Time for a Real *Change: Revisiting the Position of Te Ture Whenua Maori Act 1993 Within Aotearoa's Legal System*

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Te Ture Whenua Maori Act 1993 (TTWMA) was enacted on the basis that it would provide a change in legislative direction. To this day, despite the best efforts of the members of the Māori Land Court, this change has not materialised. TTWMA is continually undermined in the same way as was its predecessor, the Maori Affairs Act 1953. This treatment of TTWMA subverts Māori land rights and does little to meet New Zealand's obligations under Te Tiriti o Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples. Disappointingly, the new discretion provided for under the Land Transfer Act 2017 (LTA 2017) insufficiently addresses this problem. It is therefore likely that the kaupapa of TTWMA will continue to be frustrated unless there is significant transformation within the land transfer system. This article argues that to address this problem, legislative amendment to the LTA 2017 providing that TTWMA overrides the indefeasibility provisions of the LTA 2017 is necessary.

I INTRODUCTION

In Aotearoa New Zealand, the principle of immediate indefeasibility consistently undermines the kaupapa of Te Ture Whenua Maori Act 1993 (TTWMA). Under immediate indefeasibility, as soon as a person registers their interest in land, they acquire indefeasible title to that land. When Māori freehold land is transferred and title to it registered, immediate indefeasibility operates to validate the transfer. This is so even where the transfer is not compliant with legislative restrictions under TTWMA. This is just one example of how New Zealand's land transfer system (LTS) circumvents Māori land interests and undermines TTWMA. This article argues that legislative amendment to the Land Transfer Act 2017 (LTA 2017) is required to address this issue. The amendment proposed provides that a transferee receiving Māori land does not obtain indefeasible title under the LTA 2017 until the transaction is shown to comply with TTWMA.

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Part II of this article introduces the theoretical underpinnings of the modern property law system as a means of grounding the discussion that follows. Part III examines circumstances in which the wider interests of the LTS have subordinated TTWMA and its predecessor, the Maori Affairs Act 1953. Parts IV to VI discuss the new discretion enacted under s 55 of the LTA 2017 and whether it can solve the problem outlined in Part III.[1] Part VII builds on this discussion, taking into account important policy considerations and concluding that s 55 is not an adequate solution. Part VIII then considers a range of alternative approaches that have been proposed to uphold Māori land rights and interests. The article concludes that while these approaches are important and necessary, legislative reform, as proposed in Part IX, is the most comprehensive and appropriate solution to the injustice perpetuated by the prioritisation of the LTA 2017 over TTWMA.

II THE THEORETICAL BASIS OF THE MODERN PROPERTY LAW SYSTEM

This first part of the article summarises the theoretical basis of the modern property law system to understand better its underlying objectives. It focusses on the work of René Demogue[2] and Pamela O'Connor.[3] The theoretical discussion throughout this article is based upon this summary.

Demogue argues that the primary concern of any legal system is to provide for the security of individuals.[4] On his view, there are two types of security that a legal system must provide: dynamic and static security.[5] Dynamic security is created when a reasonable belief or manifestation of a right generates the same effect as an actual right.[6] The purpose of dynamic security is to make transactions easier.[7] Demogue argues that Western legal systems favour approaches that produce dynamic security because they are dominated by an "ideal of business".[8] Equally important in Demogue's opinion, however, is the concept of static security. Static security is the idea that when a person is legally entitled to a right, they should not be deprived of it due to the acts of third parties.[9] For Demogue, it is the role of legislators to choose between either form of security, and in Western legal systems dynamic security is often favoured over static security.[10]

1 Land Transfer Act 2017, s 55.
2 René Demogue "Security" in A Fouillée and others (eds) *Modern French Legal Philosophy* (Augustus M Kelley Publishers, New York, 1968) 418.
3 Pamela O'Connor "Registration of Invalid Dispositions: Who Gets the Property?" in Elizabeth Cooke (ed) *Modern Studies in Property Law* (Hart Publishing, Portland (OR), 2005) vol 3 45.
4 Demogue, above n 2, at 418.
5 At 428.
6 At 424 and 427–428.
7 At 427.
8 At 428.
9 At 428.
10 At 431.

O'Connor applies Demogue's general theory of security to the field of property transactions.[11] She argues that modern property law systems require both dynamic and static security. Dynamic security protects purchasers' reasonable expectations that they will acquire property title free from unknown defects and adverse interests.[12] Static security protects existing property owners from being deprived of their property without proper consent.[13] Without static security, owners would not have any incentive to invest in the development and improvement of their land. Likewise, without dynamic security, purchasers would have no incentive to invest in land given a third party could successfully assert a prior claim.[14] While land title registration provides for both forms of security to some extent, O'Connor recognises "it is sometimes impossible to provide both forms of security when the rights of the prior owner conflict with those of a good faith purchaser".[15] In such situations, lawmakers are faced with the challenge of balancing static and dynamic security.[16] These theoretical foundations inform the problem this article seeks to address — namely, the subordination of TTWMA and its objectives when they conflict with the objectives of the wider LTS.

III THE PROBLEM: TTWMA'S INTERACTION WITH THE LTS PRIOR TO THE LTA 2017

TTWMA regulates dealings with Māori land in New Zealand. It attempts to respond to the diminution of the total area of land owned by Māori that has continuously occurred since the beginning of colonisation.[17] TTWMA's objectives are primarily to promote the retention of Māori land by Māori owners and to facilitate development and utilisation of that land.[18] Restrictions on transactions involving Māori land are the main mechanism TTWMA employs to achieve these objectives. For example, s 130 of the Act provides that Māori freehold land and Māori customary land may only change status in accordance with the provisions of TTWMA, or as provided for in another Act. Additionally, most dealings with Māori land require assistance or approval from the Māori Land Court (MLC).[19] The MLC's primary objective is to promote the kaupapa of TTWMA and it does so by placing substantial weight on the Act and its objectives in its decisions.[20] TTWMA is a vitally important component of New Zealand's legislative landscape, representing New Zealand's unique and vibrant, but nevertheless colonial, history.

11 O'Connor, above n 3.
12 At 48.
13 At 47.
14 At 48.
15 At 48.
16 At 49.
17 *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC) at [59].
18 Te Ture Whenua Maori Act 1993, preamble.
19 Tom Bennion "Māori Land" in Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) 441 at 457.
20 At 458.

Despite the importance of TTWMA in New Zealand land law, there is a concerning trend emerging. When the wider LTS conflicts with the object and provisions of TTWMA to protect and develop Māori land, TTWMA consistently loses out, so much so that the wrongful alienation of Māori land due to the workings of the LTS has become a familiar narrative.

This article now turns to examine instances where the conflict of interests between TTWMA and the wider LTS adversely impacts Māori land. The main case discussed is *Warin v Registrar-General of Land*.[21]

Warin v Registrar-General of Land

Warin is a High Court case from 2008. It concerned a block of land situated in Bland Bay, Northland, that the plaintiffs purchased in 1995.[22] At the time of the purchase, the plaintiffs treated the land as general freehold land, unaware that it was in fact Māori freehold land.[23] This meant the plaintiffs did not comply with TTWMA restrictions governing its alienation.[24] Specifically, the transfer was not consented to by at least three quarters of the owners,[25] the preferred class of alienees' (PCA) right of first refusal was not observed,[26] a special valuation was not obtained and presented to the MLC,[27] and no application was made to the MLC, so it could not confirm the transfer.[28] Notwithstanding these failures to comply with TWWMA, the land was registered in the plaintiffs' names pursuant to the Land Transfer Act 1952 (LTA 1952).[29] Seven years later, the plaintiffs sought to resell the land and discovered it was Māori freehold land.[30] This called into question both the validity of the initial transfer and the plaintiffs' claim to ownership. The discovery sparked a six-year litigation in the MLC, Māori Appellate Court and High Court.

