

Office of Te Minita Whanaketanga Māori
Office of the Minister of Justice

Chair
Cabinet Māori Crown Relations: Te Arawhiti Committee

**PAPER ONE: TE TURE WHENUA MĀORI (SUCCESSION, DISPUTE RESOLUTION
AND RELATED MATTERS) AMENDMENT BILL**

Proposal

1. This is the first of two papers that respond to Cabinet's invitation to provide options for realising opportunities for Māori land [CAB-18-MIN-0143 refers].¹ It seeks approval to commence the drafting of practical and technical changes to Te Ture Whenua Māori Act 1993 (TTWM Act) that support the Māori Land Court and strengthen the regulatory framework for Māori land tenure. Legislation will not be introduced until financial resources are secured.

Executive Summary

2. Māori freehold land is taonga tuku iho for retention through the generations. It contributes to the cultural and economic wellbeing of Māori and has unrealised potential for productive economic growth, including job creation for whānau. Working with Māori land owners to unlock this potential contributes to the Government's goals to grow and share New Zealand's economic prosperity more fairly, support thriving and sustainable regions, and build closer partnerships with Māori.
3. A key aspect to supporting Māori land owners realise the full potential of their land is an effective legal and regulatory framework. Strengthening the Māori land tenure system is part of the wider Whenua Māori Programme, which is a key priority for the Whanaketanga Māori Development portfolio. Rather than a full overhaul of this framework, changes to Māori land tenure are planned to be introduced in three stages:
 - a. targeted amendments to address those areas that hinder the successful functioning of TTWM Act;

b. [REDACTED]

¹ Māori land in this paper refers to Māori freehold land unless otherwise specified. Māori freehold land is defined in TTWM Act as land the beneficial ownership of which has been determined by the Māori Land Court.

c. [REDACTED]

4. The targeted amendments in this paper seek to improve outcomes for Māori land owners' prosperity and intergenerational wellbeing, supporting both protection and development opportunities over their land. They also seek to reduce the complexity and compliance that Māori land owners encounter when they engage with the Māori Land Court, while maintaining the overall scheme of the Māori land tenure system.
5. These objectives will be achieved by making amendments to TTWM Act that improve the succession process and provide for a new dispute resolution process. Additional amendments are proposed to extend the jurisdiction of the Māori Land Court, improve the functionality of the Court, and enhance housing tenure. A number of minor and technical changes are also recommended.
6. The proposed changes will promote the efficient operation of the Māori Land Court, decrease the costs associated with court proceedings, and ensure the remedies available to enforce a decision are practical and effective. They will also ensure that the Māori land tenure system is fit-for-purpose, clear, accessible and future-proofed.
7. There are some cost implications associated with these changes, particularly the proposals relating to the succession process and dispute resolution. Additional funding is required to enable the Māori Land Court to support the proposed changes and deal with an expected increase in court applications. The funding associated with these proposals will be sought in Budget 2019.
8. Seeking policy approval at this stage will enable us to prepare drafting instructions for the Parliamentary Counsel Office and allow the proposed Te Ture Whenua Māori Amendment Bill to be introduced in the first half of 2019. If drafting is delayed until after final Budget 2019 decisions are made, it is unlikely that changes to TTWM Act will be made within this parliamentary term.

Background

Māori land

9. Whenua is a fundamental point of reference in te ao Māori, providing a sense of cultural identity and belonging for current and future generations. There are approximately 1.4 million hectares of Māori land, which equates to around 5 percent of New Zealand's land area, with most concentrated in the mid to upper North Island.²
10. Māori land has unrealised potential for productivity growth and for achieving economic benefits for whānau. Working with Māori land owners to unlock this potential and support their economic aspirations for their land are critical contributors to the Government's goals to grow and share New Zealand's economic

² The status of land that has been returned as part of a Treaty of Waitangi settlement's cultural redress is at the Post-Settlement Governance Entity's discretion, but most settlement lands have been returned as general land (for example, the Waikato-Tainui and Ngāi Tahu settlement).

prosperity more fairly, support thriving and sustainable regions, and build closer partnerships with Māori.

11. To support this strategic focus, the Government has established a Whenua Māori Programme (the Programme), which will connect Māori land owners with better opportunities to govern, manage and develop their land that are presented in other sectors such as regional growth, afforestation, housing/papakāinga and conservation. In addition, whānau will be supported to reach their aspirations and full potential by enhancing whenua productivity and contributing to their wellbeing and prosperity. The Programme expects to deliver a range of services for whānau that are pragmatic, tangible and effective.
12. In April 2018, Cabinet agreed opportunities exist to assist and improve the system for Māori land owners in managing freehold land and, that by doing so, additional economic returns can be achieved delivering social and cultural benefit for Māori [CAB-18-MIN-0143 refers]. Cabinet invited us to provide options for realising opportunities for Māori land and to seek agreement to an approach on the options and proposed programme of activity to design and deliver services for Māori land owners. The agreed options will be delivered through the Programme. A companion paper seeks approval to a Business Case for the Programme and a preferred way forward for its delivery.

Te Ture Whenua Māori Act 1993

13. Supporting Māori land owners to realise the full potential of their land requires an effective legal and regulatory framework.
14. Māori land tenure is governed by TTWM Act, which recognises that Māori land is taonga tuku iho with special cultural significance for Māori. TTWM Act endeavours to balance the retention of Māori land while facilitating the occupation, development and utilisation of that land by its owners, governors and their whānau, hapū and descendants. To achieve those goals, TTWM Act encourages collective management and governance of Māori land, and contains safeguards to limit the sale, gift and long-term lease of Māori land, including requiring all major dealings with Māori land to be examined and confirmed by the Māori Land Court.

