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The Māori Land Court: Exploring the Space between Law, Design, and Kaupapa Māori

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A thesis submitted for the degree of Master of Laws

15 June 2020

Abstract

Aotearoa/New Zealand is currently contemplating legislative reform of Te Ture Whenua Maori Act 1993, the statutory regime that governs Māori land. With the focus of both Māori and the Crown once again strongly on the Māori land law regime, this thesis takes the opportunity to bring a new perspective to the Māori Land Court, as the legal entity that sits at the centre of that regime. It draws on law's recent, growing interest in design-based concepts and practices and how these can usefully be brought to bear on legal subject matters. It combines law and design, within a Kaupapa Māori research and theoretical framework, with two overarching objectives: to explore whether a design perspective can enrich our understanding of the relationship between owners of Māori land and the Māori Land Court; and to explore what design might contribute to ongoing and future Court reform.

The relationship between owners of Māori land and the Māori Land Court is unique, and many owners of land may not be engaged with the Court or with their land interests, for a range of complex reasons. In illustration of this, many thousands of interests in Māori land have not been succeeded to through the Court, and remain in the ownership of a deceased individual. Design may make a valuable contribution here in that it encourages us to take seriously the notion that courts ought to be designed with all users in mind. This thesis draws on the emerging legal design field being developed by researchers in North America and Europe, and on accounts of Māori design within Aotearoa/New Zealand, to start to make the Western theory appropriate for application in our Indigenous legal spaces.

As part of the thesis, a small qualitative research study was undertaken with seven current Māori landowners, who have each recently used the Court to succeed to interests in Māori land. The research methodology was informed by design and Kaupapa Māori. Participants were asked to create collages and respond to exercises pertaining to their interactions with the Court, and then describe to the researcher what they made. The

research sought to gain insights into the experience of succeeding to land through the Court.

Drawing on the results of that research, the thesis makes suggestions for how we can better attend to the experience of succeeding to Māori land through the Court, and better support those people who do so. The thesis also puts forward a framework for organising the different landowner relationships that surround the Court into three groups, of use, non-use (or potential use), and future-use. This framework may help us to consider how we can design the Māori Land Court system in such a way that all landowners will see its meaning and relevance to their lives.

The thesis also considers whether a design perspective might contribute to ongoing Court reform. The Crown has begun to mobilise "co-design" approaches towards policy and law reform in areas that affect Māori, and we may see a similar approach applied to the Māori Land Court in the future. To date, however, co-design approaches have promised more than they have delivered. The thesis suggests that a successful design-oriented reform approach to the Court would be collaborative, convivial, imaginative, experimental, and creative. It would connect with Indigenous political projects of reframing, envisioning, and creating. Furthermore, the field research suggests that Māori stakeholders are willing to engage in creative research methods, and that valuable insights emerge when they are asked to apply their creativity to issues of significance in their lives. These findings may prove useful if a design-based law reform approach is applied to the Māori Land Court in the future.

Acknowledgments

I express my deepest gratitude to my two supervisors, Doctor Bridgette Toy-Cronin and Professor Jacinta Ruru. Nei rā te mihi nunui ki a kōrua, thank you both very much, for your skillful and compassionate guidance, and for opening up the field of academic research in many welcome and unforeseen ways. In particular, I am grateful to Doctor Toy-Cronin for her advice on conducting field research, and to Professor Ruru for helping me to think deeply about the connections between law, design, and Kaupapa Māori.

I wish to thank the funders of this research, the University of Otago Legal Issues Centre/Te Pokapū Take Ture and Ngā Pae o te Māramatanga/New Zealand's Māori Centre of Research Excellence, who jointly have met my tuition costs and provided a stipend that has enabled me to immerse myself in the research fulltime, which has been a great luxury.

I extend my thanks to the owners of Māori land who took part in my research. Each was willing to participate in a novel, make-based research method that was demanding of their time and creative engagement. I runga i te ngākau whakaiti, e rere aku kupu mihi ki a koutou: I am humbled by your participation, and I acknowledge and thank you.

I am grateful also to Craig Linkhorn and Sara Passmore, who each made time to share knowledge and experience relating to the research topic, and to Allie Cunninghame and David Turner, for providing thoughtful and helpful comments on an early version of the workbook.

Lastly, I thank my family and my partner, Eru. Thank you for your emotional and practical support, and for reviewing the workbook and draft chapters. Thank you especially to my parents, Leo and Prudence, for supporting me in my legal career and for raising us in a home where creativity was always encouraged.

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List of Abbreviations

TTWMA	Te Ture Whenua Maori Act 1993
TTWMB	Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019

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Ethical Approval

This research was approved by the University of Otago Human Ethics Committee (reference code 19/095, 18 July 2019).

Citation

Citation is in accordance with the New Zealand Law Style Guide.

Chapter 1

Introduction

This thesis is an exploration of the relationship between landowners and the Māori Land Court, which draws on design and Kaupapa Māori research theory. The purpose of the thesis is twofold: first, to see whether a design perspective can help us explore the relationship between owners of Māori land and the Māori Land Court; and second, to consider whether a design perspective might contribute to ongoing discussions about the Court and possible reforms.

At the core of the thesis is my small-scale qualitative research with a group of Māori landowners who have each recently used the Court to succeed to interests in Māori land. The objective of the research was to gain insights into those owners' experience of succeeding to land through the Court. Based on that research, I put forward some ideas to support and improve the experience of people who use the Court. I also propose that, if we are considering how to encourage landowners to engage with the Court, we need to consider what significance the Court holds to those who choose not to access it, or who might one day choose to access it in the future.

To conduct my research, I used make-based methods, in which I asked participants to create collages and respond to exercises pertaining to their interactions with the Court, and then describe to me what they had made. This is a design-led approach to research, and enabled me to further test the value of design to the Māori Land Court, from a research perspective. It is also a research method that connects with Kaupapa Māori research theory and epistemology, in that it seeks to enable research participants to choose what aspects of their experience they want to highlight, and in turn may allow for participants to exercise greater control over the direction of the research inquiry.

This thesis sits within the space of law, design, and Kaupapa Māori. I am not aware of any other research studies that have explored this space to date.

I The Context

The context to this thesis is found in two areas. The first is the recent expansion of design into law, which is occurring primarily overseas but gaining ground in Aotearoa/New Zealand. The second is Indigenous to our legal system, and is the longstanding, ongoing discussion about the statutory regime for Māori land, and in particular, the role of the Māori Land Court as the institution at the centre of that regime.

A The Māori Land Court and Legal Design

Overseas, particularly in the United States and Canada, but elsewhere as well, legal theorists have begun to show an interest in design and "design thinking".[1] Design thinking is a methodology for doing design that can be applied to a whole range of subject matters. It is particularly being promoted as a way of focusing on "court users", and on the accessibility of courts to those who need to use them. We are seeing the emergence of a field of "legal design", which is concerned with "how design-based methods and attitudes might be deployed in relation to legal matters".[2] A recent contribution to the field has argued that "designerly thinking" is useful for lawyers who have a "juristic commitment to the well-being of law as a practical idea".[3]

Meanwhile, in Aotearoa/New Zealand there is an ongoing, longstanding discussion about the statutory regime that governs Māori land (Te Ture Whenua Māori Act 1993/the Māori Land Act 1993) and the Māori Land Court as the legal entity at the centre of that regime. The most recent development in this area is the introduction of Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill to the House of

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[1] For an introduction to these developments see Margaret D Hagan "A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Intervention to Make Courts User-Friendly" (2018) 6 Indiana Journal of Law and Social Equality 42.
[2] Amanda Perry-Kessaris "Legal Design for Practice, Activism, Policy, and Research" (2019) 46 Journal of Law and Society 185 at 186.
[3] At 187. Perry-Kessaris makes reference in this regard to Roger Cotterrell *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (Routledge, London, 2018).

Representatives, in September 2019 (TTWMB).[4] If passed, TTWMB will make a number of "practical and technical" changes to the laws around Māori land to reduce the "complexity and compliance requirements" that landowners face when they are engaging with the Court in order to deal with their land.[5] However, TTWMB will not be the end of ongoing conversations about change and reform within the Māori land system. The Government has already stated that it envisages further stages of legislative amendment, although has not indicated what those changes might be, or a timeframe for them.[6]

A related development is the way in which "co-design" is becoming popular as a method of developing government policy in a range of areas, including in sites of struggle for Māori.[7] We can anticipate that the Crown might wish to take a similar "co-design" approach towards Māori Land Court reform, and may seek to conscript Māori landowners and other Court stakeholders into a co-design approach for reform. That possibility makes clear the need for a critical and considered analysis of what a design perspective can bring to the Māori Land Court.

In that vein, this thesis has two objectives. The first is to explore whether legal design can enrich our understanding of the relationship between owners of Māori land and the Māori Land Court. As addressed in chapters 4 to 7 of this thesis, to support this research objective I conducted a small-scale qualitative research study with seven owners of Māori land. The second objective, which is principally covered in chapter 8, is to consider what contribution design might make to broader, ongoing conversations about reform of the Māori land system, including the Māori Land Court.

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[4] Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179–1).

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

[6] During TTWMB's first reading, the Minister for Māori Development said: "There is further legislative reform on the way, but I'll save that for another time.": (15 October 2019) 741 NZPD 14273.

[7] See for example *Policy by Design: Exploring the intersection of design & policy in Aotearoa NZ: 7 case studies* (May 2018). These include the use of design-based approaches to develop education strategy, to engage Māori in development of social services, and to design housing policy prototypes. In the youth justice space, Oranga Tamariki (New Zealand's government ministry responsible for child social policy and youth justice) has a "Māori Design Group" which forms part of the Ministry's commitment to "collaborative design": Oranga Tamariki *Annual Report 2017/2018* at 30.

B About the Māori Land Court

The Māori Land Court sits at the centre of the statutory regime that governs Māori land in Aotearoa/New Zealand.[8] In this thesis I use the term "Māori land" to refer to a particular category of land provided for under the statute, namely, Māori freehold land.[9] This land makes up roughly five per cent of the country's landmass.[10] The rules that govern what can be done with Māori land are contained in Te Ture Whenua Maori Act 1993 (TTWMA).

Māori land is special for a number of reasons. First, it constitutes what remains of the Māori estate after land confiscation and land sales during the early colonisation of Aotearoa.[11] It needs to be retained in Māori ownership. Therefore, any proposals that will affect Māori land title or interests in Māori land must be carefully regulated. The Māori Land Court oversees this.[12]

Second, most Māori land has many owners.[13] Māori land owned by two or more persons is presumed to be held by them as tenants in common[14] and none of the owners individually has exclusive rights to use or occupy it. The Court can approve the proposals of a minority or a portion of owners to use Māori land in ways that will affect all its

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[8] Te Ture Whenua Maori Act 1993.

[9] Māori freehold land is defined as "land, the beneficial ownership of which has been determined by the Maori Land Court by freehold order": Te Ture Whenua Maori Act 1993, s 129(1). The Act defines "Maori land" to also include "Maori customary land": Te Ture Whenua Maori Act 1993, s 4. "Maori customary land" is defined as "land that is held by Maori in accordance with tikanga Maori": Te Ture Whenua Maori Act 1993, s 129(1). There is very little of this land remaining in New Zealand. The vast majority of Māori land is Māori freehold land. For this reason, I focus on the Māori Land Court's role in respect of Māori freehold land. When I use the shorter term "Māori land", I exclusively mean Māori freehold land.

[10] As at June 2019 Māori land (both customary and freehold) covered 1.4 million ha: Māori Land Court "Māori Land Update – Ngā Āhuatanga o te whenua" (June 2019) at 1. This is the equivalent of approximately 5 per cent of New Zealand's total land area (roughly 27 million ha).

[11] See Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008) and Richard Boast and Richard S Hill (eds) *Raupatu: The Confiscation of Māori Land* (Victoria University Press, Wellington, 2009).

[12] Te Ture Whenua Maori Act 1993, "preamble" and s 17.

[13] For a brief summary of current ownership data see Māori Land Court "Māori Land Update – Ngā Āhuatanga o te whenua", above n 10.

[14] Te Ture Whenua Maori Act 1993, s 345(1).

owners. In doing so it must seek to achieve two critical statutory objectives, of retaining land in Māori ownership, and enabling it to be used for the benefit of its owners.[15]

Each year the Māori Land Court receives and disposes of thousands of applications from owners of Māori land.[16] The decisions the Court makes cover a broad range of areas relating to what can be done with Māori land, from who is entitled to succeed to interests in Māori land,[17] to whether a road can be built across it to improve access.[18]

As I explain in chapter 2 of this thesis, the Court's role in deciding these applications puts it into a complex and special position with respect to owners of Māori land. On the one hand, the Court has a pervasive influence over what landowners can, and cannot, do with Māori land. Proposals that affect Māori land title or interests in Māori land are carefully regulated by TTWMA, and the Court is ultimately responsible for overseeing how this is done.[19] On the other hand, the nature of Māori land tenure is such that the Court's decisions may often go unnoticed or unremarked upon by a large number of Māori landowners, who may not be engaged with the Court's decision-making. The Court has been described as dealing with "the highest proportion of unrepresented litigants of any New Zealand court".[20] While those landowners who participate in Court applications will be aware of its impact, many others, who are not so active, may not be.

Land is described as being central to Māori identity.[21] The Court's decisions have significant legal and cultural import for Māori, partly because of the special significance that land holds to Māori. TTWMA recognises this in its description of land as a "taonga

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[15] Section 17(1).
[16] In 2018 the Māori Land Court and Appellate Court collectively disposed of 5,158 Māori land applications: Ministry of Justice *Annual Report 2018/19* at 93.
[17] Te Ture Whenua Maori Act 1993, s 113.
[18] Section 287.
[19] Preamble and s 17.
[20] Layne Ross Harvey "Would the proposed reforms affecting ahu whenua trusts have impeded hapū in the development of their lands? A Ngāti Awa perspective" (PhD thesis, Auckland University of Technology, 2018) ["A Ngāti Awa perspective"] at 171.
[21] At 30.

tuku iho" (a treasure handed down through generations).[22] Māori land is also economically significant. Large commercial Māori land trusts manage millions of dollars of assets and investments,[23] demonstrating the commercial value of Māori land and its significance as a source of economic support and development. Given this, I argue that it is worth focusing our attention on the nature of the special relationship between Māori landowners and the Court. In this thesis I explore whether legal design provides concepts or practices that can help deepen or enrich our understanding of that relationship.

It is important to note that the Māori Land Court has a remarkable history. Its permanent existence dates to 1865, when it was established as the Native Land Court.[24] The Court's role was to assist the Crown to acquire land for newly arriving British settlers. Its task was to inquire into the ownership of land held by Māori in a customary manner and then to issue individual titles in that land. Those individual titles could then be sold to the Crown and to settlers. Its work led to the widespread, deliberate alienation of Māori land out of Māori hands, and the distancing of Māori from their cultural and economic estate.[25]

The Māori Land Court's role today is completely different, although it remains, technically, the same legal entity.[26] Today, as TTWMA makes clear, the Court is tasked with promoting the retention of Māori land in the hands of its owners, and with enabling its effective use and development by those owners and on their behalf.[27]

Finally, and as briefly noted at the beginning of this chapter, TTWMB is a recent legislative development in the field of Māori land law. TTWMB has a somewhat tortuous history that can be traced back to 2012, when the National-led Government of the day

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[22] Te Ture Whenua Maori Act 1993, "preamble".
[23] Harvey "A Ngāti Awa perspective", above n 20 at 30.
[24] Native Lands Act 1865. See also the previous statute that established the Court as a temporary measure: Native Lands Act 1862.
[25] David V Williams '*Te Kooti Tango Whenua': The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999).
[26] Te Ture Whenua Maori Act 1993, s 6.
[27] Section 17(1)(a).

announced the formation of an independent review panel tasked with reviewing TTWMA. The review panel reported back in 2014 with a recommendation to repeal TTWMA and replace it with a regime oriented towards owner autonomy.[28] Māori expressed significant concerns about the proposals and a claim was brought to the Waitangi Tribunal arguing that the reforms were in breach of the Crown's obligations under te Tiriti o Waitangi/the Treaty of Waitangi.[29] A Bill was introduced,[30] but withdrawn in December 2017,[31] by which stage a new Labour-led Government was in power. That Government has since introduced a new, more modest legislative reform proposal in the form of TTWMB, which at the time of writing awaits its third reading.[32] TTWMB is described as making largely "practical and technical" law changes.[33] If passed it will also establish a new mediation service that landowners can use to resolve disputes about matters over which the Court has jurisdiction.[34]

II Field Research Conducted as Part of the Thesis

As part of this thesis I conducted a small, qualitative research study with a group of seven landowners, each of who has experienced applying to the Court to succeed to their interests in Māori land. The objective of the research was to gain insights into those owners' experience of succeeding to land through the Court. A succession application may be the first contact a person has with the Māori Land Court, and by focusing on succession applications, I sought to collect useful data about those initial interactions with the Court.

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[28] Matanuku Mahuika and others *Report: Te Ture Whenua Māori Act 1993 Review Panel* (March 2014).
[29] Waitangi Tribunal *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act* (Wai 2478, 2016) at 2.
[30] Te Ture Whenua Māori Bill 2016 (126–1).
[31] Heta Gardiner "Ture Whenua Bill has been binned" *Te Ao Māori News* (online ed, Auckland, 22 December 2017).
[32] Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179–2).
[33] Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179–1) (explanatory note) at 1.
[34] Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179–2), cl 19.

I used a research methodology that asked participants to create collages and respond to exercises pertaining to their experiences in and around the Court during the succession application, and then describe to me what they had made. This kind of "make-based" research is intended to allow participants greater creative control over their research responses, and, potentially, greater control over the direction of the research inquiry, in a way that may be consonant with the ideals of Kaupapa Māori research. Kaupapa Māori research is research conducted according to a set of principles and processes that are grounded within a Māori worldview. It has the aim of benefiting Māori and advancing tino rangatiratanga (Māori control, autonomy, self-determination). It has been described as research that is by, for, and with Māori.[35]

Through using a make-based method, my objective was to explore the experience of succeeding to land through the Māori Land Court and to gain deeper insights and understanding of that experience. This is foundational work to suggesting changes that might improve that experience, and potentially break down some of the barriers to Māori succeeding to their Māori land and generally engaging with the Māori Land Court.

In undertaking this research, I was partly motivated by the desire to fill gaps in my own knowledge of Māori land. I was aware that my Nana (my father's mother) had interests in Māori land and that these had been succeeded to by her children (my father and his six siblings) after her death in 2016. However, I did not know where these land interests were and I was not sure who to ask, having not grown up near my tribal territories or in close proximity to whānau members. I wanted to build my legal knowledge about the Māori Land Court, and felt this was especially important since I am the only lawyer in my extended family. As a result of undertaking this research I have learned about my whānau's interests in land, when they were succeeded to, and what legal structures apply

[35] Shayne Walker, Anaru Eketone and Anita Gibbs "An exploration of kaupapa Maori research, its principles, processes and applications" (2006) 9 Int J Social Research Methodology 331 at 333, citing LT Smith "Kaupapa Maori methodology: our power to define ourselves" (1999, unpublished paper presented to the University of British Columbia).

to them. I have passed on what I have learned to my father and his siblings, and some have now become registered beneficiaries with relevant ahu whenua trusts.

III Outline of the Thesis

I begin in chapter 2 by describing the Court's role in the Māori land system and explore why this gives rise to a complex and unique relationship between landowners and the Court. I describe what we know about how landowners currently engage with the Court.

I then turn in chapter 3 to the field of legal design. I provide an outline of this emerging field, and consider different possible implications of applying a design perspective to the Māori Land Court, including in terms of design's appropriateness for an institution that is focused on Māori people and Māori concerns.

The next part of the thesis introduces my research with seven Māori landowners, each of whom has used the Court to succeed to interests in Māori land. My objective in conducting this field research was to gain a deeper understanding of the experience of succeeding to land through the Māori Land Court. In chapter 4, I describe the research methodology, which was informed by both design and Kaupapa Māori research. I asked landowners to respond creatively to a range of exercises pertaining to the Court, and then talk to me about what they made.

My research findings and discussion are divided across chapters 5, 6, and 7. In chapter 5, I describe and discuss what motivated research participants to use the Court, and the way in which participants' family relationships informed or contextualised their interactions with the Court. From this, I propose a framework through which we can consider what the Court means to different groups of landowners. I suggest that this can help us focus not only on what the Court means to landowners who use it, but also what it means to those who do not, or who might one day need to.

In chapters 6 and 7, I describe and discuss those findings that pertain to participants' experiences in and around the Court. These findings provide a glimpse into the experience of using the Court, which we can draw on to propose some ideas to support

and encourage landowners to engage with the Court. I set out some proposals in chapter 7.

In chapter 8, I note the Crown's increased interest in applying "co-design" to areas of law and policy that significantly affect Māori. I look across the design field for a collection of ideas and practices that might amount to a more productive and engaging way of bringing a design approach to Māori Land Court reform. I evaluate the ways in which participants in my research were willing to engage creatively in my research, indicating that these methods may be useful in ongoing and future Court reform.

Chapter 9 provides a brief conclusion to the thesis, and suggests areas both here and overseas where it might make a valuable research contribution.

Chapter 2

Owners of Māori Land and the Māori Land Court

Owners of Māori land occupy a complex position in respect of the Māori Land Court. The Court plays a pivotal role in determining what can be done with Māori land, but many landowners do not actively engage with the Court, for a variety of complex reasons. One illustration of the complexities of the relationship between landowners and the Court, which is discussed in this chapter, is in the Court's succession jurisdiction. It is not possible to legally inherit Māori land without bringing a succession application to the Māori Land Court. But it is common for people to inherit Māori land *without* directly engaging with the Court, since under TTWMA one person can bring a succession application on behalf of many others[1] (for example, one of the deceased's children will make an application on behalf of all the deceased's children).

Landowners have expressed a range of strong sentiments about the Court over time, but as explained in this chapter, we also know that there is a large cohort of future landowners who have not succeeded to their interests in Māori land. Another key defining feature of the relationship is that lawyers are often not involved, so the majority of landowners' interactions with the Court are direct, not mediated through lawyers.

This chapter describes the Court's role in the Māori land system, in order to explore the relationship of the Court to landowners, and those entitled to claim ownership of Māori land. This sets the groundwork for my exploration in the next chapter (chapter 3) of design, and what design concepts and practices can potentially add to our understanding of the relationship between the Māori Land Court and those who are entitled to access it.

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[1] Te Ture Whenua Maori Act 1993, s 113(1).

I The Court's Role in the Māori Land System

Most of the matters that the Māori Land Court hears on a day-to-day basis arise from its responsibility to regulate and oversee the way that Māori land, as multiply-owned land, is dealt with by landowners.[2] Each year the Court receives and disposes of thousands of applications from owners of Māori land.[3]

The decisions the Court makes cover a broad range of areas relating to what can be done with Māori land. As will be discussed in this chapter, the Court determines who is entitled to succeed to interests in the land.[4] It also confirms sales or gifts of Māori land, without which such sales and gifts would have no "force or effect".[5] Another important function is how it oversees the rationalisation of land interests. The Court has exclusive and discretionary jurisdiction to grant orders that will allow owners to sever their interests in land from other owners, bring their interests together, or create access to parcels of Māori land.[6] The effect of the Court's oversight of all these matters is that "Māori Land owners are part of a complex land system that owners of General Land are not."[7]

As explained below, the reason for the complexity of this system has to do with the massive decline in Māori ownership of land since the arrival of British settlers and the Crown, and the desire that Māori retain ownership of what remains. The complexity also stems from the statutory tenurial system, under which Māori land parcels have multiple owners.

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[2] Layne Ross Harvey "Would the proposed reforms affecting ahu whenua trusts have impeded hapū in the development of their lands? A Ngāti Awa perspective" (PhD thesis, Auckland University of Technology, 2018) ["A Ngāti Awa perspective"] at 99. For a breakdown of averaged figures across the different types of applications (as at 2015) see Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero: 150 Years of the Māori Land Court* (Ministry of Justice, 2015) [*150 Years*] at 112, 114 and 118.

[3] In 2018 the Māori Land Court and Appellate Court collectively disposed of 5,158 Māori land applications: Ministry of Justice *Annual Report 2018/19* at 93.

[4] Te Ture Whenua Maori Act 1993, s 113.

[5] Sections 152, 156.

[6] Section 287.

[7] Office of the Auditor-General *Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee* (Wellington, 2004) at 8.

A Retention of Māori Land

Since the arrival of British settlers and the Crown, Māori have lost control and possession of much of their ancestral land base.[8] Many of these losses were deliberately facilitated by the Māori Land Court itself, which at that time was operating as the Native Land Court and was tasked with investigating customary title and individualising it.[9] By 1880, the Court had determined the title to over 9.8 million acres of land.[10] The introduction of individualised title led directly to land alienation,[11] and by the early 20th century only a relatively small proportion of original landholdings remained in Māori ownership.[12]

Land is "the material basis of [Māori] identity".[13] The land that remains within Māori control must be retained.[14] The Māori Land Court achieves this goal by overseeing and regulating all land proposals that affect title to Māori land or interests in Māori land.[15]

B Multiply-Owned Land

The statutory tenurial system for Māori land is one of multiple ownership – usually at the level of whānau or hapū, and, more rarely, by iwi.[16] To give an idea of the nature of multiple ownership, as at June 2019 the average Māori land block was 51 ha in size and had 105 owners.[17]

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[8] See generally Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008) and Richard Boast and Richard S Hill (eds) *Raupatu: The Confiscation of Māori Land* (Victoria University Press, Wellington, 2009).
[9] Native Lands Act 1865, s 5.
[10] Royal Commission of Inquiry into the Maori Land Courts *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1980) [*Report*] at 10.
[11] Waitangi Tribunal *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Maori Act* (Wai 2478, 2016) [*He Kura Whenua*] at 14.
[12] At 11.
[13] IH Kawharu *Maori Land Tenure: Studies of a Changing Institution* (Clarendon Press, Oxford, 1977) at 1.
[14] Te Ture Whenua Maori Act 1993, s 17. See also Harvey "A Ngāti Awa perspective", above n 2 at 24–25.
[15] Te Ture Whenua Maori Act 1993, s 6.
[16] Harvey "A Ngāti Awa perspective", above n 2 at 104.
[17] Māori Land Court "Māori Land Update – Ngā Āhuatanga o te whenua" (June 2019) at 1.

Māori landowners are tenants in common in the land,[18] and individual owners do not have a pre-existing right to the exclusive use or occupation of any single part of the land. A Court order is required for individuals or groups of landowners to make use of the land in one of several different possible ways. For example, an owner may seek the right to live in a house on the land.[19] An owner may want to partition off a section of land for the benefit of themselves and members of their whānau.[20] A group of owners may want to put a block, or blocks, of land into a commercial trust (known within TTWMA as an ahu whenua trust), which will enable the land to be managed by a small group of legal owners on behalf of all those who have beneficial interests in the land.[21]

In all such instances, a Court application is required. It is a principle of the Māori land regime that the decisions of a minority group of landowners ought not to bind or affect other landowners unless there is a sufficient level of support for the proposal and appropriate processes have been followed to advance it.[22] Where the Court makes a decision, this binds all the owners of the land, whether or not they were directly involved in the land proposal in question.[23]

Judge Layne Harvey (writing extra-judicially)[24] makes the point that under general law, owners in common of land cannot take decisions that bind others without their consent. By comparison, in respect of Māori land, TTWMA:[25]

> uniquely empowers the Court to, effectively, circumvent that general law and to order such arrangements as are appropriate in the circumstances, provided the

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[18] Te Ture Whenua Maori Act 1993, s 345(1).
[19] See for example *Keepa – Te Touwai B16A* (2019) 207 Taitokerau MB 109 (207 TTK 109).
[20] See for example *Thwaites v Barnett – Harataunga East 2B 2B 1* (2019) 174 Waikato Maniapoto MB 233 (174 WMN 233)
[21] See for example *Luke v Grey – Wairau Block XII Sections 1A1 and F and Block XII Cloudy Bay Survey District Sections 20, 22, and 24* (2019) 53 Te Waipounamu MB 167 (53 TWP 187) at [25].
[22] Harvey "A Ngāti Awa perspective", above n 2 at 87.
[23] Te Ture Whenua Maori Act 1993, s 76.
[24] Judge Harvey is a current sitting Judge of the Māori Land Court. He was appointed to the Court in 2002 and is the resident Judge for the Aotea and Tākitimu districts of the Māori Land Court: www.maorilandcourt.govt.nz.
[25] Harvey "A Ngāti Awa perspective", above n 2 at 87.

> Court is satisfied that there is a sufficient degree of support amongst the owners, following due process.

If TTWMA did not provide for this, Māori land could not, in effect, be put to use:[26]

> Māori land owners would be mired in unending litigation over the rights and obligations of competing owners, given the realities of multiple ownership and the inherent structural challenges of that form of tenure.

Some blocks of Māori land may have a very large number of owners, many of whom may be disconnected or disengaged from the land, and not participating in decisions about its use.[27] It would be "virtually impossible" to ensure that all owners participated in decision-making for that land.[28] Therefore, the Court ensures that the interests of those who do *not* take part in the decision-making are protected. The Māori land regime:[29]

> empowers the Court to enable [land] initiatives to proceed in the absence of total owner agreement or participation. In doing so, the Court's function is to *safeguard the interests of the owners overall, particularly those who are unrepresented.*

Harvey has made the point that the Court deals with "the highest proportion of unrepresented litigants of any New Zealand court".[30] The Court's role, as noted in the quotation above, is to "safeguard" the interests of those unrepresented parties. It does this by applying the variety of complex rules within TTWMA to determine whether a particular application has the level of support required. In this way, it has been said to serve as "'protector' of the interests of a silent majority".[31]

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[26] At 87.
[27] Waitangi Tribunal *He Kura Whenua*, above n 11 at 205.
[28] At 205.
[29] Judges of the Māori Land Court "Submission to the Māori Affairs Select Committee on the Te Ture Whenua Māori Bill 2016" at 12 (emphasis added).
[30] Harvey "A Ngāti Awa perspective", above n 2 at 171.
[31] At 100.

C Overview of Applications Heard by the Court

Each year, the Court hears somewhere in the realm of 5,000 applications relating to Māori land.[32] In a report released in 2015 to mark 150 years of the Court's existence, the Ministry of Justice provided a breakdown of the number of applications processed by the Court each year, based on a ten-year average.[33] The largest categories of applications processed related to successions (2,600)[34] and trusts and incorporations (1,400).[35] The Court also processes hundreds of applications each year relating to the vesting and alienation of land[36] and the rationalising or reorganising of interests in land.[37]

Various provisions of TTWMA describe what the Court must consider when determining different kinds of land applications. The provisions are spread throughout the Act, from Part 4 to Part 14.

