

DISCUSSION DOCUMENT:

TE TURE WHENUA

MĀORI ACT 1993

REVIEW PANEL

MARCH 2013

Cover: the off-spring of Tāne and Tunarangi, the **nikau** provided a rich array of benefits for Māori including thatching and weaving materials (leaves), storage containers (outer trunk), necklaces (berries) and food (young shoots).

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Foreword

Māori land is a taonga and resource which should be able to be used for the benefit of the owner, their whānau and future generations, free from unnecessary obstacles created by legislation.

That is why this review of the functioning of Te Ture Whenua Māori Act 1993 was commissioned. The expert panel was asked for suggestions on how to improve the Act for the benefit of Māori land owners.

Māori land tenure and the system for administering Māori land has been considered many times over the years. One of the central challenges has always been to find a way to allow for the effective management and development of a communal heritage asset which is held by individual interests, and is increasingly fragmented.

Research shows that the existing legislation does not achieve this. Eighty percent of Māori land is currently underdeveloped and ignored by some disengaged owners. Through this review, we have the chance to put hundreds of millions of dollars extra into the hands of whānau, hapū and iwi while ensuring better guardianship of this taonga.

The Panel's review recommends empowering landowners in the use and management of their land by vesting decision-making authority in the owners who actively engage with their land by participating in decision-making processes.

Alongside this proposal, the Panel is proposing changes to the role of the Māori Land Court, the introduction of mediation as a first step in Māori land disputes and better alignment of the rules affecting Māori land trusts and incorporations with the rules applying to trusts and bodies corporate generally. The Panel is also proposing that more stringent rules be applied to the governance of bodies administering Māori land and that there is increased scope for the appointment of third party administrators and managers.

Before progressing further with these propositions, it is important that the Panel tests its thinking by obtaining feedback from landowners themselves, and those with an interest in Māori land and Māori land development. We hope you take the opportunity to read this discussion document and provide the Panel with your views.



Hon Dr Pita R Sharples
Minister of Māori Affairs



Hon Christopher Finlayson
Associate Minister of Māori Affairs

Executive Summary

The Te Ture Whenua Māori Act 1993 Review Panel (the Panel) has developed an integrated package of five propositions to improve the likelihood of utilisation of Māori land.

Proposition 1: Utilisation of Māori land should be able to be determined by a majority of engaged owners

An engaged owner is defined as an owner who has actively demonstrated their commitment to their ownership interest by exercising a vote either in person or by proxy or nominee. Engaged owners should be able to make decisions (excluding sale or other permanent disposition) without the need for endorsement by the Māori Land Court.

Proposition 2: All Māori land should be capable of utilisation and effective administration

Where owners are either not engaged or are unable to be located, an external manager or administrator may be appointed to manage under-utilised Māori land. The Māori Land Court should have a role in approving the appointment and retaining oversight of external administrators.

Proposition 3: Māori land should have effective, fit for purpose, governance

The duties and obligations of trustees and other governance bodies who administer or manage Māori land should be aligned with the laws that apply to general land and corporate bodies. There should be greater consistency in the rules and processes associated with various types of governance structures.

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

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

Proposition 5: Excessive fragmentation of Māori land should be discouraged.

Succession to Māori land should be simplified. A register should be maintained to record the names and whakapapa of all interests in Māori land, regardless of size.

The five propositions are based on the core principles of owner engagement and empowerment, accountability, fit for purpose, and best practice. The Panel considers these principles should underpin the legislation that governs Māori land. The propositions also seek to address and remove barriers to the utilisation of Māori land.

The cornerstone of the propositions is the concept that engaged Māori land owners, who actively participate in the administration of their land interests, should have the ability

to make decisions themselves about the utilisation of their land, with a minimum of external intervention. The only exception to this principle should be in the case of sale where more process and oversight are required given the value of Māori land as taonga tuku iho that generally should be retained. Also, when Māori land owners are not able to engage with their land, there may be a case for an external administrator to manage the land on their behalf.

As a consequence, the Panel considers that Māori land should have an enabling institutional framework to support owners to make decisions and resolve any disputes efficiently. The Māori Land Court should be a forum of last resort for disputes resolution. An independent mediation service would act as the first point of external intervention for disputes resolution. The Māori Land Court should continue with its registry function focusing on the collection and provision of information and have a general role for matters of process and points of law.

Context and Overview

Purpose of document

The purpose of this discussion document (the Document) is to seek views on the issues associated with Māori land utilisation and the Te Ture Whenua Māori Act 1993 Review Panel's (the Panel's) propositions to address these issues. Your feedback will input directly into the Panel's development of its final proposals, which will form the basis of recommendations to the Government.

How you can provide feedback on this discussion document

You can provide feedback during the consultation hui or by submitting written comments to: TTWMA@tpk.govt.nz or Te Ture Whenua Māori Act 1993 Review Panel, c/o Te Puni Kōkiri, PO Box 3943, Wellington by no later than 17 May 2013. Once the Panel has had an opportunity to consider everyone's comments, final recommendations will be developed for consideration by Ministers.

Current situation

On 4 April 2011, the Minister of Māori Affairs jointly with the then Minister of Agriculture released two reports on the issues associated with Māori land as identified by Māori land owners.¹ In summary, Māori land owners stated that Māori land should be retained and utilised to enable it to be passed on to future generations and that the use of the land should balance commercial and cultural imperatives. They also expressed the strong view that Māori land is a taonga tuku iho (a legacy) of special significance to Māori that should be retained and developed for the benefit of the owners, their whānau and hapū.

There is significant scope to increase economic returns from Māori land. Research from the then Ministry of Agriculture and Forestry (now the Ministry for Primary Industries) estimates that 40% of Māori land is under-performing and a further 40% is under-utilised. This research also estimated that the current capital value, output value and contribution to Gross Domestic Product (GDP) and employment of Māori land could more than double with improvements to management and further development.² Increasing the productivity of these assets therefore has the potential to make a significant contribution towards improving the economic wellbeing of Māori as well as the New Zealand economy as a whole.

The Panel's scope

On 3 June 2012, the Associate Minister of Māori Affairs announced the formation of the Panel to Review Te Ture Whenua Māori Act 1993 with a view to unlocking the economic potential of Māori land for its beneficiaries, while preserving its cultural significance for future generations. The Panel is chaired by Matanuku Mahuika. The other members are Tokorangi Kapea, Patsy Reddy and Dion Tuuta.

1. Te Puni Kōkiri (2011): *Owner Aspirations Regarding the Utilisation of Māori Land*, Wellington, New Zealand; and Ministry of Agriculture and Forestry (2011): *Māori Agribusiness in New Zealand: A Study of the Māori Freehold Land Resource*.

2. Ibid.

The Panel has been asked to make practical recommendations on what form of legislative intervention might best support the owners of Māori land in reaching their aspirations, while enabling the better utilisation of their land. Increasing productivity and achieving economic growth should be balanced with preserving the cultural significance of Māori land for future generations.

A number of barriers have been identified as impacting on the utilisation of Māori land and therefore the ability of landowners to derive benefit from those lands. These issues are not new or uncommon – they have been identified in numerous studies of Māori land and Māori land development. The Panel has been asked to develop a menu of practical recommendations to address four key areas:

- Ownership: Māori land owners are affiliated and engaged with the land;
- Governance: there are appropriate structures and trustees with expertise to support effective decision-making;
- Access to resources: resources are available to enact decisions; and
- Utilisation: better utilisation of Māori land is enabled.

The Panel has been asked to focus on assisting owner-driven utilisation, rather than seeking to impose pre-determined solutions, as the former will be more sustainable in the long term.

