposition were at 'similar levels'; that is half in favour and half opposed.[665] 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 Maori land could be leased', and about how exchanges and amalgamations would be decided.[666] The ability of 75 per cent of participating owners to make long-term leases was seen as a way of making virtual alienation easier.[667]

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.

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 Maori 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 Maori 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.[668]

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[663] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 221, 243-245)
[664] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 213)
[665] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 250)
[666] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 213)
[667] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 221, 257-258)
[668] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 213, 262)

TPK recorded majority support 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 Maori 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 whanau trusts if an owner died without a will.[669] There was disagreement over whether whangai should be able to succeed in cases of intestacy.[670]

Thus far, on TPK's analysis, there had been significant opposition (around 50 per cent) 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' whanau trusts), and significant concern about losing Maori 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 whanau to engage with their lands. So would simplifying the process for establishing a governance body. But the proposal for a 'one size fits all' rangatopu was viewed as 'too assimilatory in nature'.[671] 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.[672] 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 Maori land governors.[673]

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[669] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 214, 289-290)
[670] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 229-230)
[671] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 213)
[672] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 213, 271-272)
[673] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 272)

Feedback was mixed on the proposal to refocus the Maori Land Court; approximately equal levels of support and opposition. Some submitters supported the proposal, and considered that approval in Maori 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.[674]

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.[675]

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.[676]

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.[677]

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[674] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 308-309)
[675] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 214, 299-307)
[676] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 215)
[677] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 215)

Finally, echoing many earlier calls for action, submitters raised issues impacting on the development of Maori 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 Maori Trustee.[678] 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 Maori economy.'[679] 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 Maori land.[680]

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 Maori 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 whanau 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. Maori 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.

[678] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 329-334)
[679] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 215)
[680] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 215)

TPK's tabulation of submitters' support, opposition, and concern[681]

	Support	Oppose	Concern
Whenua Tapui	50%	10%	40%
Owner decision-making regime	32%	27%	41%
Disposition of Maori 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 MLC's jurisdiction	33%	34%	32%
Maori Land Service	30%	10%	60%

Matanuku Mahuika, Crown witness and member of the MAG, took the view that the crucial element in the above table 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.[682] 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.[683] The ICF's resolutions also played a prominent part in the template submission. The ILG did not make a submission itself, nor did the ICF reach a position on the Bill. It intended to do so after the ICF hui in August 2015,[684] but the planned submission at the end of that month was never made.[685]

[681] TPK, 'Te Ture Whenua Maori 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
[682] Transcript 4.1.3, pp 19-21
[683] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 224)
[684] Rahui Papa, chair, Waikato-Tainui Te Arataua, submission on Exposure Bill, 8 June 2015 (Crown counsel, first disclosure bundle (doc A8), pp 2284-2285)
[685] Crown counsel, memorandum, 20 November 2015 (paper 3.1.76), p 2

The ILG held its own hui and sought direct collaboration with the Crown, as in 2014.[686]

On 20 July 2015, the Minister for Maori Development made a formal response to the ICF's resolutions of the previous year.[687] 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.[688]

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 Maori Land Court valuing Maori land (to address rating issues) in the present Bill if feasible.[689]

Thus, the ICF's constitutional position about who should make laws in relation to Maori 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.[690]

(b) FOMA

FOMA represented the 'largest collaboration of Maori landowner groups affected by the reforms'.[691] 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

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[686] 'Te Ture Whenua Maori Iwi Leadership Group, Position on the Ture Whenua Maori', 2 June 2015 (doc A29), pp 845-851)

[687] Minister for Maori Development to Sonny Tau, undated (20 July 2015) (Lant, papers in support of second brief of evidence (doc A6(a)), pp 431-435)

[688] Minister for Maori Development to Sonny Tau, undated (20 July 2015) (Lant, papers in support of second brief of evidence (doc A6(a)), pp 432, 434)

[689] Minister for Maori Development to Sonny Tau, undated (20 July 2015) (Lant, papers in support of second brief of evidence (doc A6(a)), pp 433-435)

[690] Minister for Maori Development to Sonny Tau, undated (20 July 2015) (Lant, papers in support of second brief of evidence (doc A6(a)), p 435)

[691] FOMA, submission, undated (August 2015) (Crown counsel, first disclosure bundle (doc A8), p 736)

reforms 'more easily and cost-effectively than the wholesale changes being proposed'.[692] If the reforms were to go ahead, they *might* achieve some of the desired ends, but only if properly resourced and implemented.[693] Importantly, FOMA also considered that without capability building on a major scale for Maori land governors, the Maori Land Court's protective jurisdiction was still required at present.[694] The Maori Land Court might also prove more effective than a split-agency MLS at delivering the enhanced services needed by Maori landowners.[695]