Part 4 deals with what the Court must consider when hearing succession applications. It sets out the Court's decision-making functions with respect to estates of deceased persons (whether or not Māori) that contain beneficial interests in Māori freehold land.[38] The key provision is s 113(1), which provides that the Court "shall determine" the entitlement of people to succeed to Māori freehold land. This process must be followed for all successions to Māori freehold land, testate or intestate. At present, the Court's jurisdiction does not extend to hearing family protection claims and testamentary

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[32] In 2018 the Māori Land Court and Appellate Court collectively disposed of 5,158 Māori land applications: Ministry of Justice *Annual Report 2018/19* at 93.
[33] Ministry of Justice *150 Years*, above n 2 at 102. These figures are now five years old, but there have been no legislative or procedural changes in the interim that might suggest those figures would be different now.
[34] Of which 600 were "further interest" successions (successions where, following the original succession order, further interests in the name of the deceased are discovered): Ministry of Justice *150 Years*, above n 2 at 112.
[35] At 114.
[36] According to my calcuations and based on the Ministry's report, approximately 770 applications of this kind are processed each year on average: Ministry of Justice *150 Years*, above n 2 at 112 and 118.
[37] Approximately 380 applications of this kind are processed per year, with that figure including status determinations, title investigations, and status changes: Ministry of Justice *150 Years*, above n 2 at 118.
[38] Te Ture Whenua Maori Act 1993, s 100.

promises claims in respect of Māori freehold land. Those are dealt with in the High Court or Family Court.[39]

Parts 7 and 8 set out the Court's duties and powers in relation to applications to "alienate" Māori freehold land. Alienations are defined in TTWMA to include sales, gifts, mortgages, and the granting of leases and licences of more than three years.[40] Section 150 prescribes that an alienation of an undivided interest in Māori freehold land can be done only by way of a vesting order made by the Court (with some exceptions, provided for in s 150: the Court can achieve the alienation by memorandum of transfer if it chooses to, and vesting orders are not required for the alienation of incorporation shares). The various statutory pre-requisites that must be met before the Court will make a vesting order differ according to what interest is proposed to be alienated (for example, a sale or a long-term lease) and by whom (trustees, an incorporation, or owners in common).[41]

Parts 12 and 13 deal with the Court's powers to establish six different types of land trust over Māori land[42] and to incorporate owners.[43] Parts 12 and 13 also set out the Court's oversight powers in respect of those governance structures.

Lastly, Part 14 deals with the orders that can be sought to "rationalise" interests in Māori land. Such orders are used to, for example, allow some owners to sever their interests in land from other owners; to allow owners to bring their interests together; or to create access to parcels of Māori land through the creation of roadways or easements. The Court has exclusive and discretionary jurisdiction to grant such orders.[44]

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[39] Te Ture Whenua Maori Act 1993, s 106; Family Protection Act 1955, s 3A; and Law Reform (Testamentary Promises) Act 1949, s 5(1). TTWMB will, if passed, change this position, so that the Māori Land Court has jurisdiction to hear testamentary claims in respect of Māori freehold land: Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179–2), cls 68, 77.
[40] Te Ture Whenua Maori Act 1993, s 4.
[41] Sections 150A–150C.
[42] Sections 211–216.
[43] Section 247.
[44] Section 287.

D Features of the Court's Decision-Making

While the factors and considerations that the Court must take into account differ according to the application before it, I point out here two notable features of the Court's decision-making, which may have an impact on how landowners experience the Court and its impact. The first is that aspects of the Court's jurisdiction are highly administrative in nature, and the second is that the Court is directed to perform a facilitative role when hearing land applications.

1 Quasi-judicial, quasi-administrative

A notable feature of the Court's decision-making is its quasi-judicial, quasi-administrative nature. This can be illustrated by the highly administrative nature of the Court's role when determining uncontested intestate successions, versus its more discretionary role when determining, for example, the eligibility of whāngai (a child adopted by Māori custom)[45] to succeed to a deceased landowner's interests.

An uncontested succession application requires little to no application of judicial discretion. The Judge's role is to determine whether all those who are proposing to succeed to land are entitled to do so under the rules of TTWMA. It is likely to be a particularly straightforward matter where the deceased died intestate, since all successors take in equal portions and the priority of entitlement is clear on the face of s 109. The Court's Judges report that in most cases the succession process is, indeed, straightforward.[46] This, combined with the fact that successions represent a large part of the Court's business, is one of the reasons why it is now proposed by the Minister for Māori Development that simple and uncontested successions be able to be determined by a Court Registrar.[47]

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[45] Section 4.
[46] Judges of the Māori Land Court "Submission to TTWM Review Panel" (12 April 2013), cited in Waitangi Tribunal *He Kura Whenua*, above n 11 at 238.
[47] Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179–1), cl 26. See page 24 of this chapter.

The Court's role in its succession jurisdiction changes where a whāngai is involved.[48] Under s 115 the Court is empowered to determine whether a person is to be recognised, for the purposes of TTWMA, as having been a whāngai of the deceased owner. The Court also has discretion over whether a whāngai succeeds to the same extent as the deceased's children, or to some specified lesser extent.[49]

TTWMA does not currently specify what the Court should consider when making these determinations.[50] In practice, in the exercise of its discretion, the Court relies on evidence from respected kaumātua and tohunga who have knowledge of the relevant tikanga for the hapū in question, keeping in mind that the custom of whāngai differs from hapū to hapū.[51] In exercising its discretion the Court may also need to take into account a range of other evidential material, such as the nature and length of the relationship between the whāngai and the deceased; the recognition of the relationship by whānau or other members of the community; and whether the whāngai also has a blood relationship to the deceased.[52]

In its whāngai jurisdiction, the Court draws on a range of evidence, assesses the quality of the evidence, and may need to deal with claims or opposition put forth by other interested whānau members. These activities differ in kind from what is otherwise, by the account of the Court's Judges,[53] the primarily administrative work of deciding successions. In this respect, the Court's jurisdiction in relation to whāngai illustrates the complexity and variability of the legal regime and the shifting nature of the Court's role within it. Even to practitioners, the law applicable to Māori estates "sometimes appears complex, and

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[48] Te Ture Whenua Maori Act 1993, s 108(2)(e).
[49] Section 115(2).
[50] If introduced, TTWMB will make clear that whāngai status is to be determined by "the tikanga of the relevant iwi or hapu": Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179–2), cl 28.
[51] *Re Hohua* (2001) 10 Waiariki Appeal MB 43 (10 AP 43) and *Northcroft — Wallingford Northcroft* 175 Aotea MB 189 (175 AOT 189). See for example a discussion of whāngai custom within the Taitokerau district: *Re Coutts* (2008) 127 Whangarei MB 145.
[52] *Moses-Heeney – Estate of Eric Moses* (2018) 201 Waiariki MB 122 (201 WAR 122) at [8].
[53] Judges of the Māori Land Court "Submission to TTWM Review Panel" (12 April 2013), cited in Waitangi Tribunal *He Kura Whenua*, above n 11 at 238. Compare evidence of Kerensa Johnston cited in the Tribunal's report, also at 238.

sometimes appears disarmingly simple".[54] It would not be surprising if Court applicants were perplexed by this.

2 Facilitative role

In determining applications or cases that come before it, the Court is directed to "determine or *facilitate* the settlement of disputes"[55] and "promote *practical solutions* to problems arising in the use or management of any land".[56]

This facilitative aspect of the Court's role is important, even if it "often goes unremarked upon".[57] It is likely to have an impact on how landowners perceive the Court and its role in the Māori land system. Judges have referred to "finding creative solutions" for the parties that come before them;[58] to having "the opportunity to listen and to provide with as much help as the law permits";[59] and to making "a joint effort to find solutions to the challenges that confront [landowners]".[60] Tom Bennion observes that a review of the Court's transcripts reveals the many occasions on which the Court "acts as a kind of whanau counselling service".[61]

II The Court's Succession Jurisdiction

In the field research conducted as part of this thesis, I looked at the experience of a small number of owners of Māori land who had each brought a succession application to the Court. As a precursor to explaining my research in more detail (see from chapter 4), it is useful to know more about the Court's succession jurisdiction.

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[54] Michael Sharp *Wills and Succession (NZ)* (online looseleaf ed, LexisNexis) at [16.1].
[55] Te Ture Whenua Maori Act 1993, s 17(2)(c) (emphasis added).
[56] Section 17(2)(f) (emphasis added).
[57] Harvey "A Ngāti Awa perspective", above n 2 at 134.
[58] Ministry of Justice *150 Years*, above n 2 at 139.
[59] At 141.
[60] At 140.
[61] Tom Bennion "Review of Te Ture Whenua Māori Act 1993 – Discussion Document" *Māori Law Review* (online ed, Wellington, May 2013) 4 at 11.

Succession applications are brought after an owner has died, so they require the owners' successors to engage with the Court (or someone to do so on their behalf).[62] Those successors may or may not already be owners of Māori land, and may have varying degrees of awareness of the existence of the Court and its role. Also, succession applications may serve as an important "entry point" to the Māori land system. It is possible, for example, that as a result of bringing a succession application, a person is motivated to engage more with their land, and with the Court.

A The Law Governing Successions

The Court determines entitlements to succeed to Māori land under Part 4 of TTWMA. Specifically, the Court's task upon receiving a succession application is set down in s 113(1) (bold emphasis in the original):

> On an application by the administrator or by any person interested or by the Registrar, the court shall determine the persons (in this section referred to as the **beneficiaries**) who are legally entitled to succeed to any beneficial freehold interest in Maori freehold land belonging to any estate to which this Part applies, and shall define the proportions of the several beneficiaries.

Māori freehold land can be passed by will only to those people who fall into the class of persons listed in s 108(2). Most of these are people who share whakapapa (an ancestral connection) with the deceased, such as children or grandchildren or members of the deceased's hapū.[63] The Court will not recognise dispositions of land to someone outside that class of persons, including spouses or partners. Spouses or de facto partners are, at

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[62] Sara Passmore "Understanding the barriers and drivers for Māori to undertake succession to ownership of Māori Land" (report submitted in partial fulfilment of the requirements for an MBA, Victoria University of Wellington, 2018) ["Understanding the barriers"] at 35.

[63] It also includes whāngai (a child adopted in accordance with Māori custom) and trustees of any of the listed persons: Te Ture Whenua Maori Act 1993, s 108(2)(e), (f).

most, entitled to a life interest in the land, which ends if they remarry or enter into a new partnership.[64]

In cases where a landowner dies without having specified who is entitled to their land interests, the order in which family members are entitled to succeed to the interests is governed by s 109(1) of TTWMA. Children are first, and in their absence, the interests go to the deceased's siblings. Successors take interests in equal portions.[65] The objective is to ensure that Māori land is always retained in the hands of those who have an ancestral connection with it.[66]

The equal division of land shares between successors in this way has been the approach to intestate Māori land succession since the Court's 1891 decision in *Papakura.*[67] The impact of this approach is that each entitled person receives a small share in the land. As this approach continues through generations, the number of owners of Māori land becomes larger and larger and the amount of each owner's share in a piece of land becomes smaller and smaller. This leads to what has been described as "crowded titles" or the "fragmentation" of interests in parcels of Māori land.[68] There may be hundreds of owners, each of who has a very small share of the total land parcel.

As fragmentation continues, more and more people will be recorded as owners of land, and will be engaged with their land interests and with the working of the Court to varying degrees. A likely consequence is that, as the ownership lists of Māori land grow longer

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[64] Te Ture Whenua Maori Act 1993, s 109(2). See also Jacinta Ruru and Michael Stevens "Maori land owners and their spouses and partners" [2007] NZLJ 325.
[65] Te Ture Whenua Maori Act 1993, s 109(1).
[66] See s 109(1)(c): the guiding principle is to determine succession "always by reference to the derivation of entitlement by the deceased".
[67] *Papakura—Claim to Succession* in Fenton *Important Judgments Delivered in the Compensation Court and the Native Land Court, 1866–1879* (Auckland, Native Land Court) at 19–20.
[68] Harvey "A Ngāti Awa perspective", above n 2 at 174 and RP Boast "Māori Land and Land Tenure in New Zealand: 150 Years of the Māori Land Court" (2016) 22 NZACL 77 at 102.

and longer, the Court will increasingly be required to make decisions on land applications in which many of the landowners are not involved.[69]

B Process for Succession Applications

It is important that succession applications are made at some point following the death of a landowner. If no succession application is made, the legal connection between the person entitled to take ownership of that Māori land is never formalised. The deceased remains recorded on the title as a legal owner and land records become out of date.

An application to succeed to freehold interests can be made by the administrator of the deceased's estate, "any person interested", or the Court Registrar.[70] The applicant must provide a death certificate and will if there is one and list all the persons who may be entitled to succeed by law to the deceased's ownership interests.[71] Forms and guidance for the process are available from Māori Land Court offices and on the Court's website.[72]

Successions are routinely determined at Court hearings, as opposed to on the papers. The applicant can attend in person or be represented by counsel, or, with leave of the Court, another representative.[73] Straightforward succession applications may be disposed of very quickly; the time allocated for the Court to deal with a succession application is often five minutes.[74] While this indicates the efficient manner in which the the Court deals with succession applications, it may also disappoint or inconvenience those who have travelled long distances to appear.

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[69] Harvey "A Ngāti Awa perspective", above n 2 at 171.
[70] Te Ture Whenua Maori Act 1993, s 113(1).
[71] See for example Māori Land Court Rules 2011, schedule, Form 21: Application for succession when grant of administration held.
[72] www.maorilandcourt.govt.nz.
[73] Te Ture Whenua Maori Act 1993, s 70(1)(c).
[74] See for example the hearing times set down in the current National Pānui, acccessible at www.maorilandcourt.govt.nz.

The Court's decision as to who is legally entitled to the interests must be recorded in the Court "minutes" (the record of Court proceedings).[75] A separate Court order must be made to vest the land interests in the persons entitled.[76] These orders are registered against the title to the land.[77]

C Proposed Reforms to the Succession Process

If passed, TTWMB will make more options available to people who are applying to succeed to Māori land. TTWMB will make it possible for a Court Registrar to receive and determine "simple and uncontested" succession applications.[78] At present, all such applications must be heard in Court and determined by a Judge. The proposal seeks to make a faster, less costly and less complex process available to people who have straightforward applications of this kind.[79]

TTWMB is currently awaiting its third reading. The parliamentary select committee tasked with examining TTWMB has recommended the following definition for a "simple and uncontested" succession:[80]

> **simple and uncontested succession** means succession that the Registrar is satisfied is—
>
> (a) simple, such as the following examples:
>
> (i) succession by will or on intestacy, whether or not probate or administration has been granted, where all successors belong to the same preferred class of alienee and succeed to equal shares:
>
> (ii) further succession based on evidence heard in court for a previous succession; and

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[75] Te Ture Whenua Maori Act 1993, s 113(2).
[76] Section 117 (applicable to vesting orders where administration of the estate has been granted) and s 118 (applicable to vesting orders where administration of the estate has not been granted or the administrator has died after the grant was made).
[77] Section 123.
[78] Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179–2), cl 26.
[79] "Explanatory note" at 2.
[80] Clause 26.

(b) uncontested because—

(i) the application has been notified or consulted on as required by the rules of court, if the rules require that; and

(ii) no one has objected to the application.

The select committee has also recommended that, rather than applicants needing to request that their application be heard by a Registrar, all applications would be heard by a Registrar "unless the applicant requests otherwise".[81]

The proposed new mediation process within TTWMB would also become available to people dealing with successions and any disputes that may arise in the course of those. The new mediation process will be available for matters that fall within the Court's jurisdiction,[82] and matters can be mediated whether or not they are already the subject of a Court application.[83] Mediations would be conducted in accordance with tikanga.[84] Approved mediators would be required to have the "skills and experience" to mediate the issues before them.[85]

III Who is Engaging with the Māori Land Court?

So far, this chapter has provided a glimpse of the kinds of applications that the Court is receiving and making decisions about, in order to illustrate some key features of the relationship between the Court and landowners. I have noted that the Court often must grapple with "unrepresented interests" when it is deciding whether to grant an order or make a decision about a land proposal before it. Succession applications have a special significance, since they must be brought by people who may not already be owners of land, and who may not know of the existence of the Court or the succession process.

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[81] Clause 26.
[82] Clause 19.
[83] Clause 19, new proposed s 98L(1) and s 98L(2).
[84] Clause 19, new proposed s 98I(c).
[85] Clause 19, new proposed s 98M.

With these things in mind, we can consider what we know about whose interests *are* being represented before the Court, and what we currently know about the nature of the relationship between landowners and the Court.

I have not been able to access any quantitative data on what proportion of the owners of a parcel of land are involved in any particular application before the Court. A data set could potentially be created by collecting this information from individual Court decisions, but it would be very time consuming to collect and might require cross-referencing between the Court's decision and the ownership data for the land block in question. This type of data would be very helpful to build a picture of the ways that landowners are, or are not, engaging with the Court.

It does seem clear, however, that people who ought to engage with the Court's succession jurisdiction are not doing so. It has been estimated that between 400,000 and as many as 1.5 million ownership interests in Māori land have not been succeeded to through the Court.[86] These interests remain under the ownership of deceased persons. The deceased's successors, who would be entitled to become owners of the land, have not brought a succession application to confirm that ownership.

This is problematic for a number of reasons. A succession application is required to ensure that those who are entitled to claim interests in land are recorded on the title as landowners. If this is not done, putative landowners might be prevented from becoming involved in those decision-making processes that require a person to have legal-owner status. It has administrative consequences, because the deceased remains recorded on the title as a legal owner and records become out of date. It may also have cultural consequences, to the extent that formalising a legal connection to land also reinforces a cultural connection to the land.[87] It is also concerning that a large number of people are

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[86] Passmore "Understanding the barriers", above n 62 at 9. Eighteen per cent of the land managed by the Māori Trustee has not been succeeded to. The Chief Judge of the Māori Land Court reported in 2011 that, of the approximately 2.3 million interests in Māori land, anecdotal evidence indicates that about half of these are held by deceased persons: Chief Judge Isaac "Māori Land Today" (*Judge's Corner*, May 2011).
[87] Passmore "Understanding the barriers", above n 62 at 11.

not engaging with the Court in its succession jurisdiction, in terms of what this might signify about landowner engagement with the Court generally.

Sara Passmore has reported on recent research into why people are not bringing successions.[88] Over the course of 2018, Te Tumu Paeroa (the organisation that supports the Māori Trustee)[89] held a series of workshops with Māori Land Court staff and young people. The workshops explored potential barriers and drivers to succession. Among the barriers identified were a lack of clear, accessible information and services for people undertaking the succession process, ambiguity about who is responsible for managing that process, the "personal circumstances" of individuals, and the conflict between court/legal processes and te ao Māori.[90]

Passmore collected further data through a subsequent online survey of owners of Māori land. The survey sought to assess owners' knowledge of the succession process, how easy or difficult they found the process, and how long it took them to become ready to make an application.[91] Passmore's findings include that succession is not well understood by a significant number of owners, but that there are some highly knowledgeable "pockets of expertise".[92] One of her recommendations was that these pockets of expertise ought to be drawn on to develop a network of succession experts.[93] I return to this idea within chapter 5, when I discuss the findings of my own research.

IV The Procedural Experience of Accessing the Court

For those who *do* engage with the Court, whether by bringing a succession application or in one of the Court's many other jurisdictions, what does this involve? I provide a brief

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[88] At 10.
[89] The Māori Trustee is an independent legislative office established to help Māori administer their land: Māori Trustee Act 1953. The Māori Trustee and its supporting organisation, Te Tumu Paeroa, provides trustee services for around 1,800 trusts on behalf of over 90,000 beneficial owners of Māori land, amounting to around seven per cent of Māori land: www.tetumupaeroa.co.nz.
[90] Passmore "Understanding the barriers", above n 62 at 10.
[91] At 18.
[92] At 22.
[93] At 37.

overview here. Notably, a number of the procedural features of the Māori Land Court experience are likely to differ from what would be encountered in a mainstream Court.

Many land applications require prior research into land details or ownership interests, so the Court's frontline research and advisory services are likely to feature heavily within the Court experience. Members of the public can approach the Māori Land Court office in their district to research and gain physical access to land records and Court decisions. Court staff receive and process Court applications and also perform critical information, access, and advice functions for landowners.[94]

Two websites in particular are likely to assist landowners who look online for information about the Court and Māori land. The first is the website of the Māori Land Court itself, which is administered by the Ministry of Justice, and contains a range of guidance and information about the Court and its role.[95] The second is Māori Land Online, which is an online, searchable database of Māori land across the country.[96] The database can be searched by owner name, block name, or through a visual map. It lists the owners of the block of land, whether the land is held under a governance structure, and other land-related information.

Another critical source of information for landowners accessing the Court is the Court's National Pānui, which is published every month, including online.[97] It contains a list of applications that are ready to proceed to hearing across each of the Court's seven districts.[98] In the Court's succession jurisdiction, the Pānui may perform a critical role in notifying potential successors that an application to succeed to a deceased's Māori land interests have been brought before the Court.[99]

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[94] Ministry of Justice *150 Years*, above n 2 at 103.
[95] www.maorilandcourt.govt.nz.
[96] www.maorilandonline.govt.nz.
[97] www.maorilandcourt.govt.nz/about-mlc/publications/national-panui/.
[98] See appendix B of this thesis for an indication of the boundaries of each Court district.
[99] Harvey, "A Ngāti Awa perspective", above n 2 at 175.

The Court hearing is likely to form a prominent part of the overall Court experience, since most Court applications are heard at a hearing, even if they are uncontested and straightforward.[100] Māori Land Court hearings can be expected to be more informal than mainstream court hearings. Section 66(2) of TTWMA directs that proceedings before the Court must be conducted in a way that "will best avoid unnecessary formality" and the Court is empowered by s 66(1) to have recourse to marae kawa. The hearings use te reo and apply tikanga in the form of karakia (prayers) and mihimihi (formal speech making).[101] When there is a hearing, the Court's Rules require that staff be on hand to explain Court procedure to attendees.[102]

The courtroom may also be different. Many of the Court's courtrooms have been refurbished with Māori carvings and artwork to reflect the traditions of local iwi.[103] For example, Te Whare o Te Rā is the Māori Land Court courtroom in the Tairāwhiti district. Local artist Derek Lardelli, who worked on the courtroom, has described the significance of its design:[104]

> The design on the entrance is called He Maungārongo meaning peace and goodwill to the land. As you enter you are greeted by Karanga, who calls and welcomes you in. The patterns on the ceiling relate to Rangi looking down on Papatūānuku and the design on the carpet signifies one of their numerous children Te Kāokāo o Rongo – the armpits of Rongo – the god of peace. At the back of the Judges' bench sits Hine Tiaki Whare, which Judge Fox has as her moko kauae. They look after the 'house' – the Court – while listening and giving direction to those who attend Court.

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[100] Office of the Auditor-General *Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee*, above n 7 at [3.56].
[101] Harvey "A Ngāti Awa perspective", above n 2 at 97.
[102] Māori Land Court Rules 2011, r 6.3.
[103] As at 2015, four out of seven courtrooms had been refurbished in this way: see Ministry of Justice *150 Years*, above n 2 at 101. See also Harvey "A Ngāti Awa perspective", above n 2 at 97.
[104] Ministry of Justice *150 Years*, above n 2 at 102.

Aside from sitting in the courtroom, the Court can sit at any forum.[105] Following the Christchurch earthquake, the Court sat within Te Waipounamu district at rugby clubrooms and workingmen's clubs.[106]

Lawyers appear infrequently in the Court. According to the Ministry of Justice, from 1999 to 2015, less than 10 percent of applications heard by the Court were "prosecuted" through legal counsel.[107] It is common for applicants and other interested parties to appear in Court on their own behalf. Straightforward and uncontested succession applications, for example, may be routinely presented by the applicant themselves.[108]

V What Have Landowners Said about the Māori Land Court?

Landowners' views of the Court have been reflected or referred to in various reports. I survey this material here, in demonstration of the fact that landowners have expressed strong, and at times conflicting, views on the Court and its impact on their lives.

Landowners have perceived the Court as a protector and an institution that "belongs" to Māori. This has been a longstanding view, despite the vastly changed nature of the Court's role from its establishment in 1865 to today. For example, in 1891, Lou Parore, appearing on behalf of landowners before the Court, referred to the Native Land Court as "a father" and "the agent for [Māori] general welfare affecting the land".[109] This sentiment existed despite the fact of the Court's negative impact on Māori landholdings and the great difficulties that many Māori experienced while attempting to access the Court in order to protect their interests in land.[110] According to the Waitangi Tribunal,

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[105] Māori Land Court Rules 2011, r 3.3.
[106] Ministry of Justice *150 Years*, above n 2 at 193.
[107] At 101.
[108] Michael Sharp *Wills and Succession (NZ)*, above n 54 at [16.45].
[109] Cited in Waitangi Tribunal *The Te Roroa Report* (Wai 38, 1992) at 139.
[110] MPK Sorrenson "Land purchase methods and their effect on Maori population, 1865–1901" (1956) 65 The Journal of the Polynesian Society 183.

Māori associated the mana of the Court with Her Majesty the Queen, with whom Māori had entered into te Tiriti o Waitangi/the Treaty of Waitangi in 1840.[111]

Many decades later, Māori expressed similar sentiments to the 1980 Royal Commission into the Māori Land Courts, which reported that:[112]

> [Māori] seemed to us to have a deep love and respect for [the Court], its judges, and its staff. They wished it retained as "our Court", and made clear that its abolition would inflict a deep emotional blow.

It is also clear, however, that these sentiments of love and respect for the Court have not been universally held. In 1977 IH Kawharu reported on conflicting views expressed by tribal elders at an education conference, including a sense of frustration at needing to go through the Court to deal with land: "Those who can mind their own business should be able to do so without having to put up with delays caused by waiting to be told what to do by the Court."[113]

This sentiment was expressed even more strongly by a submitter to the 1980 Royal Commission into the Māori Land Courts (referred to above). Mrs P Te Ruihi Warner said:[114]

> The Court's big-brother/guardian attitude amounts to interference with my rights as a citizen. The Maori Courts impound the Maori in the kindergarten of our national life; they prevent us from becoming fully fledged citizens; and they condemn us to a life sentence of second class citizenship in the land of our birth.

Paerau Warbrick, whose whānau interacted with the Court over the decades from 1960 to 1980, describes the Court as an institution that was about *people*, and the interactions that were had there:[115]

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[111] Waitangi Tribunal *The Te Roroa Report*, above n 109 at 139.
[112] Royal Commission of Inquiry into the Maori Land Courts *Report*, above n 10 at 73.
[113] Kawharu *Maori Land Tenure: Studies of a Changing Institution*, above n 13 at 92.
[114] Royal Commission of Inquiry into the Maori Land Courts *Report*, above n 10 at 2.

> The Court itself was a place that you had to go to conduct all of your land business. You had to go and inherit land through the Court. The Court changed our land titles for this purpose or that purpose. Our whanaunga (relatives) went to the Court to sell land to get money. The Court was an institution that involved people.

In 1986, the Government of the time established an independent committee tasked with inquiring into and reporting on community needs for access to justice.[116] The Committee carried out a public consultation process in which over a thousand groups and individuals participated, including a number of prominent Māori organisations.[117] The Committee concluded in its final report, *Te Whainga i te Tika*, that the Māori Land Court was seen as a "bureaucratic and inaccessible Pakeha structure".[118]

Moving into the period of TTWMA, we see landowners continuing to express mixed feelings about the Court. In 2004 the New Zealand Law Commission gave its perception of how Māori felt about the Māori Land Court:[119]

> After a long history of Māori antipathy to the Māori Land Court and Māori Appellate Court, which were the historic means by which their land was alienated, Māori are moving to reclaim these courts as their own and to have faith and trust in them as a legal vehicle able to process intra-Māori disputes. Māori feel they are "their courts".

It would be an over-simplification to suggest that all Māori feel this way about these Courts in their contemporary form, and the Law Commission reported that some

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[115] W Paerau Warbrick "Māori Land Court 1960–1980: An autoethnographic and social commentary" (PhD thesis, University of Otago, 2009) at xii.
[116] Advisory Committee on Legal Services *Te Whainga i te Tika: In Search of Justice* (Wellington, 1986).
[117] At 1. This included Māori Women's Welfare League branches, Māori Wardens, kōhanga reo, and tribal rūnanga.
[118] At 55.
[119] New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 249.

submitters said they still see them as "Pākehā institutions, which draw on some aspects of Māori culture to oversee essentially Pākehā law".[120]

Today the Māori Land Court remains an integral part of the legal landscape, and generally accessible to landowners. This is critical, as one participant commented in the course of Layne Harvey's research:[121]

> So, the Māori Land Court is something like the church for us. While we may not need to go all the time, which is a good thing, it is reassuring to know that it is there when we need it.

A particular theme raised by landowners in recent years relates to the way that the Court makes its decisions and exercises its discretion, which has been suggested to act as a barrier to the utilisation of Māori land. Landowners raised concerns of this nature in 1998 to the Māori Multiple Owned Land Development Committee.[122] The Committee reported "frustration and disappointment" among landowners with the perceived conservatism of the Court's decision-making.[123] Similar concerns were again reported on in 2011, following a series of hui (meetings) held by the Government to investigate landowner aspirations for Māori land.[124] Landowners reported their perceptions of inconsistent decision-making, questionable applications of judicial discretion, and paternalistic restrictions on trustee investments.[125]

All the evidence of this kind to date is anecdotal, and based on landowner perception, so it is difficult to know whether the concerns that landowners have expressed have legal validity. It appears that no research has been done that can either confirm or negate these

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[120] New Zealand Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 192.
[121] Harvey "A Ngāti Awa perspective", above n 2 at 259.
[122] The Committee was established in 1998 to give independent advice to the then-Minister of Māori Affairs. Maori Multiple Owned Land Development Committee *Māori Land Development: A report prepared by the Maori Multiple Owned Land Development Committee* (Wellington, 1998).
[123] At 15.
[124] Whaimutu Dewes, Tony Walzl and Doug Martin *Ko Ngā Tumanako o Ngā Tāngata Whai Whenua Māori: Owner Aspirations Regarding the Utilisation of Māori Land* (Te Puni Kōkiri, Wellington, 2011).
[125] At 34 to 35.

concerns.[126] This is despite the recommendation of the Māori Multiple Owned Land Development Committee in 1998 that this research should be done.[127] In 2016, the Waitangi Tribunal also called for "carefully conducted impartial empirical research" into whether Court decision-making does in fact constitute a barrier to utilisation of land.[128] In the absence of empirical research, supported by clear communication of what the Court's role is and how it makes its decisions, it is likely that landowners will keep expressing concerns of this kind.

The continued strength of landowner sentiment around the Court is also generally demonstrated by the reaction from Māori to reform proposals to TTWMA that were first floated in 2013.[129] As the shape and intent of the proposed reforms became clear, a claim was brought to the Waitangi Tribunal arguing that they were in breach of the Crown's obligations under te Tiriti o Waitangi/the Treaty of Waitangi.[130] Māori remained troubled by the reforms as they progressed, and they were criticised as being complicated, confusing, and imprecise.[131] Ultimately, the reforms did not proceed.

VI Use of Lawyers in Māori Land Matters

Lawyers are intermediaries between courts and court applicants. In the Māori Land Court, as noted above, lawyers rarely appear. We can also assume that many people do not seek legal advice or assistance to prepare Court applications. For a straightforward application, it is possible to navigate the various requirements with the assistance of online resources, and file an application on one's own behalf. Or, applicants may use a

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[126] This was also commented on by the Waitangi Tribunal in 2016: Waitangi Tribunal *He Kura Whenua*, above n 11 at 109.
[127] Maori Multiple Owned Land Development Committee *Māori Land Development: A report prepared by the Maori Multiple Owned Land Development Committee*, above n 122 at 15.
[128] Waitangi Tribunal *He Kura Whenua*, above n 11 at 210.
[129] For a brief overview of these reforms and what became of them see chapter 1 of this thesis at page 6.
[130] Waitangi Tribunal *He Kura Whenua*, above n 11 at 2.
[131] Paerau Warbrick "Commentary: A cause for nervousness: The proposed Māori land reforms in New Zealand" (2016) 12 AlterNative at 369.

lawyer to prepare their application, and then appear in Court to prosecute it on their own behalf.[132]

In 2004, the Auditor-General raised concerns about the scarcity of legal advice services for Māori land matters.[133] It is difficult to know what the position is now, in the absence of any recent research into the availability of legal expertise on Māori land matters. However, recent cases provide an example of landowners having engaged a lawyer who was not sufficiently experienced in Māori land matters,[134] and of having difficulty finding an experienced, local solicitor who is not conflicted.[135] It is possible that there is a degree of unmet legal need associated with the matters dealt with by the Māori Land Court.

