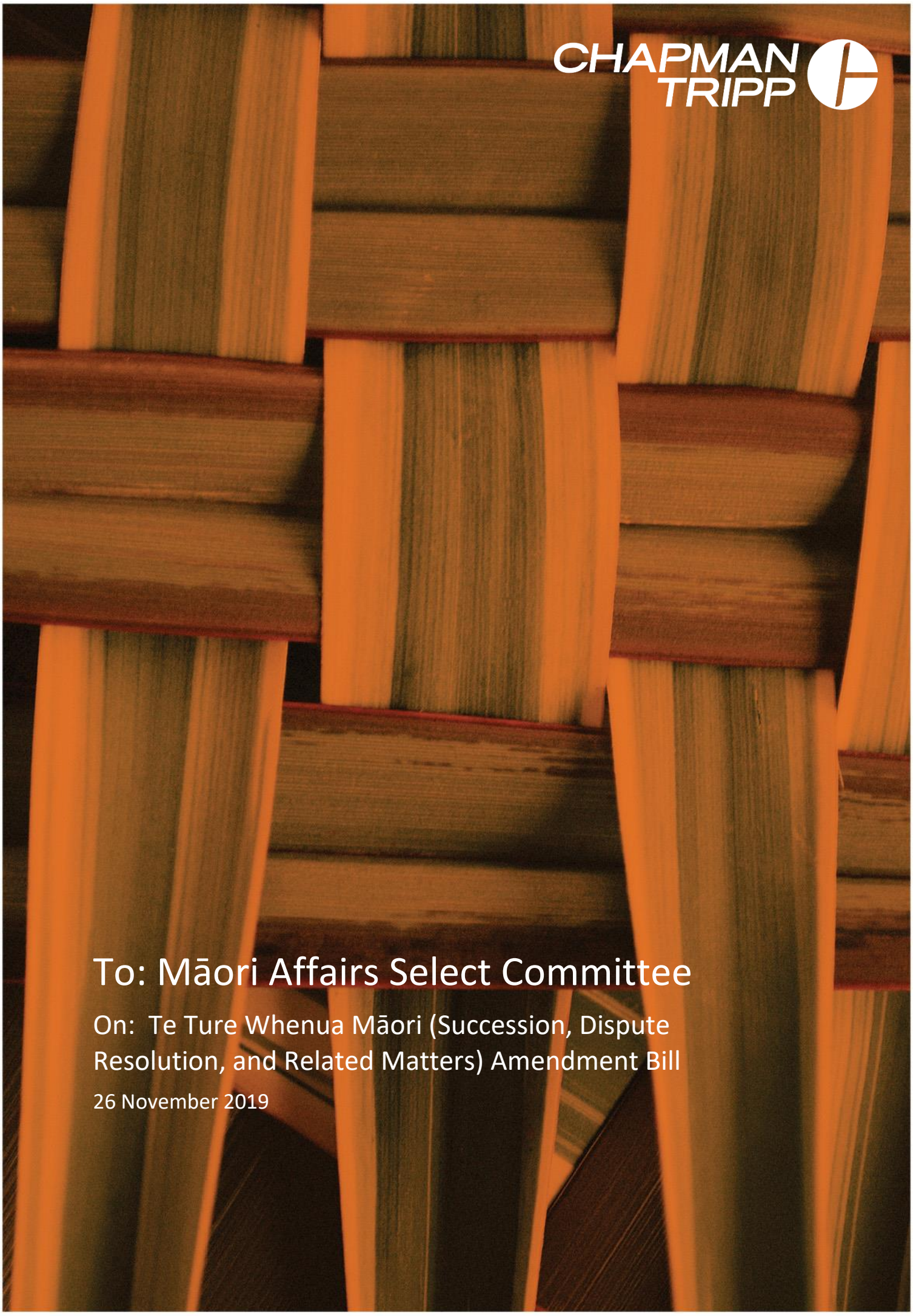

To: Māori Affairs Select Committee

On: Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Bill

26 November 2019

INTRODUCTION

The Committee Staff of the New Zealand Parliament has sought feedback on the Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (*Bill*), an omnibus bill to amend the Te Ture Whenua Māori Act 1993 (*Principal Act*).

The amendments proposed in the Bill are of direct interest to us as legal practitioners, and to our clients whether they are Māori businesses, landowners, individuals or non-Māori clients who deal with Māori.