Review of Te Ture Whenua Māori Act 1993

15. In December 2017, Te Minita Whanaketanga Māori withdrew the former Te Ture Whenua Māori Bill (the former TTWM Bill) and, instead, decided to pursue a targeted set of legislative proposals to better support the governance, management and development of Māori land [CAB-17-MIN-0567 refers].
16. In April 2018, Te Minita Whanaketanga Māori indicated that the targeted set of legislative proposals would be advanced in two stages [CAB-18-MIN-0143 refers]. The first stage involves practical and technical changes to TTWM Act. The second stage will address a range of matters that create impediments for Māori land owners (i.e. valuation, rating and public works). Proposals in these two stages will help realise opportunities for Māori land, and complement the proposed programme of activity to design and deliver whenua support services for Māori land owners. We

were invited to return with a paper seeking agreement to amendments to TTWM Act (the first stage) [CAB-18-MIN-0143 refers].

Targeted Amendments

17. This paper outlines the targeted amendments for succession, dispute resolution, extending the jurisdiction and improving the functionality of the Māori Land Court, and enhancing housing tenure. A small number of minor and technical changes are also recommended.

Succession

Application process

18. We propose that simple and uncontested succession applications should be processed through a simplified process undertaken by a Māori Land Court registrar, as occurs in mainstream courts like the probate jurisdiction of the High Court.

19. Currently, to succeed to an interest in Māori land, an application must be made to the Māori Land Court to prove the successor's right to succeed. In 2017, the Māori Land Court received a total of 2378 succession applications; this figure is slightly higher than the average for the last ten years (2008-2017 inclusive), during which the Court received 2241 succession applications per year.

20. All succession applications need to be heard at a sitting of the Māori Land Court, most often in the district in which the Māori land is located. This often requires whānau to travel, or take time off work, to attend a hearing, which only takes a few minutes for uncomplicated applications where all family members agree who should succeed. Applications take between two to nine months to process depending on complexity and court scheduling pressures.³ This has been a disincentive for whānau applying for succession and has contributed to a high number of interests remaining in the name of a deceased person, resulting in reduced participation and access to decision-making by whānau over their lands.

21. Approximately two-thirds of succession applications are simple matters that could, and should, be dealt with by a court registrar. Requiring these applications to be considered by a judge is inefficient, incurs costs (to the applicant, their whānau and the Māori Land Court), and is unnecessary.

22. Providing for simple and uncontested succession applications to be received, confirmed and recorded by a court registrar would speed up the process and free up judicial time for other matters. It would maintain safeguards around the accuracy of any such determination, as all orders completed by a court registrar would be subject to appeal or rehearing by the Māori Land Court if a complication emerged. Improving the ease and speed of the succession process is likely to lead to more whānau succeeding to Māori land – as the process would reduce disincentives for whānau applying for succession – and enable them to begin to reconnect with their land and participate in its management.

³ On average, it takes two to six months from the time an application is made to approval for general succession, and six to nine months for more complex applications.

23. We also propose some additional changes to address other issues with the current succession regime.

Whāngai and adopted children

24. Whāngai and adopted children are treated differently for the purposes of succession.

25. Children adopted under the Adoption Act 1955 are entitled to succeed to their adopted parent's interests in the same way as any natural child. This is regardless of whether they are Māori or from the same hapū or iwi as their adopted parent. This has caused issues amongst the hapū where customary adoptions are not recognised in accordance with tikanga Māori.

26. On the other hand, persons adopted in accordance with tikanga Māori, or Māori customary values and practices, are only entitled to succeed if the Māori Land Court determines that they have been formally recognised as being the whāngai of the deceased owner. In such cases, the Court may make provision for the whāngai to succeed to the same interests, or any specified lesser extent, as if that person had been the natural child of the deceased. While this approach is more closely aligned with Māori customary values and practices, the process is not codified, and different approaches may be taken in the different Māori Land Court districts.

27. We recommend that the entitlement of whāngai and adopted children to succeed to Māori land interests should be determined in accordance with the tikanga of the relevant iwi or hapū. This change will codify the existing practice of the Māori Land Court for whāngai. For adopted children this change would allow an adopted child to inherit from his or her natural parents, if this is in accordance with tikanga: however, it may reduce the adopted child's ability to succeed to the Māori land interests of his or her adopted parents if the relevant tikanga does not permit adopted children to inherit.

28. In the event that the Māori Land Court finds that a whāngai or adopted child is not entitled to succeed to a full interest in their whāngai or adopted parent's estate, the whāngai or adopted child should be eligible to receive a life interest in the estate instead. This would mitigate any potential negative impacts by entitling the recipient to income from the deceased owner's interests in Māori land, to occupy a family home on the land, and, in accordance with tikanga, to participate in decision-making regarding the land.

Eligibility to succeed in accordance with tikanga Māori

29. Currently a Māori land owner can bequeath their interests in Māori land to their children, any other person who would be entitled to succeed if they had left no will, any other blood relative who is a member of the hapū associated with the land, other owners of the land who are members of the hapū associated with the land, and whāngai or trustees of the people referred to above. It is possible under these rules for a person to succeed to Māori land despite not having a whakapapa connection to that land (e.g. where the owner of the land is non-Māori).

30. There are differing views on whether ownership of Māori land should be limited to those who are connected to the land in accordance with tikanga Māori. The current

position risks Māori land interests being transferred away from the hapū which is undesirable. However, any change to this position will affect existing property rights and is therefore contentious.