The MLC found that due to the failure of the initial transfer to comply with TTWMA, the land should never have been registered under the LTA 1952. Accordingly, the transfer was of no force or effect.[31] On appeal to the High Court, the plaintiffs sought a declaration that their title was protected by indefeasibility by virtue of its registration in 1995.[32] While the High Court agreed with the MLC that the transfer of the land *ought* not to have been registered due to its non-compliance with TTWMA,[33] it nevertheless held that the plaintiffs had the benefit of indefeasible title because it *had* been

21 *Warin*, above n 17.
22 At [3].
23 At [13].
24 At [67].
25 At [69].
26 At [70]–[71].
27 At [73].
28 At [74].
29 At [12].
30 At [4].
31 At [32].
32 At [7].
33 At [86].

registered.[34] Essentially, this meant the provisions of TTWMA were overridden by the indefeasibility granted by the LTA 1952.[35] Unfortunately, *Warin* is merely one example of many in which TTWMA and Māori interests in land have been subordinated to the wider LTS.

Other Circumstances Where TTWMA and Māori Interests Have Been Subordinated to the Wider LTS

Before *Warin*, the primary case demonstrating the relationship between the LTS and Māori land was *Housing Corporation of New Zealand v Maori Trustee*.[36] In that case, a mortgage registered against the land in question was found to be valid and enforceable despite the fact it had not received the consent of the MLC Registrar as required by s 233 of the Maori Affairs Act.[37] *Housing Corporation* is therefore another example where legislation designed to protect Māori land has been overridden by indefeasibility.[38] Scholar Richard Boast goes so far as to suggest:[39]

> … there may be some reason for thinking that one motive for the introduction of the [Torrens] system may have been the quite deliberate one of placing illegally acquired Maori land beyond the reach of proprietary actions in the Courts.

Indeed, there are cases from the early 1900s that are evidence of the use of indefeasibility as a trump card to swindle Māori of interests in land.[40] These examples demonstrate not only that the issue is longstanding (and at one point possibly deliberate), but also that it is well-recognised. In *Re Pakiri – R Block*, the Māori Appellate Court stated that almost all judges would be able to point to cases where instruments had been registered against a clearly identified Māori land title, in conflict with the provisions of the Maori Affairs Act.[41]

While these examples show how indefeasibility has consistently undermined Māori interests in land, there are further ways in which these interests, and TTWMA specifically, have been subordinated to the wider LTS. In several decisions in the first decade following the enactment of TTWMA, the Court of Appeal significantly limited the jurisdiction of the MLC to rule on issues affecting Māori land interests.[42] These decisions, as well as

34 At [135].
35 At [129].
36 *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662 (HC).
37 At 666.
38 At 678.
39 Richard P Boast "The Implications of Indefeasibility for Maori Land" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 101 at 101.
40 *Beale v Tihema Te Hau* (1905) 24 NZLR 883 (SC); and *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC).
41 *Re Pakiri – R Block* (1994) 3 Tai Tokerau Appellate MB 178 (3 APWH 178) at 393.
42 *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA); and *McGuire v Hastings District Council* [2000] 1 NZLR 679 (CA). For an analysis of these cases, see Nin Tomas "Me Rapu Koe Te Tikanga Hei Karo Mo Nga Whenua: Seek the Best Way to Safeguard the Whenua" (2000) 9 BCB 49; and Nin Tomas "Jurisdiction Wars: Will the Maori Land Court Judges Please Lie Down" (2000) 9 BCB 33.

Bruce v Edwards,[43] demonstrate a resistance by the Court of Appeal to the changes intended by TTWMA.[44] They also show how *Warin* fits within a wider trend of judicial decisions in which Māori interests in land are undercut by other interests of the LTS. This is particularly the case where TTWMA interacts with other statutes — most notably the LTA 1952 and its successor, the LTA 2017. This is unfortunate given that TTWMA has been promoted as a change in legislative direction.[45]

The *Warin* Saga Continued

Returning to *Warin*, it must be acknowledged that the litigation did not end in the High Court. While Allan J ruled that the LTA was to override TTWMA, thus keeping the land in the plaintiff's ownership, his Honour was not prepared to make a finding on the status of the land.[46] His Honour therefore advised the plaintiffs to make a fresh application to the MLC to have the land's status changed.[47] The MLC considered the application in *Warin – Whangaruru Whakaturia 4 Lot 32 DP 126453 (Part)*.[48]

In *Whangaruru*, the plaintiffs put forward multiple arguments for having the status of the land changed from Māori land to general land. These arguments included that having it remain Māori land would be incongruous with achieving effective management and utilisation of the land as the plaintiffs were not Māori, and that there was no useful purpose in having the land remain Māori land while the landowners were non-Māori.[49] Following a comprehensive analysis of the plaintiffs' submissions, Ambler J concluded that a change in designation from Māori land to general land would be inappropriate.[50] He noted that if land in these circumstances retained the status of Māori land, the objectives of TTWMA could still be met. This was because even if the land were held outside the ownership of the PCA for some time, its status as Māori land meant TTWMA would govern any future transaction. It would still have to be offered back to the PCA if resale were to arise. Therefore, the purpose of retention of Māori land by Māori was not lost.[51]

The outcome of *Whangaruru* demonstrates that the issue of "which Act overrides the other" is perhaps more complex than first imagined. It is also possible that, if followed in other cases, *Whangaruru* could be a solution to the problems that arise when indefeasibility works to legitimise wrongful

43 *Bruce v Edwards* [2003] 1 NZLR 515 (CA). In this case, land was alienated to Pākehā owners in circumstances where the preferred class of alienees was not consulted or given an opportunity to oppose a status change from Māori freehold land to general land.

44 Jacinta Ruru "Commentary on *Bruce v Edwards* Taonga Tuku Iho: The Generational Treasure of Land" in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope* (Hart Publishing, Portland (OR), 2017) 329 at 330.

45 *Warin*, above n 17, at [59].

46 At [139].

47 At [139].

48 *Warin – Whangaruru Whakaturia 4 Lot 32 DP 126453 (Part)* (2010) 30 Taitokerau MB 37 (30 TTK 37).

49 At [11].

50 At [107].

51 At [63].

alienations of Māori land. The adequacy of *Whangaruru* as a solution was tentatively considered by the Māori Appellate Court in *Muraahi v Phillips*.[52] The Court there noted that continuation of the PCA's right in future alienations, despite the fact the land is held outside the PCA's ownership in the interim, may well offer sufficient protection of Māori land interests.[53] The sufficiency of this solution is discussed further in Part VIII. This article now discusses whether the ruling in *Warin* is adequate from a theoretical standpoint. It concludes that it is not — a finding built on later in this article in arguing for law reform.

