

In Confidence

Office of the Minister for Māori Crown Relations: Te Arawhiti

Cabinet Social Outcomes Committee

Exempting Post Settlement Governance Entities from the supervisory jurisdiction of the Māori Land Court

Proposal

- 1 This paper seeks agreement to a one-off legislative solution to remove the supervisory jurisdiction of the Māori Land Court (**MLC**) from post-settlement governance entities (**PSGE**) for those who request it.

Relation to government priorities

- 2 This proposal relates to the Government's priority of upholding Treaty settlements and reducing red tape and regulation by removing unnecessary administrative burden.

Executive Summary

- 3 On 3 October 2024, the Supreme Court released the judgment of *Nikora v Kruger*.¹ The judgment held that Te Uru Taumatua, the PSGE for the Tūhoe historical Treaty settlement, was subject to the supervisory jurisdiction of the MLC under Te Ture Whenua Maori Act 1993. The Supreme Court judgment sets the precedent for this supervisory jurisdiction to be applied to 73 PSGEs, representing 73 historical Treaty settlements.
- 4 Under the Treaty settlement framework, it was not foreseen (**or intended**) that the supervisory jurisdiction of the MLC would apply to PSGEs. This court ruling therefore has an unforeseen effect on existing Treaty settlements. The court acknowledged that the judgment “results in untidiness and uncertainty” and “this patchy regime is not optimal” and “a more thoroughgoing statutory reform would be preferable ”
- 5 Through the Treaty settlement negotiations process, a post-settlement governance framework was established. The framework requires negotiating groups to establish an entity that is representative, accountable and transparent. The entity is then ratified, generally at the same time as the settlement, by the claimant community. A PSGE is required by the Crown to be representative, transparent and accountable, including having appropriate dispute resolution mechanisms.

¹ *Paki Nikora and Parearau Polly Alice Nikora on behalf of Te Kaunihera Kaumatua o Tūhoe v Tamati Kruger on behalf of Tūhoe – Te Uru Taumatua Trust* [2024] NZSC 130.

- 6 All 73 PSGEs have been consulted following the Supreme Court judgment, and thus far, 42 PSGEs have formally confirmed their requests for the supervisory jurisdiction of the MLC to be removed. By this confirmation, these PSGEs confirm that they have followed their respective trust deed provisions for making a decision of this nature. Individual PSGE trust deeds may vary on the decision-making requirements.
- 7 I seek Cabinet agreement to propose legislation to exempt specified PSGEs, where the relevant PSGEs have formally requested, from the supervisory jurisdiction of the MLC.
- 8 In proposing this one-off legislative solution, I consider it preserves the authority of the PSGEs as intended by both Crown and Iwi at the time of settlement and, in doing so, upholds the integrity of each Treaty settlement. Further, this legislation is bespoke, and technical in so far that it only deals with a jurisdictional issue rather than the broader issue of mechanisms, tools and for a for resolution of PSGE issues.
- 9 In addition to dispute resolution provisions contained in a PSGEs Trust deed, I consider that the dispute resolution services empowered by Part 3A of Te Ture Whenua Maori Act 1993 (which pertain to any matter over which the Māori Land Court has jurisdiction), can also provide an effective mediation service for PSGEs at no cost to the PSGE.
- 10 Therefore, I am proposing that the Bill clarify that the PSGEs for which the Bill will remove the MLC's jurisdiction to hear applications under sections 237 – 245 may nonetheless refer any dispute to the MLC for mediation under Part 3A, by agreement of the disputing parties.
- 11 Should the current reviews of the Treaty of Waitangi Act 1975 and the Te Ture Whenua Maori Act 1993 identify measures pertinent to improving the PSGE framework, such measures may be enacted through further policy work and or legislative amendments. Delaying this proposal until these reviews are completed goes against PSGEs' expectations from consultation after the Supreme Court ruling and may heighten tensions among PSGEs, who have stressed the need for prioritisation.

