

Māori Land Trusts: Rethinking the Relationship between Retention and Utilisation in Te Ture Whenua Maori Act 1993 Reform

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I Introduction

Whatungarongaro te tangata toitū te whenua.¹

As man disappears from sight, the land remains.

In June 2012, the National-led Government announced a review of Te Ture Whenua Maori Act 1993 (TTWMA) to unlock “the economic potential of Māori land for its beneficiaries, while preserving its cultural significance for future generations”.² This came after a report by the Ministry of Agriculture and Forestry estimated that up to 80 per cent of Māori land was underperforming for its owners due in large part to issues which stemmed from the legislation.³ Following the appointment of an independent review panel which engaged in nationwide consultation with Māori, and a report prepared for the Ministry for Primary Industries which projected that Māori land could generate an additional \$8,000,000,000 in nominal total output as well as 3,600 jobs over 10 years,⁴ Te Ture Whenua Māori Bill (2016 Bill) was introduced into the House in 2016. It proposed to repeal and replace TTWMA with a completely new law. The 2016 Bill was widely unpopular and was withdrawn from the legislative agenda by the incoming Labour-led Government in 2017.

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1 Hirini Moko Mead and Neil Grove *Ngā Pēpeha a ngā Tipuna: The Sayings of the Ancestors* (Victoria University Press, Wellington, 2001) at 405.

2 New Zealand Government “Te Ture Whenua Maori Act review announced” (press release, 4 June 2012) <www.beehive.govt.nz>.

3 Ministry of Agriculture and Forestry *Māori Agribusiness in New Zealand: A Study of the Māori Freehold Land Resource* (March 2011) at 13–21.

4 PricewaterhouseCoopers *Growing the Productive Base of Māori Freehold Land* (Ministry for Primary Industries, February 2013) at 7.

In September 2019, the Labour-New Zealand First Coalition Government introduced its own reform proposal. Rather than replace the Act with a completely new law, Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (2019 Bill) includes a suite of amendments to the existing legislation designed to reduce the complexity and compliance requirements Māori encounter when we engage with our land.⁵ The 2019 Bill is currently at the second reading stage, but National has pledged to continue to progress its policy to repeal and replace TTWMA with the 2016 Bill if re-elected in September.⁶ Whether by the Labour-led Government's amendment Bill or National's replacement Bill, reform of TTWMA is clearly imminent.

TTWMA is the primary legislation which governs and regulates Māori land.⁷ Māori land comprises roughly 1,403,551 million hectares, or around 5 per cent, of New Zealand's land base.⁸ It differs from other land in New Zealand in two major respects. First, Māori land typically has multiple owners as a result of the communal nature of the original customary interest and the ongoing fragmentation of the freehold interest.⁹ In 2019, the Ministry of Justice recorded 3,262,879 ownership interests in just 27,456 Māori land titles, the average block having 105 owners.¹⁰ On account of this multiplicity of ownership, management structures are often established by Māori owners to oversee and direct the use of our land.¹¹ The trust has been the vehicle of choice for the great majority of Māori landowners.¹² Secondly, most dealings with Māori land require the

5 Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179-1) (explanatory note) at 1.

6 New Zealand National Party "The Economy: Discussion Document" (2019) <www.national.org.nz> at 23.

7 Kerensa Johnston "Māori Legal Developments" [2015] NZ L Rev 171 at 184.

8 Ministry of Justice "Māori Land Update – Ngā Āhuatanga o te whenua" (June 2019) at 1.

9 Tom Bennion "Māori Land" in John Burrows and Elizabeth Toomey (eds) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) 443 at 457.

10 Ministry of Justice, above n 8, at 1.

11 Layne Ross Harvey "Would the proposed reforms affecting ahu whenua trusts have impeded hapū in the development of their lands? A Ngāti Awa perspective" (PhD Thesis, Auckland University of Technology, 2018) at 95. Harvey was appointed as a Judge of the Māori Land Court on 1 September 2002.

12 Wilson Isaac "Governance Structures for Māori Land" (paper presented to Whenua: Sustainable Futures on Māori Land Conference, Rotorua, July 2010). Isaac was appointed as a Judge of the Māori Land Court on 11 March 1994. In 1999, he was appointed Deputy Chief Judge and, on 13 August 2009, he was appointed Chief Judge.

assistance or approval of the Māori Land Court (MLC).¹³ Under TTWMA, the MLC has exclusive jurisdiction to constitute the various trusts authorised by the Act.¹⁴ This includes: fixing the terms of the trust; appointing, removing and conferring powers on trustees; authorising new ventures; reviewing the trust; and enforcing trust obligations.¹⁵

The need for some kind of reform of TTWMA is not in dispute. Change is clearly desired — the question is simply the extent of reform necessary. With the background of the proposed reforms in mind, we must consider whether the current law impedes the use and development of Māori land. Utilisation goes hand in hand with retention in TTWMA. The preamble to the Act acknowledges that “land is a taonga tuku iho of special significance to Māori”.¹⁶ Māori land ownership must, therefore, be viewed entirely differently from ownership as it is understood in British law.¹⁷ As the New Zealand Māori Council has explained:¹⁸

Our land interests are an inheritance from the past entrusted to the future in which we have no more than certain rights to enjoy the fruits of the land in our own lifetimes, and a duty to convey those rights to succeeding generations.

This tension between retention and utilisation in Māori land law is analogous to the tension between facilitation and inhibition in general land law.¹⁹ Māori land law is primarily concerned with inhibiting the permanent alienation of Māori land. But behind this inhibition lies a facilitative goal — namely, to promote the use and development of Māori land for the benefit of current and future generations of owners, their whānau and their hapū. So, the law must facilitate, but it must also inhibit, in order to achieve a reconciliation between these dual and sometimes

13 Bennion, above n 9, at 457.

14 Te Ture Whenua Maori Act 1993 [TTWMA], s 211.

15 Part 12.

16 Preamble (macron added).

17 New Zealand Māori Council *Kaupapa: Te Wahanga Tuatahi – A Discussion Paper on Māori Affairs Legislation* (New Zealand Māori Council, 1983) at 10.

18 At 10.

19 See Peter Birks “Before We Begin: Five Keys to Land Law” in Susan Bright and John Dewar (eds) *Land Law: Themes and Perspectives* (Oxford University Press, Oxford, 1998) at 461–462.

conflicting objectives.²⁰ It is this tension that we must balance carefully in any reform of TTWMA. Layne Harvey has observed that a central question to consider when reforming the legislation is:²¹

... whether the current law provides an appropriate balance and a sufficiently broad framework to enable trustees and owners to [use and] develop their land, while at the same time ensuring that the necessary checks and balances exist and are applied [to promote retention]. It is also a question, [he] suggests, of whether the appropriate balances exist or need reform, between a continuing paternalism (perceived or otherwise) inherent in the oversight of ahu whenua trusts by the Court, and an essentially unregulated approach where trustees are relatively unconstrained by legal frameworks and accountability.

This is because the MLC has extensive discretionary powers to safeguard the retention of Māori land when it comes to balancing retention with the risks that utilisation could pose to it in Māori land trust matters.

In this article, I will use Harvey's question as a standard against which to assess the reform proposals, as well as my own. I argue the MLC's extensive discretionary powers create uncertainty for owners of Māori land in decision-making, particularly regarding the use and management of our lands, and that this uncertainty can be resolved by amending TTWMA to improve owner involvement in trust matters. In Part II, I will briefly outline the evolution of Māori land law to elucidate how its historical development has given rise to this tension between retention and utilisation. I will also explain why Harvey's suggestion that providing a suitable balance and a sufficiently broad framework to enable trustees and owners to use and develop their land, while at the same time ensuring that the necessary checks and balances exist and are applied to promote retention, is the appropriate standard to apply when determining what reform of TTWMA should look like. In Part III, I will survey pt 12 of the Act, dedicated solely to Māori land trusts, and set out the key legislative mechanisms

20 See also TTWMA, s 2.

21 Harvey, above n 11, at 108.

governing these entities. Through an analysis of the decision of the MLC in *Hall v Opepe Farm Trust* in Part IV, I will examine whether TTWMA provides an appropriate balance and a sufficiently broad framework to enable trustees and owners to use and develop their land, while at the same time ensuring that the necessary checks and balances exist and are applied to promote retention.²² In Part V, I will consider how the proposed reforms would alter this balance by assessing how they would have impacted the decision-making process of the judge in that case, had they been in force at the time it was decided. Finally, in Part VI, I will suggest what the reform should look like to satisfy the standard of providing an appropriate balance and a sufficiently broad framework to enable trustees and owners to use and develop their land, while at the same time ensuring that the necessary checks and balances exist and are applied to promote retention, in terms of the decision-making process of the judge in that case.

II The Evolution of Māori Land Law

Māori land law is “a branch of New Zealand law solidly rooted in the past” that cannot be adequately understood without some understanding of the context in which it developed.²³ TTWMA emerged from the long evolution of Māori land legislation dating back to the mid-1800s and, in particular, the way in which that legislation facilitated the alienation of Māori land to the Crown and settlers for many decades.²⁴ As Professor IH Kawharu observed, the system instituted after 1865 was “a veritable engine of destruction for any tribe’s tenure of land, anywhere”.²⁵ It was not until 1974 that retention became one of the main objectives of the law, and it would be a further 19 years before it was given any practical effect in TTWMA.²⁶ In this Part, I will briefly outline the evolution of Māori land legislation to elucidate how its historical development has given rise to the tension between retention and utilisation.

22 *Hall v Opepe Farm Trust* (2010) 19 Waiariki MB 258 (19 WAR 258).

23 Richard Boast “The Evolution of Māori Land Law 1862–1993” in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 65 at 66.

24 See generally David V Williams *Te Kooti Tango Whenua: The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999) at 51–100.