In particular, FOMA criticised:

- high compliance and implementation costs for all Maori 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 Maori land development);
- an increase in scope of political interference in control and administration of Maori land;
- erosion and revocation of Maori property rights (in respect of the proposed decision-making thresholds and voting rights);
- the impact of the Bill on tikanga Maori;
- the reforms were not user friendly or easily understood and accessible by Maori landowners; and

[692] FOMA, submission, undated (August 2015) (Crown counsel, first disclosure bundle (doc A8), p 748)
[693] FOMA, submission, undated (August 2015) (Crown counsel, first disclosure bundle (doc A8), p 748)
[694] FOMA, submission, undated (August 2015) (Crown counsel, first disclosure bundle (doc A8), p 741)
[695] FOMA, submission, undated (August 2015) (Crown counsel, first disclosure bundle (doc A8), p 744)

- the impact of the Bill on Maori property rights (including where the Bill did not enable beneficial owners to have a choice about how their interests were dealt with).[696]

(c) The Maori Women's Welfare League

The Maori 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 Maori 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.[697]

(d) The New Zealand Maori Council

As foreshadowed in the 2013 submission of the NZMC to the review panel, the District Maori 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 Maori Councils, Raukawa and Aotea, made submissions supporting the Bill. Two other councils, Te Taitokerau and Te Tairawhiti, made submissions in opposition.[698] 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 Maori Council, pursued a claim in this Tribunal, although his district council did not make a submission as part of the June–August 2015 consultation.

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[696] FOMA, submission, undated (August 2015) (Crown counsel, first disclosure bundle (doc A8), pp 737-739)

[697] Prudence Tamatekapua, brief of evidence, 30 October 2015 (doc A14), pp 3-4

[698] See Crown counsel, first disclosure bundle (doc A8).

(e) The Maori Trustee and the Maori Land Court judges

Although the Maori Trustee and the Maori Land Court judges have been identified as key stakeholders by the Crown, the views of those bodies are not 'Maori' views in the sense of consultation between the Crown and its Maori 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.[699]

By the beginning of August 2015, the Minister had decided that more time was needed to 'ensure the work on developing and designing the Maori Land Service and the Maori Land Networks is more advanced before the Bill is introduced'.[700] The introduction of the Bill was postponed from October 2015 (the plan at the beginning of the consultation process) to early 2016.[701] 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 Maori land owners will have a further opportunity for input through the select committee process.[702]

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.

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[699] Minister for Maori Development to Sonny Tau, undated (20 July 2015) (Lant, papers in support of second brief of evidence (doc A6(a)), pp 432-435)
[700] Grant, fourth brief of evidence (doc A5), pp 7-8
[701] Grant, fourth brief of evidence (doc A5), pp 7-8
[702] Grant, fourth brief of evidence (doc A5), p 8

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 Maori were 'rightly concerned', and the MAG was 'seeking clarity as to how the Crown thinks this regime might work'.[703] Mr Mahuika noted that provisions to deal with rating, landlocked lands, and extending the Maori 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'.[704]

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 Maori Fund (the $12.8 million over four years) and a new 'Whenua Maori Enablers' work stream.[705] This would facilitate advice from the MAG on a 'total package of initiatives', not just the Bill and the MLS.[706] The Cabinet paper also summarised the outcome of the consultation, advising that submissions were 'generally supportive of the proposals for: (a) clear obligations for kaitiaki (governors); (b) dispute resolution; and (c) the participating owners' model'.[707] 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 percent, and 'concern' at 41 per cent.[708]

TPK also reported to Cabinet in October that 'issues' were raised regarding managing kaiwhakarite, mandatory whanau trusts for intestate successions, and transition for trusts and incorporations to rangatopu. These three matters would

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[703] Mahuika, brief of evidence (doc A23), p 9
[704] Mahuika, brief of evidence (doc A23), pp 9-10
[705] 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.
[706] Minister and Associate Minister for Maori Development to Cabinet Economic Growth and Infrastructure Committee, 13 October 2015, p 5 (claimant counsel, OIA papers (doc A38), p [296])
[707] Minister and Associate Minister for Maori Development to Cabinet Economic Growth and Infrastructure Committee, 13 October 2015, p 3 (claimant counsel, OIA papers (doc A38, p [294])
[708] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 213, 242, 243)

be addressed through revising the Bill, with approvals sought in November 2015.[709]