We do not object to our submission being published.

We would be happy to discuss any aspect of our submission with the Committee Staff. We also agree to be heard on our submission, if that would assist the Committee.

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ABOUT CHAPMAN TRIPP

We are New Zealand's leading law firm. With 60 partners, over 200 legal staff and more than 200 support staff across three offices in Auckland, Wellington and Christchurch, we have the experience to advise on all areas of the law of Aotearoa.

Our dedicated Māori Legal Group, Te Waka Ture, specialises in Māori legal issues in both governance and commercial contexts, structuring and joint venture arrangements, Māori land and forestry matters, and litigation and dispute resolution.

Te Waka Ture assists iwi and Māori organisations to promote and achieve their economic, social, cultural and commercial objectives, including by strengthening their relationships and maximising their commercial assets. We have also assisted a number of clients with Treaty settlement matters and post-Treaty settlement matters.

Overview of this submission

Summary

This submission touches on what we consider to be the four primary strands of proposed amendment set out in the Bill. These are:

- the extension of the Māori Land Court's equitable jurisdiction;
- the proposed dispute resolution processes;
- trust and succession matters; and
- core Māori Land and property matters.

Chapman Tripp largely supports the amendments proposed in the Bill. Our submission focuses primarily on suggesting technical improvements to ensure that the Māori Land Court and its Registrars will be able to use their proposed new powers to the fullest extent, so that any proceedings relating to Māori landowners do not unnecessarily engage parties in protracted litigation.

We also suggest, in relation to a number of provisions, some amendments that would align the Principal Act with similar regimes under other legislation. In particular, we suggest that some of the proposed dispute resolution mechanisms might appropriately reflect similar processes in the High Court Rules. We also suggest that the proposed interest register for Māori Incorporations should align with its equivalent in the Companies Act 1993.

We consider that the provisions governing trusts could have been more explicitly aligned with the framework set out in the Trusts Act 2019 (effective 2021). While we acknowledge that the Māori Land Court may exercise the same powers with respect to trusts as the High Court,[1] we note that the Māori Land Court is considering trustees' duties with increasing frequency. In our view, this amendment process has missed the opportunity to seek submissions as to how trustees' duties can and should apply specifically to the Te Ture Whenua framework. For example, we consider that it would be useful for trustees of trusts constituted under the Principal Act if there was a clause which made it explicit that trustees are subject to the Principal Act and the Trusts Act 2019, including with respect to duties as trustees.

As to the proposed amendments to core Māori land and property provisions, we consider these generally support the over-arching objectives of the Principal Act to promote the retention of Māori Land, and to assist in its effective use, management and development. We note the latter objective aligns with current government policy, and other measures already taken by the Government (such as the Kāinga Whenua Loans proposed by Kiwibank in partnership with Kāinga Ora). We note, however, some inconsistencies relating to the proposal to restrict the alienation of Māori customary land that has changed to Māori freehold land.

Structure of this submission

This submission does not comment on each clause in the Bill. Rather, we comment on specific clauses as indicated by the subheadings in each section.

[1] See sections 236-237 of the Principal Act.

Extending the equitable jurisdiction of the Māori Land Court

Clause 6: injunctive relief

We invite some clarity as to the extension of the Māori Land Court's powers with respect to general land owned by Māori. We note that the Māori Land Court already has jurisdiction as to general land owned by Māori that is owned by a trust,[2] but query whether the Committee has fully considered the implications of allowing individual Māori owners of general land to apply for injunctive relief.

Otherwise, we generally support the amendment on the basis that it is consistent with equipping the Māori Land Court with greater options to resolve disputes for the betterment of Māori.

The Māori Land Court is likely in many cases to be more accessible to applicants than the High Court, as the Māori Land Court will have lower filing fees and may have less backlog of cases in comparison to the High Court. For example, in the High Court the filing fee for a standard interlocutory application is $500, whereas in the Māori Land Court fees range from $60 to $200. Further, given its specialised subject matter jurisdiction, the Māori Land Court may well be better placed to consider any specific Māori concerns than the High Court.

We do not suggest that this section should provide exclusive jurisdiction to the Māori Land Court and limit the High Court's inherent jurisdiction. Instead it offers a cheaper and quicker alternative. In some instances it may be more useful to seek an injunction in the High Court, particularly if there are a series of issues, some of which fall outside the scope of the Māori Land Court.