25 IH Kawharu *Maori Land Tenure* (Oxford University Press, London, 1977) at 15.

26 Compare Maori Affairs Amendment Act 1974, s 4(2)(a); and TTWMA, ss 2 and 17.

I will also explain why Harvey’s suggestion that providing a suitable balance and a sufficiently broad framework to enable trustees and owners to use and develop their land, while at the same time ensuring that the necessary checks and balances exist and are applied to promote retention, is the appropriate standard to apply when determining what reform of TTWMA should look like.

The existing framework for regulating Māori land has its origins in the Native Lands Acts of 1862 and 1865.²⁷ Although the 1862 Act “was brought into operation in only a few places due to the pressures of armed conflict”, and was soon repealed and replaced by the much more comprehensive 1865 Act, the Acts shared the same conceptual structure and it is moot whether the current system began in 1862 or 1865.²⁸ Notable features of the Acts included the waiver of Crown pre-emption, the conversion of Māori customary title to freehold title, and the creation of the Native Land Court.²⁹ As Tom Bennion aptly put it, the conversion of Māori customary interests to fee simple interests, thereby creating Māori freehold land, was “a deliberately crude conversion”.³⁰ The Native Land Court awarded the freehold title to 10 or fewer individuals as tenants in common.³¹ Fatefully, no provision was made for land awarded in this way to be held in trust for the many parties and differing interests that existed under the customary regime.³² The Native Lands Acts, therefore, “exemplif[ied] a distinct trend away from collective rights in land to individualised tenure”.³³ However, in response to complaints from Māori, an amendment in 1867 provided that the names of every person with an interest in the land could be listed on the back of title documents — a list that could run to hundreds of names.³⁴ Coupled with the Native Land Court’s decision that, on intestacy, the interests of an owner were to be divided equally among all their children as tenants in common, every generation

27 Native Lands Act 1862; and Native Lands Act 1865.

28 Boast, above n 23, at 68–69.

29 At 68–75.

30 Bennion, above n 9, at 448.

31 Native Lands Act 1865, s 23.

32 Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Maori Act 1993* (Wai 2478, 2016) at 14.

33 Boast, above n 23, at 72.

34 Native Lands Amendment Act 1867, s 17.

“saw continually enlarging bodies of owners in what were often shrinking blocks of land”.³⁵

The whole subsequent evolution of Māori land legislation is in many ways a postscript to the problem of multiple individualised ownership (as distinct from the collective nature of the original customary interest). As Richard Boast has observed, “earlier governments may have seen this an impediment to land alienation and later ones as an impediment to land utilisation, but the root cause is the same”.³⁶ The Native Land Act 1909 consolidated the complex legislative jungle that had grown up after 1862 into one comprehensive and relatively intelligible enactment.³⁷ It was recodified in 1931, 1953 and, most recently, in 1993 with TTWMA.³⁸ The 1953 Act finally made provision for Māori land to be held in trust³⁹ but, following the publication of two key reports highlighting multiple ownership as a barrier to utilisation and Māori economic advancement, a major amendment was passed in 1967.⁴⁰ While the provisions relating to court-established trusts were significantly improved and expanded, the amendment proved hugely unpopular because it significantly reduced the MLC’s protective powers to review and confirm alienations.⁴¹ The Court, it was said, was “not there to help the owner keep [their] land; its sole job for the Māori owner [wa]s to see that [they got] a fair price”.⁴² However, the last major statutory recasting of Māori land law before the enactment of TTWMA recognised Māori aspirations by strengthening the restrictions on alienation.⁴³ It also amended the functions of the Department of Māori Affairs to include “the retention of Māori land in the hands of its owners, and its use or administration by them or for their benefit” in giving effect to the Act.⁴⁴ In these changes, “the government recognised ‘the right of kin groups to remain proprietors of their land’,

35 Waitangi Tribunal, above n 32, at 15.

36 Boast, above n 23, at 118.

37 At 100.

38 Native Land Act 1931; Maori Affairs Act 1953; and TTWMA.

39 Maori Affairs Act 1953, ss 438 and 439.

40 See Boast, above n 23, at 110–112.

41 See Maori Affairs Amendment Act 1967, s 142. See generally pt 6.

42 Waitangi Tribunal, above n 32, at 36.

43 See Maori Affairs Amendment Act 1974, pt 7.

44 Section 4(2)(a) (macron added).

though with ownership came ‘the responsibility of ensuring the effective use of [that] land’⁴⁵. Thus, a clear tension between the retention and utilisation of Māori land was born.

In short, Māori land has been subject to major legislative and judicial intervention since at least 1865.⁴⁶ The impacts of multiple individualised ownership have not been to the benefit of hapū or Māori landowners generally, except in the rarest of cases. Individualisation of title and the ongoing fragmentation of ownership interests has made it difficult for Māori to both retain and effectively utilise their land. The difficulty for today is that the tension between retention and utilisation in Māori land law is a reality of Māori land ownership. This is why Harvey’s suggestion that providing a suitable balance and a sufficiently broad framework to enable trustees and owners to use and develop their land, while at the same time ensuring that the necessary checks and balances exist and are applied to promote retention, is the appropriate standard to apply when determining what reform of TTWMA should look like.

III Māori Land Trusts

Described as “a watershed moment based on broad consensus”, the enactment of TTWMA marked a turning point in that Māori aspirations for our land were to some extent incorporated into Māori land law.⁴⁷ For the first time in history, legislation was passed acknowledging that Māori land is a taonga tuku iho.⁴⁸ TTWMA also provides that:⁴⁹

... it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of

45 Waitangi Tribunal, above n 32, at 37.

46 Monique van Alphen Fyfe “Not One More Acre: Opportunity and Compromise in Te Ture Whenua Māori Reform” (2016) February Māori LR 33 at 33.

47 At 33.

48 Bennion, above n 9, at 454.

49 TTWMA, s 2(2) (macron added).

Maori land as taonga tuku iho by Maori owners, their whānau, their hapū, and their descendants, and that protects wahi tapu.

As discussed, the practical legal mechanisms provided in the Act to enable the retention of Māori land on the one hand, and its use and development on the other, are a range of governance entities, and the trust has been the vehicle of choice for the great majority of Māori owners. In this Part, I will survey pt 12 of the Act, dedicated solely to Māori land trusts, and set out the key legislative mechanisms governing these entities.

A Part 12

Part 12 sets out extensive provisions for the formation, operation and termination of trusts constituted under the Act. It comprises 35 sections (ss 210–245) divided into four separate categories. The first category provides for the constitution of five types of trust in respect of Māori land.⁵⁰ The ahu whenua trust is the most common Māori land trust.⁵¹ The MLC has exclusive jurisdiction to constitute these trusts under TTWMA; however, like trusts, they can be created by will or deed and given effect to by the Court.⁵² Once the owners have elected nominee trustees and approved the terms of trust, the Court retains the discretion to appoint the trustees⁵³ and confirm the trust order.⁵⁴

The second category sets out the process for appointment and powers of trustees. The Act recognises three types of trustee: responsible; advisory; and custodian.⁵⁵ The land is typically vested in the responsible trustee who is responsible for carrying out the terms of the trust, the proper administration and management of the trust's business, preserving the assets of the trust, and collecting and distributing trust income.⁵⁶ Different functions and responsibilities apply where an advisory or

50 See generally TTWMA, ss 212–217.

51 *Māori Land Trusts: A Guide* (Department for Courts, Wellington, 2001) at 8.

52 TTWMA, s 211.

53 Section 222.

54 Section 219.

55 See generally ss 223–225.

56 Section 223.

custodian trustee is appointed, and the trust order can specify further duties.⁵⁷ Trustees are also required to administer the trust property in accordance with general trust law and the provisions of the Trustee Act 1956.⁵⁸ This includes acting with “the care, diligence, prudence, and good judgement that prudent business people would exercise in managing other peoples’ affairs”.⁵⁹

The third category includes miscellaneous provisions relating to trusts constituted under the Act. Of significance is s 229, which provides that trustees may apply to the MLC for the approval of new ventures. The Court also has the power, in the trust order constituting any trust under pt 12, to make provision for the keeping of accounts pursuant to s 230, and to periodically review the terms, operation or other aspect of the trust on the application of the trustees, or a beneficiary of the trust, under s 231.

The fourth category contains provisions relating to trusts generally. These provisions apply to every trust constituted in respect of any Māori land.⁶⁰ Section 237 confirms that the MLC has and may exercise all the same powers and authorities as the High Court in respect of the trusts it has jurisdiction over. Section 238 permits the MLC to require trustees to report in writing or appear in person on any matter relating to the trust or the performance of their duties at any time, and to enforce the obligations of his or her trust (by way of injunction or otherwise) where appropriate. The MLC also has the authority to terminate the trust, vary the terms of the trust, add to or reduce the number of trustees, and replace one or more of the trustees on the application of the trustees or a beneficiary of the trust.⁶¹ Finally, s 240 enables the MLC to make an order for the removal of a trustee if it is satisfied that the trustee has failed to carry out their duties satisfactorily.

57 See ss 224–226.

58 Law Commission *Review of the Law of Trusts* (NZLC R130, 2013) at [3.53].

59 *Māori Land Trusts: A Guide*, above n 51, at 15.

60 TTWMA, s 236.

61 See ss 239–244.

B Part 9

Once a trust is constituted, the beneficial owners have decision-making abilities in relation to land utilisation under the Māori Assembled Owners regime.⁶² For example, where a proposal involves an alienation by lease, the trustees are required to obtain the approval of a set percentage of the beneficial ownership depending on its duration.⁶³ A lease of between seven and 15 years requires a quorum of 30 per cent of the shareholding in the land, whereas a lease exceeding 42 years requires 50 per cent.⁶⁴ In practice, however, Harvey has observed that these thresholds would be impossible to achieve for many — if not most — Māori land trusts, as a result of the ongoing fragmentation of the freehold interest.⁶⁵

IV Hall v Opepe Farm Trust

In this Part, I will examine whether TTWMA provides an appropriate balance and a sufficiently broad framework to enable trustees and owners to use and develop their land, while at the same time ensuring that the necessary checks and balances exist and are applied to promote retention, through an analysis of the decision of the MLC in *Hall v Opepe Farm Trust*.

