

# Review of Te Ture Whenua Act 1993

## Introduction

At the beginning of April this year the Associate Minister of Māori Affairs released the Review Panel's report into Te Ture Whenua Māori Act 1993. The report makes broad recommendations for reform of the Act. Given the potential for the report to influence the development of Government policy in relation to the Act it deserves timely and robust scrutiny.

Yet to date the report has not been the subject of any scrutiny of note in the public arena. Although Māori bodies and legal commentators did engage with the review process itself, and there was a modest level of media interest in the report when it was first released, I am not aware of any in-depth analysis of the report since its release. This may be contrasted with the response in earlier generations to reports that led to the reform of Māori land law – the analysis was timely, incisive and often prescient.

The absence of scrutiny of the report puts some responsibility back on the Māori Land Court, which deals with the Act on a daily basis, to offer an assessment of the report. In particular, the Court's key stakeholders, Māori land owners, deserve an in-depth evaluation of the report. Constitutional convention dictates that the judiciary cannot comment on Government policy concerning the law, in this case the Act. However, importantly, the report is not Government policy but the view of an independent panel reporting to the Government, and at the time of writing this article the Government has yet to announce its policy in response to the report.

Therefore in this article I provide my evaluation of the report as a Judge of the Māori Land Court. I approach this exercise by briefly setting out the background to the review of the Act, then offer my general assessment of the report, and finally discuss in some detail the report's five propositions and various recommendations.

## Background to the review

The Panel's appointment in June 2012 was preceded by two earlier reports released in 2011: Owner Aspirations Regarding the Utilisation of Māori Land, Te Puni Kokiri (2011), and Māori Agribusiness in New Zealand: A Study of the Māori Freehold Land Resource, Ministry of Agriculture and Forestry (2011). The MAF report clearly influenced the scope of the review as it is cited in the Panel's terms of reference, and both reports are cited in the Panel's report. In addition, in February 2013 during the course of the review, the Ministry for Primary Industries released a further report prepared by PricewaterhouseCoopers: Growing the Productive Base of Māori Freehold Land (2013).

Although the TPK, MAF and MPI reports addressed different aspects of Māori land, their common theme was the enhancement of Māori land owners' use and development of their land to increase its productivity. What did the reports consider to be the key determinant for increasing the productivity of Māori land? The MAF report best expressed the answer in this way:

*...the delivery, or not, of the undoubted economic growth opportunity associated with enterprises centred on Māori freehold land is strongly linked to two key and dominant factors:*

- *The ability to make decisions;*
- *Access to, and availability of, appropriate skills and capability.*

*These two factors are closely associated and strongly influence each other, to the point that they should not be considered in isolation of each other. MAF's proposition is that the dominant factors of decision-making and access to appropriate skills and capability are the root of success at all levels within the framework that we have described earlier. At all levels decision-making relies on the governance structure in place and the advice available to support the decision-makers. In turn, the execution of decision-making relies on the collective interaction of the governance structure in place, the farm supervisor and/or consultant, the farm manager and the farm staff.*

The principles that underlie these conclusions apply not only to agribusiness but also to all Māori land. In short, good governance is widely considered to be the key determinant of successful utilisation and development of Māori land. That is certainly the experience in the Court. Thus, improving governance of Māori land might reasonably be expected to feature to a large degree in the review and the resulting report.

Accordingly, the review of the Act may be seen as the culmination of the three earlier reports, with the Panel being expressly tasked with looking at the role of the Act in enhancing or inhibiting Māori land owners' use and development of their land. This is reflected in the review's terms of reference.

The *ultimate outcome* of the review is "to empower Māori land owners to achieve their aspirations while enabling the better utilisation of their land."

The scope of the review focuses on four key areas:

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

In addition, the Panel was expected to make recommendations about improving capability (particularly skills and knowledge) in those four areas.

The Panel's *tasks* were to:

- draw on existing research and conduct additional research and consultation as required;
- assess the extent to which the current regulatory environment is enabling or inhibiting the achievement of Māori land owner aspirations in general as well as specifically in the cases of ownership, governance and access to resources;
- undertake consultation; and
- provide a report to the Associate Minister of Māori Affairs with a series of structured recommendations on what form of legislative intervention might best support the owners of Māori land in reaching their aspirations.