We observe, however, that by expanding this jurisdiction there may be inconsistencies in judgments, results and jurisprudence as between the Māori Land Court and the High Court. Divergence in jurisprudence may, for example, lead to forum shopping by applicants (in other words, an applicant may choose to apply for an injunction in the High Court if he or she considers the jurisprudence favours their position, despite opposing jurisprudence in the Māori Land Court). Divergent jurisprudence may also provide cause for more appeals from the Māori Land Court to the High Court.

In our experience, when determining whether to award an injunction, the Māori Land Court tends to follow the same approach as the High Court by considering the following questions:[3]

- whether there is a serious question to be tried;
- whether the balance of convenience is in favour of an injunction; and
- whether it is in the interests of justice to grant an injunction.

[2] See section 236(1)(c) of the Principal Act. We also note the decision in *Moke v Trustees of Ngāti Tarāwhai Iwi Trust* (2019) Māori Appellate Court MC 265 which appears to cement the Māori Land Court's jurisdiction over general land owned by Māori that is held by a trust, even if the primary or dominant purpose of that trust is not land-related.

[3] See for example *Laing v Taniwha & Paul – Te Touwai B2B2A* (2018) 182 Taitokerau MB 136 (178 TTK 136) at [8], applying the approach established *American Cyanamid Co v Ethicon* [1975] AC 396, [1975] 1 All ER 504 (HL), and followed general in New Zealand *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, *New Zealand Māori Council v Federation of Māori Authorities Inc* [2015] NZHC 1376.

If the Māori Land Court continues with this approach, noting its specialist subject matter jurisdiction, then any inconsistencies in jurisprudence and outcomes may remain more theoretical than real.

Clause 9: equitable relief

We generally support extending the Māori Land Court's jurisdiction to grant equitable relief. This will give the Māori Land Court the same powers as the general courts when considering equitable remedies.

Again we do not suggest that this extension should be treated as limiting the High Court's jurisdiction in any way. To that end we suggest the proposed new section 24C incorporates a further subsection along these lines:[4]

> "Nothing in subsections (1) to (3) shall limit or affect the jurisdiction of the High Court".

Overall the proposed amendments will benefit applicants by providing a less costly and more efficient way to seek a resolution rather than requiring action in the High Court. The proposed amendment also means that broader tikanga-based dispute resolution processes are available to parties, if read in conjunction with the proposed dispute resolution amendments.

[4] Section 237(2) of the Principal Act includes a similar provision with respect to the Māori Land Court's jurisdiction vis-à-vis the High Court's in matters relating to trusts.

Proposed dispute resolution processes

Clause 11: Additional members who know tikanga Māori or whakapapa for proceedings about Māori land

We generally support the proposal that the Māori Land Court has the power to appoint additional members with experience of tikanga Māori or whakapapa.

We note that, for consistency, the existing section 32(2) ought to refer to:

> "… every person appointed under section 31 … shall possess knowledge and experience of tikanga Māori or whakapapa".

Our view is that additional members appointed to assist the Tribunal are acting similarly to lay members of the Court. An additional member or members sitting with a Māori Land Court Judge constitute a sitting of the Māori Land Court,[5] though there are currently no provisions that the Judge or Chief Judge must be satisfied that the additional member is qualified by virtue of that person's knowledge of tikanga or whakapapa. Because of the additional member's ability to influence decision-making of the Māori Land Court, we consider that further provisions are required to reflect the importance of the additional member's position.

As an example, we note sections 77 and 78 of the Commerce Act 1986, which set out the framework for appointing lay members to the High Court when exercising its jurisdiction in relation to certain competition law matters. There, the Governor-General appoints lay members, and must be satisfied of their expertise and qualifications.[6]. Those lay members may also be removed from their position if they are no longer able to perform the functions of the office, they become bankrupt, neglect their duties or engage in misconduct.[7]

While we acknowledge that this Bill envisages appointments on a case-by-case basis, rather than for terms of several years like in the Commerce Act, we nonetheless consider a more robust appointment process is justified. As currently drafted, the only obligation on the additional members is to take an oath to "faithfully and impartially perform the duties of his or her office".[8]

We also consider that the drafting of sub-clause (4) to be in the nature of a privative or ouster clause that immunises the Māori Land Court processes from what otherwise might be a justified challenge or appeal. It is widely acknowledged in New Zealand that such clauses will be construed narrowly so as not to exclude the High Court's jurisdiction for review of error of law.[9]

The clause as currently drafted would be inconsistent with section 27(2) of the New Zealand Bill of Rights Act 1990 (*NZBORA*) which preserves a person's right to apply for judicial review of a determination of any tribunal that affects the rights, obligations or interests of that person. With the Supreme Court recently affirming the courts' power to grant declarations of inconsistency with NZBORA rights,[10] we consider this sub-clause is problematic.

