

Regulatory Impact Statement: Reform of Te Ture Whenua Māori Act 1993

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by Te Puni Kōkiri. It accompanies the Cabinet Paper titled *Te Ture Whenua Māori Bill: Policy Approvals*.

This RIS provides an analysis of options to improve the institutional and legislative framework governing Māori land. It follows a review of Te Ture Whenua Māori Act 1993 (TTWMA), which aimed to identify what form of legislative interventions might best support owners of Māori land in reaching their aspirations, while enabling the better utilisation of their land.

This RIS summarises preliminary analysis of four options that represent differing levels of regulatory intervention and involvement in Māori land transactions. It also outlines a more detailed analysis of the impacts of the preferred option, which would see light judicial oversight of Māori land transactions.

The proposed changes are expected to result in increased utilisation of Māori land through empowering Māori land owners and governors to make decisions themselves, supported by an enabling institutional environment.

There are some constraints on the analysis in this paper:

- The scope of the review of the current framework governing Māori land was limited to legislative considerations, as set out in the TTWMA Review Panel's Terms of Reference.
- There is limited quantitative data on the current profile and utilisation of Māori land available to inform a detailed assessment of the scale of the problem, to develop aspects of proposed changes, and/or to predict the impacts of some proposed changes.
- In many cases, options aim to provide owners of Māori land with more choice and flexibility in the governance and management of their land. It is difficult to predict how owners' behaviour and decision-making may change as a result of this increased choice and flexibility.
- The analysis of the financial implications of the preferred option presented in this RIS does not represent a detailed or final financial costing to determine the operational impacts of the policy proposals. More detailed financial costing and budgeting will be undertaken as part of a report back to Cabinet in October 2013, if Cabinet agree.

Karen McGuinness, Acting Deputy Secretary (Policy), Te Puni Kōkiri

K McGuinness
21 August 2013

Status quo and problem definition

Previous Consideration

1. On 21 May 2012, Cabinet agreed that a Te Ture Whenua Māori Act 1993 (TTWMA) Review Panel (the Panel) be established to undertake work on what form of legislative interventions might best support Māori land owners in reaching their aspirations, while enabling the better utilisation of their land [CAB Min (12) 17/1C refers].
2. The review of TTWMA has been identified as Action 39 under the Natural Resources component of the Business Growth Agenda. The TTWMA review also has implications for the Government's better public services priority in terms of configuring the Māori land institutional framework to best support the achievement of Māori land utilisation.
3. The Māori Economic Development Strategy and Action Plan: He Kai Kei Aku Ringa (HKKAR) [CAB Min (12) 40/7 refers] complements the legislative and institutional focus of the review of TTWMA by actively seeking to enable growth (Goal 4) and develop natural resources (Goal 5) through identifying and targeting resources to land blocks with development potential (Recommendation 17).
4. On 25 February 2013, Cabinet approved the 2013 Legislation Programme, including a Te Ture Whenua Māori Bill to be referred to a select committee in 2013 (Category 5) [CAB Min (13) 5/7].
5. On 25 March 2013, Cabinet agreed to publicly release the Panel's Discussion Document to seek feedback on propositions to improve Māori land utilisation and invited the Associate Minister of Māori Affairs to report to the Economic Growth and Infrastructure Committee with a final proposal [CAB Min (13) 9/11 refers].

Status quo

6. Māori land is defined and governed by its own legislation: TTWMA. The preamble to TTWMA recognises that land is taonga tuku iho, of special significance to Māori that should be retained and developed for the benefit of the owners, their whānau and hapū. TTWMA also establishes the objectives, jurisdiction and powers of the Māori Land Court (MLC). The general objectives of the MLC are to promote and assist in the retention, effective use, management and development of Māori land.
7. Māori land comprises 1.466 million hectares¹ (ha), which is approximately 5.5 percent of New Zealand's land mass. Most Māori land is situated in the north, centre and east of the North Island. There are 27,308 separate Māori freehold land titles with an average size of 53.7 ha. The smallest 10 percent of titles average 0.79 ha and the largest 10 percent of titles average 487 ha. The total number of ownership interests in all Māori land blocks is 2,710,214, with approximately 100 owners per title on average.

Problem definition

8. The Māori share of the total New Zealand asset base is estimated at \$36.9 billion. Around \$10.6 billion is held by Māori collectives such as Māori land entities.² Research estimates that 80 percent of Māori land is under-performing³ and that Māori land could generate an extra \$8 billion in gross output and 3,600 jobs.⁴

¹ Māori Land Court (2012). *Māori Land Update – Ngā Āhuatanga o te Whenua*, June 2012.

² Business and Economic Research Limited (BERL), 2011. *The Asset Base, Income, Expenditure and GDP of the 2010 Māori Economy*. Wellington, New Zealand.

³ Ministry of Agriculture and Forestry (2011). *Māori Agribusiness in New Zealand: A study of the Māori freehold land resource*. Wellington, New Zealand.

⁴ Ministry for Primary Industries (2013). *Growing the Productive Base of Māori Freehold Land*. Wellington, New Zealand.

9. Successful Māori land businesses are likely to operate on the most versatile and productive Māori land and are likely to succeed regardless of the legislative framework. More marginal or start-up businesses are likely to be impacted by the legislative framework, which makes it important to ensure that the framework is appropriate.
10. Research into the current legislative framework suggests that it does not adequately facilitate the utilisation of land.⁵ The Panel's work and consultation supports this hypothesis. In the absence of any change to the legislative framework governing Māori land, owners will continue to face high compliance costs in making decisions and effecting transactions relating to their land. Utilisation of Māori land (for economic or other purposes) is unlikely to achieve its potential, and the benefits that could flow from utilisation are unlikely to be realised by owners of Māori land.
11. The Panel identified and consulted on three key areas (ownership, governance, institutional framework) within the current system which create barriers to owners achieving their aspirations with regard to their land. While there are other, non-legislative challenges with the current system, these are not within the scope of the Panel's recommendations.
12. The following table sets out a description of the current system in relation to each of the three areas, and identifies nine key problems:
 - a. owners are not able to make decisions themselves;
 - b. unengaged owners can inhibit decision making;
 - c. unengaged owners may result in Māori land not being utilised;
 - d. lack of choice and flexibility in establishing governance structures;
 - e. lack of specificity and accountability for Māori land governors;
 - f. the current mediation option is not comprehensive or efficient;
 - g. lack of succession to Māori land;
 - h. fragmentation of Māori land ownership; and
 - i. the identification of Māori land by status has not been effective.
13. The key issue identified in the assessment of the status quo, and in the Panel's review of TTWMA, is that the current framework is structured so that most matters relating to Māori land require some sort of judicial involvement. This disempowers owners' autonomous decision-making, and hinders choices about utilisation for Māori land owners as judicial involvement can be time consuming, expensive and complicated.