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 Maori Act 1993, including the existing emphasis on the Treaty of Waitangi and its principles;
> - to give greater discretion to the Maori Land Court when considering applications to remove the status of Maori freehold land;
> - to remove the managing kaiwhakarite regime;
> - to provide whanau with an option of obtaining succession by individuals instead of forming a whanau trust on intestate succession;
> - to provide that existing incorporations and trusts do not need to become rangatopu unless they opt to do so; and to provide further flexibility in transitional provisions.[710]

Mr Grant added that work would continue on prodecural matters, and further changes would likely be made as a result.[711] This work addressed a number of significant concerns raised during the consultation, some of them by the Maori 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 whanau'; 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.[712] The occupation lease provisions would be 'substantially rewritten'. The provision in the current Act making Maori reservations inalienable (including by taking for public works) would be carried over for whenua tapui. Changes would also be made to the definition of whangai, 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.[713] A number of important amendments to

[709] Minister and Associate Minister for Maori Development to Cabinet Economic Growth and Infrastructure Committee, 13 October 2015, p 3 (claimant counsel, OIA papers (doc A38, p [294])
[710] John Grant, sixth brief of evidence (doc A27), pp 1-2
[711] Grant, sixth brief of evidence (doc A27), p 2
[712] John Grant, 'Te Ture Whenua Maori Bill – Summary of main points of change following consultation' (undated) (doc A27(a))
[713] Grant, 'Summary of main points of change' (doc A27(a))

specific provisions were thus planned or had already been made in the revised drafts issued on 9 November and (track-changed) 16 November 2015.[714]

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'.[715] 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.'[716]

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 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.[717] 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 Maori landowners with no plan to widely re-engage;
- The managing kaiwhakarite concept was so anathema to tikanga Maori that it would not have seen the light of day had advice from kaumatua been available;
- The whanau 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.[718]

Crown counsel disagreed, pointing to these changes as evidence that consultation had been 'a reality, not a charade'.[719] 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

[714] See, for example, the Court's jurisdiction in respect of partition: Te Ture Whenua Maori Draft Exposure Bill 2015, revised draft, 9 November 2015, cl 94(6) (paper 3.1.69(a)), p 84.
[715] Grant, sixth brief of evidence (doc A27), p 2
[716] Transcript 4.1.3, p 15
[717] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 34
[718] Claimant counsel (Watson), closing submissions (paper 3.3.8), pp 34-35
[719] Crown counsel, closing submissions (paper 3.3.6), p 29

impact on amendments to the exposure draft Bill, notably around simplifying transitional arrangements and the removal of the managing kaiwhakarite regime.[720]

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 31 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 31 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'.[721]

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

[720] Crown counsel, closing submissions (paper 3.3.6), pp 34-35
[721] Crown counsel, closing submissions (paper 3.3.6), p 33

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 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.'[722] 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.[723]

Ms Johnston commented:

> where possible, I have participated in hui arranged by Te Puni Kokiri on the Bill. The usual practice of Te Puni Kokiri 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 Maori 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 Maori 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

[722] Kerensa Johnston, second brief of evidence, 16 December 2015 (doc A36), pp 2-3
[723] Johnston, second brief of evidence (doc A36), p 3

> 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 Maori land owners. Full, free and informed consent can only be given if Maori land owners are aware of the implications, risks and consequences of the changes and there is clarity on how the new rules will operate.[724]

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.[725] At the 16 September hui, officials made statements such as 'everything about the reforms is an if' and 'nothing is set in concrete'.[726] 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.'[727] 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?'[728]

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 Maori Women's Welfare League.[729] There has been post-consultation engagement with the Maori Land Court judges as a key stakeholder group, but information from that consultation was kept confidential.[730] Meetings have also been held with the representatives of certain land trusts.[731]

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

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[724] Johnston, second brief of evidence (doc A36), pp 3-4
[725] See minutes and hui notes, 16 September to 10 November 2015 (Crown counsel, third disclosure bundle, vol 3 (doc A29(b)), pp 1-70)
[726] 'Unconfirmed Minutes of Stakeholder Hui', 16 September 2015 (Crown counsel, third disclosure bundle (doc A29(b)), p 5)
[727] Lillian Anderson, second brief of evidence, 18 December 2015 (doc A40), p 3
[728] 'Group feedback from Te Puni Kokiri (TPK) hui held 10 November 2015' (Kerensa Johnston, papers in support of second brief of evidence (doc A36(a)), p 1)
[729] Anderson, second brief of evidence (doc A40), pp 2-3
[730] John Grant, answers to questions in writing, 27 November 2015 (doc A32), p 13
[731] Anderson, second brief of evidence (doc A40), p 2