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5 Section 36 of the Principal Act.

6 Commerce Act 1986, section 77(2).

7 Commerce Act 1986, section 77(5).

8 Section 34 of the Principal Act.

9 *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (CA) at [16]. See also PA Joseph "The demise of ultra vires: Judicial review in the New Zealand courts" [2001] PL 354 at 354–355, 363–365.

10 *Taylor v Attorney-General* [2018] NZSC 104, [2019] 1 NZLR 213

Further, demonstrating that an additional member has acted in bad faith is an extremely high bar to prove, requiring evidence that a decision maker was "motivated by ill-will, dishonesty or fraud … and that the [decision-maker] knew what she was doing was unlawful".[11] Quite clearly there are many possibilities that the "proceedings and processes" of the court may be open to appeal or challenge when sitting with an additional member.

This sub-clause also creates confusion that the "proceedings and processes of the court" will be able to be appealed or challenged in the usual way when the Māori Land Court determines matters without the assistance of an additional member, but not when an additional member is a member of that court.

We consider that sub-clause (4) should be removed altogether.

Clause 15: judicial settlement conferences

We support the purpose of this clause. We acknowledge the benefit of a setting less formal than a courtroom where a Judge can assist the parties to identify the strengths and weaknesses of their position on the important issues, and to understand what solutions are appropriate and will lead them to an appropriate conclusion to the dispute.

Given that judicial settlement conferences will be a new process for the Māori Land Court, we observe that it may be desirable for the drafting of this provision to be more consistent with its equivalent in the High Court Rules (rule 7.79). This consistency is so that, as with other aspects of the Māori Land Court's jurisdiction, High Court practice and procedure may provide guidance as to how the process should be implemented, while not limiting the ability for the Māori Land Court to develop distinct jurisprudence and guide proceedings in accordance with tikanga as appropriate. For example, the publication the *High Court Guideline on Judicial Settlement Conferences* may provide useful guidance for the Judges and parties.

In particular, we consider that there should be separate provision for judicial settlement conferences that are convened before a hearing, and those convened during a hearing.

Where a Judge convenes a conference before the hearing of a proceeding, that Judge may assist the parties in negotiating a settlement. If a conference is not successful, that Judge should not be able to preside at the hearing of the proceeding unless by consent of the parties and the Judge is satisfied that there are no circumstances that would make it inappropriate for the Judge to do so (rule 7.79(1) and (2), High Court Rules).

Where a Judge convenes a conference during the hearing of a proceeding, that Judge may not assist the parties with the negotiations (and must arrange for another Judge to do so), unless the parties agree that the Judge should assist with the negotiations and continue to preside at the hearing.

On the current drafting of clause 15(3), a Judge who convenes a judicial settlement conference may assist the parties in their negotiations, but must not preside at the hearing unless by consent of the parties or the only matter for resolution at the hearing is a question of law.

We do not understand why a Judge would be able to preside at the hearing of a matter if the only matter for resolution is a question of law. First, we presume the rationale for removing a Judge from progressing the proceeding is that he or she may have expressed a view on the merits of the case which would make their presiding over the remaining proceeding inappropriate (even though a Judge's role in a judicial settlement conference ought not to extend to an indicative view of the merits). If that is the case, then it may also be inappropriate for the Judge to determine matters of law.

[11] *Attorney-General v Ririnui* [2015] NZCA 160 at [78], *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [106].

Second, it appears that the parties' consent is not required if only legal matters remain to be determined. We consider that the parties' consent, and whether there are any circumstances that would make it inappropriate for the Judge to continue presiding, should not be relevant to whether or not the Judge should continue to preside.

We consider there should be a provision to require that any material produced for the purposes of the mediation should remain confidential to the judicial settlement conference.

We acknowledge that ordering costs in the Māori Land Court is within the Judge's discretion, but we consider that costs should be explicitly excluded from the judicial settlement conference provision, unless there are exceptional circumstances that justify an award of costs.

