

**Would the proposed reforms affecting ahu whenua trusts have
impeded hapū in the development of their lands?
A Ngāti Awa perspective.**

Layne Ross Harvey

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ABSTRACT

This thesis provides a critical examination, from the perspective of three hapū (subtribes) of the Ngāti Awa iwi (tribe) from Te Moananui-a-Toi (the Bay of Plenty), in Te Ika a Maui (the North Island) in Aotearoa (New Zealand), of how changes to important aspects of ahu whenua trusts under Te Ture Whenua Māori Bill 2016 might have impeded hapū in achieving their land utilisation objectives. This form of trust, established under Te Ture Whenua Māori Act 1993, is the principal vehicle for Māori land management involving hundreds of thousands of hectares valued in billions of dollars on behalf of hundreds of thousands of owners, their whānau (family) and hapū. These trusts are sometimes of more significance to tribal communities than are post settlement governance entities; so expansive are their economic, social, cultural and political footprints.

The radical proposals for change, contained in the now defunct Te Ture Whenua Māori Bill 2016 are examined, as they concerned core elements of the functioning of ahu whenua trusts, given what might have been their potential impacts on the management of Māori land. Those functions include the establishment, review and termination of such trusts and their operation in the normal course of business. The role of trustees and beneficial owners, their rights and obligations and their relationships with each other, are also considered. The overarching aim of this research is to assess key aspects of the proposed changes against the status quo and identify potential risks in the context of how they might operate in practice, should such proposals be revived, wholly or in part, by a future government. More importantly, proposals to amend the current legislation as an alternative approach are also explored with an emphasis on devolving a significant part of the existing transactional jurisdiction of the Māori Land Court from judicial to administrative oversight. In this way, it is intended that an original contribution to the study of Māori land can be made.

TABLE OF CONTENTS

ABSTRACT.....	3
LIST OF FIGURES	8
ATTESTATION OF AUTHORSHIP	9
ACKNOWLEDGMENTS	10
PREFACE	16
CHAPTER ONE – INTRODUCTION	20
Overview	20
Background to the research	22
<i>Distinguishing between pre-and post-settlement resources.....</i>	<i>23</i>
<i>A century of change and a new millennium 1900-2000.....</i>	<i>25</i>
<i>From disintegration to reconstruction.....</i>	<i>26</i>
Research issues.....	27
Positioning the researcher	29
Justification for the research	33
Research methodology.....	34
Ethical considerations.....	35
<i>The interview processes.....</i>	<i>36</i>
<i>Confidential information.....</i>	<i>37</i>
<i>The principle of comity</i>	<i>39</i>
CHAPTER TWO – THE HAPŪ.....	41
Introduction.....	41
Ngāti Awa	41
<i>Historical background</i>	<i>41</i>
<i>The connection between Te Tini o Toi and the Mataatua waka</i>	<i>42</i>
<i>Te Heke o Te Rangihouhiri I (The migration of Te Rangihouhiri I).....</i>	<i>44</i>
Ngā Hapū: Taiwhakāea II, Hikakino me Te Rangihouhiri II	46
<i>Hikakino.....</i>	<i>46</i>
<i>Te Rangihouhiri II.....</i>	<i>47</i>
<i>Taiwhakāea II</i>	<i>47</i>
Summary.....	48
The coming of colonisation.....	50
<i>Traders, missionaries and the Crown.....</i>	<i>50</i>
Conflict and confiscation.....	53
<i>Te Kaokaoroa 1864.....</i>	<i>53</i>
<i>Hemi Te Mautaranui Fulloon</i>	<i>54</i>
<i>Crown and Loyalist invasion 1865</i>	<i>54</i>
<i>The Trials.....</i>	<i>55</i>
<i>The aftermath: Raupatu</i>	<i>55</i>
CHAPTER THREE – COMPETING CLAIMS 1867-1999.....	57
Introduction.....	57
<i>Overview: The competing claims of Ngāti Rangitahi and Tūwharetoa ki Kawerau</i>	<i>58</i>
The Compensation Court	60
<i>Matatā Lot 63.....</i>	<i>61</i>
<i>Ngāti Awa support for Te Rangihouhiri II and Hikakino</i>	<i>61</i>
<i>Te Arawa support for Ngāti Awa.....</i>	<i>62</i>
<i>Matatā 31 and 39 and the cross claims of Tūwharetoa ki Kawerau.....</i>	<i>63</i>
<i>Ngāti Rangitahi.....</i>	<i>65</i>
Crown grants.....	69
<i>Rangitāiki 28, 31 and Matatā 100,101 and 102</i>	<i>69</i>

<i>Waimana 266</i>	69
The Native Land Court	69
<i>Matahina</i>	70
<i>Putāuaki</i>	70
<i>Te Pokohū</i>	71
Summary	71
The raupatu claims of Taiwhakaea II, Hikakino and Te Rangihouhiri II	75
<i>Preparing for the hearings</i>	76
<i>Relearning tribal history from the Compensation and Native Land Courts' records</i> ...	77
<i>Enhancing hapū and iwi cohesiveness</i>	81
<i>Waitangi Tribunal - The Ngāti Awa Raupatu Report 1999</i>	82
<i>Ngāti Awa Deed of Settlement, 2003</i>	83
<i>Deed of Settlement with Ngāti Awa, 2008</i>	83
<i>Prologue: Te Pāroa Lands Trust</i>	84
CHAPTER FOUR - AN OVERVIEW OF THE MĀORI LAND COURT	86
Introduction	86
<i>The nature of Māori land</i>	86
Early Māori land legislation	89
Te Ture Whenua Māori Act 1993	90
<i>Overview</i>	90
Jurisdiction	93
<i>Overview</i>	93
<i>Section 17: General objectives</i>	94
The operation of the Māori Land Court	95
<i>Background</i>	95
<i>Courtroom practice and procedure – contrasts with mainstream courts</i>	96
<i>The roles of Registrars and Judges</i>	100
Summary	106
CHAPTER FIVE - AHU WHENUA TRUSTS	108
Introduction	108
<i>Background</i>	108
<i>Objects and purposes</i>	110
<i>The role of the Māori Land Court</i>	110
<i>The powers of trustees of ahu whenua trusts</i>	112
<i>Section 220 and 222: Appointment of trustees</i>	113
<i>General meetings and voting</i>	115
<i>Section 226: Trust orders and trustee remuneration</i>	119
<i>Section 231: Review of trusts</i>	121
<i>Section 238: Enforcement of obligations of trust</i>	126
<i>Section 240: Removal of trustees</i>	127
<i>Section 241: Termination of trusts</i>	132
Summary	133
CHAPTER SIX - THE HAPŪ LAND TRUSTS	135
Introduction	135
<i>Overview</i>	135
Rotoehu Forest Lands Trust	135
<i>Background</i>	135
<i>Financial performance</i>	137
<i>Hapū revival and reconstruction</i>	138
Te Pāroa Lands Trust	140
<i>Background</i>	140
<i>Establishment of Te Pāroa Lands Trust</i>	141
<i>Financial performance</i>	142

<i>Community support</i>	143
Kiwinui Trust	144
<i>Background</i>	144
<i>The Māori Trustee and the Luttrell lease</i>	146
<i>The establishment of Kiwinui Trust</i>	147
<i>Financial performance</i>	149
<i>Community involvement</i>	150
Can the Hapū further consolidate their land use under the Act?	150
<i>Further amalgamation of trusts</i>	150
Summary	152
CHAPTER SEVEN – A RADICAL APPROACH TO REFORM	154
Introduction	154
<i>The Law Commission</i>	154
<i>Background</i>	155
<i>Overview</i>	157
Government commissioned Māori land productivity reports 2011-2014	158
Te Ture Whenua Māori Act 1993 Review Panel	160
<i>Discussion Document</i>	160
Māori land utilisation should be determined by a majority of engaged owners.	161
<i>Minority owners will be able to bind the majority without Court oversight</i>	162
All Māori land should be capable of utilisation and effective administration	167
Māori land should have effective, fit for purpose governance	168
An enabling institutional framework should be created to support owners of Māori land to make decisions and resolve any disputes	171
Excessive fragmentation of Māori land should be discouraged	174
Summary	176
CHAPTER EIGHT – ASSISTING OR IMPEDING?	183
Te Ture Whenua Māori Act 1993, Part 12	183
<i>Overview</i>	183
<i>Constitution of trusts</i>	184
<i>Appointment and powers of trustees</i>	185
<i>Miscellaneous provisions relating to trusts constituted under Part 12</i>	185
<i>Provisions relating to trusts generally</i>	186
<i>Summary</i>	189
Te Ture Whenua Māori Bill, Parts 5 and 6	190
<i>Overview</i>	190
<i>Part 5 of the Bill</i>	190
<i>Part 6 of the Bill</i>	191
Replacing well-defined terms may create confusion and uncertainty	192
<i>Is a kaitiaki a trustee, a director or something else?</i>	193
Compulsion may create risk	195
<i>Imposed terms of office for trustees undermines self-determination</i>	195
<i>Voting by shares is contrary to custom and undermines owner autonomy</i>	197
<i>The imposition of new compliance regimes may undermine the intent of the Bill</i>	198
Constraining access to the Court may cause unintended consequences	199
Inflexible voting regimes may undermine decision making processes	201
<i>Process for appointing governance body</i>	201
<i>Registration of governance agreements</i>	204
<i>Rangatōpu certificate</i>	206
<i>Summary</i>	206
The Hapū submission on the Bill	207
Summary	208
CHAPTER NINE – ALTERNATIVE PROPOSALS	210

