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TE TURE WHENUA MĀORI REFORM – WHEN POOR PROBLEM DEFINITION LEADS TO ILLEGITIMATE POLICY

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Abstract

Achieving policy legitimacy is incredibly challenging. One key element includes input legitimacy which includes the early review stages that seek to define the problem the resulting policy will address. The recent proposed reform of the Te Ture Whenua Māori Act 1993 demonstrates the importance of problem definition in achieving policy legitimacy. In order to effectively define the problem in this case, an assessment of the Act was required to determine whether the regulatory framework and the Māori Land Court were inhibiting utilisation of Māori land. The Review Panel tasked with undertaking the review of the 1993 Act chose to rely on current research to design a policy that sought to address what it perceived as the barriers to utilisation of land, rather than determine whether the current framework was in fact inhibitory. This choice was the ultimate error and resulted in a policy perceived as illegitimate overall. The Panel effectively ignored history, relied disproportionately on poor quality evidence, and used this evidence incorrectly.

Key Words

Policy legitimacy
Problem definition
Economic development
Māori land
Te Ture Whenua Māori

Contents

I Introduction

In a speech discussing reform, the then Lord Chief Justice of England, Lord Parker sounded some words of warning:[1]

> There is I think a real danger of the zeal for reform resulting in reform for the sake of reform. Before you reform, you must be sure that what is proposed is really better than what was there before.
>
> There is a danger of making reforms which are undoubtedly worthwhile but without giving sufficient consideration to whether there are or will be in the foreseeable future sufficient means, whether in buildings or personnel, to enable the reforms to work.
>
> There is a danger that as the zeal for reform gathers momentum it will tend to get out of control so that something will be done on the spur of the moment which will be regretted hereafter. In other words there is a need to apply the brake on occasions.

Policy creation has become increasingly complex. In very few cases does it simply involve members of parliament passing law. Instead, there has been a rise in what can be described as participatory or interactive law reform, which involves a diverse range of people and organisations. The change is in part due to a change in citizen involvement in politics and an increasing theme of vocalising dissent, but it also relates to a general desire from policy makers to create policy that works. In order for policy to work, involving those most likely to be impacted, as well as those who will be crucial in the implementation and ultimate success of the policy, is essential. This is particularly so in significant areas of reform, such as where there have been catastrophic events historically or where there could be severe consequences. One such example is reform that concerns Māori, who have been historically

[1] Lord Chief Justice of England, Lord Parker speech on law reform, p 405.

impacted negatively by the law. Such a situation arguably requires something more than conventional procedure to promote legitimacy.

"Legitimate" policy is a broad concept and difficult to define. Part of this difficulty is that there is no prescribed one size fits all approach. Although the absence of prescription means there is greater flexibility, most reform processes seem to resort to more conventional methods rather than utilising this flexibility to create processes that are appropriate for the particular reform. This inadequacy means that the usual tools aimed at legitimising the policy process, such as consultation and the use of exposure draft bills, can and often do, result in wide scale criticism rather than the support sought. This may be because these tools are poorly used or it may be that they are unable to correct a flawed process overall. One way that a process can be flawed is where the problem has been defined incorrectly or incompletely. Problem definition is one of the crucial steps in policy reform and where it is done poorly, consultation will struggle to correct it. The reforms into the Te Ture Whenua Māori Act 1993 (the Act) exemplifies the importance of correctly defining the problem, reflecting Lord Parker's warning.

The enactment of Te Ture Whenua Māori Act 1993 is considered a watershed moment[2] that signified a turning point in Māori legislative history because it was the first time that Māori views and desires were given recognition in a legislative instrument.[3] The Act was based on broad consensus and[4] was also the first to embody the principle that Māori land should, as far as possible, remain under Māori ownership and control.[5] Multiple amendments to the Act have occurred since its inception. Although these have attempted to address various issues and more effectively deal with the circumstances it governs, most

[2] Judges of the Māori Land Court "Te Tari o te Kaiwhakawā Matua o te Kooti Whenua Māori / Submission of the Judges of the Māori Land Court on the Te Ture Whenua Māori Bill" (7 August 2015) at 5.

[3] Andrew Erueti "Te Ture Whenua Maori Act 1993" (Master's thesis, Victoria University of Wellington, 1993) at 7.

[4] Waitangi Tribunal Initiation, Consultation and Consent: Chapter 3 of Report into Claims concerning Proposed Reforms to Te Ture Whenua Maori Act 1993 Pre-Publication Version (Wai 2478, 2016) at 1.

[5] Rāwiri Taonui, 'Te ture – Māori and legislation - Restoring Māori customary law', Te Ara - the Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/photograph/36551/te-ture-whenua-maori-act-hui-1993 (accessed 8 September 2017).

of the amendments have not changed the overall workings of the Act.[6] Many calls have been made for a review of the Act in order to determine how it is currently working in achieving its dual aims of retention and utilisation of land.[7] In 2012 a comprehensive review of the Act was announced and an independent Review Panel was appointed to undertake this review in order to advise on unlocking the economic potential of Māori land for its beneficiaries, while preserving its cultural significance for future generations.[8] Despite consensus that the Act required amendment the reform has been incredibly controversial and in many ways unsuccessful. The question of what went wrong is, like the policy process, complex. A thorough consideration of the reform process points to one main flaw. The initial review and its inadequate problem definition meant that the process was flawed from the beginning. Each subsequent step compounded those inadequacies and resulted in an "illegitimate" policy.

This paper explores the key elements from the review stage in order to demonstrate procedural flaws and thus why consultation and other participatory mechanisms used did not (and could not) rectify these. The importance of understanding and taking account of history is highlighted, as well as the importance of transparency if policy legitimacy is the goal. It concludes that, the inadequate review and problem definition resulted in a cascade of illegitimacy that infected all elements of the reform process.

II A note on legitimacy

Policy legitimacy is important because it instills faith and trust in democracy. This means people are more likely to follow the law and thus it is more likely to work. Policy legitimacy has been framed in a number of ways. One framework involves the three principles of performance, democracy, and legality. Under this framework, policy will be legitimate

[6] Ani Mikaere and Craig Coxhead "Treaty of Waitangi and Maori Land Law" (2002) NZ Law Review 415 at 433; and Te Ture Whenua Maori Amendment Act 2002.

[7] Waitangi Tribunal (WAI 2478) *He Kura Whenua Ka Rokohanga - report on claims about reform of Te Ture Whenua Māori Act 1993* (Wellington: Legislation Direct, 2016) at [3.3.2].

[8] Te Puni Kōkiri Discussion Document: Te Ture Whenua Maori Act 1993 Review Panel (March 2013) at 5; Christopher Finlayson "Te Ture Whenua Maori Act review announced" (3 June 2012) New Zealand Government official website <www.behive.govt.nz>.

when these three principles are respected.[9] Performance is an assessment of the effectiveness and efficiency of the policy, which includes elements of acceptability and implementability.[10] Democracy refers to the development of policy in a democratic way, whereby stakeholders are given the opportunity to influence policy and policy makers are held accountable for (including giving an account of) their decisions.[11] Legality is concerned with abiding by certain norms and rules, such as policy choices being prepared by those mandated to do so.[12] However, a fourth element has also been acknowledged as forming a large part of policy legitimacy. This concerns positive evaluation of the policy by those involved.[13] This fourth element highlights an inherent tension within policy making in that even if it meets the principles of performance, democracy, and legality, if it is not seen in a positive light by those involved, it may still be considered illegitimate. For example, consultative and participatory processes that follow general practice are not necessarily perceived or evaluated in a positive manner by those involved and are often seen as "process for the sake of process".[14] However, in practical terms this becomes increasingly difficult as catering to specific needs is unlikely to be feasible in many situations for a number of reason, including that it can be difficult to discern exactly what is required in a particular instance.

Key drivers of policy legitimacy include evidence-based policy making and interactive policy tools of public consultation and participation.[15] Consultation and participation occur with target groups thereby including stakeholders and/or citizens directly into the policy making process. Including stakeholders early on benefits policy implementation because those responsible for policy delivery have essential knowledge and information that can

[9] Jan Van Damme and Marleen Brans "Consultation, participation and the quest for policy legitimacy" (Paper for ECPR Joint Sessions, April 2011, St Gallen) at 6-9.
[10] Damme, above n 9, at 4.
[11] Damme, above n 9, at 5.
[12] Damme, above n 9, at 5.
[13] Damme, above n 9, at 5
[14] Sarah Kerkin "Here there be dragons: using systems thinking to explore constitutional issues" (Doctorate thesis, Victoria Univerity of Wellington, 2017) at 187.
[15] Damme, above n 9.

drive policy success.[16] Interactive policy includes both "input legitimacy" and "process legitimacy". Input legitimacy is concerned with open access to the policy making process and is about inclusion, diversity and transparency.[17] Input legitimacy can be achieved through consultation and participation. Process legitimacy is about ensuring that people not only have access to the policy making process, but are also able to engage in meaningful interaction through ensuring information equality, equality in interaction, and accountability.[18]

Legitimacy has also been described as seeking to ensure that those affected by the policy accept and support it.[19] Support is difficult as the very concept of receiving support may conflict with the right of democratically elected individuals to create law in line with parliamentary supremacy. However, the special relationship with Māori coupled with a growing international jurisprudence regarding indigenous peoples suggests that support may be required in certain situations.[20] In particular, given the significance of land, the historical disenfranchisement in relation to Māori land, and the Treaty principle of partnership, it is likely that land may trigger such a requirement of support for a policy to be considered legitimate.[21]

This paper will focus on input legitimacy. Importantly, input legitimacy is an essential aspect of policy legitimacy overall, because without it there cannot be process legitimacy.

[16] Damme, above n 9, at 6.
[17] Damme, above n 9, at 8.
[18] Damme, above n 9, at 8.
[19] Damme, above n 9, at 4 and 8.
[20] Waitangi Tribunal, above n 7, at 157, 159, 237 and 353.
[21] Waitangi Tribunal, above n 7, at 157, 159, 237 and 353.

III Background

*A **The current reform***

Following the appointment of Minister Chris Finlayson as Associate Minister of Māori Affairs in 2011, a comprehensive review of the Act was announced in 2012.[22] The Minister appointed a Review Panel (the Panel) to review the law for Māori land and advise on unlocking the economic potential of Māori land for its beneficiaries, while preserving its cultural significance for future generations.[23] The panel consisted of Matanuku Mahuika (Chair), Toko Kapea, Patsy Reddy, and Dion Tuuta, all of whom have significant commercial and corporate legal experience.[24] The aim of the review was to provide a recommendation for a form of legislative intervention that would empower Māori land owners to achieve their aspirations while enabling the better utilisation of land.[25] In particular it was to make recommendations on legislative intervention in four key areas: ownership, governance, access to resources and utilisation.[26] The terms of reference asked it to draw on existing and additional research as required, assess the current regulatory environment, undertake consultation and provide a report.[27]

The Panel undertook a review of the existing literature, which consisted of a series of reports that focused on Māori economic development and Māori land owner views on what they considered to be the problems with the current regime, in order to identify the current issues with the Act.[28] The Panel held initial meetings with selected stakeholders with

[22] Finlayson, above n 8.

[23] Finlayson, above n 8.

[24] Te Puni Kōkiri Independent Review Panel PowerPoint for consultation June 2013.

[25] TPK, above n 8, at 6.