A The Case

In the context of the removal of trustees, *Hall v Opepe Farm Trust* has been described as “an example *par excellence* of how, when things go wrong, they can do so disastrously”.⁶⁶ It is, therefore, a sobering reminder of the fact that when things do go wrong, it is the MLC to which landowners turn to for help. This is important to bear in mind when considering what have been described as “the often intrusive supervisory powers of the Māori Land Court”.⁶⁷

62 Section 169(2).

63 See s 179. See also Maori Assembled Owners Regulations 1995, reg 45(4).

64 Maori Assembled Owners Regulations, reg 34.

65 See Harvey, above n 11, at 164.

66 At 130 (emphasis in original).

67 Michael Sharp “Maori land development” [2013] NZLJ 342 at 343 (macron added).

1 Facts

Opepe Farm Trust (OFT) is an ahu whenua trust constituted in respect of a block of Māori freehold land — Tauhara Middle 4A 2B 2C — which had 4,534 beneficial owners at the time these proceedings were commenced.⁶⁸ The land was initially vested in the Perpetual Trustees Estate and Agency Company of New Zealand Ltd as custodian trustee, and eight men were appointed as responsible trustees. Three of these men remained as responsible trustees when the respondents, Emily Rameka and Putiputi Biel, were appointed as responsible trustees on 29 November 2001.

On 23 November 2001, the then custodian trustee of OFT, Opepe Administration Services Limited, entered into a partnership agreement for the acquisition of a mussel farm and a mussel processing factory. On the application of the trustees, Judge Savage gave directions under s 229 that this activity was within the power of OFT. More than \$1,500,000 of trust funds was paid into the mussel farm venture in 2003 alone, and the trustees authorised further funds in excess of \$2,000,000 to be invested over the next several years without receiving any returns. In mid-2008, a majority of the trustees — which included the respondents — voted in favour of finding an equity partner and selling down some farms in Abel Tasman Seafoods Ltd to continue with the investment. As a result, by the time these proceedings were commenced, OFT had lost over \$3,000,000 in this failed venture.

Acting by majority, the three male trustees also authorised OFT to lend \$1,000,000 of trust funds to Te Whenua Venture Holdings Limited (T WVHL) on an unsecured basis. When T WVHL failed to repay the loan in July 2006, the transaction was converted into an investment in the company. T WVHL's principal asset was a block of land near Turangi township which the company planned to develop. Loans of \$10,000,000 borrowed by T WVHL for the development were guaranteed in part by OFT and the male trustees personally. When the respondents learned of the investment in July, they expressed concerns, and eventually filed proceedings against the three male trustees in the High Court in December 2008. The matter was ultimately settled with

68 *Hall v Opepe Farm Trust*, above n 22, at [10].

an agreement to work together, though it generated \$140,000 in legal costs. The trustees were also advised of the risk the investment posed to OFT by the trust solicitors, and to seek directions from the MLC, but failed to do so. Consequently, at the time the development failed, OFT had so far suffered losses as follows: \$1,000,000 as the principal sum of the loan; \$140,000 in legal fees; and liable in part for a debt of over \$4,500,000.⁶⁹

In November 2006, OFT also borrowed \$4,000,000 against its only freehold asset to invest in Hikuwai Hapū Land Trust (HHLT) for the purchase of Tauhara North land. The land was sold to HHLT and Tauhara Middle 15 Trust (TMT), OFT's joint investor on this project. The trustees did not enter into a written partnership agreement with TMT for the purchase of the land to protect OFT's position, nor did they seek professional advice on the venture. Mrs Rameka was a trustee of HHLT when the transaction was negotiated, and Mrs Biel became a trustee of HHLT in April 2007.

On application by Temuera Hall to the MLC, Judge Carter granted an injunction restraining the trustees from incurring any further liability or altering the trust's legal obligations with any outside party other than in the normal course of the operation of its trading business in June 2009. Mr Hall then sought an order for the removal of the trustees under s 240.

2 Procedural History

Following a substantive hearing of the MLC under s 238, which concluded with Judge Harvey adjourning the application to a chambers conference with counsel, the three male trustees resigned. The respondents were then removed as trustees of OFT by an order of Judge Harvey under s 240 for failing to carry out their duties as trustees satisfactorily in relation to: the mussel farm venture; the development project; and the Tauhara North purchase.⁷⁰ His Honour's decision to remove the respondents

69 *Dorchester Finance Ltd v Ngahuia Ltd* HC Auckland CIV-2009-404-2529, 8 February 2010 at [141]–[142].

70 *Hall v Opepe Farm Trust*, above n 22, at [231].

as trustees of OFT was upheld on appeal to both the Māori Appellate Court⁷¹ and the Court of Appeal.⁷²

3 Issues

The principal issue for determination in this case was whether the respondents should be removed as trustees of OFT. This turned on whether Judge Harvey was satisfied that the respondents had failed to carry out their duties satisfactorily with respect to the mussel farm investment, the TWVHL project and the Tauhara North purchase.

4 Decision

In relation to the mussel farm investment, Judge Harvey was satisfied that the respondents' conduct constituted a breach of their duties that was sufficiently serious to warrant their removal. His Honour concluded that the respondents had failed in their duties of prudence and of protecting the assets of the trust, having lost millions of dollars of trust funds over a period of eight years. This assessment was based primarily on: the respondents' failure to express and record their opposition to the ongoing investment of funds into the venture, as envisaged by the Act; the scale of the sums involved; and the lengthy period of inaction during which the appellants neglected to seek directions from the Court.⁷³

As regards the TWVHL project, Judge Harvey took the view that the respondents' conduct constituted a serious breach of their duties. While noting that they had not shared in the three male trustees' reckless breach of the trust order, his Honour determined that, upon learning of and expressing concerns about the investment, the respondents had a duty to preserve the assets of OFT and to seek directions from the Court. Judge Harvey concluded that the respondents must be held to account for ignoring the advice of the trust solicitors and thereby failing to seek directions at the

71 *Biel v Hall – Opepe Farm Trust* [2011] Māori Appellate Court MB 535 (2011 APPEAL 535) at [136]–[139].

72 *Rameka v Hall* [2013] NZCA 203.

73 See TTWMA, s 227(6).

earliest reasonable opportunity. His Honour considered that, had they done so, the \$140,000 incurred in legal costs could have been reduced, if not wholly avoided.

With respect to the Tauhara North purchase, Judge Harvey was satisfied the respondents' conduct constituted a breach of their duties sufficiently serious to warrant their removal. His Honour concluded that the respondents had acted imprudently in failing to execute a written partnership agreement with OFT's joint investor when the purchase was settled and to seek professional advice on the venture. His Honour also found that Mrs Rameka was conflicted in relation to the purchase.

Taking into account these breaches of trust, the expenditure of substantial amounts on what was potentially needless High Court litigation, and the impact of the breaches on the financial state of OFT, Judge Harvey made an order for the removal of the respondents as trustees of OFT. Through an analysis of this decision, I will now examine whether TTWMA provides an appropriate balance and a sufficiently broad framework to enable trustees and owners to use and develop their land, while at the same time ensuring that the necessary checks and balances exist and are applied to promote retention.

B Balancing Retention and Utilisation in TTWMA

When it comes to balancing retention with the risks that utilisation and development could pose to it in Māori land trust matters, TTWMA prioritises retention. This is primarily due to the extent of the supervisory role played by the MLC in the administration of Māori land trusts. As Judge Harvey's decision in *Hall v Opepe Farm Trust* illustrates, the Court has significant discretionary powers to safeguard the retention of Māori land in the event of disaster or mishap. The effect of these powers is not to undermine owner autonomy (including the autonomy of trustees of Māori land once appointed) in decision-making, but rather to assist owner-driven utilisation in a way that ensures the necessary checks and balances exist, and are applied to give effect to the overwhelmingly supported imperative of retention. This means that the Court has extensive supervisory powers over the conduct of

trusts or trustees where its discretion is required by the Act, including the power to initiate a review of a trust's activities of its own motion whenever it considers it necessary to promote retention and to make an order for the removal of a trustee whenever their conduct is deemed to pose a threat to retention.

First, s 237 gives the MLC “the most extensive supervisory powers” over the administration of Māori land trusts where its involvement is required by the Act to promote retention.⁷⁴ This is because s 237 is complemented by a raft of discretionary powers vested in the MLC which are not likewise vested in the High Court. The special designation of Māori land as a taonga tuku iho means it is necessarily subject to many restrictions on utilisation not placed on other freehold land to promote retention. As Harvey contends:⁷⁵

The role of the Māori Land Court in its supervisory jurisdiction is therefore quite distinct. It is important to trustees and beneficiaries alike, given the circumstances of Māori land tenure, the impacts of individualisation and the large percentage of disengaged owners.

Some examples of the supervisory powers exercised in this case include the power to approve an extension of the activities of a trust (s 229), to call on trustees to report on the administration of a trust (s 238), and to make an order for the removal of trustees (s 240).

Secondly, s 238 effectively enables the Court, of its own motion, to initiate a review of a trust's activities whenever it considers it necessary, based on evidence provided by an owner, trustee or other interested party, to promote retention. Seeing as the Court is not permitted to initiate a review of the terms, operation or other aspect of the trust of its own motion under s 231, s 238 is key in providing owners with an avenue for the accountability of their trustees. This is because s 238 enables the jurisdiction of the Court to be invoked at any time, the advantage of which is that concerned owners can access the Court with relative ease, often on an urgent basis, where issues

74 *Proprietors of Mangakino Township v Maori Land Court* CA65/99, 16 June 1999 at 9–10.