Background

Establishment of Post-Settlement Governance Entities

- 12 Standard Treaty settlement policy requires negotiating groups to establish a governance entity, which must meet the principles of representation, accountability, and transparency. The PSGE is then taken through a ratification process, alongside the initialled deed of settlement. This is to allow the claimant community to ratify if they support the entity, alongside the settlement itself that has been negotiated. Subject to successful ratification, the deed of settlement is

then signed by the Crown and Iwi, and the settlement legislation is progressed for enactment.

- 13 The PSGE framework is designed to place the authority to manage settlement assets with the trustees. The claimant community exercise their rights in two main ways, subject to their individual trust deeds:
 - a. in deciding whether to approve significant proposed transactions; and
 - b. electing the trustees.
- 14 Should the PSGE Trust deed contain dispute resolution processes, any dispute the claimant community may have should be approached through the process within their trust deeds. Recourse to the High Court is available to the claimant community for PGSEs that are private trusts, if an issue requires escalation.
- 15 Given the framework and processes, it is appropriate that the threshold for resorting to litigation is high.
- 16 The supervisory jurisdiction of the MLC is not mentioned in the PSGE guidance given through the Crown's guide to the Treaty settlement process '*Ka tika ā muri, Ka tika ā mua – Healing the past, building the future – A Guide to Treaty of Waitangi claims and Negotiations with the Crown*' (commonly referred to as the Red Book.² This supervisory jurisdiction was not mentioned as it was not intended to apply. This means there can be no reasonable expectation that PSGEs are expected to be subject to this jurisdiction at the time of negotiations, unless it is for specific Māori land matters, such as redress that transfers under Te Ture Whenua Māori Act.

Legislative background: Te Ture Whenua Maori Act 1993 as it relates to Māori land Trusts and trusts constituted in respect of general land owned by Māori.

- 17 Sections 237 to 245 of Te Ture Whenua Maori Act 1993 provide the MLC with supervisory jurisdiction over Māori land trusts and trusts constituted in respect of General land owned by Māori.
- 18 Te Ture Whenua Maori Act 1993 was enacted prior to the development of the PSGE framework. The framework has favoured trusts to be the standard PSGE model from the mid-1990s. This supports the position that PSGEs were not in mind in the development of sections 237 to 245 of Te Ture Whenua Maori Act 1993.

Litigation background: Nikora v Kruger

- 19 In August 2019, Paki Nikora (on behalf of Te Kaunihera Kaumatua o Tūhoe) commenced proceedings in the MLC against Te Uru Taumatua (the PSGE for

² First published in 1999, it has been updated several times to reflect practical developments in the negotiations process, Cabinet decisions and Waitangi Tribunal recommendations.

Tūhoe) over the election of a particular trustee and the refusal to accept the nomination of another trustee.

- 20 This litigation concluded in October 2024. The Supreme Court decided that Te Uru Taumatua is subject to the supervisory jurisdiction of the MLC under Te Ture Whenua Maori Act 1993.

Relevant findings of the Supreme Court decision of *Nikora v Kruger*

- 21 The Supreme Court found that a PSGE would come within the MLC's supervisory jurisdiction under Te Ture Whenua Maori Act 1993 if:
- a. The PSGE is a private trust, and its settlement legislation does not exclude section 236 of Te Ture Whenua Maori Act;
 - b. The PSGE was constituted in respect of land; and
 - c. The land the PSGE holds is either Māori land or General land owned by Māori.
- 22 These findings are relevant as the majority of PSGEs are private trusts, and very few PSGEs have specifically excluded section 236 which pertains to the application of sections 237-245 of Te Ture Whenua Māori Act in their settlement legislation.
- 23 There are 73 PSGEs specifically affected by this decision. These PSGEs are land trusts and are not specifically exempted from the supervisory jurisdiction of the MLC.