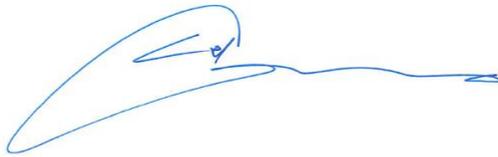
Introduction.....	210
<i>Overview</i>	<i>210</i>
<i>Summary of proposals.....</i>	<i>212</i>
Enhancing online connectivity for Māori land owners.....	212
<i>Establishing a single Māori land information online portal</i>	<i>212</i>
<i>Digitisation of all Court records.....</i>	<i>213</i>
<i>Personalised Māori land owner log in</i>	<i>213</i>
<i>Increased access to audio-visual resources for meetings and hearings.....</i>	<i>214</i>
Realigning administrative and judicial roles	215
<i>Overview</i>	<i>215</i>
<i>District Māori Land Registrars</i>	<i>216</i>
<i>Māori land entities created by registration</i>	<i>217</i>
<i>Governance obligations and training</i>	<i>219</i>
<i>Successions processed administratively.....</i>	<i>220</i>
Expanding dispute resolution options	222
<i>Enabling alternative dispute resolution and settlement by owners.....</i>	<i>222</i>
<i>Mediation</i>	<i>223</i>
Streamlining existing processes	225
<i>Fastrack hearing processes within statutory timeframes.....</i>	<i>225</i>
<i>Improvements to appeal procedure.....</i>	<i>225</i>
<i>Increased use of Registrars for taking of evidence</i>	<i>226</i>
Increasing the choice of forum for Māori land owners	226
<i>Restoring succession jurisdiction.....</i>	<i>226</i>
<i>Land valuation and resource management matters</i>	<i>226</i>
<i>Enhancing the Court's civil jurisdiction.....</i>	<i>227</i>
<i>Australasian accessibility</i>	<i>227</i>
<i>Coastal Marine Title Act 2011</i>	<i>227</i>
Summary.....	228
CHAPTER TEN - CONCLUSIONS	232
Introduction.....	232
Te Ture Whenua Māori Bill 2016.....	232
<i>Overview</i>	<i>232</i>
<i>Was there effective consultation?</i>	<i>237</i>
<i>Was there a mandate for change?.....</i>	<i>239</i>
Did the Bill simplify Māori land law?	243
Is fragmentation an impediment to development?	245
Is a standalone Māori Land Service necessary?.....	247
Would the Bill have impeded hapū in the development of their land?	249
Conclusion	255
Appendix One – Fieldwork Research.....	263
Appendix Two – Interview Questions	265
Appendix Three – Advice from Te Puni Kōkiri to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill dated 16 October 2016.....	267
Bibliography	269

LIST OF FIGURES

- Figure 1: Ngāti Awa Area of Interest
- Figure 2: Whakapapa 1
- Figure 3: Whakapapa 2
- Figure 4: Location of Ngāti Awa Hapū in 1840
- Figure 5: The Matahina, Putauaki and Te Pokohū blocks
- Figure 6: The Matahina blocks
- Figure 7: Rotoehu Forest Trust annual account summary 2013-2016
- Figure 8: Te Pāroa Lands Trust annual account summary 2013-2016
- Figure 9: Kiwinui Trust annual account summary 2013-2016
- Figure 10: Kiwinui Trust asset class summary 2015-2016
- Figure 11: Combined trusts annual accounts summary 2013-2016

ATTESTATION OF AUTHORSHIP

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements), nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning.

A handwritten signature in blue ink, appearing to read 'Layne Harvey', with a large, sweeping initial 'L'.

Layne Harvey
30 June 2018

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E te iwi, ngā mihi maioha, ngā mihi mahana ki a koutou. Heoi ano ra, tēnā ra koutou katoa. With all formality, decorum and sincerity, greetings to all.

It is customary in documents like this to include at the beginning a pēpeha or tribal motto. That approach is appropriate particularly where the author has one tribal affiliation. However, it can become complicated where there are more. My iwi and hapū are Ngāti Awa of the Eastern Bay of Plenty of New Zealand, (Te Patutātahi-Ngai Taiwhakaea II, Ngāti Hikakino, Ngāi Te Rangihouhiri II, Te Tāwera and Ngā Maihi), Rongowhakaata (Ngāti Maru, Ngāti Kaipoho and Ngāi Tāwhiri) and Te Aitanga a Māhaki of Turanga-nui-a-Kiwa (Gisborne) (Ngāti Wāhia, Te Whānau a Kai, Te Whānau a Taupara, Ngā Pōtiki), Ngāti Kahungunu ki Te Wairoa and Te Whānau a Apanui (Te Whānau a Rutaia) of the East Cape. They are all important to me and I do not distinguish between them. I cannot therefore include a pēpeha for one without doing so for all.

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After university, and until my appointment to the Bench, I was fortunate to gain employment with two law firms over a ten-year period: Simpson Grierson in Auckland between 1992 and 1997 and following that, with what then was Walters Williams & Co, from October 1997 until October 2002. Each firm played a vital role in providing the necessary training and experience that any lawyer requires. My supervising partners at Simpson Grierson included John Gresson, Michael Cole, Mark, now Justice Cooper of the Court of Appeal, and Robert Fisher QC. At Walters Williams I worked for Joseph, now Justice Williams of the Court of Appeal, and former Chief Judge of the Māori Land Court and Chairperson of the Waitangi Tribunal; and with Grant, now Justice Powell of the High Court. Inevitably they have all had an influence on my knowledge and understanding of law as it has affected my role as counsel for the many individuals, whānau, hapū, iwi and corporates that I have had the privilege of acting for during my time as a lawyer. Without those experiences, what I have come to understand about the law and its effect on Māori and Māori land, would have been profoundly diminished. I am extremely grateful for all the many diverse and varied opportunities that Simpson Grierson and Walters Williams provided me with during that decade 1992-2002.

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The importance of the kupu whakaari (prophetic sayings) of my great-great-great grandfather's brother, the prophet and founder of the Ringatū faith, Te Kooti Arikirangi Te Turuki,¹ in maintaining my motivation and fervour for this enterprise when, occasionally, my enthusiasm may have waned, must also be acknowledged. His waiata (song) *Kāore te po nei morikarika* in particular:²

Ko te mana tuatahi, ko Te Tiriti o Waitangi
Ko te mana tuarua, ko Te Kooti Whenua
Ko te mana tuatoru, ko te Mana Motuhake

The first authority is the Treaty of Waitangi
The second authority is the Land Court
The third authority is the Separate Māori Authority

And his most oft recited kupu whakaari (prophetic sayings) from 1893:³

Ko te waka hei hoehoenga mō koutou i muri i ahau, ko te ture.
Ma te ture ano, te ture e aki.

The canoe for you to paddle after me is the Law.
Only the Law can be pitched against the Law.

His own example of seeking to adopt the tools that the settlers brought and of attempting to embrace the new economy, underscored the need for Māori communities to adapt to survive or face extinction. Te Kooti would eventually be drawn into local conflicts and wider political dynamics of the New Zealand Land Wars period, which led to his arrest, imprisonment and exile without trial, the expropriation of his tribal and personal properties and the deaths of his kin.⁴ These iniquitous experiences fomented a disdain for the settler government as a result of the gross maltreatment he experienced through the inconsistent application of the rule of law to suit political, economic and in some instances, racist outcomes. Yet despite those bitter experiences, he exhorted his followers to abandon any recourse to arms in disputes, including those over land, and to instead embrace the legal pathway, with all its inherent flaws and imperfections.

¹ Te Kooti Rikirangi or Te Turuki as he was commonly known was a nineteenth century Māori prophetic leader and founder of the Ringatū (Upraised Hand) faith: Judith Binney *Redemption Songs – A life of Te Kooti Arikirangi Te Turuki* (Auckland University Press, Auckland, 1995).

² At 321-324.

³ At 490.

⁴ Waitangi Tribunal *Turanga Tangata, Turanga Whenua – The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) Vol 1 at 169-251.