⁵ Noted, for example, in Dewes, Whaimutu, Walz, Tony and Martin, Doug (2011). *Owner Aspirations Regarding the Utilisation of Māori Land*. Wellington, New Zealand.

<p>Status Quo Description of the current framework</p>	<p>Problem Definition Why the current framework creates barriers for owners</p>
<p>Ownership</p> <p>The current legislative framework governing Māori land is structured so that many decisions cannot be taken by Māori land owners themselves, because the decisions are required to be endorsed by the MLC. For example, TTWMA requires the MLC to:</p> <ul style="list-style-type: none"> • approve sale/long-term lease of Māori land; • establish governance structures and appoint trustees; and • in the absence of a governance structure, confirm decisions made at meetings of assembled owners. <p>Two examples of owner decision-making processes are provided below.</p> <p>A long-term lease (more than 52 years) over Māori land requires the consent of at least 50% of owners (by number or by shareholding). The sale of land requires offering the right of first refusal to purchase the land to the preferred class of alienees (children and family of the owner seeking to alienate the land, other owners and their descendants) as well as the consent of 75% of owners (by number or by shareholding) and the approval of the MLC.</p> <p>An application to the MLC is required to establish a governance structure and appoint trustees. In the absence of a governance structure, TTWMA requires owners to apply to the MLC to call a meeting of assembled owners. All resolutions passed at the meeting are then subject to confirmation by the MLC, and the MLC may set aside any resolution if the meeting was conducted in a manner that was unfair to any owner or group of owners.</p> <p>Many land ownership bases are also large and fragmented. The fragmentation of Māori land ownership interests has resulted in varying levels of engagement by potential and actual owners of Māori land. The level of engagement ranges from potential owners who are unaware of their ability to succeed to land ownership interests, through to those who have succeeded and actively participate in decision-making. Ownership registers may also include a number of owners who cannot be located or contacted, or who may be deceased.</p>	<p>Owners are not able to make decisions themselves</p> <p>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 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 many decision-making processes unnecessarily complex. This can hinder choices about utilisation for Māori land owners as judicial involvement can be time consuming, expensive and complicated, which creates barriers to making and effecting utilisation decisions.</p> <p>Unengaged owners can inhibit decision-making</p> <p>Unengaged owners sometimes impact on the ability of engaged owners (defined as those who exercise a vote) to make decisions and effect land transactions because of the practical difficulties in locating and contacting unengaged owners. In some cases (for example, with deceased owners, or owners who are unaware of their potential ownership interests), this is impossible.</p>
<p>Governance</p> <p>As noted above, there are varying levels of owners' engagement with their land today. Some Māori land titles have a majority of owners who cannot or will not succeed to their ownership interests, despite attempts to encourage them to succeed. Owner-driven utilisation of the land cannot occur in these situations. TTWMA enables the MLC to appoint Te Tumu Paeroa (formerly the Māori Trustee) as an external manager to administer Māori land in the absence of engaged owners, if it is satisfied that the appointment of Te Tumu Paeroa would be broadly acceptable to the beneficiaries of the trust.</p>	<p>Unengaged owners may result in Māori land not being utilised</p> <p>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. This makes owner-driven utilisation of the land problematic. There is an opportunity to broaden the range of organisations eligible to be appointed as external managers to assume administration responsibility for a Māori land title(s) in order to maintain or develop the land, identify potential owners and return the land.</p>

<p>Status Quo Description of the current framework</p> <p>Governance</p>	<p>Problem Definition Why the current framework creates barriers for owners</p>
<p>TTWMA prescribes specific land governance structures currently available to owners of Māori land (Māori incorporation, or one of five types of trust). These structures are unique to Māori land and have specific restrictions and functions. The structures available include 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, kaitiaki and pūtea trusts, and Māori reservations) and to facilitate land management (ahu whenua trusts and whenua tōpū trusts and Māori incorporations). Only 41% of Māori land titles have a governance structure. Approximately 98% of governance structures on Māori land are ahu whenua trusts (68%), Māori reservations (28%) or Māori incorporations (2%). No new incorporations have been created for a number of years. The mechanisms and policies for distributing benefits (e.g. income generated from the land or rental agreements) are set out in individual trust deeds or constitutions.</p> <p>TTWMA sets out a series of generic functions and powers of trustees for Māori land. The functions include responsibility for carrying out the terms of the trust, the proper administration and management of the business of the trust, the preservation of the assets of the trust and the collection and distribution of the income of the trust. Trustee powers include all such powers and authorities as may be necessary for the effective management of the trust and the achievement of its purposes.</p> <p>TTWMA enables the MLC to impose limitations or restrictions on trustees through the trust order, or to require a governor to appear before the MLC regarding non compliance with trustee duties or statutory requirements. TTWMA empowers the MLC to make an order to remove a trustee at any time if certain conditions are met.</p> <p>Institutional framework</p> <p>The current legislation provides for the MLC to determine or facilitate the settlement of disputes. However, TTWMA only explicitly provides for mediation in prescribed circumstances: 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. TTWMA requires significant MLC involvement in these mediation processes. For example, 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.</p>	<p>Lack of choice and flexibility in establishing governance structures</p> <p>There is a lack of choice and flexibility in providing for governance structures to be established on Māori land. There is an opportunity to provide Māori land owners with greater choice and flexibility in the governance and management of their land, and to better align the legislative framework governing this with laws that apply to general land and corporate bodies. This includes providing for the ability to establish governance structures themselves and to establish other types of governance entities beyond those prescribed in TTWMA.</p> <p>Lack of specificity and accountability for Māori land governors</p> <p>The current functions and duties for governors of Māori land prescribed by the legislation are not specific enough to provide sufficient clarity to governors or accountability to Māori land owners. Instead, the current framework provides for the MLC to maintain accountability through establishing the entity, vetting trustees and being able to intervene if it considers necessary. The current framework also does not align with general trust and company law.</p>
	<p>The current mediation option is not comprehensive or efficient</p> <p>The limitations on mediation (in that it must be judicially-led and is only provided for in certain circumstances) mean owners are required to go to the MLC in the first instance, which can be time consuming, expensive, and complicated. The mediation options available can also be seen as more formal and adversarial in nature.</p>