The impact of the judgment in practice

- 24 While the Supreme Court case was about the PSGE for Tūhoe – Te Uru Taumatua, it sets a legal precedent for existing PSGEs that are land holding trusts without exemption in their settlement legislation, based on the Court's interpretation of Te Ture Whenua Maori Act 1993. The Supreme Court judgment has been a surprise and concern to most PSGEs who opted, through their negotiations with the Crown, to receive redress land as general land rather than as Māori freehold land.³ It was not intended, through any part of the settlement process, that the land would be subject to the MLC's jurisdiction.
- 25 It was never envisaged by the Crown that the Māori Land Court's jurisdiction would apply to PSGEs, as most transferred land in settlements is general land.
- 26 The judgment confirms that the following sections, and the effects of those sections, of Te Ture Whenua Maori Act 1993 would apply to PSGEs that are land

³ As confirmed by many PSGEs at a hui hosted by Te Arawhiti with 73 PSGE representatives on 25 November 2024.

owning trusts and not exempted in their settlement legislation, giving the MLC's jurisdiction over them:

- a. Section 237 – to exercise all the powers over the PSGE that the High Court has in respect of trusts;
- b. Section 238 - enforces the trust obligations of the PSGE trustees;
- c. Sections 239 - 240 - adding to or reducing PSGE trustee numbers; and or remove or replace trustees;
- d. Section 241- terminating the PSGE;
- e. Section 242 - to be able to order the PSGE to pay funds to someone entitled to it;
- f. Section 243 – to determine whether to retain the land as an investment or apply to the MLC to have the land form part of the corpus of the Trust; and
- g. Sections 244 - 245 - at the trustees' request with sufficient beneficiary support vary the PSGE trust terms and/or approve charitable trusts for PSGE income.

Engagement with PSGEs

- 27 On 25 November 2024, the Chief Executive of the then, Office for Māori Crown Relations - Te Arawhiti, convened a hui with the 73 PSGE representatives in attendance to outline the Supreme Court's decision and ascertain their views. Many PSGEs expressed surprise and concern that the Court held that their PSGE was subject to the supervisory jurisdiction of the MLC and favoured enacting urgent legislation to exempt them.
- 28 At my instruction, on 13 December 2024, officials wrote to each PSGE and provided them with two options in relation to the supervisory jurisdiction of the MLC over their PSGE. The options provided in the letter were to:
 - a. retain the status quo (Option One); or
 - b. exempt the PSGE from the supervisory jurisdiction of the MLC (Option Two).
- 29 The letter requested that they indicate a preferred option by way of counter-signing the letter. By counter-signing the letter, each PSGE was confirming that their preference was arrived at in accordance with their required trust procedures for decision-making and engaging with their beneficiaries. These processes vary from PSGE to PSGE.
- 30 The letter noted that continuing with the status quo, as interpreted by the Supreme Court, would mean the supervisory jurisdiction of the MLC would continue to apply to the PSGE and remain accessible to their trust beneficiaries as confirmed by the Supreme Court judgment.

- 31 The letter also explained that the removal of the supervisory jurisdiction of the MLC from their PSGE will result in legislation to explicitly exempt the supervisory jurisdiction of the MLC under Te Ture Whenua Maori Act for the PSGEs who request it.
- 32 To date, there have been 42 formal responses from PSGEs confirming Option Two – to be exempt from the supervisory jurisdiction of the MLC. Five PSGEs have confirmed that they are comfortable with the MLC’s supervisory jurisdiction applying to their PSGE (Option One).
- 33 **Appendix One** includes a list of the PSGEs along with the relevant settlement legislation which have confirmed either Option One or Option Two. This list is expected to increase.