The Court oversees a legal aid fund, which can be directed to cover the legal costs or expenses of persons heard or represented in Court proceedings.[136] The fund is intended to assist those "who would otherwise not be able to prosecute cases because of the special circumstances of their case".[137] Free legal advice on Māori land matters is available at community law centres throughout the country.[138]

VII Academic Studies of the Relationship between the Court and Landowners

Looking at the academic literature and research on the Court, we have a rich body of historical research on the Court, but comparatively fewer studies of the Court's contemporary impact on landowners.

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[132] Michael Sharp *Wills and Succession (NZ)*, above n 54 at [16.45].
[133] Office of the Auditor-General *Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee*, above n 7 at 51.
[134] *Luke v Grey – Wairau Block XII Sections 1A1 and F and Block XII Cloudy Bay Survey District Sections 20, 22, and 24* (2019) 53 Te Waipounamu MB 167 (53 TWP 187) at [25].
[135] *Kidwell v Karaitiana – Waipuka 3A3A* (2019) 78 Tākitimu MB 7 (78 TKT 7) at [7].
[136] Te Ture Whenua Maori Act 1993, s 98.
[137] Māori Land Court "Practice Note – Special Aid Fund – Appointment of a Barrister or Solicitor" (31 May 2012) at [3].
[138] See for example Ngāi Tahu Māori Law Centre (www.ngaitahulaw.org.nz) and Community Law Wellington and Hutt Valley (www.wclc.org.nz).

As the Native Land Court, the Court's operation had a major impact on Māori landholdings and Māori cultural and social life, and these topics have generated a considerable body of study.[139] Richard Boast[140] and David Williams[141] have both completed jurisprudential studies of the Native Land Court, including Boast's three-volume compilation of leading Native Land Court cases from 1862 to 1963.[142] Other prior, important contributions to the field include IH Kawharu's study of Māori land tenure in the 19th and early 20th century[143] and Sorrenson's research into the effects on Māori of the Native Land Court up to 1901.[144]

Aside from this academic scholarship, the Waitangi Tribunal is responsible for much of the historical research into the Court. The Waitangi Tribunal is a standing commission of inquiry whose functions include investigating Crown breaches of te Tiriti o Waitangi/the Treaty of Waitangi.[145] In this capacity, the Tribunal has commissioned numerous research reports pertaining to the Native Land Court and the Court's close relationship with the Crown, with a strong focus on the major period of Māori land acquisition up to 1939.[146]

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[139] See for example Richard Boast "The Native Land Court and the Writing of New Zealand History" (2017) 4 law&history 145; MPK Sorrenson "The lore of the judges: Native Land Court judges' interpretations of Māori custom law" (2015) 124 The Journal of the Polynesian Society 223; Beryl Woolford Roa "The Long Dark Cloud of Racial Inequality and Historiographical Omissions: The New Zealand Native Land Court" (2012) 1 MAI Journal 3.

[140] See for example RP Boast "The Lost Jurisprudence of the Native Land Court: The Liberal Era 1891–1912" (2014) 12 NZJPIL 81.

[141] David V Williams '*Te Kooti Tango Whenua': The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999).

[142] Richard Boast *The Native Land Court 1862–1887: a historical study, cases, and commentary* (Brookers, Wellington, 2013); Richard Boast *The Native Land Court Volume 2, 1868–1909: a historical study, cases, and commentary* (Thomson Reuters, Wellington, 2015); Richard Boast *The Native Land Court Volume 3, 1910–1953: collectivism, land development and the law* (Thomson Reuters, Wellington, 2019).

[143] Kawharu *Maori Land Tenure: Studies of a changing institution*, above n 13.

[144] Sorrenson "Land purchase methods and their effect on Maori population, 1865–1901", above n 110.

[145] Treaty of Waitangi Act 1975, s 6.

[146] Bryan Gilling *The Nineteenth-Century Native Land Court Judges: An Introductory Report* (commissioned by the Waitangi Tribunal, 1994); Donald M Loveridge *Maori Land Councils and Maori Land Boards: A Historical Overview, 1900 to 1952* (Waitangi Tribunal, Rangahaua Whanui National Theme K, 1996); Tom Bennion *The Maori Land Court and Land Boards, 1909 to 1952* (Waitangi Tribunal, Rangahaua Whanui National Theme P, 1997); Tom Bennion and Judy Boyd *Succession to Maori Land, 1900–52* (Waitangi Tribunal, Rangahaua Whanui National Theme P, 1997); Hazel Riseborough and John Hutton *The Crown's Engagement with Customary Tenure in the Nineteenth Century* (Rangahaua Whanui National Theme C, 1997); Michael Belgrave, Anna Deason and Grant Young *Crown Policy with Respect to Maori Land, 1953–1999* (prepared for the Waitangi Tribunal, 2004).

The Tribunal's own published reports have contributed further to the body of historical analysis of the Court.[147]

Against this wealth of historical research, there is comparatively little recent research that focuses on the contemporary relationship between landowners and the Court. Perhaps the most recent investigation in this area took place in 2004. The Law Commission looked at the Māori Land Court as part of a "root-and-branch" review of the structure and operation of all state-based adjudicative bodies in New Zealand.[148] Its main substantive recommendations for the Court were that it should have jurisdiction to determine all disputes involving communal Māori assets, and that tikanga experts should be able to be appointed as full members of the Court where needed.[149]

Two recent, academic contributions to the field are Paerau Warbrick's account of his whānau's Court experiences from 1960 to 1980,[150] and Layne Harvey's hapū-based perspective on the proposed reforms to TTWMA in 2016, which never proceeded. Harvey's contribution is of particular legal and sociological interest, given his status as an owner of Māori land who is also a system "insider". He has acted as a Māori land law practitioner, and is now a sitting Judge of the Court.[151]

VIII Conclusion

This chapter has highlighted some of the complexities of the relationship between the Court and landowners. On the one hand the Court's decisions have a major impact on Māori landowners, given the significance of Māori land. But the nature of the Court's work is such that often it is dealing with unrepresented interests – the interests of

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[147] See for example Waitangi Tribunal *The Te Roroa Report*, above n 109; Waitangi Tribunal *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wai 64, 2001); Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims Stage 1 vol 1* (Wai 1200, 2008); Waitangi Tribunal *He Whiritaunoka: The Whanganui Land Report vol 1* (Wai 903, 2015).
[148] New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, above n 119.
[149] At 239–241.
[150] W Paerau Warbrick "Māori Land Court 1960–1980: An autoethnographic and social commentary", above n 115.
[151] Harvey "A Ngāti Awa perspective", above n 2 at 31–32.

landowners who, for whatever reason, have not engaged with the Court on that particular application. Landowners who *are* strongly involved with the Court have expressed strong sentiments about it. On the one hand it is "our Court", and serves the purpose of retaining Māori land within Māori ownership, but in performing that function it has come under critique for acting as a perceived barrier to the utilisation of land.

The fact that thousands of potential owners have not brought Court applications to succeed to land demonstrates that there are large numbers of people who ought to be engaging with the Court's succession jurisdiction, and are not. We might take this as a troubling indication that there is a broader lack of engagement with the Court by owners who ought to be more involved. On the other hand, the nature of Māori land is such that the Court will *always* be dealing with unrepresented interests, and this is part of the reason that it exists – to protect the interests of owners who are not involved in decision-making about their land. We also know that interactions between landowners and the Court are often unmediated by lawyers, and this is likely to add an extra layer of complexity to the relationship.

In the next chapter, I look to the field of design, and consider whether it can help conceptualise and analyse this complex relationship between landowners and the Court.

Chapter 3

Exploring Design and its Application to the Māori Land Court

Law and design are beginning to be combined, both in the private practice of law and in socio-legal studies of law and legal institutions. We are seeing the emergence of a field of "legal design". These developments provide an opportunity to consider whether design might help us explore, and better understand, the relationship between owners of Māori land and the Māori Land Court. As discussed in the last chapter, that relationship is complex, and often unmediated by lawyers.

This chapter delves into the field of legal design by providing some examples of places and spaces where legal design is being done. Then, the chapter moves to a consideration of what it might look like to bring a design perspective to the Māori Land Court, as the legal entity at the centre of the Māori land regime. I describe the challenges I faced when considering how design might translate to the Māori Land Court, and I provide some initial thoughts on how design might enrich our understanding of the relationship between landowners and the Court.

I The Emergence of "Legal Design"

Within the last five years, the legal community has shown a growing interest in design. Legal practitioners and academics have taken a design-based approach to a diverse range of legal topics, from family law,[1] to administrative justice,[2] to criminal sentencing.[3]

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[1] Jane Morley and Kari D Boyle "The Story of the BC Family Justice Innovation Lab" (2017) 34 Windsor YB Access Just 1.
[2] Lorne Sossin "Designing Administrative Justice" (2017) 34 Windsor YB Access Just 87.
[3] W David Ball "Redesigning Sentencing" (2014) 46 McGeorge L Rev 817.

Within those areas, for example, lawyers and legal academics are considering how legal information in contracts can be designed;[4] how mobile applications might use emerging digital technology to provide legal information and basic legal advice;[5] and how design methodologies might contribute to legal practice.[6] It has been suggested that access to justice can be treated like a design problem.[7] Some have sketched out a broad role for design in law, to fundamentally transform the way that we think about the justice system and the role of lawyers within it.[8]

According to Amanda Perrry-Kessaris, these various explorations of design within a legal context point to the emergence of a field of "legal design". In the field of legal design, people are essentially interested in "how design-based methods and attitudes might be deployed in relation to legal matters".[9]

Legal design is happening in a number of legal spaces and places. A prominent example is the Legal Design Lab based at Stanford University. The Legal Design Lab applies a "design thinking" approach to the design of new legal services and interventions, intended to help people navigate their way through law and the law courts.[10] Margaret Hagan is the Lab's director and describes legal design as an approach to legal services

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[4] Helena Haapio and Margaret Hagan "Design Patterns for Contracts" in Erich Schweighofer and others (eds) *Networks. Proceedings of the 19th International Legal Informatics Symposium* (Österreichische Computer Gesellschaft, Wien, 2016).

[5] Lois R Lupica, Tobias A Franklin and Sage M Friedman "The Apps for Justice Project: Employing Design Thinking to Narrow the Access to Justice Gap" (2017) 44 Fordham Urb LJ 1363.

[6] Jin An "Legal practice and design principles" *LawTalk* (online ed, 8 October 2015); Craig Allan "Design thinking – how to make it work for you" (21 March 2019) Law Society of Scotland <www.lawscot.org.uk>; Nisha Francine Rajoo "Law by Design: What the Legal Profession Can Learn from Design Thinking" *Singapore Law Gazette* (online ed, December 2019); Mark Szabo "Design Thinking in Legal Practice Management" (2010) 21 Design Management Review 44.

[7] Bill Henderson "Is access to justice a design problem?" (23 June 2019) Legal Evolution <www.legalevolution.org>; Daniel Rodriguez and Margaret Hagan "Approaching access to justice with a designer's mindset" (podcast, 19 April 2018) Northwestern Pritzker School of Law <www.news.law.northwestern.edu/podcasts/>; Katherine Alteneder and Linda Rexer "Consumer Centric Design: The Key to 100% Access" (2014) 16 Journal of Law and Society 5.

[8] Susan Ursel "Building better law: How design thinking can help us be better lawyers, meet new challenges, and create the future of law" (2017) 34 Windsor YB Access Just 28.

[9] Amanda Perry-Kessaris "Legal Design for Practice, Activism, Policy, and Research" (2019) 46 Journal of Law and Society 185 at 186.

[10] See www.legaltechdesign.com.

that focuses on users. Hagan describes this as "human-centred design".[11] Design applied in this manner can "transform the legal sector" and create "ambitious new visions for how legal services can be provided".[12]

Legal design is also taking place at facilitated events throughout the world, such as the annual global legal hackathon.[13] At the global hackathon and at similar national events, teams of people with legal, technological, and other skills work together within a confined timeframe to design new legal technology, aimed either at facilitating access to justice or improving the business of law. The winning access to justice design intervention from the 2019 global legal hackathon was an application that used artificial intelligence to translate legal jargon in letters received from the government into everyday language.[14]

Law schools are also helping to grow the field of legal design. Design has begun to be seen as part of the skillset law students need to engage in legal practice or to tackle big-picture systemic problems around access to justice.[15] There are numerous examples of university law courses or degrees combining technology, law, and design,[16] and a number of universities (particularly in North America) that have labs or centres focused on the intersection between these areas.[17] Students in these courses or labs might design a

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[11] Margaret Hagan *Law by Design* (online "working prototype") <www.lawbydesign.co/en/home/>. See also www.openlawlab.com.
[12] See www.lawbydesign.co/en/home.
[13] See www.globallegalhackathon.com.
[14] See www.globallegalhackathon.com. I attended one of these events in September 2019, hosted by Legal Hackers NZ at the Auckland University of Technology. It was "New Zealand's first legal design hackathon": see www.meetup.com/Legal-Hackers-NZ/events/263996823.
[15] Dan Jackson "Human-centered legal tech: integrating design in legal education" (2016) 50 The Law Teacher 82.
[16] See for example Queensland University of Technology "LLB251 Law and Design Thinking" (www.qut.edu.au) and University of Auckland conjoint Bachelor of Design/Bachelor of Laws Honours paper (www.auckland.ac.nz).
[17] See for example LawX at Brigham Young University (students create technological innovations to help non-lawyers navigate the legal system: see www.law.byu.edu/clinics-and-centers/lawx/); Ryerson University's Legal Innovation Zone (a "legal tech incubator with a focus on building better legal solutions for the consumers of legal services": see www.legalinnovationzone.ca); the Duke Law Tech Lab ("we accelerate the next generation of startups that will change the way legal services are delivered": see www.dukelawtechlab.com); Nulawlab at Northeastern University School of Law ("we engage with the fields of art and design to create new strategies of legal empowerment": see www.nulawlab.org).

mobile application to improve access to justice,[18] or apply human-centred design to a legal service.[19]

While many applications of design within law are focused on design and legal technology, some people have located the potential for design to change the way that we think about and do law in quite a fundamental way. Susan Ursel suggests that design can contribute to "the project of law in its broadest sense".[20] Dan Jackson says that design can help us "reimagine the law as a creative pursuit". [21] Jeff Ward writes that design thinking helps fuel change, encourages lawyers to be more human-centred, and fosters inter-disciplinarity.[22] Underpinning the stance of Ursel, Jackson and Ward is the belief that law (and lawyers) need to innovate, and change, in order to remain relevant and useful to society, and design will help law do so.

Part of the reason for the expansion of design into law can be attributed to what Kees Dorst refers to as the "expanded field of design".[23] Today, designers can be found working within all fields and industries. Design is being put to use in social innovation movements[24] and humanitarian initiatives.[25] Designers are working alongside the end-users of their products or are co-designing alongside them.[26] End-users are being encouraged to take on design knowledge and skills themselves, and to become non-

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[18] Tanina Rostain, Roger Skalbeck, and Kevin G Mulcahy "Thinking Like a Lawyer, Designing Like an Architect: Preparing Students for the 21st Century Practice" (2013) 88 Chi Kent LR 743.
[19] Margaret Hagan "A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Intervention to Make Courts User-Friendly" (2018) 6 Indiana Journal of Law and Social Equality 42 ["A Human-Centered Design Approach to Access to Justice"].
[20] Ursel "Building better law: How design thinking can help us be better lawyers, meet new challenges, and create the future of law", above n 8.
[21] Jackson "Human-centered legal tech: integrating design in legal education", above n 15.
[22] Jeff Ward "Legal Solution by Design – a brief assessment of the role of design thinking in law schools" (3 October 2018) Medium <www.medium.com>.
[23] Kees Dorst "Frame Creation and Design in the Expanded Field" (Autumn 2015) she ji: The Journal of Design, Economics, and Innovation 22.
[24] Ezio Manzini "Making things happen: social innovation and design" 2014 (30) Design Issues 57.
[25] Andrew Drain, Aruna Shekar and Nigel Grigg "Insights, Solutions and Empowerment: a framework for evaluating participatory design" CoDesign (online, 2018).
[26] Elizabeth BN Sanders "From user-centred to participatory design approaches" in Jorge Frascara (ed) *Design and the Social Sciences: Making connections* (Taylor & Francis, London, 2002) 1.

professional or "diffuse" designers in their own fields.[27] Design is seeing the continued theoretisation of its practices, as the design academy responds to the demand for design knowledge from non-design disciplines.[28] As this expanded field of design begins to intersect with law, it provides an opportunity to consider what contribution design might make to the relationships between citizens and courts.

II What Is "Legal Design" and How Is It Done?

There is no single way of "doing" design,[29] and the same is true of legal design. Those who are applying design within law may draw on a range of different design practices and concepts, such as brainstorming,[30] abductive reasoning,[31] use of prototypes,[32] metaphor,[33] and so on. Design has long been theorised as a field of practice and study, and there is a rich set of accounts of design that legal designers and aspiring legal designers can draw on.

One particular "design methodology" that has been popular in the legal design field to date is design thinking.[34] In design thinking, a designer or a design team moves through a

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[27] Ezio Manzini *Design, When Everybody Designs: An Introduction to Design for Social Innovation* (MIT Press, Cambridge (Mass), 2015) at 37.
[28] Kees Dorst "The core of 'design thinking' and its application" (2011) 32 Design Studies 521.
[29] See for example Krippendorff's discussion of the reduction of design to "rational problem solving" in Klaus Krippendorff "Design Research, an Oxymoron?" in Ralf Michel (ed) *Design Research Now: Essays and Selected Projects* (Birkhauser, Basel, 2007) 67 at 70.
[30] See for example reference to the practice of brainstorming in Margaret Hagan *Law by Design* (online "working prototype") <www.lawbydesign.co/design-process/#1/>. For a design-based description of the practice of brainstorming see Klaus Krippendorff *The semantic turn: A new foundation for design* (CRC Press, Florida, 2006) [*The semantic turn*] at 213.
[31] See for example Ursel "Building better law: How design thinking can help us be better lawyers, meet new challenges, and create the future of law", above n 8 at 37. For a design-based discussion of abductive reasoning see Dorst "The core of 'design thinking' and its application", above n 28.
[32] See for example the use of prototypes as described in Margaret Hagan "Participatory Design for Innovation in Access to Justice" (2019) 148 Daedalus 120.
[33] Ursel "Building better law: How design thinking can help us be better lawyers, meet new challenges, and create the future of law", above n 8 at 47. For a design-based description of the use of metaphor see Krippendorff *The semantic turn*, above n 30 at 168.
[34] For examples of use of the term "design thinking" in law, or a design thinking approach, see Ball "Redesigning sentencing", above n 3; Hagan "A Human-Centered Design Approach to Access to Justice", above n 19; "Jackson "Human-centered legal tech: integrating design in legal education", above n 15; Sossin "Designing Administrative Justice", above n 2; and Ursel "Building better law: How design thinking can help us be better lawyers, meet new challenges, and create the future of law", above n 8.

series of steps to come up with an idea, test the idea with users, and then refine it. It is cyclical and iterative, so what is learnt from testing a design outcome is fed into the next iteration of the design.[35] Design thinking begins by attempting to understand the needs of the "user", so these can be accounted for within the design process. Throughout the process there is an emphasis on withholding judgment, using a team-based approach, and using prototypes to test ideas quickly with minimal investment.[36] Along the way, people are encouraged to "build empathy", "fail fast", and "make it visual".[37]

Design thinking has had a wide reach and is attractive to those who are looking for new ideas and fresh thinking in their own field. The terminology of design thinking has been taken up in public policy,[38] health,[39] and education.[40] However, design thinking has come under critique from designers, both in academia and in the profession.[41] Its critics point out that it is based on anecdotal accounts, and as such is limited in what it can contribute to a coherent and replicable methodology of design.[42] It lacks theoretical rigour. For example, while claiming to be user-centred, it centralises the designer's activities and does not account for the way in which a design's users are themselves involved in the

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[35] Tim Brown "Design thinking" *Harvard Business Review* (Brighton (Mass), June 2008) 1.
[36] Tim Brown *Change By Design: How Design Thinking Transforms Organizations and Inspires Innovation* (Harper Collins, New York, 2019).
[37] At 235.
[38] See for example Lucy Kimbell "Prototyping and the new spirit of policy-making" (2017) 13 CoDesign 214 and Mark Considine, Damon Alexander and Jenny M Lewis "Policy design as craft: teasing out policy design expertise using a semi-experimental approach" (2014) 47 Policy Sciences 209.
[39] For discussion of the use of human-centred design used across a range of global public health contexts see Alessandra N Bazzano and others "Human-centred design in global health: A scoping review of applications and contexts" (2017) 12(11) PLoS ONE. For specific co-design or participatory examples in practice see T Cawood and others "Creating the optimal workspace for hospital staff using human centred design" (2016) 46 Internal Medicine Journal 840 and Sara Donetto and others "Experience-based Co-design and Healthcare Improvement: Realizing Participatory Design in the Public Sector" (2015) 18(2) The Design Journal 227.
[40] See for example Muriel Garreta-Domingo, Peter B Sloep and Davinia Hernández-Leo "Human-centred design to empower 'teachers as designers' (2018) 49 British Journal of Educational Technology 1113.
[41] Lee Vinsel "There's So Little There: A Response to the Stanford d.school's Defense of Design Thinking" (15 June 2018) Noteworthy: The Journal Blog <www.blog.usejournal.com>.
[42] Ulla Johansson-Sköldberg, Jill Woodilla and Mehves Çetinkaya "Design Thinking: Past, Present and Possible Futures" (2013) 22 Creativity and Innovation Management 121.

design process.[43] Others suggest that design cannot be simplified to a single methodology in this way.[44]

Design thinking does not represent the entirety of design and design theory. Design as a field has been theorised since the mid-20th century, in step with the emergence of modernism throughout Europe and parts of the United States.[45] Many designers, such as Kees Dorst, have encouraged those who are interested in design to look beyond design thinking, and to "go back to first principles" of design:[46]

> [D]esign holds incredibly valuable sets of practices that are more relevant than ever. Rather than saying that "design thinking is dead" and throwing it out, we need to engage with these developments, go back to first principles, and create coherent practices that do make sense outside of the confines of the traditional design disciplines.

Klaus Krippendorff argues that design cannot be reduced to a series of steps, and we must instead treat design as:[47]

> a systematic collection of accounts of successful design practices, design methods, and their lessons, however abstract, codified, or theorized, whose continuous rearticulation and evaluation within the design community amounts to a self-reflective reproduction of the design profession.

Similarly, legal design ought not to be simplified to a single methodology, based around design thinking or otherwise. The field of legal design will grow if those doing legal design draw systematically on accounts of design, and reflect on what worked or what added value in any particular legal context.

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[43] Lucy Kimbell "Rethinking Design Thinking: Part I" (2011) 3 Design and Culture 285.
[44] Klaus Krippendorff "Design Research, an Oxymoron?", above n 29 at 70.
[45] Nigel Cross "From a Design Science to a Design Discipline: Understanding Designerly Ways of Knowing and Thinking" in Ralf Michel (ed) *Design Research Now: Essays and Selected Projects* (Birkhauser, Basel, 2007) 41.
[46] Dorst "Frame Creation and Design in the Expanded Field", above n 23 at 33.
[47] Krippendorff *The semantic turn*, above n 30 at 209.

Amanda Perry-Kessaris does not put forward a legal design methodology.[48] She suggests that certain "designerly ways" (experimentation, communication, and making things visible and tangible)[49] are useful to those who have a commitment to "juristic lawyering", as theorised by Roger Cotterrell.[50] Juristic lawyers are those who:[51]

> … can be identified by their commitment, first, to the 'well-being' of law, and specifically to its 'enrich[ment] and sustain[ment]' rather than its mere exploitation, 'unmasking or debunking'; and secondly, to 'law as a practical idea' rather than merely an abstract phenomenon, and specifically to its 'meaningfulness as a social institution'.

Perry-Kessaris suggests that juristic lawyers have to be at once practical, critical, and imaginative, and designerly ways can help them do that.[52] Juristic lawyers can use design to make legal documents, such as contracts, more visually appealing and informative.[53] Design might also be used to encourage political engagement and awareness of legal rights by disseminating visual resources and animations.[54] Design might help improve legal policy.[55] Perry-Kessaris draws on her own work to demonstrate how model-making can be a form of designerly activity within academic legal research. Perry-Kessaris makes her research tangible and visible with Lego, "stumbled-upon or curated items", and clay.[56] The materials can be used to explain her research, to generate new perspectives on her research, or "for the imaginative purpose of speculating about new possibilities

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[48] Perry-Kessaris "Legal Design for Practice, Activism, Policy, and Research", above n 9.
[49] At 192.
[50] Roger Cotterrell *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (Routledge, London, 2018).
[51] Perry-Kessaris, above n 9 at 187.
[52] At 187.
[53] At 194.
[54] At 200.
[55] At 203.
[56] At 207–209. See also the Sociolegal Model Making Project: www.amandaperrykessaris.org/modelmaking/.

emanating from a project".[57] These activities can be used at all stages of the research process.

III Bringing Design into the Space of the Māori Land Court

The expansion of the legal design field offers the opportunity to consider what we know about the relationship between the Māori Land Court and those who use it, and what that experience of use is like. Design concepts and practices can assist this. The application of those concepts and practices is not without its challenges, however. In this part of the chapter I describe some of the conceptual challenges I faced when bringing design into the space of the Māori Land Court and how I sought to address these by referring to the design literature.

I am not aware of design having been applied in an Indigenous legal context in the manner in which I am proposing to apply it to the Māori Land Court. While the "design thinking" approach lends itself to facilitated workshops, and I am aware of at least one example of this approach being applied to an Indigenous subject matter,[58] my thesis goes beyond design thinking and into a range of other theoretical and practical accounts of design. In doing so, I have needed to consider design's Anglocentric cultural heritage and the impact of bringing that heritage into an Indigenous legal space. This is one of the challenges that I discuss below, and I describe how I approached it at the end of this chapter.

A What is Being Designed?

One of my concerns in investigating design and how it might be applied to the Māori Land Court was whether the Māori Land Court *itself* can be the subject of design efforts, or whether legal design is really focused on those things that surround a court and that

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[57] At 209.

[58] The Winkler Institute for Dispute Resolution, based at Osgoode Hall Law School, conducts research on innovation in dispute resolution and access to justice. It describes having conducted design thinking workshops with Canadian Aboriginal youth to "design a better justice system": Winkler Institute for Dispute Resolution *Aboriginal Youth: Designing a Better Justice System* (September 2018).

help make it more accessible – for example, in the Māori Land Court context, new forms of digital technology that might guide people through the Māori land law system and the process of making a Court application. I found that much of the legal design literature is focused not on the design of courts per se, but on the design of things "around" the courts, that are intended to help make those courts more accessible. However, there are also people writing about legal design who have tested the application of legal design to sentencing commissions,[59] administrative tribunals,[60] and parts of the civil justice system.[61] From this, we can take it that the Māori Land Court itself can also be the focus of legal design.

1 The design artifact

A design concept that helped me navigate this issue, and which I argue ought to feature more prominently in legal design, is the concept of the "design artifact". The design artifact is the outcome of design activity. In design terms, an artifact is an outcome that is "artificial", a product of human agency, rather than "natural", a product of naturally occurring phenomena.[62] Therefore, we can say that the Māori Land Court is an artifact of design, and so are a number of other things in the Māori land system, such as the online database Māori Land Online, the forms people fill out to apply to the Court, the order that is issued at the end of the Court proceedings, and so on.

The artifact is an important concept for legal design, for at least two reasons. In English, the word "design" can be used to refer to the *activity* of design, which is connected with how people act and think in a "designerly" ways. It can also be used to refer to the *outcome* of that activity, as in, "that which is realized in the world".[63] Sometimes, those

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[59] Ball "Redesigning Sentencing", above n 3.
[60] Sossin "Designing Administrative Justice", above n 2.
[61] See for example Hagan "A Human-Centered Design Approach to Access to Justice", above n 19 and Shannon Salter and Darin Thompson "Public-Centred Civil Justice Redesign: A case study of the British Columbia Civil Resolution Tribunal" (2016–2017) 3 McGill Journal of Dispute Resolution 113.
[62] Krippendorff *The semantic turn*, above n 30 at 210.
[63] Liz Sanders and Pieter Jan Stappers "From Designing to Co-Designing to Collective Dreaming: Three Slices in Time" *ACM Interactions* (New York, Nov–Dec 2014) 24 at 26.

writing about law and design switch between these two meanings of design in ways that can be confusing. The concept of a design artifact clarifies that the focus is on the outcome of design activity.[64]

Second, the concept of the artifact helps legal designers explain what it is that makes design distinctive. In design, artifacts are those things that "do not yet exist and could not come about naturally".[65] This makes it clear that the essential task of the designer is to skillfully apply human agency to bring about something (an artifact) that would never arise by way of a natural phenomenon. These artifacts of design can be both tangible and intangible (experiences, services, spaces, even discourses).[66]

Therefore, design is not just about following a process, as in the design thinking methodology. It is a way of thinking about systems, processes, entities, experiences and so on as forming "part of the artificiality of the world",[67] and therefore within our control to change, rethink, and redesign. Whereas science and scientists are concerned with what *is*, and develop theories and propositions to explain existing observable phenomena, design and designers are "concerned less with what has happened, what already exists, or what can be predicted by extrapolations from the past than with *what can be done*".[68] Design methods and practices are distinguished by the ways in which they seek to introduce variability in order to achieve innovation and make change happen.[69]

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[64] For example, many legal designers have written about how important it is to design legal technology in a human-centred way, or how new legal technology can help people who cannot afford lawyers: see for example Lupica, Franklin and Friedman "The Apps for Justice Project: Employing Design Thinking to Narrow the Access to Justice Gap", above n 5. These are about the artifacts of design – what things can be produced in the world to make our legal and court systems more accessible? Many legal designers *also* articulate much broader visions of what lawyers can achieve by "thinking like designers". This is about the activity of design – putting to one side our concern with a particular artifact, what change might we achieve in the world by thinking like designers? This is a broader conversation about the potential for design to change the way that we think about and do law in a more fundamental way.
[65] Krippendorff *The semantic turn*, above n 30 at 210.
[66] At 5–13.
[67] At 2.
[68] At 28 (emphasis added).
[69] At 210.

2 Some examples of design artifacts within the Māori land law system

The Māori Land Court itself can be an "artifact of design". It is not a natural phenomenon. It forms part of the artificiality of the world, and emerged as a result of the exercise of human agency across a number of different legal and policy spaces, in an incremental way, and over a long period of time. Therefore, we can apply our designerly attention to the Māori Land Court, and think about what we might change about that artifact, and why.

In addition, we can bring a design perspective to the many other artifacts in the Court system, and consider whether these various artifacts have been designed in a way that makes the Māori land law system more (or less) accessible to landowners.

For example, we might consider the fact that much of the guidance on the Māori Land Court's website is located within PDF files, which must be downloaded before they can be viewed. This departs from government-issued guidance on digital accessibility, which suggests "writing content specifically for the web instead of publishing documents designed for print".[70] We might turn our designerly attention to the legislation, and in that respect might observe that the provisions under which the Māori Land Court makes its decisions on land applications are spread throughout the different parts of TTWMA. The now-withdrawn Te Ture Whenua Māori Reform Bill would have collected the Court's various decision-making powers into one provision,[71] but there is no proposal to do so in the current TTWMB.[72] We might consider the design of the Court's National Pānui, which is published on the website as a PDF. The current Pānui is 56 pages long,[73] and could immediately be made more useable by the addition of internal links that allow users to quickly navigate to different sections.