31. We consider this is an issue worth testing further during the select committee process. For this purpose, we propose to include an amendment in the Bill providing that beneficiaries should be associated with the land in accordance with tikanga Māori in order to succeed to Māori land. We intend to make clear in the material accompanying the Bill that we would like the Māori Affairs Committee to scrutinise this proposal particularly closely before a final decision is made about whether it should proceed.
32. Many people own Māori land in areas where they have no traditional connection (such as the owners of SILNA lands⁴). This proposal is not intended to limit the ability of these owners to pass on their land interests to their descendants. We propose that a provision is inserted that deems a Māori person who is an owner of Māori land at the commencement of the amendment to be an eligible successor. To reduce the impact of this change on any owners who are not deemed to be an eligible successor at the commencement of the amendment (e.g. non-Māori owners), we also suggest that a provision should be inserted that allows these persons to bequeath their land interests to their children, but not to any future generations.

Surviving spouse or partner

33. Currently, where a deceased owner dies intestate, their surviving spouse or partner is entitled to apply for and receive a life interest in the ownership of their interests in Māori land.⁵ This means they can receive income and grants from the deceased owner's interests in the land, can occupy a family home situated on the land and can participate (e.g. vote) in decision-making about the land.
34. These interests only pass to the deceased owner's descendants once the spouse or partner has died or the life interest has otherwise ended (e.g. because the surviving spouse remarries). The opportunity of descendants to be involved in the management of the Māori land is therefore postponed.
35. We propose to change this so that upon the death of an owner of Māori land, their interests pass to their descendants immediately. This will enable the next generation to be involved as owners of the land straight away.
36. To mitigate the impact on the surviving spouse or partner, we propose that they are able to apply to the Māori Land Court to obtain a life interest in income and grants from the deceased owner's interests in Māori land, as well as occupation rights in respect of a family home situated on the land. This change will ensure spouses and partners continue to receive the same potential revenue source the deceased had when alive and they can remain in the family home. However, the surviving spouse or partner would not be able to participate in decision making regarding the land.

⁴ In 1906, 4,000 individuals of Māori descent were given 57,000 hectares of land under the South Island Landless Natives Act (SILNA). Currently, there are an estimated 40,000 SILNA owners.

⁵ The holder of a life interest is unable to alienate that interest except with the consent of the deceased owner's successors.

Dispute resolution

37. We propose to enable people to resolve disputes about Māori land themselves and to do so, as far as possible, in accordance with their own tikanga and values.
38. The establishment of a tikanga-based dispute resolution process for Māori land owners is long overdue. Disputes involving Māori land are often delicate and unique situations that if not sensitively managed can lead to heightened levels of emotion for the many personalities involved. These disputes may create problems that lead to long standing whānau disagreements with lasting negative impacts on relationships between the individuals in dispute, trustees and other owners.
39. During the consideration of the former TTWM Bill, some submitters felt that many disputes that ended up in court could have been resolved earlier had a dispute resolution process been in place. Concerns were raised that the emphasis on litigation forced parties to focus on their positions or the outcomes sought. There was a further concern that taking a case to court was often time-consuming and expensive in terms of court fees, lawyer and expert fees and work time lost.
40. Providing a dispute resolution process that draws on tikanga Māori would not only avoid unnecessary litigation but would be less expensive for the parties compared to going to court. Dispute resolution, if entered in good faith and in the right circumstances, would give the parties a sense of control over the decision-making process, lead to more durable resolution of disputes and help preserve the long-term relationship between the parties.
41. The Māori Land Court already has the power to refer matters to dispute resolution in relation to certain applications concerning fisheries, aquaculture and representation issues. Enabling dispute resolution in the area of Māori land would be consistent with these existing powers.
42. The key components of our proposed process are that:
- a. the process would be limited to matters within the Māori Land Court's jurisdiction and administered by the Māori Land Court;
 - b. the process would be fully funded (except that parties would be required to meet their own legal costs), with mechanisms built into the process to ensure it was only used in appropriate cases;
 - c. the process would not be compulsory, with any party able to withdraw from the process at any time;
 - d. the process would be available for proceedings that were already before the Māori Land Court, as well as disputes for which court proceedings had not been initiated; and
 - e. the dispute resolution process would be confidential and without prejudice. Where an agreement is reached, the terms of settlement would be final and binding on the parties.

Supporting the Māori Land Court

43. We also propose that some additional amendments are made to support Māori land owners by allowing the Māori Land Court to consider a wider range of issues including in the area of housing tenure, improving and streamlining the way the Court is run, and expanding the types of remedies the Court can provide.

Extending the jurisdiction of the Māori Land Court

Matters relating to Māori land

44. The Māori Land Court has jurisdiction to hear matters relating to Māori land under TTWM Act and a range of other statutes (such as the Fencing Act 1978).

45. However, certain statutes give other courts jurisdiction to hear matters relating to Māori land. For instance, the District Court is able to consider applications under the Local Government Act 1974 to enclose and cover a watercourse on Māori land if it is going to become dangerous or a nuisance to the public, as well as to provide relief from notices issued to carry out work on or remove material from Māori land under the Government Roding Powers Act 1974.

