NEW ZEALAND LAW SOCIETY

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Te Ture Whenua Māori Bill

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Table of contents

1	Introduction	2
2	Structure	2
3	Reform objectives	3
4	Express ‘Purpose’ and ‘Principles’ of the Bill	4
5	Terminology	6
6	Land Classifications	8
7	Ownership interests	8
8	Māori customary land	9
9	Māori freehold land	10
10	Whenua tāpui	10
11	Recollectivisation	10
12	Dispositions of Māori freehold land and other land	11
13	Decision-making	12
14	Governance bodies	14
15	Governance Agreements	15
16	Role of the Māori Land Court and the Chief Executive	15
17	Māori Land Service	16
18	Dispute resolution	16
19	Appendix: Detailed comments and recommendations	20

1 Introduction

1.1 The Law Society welcomes the opportunity to comment on the Te Ture Whenua Māori Bill (Bill).

1.2 The Bill is a very significant and comprehensive reform and in the time available it has not been possible for the Law Society's volunteers to complete a detailed review of all 379 pages of the Bill. The Law Society's submission therefore focuses on significant issues and matters of legal principle. The submission also identifies some drafting and technical issues, and recommends changes to improve the clarity and certainty of the legislation.

1.3 The submission also identifies concerns about how the new processes will work in practice and the potential for problems with implementation of the reforms. The Bill needs to be readily understood by owners and managers of Māori land if it is to achieve its purpose and meet the needs of landowners and existing and future kaitiaki. The current version of the Bill does not do that. The Bill is extremely long and complex and will result in three separate statutes.

1.4 The reforms are designed to place greater and clearer responsibilities on governance bodies and kaitiaki (boards or managers), both in terms of stricter eligibility criteria, clearer duties and responsibilities more akin to those of company directors, as well as trustee duties in respect to the Māori land being managed. This is a good development. However, in order for the Bill to be effective such bodies and kaitiaki will need to have a good understanding of the Bill and their duties and obligations under it. This may be a challenge for some landowners and those in governance positions, due to the Bill's length and complexity. Larger, profitable land-holding entities will be better placed to meet these obligations. Smaller trusts may not have the finances or resources to undertake a robust transition or deal with the demands of the new regime.

2 Structure

2.1 The Bill will result in three separate statutes: a separate Te Ture Whenua Māori Act, a Te Kooti Whenua Māori Act, and a Te Ture Whenua Māori (Repeals and Amendments) Act.[1]

	Te Ture Whenua Māori Bill	**Te Kooti Whenua Māori Bill**	**Te Ture Whenua Māori (Repeals and Amendments) Bill**
Parts	Parts 1 to 9	Parts 10 to 15	Part 16
Clause	1 - 342	343 - 454	455 - 495
Schedules	Schedules 1 to 4	Schedules 5 to 7	Schedules 8 to 12
Interpretation clause	5, 6, 7, 12, 20 74, 96, 329	343, 350, 354,398	462

2.2 In this the Bill is a clear departure from all of the previous Acts. The principal reason for the separate statutes appears to be set out at page 16 of the Explanatory Note: "[t]he Māori Land Court and the Māori Appellate Court are provided for as part of the supportive institutional framework, rather than as the central focus of the legislation, as has tended to be the case historically". The decision to place the role of the Court into separate legislation also, it is assumed, reflects the policy of reducing the discretionary role of the Court. The Māori Land Court exercises jurisdiction under a few other statutes, most particularly the

[1] Explanatory Note page 16.

Māori Fisheries Act 2004 and the Māori Commercial Aquaculture Claims Settlement Act 2004.

2.3 Even so the Law Society questions whether three separate statutes are necessary.

2.4 The Court's jurisdiction is now largely set out in the proposed Te Ture Whenua Māori Act.

2.5 If the objective is to create a separate stand-alone statute relating to the Māori Land Court, it is noted that the major part of what will be the Court's jurisdiction is not set out in the proposed Te Kooti Whenua Māori Act but remains in Te Ture Whenua Māori Act. The two principal statutes will have their own interpretation provisions[2] but in the case of Te Kooti Whenua Māori Act these definitions necessarily cross-refer to definitions provided for in Te Ture Whenua Māori Act.

2.6 The proposed Te Kooti Whenua Māori Act will contain a number of powers which would primarily relate to Māori land:

a Injunctions in respect to Māori land or whenua tāpui, or wāhi tāpui or in respect to trustees or agents of Māori land (clause 407);

b orders made in relation to Māori land (clause 413);

c charging orders over Māori land, proceeds of or assets associated with Māori land (clause 418);

to name a few, which would seem better included in one place within Te Ture Whenua Māori Act.

2.7 Where a major statutory reform has taken place that confers jurisdiction on a special tribunal, it has been standard practice for the same statute to cover the substantive provisions and to establish that court or tribunal. For example, the jurisdiction of the Environment Court is comprehensively and clearly set out in the Resource Management Act 1991 and a separate statute was not enacted relating to the Court. The Environment Court performs roles in relation to a number of statutes not just the Resource Management Act 1991.

2.8 The Law Society therefore submits that it is not necessary to enact the Te Kooti Whenua Māori Act. The relevant provisions relating to the Court could instead be contained within Te Ture Whenua Māori Act.

3 Reform objectives

3.1 Māori land is an important category of land in New Zealand, covering 1.456 million hectares and accounting for 12% of the North Island[3] (for historical reasons there is virtually no Māori land in the South Island).

3.2 The Bill is the first restatement of the law on Māori land since 1993 (the current Act is Te Ture Whenua Māori Act 1993 (TTWM 1993). When the current Bill is enacted it will be the eleventh statute in a long sequence of core Māori land statutes starting with the Native

2 Clauses 5 and 343.

3 TTWM Bill 2016, Explanatory Note, p 2.

Lands Act 1862.[4] There have been a vast number of amending Acts and supplementing Acts from time to time, as well as much statute law relating to Māori reserved lands (which the current Bill does not deal with). Over this time there have been many changes in approach, although the core institution, the Native/Māori Land Court, has been a constant factor from the beginning, and has been retained in the current Bill.