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'.[732] 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.[733] 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 Maori.[734]

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 Maori 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'.[735]

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.[736] At a meeting a month later, John Grant told ILG advisers that enabling provisions in the Bill might allow practical solutions for landlocked land

[732] Anderson, second brief of evidence (doc A40), pp 1, 2
[733] Anderson, second brief of evidence (doc A40), p 3
[734] Anderson, second brief of evidence (doc A40), pp 2-4
[735] 'Unconfirmed Minutes of Stakeholder Hui', 16 September 2015 (Crown counsel, third disclosure bundle (doc A29(b)), p 2)
[736] 'Unconfirmed Minutes of Stakeholder Hui', 16 September 2015 (Crown counsel, third disclosure bundle (doc A29(b)), p 2)

to be worked out in the future.[737] Crown counsel, in closing submissions on 18 December 2015, told us that rating 'might' be addressed in the Bill due for early 2016.[738]

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.[739] One or two points seem clear. The Crown is considering, for example, a provision in the Bill that Maori land placed under Nga Whenua Rahui[740] would not be rated. It is also considering a scheme to provide easements where access to Maori land is prevented by Crown land.[741] 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 Maori '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 asecertained that the Crown has now promised to fund the 'compliance costs associated with the transition process'.[742] 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.

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[737] 'Unconfirmed Minutes of TPK workshop with Iwi Leaders Group advisors', 15 October 2015 (Crown counsel, third disclosure bundle (doc A29(b)), p 22)
[738] Crown counsel, closing submissions (paper 3.3.6), p 49
[739] 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.
[740] Conservation covenants.
[741] 'Unconfirmed Minutes of TPK workshop with Iwi Leaders Group advisors', 15 October 2015 (Crown counsel, third disclosure bundle (doc A29(b)), p 22); TPK, 'Whenua Maori Enablers', powerpoint presentation, undated (Crown counsel, third disclosure bundle, vol 3 (doc A29(a)), p 55)
[742] FOMA, submission to the Crown, 18 December 2015 (paper 3.1.95(a)), p 7

We turn next to make our findings as to whether the Crown's consultation with Maori 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'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.[743]

The Crown's submission also quoted the Tribunal's *MV Rena* report to the effect that the Crown is 'required to ensure that Maori are "adequately informed so as to be able to make intelligent and useful responses", as was found in the Wellington Airport case'.[744]

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

[743] Crown counsel, closing submissions (paper 3.3.6), p 25
[744] Crown counsel, closing submissions (paper 3.3.6), p 25

uncommonly can follow, as the tendency in consultation is to seek at least consensus'.[745]

The Crown's consultation on the Exposure Bill began in 2015 with the appointment of Maori 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 Maori '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.[746]

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)).

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[745] Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 3

[746] Minister and Associate Minister for Maori 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])

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 more than 400 pages of dense, complex material, including the 300-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 Maori, 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. Maori 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 Maori 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 whanau and Maori 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'.[747] Crown counsel submitted that the Crown 'has not closed its mind to substantive changes, including whether to proceed with a Bill at all',[748] but, as we discussed above, the 2015 consultation was not carried 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 Maori owners for more autonomy, less

[747] Crown counsel, closing submissions (paper 3.3.6), p 25
[748] Crown counsel, closing submissions (paper 3.3.6), p 33

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 tapui 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.[749] In particular:

> The review process has included extensive consultation involving substantial opportunities for both Maori 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.[750]

We accept that, from the nationwide hui in 2013 and 2014, the Crown understood there was general support for (a) the independent review panel's propositions and (b) 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 Maori 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 Maori 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, Maori 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,

[749] Crown counsel, closing submissions (paper 3.3.6), pp 26-28, 30-33
[750] Crown counsel, closing submissions (paper 3.3.6), pp 27-28

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 Maori 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 Maori 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 Maori 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 rangatopu, and the mandatory whanau 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 Maori 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-three per cent of submitters, for example, opposed the fundamental changes to the Maori Land Court's jurisdiction, and another 32 per cent expressed 'concerns' about those changes, with only 34 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 Maori 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 it happened.