We consider that this provision should be explicitly subject to the privilege provisions in the Evidence Act 2006 (part 2, subpart 8).

Clause 19: proposed dispute resolution / mediation process

We generally support the proposal for a formal mediation process. We acknowledge that proceedings before the Māori Land Court often involve many sensitive whānau and hapū matters that may be exacerbated by an adversarial court process.

Our submissions on the proposed Part 3A focus primarily on encouraging further clarity as to how tikanga would be involved in the dispute resolution process envisaged by the proposed provisions.

For example, we note that tikanga is only explicitly provided for in proposed section 98I, the purpose provision. At proposed section 98O(4), the mediator is only obliged to "try to give effect to the purpose of this Part in mediating the issues". We consider that tikanga ought to feature more prominently in the proposed conduct of the mediation. For example, proposed section 98O(3) could explicitly allow for the possibility that a mediation could take place on a marae of one of the parties (by consent), or at a different marae if the parties are not able to agree.

We also consider that, similar to our submission about appointing additional members to the Court, a mediator should be sufficiently qualified and have knowledge of experience in tikanga and te reo Māori. As currently drafted, proposed section 98M must have the "skills and experience to mediate the issues referred to them". In our view a mediator who also has knowledge and experience in tikanga may assist the parties in resolving a dispute, even where the issues involved are not tikanga-related. While matters of tikanga may not be the primary issues for mediation, tikanga-based processes can encourage resolution.

In this regard, we consider there should be a more robust process for the appointment of mediators. We consider that the list of approved mediators compiled by the Chief Executive of the Ministry of Justice (proposed section 98M(2)), would benefit from input by the Chief Executive of Te Arawhiti, the co-Presidents of Te Hunga Roia Māori o Aotearoa, the New Zealand Law Society and/or the Arbitrators' and Mediators' Institute of New Zealand. In this regard we observe that our experience of alternative dispute resolution processes agreed between Māori parties often include input from Te Hunga Roia Māori o Aotearoa.

We also consider that mediations in accordance with tikanga may assist in disputes involving both Māori and non-Māori parties. We consider that the current drafting of proposed section 98O would not necessarily encourage or allow for non-Māori parties to be engaged in tikanga matters (because proposed section 98I refers only to "the relevant tikanga of the whanau or hapu with whom they are affiliated"). Our view is that non-Māori parties to any disputes subject to mediation ought to be permitted to engage a representative or consultant to assist that party engage in any tikanga related matters, whether procedural or substantive.

The Bill also requires the mediator to provide written reports to the Registrar to record the "progress" of the mediation. In our experience of dispute resolution, mediators are wary of creating any formal record of negotiations between that parties that do not reflect the actual (or interim) positions of the parties. We also acknowledge this step could provide an administrative burden on the mediator. We suggest removing this proposal, and substituting a requirement that the mediator must be satisfied that any written agreement produced as a result of the mediation fully and finally settles the aspects of the dispute that were subject to mediation, noting the issues (if any) that the parties agree should proceed to hearing.

Overall, we consider that this is an opportunity for the Māori Land Court to establish an alternative dispute resolution process that incorporates and reflects tikanga Māori. If successful, then that process may be reflected in private dispute resolution processes agreed by parties (whether Māori or non-Māori) in private contractual agreements.

Trust and succession matters

Clauses 20-24: disposition

We generally support these proposed amendments to the Principal Act because, consistent with the purposes of the Principal Act, they allow interests in Māori freehold land to pass to the descendants of deceased owners immediately.

We agree that, as has been the case since the Principal Act's inception, interests in Māori freehold Land should stay within whānau lines. Too often in decades past have interests been transferred to or ultimately controlled by those outside of the whānau line (i.e. a spouse). These sections make it clear that interests will automatically be vested in descendants upon the death of an owner of Māori land, while protecting a spouse's right to occupy the family home (if it is on the land) and receive any income or discretionary grants from the interest for some time.

Clause 26: extended powers for the Registrar for "simple and uncontested" succession matters

We support the proposed amendments to the Registrar's powers. In our view, this proposal will provide meaningful and substantial benefits to those who must deal with their Māori freehold Land through the Māori Land Court.

However, we do not think this section goes far enough. We are concerned that Registrars may too readily refer any perceived controversial cases to the Court when their powers ought to be exercised, reducing the effectiveness of this section.