<p>Status Quo Description of the current framework <i>Institutional framework</i></p>	<p>Problem Definition <i>Why the current framework creates barriers for owners</i></p>
<p>The legislative framework requires an extensive process for confirming succession to Māori land ownership interests. When an owner of Māori land passes away, TTVMA requires that an application for a succession order be made to the MLC in order for the land ownership interest(s) to be transferred to the person(s) entitled to receive them (usually an owner's children or siblings). In the presence of a will, the extent of the ownership interest is prescribed. Without a will, the ownership interest is divided equally among the owner's children or siblings. A surviving spouse also receives a life interest. A significant proportion of owners recorded on titles have passed away and their interests have not been succeeded to.</p>	<p>Lack of succession to Māori land The current system has overseen a lack of succession to Māori land. This results in dissociation of owners from their land, and presents issues regarding administration and decision-making (as discussed above). The simplification of succession processes can contribute to addressing this issue.</p>
<p>The legislative framework does not allow for the collective ownership of Māori land. Ownership interests increase with each generation. The 27,308 Māori freehold land titles are currently held in 2,710,214 individual succeeded ownership interests – this is comparable to the number of interests represented in the rest of New Zealand's land area.</p>	<p>Fragmentation of Māori land ownership The current system of succession has resulted in the fragmentation of Māori land ownership interests. This results in dissociation of owners from their land. An individualised system of ownership does not reflect the traditional nature of Māori land tenure, where land was collectively owned. While whānau trusts provide a vehicle to enable a trustee or trustees to hold individual ownership interests on behalf of a collective class, they do not provide for collective ownership of land parcels. An application to the MLC is required.</p>
<p>Māori land status is embedded in the title information of individual land parcels, rather than being immediately identifiable. Key points relating to this include:</p> <ul style="list-style-type: none"> • The MLC has jurisdiction to determine and change land status. Almost all such determinations are historic. • Māori land is subject to the Māori land regime, including protections to recognise its cultural significance, and most dealings cannot be effected by simply registering an instrument of conveyance. An order of the MLC is usually necessary and the dealing takes effect in the land transfer system when the order is registered. There are a number of examples of this where the courts have held that registration in breach of the protection regime nevertheless confers an indefeasible interest. • Because ownership determinations by freehold order are historic, many have been affected or overridden by subsequent orders of the MLC dealing with status or by the operation of previous Native/Māori land legislation. 	<p>The identification of Māori land by status has not been effective Status is not always apparent or easy to ascertain, and often requires the formality of a status determination by the MLC. This carries compliance and judicial transaction costs to Māori land owners and the MLC. It also carries risks of status-based protections being overlooked or unrecognised. There are a number of examples where the courts have held that registration in breach of the protection regime nevertheless confers an indefeasible interest. Because ownership determinations by freehold order are historic, many have been affected or overridden by subsequent orders of the MLC dealing with status or by the operation of previous Native/Māori land legislation. The complexity of this regime contributes to the barriers to more effective utilisation of Māori land.</p>

Objectives

14. The current review of TTWMA and any subsequent policy change is aimed at focussing legislation and supporting systems on Māori land owners and their aspirations, by freeing up utilisation decision-making for engaged owners, while maintaining high thresholds for sale of Māori land. This aim aligns with the objectives set out in the current legislation:
 - a. to promote the retention of that land in the hands of its owners, their whānau, and their hapū, and to protect wahi tapu; and
 - b. to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whānau and their hapū.
15. The development of the options explored in this RIS has been guided by five propositions that were developed by the Panel and consulted on publicly:
 - a. Utilisation of Māori land should be able to be determined by a majority of engaged owners.
 - b. All Māori land should be capable of utilisation and effective administration.
 - c. Māori land should have effective, fit for purpose, governance.
 - d. There should be an enabling institutional framework to support owners of Māori land to make decisions and resolve any disputes.
 - e. Excessive fragmentation of Māori land should be discouraged.
16. The feedback received during the Panel's consultation was generally supportive of the overall thrust of the propositions.
17. Although not represented in the five propositions listed above, a further policy objective of protection of Māori land has also guided the development of policy options explored in this RIS. Protection of Māori land as taonga tuku iho to be passed down to future generations has been a strong theme in the Panel's work and was strongly supported during the Panel's consultation.

Regulatory impact analysis

18. This RIS sets out four possible options for reforming the framework governing Māori land in order to better meet owners' aspirations for their land. The options are based on differing levels of regulatory intervention and involvement in transactions relating to Māori land:
 - a. **Option 1:** This option considers the impact of maintaining the status quo.
 - b. **Option 2:** This option proposes a strong degree of judicial oversight, with specific laws and judicial forum for Māori land, and a strong focus on protecting the retention of the land. This option maintains many features of the status quo framework, as well as empowering the MLC to pro-actively seek facilitation of under-utilised land.
 - c. **Option 3:** This option proposes light oversight of owner-driven decision-making, removing MLC involvement in most transactions, but maintaining protections for the retention of Māori land.
 - d. **Option 4:** This option proposes minimal specialist judicial involvement by removing the specific rules and judicial forum for Māori land, with Māori land to be governed under general law.