One of the most important achievements of the 2015 consultation round, however, was the Crown's decision to finally act on longstanding barriers to utilisation. This decision has been welcomed by Maori. 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 Maori

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 Maori 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 Maori submitters.

In the claimants' view, the Crown has changed some of the Bill's more 'egregious' 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 Maori. The necessary research had not been done to ensure that the reform propositions were sound, and Maori 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 Maori were properly informed was mitigated by two factors. The first was that the review panel's propositions did arise from a significant debate within Maoridom, and clearly had support at that stage, as did the Crown's imperative to see more Maori land in production. The second is that the extension of time for written submissions in 2015 enabled Maori to make better-informed and considered submissions on the Exposure Bill. The 2015 consultation process thus enabled Maori to provide a considered, indepth 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 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 Maori landowners. TPK noted that submissions were received from many owners (individuals and whanau) using Marise Lant's submission 'Not One Acre More'. In addition, 96 Maori land trusts, 15 incorporations, 29 local Maori organisations, six national Maori organisations, and six iwi organisations made submissions.[751] We also rely on TPK's own analysis of the levels of support, opposition, and concern from these submitters, to determine whether Maori 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.

(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'.[752] The claimants go further and submit that Treaty principles *require* negotiated agreement in the present case. As we discussed above in section 3.4.5, the claimants rely on the Tribunal's Wai 262 and *Whaia 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 it 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 'free, full and informed consent' of Maori is required when a legislative change substantially affects or even controls a matter squarely under their authority. The governance and management of Maori 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 Maori Treaty partner'.[753] Professor Winiata also quoted the Tribunal's *Motunui Waitara Report*: '"Rangatiratanga" denotes the mana not only to possess what is yours, but to control and manage it in accordance with your

[751] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), pp 217-218)
[752] Claimant counsel (Ertel), oral closing submissions (paper 3.3.9(a)), p 3
[753] Whatarangi Winiata, brief of evidence, 30 October 2015 (doc A12), p 3

own preferences.'[754] This is fundamental to Maori identity and well-being, and to the continued existence of Maori 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 tipuna without the authority to determine what happens to and with the whenua.[755]

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).[756] We see nothing unreasonable in the proposition that broadly based, informed Maori support is required to change how Maori 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 Maori 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 Maori landowner citizens. The Crown also has a Treaty duty to protect Maori, 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 Maori landowners, and it has an obligation to fix the system (insofar as a system of individual titles for Maori land can be fixed).[757] 'And we should not let them off the hook', Mr Dewes said at our hearing, 'but we should make sure they get it right.'[758]

Thus, a statute like Te Ture Whenua Maori Act 1993 differs from the Maori Community Development Act 1962, in that aspects of it fall into both Treaty partners' spheres of authority. Either Treaty partner, in our view, could intiate and lead a review of Te Ture Whenua Maori Act 1993, in consultation with the other and working towards their mutual benefit. Importantly, the review in this case was intiated in response to both longstanding Maori concerns and Crown

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[754] 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
[755] Moana Jackson, brief of evidence, undated (October 2015) (doc A11), p 5
[756] Crown counsel, closing submissions (paper 3.3.6), p 17
[757] Transcript 4.1.2, p 245
[758] Transcript 4.1.2, p 245

imperatives for development, it was led by an independent panel, and the resulting reform proposals were agreed to in 2013 by both Maori and the Crown (see section 3.3.5).

Key elements of the reforms, however, fall within the Maori sphere of authority (tino rangatiratanga). As noted, that encompasses such fundamentals as how Maori land is to be owned, used, governed, and retained (including what Maori 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'.[759] Broad Maori support is essential in Treaty terms for significant changes to such matters as how Maori 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 Maori 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 Maori, 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 Maori land – '[t]rue active protection required the Crown to protect the interests of Maori not unilaterally, but in the manner in which they wanted them protected.'[760] Nonetheless, the Crown, as a Treaty partner and with the responsibility of actively protecting Maori land and Maori authority, has its own share in deciding what form protection should take. Matters of affordability, practicability, 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 Maori 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:

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[759] Winiata, brief of evidence (doc A12), pp 5-6

[760] Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 183

> There can be no 'one size fits all' approach. Rather, the Treaty standard for Crown engagement with Maori operates along a sliding scale. Sometimes, it may be sufficient to inform or seek opinion … But there will also be occasions in which the Maori 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 Maori 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.[761]

It is our finding that the reform of Te Ture Whenua Maori Act 1993 is an instance where the Maori interest is so central and so compelling that the Crown cannot proceed without an indication of broad, fully informed support from Maori. 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 Maori landowner is not feasible. But that does not make it reasonable for the Crown to pursue its policy, justified by broad Maori 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 Maori 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 Maori support for and approval of the changes has been achieved.[762] [emphasis in original]

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[761] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 237

[762] Johnston, second brief of evidence (doc A36), pp 18-19

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 Maori support for the proposed reforms, and whether further consultation is in fact required.[763]

How is such support to be judged?