In that regard, we suggest that the Registrar should be able to determine matters that are simple or uncontested, rather than requiring matters to be both simple and uncontested.

We say that because we can envisage that simple succession matters may be contested but on frivolous grounds. It would be bizarre if the Registrar could not determine a simple succession matter that was contested, for example, on grounds that are not within the contemplation of the Act (for example, if the contest is made on frivolous or vexatious grounds, or grounds that abuse the processes of the Court). On the other hand, there may also be uncontested matters that are simple enough for the Registrar to discern.

Separately, we are concerned that neither the Bill nor any proposed government commentary explains whether, and to what extent, resources will be dedicated to training Registrars to equip them to deal with the proposed extended powers. Whether matters are simple and/or uncontested, the Registrar's powers are ultimately adjudicatory. Additional resources and training ought to be provided for so that the proposed power is used effectively.

Taking those submissions into account, we would amend sub-clause (4) as follows:

> "The Registrar may, only after due consideration and there being no other way for the Registrar alone to progress an application under section 113A(1), at any time refer the applications to the court for determination if the Registrar decides that an application is not for a simple ~~and~~ or uncontested succession."

Clause 27: whangai determined by tikanga Māori

While family law matters are outside Chapman Tripp's primary Māori legal practice, we note simply that feedback in response to the proposed amendments to the Principal Act in 2016 included questions as to how the Māori Land Court would determine if the "tikanga of the relevant iwi or hapu" differs from and therefore overrides the tikanga of the relevant whānau.

At the time, the Select Committee's recommendation was that the tikanga of the relevant whānau ought to prioritised over the tikanga of the wider hapu or iwi. In the absence of such explicit guidance in this Bill, we suggest that these matters would be within the expertise of additional members that the Māori Land Court may appoint under clause 11 (proposed section 32A).

The Committee may consider explicitly noting that additional members appointed under proposed section 32A may assist the Māori Land Court with determining whangai matters.

Clause 42: removal of trustee

We generally support the alignments made under this section with other relevant legislation, particularly the Trusts Act which will become effective in 2021. We believe the amendments in line with the broadening of scope for removal of trustees, as demonstrated in more recent Māori Land Court jurisprudence regarding trustee duties.[12]

We would, however, propose a change to section 240(3), as follows:

> "A person may no longer be suitable to hold office as trustee, for example, because of the following conduct or circumstances:
>
> (d) ceases to qualify as an officer of a charitable entity under section 16 of the Charities Act 2005."

While it is outside the scope of the amendments proposed in the Bill, we consider the lack of specific alignment with, or reference to, the statutory duties on trustees in the Trusts Act 2019 is a missed opportunity. We consider clarity and specificity of duties and functions would assist trustees of trusts under the Principal Act.

Clause 46: committee of management

We query why this section is not being fully re-designed, as per the new removal criteria in proposed clause 42 (section 240). We consider that consistency across removal rights (in relation to different entities under the Principal Act) should be prioritised. Unless good cause exists to not align the removal regime, this section should be amended further per clause 42.

Clause 48: interest register for Māori incorporations

We generally support this amendment to the Act. It is not only good practice to be transparent about interests held by those in charge of the governance of an entity, but this amendment also better aligns Māori incorporations with the requirements for companies under the Companies Act 1993.

With that in mind, we suggest minor amendments to the new section, to further align in with the Companies Act:

> Section 274B(2):
>
> The register must contain—
>
> (a) details of the beneficial interests held by each member; ~~and~~
>
> (b) details of dealings in the beneficial interests by each member; ~~and~~
>
> (c) details of the making of a payment or a provision of the benefit or the making of a loan or the giving of a guarantee or the entering into of a contract by the committee of management for the benefit of a member or members of the committee of management;

[12] *Bamber - Tahorakuri A No 1 Sec 33A 2 Block* (2019) 218 Waiariki MB 292 (218 WAR 292); *Tata v Katipa - Waiwhakaata 3E4C Lot 2A* (2018) 170 Waikato Maniapoto MB 123 (170 WMN 123); *Nicholls v Nicholls - Koromatua 3A* [2018] Māori Appellate Court MB 604 (2018 APPEAL 604).

(d) details of any indemnity given to, or insurance effected for, any member or employee of the committee of management; and

(e) declarations made under section 274C.