The second of these tasks – assessing the “regulatory environment” – was and remains critical to the ultimate success of the review. Any panel assigned to review an Act must focus on its substance: that is, what works and what does not work? This was particularly important for the present review as the earlier TPK and MAF reports had perceived there to be “regulatory impediments” to utilisation and development of Māori land without providing any specific examples.

### **General assessment of the Panel's report**

In my view the report falls short of its terms of reference, is flawed in many respects and, as a consequence, the review has missed the opportunity for a rigorous evaluation of the Act. To be fair to the Panel, there may have been timing and resourcing issues that constrained their work. Nevertheless, the report's limitations are there to be scrutinized.

As noted above, because the review followed the broader-focussed TPK, MAF and MPI reports, it needed to provide in-depth expert analysis of whether the Act was “enabling or inhibiting the achievement of Māori land owner aspirations”, as the terms of reference required. It does not do that.

In point of fact, the Panel candidly acknowledges that it abandoned a “what is wrong with the current law and how should it be fixed” approach in favour of what it terms a “principle-based approach”, that is, “what should the law look like”.

A principle-based approach is commendable, but it is of little value if it is not supported by analysis of the existing law and how well that law advances the said principles. Dispensing with that level of analysis leads to a document that is no more

than a philosophical discussion, and ignores the central point of a review of this type, which is to critically examine the existing law.

The structure and brevity of the 33-page report give an indication of its shortcomings. The report consists of an executive summary (pages 3-13), a background discussion of Māori land and the Panel's process (pages 14-16), an explanation of the Panel's principle-based approach and discussion document (pages 17-20), a summary of feedback from submitters (pages 21-28), and the Panel's recommendations (pages 29-31). The chapters tend to repetition and it is often difficult to glean with any clarity the substance of the Panel's reasoning (most of which is contained in pages 17-20 and 29-31).

Significantly, the substantive analysis of the perceived problems with the Act amounts to three paragraphs beginning at the bottom of page 17:

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

*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.*

*Engagement may not be occurring for a number of reasons, including a significant lack of incentive to engage (e.g. the land is unable to be utilised or is extremely marginal) or the presence of a disincentive to engage (e.g. the land is in a significant state of disrepair or subject to large rates arrears). However, this land still needs to be administered as effectively as possible. There may be opportunities for an external administrator to identify potential owners and return the land in its current state or in a more developed state.*

Such cursory analysis is wholly inadequate for what was intended to be the first comprehensive review of the Act since 1993. It gives an inaccurate impression of how the Act operates and fails to explain in any reasoned way how the Act inhibits (or enhances) Māori land owners' aspirations. The Act may well have deficiencies, but having read the report the reader is none the wiser as to the specifics of those deficiencies

The report is structured around five propositions:

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

- Proposition 2: All Māori land should be capable of utilisation and effective administration;
- Proposition 3: Māori land should have effective, fit for purpose governance;
- Proposition 4: There should be an enabling institutional framework to support owners of Māori land to make decisions and resolve any disputes;
- Proposition 5: Excessive fragmentation of Māori land should be discouraged.

The propositions are themselves laudable and will no doubt resonate favourably with Māori land owners. In fact, for the most part they can already be found in the Act's Preamble and ss 2 and 17.

However, the major flaws in the report lie not in the five propositions themselves but in how the report's analysis navigates from those propositions to the various recommendations for reform of the Act.

Some of the report's minor recommendations need little explanation, such as the proposal for mediation. But the more significant recommendations – especially the proposed new category of “engaged owners” or the new type of governor known as an “external manager or administrator” – have serious shortcomings.

In terms of the general problems with the recommendations, many suffer from an erroneous understanding of the Act or the circumstances of Māori land; are not supported by relevant case studies or empirical evidence; at times comprise over-designed solutions for what are simple problems needing simple amendments to the Act; and are not evaluated within the historical context of the Act and its predecessors. I elaborate on these matters in my discussion of the five propositions.

The lack of reference to case studies and empirical evidence is a particular weakness in the report. If the Panel was of the view that the Act impeded Māori land owners in certain circumstances, then it needed to test its thesis by considering actual case studies. Moreover, the case studies needed to examine whether Māori land owners in similar circumstances have succeeded. This is important because there are numerous examples of Māori land trusts and incorporations that have flourished under the Act, which invites the questions: why have some Māori land blocks succeeded and others have not? To what extent is the Act to blame? These questions are left unasked and unanswered in the report.