3.3 While the Bill continues many aspects of earlier legislation, there are a number of important new changes, including:

a The Native (Māori) Land Court's historic function of investigating titles, being the principal reason the Court was set up in the first place, has now come to an end;

b Owners can now change their land to a collectivised tenure and terminate successions;

c Governance entities are no longer confined to a restricted number of statutory options set out in the legislation and are no longer required to be established by order of the Māori Land Court. Owners can now choose virtually whatever type of governance they like (including ordinary companies, incorporated societies, and ordinary trusts). No Court orders will be necessary for their establishment;

d Changes with respect to the law relating to "preferred recipients" (referred to in TTWM 1993 as a "preferred classes of alienees");

e A new national Māori land register, intended to replace the Māori Land Court's current system of record-keeping, will be created;

f The discretionary powers of the Māori Land Court have been largely eliminated and the Court's functions have been reduced.

3.4 Three key objectives emerge from the introductory discussion in the Explanatory Note:

i. the need to reduce the discretionary powers of the Māori Land Court;

ii. the importance of utilisation of Māori land; and

iii. the need to simplify the requirements relating to governance structures.

Most of the other innovations in the Bill appear to derive from these core objectives.

4 Express 'Purpose' and 'Principles' of the Bill

4.1 The Preliminary Provisions part contains a statement of the purpose and principles of the proposed Te Ture Whenua Māori Act; a provision relating to how the purpose and principles of the Act are to be achieved; an interpretation provision; and some specific provisions relating to individual freehold interests, owners, descent relationships, and proof of tikanga Māori.

4.2 The Act begins with a statement of "purposes" and "principles" (clause 3), given in the Māori and English languages. Clause 4 states that persons exercising powers under the Act etc "must do so, as far as possible, to achieve the purpose of Parts 1 to 9 [of the proposed Te Ture Whenua Māori Act]" and, "in order to achieve that purpose",

[4] The others being the Native Lands Act 1865, the Native Land Act 1873, the Native Land Court Act 1880, the Native Land Court Act 1886, the Native Land Court Act 1894, the Native Land Act 1909, the Native Land Act 1931, the Māori Affairs Act 1953, and the Te Ture Whenua Māori Act 1993.

must "recognise the principles of Parts 1 to 9". The descriptions of "purpose" (Clause (3)(3)) and "principles" (Clause (3)(4)) are both complex.

4.3 It is suggested that the "purposes/principles" distinction should be reconsidered and the possibility of the objectives of the Bill being consolidated into one general provision should be addressed.

4.4 The Resource Management Act 1991 provides valuable lessons as to the likelihood of complex litigation where statutes have "purposes" and "principles" and there are then issues as to relative rankings between different parts of the Act.

Treaty reference

4.5 The Treaty of Waitangi is referred to, given that land is one of the taonga guaranteed under the Treaty. However, the Treaty reference (clause 3) is not consistent with the drafting of the majority of other statutory references to the Treaty. Most statutory references have been to the 'principles of the Treaty' and it is those words which have been the subject of judicial interpretation.

4.6 Such legislation is now numerous and has been fairly usual wherever the scope of the particular legislation has impinged on Treaty guaranteed rights, although its use has become rare since 2003. Legislation which include references to the 'principles' of the Treaty now include:

a Treaty of Waitangi Act 1975;

b State-owned Enterprises Act 1986 (s 9);

c Conservation Act 1987 (s4);

d Education Act 1989 (s 18);

e Crown Minerals Act 1991 (s 4);

f Resource Management Act 1991 (s 8);

g Harbour Boards Dry Land Endowment Revesting Act 1991 (s 3);

h Crown Research Institutes Act 1992 (s 10);

i Hazardous Substances and New Organisms Act 1996 (s 8);

j Royal Society of New Zealand Act 1997 (s 24);

k Crown Pastoral Land Act 1998 (s 25);

l Employment Relations Act 2000 (Schedule 1B);

m Energy Efficiency and Conservation Act 2000 (s 6);

n New Zealand Public Health and Disability Act 2000 (s 4);

o Hauraki Gulf Marine Park Act 2000 (s6);

p Climate Change Response Act 2002 (s3A);

q Local Government Act 2002 (s 4),

r Land Transport Management Act 2003 (s 4);

s Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (s 12).

4.7 The standard that the persons exercising discretion under the various statutes have to meet in relation to the principles of the Treaty has ranged from 'nothing in this Act shall permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi',[5] to 'giving effect to the principles of the Treaty' or 'having regard to the principles of the Treaty', to the most recent: 'in order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act'.[6]

4.8 If any discretion of the Chief Executive under the new Act is questioned, the courts would have to revisit the interpretation of the sections in this Bill which refer to 'principles of the Treaty', because these references are currently drafted differently from the other legislation referred to above. As case law and interpretation of a similar phrase in other Acts is now well settled, it would add certainty to have the Bill drafted in a similar manner.

4.9 The Law Society therefore recommends that consideration be given to rephrasing clause 3(3) to incorporate recognition of, and provision for, the principles of the Treaty of Waitangi. This would give the benefit of a provision that has settled case law underpinning its interpretation. Suggested wording could be:

> The purpose of **Parts 1 to 9** is to recognise and provide for *the principles of Te Tiriti o Waitangi and the* mana and tino rangatiratanga that since time immemorial Māori have exercised and continue to exercise over their lands, resources, and taonga in accordance with tikanga Māori and, consistent with the guarantees given to Māori in Te Tiriti o Waitangi, to protect the right of owners of Māori land to retain, control, occupy, and develop their land as a taonga tuku iho for the benefit of present and future generations of owners, their whānau, and their hapū.

5 Terminology

New terms

5.1 The Bill incorporates many Māori terms. Examples are "kaitakawaenga", "kaitiaki", "kaiwhakamarumaru"; "kawnenata tiaki whenua"; "matauranga takawaenga", "participating owners" (a wholly new concept); "preferred recipients" (replacing "preferred classes of alienees"); "rangatōpū" (meaning a governance entity, whether this is a trust, incorporation, or other corporate body); and "whenua tāpui".

5.2 This array of new terms risks creating significant new uncertainties. The final meaning of some of them may have to be tested in court, but this will take some time, and in the meantime those having to use the new legislation will have to make sense of it themselves.

5.3 While this may be the inevitable result of new legislation, it raises the issue as to whether with each definition such wholesale change (with the attendant risk of litigation) is necessary.