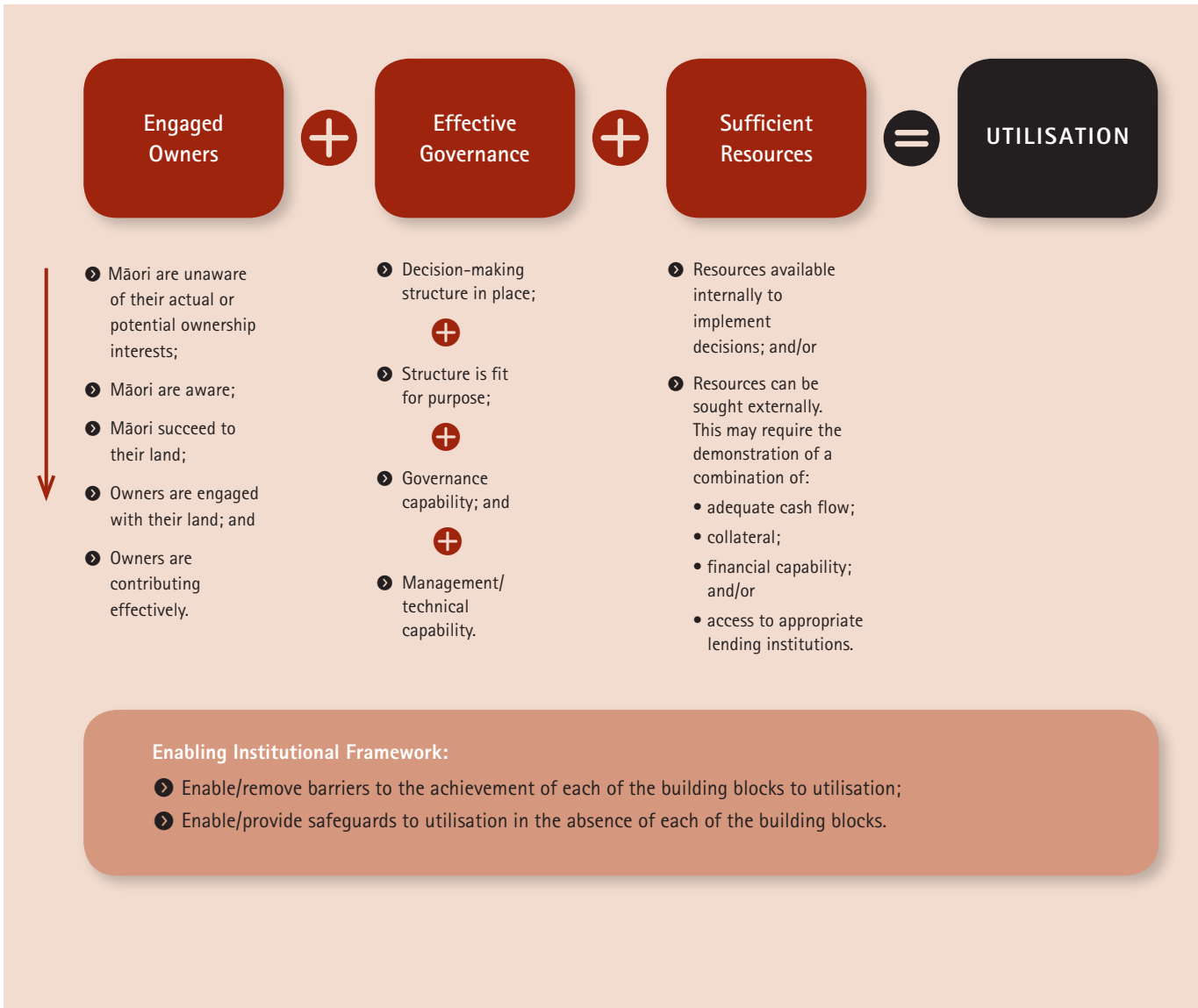
Utilisation Framework

The Panel considers that owner-driven utilisation is the most sustainable and durable form of utilisation and therefore should be encouraged where possible with an enabling institutional framework. Where owner-driven utilisation is not possible, the institutional framework should still provide for utilisation to occur. Conceptually, this can be expressed in the model on page 7.

If owners are engaged, there are effective governance structures, sufficient capability and resources are available to enact decisions, then utilisation should occur. Supporting enablers of, and removing barriers to, these outcomes through legislative recommendations is the focus of the Panel.

The Panel considers that access to resources and utilisation are best addressed through propositions focused on the areas of ownership, governance, and the institutional framework governing Māori land. Utilisation is a product of the other components so that if these are provided for then utilisation will likely result. Research undertaken indicates that accessing resources to fund utilisation decisions does already occur and that the key driver to increasing access is to improve the value proposition of the decision and clearly demonstrate the ability to execute the proposition. This means ensuring that the business case is robust and that appropriate ownership and governance mechanisms and adequate management capability are in place. These issues are best addressed through non-legislative mechanisms.

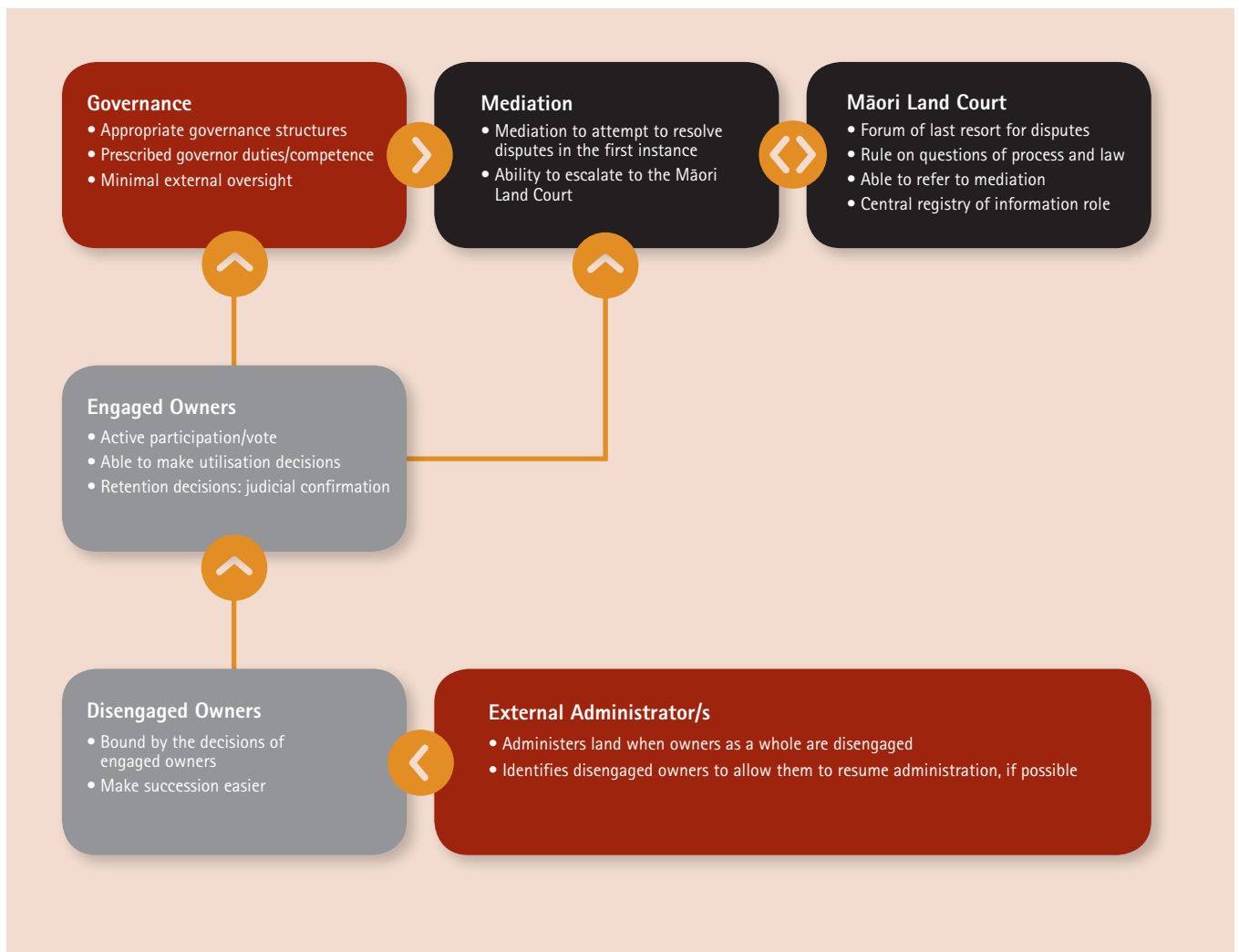
Figure 1: Utilisation Framework



Institutional Framework

In an institutional setting, owner-driven utilisation results when engaged owners are able to establish effective governance arrangements, with support from disputes resolution processes. If owner engagement is lacking, an external administrator or administrators provides for utilisation, and encourages owners to engage where possible. Disputes resolution involves mediation in the first instance with the ability to escalate this to the Māori Land Court. The Māori Land Court provides a disputes resolution and information registry function.