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[70] See www.digital.govt.nz under "Design and UX".
[71] Te Ture Whenua Māori Bill 2016 (126–2), cl 300.
[72] Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179–2).
[73] Accessible at www.maorilandcourt.govt.nz/about-mlc/publications/national-panui.

B Who Are We Designing For?

Having identified some of the artifacts in and around the Māori Land Court to which we could bring a designerly perspective, the next question is who, within that system, we are designing for. This issue has a close connection with the relationship between landowners and the Māori Land Court, which is one of the primary concerns of this thesis, and was discussed in chapter 2.

1 The idea of the "user"

Most discussions of legal design that I have referred to so far in this chapter are concerned with human-centred or user-centred applications of design. The concept of the "user" is a central figure within design generally. In legal design, the "user" is the term often used to refer to people who are approaching the court, or the legal system, with a legal need. For example, legal designers argue that the civil justice system ought to be "user-centred" (or "human-centred").[74] This will help make it more accessible to those who need to use it.

I found two challenges when I connected the concept of the user, as it has been developed in legal design to date, to the Māori Land Court. The first has to do with concerns that are sometimes expressed about focusing on "court users" (litigants and applicants) to the exclusion of other important relationships in and around a court. Is there a risk that in doing so, we fail to account for the broader constitutional role that courts play in our society?[75]

The second concern has to do with the unique "use" relationships that we see within the Māori Land Court. As has already been explained in chapter 2, a vast number of landowners are directly impacted by that Court's decisions on any particular application,

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[74] See for example Hagan "A Human-Centered Design Approach to Access to Justice", above n 19.
[75] See for example concerns of this nature expressed about conceiving of courts as service providers: John Thomas "The centrality of justice: its contribution to society, and its delivery" (2017) 13 Judicial Review 115. See also Bridgette Toy-Cronin "Justice Customers: Consumer Language in New Zealand Justice" (2019) 15 Policy Quarterly 57.

but are not "Court users" in the traditional sense. They have not brought the Court application, and they might not be involved in the Court hearing at all. How, then, to bring the designerly concept of the "user" into the Māori Land Court, in a way that can recognise this?

2 Moving from "use" to "meaning"

Klaus Krippendorff's semantic theory of design is useful in this regard.[76] Krippendorff's theory of design moves beyond the concept of "use" and the "user", which is likely to be a limiting concept in legal design and juristic lawyering. Instead, it focuses on the web of stakeholder relationships that exist within a design artifact. It acknowledges that an artifact can have different meanings to different groups of stakeholders, because stakeholders "create different meanings for what seems from any one perspective to be the same thing".[77] They occupy different "semantic layers" of an artifact.[78] In semantic design, the designer's role is to work with the stakeholders of a design in order to understand how they use or interact with an artifact, or how they hope to do so,[79] and endeavour to make a design artifact that makes the "maximum sense possible" to those who have a stake in it.[80]

Semantic design theory may put legal designers in a better position to grapple with the various interests that arise, and must be addressed, when considering the accessibility of courts and court systems. We might say that litigants or applicants are in one semantic layer of a court; judges are in another; lawyers are in another; policy officials are in another; and so on. We can identify all the meanings that a court holds to its various stakeholders, and then make an assessment as to what meanings should predominate and when.

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[76] Krippendorff *The semantic turn*, above n 30.
[77] At 49.
[78] At 129.
[79] Krippendorff "Design Research, an Oxymoron?", above n 29 at 70–71 and Krippendorff *The semantic turn*, above n 30 at 63.
[80] Krippendorff *The semantic turn*, above n 30 at 25–26.

In the Māori Land Court, we can theorise about, for example, the meaning of the Court to landowners, both those who use it and those who do not. As I make clear in the section directly below, those meanings provide the focus of this thesis. We can also think about the meaning of the Court as a policy instrument, which has been used by the Crown over many decades to achieve particular policy objectives for Māori land.[81] We can think about the meaning of the Court to Māori as a partner to Te Tiriti o Waitangi/the Treaty of Waitangi,[82] and the ways in which Māori have responded or reacted to the Crown's policy objectives for Māori land, or have proactively pushed for a different kind of change.[83]

3 Focusing on landowners

I argue that our designerly efforts with respect to the Māori Land Court ought to be directed towards ensuring that the Court, and its associated artifacts, are meaningful to landowners. If the Court is not meaningful to landowners – if they cannot "see the point" of it or it does not "make sense" to them – then they are unlikely to engage with it. The Court's function, in our contemporary legislative and policy framework for Māori land, will be undermined. Legal titles will become outdated, recording the names of owners who have passed away. Opportunities to enable the optimal use of Māori land will not be capitalised on. Usages of land that have not been legally sanctioned by the Court may emerge and impact detrimentally on landowners. The opportunity to establish or reinforce cultural connections to land through the Māori Land Court process will be lost.

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[81] For an overview and examples see Richard Boast "The Evolution of Māori Land Law 1862–1993" in Richard Boast and others *Māori Land Law* (2 ed, LexisNexis, Wellington, 2004) 65 at 117–119.

[82] Te Tiriti/the Treaty forms the foundation of the relationship between the Crown and Māori. That relationship, and the principles that derive from te Tiriti/the Treaty, is the subject of a body of jurisprudence that includes academic texts (see for example Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016)), reports of the Waitangi Tribunal, and case law (see for example *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641). The Waitangi Tribunal articulated the application of Treaty principles to Te Ture Whenua Māori Bill in Waitangi Tribunal *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act* (Wai 2478, 2016) ch 4. See also Treaty of Waitangi Act 1975, s 6.

[83] For an overview and examples see Waitangi Tribunal *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act*, above n 82 at ch 2.

Therefore, I argue, discerning and maximising the Court's meaningfulness to landowners ought to be a priority in a design-based approach to the Court.

4 Locating meaning in use, and in language

I have suggested that the Māori Land Court must be "meaningful" to landowners, but what does this mean exactly? The notion that design artifacts hold meaning, and that this meaning can be interpreted and maximised, comes from Klaus Krippendorff's semantic theory of design.[84]

A design artifact that is "meaningful in use" is, among other things, *cognisable* to those who use it. Stakeholders must be able to apply their own conceptual categories to recognise the artifact, drawing on prior experiences with similar artifacts, their common sense, and prevailing conventions.[85] It enables *exploration* – people are able to find out how the artifact can be engaged with, and what can and cannot be done with it.[86] A meaningful artifact also supports *reliance*.[87] Reliance happens when we know how an artifact works and we can turn our attention to other things while the artifact is in use. Reliance mode actually sees meaning recede, because we no longer need to attend to the meaning of the artifact. This ought to be the primary aim of design: "to make interactions meaningful to start out with but then able to disappear in favour of other concerns".[88]

Design artifacts can also be "meaningful in language".[89] This is a critical concept in the semantic theory of design because it allows for artifacts to have significance to those who are "bystanders" to use – such as, for example, landowners who are not engaged with the Court, but are affected by its decisions. Meaning in language can be discerned from the discourses that grow up around an artifact,[90] from the narratives that stakeholders tell

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[84] Krippendorff *The semantic turn*, above n 30.
[85] At 91.
[86] At 104.
[87] At 132.
[88] At 133.
[89] At 147 and following.
[90] At 23.

each other about it,[91] and from the identities they construct around it.[92] The concept of meaning in language recognises that the use of an artifact is only a small part of the meaning the artifact will carry in our lives: "Artifacts that are being talked about enter the language of particular communities, and become social or cultural artifacts, often well before they are actually used by individuals."[93]

I return to these semantic design concepts within chapter 5 and chapter 7, where I draw on them to discuss some of my research findings.

C The Need to be Critical and Reflexive in the Legal Design Field

Throughout this thesis, it has been necessary to be reflexive and critical about what contribution design can make from a socio-legal perspective, particularly when contrasted with rich theoretical approaches offered by the social sciences.

For example, a number of accounts of design, and especially design thinking, refer to the desirability of developing "empathy" with the end-users of a design artifact.[94] Developing empathy is presented as a means of accessing the lived experience of the end-user. Louise St Pierre describes what she calls "empathic immersion": "go out there (into the real world) and find out things for yourself, feel the other point of view, live it, experience it, see what it feels like".[95] Legal designers may draw on this to encourage an empathy-driven approach towards people who access the courts. However, as Kimbell has pointed out, unlike social scientists, designers may not be "trained to question what theoretical, political, or other commitments they bring to their work".[96] Baker points out that, in the commercial space at least, empathy is simply the means to the market, and no longer

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[91] At 169.
[92] At 162 and following.
[93] At 147.
[94] See for example Deana McDonagh and Joyce Thomas "Design + Empathy = Intuitive Design Outcomes" (2001) 14 The Design Journal 147.
[95] Louise St Pierre "Research and design collaboration: A case study" in Jorge Frascara (ed) *Design and the Social Sciences: Making Connections* (Taylor & Francis, London, 2002) 135 at 135.
[96] Kimbell "Rethinking Design Thinking: Part I", above n 43 at 295.

needed once the value proposition of the design has been discovered and exploited.[97] Legal designers should be aware that the social sciences might provide a richer source of reflexive literature about accessing and understanding the lived experiences of those who are impacted by the artifacts of law.

Similarly, legal designers might consider their approach to "personas", which is another concept seen within design.[98] Designers may construct a set of personas, a collection of imagined possible users of a design, which can be used to reflect on how a design might be used by various types of users. Personas are the construction of the designer, and therefore are likely to reflect the designer's own expectations of how people would behave.[99] They will also, therefore, reflect the designer's own assumptions and biases. Legal designers who have a commitment to critical and reflexive legal design will need to be aware of this, and approach personas accordingly.

As explored in the next part of this chapter, this critical reflexivity must also extend to legal designers' awareness of the cultural heritage of design. Is it appropriate to apply design, with its traditionally Western heritage, to an institution like the Māori Land Court, which is focused on serving Māori people and deals with Māori concerns?

IV Is Design Appropriate for an Institution Focused on Māori People and Māori Concerns?

Critical design theorists have pointed out that the dominant global conception of design is Anglocentric/Eurocentric. This conception of design has its roots within industrialisation and the emergence of modernist and neo-liberal philosophies that emphasise objectivity, rationality and consumerism. These philosophies are responsible for many of the power structures that exclude and marginalise certain sectors of society. To the extent that

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[97] Sarah Elsie Baker "Post-work Futures and Full Automation: Towards a Feminist Design" (2018) 2 Open Cultural Studies 540 at 543.
[98] Lene Nielsen "Editorial: Design Personas – New Ways, New Contexts" (2018) 4 Persona Studies 1.
[99] Krippendorff *The semantic turn*, above n 30 at 135.

design remains allied with those philosophies, it participates in the spread of those ideals across the globe.[100]

To respond to this concern, I explored whether we can identify a distinctively "Māori" form of design, and whether Māori designers are carving out a Māori design space, separate from mainstream design.[101]

There are numerous Māori designers in Aotearoa/New Zealand who are talking about and doing design in a Māori way, particularly within environmental and urban design.[102] Rebecca Kiddle has done work on a collaborative design project to "decolonise the city".[103] Jade Kake has called for culturally informed design guidance in the design of supportive housing facilities for Māori.[104] Their work also demonstrates there is a rich set of Māori concepts and practices to draw on. Kake's work in housing design, for instance, draws from papakainga to propose a Māori community-based housing model.[105] Troy Brockbank uses the Māori concept of mauri to measure the environmental impact of wastewater design.[106]

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[100] See for example Ahmed Ansari "What a Decolonisation of Design Involves: Two Programmes for Emancipation" (12 April 2018) Decolonising Design <www.decolonisingdesign.com>; the Design Justice Network (www.designjustice.org); Depatriarchise Design (www.depatriarchisedesign.com); Baker "Post-work Futures and Full Automation: Towards a Feminist Design", above n 97; Shaowen Bardzell "Utopias of Participation: Feminism, Design, and the Futures" (2018) 25 ACM Transactions on Computer-Human Interaction 1; and Norman Sheehan "Indigenous Knowledge and Respectful Design: An Evidence–Based Approach" (2011) 27 Design Issues 68.

[101] This might be described as a "Kaupapa Māori design space". Kaupapa Māori can refer to the creation of a "space" for discussion of Māori practices, values, and methodologies, free from Pākeha or Western values and concerns. See Leonie Pihama, Fiona Cram and Sheila Walker "Creating Methodological Space: A Literature Review of Kaupapa Māori Research" (2002) 26 Canadian Journal of Native Education 30.

[102] See for example Keriata Stuart and Michelle Thompson-Fawcett (eds) *Tāone Tupu Ora: Indigenous Knowledge and Sustainable Urban Design* (Steele Roberts, Wellington, 2010). See also Ngā Aho: Network of Māori Design Professionals (www.ngaahomaori.nz) and Te Aranga Māori Cultural Landscape Strategy (2 ed, 28 April 2008).

[103] Imagining Decolonised Cities (www.idcities.co.nz/index.php).

[104] Jade Kake "Towards the Design of Culturally-Based Supportive Housing Facilities" (2017) 30 Parity 20.

[105] At 21.

[106] Troy Brockbank "Just add Mauri: Water-sensitive design meets tikanga Maori" *Local Government Magazine* (online ed, December 2017) 31. Brockbank's approach is adapted from Te Kipa Kepa Brian Morgan's use of mauri to measure the environmental impact of the MV Rena disaster: Te Kipa Kepa Brian Morgan and Tumanako Ngawhika Fa'aui "Empowering indigenous voices in disaster response: Applying

In 2012, the University of Otago and the Otago Polytechnic[107] collaborated on a research project exploring how Western ideas of design may differ from Māori ideas of design. The study's findings suggest that a distinctively Māori form of design might draw on or emphasise Māori concepts of wairua, mauri/tinana, and whakapapa.

The term wairua can be used to denote both the concept of creativity and the health and wellbeing of a Māori community.[108] The creativity expressed within design must be put to work in service of the health and wellbeing of the community. For example, raranga (weaving) and whakairo (carving) are creative practices that record stories and histories for the benefit of the community.[109] It follows that Māori design is design that benefits the community.

Participants in the Otago research project spoke of the importance of the spiritual dimension of the design material (its mauri). Designers must be "in touch with the spiritual value of that material".[110] This is as important, if not more important, than the material's physical aspect. The designer is not at the centre of the process, and nor is the "user" – the mauri of the design material is at the centre.[111] Māori design is "mauri-centred". It engages both the spiritual and the physical, and both dimensions must be expressed and accounted for in the final designed artifact.

The research report also discusses what one participant said about whakapapa and whakapapa narratives and how this connects with design's general preoccupation with new ways of doing things and new ideas. Design ought to connect with the histories that

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the Mauri Model to New Zealand's worst environmental maritime disaster" (2018) 268 European Journal of Operational Research 984.

[107] Caroline McCaw, Sarah Wakes, and Tracey Gardner *Māori Design and Tertiary Education* (Otago Polytechnic and University of Otago, March 2012).

[108] At 16.

[109] At 16.

[110] At 18.

[111] At 18.

are recounted in Māori narratives and recitations of whakapapa, and *extend* these in a way that is meaningful to one's whānau, hapū, and iwi:[112]

> … design has got to have meaning and application to your *whānau*, *hapu* and *iwi*. If it doesn't have meaning then it makes no sense. People wanting to break the mould, i.e. Māori trying to push the boundary, you have to be very clear in your mind about the bigger picture. The narratives are crucial and timeless… how can we think about those histories and extend them beyond our time?

These practices and accounts of design, which come from Māori designers who are drawing on Māori concepts, suggest that although design has a Western heritage, it can be applied in a way that makes it appropriate for a Māori context. These are the accounts of design that should be drawn on within Indigenous legal design in Aotearoa/New Zealand.

V Conclusion

In this chapter I have explored some of the conceptual challenges that arise in bringing together legal design and the Māori Land Court. I navigated through these challenges by referencing various accounts of design.

There are many design artifacts within the Māori Land system that we could turn our "designerly" attention towards, including the Court itself. While "use" is a central concept within legal design, especially in its application to courts, we ought to think about the *meaning* of the Court, both to landowners who use it, and those who do not. Semantic design theory helps us to locate meaning in the way the Court is used ("meaning in use") and meaning the way the Court is talked about and learned about through discourses and narratives ("meaning in language"). I suggest that the meaning we need to put more focus on, in ongoing and future Court reform, is the meaning the Court holds to landowners – as opposed to, say, the meaning the Court holds to the Crown.

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[112] At 24.

While there is no single "way" of doing design, design is, essentially, about "what could be" – that is, it is about moving beyond what we know to be possible in *current* conditions, and bringing about new artifacts (whether tangible or intangible) to move into more desirable, envisioned futures. Finally, and perhaps most critically, there are Māori approaches to design, which may be appropriate for application to an institution like the Māori Land Court, which primarily serves Māori people.

In the next part of this thesis (encompassing chapters 4 to 7) I describe another way in which I have brought legal design to the Māori Land Court as an Indigenous legal space. I conducted a small-scale qualitative research study with landowners who have recently used the Māori Land Court to succeed to land. The objective of the research was to explore and better understand the experiences of using the Court, and to see whether design concepts or ideas resonate with that experience. Ultimately, I looked for ways to improve the use experience of the Court, and potentially also engage and attract more landowners towards the Māori Land Court.

When setting out to conduct this thesis, I knew I wanted to create a qualitative research approach that honoured Kaupapa Māori research, as a form of research that is by, for, and with Māori.[113] I have sought to achieve that goal with my research methodology, which is a make-based form of research that draws both on design and on a Māori view of knowledge-building. I explain the methodology in the next chapter.

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[113] Shayne Walker, Anaru Eketone and Anita Gibbs "An exploration of kaupapa Maori research, its principles, processes and applications" (2006) 9 Int J Social Research Methodology 331 at 333, citing LT Smith "Kaupapa Maori methodology: our power to define ourselves" (1999, unpublished paper presented to the University of British Columbia).

Chapter 4

Exploring the Experience of Using the Māori Land Court – A Make-Based Research Approach

So far in this thesis I have explored some design concepts and considered, in a preliminary way, their possible application to the Māori Land Court. In this next part of the thesis (chapters 4 to 7) I turn to the fieldwork I undertook to explore the application of design research (integrated with Kaupapa Māori research) in the setting of the Māori Land Court, and I analyse the results of that research.

The research methodology involved asking participants to create collages and respond to exercises pertaining to their interactions with the Court, and then describe to me what they had made. This can be described as a form of "make-based" research. This is a design-led approach to research, in that it is intended to "expand the design space"[1] relating to the Māori Land Court. Make-based methods also allow participants greater creative control over their research responses, and potentially, greater control over the direction of the research inquiry, in a way that may be consonant with a Kaupapa Māori epistemology.

The objective of the research was to gain insights into owners' experience of succeeding to land through the Court. A succession application may be the first contact a person ever has with the Māori Land Court system, and I hoped that by focusing on succession applications, I might collect useful data about people's initial interactions with the Court.

In this chapter I describe the research method and methodology and its connection with both design and Kaupapa Māori research. I explain how I conducted the research, including how I addressed ethical issues that arose during the research.

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[1] Klaus Krippendorff *The semantic turn: A new foundation for design* (CRC Press, Florida, 2006) at 230.

I Method and Methodology

I used a two-stage method in which I asked participants in my research study to complete creative exercises in a workbook, and then meet with me to discuss what they had made. This method is a form of "make-based" research, which draws on Sanders' and Stappers' theory and practice of generative design research, and is a form of research that happens early in a design process.[2] In generative design research people are asked to *make* something that speaks to their experiences, hopes, or dreams on a particular topic or in relation to a particular artifact. The thing created could be a collage, a picture, a diagram, or even a mock-up of a physical experience or interaction.[3] Participants may be asked to describe what they have made, and may take part in a facilitated session where they discuss their creations with others. Through this process of making, and describing what they have made, participants may reveal previously unexpressed needs, desires, and imaginings for the future.[4] Designers can use these as a "bridge" to new design ideas that add value to participants' lives.[5]

Make-based methods, as will be discussed in this chapter, are essentially concerned with eliciting a deeper understanding of a person's experience. In this sense, make-based research can be located within the interpretivist tradition – the methods seek to "stay close to how social actors understand their own activities".[6] They privilege participants' own interpretations, both of the subject matter at issue and the creative responses that participants produce during the research.

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[2] Elizabeth BN Sanders and Pieter Jan Stappers *Convivial Toolbox: Generative Research for the Front End of Design* (BIS Publishers, Amsterdam, 2012) [*Convivial Toolbox*]; Elizabeth BN Sanders "Postdesign and Participatory Culture" (paper presented to Useful and Critical: The Position of Research in Design, Tuusula, September 1999); Elizabeth BN Sanders and Pieter Jan Stappers "Probes, toolkits and Prototypes: three approaches to making in codesigning" (2014) 10 CoDesign 5.
[3] See various examples given throughout Sanders and Stappers *Convivial Toolbox*, above n 2. See also Froukje Sleeswijk Visser and others "Contextmapping: experiences from practice" (2005) 1 CoDesign 119.
[4] Elizabeth BN Sanders "From user-centred to participatory design approaches" in Jorge Frascara (ed) *Design and the Social Sciences: Making Connections* (Taylor & Francis, London, 2002) 1 at 3.
[5] Sanders and Stappers *Convivial Toolbox*, above n 2 at 271.
[6] Max Travers *Qualitative Research Through Case Studies* (Sage Publications, London, 2001) at 15.

The research proposal was submitted to the University of Otago Human Ethics Committee, which approved the proposal in July 2019.[7] Approval was subject to making a minor amendment to the wording of the research advertisement. The research proposal was also submitted to the University of Otago Ngāi Tahu Māori Research Consultation Committee, with an explanation of who was involved in the research and how Māori might be affected by it. The Research Consultation Committee considered the proposal and commended the research approach.[8]

Research participants were recruited through advertisements placed online, principally on Facebook. My thesis supervisors connected me with a community law centre that specialises in providing free legal advice to Māori clients. Staff at the centre helped me recruit participants by advertising my research on the centre's website and Facebook page. I chose not to limit my research to a particular Court district, in order to avoid limiting the pool of potential research participants.

My inclusion criterion for participation was people who had commenced or completed a succession application in the Māori Land Court, preferably within the last two years. I focused on successions because a succession application may represent the "gateway" application to the Māori Land Court. In the event, for three participants, the succession was the only application they had made to the Court, while for the remaining four participants, their succession application was one of a number of Court interactions that they had had over the years.[9] These latter participants had, for instance, brought partition applications, sought occupation orders, or sought to vest their land interests in descendants or relatives. They shared their holistic experiences of the Court, not just of the Court's succession jurisdiction. Therefore, the results of my research are not limited to the experience of the Court's succession jurisdiction, although that was the basis on which I recruited research participants.

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[7] Letter from Human Ethics Committee to Dr Bridgette Toy-Cronin (18 July 2019), on file with the author.
[8] Letter from Ngāi Tahu Research Consultation Committee to Dr Bridgette Toy-Cronin (9 July 2019), on file with the author.
[9] I had an eighth research participant who completed the workbook but did not take part in the interview stage of the research, and I was not able to confirm the extent of her experience in the Court.

I provided each participant with a workbook of creative exercises for them to complete in their own time.[10] They then met with me for an interview to discuss the exercises and their responses. In total, eight people were involved in my research, although only seven took part in both stages of the research method (completion of workbook and interview). The eighth participant completed a workbook, but was not able to meet with me for an interview.[11] At the conclusion of data collection, I had eight completed workbooks and seven interview transcripts. Within this data, I looked for insights into the participants' experiences in and around the Court, and whether design concepts resonated with those experiences.

A About the Research Participants

The research participants lived all across the country, from the top of the North Island to the deep south. Their Māori land interests were also spread fairly widely across the country. The land interests of four participants were all located in the South Island, with one at the top of the South Island and the remaining three at the bottom of the South Island. All of these areas lie within the Court district of Te Waipounamu.[12] The remaining three participants' land interests fell within the eastern side of the North Island, within the Court districts of Tairāwhiti, Takitimu, Waiariki, and Aotea.[13]

In sum, collectively the participants in my research had interacted, to some extent, with a fairly large number of Court offices across the country, as a result of the spread of their land interests and where they lived. In addition, one participant was travelling around the country making applications on others' behalf, so had experience with a number of different Court offices in the relevant Court districts.

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[10] See appendix A.
[11] I describe how I dealt with this eighth participant's workbook data at page 78.
[12] See appendix B for a map of the Court's current district boundaries.
[13] See appendix B.

B Make-Based Research Methods – Theory and Foundations

I have described above how make-based research methods are used as part of generative design research, to "expand the space" for possible designs. Make-based research methods are also used in the social sciences.[14] Here, they are used not to generate design ideas, but to add to the body of knowledge and research on a particular subject matter. As in generative design research, a vast range of creations are possible, including visual things like collages and pictures,[15] or embodied things like plays or sketches.[16] Gauntlett describes this kind of research as "an approach which allows participants to spend *time* applying their playful or creative *attention* to the act of *making* something symbolic or metaphorical and then *reflecting* on it".[17] Through this kind of research, we can draw useful insights that might not be obtained through interview techniques alone.[18]

Within the theory of generative design research, make-based methods are intended to elicit tacit and latent insights from research participants, and information that might not otherwise be expressed through an interview or ethnographic observation. Research participants are able to make a product, or represent a scenario or an experience, that does not currently exist, but that they would like to exist (or, perhaps, would like to avoid). The created item holds meaning not only about current experience, but also one's hopes and dreams for the future. In this way make-based methods are "able to support the jump to imagining the future on the basis of deeper interpretations of the past".[19]

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[14] See for example Helen Kara *Creative Research Methods in the Social Sciences: A Practical Guide* (Bristol University Press, 2015).
[15] See for example Dawn Mannay "Making the familiar strange: can visual research methods render the familiar setting more perceptible?" (2010) 10 Qualitative Research 91.
[16] See for example Brad Coombes "Kaupapa Māori Research as Participatory Enquiry: Where's the Action?" in Te Kawehau Hoskins and Alison Jones *Critical Conversations in Kaupapa Māori* (Huia Publishers, Wellington, 2017) ["Where's the Action?"] at 29.
[17] David Gauntlett *Creative Explorations: New approaches to identities and audiences* (Routledge, London, 2007) [*Creative Explorations*] at 3 (emphasis in the original). Gauntlett describes asking people to construct metaphorical identities out of Lego in order to investigate how people present themselves to the world and connect with others.
[18] At 90.
[19] Sanders and Stappers *Convivial Toolbox*, above n 2 at 75.

1 Accessing tacit knowledge

Sanders and Stappers argue that one of the strengths of make-based research is its ability to express information that a participant is not able to communicate verbally. This may be because those things do not lend themselves to verbal expression, or because they are obscured by our inability to "attend" to them.[20] Thus, Sanders and Stappers connect make-based research with Polanyi's theory that "we can know more than we can tell".[21] Asking someone to make something can make that knowledge accessible, where asking the person a question or observing their behavior would not.

Gauntlett connects his theory of make-based research (which he describes as "the new creative methods")[22] to activity in the brain. He argues that much of our brain's activity remains hidden to us, and when researchers ask people about a topic, people are likely to provide an incomplete narrative.[23] Because creative methods "invite people to reach down into the 'engine' and pull up a narrative in a different way",[24] these methods have the potential to provide a fuller account of the subjectivities of human experience.

2 Everyday creativity

Both Sanders and Stappers, and Gauntlett, draw on a theory of "everyday creativity" – that is, everyone is creative and can be supported to create, so make-based research methods can be used with everyone.[25] Sanders and Stappers argue that a person can be creative in the simplest and most straightforward ways, simply by "doing". More advanced forms of creativity are *adapting*, *making*, and *creating*.[26] Because people move

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[20] At 52 and 64–67. See also Sanders "From user-centred to participatory design approaches", above n 4 at 3, citing Michael Polanyi *The Tacit Dimension* (Doubleday, New York, 1966).
[21] Michael Polanyi *The Tacit Dimension* (Doubleday, New York, 1966) at 4.
[22] Gauntlett *Creative Explorations*, above n 17 at 3.
[23] At 71–73.
[24] At 90.
[25] At 24–25. See also David Gauntlett *Making is Connecting: The social meaning of creativity, from DIY and knitting to YouTube and Web 2.0* (Polity Press, Cambridge, 2011) at 13–17.
[26] Sanders and Stappers give the example of someone who sews their own clothes (making or creating) and is then inspired to put existing items in their wardrobe together in different ways (adapting): Sanders and Stappers *Convivial Toolbox*, above n 2 at 40.

through layers of creativity from basic to more advanced, people can be supported in their creativity. More support or "scaffolding" may be needed for a person who is less accustomed to expressing him or herself creatively. A "clean slate" may be better for someone who wishes to express him or herself in a highly creative and unguided way.[27] Make-based research exercises can therefore be designed in a way that is calibrated to the degree of support a person needs to move through the layers of creativity.

Social scientists who use visual research methods have emphasised that the researcher must prioritise the participant's own interpretation of what they have made. In Dawn Mannay's collage-based study of the experience of British mothers and daughters on a housing estate, she draws on auteur theory to support the notion that images have no inherent meaning.[28] The sense made of them depends on circumstances in which they are viewed and factors unique to the viewer. Therefore, participants ought to be asked what their images represent, rather than the researcher relying on his or her own interpretation.[29] In my research, participants were told they could add writing or explanation to their collages or images if they wished, in addition to describing their creative responses in the interview.

3 Alignment with a Kaupapa Māori approach to knowledge-building

Kaupapa Māori research is research conducted according to a set of principles and processes that are grounded within a Māori worldview.[30] It has the aim of benefiting

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[27] At 40.

[28] Mannay "Making the familiar strange: can visual research methods render the familiar setting more perceptible?", above n 15 at 100. See also Gillian Rose *Visual Methodologies: An Introduction to Researching with Visual Materials* (Sage Publications, London, 2016) at 24–25.

[29] See also David Gauntlett "Using Creative Visual Research Methods to Understand Media Audiences" *MedienPädagogik* (March 2005) at 8–11 and Louisa Allen "'Picture this': using photo-methods in research on sexualities and schooling" (2011) 11 Qualitative Research 487 at 491.

[30] See for example Linda Tuhiwai Smith *Decolonizing Methodologies* (2 ed, University of Otago Press, Dunedin, 2012); Jessica Hutchings and Jenny Lee-Morgan (eds) *Decolonisation in Aotearoa: Education, Research and Practice* (NZCER Press, Wellington, 2016); and Te Kawehau Hoskins and Alison Jones (eds) *Critical Conversations in Kaupapa Māori* (Huia Publishers, Wellington, 2017).

Māori and advancing tino rangatiratanga (Māori control, autonomy, self-determination). It has been described as research that is by, for, and with Māori.[31]

In designing the research approach, I considered the epistemological nature of Kaupapa Māori research and explored the connections between this and make-based forms of research.

Carl Te Hira Mika has discussed the epistemological qualities of Kaupapa Māori research. Te Hira Mika positions Kaupapa Māori research as research that is guided by a Māori metaphysics, and he says that Māori ways of thinking about the world ought to steer the entire research project.[32] For example, Kaupapa Māori research ought to account for the fact that in Māori metaphysics the material ground and the grounds for thought are inseparable. We exist and are immersed within Papatūānuku (Earth Mother), so cannot use her as a separate foundation from which to perceive the world. We can theorise about certain elements of Papatūānuku, but our theories remain contested and incomplete in terms of how that element reacts with and relates to all others.[33]

One of the specific qualities of research that Te Hira Mika critiques, in terms of its contrast to Māori metaphysics, is the assumption within research that we can define things *in advance* in order to find out about them.[34] Research tends to impose pre-existing conceptual categories on the world, and then uses these as the jumping-off point to build further knowledge. But what if those categories do not make sense to research participants?