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5 Section 9 State-owned Enterprises Act 1986

6 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (s 12)

Definitions

5.4 The Bill introduces a significant body of terminology and also has many new defined terms spread throughout the Bill. In the Law Society's view, the Bill could be improved for end users by adding more of these defined terms to clause 5 so that there is one location (the Interpretation section) that provides a more comprehensive set of definitions.

5.5 However, some definitions are lengthy and cannot sensibly be included in a general Interpretation provision. For example, clause 6 provides the meaning of "individual freehold interest", clause 7 defines 'owner ', clause 12 provides the definition of "Māori customary land", clause 20 provides the definition of "Māori freehold land". These are helpfully located at the front end of the Bill and these terms are cross-referenced in the Interpretation provision (clause 5) which references the meanings of these terms in the substantive provisions.

5.6 This approach has however not been applied consistently. For example, although the interpretation provision (clause 5) provides that the definition for "preferred recipient" is the "meaning given by section 76", section 76 also contains a definition of the term "preferred entity" but this is not listed in the Interpretation section.

5.7 Other more extensive definitions are located elsewhere in specific clauses of the Bill and referenced in clause 5, although they apply throughout the Bill. There are also terms which are defined for specific parts of the Bill but which are not used elsewhere. 'Landlocked land' is defined in clause 319 and then used elsewhere (clauses 110, 113, 115, 136, 298 and Schedule 1) but with reference to clause 319. This could usefully be included in clause 5. Other examples of definitions that could helpfully be included in clause 5 are 'eligible beneficiary' and 'owner needing protection'.

5.8 Another term which is defined for the purposes of Parts 1 to 9 (that is for the whole of the proposed Te Ture Whenua Māori Act) in separate clauses but is not included in clause 5 is: 'electronic workspace facility' in clause 279.

5.9 The term 'representative entity' is used in several places (clauses 96, 154, 175, 300, 342, Schedules 3 and 4), yet to find its full meaning one has to go via clause 5 to clause 158(3). It is recommended that this term be included fully in clause 5; likewise, 'existing statutory body', also defined in clause 158(3).

5.10 It is not clear why certain Parts of the statute have their own separate definition sections. For example, clause 329 provides a definition for 'kaitakawaenga' and 'mātauranga takawaenga' 'in this Part'. These terms are not used elsewhere in the main body of the Bill, so there can be no confusion as to their use in Part 9 or in some other part. However, despite the limited scope of the definition provision in clause 329 (that is it only applies to Part 9), the term is used in Schedule 6. It would be more helpful if these definitions were all located or cross-referenced in clause 5.

5.11 In some cases there is overlap between clauses as to meaning of concepts. An example is 'owner' (which is dealt with in the next section of these submissions).

5.12 Further cases are where terms are defined but not used consistently as defined terms through the Bill. Examples of inconsistencies, awkwardness or difficulties with cross-referencing are:

a 'Residential housing' is defined twice in the Bill (clauses 40(7) and 128(11)) with the same definition. In clause 40 it states the definition is for clauses 41 – 43 only; in clause

128(11) it states the term is defined for clauses 128 to 130 (although it is also used in clause 131, 255, 258 and elsewhere). A similar situation occurs for the word 'term'.

b The transitional provisions in Schedule 1 contain references to trusts established under TTWM 1993 and provides for transitional arrangements for them. This Schedule makes it clear that ahu whenua or whenua tōpū trusts are those established under TTWM 1993, although no definition provision is provided. The main body of the proposed Act (clauses 154, 158, 160, and so on) refer to them but do not define what these bodies are. We suggest these should be defined in clause 5, along with Māori incorporations, which are currently defined in clause 2 of Schedule 1. In clause 319(5) the term 'occupier' is defined for the purposes of that clause but is not used in that clause. Furthermore, it is not clear what the definition of 'owner' adds to the longer meaning in clause 7 and why it is needed in clause 319(5).

c The term 'trustee company' is used as a defined term in some clauses (clause 158) but used in its fully defined in other clauses (clause 78). An inconsistent approach is also used for 'welfare guardian' (clauses 78. 85, 131). Both terms are only used three times in the Bill and are defined or clarified by reference to the Protection of Personal and Property Rights Act 1988. It would be more helpful to include a reference to the Protection of Personal and Property Rights Act 1988 for the definition of 'welfare guardian'.

d See other examples in the Appendix.

6 Land Classifications

6.1 This Bill is part of a process of reclassification of the principal categories of land in New Zealand. Under TTWM 1993, land was classified into Crown land, general land, Māori freehold land, Māori customary land, and general land owned by Māori. The Explanatory Note does not explain why there is no longer a reference to 'general land owned by Māori'.

6.2 Under TTWM 1993 the trusts (Part 12), title improvement (Part 15) and occupation orders (Part 16) provisions applied to general land owned by Māori. Now the basic classification is between "Crown" land and "private land", and "private land" is subdivided into "Māori land" and "other private land". "Māori land" is defined to mean "Māori customary land and Māori freehold land". The reclassification is perhaps more logical than before, except that the useful generic category of general land has now disappeared, leaving the clumsy term of "other private land" or "private land other than Māori land" (i.e. what formerly used to be known as "general" land).

6.3 The Law Society suggests the retention of the classification of 'general land owned by Māori', to add clarity.

7 Ownership interests

Definition of 'owner'

7.1 This Bill, like its predecessor, focuses on existing owners of Māori freehold land. "Preferred recipients" are generally limited to persons descended from former owners, but also now includes 'representative entities'. The scope of what is included in this term is uncertain. This is dealt with below.

7.2 "Owner" is defined in clause 7. This clause stipulates that owners of Māori customary land are the members of the class of persons who hold the land in accordance with tikanga Māori; and owner(s) of Māori freehold land are either the sole owner of the beneficial interest in the freehold estate or alternatively each of the multiple owners of the beneficial interests in the freehold estate. Clause 7 is intended to show that the term 'owner' has different legal meanings depending on the nature of the estate, and we generally agree with these expressions of the law.

7.3 The Law Society recommends that clause 7(1) expressly states that the term 'owner' has different meanings depending on the nature of the land estate it relates to.

7.4 To improve clarity of meaning, the word 'legal' should be added in clause 7(6): 'the trustees are the legal owners of the parcel or interest'.

8 Māori customary land

8.1 The Act contains extensive provisions relating to Māori customary land. It is defined in clause 12 to mean land "held in accordance with tikanga Māori" and "includes" land that has already been determined by the Māori Land Court to be Māori customary land and also land that "has not become or determined to be land of another status" but "does not include Māori freehold land".