[26] Te Puni Kōkiri Independent Review Panel Terms of Reference 2012; TPK PPT, above n 26.

[27] TPK PPT, above n 26.

[28] Explanatory note: Māori Land Investment Group *Securing Finance on Multiple-Owned Māori Land: Options for Government* (1996); Federation of Māori Authorities *Māori Land Court and Utilisation Options Under Te Ture Whenua Māori Act 1993* (1997), the Māori Multiple-Owned Land Development Committee's *Māori Land Development* (1998), Te Puni Kōkiri reports arising from the 1998 review of Te Ture Whenua Maori Act 1993 including feedback reports on consultation hui,*Report of the National Wānanga Held to Discuss the Principles to Underpin Māori Land Legislation* (1999), the New Zealand Institute of Economic Research's *Māori Economic Development: Te Ōhanga Whanaketanga Māori* (2003), the Controller and Auditor-General's *Māori Land Administration: Client Service Performance of the Māori*

particular Māori land experience including the Māori Land Court and the Māori Trustee, in order to work through the identified issues.[29] In doing so it developed five propositions that should underpin any legislative reforms. A discussion document with these five propositions was produced in order to consult with Māori land owners.[30] These propositions were: [31]

- utilisation of Māori land should be able to be determined by a majority of engaged owners;
- all Māori land should be capable of utilisation and effective administration;
- Māori land should have effective, fit for purpose governance;
- there should be an enabling institutional framework to support owners of Māori land to make decisions and resolve any disputes; and
- excessive fragmentation of Māori land should be discouraged.

This first round of consultation hui occurred in April and June of 2013. It consisted of 20 consultation hui and garnered 189 written submissions.[32] After analysing the feedback they had received during the consultation process, the Panel submitted its final report to the Associate Minister in July 2013, which resulted in a recommendation that the 1993 Act should not just be amended but that it should be replaced.[33]

Minister Finlayson accepted the Panel's report and, in September 2013, Cabinet agreed to a proposal for a new Te Ture Whenua Māori Bill which would implement the review

Land Court Unit and the Māori Trustee (2004), the Hui Taumata's *Māori Land Tenure Review: Report on Issues* (2006), Te Puni Kōkiri's *Ko Ngā Tumanako o Ngā Tangata Whai Whenua Māori: Owner Aspirations Regarding the Utilisation of Māori Land* (2011), the Ministry of Agriculture and Forestry's *Māori Agribusiness in New Zealand: A Study of the Māori Freehold Land Resource*(2011), and the Ministry for Primary Industries' *Growing the Productive Base of Māori Freehold Land* (2013).

[29] TPK PPT, above n 26.

[30] TPK PPT, above n 26.

[31] TPK, above n 8, at 3.

[32] Waitangi Tribunal, above n 7, at 138.

[33] Review Panel *Te Ture Whenua Māori Act 1993 Review Panel Report, Poutū-te-rangi* (2014) at 31.

panel's recommendations.[34] Following Cabinet's decision, a technical panel was formed to commence policy work for a new Bill.[35] At this point Finlayson also started holding a series of presentations that detailed the outcome of the Panel's review and the Government's legislative intentions to groups of Māori land owners and administrators. Attendees were told that a Bill was proposed to replace the 1993 Act which would allow:[36]

- engaged owners to make decisions without requiring endorsement from the Māori Land Court;
- continued protections to facilitate the retention of land;
- appointment of external managers for under-utilised blocks;
- a clear framework for Māori land governance entities;
- more mediation, with fewer matters requiring involvement of the Māori Land Court;
- the ability to convert Māori freehold land to collective ownership.

Te Puni Kōkiri (TPK) (with the Iwi Leaders Group and the Federation of Māori Authorities), conducted a second round of consultation hui in August 2014. There were 19 consultation hui in total.[37] These hui described some of the key proposed changes and were intended "to inform people of the thinking to date … to seek feedback and to test if there were other ideas or matters that had not occurred to the advisers".[38]

In October 2014 after the general election, Hon Te Ururoa Flavell, became the Minister for Māori Development and took over the review of Te Ture Whenua Māori Act.[39] Minister Flavell established the Te Ture Whenua Māori Ministerial Advisory Group (MAG), which

[34] Waitangi Tribunal, above n 7, at 2.
[35] Waitangi Tribunal, above n 7, at 2.
[36] Waitangi Tribunal, above n 7, at 2.
[37] Waitangi Tribunal, above n 7, at 175.
[38] Waitangi Tibunal, above n 7, at 2.
[39] TPK PPT, above n 26.

included experts in land management and legal matters.[40] The MAG were "to provide independent advice … on the development of an exposure draft of Te Ture Whenua Māori Bill and the Māori Land Service from the perspective of those who operate within the Māori land regime".[41] The Māori Land Service (MLS) was the proposed new multi-agency body intended to replace a number of the Court's functions by providing an enhanced delivery of the Crown's administrative services in respect of Māori land.[42] The MLS would effectively take over the administrative and advisory role of the Court by consolidating existing services available to Māori land owners as well as providing new services through a single facility. It would begin running 18 months after the Te Ture Whenua Māori Bill is enacted.[43]

MAG conducted pre-consultation with a range of Māori leadership groups after releasing a preliminary discussion paper in April 2015. Following this it submitted a progress report to the Minister, outlining the work it had undertaken and making recommendations for changes to the Bill.[44]

In May 2015, an exposure draft Bill was released to the public for review.[45] In June 2015 there was a third round of consultation hui on this exposure draft. There were 23 consultation hui in total and the documentation included the first exposure draft Bill, a consultation document describing the proposed reforms, and an information pack detailing how consultation was to proceed.[46]

Concurrently with the second round of consultation hui, in August and October 2014, claims were filed with the Waitangi Tribunal (the Tribunal) in order to inquire into the reforms of the Act. The claimants' position was that only Māori, and not the Crown, could

[40] The members of the MAG were Kingi Smiler, Traci Houpapa, Spencer Webster, Linda Te Aho, Sacha McMeeking, Dr Tanira Kingi and Matanuku Mahuika.
[41] Te Puni Kōkiri Terms of Reference Te Ture Whenua Māori Ministerial Advisory Group 2014.
[42] Waitangi Tribunal, above n 7, at 4.
[43] Te Puni Kōkiri *Te Ture Whenua Māori Reform Update* (2017).
[44] Report by the Ministerial Advisory Group on Te Ture Whenua Māori Reform', 13 May 2015.
[45] TPK, above n 45.
[46] Waitangi Tribunal, above n 7, at 16 and 204.

initiate a review into the legislation governing Māori land. They considered the review process to be Crown led, pursuing Crown policy objectives rather than the aspirations of Māori land owners.[47] The reduction of Māori to stakeholder status was inconsistent with the Treaty's guarantee of tino rangatiratanga and the Crown instead requires the full, informed, and free consent of Māori before introducing the Bill.[48] Secondly, the claimants argued that the provisions of the exposure draft of the new Bill (as well as subsequent drafts) were prejudicial to Māori and in breach of Treaty principles because they weaken the kaupapa of retention and the protections afforded to Māori landowners.[49] Further, the Bill failed to address a number of real barriers to the utilisation of Māori land, such as resourcing, governance training, landlocked land, and rating valuations of land.[50]

An urgent inquiry into the reforms was conducted during November and December of 2015, with the Tribunal releasing an interim report in February 2016, and its final report in March 2016. Overall, the Tribunal found that the Crown's process was flawed because Māori had not been properly informed.[51] To avoid breaching the principles of the Treaty of Waitangi, properly informed and broad-based support for the proposed reforms should be obtained.[52] Regarding the substantive reforms, the Tribunal found that a number of provisions were Treaty-deficient and that Māori would be prejudiced if the Bill proceeded in its current form. Further, the Bill's proposals cannot be fairly assessed by Māori without much more detail about how the Crown will operate and fund the MLS, and how it will respond to the longstanding constraints to land utilisation which are the subject of a programme of work called the Māori enablers workstream. As a result of this unacceptable level of uncertainty, Māori would have been unable to offer properly informed, broad-based support for the Bill to proceed at this time, as Treaty principles require.[53] The Government did not follow the recommendations of the Tribunal.

[47] Waitangi Tribunal, above n 7 at 2.
[48] Waitangi Tribunal, above n 7 at 2.
[49] Waitangi Tribunal, above n 7 at 2.
[50] Waitangi Tribunal, above n 7 at 2.
[51] Waitangi Tribunal, above n 7 at 240.
[52] Waitangi Tribunal, above n 7 at 240.
[53] Waitangi Tribunal, above n 7 at 240.

Following the Tribunal's inquiry the draft Bill was revised and introduced to Parliament in April 2016. The Bill passed the First Reading and went to the Māori Affairs Select Committee, which received 192 submissions. The Select Committee made subsequent recommendations, addressing some of the key concerns raised in the submission process.

The Bill subsequently passed the Second Reading on 13 December 2016. It has halted at the Committee of the Whole House stage, with discussion being midway through part 6 of the Bill. Parts 1 through 5 have been accepted and agreed to, including the amendments made by Supplementary Order Paper 278, 279, and 311 to these parts.[54] Te Ururoa Flavell halted the Bill's progress until after the September 2017 general election. Due to the changes in Government, it is not clear if the Bill will proceed at all.[55]

B ***Broader Ideology***

Policy cannot be isolated from politics and the reform rhetoric (opposition and support) can be explained by the respective parties' underlying political ideology. Although political ideology is complex and this description may tend towards oversimplification, it is important to consider the basic tenets of the ideological underpinnings that are exemplified in this reform. Further, although the traditional division between the left and the right no longer exists in New Zealand, in that there has been a convergence towards the centre of the political spectrum, there are some key differences reflected in the rhetoric of those opposed and those in support of the reform.[56]

The National Party ideology is commonly associated with individualism, free market philosophy, and the rhetoric of "free enterprise".[57] These concepts are reflected in the rhetoric surrounding the Te Ture Whenua reform more generally, such as the push towards

[54] These amendments are largely technical and seek to promote clarity, workability, and consistency within the Act.

[55] "Failure of Maori land bill 'victory for landowners': Whaitiri" *The Gisborne Herald* (New Zealand, July 11 2017) <http://gisborneherald.co.nz/localnews/2889110-135/failure-of-maori-land-bill-victory>.

[56] Bryce Edwards "Political Parties in New Zealand: A Study of Ideological and Organisational Transformation" (Doctoral Thesis, University of Canterbury, 2003) at 7.

[57] Jesson, Bruce "The Age of Irresponsible Government" Metro, 200-202, December 1989 at 156.

owner autonomy, tino rangatiratanga, the utilisation of land for productivity, and the overarching focus on economic development at what appears to be the expense of all other Māori owner aspirations.

Those opposed to the reform do not oppose utilisation or economic development. The ideology of those opposed tends to reflect left-wing ideals that aim to balance market considerations with integrated social policies that address a range of social issues.[58] This can be seen in the opposition's emphasis on access to finance, addressing longstanding barriers to utilisation, and the concerns about the lack of information regarding the service proposed to replace the majority of the Māori Land Court's functions.