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[31] Shayne Walker, Anaru Eketone and Anita Gibbs "An exploration of kaupapa Maori research, its principles, processes and applications" (2006) 9 Int J Social Research Methodology 331 at 333, citing LT Smith "Kaupapa Maori methodology: our power to define ourselves" (1999, unpublished paper presented to the University of British Columbia).
[32] Carl Te Hira Mika "The Uncertain Kaupapa of Kaupapa Māori" in Te Kawehau Hoskins and Alison Jones (eds) *Critical Conversations in Kaupapa Māori* (Huia Publishers, Wellington, 2017) 119.
[33] At 128.
[34] At 125.

David Gauntlett makes this point, not in a Māori context, but to support his use of creative research methods. Creative or make-based research responds to the fact that:[35]

> researchers expect people to explain immediately, in words, things which are difficult to explain immediately in words; and that researchers often start with their own sense of a topic or problem (media, prejudice, economics or whatever) and then are frustrated when their pesky subjects do not seem to think that this subject-matter is as important as the researchers do.

Asking people to make things can respond to this idea. It is up to participants to decide what to make, in a way that may reflect their own conceptual frameworks. Make-based methods may, therefore, allow research participants to shape the conceptual categories that will direct the research inquiry.[36]

They may also give participants more control. Rather than being limited to respond immediately to an interview question, for example, in make-based methods participants create artifacts of their experience, and exercise control over the time and space in which they do so. Gauntlett makes this point in the following way:[37]

> Traditionally, a researcher merely encounters ‹subjects› and takes ‹data› away, without giving anything back to the people involved. Participants are not involved in the process, are not consulted about the style or content of the process – apart from in the moment(s) in which they supply data – and do not usually get an opportunity to shape the agenda of the research. The process usually involves little real interaction, or dialogue. The creative/visual methods do not inherently or necessarily avoid this, but they provide more opportunities for participants to shape the content of the enquiry, to bring in issues and questions which the researcher may not have considered, and to express themselves outside of boundaries set by the researcher.

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[35] See Gauntlett *Creative Explorations*, above n 17 at 3.
[36] At 3.
[37] Gauntlett “Using Creative Visual Research Methods to Understand Media Audiences”, above n 29 at 13.

Make-based methods also have a connection with participatory action research and, in turn, Kaupapa Māori. Participatory action research is a form of research that seeks to equip and empower historically marginalised or disadvantaged communities.[38] It is an approach to research that builds on Paolo Freire's theory of conscientisation, which is the process through which Indigenous or colonised persons become aware of power relationships to which they are subject, and take action to change the way they think and do things.[39] Kaupapa Māori research has a Freirian heritage and a commonality with participatory action research.[40] Therefore, to the extent that make-based methods may present as a form of participatory action research, they have a connection with Kaupapa Māori research, which is worth exploring.

Brad Coombes has argued in favour of generative research practices as a way of bringing participatory action to the fore in Kaupapa Māori research.[41] Coombes is especially interested in performance-based techniques, but supports any kind of generative research activity that consists of "examining the life world while 'doing' together".[42] Using generative (or make-based) techniques may, therefore, underscore the participatory and transformative aims of Kaupapa Māori research.[43] In chapter 8, I return to these ideas in my evaluation of the use of make-based methods within my research.

C Research Materials

Drawing on the theory of make-based research, I developed a workbook for participants.[44] The workbook was made up of five exercises, with participants asked to complete one exercise per day over five days. Each exercise was connected in some way to the experience of succeeding to land in the Māori Land Court and various steps that are involved in that process. The exercises were designed to elicit a creative response,

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[38] Bagele Chilisa *Indigenous Research Methodologies* (Sage, California, 2012) at 235.
[39] At 235. Paolo Freire *Pedagogy of the Oppressed* (Continuum, New York, 1970).
[40] Coombes "Where's the Action?", above n 16 at 32.
[41] At 29.
[42] At 39.
[43] At 36.
[44] See appendix A.

through a combination of visual stimuli, gap-filling techniques, and collage-based exercises.

While generative design research often occurs in a facilitated setting, with participants making things alongside others, it is also possible to do this kind of research with exercises that participants complete in their own time.[45] The workbook approach allowed participants to complete the exercises in their own time and in their own home. I could post them the workbook and all the materials they needed to complete it in advance of the interview, so they would have time to complete it and reflect on their responses before meeting with me.

In designing the workbook, I sought to achieve a balance between structure and creative freedom. The earlier workbook exercises provided more structure and support for creative expression, while later exercises provided less.

The theory of generative design research suggests that people are prompted to fill in gaps in order to create meaning.[46] I drew on this idea in exercise 1, where I asked participants to fill in speech or thought bubbles to represent what figures within two different scenarios might be thinking, feeling, or saying (see figures 1 and 2).

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[45] See for example the use of "sensitizing toolkits" in a generative research context: Sanders and Stappers *Convivial Toolbox*, above n 2 at 76.
[46] At 45.

Figure 1: Exercise 1 – On the land

Image reproduced with the permission of Te Tumu Paeroa

Figure 2: Exercise 1 – In the courtroom

"ROTMLC1" by fc.nz is licensed under CC BY-NC-SA 2.0

The images contained concepts or relationships that participants could explore, such as the role of children in respect of Māori land (see figure 1) or the relationship between parties in the courtroom (see figure 2). Many participants were very attentive to the figures portrayed within the images and incorporated them into their responses. For example, one participant described the child's "lightness of step" within the image of people on the land (see figure 1), which she interpreted as a sign of happiness and being "refreshed by the kōrero".

Subsequent exercises provided progressively less structure and support. Exercise 2 in the workbook provided a visual stimulus (a photograph of the research room at the Hamilton Māori Land Court) and gave participants the option of writing or drawing their response. Exercise 3 asked for a solely visual response. By the end of the week, participants were effectively presented with a blank page and asked to create a collage. I asked participants to create two collages; the first representing their experience succeeding to land through the Māori Land Court, and the second representing their *ideal* experience of succeeding to land through the Māori Land Court.

There are various options when it comes to the collage construction materials, such as supplying participants with magazines that they can use to find their own images[47] or using bits of hand-painted paper that participants cut up to make images or shapes.[48] To ease the administrative burden on participants and encourage participation, I included with the workbook 172 small, coloured photos, symbols, and pictures that could be used to construct the collages. I aimed to supply enough images that participants would have a range of choices, but not feel overwhelmed. All of the participants who made collages made use of a range of these images, and those who were asked confirmed that the selection was large enough for their purposes. One participant pondered whether there were too many, but then decided that the number was right. This reinforces the need to take care over the size of the generative toolkit.[49]

I was concerned with the "look and feel" of the workbook and wanted it to appear professional but also engaging. I also spent a lot of time crafting the instructions on how to complete the workbook, to ensure that they were clear but not too lengthy. Each workbook was colour-printed (one-sided, for ease of later analysis of responses) and spiral bound with a clear plastic cover. Participants seemed to appreciate the effort put into these aspects, noting the accuracy of the courtroom image in particular (see figure 2)

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[47] Fatima Awan "Young People, Identity and the Media: A Study of Conceptions of Self-Identity Among Youth in Southern England" (PhD thesis, Bournemouth University, 2007).
[48] Wendy Luttrell *Pregnant Bodies, Fertile Minds: Gender, Race, and the Schooling of Pregnant Teens* (Routledge, New York, 2003).
[49] Sanders and Stappers *Convivial Toolbox*, above n 2 at 73.

and the clarity of the workbook instructions. I provided scissors, glue, coloured markers, coloured pencils, and biros. I also included a prepaid reply envelope for participants to send the workbook back to me once completed. This was intended to give me time to review the workbooks before I met participants for their interviews.

I included a number of Māori aspects within the workbook. I chose a whakataukī (Māori proverb) for the cover of the workbook that I hoped might reflect the envisioning nature of design.[50] I included a number of Māori images for use in the collage, such as a wharenui and a pōwhiri and a picture of part of te Tiriti o Waitangi/the Treaty of Waitangi. I sourced a number of images from the Flickr account of Te Tumu Paeroa, with their consent.[51]

> Whereas language-based methods require an instant or fairly speedy response, in creative research methods, participants are expected and encouraged to take their time.[52] This may encourage more reflexivity and more creativity. To allow this, I asked participants to complete one exercise per day over five days. Five participants followed this instruction. When I asked whether they thought taking their time had contributed to a more thoughtful response, only one said they thought it had. However, participants were able to do things that they could not have done had we *only* conducted an interview; for example, after receiving the workbook and before our interview, one participant went online to "refresh her memory" of what the succession process involves. Make-based research methods build in time for participants to undertake these kinds of ancillary activities that they perceive as relevant to their research response.

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[50] "Kia mau tonu ki tēnā, kia mau ki te kawau mārō, whanake ake, whanake ake." "Hold fast to that, to the flying cormorant, move forward, move forward." This is a Ngāti Maniapoto whakataukī. It was spoken by the ancestor Maniapoto to his people as he lay dying, and speaks to "future wellbeing and destiny": www.maniapoto.org.nz.

[51] Email from Maika Bennett to Mihiata Pirini (4 September 2019), on file with the author.

[52] Gauntlett "Using Creative Visual Research Methods to Understand Media Audiences", above n 29 at 3 and Sanders and Stappers *Convivial Toolbox*, above n 2 at 50.

D Expressions of Tikanga within the Research

In Kaupapa Māori research, the research practices and methods will be infused by or will emphasise tikanga Māori and te reo Māori.[53] The researcher will demonstrate an attitude of respect and service to the ideals of tikanga and te reo. This applies to all the surrounding processes of the research, from the manner in which the research community is accessed, to the decisions around how the research will be published or distributed.

Throughout the research I was encouraged by my supervisors to consider the ethical implications of conducting research in a Māori space with Māori participants, and to ensure a thoughtful approach to participant recruitment and communication. In my research practices and methods, I was guided by two principal tikanga-based values: whanaungatanga (the importance of relationships and connections) and manaakitanga (the value of showing respect, generosity, and care towards others). I sought to allow these values to infuse critical aspects of the research and its surrounding processes. As an expression of whanaungatanga I implemented the principle of kanohi kitea ("the seen face") and conducted interviews with each of my research participants in person. Taking the time and effort to travel across the country to meet individual participants was also an expression of manaakitanga. I wanted to show respect for the time and effort they had taken to complete the workbook and to meet me for an interview.

The time and care that I took to craft the workbook was also intended as an expression of manaakitanga. I was asking my participants to express themselves creatively in a manner that might make them feel vulnerable. I wanted to explain clearly, and in an engaging way, why I was pursuing this novel research approach and how their participation would contribute to my thesis.

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[53] Walker, Eketone, and Gibbs "An exploration of kaupapa Maori research, its principles, processes and application", above n 31 at 334.

II Ethical Issues

In this part of the chapter I address the ethical considerations raised by different aspects of my research, and how I factored these into the design and implementation of the research.

A Preserving the Anonymity of Participants and Details about Their Land Interests

Participants took part in my research on the basis that personal or identifying information about them would not be included in the thesis, and that every attempt would be made to preserve their anonymity.

In writing up my findings, I have used pseudonyms to refer to participants, and have also changed the gender of some participants to further minimise the likelihood of them being identified from information they have shared. I have removed references to potentially identifying information, such as the names of towns or cities and participants' occupations. Where participants referred to their relationships with people outside of the research study, I have also changed some of the genders of those people. Also, where participants shared particularly private material (for example, past experience in a criminal court) I have referred to them as "a participant", rather than using their pseudonym.

I have described in general terms where participants' land interests are located across the country (see page 64) but I have not connected specific land interest locations to specific participants, in order to minimise the possibility of participants being identified through the location of their land interests.

These measures were especially important since participants in the research were sometimes describing quite emotional issues, and because land has special significance within Māori culture and people may wish to keep the details of their land interests private and protected. In reflection of this, during interviews I also informed participants that they did not need to tell me where their land interests were specifically located if they did not want to, and they could talk about the land in quite general terms.

B Data Storage

Participants were audio recorded, and I transcribed the recordings. During the research, all audio recordings and interview transcripts were stored securely under password protection on my computer and on a secure online data storage system, also under password protection. The workbook data that participants produced, as well as photos that I took of some of their workbooks, were stored in a secure location in my home during the research period. Participants were informed that the workbook data and the audio recordings of the interview would be destroyed once the research was written up.

Participants were informed before taking part in the research that all transcriptions and photographic records, and any written notes made by the researcher, would be securely stored under password protection for at least five years, and possibly indefinitely, with access restricted to the researcher and her supervisors involved in the project.

C Dealing with Emotion, and Other Sensitive Topics

Generative research is intended to elicit "deep" responses at the level of emotions, hopes, dreams, memories, and so on. I anticipated that my participants might have strong emotions around the experience of succeeding to land, especially if there was conflict within their whānau about how the succession should be managed.

Before taking part in the research, participants were informed of the topic of the research, and that they would be asked to complete a short workbook of creative exercises that would ask them about their experiences in the Māori Land Court. Participants were informed that they could withdraw from the study at any point up to data analysis.

At the beginning of each interview I let each participant know that they did not need to share any more information than they were comfortable with, and that we could stop the interview at any time. During the interviews, and in their workbooks, some participants did refer to some quite personal events (for example, tension in their families), but never indicated that they were not willing or able to discuss those matters. As noted in this chapter, my research methods were designed to allow participants to choose what aspects

of their Court experience they wanted to focus on, and I trusted that participants were not sharing more than they felt comfortable doing so.

I was alert to the possibility that participants might ask me for legal advice, information, or assistance. I was prepared to navigate that by, for example, pointing participants towards online legal resources, local community law services, or other organisations that could help. However, no participants did so.

D Involvement of Whānau

I anticipated that some participants might want whānau members to be involved in the research. I thought this should be facilitated if practicable, given the reality that Māori land is held collectively. Ultimately some participants did involve their whānau or partners within the research, and in ways that I believe were ultimately beneficial both for the research and for my participants' experience of the research. Two participants had their partners help them to complete the workbook, and one of those participants brought his partner along to the interview itself. His partner mostly just listened, but contributed on some points, since she had been an important source of support for him throughout the succession process. I sought to facilitate her involvement to an extent that I thought was appropriate – for example I asked her at the end of the interview whether there was anything further that she wanted to add, from her own perspective.

E Issues Associated with Interpreting and Presenting the Data

One research participant completed the workbook, but was not able to meet with me for an interview. I felt hesitant about what to do with this data, given that part of the research methodology is to prioritise the participant's own interpretations of what they have made. In the end, I read through that participant's workbook responses in my initial review of the data, in order to gain an overall impression of their responses, but did not include their workbook responses in my more structured coding of the workbook data.

I have quoted participants in the research findings, both what they said in interviews and what they wrote in their workbooks. My aim, when quoting participants, has been to achieve readability. For example, when quoting from the interviews I have not included

vocalisations such as “mm”, “um”, or “ah”. I have also made some minor spelling or punctuation corrections where necessary, to ensure readability.

III Data Collection

A Participants’ Completion of Workbooks

All of the participants completed the workbooks in advance of my interview with them. In one case, one participant received the workbook without sufficient time to complete one exercise per day over five days, so he did all the exercises at once, and did not provide any visual responses. He was one of two participants who provided only written responses. The other five participants included visual elements within their workbooks, both hand-drawn elements and images they pasted in from those I supplied.

Ideally, I wanted to review the workbooks before I sat down to interview the participants. In two cases this was able to happen, because participants had either mailed the workbook back to me or I had collected it from them a day in advance of the interview. In other cases, I had to review the workbook at the same time as completing the interview.

I concluded it was not critical to the research method to review the workbook in advance. Seeing the workbook for the first time during the interview felt in some ways more immediate and more personal. The more critical factor is to ensure that participants are given an opportunity to speak to all aspects of their workbook responses in the interview, and to ensure that as the researcher I had captured all their interpretations and comments.

B Interviews

The interviews took place mostly at a local café or library, and once in a participant’s home.[54] In six of the seven interviews, we had the workbook in front of us during the

[54] Because we were not meeting in a public place, as a personal safety measure I texted my supervisor immediately before the interview, and again once the interview was complete.

interview. During the interview I relied primarily on participants talking me through their workbook responses and choosing what aspects they wanted to discuss.

I did not ask participants direct questions about, for example, "what it was like to use the Court". Rather, I relied on participants describing their workbook exercises and raising what they felt was important about their responses to each one. I hoped that participants would find their own way to discussing those things that they felt had shaped or affected their experiences in and with the Court. This connected to my desire to give participants more control over the direction of the research inquiry. I asked additional questions only where I wanted a participant to clarify or elaborate on one of their workbook responses. There were also opportunities throughout the interview for participants to raise other topics or share other issues outside of those expressed in their workbook responses.

In one interview, the participant had completed the workbook and put it in the mail, but it did not arrive in time for our interview. This meant that we did not have the workbook in front of us when we did the interview, and the interview lacked some of the structure that it might otherwise have had. Fortunately this particular participant was quite talkative and I found that we did not need the workbook to sustain the momentum of the interview. However, it did mean that I was not able to ask her about her workbook responses in person, and when her workbook eventually arrived in the mail I had to connect her creative responses to her interview responses retrospectively.

IV Data Analysis

In data analysis, I took care to foreground the interpretations that participants had given me to explain their workbook responses. I put post-it notes on workbook exercises to cross-reference to locations in the interviews where participants were describing to me what they created, so I could keep track of that data while analysing the workbooks.

I used coding to organise, analyse, and "break open" the data.[55] I coded the interview transcripts separately first. I used traditional coding methods, numbering small chunks of spoken data and assigning codes according to what I interpreted within the data. I used codes relating to participants' experience of the Māori Land Court and codes relating to the effectiveness of the make-based research method.

I commenced coding of the workbooks by listening to the interview recordings and paging through the workbooks at the same time. This helped "take me back" to the interview in a way that I found useful given that I did not have video-recordings of the interviews. For example, I found it helpful to hear inflections and pauses and sounds, like one participant tapping the table to emphasise a point while describing his collage. It also allowed me to immerse myself more fully in the workbook data because I could absorb the images and the participant's commentary on it at the same time, rather than having to cross-refer to a written transcript.

I added post-it notes to the workbooks to capture ideas and concepts that came to me at this stage. Sometimes, while listening to the interview recordings, I was alerted to a participant's statement that I had overlooked when coding the interview transcripts. I added to or adjusted my coded interview data accordingly.

I then broke down the workbooks into separate sheets and arranged the exercises in a grid on the wall in order to facilitate comparison within and across the workbooks (see figure 3).[56]

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[55] Pat Bazeley *Qualitative Data Analysis: Practical Strategies* (Sage Publications, London, 2013).
[56] Sanders and Stappers *Convivial Toolbox*, above n 2 at 212.

Figure 3: Arrangement of data on the wall

Exercise 1	Exercise 2	Exercise 3	Exercise 4	Exercise 5	Exercise 6
Participant A	Participant A	Participant A	Participant A	Participant A	Participant A
Participant B	Participant B	Participant B	Participant B	Participant B	Participant B
Participant C	Participant C	Participant C	Participant C	Participant C	Participant C
Participant D	Participant D	Participant D	Participant D	Participant D	Participant D
Participant E	Participant E	Participant E	Participant E	Participant E	Participant E
Participant F	Participant F	Participant F	Participant F	Participant F	Participant F
Participant G	Participant G	Participant G	Participant G	Participant G	Participant G

Organising the data in this way led to new insights because I was able to compare different participants' responses to the same exercise. For example, only once the data was on the wall did it become clear that, with respect to the image in exercise 1 that portrayed people on the land (see figure 1), all participants bar one had incorporated into their scenario the fact that one of the figures in the image was a child.[57]

V Conclusion

In this chapter, I have described the way in which I sought to integrate a design-led approach to research with a Kaupapa Māori mindset. In my research, this meant using make-based methods that deliberately made room for research participants to exercise more control over the direction of the research inquiry. Participants decided, in their own space and time, what things they wanted to create, within a framework I provided to assist and stimulate their creativity. Participants then chose what aspects of their creations they wanted to explore in person with me, and what their creations signified, which I sought to interpret and capture from my position as the researcher.

This research approach will not capture a complete picture of what it is like to use the Māori Land Court or how it is perceived by those who use it. It is intended to provide a glimpse of those things that a small number of Court users considered to be important about their Court experience. These insights will contribute to building a more complete, more nuanced picture of the relationship between landowners and the Court, which is one

[57] See figure 1 at page 72 of this thesis.

of the ultimate aims of this thesis. It is hoped that this, in turn, will also contribute to ongoing and future reform conversations about the Court.

In the following chapters (chapters 5 to 7), I describe and discuss the findings of my research.

Chapter 5

Landowner Relationships with the Court: Findings and Discussion

In this chapter and the following two chapters, I describe and discuss the insights that emerged from utilising the make-based methods outlined in chapter 4. As noted, the objective of the research was to gain insights into the experience of succeeding to land through the Court.

Participants decided what aspects of their experience they wanted to emphasise in what they created in their workbooks, and decided what parts of their workbooks they wanted to describe and explain in detail in the interviews. As a result, I found that the results of my research covered a wide range of diverse topics, which I have divided into two chapters.

In this chapter, I describe (1) how participants first learned of the existence of the Māori Land Court and (2) the ways in which participants positioned their engagement with the Court within the context of their family relationships. Drawing on these findings, I propose a framework through which to organise and understand different landowners' interactions with the Court.

In the next chapter, chapter 6, I describe (1) the emotional and administrative nature of succeeding to land through the Court; (2) participants' courtroom experiences; and (3) what motivated participants to engage with the Court. In chapter 7, I discuss the implications of those findings. I suggest proposals that might improve the experience of those who use the Court, and that may also impact positively on those who do not currently use the Court, but might one day need to.

I How Participants Learned about the Court

As noted in chapter 4, part of the reason I chose to focus on succession applications within my field research is because a succession application is a likely entry-point into the Māori land system for many Māori. I was interested to explore how people first learn about the Māori Land Court, and how they know that a succession application needs to be done.

I found a clear split between participants in terms of how they first learned about the Court, and how they knew that they needed to do a succession application. All of those participants who had more experience in the Court (Patricia, Frances, Simon, Wiremu) reported learning about the Court from parents and grandparents. They had seen them make applications to the Court, and in some cases assisted them to do so. For Wiremu, it was difficult to even pinpoint exactly *how* he knew that he needed to go to the Māori Land Court to succeed to his mother's interests after she died – he had learned from his mum, but also, "I just knew". Simon and Frances described seeing their parents engage with the Court from fairly early on in their lives.

Those participants who had less experience in the Court (Allison, Linda, George) did not learn about the Court while they were growing up. They found out about it later in life, through different life experiences or events. Allison heard about Māori land when she was growing up, but not the Māori Land Court, and was not aware that you had to go to Court to transfer interests in land upon a landowner's death. Her interaction with the Court was prompted by her sibling's proposal (which she opposed) that one child should succeed to *all* their mother's interests. George found out about the concept of Māori land after he began working for a Māori organisation, and from there began to conduct his own investigations into the Māori Land Court, and ultimately brought an application to succeed to his mother's land interests on behalf of himself and his siblings.

II Lead Whānau Users

Many of the participants in my research described being either the *most* or the *only* active person amongst their siblings who was engaging with the Court. For example, Wiremu

dealt with the Court on behalf of his siblings and their children, a role that he stepped into only after his mother died: "mum really would've wanted me to do it". Patricia did the same. Allison and Linda are siblings and Allison took the lead in their succession application. George filed his succession application on behalf of his many siblings. In addition, Wiremu and Patricia reported doing Court applications on behalf of cousins, nieces, and nephews.

III Engaging with the Court – An Inter-Generational Experience

A notable feature of the research was the way in which participants positioned their own engagement with the Court in terms of how their parents engaged with it, or dealt with Māori land; or in terms of how they anticipated that their children or grandchildren would engage with the Court.

A Participants Discussing Their Parents' Engagement with the Court

Allison talked about her mother and the decisions she made with respect to Māori land. Her mother regretted having transferred some of her interests in land to other family members. Allison recalls her describing that decision as "the biggest mistake of my life". In turn, Allison is very strongly motivated to *preserve* her connection with her mum's Māori land and ensure that she and all her siblings succeed equally to those land interests.

Frances talked about how her father was able to use the Court effectively. Her father amalgamated or swapped his land interests with other owners in his generation. Frances expressed her belief that her father's generation was better at reaching agreement on what to do with land in shared ownership. She described the way they would talk and agree to swap shares for amalgamation purposes:

> I'll take my shares out of this block, you know so you have that block and we'll just swap shares over. Back then. Yeah, it was good then.

Frances's own experience trying to do a partition of land then stands in fairly sharp contrast to this; "the other half were just fighting against us, we were getting nowhere…". In the end they abandoned the partition application and instead applied for, and obtained,

an occupation order. The order enabled Frances's sister to occupy a small pre-existing cottage on the farm.

One participant drew a strong connection between her mother's experience and her own experience. Her mother "went through the cleaners" in the Court, and as a result "I've always grown up knowing that the Māori Land Court isn't a nice place to be".

Patricia described her father as knowing "very little about Māori Land Court and Māori Land Court practice". As a result, it became her job to engage with the Court, and she continues to do that on behalf of all her family.

B Participants Anticipating How Their Children and Grandchildren Would Engage

Both Allison and Linda (siblings) spoke about what they thought their children's experience would be in relation to the way they make decisions about their land. Allison was confident that the conflict she experienced with her siblings would not be repeated amongst her own children: "I know that my boys will not do what my family's done". Linda was unsure whether all the children in the generation below (her son, and her nieces and nephews) would be able to agree – "that could be a bit trickier". She spent several minutes in the interview working through the number of children that each of her siblings had, and predicting whether they might have issues coming to an agreement about the land in due course.

Simon believes that his children and grandchildren are, and will be, highly impacted by the negative experience that he has had with the Court. He reports that his children and grandchildren know that the Māori Land Court is not "a nice place to be" and that "none of them want anything to do with Māori land". He describes his children as "browbeaten".

George grew up with no knowledge of the Court at all. Now, in his dealings with Māori land, he describes intentionally bringing in the next generation:

> Our children have come to the fore because we included, you know I included *all* of them in this as well … And so they're twenties and thirties so they're, you know, I

> forced the issue and said right, we are the trustees and we're resigning, and we need you guys to take this over so three other trustees have picked that up and run with it.

Moreover, George holds a lot of hope for how his children and their cousins will engage with their whakapapa and navigate their way through this complex system. They are the generation that "will come through and heal" because "they're a generation without all of the hang ups that we have". They will find their way through what he describes as the "mess" of the current law.

Patricia, by contrast, is the only one in her family "carrying on the mahi". There is no one in the next generation who wants to carry on her role. Her children are "not interested".

IV Discussion: A Design Framework for Analysing the Relationship between Landowners and the Court

While many future landowners will learn about the Court within their whānau, not all will. Some future landowners are exposed to the Court through their contacts in the community, friends, or in the workplace. This would seem to suggest that we need the Court to be the subject of a thriving community discourse, if we want to maximise the likelihood that all those who *need* to hear about it, do. We know that there are thousands of future landowners who have not yet succeeded to their land interests, and part of the reason for this could be that they do not know enough about the Court and its role.

While it is not *surprising* that participants talked about their family members, given their family have a relationship with the land too, it is notable that the participants were very aware of the ways in which the significance of the Court is handed down from generation to generation. Those who use the Court are influenced by what they see their parents and grandparents do, and also expect that their own experiences will influence the following generation. For some participants this translated into a desire to get the next generation involved, and they put their faith in that generation as "doing better" than they perceive their own generation having done. For others it was less clear to them how the next generation would engage, or whether they would want to engage at all. This aspect of the research was remarkable for how consistently it was raised by all participants.

The research findings described above present a picture of the significance of the Court extending beyond the participants themselves, and into the generations above and below them. Reflecting on these findings, as well as TTWMA itself, which recognises the significance of descendants of current owners,[1] I considered a design perspective on the Court that incorporates all Māori landowners, not just those who are currently using the Court. In chapter 3 I refer to the theory that a design artifact, such as the Māori Land Court, can be "meaningful in use" and "meaningful in language". We might, therefore, consider how different landowners experience a different kind of "meaning" in the Court, depending on whether they are (1) using the Court now; or (2) not using the Court, in conditions where they need to (for example, those who have not succeeded to interests in land).

The Court will have "meaning in use" to those in the first group, but not to those in the second. It is likely, however, to have "meaning in language" to *both* groups, since artifacts "enter the language of particular communities, and become social or cultural artifacts, often well before they are actually used by individuals".[2] That is, the Māori Land Court is likely to have a meaning to those landowners who do not "use" it. By investigating that meaning, we might see ways to think about how to encourage more engagement with the Court – not necessarily by all landowners, but by those who we might describe as "needing" to use the Court.

I suggest that we can think broadly about three different "types" of landowners. These are fluid typologies, not fixed, and are intended to help us reflect on the meaning of the Court to landowners and how that meaning is created and sustained. My objective in proposing these types is not to suggest that these groups are not currently properly recognised within TTWMA, but rather, to suggest that we might consider how we account for these

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[1] See for example Te Ture Whenua Maori Act 1993, s 2, which explicitly refers to the need for interpretation of the Act to take account of descendants of current owners. See also recognition of descendants of owners as beneficiaries of whānau trusts: Te Ture Whenua Maori Act 1993, s 214(5).
[2] Klaus Krippendorff *The semantic turn: A new foundation for design* (CRC Press, Florida, 2006) at 147.

different groups of landowners within the design of the Court, and associated Court artifacts.

First, we can think about "Court users". These are people who have used the Court at some point in time. They have moved beyond the stage of hearing about the Court, or researching it, and have actually filed a Court application, or have been actively involved in a Court application that affects them and their land interests. This group of people is experiencing meaning in use. They are also sustaining and contributing to the Court's meaning in language by participating in discourses and narratives that surround the Court, and this is affecting other landowners or future landowners (most obviously, their children).

Secondly, we can think about "non-Court users", or what we might also call potential users. These are people who are in a current state of need with respect to the Court. That is, they need to engage with the Court in order to obtain rights or entitlements (for example, they need to succeed to a parent's land interests), but they have not yet done so. This group of landowners may have been exposed to the Court's meaning in language – for example, they might have heard of others who have used the Court. Or they could be experiencing a complete absence of meaning, as was the case with George, before he found out about the Court – they do not know that the Court exists, therefore it holds no meaning. It is also possible that these landowners are at the threshold of meaning in use. For example, they might have looked at Māori Land Online, or approached a Court office.

Thirdly, we can think about "future Court users". These are people who have no immediate need to use the Court. Their rights and entitlements in respect of Māori land are not being affected by the fact that they are *not* engaging with the Court. This is not to suggest that the Court's decisions are having no impact on them, but that they have no pressing need to make a Court application now. At a point in time in the future, however, they will need to become "Court users"; that is, they will need to move into the first group above. Into this group we can put, for example, young people who have parents with Māori land interests to which those young people will one day need to succeed.

While this group will not be experiencing meaning in use, they will be affected by meaning in language – that is, by the way that the people around them talk about the Māori land system, and the Court.