8.2 The intention, presumably, is to exclude Crown land and what was formerly known as "general" land from having the status of Māori customary land. There are virtually no known examples of the Court having declared any land to have had the status of "Māori customary land". The historic function of the Court was to convert land held under Māori customary law to other categories of land, these other categories now having come together in the form of the general category of "Māori freehold land". The sole exception appears to be the Court's decision relating to the Whanganui River in the 1940s, but the situation with respect to Whanganui was atypical.

8.3 However occasional parcels of Māori customary land do occur from time to time, and indeed such a case is currently pending in the Whanganui court. The Court currently has the option of declaring such land to be Māori customary land, without going on to the next step of turning such land into Māori freehold land.[7] Clause 12(b)(i) is useful to the extent only that it reflects this existing option.

8.4 Clause 16 relates to the Court changing the status of Māori customary land to Māori freehold land. Such a status change cannot occur unless there has been an owners' meeting, the change of status is agreed to by more than 50% of the owners who attended the meeting, and the land "comprises a parcel or parcels defined in compliance with the applicable survey standards" (clause 16(3)).

8.5 An owners' meeting will often not be feasible in the case of Māori customary land. In the few cases in which this procedure is likely to operate, the Court might decide to award the land to entire hapu or a number of hapu, just as the Court did in earlier days when investigating title. Tens of thousands of people might be theoretically entitled to attend such a meeting, although of course it is likely that only a fraction will actually do so (unless, of course, the land in issue relates to some important landmark such as an island or a lakebed).

[7] As per the Court of Appeal judgment in *Ngati Apa v Attorney-General*.

8.6 Some other procedure for "meeting" should be made available, such as proxies or online or postal procedures.

9 Māori freehold land

9.1 There is considerable overlap between clauses 6, 7, 45 and 46. These clauses all deal with different perspectives on what is an 'owner'. Clauses 45 and 46 deal with the nature of ownership in the context of Māori freehold land. Clause 45 is intended, presumably, to explain the tenants in common concept and clause 46 provides that if there are multiple owners, it is presumed that the owners hold beneficial interests in common, which is longstanding law.

9.2 Further, the whole of clause 45 is not 'an' example. Clause 45(2) says the same thing as clause 7(3)(b) except without reference to the tenants in common point.

9.3 Clause 45 requires redrafting to clearly explain what it aims to achieve. The reference to it being "an example" should be removed.

10 Whenua tāpui

10.1 Whenua tāpui are a new creation, and they replace Māori reservations under sections 338 – 341 of TTWM 1993. Māori reservations are also controlled by the Māori Reservations Regulations 1994.

10.2 By clause 31(3)(a) the Māori Land Court may not make whenua tāpui order over any land managed under a governance agreement. This can happen under the present TTWM 1993 (s 338). The Act makes separate provision for a kawenata tiaki whenua under clause 137. The need for two separate processes is not obvious. The range of purposes for a kawenata tiaki whenua is narrower than for a whenua tāpui. It is submitted that there should be no restriction.

11 Recollectivisation

11.1 Clauses 48 – 50 establish a procedure by which Māori freehold land may be converted to collective ownership. This is new law, although it perhaps has some affinities with a whenua tōpū trust under section 216 of the existing Act (although clauses 48 – 50 do not establish a trust). It appears that the owners may decide to convert the land to collective ownership (clause 48(2)). The role of the Court is to make an order of confirmation (clause 48(3)).

11.2 Clause 49(2) states that the beneficial ownership of the parcel is vested in the defined class of collective owners, meaning that the former owners are not owners any longer. Presumably the owners can decide for themselves who the "defined class of collective owners" is, and this defined class then becomes the owner. There does not appear to be a procedure by which the Court can define the class under clauses 48 – 49. The Law Society recommends that such a procedure be added.

11.3 If the intention is to allow owners in effect to return their land to some kind of collective state (determined, say, by descent from a particular tupuna) and to end successions, then the provisions do not seem to go far enough. There does not appear to be any mechanism by which such recollectivised land can be managed or decisions made in respect of it. It appears to simply exist under its defined class. The Law Society recommends that appropriate procedures be inserted in the Bill to support the conversion to collective ownership.

12 Dispositions of Māori freehold land and other land

12.1 Under the Bill 'disposition' replaces 'alienation' under TTWMA 1993.[8] Although the definition of 'disposition' in clause 5 includes elements of the previous term, the differences between the two are not clear. This is likely to lead to legal uncertainty.

12.2 As noted earlier, 'preferred recipients' replaces the previous category under TTWM 1993 of 'preferred classes of alienees'. Preferred recipients are still generally limited to persons descended from former owners. Now, however, all categories must also be 'associated with the land in accordance with tikanga Māori'.[9] It is assumed that this must mean that the interest must be ultimately derived from a tupuna who held a customary interest in the land pre-1840. It has not been possible to locate any case law on the meaning of this phrase as it is currently used in section 4 of TTWMA 1993. However, if the interpretation noted above its applied, it would mean that any existing owner of interests in Māori land, who has no 'association with the land in accordance with tikanga Māori', would no longer be able to transfer those interests to his or her descendants (if they have no other grounds for such association with the land, i.e. through another parent).

12.3 It is now common for non-Māori or Māori without any relevant customary associations to hold interests in Māori land.

12.4 The group to which dispositions can be made now includes 'preferred entities' for some limited dispositions (sale under tender, gift or will: clauses 100, 105, 239). It is not clear why dispositions to entities are limited from those to preferred recipients. 'Preferred entities' in turn includes 'representative entities'; the scope of these entities are uncertain. A representative entity means an entity that—

(a) represents a hapū or an iwi associated with the land in accordance with tikanga Māori; and

(b) is recognised by the owners of the land as having authority to represent the hapū or iwi.

12.5 This definition seems to suggest that it includes post-settlement governance entities ('PSGEs') which have been established to represent customary groups (generally hapū or an iwi descended from a named ancestor who exercised customary rights over an area of land).[10] Including PSGEs in the group of 'preferred entities' would allow the return in some form of land back to a 'customary collective' where land is held for the benefit of the customary group. It would also allow owners to dispose of land to an entity which represents a wider descent class than just whanau and to be adequately compensated.