The failure of the report to place the Act and its predecessors in their historical context is a further significant omission. Māori land is one of the most legislated subjects in our parliamentary history. Understanding that history, and the circumstances that led to the passing of the Act in 1993, is fundamental to any review of the legislation. The report does not address that historical context. The 21 year period since the passing of the Act has arguably been the quietest two decades of legislative activity affecting Māori land since 1840. And yet in that time we have seen major successes with utilisation and development of Māori land. That in itself

suggests that the fundamentals of the Act are sound. In the absence of an historical perspective, the report risks underplaying the positive features of the Act and repeating mistakes of the past.

At a more fundamental level, the relationship between the stated outcome and scope of the review and some of the report's recommendations is difficult to understand. In particular, how do the recommendations actually promote "trustees with expertise to support effective decision-making", or ensure "the better utilisation of Māori land is enabled", or "improve capability, in terms of skills and knowledge"? As for "access to resources", the report simply does not address the topic.

Perhaps the point of greatest moment is that the report fails to make any recommendations that will substantially improve the governance of Māori land.

I now turn to consider in detail the five propositions and the various recommendations made in the Panel's report.

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

The difficulty with proposition 1 is its underlying premise that there are significant impediments in the Act to the engaged owners utilising their land, and that a remedy is therefore needed.

The Panel's principal recommendation is that the Act be amended by introducing a new statutory category of "engaged owners". An engaged owner is said to be "an owner who has actively demonstrated their commitment to the ownership interest by exercising a vote either in person or by proxy or nominee." The engaged owners are to be empowered to make decisions concerning the land (except for sale or permanent disposition) that will bind all owners and third parties, without the need for endorsement of the Court. The second recommendation is that the Act continues to include safeguards requiring a high threshold of owner agreement before decisions to dispose of Māori land have binding and legal effect (this is effectively a continuation of the existing law).

The major defect with the principal recommendation is that it imagines a problem that does not exist. That is, it assumes that the engaged owners – those who take an active interest in their land – are unable to realise their aspirations for their land because the unengaged owners act as some sort of handbrake that prevents progress. Thus, the report implicitly reasons that empowering the engaged owners to make decisions will release that handbrake. In addition, the report claims that the Court's approval is required for most decisions, and that this has been an impediment to progress.

As I explain below, both assumptions are wrong. The engaged owners currently make decisions regarding their land, and most utilisation and development decisions do not require the approval of the Court. In other respects, as I will also explain, the engaged owners model is inherently problematic.

***The unengaged owners are not the problem the report imagines***

For a significant number of blocks of multiply-owned Māori land today, the engaged owners are a minority of the owners. This is easily confirmed by comparing the attendance of owners at meetings with overall ownership. And it is not a new phenomenon. Native Land Court minutes from the late nineteenth and early twentieth centuries often noted that within a few years of title having been determined, there were difficulties in engaging with the majority of owners.

But the current Act and its predecessor addressed the major problems that stemmed from that phenomenon through the legislation's governance structures of trusts and incorporations. In short, it is a straightforward process for the engaged owners to place their land under a governance structure, and once that occurs the engaged owners effectively decide who the governors are and what happens with the land.

It is simply wrong for the report to infer that any lack of development of Māori land since 1993 is due to the engaged owners being in the minority and therefore unable to make decisions. There will be a range of other factors that have held back the progress of such land blocks.

In practice, when the engaged owners wish to progress their land they simply constitute an ahu whenua trust. This has been well understood by Māori land owners. Since the Act's inception over 1500 ahu whenua trusts have been created (and only a few terminated). Invariably, those new trusts have been initiated by the engaged owners who are in the minority.

Critically, s 215 of the Act addresses the phenomenon of engaged owners being in the minority by not requiring a minimum threshold of owner support to create an ahu whenua trust. Instead, the key test is quite appropriately that there is no "meritorious objection" to the formation of the trust (s 215(4)(b)). The drafters of the Act clearly understood the dynamics of Māori land and Māori land owners.