Options for a legislative and institutional framework that better supports aspirations of Māori land owners

Problem statement	Option 1: Status Quo	Option 2: Strong judicial oversight	Option 3: Light judicial oversight	Option 4: Minimal judicial oversight
Ownership				
Owners are not able to make decisions themselves	<ul style="list-style-type: none"> Judicial process required for most transactions 	<ul style="list-style-type: none"> (status quo) 	<ul style="list-style-type: none"> Remove requirement for extensive judicial involvement in transactions relating to Māori land except in case of sale 	<ul style="list-style-type: none"> Remove requirement for judicial involvement in any transactions relating to Māori land – removing specialist MLC jurisdiction and specific protections on Māori land
Unengaged owners can inhibit decision making	<ul style="list-style-type: none"> Owners required to obtain approval of portion of entire ownership base MLC acts on behalf of unengaged owners 	<ul style="list-style-type: none"> (status quo) 	<ul style="list-style-type: none"> Reduce onus on owners to obtain approval of unengaged owners in decisions, except in the case of sale (noting that safeguards such as minimum notice periods will apply and all owners will always be free to engage or re-engage simply by participating in decisions) Extensive judicial involvement no longer required except in case of sale (as proposed above) Incentivise engagement by enabling absentee voting 	<ul style="list-style-type: none"> Reduce onus on owners to obtain approval of unengaged owners (noting that notice requirements will apply and owners will always be free to participate in decisions) Extensive judicial involvement no longer required Incentivise engagement by enabling absentee voting
Governance				
Unengaged owners may result in Māori land not being utilised	<ul style="list-style-type: none"> MLC able to appoint Te Tumu Paeroa as external manager 	<ul style="list-style-type: none"> (status quo) MLC to pro-actively seek opportunities to appoint external managers to under-utilised parcels of land 	<ul style="list-style-type: none"> Broaden the range of organisations eligible to be appointed as external managers (by specifying eligibility criteria) Reduce the judicial burden by making appointment and supervision of external managers an administrative function 	<ul style="list-style-type: none"> No specific provision for the appointment of external managers to under-utilised Māori land – external managers may be appointed under general legislation if circumstances require
Lack of choice and flexibility in governance structures	<ul style="list-style-type: none"> Prescribed set of governance structures (five types of Māori trust and incorporation) Judicial process required to establish entities 	<ul style="list-style-type: none"> (status quo) 	<ul style="list-style-type: none"> Remove prescribed structures but maintain minimum provisions (aligned with other legislation such as Trustees Act and Companies Act), within which owners can choose entity structure of their choice Remove requirement for judicial involvement in Māori land transactions (as proposed above) will allow owners to establish governance entities without judicial involvement MLC to have jurisdiction to hear breaches of duty 	<ul style="list-style-type: none"> Remove prescribed structures and minimum provisions Remove requirement for judicial involvement in Māori land transactions (as proposed above) will allow owners to establish governance entities without judicial involvement

Problem statement	Option 1: Status Quo	Option 2: Strong judicial oversight	Option 3: Light judicial oversight	Option 4: Minimal judicial oversight
Lack of specificity and accountability for Māori land governors	<ul style="list-style-type: none"> Prescribed but generic functions and powers 	<ul style="list-style-type: none"> (status quo) 	<ul style="list-style-type: none"> Prescribe specific duties and obligations of governors (including penalties) that are better aligned with general trust and company law 	<ul style="list-style-type: none"> Remove prescribed but generic functions and powers, subject to the general law
Institutional framework				
The current mediation option is not comprehensive or efficient	<ul style="list-style-type: none"> Judicial process required for most transactions 	<ul style="list-style-type: none"> (status quo) 	<ul style="list-style-type: none"> Remove judicial involvement in many transactions (as noted above), with mediation services being provided separately Require disputes to be referred to mediation in the first instance, with MLC as forum of last resort 	<ul style="list-style-type: none"> Rely on general mediation
Lack of succession to Māori land	<ul style="list-style-type: none"> Succession via a judicial process 	<ul style="list-style-type: none"> (status quo) 	<ul style="list-style-type: none"> Simplify succession through making it an administrative process 	<ul style="list-style-type: none"> Simplify succession through utilising general law
Fragmentation of Māori land ownership	<ul style="list-style-type: none"> Individualised shareholding system Succession processes require judicial involvement 	<ul style="list-style-type: none"> Phase in collective tenure system where all owners hold undefined interests in common Maintain judicial involvement in succession processes 	<ul style="list-style-type: none"> Provide an option for owners to transition to a collective tenure system where all owners hold undefined interests in common, if they wish Transfer responsibility for confirming succession from judiciary to an administrative function 	<ul style="list-style-type: none"> Maintain individualised shareholding system Transfer responsibility for confirming succession from judiciary to an administrative service
The identification of Māori land by status has not been effective	<ul style="list-style-type: none"> Māori land status embedded in title information 	<ul style="list-style-type: none"> (status quo) 	<ul style="list-style-type: none"> Consider provisions to ensure Māori land is clearly identified within the land titles register. 	<ul style="list-style-type: none"> Remove special status of Māori land altogether

Preliminary impact analysis

19. In a preliminary analysis, the four options were qualitatively assessed at a high level. This analysis sought to identify which option(s) should be considered for more detailed impact analysis. The four options were assessed in terms of whether each option:
- achieved the desired policy objectives; and
 - addressed the nine issues identified in the problem definition.
20. Analysis was based on feedback received during public consultation on the Panel's Discussion Document, and on the experience and knowledge of officials and Panel members.
21. A summary of this analysis is presented in the table below.