46. We consider the Māori Land Court should have jurisdiction to consider matters and grant relief under the following provisions when Māori land is involved:

- a. section 446 of the Local Government Act 1974, which allows a council to enclose and cover a watercourse on a parcel of land, including Māori land, that may become a nuisance or dangerous to the public;
- b. sections 48, 50, 55, 61, 74 and 76 of the Government Roding Powers Act 1989 which relate to:
 - i. seeking relief from a notice issued by the Minister of Transport (section 48) or the New Zealand Transport Agency (section 61) of an intention to carry out work or to remove any material;
 - ii. seeking relief from a notice issued by the Minister of Transport or the New Zealand Transport Agency not to remove any material if doing so could cause damage to an adjacent bridge or culvert (section 50);
 - iii. seeking relief from a notice issued by a responsible authority to cut down, lower or trim trees, hedges or shrubs, adjacent to a road or public work or to remove an encroaching structure (section 55);
 - iv. seeking relief from a notice issued by the person in charge of a motorway construction to temporarily occupy land (section 74); and
 - v. a dispute relating to road access to land that is cut off by a new motorway (section 76).

47. Currently, the Māori Land Court has the power to grant relief and exercise powers under sections 253 to 260 and 264, and subparts 1 and 2 of Part 6 of the Property Law Act 2007 when Māori land is involved. We propose the Court should also have

jurisdiction under Part 3 (relating to mortgages of Māori land) and sections 313 and 317 (relating to the enforcement, modification or extinguishment of easements and covenants) of the Property Law Act.

48. In our view, the Māori Land Court is a more appropriate forum to hear applications relating to Māori land under these provisions. These changes would make the relevant remedies more accessible to owners and better utilise the expertise of Māori Land Court judges, who have a better appreciation of tikanga Māori, the cultural connection of Māori to their land and the need to safeguard ownership interests.

49. Since the District Court and the High Court also have jurisdiction for these matters, we propose that:

- a. an application that relates only to Māori land would be filed in the Māori Land Court;
- b. an application that relates both to Māori land and general land would be filed in the District Court or High Court as appropriate;
- c. it would be possible to transfer proceedings (or issues in those proceedings) between the Courts as appropriate, either on the parties' application or the Court's own motion; and
- d. to maintain consistent court precedents, appeals from Māori Land Court decisions would be to the High Court (as for District Court decisions) and not the Māori Appellate Court.

Family Protection Claims and Testamentary Promises

50. We seek agreement to restore the Māori Land Court's jurisdiction under the Family Protection Act 1955⁶ and confer jurisdiction under the Law Reform (Testamentary Promises) Act 1949 for family protection or testamentary promises claims in relation to Māori land.

51. Since the Family Court and the High Court also have jurisdiction for these matters, we propose that:

- a. a claim that relates only to Māori land would be filed in the Māori Land Court;
- b. where a claim covers additional property, the matter would be heard by the Family Court or High Court;
- c. it would be possible to transfer proceedings (or issues in those proceedings) between the Courts as appropriate, either on the parties' application or the Court's own motion; and

⁶ The jurisdiction was accorded to the Māori Land Court (formerly the Native Land Court) by the Testators Maintenance Act 1900, and was reaffirmed in various legislation (such as the Family Protection Act 1908; Māori Land Act 1931; Māori Affairs Act 1953; and Māori Affairs Amendment Act 1962) until it was taken away along with other laws recognising Māori land interests under the Māori Affairs Amendment Act 1967 (as part of the policy to assimilate Māori). Following a change in government, most of these laws were re-inserted – although the jurisdiction of the Māori Land Court was not re-introduced. The Family Court was granted concurrent jurisdiction in 1992.

d. to maintain consistent court precedents, appeals from Māori Land Court decisions would be to the High Court (as for Family Court decisions) and not the Māori Appellate Court.

52. The Family Protection Act ensures close family members are adequately provided for when someone dies. The Court can order the estate to make adequate provision for a family member. The Law Reform (Testamentary Promises) Act covers the situation where promises are made by a person who has since died. If a person can prove to the Court that a deceased person promised a reward from their estate for services received while they were alive, the Court can order the estate to pay such a person or give them ownership of land or other property.

53. When forming a will, Māori land owners do not always make specific provision for the distribution of their land interests. Some contested succession applications raise family protection and testamentary promises issues. When confronted with such claims, the Māori Land Court judges spend considerable time working with the parties to find an amicable solution. If one cannot be found, the only option for the aggrieved party is to file proceedings in the Family Court or High Court. Once these proceedings have been concluded, the application is referred back to the Māori Land Court, which is responsible for distributing the estate's shares to the beneficiaries.

54. It is an anomaly that Māori land owners can deal with most elements of succession before the Māori Land Court, but must file proceedings in another jurisdiction if they wish to make a family protection or testamentary promises claim in relation to Māori land. The Māori Land Court has specialist expertise in matters relating to Māori land and a close understanding of the dynamics of Māori families and society. The Māori Land Court is better placed to assess the cultural implications of how interests in Māori land should be dealt with and would bring further expertise and empathy to the determination of claims of this kind.

Improving the functionality of the Māori Land Court

55. A small number of changes need to be made to improve how the Māori Land Court functions and expand the range of remedies that it may provide.

Uncomplicated trust applications

56. Each year, the Māori Land Court receives approximately 1,590 applications for the formation, variance and termination of a land management trust or whānau trust, and the appointment and replacement a trustee. In general, these applications need to be considered by a judge even when they are uncomplicated, such as when a trustee has passed away and the other trustees want to simply remove his or her name from the list of responsible trustees.

57. We propose that simple and uncontested trust matters should be dealt with by a Māori Land Court registrar, rather than going through the court process. This change would save Māori land trusts considerable time and money, as well as free up judicial time and court resources for other matters.