A Theoretical Analysis of *Warin*

The High Court judgment in *Warin* demonstrates the blunt rule of immediate indefeasibility. In considering the theoretical basis of the LTS, O'Connor argues that immediate indefeasibility favours dynamic security because the purchaser can have confidence that the register is conclusive evidence of ownership of title.[54] In *Warin*, the purchasers' incorrect assumption about the land (that it was general land) was upheld through the application of immediate indefeasibility. In taking this approach, the Court favoured dynamic security as the purchasers were not required to investigate the validity of the title beyond checking the register. Importantly, the favouring of dynamic security was to the detriment of static security: the original Māori owners were deprived of their land without their consent. Drawing on O'Connor's work, this article argues why an approach favouring immediate indefeasibility at all costs (as taken in *Warin*) is fundamentally flawed.

First, on O'Connor's view, immediate indefeasibility does not attempt to strike a balance between dynamic and static security.[55] O'Connor observes that when such a balance is not struck, the benefit a purchaser receives from immediate indefeasibility is marginal.[56] At most, the purchaser benefits from the ease of the transaction and the need not to search beyond the register. However, this benefit is offset by the loss in static security sustained once the purchaser becomes the owner of the title upon completion of the transaction. That is, because the purchaser could be deprived of their estate under similar circumstances in the future, they make no gain in their level of overall security. As no party to the transaction makes an overall gain, O'Connor argues a more desirable approach would be one that balances both purchasers' and owners' requirements for dynamic and static security.[57]

Secondly, an approach that favours immediate indefeasibility at all costs undermines other rules of property law by rectifying the invalidity of a transfer instrument upon registration.[58] Vendors and purchasers thus have

52 *Muraahi v Phillips – Rangitoto Tuhua 55B1B and 55B1A2* [2013] Maori Appellate Court MB 528 (2013 APPEAL 528).
53 At [119].
54 O'Connor, above n 3, at 54.
55 At 60.
56 At 60.
57 At 60.
58 At 60.

little incentive to ensure their transfer instruments are compliant.[59] Similarly, the judges of the MLC note that when indefeasibility overrides TTWMA, there is little incentive for Land Information New Zealand (LINZ) to ensure the MLC approves alienations of Māori land.[60] In *Warin*, the transfer received the benefit of indefeasibility upon registration.[61] This completely undermined TTWMA, which would have rendered the transfer of no force or effect.

Finally, an approach that favours immediate indefeasibility at all costs is likely to allocate land to someone who does not currently occupy it preferentially over the current occupier.[62] O'Connor argues that such allocation may not be appropriate because, generally, an occupier will value the property higher than a non-occupier will.[63] Admittedly, in *Warin*, immediate indefeasibility did not result in the removal of the property from the current occupier because the wrongful nature of the initial transfer only became known many years later. However, in almost all other cases, indefeasibility would operate to remove title to the land from the current occupier and vest it in a purchaser. Whether this truly is the party who values the property most is explored in further detail in Part VI.

IV THE LTA 2017: DISCRETIONARY INDEFEASIBILITY

Since *Warin* and *Whangaruru*, the LTA 1952 has been repealed and replaced with the LTA 2017. This section outlines the new legislative discretion provided by s 55 of the LTA 2017 and discusses whether this discretion resolves the problem outlined in Part III. It similarly analyses the theoretical underpinnings of the discretion. It concludes that while the discretion is a welcome addition to the LTS, it does not provide appropriate or sufficient protection for Māori land.

The LTA 2017, similar to its predecessor, complements the Torrens system of land registration in New Zealand. Section 51 of the LTA 2017 codifies immediate indefeasibility by providing that upon a person's registration as the owner of an estate or interest in land, that person obtains a title that cannot be set aside.[64] Section 51 is subject to the exceptions and limitations set out in ss 52 to 56 of the Act.[65] Section 52 contains several notable exceptions to immediate indefeasibility, many of which are familiar from the LTA 1952. In addition to the listed exceptions in s 52, s 55 of the Act provides for a new *general* discretion allowing the court to depart from s 51 in limited circumstances. Under s 55, the court can make an order cancelling a person's registration if it would be *manifestly unjust* to allow them to remain the registered owner. For clarity, the full section is set out below:

59 At 61.
60 Law Commission *A New Land Transfer Act* (NZLC R116, 2010) at [6.15].
61 *Warin*, above n 17, at [135].
62 O'Connor, above n 3, at 61.
63 At 61.
64 Section 51(1).
65 Section 51(3)(a).

55 Court may make order only in cases of manifest injustice

(1) The court may make an order cancelling the registration of person B only if it is satisfied that it would be manifestly unjust for person B to remain the registered owner of the estate or interest.

(2) For the purpose of subsection (1), the existence of forgery or other dishonest conduct does not, of itself, constitute manifest injustice.

(3) An order under this section may be made only if the court is satisfied that in the circumstances the injustice could not properly be addressed by compensation or damages, whether under subpart 3 or otherwise.

(4) In determining whether to make an order, the court may take into account—

- (a) the circumstances of the acquisition by person B of the estate or interest; and
- (b) failure by person B to comply with any statutory power or authority in acquiring the estate or interest; and
- (c) if the estate or interest is in Māori freehold land, failure by a person to comply with Te Ture Whenua Maori Act 1993; and
- (d) the identity of the person in actual occupation of the land; and
- (e) the nature of the estate or interest, for example, whether it is an estate in fee simple or a mortgage; and
- (f) the length of time person A and person B have owned or occupied the land; and
- (g) the nature of any improvements made to the land by either person A or person B; and
- (h) the use to which the land has been put by either person A or person B; and
- (i) any special characteristics of the land and their significance for either person A or person B; and
- (j) the conduct of person A and person B in relation to the acquisition of the estate or interest; and
- (k) any other circumstances that the court thinks relevant.

(5) The court may make an order under this section on any conditions that the court thinks fit (for example, an order relating to possession of the land).

In order to trigger s 55, the person applying for alteration of the register must have been deprived of an estate or interest in land or have suffered loss or damage by the registration under a void or voidable instrument of another person as the owner.[66] They must also make an application for an order under s 55 within six months after they become aware (or ought reasonably to have become aware) of the acquisition of the interest.[67] If a person is deprived of an estate or interest in land and an order made under s 55, the applicant may claim compensation under s 59.[68] The court is not able to make an order under s 55 if the land has already been transferred to a third party and that third party has acted in good faith.[69]

66 Section 54(1).
67 Section 54(3).
68 Section 59(2)(c).
69 Section 56.

These amendments can be adequately summarised as retaining the previous rule of immediate indefeasibility but adding a general discretion allowing the court to depart from this rule where maintaining the status quo would cause manifest injustice. The next section of this article unpacks s 55 to determine what a genuine exercise of the legislative discretion might look like in circumstances of non-compliance with TTWMA. This is done by analysing the views of various commentators and the approaches of alternate jurisdictions. This analysis is undertaken to determine whether s 55 embodies a solution to the problem outlined in Part III of this article insofar as it can achieve the policy of retention and development required by TTWMA.

V UNPACKING S 55: WHAT DOES A GENUINE EXERCISE OF THE DISCRETION LOOK LIKE?