There is a degree of subjectivity to these categories, particularly the "non-Court user". It depends on landowners' own perceptions of whether they need to engage with the Court and whether, by not doing so, they are suffering some kind of detriment, or are prevented from realising a benefit of some kind. This connects to the point that ultimately, landowners have control over the extent to which they become involved with the Court. Some may choose not to engage at all. Their choices will be influenced by a range of factors, including for instance if they have someone in their whānau who is active in Māori Land Court matters, and acting on behalf of the whole whānau. The reality is that the Court will always be an entity that needs to grapple with a range of unrepresented interests.[3] While it is not possible or desirable to *force* all of those who have interests in Māori land to engage with the Court, it is possible to design the Māori Land Court in a way that people will see its meaning and relevance to their lives, and will *want* to engage with it.

V Discussion: The Need to Support Lead Users

A number of participants in my research described being the member of their whānau who brings Court applications on others' behalf. It is not surprising that one member of a group of siblings would take the lead on pursuing a succession application, since all are succeeding to the same interest in land and a single application can be made on behalf of all of them. In Sara Passmore's survey on successions, there was a fairly even split between respondents who said they had brought a succession application on their own behalf and those who said that a member of their whānau had made the application on

[3] Layne Ross Harvey "Would the proposed reforms affecting ahu whenua trusts have impeded hapū in the development of their lands? A Ngāti Awa perspective" (PhD thesis, Auckland University of Technology, 2018) at 171.

their behalf.[4] Just under 50 per cent of the respondents to Passmore's survey reported that, in respect of successions, "I'm tenacious and get things done".[5] Perhaps whānau or hapū have one, two, or a small group of members who are motivated to bring succession applications, and to ensure their whānau's legal connections with land are formalised.

A Support Experienced Users to Network and Connect

Passmore recommended, in her research, that we ought to draw out the "pockets of expertise" within whānau and develop these into a "network of highly knowledgeable succession experts".[6]

My research supports this recommendation. In particular, I suggest that we ought to direct our efforts towards supporting experienced users to network with each other and connect. This could be facilitated through an online platform somewhat like Facebook, but run through official channels. These people are already engaged, and we ought to support them to do so, by enabling them to connect with each other for support, encouragement, and sharing of expertise.

Encouraging supportive relationships between experienced Court users could have consequential benefits for other landowner groups identified in this chapter. It helps non-Court users if Court users are supported to bring the applications that will ultimately ensure that non-Court users' interests are formalised through the Court.

Future Court users, including young people who are interested in learning about succession, could use the network as a resource. Young people report wanting to learn more about succession, but may experience a reluctance from elders to include them in decision-making.[7] Accessing this network of experienced Court users could be "a way

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[4] Sara Passmore "Understanding the barriers and drivers for Māori to undertake succession to ownership of Māori Land" (report submitted in partial fulfilment of the requirements for an MBA, Victoria University of Wellington, 2018) at 18.
[5] At 28.
[6] At 37.
[7] At 10–11.

in". One of the participants in my research, Patricia, suggested that experienced users should have a trainee or caddy who can learn the process first-hand by watching and doing. If there was training at the point of succession, "I think there'd be a whole new view about these Court processes".

It would be worth exploring the idea of such a network being run perhaps through Te Tumu Paeroa, as the organisation that supports the Māori Trustee. The Māori Trustee is an independent legislative office established to help Māori administer their land.[8] As its supporting organisation, Te Tumu Paeroa provides trustee services to around 1,800 trusts on behalf of over 90,000 beneficial owners of Māori land, amounting to around seven per cent of Māori land.[9] The Māori Trustee receives revenue from the Crown,[10] some of which is directed by Te Tumu Paeroa to supporting owners to be more connected to their whenua.[11] Te Tumu Paeroa may be well placed to provide a network through which experienced users of the Court can connect.

B Funding

Another idea is to consider making funds available to those who are pursuing succession applications, whether on behalf of themselves and other siblings or on behalf of third parties. Even a simple succession application takes time and effort. Those who do so are helping to ensure that Māori land records remain up to date, and could be said to be performing a public service of sorts. Making a fund available to assist with travel and other expenses, such as obtaining death certificates, would help recognise the time and effort put into this role. Some thought would need to be given to how the fund could be administered in a low-cost and efficient way.

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[8] Māori Trustee Act 1953.
[9] www.tetumupaeroa.co.nz.
[10] According to its most recent annual report, Te Tumu Paeroa received revenue of $11,261 from the Crown for the year ending 31 March 2019: Māori Trustee *Annual Report 2019* at 53.
[11] Passmore "Understanding the barriers and drivers for Māori to undertake succession to ownership of Māori Land", above n 4 at 8.

VI Conclusion

In this chapter, I have drawn on my research findings to propose a framework that helps conceptualise the diversity of relationships between landowners and the Court. The framework is useful because it directs our attention to how we might design the Māori Land Court system so that landowners will see its meaning and relevance to their lives, and will *want* to engage with it. "Lead users", who are already deeply involved with the Court, ought to be enabled to make connections and share experiences. This may have beneficial consequences not only for those lead users, but also for those landowners who they assist, or whose interests they may represent, particularly by bringing succession applications on their behalf.

Chapter 6

Court Experiences: Findings and Analysis

This chapter discusses the findings of my research that relate to the experience of succeeding to land through the Court, and what motivated participants to engage with the Court. These findings provide a snapshot of the experience of a small group of owners interacting with the Māori Land Court as a "user". Gaining deeper insights of those experiences may contribute to deepening our understanding of the relationship between the Māori Land Court and those who choose to use it. It is also foundational work to suggesting changes that might improve that experience, and potentially to break down some of the barriers to Māori succeeding to their Māori land and generally engaging with the Māori Land Court.

I begin by noting how many participants used lawyers to support their interactions with the Court, and what other people and places participants relied on to support their Court interactions. I organise the remainder of the chapter around the following themes: the emotional nature of the Court experience; the administratively burdensome nature of the Court experience; what motivated participants in their use of the Court; and participants' experiences of being in the courtroom. In the next chapter, I discuss the implications of those findings and suggest proposals to recognise the experiences of those who use the Court, and to support them.

I Use of Lawyers and Other Support

One of the aspects of bringing a design perspective to the Māori Land Court is considering whether landowners interact with the Court directly or mediated through a lawyer, and what other services or support they draw on. These things impact on landowners' experiences of use.

Five participants in my research mentioned having used a lawyer in the course of their interactions with the Court. Of those, three participants (Wiremu, Allison, and Linda) spoke positively about their experiences with lawyers, and suggested that they relied quite heavily on their advice and assistance. All of those participants were using the legal services of a free, local community law centre.

The remaining two participants who used lawyers, Simon and Frances (husband and wife), were less complimentary about their experiences. The two issues they raised were the high cost of getting legal advice (Frances reported that she and her whānau spent $60,000 for legal advice to help with their partition application over a period of 10 to 15 years) and lack of lawyers with the right expertise. Simon said "there's no lawyers that really know Te Ture Whenua inside out" and "I've spent thousands of dollars educating them and I've just given up".

Two participants, George and Patricia, had not used lawyers in their interactions with the Court. George completed his succession application on his own, using the internet to find out what he needed to know. Because of this, when he got to the hearing, he did not know about the possibility of putting the interests into a whānau trust. The Judge asked him at the hearing whether he and his siblings wanted this to happen. Had George had legal advice, he probably would have been advised about this option in advance. He was surprised to hear about the possibility for the first time at the hearing, but also it demonstrated to him that the Judge was being helpful, and like "he really cared".

Patricia reported never having used a lawyer, despite being very active in the Court. She told me that she believes whānau should educate themselves on the Court and gain the knowledge needed to interact with it. She reflects this stance in her own dealings with the Court, and she travels all over the country doing successions on behalf of members of her extended whānau.

Aside from seeking legal advice, participants reported drawing on three main places or people for information and guidance on using the Court: (1) Court offices; (2) the internet; and (3) friends and the wider community.

A Court Offices

Participants reported mixed experiences with getting information from their local Court office. Three participants referred to the lack of time and resource that Court staff could provide them. Simon described the staff at his local office as "overworked and underpaid". Patricia referred to quite major variations in the helpfulness of Court staff between different offices: some were "great" and some were "shockers". Also, when staff members changed, this caused frustration:

> Sometimes you'll take an application so far and that person might leave. So then you've got to go and see another one. So it gets a bit jumbled. And you've got to be repetitive. Or it can be quite upsetting. Because you've probably forgotten half the stuff, let alone the court staff moving on and losing your stuff.

One of the exercises in the workbook asked participants to describe their "ideal experience" for succeeding to land through the Māori Land Court, and a theme of three participants' responses was the need for more resourcing of Court staff.

B The Internet

There were two aspects to the comments that participants made about accessing the Internet. First, they acknowledged the convenience of being able to access materials that they needed online, such as Court guides to making an application. Second, they talked about aspects that they found annoying or troublesome (such as having to "download every PDF"). The internet experience was not free of difficulty, but nor did any participants suggest that they found it a major barrier to interacting with the Court. For example, Frances described learning to make her way around a relevant website:

> I had to wing it for a while. Push the wrong button, oops, go back. I'm still learning how to do it, even now I make a mistake, it sends me somewhere else, so I've got to backtrack… but yeah. It's all part of the fun.

C Friends and the Community

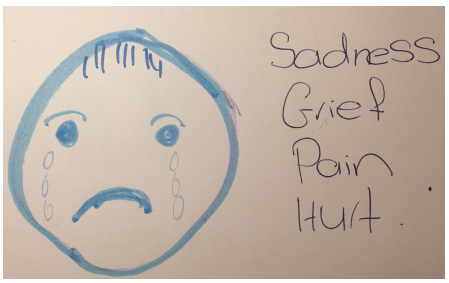
Some participants mentioned finding out what they needed to know through acquaintances that had been through the process, or through people in their community. For example, Allison was first put in touch with a local law centre through a contact at her son's school. George found that the local librarian was able to tell him who to talk to about Māori land. Simon works in a community role, and is himself a source of community information. He described telling people in the community about Māori land resources, and giving others strategic advice about their Court applications.

II Using the Court is an Emotional Experience

It was clear from participants' workbooks and interviews that their experiences using the Court were highly emotional, for a range of reasons. Participants either said so directly, or used images in the workbook exercises that signified strong emotion. Examples of positive and negative emotions were given, and emotions arose at different points of the Court experience, for a range of different reasons. Knowing that emotions feature prominently within the Court experience, we might consider how those emotions can be acknowledged in the design of the Court or associated Court artifacts, and how users can be supported at a time of emotional vulnerability.

One participant suggested that her use of the Court was deeply influenced by her mother's experience with Māori land, and this gave rise to strong emotions in her own interactions with the Court. To this participant, the experience of succeeding to land through the Court was visually represented in the following way (see figure 4):

Figure 4: "Sadness, grief, pain, hurt"



One participant pointed out that succession applications in particular can be expected to elicit emotion, because they are done after someone has died. This is a point that was also made by respondents to Sara Passmore's research into the barriers and drivers to succession.[1] Respondents to her survey reported that dealing with grief or other aspects around death was a common reason for delay in commencing a succession application.[2]

Patricia referred to the emotions that can arise as a result of researching the history of the land and its owners:

> It can be quite lonely, it can actually be quite sad because you're reading a lot of the old tipuna korero and their history and how they saw things at that time, so there's a whole heap of emotions going on.

For George, who grew up without access to his Māori side, the source of his emotions came partly from how "brand new" the whole process was to him. His language during our interview suggested that the succession process was transformative, in that it was "a very emotional journey" that unlocked a spiritual or wairua level "which I'd *never* struck before and would completely deny." He felt "overwhelmed".

As George learned more about Māori land through engaging with the Court, his emotions changed quite significantly: "initially it was so cruisy, the whole experience, it was just like, this is easy". But later, he described feeling "trapped" and "stuck" because "having succeeded to the land, there's nothing you can really do". He felt cynical and lacked optimism. His experience also made him feel angry. This came not from using the Court, but from finding out that the Māori land he has interests in has been farmed under perpetual lease for many years, and his whānau have not felt the benefit of that:

> While it was an enlightening time I also started getting really cynical and angry about it too. Yeah, because, despite having studied, you know, Te Tiriti o Waitangi

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[1] Sara Passmore "Understanding the barriers and drivers for Māori to undertake succession to ownership of Māori Land" (report submitted in partial fulfilment of the requirements for an MBA, Victoria University of Wellington, 2018).
[2] At 30.

> and understood that process of colonisation, to see it first hand in a really personal context just pissed me off really.

Allison also went on an emotional journey as a result of engaging with the Court. The beginning of Allison's journey was characterised by uncertainty and family conflict. After her mother's death there was tension in the family and this carried over into the proposal for how her mother's Māori land interests would be succeeded to. One of Allison's siblings wanted to succeed to all of the interests in their mother's land, but Allison refused, and ultimately arranged for each sibling to succeed equally, with the assistance of the local community law centre. As a result of this, some relationships in the family remain strained. Allison said that while she was doing the work involved with the succession, she "sat at home crying for many, many days." But her feelings at the end of the process are of pride and satisfaction, as expressed in one of her responses to the workbook: "I stood up for myself and my children, grandchildren and more to follow. Still the best decision I made. I am proud I did this!!".

In summary, the experience of using the Court, and doing the ancillary work involved with this, stirs up strong emotions for Court users. The impact of these emotions can be both positive (satisfaction, pride, cultural discovery) and negative (sadness, conflict, grief). They can come from a range of sources – family tension; the history of the land; remembering a deceased family member. We can expect that applicants to the Court's succession jurisdiction may be in a particularly vulnerable emotional state given succession applications are done in the aftermath of a death. Also, my research suggests that it does not necessarily matter if a landowner has been doing this work for a long time and has a lot of experience in the Court. The participants in my study were a combination of very experienced and inexperienced. They all reported being affected by the emotional nature of dealing with Māori land and whānau relationships in a Court setting.

III Using the Court is Administratively Burdensome

Participants' experiences also suggest that using the Court is an administratively burdensome experience. It was not the fact of appearing in Court for the hearing that participants found administratively burdensome; indeed, some participants spoke in

positive terms about their Court hearing, referring to how straightforward it was and how they felt well looked after. Rather, participants talked about all the other things they had to do in order to progress an application, and many of these things were made more complicated by the fact that many participants were bringing applications on behalf of themselves and a number of others.

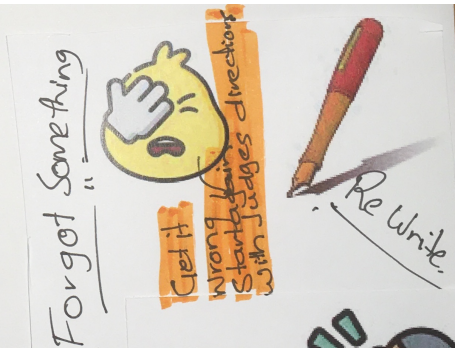
George's situation was a good example of this. George is one of a very large number of siblings and reports that they grew up essentially "non-Māori". George himself only found out about the existence of Māori land after he began working for a Māori organisation and a kaumatua told him he needed to succeed to his mother's land. As a result, he did not have the prior knowledge needed to get the Court process underway. He looked online, made a trip to visit the land, appeared in Court (along with those siblings who could attend), and notified absent siblings of the outcome, including photocopying "absolutely everything". Mostly he had to find out the process himself, because the Court office was too far away to travel to easily, and his phone calls would not get answered. All of this took time and required effort, which was magnified because he was making the application on behalf of a large number of siblings.

Patricia's situation also speaks to the administrative burden involved with using the Court. Patricia is extremely active in doing the successions for her whānau. Since a large number of her siblings have had children, but some of her siblings are now deceased, she is often travelling around the country to do the work needed to make sure her siblings' children are recorded as landowners. On one occasion she took a seven-hour bus trip to a central city, appeared in Court, stayed one night and then took a bus home the next day.

The "administrative" theme was repeated in Patricia's workbook. Her collage describing her experience of succeeding to land in the Māori Land Court was constructed broadly to represent a process containing several steps, beginning at the top of the page (with research) and ending at the bottom with a "happy whānau". Each image represented a step in the process (research; hold hui; file application; keep court informed; brief whānau before court hearing; and finally, "get the process right"). She used a "face palm"

image to communicate how annoying it can be when she forgets something and has to do it again (see figure 5).

Figure 5: "Face palm"



In summary, each of the participants described a process of engaging with the Court, or of assisting others to do so, that puts fairly high demands on their time and resources. Even an uncontested succession application will require at least *one* person to take all the steps needed to gather the information together, file an application, and keep successors informed. The experiences of participants in my research demonstrate that doing all this takes time and effort. Also, some Court users may not use lawyers to assist them – like George, who found out everything he needed to know on his own, or Simon, who says he has given up on lawyers altogether. In those instances, there is no "intermediary" between the user and the Court. Applicants talk directly to Judges. They do their own research and investigations, gather their own evidence, and fill out their own court forms.

IV Motivations for Using the Court

Participants raised a number of motivations for using the Court. They were each trying to achieve a specific legal outcome – for example, being named as a legal owner of land, and gaining a legal status that would enable them to participate in decisions about the land. But participants also talked at length about broader values or considerations that moved them to pursue a particular application and to continue with it even though it was hard or emotional. Three motivations were discernible from my analysis of the data. Participants were driven by their desire to (1) establish or maintain links with land, (2) help others, or (3) fulfill a parent's wishes.

A Establishing and Maintaining Links with Land

Five participants spoke in fairly strong terms about their ancestral connections with land. They couched their use of the Court, or their relationship to the Court, within their desire to establish or maintain their ancestral connections and their links to the land, both for themselves and their descendants.

This was a strong motivator for Allison, who was in the situation where one of her siblings wanted to succeed to all their mother's interests in the land. Allison refused, because she wanted to keep her rights to the land, and ensure that her children and grandchildren also had such rights. She wrote in her workbook that she "stood up for myself and my children, grandchildren and more to follow".

Linda (Allison's sister) spoke of being in a phase of cultural reconnection. This was one of the reasons she took part in my research: "I do have a big interest now in my heritage Māori". She had recently completed a three-day stay on a marae that she described as "overwhelming and empowering": "I came home like I was on acid, it took me three days to come down." Linda said that she would not have commenced the succession process herself (she relied on her sister to do so). It is possible that her re-engagement in Māori culture motivated her to more actively participate in the succession application, in a way that she might not have otherwise. For example, she attended the Court hearing, and seems to have taken a keen interest in everything that happened at Court. Like Allison, it is important to her that she and her descendants remain connected to the land: "between the courts and everything I've set up something for my son, and I've set something up for my grandchildren, so it carries on".

Maintaining connections with land also motivates Wiremu, principally in relation to those blocks of land that are important in terms of his ancestry – "those main ones, where we came from, where our ancestral homes are".

George grew up knowing very little about Māori culture or his Māori heritage. He made it clear that his use of the Māori Land Court was closely connected with the "wairua journey" of discovering about his Māori ancestry and his mum's land. Indeed, he was

motivated to travel to see the land, at some distance from his own place of residence, in order to reinforce that cultural connection, and this was presumably also a key motivating factor for him in pursuing the succession application:

> I was just overwhelmed with this sense that I needed to go there. … Talked to this kaumatua and he said "look you need to go, this woman is waiting for you".

For Frances, engaging with the Māori Land Court forms part of the way in which one connects with Māori culture and society. Frances grew up observing how her father's farm, located on Māori land, supplied kai, firewood and meat for marae events. She and her husband Simon lived overseas for 12 or 13 years and on their return, were motivated to update themselves on "what was happening in Māoridom". They were already aware of their whakapapa and of the Māori Land Court but "wanted to continue it on" and "find out who we are, where we're from". As part of that they engaged with the Māori Land Court, "searching records". So, Frances's engagement with the Māori Land Court at this particular life stage was prompted by a desire to reconnect with Māoridom and with whakapapa, having spent over a decade in a different country.

B Helping Others

For some participants, a strong motivation for engaging with the Court was that they could help others, or could achieve someone else's wishes for their own land, and they took pride and satisfaction in being able to do that. This was a particularly strong theme within the interviews and workbooks of Simon and Patricia, who both described assisting others with their succession applications or Court interactions on a number of occasions.

Patricia's focus was on making sure things were "right", correct processes had been followed, and people's wishes had been upheld. Describing the content of one of her workbook responses, she said "get the process right, smiles and handshakes, happy whānau, when you come out of the court, everybody's happy". There was an aspect for Patricia of being motivated by the pride and satisfaction she gets from helping others in a way that is consistent with Court process; she noted that "usually I get my applications to a tee so I don't have to come back again".

Simon was motivated to assist others in part to help them avoid having the negative experiences that he has had with the Court: "even though I've had a bad run I don't want anyone else to have the same."

C Fulfilling a Parent's Wishes

The third strong motivator for participants to engage with the Court was the desire to fulfill the wishes of a parent. This was a motivation raised by Allison and Linda (siblings), Simon, and Wiremu.

In some cases, the motivation was tied to a specific outcome that a parent had wanted, for instance, that all siblings should succeed equally to the land. This was the wish of Allison and Linda's mother and they both referred to it. Allison said that she knew her mum "would be proud" that she had pursued the succession application that led to equal shares for all the siblings. Linda noted that she was fairly happy to follow the lead of a third sibling, who wanted to succeed to all the land, until she found out that was *not* what their mother wanted.

Simon was pursuing an application on behalf of his father, who has now passed away. He sought an occupation order in respect of a piece of Māori land because it was what his father would have wanted:

> I fought for my occupation order for my dad and then he passed away, so I continued the thing and I got the occupation order. But the fight was for my dad, it wasn't for me.

Simon was motivated, therefore, to correct what was "wrong" on behalf of his father even though he did not see himself as being personally impacted by the outcome: "I don't have a major problem either way because I'm not the affected [party]".

In summary, each of the participants in my research was motivated to engage with the Court for reasons that went beyond the strictly legal outcomes that the Court delivers. The goals that participants wanted to achieve, and the things that sustained them in their interactions with the Court, were often of a more personal and ephemeral nature than just

"obtaining a Court order" or "having rights recognised". While participants did make reference to those more objective goals, they were often framed as the *means* through which participants could achieve a range of more personal outcomes. Participants wanted to be connected to the land, and ensure their descendants also benefited from that connectedness. They wanted to show respect to a deceased parent. Or they wanted to engender positive feelings of competence, responsibility, and helpfulness, by assisting other landowners.

Each of these goals could be described as "intrinsic motivations" for using the Māori Land Court. An intrinsic motivation is something that is important to a person because it speaks to their values or emotions. It contrasts with an extrinsic motivation, which is a motivation to achieve an objectively measurable outcome.[3] I explore this further in the next chapter, where I discuss my findings and extend them into proposals to support those who use the Court.

V The Experience of Being in the Courtroom

As noted in chapter 2, the Court hearing is likely to form a prominent part of the overall Court experience. The first exercise in the workbook included an image of the courtroom with speech bubbles to fill out, and almost all the participants used this exercise to report on their personal experience in the courtroom and how they found it. Three themes arose. First, participants expressed quite mixed views about the experience, some negative and some positive. Secondly, participants who had prior experience in other court settings contrasted those experiences quite strongly with their experience in the Māori Land Court. Thirdly, participants commented on the openness of the courtroom – some in a positive light, and some in a negative light.

[3] Klaus Krippendorff *The semantic turn: A new foundation for design* (CRC Press, Florida, 2006) at 137.

A Mixed Views about the Court Experience

Three participants expressed positive views about the experience of being in the court hearing, mainly due to the informality of the experience and the support that they received from both the staff and, in some cases, from the Judge. For example, George said: "you could have been having a cup of coffee ... you couldn't have been more informal!" As a result, "it felt very real". Linda described the process as "lovely":

> It was fantastic, the whole process in court, I mean the judge, the court staff, the whole lot, you can see total respect put out there. It was. The whole process. I was just like – woah. It was absolutely lovely.

The only slightly negative comment that Linda had to make about the courtroom experience was the fact that, when te reo words were used, some were translated but some were not, and she could not pick up all of what was said.

Simon, an experienced Court user, was critical of the courtroom experience. He disliked the feeling of being in a courtroom at all:

> The idea of the Māori Land Court was to break down the barriers to Māori, to make it easier and give us access to justice, that was the goal when it got changed to the 92 Act; that was the goal. What we've got now is, you go into a courtroom. You may as well go to the, well, our one is held at the local court like most of them are. So you go in the courtroom, there's the Judge sitting up there, there we are down there, there's the public behind you and they get to hear all your dirty laundry.

Patricia, also an experienced user, also pointed out some of the downsides of the Court hearing. She used a cartoon image of a grumpy looking older man to represent the Judge and emphasised, in pen, his downturned mouth. She wrote beside it "Geez, was the judge talking to me?". In her interview she expanded on this:

> If you're in a hearing of some sort, you know and you missed a question – what was the question? For me, if I miss a question or I miss some kōrero that's really important, it can really rattle me because I like to know everything and I like to be on top of everything.

B The Influence of Prior Court Experience

Three participants had prior experience in other courts, and all of them raised this in order to draw a contrast with what the Māori Land Court experience was like.

Two participants had previously been involved in the courts as defendants in criminal proceedings. One had been in the *same courtroom* in the past as a defendant in a criminal matter. This appeared to contribute to, rather than detract from, the positive nature of the experience for this participant. Unprompted, this participant said "it's quite nice being in the courtroom without going in the dock you know".

One participant had previous experience in courts in a professional capacity, providing advisory reports, and it seemed that the main difference for her was the informality of the Māori Land Court hearing, compared to her previous experiences in other courts.

C Observing Court Hearings

Three participants commented on the ability to observe other applicants' Court hearings; one view was negative and one was positive. The openness of the Court hearing was an issue of concern to Simon. He understood the underlying principle of the need for transparency but "does the whole of New Zealand, every Māori in New Zealand need to know?". He included an image in the "Court experience" collage of a group of people to represent "whānau laughing/smart remark" and included text saying "it's hard talking to the judge, people behind you talking, kids and babies crying".

For Allison and Linda, however, being able to observe the people in Court ahead of them was helpful because they learned things from the people that went up before them. Allison felt nervous before the hearing, but "another case went up before us so we sort of got an overview of what happens, which made it a wee bit relaxing".

In summary, there were very mixed views amongst participants in terms of their experiences of being in the courtroom. Some were pleasantly surprised at how informal it was, particularly when compared to their experiences in other courts, whereas other participants felt that aspects of the court setting were problematic.

D Interactions with Judges in the Hearing

Participants reported a range of different perceptions about the Judge within the hearing. Some of these perceptions speak to the nature of the Court experience as being direct and usually unmediated by lawyers. Others speak to the facilitative role of the Judges in hearing and determining applications (see chapter 2).

All of the less experienced participants found comfort and reassurance in the Court's facilitative role and expressed how it was useful to them. For example, two participants pointed out that they received assistance or information from the Judge in the hearing itself, in relation to their ability to put their land interests into a whānau trust. George appreciated this – he thought the judge was "very cool" and felt like "he really cared ... he's helping".

Patricia, an experienced Court user and who has never used a lawyer in the Court, spoke about how she was confident in her interactions with the Judges. She is respectful of their authority, but also, "I've sort of gotten used to them, I can stand and challenge them." Patricia's experience speaks to what it is like to appear in the Court without a lawyer, and to represent one's own interests.

Lastly, two participants reported feeling less content with the facilitative nature of the Judges' approach. For example, when I asked Frances for her view on how the Judges handle the proceedings, she was generally positive but also pointed out that "they're too eager to send you out and go and hui and hui and hui and come back with a result". She understood that the Court has to protect the interests of the minority, but pointed out "if the evidence is there, they should rule on that evidence". Otherwise, the Court deprives people of a decision, and also applications can drag out for years, much longer than they would "in the European Court".

VI Conclusion

This chapter has provided a holistic impression of the experience of using the Māori Land Court, based on my research findings. I have sought to present as faithfully as possible

the common threads of experience between participants, as well as to point out those areas where their experiences diverged.

Consistent with the aims of my research methodology, participants were left to make choices about what aspects of their experience they wanted to highlight, and the findings in this chapter do not present a complete account of the experience of using the Court. However, they reflect participants' own choices about what aspects of their experience they wanted to discuss. In this way, they provide insight into the things that participants considered to be important, or worth sharing, about their Court experience.

In the next chapter, I discuss the implications of these findings, and put forward some proposals.

Chapter 7

Court Experiences: Discussion and Proposals

The research findings set out in the previous chapter provide a snapshot of the experience of a small group of owners interacting with the Māori Land Court as a "user". In this chapter, I discuss the possible implications of those findings, and suggest ways that we might recognise the experience of those who use the Court, and support their use of it. At relevant points I link the discussion to design concepts that were introduced in chapter 3.

I Support and Sustain Intrinsic Motivations to Use the Court

As reported in the previous chapter, participants expressed three main, intrinsic motivations for using the Court. Participants were driven by their desire to (1) establish or maintain links with land, (2) help others, or (3) fulfill a parent's wishes. These can be described as intrinsic motivations because they speak to the fulfillment of personally held values or emotions, rather than being directed towards achieving objectively measurable outcomes.

There are some similarities between my findings on intrinsic motivations and the findings of Sara Passmore's research into the drivers and barriers that landowners experience when succeeding to Māori land.[1] Passmore surveyed Māori landowners on a selection of drivers and barriers, and asked them to choose which drivers made the succession process easier. Just under 70 per cent of respondents selected "having a feeling of duty and responsibility" as a driver that would make succession easier.[2] This resonates with my own research, in which participants described being motivated to engage with the Court because of a feeling of duty or responsibility (in my research, this was directed towards

[1] Sara Passmore "Understanding the barriers and drivers for Māori to undertake succession to ownership of Māori Land" (report submitted in partial fulfilment of the requirements for an MBA, Victoria University of Wellington, 2018).
[2] At 28.

fulfilling a parent's wishes). Just over 30 per cent of respondents to Passmore's survey said that "mana" made the succession process easier – that is, having the authority, status and influence to bring the succession application.[3] This may align, to some extent, with participants in my research being motivated by a feeling of wanting to help others and demonstrate their competence in dealing with the Court.

Intrinsic motivations are meaningful, in terms of the semantic theory of design, and design artifacts ought to support those intrinsic motivations.[4] We can therefore ask whether the Court, and its surrounding artifacts, support the intrinsic motivations described above. We can explore ways to support the intrinsic motivations that bring landowners to the Court. In doing so, we can make the Court experience more meaningful for people, and encourage those who are already using the Court to continue to do so. What are some ideas to build on or support the intrinsic motivations that participants expressed in my research?

A Facilitate Connections between Experienced Court Users

In chapter 5 I propose the creation of a network through which experienced Court users can connect with each other and share their expertise. A network of this kind might appeal to and support Court users' intrinsic motivations to help other people navigate the Māori Land Court system. The network provides a platform through which experienced users can demonstrate competence in Māori land matters, and help others. It engages people according to what motivates and drives them.

B Leverage off Existing Online Tools and Resources

Another way we could target, and make use of, landowners' intrinsic motivations to engage with the Court is in the design of online tools and websites about Māori land. There is a remarkable number of these online resources, which people can use to see

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[3] At 28.
[4] Klaus Krippendorff *The semantic turn: A new foundation for design* (CRC Press, Florida, 2006) at 137.

details about their land. Māori Land Online is a database of ownership information.[5] My Whenua is a site for owners of land managed by Te Tumu Paeroa.[6] Last year the Government launched an upgraded website called WhenuaViz, which allows landowners to generate customised land reports including information about soil properties, climate, and potential land uses.[7] The Government is in the course of developing another standalone website, the "Whenua Knowledge Hub", as a hub for land information, although the details of what it will contain have not yet been specified.[8]

These various websites and access points to the Māori land system can leverage off landowners' motivations to be more connected to their land, and this in turn may lead to greater landowner engagement with the Court. Particularly for young people, especially those who grow up without access to tribal lands, these kinds of tools may be very significant. Some of that significance can "rub off" on the Māori Land Court, and get future landowners into the land system. A productive area for further inquiry might be, for example, whether these kinds of websites can incorporate visual, cultural, historical, and tikanga-based information about land, to draw current and future landowners in and encourage them to explore and engage.