75 Harvey, above n 11, at 111.

regarding the trust's operation or trustees' conduct have arisen.⁷⁶ In this case, s 238 was applied in directions to all five trustees to provide answers to questions regarding the financial position and investment activities of OFT. This underscores the utility for owners of having ready access to an independent and inexpensive judicial forum, exercising a discretion that is protective of the retention of Māori land, for the determination of issues that can and often do arise in the use and development of Māori land.

Finally, s 240 permits the Court to make an order for the removal of a trustee whenever their conduct is deemed to pose a threat to retention. As the decision in this case illustrates, the removal of trustees involves a two stage inquiry. The first stage is for the Court to consider whether the trustee has failed to carry out their duties satisfactorily. Problematically, what constitutes satisfactory conduct is not dealt with in TTWMA, so the Court is effectively at liberty to set the standard against which a trustee's performance is to be assessed. In *Hall v Opepe Farm Trust*, Judge Harvey, citing an appellate authority, resolved that it required consideration of the impact of the trustee's actions on the beneficiaries and any apprehension of risk to the trust assets, namely the land itself.⁷⁷ This means it is not every unsatisfactory act or omission which should lead to removal, but those that pose a threat to retention. As regards the mussel farm investment, the TWVHL project and the Tauhara North purchase, each involved a clear and present apprehension of risk to the trust assets as a result of the inaction of the respondents, so findings of unsatisfactory conduct were readily available.

The second stage is for the Court to exercise a discretion to decide whether removal of the trustee is warranted. TTWMA does not contain any specific criteria for the exercise of this discretion outside the general objectives the Court is directed to seek in s 17. These include ascertaining and giving effect to the wishes of the owners, and promoting practical solutions to problems arising in the use or management of

76 At 188.

77 *Hall v Opepe Farm Trust*, above n 22, at [158]–[160].

the land.⁷⁸ However, in this case, Judge Harvey exercised his discretion to remove the respondents as trustees of OFT without consulting the owners. Clearly then, where a trustee's conduct is deemed to pose a threat to retention, the power to remove them from office is available to the Court irrespective of the owners' wishes. Judge Harvey also took the view that the owners' desire to see the return of the Tauhara North land for cultural and historic reasons could not "override the trustees' principal duties of protecting the existing assets of the trust and their duty to act prudently".⁷⁹ So, when it comes to balancing the dual and sometimes conflicting objectives of retention and utilisation in Māori land trust matters, TTWMA prioritises promoting retention through the exercise of the extensive supervisory powers vested in the MLC.

However, as the Waitangi Tribunal has observed, "the court's powers are extensive on an ex post facto basis, after trustee decisions are made".⁸⁰ Sections 237, 238 and 240 do not enable the Court to unpick trustee decisions. Rather, they empower the Court to hold trustees to account for the decisions they make regarding the utilisation and development of Māori land to promote the retention of that land in the hands of its owners, their whānau and their hapū. This is where the accessibility of the MLC becomes important, since an inaccessible remedy is no remedy at all.⁸¹ The fee to file an application in the Court for most trust matters is \$60, which can be waived on application.⁸² While counsel are permitted, they are not required. Furthermore, as Judge Harvey's decision in this case shows, where an owner seeks an injunction, it is also possible for the Court to order a review, replacement or removal of the trustees since, unlike the procedure for Māori incorporations, there are no quorum requirements or voting thresholds for concerned owners to trigger the MLC's

78 TTWMA, s 17(2).

79 *Hall v Opepe Farm Trust*, above n 22, at [105].

80 Waitangi Tribunal, above n 32, at 227.

81 Harvey, above n 11, at 111.

82 Ministry of Justice "Māori Land Court Application Fees and Forms" (11 January 2020) <www.maorilandcourt.govt.nz>.

jurisdiction.⁸³ While it could be said that this approach provides an appropriate balance and a sufficiently broad framework to enable trustees and owners to use and develop their land, because owners are free to engage with their land without the MLC directing the form of that utilisation, Te Puni Kōkiri has reported that reliance on this level of discretion creates uncertainty for owners and trustees in the development of aspirations for their land and in the implementation of actions to achieve those aspirations.⁸⁴ The question then arises as to whether this is the ideal approach or whether another might be more appropriate when it comes to balancing retention with the risks that utilisation and development could pose to it in Māori land trust matters.

V Reform Proposals

Since TTWMA was enacted in 1993, numerous reports prepared by the Crown and related agencies like the Law Commission, as well as Māori landowner groups, such as the Federation of Māori Authorities, have highlighted areas for improvement and reform.⁸⁵ While some of these concerns were addressed in an important amendment to the Act in 2002, a number of the more substantial changes were dropped at the Select Committee stage and criticism has continued.⁸⁶ Unsurprisingly, issues that have clearly emerged in debate and discussions between Māori, and between Māori and the Crown, in the trust context include how to balance retention with the risks of utilisation and development, how to balance owner autonomy with the protective mechanisms necessary to ensure retention, and whether the MLC's extensive supervisory powers are still needed or appropriate.⁸⁷ In this Part, I will consider how the proposed reforms would alter the balance between

83 See TTWMA, s 280(3). Where a shareholder seeks an investigation by the Court, 10 per cent of the shareholding must support the application, or a special resolution endorsing the application must be passed.

84 Whaimutu Dewes, Tony Walzl and Doug Martin *Ko Nga Tumanako o Nga Tangata Whai Whenua Maori: Owners Aspirations Regarding the Utilisation of Māori Land* (Te Puni Kōkiri, April 2011) at 49.

85 See Harvey, above n 11, at 157.

86 See generally Waitangi Tribunal, above n 32, at [3.3.2].

87 At 89.

the dual, and sometimes conflicting, objectives of retention and utilisation in Māori land trust matters by assessing how they would have impacted the decision-making process of Judge Harvey in *Hall v Opepe Farm Trust*, had they been in force at the time the case was decided.

A The 2016 Bill

The 2016 Bill is a replacement Bill. A complete re-write of the current law was chosen over piecemeal amendment on the recommendation of an independent review panel tasked with reviewing the Act in 2012.⁸⁸ The Panel considered that the changes necessary to give effect to the purpose of the reform required new legislation.⁸⁹ It was of the view that:⁹⁰

The structure of Te Ture Whenua Maori Act, with a primary focus on the Māori Land Court and its jurisdiction, does not lend itself well to a new framework in which we consider the focus should very clearly be on Māori land protection and utilisation and empowerment of Māori landowners and their decision-making.

Because the main thrust of the Panel's recommendations was to remove a perceived barrier to utilisation, which the involvement of the MLC was assumed to carry with it, the 2016 Bill severely reduces the role of the Court in relation to Māori land trusts.⁹¹

In general, the reform proposes to replace the protections afforded to Māori landowners by the impartial oversight of the MLC, when it comes to decisions regarding the use and development of Māori land, with a participating owners' regime designed to empower greater final decision-making by owners. The role of the Court is reduced from examining the merits of management decisions to one of

88 See Matanuku Mahuika and others *Report: Te Ture Whenua Maori Act 1993 Review Panel* (Te Puni Kōkiri, Wellington, 2014) at 31.

89 At 31.

90 At 31.

91 Waitangi Tribunal, above n 32, at 228.

primarily procedural checks.⁹² While this approach seems to provide a more appropriate balance, and a sufficiently broad framework to enable trustees and owners to use and develop their land, it comes at the price of increased compliance requirements to ensure the necessary checks and balances still exist and are applied to promote retention. In the context of Māori land trusts, this means the 2016 Bill is more complex, access to the Court is curtailed and there is a lengthier process for the removal of trustees.

1 The 2016 Bill is more complex

The 2016 Bill does away with all the management entities available under TTWMA except for the whānau trust. Instead, it provides for owners to appoint a governance body to manage the land on their behalf.⁹³ Owners are given the choice of a Māori incorporation, a private trust, a new or existing rangatopu, an existing statutory body, or a representative entity.⁹⁴ The 2016 Bill also contains some 175 provisions that Māori owners and trustees must navigate to use and develop our land.⁹⁵ By contrast, there are 97 provisions, including the regulations governing the powers of assembled beneficial owners, that owners and trustees must engage with under the current Act. The 2016 Bill's provisions are also extremely convoluted and require constant cross-referencing between various clauses in the body of the legislation and in the schedules. As Te Paroa Lands Trust maintained in their submission on the 2016 Bill, the proposed reform "imposes all kinds of cumbersome processes that are worse than those under the current Act".⁹⁶

As an ahu whenua trust, OFT would have continued to exist as a governance body in the form of a private trust.⁹⁷ The trustees together would have become the governance body and each individual trustee would have become a kaitiaki.⁹⁸

92 van Alphen Fyfe, above n 46, at 37.

93 Te Ture Whenua Māori Bill 2016 (126-2), cl 154(1).

94 Clause 158(1).

95 See pts 5 and 6. See also schs 1–4.

96 Te Paroa Lands Trust "Submission to the Māori Affairs Committee on Te Ture Whenua Māori Bill 2016" at [9].

97 Te Ture Whenua Māori Bill (126-2), sch 1 cl 12(1)(a).

98 Schedule 1 cls 12(1)(b) and 13(3)(a). See cl 154(2).

These new terms and transitional provisions are confusing and unnecessary, and would undoubtedly only have made it more difficult for the owners of OFT to use and develop their land.⁹⁹ The vast increase in law would also only have made it more difficult for the owners of OFT to use and develop their land. Far from empowering greater final decision-making by the owners of OFT, the added complexity arising from the need to craft new protective mechanisms to replace the impartial oversight of the Court in Māori land trust matters would only have made the business of OFT more difficult to run. It would have also almost certainly required both the trustees and owners of OFT to seek legal advice to explain this complicated framework. This would have added to the cost of running the business of OFT as well as resolving the dispute regarding the removal of the trustees. The current trust framework for the management of Māori land is, therefore, far simpler than what is proposed under the 2016 Bill and involves less cost to owners. Accordingly, the question could be asked: what would have been the benefits for OFT under such a regime?