Proposed legislative solution

- 34 I propose to introduce a Bill to provide for a one-off legislative solution to exempt those PSGEs who have formally confirmed their request to have the supervisory jurisdiction of the MLC removed from them.
- 35 I consider that the most appropriate legislative mechanism would be a standalone Bill. The general policy statement for the Bill would note that under the PSGE framework, it was never envisaged by the Crown that the supervisory jurisdiction of the MLC would apply to PSGEs. The relevant PSGEs to be exempted would be attached as a schedule.
- 36 I also consider the Bill should include an Order in Council making power so that the exemption from the jurisdiction of the MLC can be extended to PSGEs that are unable to make a formal decision before the Bill is enacted, by way of an Order in Council.
- 37 This power would be exercised on my recommendation and would require the consent of the relevant PSGE. If I were to wait until all PSGEs had confirmed their preference before introducing this Bill, this would not be addressing with sufficient speed the problem currently faced by those PSGEs who have responded quickly.
- 38 Without including this power, Parliament would need to consider further legislation to exempt the remaining PSGEs who have not yet confirmed their views. This proposal to amend primary legislation through secondary legislation has sufficient safeguards by requiring the consent of the relevant PSGEs.
- 39 The Bill will not have retrospective effect. This is consistent with the *Legislation Guidelines* principle that legislation should not have retrospective effect.⁴ The threshold for retrospective legislation is very high and would not be met for this Bill. The jurisdiction of the MLC will continue to apply to PSGEs until the exempting legislation is enacted. Any trust applications that meet the requirements of section

⁴ *Legislation Guidelines (2021 edition)* chapter 15.

236 of the Act filed in the MLC before the commencement of the Bill will be able to be heard in that court.

- 40 I consider that the Bill will be relatively simple and straightforward as its only purpose is to exempt specified PSGEs from the supervisory jurisdiction of the MLC. The Bill will provide that the relevant sections 237-245 of Te Ture Whenua Māori Act 1993 do not apply to the specified PSGEs. The Bill will not be amending Treaty settlement legislation.
- 41 In addition to dispute resolution provisions contained in a PSGEs Trust deed, I consider that the dispute resolution services empowered by Part 3A of the Te Ture Whenua Maori Act 1993 (which pertains to any matter over which the Māori Land Court has jurisdiction), can also provide an effective mediation service for PSGEs at no cost to the PSGE. I therefore propose that the Bill clarify that the PSGEs for which the Bill will remove the MLC's jurisdiction to hear applications under sections 237 – 245 may nonetheless refer any dispute to the MLC for mediation under Part 3A of the Act, by agreement of the disputing parties. The MLC would not be able to make any orders sought by the parties following a successful mediation, but this does not affect the usefulness of the mediation option, as most mediations do not require orders following the resolution of the dispute. If orders were needed the parties could file an application for any orders with the High Court.

Timing of this proposal in relation to other reviews

- 42 I am currently completing reviews of Te Ture Whenua Maori Act 1993 with consultation underway and have recently announced a review of the Treaty of Waitangi Act 1975, with a particular focus on the Waitangi Tribunal.
- 43 Regarding Te Ture Whenua Maori Act 1993, any consideration of amending this primary legislation would necessarily entail broader consideration of the matter of all trusts with general land, owned by Māori. That is beyond the scope of the current review.
- 44 Regarding the review of the Waitangi Tribunal, this matter is outside of the scope of the Waitangi Tribunal. In the event, that the current reviews of the Treaty of Waitangi Act 1975 and the Te Ture Whenua Maori Act 1993 identify measures pertinent to improving the PSGE framework, such measures may be enacted through further policy work and or legislative amendments. Delaying this proposal until these reviews are completed goes against PSGEs' expectations from consultation after the Supreme Court ruling and may heighten tensions among PSGEs, who have stressed the need for prioritisation.

Application to trusts related to PSGEs

- 45 While the solution proposed is for PSGEs only, it may be appropriate, in rare circumstances, to extend this opportunity to other trusts related to the PSGEs where they meet the general PSGE framework parameters. I do not intend this to be for all subsidiary trusts, but rather where there are circumstances that warrant

the same consideration as PSGEs. I will consider any requests for such exemptions from the supervisory jurisdiction of the MLC on a case-by-case basis.