Judicial settlement conferences

58. We recommend that the Māori Land Court judges are given the power to convene a judicial settlement conference to give parties an opportunity to reach settlement of a claim or issue.
59. Both the District Court and the High Court can hold judicial settlement conferences to assist the parties to negotiate a settlement of the entire case, or any of the issues in the proceedings. While TTWM Act currently provides for judicial conferences to deal with procedural issues, the judges are unable to facilitate the negotiation of a settlement between the parties.
60. The option of convening a judicial settlement conference will be useful in cases where the parties are unlikely to settle without judicial input. Being able to resolve any of the issues in a conference, rather than in court, saves the parties time and lawyer costs. It provides parties with the opportunity to come to a decision about the issues themselves, rather than having one imposed on them, and helps preserve the long-term relationship between them. It also saves court resources, as hearings would not need to be held in some cases, or hearings would be shorter following the resolution of certain issues during a conference.

Appointment of experts in tikanga Māori and whakapapa

61. TTWM Act enables the Māori Land Court to appoint experts (for example, in tikanga Māori) as additional members of the Court in relation to some fisheries and aquaculture matters. We propose supplementing these provisions by enabling the Court to appoint up to two experts in tikanga Māori and whakapapa (“pūwānanga”) as additional members of the Court in particular cases involving Māori land.
62. The ability to appoint pūwānanga is appropriate given the increased use of tikanga Māori in proceedings and the overlying recognition that tikanga Māori is central to matters involving Māori land. It also supports other proposals in this paper (e.g. with respect to succession) in which determining the applicable tikanga will be critical to the Court’s work.
63. The additional members would ensure that expert evidence about tikanga Māori is properly understood, tested and assessed by the Court. The appointment of additional members will be at the discretion of the Court and, once appointed, the additional members will become a member of the Court for the purposes of the case.

Extending the range of remedies

64. We also recommend the following amendments to provide more effective remedies for disputing parties:
- a. insert a specific power authorising the granting of equitable relief (for instance, to rescind a contract and restore the parties to their pre-contract position) if the Māori Land Court is satisfied that it is necessary to achieve a just outcome and other remedies are insufficient to achieve that outcome;

- b. include a provision enabling an order for the recovery of land to be enforced in the Māori Land Court (the absence of enforcement provisions means that owners are currently required to go to the District or High Court for this remedy, which is expensive and time-consuming); and
- c. extend the ability to issue injunctions to include the power to compel action (such as to restore Māori land to the condition it was before it was damaged by any earthwork), not just restrain things from happening.

Improving housing tenure

65. Living on their Māori land enables whānau to reconnect with whenua and whakapapa, and to live in communities based on whanaungatanga. The following amendments are proposed to give Māori land owners a better opportunity to use their land to achieve their housing aspirations, including through papakāinga developments (which include whare, and communal design elements, and facilitate cultural, social, economic, conservation and recreational activities):

- a. enable the Māori Land Court to grant occupation orders in favour of a beneficiary of a whānau trust provided the trustees of the whānau trust consent⁷; and
- b. enable trustees of a Māori reservation to grant a lease for the purpose of papakāinga housing for terms exceeding 14 years⁸.

66. To support these changes, we also propose an amendment to the way Māori reservations are created. Currently, applications to form Māori reservations need to be approved by the chief executive of Te Puni Kōkiri after they have been heard by the Māori Land Court. This two-step process is unnecessary and could be simplified to allow for the establishment of a Māori reservation to be by way of a single order of the Court. Removing the additional step would make the process easier for owners seeking to establish a reservation over their Māori land.

Minor and other technical amendments

67. We seek agreement to make a small number of minor and technical changes to improve the operation of TTWM Act, as set out in Appendix 1. These changes will improve the accountability of governance bodies; strengthen the protections for promoting the retention of Māori land; clarify the law of adverse possession in relation to Māori land; and address miscellaneous matters.

⁷ Currently eligibility to apply for an occupation order is limited to owners and their successors – beneficiaries of a whānau trust are excluded

⁸ Currently, the maximum period that a lease may be granted is only 14 years, which discourages whānau from building papakāinga housing. There is an exemption for leases granted for the purposes of education or health. The proposal will extend the scope of this exemption.

Risk management

68. The risks and unintended impacts of the proposals appear low as the matters that generated the greatest concern from the former TTWM Bill are not being progressed. There are residual risks arising from:

- a. The proposal to change the succession rights of whāngai and adopted children. This risk is being mitigated by providing the Māori Land Court with the ability to provide a life interest in the deceased owner's estate instead.
- b. The proposal that only those who are associated with Māori land in accordance with tikanga Māori should succeed to the land, which will affect existing property rights. As discussed at paragraph 32, mitigations are proposed to limit the effect of this proposal on descendants of Māori land owners who have no traditional connection to their land. As will be made clear in the material accompanying the Bill, we intend that this proposal is tested further during the select committee process before a final decision is made about whether it should proceed.
- c. The effectiveness of the dispute resolution process relies on the availability of a sufficient pool of mediators with expertise in that field as well as in tikanga Māori. This pool is currently limited. Officials will explore ways to increase expertise in this area as part of the Bill's implementation. Māori Land Court judges will be able to act as mediators under the proposal, which will reduce the capability gap.

Next steps

Māori land law

69. [REDACTED]

70. [REDACTED]

Implementation

71. After legislation is in place, implementation of some of the proposals will also require changes to the Māori Land Court Rules 2011 and may require changes to

the Māori Incorporations Constitution Regulations 2004 and Māori Land Court Fees Regulations 2013. The Māori Land Court Rules Committee will need to be reconstituted to review the current Māori Land Court Rules and ensure they align with the amendments being made to TTWM Act. There is also potential for additional streamlining of Registry processes to occur as part of the Bill's implementation.