When a court is faced with an application to depart from indefeasibility under s 55 of the LTA 2017, it is given freedom to make any order it considers appropriate in the circumstances,[70] provided the manifest injustice threshold is met.[71] Section 55 provides factors to guide the court in determining whether the circumstances are manifestly unjust. Of particular importance is s 55(4)(c), which provides that the court may, "if the estate or interest is in Māori freehold land," take into account "failure by a person to comply with [TTWMA]". The decision to include this factor shows that non-compliance with TTWMA was squarely within Parliament's contemplation when enacting the legislative discretion under s 55. It also makes clear that this kind of situation (that is, the situation in *Warin*) is capable of being considered manifestly unjust. However, s 55(4)(c) and the other factors listed in subs (4) are not mandatory considerations. Further, the court may take into account any other factors it thinks relevant.[72]

There is little guidance as to the circumstances in which the discretion may apply. The legal community has expressed concern about the potentially wide application of s 55 and a consensus has developed that the discretionary power should be used conservatively. While broadly supporting the discretion, the New Zealand Law Society states it should only apply in "very rare situations" so as to avoid its threatening the doctrine of indefeasibility of title.[73] Thomas Gibbons, while believing that an appropriate interpretation of manifest injustice is one that allows relief in different kinds of cases, argues that the discretion should only be exercised in cases where the injustice is *egregious*.[74] LINZ takes the similar position that manifest injustice is a "limited judicial discretion [and] is intended for use only in exceptional

70 Section 55(5).
71 Section 55(1).
72 Section 55(4)(k).
73 *Land Transfer Bill: Report of Land Information New Zealand to the Government Administration Committee* (July 2016) at [46].
74 Thomas Gibbons *A Practical Guide to the Land Transfer Act* (LexisNexis, Wellington, 2018) at [2.5.3.1]–[2.5.3.2].

circumstances".[75] The Law Commission is also of the view that the discretion would apply in a very limited number of cases.[76]

While these observations evidence a concern about the potential uncertainty and wide application of the discretion, commentators nevertheless seem to agree the discretion should remain undefined to facilitate its unfettered application. In 2016, LINZ commented that defining the term "manifest injustice" could result in the exact kind of rigidity and injustice the Bill was trying to avoid.[77] Similarly, Gibbons believes the court should refrain from outlining situations that would *always* or *never* count as manifest injustice in order to facilitate best the remedial nature of the provision.[78]

While the commentators mentioned above appear generally to support the inclusion of the discretion (albeit having some reservations as to its application), support for s 55 is not universal. Rod Thomas criticises the provision on the basis that it favours the return of the land to the dispossessed owner and sets too low a threshold for the discretion to be exercised.[79] These features, he argues, go against the primary function of the Torrens system of land registration: to create security of title.[80] In determining whether to exercise the discretion, the court will almost always prefer the vendor over the purchaser, thus effectively returning New Zealand land law to a system ruled by deferred indefeasibility.[81]

The Law Commission's report on the LTA 2017 noted two other Torrens jurisdictions with discretionary powers to depart from indefeasibility: Nova Scotia and Queensland.[82] However, neither appear to offer any precise insight as to how s 55 should be approached by New Zealand courts. Nova Scotia's Land Registration Act 2001 has the most comparable discretion to New Zealand's s 55.[83] The Nova Scotian legislation provides an avenue for persons who are aggrieved by a registration of title to commence proceedings for an order to correct the register.[84] In determining whether it is just and equitable to correct or confirm the register, the court considers several factors.[85] These factors are similar to those provided under s 55(4) of the LTA 2017. Nevertheless, the courts in Nova Scotia have taken mixed approaches to the exercise of their discretionary power and no general statement of principle has emerged. In Queensland, the Land Title Act 1994 gives courts a discretion to make orders that are just in the circumstances, but only if one of the grounds in s 187 (such as fraud) is made out.[86] This is fundamentally

75 *Land Transfer Bill*, above n 73, at [45].
76 Law Commission, above n 60, at [2.12].
77 *Land Transfer Bill*, above n 73, at [52].
78 Gibbons, above n 74, at [2.5.3.3].
79 Rod Thomas "Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act" [2011] NZ L Rev 715 at 727. Note that while Thomas critiqued the proposed version of the discretion, the enacted version is substantially the same.
80 At 727.
81 At 732–733.
82 Law Commission, above n 60, at [2.15].
83 Land Registration Act SNS 2001 c 6.
84 Section 35(1).
85 Section 35(6).
86 Land Title Act 1994 (Qld), s 187(1).

different to the discretion conferred upon New Zealand courts by the LTA 2017. In New Zealand, the court's exercise of s 55 may remove indefeasible title. In contrast, in Queensland, the court has a discretion to make orders it considers just and equitable only *after* indefeasible title has already been removed by an exception.

In light of the varied views of commentators and the lack of overseas precedent, there is no satisfactory guidance as to how s 55 should be approached in New Zealand. Further, while LINZ comments that the discretion should be saved for cases that are both *manifest* and *exceptional*,[87] and Gibbons argues the injustice must be *egregious*,[88] this is not what the statute provides. According to s 55(1), injustice need only be manifest. This is a considerably lower threshold than that LINZ and Gibbons advocate. This low threshold could lead to the exercise of the discretion in a manner more in line with Thomas's concerns — that is, favouring the return of the land to the dispossessed owner.[89]

VI TTWMA UNDER THE LTA 2017

This section assesses how s 55 is likely to work in practice and whether the discretion is sufficient to solve the problem of immediate indefeasibility's circumvention of TTWMA. In the absence of case law demonstrating how the relationship between TTWMA and LTA 2017 works in practice, this article applies s 55 to the facts of *Warin* and *Whangaruru*. It considers what outcome would be reached if those cases were before the court today and litigated under LTA 2017.

Revisiting *Warin* Under s 55

Transfers of land in contravention of TTWMA are considered "void"[90] by virtue of s 160 of that Act, which provides that certain specified instruments of alienation have no force or effect unless confirmed by the court. In *Warin*, the MLC never confirmed the transfer because no application was made.[91] This means the transfer was void, thus falling within the ambit of s 54(1)(a) of the LTA 2017, which enables a person to bring a claim on the basis of their having been deprived of an estate or interest in land by a void instrument. For completeness, the PCA in *Warin* would *not* be entitled to bring a claim under s 55 as it has not been "deprived of an estate or interest in land" for the purposes of the LTA 2017.[92] This is because *Whangaruru* ensures its right of first refusal continues.[93]

87 *Land Transfer Bill*, above n 73, at [45].
88 Gibbons, above n 74, at [2.5.3.1]–[2.5.3.2].
89 Thomas, above n 79, at 727.
90 Thomas, above n 79, at 729–730.
91 *Warin*, above n 17, at [74].
92 Section 54(1)(a).
93 *Whangaruru*, above n 48, at [105].

There would be two possible outcomes to an application under s 54 of the LTA 2017. If the court viewed the retention of the land by the registered owners as manifestly unjust, the discretion could be invoked so as to return the land to the beneficial owners. If not, immediate indefeasibility would operate such that the land would remain with the registered owners. In considering whether the circumstance are manifestly unjust, the court would look to the factors listed under s 55(4). The court could only make an order if satisfied that the injustice could not be addressed by compensation or damages.[94] The factors likely to be considered are now discussed.

1 The Circumstances of the Acquisition[95]

Mr and Mrs Jensen (two of the plaintiffs) purchased Lot 30 when the Maori Affairs Act was in force.[96] Section 2(2)(f) of that Act provided that the status of land changed from Māori land to general land upon transfer of ownership to non-Māori.[97] These circumstances of acquisition may operate in favour of the plaintiffs if the court were to consider it fair for the plaintiffs to assume s 2(2)(f) would apply the second time around when they purchased Lot 32. More likely, however, is that the circumstances of acquisition would weigh against the plaintiffs; the court may consider that since the plaintiffs knew the history of the land they should have made inquiries as to its status.