Preliminary impact analysis of four options	Option 1	Option 2	Option 3	Option 4
Extent to which option meets policy objectives				
Māori land is taonga tuku iho that should be protected and passed down to future generations	✓	✓	✓	x
Utilisation of Māori land should be able to be determined by a majority of engaged owners	x	x	✓	✓
All Māori land should be capable of utilisation and effective administration	x	x	✓	✓
Māori land should have effective, fit for purpose, governance	x	x	✓	✓
There should be an enabling institutional framework to support owners of Māori land to make decisions and resolve any disputes	x	x	✓	✓
Excessive fragmentation of Māori land should be discouraged	x	✓	✓	x
Extent to which option addresses issues in problem definition				
<i>Ownership</i>				
Owners are not able to make decisions themselves	x	x	✓	✓
Unengaged owners can inhibit decision making	x	x	✓	✓
<i>Governance</i>				
Unengaged owners may result in Māori land not being utilised	x	✓	✓	x
Lack of choice and flexibility in governance structures	x	x	✓	✓
Lack of specificity and accountability for Māori land governors	x	x	✓	✓
<i>Institutional Framework</i>				
The current mediation option is not comprehensive or efficient	x	x	✓	✓
Lack of succession to Māori land.	x	x	✓	✓
Fragmentation of Māori land ownership	x	✓	✓	x
The identification of Māori land by status has not been effective	x	x	✓	x ⁶

22. Options 1 and 2 (status quo and high judicial involvement) maintain the current regulatory protection of retention of Māori land, which extends to requiring a judicial process for many other transactions relating to Māori land (for example, the establishment of governance entities, the appointment of trustees and succession to ownership interests).

⁶ Under this option, there would be no Māori land status.

23. This high level of judicial oversight carries compliance costs for owners of Māori land, which contributes to these options being assessed as failing to meet several other policy outcomes (such as facilitating utilisation and empowering engaged owners to make their own decisions about land). It also means these options fail to address many of the problems associated with high compliance costs in the status quo problem definition.
24. Option 2 differs from Option 1 with the introduction of two new measures to address problems with the status quo: firstly, Option 2 would see the MLC pro-actively seeking opportunities to appoint external managers to under-utilised parcels of Māori land (without engaged owners), and secondly, it would see the phasing out of the current individualised shareholding tenure of Māori land.
25. Overall however, the preliminary analysis found Options 1 and 2 would not adequately achieve the desired policy outcomes or address the problems with the current Māori land system. These two options were not considered further.
26. Of the four options considered, Option 3 (light judicial involvement) was found to best achieve the policy outcomes and address the issues in the problem definition. This option was found to maintain protection of the retention of Māori land (achieving the first desired policy outcome) without imposing judicial processes on other transactions relating to Māori land. This would reduce compliance costs for owners of Māori land, therefore better empowering them to make autonomous decisions relating to their land (achieving several other policy objectives and addressing several aspects of the problem). Option 3 would also provide owners of Māori land with an option to transition to a system of collective ownership of parcels of land, satisfying the final policy objective and addressing a further issue associated with the status quo.
27. Option 4 (minimal judicial involvement) represents the largest departure from the status quo. This option would see all Māori land effectively converted to general freehold land and the specific legislative framework governing Māori land removed. The impacts of this option would likely address several of the problems associated with the current regulatory framework. However, it failed to meet two of the five policy objectives. In particular, it does not recognise Māori land as taonga tuku iho, which was a central tenet of the review of Māori land. On further consideration, this option was also found to carry significant political and legal risks (in terms of potential breach of the Treaty of Waitangi). These risks would also apply if Māori land status was retained (but all other specialist judicial oversight was removed). This option was therefore not further considered.
28. On the basis of this preliminary impact analysis, the impacts of implementing Option 3 were further considered. A summary of this more detailed analysis is set out below.

Expected impacts of implementing Option 3 (light judicial oversight)

Overall

29. Legislation empowering Māori land owners is a necessary but not a sufficient condition to achieve the step change in Māori land utilisation that the Government is seeking. Allied to this is the need for a more proactive approach to the channelling of resources to this sector. This is occurring already through the Treaty settlement process as well as through He kai Kei Aku Ringa (HKAR). There is also a need to separately address other long standing issues such as building capability, improving access to finance, reducing debt (including rates arrears) and providing robust information and data. However, ensuring the rules governing Māori land are appropriately tailored to the needs of Māori land owners, particularly those who are wanting to make decisions, with appropriate safeguards, is crucial in underpinning both the achievement of Māori aspirations and Māori land utilisation.
30. Option 3 seeks to strike a balance between maintaining the necessary protections around the sale and governance of Māori land, and supporting the utilisation and development of land. In this context, the policy proposals are designed to:

- a. Remove requirements that no longer provide the intended benefits relative to the costs they impose. For example, it is proposed that the requirement for the MLC to approve the establishment of a governance entity is removed. These changes benefit owners and governors by reducing the need for them to spend time dealing with governance processes, so they can instead focus on value-adding activities.
 - b. Streamline and improve the efficiency of the processes and functions that support the framework. For example, the proposed administrative services include an independent, purpose-designed mediation service to provide efficient and effective dispute resolution services for disputes relating to Māori land. The introduction of efficient and streamlined processes, such as the mediation service, makes it easier and cheaper for owners and governors of land to utilise the TTWMA framework.
 - c. Increase the flexibility of the framework, as an enabler for owners and governors of land. For example, under the proposals owners of land will have the flexibility to choose a governance or management entity structure of their choice. The changes are designed to provide sufficient flexibility to meet the changing needs of the owners of Māori land and support social and economic development.
31. While there will be one-off implementation costs, over time Option 3 is expected to be fiscally neutral, with the costs of the reforms offset by cost savings and efficiency improvements. This will be underpinned by a transition from a judicial to an administrative system. This will result in a reduction in judicial activity of the MLC, which is designed to free up resources and allow cost savings to be realised, and the introduction of the administrative services, with comparatively lower cost registry and disputes resolution functions. To achieve the efficiency gains required, the administrative services will be structured to include increased automation in application processing and a greater use of technology to support customer interactions. Detailed financial costings of the changes will be undertaken as part of a report back to Cabinet in October 2013, if Cabinet agree.
32. The expected net benefits of the proposal are broad efficiency and effectiveness benefits to owners of Māori land, enabling improvements in land utilisation. In this context, the proposal is designed to reduce compliance costs associated with setting up governance entities for managing land use, make it easier for engaged owners to make decisions about the use of land and simplify the functions that support the land governance framework. It is assumed that these improvements will empower owners of Māori land to make decisions about the use of their land, which will lead to greater utilisation of land and positive social and economic impacts.
33. While it is difficult to quantify these benefits, analysis commissioned by Te Puni Kōkiri estimates that the policy proposals could result in greater use of the land governance framework and, as a result, an increase in land utilisation decisions and a resulting uplift in the economic utilisation of approximately 300 currently under or not fully utilised land blocks. This will enhance regional economies through employment opportunities (e.g. an estimated uplift in compensation for employees directly involved in the utilisation of the land of \$800,000 per annum) and to owners of land through the profits of the businesses operating on the land (e.g. an estimated uplift of \$3 million per annum in profits returned to owners of assets utilising the land). Continued improvements in utilisation will be better enabled by Option 3, the impacts of which will be monitored over time.
34. Wider benefits are more difficult to quantify given that it is difficult to predict how owners' behaviour may change as a result of increased choice. It is also difficult to attribute legislative change with wider benefits given the contribution of other factors. However, research provides an estimate of the potential ceiling that could be reached: an extra \$8 billion in gross output and 3,600 new jobs for the primary sector.⁷