Consultation

72. The following agencies have been consulted on this paper: the Departments of Conservation, and Internal Affairs; Land Information New Zealand; the Ministries of Business, Innovation and Employment, Housing and Urban Development, and Transport; the Ministries for Primary Industries and Environment; the New Zealand Transport Agency; the State Services Commission; and the Treasury. The Department of the Prime Minister and Cabinet was informed.

73. Te Minita Whanaketanga Māori has met with a range of interested parties including those involved with the Māori Land Court, as well as groups of Māori law academics and practitioners, Māori land entities, iwi chairs, and Māori land owners regarding the proposals in this paper. The proposals have been modified to take account of their comments.

Financial Implications

74. It is recommended that the additional funding required by the Ministry of Justice to implement the legislative changes proposed in this paper during the 2018/19 financial year be drawn from the \$7.000 million Whenua Māori Reforms contingency fund that was established as part of Budget 2018. Approval to draw down funding of \$0.591 million for this purpose is being sought in the *Support for Māori Freehold Land Owners Whenua Māori Programme Business Case & Access to Contingency Funding* Cabinet paper that accompanies this paper.

75. As part of Budget 2019, additional funding of \$20.935 million over four years will be sought to cover additional costs from 2019/20 onwards. The table below outlines the funding that will be sought as part of Budget 2019:

	2019/20 \$m	2020/21 \$m	2021/22 \$m	2022/23 & outyears \$m
Legislative changes – Te Puni Kōkiri	0.793	-	-	-
Legislative changes – Ministry of Justice	2.711	\$0.716m	-	-
On-going operating costs – Ministry of Justice	2.528	\$4.745m	\$4.826m	\$4.616m
Total	6.032	5.461	4.826	4.616

76. The on-going operating funding required by the Ministry of Justice will cover additional registry staff required by the Māori Land Court to support the changes made to court processes. There will also be additional costs associated with the appointment of mediators and pūwānanga.

Human Rights

77. The proposal in this paper are consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Legislative Implications

78. [REDACTED]

79. [REDACTED]

Regulatory Impact Analysis

80. The Regulatory Quality Team (RQT) at the Treasury has reviewed the Regulatory Impact Assessment (RIA) "Te Ture Whenua Māori Amendment Bill" produced by Te Puni Kōkiri (TPK) and the Ministry of Justice (MoJ) and dated November 2018. The review team considers that it meets the Quality Assurance criteria.

81. RQT assessed an earlier version of this RIA in June 2018, at which time it was assessed as partially meeting the QA criteria. Since then, TPK and MoJ have significantly revised the RIA. The problem and proposed approach are clearly set out. The impact analysis is clear and convincing. TPK and MoJ have consulted extensively with the key stakeholders on the problem and options. Implementation steps will include the development of a transition plan. Finally, the monitoring and evaluation arrangements appear well considered to enable prompt identification of any issues with the system in practice.

Gender Implications

82. There are no gender implications arising from the proposals.

Disability Perspective

83. There are no disability issues.

Publicity

84. Subject to Budget 2019 approvals, we will announce these policy decisions and proactively release this Cabinet paper as soon as practicable. This will provide certainty for the users of the Māori Land Court about the improvements being made to Court process and related reforms.

Recommendations

85. We recommend that the Cabinet Māori Crown Relations Committee: Te Arawhiti (MCR):

Background and context

- a. **note** that, in April 2018, Cabinet agreed opportunities exist to assist and improve the system for Māori land owners in managing freehold land and, that by doing so, additional economic returns can be achieved delivering social and cultural benefit for Māori [CAB-18-MIN-0143 refers];
- b. **note** this paper responds to Cabinet's invitation to Te Minita Whanaketanga Māori and the Minister of Justice to return with a paper seeking agreement to amendments to Te Ture Whenua Māori Act 1993 (TTWM Act) [CAB-18-MIN-0143 refers];
- c. **note** a companion paper responds to Cabinet's invitation to Te Minita Whanaketanga Māori and the Minister of Justice to provide options for realising opportunities for Māori land and to seek agreement to an approach on the options and proposed programme of activity to design and deliver services for Māori land owners [CAB-18-MIN-0143 refers].

Amendments to Te Ture Whenua Māori Act

- d. **agree** that targeted amendments should be made to TTWM Act that support the Māori Land Court and strengthen the regulatory framework for Māori land tenure;

Succession

Application process

- e. **agree** that TTWM Act should allow a Māori Land Court registrar to process simple and uncontested succession applications for interests in Māori land;

Succession for whāngai and adopted children

- f. **note** that adopted children may succeed to their adopted parent's interests in Māori land in the same way as any natural child;
- g. **note** that whāngai may only succeed to interests in Māori land if the Māori Land Court recognises them as whāngai of the deceased and makes provision for them to succeed to the same or any specified lesser extent as if the whāngai had been a natural child of the deceased;
- h. **agree** to align the approach to succession for whāngai and adopted children and provide that their eligibility to succeed to Māori land interests should be determined in accordance with tikanga Māori;
- i. **agree** that the Māori Land Court may provide a life interest in the estate of the deceased to a whāngai or adopted child who is not entitled to succeed to their whāngai or adopted parent's estate;