2 Failure to Comply with TTWMA[98]

The court may consider that the failure to comply with TTWMA was severe and occurred in four separate ways.[99] This factor would favour returning the land to the Māori owners.

3 The Identity of the Person in Actual Occupation[100]

Part of the complexity of the *Warin* case is that the void nature of the transaction only came to light many years after it occurred, when the owners sought to onsell the land.[101] The land was therefore already in the registered owners' possession and had been for many years. This would be a factor in favour of leaving the land with the registered owners.

94 Section 55(3).
95 Section 55(4)(a).
96 *Whangaruru*, above n 48, at [4].
97 At [4].
98 Section 55(4)(c).
99 Specifically, the transfer was not consented to by at least three quarters of the owners, the PCA's right of first refusal was not observed, a special valuation was not obtained and presented to the MLC, and no application was made to the MLC, so it could not confirm the transfer: *Warin*, above n 17, at [69]–[71] and [73]–[74].
100 Section 55(4)(d).
101 *Warin*, above n 17, at [4].

4 The Nature of the Estate or Interest[102]

The land is freehold land.[103] This factor would not appear to favour either party.

5 The Length of Time the Respective Parties Had Owned the Land[104]

Taking into consideration the history of Māori freehold land in New Zealand,[105] it is reasonable to assume the Māori owners had a lengthy association with the land. The registered owners owned the land continuously from 1995 to 2008, when the case came before the High Court (a period of 13 years).[106] Both parties would have a legitimate claim based on the length of time the property was owned.

6 The Nature of Any Improvements Made by the Respective Parties[107]

Neither party made any improvements to the land. The land was subdivided before it was put up for sale and purchased by the Jensens.[108] In 2011, the land was described as a vacant section suitable for a home.[109] This factor would not appear to favour either party.

7 The Use to Which the Land Had Been Put[110]

The land was not put to any "use". The registered owners had been locked in litigation for a number of years and contended they had difficulties securing finance in order to develop the land.[111] This factor would not appear to favour either party.

8 Any Special Characteristics of the Land and Their Significance for the Respective Parties[112]

No special significance was reported by the registered owners of the land. However, to the previous beneficial owners and members of the PCA the land is Māori ancestral land.[113] It must therefore be recognised as a taonga tuku iho of special significance to Māori.[114] This factor would go in favour of returning the land to its original owners.

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102 Section 55(4)(e).
103 *Whangaruru*, above n 48, at [1].
104 Section 55(4)(f).
105 See Bennion, above n 19, at 456.
106 *Warin*, above n 17, at [3].
107 Section 55(4)(g).
108 *Warin*, above n 17, at [12].
109 *Whangaruru*, above n 48, at [14].
110 Section 55(4)(h).
111 *Whangaruru*, above n 48, at [15].
112 Section 55(4)(i).
113 *Whangaruru*, above n 48, at [27].
114 Te Ture Whenua Maori Act, preamble.

9 The Conduct of the Respective Parties[115]

The registered owners of the land were unaware of its status and relied on flawed legal advice to make the transfer, without reference to TTWMA.[116] This may be seen both as a factor favouring the owners due to their "innocence", as well as a factor counting against them: it would provide an alternate remedial route by which the registered owners could pursue their lawyer.[117]

10 Any Other Circumstances[118]

It is likely the court would also consider that, while consent to sell the land was not given at the required time by three quarters of the Māori owners, several years prior to sale general authority *was* given by the beneficial owners to subdivide the land and sell certain lots (including the present land).[119] Another factor that may be considered is that the registered owners incurred costs of over $100,000 during litigation and the process would have created considerable stress for them.[120]

It remains to be determined whether the discretion permits the court to consider the relevant tikanga. In the context of *Warin*, this would permit the court to consider the uri (descendants) of the Māori beneficial owners, who would also have rights to and interests in the land. This is based on the idea that living generations of Māori are guardians of ancestral land, as their tupuna were before them, and their uri benefit from this guardianship.[121] Thus, the land is "shared between the dead, the living and the unborn".[122] If the land were to remain outside the ownership of Māori, their ability to perform this customary obligation would be significantly diminished. As there is no section in the LTA 2017 that explicitly provides the court may consider the relevant tikanga, one can only hope these factors would be taken into account under s 55(4)(k).

Following consideration of the factors in s 55(4), it is not clear whether the court would exercise its discretion and make an order cancelling the plaintiffs' registration. If the land were removed from the plaintiffs' possession, they would lose land of which they had been in possession for 13 years. However, if the plaintiffs were to remain the registered owners, the principles of TTWMA would be undermined and the beneficial owners would lose the land without consent. While *Whangaruru* makes clear that the PCA may be able to purchase the land back in the future, the land may have fundamentally changed or the price dramatically risen by the time this

115 Land Transfer Act 2017, s 55(4)(j).
116 *Whangaruru*, above n 48, at [89].
117 At [89].
118 Section 55(4)(k).
119 *Warin*, above n 17, at [69].
120 *Whangaruru*, above n 48, at [14].
121 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (revised ed, Huia, Wellington, 2016) at 299.
122 At 299.

opportunity arises. This would significantly reduce the chances future generations of Māori have of being in control of the maintenance and development of their ancestral land.

Finally, it must be noted that in *Warin* there was no evidence any beneficiary was particularly disenfranchised by the sale,[123] and it took seven years for the original sale to be called into question.[124] In reality, an application under s 55 would require a large amount of resources and commitment on the part of the applicant, so much so that someone would *need* to feel sufficiently aggrieved to bring a claim.

If an order under s 55 were made, the registered owners would be able to apply for compensation under s 59 on the basis that they had been deprived of an estate or interest in land *by reason of* an order made under s 55.[125] The award of financial compensation in these circumstances seems ironically adequate given it would put the registered owners in much the same position as if they had completed their sale, receiving money as consideration for the property. Alternatively, if s 55 were not exercised and the status quo were to remain, the Māori beneficial owners could apply for compensation on the basis that another person had been registered as the owner of their land under a void instrument.[126] The adequacy of this outcome is doubtful given financial compensation is viewed to be an inappropriate measure by which to make good the loss of Māori land.[127]

A Theoretical Analysis of s 55

This article now examines the adequacy of the s 55 discretion through O'Connor's theoretical lens.[128] It concludes that while the discretion is theoretically suitable for the wider LTS, applying it to Māori land may not be appropriate or sufficient. O'Connor contends that immediate indefeasibility is unable to allocate land to the party who values it most in all cases. For this reason, she argues for a presumptive rule, which could be departed from in particular cases, to allocate land to the person who values it the most.[129] As part of this approach, O'Connor suggests legislation should provide a set of non-exhaustive factors that may justify a departure from the general rule.[130] What O'Connor is effectively describing is s 55 of the LTA 2017. Arguably, then, the real effect of the s 55 discretion is to allocate the land to the party who values it most.