The conflict between the two ideologies also reflects an inherent conflict in the dual kaupapa of retention and utilisation in the current Act. Māori concerns about an imbalance in the Act between retention and utilisation is not new, having been raised since the current Act's inception.[59] Thus opposition could reflect opposition to the particular economic model being advanced and the fact that utilisation has been given preeminence over all other aspirations, such as retention. This particular model has been termed the "New Right" by Professor Mason Durie and his analysis provides the most applicable description of the particular economic model underpinning this current attempt at reform.[60]

1 Right wing political ideology and the "New Right"

The current focus on economic development is not new in the history of Māori land reform. There is a long history of imposing a Western ideology of economic development and productivity on Māori, and in particular a specific type of economic development that reflects the political and social ideology of those driving the reform.[61] Although it is important to acknowledge that some Māori want and desire utilisation, the current reform

[58] NZ Labour Party "Labour: Constitution and Rules" 2014.

[59] Erueti, above n 4.

[60] Mason Durie *Te Mana, Te Kawanatanga: The Polictics of Self Determination* (Oxford University Press, 1998).

[61] Erueti, above n 4.

could be seen as the imposition of yet another Crown policy aimed at pushing Western notions of private property development on Māori and, more importantly, on *all* Māori.

The current train of development began with the Hui Taumata 1984 report. The Hui Taumata or Maori Economic Summit Conference was held at Parliament and its main legacy was to give impetus to a Māori-focused economy.[62] This focus is of a positive nature in comparison to past examples of economic policy that resulted in further fragmentation and alienation of land.[63] However, despite its positive focus on Māori driven economic development, the specific economic driver appears reminiscent of Professor Durie's New Right discussed in the Hui Taumata 1984.[64] He describes the birth of the decade of Māori development as:[65]

> [P]ositive Māori development with its focus on tribal responsibilities for health, education, welfare, economic progress and greater autonomy, fitted quite comfortably with the free market philosophy of a minimal state, non-government provision of services, economic self-sufficiency and privatisation. There is no doubt that the Hui Taumata captured the attention of politicians, but there was parallel concern that the Hui Taumata itself had been captured by the architects of a free market economy and the monetarist theories of the 'New' Right".

Essentially, this new right exploits Māori aspirations for autonomy (and development) to fit their economic agenda.[66] This can be seen in this current reform. Māori aspirations include development, but this aspiration seems to have been emphasised at the expense of others.[67] This could also explain the aversion to corporatisation and commercialisation

[62] Edward Ellison, 'Ngā haumi a iwi – Māori investment - Māori economy', Te Ara - the Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/photograph/23124/hui-taumata (accessed 19 September 2017).
[63] Māori Affairs Amendment Act 1967.
[64] NZ Treasury *The Context for Māori Economic Development A background paper for the 2005 Hui Taumata* (2005); Ellison, above n 64.
[65] Durie, above n 60, at 11.
[66] Durie, above n 60, at 11.
[67] Te Puni Kōkiri *Ko Ngā Tumanako o Ngā Tangata Whai Whenua Māori: Owner Aspirations Regarding the Utilisation of Māori Land* (2011).

expressed during the Waitangi Tribunal hearing inquiring into the reforms.[68] Thus the opposition to corporatisation or commercialisation may in fact be an opposition to the specific type of economic development and to the Government acting unilaterally in imposing a particular policy at the expense of other types of development or aspirations. The question of why one policy aimed at one Māori aspiration (utilisation) is being imposed on all Māori is easily explained by the underlying ideology. However, the corollary question is why this utilisation policy could not have been achieved without legislative change or through careful amendment of the current Act.

C ***Policy versus process***

Following the review, the Panel recommended that new legislation was required as opposed to amending the current Act. Although there is wide scale agreement that the Act needed fixing, many questioned the Panel's choice to wholesale repeal the 1993 Act because it was considered that the changes could be achieved through careful and considered amendments.[69] However, another major consideration when looking at the impetus behind a reform project is the status and workability of the existing law in the area. If decision-makers designing new policy feel the current law is based on sound principles, they will be more likely to approach any perceived problems through careful and considered amendments to existing legislation. If, however, the Act is considered to be fundamentally flawed, then this somewhat piecemeal amendment process would be inadequate and a wholesale reform would be required to restructure the law on a more acceptable policy base. Ultimately, whether issues can be resolved through a piecemeal or wholesale approach to law reform depends on how those undertaking the review perceive the nature of the problem to be resolved: is it a problem of practice, or a problem of policy?

The reform's surrounding rhetoric points to an issue of policy that is considered to favour retention, which is reinforced by the practice of the Māori Land Court. The Panel has been explicit in its perception of the Court as an impediment to utilisation, evidenced by one of the Panel's key drivers being to reduce the Court's role. In considering this aim alone it is

[68] Waitangi Tribunal, above n 7, at 176 (Lant, first brief of evidence (doc A4), p 10).

[69] Above n 22, at [6.5].

likely that piecemeal amendment would have been seen as impossible given the structure of 1993 Act, which revolves around Court discretion. However, this preoccupation of the Court is not new and a consideration of the historical reform in relation to Māori land demonstrates that this preoccupation with the Court has veered everything off course, both historically and currently. This is important because it demonstrates why the current approach to reform has been opposed as well as why the problem has been incorrectly defined. In many ways, a consideration of the historical reviews of the 1993 Act demonstrate that the preoccupation with the Court has conflated the issue of utilisation with the role of the Court.

The first two inquiries of the Act were commissioned by TPK in order to survey Māori land owners in order to aid policy development for Māori land.[70]

The Māori Land Investment Group was established by TPK to "assist in identifying, and developing policy options for resolving the problems associated with attaining finance for multiple-owned Māori land".[71] The group, consisting of six Māori advisers, wrote up a report following discussion with TPK officials. The group considered that "creating a greater choice for landowners over organisational governance and decision making was paramount". They considered Māori owners too constrained by the paternalistic restrictions of the 1993 Act and criticised the Court as too focused on retention and preventing risks of alienation.[72] Overall they called for a review of the Court's role in decisions about the economic utilisation of Māori land. The Group recommended that the Government simplify governance structures and bring them more in line with the Companies Act 1993, and investigate the court's role and discretion in 'ruling on the economic utilisation and governance of Māori land'.[73]

[70] Waitangi Tribunal, above n 7, at [3.3.2].
[71] Waitangi Tribunal, above n 7, at [3.3.2].
[72] Waitangi Tribunal, above n 7, at [3.3.2].
[73] Waitangi Tribunal, above n 7, at [3.3.2].

Following receipt of this report, TPK commissioned a Federation of Māori Authorities (FOMA) survey of its members to consider whether the Act "has been successful in meeting its objectives and to identify whether the Act is working for Māori landowners".[74] However, the survey targeted the Court's jurisdiction and sought to find out from the respondents how "judicial discretion … had affected their plans for utilisation and development of their land".[75] The FOMA report ultimately concluded that "Māori land owners, trustees, committee of management and professional advisers have been concerned at the use of judicial discretion in a number of hearings in various districts since the enactment of the Act".[76] These two reports were followed by the McCabe Report of the Māori Multiple Owned Land Development Committee, which was influential in the policy-formation that produced the 1999 Amendment Bill.[77]

The Māori Multiple Owned Land Development Committee was established to provide independent advice to the Minister of Māori Affairs, Tau Henare, about Māori land development.[78] The Committee was tasked with assessing issues TPK considered need addressing before "Māori land owners can realise greater control over decisions relating to their land, and be more proactive in identifying and progressing development options".[79] Although the Committee identified a number of issues to utilisation of Māori land, it recommended that any wider review of the Act should also include a qualitative analysis of Māori Land Court decisions to determine whether "the impact of judicial discretion is a barrier to the use of land as security".[80] Following this report, another review of the Act was initiated in 1998.

The aim of the 1998 review was to "identify how to make the Act more useful and effective, in particular to make it easier to retain, occupy, develop and use Māori land".[81]

[74] Waitangi Tribunal, above n 7, at [3.3.2].
[75] Waitangi Tribunal, above n 7, at [3.3.2].
[76] Waitangi Tribunal, above n 7, at [3.3.2].
[77] Waitangi Tribunal, above n 7, at [3.3.2].
[78] Waitangi Tribunal, above n 7, at [3.3.2].
[79] Waitangi Tribunal, above n 7, at [3.3.2].
[80] Waitangi Tribunal, above n 7, at [3.3.2].
[81] Waitangi Tribunal, above n 7, at [3.3.2].

Consultation was conducted in order to determine whether "the Act, and the Court's role, reflect the views and aspirations of tangata whenua".[82] In particular the discussion document focused on the Court, stating that there had been "much discussion about the extent of the Court's discretionary powers" and whether the Court was balancing retention and utilisation in a "complementary fashion", and whether it should have more or less discretion.[83] TPK's report on the outcome noted:[84]

> Many people were critical of the Court's powers to intervene in the affairs of trusts and landowners. They were concerned about the Court disregarding the views of beneficiaries when appointing trustees, and also the Court's discretion to refuse to constitute a trust where the specified criteria…had been satisfied. There were mixed views about what the role of the Court should be in overseeing and monitoring trustees and their decisions. In particular, concern was expressed that the Court lacks the required commercial expertise to adequately scrutinise the operations of trusts. Others considered that trustees should continue to be responsible to the Court and that the Court be able to review trusts under certain circumstances.

In relation to this issue, TPK stated that officials would review the Court's powers to determine whether they are unnecessarily wide, or where matters could be dealt with at a level below that of a judge.[85] However, no such information eventuated and nothing substantive resulted from the review overall. Executive focus on the Act lay dormant until the current review was announced in 2012.

Similar sentiments present in the historical reviews and resulting reports are present in the current review. Each sought to identify barriers to utilisation as well as the impact the Court has had on the development and management of Māori land. In particular, calls for a review of the discretionary powers of the Court and the extent of those powers is a consistent

[82] Waitangi Tribunal, above n 7, at [3.3.2].
[83] Waitangi Tribunal, above n 7, at [3.3.2].
[84] Waitangi Tribunal, above n 7, at [3.3.2].
[85] Waitangi Tribunal, above n 7, at [3.3.2].

theme. This preoccupation with the Court extends back to the reform that lead to the current Act. Despite this, no such assessment or review has in fact been undertaken and it remains to be proven whether the Court's powers impede utilisation. In fact, there are many who consider that the Court is fulfilling a definite social purpose, of which the core purpose is to "assist the retention of Māori land in Māori ownership by facilitating its better use and management".[86] This opinion is shared by submitters on the Bill, who stated that the administrative role of the Court should remain, particularly in relation to the maintenance of the Court records.

Importantly, some reduction in the role of the Court is widely accepted, even by its judges.[87] However, the parallels between this current review and those that have occurred in the past are insightful. The issues concerning utilisation of land have been conflated with the Court's discretionary powers such that the former has been incorrectly attributed to the latter. It is this conflation that has essentially misguided the Panel's approach to reform resulting in poor policy and thus law.

IV Legislative changes

The Bill is markedly different from the Act both in structure and function. The proposed changes were intended to provide a solution to the issues raised by the Panel in its final report. The issues raised were that:[88]

- the current regime's recourse to the Courts takes authority away from Māori, which the Panel believes does not empower them as owners;
- some Māori land titles have a majority of owners who cannot or do not engage, which is suggested as making owner-driven utilisation of land difficult;
- that a lack of Māori land title governance is considered to be a major contributor to the underutilisation of Māori land;

[86] Erueti, above n 4 at *II D 2.*; Te Puni Kōkiri "Te Ture Whenua Maori Reform: Summary of Submissions" (2015).
[87] Māori Land Court submission, above n 2.
[88] Review Panel, above n 35.