Eligibility to succeed in accordance with tikanga Māori

- j. **note** that TTWM Act currently enables a person to succeed to Māori land despite not having a connection to that land in accordance with tikanga Māori;
- k. **note** this position risks Māori land interests being transferred away from the hapū but any change to the position will affect existing property rights and be contentious;
- l. **agree** to provide in the Bill, for the purposes of testing at select committee:
 - i. that in order to succeed to Māori land, beneficiaries must be associated with the land in accordance with tikanga Māori;
 - ii. that a Māori person who is an owner of Māori land at the commencement of the amendment shall be deemed to be an eligible successor; and
 - iii. that any owner of Māori land who is not deemed to be an eligible successor may bequeath their land interests to their children;

Surviving spouse or partner of Māori land owner

- m. **note** that a surviving spouse or partner of a deceased Māori land owner who dies intestate is entitled to a life interest in the ownership of the owner's interests, which do not pass to the deceased owner's descendants until their spouse or partner has died or remarried;
- n. **agree** that a surviving spouse or partner should be only able to receive a life interest in income or grants from the deceased owner's interests in Māori land, and occupation rights in respect of a family home that is situated on Māori land, but should not be able to participate in decision-making about that land;

Dispute resolution process (mediation)

- o. **agree** that TTWM Act should include provisions establishing a process to enable Māori land owners to resolve disputes about their land based on tikanga Māori;
- p. **agree** that the key components of this process should be that:
 - i. the process would be limited to matters within the Māori Land Court's jurisdiction and administered by the Māori Land Court;
 - ii. the process would be fully funded (except that parties would be required to meet their own legal costs), with mechanisms built into the process to ensure it was only used in appropriate cases;
 - iii. the process would not be compulsory, with any party able to withdraw from the process at any time;

- iv. the process would be available for proceedings that were already before the Māori Land Court, as well as disputes for which court proceedings had not been initiated; and
- v. the dispute resolution process would be confidential and without prejudice. Where an agreement is reached, the terms of settlement would be final and binding on the parties.

Jurisdiction of Māori Land Court

- q. **agree** that the Māori Land Court should have jurisdiction (in addition to the District Court and High Court as currently) to deal with matters relating to Māori land under the following provisions:
 - i. section 446 of the Local Government Act 1974;
 - ii. sections 48, 50, 55, 61, 74 and 76 of the Government Roding Powers Act 1989; and
 - iii. Part 3 (relating to mortgage of Māori land) and sections 313 and 317 of the Property Law Act 2007;
- r. **agree** that the Māori Land Court should have jurisdiction (in addition to the High Court and Family Court as currently) to hear and decide claims under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 when a claim relates to an estate with interests in Māori land;

Functionality of the Māori Land Court

- s. **agree** that the following amendments should be made to improve the functionality of the Māori Land Court:
 - i. allow a Māori Land Court registrar to deal with simple and uncontested trust matters;
 - ii. enable a Judge of the Māori Land Court to convene a judicial settlement conference to give parties an opportunity to reach settlement of a claim or issue;
 - iii. allow the Māori Land Court judges to appoint experts in tikanga Māori and whakapapa ("pūwānanga") to assist, as additional members of the court, in particular cases;
 - iv. authorise the Māori Land Court to grant equitable relief if satisfied that it is necessary to achieve a just outcome and other remedies are insufficient to achieve that outcome;
 - v. enable a Māori Land Court order for the recovery of land to be enforced by the Māori Land Court, rather than by the District or High Court as currently; and

- vi. extend the ability of the Māori Land Court to issue injunctions to include the power to compel action;

Māori housing tenure

- t. **agree** that the following amendments should be made to improve Māori housing tenure:
 - i. enable the Māori Land Court to grant occupation orders in favour of a beneficiary of a whānau trust provided the trustees of the whānau trust consent;
 - ii. allow the trustees of a Māori reservation to grant a lease or occupation license for the purpose of papakāinga housing for terms exceeding 14 years; and
 - iii. remove the requirement that applications to form Māori reservations must be approved by the chief executive of Te Puni Kōkiri after they have been determined by the Māori Land Court;

Minor and technical amendments

- u. **agree** to the amendments in Appendix 1 to:
 - i. improve the accountability of governance bodies;
 - ii. strengthen the protections for promoting the retention of Māori land;
 - iii. clarify the law of adverse possession in relation to Māori land; and
 - iv. address miscellaneous matters;

Financial implications

- v. **note** that the Ministry of Justice will require additional funding of \$0.591 million during 2018/19 for the implementation of these legislative changes;
- w. **note** that the *Support for Māori Freehold Land Owners Whenua Māori Programme Business Case & Access to Contingency Funding* Cabinet paper, which accompanies this paper, proposes that the additional funding required by the Ministry of Justice outlined in recommendation v above, be drawn from the \$7.000 million Whenua Māori Reforms contingency fund that was established as part of Budget 2018;
- x. **note** that the estimated implementation costs for the Ministry of Justice and Te Puni Kōkiri associated with the legislative amendments to TTWM Act are \$3.504 million in 2019/20 and a further \$0.716 million in 2020/21;
- y. **note** that the estimated on-going operating costs for the Ministry of Justice associated with the legislative amendments to TTWM Act are \$2.528 million in 2019/20, \$4.745 million in 2020/21, \$4.826 million in 2021/22 and 4.616 million in 2022/23 and outyears;

- z. **note** that as part of Budget 2019 additional funding of \$20.935 million over four years will be sought for the additional costs outlined in recommendations x and y above;

Budget 2019

- aa. **agree** that the decisions in paragraphs 83(e) to (u) are subject to funding through the Budget 2019 process;

Legislative implications

- bb. **agree** to include the above decisions in Te Ture Whenua Māori Amendment Bill (TTWM Bill);

cc. [REDACTED]

dd. [REDACTED]