Finally, I acknowledge the influence of my kuia (grandmother), Kētia Te Hihira Kīngi and my great-grandfather, Kere Wano who died in 1948, a year before my mother was born. I dedicate this work to their memory. My grandmother had a profound impact on everything I do and her unqualified endorsement of me laid the foundation for the journeys I have completed and may yet embark upon. Kere Wano was her father-in-law. His portrait looms large in my chambers to remind me of his selfless example as one of the leaders of our hapū. Like many of his peers, Kere Wano spent much of his adult life attempting to navigate the law in the Native Land Court, when dealing with political leaders both local and national, and in overseeing the activities of the hapū in their attempts to remain a cohesive force for our communities. Their unceasing efforts to seek redress for the many wrongs done to the hapū at the hands of the government continue to motivate and inspire their uri (descendants) now, and in the days yet to come.



Keremeta (Kere) Te Wano 1878-1948

Image c 1905



Ketia Te Hihira Cook 30 September 1913 – 22

June 1988. Rochelle Harvey, Layne Harvey

Image c 1972

PREFACE

I have never lived permanently in any of my tribal homelands. This may seem unusual, but it is not for anyone of Māori descent born after 1967. Many Māori rural communities were unable respond effectively to the urban drift so traditional areas of occupation were either abandoned or greatly reduced in size. The inexorable depopulation of rural areas where much of the Māori community resided historically would have a significant effect on the ability of hapū and iwi to retain their land, customs and language. My grandparents left our community at Te Pāroa, outside of Whakatāne, in 1953 and never returned to live permanently. So, I grew up in Mangere, South Auckland and in Mt Roskill, where our grandparents and cousins lived, along with most of my parents' siblings. So rare were our journeys back to Whakatane, I can recount them all: 1977 for a tangi (funeral), 1981 for a double wedding and 1984 for a sixtieth birthday and all of them held at our marae, Te Pāroa (Taiwhakaea II), and all events of our close relatives.

Yet, the fact that we did not grow up there did not seem to matter too greatly since our grandmother Kētia brought her communities of Te Pāroa and Te Karaka near Gisborne, her elders and the events that shaped her own life into our urban existence of the 1970s and 1980s. She rarely talked of anything else, and often spoke with enthusiasm, reflection and insight. We stayed with her and our cousins most weekends and every school holiday including during college. So, while we may not have lived in the rohe (tribal district), we certainly learnt about it over a period of fifteen years from the age of five until I turned twenty. Her relatives would also visit from time to time and, so they too added to our education on our tribal homelands. That education was augmented by a close study of Michael King's texts *Te Ao Hurihuri – Aspects of Maoritanga*, the 1978 follow up *Tihei mauri ora* and *Maori – A Photographic and Social History*.⁵ That part of the journey, however, ended abruptly on 22 June 1988 when she passed away. At the time, it seemed as though

⁵ Michael King (ed) *Te Ao Hurihuri – The World Moves On: Aspects of Māoritanga* (Hicks Smith, Wellington, 1975); Michael King (ed) *Tihei Mauri Ora: Aspects of Māoritanga* (Methuen, Wellington, 1978); and Michael King *Māori – A Photographic and Social History* (Heinemann, Auckland, 1983).

our only connection to the tribal domain had been severed and our link to that knowledge permanently disconnected. But, happily for us, that was not to be.

As I was studying Law at the time, it was only natural that I would progress my grandmother's succession to her Māori land interests through the Māori Land Court on behalf of my mother and her siblings. This required the filing of a death certificate and related documents that would start the succession process. It is only through the Court that succession from a deceased owner can be effected. That began a direct connection both with my tribes and with agencies such as the Court and the Māori Trustee that would continue for three decades; up to the present day. It was the catalyst for what has been and is likely to continue to be a lifetime of immersion in the affairs of the whānau, hapū and the iwi. Ironically, since 1988, I have made thousands of journeys back to Whakatāne, Matatā, Kawerau, Te Teko, Awakeri, Gisborne, Manutūke and Wairoa. Invariably, those trips have involved hui (meetings) and wānanga (forums) of every description, as well as commemorations, graduation ceremonies, tangi, unveilings, and social events. But always at the centre has been some aspect of the business of the iwi and the hapū, which I was privileged to be invited into, over twenty-five years ago. Living in Rotorua for the last fifteen years has also enabled me to continue to participate in our tribal business.

The result has been an empathetic and even enthusiastic approach to land utilisation and development while at the same time I was able to maintain a detached and independent perspective on the use of Māori land in these tribal communities. It has been a long journey of enlightenment and revelation, of frustration and endurance, and of failure and success. One of the great benefits to me personally has been the privilege of working alongside our tribal leaders and elders as well as my many uncles, aunts and cousins, all relating to our marae, our lands and our customs. Being able to retrace those footsteps of our forebears while seeking to reconstitute that which had been lost due to the dislocation and trauma of war, confiscation, dispossession and disempowerment.

The land trusts that are the subject of this research do not pay a dividend, but are primarily focussed on community development initiatives and targeted assistance for the elderly, for secondary and tertiary students, and above all, on providing support

for marae based communal activities. Accordingly, issues of any potential conflict of interest on my part diminish and more so now that I have not been counsel for these entities for almost sixteen years. Put another way, the gains to be had by direct participation in the administration and management of these tribal lands are largely indirect. More important than personal gain is the opportunity to participate in the hapū reconstruction that is sorely needed in most tribal enclaves.

The relearning of our ancient traditions, our reo (language) and tikanga (customs) our whakapapa (genealogies) and waiata (songs), our karakia (prayers and incantations) and whakatāuki (proverbs) and our tauparapara (soliloquies), all from centuries past remains a central priority. The information that allows a retelling of the histories of our ancestors and the events that have shaped our present, is drawn from long lost nineteenth century records of the very institutions that facilitated our slide into a state of near extinction culturally. These anchor stones are what define us as Māori within our own tribal districts and when they are at risk, the focus of our resources must be on their survival and retention.

One of the critical pathways forward is to ensure that tribal estates are self-sustaining and regenerating, as they should have remained following colonisation. History teaches that the loss of productive resources and wealth generation leads to impoverishment, marginalisation and disempowerment of whole communities and their descendants. Coupled with the effects of the breakdown of Māori social structures and systems including the loss of te reo Māori; a disenfranchising political system at a time when the Māori population was much higher than it is today; a deliberate policy of assimilation and mainstreaming over generations, including an education system that directed Māori students into manual pursuits and to be good farmers and farmers' wives; and then to be followed by the structural and economic changes of the 1980s which had a disproportionate effect on Māori communities like Moerewa, Minginui and Murupara - it is little wonder that those communities remain in a parlous state. It is only through the strategic application of our own resources, especially Māori land and Treaty settlements, to our own challenges, both in partnership with and independent of government, that the horizon may begin to appear more certain. The ways that Māori land owners and their communities can develop the opportunities provided by that land will therefore have a real impact on

social, economic and cultural regeneration. Only through that independence of action and acceptance of responsibility can our present be reconciled with our past to uncover that elusive pathway toward the future.

CHAPTER ONE – INTRODUCTION

Overview

This thesis examines the last National led Government's policy to replace the existing Māori land law, Te Ture Whenua Māori Act 1993, with Te Ture Whenua Māori Bill 2016, for convenience now referred to as the Act or the 1993 Act and the Bill or the 2016 Bill respectively. It considers the implications of such proposed reforms from the perspective of three Ngāti Awa hapū and questions the extent to which such reforms are required.

It also discusses the loss of land of these hapū during the Land Wars era of the nineteenth century and the effect of decisions of the Compensation Court in 1867 and the Native Land Court during the 1870s and 1880s. Moreover, this research reviews the response of the hapū to their circumstances during the 1990s to retain what remnants of land were left to them; how they have fared in their endeavours under the Act and how the Bill, if it had been enacted, might have affected them.

As a result, this research has two core elements. First, the hapū and their development under the Act. Second, the effect that the reforms proposed by the Bill might have had on the hapū. Finally, this research provides a series of alternative proposals as to how amendments to the Act and policy changes to enhance the responsiveness of the legislative and regulatory framework that governs Māori land could ultimately benefit the aspirations of Māori land owners, their whānau and hapū without the need for completely new legislation.

Chapter One sets out the background to the research and some of the relevant literature, as well as outlining the research issues, methodology and ethical considerations. This includes consideration of the principle of comity that exists between the three branches of government; legislative, executive and judicial.

Chapter Two provides a short background to each of the Ngāti Awa hapū that are the subject of this research. It includes an examination of the loss and expropriation of Ngāti Awa hapū land, the impact of those losses and an analysis, using case studies, of how the processes of the Compensation and Native Land Courts came to disempower hapū.

Chapter Three considers the effects and implications of competing claims in a customary context and provides an examination of the efforts by Ngāti Awa hapū to reconstruct themselves in the context of successful claims to the Waitangi Tribunal across a range of objectives and initiatives premised on cultural revival.

Chapter Four briefly outlines the evolution of Māori land legislation and the introduction of the Act in 1993. It also considers the operation of the Māori Land Court and the key aspects of the Court's procedure and jurisdiction that makes it distinct from mainstream courts.