2 Access to the Court is curtailed

The answer seems to be in the power conferred on the Court to make an order permanently disqualifying a person from being appointed, or continuing in an appointment, as a trustee.¹⁰⁰ However, access to the Court in the case of a conflict or dispute is significantly curtailed by the imposition of new thresholds to trigger the jurisdiction of the MLC. While the Court retains the power to initiate a review of a trust's activities of its own motion under cl 216, it can only do so on the application of the governance body, or at least 15 owners who together hold at least five per cent of the beneficial interest in the land.¹⁰¹

Assuming the trustees would not have been willing to initiate a review of their own decisions, Mr Hall's application would have needed the support of at least

99 See Harvey, above n 11, at 192–195.

100 See Te Ture Whenua Māori Bill (126-2), cl 220.

101 Clause 216(4)(a).

14 other owners, who, together with him, held at least five per cent of the beneficial interest in the land, to trigger the jurisdiction of the MLC. As with the thresholds under the Māori Assembled Owners' regime, this threshold would have almost certainly been impossible to achieve due to the ongoing fragmentation of the freehold interest and, therefore, would have made it impossible for the owners to seek accountability. Through the imposition of these new thresholds, the trustees of OFT would have essentially been immune to the owners' concerns. So long as the correct decision-making procedures were followed, the Court would have been powerless to provide a remedy. As Harvey has observed, "the application and enforcement of rigid statutory thresholds under the [2016] Bill leaves little practical room for exceptions, which [is] counterproductive to one of the central aims of the reform" — namely, owner empowerment.¹⁰² The 2016 Bill also fails to ensure that the necessary checks and balances exist, and are applied to promote the retention of Māori land. Despite having squandered millions of dollars of trust funds, Mrs Rameka, Mrs Biel and the three male trustees would likely still be in office because the threshold required to trigger the MLC's jurisdiction would probably not have been met.

3 A lengthier process for the removal of trustees

If the threshold required to trigger the MLC's jurisdiction is somehow met, there is likely to be a lengthier process for the removal of trustees under the 2016 Bill. First, a judge can convene a conference "to give the parties to a proceeding before the [C]ourt an opportunity to negotiate a settlement of a claim or any issue".¹⁰³ The judge is permitted to assist the parties in their negotiations, but cannot then preside at the hearing of the proceeding (if any) "unless all parties taking part in the conference consent ... or the only matter for resolution at the hearing is a question of law".¹⁰⁴

Judge Harvey could have convened a judicial settlement conference in *Hall v Opepe Farm Trust*. With his help, the parties could have negotiated a settlement of

102 Harvey, above n 11, at 254.

103 Te Ture Whenua Māori Bill (126-2), cl 425.

104 Clause 425(3).

Mr Hall's application for the removal of the trustees and avoided the cost of potentially needless litigation. However, if the issue proceeded to court, Judge Harvey would not have been able to preside over the hearing unless all parties who took part in the conference consented or the only matter for resolution at the hearing was a question of law. While this gives effect to owner autonomy by providing greater alternative dispute resolution options for owners, it could have caused OFT undue delay or prejudice if the uptake on settlement conferences was high. As the lawyers at McCaw Lewis have pointed out, "there are only 12 Māori Land Court judges who have increasing demanding workloads in the Waitangi Tribunal, Environment Court and Pacific Courts".¹⁰⁵

Secondly, a judge can refer an application to a dispute resolution process. If satisfied there is an issue in dispute that the parties should attempt to resolve themselves, a judge is required to adjourn the matter to allow any dispute resolution process set out in the governance agreement to be carried out, or to refer the dispute to the Chief Executive to initiate a dispute resolution process in accordance with pt 9.¹⁰⁶ The parties are then required to agree on and nominate one or more kaitakawaenga (person to provide dispute resolution services) for appointment within 20 working days.¹⁰⁷ If the parties fail to nominate a kaitakawaenga or other suitable person, the Chief Executive is required to appoint one.¹⁰⁸ The parties must then elect to give the appointed kaitakawaenga the power to make written recommendations or a binding decision on the dispute.¹⁰⁹ If this process is unsuccessful, the matter would then proceed to the MLC for determination.¹¹⁰

Judge Harvey could have referred Mr Hall's application for the removal of the trustees to a dispute resolution process in *Hall v Opepe Farm Trust*. If satisfied that removal of

105 McCaw Lewis Lawyers "Submission to the Māori Affairs Committee on Te Ture Whenua Maori (Succession, Dispute Resolution and Other Related Matters) Bill 2019" at [20].

106 Te Ture Whenua Māori Bill (126-2), cl 216(4).

107 Clause 332.

108 Clause 332.

109 Clause 335.

110 Clause 337.

the trustees was an issue the parties should attempt to resolve themselves, his Honour would have been required to adjourn the matter and refer the dispute to the Chief Executive to initiate a dispute resolution process. This in itself could have been lengthy and convoluted.¹¹¹ As the Arbitrators' and Mediators' Institute have noted, "the dispute resolution process inserted into the [2016] Bill creates a strictured model which may hinder rather than encourage effective dispute resolution for Māori".¹¹² For example, if Mr Hall and the trustees had irreconcilable differences, or alternative dispute resolution was not their preferred course of action, being forced into such a process would simply have caused them undue cost, stress and delay in having to take a longer route to access the Court. Although providing greater alternative dispute resolution options for owners gives effect to owner autonomy, forcing Mr Hall and the trustees into such a process without their consent is the antithesis of the rangatiratanga and choice that the 2016 Bill was intended to embody.

Finally, a judge can make an order for the disqualification of trustees. If satisfied that a trustee has persistently failed to comply with any of their duties arising under any enactment, rule of law, rule of court, or court order, a judge can make an order disqualifying a person from being appointed, or continuing in an appointment, as a trustee.¹¹³ Such an order can disqualify a person permanently or for a period specified in the order.¹¹⁴ However, the MLC may only disqualify a person permanently or for a period longer than 10 years in the most serious cases.¹¹⁵

Judge Harvey could have made an order disqualifying the respondents from continuing in appointment as trustees of OFT if his Honour was satisfied that they had persistently failed to comply with any of their statutory duties. As with s 240, this would have involved a two stage inquiry. The first stage would have been for the Court to consider whether the respondents had persistently failed to carry out one of their

111 See generally cls 330–337.

112 Arbitrators' and Mediators' Institute of New Zealand "Submission to the Māori Affairs Committee on Te Ture Whenua Māori Bill 2016" at 2.

113 Te Ture Whenua Māori Bill (126-2), cl 220(1)(b)(i).

114 Clause 220(2).

115 Clause 220(3).

statutory duties. While this seems to remove the discretion currently conferred on the Court to set the standard against which a trustee's performance is to be assessed, what constitutes a persistent failure is likewise not defined in the 2016 Bill. This means that the Court would have still effectively been at liberty to set the standard against which the respondents' performance was to be assessed. As the mussel farm investment, the TWVHL project and the Tauhara North purchase each involved a clear breach of the respondents' duty to act prudently, it is likely that Judge Harvey would have found that the respondents had persistently failed to carry out one of their statutory duties.

The second stage of the inquiry would have remained for the Court to exercise a discretion to decide whether removal of the trustee was warranted. Like TTWMA, the 2016 Bill does not contain any specific criteria for the exercise of this broad discretionary power outside the general principles the MLC is required to recognise in seeking to achieve the purpose of the reform.¹¹⁶ These include that: owners have the right to decide how their land is used and to take advantage of opportunities to develop their land; tikanga is central to matters involving Māori land; and disputes should be managed in a way that maintains or enhances the relationships among the owners, and members of their whānau and their hapū.¹¹⁷ But there is still nothing in the 2016 Bill that would have prevented Judge Harvey from exercising his discretion to remove the respondents as trustees of OFT without consulting the owners. The Court would have retained the power to remove trustees from office irrespective of the owners' wishes. Again, this is the antithesis of the rangatiratanga and choice that the 2016 Bill was intended to embody. However, the principle that tikanga is central to matters involving Māori land could have altered the Court's view in relation to the Tauhara North purchase by giving more weight to the owners' desire to see the return of the land for cultural and historic reasons.

116 Clause 4.

117 Clause 3(4).

B The 2019 Bill

Having considered how the 2016 Bill would alter the balance between the dual and sometimes conflicting objectives of retention and utilisation in Māori land trust matters, I will now turn to do the same with the 2019 Bill by assessing how the proposed amendments would have impacted the decision-making process of Judge Harvey in *Hall v Opepe Farm Trust*. As its title suggests, the 2019 Bill is an amendment Bill. An amendment to the existing law was chosen over a complete re-write because the Labour-led Government is of the view that TTWMA “continues to provide a sound legislative framework for Māori land tenure, supporting owners of Māori land to retain, as well as develop and utilise, their land”.¹¹⁸ However, it also believes the Act “would benefit from some practical and technical changes that support the Māori Land Court and strengthen the legislative framework”.¹¹⁹ The 2019 Bill is, therefore, narrower in scope than the 2016 Bill.

In general, the 2019 Bill proposes small changes to the law governing succession, dispute resolution and other related matters to reduce the complexity and compliance requirements owners encounter when they engage with the MLC about their land.¹²⁰ The idea is that streamlining access to the Court will better balance owner autonomy with the protective mechanisms necessary to ensure retention, by making it easier for Māori to engage with and resolve disputes about their whenua. In the context of Māori land trusts, this means a MLC Registrar can determine applications for simple and uncontested trust matters, there are more dispute resolution options for owners and there are updated grounds for the removal of trustees.

118 Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (179-1) (explanatory note) at 1.

119 At 1.

120 At 1.

1 A MLC Registrar can determine applications for simple and uncontested trust matters

The new s 235A permits a Registrar to determine an application for a simple and uncontested trust matter unless the applicant requests otherwise.¹²¹ A simple and uncontested trust matter is explained in subs 9 as meaning one that the Registrar is satisfied is *simple*, such as the appointment of a trustee to a whānau trust or having a whānau trust constituted to hold only the applicant's beneficial interests or shares, and *uncontested* because the application has been notified or consulted on as required by the rules of the Court and no one has objected.