⁷ Ministry for Primary Industries (2013). *Growing the Productive Base of Māori Freehold Land*. Wellington: New Zealand.

35. While there will be one-off implementation costs, over time Option 3 is expected to be fiscally neutral, with the costs of the reforms offset by cost savings and efficiency improvements. The key components of this are the reduction in judicial activity of the MLC, which is designed to free up resources and allow cost savings to be realised, and the introduction of administrative services, with comparatively lower cost registry and mediation functions. To achieve the efficiency gains required, the administrative services will be structured to include increased automation in application processing and a greater use of technology to support customer interactions. Detailed financial costings of the changes will be undertaken as part of a report back to Cabinet in October 2013, if Cabinet agree. This will be factored into departmental planning and processes leading up to Budget 2014, if Cabinet agree.

Impacts on owners of Māori land

36. Implementing Option 3 is expected to result in increased utilisation of Māori land through improvements to the governance framework and a reduction of the compliance burden for owners and governors of Māori land. In particular, engaged owners will enjoy faster and simpler processes when making utilisation decisions and resolving disputes – for example, they will not be required to obtain MLC approval of decisions in order to effect transactions (other than sale). Option 3 aims to extend to owners of Māori land many of the same freedoms and obligations enjoyed by owners of general freehold land, while retaining the protections accorded to that land as taonga tuku iho.
37. Unengaged owners of Māori land are also likely to be impacted in the following ways:
- a. Unengaged owners may be incentivised to become engaged with their land and participate in decision-making due to reduced transaction costs and easier engagement processes (such as enabled absentee voting).
 - b. Their land will be more likely to be utilised, either through the decisions of engaged owners, or through the appointment of external managers. The proposal to broaden the range of organisations eligible for appointment as external managers will create competition (in both cost and quality of service), which is expected to provide further benefit to unengaged owners.
38. It is important to note that unengaged owners will always have the option to re-engage, simply by participating in decision-making relating to the land.
39. Prescribing the duties and obligations of Māori land governance entities is likely to support better awareness of these duties and obligations among owners of Māori land, and may lead to better decision-making by governance entities of Māori land.
40. The proposal that officials give considerations to provisions to ensure Māori land is clearly identified within the land titles register is expected to give owners of Māori land greater certainty in the classification of their land under the proposed new title system, reducing the risk that protections are overlooked or unrecognised.
41. Owners of Māori land will enjoy the option of transitioning to a system of collective ownership of their land, if they wish. This would reduce compliance and transaction costs for those owners and will prevent the further fractionalisation of ownership interests for those owners. Those owners who prefer to maintain existing defined ownership interests would not be impacted.

Impacts on government agencies

42. It is expected that the administrative services to be provided or administered by an existing government agency or agencies. While these services have commonalities with Land Information New Zealand (LINZ), they could also efficiently operate by leveraging common infrastructure (such as regional offices and information systems) and operating in tandem or separately within the Ministry of Justice. While there will be additional costs associated with these services, the change is expected to result in lower processing costs and times for applications. An independent mediation service will be provided for resolving disputes relating to Māori land. This mediation function is expected to result in

better access to and lower cost of dispute resolution. These changes may represent potentially significant impacts on the workload and resourcing of government agencies, including the Ministry of Justice and LINZ. Further analysis of these potential impacts will be considered as part of a report back to Cabinet in October 2013, if Cabinet agree.

43. The role and jurisdiction of the MLC in terms of judicial processes would be refocused under Option 3, with the MLC focussing on retention decisions, complex disputes and existing specialist areas. Option 3 will reduce the workload of the MLC, freeing up resources to work on processing complex cases more quickly, or allowing cost savings to be realised. These changes may also represent potentially significant impacts on the workload and resourcing of the Ministry of Justice. Further analysis of these potential impacts will be considered as part of a report back to Cabinet in October 2013, if Cabinet agree.

Impacts on other parties

44. The proposal to broaden the range of organisations that may be eligible for appointment as external managers of Māori land will also impact on Te Tumu Paeroa, who is currently the only agency eligible for appointment as an external manager of Māori land), whose portfolio may decrease. Other prospective external managers, including Māori trusts and incorporations or professional trustee companies such as Guardian Trust will have the opportunity to provide services to new clients. The impacts on these organisations are unable to be assessed at this time, due to the uncertainty about how this proposal will be implemented and the limited data on the profile of under-utilised Māori land. Further analysis will be undertaken as legislative drafting instructions progress.

Consultation on options

Consultation on Discussion Document

45. On 3 April 2013, the Minister and Associate Minister of Māori Affairs publicly released a Discussion Document developed by the Panel. One hundred and ninety five written submissions were received and 20 public hui were held throughout New Zealand.
46. The targeted feedback received during the consultation hui was generally supportive of the overall thrust of the propositions to improve the utilisation of Māori land through the empowerment of Māori land owners. Overall, discussion focussed on what the propositions mean in practice and how they would be implemented. The most common themes from the hui and written submissions included:

Ownership

- a. general support for an engaged owner concept;
- b. agreement that remaining Māori land must not be sold and support for the retention of the current high threshold for the sale of Māori land;

Governance

- c. agreement that robust and accountable governance is crucial;
- d. differing views on the concept of an external manager, but general support from written submissions;

Institutional Framework

- e. general support for mediation;
- f. general support for resolving fragmentation issues but no consensus on how this might be achieved;
- g. differing views on collective or individual ownership and voting by shareholding or by owner; and

- h. rejection of the Panel's suggestion that decision-making rights be limited to owners that have a minimum ownership interest.
- 47. A wide range of other issues were also raised that are beyond the scope of the propositions and the review.
- 48. Feedback received through this consultation has informed the development of the policy proposals set out in this paper.