Accordingly, under the Act the engaged owners presently make decisions about their land through the legal structures of trusts and incorporations. The vast majority of trusts and incorporations function despite the fact that the engaged owners continue to be a minority, often a mere 5 to 10% of the owners. This is the case for the largest and most successful trusts and incorporations, such as the Tuaropaki Trust and Mangatu Incorporation, right down to the smallest papakainga trusts. Not only have trusts and incorporations functioned under the Act, many have flourished, completely transforming their land and financial circumstances.

That is not to say that the unengaged owners should not be encouraged to get engaged with their land or that they do not give rise to some problems. They can certainly pose problems when it comes to maintaining records, holding unclaimed dividends or meeting the statutory threshold for certain exceptional initiatives under the Act (see below). But unengaged owners are simply not the handbrake to progress the report imagines.

Even for Māori land blocks without governance structures, the engaged owners are able to make everyday decisions about their land. However, where they may encounter difficulties is in making longer-term decisions. But the philosophy of the Act in that situation is to shepherd the owners towards one of the Act's governance structures – an approach that has been hugely successful to date and fits with the MAF report's conclusion that good governance is the key to success.

### ***The Court's approval is not required for most initiatives***

The report gives the impression that Māori land owners are also hamstrung because they cannot make decisions themselves without the “endorsement” of the Court. This is said to “disempower owners and makes decision-making processes unnecessarily complex for the majority of the decisions affected.” The report fails to provide any evidence to support this view. It is inaccurate and overstates the effect of the Act.

Land owners and governors implement all but the most exceptional land utilisation or development initiatives themselves without reference to the Court for approval. Any number of case studies could have satisfied the Panel regarding this point. It need only have selected the top 20 trusts and incorporations in the country and surveyed which of their initiatives in the last 20 years required the endorsement of the Court. Very few, if any, would have required the Court's approval. Well-functioning trusts and incorporations seldom need to resort to the Court.

The “exceptional initiatives” (as I term them) that do require Court orders are sales, long-term leases, change of status, title reconstruction and improvement, and occupation orders. But these are truly exceptional initiatives in the sense that they entail permanent or significant alterations to Māori land title, and the Act appropriately imposes certain safeguards in that regard. Furthermore, as per the second recommendation, the Panel in fact agrees that these safeguards should remain. Certainly, for some of the safeguards (such as for long-term leases) there may be an argument to review the statutory thresholds – something the Judges of the Court raised with the Panel – but that is a matter that can be easily addressed by discrete amendment to the Act.

### **The engaged owner model is inherently problematic**

It is also difficult to see how the engaged owner model will actually improve the situation for Māori land owners. Arguably, it will make it worse. I see four particular problems with the model.

First, the model may provide a significant disincentive for owners to place their land under sound governance structures because the engaged owners will be able to make binding decisions in the absence of any governance structure. Given that the MAF report emphasised the critical importance of good governance (a principle echoed by proposition 3), it seems contrary to accepted wisdom and logic (not to mention the aims of the review) to promote a model that circumvents sound governance structures.

Second, the model has the potential to create considerable uncertainty for owners and third parties dealing with Māori land. Who are the engaged owners at any given point in time? Are they the owners who attended the most recent meeting? What about those who attended last year's meeting? What constitutes the official proof of who are the engaged owners? Will lending institutions and government agencies be prepared to deal with the last muster of engaged owners when it comes to important decisions? It is critical for any effective decision making process to have certainty and continuity of decision makers, and both elements are absent from the engaged owners model.

Third, what duties do the engaged owners owe to their fellow owners? The Act imposes trustee duties on those in governance, yet it is not clear whether similar duties will apply to engaged owners. If similar duties are not to apply, what is the basis for accountability? If similar duties are to apply, would it not be preferable for those duties to be exercised within the disciplined environment of a governance structure?

Fourth, if engaged owners are to have the ability to bind their fellow owners, then the rules governing meetings of engaged owners will need to be highly prescriptive. The provisions will likely replicate the current rules under Part 9 of the Act for meetings of assembled owners. If that is so, then it would appear the report is simply suggesting a revamp of the assembled owners' provisions. Experience tells us that the assembled owners' provisions can be suitable for confirming sales or leases of land, but are good for little else. They certainly do not promote improved governance – they were introduced by the Native Land Act 1909 which was not concerned with promoting Māori governance of their land. If the engaged owners model does replicate the assembled owners' provisions it will likely give rise to Māori land owners making ad hoc and short-term decisions. That will certainly not result in the increased productivity of Māori land.