12.6 However, there may be difficulties with that interpretation. PSGEs do represent 'a hapū or an iwi associated with the land in accordance with tikanga Māori' (the first element in clause 158(3)) and through the settlement ratification process has to be recognised by the customary group as having authority to represent the hapū or iwi. It is not certain if this would meet the second element of clause 158(3): 'recognised by the owners of the land'. The second branch of the test suggests a different ratification process by (potentially) all the current land owners. It is not clear how this recognition can occur with a PSGE. Clause

8 Section 4 TTWM 1993.

9 Compared with TTWM 1993 – see definition of 'preferred class of alienees' in section 4.

10 See definition of 'Ngati Porou in section 11 of the Ngati Porou Claims Settlement Act 2012.

96(2)(b) provides that a 'preferred entity' must be a 'a representative entity for the land for disposition'. It is not clear whether a PSGE could meet that test.

12.7 Overall clause 96 as currently drafted is unclear and is likely to lead to litigation. The Law Society recommends that it be redrafted to address the issues identified above.

13 Decision-making

13.1 The Explanatory Note states that the Bill prescribes a clear decision-making process.[11] The default decision-making process as set out in Schedule 2 is reasonably straightforward. It states it will apply if the Bill or governance agreement provides it will apply or is silent on majority thresholds. The Schedule sets out notice and meeting requirements. But this is only a part of the whole regime for decision-making.

13.2 Schedule 4 sets out what must be included in governance agreements. It requires all agreements to contain the Schedule 2 process for some types of decisions (to sell land, revoke the governance body or change the status of land).[12] Otherwise it seems the agreement can prescribe another form of decision-making.

13.3 Threshold or majority requirements for decision-making are complicated and not easily understood. Decision-making majority threshold (that is, proportion of owner support) requirements are included in clauses 51 – 57, together with numerous other majority thresholds throughout the Bill. The thresholds which must be met for some decisions will depend on the particular type of decision required. Different levels of support are required before the Māori Land Court may exercise its powers to make orders. The thresholds may be based on different groupings of owners. In some cases it will be a proportion of owners who attend the meeting, or a proportion of owners who hold a level of percentage shares in the land or the parcel, or a percentage of those 'participating owners' total share in the land, or percentage of the 'participating owners' of the land (casting votes being of equal weight). There is no single method to determine decision-making levels and powers.

13.4 In addition, there are minimum quorum thresholds which depend on the number of owners in parcels of Māori freehold land. These are set out in Schedule 2 (clause 12). It appears these quorum requirements can be altered by way of the governance agreement as this is not a prescribed matter under Schedule 4.

13.5 Given the number and complexity of the provisions relating to decision-making, considerable effort is required to understand how the Bill and Schedules work together. Owners will need to understand the regime in order to develop their governance agreements. In practice it is likely to be a difficult transition and not easy to implement for the average landowner. The Law Society recommends that consideration be given to whether the threshold requirements for decision-making can be simplified.

13.6 The Bill provides that owners may participate in voting through a proxy, using postal or email voting forms or by using an electronic voting system and may attend meetings of owners in person, via a nominated representative, or via telephone or Internet-based technology.[13] This is useful reform but for many types of decisions may be changed by the governance

11 At page 3.

12 Schedule 4 paragraph 12.

13 Explanatory Note page 10; Schedule 12, paragraph 12 and 13.

agreement.[14] The Law Society recommends that consideration be given to whether providing for proxy voting as a default requirement strikes the appropriate balance between self-governance and ensuring participation.

Minors and Persons needing protection

13.7 Clause 52(2) allows minors to 'participate' in meetings of owners about decisions relating to their land but not to vote on any decision.[15] As the Tribunal said at p 321 of its *Wai 2478* report, the ability to 'participate' is somewhat illusory if one cannot vote. It may also be inconsistent with owners' rights to exclude persons who are under 18 years old and who lack a kaiwhakamarumaru or other legally appointed agent, from voting in decisions that have the potential to affect their land for decades (e.g. with decisions to enter long term leases).

13.8 In other areas of property law, a property owner's rights cannot be removed just because of age. Decisions in respect of land can be made by persons legally empowered to make decisions about property on behalf of others. So the objectives of self-governance need to be balanced against the competing rights of minors.

13.9 The Bill amends the Protection of Personal and Property Rights Act 1988 (PPPRA)[16] to provide for kaiwhakamarumaru appointments and provisions relating to Māori incorporations. In this context, a property order under section 31 of the PPPRA does not apply in respect to Māori land subject to a kaiwhakamarumaru appointment or a kai tiaki trust.

13.10 In general, an agent or attorney cannot decide things for a minor in respect of Māori land unless that person has been appointed by the Māori Land Court as a kaiwhakamarumaru. The power of an attorney or manager appointed under the PPPRA is restricted by clause 52. A minor will in most cases have a legal guardian. All mothers and most fathers are automatically guardians of their children at birth. In the absence of a parent, other adults can be appointed guardians by the Family Court.[17] It is not clear why other legally appointed or enabled agent or guardians for minor are excluded from acting for a minor.

13.11 The Law Society recommends that the Bill provide that:

a a legal guardian, or a manager or attorney appointed by a Property Order under the PPPRA or under an enduring power of attorney (EPA) should be able to vote on behalf of the minor; or

b a legal guardian, Manager appointed by a Property Order under the PPPRA or under a EPA is deemed to be the kaiwhakamarumaru and able to vote if the Property Order or EPA provides for this.

Second chance meeting

13.12 Clause 51(8) provides for 'second chance' meetings in which binding decisions can be made by the required majority of the participating owners who attend the meeting, irrespective of how many owners attend and participate in making the decision. There is no participation

14 These requirements are only prescribed for some decisions: Schedule 4 paragraph 12.
15 See to the same effect Schedule 2, clause 13(2)(a)
16 Schedule 8, page 363-4. New sections 31A and 31B.
17 Care of Children Act 2004

threshold and the quorum requirement does not have to be met. This process has been controversial.

13.13 The decisions which can be made under this decision-making threshold are not merely 'management and utilisation' functions as is suggested by the Explanatory Note (page 10), but can have a significant impact on owners' rights and control of land, via mechanisms such as amalgamation, aggregation and leases of up to 52 years.

13.14 In practice this could allow very small numbers of engaged owners to make significant and long-lasting decisions in relation to parcels of Māori freehold land. For example, if only 10 owners are present at the first meeting, a second meeting can be organised; only one owner need be present; and that one owner, who does not need to meet any threshold of land ownership (that is, he or she could own a .001% share in the land), can bind all the owners in the land.