- ee. **invite** Te Minita Whanaketanga Māori and the Minister of Justice to prepare drafting instructions for the Parliamentary Counsel Office to give effect to the recommendations in this paper;

- ff. **agree** that TTWM Bill will not be introduced until final budget decisions have been made and the financial resources for the proposed amendments have been secured;

- gg. **authorise** Te Minita Whanaketanga Māori and the Minister of Justice to approve further minor and technical amendments, if required;

Publicity

- hh. **note** that Te Minita Whanaketanga Māori and the Minister of Justice will make announcements on these policy decisions and proactively release this Cabinet paper in due course;

Next steps

- ii. **note** the Minister of Local Government and the Minister of Land Information New Zealand intend to submit a joint paper to MCR in early 2019 seeking agreement to further amendments to address a range of matters that create impediments for Māori land owners (such as valuation, rating and public works); and

- jj. **note** Te Minita Whanaketanga Māori intends to submit a paper to MCR in late 2019 outlining the process to consider whether further improvements to Māori land law are required, including additional legislative amendments.

Authorised for lodgement

Hon Nanaia Mahuta
Te Minita Whanaketanga Māori

____ / ____ /2018

Hon Andrew Little
Minister of Justice and Minister for Courts

____ / ____ /2018

Technical and minor amendments

1. We are seeking approval for the following technical and minor amendments to TTWM Act.

Improving accountability of governance bodies

2. We propose to make changes to ensure governance bodies are accountable and discharge their obligations effectively. This would lead to better decision-making and communication about how Māori land entities are operating. The process for establishing a Māori incorporation should also be streamlined.
3. These changes include:
 - a. enabling the Māori Land Court to disqualify a person from being appointed or continuing to be a trustee or member of the committee of management of a Māori land entity (for instance, when they have been removed from another trust for reasons of fraud);
 - b. updating the financial reporting requirements for Māori incorporations by requiring them to establish and maintain an interests register and keep records of distributions made to owners, which will bring these requirements into line with similar entities and provide for greater transparency; and
 - c. making it easier for Māori land owners to establish a Māori incorporation to manage and govern their land interests (such as replacing the current requirement that 15 percent of owners must agree to establish a Māori incorporation with a provision that provides the Māori Land Court needs to be satisfied that adequate notice has been given to the owners and there is sufficient degree of support having regard to the importance of the matter).

Strengthening protections for retention of Māori land

4. We consider the following changes are needed to bolster the protections for promoting the retention of Māori land in the hands of its owners:
 - a. ensure that when land is changed from Māori customary land to Māori freehold land, the Māori Land Court continues to recognise the equal ownership of the collective lands as opposed to converting the ownership interests into individual shares;
 - b. clarify that the use of statutory land charges and sale orders as part of modernising fines enforcement will not override provisions in TTWM Act that prevent Māori customary land and beneficial interests in Māori freehold land being taken to pay owners' debts and liabilities [CAB-16-MIN-0250.01 refers];
 - c. clarify that Māori customary land and Māori reservations, which are unable to be sold, transferred or given away, are also protected from compulsory acquisition or vesting under another statute;

- d. insert a clear and detailed process in TTWM Act to ensure the right of first refusal is genuine and cannot be circumvented (although TTWM Act provides a right of first refusal to members of the preferred classes of alienees for sale or gift of any Māori land, the process for doing so is not specified and therefore can be circumvented to their detriment); and
- e. clarify that Māori land is fully exempt from the requirement that on or following a partition of land that adjoins or abuts the sea, a river or lake, an esplanade reserve will be taken.

The law of adverse possession in relation to Māori land

5. The doctrine of adverse possession (which is colloquially described as squatter's rights) enables a person who has been occupying land continuously for at least 20 years to claim prescriptive ownership of that land. This doctrine is given effect through the Land Transfer Act 2017 which sets out the process by which someone claiming prescriptive title can obtain full title to the land in question.
6. Māori land is expressly excluded from the prescriptive title process under the Land Transfer Act, along with certain other land such as land owned by the Crown or a local authority. However, there is some uncertainty whether or to what extent Māori land remains susceptible to claims for adverse possession based on common law principles. It is important we remove this doubt.
7. Māori land owners are placed in a position that no other land-owning community is placed in. This is because the historical anomalies and flaws in Māori land tenure has led to multiple ownership and disconnection over generations. In addition, disproportionate landlocking and impractical partitioning of titles expose Māori land to adverse possession to a much greater extent than other land.
8. It is possible that some owners of land adjoining unused Māori land have been occupying it in the expectation they may eventually be able to claim it through the common law doctrine of adverse possession. We consider that TTWM Act should be amended to ensure this will not be possible.

Miscellaneous amendments

9. The following changes should also be made to TTWM Act:
 - a. remove the requirement that the Chief Surveyor must arrange for blocks of Māori land to be surveyed and the ability to impose a charge over Māori land to secure payment of the costs of the survey;
 - b. remove the provision deeming Māori customary land to be Crown land for the purpose of preventing trespass and related matters affecting the land, and instead authorise Māori Land Court appointed agents or the Māori Trustee to address those matters;
 - c. modify the factors that the Māori Land Court needs to take into account when considering whether to grant reasonable access to landlocked Māori land (as access to landlocked land remains an obstacle to whānau accessing and using

their Māori land) and provide that appeals would be to the Māori Appellate Court instead of the High Court (to reduce costs for Māori land owners); and

- d. replace the requirement that a court order must be forwarded to the Legal Services Commissioner by post with an ability to transfer a court order by any means.

Released by the Minister for Māori Development