Figure 2: Institutional Framework



Within this framework, the Panel's role is to make legislative recommendations to support utilisation, based on a set of core principles the Panel considers should underpin Māori land legislation.

Core principles

The core principles underpinning the Panel's vision to improve utilisation and achieve owner aspirations are:

Māori land legislation should empower engaged owners

Informed and engaged Māori land owners who have actively demonstrated their commitment to their ownership interest are best placed to make decisions about their land. This is consistent with the principle of tino rangatiratanga as well as the property rights protected by statute and common law.

Māori land legislation should be fit for purpose

Māori land has value as taonga tuku iho (a legacy) to be maintained, enriched, and passed on to future generations. This legacy value may sometimes be of more importance to the owners than the economic value or potential of the land. The legislation governing Māori land should protect those essential features that make Māori land unique, including retention.

Māori land legislation should be best practice

Māori land legislation should draw on lessons from other jurisdictions in terms of efficiency and effectiveness.

Māori land legislation should encourage accountability

Māori land legislation should encourage accountability at multiple levels. Owners should be accountable for utilising the land and passing it on to future generations.

Proposition Framework

The Panel has developed an integrated package of five propositions to improve the likelihood of utilisation of Māori land in three key areas: ownership, governance, and institutional framework. Within each key area, care has been taken to put the issues in the appropriate historical context by outlining how each area has evolved over time to the present day. Based on this context and in keeping with the core principles, the Panel has identified problems that need to be addressed and the Document articulates a set of propositions to address these.

The Terms of Reference for the Panel limited its scope to legislative interventions. The Terms of Reference also allows the Panel to take a first principles approach. Therefore, the Panel has deliberately not constrained itself to focusing on the existing legislation: Te Ture Whenua Māori Act 1993 (TTWMA). Changes could involve changes to the status quo or a completely new approach. The Panel believes it is important that the key legislative concepts are agreed and that they directly address the set of problems, before considering how they will be implemented (i.e. maintaining the status quo, refining the status quo or taking a new approach).

Each proposition is broken down into its key components and the Panel is seeking feedback on each of these. A summary of the propositions is provided in Table 1 below. Appendix 1 provides a table comparing the propositions and their components with the status quo in order to demonstrate the quantum of change proposed. A glossary is attached as Appendix 2.

Following feedback on the Document, the Panel will consider implementation of any changes and the subsequent legislative change required.

Summary of Propositions

To increase utilisation of Māori land, the Panel has identified a number of integrated propositions, which are summarised below.

Table 1: *Summary of propositions*

Key area	Summary of propositions	Pages
Ownership	Proposition 1: Utilisation of Māori land should be able to be determined by a majority of engaged owners	17–19
	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.	18
	Where Māori land is alienated by sale or other permanent disposition, Māori Land Court approval should be required to confirm that 75% agreement from all registered owners has been obtained and that those who affiliate to the land have been given the first right to purchase the land.	18
	All other decisions should require the approval of at least 50% of engaged owners, provided there has been full and timely disclosure of the proposal to all registered owners; and should only be able to be challenged as to whether fair value has been obtained or where there has been a conflict of interest or other breach of duty.	19
	Certain significant decisions (e.g. long-term lease) may require the approval of at least 75% of engaged owners.	19

Key area	Summary of propositions	Pages
Governance	Proposition 2: All Māori land should be capable of utilisation and effective administration	22–26
	Where owners are either not engaged or are unable to be located, an external manager or administrator may be appointed to manage Māori land titles.	23
	Certain Māori entities in addition to the Māori Trustee; such as Post Settlement Governance Entities, Māori trusts and incorporations with hapū or iwi affiliation to the particular Māori land; may be eligible to undertake the role of external administrator or manager.	23
	Case Study 1: Māori Trustee Funding Agreement	23
	The Māori Land Court should approve the appointment and retain oversight of external administrators of Māori land.	24
	Rules governing the external administration of Māori land should include: the powers of external administrators; the rights of registered owners to resume administration of Māori land for their own use and management; processes for appointing external administrators; obligations of reporting and accountability for actions taken by the external administrators; and requirements for profits and distributions to be held in trust for owners where they are unable to be located.	24
	Case Study 2: Māori Trustee Roles	25
	Case Study 3: Rules Governing the Involvement of the Māori Trustee	26

Key area	Summary of propositions	Pages
Governance	Proposition 3: Māori land should have effective, fit for purpose, governance	26–30
	The duties and obligations of trustees and other governance bodies who administer or manage Māori land should be aligned with the laws that apply to general land and corporate bodies.	27
	Case Study 4: Company Model	27
	The management and administration of Māori land should be more clearly the responsibility of the duly appointed governors.	28
	The duties, responsibilities and required competence of governors of Māori land should be more explicit and should include penalties and possible disqualification from governance roles for breaches of those duties.	28
	Case Study 5: Company Directors Duties	28
	There should be greater consistency in the rules and processes associated with the various types of governance.	29
	Elections and appointments of trustees and other governance entities should be recorded by the Registrar of the Māori Land Court with the Court's power to intervene aligned with the powers of the general courts.	29
	Case Study 6: Charities Board	29
	The role of the Māori Land Court should be to adjudicate over breaches of the rules.	30

Key area	Summary of propositions	Pages
Institutional Framework	Proposition 4: There should be an enabling institutional framework to support owners of Māori land to make decisions and resolve any disputes	33–35
	Disputes relating to Māori land should be referred, in the first instance, to mediation.	33
	Case Study 7: Employment and Family Mediation	34
	The Māori Land Court should be empowered to conduct judicial settlement conferences and refer disputes to mediation.	34
	Where the dispute remains unresolved following mediation, it may be determined by the Māori Land Court.	35
	Case Study 8: High Court	35
Institutional Framework	Proposition 5: Excessive fragmentation of Māori land should be discouraged.	36–37
	Succession to Māori land should be simplified.	36
	A register should be maintained to record the names and whakapapa of all interests in Māori land, regardless of size.	36
	The rights of decision making in respect of Māori land should be limited to those owners with minimum threshold interests.	37

Background and Landscape

Legislative Framework

There are unique contextual and legislative factors that have to be accounted for in achieving greater utilisation of Māori land. The cultural value associated with Māori land is a key consideration and is explicitly recognised in TTWMA, the principal statute governing Māori land.

TTWMA recognises Māori land as a taonga tuku iho of special significance to Māori. For the first time, Māori land was acknowledged as a form of land tenure in its own right. Prior to this, Māori land was treated as a transitional tenure until it could be brought in line with the title regime. TTWMA retained the Māori Land Court (MLC) and empowered it to make decisions relating to the retention, occupation, development, and utilisation of Māori land, and expanded its jurisdiction to hear all cases on all matters related to Māori land. The MLC has an active role in the administration of Māori land and all major transactions, such as long-term (more than 52 years) lease and sale, are subject to its approval.

What is Māori Land?

Māori land includes Māori customary land held in accordance with tikanga Māori and Māori freehold land, which is determined to have freehold status by the MLC. Very little land remains in Māori customary title, so when the Document refers to Māori land, it is referring to Māori freehold land.