13.15 The possibility for outcomes of this kind was criticised at pages 295 – 297 of the Tribunal's *Wai 2478 report*, and the Tribunal recommended at page 361 that the Māori Land Court's discretionary powers should be restored in respect of any second-chance provision, to protect all owners' interests. This provision was also subject to criticism by the Judges of the Māori Land Court.[18]

13.16 The provisions of Schedule 4 for distance participation are not a general requirement for all governance agreements, nor are the quorum thresholds.[19] The Māori Land Court does not seem to have jurisdiction to review the decision-making process and ensure that the process has been correctly followed. Clause 216 only seems to apply to the operation of the governance body and such a jurisdiction does not fall within any of the other jurisdiction provisions (in particular the wash up jurisdiction clause 300).

14 Governance bodies

14.1 There are new standards for governance bodies and kaitiaki which are more akin to the corporate model.

14.2 Governance bodies must:

a under clause 202(1)(a) and (b), manage the asset base in accordance with the governance agreement and operate in a manner that is consistent with the governance agreement; and

b under clause 202(1)(c) and (d), operate in a manner that does not, and is not likely to, create a substantial risk of serious loss to the owners or creditors; and before incurring an obligation or liability, must be satisfied that there is a reasonable prospect of the governance body being able to meet the obligation or liability when required to do so.

14.3 These duties derive from sections 135 (reckless trading) and 136 (duties in relation to obligations) of the Companies Act 1993.

14.4 A kaitiaki of a governance body must, in his or her role as a kaitiaki, act honestly and in good faith; act, and ensure that the governance body acts, in accordance with the governance

[18] Te Tari o te Kaiwhakawa Matua o te Kooti Whenua Māori: Te Ture Whenua Māori Bill 7 August 2015, paragraph 148 – 9: The 'Wai 2478 Report'

[19] See our comments above under decision-making.

agreement and the requirements of the Act and exercise the degree of care and diligence that a reasonable person with the same responsibilities would exercise in the circumstances. These obligations are analogous to those in section 131 (director's duties) and section 137 (director's duty of care) of the Companies Act 1993.

14.5 There is however no general duty to act in what the kaitiaki believes to be the best interests of the owners – which would be analogous to section 131(1) of the Companies Act 1993. Such a duty is only found in the clauses relating to the duties for kaiwhakamarumaru.[20] Whilst it is accepted that kaitiaki are caretakers of the governance body, it is expected that there is some connection between that role and the interests of beneficial owners. The Law Society recommends that consideration be given to whether the kaitiaki should owe some duty to the beneficial owners, similar to section 131(1) of the Companies Act and the duties of trustees under the Trustees Act.

14.6 Kaitiaki do not have a general duty to disclose interests in transactions[21] but only dealings in the land managed by the governance body.[22] Governance bodies will, presumably, be managing other assets for owners apart from Māori land and there appears to be no reason why the duty is so limited. There does not appear to be any equivalent to the use by directors of company information prohibitions under the Companies Act.[23]

14.7 The Māori Land Court is given jurisdiction in clause 216 to investigate governance bodies but *only* if they fail to meet one arm of the reckless trading test.[24] There does not appear to be any power to investigate whether kaitiaki have met their duties, although they may be disqualified if they have 'persistently' failed to meet their duties, been guilty of fraud or acted in a reckless or incompetent manner.[25] Nor is there any longer a general jurisdiction power as under TTWM 1993[26] which would fill this gap – presumably because the intent of the reform is to reduce the jurisdiction of the Court.

14.8 The Law Society recommends that consideration be given to matching the move to a corporate model with oversight by the Court, similar to the oversight of directors and trustees.

15 Governance Agreements

15.1 At this stage it is impossible to comment on whether the 'standard' governance agreement will be of any practical assistance to groups because it has not yet been circulated. It is suggested however that one 'standard' Agreement will not likely be sufficient. A standard agreement will most likely need to be drafted for each of the likely types of governance body (incorporation, trust, body corporate).

16 Role of the Māori Land Court and the Chief Executive

16.1 The Explanatory Note states that the Bill provides a shift from an 'extensive reliance upon the exercise of judicial discretion' to greater rangatiratanga in the hands of owners. It has

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20 Clause 76

21 Compared with sections 139 and 140 of the Companies Act 1993

22 Clause 230. Comparable to dealings in shares in section 148 of the Companies Act 1993.

23 Section 145.

24 Clause 216(1) only refers to the standard in clause 202(1)(c)(I) only and not the rest of clause 202.

25 Clause 220.

26 Section 18 TTWM 1993.

also resulted in a shift of discretion into the hands of the Chief Executive. While the powers of the Court are significantly reduced, the role and functions of other entities seem to be expanded. The Chief Executive has very extensive powers proposed under the new Act. The new Act shifts much decision-making from the Māori Land Court to the Chief Executive.

16.2 The Chief Executive is required to establish and maintain a register of Māori land (clause 270). Given his/her responsibilities to establish a register, it seems most likely that the Chief Executive will in fact be the Chief Executive of LINZ, but this is not stipulated.

Consultation

16.3 A number of clauses throughout the Bill provide for the Court or the Chief Judge to consult with parties before making orders. It is not clear how such consultation should take place or in some cases who the 'persons affected' are (as in clause 341). It would be more appropriate for a court of record to 'have regard to the views of the parties on this matter' than to 'consult'. The Explanatory Note[27] states that 'under the Bill, the role of the Māori Land Court changes from having final discretion over a range of decisions to one of ensuring due process and legal requirements are complied with'.

17 Māori Land Service

17.1 The success of the reform will greatly depend on government support for its implementation. The Māori Land Service, which will play a vital role in the implementation of the new legislation, has not been provided for in the Bill. What the service will look like, and how it will work, is at present unknown.

17.2 The Law Society understands the Māori Land Service will undertake many of the administrative functions of the Māori Land Court. However, the Bill does not explicitly provide for the Māori Land Service, its role, how it will function, and whether its processes will be open and transparent. This contrasts with the Māori Land Court: the TTWM 1993 clearly provides for the function, jurisdiction and processes of the Māori Land Court.