- there is judicial involvement in most matters and the rules governing the Court and those practiced are out of alignment; and
- fragmentation due to increasing ownership interests is thought to constrain the ability of owner engagement and thus utilisation.

The proposed changes were also intended to:[89]

- empower Māori land owners to pursue their aspirations for the sustainable development of their land;
- enable Māori land owners to make decisions without needing Māori Land Court approval and encourage owner participation; and
- respect the intrinsic cultural significance of Māori land; and
- provide an effective alternative to litigation to resolve disputes.

The main changes to the Bill can be tied to the issues raised by the Panel in their report.

First, the Bill reduces the role of the Court to matters of procedure and checking compliance with the Bill. Under the Act, a number of owner decisions required approval of the Court, whereas under the Bill more authority now rests with the owners. This is intended to promote tino rangatiratanga and owner autonomy.

In order to address the issues of owner engagement the Bill introduces the participating owners scheme.[90] This scheme enables decisions to be made by a proportion of owners that participate in the decision. This excludes "all owner" decisions such as sale of land, which require a majority of all owners rather than a majority of the actively participating owners. This means that a small majority of owners could make decisions that bind all owners.

In order to address fragmentation, the Bill introduces a compulsory whānau trust where an owner dies intestate and there is more than one eligible beneficiary, as well as allowing for the conversion to collective ownership.

[89] Review Panel, above n 35.

[90] Te Ture Whenua Māori Bill 2016, cl 5.

In order to address issues of governance, the Bill sets up an entirely new governance regime called the rangatōpū.[91] These governance structures can take the form of a trust or an incorporation. The regime reflects company law in that many of the duties are aligned to director's duties and the governance models overall look like a company or an incorporation.

In order to further reduce the role of the Court, the Bill creates a compulsory dispute resolution process for matters of fact. Responsibility for determining matters of law, however, remains with the Court.

Overall the Bill is incredibly prescriptive with many procedural requirements for which must be followed for decisions to be valid. This procedural heavy framework is intended to promote the principle of retention by providing procedural safeguards in place of the Court's discretion, which is the key safeguard under the current Act.

V Input legitimacy and Problem Definition

As noted above problem definition is an integral part of the policy process.[92] It involves identifying the issues, discussing and framing the issues, analysing data and resources, and naming the problem.[93] However, problem definition is invariably complex. It often cannot be distilled into one specific problem, but a range of problems that impact different people. Further, the gravity of the problems may be perceived differently for different people. Thus a problem also needs to be defined in terms of "for whom it is a problem".[94] When considering policy legitimacy, some consider that at its core, legitimacy is the product of satisfying felt needs and solving perceived problems.[95] Thus, if the problem definition is

[91] Te Ture Whenua Māori Bill 2016, Part 5.

[92] Adrienne Windhoff-Hérifier "Journal of Public Policy" (1985) 5 Journal of Public Policy.

[93] Backer, Barbara "You can get there from here: Guide to Problem Definition in Policy Development" (1991) 29 Journal of Psychosocial Nursing & Mental Health Services 24 at 24.

[94] At 24.

[95] Hanberger, A. (2003). Public policy and legitimacy: A historical policy analysis of the interplay of public policy and legitimacy. Policy Sciences, 36(3), 257-278.

not correctly defined the policy process overall may be considered illegitimate and inevitably fail. One reason for the widespread criticism of the Bill is that the problem definition that dominated the rhetoric was wrong or at least wrongly framed. This inevitably led to a reliance on the wrong evidence and resulted in inadequate consultation and a poorly drafted Bill.

This paper focuses on the necessary aspects of the policy-making process which lead to and strengthen input legitimacy. Legislation which has a high-degree of input legitimacy during the policy stage will likely be seen as more legitimate on the whole. Unfortunately, in this case the proposed reform failed to secure sufficient input legitimacy for a number of reasons.

A ***Review of the Act***

The first point at which the Panel erred in its review was by failing to assess (as required by its terms of reference):[96]

> [T]he extent to which the current regulatory environment is enabling or inhibiting the achievement of Māori land owner aspirations in general as well as specifically in the cases of ownership, governance and access to resources.

This task arguably was and remains critical to the ultimate success of any review and therefore defining the problem, particularly given historical failure. Instead the Panel chose to proceed without undertaking an empirical analysis of the current regulatory environment, and relied on the research available, which had concluded that the regulatory regime is inhibiting the utilisation and development of Māori land.[97] In fact, in its report, it states that it abandoned a "what is wrong with the current law and how should it be fixed" approach in favour of what it terms a "principle-based approach", that is, "what should the law look like".[98]

[96] TPK ToR, above n 28.

[97] The Ministry of Agriculture and Forestry's *Māori Agribusiness in New Zealand: A Study of the Māori Freehold Land Resource* (2011); TPK, above n 67.

[98] Review Panel, above n 35, at 17.

Arguably, any panel assigned to review an Act must focus on its substance: that is, what works and what does not work. This is particularly important for the present review because the earlier TPK and MAF reports had perceived there to be "regulatory impediments" to utilisation and development of Māori land without providing any specific examples. Further, given the historical attempts at reform, all of which identify the need to assess the regulatory framework, it seems the Panel was on a course set to repeat mistakes of the past. Although it is understandable that a principle-based approach was desired, which was the approach taken by the NZMC in forming the Act, if it is not supported by an analysis of the existing law and how well that law advances the said principles, it may be of limited value. The subsequent result is a philosophical discussion that ignores the central point of a review, which is to critically examine the existing law.

There are two observations that could be made in relation to the Panel's decision to proceed without undertaking a review. First, it is likely that there was no capacity or time to undertake such an empirical analysis of the key institutions of the current law such as the Court. Further, even if capacity and time were no barrier, it is questionable whether such a study could have in fact been undertaken. A detailed study of the case law of the Court since the enactment of the 1993 Act to see how the Court has gone about exercising its discretionary powers is an incredibly difficult task because Court and Māori Appellate Court decisions have not been consistently reported in a Law Reports format.[99] They are, however, available online and due to the emphasis in the Panel's report on redistributing the powers and duties of the Court, the Panel should have attempted to conduct such a review early on in the reform process.

The second reason could be that intellectually the Panel thought it knew the problem and thus how to solve it. In the foreword to the Discussion Document, it stated that research showed that existing legislation does not achieve the effective management and development of Māori land. In the Panel's review report they stated that Māori land issues

[99] Kensington Swan "Submission to the Māori Affairs Select Committee on the Te Ture Whenua Māori Bill 2017" at [7.12].

have been well documented and thus they were able to draw on relevant material without having to undertake new research.[100] The Panel further stated that it found two documents particularly helpful and a thorough read of those documents demonstrate that the Panel accepted these reports without question. However, later consideration of the literature relied on by the Panel demonstrates that this was an oversight as it was based on flawed evidence. Unfortunately, this decision not to undertake further research and instead rely on a small amount of existing literature only further undermined the reform process.

B ***Evidence Based Policy***

The second major flaw in the review process was the selective use of research and the inappropriate use of two reports. Evidence-based policy (EBP) is not new. However, the increased interest in its use reflects a perception that governments need to improve the quality of policy making.[101] This can be related back to the idea that policy legitimacy no longer rests on properly made legislation by democratically elected officials, but requires something more. However, EBP is subject to its own problems. These potential problems can be illustrated in the reform of the Act and the choice by the Panel to rely disproportionately on two reports to guide the reforms. These two reports will be used to exemplify the shortcomings of EBP as well as highlight why this aspect of the reform did not promote policy legitimacy and therefore contributed to the failure of the Bill. Overall it appears that the literature relied on was being used to bolster a policy objective rather than properly define the problem.

EBP refers to policy programmes that are grounded in rigorous empirical evidence.[102] EBP is concerned with high-quality evidence from peer reviewed research, which has arisen from the scientific process.[103] However, it can include a wide variety of information and often draws from a range of sources because peer reviewed research is not always available.

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[100] TPK, above n 8 at 2, Kensington Swan, above n 99, at 15.

[101] David Zussman Evidence-Based Policy Making: Some Observations of Recent Canadian Experience Social Policy Journal of New Zealand (20) 2003 at 64.

[102] Peter Gluckman Towards better use of evidence in policy formation: a discussion paper (Office of the Prime Minister's Science Advisory Committee, April 2011) at 6.

[103] Peter Gluckman The Role of Evidence in Policy Formation (Office of the Prime Minister's Science Advisory Committee, September 2013) at 7 and 8.

The use of EBP is considered to help ensure policy has some empirical basis and to address the criticism of policy being too often driven by inertia or short-term political pressures rather than by evidence [104] However, the use of EBP does not mean that these other factors do not influence policy decisions, nor does it mean that the chosen evidence is used effectively or appropriately.[105] In particular, scientific research used out of context can be misleading and if policy makers do not know how to interpret the literature, they may misinterpret the results, or pick and choose aspects that suit their agenda.[106] Evidence is also not often conclusive and the speed at which circumstances are changing mean that evidence relied on may no longer be relevant or may be inappropriate for the use for which it is employed. Thus EBP should not form the sole basis for a policy decision.

The potential problem with EBP can be illustrated in this instance by the Panel's choice to disproportionately rely on two reports to guide the reforms. This exemplifies the shortcomings of EBP as well as highlighting why this aspect of the reform did not promote policy legitimacy and therefore contributed to the Bill being perceived negatively. Overall it appears the literature relied upon was being used selectively to bolster a policy objective rather than properly define the problem.

The Explanatory Note on the Bill as introduced notes a number of reports and studies that were used to inform the development of the Bill. Very few of these are recent, with only three occurring after 2006. Two of them occur before the enactment of the current Act in 1993, while the remainder occur between 1996 and 2006. Their age raises the question of how relevant they continue to be. However, it is clear that most weight was given to two main reports. These were:

> Māori Agribusiness in New Zealand: A Study of the Māori Freehold Land Resource; and

[104] David Zussman Evidence-Based Policy Making: Some Observations of Recent Canadian Experience Social Policy Journal of New Zealand (20) 2003 at 64.
[105] Peter Gluckman, Chief Science Adviser "Scientific advice in a troubled world" (Canadian Science Policy Conference Lecture Series, University of Ottawa, 17 January 2017).
[106] Gluckman, above n 105.

Growing the Productive Base of Māori Land.

1 Māori Agribusiness

The Ministry of Agriculture and Forestry (MAF) undertook a series of interviews and meetings around New Zealand with various individuals and organisations, and conducted a substantial literature review in order to inform MAF of the current state and future potential of Māori freehold land.[107] The study's finding were consistent with the themes apparent in the literature. These include that:[108]

- lack of effective governance accentuates management challenges;
- there needs to be greater investment in Māori upskilling at all levels;
- the administration and compliance costs associated with the Act and the Court are prohibitive;
- a wide range of collaborative development will deliver greater productive capacity in future; and
- the performance of Māori agribusiness is not simply financial but encompasses social, environmental, cultural and spiritual elements.