Section 274B(4): [insertion of the following at the end of the current section]: An interests register referred to in Act may be documented in electronic form only, as long as it reflects the true and accurate version of the interests register and can be attested to as such during normal business hours by a duly-appointed representative or member of the committee of management.

Core Māori land and property matters

Clauses 7-8: Powers relating to Māori freehold land (mortgages, easements and covenants)

We generally support the proposal to extend the Māori Land Court's jurisdiction to deal with specific matters relating to Māori freehold land because the Māori Land Court has expert knowledge regarding Māori freehold land and is therefore the most appropriate body to deal with these matters.

The characteristics of multiply owned land means that more specific expertise may be required to appropriately deal with easements and covenants affecting Māori land. For example, under Māori trusts, trustees can make decisions by majority (which is distinct from general trust law). This means decisions regarding easements can be made without the support of all concerned, which can (and does) lead to challenges and conflict that require a depth of understanding that the general courts do not possess.

An example of a case that shows the complexities of multiply owned land is the series of decisions concerning the roadway order on Whaanga 1D.[13] While this application is already under the jurisdiction of the Māori Land Court, it does show the complexities that can occur with regard to interests affecting multiply owned land.

Clause 16: Enforcement orders for recovery of land

We support the inclusion of this clause allowing the Māori Land Court to send an order for recovery of land to the High Court or District Court as this addresses the lack of enforcement provisions in the Act.

For example, under the Principal Act, applications under section 20(d) in particular, are often brought in conjunction with an application for an injunction under section 19. This is in large part because it is unclear how section 20(d) orders are to be enforced. By comparison, under the District Court's comparable section 79 of the District Court Act 2016, the District Court can issue a warrant under sections 194 to 201 of that Act authorising a bailiff or constable to give possession of the land to the person named in the warrant (the form of the warrant is set out in Schedule 2 of the District Court Rules 2014).[14]

Further, under subsections (a)-(c) of the Principal Act, where an injunction is not appropriate, Māori land owners are required to seek enforcement orders in the District or High Courts, which is expensive and time consuming.

Therefore the inclusion of this clause will reduce ambiguity, promote access to justice, and provide the Māori Land Court with an alternative mechanism to the issue of an injunction.

Clause 31: Change from Crown land to Māori customary land

This proposed amendment is a new power, which we generally support. We note some general drafting amendments:

- "[M]embers" at proposed s 131A(5)(b) is not defined. We query whether "members" should be replaced with "new owners", which is a defined term;
- "Minister" is defined to mean the Minister of Māori Affairs , though there are no amendments in current Bill to amend the Principal Act in this regard. We query whether the drafting intends any Minister to mean any Minister of Māori Affairs, or any Minister in

[13] *Donaldson - Whaanga 1D 1D Roadway* (2019) 188 Waikato Maniapoto MB 142 (188 WMN 142

[14] See *Henry v Wood - Part Whakanekeneke 1B* (2014) 85 Taitokerau MB 175 (85 TTK 175).

the broader sense — in particular given the word "any" has been used. If the drafters intended "any Minister of the Crown" to have this power, we suggest rephrasing s 131A(2)(b) to "any Minister of the Crown".

Clause 32: Change from Māori Customary Land to Māori freehold land

We note in particular the proposed removal of the words "the relative interests of" from section 132 of the Principal Act.

Nothing in the explanatory note to the Bill suggests that the changes to section 132 are intended to prevent the Māori Land Court from determining the relative interests of owners in land. There are also no comments in the explanatory note about reducing the scope of the Māori Land Court's exclusive jurisdiction on certain matters.

The Cabinet Paper and the Regulatory Impact Statement do not address this change specifically, however the Cabinet paper does note at Appendix 1 (Strengthening protections for the retention of Māori land) that land status changes from Māori customary land to Māori freehold land, "the Māori Land Court must continue to recognise equal ownership of the collective lands as opposed to converting the ownership interests into individual shares."[15]

This material suggests that where Māori customary land is concerned, the focus should be on the class and therefore the Court should not determine the relative interests of the owners as this may be seen as inconsistent with recognition of equal interests.

We consider that this section should be amended to make it explicit if the intention is to remove the ability of the Māori Land Court to determine relative interests.

Clause 35: Māori customary land cannot be alienated

We support the proposed amendments to section 145. In particular we support that Māori customary land cannot be vested or acquired under any Act. This amendment provides clarity that Māori customary land cannot be acquired under the Public Works Act 1981.