17.3 It is also not clear how or whether the actions and decisions of the service will be subject to appeal or review. In the absence of a clear statutory regime that applies to the Māori Land Service, there is uncertainty about access, review, decision-making and resourcing. The role, functions and processes of the Māori Land Service should be outlined in the legislation, including the provision of an appropriate appeals process.

18 Dispute resolution

18.1 Currently the Māori Land Court has some restricted powers to refer disputes to mediation.[28] The introduction in the Bill of a dispute resolution mechanism (Part 9) is a major change. Moreover, in certain circumstances the dispute resolution process is to be compulsory, and in some respects it goes further than dispute resolution as that phrase is usually understood, given that adjudicatory powers are conferred on the persons appointed to manage the disputes. This will need to be carefully managed to avoid complaints of breaches of natural justice. The specific dispute resolution provisions of the Bill are not duplicated in the case of any other court in New Zealand – even in the Family Court compulsory mediation applies only in certain circumstances.

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27 At page 9.

28 Matters arising under the Māori Fisheries Act 2004, the Māori Commercial Aquaculture Claims Settlement Act 2004, the Protected Objects Act 1975, and in a limited number of other circumstances.

18.2 The Law Society recommends a simpler process of allowing the Court to refer cases before it for mediation, as provided in other statutes. Although dispute resolution has obvious value, there are risks that such a process may delay urgent proceedings in the Court or may indeed become a means of prolonging disputes in some cases.

18.3 Clause 329 defines "kaitakawaenga" (a person engaged to provide dispute resolution services) and "matauranga takawaenga". The latter means (in the case of a hapu dispute) a process "in accordance with the tikanga, values, and kawa of the hapu associated with the relevant land"; and in the case of a whanau dispute, "in accordance with the kawa of the whanau". This seems to assume that ordinarily a single hapu will be associated with a block of Māori land, which is often not the case.

18.4 A kaitakawaenga is required to be guided by the concept of matauranga takawaenga when deciding the dispute resolution procedures that should be followed. This may however allow scope for dispute between whanau or hapu members about the process to be followed, and could prolong disputes. It may also allow basic procedural safeguards to be overridden. Additionally, there is no requirement for the kaitakawaenga to have legal qualifications, although they do appear to be performing quasi-judicial functions.

18.5 There is considerable uncertainty about the kinds of disputes to be covered by this part of the Act. Clause 330(1) states that the Chief Executive must employ persons to enable "land owners and other parties" (who these "other parties" are is unclear) to resolve "disputes about Māori land". This could mean disputes relating to proceedings under the Act, or *any* dispute relating to Māori land. Presumably the former (disputes on matters falling within the Act) is intended. This should be clarified.

18.6 The dispute resolution process can be triggered in a variety of ways. The first (clause 331(1)) is by means of a party to the "dispute" lodging an application for dispute resolution assistance with the Chief Executive. A single person will therefore be able to trigger the dispute resolution process and the other parties will have to participate, whether they wish to or not. The contents of the "application for dispute resolution assistance" are described very loosely, and all the other parties have to lodge a response within 20 working days.

18.7 The second method is where the parties refer a dispute to the Chief Executive under clause 342. Clause 342 relates to proceedings before the Court and requires compulsory dispute resolution where there is a dispute over an issue "that does not involve a point of law" in certain kinds of cases specified in clause 342(2). It is not clear who would decide whether the dispute does not involve a point of law.

18.8 In these circumstances the parties must refer the issue to the Chief Executive for dispute resolution. Until the dispute resolution process has run its course, there is no access to the Court (Clause 342(4)). This raises issues about access to justice especially if there is undue delay.

18.9 The third method is where the dispute resolution process is triggered by the Court itself. This can arise under clause 216(4), where the Court is exercising its powers in relation to governance bodies and is satisfied there is a matter in dispute that the owners and governance body "should attempt to resolve themselves". The Court must either adjourn the hearing to allow any dispute resolution provided for in the governance agreement to be carried out, or must refer the dispute to the Chief Executive. Alternatively, the Court has a general jurisdiction to refer a matter to the Chief Executive for dispute resolution under

clause 341. The Court has similar powers to refer matters to dispute resolution under clause 3(3)(c) of Schedule 6 (Māori Fisheries Act) and clause 4(3)(d) of Schedule 7 (Māori Commercial Aquaculture Claims Settlement Act 2004).

18.10 Clause 341(1) states that a Judge, "after consulting the persons affected by any dispute brought to the Court", can refer the dispute to the Chief Executive. It is unclear what is meant by an "affected person". It is also unclear what is meant by "consultation".[29]

18.11 The dispute resolution process is set out in clause 334 and is consistent with the very open-ended powers in clause 333. A kaitakawaenga can "address any party to the issues in dispute with or without any representative of that party being present", can "express to any party his or her views on the substance of one or more issues in dispute" with or without any representative of the other party being present and can likewise express his or her views on the process the party is following about the dispute or any issue in dispute. The risk is that a party may be exposed to harassment or bullying during the course of the process. The ability to deal with parties ex parte or without representation is a significant power that needs to be very carefully considered in terms of its impact on principles of natural justice.

18.12 A kaitakawaenga is required to act in accordance with general instructions issued by the Chief Executive (clause 333(2) and clause 340) but these are very open-ended provisions and do not address the concerns about the lack of procedural safeguards. Procedural safeguards need to be incorporated in Part 9, given the wide powers granted to kaitakawaenga and the Chief Executive.

18.13 Under clause 335 the parties can confer on the kaitakawaenga the power to decide the issues in dispute – i.e. to exercise a judicial function. This is not merely a dispute resolution process but is in fact an adjudicatory function. This means that the skill set of the kaitakawaenga needs to be carefully considered and in particular there should be a requirement for the kaitakawaenga to be legally trained.

18.14 Once decided, the terms are final and binding on the parties (clause 336(3)(a)) and "no party may seek to bring those terms before a court, whether by action, appeal, application for review, or otherwise (clause 336(3)(b)). Clause 335(2) makes it clear that this privative clause also applies where the parties confer on the kaitakawaenga the power to decide the dispute.

18.15 Privative clauses are controversial. Removing rights of judicial review is constitutionally objectionable. There is no justification for removing basic safeguards in this context. It is very unusual to exclude protections aimed at ensuring natural justice and there should be no question about the ability of the courts to address issues such as bias and corruption. The Law Society submits that clause 336(3)(b) should be amended so that it does not exclude judicial review. At a minimum the process should include the safeguards reflected in article 36 of the first schedule of the Arbitration Act 1996, which provides for the court to refuse recognition or enforcement of an arbitral award if it would be contrary to public policy.