Consultation on further policy development

- 49. The Treasury; Ministry of Justice; Ministry for Primary Industries; Ministry of Business, Innovation and Employment; Ministry for the Environment; Land Information New Zealand; Department of Conservation; Department of Internal Affairs and the Office of Treaty Settlements have been consulted on the draft Cabinet paper that this RIS accompanies.
- 50. The Department of the Prime Minister and Cabinet has been informed of that draft Cabinet paper.
- 51. The Minister of Māori Affairs has agreed to the submission of that Cabinet paper.

Consultation on RIS

- 52. The Treasury; Ministry of Justice; Ministry for Primary Industries; Ministry of Business, Innovation and Employment; Ministry for the Environment; Land Information New Zealand; Department of Conservation; Department of Internal Affairs and the Office of Treaty Settlements have been consulted on the RIS.
- 53. The Department of the Prime Minister and Cabinet has been informed of the RIS.

Conclusions and recommendations

- 54. As set out in this paper, Te Puni Kōkiri has analysed four options for reforming the legislative and institutional framework governing Māori land, and undertaken more detailed impact analysis of one of those options (Option 3). Based on that analysis, Te Puni Kōkiri recommends progressing Option 3. In summary, Option 3 contains the following recommendations:

Ownership

- a. enable engaged Māori land owners to make utilisation decisions without the need for judicial involvement;
- b. continue to include protections for the retention of Māori land;

Governance

- c. improve the mechanisms for the appointment of external managers to administer under-utilised Māori land blocks;
- d. allow Māori land owners to establish governance entities themselves;
- e. prescribe the duties and obligations of Māori land governance entities and align these with the general law;

Institutional Framework

- f. support Māori land owners with administrative services to be provided by an existing government agency or agencies including:
 - i. administering a mediation service;
 - ii. appointing and overseeing of external managers in appropriate cases;
 - iii. managing decision-making processes for owners to establish governance entities;

- iv. maintaining the record of Māori land ownership and titles;
 - v. providing information and registry services;
 - g. refocus the jurisdiction of the MLC to primarily retention decisions, complex disputes and existing specialised areas;
 - h. ensure Māori land is correctly identified; and
 - i. provide an option to transition to collective ownership.
55. Analysis undertaken by Te Puni Kōkiri has found that this option best achieves the desired policy objectives for Māori land, and best addresses the problems associated with the current framework.
56. The proposal seeks to provide the conditions in which greater owner-driven utilisation of Māori land can occur. Ensuring the rules governing Māori land are appropriately tailored to the needs of Māori land owners, particularly those who are wanting to make decisions, with appropriate safeguards, is crucial in underpinning both the achievement of Māori aspirations and Māori land development.
57. The proposed changes are designed to result in increased utilisation of Māori land through empowering Māori land owners and governors to make decisions themselves, supported by an enabling institutional environment. While there will be one-off implementation costs, over time the proposal is expected to be fiscally neutral, with the costs of the reforms offset by cost savings and efficiency improvements. Detailed financial costings of the changes will be undertaken as part of an implementation report back to Cabinet in October 2013, if Cabinet agree. This will be factored into departmental planning and processes leading up to Budget 2014, if Cabinet agree.
58. Te Puni Kōkiri therefore recommends proceeding with Option 3. The Associate Minister of Māori Affairs intends to seek Cabinet's agreement to progress the proposals under this option in the Te Ture Whenua Māori Bill 2013.

Implementation

Implementation planning

59. The significance of the changes required for the preferred option (Option 3) to be adopted requires the development of a new legislation. This RIS accompanies a Cabinet Paper which has been developed to seek Cabinet's agreement in principle to progress preferred policy options, to issue drafting instructions and to report back in October 2013 with a detailed implementation plan.
60. A sequenced approach consisting of policy, legislative and implementation phases is proposed so that Cabinet will have the ability to consider each stage of the process before potentially agreeing to proceed to the next phase. The Cabinet Paper that this RIS accompanies is the culmination of the policy phase. It seeks agreement to commence the legislative phase through the issuing of drafting instructions and to a report back to Cabinet in October 2013 on the implementation phase in consultation with the Minister of Māori Affairs and relevant portfolio Ministers, including the Minister of Justice, the Minister for Courts and the Minister for Land Information. It is proposed the report back include a detailed implementation plan, including detailed costings and timelines, aligned with the 2014 Budget process. This work is likely to align with the Government's better public services priority.
61. High level and indicative consideration has been given to the proposals that will require specific transitional arrangements, as set out in the table below:

Proposal	Transitional arrangements required
Support Māori land owners with administrative services to be provided by an existing government agency or agencies.	Supporting Māori land owners with administrative services to be provided by an existing government agency or agencies is central to a number of the proposed changes (e.g. engaged owners' ability to establish governance entities, appointment of external managers, disputes mediation), so these must be in place by the time legislative changes take effect. Detailed implementation planning will form part of a report back to Cabinet in October 2013, if Cabinet agree.
Changes to the jurisdiction of the MLC	In addition to the transitional arrangements for the administrative services, the processes and infrastructure of the MLC will change. Implementation planning will need to take into account the changing needs of the MLC and ensure that the MLC and the administrative services have effectively integrated services and platforms.
Provide Māori land owners with an option to transition from individually held interests to collective ownership of Māori land	This proposal poses implementation challenges as it will effectively lead to a dual system. However, those owners of Māori land who elect to transition to collective ownership will still be operating within the same framework as those who choose to retain individualised shareholding. As with the proposal to establish a special category of Māori land within the land titles register, little will change in practice for owners of Māori land unless they wish to transition to collective ownership.