Today, Māori land comprises 1.466 million hectares, which is approximately 5.5 percent of New Zealand's land mass. The average size of a Māori land title is 53.7 hectares – the smallest 10 percent of titles average 0.79ha and the largest 10 percent of titles average 487ha.³ There are approximately 100 owners per title on average. Most Māori land is situated in the north, centre, and east of the North Island.⁴

3. Māori Land Court (2012) Māori Land Update – Ngā Āhuatanga o te Whenua, June 2012, Wellington, New Zealand.

4. Ibid.

Table 2: Māori Land by Māori Land Court District as at June 2012

Rohe	Number of titles	Area (hectares)
Taitokerau	5,464	145,686.8561
Waikato Maniapoto	3,821	125,642.7569
Waiariki	5,200	313,964.3235
Tairāwhiti	5,295	262,335.5152
Tākitimu	1,353	87,971.9052
Aotea	3,811	456,985.1624
Te Waipounamu	2,364	68,045.8173
Total	27,308	1,465,917.2885

Source: MLC, 2012

Utilisation of Māori Land

Research from the then Ministry of Agriculture and Forestry (now the Ministry for Primary Industries) estimates that 40% of Māori land is under-performing and a further 40% is under-utilised. This research also estimated that the current capital value, output value and contribution to Gross Domestic Product (GDP) and employment of Māori land could more than double with improvements to management and further development.⁵

The New Zealand Institute for Economic Research estimated that in 2003 \$700 million was contributed to GDP from Māori land and associated Māori-owned general land. Estimates vary in the way they are calculated and so are not directly comparable. Data on the performance of Māori land enterprises is limited. The perception is that Māori land enterprises perform at a level below comparable general land businesses. Estimated production levels of Māori land range between 60–70% of general land.⁶

5. Ministry of Agriculture and Forestry (MAF) 2011: Māori Agribusiness in New Zealand: A Study of the Māori Freehold Land Resource, Wellington, New Zealand.

6. Ibid.

Ownership

Proposition 1: Utilisation of Māori land should be able to be determined by a majority of engaged owners.

Context

The Treaty of Waitangi, amongst other things, guaranteed Māori undisturbed possession of their land and specified that Māori could sell land only to the Crown (Crown pre-emption). The Native Lands Act 1862 expressly waived Crown pre-emption and introduced many of the characteristics that define the Māori land ownership base today. The title regime contradicted traditional Māori concepts of ownership and effectively ended Māori customary title.

Under the Native Lands Act 1865 the number of owners on a certificate of title was restricted to 10. The 10 owners were intended to act as representatives who held the land on behalf of all owners although once the title was issued they were recognised as the legal owners.⁷ A title could only be issued in the name of a tribe if the block in question was more than 5,000 acres.

The 10 owner rule was repealed in 1873 and replaced with a memorial of title regime, which recorded all owners' interests. The number of owners increased every generation as individuals succeeded to their parents' land interests. For some time prior to this, the MLC had been allowing individuals to succeed to land interests regardless of where they lived.

The Government began turning its attention to issues created by multiple ownership of Māori land in the 1920s. Conversion, another form of alienation and an attempt to control the fragmented owner base, was introduced under the Māori Affairs Act 1953. Under this Act, Māori owners who held uneconomic interests (shares worth less than £25) were forced to sell to the Māori Trustee, who then sold the shares within the preferred class of alienees (usually to Māori who had greater interests in the same piece of land). This process was intensified with an unpopular 1967 amendment to the Māori Affairs Act 1953, where land interests of less than \$50 were compulsorily purchased. It was often easier for the Māori Trustee to sell these land interests to the Crown.⁸ The 1967 amendment also introduced the compulsory conversion of Māori land with fewer than four owners to General title.

The situation today

For the average owner today, interactions and connections with the land are very different from what was experienced before introduction of the Māori land title tenure system, where land use rights were kept alive by continuous occupation (ahi kā roa). In traditional

7. Boast, R (2009) 'Te tango whenua – Māori land alienation, Te Ara - The Encyclopedia of New Zealand, <http://www.teara.govt.nz/en/te-tango-whenua-Māori-land-alienation>.

8. Ibid.

Māori society, failure to maintain active connection with whenua could result in use rights being reduced or lost altogether. Changes created by the implementation of the tenure system, combined with changes in the Māori population, such as urbanisation, have resulted in varying levels of engagement, which can be broadly categorised at five levels:

- potential owners are unaware of their ability to succeed;
- potential owners are aware of their interests, but have not succeeded;
- owners have succeeded to their interests, but don't vote;
- owners have succeeded to their interests and vote; and
- owners have succeeded to their interests, vote, and are actively contributing to the development of their land.

The issue of differing degrees of engagement is more significant for larger titles with multiple ownership interests than for titles owned and managed by one person or family. One of the principles set out in TTWMA is retention of Māori land by owners, their whānau and hapū and the MLC applies this principle in its oversight of alienations of Māori land. Owners' property rights are protected by the MLC, irrespective of whether they exercise them or are even aware of them. This can act as a disincentive for some to take an active role as they know their interests will be protected. There is a fine balance between recognising the rights of the whole group while not impinging on the rights of those who have succeeded.

Problem Definition

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

Proposition 1: Utilisation of Māori land should be able to be determined by a majority of engaged owners.

This would involve providing for utilisation decisions to be made **without the need for endorsement by the MLC** except in the case of sale or other permanent disposition of the land. Decisions relating to sale and permanent disposition would be expected to have more process and oversight given the value of Māori land as taonga tuku iho that generally should be retained. The intent is to provide an appropriate balance between the retention and utilisation of Māori land. For this proposition to be developed into a recommendation, further consideration of the following is required:

- The definition of an engaged owner.
- Defining the MLC's role in confirming the agreement of owners for the sale or permanent disposition of Māori land – 75% of all owners agree and those who affiliate to the land have been given first right to purchase the land.
- All other decisions should require the approval of at least 50% of engaged owners, provided there has been full and timely disclosure of the proposal to all registered owners and decisions should only be challenged as to whether fair value has been obtained or where there has been a conflict of interest or other breach of duty.
- Some types of utilisation decisions may require the consent of a larger group of engaged owners (e.g. at least 75%).

Definition of an engaged owner

The Panel proposes that an engaged owner be 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. This is an appropriate threshold because it requires potential owners to actively participate in the administration of their land.

Dealing with situations where engagement and owner utilisation are not possible is covered in proposition 2.

The Panel is seeking your feedback on the following question:

- What is your view on an engaged owner being 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?

The Māori Land Court's role in confirming the agreement of owners in the sale or permanent disposition of Māori land

The Panel proposes that all decisions not including sale or permanent disposition of land should be undertaken by the engaged owners or their nominated governors. This would involve defining in legislation what sale or permanent disposition would include, which would act as the trigger for intervention by the MLC and what form this should take.

The Panel considers that sale should be defined as where the ownership of land or interests in land passes to another party (apart from succession, which is dealt with under proposition 5 or mortgagee sale as set out below). This would include any sale, gifting/ vesting of land or ownership interests.

For all sales (except mortgagee sale), the Panel proposes that the agreement of 75% of all owners is an appropriate threshold given the value of Māori land as taonga tuku iho that generally should be retained. The Panel proposes that those who affiliate to the land should have the right to purchase the land first, before it is offered to external purchasers. The Panel proposes that those who affiliate to the land should include children and whānau of the owners and their descendants.

The Panel proposes that endorsement by the MLC should involve ensuring that 75% agreement from all owners has been obtained and that those who affiliate to the land have been given a reasonable opportunity to purchase the land.

The Panel is seeking your feedback on the following questions:

- What is your view on any decisions, not including sale or permanent disposition of land, being undertaken without the need for endorsement by the MLC?
- What is your view on one role of the MLC being to ensure that 75% agreement has been obtained from all registered owners and that those who affiliate to the land have been given first right to purchase the land before Māori land can be sold?

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

The Panel proposes that the consent of at least 50% of engaged owners should be required for all other utilisation decisions, provided there has been full and timely disclosure of the proposal to all registered owners. Utilisation decisions should only be challenged if there is a question as to whether fair value has been obtained or where there has been a conflict of interest or other breach of duty.

The Panel is seeking your feedback on the following questions:

- What is your view on utilisation decisions other than sale requiring the agreement of at least 50% of engaged owners, provided there has been full and timely disclosure of the proposal to all registered owners?
- What is your view on utilisation decisions only being able to be challenged on the basis of whether fair value has been obtained or where there has been a conflict of interest or other breach of duty?

Some types of utilisation decisions may require the consent of a larger group of engaged owners (e.g. at least 75%)

The Panel considers that some non-sale utilisation decisions may require a higher level of consent. One example could be the decision to enter into a mortgage, because a failure to repay the mortgage could result in a mortgagee sale. Another example could be a long-term lease, as the land will be locked into a particular use for a significant period of time.

The Panel is seeking your feedback on the following question:

- What is your view on some types of utilisation decisions (e.g. long-term lease) requiring the consent of a larger group of engaged owners (e.g. at least 75%)?

Governance

Proposition 2: All Māori land should be capable of utilisation and effective administration.

Proposition 3: Māori land should have effective, fit for purpose, governance.