As well as the study's findings being aligned with existing themes, recommendations were made to assist in the unlocking of growth potential of Māori land which included both practical, regulatory, and legislative action to fully implement.[109]

Overall, the report found that delivering the productive potential of Māori freehold land requires a multifaceted approach that involves a range of agencies and entities both within government and within Māoridom. This includes support of social structures and the development of collective approaches to land management and development, all level

[107] Ministry of Agriculture and Forestry, above n 97, at iii.
[108] Ministry of Agriculture and Forestry, above n 97, at iii.
[109] Ministry of Agriculture and Forestry, above n 97, at iv.

training, specialist support to assist all levels of development, and the streamlining of the Act's processes and procedures.[110] These recommendations reflect the sentiments of historical review and reform and in particular those raised in the Māori Land Investment Group, FOMA, and the McCabe reports. Despite a consistent theme that points to a comprehensive policy programme that addresses the issues of fragmentation, access to finance, governance training, business capability, and access to other specialist skills each reform continues to seek to address utilisation and incorrectly conflates that issue with the Court.

2 Growing the Productive Base

Growing the Productive Base was a study undertaken in order to estimate the economic potential of Māori freehold land.[111] In so doing, Price Waterhouse Cooper (PWC) used the *Māori Agribusiness in New Zealand* study as a primary source of information to estimate this economic potential.[112] Using statistical modeling tools, PWC forecast that there was a potential $8 billion nominal total output available by transforming underperforming agricultural Māori freehold land.[113] Once published, this report became the main source of support for the reform proposals, with the figures being quoted frequently in various articles and discussions in relation to unlocking the economic potential of Māori land.[114] For example, the $8 billion figure was referred to in a ministerial press release that was focused on why the reforms were needed.[115] John Harbord (previously senior advisor to the Prime Minister and the Attorney-General) depended on these figures as reasons for the major overhaul in an article written in the National Business Review.[116] Harbord's article could have effectively acted as a Government press release as it reflected the reforms popular underlying rhetoric. It stated that reform is necessary to unlock the "potential of significant amounts of under-utilised land and to create thousands of jobs" that is currently

[110] Ministry of Agriculture and Forestry, above n 97, at iv.

[111] Ministry for Primary Industries *Growing the Productive Base of Māori Freehold Land* (2013) at 5.

[112] Ministry for Primary Industries, above n 111, at 5.

[113] Ministry for Primary Industries, above n 111, at 5.

[114] Ministry for Primary Industries, above n 111, at 5.

[115] Christopher Finlayson "Te Ture Whenua Maori Act review announced" (3 April 2014) New Zealand Government official website <www.behive.govt.nz>. <releasedhttp://www.beehive.govt.nz/release/te-ture-whenua-m%C4%81ori-act-review-report-released>.

[116] National Business Review August 28, 2013 (see appendix for full article).

"impacted by ownership and decision-making rules". He ultimately concluded that to realise this potential the law needs to be changed "to reduce the paternalistic role of the Māori Land Court". However, the reliance on this report and its figures, particularly by the Panel in a later review, is problematic for a number of reasons.

First, close analysis of the report shows that it was of a preliminary nature and based on some rough working assumptions. The report was carried out in two weeks and data used in the model originates from official statistics compiled by Statistics New Zealand and from Ministry of Primary Industries publications, including data from estimates, forecasts, and long range projections for output from the agriculture sector. Industry data was also incorporated where available.[117] The issue with this data is it is nominal as opposed to real, and it is estimated at the national as opposed to regional level, and thus is not overly accurate or specific. Further, its heavy reliance on the *Māori Agribusiness* also requires us to accept the conclusions drawn in that report. It is not clear why such an error was made on behalf of the Panel, but it is likely related to time and capacity.

Second, in order to report in this timeframe a number of broad assumptions were made. These included:[118]

> Of the land in class III and IV (Limited arable use, highly suited for pastoral use) 75 percent is assumed to be in Tier 1 (Well developed for Agribusiness, strong primary industries) and the remaining 25 percent is from Tier II (Under-performing entities. Developed for productive use but under-performing relative to industry benchmarks).
>
> Small block inefficiencies were not considered due to a lack of information available at the time, as such the model essentially aggregates individual areas of land into one area of land that may not have actual potential due to the size of each individual holding. These assumptions are fundamentally flawed and undermine the overall conclusion of the report because it does not take into account fragmentation of land holdings both as to ownership and location.

[117] Ministry for Primary Industries, above n 111, at 4 – 8.
[118] Ministry for Primary Industries, above n 111, at 4 – 8.

The report notes its own limitations, which further undermines the reliance on this report for undertaking the particular reforms. These include an inability to factor in climatic variations between regions; differing soil quality and therefore stock holding potential and production capabilities, and deferential pricing between regions.[119]

Third, a later PWC report, which sought to revise the 2013 report and which severely cut the $8 billion estimate, was effectively ignored. This report, published in 2014, revised the proposed figures from $8 billion to $3.5 billion.[120] Although still quite broad and sweeping in its calculations, it was far more detailed and gave a more accurate prediction of what was available to be unlocked in relation to Māori land. The report's purpose is to develop an "economic model that covers the agriculture sector and its major constituent industries" and "to facilitate an economic analysis of the potential impact of bringing under productive or under-utilised Māori freehold land into agricultural production".[121] The model focusses on four main primary sectors:[122]

- Dairy cattle farming;
- Sheep and beef cattle farming;
- Horticulture (focusing on four main crops: wine grapes, kiwifruit, apples, and potatoes);
- Plantation forestry.

Although a more realistic prediction, the report also includes a number of caveats to the economic model. These include:[123]

[119] Ministry for Primary Industries, above n 111, at 4 – 8.
[120] Ministry for Primary Industries, above n 111, at 13.
[121] Ministry for Primary Industries, above n 111, at 13.
[122] Ministry for Primary Industries, above n 111, at 13.
[123] Ministry for Primary Industries *Growing the Productive Base of Māori Freehold Land – further evidence and analysis* (2014) at 16 and 17.

- About 16 percent of total Māori freehold land comprises of about 150,000 blocks of less than 10 hectares. Commercial use of this land will be difficult;
- There are limits to water allocation and the capacity to store water for irrigation;
- Regulatory restrictions, including Emissions Trading Scheme and regulations on outflows of nutrients from farms; and
- Constraints in labour and product markets may limit growth.

The report makes it clear that there are over 100,000 blocks of Māori freehold land of less than one hectare that have been excluded from the calculations due to their size. However, the model includes an additional 52,517 blocks with one to nine hectares in the overall land area and which make up 178,504 hectares in total. Although this only represents a minority of Māori freehold land (1,205,450 hectares) available, these land parcels are very small. Thus if isolated, irrespective of the lands quality, this land is not necessarily viable for significant economic development, effectively lowering the figure of $3.5 billion even further.[124]

The Tribunal discussed these reports in its own report, noting that the productivity estimates required an investment of $905 million before it could be achieved.[125] The Tribunal concluded:[126]

> The Crown, in proceeding with the reform of Te Ture Whenua Māori, has clearly been influenced by the potential economic gain to be had from removing the barriers to decision-making on the utilisation of Māori land – originally an $8 billion return over 10 years on an investment of $3 billion over three years, subsequently reducing to $3.5 billion on an investment of $905 million, as we described in chapter 3. This gain depends, however, on investment funds on this scale being found.

[124] Kensington Swan, above n 99, at [7].

[125] Waitangi Tribunal, above n 7; Ministry for Primary Industries, above n 125, at 133, 146, 150, 187 and 349.

[126] Waitangi Tribunal, above n 7, at 186.

However, the Tribunal received no such evidence of where that major source of funding was going to come from. This suggests that there is a not a substantial economic case in favour of the particular reforms suggested and there is a further concern that the necessary start up investment cost may have to be made by all land blocks transitioning to the new regime.[127] Although some uncertainty is to be expected, given the historical significance of land reform to Māori, policy legitimacy arguably requires something more reliable and robust from earlier on in the process.

There are a number of problems with the Panel's reliance on these reports. The first relates to reform timeframes, and the second is that the reports content seems to have been incorrectly used in the sense that they do not actually define the problem.

3 Timeframes

Timeframes influence policy decisions immensely and may help explain why some poor decisions, in hindsight, are made. Generally long term policy making or policy that requires a more thorough and nuanced approach, which is arguably the case with all reform with Māori, does not fit with New Zealand's short-term policy cycle.[128] What this means is that policy can be rushed and not well thought out. In relation to Māori, this is unlikely to ever be perceived well given the historical disenfranchisement that has been the result of Crown legislative and policy decisions. The Panel's reliance on these reports can be seen in the context of time constraints and demonstrates a key limitation in using EBP.

EBP is also not often suited to short-term policy making that concerns complex issues, which arguably require a more robust and thorough approach.[129] As a result there is often a tension between the need for good evidence and the need for speed resulting in policy being pushed out too quickly without sufficient research into the problem or at least

[127] Kensington Swan, above n 99, at 7.11.

[128] Peter Gluckman, Chief Science Adviser "Perspectives on science advising: what are the skills needed?" (paper presented to the International Network for Government Science Advice, Brussels, 17 March 2017).

[129] Gluckman, above n 128.

analysing the available research adequately.[130] Although some uncertainty should be expected, and that uncertainty should not be a reason to halt a particular process, it is unlikely that a blind-faith approach to EBP will ever aid in good policy. In this situation the evidence does nothing to aid the problem definition which ultimately guides policy development. Instead, it seems that a blind faith approach was adopted by the Panel when considering this evidence and this added to the inherent flaw in their review.

Time constraints and uncertainty does not mean that certain evidence cannot provide assistance. However, there must be clarity over what the evidence relied upon is actually being used for. In this situation the evidence does nothing to aid the problem definition. Instead it seems that the evidence is being selectively used to bolster a policy decision already made. The blind faith in the PWC 2013 report and $8 billion figure exemplifies these problems perfectly. Evidence that is incomplete or ambiguous, or as in the PWC reports, nominal and theoretical, should not form the basis for policy decisions.[131] Further, the use of apparent evidence after the policy reform has begun only opens the reform drivers up to further criticism. This reliance by the Panel could also explain the criticism discussed earlier – that they were advancing utilisation at the expense of other agendas. Thus the blind reliance on this report for further justification of the reforms further undermines the process overall because it demonstrates that predetermined decisions had been made regardless of an empirical basis.

4 Incorrect use of the evidence

The second major problem with the use of these reports is that they do not define the problem. While the *Māori Agribusiness* report makes recommendations in order to solve the perceived problem, *Growing the Productive Base* presents the potential economic outcome if the perceived problem is fixed. Neither of these define the problem. Instead they both assume the problem exists. In relation to the first it could be that the downfall of

[130] Gary Banks, Evidence based policy-making: What is it? How do we get it? (ANZOG/ANU Public Lecture Series 2009, Canberra, 4 February 2009) at 15.
[131] Gluckman, above n 128.

the Panel is that its terms of reference were too narrow. It was only tasked with providing legislative recommendations and thus had no capacity to recommend a policy programme that addressed the reports particular recommendations. The use of the second report is more transparent. It reflects the particular type of economic model pushed by the National Government and exemplifies the hijacking of Māori aspirations.

The *Māori Agribusiness* report assumes a problem with the regulatory framework in order to discuss those solutions. However, those solutions are hardly addressed by the Panel in any of the dialogue or reform documentation. For example, the *Māori Agribusiness* report does not suggest wholesale reform, nor does it suggest legislative change is enough.[132] Only one of the ten recommendations in the report refers to legislative change and in fact it states that the legislation needs to be updated, rather than replaced, in order to provide tools and options to deal with current issues. The report states that the approach should be multifaceted and involve a range of agencies and entities within both government and Māoridom.[133]

Importantly, the report reinforces the importance of building capacity, capability, and skills, something that cannot be done by legislation alone. Despite this, only in the later stages of the reform did any detail concerning the proposed MLS become available. For a substantial portion of the reform only the draft Bill had been presented as the key component in addressing Māori land issues. Despite calls for more detailed information, many officials when asked could still offer very little in the way of specifics. Further, in considering the recommendations, there has been no suggestion that agencies within Māoridom will be established, nor that there will a focus on building capacity and capability. Instead the legislation was offered as the main solution to all the problems.