Chapter Five examines Part 12 of the Act, regarding ahu whenua trusts, and sets out the key legislative mechanisms that currently govern such entities as well as consideration of relevant case law.

Chapter Six then sets out case studies of each of the three Māori land trusts of the Hapū and considers their operation and development under the Act.

Chapter Seven assesses the pathway to reform, following the 2011 general election and the importance of a reforming agenda for the National led Government in terms of Māori land capability and use. It also explores the Government's radical proposal to completely replace the Act with the Bill, and examines the propositions developed by the Government review panel created to review the operation of the Act.

Chapter Eight has a focus on key elements of the Bill as compared with the Act, as they would have affected aspects of the operation of ahu whenua trusts and provides an analysis of the potential effects of the Bill, in particular, the potential to impede land owners in the management and development of their lands.

Chapter Nine then provides an outline of alternative proposals that focus on devolving a significant number of transactional functions from judicial to administrative oversight. The changes proposed would require amendment to the Act rather than a complete rewrite as proposed by the Bill. Related policy changes and resource reallocations to enhance such proposals are also discussed.

Chapter Ten summarises key elements of the body of the thesis and sets out some concluding remarks with reference to several key questions concerning a mandate for change; the simplification of Māori land law, the effects of fragmentation of

ownership as an impediment, the necessity for a Māori Land Service, and whether the changes proposed by the Bill would have impeded land development.

Background to the research

The relevance of Māori commercial activity to the national economy has been increasing over the last twenty five years following the landmark decision of the National Government in 1992 under Treaty of Waitangi Negotiations Minister the Hon Douglas Graham, to commence the settlement of historical claims.⁶ The ensuing transfer of wealth from government into the hands of tribal structures has seen the two largest settlement tribes, Waikato-Tainui and Ngāi Tahu, in less than a generation expand their asset bases beyond a billion dollars, with several others approaching that milestone.⁷ These gains have at their foundation those tribes' successful claims against the Crown. This reality has become increasingly better understood over the last three decades in the context of the relationship with the Crown and Māori as signatories to the Treaty of Waitangi on 6 February 1840.⁸ Despite the continuing debate over the differences and meanings between the Māori and English versions of the Treaty,⁹ and the contemporary development of the Treaty

⁶ Vij Kooyela 'The Māori Commercial Asset Base' (Te Puni Kōkiri, 2007). See also the Waikato Raupatu Claims Settlement Act 1995.

⁷ Anne Gibson "Waikato-Tainui tops \$1b in assets." *The New Zealand Herald* (online ed, Auckland, 2 July 2014); Anne Gibson "Prospects appear even brighter for Māori economic renaissance" *The New Zealand Herald* (online ed, Auckland, 6 February 2015); Mihingarangi Forbes "Iwi wealth reaches \$6 billion" (9 December 2016) Radio New Zealand <www.radionz.co.nz/news> ; Anne Gibson "Iwi assets climb from \$6b to \$7.8b: new report" *The New Zealand Herald* (online ed, Auckland, 23 January 2018).

⁸ Michael Belgrave, Merata Kawharu and David Williams Waitangi Revisited: *Perspectives on The Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005); FM Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 2006); Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Auckland, 2012); Carwyn Jones *New Treaty, New Tradition, Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016); Jane Kelsey *A Question of Honour?: - Labour and the Treaty 1984-1989* (Allen & Unwin, New Zealand, 1990); Paul McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991); Claudia Orange *The Treaty of Waitangi* (2nd ed, Bridget Williams Books, Auckland, 2011); Matthew S R Palmer *The Treaty of Waitangi in Law and New Zealand's Constitution* (Victoria University Press, Wellington, 2008); Alan Ward *An Unsettled History – Treaty Claims in New Zealand Today* (Bridget Williams Books, Auckland, 1999). For alternative views see Stuart Scott *The Travesty of Waitangi: Towards Anarchy* (Campbell Press, Dunedin, 1995); David Round *Truth or Treaty? Commonsense Questions About the Treaty of Waitangi* (Canterbury University Press, Christchurch, 1998) at 219; and Susan Guthrie and Gareth Morgan *Are we there yet? The future of the Treaty of Waitangi* (Phantom House Books, Auckland, 2015).

⁹ Waitangi Tribunal *He Whakaputanga me te Tiriti, The Declaration and the Treaty - The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 497-529.

principles jurisprudence and their impacts, it is now common ground that Māori enjoy specific consideration by the government, because of those Treaty commitments, across a range of important relationships and rights including lands and resources, language and culture and political representation.¹⁰

Distinguishing between pre-and post-settlement resources

Yet, while Treaty settlements are extremely important to hapū and iwi communities, they are not *the* major part of the Māori collective economy, as distinct from wealth held by individuals. The bulk of hapū resources are held by thousands of Māori land trusts and incorporations on behalf of their beneficial owners and shareholders.¹¹ In 2013, Te Puni Kōkiri (the Ministry of Māori Development) estimated that the total asset base of Māori land management bodies and post settlement governance entities at \$12.5 billion. As foreshadowed, these entities are engaged in significant commercial activity with assets exceeding the combined values of the Waikato Tainui and Ngāi Tahu settlement bodies.¹² The current framework of Māori land laws within which Māori land entities function, and the former National led Government’s proposed reforms contained in Te Ture Whenua Māori Bill, therefore remain of considerable importance, despite the recent change of government at the September 2017 New Zealand general election.

Moreover, if the aspirations of the hapū who still retain land are to be realised, then an assessment of the continuing relevance of the current Māori land laws is necessary, especially given the new Labour led coalition Government’s intention not to proceed with the Bill but to instead undertake their own review to determine appropriate amendments to the Act.¹³ In general terms, the aspirations of hapū continue to focus on attaining some degree of self-determination, local autonomy

¹⁰ For examples see *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (CA) [the Lands case]; *Mahuta and Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) [the Coal case]; *New Zealand Māori Council v Attorney General* [1994] 1 NZLR 513 (PC) [the Broadcasting case]; Waitangi Tribunal *The Māori Electoral Option Report* (Wai 413, 1994).

¹¹ Wilson Isaac “Governance Structures for Māori Land” (paper presented to Whenua- Sustainable Futures on Māori Land Conference, Rotorua, July 2010).

¹² Te Puni Kōkiri “Māori asset base up \$6 billion” Kōkiri Magazine (online ed, February 2015).

¹³ Interview with Hon Nanaia Mahuta, Minister of Māori Development “Incremental changes likely to Māori land law” (6 November 2017) Radio Waatea; “Government ditching bill to create a Māori land service” (30 October 2017) Television New Zealand, One Network News <www.tvnz.co.nz>.

and economic independence.¹⁴ Such aspirations are also consistent with the non-binding United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that the New Zealand government has endorsed.¹⁵

While they are often commercially successful, Māori land entities are also responsible for retaining for the benefit of future generations, the remnants of a significantly diminished tribal estate of approximately 1.5 million hectares or less than six percent of the land area of Aotearoa-New Zealand.¹⁶ That responsibility is enshrined in the Act which permits the permanent alienation of Māori land only with the consent of seventy five per cent of the beneficial ownership.¹⁷ In this way Māori land entities are unique when compared with their general law counterparts in that they cannot, without providing sufficient justification, alienate land in the normal course of business without meeting a high threshold of approval or persuading the Māori Land Court that such a course is necessary to require invoking of one of the rare exceptions to achieving that seventy five per cent consent. This is at the heart of the principle of retention, which, many Māori groups and individuals advocated for during the long period of consultation that occurred during the development and refinement of the current Act.

The rationale for this prohibition is the fact that the remaining Māori land base has been so severely depleted that what is left must be protected.¹⁸ Accordingly, it is

¹⁴ See Whaimutu Dewes, Tony Walzl and Doug Martin *Ko Ngā Tumanako o Ngā Tangata Whai Whenua Maori: Owners Aspirations Regarding the Utilisation of Māori Land - Case Study Research and Implications for Regulatory Review* (Te Puni Kōkiri, 2011); Federation of Māori Authorities “Submission to the Māori Affairs Select Committee on the Te Ture Whenua Māori Bill, the Māori Land Service and other areas of the Te Ture Whenua Reform” at [8]–[16]; Māori Party “\$17.8 million to support Māori land owners” Māori Party <www.maoriparty.org>; Judge Craig Coxhead “Māori land – unlocking the potential” (2013) May Māori LR 1; Fleur Adcock “The UN Special Rapporteur on the Rights of Indigenous Peoples and New Zealand: A study in compliance ritualism” in *The New Zealand Yearbook of International Law* (Canterbury University, Christchurch, 2012) Vol 10 at 97-120.

¹⁵ See Human Rights Commission “UNDRIP and the Treaty” <www.hrc.co.nz>; Adcock, above n 14, at 97-120.