In the claimants' view, the 2015 consultation round demonstrated conclusively that Maori do not support the proposed reforms:

> There is a worrying lack of evidence of support from Maoridom for this Bill. The New Zealand Maori Council has not endorsed the Bill. The Maori 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 Maori, 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). Whanau, hapu 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.[764]

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'.[765] Crown counsel also argues that 'the Tribunal

[763] Crown counsel, closing submissions (paper 3.3.6), p 33
[764] Claimant counsel (Watson), closing submissions (paper 3.3.8), p 35
[765] Crown counsel, closing submissions (paper 3.3.6), p 34

should not confuse concern with particular aspects of the proposals as opposition to the proposals as a whole'.[766] 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 Maori 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'.[767]

In our view, the answer to this question rests in part with TPK's tabulation of the results of the submissions from trusts, incorporations, Maori 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).[768] For ease of reference, we reproduce the results here.

TPK's tabulation of submitters' support, opposition, and concern[769]

	Support	Oppose	Concern
Whenua Tapui	50%	10%	40%
Owner decision-making regime	32%	27%	41%
Disposition of Maori 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 MLC's jurisdiction	33%	34%	32%
Maori Land Service	30%	10%	60%

Clearly, there was majority support for two aspects of the reforms: an alternative disputes resolution process (52 per cent), and the arrangements for whenua tapui (50 per cent). For everthing else, there were high levels of concern or opposition.

[766] Crown counsel, closing submissions (paper 3.3.6), p 19
[767] Crown counsel, closing submissions (paper 3.3.6), p 20
[768] TPK, 'Te Ture Whenua Maori Reform: Summary of Submissions', September 2015 (Crown counsel, third disclosure bundle, vol 2 (doc A29(a)), p 217
[769] TPK, 'Te Ture Whenua Maori 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

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 Maori Council.[770] But the largest organisation representing Maori 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.[771] This was followed, as claimant counsel noted, by the development of a protocol for further engagement between the Crown and the ILG in December.[772] 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 Maori Women's Welfare League), or had not come forward with a position (the NZMC).[773]

FOMA's submission of 18 December 2015 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.[774]

It is not possible to say whether the Crown's changes to 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 FINDING AND RECOMMENDATION

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 Maori Bill to proceed. Maori landowners, and Maori whanau, hapu, and iwi generally, will be prejudiced if the 1993 Act is repealed against their wishes,

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[770] Raukawa District Maori Council, submission, undated (Lant, papers in support of second brief of evidence (doc A6(a)), pp 455-461)

[771] Freshwater and Conservation Iwi Leaders Group, panui, November 2015 (doc A31)

[772] 'Protocol between the Crown and Te Ture Whenua Maori Iwi Leaders Group for the Sharing of Information, Policy Advice and Communications in relation to Te Ture Whenua Maori Issues', December 2015 (Crown counsel, third disclosure bundle, vol 4 (doc A39), pp 7-15)

[773] As noted earlier, we do not count the submissions of Te Tumu Paeroa or the Maori Land Court judges, as they were consulted as stakeholders but not as part of the Treaty partner (that is, as 'Maori').

[774] FOMA, submission to the Crown, 18 December 2015 (paper 3.1.95(a))

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 Maori support, but argues (a) that it has sufficient support, and (b) that Treaty principles, rightly understood, do not restrain it in any case.

We disagree with both propositions, for the reasons given above.

We recommend that the Crown avoids prejudice to Maori by further engagement nationally with Maori landowners, through a process of hui and written submissions, after reasonable steps have been taken to ensure that Maori landowners are properly informed by the necessary empirical research, funded by the Crown.

If such a consultation shows broad Maori support for the Bill to proceed, then we recommend further engagement with Maori 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 Maori experts, and to accord a leadership role to a representative advisory group in its engagement with Maori.

Dated at Wellington this 5th day of February 2016

Ron Crosby, presiding officer

Miriama Evans, member

Dr Rawinia Higgins, member

Professor Sir Hirini Mead KNZM, member

Dr Grant Phillipson, member