Second, *Growing the Productive Base* does not define a problem or provide solutions. Instead it estimates the potential outcome of utilised Māori land, if the barriers (whatever they may be) to utilisation are removed. This report was simply offered as a reason to

[132] Ministry of Agriculture and Forestry, above n 97, at iv.

[133] Ministry of Agriculture and Forestry, above n 97, at ii.

proceed with the reforms, which assume that the removal of barriers will in fact result in the estimates predicted. However, this is the myth of this reform. First, incorrect identification of the problem means the estimates can never be realised and second, even if correctly defined, these estimates are unlikely to be realised based on the nature of Māori land and the limitations noted in this respect in the report.

The reliance on these reports ultimately resulted in a process that was flawed from the beginning and in effect delegitimised the process overall. A discussion of the problems as defined by the Panel demonstrates these flaws.

C ***The problem as defined by the Panel***

The key flaw in the Panel's review process concerned its incomplete definition of the problem affecting the current Act. This was the product of a poorly executed review and culminated in an inadequate Discussion Document that was used for consultation during the review process. As a result, the consultation process was flawed because the Panel effectively consulted on an already defined problem rather than securing assistance in defining that problem. This further resulted in a review report that was inadequate for the scope of the reform attempted.

1 Discussion Document

The Discussion Document was the result of the literature review undertaken by the Panel, as well as consultation with key stakeholders. It states the problem in this way:[134]

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

[134] TPK, above n 8, at 17.

From this statement, the inference can be drawn that the problem is under-utilisation of Māori land and that this problem is caused by the Court. However, this problem definition is not based in evidence and simply reflects the Panel's reliance on the MAF and TPK reports. Further, the problem is defined very narrowly in terms of the Panel's terms of reference which was to determine "the extent to which the current regulatory environment is enabling or inhibiting the achievement of Māori land owner aspirations in general as well as specifically in the cases of ownership, governance and access to resources".[135] This statement is much broader. It encompasses an aspiration of utilisation but is not confined to it.

Importantly, many Māori desire utilisation and have for some time, yet many have aspirations that do not include utilisation.[136] However, the Panel has confined its policy recommendations to a particular form of utilisation and, in its preoccupation with the Court, it has failed to address other key barriers to effective utilisation: rating valuations, resource access and finance, landlocked land, and paper roads.[137]

The Panel then created five propositions that it stated would increase utilisation of Māori land and address and remove the barriers to such utilisation.[138] The main problem with these propositions is that they are unlikely to receive any kind of dissent from Māori land owners and largely reflect the Act's Preamble, and sections 2 and 17. Further, it is not clear how a high-level principle could possibly address and remove the barriers to utilisation of Māori land given what is known about the barriers, and that they will require more than legislative intervention to overcome. These propositions were then used to generate

[135] TPK ToR, above n 26.

[136] TPK, above n 69.

[137] TPK, above n 69.

[138] Review Panel, above n 35, at 10. (1) utilisation of Māori land should be able to be determined by a majority of engaged owners; (2) all Māori land should be capable of utilisation and effective administration; (3) Māori land should have effective, fit for purpose governance; (4) there should be an enabling institutional framework to support owners of Māori land to make decisions and resolve any disputes; and (5) and excessive fragmentation of Māori land should be discouraged.

specific questions for consultation, thereby confining consultation to an incorrect problem definition, and resulting in an inadequate Panel report.

2 Review Panel Report

The Panel's report was structured around the Panel's five propositions. It made a number of recommendations for legislative intervention that sought to address the problem as defined. The conclusions drawn by the Panel in relation to the Act's perceived problems were summarised in three paragraphs:[139]

> The current regime governing Māori land is structured so that a number of decisions cannot be taken by Māori land owners themselves because they are subject to endorsement by the Māori Land Court. Currently, this ranges from sale and long term lease decisions to the establishment of trusts and incorporations to ratifying the decisions of assembled owners. This serves to disempower owners and makes decision-making processes unnecessarily complex for the majority of the decisions affected.
>
> Some Māori land titles have a majority of owners who cannot or will not succeed to their ownership interest despite attempts to encourage them to succeed. This makes owner-driven utilisation of the land problematic.
>
> Engagement may not be occurring for a number of reasons, including a significant lack of incentive to engage (e.g. the land is unable to be utilised or is extremely marginal) or the presence of a disincentive to engage (e.g. the land is in a significant state of disrepair or subject to large rates arrears). However, this land still needs to be administered as effectively as possible. There may be opportunities for an external administrator to identify potential owners and return the land in its current state or in a more developed state.

[139] Review Panel, above n 35, at 17 - 18.

The first paragraph is simply a restatement of the problem as defined in the Discussion Document, while the final two seem to provide support for the engaged owner or participating owner regime that becomes a key characteristic of the Bill. However, even if these two paragraphs are correct problem definitions the legislative mechanisms proposed by the Panel are unlikely to address them. These problems do not stem from a lack of legislative mechanisms available. If that were the case then they would not be a problem.

In fact, the participating owner scheme does not address the problem at all, it just circumvents it. The Panel does not provide evidence or use case studies to demonstrate the Act inhibited Māori land owners in certain circumstances. The Act may have deficiencies, but the report fails to specify what they are, despite claiming to be a comprehensive review. It also effectively ignores the numerous examples of Māori land trusts and incorporations that have succeeded under the Act. Thus a key question for the Panel could have been why have some Māori land blocks succeeded, while others have not, and what role has the Act played in the success or failure? Overall, the report gives an inaccurate impression of how the Act operates and fails to explain in any reasoned way how the Act inhibits or enhances Māori land owners' aspirations. This lack of understanding of the Act is exemplified in the proposed recommendations to the five propositions.

3 *Utilisation of Māori land should be able to be determined by a majority of engaged owners*

The difficulty with proposition one is its underlying premise that there are significant impediments in the Act to the engaged owners utilising their land, and that a remedy is therefore needed. In order to address this problem the Bill proposes the participating owners scheme that enables participating owners to make decisions concerning the land (except for sale or permanent disposition) that bind all owners and third parties, without the need for endorsement of the Court.[140] This new model is claimed to empower those owners engaged with their land. The preliminary problem with this is that the participating owners' scheme does not promote owner engagement or address the reason why owners

[140] Te Ture Whenua Māori Bill 2016, cl 5; Review Panel, above n 35, at 29.

are not engaged. It mainly circumvents the problem by allowing those owners who are already engaged to make a decision.

This scheme is in conflict with the Panel's terms of reference that required them to make a recommendation in terms of ownership and what would be required to enable Māori land owners to affiliate and engage with their land. This is a very fraught issue, not answered by the Panel's recommendation. The Panel's choice to frame the principle and recommendation in this way reflects the underlying drive for utilisation by empowering engaged owners, but does nothing to determine how to get unengaged owners to engage.

The recommendation also assumes that engaged are unable to realise their aspirations for their land because the unengaged owners inhibit progress. Additionally, the report claims that the Court's approval is required for most decisions, which further acts as an impediment to utilisation. According to Judge Ambler, both these assumptions are wrong.

First, for a significant number of blocks, engaged owners are the minority.[141] The Act has successfully addressed this problem through the governance structures of trusts and incorporations, which enable the trustees or incorporation committee to make decisions on behalf of all owners. Thus the lack of development of Māori land since 1993 is unlikely to be due to the engaged owners being in the minority and therefore unable to make decisions. Instead it is likely to be a range of other factors, such as the barriers of rating valuations of land or the nature of the land block in question. Although engagement should be encouraged and unengaged owners can indeed pose problems, the claim unengaged owners are impeding utilisation is not made out on the evidence.[142]

Second, the reports claim that the Court impedes decision-making by making it inherently complex is incorrect. Most land owners and governors implement all but the most exceptional land utilisation or development initiatives themselves without Court

[141] Judge D J Ambler Review of Te Ture Whenua Māori Act 1993 Judge's Corner (2014) at 7-9.

[142] Ambler, above n 141, at 7-9.

approval.[143] There are considerable case studies available to demonstrate this.[144] There are decisions that require Court approval, such as sales, long-term leases, change of status, title reconstruction and improvement, and occupation orders. However, these entail permanent or significant alterations to Māori land title, and the Court's role in this is to provide appropriate safeguards. The Panel agrees these safeguards should remain. In many ways the Bill in its current form includes a Court discretion in relation to a number of these decisions and thus the Bill replicates a measure of the Act.[145] This further undermines the Panel's problem definition.

In relation to complexity, the Panel's claim again undermines its own reasoning as the Bill is invariably complex, convoluted, and requires a significant understanding on behalf of a user to navigate.[146] This is even more problematic given that the Bill was designed to be used by owners. If this was the intention, then the Panel should have included instructions to that effect to the Parliamentary Council Office. Interestingly, the Bill's own inherent complexity conflicts with the broader ideological underpinning that favours minimal intervention on behalf of lawyers and other professionals. It is likely that this legislation will require more involvement of professionals, such as lawyers to aid interpretation.

4 All Māori land should be capable of utilisation and effective administration

In order to address this proposition, the Panel recommended that the Bill provide for a new category of governor of Māori land known as an "external manager or administrator" called the managing kaiwhakarite regime.[147] This person or body would be appointed to administer under-utilised Māori land where there is absolutely no engagement by the owners. Māori bodies in addition to Te Tumu Paeroa (the Māori Trustee), such as post settlement governance entities and Māori trusts and incorporations, would be eligible to undertake the role. Judge Ambler considered this to be an overly complex solution to a

[143] Ambler, above n 141, at 7-9.
[144] Ambler, above n 141, at 7-9.
[145] Ambler, above n 141, at 7-9.
[146] Te Ture Whenua Māori Bill 2016 (126-1) (commentary).
[147] Review Panel, above n 35, at 29 and 30.

very rare problem that could be addressed via a discrete amendment to the current Act.[148] This regime was subsequently dropped from the Bill entirely due to reasons that will be discussed later.

5 Māori land should have effective, fit for purpose governance

The report makes two recommendations in relation to effective governance.[149] First, it recommends that the law clearly prescribe the duties and obligations of Māori land governance entities, and that it align those duties and obligations with the general law. Second, it recommends that the law "clarify" the jurisdiction of the Court to consider alleged breaches of duty of governors and make appropriate orders. The first recommendation assumes that the current law is deficient in relation to the duties of trusts or incorporations, but it does not provide reasons for why it makes this assumption. Importantly, the key problem here is unlikely to be legislative but instead reflects that some trustees and governors are not aware of their duties, a point that was discussed in the MAF report. The assumption made by the Panel is that a clearer reflection of such duties will change this problem, which is a problematic approach to law reform.

In relation to the second recommendation, it is not explicit what the Panel is suggesting. It can be inferred that it is promoting a reduction in the Court's role in the appointment and removal of trustees. This might be to align it with general trust law. However in the context of the review it is not clear how this recommendation will improve trustees' governance of Māori land. The report does not address this.