Context

Traditionally, land was managed based on reciprocal obligations at the whānau and hapū level. Retaining land has always been central to maintaining cultural connection. Prior to the signing of the Treaty of Waitangi, rangatira would often enter into arrangements and transactions with settlers who required land. This would often involve allowing Europeans to settle on Māori land in exchange for goods. However, these arrangements were never intended to grant absolute ownership. Land was still governed in accordance with tikanga and transactions would have been viewed in terms of entering into reciprocal and shared relationships. Rights were transferred but not ownership.⁹ Over time, as the numbers of owners have increased, along with problems with identifying and communicating with all owners, mechanisms have been developed to introduce governance structures.

TWMA sets out the land management structures currently available to owners of Māori land. However, evidence suggests that some forms are being utilised more extensively than others.

There are three main types of structures:

- those that enable pooling and collective management of shares in Māori land and are designed to reduce the impact of fragmentation of the ownership base (whānau trusts and pūtea trusts);
- land management structures that enable owners to manage whole block(s) of Māori land on a collective basis (ahu whenua trusts and whenua tōpū trusts); and
- Māori incorporations (which are similar in structure to companies).

A kai tiaki trust can be established in respect of any interests in land or any personal property, to which any person who has a disability is beneficially entitled.

The situation today

Recent research indicates that only 41% of Māori land titles have a governance structure. While this figure appears low and could indicate a lack of engagement with these titles, there may be a number of reasons why this may not be the case. These include situations

9. Boast, R (2009) 'Te tango whenua – Māori land alienation, Te Ara - The Encyclopedia of New Zealand, <http://www.teara.govt.nz/en/te-tango-whenua-Māori-land-alienation>.

where land is used for housing purposes and so no governance structure is needed or where informal arrangements are in place, making a formal structure unnecessary. However, it is likely that a significant proportion of titles without governance structures are due to a lack of engagement by owners. The types of governance structures in place are set out below.

Table 3: TTWMA Governance Structures by MLC Region

	Ahu Whenua	Māori Incorporation	Māori Reservations	Pūtea	Whenua Tōpū	Other	Total	Percentage
Taitokerau	483	16	573	0	1	11	1,084	13.1%
Waikato	977	15	279	0	3	15	1,289	15.6%
Waiariki	1,576	28	544	2	8	55	2,213	26.8%
Tairāwhiti	941	63	364	1	5	25	1,399	16.9%
Tākitimu	380	5	103	0	4	8	500	6.0%
Aotea	798	24	360	0	10	13	1,205	14.6%
Te Waipounamu	427	9	119	0	2	22	579	7.0%
	5,582	160	2,342	3	33	149	8,269	100%

Source: MLC, 2012

Approximately 98% of governance structures on Māori land are Ahu Whenua trusts (68%), Māori reservations (28%) or Māori incorporations (2%). This suggests that the other forms are significantly under-utilised. No new incorporations have been created for a number of years.

The lack of suitable governance experience and training has been identified as a significant issue for trustees and owners of Māori land. The key issues relating to efficient and effective governance can be attributed to:

- Selection of trustees. Anecdotal evidence suggests that some trusts select trustees based on how well known and trusted they are by other owners, rather than on governance expertise and experience.

- Lack of capability of trustees hindering decision making on land development and utilisation. Trustees who lack management and business experience may not be confident in making decisions to improve utilisation and increase productivity of land.
- Lack of incentives to encourage participation by skilled trustees.
- Lack of penalties and sanctions to discourage poor performance.

Problem Definition

Some Māori land titles have a majority of owners who cannot or will not succeed to their ownership interest despite attempts to encourage them to succeed (proposition 5). This makes owner-driven utilisation of the land problematic (proposition 1).

Disengagement may occur for a number of reasons, including a significant lack of incentive to engage (e.g. the land is unable to be utilised or is extremely marginal) or the presence of a disincentive to engage (e.g. the land is in a significant state of disrepair or subject to large rates arrears). However, this land still needs to be administered as effectively as possible. There may be opportunities for an external administrator to identify potential owners and return the land in its current state or in a more developed state.

As noted above, only 41% of Māori land titles have a governance structure and of those that do have a structure, the governance capability can vary. Proposition 5 should provide greater succession and engagement with Māori land, which is likely to result in more governance structures being established. Proposition 2 will provide for governance when owners as a whole are disengaged. As a result, it is expected that governance coverage will increase. Therefore, it is important that governance quality is high by ensuring that the governors are capable and the role of the MLC is appropriate.

Proposition 2: All Māori land should be capable of utilisation and effective administration.

This would involve providing for an external administrator or administrators who could assume administration responsibility for a Māori land title or titles in order to maintain or develop the land, identify potential owners, and return the land (if possible). The intent is to improve utilisation in situations where the owners themselves are very unlikely to, or will never, engage.

For this proposition to be developed into a recommendation, further consideration of the following is required:

- Where owners are either not engaged or are unable to be located, an external manager or administrator may be appointed to manage under-utilised Māori land titles.
- Certain Māori entities in addition to the Māori Trustee may be eligible to undertake the role of external manager or administrator.
- The MLC approves the appointment, and maintains oversight, of external administrators of Māori land.

- There should be clarity about the rules governing the external administration of Māori land.

Where owners are either not engaged or are unable to be located, an external manager or administrator may be appointed

In extreme situations, the owners of some Māori land blocks cannot be located or are never likely to engage. There may be significant potential in these under-utilised land blocks and the Panel considers that, where feasible, action should be taken to appoint an external manager to administer and develop the block on behalf of the disengaged owners. The Panel considers that the threshold for such an intervention should be extremely high and is only likely to be used in exceptional circumstances.

The Panel is seeking your feedback on the following question:

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

Certain Māori entities in addition to the Māori Trustee, may be eligible to undertake the role of external manager or administrator

The Panel proposes that certain Māori entities in addition to the Māori Trustee (such as Post Settlement Governance Entities, Māori trusts, and incorporations with hapū or iwi affiliation to the particular Māori land block) may be eligible to undertake the role of external manager or administrator.

The Panel notes that this may require external resourcing of these entities as they may not wish to undertake this work. For example, the Government currently funds the Māori Trustee to undertake some of the roles of an external manager or administrator.

Case Study 1: Māori Trustee Funding Agreement

Currently, the Minister of Māori Affairs has an agreement with the Māori Trustee to undertake the statutory and legal obligations to beneficial owners of land the Māori Trustee administers. This includes administration of trusts (including entities handed over to beneficiaries), maintenance of a share registry (including addition of new ownership interests, and increasing the level of contact details held), lease administration, land and business development, common fund management, distributions to owners, and organisational performance. While there are elements of owner identification within some of the outputs the Māori Trustee is required to deliver on, there is no explicit performance measure specific to identification of potential owners or return of land to owners.

The Panel is seeking your feedback on the following question:

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

The Māori Land Court approves the appointment, and maintains oversight, of external administrators of Māori land

The Panel proposes that the MLC be given the role of approving the appointment and retaining oversight of the external managers or administrators of under-utilised Māori land. This may include the MLC keeping an up-to-date register of potential external administrators.

The Panel is seeking your feedback on the following question:

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

There should be clarity about the rules governing the external administration of Māori land

To protect the rights of owners, rules will need to be implemented to govern the external administration of Māori land, including:

- powers of external administrators and the rights of registered owners to resume administration of Māori land for their own use and management;
- the process for appointing an external administrator and obligations of reporting and accountability for actions taken by the external administrator; and
- requirements for profits and distributions held in trust for owners where they are unable to be located.

Powers of external administrators

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The Panel proposes that the role of the external administrator should be to administer the land as effectively as possible and, if possible, to identify potential owners and return the land in its current state or in a more developed state. Depending on the capability of the land and the issues associated with it, administration could range from designating it for cultural or environmental purposes (e.g. Wāhi Tapu, Māori Reservation, Ngā Whenua Rāhui), leasing or low intensity utilisation in order to maintain the property (e.g. pay rates, maintain fences), or higher intensity utilisation in order to generate a return.

In situations of cultural or environmental designation, identification should proceed if possible. In situations of low or high intensity utilisation, identification should occur after this has been achieved in order to fund identification activity as well as to encourage potential owners to succeed.