¹⁶ See David V Williams *Te Kooti Tango Whenua – The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999) at 51-62; and Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865-1921* (Victoria University Press, Wellington, 2008) at 448-453. The total Māori land base, including 1204.3023 hectares of Māori customary land currently stands at 1,414,908.6141 hectares: Ministry of Justice “Māori Land Update” (June 2017) <www.maorilandcourt.govt.nz>.

¹⁷ Te Ture Whenua Māori Act 1993, ss 145-168.

¹⁸ Sidney Moko Mead *Landmarks, Bridges and Visions – Aspects of Maori Culture* (Victoria University Press, Wellington, 1997); and Boast *Buying the Land* above n 16, at 429-442.

uncontroversial that the remaining Māori land estate and the cultural overlays that it both supports and represents is of even more importance to owners, their whānau and hapū, than was the case in previous generations.¹⁹ That said, some commentators continue to echo the policies of the past and call for the removal of alienation protections and the transfer of Māori land into General land as a means of removing discriminatory laws and empowering citizens with equality.²⁰ This research will explore whether or not such sentiments are congruent with the general views and aspirations of Māori land owners themselves.

A century of change and a new millennium 1900-2000

In this context of land retention, some experts have argued that Māori development since 1900 can be categorised into four distinct phases: the Recovery period from 1900 to 1925, the Rural Development era between 1925 and 1950, the time of Urbanisation from 1950 to 1975 and then the Treaty claims, settlement and increased self-determination and autonomy era from 1975 to the present.²¹ These periods loosely track the consequences of land alienation during the mid to late-nineteenth century and also reveal several of the key responses to that loss. This era gave rise to the land development schemes of Sir Apirana Ngata,²² Minister of Native Affairs; and amongst other things, the significant depopulation of Māori rural communities and the flow on effects to the largely subsistence-based land economy.

The periods of change would eventually include the era that led to the enactment of the Treaty of Waitangi Act 1975, and the critical amendment to that legislation in 1985 that permitted the filing of Māori claims against the Crown for breaches of the principles of the Treaty of Waitangi dating back to 1840. Then came the passing of

¹⁹ Bernadette Consedine “Historical Influences and the Māori economy” (Te Puni Kōkiri, 2007): “By 1865, the Crown had acquired the South Island, Stewart Island, and much of the North Island either by purchase, confiscation or it had been claimed as ‘wasteland’. There was, however, a large part of the North Island which remained beyond the current reach of colonisation and settlement much of which now came under the scrutiny of the Native Land Court’...In 1865 some nineteen million acres of land was considered to be in Māori customary title. By 1909 more than eighteen million acres of this land had been surveyed and was in individual ownership. Almost none if this land had been settled by Māori.”

²⁰ Bernard Robertson “The New Zealand Law Journal Constitutional Review” (2014) NZLJ at 1.

²¹ Mason Durie *Ngā Kāhui Pou: Launching Māori Futures* (Huia Publishers, Wellington, 2003) at 87-89.

²² See Ranginui Walker *He Tipua: The Life and Times of Sir Apirana Ngata* (Penguin Books, Auckland, 2006); and M. P. K. Sorrenson “Ngata, Apirana Turupa” (1996) Te Ara - the Encyclopedia of New Zealand <www.teara.govt.nz>.

Te Ture Whenua Māori Act 1993, which, for the first time since 1865, made the alienation of Māori land more difficult. This thesis explores the impact of both current and proposed Māori land laws on key aspects of the operation of ahu whenua trusts, and how they serve to impede or enhance the retention and development of Māori land by its owners.

From disintegration to reconstruction

‘Tribal development’ is a very broad term often used to describe key components of the Māori renaissance evident since the mid-1980s.²³ It has come to include not only the restoration of previously expropriated tribal lands of iconic significance but also the acquisition of investment lands and resources in a deliberate effort to reconstruct the hapū resource base as part of the ongoing revival of tribal autonomy and independence.²⁴ It can also refer to the various modes of distribution to beneficiaries including support for the preservation of important structures and landmarks.²⁵ It can even include age related grants and outcome specific objectives, especially in the context of collective and individual educational initiatives within the framework of a Māori business and its practices.²⁶ However, these definitions are not comprehensive and in a Māori context, can encompass more than the commonly acknowledged parameters of the word ‘development’.

The evidence confirms that the trust is the vehicle of choice for Māori owners when managing their land, possibly because the current range of options is limited to trusts, incorporations and agencies. As foreshadowed, there are thousands of trusts currently in operation that administer and manage Māori land, General land owned by Māori, General land and other assets that are held in trust for, invariably, a specified class of beneficiaries.²⁷ Along with post settlement governance entities, they are successful business enterprises with millions of dollars in annual income

²³ Malcolm Mulholland “Te Pae Roa 2040, He Tirohanga Whakamua – the distant horizon, reflecting on the past three decades of Māori Development 1984-2013” (paper presented to Te Pae Roa 2040 Hui Taumata Commemoration Conference, Massey University, 2 September 2014).

²⁴ Mason Durie *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998).

²⁵ David Throsby *Economics and Culture* (Cambridge University Press, United Kingdom, 2000).

²⁶ Mason Durie “The Business Ethic and Māori Development” in Durie (ed) *Ngā Kāhui Pou* above n 21 at 241-252.

²⁷ Isaac “Governance Structures” above n 11.

and distributions and billions in assets.²⁸ They are therefore unique in being large commercial entities involved in a diverse range of businesses yet with a beneficial ownership often numbering in the thousands who are uri (descendants) of a common set of tīpuna (ancestors) who are related by blood. This whakapapa (genealogical) connection provides a distinctive overlay of familial connection, interaction and practice that is unlike most comparable organisations holding General land.

In short, many Māori land and asset holding entities can be described as ‘clannish’ because, as foreshadowed, the members are overwhelmingly connected by blood. Like any private entity there are also restrictions on entry and invariably this is by descent. To be eligible for membership you must be a descendant of one of the key ancestors previously determined as being one of the original custodians of the land. There is no other way of entry, other than by blood, or in certain cases by the application of Māori customary adoption.²⁹ The way such entities function and operate - while having many obvious similarities with their mainstream counterparts - in an environment of historic and cultural overlay, presents its own set of opportunities and challenges. Those overlays can include the application of resources for cultural, political and social purposes.³⁰ These purposes all contribute, directly and indirectly to the reconstruction of tribal polities that have been damaged by the effects of colonisation over generations to the point of disintegration and near extinction.

Research issues

It will be argued that, fundamentally, tribal reconstruction means the use of hapū based resources to assess and identify those customary and traditional practices that

²⁸ For examples see Parininihi ki Waitotara Incorporation *Annual Report 2017*: <www.pkw.co.nz>; Wakatu Incorporation *Annual Report 2015*: <www.wakatu.org.nz>; Pukeroa Oruawhata Trust *Annual Report 2016*: <www.rotorua.deloitte.co.nz>.

²⁹ Te Ture Whenua Māori Act 1993, s 115. See also the seminal decision *Hohua – Estate of Tangi Biddle or Hohua* (2001) 10 Waiāriki Appellate MB 43 (10 APRO 43).

³⁰ For example, with both the Waikato tribes and Ngāti Tūwharetoa of Lake Taupō, an annual grant is paid from revenues held in trust to each tribe’s traditional leader, Tuheitia for the Waikato iwi and Te Arikinui (Paramount Chief) Sir Tumu Te Heuheu for Ngāti Tūwharetoa. This grant is made, effectively, for the maintenance of the dignity of their office. In Waikato, the position is referred to as King or Queen and in Ngāti Tūwharetoa the hereditary leadership is referred to as the Paramountcy. Grants are also made for marae maintenance and insurance for most large to medium sized trusts and incorporations as well as for educational, health and sporting purposes.

lie at the core of hapū identity and that are currently at risk and applying those resources to remedy the decline and deterioration of those customs and knowledge bases. This is, therefore, an example of a setting where hapū are attempting to restore and preserve their customary knowledge and identity through their own efforts by deploying their own resources on their own terms.³¹ This perspective is also congruent with the view that, in a post settlement world, the retention and preservation of cultural identity rests not only with government or external parties, but with the people themselves, their hapū and their whānau. And all of this happens within a legal framework that is increasingly attuned and responsive to tikanga Māori. While the pace of such rebuilding may be viewed as frustratingly glacial, contrasted with the successes and failures of previous generations, the present progress with tribal reconstruction cannot be underestimated.

In summary, the focus of this research is whether the proposed reforms to the law governing Māori land might have impeded hapū development in the context of the core elements of the functioning of ahu whenua trusts in the normal course of business. That includes the critical relationship between trustees and themselves and as between trustees and their beneficiaries. This will inevitably include consideration of the resolution of disputes within the context of the use and development of land given that the overarching theme of how the Bill might have impeded that development. It will be argued that the proposed reforms, in the absence of significant change to the Bill, would have indeed impeded hapū development as compared with the status quo.