6 There should be an enabling institutional framework to support owners of Māori land to make decisions and resolve any disputes

The report makes two recommendations in relation to frameworks for dispute resolution.[150] First, it recommends the Bill provide for mediation in the first instance in relation to disputes. Secondly, it recommends that the law contain "clear and straightforward

[148] Ambler, above n 141, at 10.

[149] Review Panel, above n 35, at 29 and 30.

[150] Review Panel, above n 35, at 29 and 30.

provisions and rules" to ensure that the Court remains an accessible forum for resolving disputes that cannot be resolved by mediation and holding governance entities to account for breaches of duty.[151]

Calls for an alternative dispute resolution process have been suggested for a long time, both by land owners and the Court.[152] However, the Bill essentially creates compulsory mediation that is complex and likely to create more problems than it might solve. First, mediation is compulsory for matters of fact as opposed to matters of law. Although that is appealing in theory, in practice, the Tribunal considered it may prolong and further escalate disputes because it is incredibly difficult to distinguish between law and fact.[153] In relation to the second recommendation, the Panel does not explain what is unclear or not straightforward about the current provisions in the Act in relation to governors' breaches of duties. The Act clearly imposes trustee duties on governors of Māori land and thus it is not clear what problem the Panel is attempting to resolve.[154]

7 Excessive fragmentation of Māori land should be discouraged

The report makes three recommendations in relation to excessive fragmentation.[155] First, the law should "provide transparent registration provisions for Māori land titles and assurance of title to reflect the nature of Māori land tenure as a collectively held tāonga tuku iho". Although the principle underpinning the recommendation is sound, again the Panel fails to demonstrate the proposed deficiencies with current Māori land titles. The Government has spent a considerable amount of money implementing the Māori Freehold Land Registration Project to enable full legal titles to issue for Māori land. Is the problem with those titles, or is the concern related to the Court registry's maintenance of the title records in addition to Land Information New Zealand maintaining the legal title? Further,

[151] Review Panel, above n 35, at 29 and 30; Te Ture Whenua Māori Bill 2016, part 9.
[152] Māori Land Court submission, above n 2; TPK, above n 88.
[153] Waitangi Tribunal, above n 7, at [4.4.6].
[154] Te Ture Whenua Māori Act 1993, part 12.
[155] Review Panel, above n 35, at 29 and 30.

in considering the review rhetoric of utilisation, it is not clear how these titles have inhibited owners.

Second, the law should simplify succession to Māori land through administrative rather than judicial processes. The report implies that the current process in the Court is complex without providing any evidence. The current succession process is not complex.[156] The complexities arise from the inherent nature of Māori land estates, not the succession process.[157] This is because Māori land estates involve deceased owners who have not been succeeded to for many years, there may be several generations of owners who remain un-succeeded, owners often hold interests in multiple blocks, some interests are held in a trustee capacity, most estates are intestate, where there are wills, there are statutory restrictions on who may receive Māori land interests.[158] Because of those restrictions, the Court can be asked to make special provision out of the estate's income for any person. If there are challenges to a will, those challenging the will must issue separate proceedings in the Family Court or the High Court, and often a decision needs to be made about the rights of whāngai to succeed. A more simplified process is not going to change these aspects of Māori land. It is not clear how such a process can in fact be simplified.

Third, the Panel simply states that there should be provisions to address "barriers caused by excessive fragmentation of Māori land ownership interests".[159] However, the report fails to make specific suggestions about how this should be achieved, and it is not clear how the first two recommendations would discourage excessive fragmentation.

Interestingly, one mechanism in the Bill in relation to succession may be to address fragmentation and simplicity. This concerns the default whānau trust regime that imposes a whānau trust on intestacy where there is more than one eligible beneficiary. One key problem with this is that it is out of alignment with a current trend in the Court that has seen an increase in cases seeking partial terminations of whānau trusts.

[156] Ambler, above n 141, at 10.
[157] Ambler, above n 141, at 10.
[158] Ambler, above n 141, at 10.
[159] Review Panel, above n 35, at 29 and 30.

Overall, the report reflects the lack of thorough analysis undertaken by the Panel and is thus flawed review overall. The underlying rationale for the reform that the current law is inadequate is unconvincing. This does not mean that reform is not necessary but the Panel's review falls short of what ought to be expected. The policy legitimacy principle of performance is also relevant here, as the proposed recommendations and the exposure Bill are unlikely to actually address the issues of utilisation and therefore are unlikely to work.

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VI Consultation

Engagement in the policy making process is becoming more common in the drive for policy legitimacy.[160] The point of all engagement is to obtain the views of the other party in order to inform decision-making and this usually takes the form of consultation. Consultation can occur at many stages in the reform process and thus can be both involved with input legitimacy as well as process legitimacy. Where it occurs in the reform will determine what its use is for. Early on in the process, consultation can help define the problem. However, if the problem has already been defined, it calls into question the purpose of the consultation and its effectiveness overall. This was evident in the Panel's choice to consult on its already defined problem and may explain the opposition to the reform proposals generally.

Process failings might represent the failure of one particular process, such as inadequate consultation, or it might be that the particular process fails because it is part of a larger series of failings. In relation to the Bill, the failings in the process seems to reflect the latter. In particular, the criticism of the review panel membership, of the exposure draft, of the disproportionate focus on utilisation, and of the consultation process, more likely reflect criticism of poorly conducted reform overall. In relation to consultation, the process was flawed for a further reason: engagement with Māori, where whenua is concerned, requires something more than consultation.[161] This section will discuss the consultation process which demonstrates that poor problem definition coupled with poor initial policy work can

[160] Damme, above n 9 at [8].

[161] Waitangi Tribunal, Above n 7, at 157, 159, 237 and 353.

easily lead to poor quality engagement. Further, it highlights that even where problem definition is correct and where the process is adequate, if consultation simply reduces Māori to stakeholder status, it is unlikely to ever be evaluated as legitimate.

Consultation is just one form of engagement and is unlikely to be enough in certain situations to achieve policy legitimacy. In relation to Māori this is particularly relevant due to the historical use of legislation to alienate Māori land and disadvantage Māori generally. The object becomes less about consultation and more about what kind of engagement is required. The more important the topic is to Māori the more likely stronger engagement is required.[162] Land is of pre-eminent importance.[163] This signals that much stronger engagement is required.

In relation to what is required, the United Nations Declaration on the Rights of Indigenous Peoples speaks of states setting out to obtain the free, prior and informed consent of indigenous peoples in matters affecting them.[164] This means that on a topic like reform of land law, the initial problem analysis needs to be sufficient so that the resulting preparatory material for engaging with affected persons presents a compelling problem analysis. This particular consultation demonstrates three separate elements that help determine whether consultation was adequate. The first considers the particular process, the second asks whether the process could succeed given the poorly defined problem, and third, whether the level of engagement was enough.

Overall the consultation process failed on all three counts.[165] First, the Panel's incorrectly defined problem meant the process was flawed from the beginning. Secondly, the process was poorly conducted both because it was rushed and because Māori and those they consulted with were not properly informed. Finally, the level of engagement was inadequate given the fundamental importance of land. If the Crown desires policy

[162] Waitangi Tribunal, above n 7, at 157, 159, 237 and 353.
[163] Waitangi Tribunal, above n 7, at 157, 159, 237 and 353.
[164] United Nations Declaration on the Rights of Indigenous Peoples A/Res/61/295 (2007) [UNDRIP].
[165] Waitangi Tribunal, above n 7, at 205 - 234.

legitimacy the consultation and engagement process needs to do more than simply reduce Māori to mere stakeholder status. A key lesson from this process is that conventional consultation is unlikely to be sufficient to result in legitimate policy for Māori where whenua is concerned. Consultation is purely procedural in that it does not require agreement, consent or veto rights. Such a process does not align with an increasing body of jurisprudence concerning indigenous rights both internationally and domestically, which demonstrates situations in which consultation with Māori must go further.[166]

VII Māori Land Reform – An Historical Context

Ka Mua, Ka Muri, a Māori whakatauki meaning walking into the future backwards is of relevance. It refers to the importance of history in driving future action because the present cannot be disconnected from its past. The failure of the Panel's report to place the Act and its predecessors in their historical context is a further significant omission. Māori land is one of the most legislated subjects in New Zealand's history. Understanding that history, and the circumstances that led to the passing of the current Act, is essential to any review of the legislation. The 21-year period since the Act's passing has arguably been the quietest period of legislative activity affecting Māori land since 1840.[167] Despite this, the period has seen major successes with utilisation and development of Māori land, suggesting the fundamentals of the Act are sound.[168]

The Panel's intentions are not new in the historical record of reform of Māori land. If the Panel had considered historical attempts at reforming Māori land law, it would have identified clear trends, such as the series of reviews of the current Act focusing disproportionately on the Court's role as discussed earlier. A consideration of these trends is a paper in itself. However, a number of examples help illustrate that the Panel's suggestions are a reinvention of the wheel, albeit unintentionally so. Thus, even if the problem definition was correct, the proposed solutions are unlikely to resolve them. In the

[166] UNDRIP, above n 164.

[167] Ambler, above n 141, at 5.

[168] Ambler, above n 141, at 5.

absence of an historical perspective, the Panel has underplayed the positive features of the Act. As a result, the law is likely to repeat mistakes of the past.

The acceptance of the Panel's recommendations by Minister Finlayson and Minister Flavell also demonstrates that there was little understanding of the history associated with Māori land management. Hanberger suggests that a more considered look at history in public policy making could help policy makers and citizens readjust expectations, illuminate the limits and prospects for public policy, and identify ways to restore legitimacy.[169] This could result in more realistic polices that achieve the legitimacy function of satisfying felt needs and solving perceived problems.[170] In order to do this, the Panel needed to actually solve perceived problems. However, the first exposure draft excluded consideration of the long-standing barriers to the utilisation of Māori land, despite widespread knowledge and consensus in relation to these barriers.[171] Although provisions aimed at addressing these issues were eventually included, the fact that they were left out of the first draft, and took some time to be included in the overall legislation, demonstrate a lack of consideration on part of the Panel. This did little to promote legitimacy overall. The absence of these issues could simply have been an oversight. However, it is a particularly large one given the popular rhetoric concerning utilisation. It seems extraordinary that an entire Bill drafted to promote utilisation failed to deal with the main barriers until very late in the piece.

A key example of ignoring history includes the inclusion of the managing kaiwhakarite regime in the first exposure draft. This regime would allow the appointment of external managers to manage land not being utilised and where owner engagement was low or non-existent. The appointment would be made by the chief executive of Te Puni Kōkiri to manage Māori freehold land on behalf of the owners.[172] Under the Bill, the managing kaiwhakarite could enable a governance body to sell or exchange land without the requisite

[169] Hanberger, above n 95.
[170] Hanberger, above n 95.
[171] Rating valuation, landlocked land, paper roads, resource access and finance; and the application of the Public Works Act.
[172] The Bill, cl 147.

owner support.[173] With the reduced role of the Court, this regime was seen as placing considerable amounts of power in the hands of a Crown official without offering the safeguard of the Court. It resulted in a fear that further alienation of land would result. To those who considered the history of reform, the regime was reminiscent of the Māori Affairs Act 1953, a regime aimed at forcing under-utilised land into productivity.