II Using the Court – Design Artifacts to Ease the Way

Māori landowners are required to engage with the Court to take steps in respect of Māori land, but the experience of doing so is not a typically "legal" experience. Often, landowners do not use lawyers, so their contact with the Court is direct and unmediated. They face new and daunting situations, like appearing in Court, possibly for the first time. Possibly they expect that it will be a formal and highly procedural experience, based on what they know about the typical "court". They may be pleasantly surprised to discover

[5] www.maorilandonline.govt.nz.
[6] www.tetumupaeroa.co.nz/services/my-whenua-online-updates-info/.
[7] www.whenuaviz.landcareresearch.co.nz.
[8] www.tpk.govt.nz/mi/whakamahia/whenua-maori.

that it is not like that, but in the meantime have faced the anxious prospect of appearing on their own behalf, or with a lawyer, to "prosecute the application" in the courtroom.

The reason they are at Court may be because one of their parents has died, and they need to assert their legal entitlement to the deceased's land interests. In the lead up to that experience, they will have dealt with grief and emotional turmoil. They might have dealt with family conflict, triggered by the death of their parent, and now finding expression in an argument over who ought to succeed to the land interests, and what their deceased parent would have wanted.

Landowners bring their personal histories to the Court. This may include having seen their own parents use the Court, and seeing the impact that the Court had on their parent's lives, whether positive or negative. They may be of an age where they have seen their grandparents engage with the Court. Perhaps this was under an old legislative scheme, which, unlike TTWMA, did not recognise Māori land as a taonga tuku iho. The experiences of previous generations of their whānau will contextualise landowners' own engagement with the Court.

After the hearing is over, and after they have received a Court order, they might need to photocopy all the materials and send them to siblings or family members at home and overseas. They might make follow-up phone calls to clarify and explain what happened at the hearing. They might need to go back to Court for a related matter, for example, to put interests that have been succeeded to into a whānau trust.

They could be appearing in Court frequently, bringing succession applications on behalf of the children of now-deceased members of their whānau. They may have travelled to a different part of the country, to a Court sitting that is close to where the land interests are located. As a result of doing this work, they are helping to ensure that land records remain up to date, and that a descendant's ancestral connection to land is formally recognised at law. That descendant may now be able to formally take part in decision-making about the land interests, where they could not have done so before.

All of these scenarios reflect or connect with the experiences of participants in my research, and they help to demonstrate what it is like to bring a land application, and especially a succession application, to the Māori Land Court. It takes time, care and effort. It can be a sad, depressing, confusing, lonely experience. It can also be emotionally uplifting, satisfying, and overwhelming. Lawyers are often not there to provide guidance, advice, and support and help people navigate the twists and turns of the legislation.

A Attend to the Design of Relevant Artifacts

These findings support the need to turn our attention to the way that various artifacts within the Māori Land Court system are designed to improve the Court experience. For example, participants in my research mentioned using the Māori Land Court website, which brings in the realm of human–computer interaction design.[9] They accessed frontline services through the Court offices, to which principles of service design and user experience design will be relevant.[10] Principles of information design are relevant to the design of Māori Land Court forms.[11] The courtroom itself is also a design artifact, to which the field of architecture and interior design will be most relevant. Sensitivity to design has been shown in the refurbishment of courtrooms to reflect local Māori traditions. It is interesting to reflect on the fact that the design of the courtrooms still relies on the inherited English tradition of the judge being on a higher level and separated from the applicants by the judicial bench.[12] In short, design is a vast field, and we can look to design to help us consider and attend to the design of artifacts in the Māori land

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[9] See for example J Jacko and A Sears (eds) *The human–computer interaction handbook: fundamentals, evolving technologies and emerging applications* (Lawrence Erlbaum, Mahwah (NJ), 2002).
[10] See for example Gavin Allanwood and Peter Beare *User Experience Design: A Practical Introduction* (2 ed, Bloomsbury, London, 2019) and Lara Penin *Designing the Invisible: An Introduction to Service Design* (Bloomsbury, India, 2018).
[11] See for example Jorge Frascara (ed) *Information design as principled action: Making information accessible, relevant, understandable, and usable* (Common Ground Publishing, Illinois, 2015).
[12] For a discussion of the design decisions associated with the positioning of the judge in English and common law jurisdictions see Linda Mulcahy and Emma Rowden *The Democratic Courthouse: A Modern History of Design, Due Process, and Dignity* (Routledge, Abingdon, 2020) at 244.

system, and whether those artifacts improve the Court experience and, perhaps, make the Court more accessible.

By attending to the design of these artifacts we recognise that Court users may be performing an important service to other landowners by representing their interests before the Court. They may be doing so at their own time and expense. Landowners cannot *avoid* using the Court if they want to deal with their land, and often they do not have a lawyer to help them navigate through the system. Each of these features is unique to the Māori Land Court and the experience of using that Court. They underscore the need to consider the way the Court and its associated artifacts are designed.

B Consider Emerging Digital Technology

In her research, Sara Passmore makes a number of recommendations involving digital technology to address a number of barriers to succession specifically. Many of these recommendations are supported by my own research findings. Passmore suggests, for example, making use of existing and emerging technology in ways that would auto-populate name and birthdate information on online Court forms and even whakapapa information.[13] Another recommendation Passmore makes, which my research also supports, is to use digital technology to keep Court users informed of the progress of their application.[14] This would remove the burden on the Court applicant to keep their family members or others updated. An example of this kind of technology is Stanford Legal Design Lab's "Wise Messenger" application, which can be used by (among others) court administrators to remind litigants of upcoming court fixtures and other important dates.[15]

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[13] Passmore "Understanding the barriers and drivers for Māori to undertake succession to ownership of Māori Land", above n 1 at 26 and 37.
[14] At 37.
[15] www.wisemessenger.co.

C Consider Further Digitisation of Court Records

One of the participants in my research pointed out that not all of the information landowners need to access is online. Therefore, another option to explore, which may ease some administrative burden for Court users, is increased digitisation of Māori Land Court records. This is a recommendation made in Layne Harvey's PhD thesis, aimed at enabling greater use of online searching.[16] If there were concerns about placing Court records online that contain evidence of whakapapa, these would need to be addressed.

III "Meaning in Use" – A Valuable Concept?

In this final part of the chapter, I draw on the concept of the meaningfulness of the Court "in use" and consider whether it resonates with things that participants said about their Court experience.

I noted in chapter 3 that a design artifact that is "meaningful in use" is, among other things, *cognisable* to those who use it. Stakeholders must be able to apply their own conceptual categories to recognise the artifact, drawing on prior experiences with similar artifacts, their common sense, and prevailing conventions.[17] A connection with this concept, which arose in the research, related to the way in which some participants described what they were expecting the Court experience to be like, or the way that they expected the Court to behave, and what it was like in reality. For example, three participants had prior experience in other courts, and all of them raised this in order to draw a contrast with what the Māori Land Court hearing was like. They approached the Māori Land Court with an expectation that the experience would be formal and intimidating. Their approach to the Māori Land Court was informed by their pre-existing conceptual categories of a court, and their prior experiences with other courts. But their Court experience was much more informal, helpful, and even "lovely".

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[16] Layne Ross Harvey "Would the proposed reforms affecting ahu whenua trusts have impeded hapū in the development of their lands? A Ngāti Awa perspective" (PhD thesis, Auckland University of Technology, 2018) at 213.
[17] Krippendorff *The semantic turn: A new foundation for design*, above n 4 at 91.

Another participant also experienced a disjunction between what she expected of the Court, and what the reality was like. Frances expressed her frustration that Judges encourage Court applicants to "hui, hui, hui". She wanted a decision on her circumstances. Frances's experience may reflect a widely held understanding that a "court" is a body that decides for one side or the other. Her frustration, and the frustration that other landowners have sometimes expressed about the way the Court exercises its functions, may have to do with the disruption to meaning that is experienced when the Court does not provide a decision, and instead encourages applicants and other interested parties to try and reach agreement on the matter between themselves.

The discussion above might lead us to consider how we communicate with landowners about the Court and its functions. Landowners might benefit from it being made even more clear, in the communication around the Court, what the Court hearing will be like; and that they will be encouraged, where possible and appropriate, to reach agreement between themselves, in line with the Court's facilitative role under TTWMA.[18] Or, we could reflect on what landowners might expect of a body that was known not as a "court", but as, perhaps, a "Māori Land Tribunal", or a "Māori Land Panel".

It is conceptually helpful to consider the ways in which a court can hold meaning to those who use it, and the ways in which this meaning might be disrupted or distorted in the Māori Land Court context, because that Court is likely to differ in many ways from the typical idea of a court that people have in their heads. By deploying the concept of "meaning in use" to deliberately pay attention to what the Court means to those who use it, rather than those who are "system insiders", we can build a richer understanding of the Court experience.

IV Conclusion

In this chapter I have suggested some things that we could do, change, or introduce in the Māori Land Court system, based on my research. These proposals are focused primarily

[18] Te Ture Whenua Maori Act 1993, s 17(2)(c).

on things that will improve the experience of using the Court. We know that the Court experience can take an emotional and administrative toll, in what may be, if someone has died, already trying circumstances. We need to facilitate and support people who are using the Court in those circumstances, especially those who are "lead users", acting on behalf of other whānau members. We need to attend carefully to the design of the many artifacts in the Court system that impact on the experience of use.

In the next chapter, I explore another connection between design and the Māori Land Court that we might explore. It relates to the way that we approach Māori Land Court reform, and how we might encourage landowners, as stakeholders in that reform, to engage in ongoing, design-oriented discussions about the Māori Land Court.

Chapter 8

Design and Māori Land Court Reform

In this chapter I address the second of my two research objectives: namely, whether a design perspective might contribute to ongoing discussions about the Court and possible reforms. I also evaluate whether the method that I developed, and tested, could be useful as a tool to assist in reform.

Considering a design perspective on reform is timely as we can expect debate and discussion around the Court and its role in the Māori land system to be a feature of the legal and policy landscape in the future. The Government has already stated that it envisages further stages of legislative amendment, although it has not set down a timeframe or indicated what those might entail.[1] Te Hunga Roia Māori, the Māori Law Society of New Zealand, has pointed out that while TTWMB makes some positive changes, it does not introduce a "Treaty compliant system" for Māori land law.[2] We may, therefore, see further discussion in the near future about the Māori land law system, perhaps with a strong focus on principles derived from Te Tiriti o Waitangi/the Treaty of Waitangi.[3] There is an opportunity to consider whether design practices and processes might be used to advance, shape, or help guide and direct those discussions.

In this chapter, I consider the potential for design to do this, in a range of different ways. The purpose is not to set down definite directions for law or Court reform, but to

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[1] (15 October 2019) 741 NZPD 14273.
[2] Te Hunga Roia Māori o Aotearoa, The Māori Law Society "Submission to the Māori Affairs Select Committee on the Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019" at [11].
[3] See page 53, n 82 of this thesis for reference to the jurisprudence stemming from te Tiriti/the Treaty and its principles. See also reference to te Tiriti/the Treaty within the preamble of Te Ture Whenua Maori Act 1993 and, for an in-depth discussion of Treaty principles in the Māori land context, see Waitangi Tribunal *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act* (Wai 2478, 2016).

investigate whether various different design practices and concepts – including the method I developed – might add value to reform processes.

I Influence of Design Already Apparent in Māori–Crown Relations

The use of design practices and processes is particularly topical given recent developments in the relationship between Māori and the Crown. The Crown has begun to apply "co-design" as a method of developing policy in a range of areas where Māori interests are significantly affected, and in some cases has explicitly positioned Māori as "co-designers".[4] In 2018, Te Arawhiti (the departmental agency responsible for Māori–Crown relations) released an "engagement framework" designed to help government departments determine how and when to engage with Māori and the degree of control Māori ought to exercise within any particular initiative.[5] Where Māori interests are "significantly affected", "overwhelming and compelling", or "central", the engagement framework requires either that Māori act as "co-designers" of the initiative, or that Māori be empowered to lead it. Putting co-design commitments into practice in a meaningful way, however, may prove challenging.[6] What is described as "co-design" may end up amounting to little more than consulting Māori on an existing Crown proposal. For

[4] For example, the current Government has introduced a criminal justice reform approach, Hāpaitia te Oranga Tangata, which focuses on "working collaboratively, using appropriate co-design methodologies": Memorandum to Hon Andrew Little, Minister of Justice "Hāpaitia te Oranga Tangata – Summit and Programme Update" (20 July 2018) at [4]. See also www.safeandeffectivejustice.govt.nz. In the youth justice space, Oranga Tamariki (New Zealand's government ministry responsible for child social policy and youth justice) has a "Māori Design Group" which forms part of that Ministry's commitment to "collaborative design": Oranga Tamariki *Annual Report 2017/2018* at 30. For further examples see *Policy by Design: Exploring the intersection of design & policy in Aotearoa NZ: 7 case studies* (May 2018), which describes design-based approaches to developing education strategy, to engaging Māori in the development of social services, and to designing housing policy prototypes.

[5] Office for Māori Crown Relations–Te Arawhiti "Engagement Framework" (1 October 2018, www.tearawhiti.govt.nz). See also Office for Māori Crown Relations–Te Arawhiti "Guidelines for Engagement with Māori" (undated, www.tearawhiti.govt.nz).

[6] See for example Donna McKenzie and others "Co-production in a Māori context" (2008) 33 Soc Pol J NZ 32.

example, this appears to have been the case in the design of the Government's primary health care strategy, which was recently commented on by the Waitangi Tribunal.[7]

We can expect that Te Arawhiti's engagement framework will influence how the Crown approaches future Māori Land Court and land law reform. We could see a co-designed approach towards Court reform, in which decision-making is shared between the Crown and Māori. Alternatively, we might see Māori lead the reform discussions. In either scenario, it is useful to consider how design practices or concepts might help lead, shape, or guide those approaches to reform.

II Moving into "Design Mode"

We can frame this investigation by considering what it might look like to move into "design mode" in respect of the Māori Land Court. This terminology comes from Ezio Manzini, who is interested in design as a fundamentally human capability.[8] He describes "design mode" as a mode that is accessible to everyone:[9]

> Design mode means the outcome of combining three human gifts: critical sense (the ability to look at the state of things and recognise what cannot, or should not, be acceptable), creativity (the ability to imagine something that does not yet exist), and practical sense (the ability to recognize feasible ways of getting things to happen). Integrating the three makes it possible to imagine something that is not there, but which could be if appropriate actions were taken.

This description of design connects with earlier discussions of design explored in chapter 3 of this thesis. Design is about *what could be*, and design practices help us move towards that future state. So, if we were to look at the Māori Land Court in "design mode", we

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[7] Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 140–142.
[8] Ezio Manzini *Design, When Everybody Designs: An Introduction to Design for Social Innovation* (MIT Press, Cambridge (Mass), 2015).
[9] At 31. Manzini is also referenced by Amanda Perry-Kessaris, in her consideration of how designerly ways can assist juristic lawyers: Amanda Perry-Kessaris "Legal Design for Practice, Activism, Policy, and Research" (2019) 46 Journal of Law and Society 185 at 186.

would look critically at how the Māori Land Court is currently operating. We might identify what is not working the way we want it to, by *imagining* alternatives to the status quo. This needs to be combined with an ability to figure out *how*, in a practical sense, to move from the status quo to the preferred state.

This straightforward description naturally does not set out all the value judgments, discussions, and decisions that would need to take place in design mode. For example, we have to decide what values and criteria we are applying to the current state of things, in order to decide whether or not that current state is acceptable. This is likely to require quantitative and qualitative research and debate amongst stakeholders about what is the appropriate purpose and function of the Māori Land Court. That debate would then influence the kind of alternatives that we imagine. Furthermore, "making things happen" in the context of the Māori Land Court, as a public entity, will require public funds and political appetite, adding an extra layer of complexity.

In this thesis, I argue in favour of focusing our designerly attention primarily on what the Court means to landowners and how landowners do (or do not) engage with the Court. However, regardless of the particular design objectives that we settle on, the purpose of being in "design mode" is to generate a space in which we can be imaginative and creative about possible Court reform, and contemplate the idea of change to the current system and what that change might look like.

A Design Mode Focuses on Change

Herbert Simon's seminal definition of design as being about the transformation of existing conditions into preferred ones[10] reminds us that, fundamentally, design is about *change.* By positioning something – a service, an entity, an institution, a product – as an artifact of design, it becomes amenable to change, and therefore challenge. So, when we enter design mode, we are, first and foremost, suggesting that the Court is open to change.

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[10] Herbert A Simon *The Sciences of the Artificial* (3 ed, The MIT Press, Cambridge (Mass), 1996).

Why is this helpful or valuable? It seems obvious that the Court can be changed because we have seen its jurisdiction shrink and expand in the past and functions added and taken away through legislative reform.[11] But there is a sense that further reform in this space is needed, along with a sense that stakeholders are not sure what reform ought to look like. Harvey observes there is "undoubtedly" a desire for change among owners of Māori land,[12] but he also reflects on the several voices participating in the discourse, "obdurately turning their faces away one from the other and each certain beyond all doubt, that their perspectives are the only correct response".[13] Four participants in my research touched on the sentiment that change of some kind is needed, without necessarily being sure about what that might be. For example, George said:

> A committee will have to sit down for twenty years and think about how they can best approach some way of resolving this for Māori. And I can't even see that happening, because I don't even know where they'd start.

One way of moving past this stuck phase could be by moving into design mode, positioning the Māori Land Court as an artifact of design and one that is open to being challenged and changed.

It would not be surprising if there were latent apprehension about what negative outcomes could result from change, such as the Court being unilaterally abolished by the

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[11] Significant jurisdictional change took place for example under the Native Lands Act 1909 (which among other things tasked the Court with exercising jurisdiction over the adoption of Māori children) and in 1932 when the Court took on the function of confirming alienations of land from the Māori Land Boards: see Royal Commission on the Maori Land Courts *The Maori Land Courts: Report of the Royal Commission of Inquiry* (Government Printer, 1980) at 13 and 16. The most recent significant legislative reform was in 2002 under Te Ture Whenua Māori Amendment Act, which gave the Court the jurisdiction to make orders enabling access to landlocked land: Jacinta Ruru and Anna Crosbie "The key to unlocking landlocked Māori land: the extension of the Māori Land Court's jurisdiction" (2004) 10 Cant LR 318.

[12] Layne Ross Harvey "Would the proposed reforms affecting ahu whenua trusts have impeded hapū in the development of their lands? A Ngāti Awa perspective" (PhD thesis, Auckland University of Technology, 2018) at 212.

[13] At 33.

Crown[14] or reverting to an institution that enables or facilitates alienation of Māori land out of Māori hands. Change could operate in a way that is ultimately harmful for Māori. It is therefore critically important that when we enter into design mode, we do so with the goal of improving outcomes for Māori. This requires that we put design to work in a critical way, with an awareness of its cultural heritage, and with the goal of displacing rather than entrenching or replicating colonial models.

Articulating the value of "design as change" is not a suggestion that the Court *ought* to be changed or that change is valuable for its own sake. Rather, "design as change" operates at the level of attitude or mode. In this mode we remind ourselves that the Court is the designed outcome of a number of deliberate choices, reflecting a range of stakeholders and interests, but ultimately within the scope of our power to change. The change that is proposed and tested might not be the change that is ultimately chosen, but we do need to encourage a space of freedom to propose changes to our current approach to Māori land tenure, and the role of the Court within that. While "design as change" is not necessarily inherently transformative, the field of design might also offer processes or ideas that can help advance, or that may connect with, the transformative aims of Indigenous critiques of law.[15]

B Design Mode Imagines Alternative Futures for the Court

Design is an interrogation of the future – as Manzini notes, it is "the ability to imagine something that does not yet exist".[16] While it can be suggested that we face intractable

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[14] In 1980 the Royal Commission of Inquiry into the Māori Land Courts reported that Māori had made clear to them that the Court's abolition "would inflict a deep emotional blow": *The Maori Land Courts: Report of the Royal Commission of Inquiry*, above n 11 at 44.

[15] See for example Gordon Christie "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67. For an example of the kind of transformative change sought in an Aotearoa/New Zealand context, see *The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (2016) <www.converge.org.nz/pma/MatikeMaiAotearoaReport.pdf>. For an example of a critical Indigenous approach to Māori land law, see George Mohi "He Whakaaro Hou – A Critical Legal Theory Perspective on the Future of Māori Land Law Reform" (a dissertation submitted in partial fulfillment of an LLB, University of Otago, October 2019).

[16] Manzini *Design, When Everybody Designs*, above n 8 at 31.

problems in some areas of the Māori land system, for example, in the ongoing fragmentation of land interests,[17] in design mode we would not be deterred by this:[18]

> Designers consider possible futures, worlds that can be imagined and could be created in real time. They are concerned less with what has happened, what already exists, or what can be predicted by extrapolations from the past than with *what can be done*.

In design mode, we are invited to apply our imaginations. This frees us from focusing on what is happening *now*, or what has happened in the history of the Māori land regime, and encourages us to imagine a range of possibilities that could exist in the future. It creates spaces where outlandish or unusual suggestions can be made and new possibilities can be debated and explored.

In the Māori Land Court context, this future-focus might help us overcome entrenched and polarising themes that have dominated discussion in the past, such as whether the Court ought to distinguish between "engaged owners" and "absentee owners".[19] Instead we might imagine a possible future where such a division either does not exist or is not useful to the work that we want the Māori Land Court to do. More radically, we might imagine a future in which the Court itself does not exist and its functions are performed by some other entity or entities.[20] Alternatively we might imagine a future in which the Māori Land Court exercises jurisdiction over a much larger range of things than it does currently.

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[17] See for example comments of Professor Richard Boast in relation to our capacity to address the challenges of "ever-proliferating lists of owners and accelerating administrative costs", challenges that are "not likely to be readily or easily overcome": Richard Boast "The Evolution of Māori Land Law 1862–1993" in Richard Boast and others *Māori Land Law* (2 ed, Lexis Nexis, Wellington, 2004) 65 at 119.

[18] Klaus Krippendorff *The semantic turn: a new foundation for design* (CRC Press, Boca Raton, 2006) [*The semantic turn*] at 28.

[19] Waitangi Tribunal *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act* (Wai 2478, 2016) at 89.

[20] See for example the suggestion of the Advisory Committee on Legal Services in 1986 that the Court's functions be decentralised to local, representative bodies like tribal rūnanga: Advisory Committee on Legal Services *Te Whainga i te Tika: In Search of Justice* (Wellington, 1986) at 55.

Being in design mode means we can bring those futures into the present and discuss them with confidence, consider their possible implications, and test them on a small scale. For the Māori Land Court, I suggest that this might facilitate hopeful, creative, and bold conversations about the role we see for the Māori Land Court, in our lives and in the lives of future generations of Māori landowners. Two design practices in particular may be helpful here: the first is prototyping, and the second is reframing.

1 Prototyping

One of the ways that design helps us imagine the future, and makes it exist in the present for us to consider, is through the use of prototypes – a test model of a product or a concept. Designers imagine new ideas or new things from possible futures and, through prototypes, make them "exist in the world" so that we can experience, consider, and imagine what a world with that idea in it would be like.[21] Prototypes help us to engage in focused discussion by "putting the phenomenon on the table", and they also confront and reveal theory because by creating a prototype we are forced to make decisions that reflect, and make visible, a theoretical positioning.[22]

Prototypes can add value to our conversations about the Māori Land Court in a number of ways. They allow us to experience a different future reality – for example, a reality in which the Māori Land Court takes on a radically different form or function – and engage in a focused discussion of that reality. They allow us to discuss and experience alternatives within an environment of reduced risk and investment. Because prototypes are not final versions, they allow us to engage confidently and courageously with the idea of alternatives to, or modifications of, the Māori Land Court. We remain in a stage of hypothesising, testing, and mulling over the possibilities in the form of the prototypes before us, and we recognise that developing and discussing a prototype does not commit

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[21] Sharon Helmer Poggenpohl "Design moves: Approximating a desired future with users" in Jorge Frascara (ed) *Design and the Social Sciences* (Taylor & Francis, London, 2002) 66 at 67.
[22] Elizabeth BN Sanders and Pieter Jan Stappers "Probes, toolkits and prototypes: three approaches to making in codesigning" (2014) 10 CoDesign 5.

us to a final form. This could help free us up to discuss ideas without that being taken as tacit consent to the Court being abolished or remodelled.

As well as prototyping Court alternatives, we could also prototype approaches to reform. For example, we could prototype a research and reform agenda for the Māori Land Court in which control over key policy and reform decisions sits with Māori.

2 Reframing

Reframing is the process of "trying out different cognitive devices until something is found that is worth pursuing further".[23] We can turn an artifact inside out; make visible what is covered or put into the foreground what is hidden; unify its organisation (organise disparate elements together) or decentralise its organisation (move from central control to dispersed control); or place it in new contexts to find new uses.[24] Reframing connects with Shklovksy's theory of estrangement.[25] The theory of estrangement (or "defamiliarisation") states that by making an object or idea strange we prolong reflection and make it "difficult", thereby revealing perceptions that might otherwise remain hidden to our cognition or consciousness.[26] Estrangement is theorised in a number of fields beyond design, including as part of a feminist critique of Western scientific method[27] and as a decolonising pedagogical technique.[28]

Another reframing approach is analogy. Through analogy, we can draw on our knowledge of the relationship between, say, A and B, and make that knowledge available

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[23] Krippendorff *The semantic turn*, above n 18 at 215.
[24] At 215.
[25] Victor Shklovsky "Art as Technique" in *Russian Formalist Criticism* (translated by Lee T Lemon and Marion J Reis) (University of Nebraska Press, Lincoln, 1965) 3.
[26] At 12.
[27] Sandra Harding writes that "thinking from the perspective of women's lives makes strange what had appeared familiar" and that this is the first step in challenging male-oriented assumptions and practices that appear natural and unremarkable: Sandra Harding *Whose Science? Whose Knowledge? Thinking from Women's Lives* (Cornell University Press, New York, 1991) at 150.
[28] Zaya Waghid and Liesel Hibbert "Decolonising Preservice Teachers' Colonialist Thoughts in Higher Education Through Defamiliarisation as a Pedagogy" (2018) 7 Educational Research for Social Change 60 and Julie Kaomea "Reading erasures and making the familiar strange: Defamiliarizing methods for research in formerly colonized and historically oppressed communities" (2003) 32 Educational Researcher 14.

for conceptualising the relationship between C and D.[29] To provide an example based in this thesis, we might consider one landowner's description of the Māori Land Court as a "church"[30] and theorise about how the relationship between landowners and the Court is like, or unlike, that of a church and churchgoers.

A kind of reframing was used in a 2001 paper authored by Chief Judge Joe Williams (as he then was), writing extra-judicially.[31] He imagined "what could have been" had the Court been driven by principles of land retention and utilisation from the very outset of its operation. Had it been, today we would see a Court "supplemented by strong community representation and applying a mix of equity, public and Maori custom law to the extent that each of them remains relevant to the circumstances of Maori kin groups in the 21st century".[32] In design terms, we could say that Williams was engaged in a reframing exercise. He looked to an alternative history to shift our perception of current conditions, and to outline a new vision to work towards.

C Design Mode Is "Convivial"

Design mode is convivial, or has the potential to contain a range of convivial and engaging practices or tools. The concept of conviviality, and convivial tools, was theorised by Ivan Illich in support of his argument that people want to, and should be enabled to, engage with and give shape to their world rather than be passive consumers of products or recipients of information.[33] A convivial tool is any thing that enables a person to express and create meaning in this way.[34] Because designers are makers and creators of meaning,[35] it may be said that design is a convivial profession by nature. But convivial tools ought not to remain solely in the hands of expert designers. Convivial tools allow all

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[29] Krippendorff *The semantic turn*, above n 18 at 216.
[30] See page 33 of this thesis.
[31] Chief Judge Joe Williams "The Maori Land Court – A Separate Legal System?" (Occasional Paper No 4, New Zealand Centre for Public Law, July 2001).
[32] At 11.
[33] Ivan Illich *Tools for Conviviality* (Heyday Books, Berkeley, 1988).
[34] At 22.
[35] Krippendorff *The semantic turn*, above n 18 at 47 and Manzini *Design, When Everybody Designs*, above n 16 at 33.

of us to express and create meaning through *making* and being *creative* – whether in the form of Lego,[36] art, collage,[37] or dramatic presentations.[38]

Perhaps in design mode, therefore, we are more collaborative and engaging in the way that we approach Māori Land Court reform. Rather than investing time and resources into long research papers and expert steering groups, we might build networks of stakeholders who are encouraged to reflect on the meaning of the Māori Land Court in their lives through making and creating in collaborative spaces.[39] These collaborative making events would be engaging, playful, imaginative, and involve stakeholders of all kinds. They would be aimed at opening up possibilities and generating conversation, rather than seeking to converge on a single and complete policy solution.

III Envisioning, Reframing, and Creating in Indigenous Spaces

The practices within "design mode" as explored above are conceptually similar to activities that Indigenous communities across the world have been engaging in for a long time. Indigenous communities have been putting these practices into effect for political purposes, as demonstrated by Linda Tuhiwai Smith in *Decolonizing Methodologies*.[40] Smith sets out 25 projects being pursued by indigenous communities as part of a struggle for survival, self-determination, and the taking back of control.[41]

For example, the project of *envisioning* is a political strategy used to bind indigenous communities together. It asks people to imagine or envision a new future in order to survive and rise above present-day circumstances. It is concerned with survival and with

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[36] David Gauntlett *Creative Explorations: New approaches to identities and audiences* (Routledge, Oxfordshire, 2007).
[37] Elizabeth BN Sanders and Pieter Jan Stappers *Convivial Toolbox* (BIS Publishers, Amsterdam, 2012).
[38] Brad Coombes "Kaupapa Māori Research as Participatory Enquiry: Where's the Action?" in Te Kawehau Hoskins and Alison Jones (eds) *Critical Conversations in Kaupapa Māori* (Huia Publishers, Wellington, 2017) 29.
[39] For a discussion of creative community-based engagement methods in the voluntary sector see Carolyn Kagan and Karen Duggen "Creating Community Cohesion: The Power of Using Innovative Methods to Facilitate Engagement and Genuine Partnership" (2011) 10 Social Policy and Society 393.
[40] Linda Tuhiwai Smith *Decolonizing Methodologies* (2 ed, University of Otago Press, Dunedin, 2012).
[41] At ch 8.

the "power of indigenous peoples to change their own lives and set new directions, despite their impoverished and oppressed conditions".[42]

The project of *reframing* sees Indigenous peoples taking control over the ways indigenous issues are discussed and handled. This could be, for example, by framing the issues that affect Indigenous communities as being sourced in history, colonisation, and the absence of indigenous self-determination.[43] Indigenous peoples decide the parameters of the problem and "what shadings or complexities exist within the frame".[44] As discussed above, reframing is also a design practice. The political act of reframing and the design practice of reframing could go hand in hand and each support the other. Māori stakeholders locate the parameters of the issues being faced; understand them in light of history and colonisation; reframe those parameters as needed; and devise and design multiple different kinds of solutions that can be tested, developed, and re-designed.

The project of *creating* recognises the "spirit of creating" that has existed within indigenous communities over thousands of years. Smith notes that "[c]reating is not the exclusive domain of the rich, nor of the technologically superior, *but of the imaginative*."[45] Creativity can be harnessed to imagine a different set of circumstances, whether this be "dreaming new visions or holding onto old ones".[46] My field research used a form of creating – a make-based method that I developed, paying specific attention to alignment with Kaupapa Māori epistemology and research approaches. I now turn to evaluate this method as a potential tool to engage landowners in a Crown–Māori co-design approach to Māori Land Court reform.