In exploring these issues, questions arise as to whether land should continue to be held for collective or individual benefit or both? Should Māori land be made permanently inalienable? If not, in what circumstances can alienation be contemplated and who should make the decision? More specific questions could include:

³¹ Durie *Te Mana* above n 24.

- (a) How have hapū deployed pre-and post-settlement assets using ahu whenua and whenua tōpu trusts to reconstruct themselves?
- (b) What has been the effect on hapū development of the existing Māori land laws that relate to ahu whenua trusts and the efforts of the hapū to rebuild their identities?
- (c) Would the reform proposed by the Bill of existing Māori land laws concerning ahu whenua trusts have impeded the retention and development of Māori land?

Positioning the researcher

This is a study about Māori people, Māori land and the law that affects both. It is a study of how one supports the other, their land and their custodians, in a binary connection created at birth and not always severed even by death. Invariably, until recently, most Māori land owners returned to their wakāinga (home territories) for interment into tribal and whānau urupā (burial grounds), many of which have endured for centuries, like other wāhi tapu (sacred sites). In addition, from a succession perspective, even today, a handful of deceased Māori landowners control, in part, the fortunes of their descendants through the device of the testamentary trust or other vehicles founded on statute. The examples of Wi Pere and Tangiora Pukepuke come to mind.³² They emphasise the importance of the remaining Māori land base and the lengths that Māori leaders will go to ensure that retention for present and future generations.

Moreover, as part of the justification against the permanent alienation of Māori land, in traditional terms, it is acknowledged that a Māori without land is like a shadow without substance.³³ There are numerous proverbial sayings that underscore how

³² See Alan Ward “Pere, Wiremu” (1993) *Te Ara – the Encyclopedia of New Zealand* <www.teara.govt.nz>. For details on the Wi Pere Trust see: <www.wipere.co.nz>. Pukepuke Tangiora was a woman of mana from Hawkes Bay. Her Will came into effect in 1936 and it provided that her substantial estate was to be held for the benefit of her family. The terms of the Will were modified by legislation in 1943 and 1951 and then again in 2011. These structures have ensured that the lands remain in both examples for the benefit of the descendants of the original settlors long after the latter’s’ deaths in 1916 and 1936 respectively.

³³ See the numerous acknowledgements by the Crown in settlement legislation that the rendering of tribes landless through the effects of Native land legislation had disastrous consequences for those affected which the Crown accepted had been a breach of the principles of the Treaty of Waitangi: Ngāti Awa Claims Settlement Act 2005, Rongowhakaata Claims Settlement Act 2012.

critical land is to the Māori identity and the distress and shame that attaches to landlessness including: “Whatungarongaro te tangata toitū te whenua – while the people may come and go, the land will endure” or “toitū he kainga, whatungarongaro he tangata – the land remains while the people disappear.”³⁴ Without the mana (prestige, authority) that land provides, both figuratively and literally, tribes cannot support themselves, let alone act as hosts to their neighbours when custom dictates.³⁵ So serious had this situation become for some tribes that government intervention was required, including the passing of the South Island Landless Natives Act 1906.³⁶ Three years later even the Native Land Act 1909 included s 373 which required that the Crown not purchase land so as to render any Māori landless.³⁷ The short point is that both Māori and the Crown regarded landlessness as a highly undesirable outcome, albeit for different yet overlapping reasons.

The word “kūpapa” originally meant to lie flat or to stoop, or to remain quiet or neutral, but it has been converted over the last century and a half to mean “traitor” or “sell out”, the phrase “kai hokowhenua” or “land seller” is almost as odious and offensive.³⁸ For many tribes, land seller remains a term of derision and abuse. In some quarters, the term denotes connotations of selfish individualism at the expense of the collective; of denuding the tribal estate for trinkets and self-aggrandizement; of being seduced by base motives that imperil the efforts of previous generations and put at risk the survival of the next. It also underscores a visceral antipathy against those past and present generations of owners who have wilfully alienated land by sale. Certainly, in the twenty first century, the selling of any part of the catastrophically diminished remaining Māori land estate is generally viewed as bewildering behaviour that is, at best, misguided and desperate and, at worst, tantamount to “treason” against the tribal nation.

³⁴ Hirini Moko Mead and Neil Grove *Ngā Pēpeha a Ngā Tipuna* (Victoria University Press, Wellington, 2004) at 405.

³⁵ Basil Keane “Māori feasts and ceremonial eating – hākari” (2013) *Te Ara – the Encyclopedia of New Zealand* <www.teara.govt.nz>.

³⁶ See also Waitangi Tribunal *The Waimumu Trust Report* (Wai 1090, 2005) at 11-24.

³⁷ Williams *Te Kooti Tango Whenua* above n 16 at 215.

³⁸ See maoridictionary.co.nz. Ron Crosby *Kupapa: The Bitter Legacy of Maori Alliances with the Crown* (Penguin Group NZ Ltd, Auckland, 2015) at 8-19.

So, two key points are evident. First, landlessness is a state that must be avoided. Secondly, the only thing worse than being landless is being rendered thus by the selling of land - an anathema to most Māori land owners, their whānau and hapū.

The researcher has been immersed in Māori land and the law that controls its management since 1988, almost three decades, as a student, an owner, a lawyer, a trustee and as a Judge. The notion of the absolute inalienability of Māori land is one that the researcher has been exposed to during that thirty-year period. Unsurprisingly, the researcher endorses the non-selling stance of many of his forebears and peers. In a professional context, for a Māori student, researcher and lawyer, there are few higher honours than being an advocate for the retention and protection of tribal interests. Where those interests are congruent with personal views, then the process is even more satisfying.

That said, a distinction must be made between advocating for and deciding over cases where the interests of non-affiliating iwi and hapū are involved. Put another way, the Act permits sales of Māori land and so from time to time, a good advocate expects to be following a client's instructions to support or oppose a change of status of Māori land to General land. Similarly, if the application of the correct legal principles to the relevant facts of a case requires the exercise of a discretion in favour of a change of status or sale, then the judicial oath requires the application of laws "without fear or favour, affection or ill will".³⁹ So, the researcher has been required in his professional capacity to act on a client instruction, even where personally opposing the proceedings on a philosophical basis; or to decide a case for change of status or sale if the facts and law support such an outcome.

But the researcher and most of the active members of his hapū would rarely support the permanent alienation of any part of what remains of the hapū and whānau land base. Inevitably, this has had an impact on how the research has been approached. With such a direct involvement in the application of the Act and its predecessor, the Māori Affairs Act 1953, on the use and management of Māori land, the researcher's perspective, in anthropological terms, can be described, to use a label, as being emic,

³⁹ Oaths and Declarations Act 1957, s 18.

or from an insider's perspective rather than etic.⁴⁰ This approach has the advantage of being close to where many of the issues that arise in the research are at their most palpable and their most sensitive; of having an insider perspective encompassing a three hundred and sixty degree overview that other researchers simply will not have access to, especially regarding the inner workings of trusts, iwi authorities and the Court itself. To underscore that rarity, it is interesting to note that of the current Bench, only Chief Judge Isaac and the researcher have ever been custodians of hapū and tribal lands as board members of trusts and incorporations prior to appointment. Rarer still, only the researcher among the current Bench has ever been a member of the iwi authority, and as well was one of their advisers and advocates on Māori land. Inevitably, the convergence of those experiences creates a unique set of perspectives.

Not surprisingly, having an insider perspective and being directly affected by significant change can also create challenges of objectivity and potential bias, both conscious and otherwise. There is a perspective that, as a Judge of the very Court that is most affected, and in a very significant way, by the Bill, there may be a sense of embarking on a self-serving, potentially unobjective and therefore conflict laden approach that might ultimately result in inherently flawed research. Balanced against that possibility – it is the researcher's personal perspective that arguments for the retention of the status quo are untenable. The researcher is an owner of interests in Māori land, and has experienced the reform process over the last seven years. His position is that change is not merely desirable, but that, taking into account a wide range of theoretical and practical considerations, the question is simply what *extent* of reform is needed.

⁴⁰ See Conrad Kottak, *Mirror for Humanity* (McGraw-Hill, New York, 2006) at 47. As the renowned anthropologist, tribal leader and former Professor of Māori Studies, Sir Hirini Mead remarked to the researcher: "The position you take in relation to the topic of your research is that you are standing in the middle of the events and looking at 360 degrees at the events you describe or analyse. You are in the centre of everything because of the job you do and the experiences you have lived through. Your view of events will be well informed because of where you stand. It is an emic view some would say, rather than an etic one which is the view that one can see from the outside. There are lots of advantages of being a participant in some of the events that you will draw upon. You will always know more because of contexts in which events occur." Email from H Mead to Layne Harvey regarding an insider's perspective to research (11 November 2014).