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

The report recommends that the Act be amended to provide for a new category of governor of Māori land known as an "external manager or administrator". This person or body would be appointed to administer under-utilised Māori land where there is absolutely no engagement by the owners. Māori bodies in addition to Te Tumu Paeroa (the Māori Trustee), such as Post Settlement Governance Entities and Māori trusts and incorporations, will be eligible to undertake the role. The Court will

appoint and oversee the external manager or administrator, and that person or body will be governed by new (as yet unspecified) rules.

This recommendation is an example of an overly complex solution for what is a very rare problem that simply requires a discrete amendment to the Act.

To put the recommendation in context, in very rare situations Māori land has effectively been abandoned because there are no known or engaged owners. I emphasise that the situation is very rare: in my eight years as a Judge in the Taitokerau district with over 5000 Māori land titles, I have encountered perhaps one instance of this type.

Currently under the Act it is not possible to appoint a trustee or trustees to administer land in such circumstances because the Court is required to be satisfied that the owners “have had sufficient notice of the application and sufficient opportunity to discuss and consider it” per s 215(4)(a). If there are no engaged owners at all, this provision cannot be satisfied and the Court cannot vest the land in trustees. The land simply languishes.

The simple solution to this isolated problem – as suggested by the Judges of the Court – is to amend s 215 to allow land to be vested in trustees in circumstances where there is no owner engagement and the land is languishing. This would align the Act with the rating charging order provisions in Part 4 of the Local Government (Rating) Act 2002, which permit the compulsory vesting of Māori land in a receiver or trustees where there is a rating debt.

The principal difficulty with the proposal for an external manager or administrator is that it creates an additional and unnecessary category of governor of Māori land for a very isolated problem, when that role can and should be performed by a trustee (as, for example, the Māori Trustee previously did under the Māori Affairs Act 1953). Furthermore, if trustees were instead appointed there would be no need to make special provision for PSGEs or Māori trusts and incorporations to take on that role as s 222(1) of the Act already permits them to be trustees. As for the need to develop special rules to govern this new role, if trustees were instead appointed there would be no need to develop new rules.

Accordingly, the report's recommendation is simply unnecessary and of very limited application.

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

The report makes two recommendations in relation to proposition 3. First, it recommends that the law clearly prescribe the duties and obligations of Māori land governance entities, and that it align those duties and obligations with the general

law. Second, it recommends that the law “clarify” the jurisdiction of the Court to consider alleged breaches of duty of governors and make appropriate orders.

The first recommendation makes sense in principle. But the report fails to address the key question: is the current law deficient in relation to the duties of trusts or incorporations? I am not aware that it is.

Currently trustees of Māori land assume all of the duties and obligations of trustees at general law. This works extremely well. Nevertheless, the Law Commission recently proposed a new Trusts Act for all trusts which would tidy up any uncertainties or inconsistencies regarding trustee duties. The Panel does not explain whether it considers the duties owed by trustees of Māori land trusts to be inappropriate or inadequate, or whether it disagrees with the Law Commission's proposal.

As for incorporations, the Act provides that every Māori incorporation holds the land and assets “on trust” for the incorporated owners in proportion to their several interests in the land (s 250(4)). Is there a difficulty with that duty of trust? Should members of the incorporation's committee of management expressly assume that duty of trust? Are there particular examples where the duties and obligations owed by incorporations or their members have been unclear? The report does not address these matters.

As for the second recommendation, the Panel appears to be promoting a reduction in the Court's role in the appointment and removal of trustees, though this is not made entirely clear in the report. Given my role as a Judge of the Court, it would be inappropriate for me to comment on whether such a change is warranted. Nevertheless, in line with proposition 3, the key issue in the context of the review is whether a reduction in the Court's oversight of trusts will improve trustees' governance of Māori land. The report does not engage with this issue.

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

The report makes two recommendations in relation to proposition 4. First, it recommends that the Act be amended to provide for mediation in the first instance in relation to disputes. Second, it recommends that the law contain “clear and straightforward provisions and rules” to ensure that the Court remains an accessible forum for resolving disputes that cannot be resolved by mediation and to hold governance entities to account for breaches of duty.