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[42] At 153.
[43] At 154.
[44] At 154.
[45] At 159 (emphasis added).
[46] At 159.

IV Make-Based Methods – A Useful Contribution?

The make-based method that I explained in chapter 4 has a number of benefits: it operates on participants' creativity; accesses knowledge that might not be accessible through interviews alone; aligns with a Kaupapa Māori epistemology; and – given it is a form of participatory action research – aligns with a Kaupapa Māori research approach. Here, I evaluate each of those aspects of the research approach. In doing so, I consider whether my make-based research method could be a tool to engage landowners in reform conversations, to take the concept of co-design beyond window-dressing, and to enable genuine and deep engagement.

A Participants' Willingness to Engage Creatively

An anticipated issue with using creative methods is that participants might resist engagement, feeling nervous, that they lack the skills, or that it is infantilising. This fear was not realised in my research, as the participants were generally willing to engage with the creative method.

Two participants did, however, show reluctance to engage creatively and provided only written responses to all of the exercises. The reason they gave is that they do not see themselves as being inherently creative. One participant said "yeah, I'm not into that", and made a "fiddly" gesture with his hands towards the workbook which sat between us on the table.[47] While these participants would not engage in the visual exercises, they were still willing to participate in the research, completing the workbook using text. It is possible that, with more support, they would engage more creatively.

Participants otherwise showed variability in the creativity of their responses. Some responses were what might be considered highly creative, like George's drawing of a

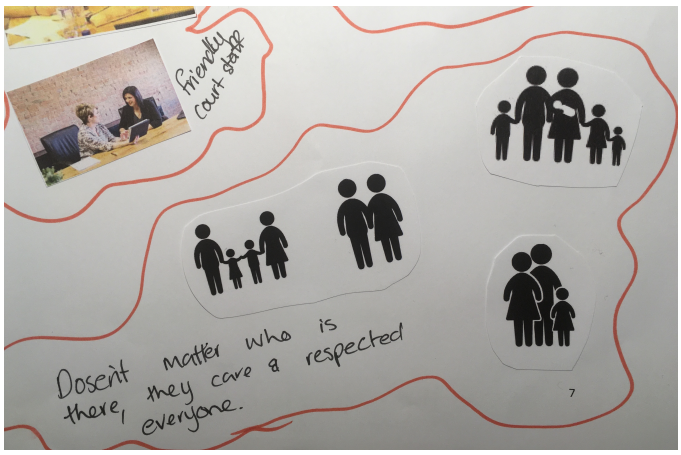
[47] I did not video record the interviews, but I made a "mental note" of the gesture at the time and I recorded it in my write-up shortly after the interview.

koru within a net (see figure 6), representing the cultural growth that he experienced going through the Court but feeling trapped by the limitations of multiply-owned land.

Figure 6: Koru in a net

Other responses were less immediately, obviously creative, but participants had *added* something or *arranged* images in a way that could be seen as creative. For example, Allison took a selection of black icon figures and pasted them together within a hand-drawn bubble (see figure 7). This represented her experience that all people in the Māori Land Court, no matter who they are, were treated respectfully. There was no single symbol or icon that could represent this idea of inclusivity, so Allison used what was available to create and communicate that concept.

Figure 7: Inclusivity



Even minimal expressions of creativity provide a starting point on which to build. A heart outline or the placement of arrows within a diagram is an example of generative use. Adding to images to communicate or emphasise particular meanings, such as tears or a downturned mouth on a face, is an example of generative use. This speaks to the theory in generative design research that creativity can be found even in the simplest forms. I suggest that an expansion of the method I created for this project would take these generative uses as a platform from which to build, and a sign that participants can be pushed to engage and create more.

One way to support participants would be to allow time to explore the idea of inherent creativity and design, and to deliberately challenge the perception that creativity is an inherent trait. It might be useful to spend some more time with participants explaining the "everyday" idea of creativity behind the research approach. On the other hand, explanations are likely to be less effective than practising being creative together, so finding ways to bring people together could be effective. There is a number of ways this could be achieved, including through facilitated sessions with participants creating together, although this would demand more time and commitment from participants. From a research perspective, this would be beneficial not only for the increase in creative output, but because it would allow the researcher to observe participants making their collages. Looking only at the "final product", as I did, meant missing out on data that arose *during* the creation process – how participants chose between different images for their collages; how long it took them to create their responses; what they were thinking and feeling when they did so.

The participants' varying degrees of creative engagement also reinforced the need for a thoughtful approach to the design of make-based methods. Participants need to feel a sense of confidence in the research method, and some participants will need significantly more structure and support to express themselves creatively. However, my research suggests that well-designed and thoughtful creative research methods do connect with people. One participant said that she "thoroughly enjoyed it" and that it had given her a "place to unleash", suggesting that she connected with the creative aspects of the research in a way that would not have happened through an interview alone.

B Indications this Approach Generated Unique Data

There are some indications that the make-based research approach had a different impact on the quality and nature of the research findings than if I had relied on interviews alone. This suggests that the make-based method might be a useful addition to oral and written consultations on reform.

First, I observed that having a visual data set stimulated my own feelings and responses, which I doubt I would have felt if I was just working with interview data. Having the participants' handmade creations made the data feel lively and, in some ways, more urgent or direct. Responses like the large image of a crying face (see figure 4) communicated emotions in a visceral way.

It also meant that I felt a closer connection to the participants when we were conducting the interview, and perhaps contributed to the creation of a positive space for sharing and discussion, and therefore more effective communication. I am not sure if the participants felt the same way, but I did think it was relevant that towards the end of our interview, George was willing to share the following information about his "wairua journey":

> I kind of wondered how far I was going to take, how much I was going to tell you, but the whole process from, you know twenty years ago, was very much … it kickstarted some sort of wairua journey. So the reason I ended up in [the place where my Māori land is] was because I was just overwhelmed with this sense that I needed to go there. This is not me, you know, I'm just a very left brain, functional, "this, this and this" person. But I talked to this kaumatua and he said "look you need to go, this woman is waiting for you". And it was very much a spiritual level. So that wairua level. Which I'd *never* struck before and would completely deny. So that was, yeah it was a very emotional journey, and this process [completing the workbook] brought back how brand new that was. The whole thing was just brand new.

It is also possible that a visual data set helps reinforce and therefore underscore ideas that are expressed verbally in interviews, and helps demonstrate their significance in the data set. An example of this is Wiremu's collage to express his existing experience of succeeding to land in the Māori Land Court. The collage is laid out with very straight

arrows in a single pathway (see figure 8). It reflects Wiremu's view that the succession process, for him at least, is simple and straightforward.

Figure 8: A straightforward process

The make-based method may also assist participants to contribute more within a programme of reform than they would if they were only asked questions in a single consultation session. I asked participants whether, through completing the workbook, they found it easier to *remember*, and therefore recall, what it was like to go through the succession experience. Two participants said that they did. For George, completing the workbook "brought back how brand new" the succession experience was for him. Patricia said:

> absolutely it did [help me remember]. Like I took myself back into those pictures to have a look at what I used to be like when I first started doing this stuff, oh, it'd be twenty, thirty years ago.

Patricia's statement seems to be supported by other comments she made in her interview. In exercise 2 (responding to an image of the research room at the Hamilton Māori Land Court) Patricia had written: "when I first started researching Tupuna Korero it was very stressful, daunting, lonely and quite terrifying". In the interview, when she described to me her response to the exercise, she began in the third person, referring to "how frightening [that experience] can be for *them*". She then switched immediately into the second person: "it can be quite lonely, it can actually be quite sad because *you're* reading

a lot of the old tipuna korero". A few seconds later she began speaking explicitly about herself: "Well it's like for me, sitting there all by myself and wondering where the heck to go and what to do next". This took place within the space of about thirty seconds. It may speak to the effectiveness of visual imagery at helping research participants "put themselves in the shoes" of their former selves, and retrieve or relive emotions or experiences from the past.

C Participants' Agency within the Research

It has been said that creative research methods can:[48]

> provide more opportunities for participants to shape the content of the enquiry, to bring in issues and questions which the researcher may not have considered, and to express themselves outside of boundaries set by the researcher.

I suggested, in chapter 4, that in this sense make-based methods may align with a Kaupapa Māori approach to knowledge-building through research, in which knowledge is allowed to unfold according to conceptual categories that develop throughout the research project, alongside participants, instead of being set down by the researcher independently in advance. I have concluded that the make-based method I used achieved this purpose. The way the participants took part in the research has had a major impact on the direction of the research inquiry. The research inquiry itself became a form of collage, a patterning together of ideas that participants have added to, here and there, across different subject matters, emphasising different things, choosing what they wanted to add and where.

Whilst this approach is more facilitative of participants' agency, this should not be overstated. During the research I made a series of decisions, as the researcher, about what aspects of the data to "pull" into my account of the Court and participants' experiences of it. I could have chosen different emphases. The researcher needs to both answer the

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[48] David Gauntlett "Using Creative Visual Research Methods to Understand Media Audiences" *MedienPädagogik* (March 2005) at 13.

research questions, while also being faithful to the varied approaches that participants might take to the make-based activity and therefore the direction of the interview.

D Make-Based Research and Participatory Action Research

Also in chapter 4, I refer to the connections between make-based methods, participatory action research, and Kaupapa Māori research. Make-based methods may present as a form of participatory action research, and in a Kaupapa Māori context, may serve a conscientisation purpose.

According to Brad Coombes, "[c]onscientisation is more likely to emerge from affective, dramatological, and generative co-creation than it is from practices that are solely based on forms of shared conversation."[49] Did any forms of conscientisation become evident through my use of make-based methods? Given the small scope of this study, I cannot draw a firm conclusion on this. I do not know whether participating in the research shifted participants' perspectives in any way. I suggest make-based methods would need to be put to use in a facilitated generative session with the participants co-creating together, perhaps over a long period of time, in order to properly test their conscientisation possibilities. This would need to be skilfully facilitated given it involves people, emotion, and being creative in shared settings.[50]

However, the use of this method did reinforce the *need* for participatory action research and conscientisation approaches in Māori land and Māori Land Court reform. Here I would point to the comments of George, explaining an image within his collage of a builder holding a plan, to which he added the phrase "not my design":

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[49] Brad Coombes "Kaupapa Māori Research as Participatory Enquiry: Where's the Action?", above n 38 at 37.

[50] Brad Coombes describes using dramaturgical generative techniques with a marae-based community discussing use of land allocated to it under the South Island Landless Natives Act 1906. He reports on the remarkably agentic use of performance by young people involved in the research, but that he also received subsequent negative feedback on the use of participatory dramatisation: at 40–41.

> Not my design, we didn't orchestrate this for ourselves. We're not the architects of this mess. Yet we have a mess. And I think it hampers Māori and it also perpetuates that sense of uselessness.

While I was not able to confirm this through my research, it is possible that being creative, together with others, on a topic that affects Māori, has significant potential as one method among many to encourage "creative, consistent, decolonized thinking that shapes and empowers the brain".[51]

V Conclusion

This chapter has considered whether a design perspective might contribute to ongoing discussions about the Court and possible reform of the Court. We can move into "design mode", which connotes openness to change and imagination, and a desire to be convivial and collaborative in our approach to reform. We can orient our reform conversations around the idea of a design project, which is intended to generate space for discussion among stakeholders, and to keep stakeholders engaged throughout those discussions. We can seek to ensure that tikanga concepts, and distinctively Māori design approaches, are drawn on throughout. Whether Māori are co-designers to Māori Land Court reform alongside the Crown, or whether Māori are in the position of leading those reforms, design may have a valuable contribution to make.

In this chapter I also evaluated the make-based methods that I used within my field research, to consider how these methods might be a valuable tool in moving into design mode to reform the Māori Land Court. I considered whether these methods could make a useful contribution to the field of Kaupapa Māori research: a way to engage landowners, in a meaningful way, to contribute to redesigning the Māori Land Court.

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[51] Michael Yellow Bird and Waziyatawin (eds) *For Indigenous Minds Only: A Decolonization Handbook* (School for Advanced Research Press, Santa Fe, 2012) at 12.

Chapter 9

Conclusion

This thesis has examined the manner in which a design perspective might (1) help us explore the relationship between owners of Māori land and the Māori Land Court; and (2) contribute to ongoing discussions about the Court and Māori land law.

The relationship between owners of Māori land and the Court is complex. By treating the Court as a focal point of meaning, it has been possible to organise the different landowner relationships that surround the Court into three groups, of use, non-use (or potential use), and future-use. I have examined how we might support existing users in their Court engagements. In addition, I hope the framework will, in the future, help us tackle the fact that many putative owners of Māori land are not bringing succession applications. It has the potential to contribute to long-term discussions about how the Court can ensure it remains relevant not only to current landowners, but also to descendants of current landowners – "future users". This question will become more pressing with the ongoing multiplication of interests in Māori land over time (even if those interests are clustered in whānau trusts). My framework is a way to help us organise our thinking around this, and consider how we might respond and engage all landowners, now and in the future.

Land, and its ownership, have "governed the tenor of relations" between Māori and the Crown since the very earliest phase of colonisation and settlement.[1] Māori land law reform will always be a strongly contested subject matter requiring much discussion amongst Māori, and between Māori and the Crown. Design has a genuine contribution to make in these ongoing discussions, and in ways that are deeper and more lasting than the Crown's positioning of co-design to date. My field research suggests that Kaupapa Māori

[1] IH Kawharu *Maori Land Tenure: Studies of a changing institution* (Clarendon Press, Oxford, 1977) at 1.

approaches to building knowledge can be aligned with design-led or creative research methods. Māori stakeholders can be supported to be creative, and valuable insights emerge when they are asked to apply their creativity to issues of significance in their lives. Therefore, Māori Land Court reform can go beyond consultation hui, or the making of submissions to an expert panel. Successful Māori Land Court reform can be collaborative, convivial, imaginative, experimental, and creative and design can help Māori Land Court reform be all of these things.

In conclusion, my thesis contributes to the discussion in Aotearoa/New Zealand by expanding and enriching the way that we understand the Court now, and the directions that Court reform might take in the future. My thesis also contributes to the ongoing international discussion about legal design. It adds to and enriches an emerging field, which is currently dominated by a "design thinking" methodology that lacks a clear theoretical foundation and is sometimes used in simplistic ways. By providing an example of design in an Indigenous legal space, my thesis suggests that design, despite having a firmly Western heritage, can be applied in an Indigenous context, keeping in mind that in Aotearoa/New Zealand, Māori designers have been doing design in a Māori way for some time. These are the accounts of design that Indigenous legal design in Aotearoa/New Zealand ought to draw on.

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Appendix A: The Workbook

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Securing Access to Justice in the Māori Land Court – Can "Design Thinking" Help Us Better Understand Users' Experience?

Workbook of exercises

Completed as part of research for Mihiata Pirini's LLM thesis, University of Otago
Ethics Committee reference code: 19/095

Kia mau ki tēnā, kia mau ki te kawau mārō, whanake ake, whanake ake

Hold fast to that, to the flying cormorant, move forward, move forward

Tēnā koe

Thank you for agreeing to participate in my research. You are helping me improve the way people experience and interact with the Māori Land Court and, ultimately, the ability of Māori to connect with and benefit from their Māori land.

In preparation for our upcoming interview, please complete the exercises in this workbook. Here is an explanation of what is involved.

Instructions	More detail
1. Do one exercise per day for five days **Day one – exercise one** **Day two – exercise two** **Day three – exercise three** **Day four – exercise four** **Day five – exercise five**	Doing the exercises over five days allows you time to reflect on your experience in the Court and your responses to the exercises Spend 5 to 10 minutes on each exercise (or more if you wish)
2. Don't worry about your drawing ability or whether what you produce is "valuable"	You can use scribbles, symbols, stick figures – whatever feels right to you I'm not judging the quality of your drawing skills Whatever responses you give will be valuable for my research!
3. When the workbook is complete, send it back to me using the prepaid return envelope (pop it into any NZ Post mailbox)	
3. If you have any questions at any stage, call or text me on [redacted], or email me on [redacted]	

Why am I asking you to do this?

Part of my research is about whether people can express deeply held values, beliefs and experiences by **making, drawing, or *creating*** something, and then talking about what they have created. This workbook asks you to draw and make things, and reflect on your experience in the Court in ways that you might not have done before.

In our interview, I will ask you some questions about your responses to the exercises, and you will also have an opportunity to raise other things you consider to be important about your Māori Land Court experience.

In this way, I hope to learn some really useful things about your experience in the Māori Land Court that will help me make suggestions for how we can improve the experience of people using the Court.

Thank you again for helping me with my research. He mihi nui tēnei ki a koe, ki tō whānau, ki ō tūpuna hoki – I acknowledge you, your whānau, and your ancestors.

DAY ONE – EXERCISE ONE

Pictured below is a group of owners of Māori land. Fill in the bubbles with what each person might be thinking, feeling, or saying.

Image reproduced with the permission of Te Tumu Paeroa

EXERCISE ONE CONTINUES OVER THE PAGE…

Now, do the same for the image below of a Māori Land Court hearing about entitlement to succeed to an ownership interest in land. Fill in the bubbles with what each person in the court hearing might be thinking, feeling, or saying.

DAY TWO – EXERCISE TWO

This is a photo of the Research Room at the Hamilton Māori Land Court. Does this photo create any memories, thoughts, or feelings about your own experience of going through the Māori Land Court? Describe or draw these in the space below.

DAY THREE – EXERCISE THREE

Spend a few minutes reflecting on your thoughts and feelings about the Māori Land Court and what the Court represents for you. Is there an image, a symbol, an item or a photograph that captures or represents the Court? Draw or paste it here, along with some notes to explain why it is representative.

DAY FOUR – EXERCISE FOUR

Use the images at the back of this workbook and the scissors and glue provided to make a collage that reflects your experience of succeeding to land through the Māori Land Court. Use as many images as you like. You can add drawings, writing, or anything else you like to add details or explanation.

DAY FIVE – EXERCISE FIVE

For this last exercise, please create another collage, but this time one that represents your *ideal* experience of succeeding to land through the Māori Land Court. Again, use as many images as you like, and add drawings, writing, or anything else you like to add details or explanation.

10

11

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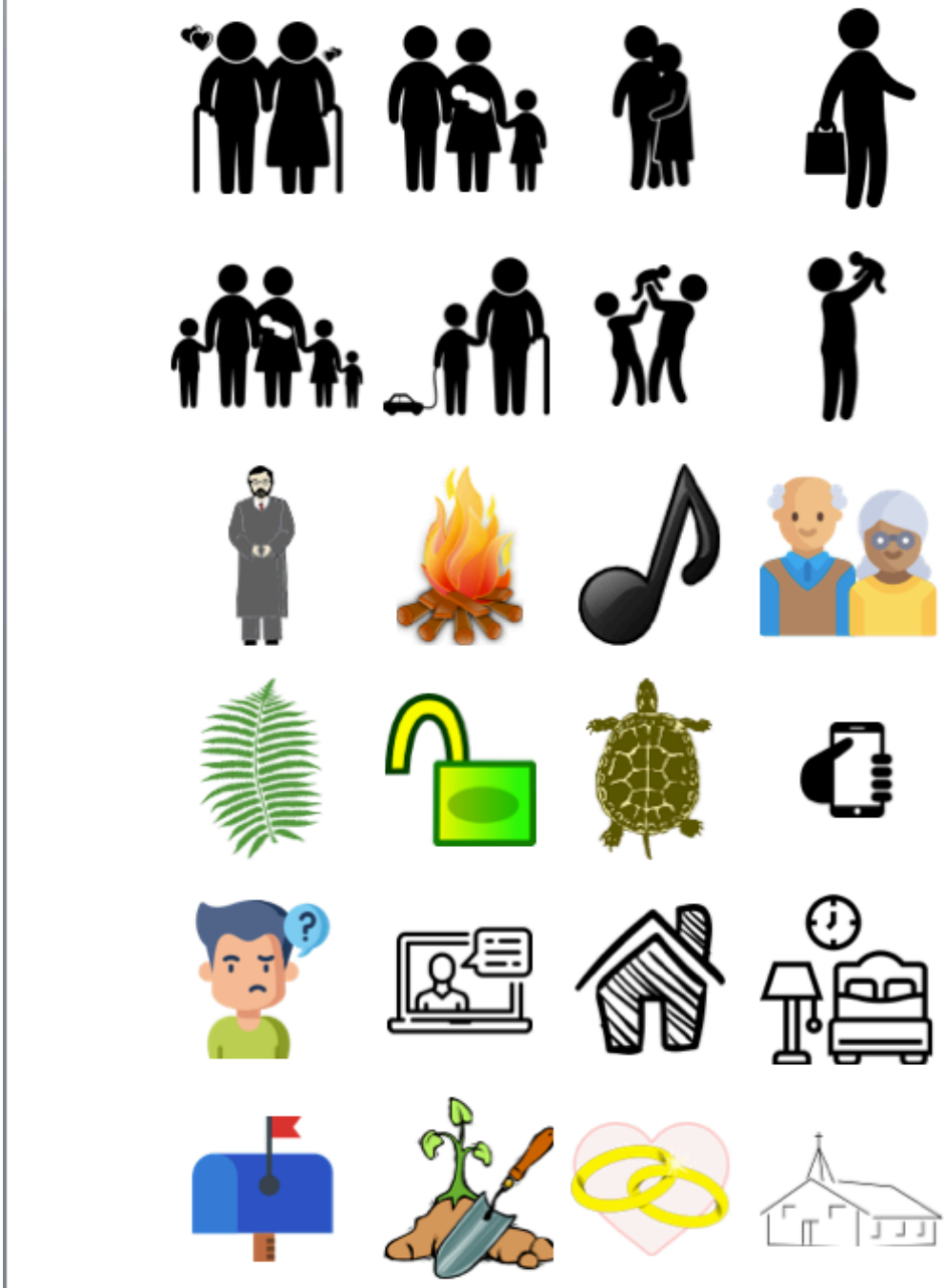
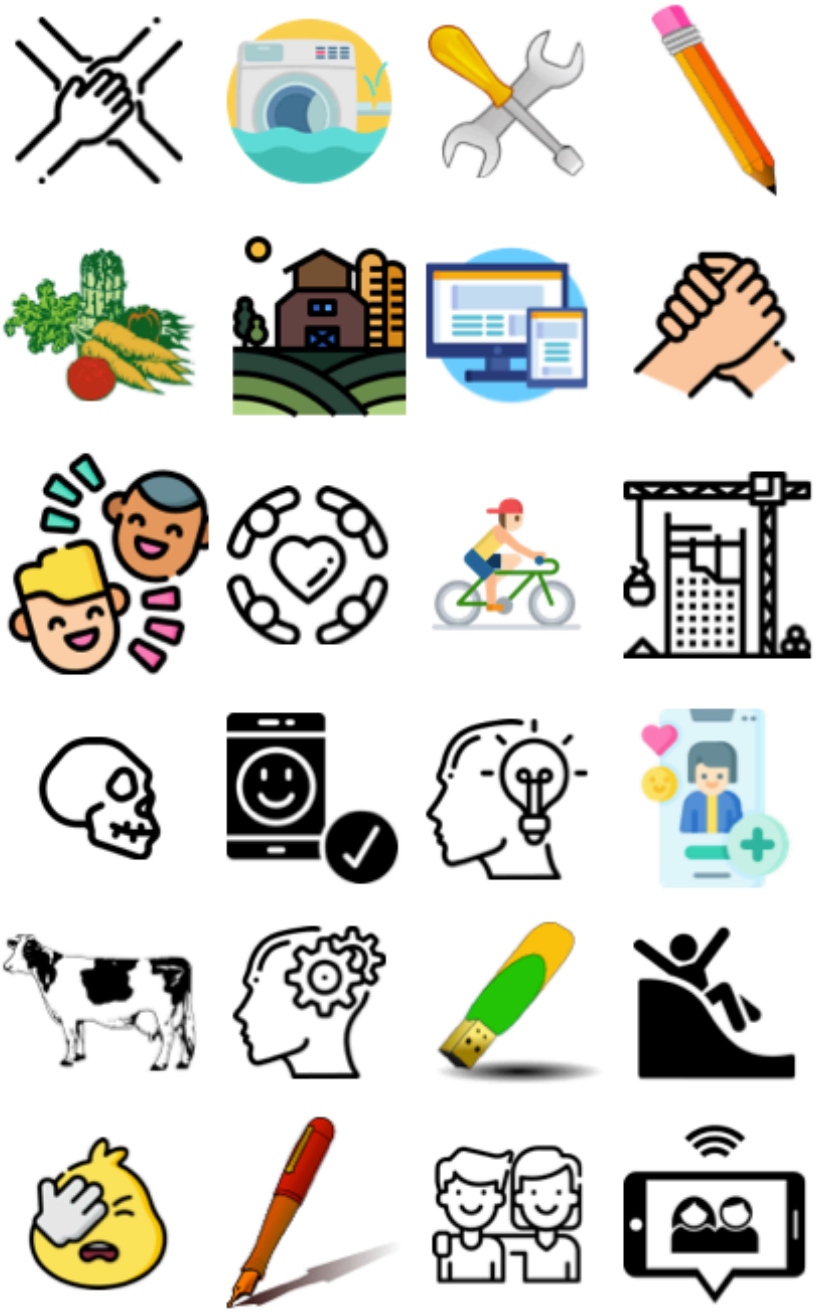


13



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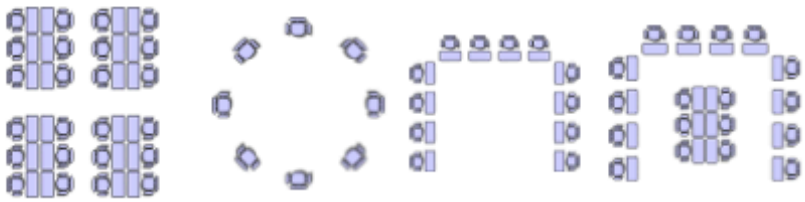

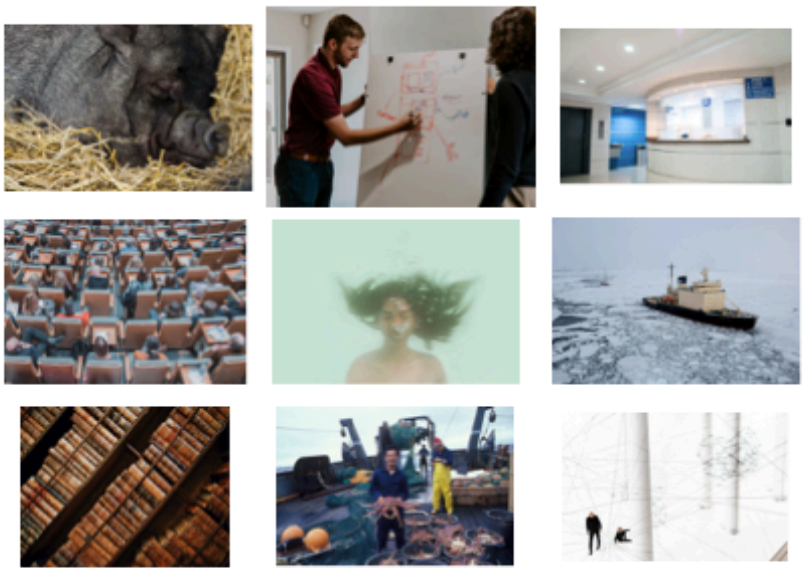

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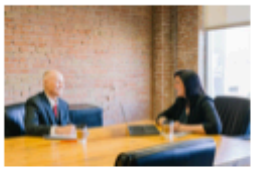






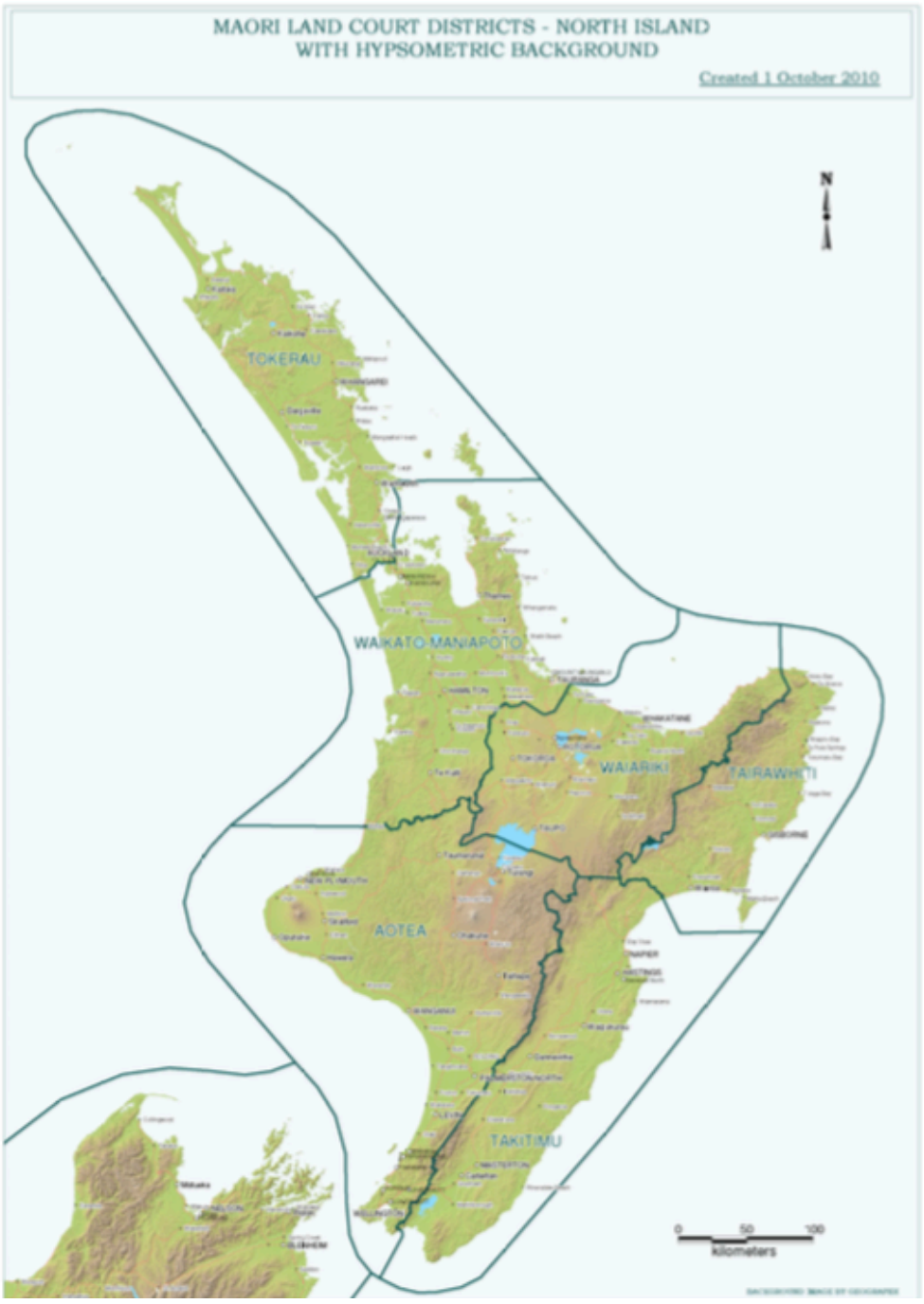









Appendix B: Māori Land Court District Boundaries




MAORI LAND COURT DISTRICTS - SOUTH ISLAND
WITH HYPSOMETRIC BACKGROUND
Created 1 October 2010
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