- 46 I therefore propose that the Order in Council making power in the Bill enable such trusts to be added to the list of trusts in the Bill exempted from the supervisory jurisdiction of the MLC. Any Order in Council would be made on my recommendation and with the consent of the trustees of the relevant trusts.
- 47 The threshold to amend Treaty settlement deeds and legislation is necessarily high. However, in the instance where both the Crown and Iwi agree there is an issue, and there is no alternative viable solution to rectify the issue, then an amendment is justified. I believe this to be the case here as the only way to rectify the situation is to consider a legislative solution. The proposed legislative solution does not affect the redress provided in settlements.
- 48 My colleague, the Minister for Treaty of Waitangi Negotiations, has confirmed that each claimant group in negotiations will be offered the opportunity to exclude the supervisory jurisdiction of the MLC, including those groups who currently have settlement legislation before the House. I consider this approach provides consistency across the entire Treaty settlement framework.

Consultation

- 49 Both Te Tari Whakatau and Te Puni Kōkiri have been involved in the development of this paper, as this work has crossed over the period of the transfer of functions between Te Arawhiti (now Te Tari Whakatau) and Te Puni Kōkiri.
- 50 In the finalisation of this paper, the Parliamentary Counsel Office and Te Tari Whakatau have been consulted.
- 51 Te Arawhiti submitted a Legislation Bid for the 2025 Legislation Programme for this purpose. The Legislative Bid is now led by Te Puni Kōkiri.
- 52 The MLC has been consulted during the Ministerial consultation period.

Proactive Release

- 53 I intend to proactively release this paper, making any relevant redactions, within 30 days of final decisions being taken by Cabinet.

Financial Implications

- 54 There are no financial implications.

Human Rights

- 55 The proposals outlined in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Legislative Implications

- 56 A standalone Bill will be introduced to override the relevant provisions of Te Ture Whenua Māori Act 1993 for the purposes of exempting PSGEs from the supervisory jurisdiction of the MLC. A legislation bid has been submitted for this matter to progress in the 2025 Legislation programme as a *Category 4 – to be passed by the end of 2025, if possible*.
- 57 This proposed legislative solution is separate from the review of Te Ture Whenua Maori Act 1993 currently being undertaken by Te Puni Kokiri.

Climate Implications

- 58 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Regulatory Impact Analysis

- 59 The Ministry for Regulation has determined that this proposal is exempt from the requirement to provide a Regulatory Impact Statement on the grounds that it has no or only minor economic, social, or environmental impacts.

Communications

- 60 No communications are planned in relation to this matter.

Recommendations

- 61 The Minister for Māori Crown Relations recommends that the Committee:
- 1 **agree** that each post-settlement governance entity that requests it be exempt from sections 237 to 245 of Te Ture Whenua Maori Act 1993 – the supervisory jurisdiction of the Māori Land Court;
 - 2 **note** that each post-settlement governance entity that requests this exemption has formally confirmed or will confirm they have followed their respective trust deed responsibilities for making a decision of this nature;
 - 3 **agree** that the Bill that will provide the exemption will list the post-settlement governance entities to be exempt in a schedule;
 - 4 **agree** that the Bill will authorise that other post-settlement governance entities, trusts established to represent a collective or combination of claimant groups, and hapū or other trusts that receive or which receive Treaty settlement redress can be added to the schedule by Order in Council (if the trust consents and the Minister for Māori Crown Relations is satisfied an exemption is appropriate);

- 5 **agree** that the Bill provide that the PSGEs listed in the schedule may refer any dispute to the Māori Land Court for mediation under Part 3A of Te Ture Whenua Maori Act, by agreement of the disputing parties;
- 6 **authorise** the Minister for Māori Crown Relations to instruct the Parliamentary Counsel Office to draft the exempting Bill to implement the proposals described in this paper; and
- 7 **authorise** the Minister for Māori Crown Relations to make technical policy decisions as needed to support the drafting instructions that are not inconsistent with the decisions in this paper.

Authorised for lodgement

Hon Tama Potaka
Minister for Māori Crown Relations: Te Arawhiti

Released by the Minister for Māori
Crown Relations

[illegible]

S9(2)(ba)(1)	

NB: The following table represents the post-settlement governance entities who have declined the opportunity of an exemption from the supervisory jurisdiction of the Māori Land Court:

Post-settlement Governance Entity	Associated Settlement Legislation
S9(2)(ba)(1)	

Released by the Minister for Māori Crown Relations