If the discretion under s 55 is purely a way of determining which party values the land most in circumstances of manifest injustice, its application to Māori land may be inappropriate. When an application concerning Māori land comes before the court and the other party to the dispute is non-Māori, the

123 *Warin*, above n 17, at [130].
124 *Warin*, above n 17, at [4].
125 Section 59(2)(c).
126 Section 59(2)(a).
127 *Warin*, above n 17, at [131].
128 O'Connor, above n 3.
129 At 62.
130 At 62–63.

court may be required to reconcile cross-cultural conceptions of value. According to the Māori worldview, the environment is an interconnected whole. All parts of it are connected by whakapapa and infused with mauri (life force). Through connection with the land and the exercise of kaitiakitanga, Māori gain a sense of identity and mana, loss of which can have profound effects on a person's social and cultural wellbeing.[131]

These ideas are not particularly reconcilable with European property values, which are often based on duration of possession and economic value. O'Connor favours European conceptions of value in her discussion. She does not refer to concepts of spirituality and connection with the land. Rather, she reaches the conclusion that the person who values the property most *must* be the current occupier because people are generally willing to pay more to retain something they already have than to acquire something they do not have.[132] What someone is willing to pay may be an adequate method of determining value in European land transactions, but it is an inappropriate method to apply to transactions involving Māori land.

A further difficulty is that many of the factors under s 55(4) are tilted towards Eurocentric conceptions of value, such as the nature of improvements made to the land and the use to which the land has been put. It is also significant that there is no provision specifically providing for consideration of tikanga or broader Māori relationships with land. There is an unfortunate irony in presenting statutory factors to determine whether circumstances are manifestly unjust, when it is the manifestly unjust actions of the British colonial administration and successive governments that have made it near impossible for Māori to demonstrate these factors. Vast areas of Māori land are vacant and undeveloped, in large part because the imposition of European land titles has subverted Māori land rights and traditional ownership models,[133] and large sects of Māori land have been permanently alienated due to colonial confiscation policies.[134] It is increasingly difficult for Māori to demonstrate the factors listed under s 55(4) when their ability to do so is impeded by these historical and continuing injustices.

While the discretion under s 55 is perhaps not particularly suitable in cases involving Māori land, it will no doubt prove a useful tool for ameliorating the harsh effects of indefeasibility in other circumstances. It is able to acknowledge the value of static security,[135] thus making it a theoretically appropriate addition to the LTS. This article now contends that even without the weight of these theoretical arguments, there are significant policy considerations that demonstrate s 55 is an incomplete mechanism for the protection of Māori land. New Zealand must do more if it is to act

131 Ministry for the Environment "Māori relationship with the environment" (October 2015) <www.mfe.govt.nz>.

132 O'Connor, above n 3, at 62.

133 See David V Williams *'Te Kooti tango whenua': The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999) for an overview of the workings of the Native Land Court.

134 See Richard Boast and Richard S Hill (eds) *Raupatu: The Confiscation of Maori Land* (Victoria University Press, Wellington, 2009) for a detailed account of the land confiscation carried out by the colonial government.

135 Katherine Sanders "Land Law" [2012] NZ L Rev 545 at 566.

equitably in light of historical injustice and if it wishes to meet its domestic and international legal obligations.

VII POLICY CONSIDERATIONS: NEW ZEALAND'S OBLIGATIONS

The severe historical injustice suffered by Māori, as well as New Zealand's obligations under Te Tiriti o Waitangi[136] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[137] are evidence that the approach taken towards the protection of Māori land must be stronger than that provided for in s 55 of the LTA 2017.

Before the arrival of Europeans, the entirety of New Zealand was Māori land. Today, only 5 per cent of land in New Zealand is Māori land.[138] This diminution occurred through large-scale, systematic, discriminatory and violent policies that removed land from Māori and placed it in the possession of British officials and settlers.[139] While it is not the intention of this article to traverse this historical injustice in detail, recognition of it is hugely important in understanding why s 55 does not provide sufficient protection for Māori land. In light of this injustice, policies geared around the retention and development of Māori land, such as TTWMA, must be given their full intended effect. This will go some way in remedying these historical wrongs and protecting what little land remains today in Māori ownership.

When historical injustice is acknowledged, the fact the consent regimes of TTWMA are only one consideration in the exercise of a discretionary power does not appear to afford adequate protection for Māori land. This is problematic because, as the discretion will not always be exercised so as to return Māori land to its previous owners, it leaves Māori land open to alienation without consent. This is especially disappointing given the government's commitment in art 2 of Te Tiriti o Waitangi (to uphold Māori rangatiratanga over their lands and other taonga), and the very explicit promises the government has made more recently by ratifying UNDRIP. UNDRIP specifically provides that states party to it must provide *effective* mechanisms to prevent and redress any actions that have the aim or effect of dispossessing indigenous peoples of their lands.[140] UNDRIP also recognises the right of indigenous peoples to maintain and strengthen their spiritual relationship with traditionally owned lands and to uphold their responsibilities

136 Te Tiriti o Waitangi 1840.

137 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

138 Law Commission *Review of the Land Transfer Act 1952* (NZLC IP10, 2008) at [10.2].

139 See Boast and Hill, above n 134; and IH Kawharu *Maori Land Tenure: Studies of a changing institution* (Oxford University Press, Oxford, 1977). See also Williams, above n 133, for an overview of the workings of the Native Land Court; and Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996) for a detailed account of a particular instance of historical injustice in the Taranaki region.

140 Article 8(2).

to future generations,[141] and requires states to implement a fair adjudicatory process that gives recognition to indigenous peoples' land tenure systems.[142]

Notwithstanding these commitments and promises, time and time again Māori lose out through the operation of the Eurocentric LTS, particularly its principle of indefeasibility, as exemplified in *Warin* and numerous other cases.[143] It is for this reason that this article argues a fundamental change in approach is required. Such a change should embody the turn in legislative direction that was intended of TTWMA, and take steps towards remedying historical injustice and meeting New Zealand's domestic and international commitments. The following section discusses potential solutions to the problem that the legal community has proposed. The article concludes, however, that the most effective solution is amendment to the LTA 2017 providing that TTWMA overrides it.

VIII POSSIBLE SOLUTIONS

In 2016, Te Puni Kokiri, LINZ and the Ministry of Justice led an inquiry to resolve and clarify the relationship between the LTA 2017 and TTWMA. The inquiry found that many of the problems this article has discussed have been due to practical issues such as incomplete and misaligned data.[144] It also found that procedural initiatives that were already being implemented were likely to resolve any remaining practical issues, and any further issues could be addressed through s 55 of the LTA 2017.[145] On this basis, it was the understanding of these agencies that the primacy of the LTA 2017 over TTWMA would have little impact on Māori land registration and therefore did not need to be reviewed.[146]

There is no doubt that the discrepancies between the LTS and the system that operates under TTWMA have contributed to the problem this article seeks to address. If consistency were achieved between the two systems and a process put in place to notify the Registrar when changes are made to a person's title, the likelihood of wrongful dealings with Māori land would be reduced. Such procedural approaches are not new. The implementation of bureaucratic measures to ameliorate the harsh effects of indefeasibility has been long called for by judges,[147] with some suggesting that the Registrar's power of correction under s 81 of the LTA 1952 could be used in such a manner.[148]

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141 Article 25.
142 Article 27.
143 *Housing Corporation*, above n 36; *Assets Co*, above n 40; *Beale*, above n 40; *Attorney-General v Maori Land Court*, above n 42; *Bruce v Edwards*, above n 43; and *McGuire*, above n 42.
144 *Land Transfer Bill: Report of Land Information New Zealand to the Government Administration Committee: Addendum to Main Departmental Report* (8 August 2016) at [9].
145 At [10].
146 At [11]–[12].
147 *Deputy Registrar – Orongotea B No 1* (2008) 125 Whangarei MB 36 (125 WH 36) at [28].
148 *Re Pakiri – R Block*, above n 41, at [60].