Expressly providing for mediation in the Act is appropriate and long overdue. For a number of years Judges of the Court have promoted such an amendment. Nevertheless, care needs to be taken in how the Act provides for mediation. For instance, requiring mandatory mediation may be counter-productive – not all

proceedings in our Court need or are amenable to mediation. Often those participating in the Court process represent a small proportion of the affected parties – how would mediation work in that situation? How would a mediated outcome interface with the Court's statutory powers, especially as they relate to Māori land title? Who will mediate? Are the parties to pay for mediation themselves? These matters are not addressed in the report and will require detailed consideration.

As for the second recommendation, the report does not explain what is unclear or not straightforward about the current provisions in the Act that hold governors to account for breaches of their duties. As discussed in relation to proposition 3, the Act quite appropriately imposes trustee duties on governors of Māori land.

### **Proposition 5: Excessive fragmentation of Māori land should be discouraged**

The report makes three recommendations in relation to proposition 5.

First, the report recommends that the law “provide transparent registration provisions for Māori land titles and assurance of title to reflect the nature of Māori land tenure as a collectively held tāonga tuku iho.”

Once again, the principle that underlies the recommendation is sound but the report fails to spell out the perceived deficiencies with current Māori land titles. In recent years the Government has spent a considerable amount of money implementing the Māori Freehold Land Registration Project to enable full legal titles to issue for Māori land. Are there problems with those titles? Is the concern that the Court registry maintains title records in addition to Land Information New Zealand maintaining the legal title? Have the current titles inhibited Māori land owners? The report does not elaborate on these matters.

Second, the report recommends that the law simplify succession to Māori land through administrative rather than judicial processes. Submitters to the Panel agreed that succession should be simplified but were unclear how this should be addressed.

Once again, given my role as a Judge of the Court I am not at liberty to comment on how well the Court performs its function in dealing with successions. Nevertheless, the report is erroneous in implying that the Court's succession process is particularly complex. Any complexities arise from the inherent nature of Māori land estates and not the succession process.

Invariably Māori land estates involve deceased owners who have not been succeeded to for many years; there may be several generations of owners who remain un-succeeded; owners often hold interests in multiple blocks; some interests are held in a trustee capacity; most estates are intestate; where there are wills, there are statutory restrictions on who may receive Māori land interests; because of those restrictions, the Court can be asked to make special provision out of the estate's income for any person; if there are challenges to a will, those challenging the will

must issue separate proceedings in the Family Court or the High Court; and often a decision needs to be made about the rights of whāngai to succeed.

Furthermore, the completion of succession through the Court often represents the only time the successors and whānau engage with someone who holds qualifications in the law in relation to their land. And importantly, the Court process provides a timely opportunity for successors to discuss and agree to their interests being vested in a whānau trust, which has the huge advantage of curtailing any further fragmentation of interests.

Certainly, some successions do not require judicial oversight. But many do, and the key task in any reform of the Act will be to ensure that the Court retains an appropriate adjudicatory and facilitatory function, and that the succession process remains simple and transparent, as Māori have come to expect.

Third, the report simply recommends that the Act contain provisions to address “barriers caused by excessive fragmentation of Māori land ownership interests” but does not make any specific suggestions. Given that proposition 5 postulated that “excessive fragmentation of Māori land should be discouraged”, it is disappointing that the report did not make any suggestions in this regard.

In fact, it is not even clear how the first two recommendations are intended to discourage excessive fragmentation. Having a sound title registration system does not reduce the fragmentation of interests, and removing successors' direct access to the Court will arguably add a major barrier to the key mechanism in the Act that reduces fragmentation of interests – the whānau trust. Thus, the report's recommendations may well exacerbate fragmentation of interests.

## **Conclusion**

The underlying rationale for any reform of the law is that the current law does not adequately address an existing state of affairs or that the law needs to address a new state of affairs. The report has failed to convincingly articulate either rationale for reform of the Act. That is not to say that there is no case for reform, but the opportunity presented by the review for a considered and expert discussion has been missed. That leaves the Government with the unenviable task of developing policy to reform the Act in the absence of a considered report, and Māori land owners with the even more unenviable task of understanding and responding to that policy when it is formulated.

**JUDGE D J AMBLER**  
**Māori Land Court**  
**Whangarei**