Since the external administrator is not the owner, utilisation decisions should be constrained so that if potential owners do succeed, they are able to make decisions about the land and not be bound in the long run by the decisions made by the external administrator.

The Panel proposes that any environmental or cultural designation, leasing or other activity undertaken by the external administrator that has the effect of locking up the land for a significant length of time should be constrained (e.g. lease duration is limited) so that any potential engaged owners can eventually make their own decisions. A potential starting point for considering what the roles of an external administrator could be is provided in the current approach of the Māori Trustee.

Case Study 2: *Māori Trustee Roles*

The Māori Trustee is an independent professional trustee organisation responsible for acting as trustee over many trusts over Māori land. The Māori Trustee assumes various responsibilities in relation to Māori land, including acting as a responsible trustee with full legal duties, a custodian trustee responsible for holding trust assets and carrying out the legal duties on the direction of the responsible trustee(s), or as an agent to provide services for a trust such as negotiating a lease or managing a meeting of owners.

The Panel is seeking your feedback on the following question:

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

Appointing external administrators and accountability for actions taken

As proposed above, the Panel recommends that the MLC be given responsibility for approving the appointment and retaining oversight of the external administrators. The Panel considers that clear rules should govern when and how an external administrator could be brought in to administer a block when owners as a whole are disengaged. A potential starting point for considering what the rules could be is provided in the current approach to the involvement of the Māori Trustee.

Case Study 3: *Rules Governing the Involvement of the Māori Trustee*

The Māori Trustee may be appointed trustee of any trust constituted in respect of Māori land by the MLC. The MLC must not do so without being satisfied that the appointment of the Māori Trustee would be broadly acceptable to the beneficiaries of the trust.

The MLC can also appoint the Māori Trustee as an agent acting in relation to any Māori land, providing that land is owned by no more than 10 persons, and is not vested in any trustee or trustees. The appointment of the Māori Trustee as an agent acting in relation to Māori land is common where the whereabouts of the landowners are unknown.

The Māori Trustee also has a role in relation to leases of Māori land where there is no MLC-appointed agent. This role includes deciding on the renewal of leases or the enforcement of covenants over Māori land. These roles are typically invoked where no one has been appointed to represent the trust.

As part of the oversight role, a process could be established for the MLC to record any utilisation decisions taken by the external administrators so that this information is on record if potential owners do succeed and take over the use and management of their land in the future. The MLC could also be required to receive reports from the external administrator and ensure that the land is being administered effectively.

The Panel is seeking your feedback on the following question:

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

Requirements for profits and distributions held in trust

A number of Māori land trusts and incorporations distribute profits and dividends to their beneficial owners. Trusts and incorporations determine their own rules for holding profits for owners who they are unable to locate (e.g. after a certain time period profits may be redistributed for social purposes). The Panel proposes that external administrators should be required to hold profits in trust for owners where they are unable to be located.

The Panel is seeking your feedback on the following question:

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

Proposition 3: Māori land should have effective, fit for purpose, governance.

In general, this would involve providing for capable governors with an appropriate level of oversight. Improved governance will drive greater utilisation of Māori land. For

this proposition to be developed into a recommendation, further consideration of the following is required:

- The duties and obligations of trustees and other governance bodies who administer or manage Māori land should be aligned with the laws that apply to general land and corporate bodies.
- The management and administration of Māori land should be more clearly the responsibility of the duly appointed governors.
- The duties, responsibilities, and required competence of governors of Māori land should be more explicit and should include penalties and possible disqualification from governance roles for breaches of those duties.
- There should be greater consistency in the rules and processes associated with the various types of governance.
- Elections and appointments of trustees and other governance entities should be recorded by the Registrar of the MLC with the MLC's power to intervene aligned with the powers of the general courts.
- The role of the MLC should be to adjudicate over breaches of the rules.

The duties of trustees should be aligned with general and corporate law

The Panel considers that the laws and corporate structures that apply to general land provide useful models that can be applied to Māori land.

Case Study 4: *Company Model*

A company is a legal entity (a body corporate) separate from its shareholders and created to carry on commercial activity. A company's constitutional document is its constitution or (if it has no constitution) the Companies Act 1993. The operation of the company and the duties and responsibilities of its directors are set out in the constitution and under the Companies Act. The High Court has jurisdiction over companies. Amongst its powers, it can hear applications for breaches of the company's constitution, a breach of a director's duties, or a claim of a prejudiced shareholder. The Registrar of Companies can remove a company from the Register on certain grounds.

The Companies Act 1993 also requires every company to:

- hold annual general meetings;
- prepare annual reports describing the activity of the business and its financial status;
- appoint an auditor annually; and
- have a registered office that keeps documents including its constitution, minutes of shareholder meetings, accounting records, and the share register.

The Panel is seeking your feedback on the following question:

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

The management and administration of Māori land should be more clearly the responsibility of the duly appointed governors

The Panel proposes that a balanced approach should be taken to the issue of improving governance capability by providing both incentives and disincentives for governors of Māori land. The demand for governance training could be encouraged by incentivising governors to access as well as act on this training. This could require governors to achieve, maintain, and gain certification of a certain level of competence.

The Panel is seeking your feedback on the following question:

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

The duties, responsibilities, and required competence of governors of Māori land should be more explicit and should include penalties and possible disqualification from governance roles for breaches of those duties

Governors should be acknowledged and remunerated for good performance but should also be punished for poor performance. The Panel proposes that the duties, responsibilities, and required competence of governors of Māori land should be specified in detail including introducing civil penalties for negligence (e.g. not filing returns) and criminal penalties in the case of fraud.

A potential starting point for considering what the duties of governors could be is provided in the current approach to the duties of company directors.

Case Study 5: *Company Directors' Duties*

Directors have significant duties under the Companies Act 1993, including to:

- act in good faith and in the best interests of the company;
- exercise their powers for a proper purpose;
- not allow the company to operate in a manner likely to cause substantial risk of serious loss to the company's creditors;
- not agree to the company incurring an obligation unless the directors believe that the company will be able to perform the obligation; and
- exercise the care, diligence, and skill that a reasonable director would exercise in the circumstances.

The Panel is seeking your feedback on the following question:

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

There should be greater consistency in the rules and processes associated with the various types of governance

The current rules and processes associated with trusts and incorporations differ in terms of the level of prescription. For example, a trust is governed by its trust order or deed in which owners are able to determine how the trust will operate. In contrast, an incorporation has a standard constitution based on regulations that sets the rules associated with elections, voting, holding of meetings and terms of office etc. The Panel considers that there should be greater consistency in the rules and processes associated with the various types of governance.

The Panel is seeking your feedback on the following question:

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

Elections and appointments of trustees and other governance entities should be recorded by the Registrar of the Māori Land Court with the Court's power to intervene aligned with the powers of the general courts

It is proposed that one of the MLC's roles would be to note the results of elections and appointments to governance entities. The MLC would not have a role in appointing governors (other than what is provided for under proposition 2 – where the MLC can appoint an external manager or administrator for land blocks with disengaged and unlocated owners). Should any disputes arise over the appointment of governors, the first point of external intervention would be disputes resolution (as provided for under proposition 4).

A potential starting point for considering what the information role of the MLC could be is provided for by the Charities Board.

Case Study 6: Charities Board

On 1 July 2012 the functions of the Charities Commission transferred to the Department of Internal Affairs. A three-person Charities Board now makes decisions about registering or deregistering charities. The Department of Internal Affairs is responsible for maintaining a register of charitable organisations and promoting education concerning the charitable sector. The Charities Board considers complaints about uncharitable activities on behalf of registered charitable organisations and has the power to either register or deregister entities from the register of charitable entities.

The Panel is seeking your feedback on the following question:

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

The Māori Land Court's role in adjudicating over breaches

The Panel proposes that the establishment and decision making of a governance structure should not be subject to confirmation by the MLC, while provision should be made for any governance disputes to be managed appropriately by disputes resolution in the first instance, with recourse to the MLC (dispute resolution is covered in more detail in proposition 4).

The Panel is seeking your feedback on the following question:

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

Institutional Framework

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

Proposition 5: Excessive fragmentation of Māori land should be discouraged.

Context¹⁰

The Native (now Māori) Land Court was created by the Native Lands Act 1865 as a Court of Record with two key functions:

- The investigation of the titles of persons to Native land.
- The determination of the succession of Natives to Native Lands.