We also support the addition of clause 145(2) as these forms of alienation enable better utilisation of land and do not alienate the land from owners in the way that a sale or lease does and so allowing these interest remains in line with the Preamble and section 2 of the Principal Act. In particular clause 2(d) enables better utilisation of land.

Clause 36: Right of First Refusal

We support prescribing a Right of First Refusal (RFR) process for sales or gifts of Māori freehold land.

The proposed prescribed process, although adding administrative steps to the RFR regime, creates certainty and ensures that the RFR is genuine and cannot be circumvented.

Clause 37: Alienation by trustees

Under the proposed section 145(2)(c), an application may be made to the Māori Land Court to change the status of land from Māori customary land to Māori freehold land. The proposed section 150A(1A) then provides that the trustees of a trust over Māori freehold land that was previously Māori customary land cannot sell or gift that land (whereas Māori freehold land may be sold or gifted provided the relevant thresholds are met). There is no commentary to explain this fetter on the rights of the class of person who are the owners of the land to determine what they want to do with the land.

In our view the intention behind this proposed amendment requires clarification.

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[15] Cabinet Paper, Appendix 1 at 4(a): *Strengthening protections for retention of Māori Land.*

Clause 38: Exclusion of interests in Māori Land founded on adverse possession

We generally support the clarification that the doctrine of adverse possession does not apply to Māori land. Under the Land Transfer Act 2017, section 159 expressly excludes Māori land from adverse possession applications. However, there was some uncertainty about whether and to what extent Māori land remains susceptible to adverse possession claims under the common law. The amendment to this section removes this doubt.

Clause 41: Simple and uncontested trust matters

We refer to our submissions on clause 26.

Clauses 54-56: landlocked land

We support clause 54 as it broadens the definition of reasonable access to include "services", which will make it easier for Māori land owners to address landlocked land issues.

Access to landlocked land is a barrier to whānau accessing and using their Māori land. Services will enable better utilisation of land (for example for placing land into production or granting a lease of land). Services are also required for resource and land use consents (for example the establishment of a papakāinga).

As for clause 55, we support the proposed addition of further factors that the Māori Land Court can consider when deciding whether to grant reasonable access to landlocked Māori land. Landlocked land is a longstanding issue for Māori owners, impacting their ability to access and utilise their land. Further, the addition of (da) and (db) specifically enable the Māori land Court to make culturally appropriate access orders.

We also support clause 56. In particular, we support the removal of section 326D(3) and (4) as this enables Māori land owners to take appeals to the Māori Appellate Court (rather than the High Court), which will reduce costs for Māori land owners.

However, this amendment does not make it explicit that appeals can now be taken to the Māori Appellate Court. In this regard we suggest amending section 326D(3) so that appeal rights are explicit, and removing section 326D(4).

Clause 57: occupation orders

We support the proposal to extend the Māori Land Court's ability to grant occupation orders to beneficiaries of a whānau trust. We consider this will enable whānau to reconnect with their whenua and provide Māori land owners with better opportunities to use their land to achieve their housing aspirations (for example, through papakāinga developments).

We note this proposed amendment aligns with the KiwiBank amendments and the Kāinga Ora Loan scheme, which both require evidence of occupation orders. This proposal also aligns with the Government's aim to increase Māori housing tenure.

Clauses 60-61, 64: Māori reservations

We generally support the amendments to the Māori Reservations scheme. Under the current regime, the ability to make a reservation rests with the Chief Executive, though in reality the Chief Executive is unlikely to reject such recommendations. Currently the process creates additional administration, which will be reduced by this amendment.

Further, the Māori Land Court has expert knowledge regarding Māori freehold land and is the most appropriate body to deal with these matters.

We also support that Māori Reservations cannot be vested or acquired under an Act, as this makes it clear that Māori Reservations cannot be acquired under the Public Works Act 1981. While Māori Reservations cannot be compulsorily taken under the Public Works Act currently,[16] a legislative prohibition creates certainty.

We also support the inclusion of leasing for papakāinga housing as we support increasing Māori housing tenure and promoting better use and development of land.

We support the proposal for registration of Māori reservations. Records of title are the foundation of most transactions in Aotearoa and therefore provide certainty and ease of administration. Currently Māori reservations are gazetted. Gazette notices are cumbersome and can create administrative issues as time passes.

[16] See *Grace – Ngarara West A25B2A* (2014) 317 Aotea MB 268.