It is also possible that the rule in *Whangaruru* (as discussed in Part III) may be an adequate response to the problem. Perhaps the most significant outcome of *Whangaruru*, if it is to be applied in other cases, is that when registered owners attempt to resell Māori land allocated to them by the workings of indefeasibility, they will be required first to offer it to the PCA in line with s 147A of TTWMA. This outcome was a staunch affirmation by the MLC of its jurisdiction and the importance of TTWMA. It also ensures that the result in *Warin* does not completely deprive Māori of rights to their ancestral lands.

While both of the approaches surveyed above are valuable ways of protecting Māori land rights, neither of them are sufficient. In particular, whether the rule in *Whangaruru* is applied in subsequent cases will always be at the discretion of a MLC judge. Further, the opportunity for the PCA to buy the land back into Māori ownership only becomes available if the current registered owner decides they want to sell the land. This situation may never arise, and if it does, the land may have increased in price and changed dramatically in nature. The procedural initiatives Te Puni Kokiri, LINZ and the Ministry of Justice discuss do not prevent wrongful alienations of land in all cases. There are cases where the Registrar has been "absolutely littered" with evidence that the land in question was Māori land, and yet wrongful registration still occurred.[149]

IX LEGISLATIVE AMENDMENT TO THE LTA 2017

In 2010, the Law Commission noted that discretionary indefeasibility was limited in its application to Māori land, but the "time and resources required to identify and put in place an effective and enduring solution to the problems" would delay the implementation of the LTA 2017.[150] With respect, neither of the approaches discussed above are "effective and enduring solutions". The remainder of this article argues that legislative amendment to the LTA 2017 would be such a solution.

The amendment would provide that TTWMA overrides the LTA 2017 in respect of the application of the principle of indefeasibility, meaning the requirements under TTWMA would operate as an exception to indefeasibility. This approach received support from the full bench of judges of the MLC, whose submissions were outlined in detail in the Law Commission's report on the LTA 2017.[151] If this approach were implemented, it would mean that a transfer instrument for Māori land registered in breach of TTWMA would not confer indefeasible title on the registered owner. Indefeasible title would be suspended until such time that the parties receive the requisite confirmation from the MLC that compliance with TTWMA has

149 *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 (HC) at 199.
150 Law Commission, above n 60, at [6.24].
151 At [6.15].

been proved.[152] It is contended that this is the most appropriate approach for several reasons as outlined below.

The Purpose of TTWMA Should Take Priority

The purpose and subject matter of TTWMA are the most important factors to be cited in arguing that TTWMA should override the LTA 2017. While Allan J in *Warin* stated that there could "be no question that [TTWMA] prevails over other legislation simply by virtue of its subject matter,"[153] the same restrictions do not apply when making a policy argument that TTWMA should override the LTA 2017 by express provision. TTWMA is clear in its purpose and intention. Section 2 provides:[154]

> … it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.

When considering this section in light of the historical context and continual diminution of Māori freehold land, these purposes are all the more important. This is especially so considering that TTWMA was intended to represent a distinctive change in statutory direction given its focus on the retention of Māori land.[155] The amendment to the LTA 2017 this article suggests aligns with these purposes: it ensures Māori retain Māori land in circumstances where its alienation lacks consent — something the current legislation does not achieve.

Of note, the Court in Warin emphasised that s 2 of TTWMA includes the phrase "as far as possible" when referring to the protection and development of Māori land.[156] The Court's purpose in doing so was to show that the Act by no means attempts to prohibit alienation absolutely.[157] While this is an important aspect of the Act to consider, the approach this article advocates does not appear not to be possible. To the contrary, legislative amendment of the kind advocated is very possible and has in fact received support from MLC judges.[158] Further, the Court's comment in Warin to the effect that TTWMA does not prohibit alienation in all its forms is irrelevant. TTWMA allows for the alienation of Māori land when it is with consent and for the benefit of the land's owners (as well as their whānau and hapū).[159] However, the kinds of alienation that the proposed reform would seek to prohibit are those that are not within the contemplation of the Act. Clearly the Act does prohibit alienation when it does not comply with the internal mechanisms of the Act.

152 At [6.16].
153 *Warin*, above n 17, at [97].
154 Te Ture Whenua Maori Act, s 2(2).
155 *Warin*, above n 17, at [59].
156 At [97].
157 At [98].
158 Law Commission, above n 60, at [6.15].
159 Te Ture Whenua Maori Act, pt 7.

The proposed reform would not prevent lawful alienations that comply with the requirements of the Act, and therefore does not support absolute prohibition of alienation.

The purpose of the LTA 2017 must also be considered. At a general level, the policy behind the Torrens system, embodied in the LTA 2017, is certainty and simplicity.[160] These aims are facilitated by indefeasibility — in particular, the rules that a registered title is secure against all claims (in the absence of fraud) and that parties are only bound by the interests noted on the register. Indefeasibility both enhances commercial certainty and the reliability of title to land and reduces the costs and risks associated with conveyancing.[161] While the effect of these policies can be blunt, it is supposedly countered by the promise of compensation to anyone who suffers loss as a result of the workings of indefeasibility.[162]

The proposed amendment to the LTA 2017 would not significantly affect certainty in land dealings. If the exception were implemented, it would be *certain* that in every case where TTWMA is not complied with, indefeasible title will be suspended pending compliance. Arguably, the amendment would provide more certainty than at present. Currently, outcomes under the s 55 discretion depend on whether a particular judge on a particular day considers the circumstances to be manifestly unjust — a term without definition or prescribed scope. Further, the proposed amendment would not have any significant effect on the simplicity of the LTS. To the contrary, a statutory provision that provides TTWMA overrides the LTA 2017 in cases where the former is not complied with would be a straightforward rule. It would also be much more cost-effective than litigating under the s 55 discretion.

It must be acknowledged that the cost of bringing an application under s 55 falls on Māori applicants. This in and of itself needs to be considered a separate reason for the inadequacy of the discretion. This reality forces the faults of the LTS onto dispossessed Māori owners, making *them* responsible for remedying its defects and requiring *them* to have the resources and time to do so. This becomes particularly problematic when it is acknowledged that even if an application is brought under s 55, there is no guarantee that a remedy will be awarded.

Further, cases where non-compliance with TTWMA is at issue are likely to be limited. This therefore limits the proposed exception to indefeasibility.[163] While one could argue the rareness of such cases points away from legislative amendment, the national importance of the issue (both socially and historically) favours the final settlement of the matter.

It is also possible that the objectives of the LTS are simply not relevant to, or even actively work against, TTWMA's objectives of retention and development of Māori land. As Boast states, although the Torrens system

160 Thomas, above n 79, at 717.
161 At 718.
162 At 717–718.
163 Law Commission, above n 60, at [6.15].

has brought "clarity and simplicity" to conveyancing, "Maori have little reason to celebrate it."[164] This was acknowledged by the judges of the MLC, who noted that ease of transfer may not be relevant to Māori land.[165] Further, it is not enough simply to state that protecting security of title and ease of transfer is all-important. As stated by Ani Mikaere, Nin Tomas and Kerensa Johnston, "[t]o hold that tangata whenua property rights should not be recognised simply because the indefeasibility principle provides too great a protection is an argument with human rights implications."[166] Certainty and simplicity are not values over which the Land Transfer Acts and non-Māori have a monopoly. While the status quo tends to be viewed as the uncritiqued norm, it must be recognised that the current system protects certainty and simplicity *for particular groups* and *to particular ends*. There is no overriding reason why the rule should not be altered in the way this article advocates.