Mr Hall's application in *Hall v Opepe Farm Trust* could have been determined by a Registrar under the proposed amendment. It is unlikely, based on the above examples, that a Registrar would have been satisfied that Mr Hall's application was a simple and uncontested trust matter because s 240 involves a question of law and the respondents clearly objected to their removal (all the way up to the Court of Appeal, in fact). Nevertheless, this mechanism would have made it easier for the owners and trustees of OFT to use, develop and resolve disputes about their land by reducing the amount of time they would have had to spend in court. However, allowing a Registrar to determine Mr Hall's application could have created uncertainty, and perhaps even prejudice, for the owners of OFT. This is because the definition of simple is too vague.¹²² Although the new s 235A(9)(a) includes a list of examples of simple trust matters for reference, it provides no specific criteria against which a Registrar is to assess whether a trust matter is in fact simple. This could mean that something as straightforward as a reduction in the number of trustees of a trust — for example, where a trustee has died or filed a written resignation — could be passed over to the Court, or that a complex application for the approval of a new venture could be dealt with by a Registrar. As the facts in *Hall v Opepe Farm Trust* illustrate, often what appears to be simple is not, especially where Māori land is concerned.

121 Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179-2), cl 41.

122 McCaw Lewis Lawyers, above n 105, at [36].

2 More dispute resolution options for landowners

Similar to what was proposed in the 2016 Bill, the new s 40A enables a judge to convene a conference “to give the parties to a proceeding before the [C]ourt an opportunity to negotiate the settlement of a claim or an issue”.¹²³ The judge is permitted to assist the parties in their negotiations, but cannot then preside at the hearing of the proceeding (if any) “unless all parties taking part in the conference consent ... or the only matter for resolution at the hearing is a question of law”.¹²⁴

Judge Harvey could have convened a judicial settlement conference in *Hall v Opepe Farm Trust*. Again, with his Honour’s help, Mr Hall and the trustees could have negotiated a settlement of Mr Hall’s application for the removal of the trustees and avoided the cost of potentially needless litigation. However, had the negotiations failed and the matter proceeded to a hearing, his Honour would not have been able to preside over the hearing unless all parties who took part in the conference consented or the only matter for resolution at the hearing was a question of law. As discussed, although this gives effect to owner autonomy by providing greater alternative dispute resolution options for owners, it could also have caused OFT undue delay or prejudice if the uptake on judicial settlement conferences was high because there are only 12 MLC judges who have increasingly demanding workloads.

Parties would also have the option to attempt to resolve any dispute about Māori land trust matters themselves under the new pt 3A.¹²⁵ The new s 98L(2) provides that either party to a dispute may apply to have the issue referred to a mediator before proceedings are initiated in court. If court proceedings have already been initiated, the new s 98L(1) permits a judge to refer any issue to a mediator at their own initiative or on the request of any party to the proceedings. However, the new s 98J makes it clear that mediation is always voluntary. It overrides the rest of the new pt 3A and provides that: an issue may only be referred to mediation if all the parties agree to

123 Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (179-2), cl 15.

124 Clause 15.

125 Clause 19.

mediation; and an issue may only be mediated while all the parties still agree to mediation.

Mr Hall and the trustees would have been able to attempt to resolve the dispute themselves under the new pt 3A. Either party could have applied to have the matter referred to a mediator before proceedings were initiated. Judge Harvey would also have been able to refer any issue arising from the matter to a mediator at his Honour's own initiative, or on the request of either party, once proceedings had begun if both parties agreed to mediation. The dispute resolution process proposed in the 2019 Bill, therefore, gives full effect to owner autonomy by providing greater alternative dispute resolution options for owners with no risk of added cost, stress or undue delay because "the policy intent is that the dispute resolution process would be free", as well as completely voluntary.¹²⁶

3 Updated grounds for the removal of trustees

The 2019 Bill updates the current grounds for the removal of a trustee with more specific grounds. These include where "the trustee has lost the capacity to perform the functions of a trustee" or where "the removal is desirable for the proper execution of the trust".¹²⁷ Where it is the latter, the judge must also be satisfied that the trustee: has repeatedly refused or failed to act as trustee; has become an undischarged bankrupt; is a corporate trustee subject to an insolvency event; or is no longer suitable to hold office because of their conduct or circumstances.¹²⁸ The new s 240(3) provides several examples of conduct or circumstances that may render a person no longer suitable to hold office as trustee, including where they are convicted of an offence involving dishonesty, and where they are prohibited from taking part in

126 Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (179-2) (select committee report) at 4.

127 Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (179-2), cl 42(2).

128 Clause 42(2).

the management of a company or other body under the Companies Act 1993, the Financial Markets Conduct Act 2013 or the Takeovers Act 1993.¹²⁹

Though the reform proposes to update the grounds for the removal of trustees, Mr Hall's application for the removal of the trustees of OFT would be dealt with in very nearly, if not exactly, the same way under the 2019 Bill. Judge Harvey could have made an order removing the respondents as trustees of OFT if satisfied that their removal was desirable for the proper execution of the trust and that they had repeatedly failed to act as trustees.¹³⁰ This would have involved a three stage inquiry. The first stage would have been whether the respondents had repeatedly failed to act as trustees. Again, while this seems to remove the discretion currently conferred on the MLC to set the standard against which a trustee's performance is to be assessed, the judge is left to determine what constitutes a repeated failure. So, the Court would still effectively have been at liberty to set the standard against which the respondents' performance was to be assessed. As the mussel farm investment, the TWVHL project and the Tauhara North purchase each involved a clear breach of the respondents' duty to act prudently, it is likely that Judge Harvey would have found that the respondents had repeatedly failed to act as trustees.

The second stage would have been whether the respondents' removal was desirable for the proper execution of the trust. Taking into account the respondents' repeated breaches of trust, the expenditure of substantial amounts on what was potentially needless High Court litigation, and the impact of their breaches on OFT's financial state, it is likely Judge Harvey would have found that the respondents' conduct was of a sufficient extent and nature to prevent the proper execution of the trust and, therefore, that their removal would have been desirable.

The third stage would have remained for the MLC to exercise a discretion to decide whether removal of the trustee was warranted. Like the 2016 Bill, the 2019 Bill does not include specific criteria for the exercise of this discretion. Again, though

129 Clause 42(3).

130 Clause 42(2).

the general objectives the Court is directed to seek in s 17 include ascertaining and giving effect to the wishes of the owners, and promoting practical solutions to problems arising in the use or management of the land, there is still nothing in the 2019 Bill that would have prevented Judge Harvey from exercising his discretion to remove the respondents as trustees of OFT without consulting the owners. Clearly then, while the 2019 Bill proposes to update the grounds for the removal of trustees, it would have made little practical difference to the decision-making process of Judge Harvey in *Hall v Opepe Farm Trust*.

VI What Reform of TTWMA Should Look Like

TTWMA is heavily reliant on the exercise of judicial discretion when it comes to balancing retention with the risks that utilisation and development could pose to it in Māori land trust matters. As Judge Harvey's decision in *Hall v Opepe Farm Trust* illustrates, the MLC has a final discretion over a range of decisions regarding the utilisation of Māori land, and priority is given to promoting retention. While this might be the appropriate trade-off for recognising Māori land as taonga tuku iho which ought to be retained and developed for the benefit of its owners, their whānau and their hapū, it creates uncertainty for owners of Māori land in decision-making, particularly regarding the use and management of our lands. Reform of the laws relating to Māori land trusts must prioritise this issue.

As discussed, the need for reform of TTWMA is not in dispute. Change is clearly desired. The question concerns the extent of reform needed to better balance owner autonomy with the protective mechanisms necessary to ensure retention. In this Part, I will suggest what reform of TTWMA should look like to satisfy the standard of providing an appropriate balance and a sufficiently broad framework to enable trustees and owners to use and develop their land, while at the same time ensuring that the necessary checks and balances exist and are applied to promote retention. I will also comment on how my suggestions might have affected the decision-making process of Judge Harvey in *Hall v Opepe Farm Trust*. In light of my earlier analysis, I argue that the law should resolve the tension between retention and utilisation by amending the current Act to improve owner involvement in trust matters.

A Amendment to the Current Act

The reform should be an amendment to the current Act rather than a complete rewrite of the law. The replacement of TTWMA with an entirely new law is not necessary to remove the uncertainties implicit in the MLC's various areas of discretionary review and supervision when it comes to balancing retention with the risks that utilisation and development could pose to it in Māori land trust matters. The appropriate balance between owner autonomy and the protective mechanisms necessary to ensure retention can, with key changes, be achieved under the existing framework. As Judge Harvey's decision in *Hall v Opepe Farm Trust* illustrates, the Court's powers are extensive on an ex post facto basis, after trustee decisions are made. Trustees do, in fact, make the decisions when it comes to the use and development of Māori land, with the Court invariably confirming their decisions in the absence of improper process, conflict of interest or other illegality.¹³¹ This is apparent from the number of trusts successfully realising their different aspirations under the current regime. As Craig Coxhead has observed:¹³²

We have land trusts worth in excess of \$200 million, trusts involved in papakāinga housing projects, orchards, and farms, along with owners who seek to utilise their land by preserving the native forest growing there through rāhui arrangements. These are all success stories where Māori landowners have been able to balance the twin aims of the Te Ture Whenua Māori Act - retention and utilisation.

Coxhead also notes that most land utilisation initiatives in the trust context do not require court approval or oversight. He says: "In the main, owners are free to go about caring for and utilising their land as they wish."¹³³ The Court is only required to be involved where a utilisation proposal involves the disposition of interests in Māori land, or on application by the trustees themselves or any beneficiary of the trust.¹³⁴

131 See Harvey, above n 11, at 179.

132 Craig Coxhead "Māori Land: Unlocking the potential" (2013) May Māori LR 1 at 1. Coxhead was appointed as a Judge of the Māori Land Court on 25 January 2008.