The main task was to inquire into Māori land ownership and issue titles. This involved identifying the dominant hapū, proved by descent from an accepted ancestor, as the basis of the claim and supported by evidence of residence, cultivation, and the management of resources. After the enactment of the Native Lands Act 1873, the Court's approach was to make a brief judgment identifying the successful claimant or claimant groups, but leaving the process of identifying names to the successful claimants.

By giving the MLC jurisdiction over successions, the legislature gave the MLC a duty of on-going involvement in the administration of a title once the original title order had been made. From this small beginning was to grow the elaborate supervisory jurisdiction of TTWMA.

In 1913, the Māori Land Boards were formally merged with the MLC. The Boards had a number of key administrative and supervisory functions, and the net effect was to involve the Judges of the MLC in a myriad of administrative tasks different from those of an ordinary Judge. In 1929, legislation greatly expanded the powers and functions of the Boards. The Boards could, for instance, purchase and establish farms, buy and sell stock and chattels, and enter into mortgages of land and chattels. Some of the Judges became active in promoting development projects.

In 1932, the MLC gained a new jurisdiction when the task of confirming alienations was transferred from the Māori Land Boards. During the period from 1935 to 1975 the MLC was an administrative as much as it was a judicial agency.

The jurisdiction of the MLC, in general as well as how it relates specifically to sale and governance, is canvassed elsewhere in the Document. Further information is provided below regarding its role with regards to title information and disputes resolution.

10. Boast, R., Erueti, A., McPhail, D. & Smith, N. (2004). *Māori Land Law, Second Edition*.

Title Information

Most orders of the MLC have to be registered with Land Information New Zealand (LINZ) under the Land Transfer Act 1952 (LTA). For example, TTWMA and the LTA explicitly provide for Māori land ownership orders to be registered under the LTA system. MLC confirmation is required for most instruments of disposition and some other instruments affecting Māori land. All original titles to Māori land and any other information associated with these titles is held by the MLC. Inconsistencies can arise between the LINZ and MLC records as a result of time delays in the transmission of instruments and the process of registration.

The LTA aims to provide certainty for the parties to a land transaction by providing that, once registered, the transaction cannot be set aside except in exceptional circumstances. This is known as the principle of indefeasibility and is a cornerstone of the LTA. The issue in relation to Māori land is that, in some cases, indefeasibility has facilitated, or prevented the reversal of, the sale of land in situations where TTWMA restrictions have been breached through error or process irregularities. Compensation, where available, may be deemed an insufficient remedy by Māori land owners, particularly when the land in question has significant historical or cultural value. A Land Transfer Bill, expected to be introduced in 2013, seeks to address this issue.

Disputes Resolution

In 2002, TTWMA was amended to empower the MLC to conduct mediation in relation to applications under the Māori Fisheries Act 2004, the Māori Commercial Aquaculture Claims Settlement Act 2004, and in relation to applications to determine the representation of Māori groups.

In the case of determining the representation of Māori groups (s. 30), if both parties agree to appoint a mediator, this decision is still subject to the approval of the MLC. A Judge may act as a mediator but may not preside over any issues arising from the mediation.

Those entitled to attend mediation include persons affected and their representatives and any other person with leave of the Judge. Any mediator may follow processes considered appropriate to resolve the dispute. Any information the mediator receives must be kept confidential. Statements made at the mediation are protected from defamation proceedings.

In the event of successful mediation, the mediator is required to present the terms of the resolution to a Judge of the MLC, who may then include it in a MLC order. In the event of an unsuccessful mediation, the mediator must refer the matter to a Judge, stating what issues have, and have not been resolved. The Judge is then able to refer the unresolved issues back to mediation or to the MLC for determination.

Problem Definition

The current regime governing Māori land is structured so that most matters relating to Māori land have some sort of judicial involvement. This can hinder choices about utilisation for Māori land owners as judicial involvement can be time consuming,

expensive, and complicated. The Panel seeks to focus this involvement by defining the role of judicial intervention in:

- utilisation decisions except for sale and permanent disposition of Māori land (proposition 1);
- the establishment and decision making of governance structures (proposition 3); and
- succession (proposition 5).

In terms of succession, a significant proportion of Māori land titles have owners who have not succeeded to their ownership interests. This is most clearly demonstrated in titles where listed owners are deceased. The effect of this phenomenon is to constrain the ability of owners to engage and make decisions.

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

The three key roles for the MLC include:

- being a forum of last resort for disputes resolution, with disputes being referred, in the first instance, to independent mediation;
- continuing the information registry role in order to provide transparent and comprehensive information to underpin the property rights of Māori land owners; and
- a general role for matters of process and points of law.

For this proposition to be developed into a recommendation, further consideration of the following is required:

- Disputes relating to Māori land being referred, in the first instance, to mediation.
- The MLC should be empowered to conduct judicial settlement conferences and refer disputes to mediation.
- Where the dispute remains unresolved following mediation, it may be determined by the MLC.

Disputes relating to Māori land being referred, in the first instance, to mediation

The Panel proposes that an independent mediation service be established as a means of trying to resolve disputes in the first instance before recourse to the MLC. The MLC will remain as the ultimate arbiter if parties to a dispute are still unable to agree.

The Panel proposes that parties to a dispute be required to demonstrate that they have attempted to resolve the dispute themselves before they are able to access mediation.

The Panel considers that a mediation service is a more efficient mechanism than intervention by the MLC in the first instance.

The Panel also proposes that the MLC be able to refer a dispute to mediation if as a result of the hearing the parties have narrowed their differences and if both parties agree.

A potential starting point for considering how mediation could work is provided in the current approach in the employment law and family law jurisdictions.

Case Study 7: Employment and Family Mediation

Employment mediation is a process whereby parties are assisted to resolve a problem through an independent, impartial third party in a confidential forum. When agreements are reached, the mediator generally records the decision and obtains the signature of both parties. Before doing so, the mediator will check to make sure the agreement complies with employment law and that both parties understand that the settlement will become final once signed. Parties to the mediation are responsible for ensuring that the agreement is followed through. If one party believes the agreement has not been honoured, they can either ask the mediator to follow this up, or can seek enforcement through the Employment Relations Authority or the Employment Court. Where an agreement cannot be reached, parties can pursue the matter through the Employment Relations Authority or the Employment Court.

Family mediation is a chance for both sides to a family dispute to discuss their differences and try to reach agreement. Family Court mediation can be led either by a qualified mediator appointed by a Family Court Judge, or by a Family Court Judge. Family mediation conferences can be held whenever someone has asked the Family Court for a parenting order, separation order, maintenance order, or a declaration that a child is in need of care or protection. There is a great deal of flexibility in terms of the mediation process, but this usually involves assisting the parties to come to agreement before the matter progresses to the Family Court.

The Panel is seeking your feedback on the following questions:

- What is your view on all disputes relating to Māori land being referred, in the first instance, to mediation?
- What is your view on parties to a dispute being required to demonstrate that they have attempted to resolve the dispute themselves before they are able to access mediation?

The Māori Land Court should be empowered to conduct judicial settlement conferences and refer disputes to mediation

A MLC Judge has provisions under TTWMA to conduct a judicial settlement conference (under s. 67). However, TTWMA only explicitly provides for mediation in prescribed circumstances. The Panel proposes empowering Judges to conduct judicial settlement conferences and refer all disputes to mediation.

The Panel is seeking your feedback on the following question:

- What is your view on MLC Judges being empowered to conduct judicial settlement conferences and refer all disputes to mediation?

Where the dispute remains unresolved following mediation, it may be determined by the Māori Land Court

The Panel proposes that the MLC should have a general role for matters of process and points of law.

The Panel proposes that matters of process should be first assessed by the mediation service to prevent excessive litigation and to resolve as many of these questions as possible. Points of law would be referred straight to the MLC. Where disputes are unable to be resolved through mediation, they may be determined by the MLC.

A potential starting point for considering what the role could involve is provided by the High Court.

Case Study 8: High Court

The High Court has statutory oversight over both companies and private trusts in New Zealand. Under the Trustee Act 1956, the High Court has a supervisory role over trusts in New Zealand, and is required to approve the fundamental steps in creating and dissolving trusts, appointing and dismissing trustees, and hearing matters relating to the administration of trust assets. The High Court generally does not involve itself with day-to-day trust activity such as the administration of trust property in accordance with the trust deed.