In this context, it is also necessary to reflect on the subjectivity of several of the other voices participating in the recent Māori land law reform discourse. It has become evident that some who have played a role in developing the reform arguments, for and against change, have themselves a background and history with the legislation and with the Court that overlaps into their personal and professional roles, much like the researcher's background does. As New Zealand is a small country, these overlaps are even more pronounced. The more conservative elements in the discussion seek limited, if any, change because they believe what is proposed will be even worse than the alleged problems the status quo represents. Inevitably, they are accused of protecting their existing interests and authority at the expense of development for a wider constituency. Their views are often seen by the promoters of reform as understandably but inevitably self-serving and therefore unworthy of anything but cursory consideration.

Conversely, some of the voices for change have a history of entanglement, often not to their liking, in the Court's processes, and so, unsurprisingly, they seek to diminish its role as much as possible. Others seeking change do so more on ideological grounds rather than from any direct personal interest or animus toward the legislation and the Court. Occasionally, their perspective is hampered, however, by limited direct knowledge of the operation of the legislation or of Māori land owners generally, and the latter's experiences of Māori land development. Others appear to accept the inevitability of change and thus seek to soften its harder edges or extract maximum concessions where possible as a means of mitigating what even they know are risks, however latent.

So, at the poles of the discussion sit the extreme positions, obdurately turning their faces away one from the other and each certain beyond all doubt, that their perspectives are the only correct response. Within those extremes however is the space of debate, examination, compromise and ideally, some form of resolution that will benefit directly the owners of Māori land, and their whānau and hapū who continue to carry the challenge of Māori land ownership, retention and use.

Justification for the research

There are few hapū centric studies on Māori land that explore the impacts of current and proposed Māori land laws on tribal development which have analysed not only

the deleterious effects of that legislation but also its reconstructive possibilities. Put simply, these are the ways that land and resources from both a pre-and post-settlement pool have been combined to facilitate the reconstruction of tribal cultural and economic infrastructure within a framework of empowering Māori land laws that underscore land owner decision making autonomy. This thesis seeks to explore how the law can be refined to support hapū autonomy and mana in decision making over land and kin based resources administered by trusts created under the Act. This research is designed to be a resource for tribal individuals and their organisations and is intended to clarify how they might navigate through some of the challenging environments inherent in Māori land management. Government and non-governmental agencies may also consider this research of assistance when informing their own reviews of pre-and post-settlement Māori land and resource development policies and regulatory frameworks.

Research methodology

To conduct a critical examination from a Ngāti Awa perspective of whether the proposed reforms affecting the operation of ahu whenua trusts would impede hapū in the retention and development of their land, the research methodology incorporates four elements:

1. An examination of the background to the iwi and hapū of Ngāti Awa the subject of this research, their customary lands and a brief outline of the effect of the confiscation of those resources by the Crown. This section includes a brief analysis of overlapping counter or cross claims on hapū lands during the Compensation and Native Land Court processes of the 1860s-1880s and an outline of the impacts of those decisions on the hapū.
2. A brief review of current law and practice affecting the hapū and their Māori land holdings as a background to an exercise of comparing the proposed reforms with the current law as they affect aspects of the operation of ahu whenua trusts.
3. A critical analysis of specific provisions of the Bill that were likely to affect ahu whenua trusts including a comparison with the existing law, followed by consideration of a series of alternative proposals that involve amendment to the Act rather than its replacement by the Bill. This analysis will also briefly

outline the reform process that led to Te Ture Whenua Māori Bill 2016, its genesis and motivations.

4. These three elements will incorporate the examination of primary source material including Compensation and Native Land Court files, annual reports and accounts of select ahu whenua trusts, iwi authority files and archives including private correspondence and personal manuscripts. Interviews for this part of the research have been conducted with key people from within the Māori land sector and with informed outsiders, as discussed below.

The first three parts of the research are based almost exclusively on an examination of historical records from the nineteenth and early twentieth centuries, along with more contemporary records, the majority of which are publicly available. The literature review encompasses both Māori and Pākehā sources on Māori land and the law governing its management and use by the hapū. The assessment of this material involves historical, empirical and critical approaches to identify possible economic, political and social drivers of both hapū development and Māori land laws relevant to ahu whenua trusts.

Attendance at various whānau, hapū and iwi meetings, as well as meetings, seminars, symposia and conferences associated with Māori and international indigenous land and resource development, including the National Native Title Conference held annually in Australia, has enabled the researcher to relate theoretical aspects of his research with actual events he has experienced or participated in. This ‘insider’ or emic perspective has enabled the researcher to evaluate key themes and viewpoints more critically, including those of direct personal relevance. Finally, a series of interviews were conducted with key informants who included iwi and hapū leaders, trustees of Māori land entities and their legal advisers, government officials and current and former judges. As foreshadowed, the information from the interviews is complemented by an examination of a wide range of primary and secondary sources along with an analysis of the relevance of the alternative proposals that need to be considered in the research conclusions.

Ethical considerations

The key ethical considerations focused on two specific issues – the interview process, and access to confidential information. In addition, the principle of comity between the different branches of government, Executive, Legislative and Judicial is a relevant consideration.

The interview processes

The interview process was essential to assessing the impacts of current and proposed laws from the perspective of the very practitioners who deal with land administration and management on a regular basis as well as from the purview of beneficiaries and tribal members. The interviews provided invaluable and unfiltered insights into the full gamut of challenges faced by owners and governors of Māori land as they sought to grapple with the structural and policy impediments inherent in Māori land tenure. The interviews were critical in connecting overarching views of land utilisation and development with the ways that Māori land practitioners applied those perspectives in practice. This emphasised the need for interpretative research, as it required analysing the responses to questions by the intentionally-chosen research participants.

The process followed for the interviews was:

- (a) All interviews were recorded and transcribed verbatim. The transcripts were integrated with notes made by the researcher which then gave a descriptive record of the interview to be analysed and interpreted. Where an interview was not possible, participants completed a detailed questionnaire instead.
- (b) The researcher read through all the transcribed data to identify the key themes and meaning of the information provided.
- (c) All identified topics were listed, and categories created, to simplify the analysis and interpretation process.
- (d) Preliminary interpretations were developed and reviewed against the interview transcriptions to test the analytic process and the accuracy of the interpretations.
- (e) Once the analysis was validated, initial conclusions were then drawn.

To obtain a purposive sample, ten participants were recruited by a personal approach. Participants were advised that their identity and personal information would not be used in the research without their authorisation. They were also provided with a selection of direct ‘on the record’ quotations, for which approval was sought for their use in the last version of this thesis. The results were reported in an aggregated fashion and specific findings were not attributed to any participants without seeking and receiving their permission to do so. However, as there were only a small number of participants, the context and views expressed could be identifiable.

For this reason, only limited confidentiality could be offered to those interviewed. It is recognised by the researcher that the research could lead to findings that are potentially controversial, as the topic involves a ‘critical examination’ of current and proposed Māori land laws from a Ngāti Awa hapū perspective. The approach highlights the possibility that the findings might in some way be critical of the last Government’s reform proposals, which may give rise to considerations of constitutional conventions and their potential if inadvertent breach. Given the nature of the proposals and the process of their development, unsurprisingly there were several negative views expressed during the interview process that might be considered provocative. Nevertheless, the researcher deems that those views expressed by the participants, and the associated key findings, are not of a sufficiently controversial nature to warrant amendment, dilution or exclusion from the research.

Confidential information

The second issue – access to confidential information – proved more challenging. This is because, as is surprisingly commonplace, information not intended for a particular recipient, while not being specifically prohibited, can fall into the public domain. Put another way; emails and related correspondence can be sent from intended to unintended recipients. Sometimes such material is highly relevant either directly or indirectly to the research question itself or to the issues surrounding its examination.

Then, on occasion, briefing papers have also been viewed by the researcher, most of which were soon after in the public domain via the Waitangi Tribunal processes

surrounding the urgent claim by Marise Lant and others into the proposed reforms of Māori land laws. Ms Lant sought and was granted an urgent hearing into the Bill. The Tribunal's subsequent report *He Kura Whenua ka Rokohanga - Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* was critical of key elements of the reform and recommended that further changes and consultation take place so the Government could be certain its proposals had the support of Māori.⁴¹

From time to time the researcher was provided with either verbal summaries or given "reference only" access to such information. It is difficult to unread something provided that is directly on point to the issues being explored. That said, even this material was eventually released into the public domain either through the Waitangi Tribunal urgency process or through Official Information Act 1982 requests made by claimants and the information placed on social media sites.

Another aspect of confidential information concerns internal Court documents available to the researcher but not in the public domain. This includes principally, a series of entries drafted by the researcher some years ago for inclusion in the Bench Book of the Māori Land Court concerning ahu whenua trusts – a particular research interest - along with a summary of case headnotes prepared and edited by the researcher over fifteen years ago. These documents have been drawn on but only where the researcher was the author. In this thesis, they have been substantially modified and updated in any event to take into account developments in the law including more recent decisions of the superior courts as they concern ahu whenua trusts.