Under the Maori Affairs Act 1953, anyone who could show the Court that a piece of good land was not being used could apply to have it vested in trustees.[174] The Maori Affairs Amendment Act 1967 introduced compulsory conversion of Māori freehold land with four or fewer owners into general land in order to promote productive use.[175] Maori Trustee powers to compulsorily acquire and sell so-called uneconomic interests in Māori land were increased under this amendment, and the legislation triggered fears that the law would result in further alienation of what land remained. While it is important to highlight that the Bill in no way compares to this previous regime, the reforms have reignited similar fears. In fact, initially, many of those opposed believed the reform was forcing them to utilise their land. Although there are significant differences between the two schemes, it is important to consider the impact that history has on the present and therefore consider how the current reform may appear similar and trigger similar fears because of the use of identical language, such as utilisation and productivity. Although "productivity" sounds good for some, it is inappropriate when that language has been used to alienate significant components of land in the past.

If the Panel had conducted their review adequately they might have identified the problematic regime like the managing kaiwhakarite not only in light of the history, but also in light of one of the key propositions underlying the reform: owner autonomy and tino rangatiratanga. Espousing these principles as key reasons behind the reforms, but including a regime in conflict with those principles is a major oversight. Importantly, the visceral

[173] The Bill, cl 53.
[174] Ministry for Culture and Heritage 'Treaty events since 1950', updated 17-May-2017 URL: https://nzhistory.govt.nz/politics/treaty/treaty-timeline/treaty-events-1950.
[175] Above n 170.

response to the managing kaiwhakarite meant it was subsequently dropped in the pre-introduced Bill and continued concern over the ability to sell or exchange land without owner support resulted in the restoration of the Court's discretion in relation to that specific power post select committee.

Another key example of a legislative change that reflects historical failures concerns the new governance regime in the form of a rangatōpū, which is a governance body that can take the form of a trust or company type structure.[176] There has been a longstanding policy problem concerning the manner in which Māori interact with the Pākehā legal system and many approaches have been attempted, albeit unsuccessfully.[177] The first concerned the Runanga Iwi Act 1990, which sought to address the lack of effective governance structures and accountabilities.[178] The second concerned the Waka Umanga (Māori Corporations) Bill 2009, which aimed to provide clarity in the process of formation of governance entities and the minimum requirements for sound commercial and administrative functions with flexibility based on cultural values.[179] The Runanga Iwi Act was repealed and the Waka Umanga Bill was dropped, the former following a change in Government and the latter due to sharp opposition by national. In relation to Waka Umanga, it was perceived that the legislation was overly-paternalistic,[180] and imposing a solution on Māori when it was not asked for or needed.[181] Interestingly, the model proposed by the Panel and the aims of cultural alignment do not differ in substance from these two examples. A consideration of these legislative attempts at governance could have provided further insight for the Panel and might have highlighted that it is not the structures themselves that are inhibiting utilisation or effect administration, but deeper issues still requiring assessment.

The poorly drafted exposure draft demonstrates the poor review and inadequate problem definition. If initial policy work is inadequate then the drafting instructions and subsequent

[176] Te Ture Whenua Māori Bill 2016, cl 5 and part 5.
[177] Geoffrey Palmer *Reform: A Memoir* (Victoria University Press, Wellington, 2013) at 411 – 414.
[178] At 411 – 414.
[179] At 411 – 414.
[180] (11 December 2007) 644 NZPD 13858.
[181] (11 December 2007) 644 NZPD 13879.

legislation will also be poor. These two examples demonstrate this poor drafting. The negative response to the exposure draft highlights the expectation of those undertaking reform to define the problem with sufficient clarity the first time. It also demonstrates that reform cannot be disconnected from the history of which it forms part. To do so is to risk the perception that the reforms offered are just another Crown policy being imposed on Māori.

VIII Conclusion

Achieving policy legitimacy is incredibly challenging. One key element includes input legitimacy which includes the early review stages that seek to define the problem the resulting policy will address. The recent proposed reform of the Te Ture Whenua Māori Act 1993 demonstrates the importance of problem definition in achieving policy legitimacy. In order to effectively define the problem in this case, an assessment of the Act was required to determine whether the regulatory framework and the Court were indeed inhibiting utilisation of Māori land. However, the Panel tasked with undertaking the review of the Act chose to rely on current research to design a policy that sought to address what it perceived as the barriers to utilisation of land. This choice was an ultimate error and resulted in a policy perceived as illegitimate overall. The Panel effectively ignored history, relied disproportionately on poor quality evidence, and used this evidence incorrectly. As a result consultation was inadequate. Further, the reform demonstrates that traditional consultation is unlikely to achieve policy legitimacy in the context of whenua Māori.

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X Appendix

*A **Timeline***

1993	Te Ture Whenua Māori Act enacted.
1998	A review of Te Ture Whenua Māori Act 1993 commenced with 18 hui held nationwide.
2002	The Act was amended but a number of recommendations from the 1998 review were not progressed.
2005	Hui Taumata established a Māori Land tenure Review Group which identified a need for reform.
2011	Te Puni Kōkiri released a report on Māori land tenure system recommending changes to the Act: *Ko Ngā Tūmanako o Ngā Tangata Whai Whenua Māori: Owner Aspirations Regarding the Utilisation of Māori Land.*
2012	An independent panel of experts was established to review the Ture Whenua Māori Act.
2013	Panel publishes a discussion document and hold 20 consultation hui nationwide. The panel's report recommended the 1993 Act be repealed and replaced by a new Act that would give Māori land owners greater mana motuhake to make decisions about their land, support the development of their whenua while ensuring Māori land is a taonga tuku iho for future generations. These principles form the basis of the current Ture Whenua Māori Bill. Cabinet accepted the panel's recommendations.
2014	
January	A Technical Panel was established to assist the drafting of a new Bill.
August	The Technical Panel (in conjunction with Iwi Leaders Group and Federation of Māori Authorities) held 20 hui nationwide with Māori land owners to seek their views.
November	The new Minister for Māori Development, Hon Te Ururoa Flavell, took over the review of Te Ture Whenua Māori Act.
2015	
February	A Te Ture Whenua Māori Ministerial Advisory Group was established to provide independent advice on the Bill. The members played a critical role in the development of the Bill. The Whenua Advisory Group attended more than 60 hui collectively and chaired seven hui with Māori leadership groups representatives and hui with Māori Land Court judges.
May	Te Puni Kōkiri releases for the first teim in its history an exposure draft to the general public.
June	23 consultation hui were held across the motu and the public were invited to make written submissions.

August	392 written submissions received on the exposure draft.
November	109 Bill provisions amended and 28 removed as a result of feedback
December	Hui continued with Māori leadership groups, trusts and incorporations to discuss changes to the bill and the reform.
2016	
January	The next draft of Te Ture Whenua Māori Bill (Draft 12) was released publicly following approved changes.
February	Cabinet agreed to include additional matters in the Ture Whenua Māori Bill relating to the valuation and rating of Māori land. 22 hui are held around the motu to explain key changes to the Bill. The first Whenua Māori Fund is released for whānau, trustees and Māori land owners to explore opportunities for their whenua. The trust fund is $12.8 million over four years.
March	14 additional wānanga are held with Māori land owners and trustees, and whanau around the motu on Ture Whenua Māori reform. Cabinet confirms its commitment to considering other barriers to the use of whenua Māori, including rating, valuation, paper roads, landlocked land and the impact of Public Works Act on Māori land.
April	The Bill went to the Māori Aairs Select Committee following its first reading and public submissions will be called for and considered.
May	A report was sent back to Cabinet on work relating to the Public Works Act, and rating of Māori freehold land associated with marae.
September	25 wānanga were held across the motu to get feedback from whanau, Māori land owners and trustees about the services that could be offered through the Māori Land Service and what it would look like.
2017	
January	25 wānanga were held across the motu to update whānau, Māori land owners and trustees on the proposed Māori Land Service's structure and services.
March	Further changes to address inequities in the Bill were announced.
May	The Bill goes to the Whole Committee of the House stage in Parliament.

B ***John Harbord National Business Review Article***

The Government is expected to shortly announce reforms to Te Ture Whenua Māori Act. Such reform is much needed to unlock the potential of significant amounts of under-utilised land and to create thousands of jobs. About 1.466 million hectares, or 5.5 per cent of New Zealand's total land mass, is comprised of multiply owned Māori land. Much of this land is situated in the north, centre and east of the North Island. Research in 2011 by

the then Ministry of Agriculture and Forestry estimated 40% of this land is under-performing and a further 40% is under-utilised. The potential of this land is enormous. Lifting productivity just to average industry benchmarks could result in an additional $8 billion in gross output and 3,600 new jobs for the primary sector alone.

Yet the ability to make productive use of this land is impacted by ownership and decision-making rules which are no longer fit for purpose. Māori Land Court records indicate that Māori freehold land is held in 27,308 titles with over 2.7 million individual ownership interests. The average title is just 54 hectares and has around 100 owners. Less than half of all titles have any governance structure. With historical and continuing urbanisation of the Māori population, interactions and connections with the land are very different from what was envisaged when the Māori land tenure system was established. Today, many Māori with an interest in multiply-owned land are not actively engaged in the use and development of their land, and the Māori Land Court plays a significant role in decision-making on how to use, manage and develop this land.

To realise the potential of this land the law needs to be changed to enable a majority of engaged owners to make effective and binding governance and utilisation decisions without the involvement of the Māori Land Court or other supervisory body. This will significantly reduce compliance and transaction costs, encouraging greater decision-making and utilisation of Māori land.

The role of the Court should be confined to retention (i.e. sale) decisions, complex disputes and existing specialised areas. Given the complexities of title and ownership, where disputes do arise mediation should be preferred over intervention by the Court in the first instance.

Governance of some Māori land would be improved, and the potential of such land unlocked, by providing clear mechanisms allowing for external managers to be appointed to administer under-utilised land where the existing owners cannot be identified or where there is no active engagement by the owners. Flexibility as to who can be a potential external manager should be increased to include Māori trusts and incorporations, post-Treaty settlement governance entities, and professional management companies. Forestry management is already performed by specialised companies and Māori landowners should

have the same opportunities to access similar specialists in agriculture, horticulture and other sectors.

The law should also be changed to allow Māori land owners themselves to establish governance entities through administrative processes rather than through the Māori Land Court – a basic right general land owners already enjoy. There is significant scope to take advantage of welldeveloped short- to medium-term leasing and share farming practices, which can be constructed to ensure the land is not alienated from its owners. The opportunities here are significant especially where the individual owners cannot be found or are not actively engaged in operating the land. Finally, Māori land owners should have a legislative option to transition land into collective ownership without individual shares and without requiring formal succession.

Land transferred through Treaty of Waitangi settlements is collectively owned in this way. Collective ownership serves to mitigate fragmentation issues, empower effective decision-making, and reduce transaction and compliance costs.

Legislative change as outlined above is but one aspect of unlocking the potential of Māori freehold land. Other changes, such as improving access to finance, are also needed.

These changes do not get away from difficult trade-offs owners will face in the future between efficient value maximising use of land and collective decision-making by multiple individual owners. Collective decision-making of this sort is a recipe for preserving the status quo and resistance to risk taking.

In order to skew the balance away from historically inefficient use and in some cases neglect, and more towards maximising the potential use of the land, reforms need to reduce the paternalistic role of the Māori land Court and the Māori Trustee. However, this will inevitably increase the scope for individuals and elites to abuse the fiduciary duties of stewardship they owe to absent landowners. Care will be needed in drafting new arrangements in the future to manage and reduce this risk where possible.

But amending legislation which is no longer fit-for-purpose is an important and long overdue step.

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