18.16 Clause 337 relates to an unsuccessful dispute resolution outcome. It applies where the kaitakawaenga "believes that those issues [i.e. the issues referred to a dispute resolution service] are unlikely to be resolved". The decision is entirely in the hands of the kaitakawaenga.

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[29] This type of engagement with parties occurs elsewhere in the Bill (See Appendix for a list).

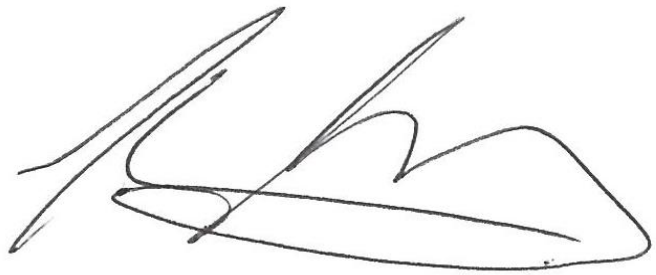
18.17 It is therefore of concern that the dispute resolution services cannot be challenged or called in question in any proceedings on the grounds that "the nature and content of the services were inappropriate" or on the grounds that "the manner in which the services were provided was inappropriate" (clause 338).

18.18 The need for the wide-ranging powers in Part 9 has not been demonstrated. They have no counterpart in any other civil proceedings. There is no justification for stripping Māori owners of procedural safeguards that are universally applicable in other adjudicatory contexts.

18.19 The Law Society recommends that Part 9 be redrafted, to incorporate appropriate safeguards in relation to fundamental principles of access to justice and natural justice, and in particular to delete limitations on the courts' supervisory role.

Conclusion

The Law Society does not wish to be heard.



Kathryn Beck
President

4 August 2016

19 Appendix: Detailed comments and recommendations

BILL PROVISION	DESCRIPTION	ISSUE	RECOMMENDATION
3(5)	Words 'by the explanation'	Not clear what is meant by this. Appear to have been brought forward from previous Exposure Draft.	Delete.
7(6)			To improve clarity of meaning the word 'legal' should be added in clause 7(6): 'the trustees are the *legal* owners of the parcel or interest'.
33	Definition of 'other specified land'.	Sub clause (11) provides for a definition 'in this section', however the term is used in several other clauses: 34, 35, 36,	Suggest 'in sections 33 to 36'
50(2)(b)		Reference to section 16 in clause 49(2)(b) appears to be in error, this should read section 15.	
4, 5, 6, 38, 45, 47, 50, 51, 52, 61, 98, 110, 113, 115, 118, 132, 133, 145, 146, 209, 213, 222, 226, 260, 274, 298, 322, 326, 418, 424, 427, 482	Bill frequently uses examples to illustrate application in clauses – either in body of clause or as a specified example (e.g. 146). This presumably is to assist understanding and meaning.	Need to clarify what status these examples have.	Need provision as in Health and Safety at Work Act 2015: **26 Status of examples** (1) In this Act, an example is only illustrative of the provisions to which it relates. It does not limit those provisions.

BILL PROVISION	DESCRIPTION	ISSUE	RECOMMENDATION
			(2) If an example and a provision to which it relates are inconsistent, the provision prevails.
193(2)(e), 341(1), 360(5), 362(3), 389(3)	Jurisdiction of the Court to consult: • Clause 193(2)(e): the Court must **consult** a proposed appointee before appointing as a Kaiwhakahaere; • Clause 341(1): Judge may, after **consulting** the persons affected by any dispute… refer the dispute to the Chief Executive; • Clause 341(2)(b)(ii): the Court may …after **consulting** the affected parties … • Clause 360(5): If the Chief Judge is authorised to appoint an additional member …he or she must, before appointing the member, **consult** the parties to the proceedings about the knowledge and experience that the additional member should possess. • Clause 362(3): The Chief Judge must, before appointing any person …for the purpose of any inquiry, **consult** the parties to the inquiry about the knowledge and experience that the person should possess. • The Chief Judge must, before appointing any person …for the purpose of any hearing, **consult** the parties to the	Query whether it is appropriate for a court of record (clause 346) to 'consult' or if it should rather be to seek and obtain submissions and have regard to the views of the parties on the matter. Explanatory Notes (page 9): 'Under the Bill, the role of the Māori Land Court changes from having final discretion over a range of decisions to one of ensuring due process and legal requirements are complied with'.	Instead should have wording along the lines of: 'the Court shall have regard to the views of the parties ….'.

BILL PROVISION	DESCRIPTION	ISSUE	RECOMMENDATION
	proceedings about the knowledge and experience of tikanga Māori that the person should possess.		
319(5)	Not clear what the definition of 'owner' adds to clause 7 or why it is needed.		Delete definition of 'occupier' and 'owner'
76(3), 193, 196(2), 197(2), 271(c)(i), 302(g)	• Clause 76(3)(e): A kaiwhakamarumaru must as far as practicable, consult any other person that, in the opinion of the kaiwhakamarumaru, is interested in the welfare of the owner and competent to advise the kaiwhakamarumaru in relation to the management of the owner's property; • Clause 193(1): The court may appoint a kaiwhakahaere on its own initiative or on the application of an interested person; • Clause 196(2): The court may make a direction to a kaiwhakahaere to report to the Court on its own initiative or on the application of an interested person; • Clause 197(2): The court may make a direction to Chief Executive to call a meeting of owners or for kaiwhakahaere to report to the owners on its own initiative or on the application of an interested person; • Clause 271(c): purpose of register is to facilitate decision-making, by enabling owners of Māori freehold land and other	Interested persons. Not always clear who they may be (see e.g. clause 76(3)(e): no definition provided). Property Law Act 2007 gives rights to persons with an interest in the property but otherwise defines who interested persons may be: section 258(4) specifically identifies the interested persons may apply to a court for relief under sections 259 and 260	'Interested parties' need to be defined where used.

BILL PROVISION	DESCRIPTION	ISSUE	RECOMMENDATION
	interested persons to be identified when decisions need to be made in relation to the land; • Clause 302: Court has powers of High Court under the Property Law Act (including relating to interested persons in section 259).		