Exceptions Have Been Made Before

New Zealand's LTS is not without concessions. While indefeasible title is a fundamental pillar of the system, the term "indefeasible" is something of a misnomer. Title to land is not protected against all claims whatsoever.[167] As well as there being explicit statutory exceptions,[168] it is well established that there may be implied exceptions to indefeasibility in New Zealand.[169] A number of such exceptions have been made on the grounds of policy or expediency.[170] An example can be seen in *Miller v Minister of Mines*.[171] In that case, the plaintiff was issued a certificate of title under the Land Transfer Act 1885. The title issued did not record the fact of Crown mining rights over the land. Notwithstanding this, there was disagreement as to whether the Crown did have such rights due to the prior granting of licences over the land. The plaintiff therefore sought a declaration from the Court that no such rights existed.[172] The Court found, on the contrary, that the Crown's mining rights, established under the Mining Act 1926, existed independently of the LTS and were therefore a burden on the plaintiff's title.[173] Effectively, the Court allowed indefeasibility to be overridden by another enactment. In making this finding, the Court commented:[174]

164 Boast, above n 39, at 101.
165 Law Commission, above n 60, at [6.15].
166 Ani Mikaere, Nin Tomas and Kerensa Johnston "Treaty of Waitangi and Maori Land Law" [2003] NZ Law Rev 447 at 478.
167 GW Hinde "Indefeasibility of Title Since Frazer v Walker" in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 33 at 36.
168 Exceptions and limitations to indefeasibility are set out in s 52 of the Land Transfer Act 2017.
169 *Warin*, above n 17, at [55].
170 Hinde, above n 167, at 38.
171 *Miller v Minister of Mines* [1963] AC 484 (PC).
172 At 486.
173 At 496–497.
174 At 498.

> It is not necessary in their Lordships' opinion that there should be a direct provision overriding the provisions of the Land Transfer Act. It is sufficient if this is proper implication from the terms of the relative statute.

The fact that an express statutory provision was not required suggests the Court did not view the overriding of indefeasibility as particularly exceptional. The ease by which the result was reached in *Miller* is relevant.[175] It exemplifies that exceptions to indefeasibility can, and do, exist. It also shows that, if constrained appropriately, such exceptions do not pose a threat to the overall system of indefeasibility of title. The amendment this article proposes would *expressly* provide that TTWMA overrides the LTA 2017.

Understanding *Warin* as an Example of the Broader Undermining of TTWMA

In Part III, this article demonstrated that *Warin* is just one of several examples wherein TTWMA was subverted in favour of the wider LTS.[176] Such cases have curtailed the MLC's jurisdiction and obstructed "the promotion of Maori land as a taonga tuku iho".[177] The description of land as taonga tuku iho (something handed down from prior generations) in the preamble to TTWMA shows that the Act envisions that future generations of Māori will have an expectation that land is passed down to them.[178] Yet the way the courts have chosen to interpret TTWMA ensures that loss of Māori ancestral land will persist.[179] Perhaps more disappointing is that in some cases concerning Māori land the courts have failed even to refer to the principles and objectives of TTWMA.[180] It appears that, in interpreting the interaction between the two systems, some judges unconsciously repeat "the mistakes of their judicial forebears."[181]

While the proposed amendment would not address every circumstance in which TTWMA is undermined, it would go some way in fulfilling Parliament's promises under Te Tiriti o Waitangi and UNDRIP, and its general commitment to remedy historical injustice. It would recognise the importance of the right the PCA possesses and move the law towards a place that is more respectful of the tikanga perspective of land tenure. Where indefeasibility operates to perfect title to wrongfully alienated Māori land, the amendment would prevent courts from coming to decisions adverse to the principles of TTWMA. The amendment would thus ensure Māori rights to land are protected to the utmost extent, as Parliament intended when it passed TTWMA.[182]

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175 The Privy Council's judgment (at 494–498), delivered by Lord Guest, is a mere five pages long.

176 See also *Attorney-General v Maori Land Court*, above n 42; *McGuire*, above n 42; and *Bruce v Edwards*, above n 43.

177 Jacinta Ruru "*Bruce v Edwards*: the Court of Appeal's latest ruling on Maori Land" (2003) 10 BCB 169 at 169.

178 *Hoko – Papamoa 2A1* (2003) 20 Waikato Maniapoto Appellate MB 167 (20 APWM 167) at 181.

179 Ruru, above n 177, at 169.

180 See for example *Bruce v Edwards*, above n 43.

181 Tomas "Jurisdiction Wars", above n 42, at 36.

182 See Te Ture Whenua Maori Act, preamble and s 2(1).

Theoretical Basis for the LTS

The proposed law reform would strike an appropriate balance between dynamic and static security. Dynamic security would be achieved by the operation of immediate indefeasibility in all cases other than those involving a failure to comply with TTWMA. In cases where TTWMA has been breached, static security would prevail and the land would return to its previous owner. Further, the s 55 discretion in the LTA 2017 would balance dynamic and static security in cases of manifest injustice other than those concerning a breach of TTWMA restrictions. Finally, amendment providing that TTWMA overrides the LTA 2017 would also address O'Connor's second[183] and third concerns[184] — namely, that immediate indefeasibility undermines other rules of property law because of its ability to neutralise sanctions, and that immediate indefeasibility is likely to allocate property to a non-occupier preferentially over an occupier.

The amendment would incentivise the legal community and purchasers to comply with TTWMA and, in most cases, it would ensure that land is returned to its Māori owners (who are likely to be the persons in possession). This is especially important where Māori land is wrongfully alienated; due to the historical and cultural significance of the land to Māori, monetary compensation does not make good the loss.[185]

X CONCLUSION

This article has analysed the relationship between TTWMA and the wider LTS in Aotearoa New Zealand. The relationship is unsatisfactory insofar as the LTS consistently undermines the kaupapa of TTWMA. This issue pervades far beyond *Warin*. It is manifest in many other cases where indefeasibility and Māori land interact, as well as in other circumstances where the interpretation of TTWMA is at issue. The relationship between TTWMA and the LTS has not been improved by the passing of the LTA 2017. This article has offered a solution to this problem: legislative amendment to the LTA 2017 providing that TTWMA overrides the LTA 2017 in circumstances where the principle of indefeasibility would otherwise work to undermine TTWMA. This amendment would not have a negative effect on the certainty and security provided by the LTA 2017. Rather, it would be an effective and enduring solution that would meet the obligations of the Crown as a partner under Te Tiriti o Waitangi and as a party to UNDRIP. It would also better effect the objectives of TTWMA while being consistent with the theoretical underpinnings of the LTS. It is the most comprehensive solution

183 O'Connor, above n 3, at 60.
184 At 61.
185 Law Commission, above n 60, at [6.15].

that has been posed thus far and it would be a clear and equitable approach for New Zealand courts to follow.