The High Court's role in relation to the operation of companies is similar in that the Court has the power to consider matters on application from shareholders such as the modification of a company's share register or constitution, or proceedings relating to the liquidation of a company. The High Court generally does not involve itself with the company's day-to-day activity.

The Panel is seeking your feedback on the following questions:

- What is your view on the MLC being able to determine the dispute if the dispute remains unresolved following mediation?
- What is your view on the MLC having a general role for matters of process and points of law?

Proposition 5: Excessive fragmentation of Māori land should be discouraged.

Succession to Māori land should be able to occur without endorsement by the MLC while providing for any disputes to be managed appropriately (dispute resolution is covered in more detail in proposition 4). The intent is to streamline the process of succession as much as possible to encourage engagement with Māori land.

For this proposition to be developed into a recommendation, further consideration of the following is required:

- Succession to Māori land should be simplified.
- A register should be maintained to record the names and whakapapa of all interests in Māori land, regardless of size.
- The rights of decision-making in respect of Māori land should be limited to those owners with minimum threshold interests.

Succession to Māori land should be simplified

A key issue is multiple ownership interests, which increase with each generation. The 27,308 Māori freehold land titles are currently held in 2,710,214 individual ownership interests – this is comparable to the number of interests represented in the rest of New Zealand's land area. This trend will continue, resulting in greater dissociation of owners from their land as well as presenting issues regarding administration and decision making, even if engaged owners are able to make decisions, unless succession processes are simplified.

The Panel is seeking your feedback on the following question:

- How could succession to Māori land be simplified?

A register should be maintained to record the names and whakapapa of all interests in Māori land, regardless of size

The Panel proposes that any changes in ownership should be recorded by the ownership group or their nominated governors and passed on to a central registry that records Māori ownership interests. The rationale for a central registry is to provide transparent and comprehensive information to underpin the property rights of Māori land owners.

The Panel is seeking your feedback on the following question:

- What is your view on the MLC undertaking the role of a central registry that records Māori ownership interests?

The rights of decision-making in respect of Māori land should be limited to those owners with minimum threshold interests

One option the Panel has considered to prevent further excessive fragmentation is to introduce a threshold under which an ownership interest can't be divided further. If such a mechanism were introduced, the decision-making rights of owners would be limited to those engaged owners with minimum threshold interests.

The Panel is seeking your feedback on the following question:

- What is your view on decision making rights in respect of Māori land being limited to those engaged owners with minimum threshold interests?
- What would an appropriate threshold be?

Appendix 1: Quantum of change

Propositions	Current
Ownership	
Proposition 1: Utilisation of Māori land should be able to be determined by a majority of engaged owners	Utilisation not able to be driven by engaged owners in some cases.
An engaged owner should be 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.	No definition of engaged owner.
Where Māori land is alienated by sale or other permanent disposition, Māori Land Court approval should be required to confirm that 75% agreement from all registered owners has been obtained and that those who affiliate to the land have been given the first right to purchase the land.	Same as status quo.
All other decisions should require the approval of more than 50% of engaged owners, provided there has been full and timely disclosure of the proposal to all registered owners; and should only be able to be challenged as to whether fair value has been obtained or where there has been a conflict of interest or other breach of duty.	No owner threshold specified for other utilisation decisions.
Some decisions (e.g. long-term lease) may require the approval of at least 75% of engaged owners.	50% of all owners threshold for long-term lease.
Governance	
Proposition 2: All Māori land should be capable of utilisation and effective administration	Some Māori land is utilised and administered effectively.
Where owners are either not engaged or are unable to be located an external manager or administrator may be appointed to manage Māori land titles.	The Māori Trustee is able to be appointed.

Propositions	Current
<p>Certain Māori entities in addition to the Māori Trustee; such as Post Settlement Governance Entities, Māori trusts and incorporations with hapū or iwi affiliation to the particular Māori land; may be eligible to undertake the role of external administrator or manager.</p>	<p>The Māori Trustee undertakes administration of some of this land. Other entities not explicitly empowered to undertake an administrator of last resort role.</p>
<p>The MLC should approve the appointment and retain oversight of external administrators of Māori land.</p>	<p>The MLC is able to appoint the Māori Trustee.</p>
<p>Rules governing the external administration of Māori land should include: the powers of external administrators; the rights of owners to resume administration of Māori land for their own use and management; processes for appointing external administrators; obligations of reporting and accountability for actions taken by the external administrators; and requirements for profits and distributions held in trust for owners where they are unable to be located.</p>	<p>The Māori Trustee does not face the majority of these constraints.</p>
<p>Proposition 3: Māori land should have effective, fit for purpose, governance</p>	<p>Only 40% of Māori land titles have structures and the quality can vary.</p>
<p>The duties and obligations of trustees and other governance bodies who administer or manage Māori land should be aligned with the laws that apply to general land and corporate bodies.</p>	<p>Currently only some alignment with provisions in general legislation that applies to general land and corporate bodies.</p>
<p>The duties, responsibilities and required competence of governors of Māori land should be more explicit and should include penalties and possible disqualification from governance roles for breaches of those duties.</p>	<p>Generic duties and responsibilities but not competence or penalties are provided for in TTWMA.</p>

Propositions	Current
The management and administration of Māori land should be more clearly the responsibility of the duly appointed governors.	Many decisions are overseen by the MLC.
There should be greater consistency in the rules and processes associated with the various types of governance.	Variance in the rules and processes that govern trusts and incorporations.
Elections and appointments of trustees and other governance entities should be recorded by the Registrar of the MLC with the Court's power to intervene aligned with the powers of the general courts.	The MLC can take a much more active role currently, including overseeing the decisions of governors.
The role of the MLC should be to adjudicate over breaches of the rules.	Current role much wider than this.
Institutional Framework	
Proposition 4: There should be an enabling institutional framework to support owners of Māori land to make decisions and resolve any disputes	Māori land has an institutional framework based on the oversight of the MLC.
Disputes relating to Māori land should be referred in the first instance to mediation.	No requirement to go to mediation first.
The MLC should be empowered to conduct judicial settlement conferences and refer all disputes to mediation.	TTWMA currently provides for only certain types of disputes to be referred to mediation.
Where a dispute remains unresolved following mediation it may be determined by the MLC.	The current MLC role includes the ability to resolve disputes.

Propositions	Current
Proposition 5: Excessive fragmentation of interests in Māori land should be discouraged	Succession can be difficult and time consuming.
Succession to Māori land should be simplified.	Currently recognised as an issue.
A register should be maintained to record the names and whakapapa of all interests in Māori land, regardless of size.	A register is held by the MLC.
The rights of decision-making in respect of Māori land should be limited to those owners with minimum threshold interests.	Currently all owners have the ability to participate in decision making.

Appendix 2: Glossary of terms

Ahi kā burning fires

Ahi kā roa continuous occupation

Ahu Whenua trust a land management trust that administers owner interests in whole land blocks (established under s.215 of TTWMA)

Hapū sub-tribe

Iwi tribe

Kai tiaki trust a trust established to manage the affairs an individual who is a minor or has a disability and is unable to manage their own affairs (established under s. 217 of TTWMA)

Māori customary land land held in accordance with tikanga Māori

Māori freehold land land determined to have freehold status by the Māori Land Court

Māori incorporation a land management structure, similar in structure to a company, that manages whole land blocks (established under s. 247 of TTWMA)

Post Settlement Governance Entity an entity established and mandated to receive and manage Treaty assets on behalf of an iwi

Pūtea trust a share management trust that allows owners of small and uneconomical land interests to pool their interests together (established under s. 212 of TTWMA)

Taonga tuku iho a legacy or treasure to be passed on through generations

Tikanga Māori traditional custom

Tino rangatiratanga Māori sovereignty or independence

Whakapapa genealogy, genealogical table, lineage, descent

Whānau extended family

Whānau trust a share management trust that enables a whānau to bring together their land interests for the benefit of the whānau and their descendants (established under s. 214 of TTWMA)

Whenua land

Whenua tōpū trust a land management trust that administers iwi or hapū interests in whole land blocks (established under s. 216 of TTWMA)