133 At 1.

134 See TTWMA, pt 8.

In respect of the latter, it is usually to protect the owners' interests in the event of disaster or mishap. Only then does the Court have extensive supervisory powers to promote retention.

The view that the structure of the current legislation does not lend itself well to "Māori land protection and utilisation and empowerment of Māori landowners and their decision-making", which informed the decision to completely repeal and replace TTWMA with the 2016 Bill, was, therefore, seriously misguided.¹³⁵ Perhaps this explains why the 2016 Bill goes too far in seeking to reduce the role of the MLC in the administration of Māori land trusts. Not only is the 2016 Bill overly complicated as a result of the need to craft new protective mechanisms to replace the impartial oversight of the Court, but it completely fails both to provide an appropriate balance and a sufficiently broad framework to enable trustees and owners to use and develop their land, and to ensure that the necessary checks and balances exist and are applied to promote retention. The ability of owners to, first, access the Court and, secondly, obtain a suitable remedy, is made more difficult by the imposition of new thresholds to trigger the Court's jurisdiction, and a lengthier process for the removal of trustees. Far from removing the uncertainties implicit in the Court's various areas of discretionary review and supervision, the 2016 Bill creates new uncertainties for owners in the development of aspirations for our land and in the implementation of actions to achieve those aspirations. As Harvey has observed, the current law is much "simpler and consequently more accessible for owners and their advisers to engage with as they manage their lands".¹³⁶

An amendment to the existing law is, therefore, all that is required to better balance owner autonomy with the protective mechanisms necessary to promote retention. The 2019 Bill is a good starting point for providing an appropriate balance, and a sufficiently broad framework to enable trustees and owners to use and develop their land while at the same time ensuring that the necessary checks and balances exist and are applied to promote retention. In this section, I will suggest some

135 Mahuika and others, above n 88, at 31.

136 Harvey, above n 11, at 189.

adjustments and additions to the proposed amendments that would help to remove the uncertainties implicit in the Court's various areas of discretionary review and supervision in Māori land trust matters. First, the 2019 Bill should contain specific criteria for the exercise of the broad discretionary power vested in the MLC in s 240. Secondly, the 2019 Bill should include more precise definitions of what is simple and uncontested in its proposal to allow a Registrar to determine simple and uncontested trust matters. Thirdly, the 2019 Bill should make provision for the employment of more MLC judges to ensure the effective operation of judicial settlement conferences. Fourthly, more thought should be given to allowing the MLC to compel parties to mediate in certain circumstances, as well as the type of mediation process to be adopted. Finally, the 2019 Bill should require all Māori land trusts to hold a general meeting of owners at least once every 12 months.

1 Specific criteria for the exercise of the broad discretionary power in s 240

The 2019 Bill should contain specific criteria for the exercise of the broad discretionary power vested in the MLC in s 240. When it comes to ensuring the necessary checks and balances exist and are applied to promote retention, several different protective mechanisms can be used. As the Waitangi Tribunal has observed: "One is to have an impartial decision-maker exercising a discretion protective of all owners in a balanced manner having regard to the purpose of the legislation."¹³⁷ This is the mechanism used by the current legislation. While it has the potential to create uncertainty for owners in the development of aspirations for our land and in the implementation of actions to achieve those aspirations, it is preferable to "setting thresholds with all their complexity, both as to quorum requirements and as to voting", which is the mechanism used in the 2016 Bill.¹³⁸ Restricting access to the MLC is the antithesis of giving effect to owner autonomy, which presumably includes the decision of whether to seek the assistance of the Court.¹³⁹ As discussed, one of the key advantages of the current law regarding Māori land trusts is that there are no quorum

137 Waitangi Tribunal, above n 32, at 224.

138 At 224.

139 Harvey, above n 11, at 206.

requirements or thresholds for concerned owners to seek accountability. While this degree of protection and accessibility comes at the expense of a level of uncertainty in decision-making, it can — and should — be removed by amending TTWMA to include specific criteria for the exercise of the broad discretionary powers vested in the MLC.

This seems to be what the 2019 Bill is trying to do in updating the grounds for the removal of trustees. However, as discussed, the proposed amendment would make little practical difference to the decision-making process of Judge Harvey in *Hall v Opepe Farm Trust*. This is largely because the updated grounds are specific to private general law trusts which typically have professional trustees appointed. As the Judges of the MLC have observed:¹⁴⁰

Māori land trusts do not, for the most part, have professional trustees appointed — trustees are generally the Māori landowners themselves, appointed to be the representatives of the full land ownership.

The proposed amendment to s 240 is, therefore, largely out of step with the common circumstances of Māori land trusts and trustees. Māori land trustees are not removed because they have received professional sanctions under the Companies Act or similar legislation, but because they have failed to properly take account of their duties.¹⁴¹

The amendment to s 240 should be adjusted to require a vote of owners as to whether they desire the removal of the trustee. Though s 17 directs the Court to ascertain and give effect to the wishes of the owners in exercising its jurisdiction and powers under TTWMA, it is not *required* to do so. As Judge Harvey’s decision in *Hall v Opepe Farm Trust* illustrates, where a trustee’s conduct is so unacceptable and in breach of core trust duties, the MLC has the power to remove them from office irrespective of the owners’ wishes. This broad discretionary power is retained in the 2019 Bill and should continue to be available to ensure the necessary checks and

140 Māori Land Court Judges “Submission to the Māori Affairs Committee on Te Ture Whenua Maori (Succession, Dispute Resolution and Other Related Matters) Bill 2019” at [110].

141 At [110]. See generally Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (179-2), cl 42(3).

balances exist and are applied to promote retention. However, the Court should be required to consult and take account of the owners' views as to whether they desire the removal of the trustee. This would achieve a better balance between owner autonomy and the protective mechanisms necessary to ensure retention by guaranteeing a level of owner involvement in the decision-making process. In Māori land trust matters, the owners' wishes are typically expressed by a vote at a meeting of owners.¹⁴² To ensure this adjustment is not an additional administrative burden on the MLC, it should be up to the applicant seeking the removal of the trustee to: inform the owners of the reasons why they seek their removal; arrange for the vote to be held and certified; and pass the results on to the Court for consideration. Such a requirement would have prevented Judge Harvey from exercising his discretion to remove the respondents as trustees of OFT without consulting the owners in *Hall v Opepe Farm Trust*.

Further, s 240 should be amended to codify the three stage inquiry for the removal of trustees. This would promote more transparent and consistent decision-making by clearly outlining the steps involved in the exercise of the MLC's discretion. In addition to creating more certainty for owners in the development of aspirations for their land, and in the implementation of actions to achieve those aspirations, separating out the different steps would simplify the decision-making process for the judges themselves when determining an application under s 240. As the New Zealand Māori Law Society suggests: "The condition that removal is desirable for the proper execution of the trust should be a standalone factor."¹⁴³

The New Zealand Māori Law Society also recommended that the MLC be given the power to remove a trustee from serving on any trust, not just the trust in question, if their conduct warrants it.¹⁴⁴ Granting the Court this power would prevent the recurrence of poor management decisions by individuals who sit on multiple Māori land trusts. The 2016 Bill's proposal to allow the Court to make an order disqualifying

142 See *Clarke v Karaitiana* [2011] NZCA 154, [2011] NZAR 370.

143 New Zealand Māori Law Society "Submission to the Māori Affairs Committee on Te Ture Whenua Māori (Succession, Dispute Resolution and Other Related Matters) Bill 2019" at 11.

144 At 12.

a person from being appointed, or continuing in an appointment, as a trustee should, therefore, be included in the amendment to s 240. These adjustments and additions would have allowed Judge Harvey to remove Mrs Rameka and Mrs Biel as trustees of both OFT and HHLT if his Honour was satisfied that their conduct warranted it, in the circumstances, to prevent the recurrence of their imprudent management decisions.

2 More precise definitions of what is simple and uncontested

The 2019 Bill should also include more precise definitions of what is simple and uncontested in its proposal to allow a Registrar to determine simple and uncontested trust matters. As discussed, allowing a Registrar to deal with simple and uncontested trust matters would have made it easier for the trustees and owners of OFT to use, develop and resolve disputes about their land, but it could have also created uncertainty, and perhaps even prejudice, for them. This potential for uncertainty and prejudice should be removed by adding more precise definitions of what is simple and uncontested in the proposed amendment, to clarify what matters a Registrar can deal with. Examples of definitions for what is simple suggested in submissions on the 2019 Bill include *easily understood or done, presenting no difficulty*¹⁴⁵ and *plain and uncomplicated in form*.¹⁴⁶ The list of examples provided in the new s 235A(9)(a) should also be expanded and refined. An application for the reduction of the number of trustees in a trust where the trustee has died or filed a written resignation should be included by way of example.

As regards what is uncontested, a more detailed process for notice should be included in the amendment so that all interested parties know how to keep track of trust applications that may affect their interests. Currently all applications go to a hearing, which is open and public. The date and time of these hearings are advertised in the National Pānui to allow interested people to attend those applications.¹⁴⁷ Such a

145 McCaw Lewis Lawyers, above n 105, at [38].

146 Māori Land Court Judges, above n 140, at [53].

147 McCaw Lewis Lawyers, above n 105, at [41].

process, therefore, could include advertising the application in the National Pānui, as Māori landowners are already familiar with this procedure. Where no objection is received after the passage of an appropriate length of time (to be specified in the amendment), the matter could then fairly be considered uncontested.