Risks

62. As the Te Ture Whenua Māori Bill is drafted and developed, detailed implementation planning will occur, and this will include identifying potential risks and mitigation strategies for those risks. The paragraphs below outline potential risks with the policy proposals.
63. At a high level, there is a risk that legislative change will not achieve the expected gains in the productivity of Māori land. The analysis cited in the Impacts section of this RIS provides an estimate of the uplift that could be attributed to legislative change; however, as discussed above, legislation change alone will not be sufficient to achieve the step change in Māori land utilisation the Government is seeking. Other issues will also need to be addressed (such as access to finance, building capability and the provision of robust data). This risk can be managed by continuing to consider policy options to address these issues. This risk and possible mitigations will also be considered as implementation planning progresses.

Ownership

64. The view that the current system of vetting governance and utilisation decisions by the MLC enables poor decisions to be avoided is based on the assumption that Judges will decline to approve decisions that, in their judgement, are poor or risky. Empowering engaged owners to make decisions free from judicial scrutiny could, therefore, be argued to carry a risk of increased exposure to the consequences of poor decision-making or poor governance appointments.
65. This risk is acknowledged, but it needs to be re-evaluated given the objectives and focus of the proposals, which recognise that owners of Māori land should not be treated by the framework paternalistically as requiring extra protections, but rather as holders of rights who are capable and should be empowered to exercise those rights and make decisions about their land based on their free and informed consent. In this regard the proposals are consistent with the approach taken by the beneficiaries of significant Treaty settlement assets and their Post Settlement Governance Entities. It is important to note

that the high threshold for the permanent alienation of Māori land will be maintained. Other safeguards (for example, the mandatory provisions applying to governance entities) will be prescribed in legislation.

66. There is a risk that the proposal to reduce the onus on engaged owners to obtain the approval of unengaged owners in decisions (except in the case of sale) will be perceived as disempowering unengaged owners. It is important to note in this context that safeguards such as minimum notice periods for major transactions will continue to apply, and that all owners will always be free to engage or re-engage, simply by participating in decisions relating to the land.

Governance

67. The risks associated with external management include the perception that Māori land is essentially being transferred to a third party and that, in the event of failure, the land will bear any outstanding debt. These risks will be mitigated by setting clear and transparent processes and accountabilities for the appointment and operation of external managers.
68. The risks associated with empowering engaged owners to establish governance entities themselves could carry a risk of poor decision-making or governance appointments. However, it is important to note that the high threshold for the sale of Māori land will be retained and other safeguards for utilisation decisions (for example, clearly prescribed governors' duties and obligations) will be prescribed in legislation.
69. The key risk of specifying the duties of Māori land governors is that it will discourage people from becoming governors or bind existing governors who were appointed before these obligations were prescribed. This is a particular concern given the low numbers of Māori land governors. This risk will be managed through a phased transition to the new system supported by information and training.

Institutional framework

70. There is potential risk that under the proposed changes, the specialist expertise of the MLC bench will be under-utilised. As with any court, the jurisdiction of the MLC does not remain static and will always be subject to policy changes from time to time. In the case of MLC Judges, less demand for sitting time or other judicial work in the MLC will lead to greater availability to act as Presiding Members in the Waitangi Tribunal, both for inquiries and for urgency applications, and increases their potential to be warranted as Alternate Environment Judges in appropriate cases.

Monitoring, evaluation and review

71. As the Te Ture Whenua Māori Bill is drafted and progressed, detailed implementation planning will be undertaken, including developing a framework and timetable for measuring the impacts and evaluating the effectiveness of the new legislative framework. It will be important to determine whether or not the proposed changes contribute to the ability of Māori land owners to achieve their aspirations and to greater utilisation of Māori land. This will be measured through ongoing monitoring of data to measure the volume and efficiency of owner decisions (which require judicial involvement under the current framework). Progress will be reviewed five years following implementation.

Consultation on Cabinet and Cabinet Committee Submissions

Certification by Department:

Guidance on consultation requirements for Cabinet/Cabinet committee papers is provided in the CabGuide (see Procedures: Consultation): <http://www.cabguide.cabinetoffice.govt.nz/procedures/consultation>

Departments/agencies consulted: The attached submission has implications for the following departments/agencies whose views have been sought and are accurately reflected in the submission:
The Treasury; Ministry of Justice; Ministry for Primary Industries; Ministry of Business, Innovation and Employment; Ministry for the Environment; Land Information New Zealand; Department of Conservation; Department of Internal Affairs and the Office of Treaty Settlements

Departments/agencies informed: In addition to those listed above, the following departments/agencies have an interest in the submission and have been informed:

The Department of the Prime Minister and Cabinet

Others consulted: Other interested groups have been consulted as follows:

Name, Title, Department: ROBERT MCGUINNESS, Acting Deputy Secretary, Policy
to PAUL KERRIN

Date:

21/08/2013

Signature

R McGuinness

Certification by Minister:

Ministers should be prepared to update and amplify the advice below when the submission is discussed at Cabinet/Cabinet committee.

The attached proposal:

Consultation at Ministerial level

☒ **has been** consulted with the Minister of Finance
[required for all submissions seeking new funding]

☒ **has been** consulted with the following portfolio Ministers: FINANCE, EC. DEV.,
PRIMARY INDUSTRIES,

☐ **did not need** consultation with other Ministers

MAORI AFFAIRS, COURTS

Discussion with National caucus

☐ **has been** or ☐ **will be** discussed with the government caucus

☒ **does not need** discussion with the government caucus

Discussion with other parties

☐ **has been** discussed with the following other parties represented in Parliament:

☐ Act Party ☐ Maori Party ☐ United Future Party

☐ Other [specify]

☒ **will be** discussed with the following other parties represented in Parliament:

☒ Act Party ☒ Maori Party ☐ United Future Party

☐ Other [specify]

☐ **does not need** discussion with other parties represented in Parliament

Portfolio

Maori Affairs

Date

21/8/2013

Signature

C. J. Finlayson