3 More judges for the effective operation of judicial settlement conferences

The 2019 Bill should also make provision for the employment of more MLC judges to ensure the effective operation of judicial settlement conferences. As discussed, allowing the Court to convene conferences to give parties an opportunity to negotiate the settlement of a claim gives effect to owner autonomy by providing greater alternative dispute resolution options for owners. However, it also has the potential to cause owners undue delay, or perhaps even prejudice, if the uptake on settlement conferences is high. This is because there are only 12 MLC judges who have increasing demanding workloads in the Waitangi Tribunal, Environment Court and Pacific Courts. The 2019 Bill should, therefore, make additional provision for an increase in the number of MLC judges to ensure the amendment operates effectively if the uptake on judicial settlement conferences is high.¹⁴⁸ This addition would have provided Mr Hall and the trustees with the opportunity to negotiate a settlement of their dispute without the risk of undue delay or prejudice, potentially avoiding the cost of needless litigation.

4 Compulsory mediation and the type of mediation process to be adopted

More thought should also be given to allowing the MLC to compel parties to mediate in certain circumstances. As discussed, the process proposed in the 2019 Bill gives full effect to owner autonomy by providing greater alternative dispute resolution options for owners with no risk of added cost, stress or undue delay, because it is intended to be free and completely voluntary. I am inclined, however, to question whether this is the best way to improve owner involvement in trust matters. An alternative amendment could be to include some statutory mechanism, rules or

148 At [20].

practice notes that sit behind the legislation to enable judges to compel parties to mediate in certain circumstances.¹⁴⁹ This would empower owners to achieve their own solutions rather than having to accept an outcome imposed on them by the Court. Although compulsion is argued to be the antithesis of rangatiratanga, there seem to be two schools of thought on this issue. Many submitters on the 2016 Bill expressed the view that compelling parties to mediate is wrong — that one of the principles of mediation is that it is voluntary.¹⁵⁰ While this may be true in the case of private general law mediation, it does not rule out the possibility that compulsion in certain circumstances is tika and appropriate.¹⁵¹ Of course, on the one hand, there is the valid argument that forcing parties to mediate where irreconcilable differences exist, or where it is not their preferred course of action, is a waste of time and money. But, on the other hand, once a person is engaged in mediation with a skilled mediator and perhaps skilled counsel, the practical reality is that settlements ensue.¹⁵²

More thought should also be given to the type of mediation process to be adopted under TTWMA.¹⁵³ There are several different mediation models across the world, including in New Zealand. The flexibility (structured or unstructured) provided in the new dispute resolution process to be inserted into the Act under cl 19 is a good starting point, but it has the potential to prejudice some landowners if mediation is run like a courtroom at one end of the country and more of a facilitative process at the other.¹⁵⁴ This potential for prejudice should be remedied through the addition of some practice notes, rules or guidelines regarding the type of mediation process to be adopted under the Act.¹⁵⁵ A specific change to the proposed amendment is not necessary as flexibility is a key tenet of successful mediation.¹⁵⁶ However, if the new pt 3A is going to be successful and grow the confidence of Māori to use it,

149 See Aidan Warren “Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill - hearing of evidence” (26 February 2020) Māori Affairs Committee <www.facebook.com/Maori.Affairs> at 5:20.

150 Te Puni Kōkiri *Te Ture Whenua Māori Reform: Summary of Submissions* (September 2015) at [587].

151 Warren, above n 149, at 6:10.

152 At 6:35.

153 See McCaw Lewis Lawyers, above n 105, at [31].

154 Warren, above n 149, at 11:30.

155 See McCaw Lewis Lawyers, above n 105, at [34].

156 Warren, above n 149, at 12:25.

more work must be done to ensure Māori can have confidence and trust in this process.¹⁵⁷

5 General meetings of owners at least once every 12 months

The 2019 Bill should also require all Māori land trusts to hold a general meeting of owners at least once every 12 months. General meetings are the principal means by which owners receive information on the performance of the trust, including the opportunity to inspect accounts, question trustees, express support or no confidence in their governance, and generally provide feedback on any relevant trust matters.¹⁵⁸ They are, therefore, very important to owners since it is the only time they are actively involved in the management of their land. The proverb *ko te kai o te rangatira, he korero* (talk is the food of chiefs) conveys the value of collective korero or dialogue within Māori society.¹⁵⁹ Although the trust orders of many trusts, especially the larger ones, likely already include mandatory provisions about annual, biannual or triannual general meetings, it is not yet a *requirement* to do so. It is not entirely surprising then that many Māori landowners feel “left out, cut out or prevented from engaging in land affairs” as a result of the trust structure.¹⁶⁰ As Kīri Mamai Dell explains:¹⁶¹

Elected governance situates authority with a nominated power or a designated few. This body then becomes legally entitled to make choices and resolutions regarding land. This is a contrasting notion from customary and inclusive forms of governance management. Traditionally, affiliated tribal members were welcomed to voice their concerns.

Māori landowners still want to feel that they are a valued part of the land management process — that is, a function of the traditional process of collective korero.

157 At 12:35.

158 Harvey, above n 11, at 115.

159 Kīri Mamai Dell “Te Hokinga ki te Ūkaipō: Disrupted Māori Management Theory – Harmonising Whānau Conflict in the Māori Land Trust” (PhD Thesis, University of Auckland, 2017) at 170.

160 At 172.

161 At 172–173.

Requiring trusts to hold a general meeting of owners at least once every 12 months will go some way toward ensuring improved owner involvement in trust matters. This reform could be achieved by requiring the MLC, in a trust order constituting any trust under pt 12, to make provision for general meetings of owners at least once every 12 months. It is important to note that this would only be a minimum threshold. Owners and trustees would still be empowered to decide when to hold general meetings, so long as it is at least once every 12 months. Some may prefer to hold general meetings biannually or once every three or four months. While this proposal would likely not have had much of an impact on Judge Harvey's decision-making process in *Hall v Opepe Farm Trust*, it could have raised owners' concerns and enabled the jurisdiction of the Court to be invoked much earlier.

B Replacement of the Current Act

If, in the alternative, National is re-elected in September and continues to progress its policy to repeal and replace TTWMA with an entirely new law, the above adjustments and additions could still be incorporated into the 2016 Bill to help remove the uncertainties implicit in the MLC's various areas of discretionary review and supervision. First, cl 220 could be amended to: require a vote of owners as to whether they desire the removal of the trustee; and to codify the two stage inquiry for the removal of trustees in the same way I have suggested for s 240. Secondly, a new clause could be inserted into the 2016 Bill permitting a MLC Registrar to determine an application for a simple and uncontested trust matter like that proposed in the 2019 Bill, but with more precise definitions of what is simple and uncontested, as I have suggested. It is worth noting, however, that the thresholds required to trigger the Court's jurisdiction would render these adjustments and additions nugatory for most trusts. As discussed, a remedy that cannot be accessed is no remedy at all. Thirdly, the 2016 Bill could similarly make provision for the employment of more MLC judges in cl 425 to ensure the effective operation of judicial settlement conferences. Fourthly, although the Court would have the power to compel parties to mediate in certain circumstances, more thought should likewise be given to the type of mediation process to be adopted under the 2016 Bill. Finally, a new clause

could be inserted into the 2016 Bill requiring all Māori land trusts to hold a general meeting of owners at least once every 12 months, in the same way I have suggested for the 2019 Bill.

VII Conclusion

When it comes to balancing retention with the risks that utilisation and development could pose to it in Māori land trust matters, TTWMA is heavily reliant on the exercise of judicial discretion. As Judge Harvey's decision in *Hall v Opepe Farm Trust* illustrates, the MLC has a final discretion over a range of decisions regarding the utilisation of Māori land, and priority is given to promoting retention. While I believe this is the appropriate trade-off for recognising Māori land as taonga tuku iho, which ought to be retained and developed for the benefit its owners, their whānau and their hapū, the Court's extensive discretionary powers create uncertainty for Māori landowners in decision-making, particularly regarding the use and management of our lands. Reform of the laws relating to Māori land trusts must prioritise this issue, but it must also ensure the necessary checks and balances exist and are applied to promote retention. Balancing this tension between retention and utilisation in Māori land trust matters is what makes reform of TTWMA particularly challenging.

As the 2019 Bill is currently at the second reading stage and National has pledged to reinstate the 2016 Bill if re-elected in September, any argument for retention of the status quo is untenable. There is clearly a desire for change — what is at issue is simply the extent of reform needed to better balance owner autonomy with the protective mechanisms necessary to ensure retention. Although we must wait until the general election to find out whether it will be the Labour-led Government's amendment Bill, National's replacement Bill or a newly elected government's Bill, the reform should remove the uncertainties implicit in the Court's various areas of discretionary review and supervision by improving owner involvement in trust matters.

If it is the Labour-led Government's amendment Bill, the Bill would need to: codify the three stage inquiry for the removal of a trustee, require a vote of owners as to whether they desire the removal of the trustee and allow the Court to make an order

disqualifying a person from being appointed, or continuing in an appointment, as a trustee in s 240; include more precise definitions of what is simple and uncontested in the new s 235A; make provision for the employment of more MLC judges in the new s 40A; give more thought to allowing the MLC to compel parties to mediate in certain circumstances, as well as the type of mediation process to be adopted, in the new pt 3A; and include a new clause requiring all Māori land trusts to hold a general meeting of owners at least once every 12 months.

If it is National's replacement Bill, the Bill would need to: codify the two stage inquiry for the disqualification of a trustee and require a vote of owners as to whether they desire the removal of the trustee in cl 220; contain a new clause permitting a MLC Registrar to determine an application for a simple and uncontested trust matter, like that proposed in the 2019 Bill, but with more precise definitions of what is simple and uncontested; make provision for the employment of more MLC judges in cl 425; give more thought to the type of mediation process to be adopted in pt 9; and include a new clause requiring all Māori land trusts to hold a general meeting of owners at least once every 12 months.

Making these adjustments and additions would help to provide an appropriate balance, and a sufficiently broad framework, to enable trustees and owners to use and develop their land, while at the same time ensuring that the necessary checks and balances exist and are applied to promote retention, by improving owner involvement in trust matters.