While not confidential, several submissions made by the Judges of the Māori Land Court to the Law Commission in 2003, to the Review Panel established in 2012, to the Ministerial Advisory Group (MAG) created in 2014, and to the Māori Affairs Select Committee in 2016, are referred to extensively in this research. Where that occurs, the submissions are appropriately referenced in the footnotes. That said, it is usually only those sections of the submission where the researcher was the author

⁴¹ Waitangi Tribunal *He Kura Whenua ka Rokohanga- Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016).

that have been referred to in detail, with an emphasis on trusts generally and on ahu whenua trusts.

The principle of comity

A third ethical consideration is the principle of comity where the different branches of government, executive, legislative and judicial, seek to respect each other's roles in the constitution and avoid criticisms by one branch against another.⁴² The Guidelines for Judicial Conduct dated March 2013 state:⁴³

(e) Submissions or evidence to Parliamentary Select Committees

64. Subject to paragraph 65, a judge is not precluded from making a submission or giving evidence before a parliamentary select committee on a matter affecting the legal system. However, caution is recommended. It is important to avoid entering upon matters of a political nature and to bear in mind the need to maintain judicial independence from the legislative and executive branches of government. It is important for the head of jurisdiction to be consulted before embarking upon a submission.

(f) Participation in public debate/media/judicial writing

65. If a matter of public controversy calls for a response from the judiciary or a particular court, it should come from the Chief Justice or head of jurisdiction or with his or her approval. In other cases it may be beneficial to public debate for judges to provide information relating to the administration of justice and the functions of the judiciary. Such participation is desirable but requires care. In particular a judge should avoid political controversy. It is important to avoid using judicial office to promote personal views and to avoid the appearance of capture by particular organisations or causes. Judges should avoid expressing opinions on matters which may arise in litigation and which may lead to concern about the impartiality of the judge.

Many of the points discussed in this research have already been raised publicly through submissions made, first, to an advisory committee established by the then Minister for Māori Development, the Hon Te Ururoa Flavell, dated 7 August 2015 and, second, to the Māori Affairs Select Committee dated 16 July 2016. Both submissions attracted media attention.⁴⁴

⁴² *Taylor v Attorney-General* [2015] NZHC 1706 at [69]. See also *Boscawen v Attorney-General* [2009] NZCA 12; [2009] 2 NZLR 229.

⁴³ Ministry of Justice "Guidelines for Judicial Conduct" (March 2013) <www.courtsofnz.govt.nz>.

⁴⁴ "Māori Land Court judges raise concerns of Te Ture Whenua reforms" (22 November 2017) Television New Zealand, Te Karere <www.tekarere.co.nz>; "Flavell reform undermines Māori property rights say judges" (15 September 2015) Radio Waatea <www.radiowaatea.co.nz>; Meka Whaitiri "Minister negligent in ignoring Land Court judges" (7 September 2016) Labour Party <www.labour.org.nz>; Patrick Smellie "Māori land reform bill draws fire" (2 September 2016) AgriHq <www.agrihq.co.nz>.

In addition, in response to a query from the AUT Ethics Committee during the approval process, a question was raised over the need to obtain approval from the Judicial Research Committee.⁴⁵ The researcher contacted the Chief Advisor Legal and Policy at the Judicial Office for Higher Courts soon after and received confirmation that the approval of the Committee was not necessary and that in any event the researcher should discuss the content of the research with the Chief Judge of the Māori Land Court. This occurred in 2017 where the Chief Judge advised that, provided the criticisms of the Bill, if any, did not go beyond the parameters of the two submissions made by the Māori Land Court Bench to the Ministerial Advisory Committee and the Māori Affairs Select Committee, then he did not consider the topic of the research to be inappropriate.

⁴⁵ Ministry of Justice Guidelines above n 43.

CHAPTER TWO – THE HAPŪ

Introduction

This chapter introduces three hapū (subtribes) Ngāi Taiwhakaea II, Ngāti Hikakino and Ngāi Te Rangihouhiri II (“the Hapū”) of the Ngāti Awa iwi in the Eastern Bay of Plenty, who are central to this study.⁴⁶ Their origins, background and traditional rohe (districts) are discussed, along with a brief overview of their encounters with Europeans in the 1830s onward leading up to conflict and land confiscation in 1865-1866 at the height of the New Zealand Land Wars era.⁴⁷ Chapter Two also briefly outlines the Hapū estate in traditional terms and how following confiscation lands were returned to the Hapū by Crown grant and Native Land Court decisions. Conflicts with neighbouring groups, both on the battlefield and in the courtroom, also require consideration, given their impact on the current composition of the Hapū land base.

Ngāti Awa

Historical background

A summary of the Ngāti Awa tribe is set out below:⁴⁸

Ngāti Awa trace their ancestry back to the people they believed were living in New Zealand before Māori arrived, and to those who arrived from Hawaiki on board the *Mataatua* canoe. The tribe have left their footprints in many parts of the country. Today, Ngāti Awa is based in the eastern Bay of Plenty, with communities in Whakatāne, Te Teko, Edgecumbe, Matatā and Kawerau.

...

In Ngāti Awa’s earliest days a large group of the tribe occupied the northern regions around Kaitiāia, Ahipara and Lake Tāngonge (now drained). Several burial caves in the region also belonged to the tribe.

After a long series of battles with Ngāti Whātua and Ngāpuhi, there was a general exodus of Ngāti Awa from the north in about 1600. There were two paths of migration. Led by Tītahi, one group went down the west coast of the North Island to Waitara in Taranaki. Tītahi also established pā in Tāmaki-makau-rau (Auckland), which included Maungakiekie (One Tree Hill). The other migrating group went

⁴⁶ For convenience, also referred to as Taiwhakaea II, Hikakino and Te Rangihouhiri II.

⁴⁷ For a discussion see James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland University Press, Auckland, 2015).

⁴⁸ Layne Harvey “Ngāti Awa” (22 March 2017) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>; David Bateman *Nga Iwi o Aotearoa – The Māori Tribes of New Zealand* (Ministry for Culture and Heritage, Wellington, 2006).

down the east coast, led by the ancestor Kauri, to Tauranga. Part of Kauri's group continued on to Whakatāne and merged with Te Tini-o-Awa. Descendants of Tītahi and Kauri can be found today among the sub-tribes of Ngāti Awa.

Despite leaving the north, Ngāti Awa still have links with many northern tribes, including Ngāi Takoto, Te Aupōuri, Te Rarawa and Ngāti Wai.

...
Today [2006], 22 sub-tribes, 19 marae and about 17,000 individuals are registered with Te Rūnanga-o-Ngāti Awa. Compensation for the unfair confiscation of land has been the aim of the tribe since 1867. During the 1990s considerable progress was made through the Waitangi Tribunal and negotiation to bring these claims to a resolution. In 1999 the tribunal's Ngāti Awa Raupatu report was published, leading to a settlement agreement in 2003.

Ngāti Awa traditions are anchored in essential reference points from their three rivers – Whakatāne,⁴⁹ Rangitāiki and Tarawera, and three maunga (mountains): along with the tribal mountain Putauaki, Te Rae o Koohi (Koohi Point headland at Whakatāne) and Whakapaukōrero at Matatā. They comprise the core foundations of the Ngāti Awa identity. The iwi revel in their majesty, in haka (ceremonial war rituals), mōteatea (songs of lament), tauparapara (soliloquies) and whakataukī (proverbial sayings).⁵⁰ They are landmarks of oratory, of poetry and of whakapapa. It is of little wonder that their descendants compete for their attentions.

The connection between Te Tini o Toi and the Mataatua waka

Ngāti Awa descends from many ancestors including Toi Te Huatahi and from the pre-migration tribes including Te Hapuoneone, Maruiwi and Te Marangaranga.⁵¹ Toi is often regarded as the principal tipuna or apex ancestor from whom many if not most of the tribes of Te-Ika-a-Maui descend.⁵² Ngāti Awa also trace their lineage from the tipuna of the Mataatua waka including Toroa, Ruaihona, Tahinga-o-te-ra and Awanuiārangi II.⁵³ So the descendants of Toi became intermarried with those of Toroa, thereby cementing the customary rights and obligations of both groups in Te Moana-nui-a-Toi and securing their position in the region as one of the foundation tribal enclaves for themselves and their descendants over many generations. Those

⁴⁹ Ngāti Awa would continue to refer to the river as Whakatāne and not Ohinemataroa: Email from Ngāti Awa kaumatua and former Te Rūnanga o Ngāti Awa Chairman Te Kei Merito to Layne Harvey regarding Ngāti Awa (25 August 2017).

⁵⁰ See <www.youtube.com/watch?v=_6-TOyJs2IM> retrieved 25 March 2017. The contemporary waiata "Putauaki" is an example. See also "Ngāti Awa te iwi" composed by Sir Hirini Mead.

⁵¹ Ngāti Awa Claims Settlement Act 2005, Schedule 9.

⁵² Elsdon Best *Tuhoe: The Children of the Mist*. (4th ed, Reed, Auckland, 1996).

⁵³ Harvey *Ngāti Awa* above n 48.

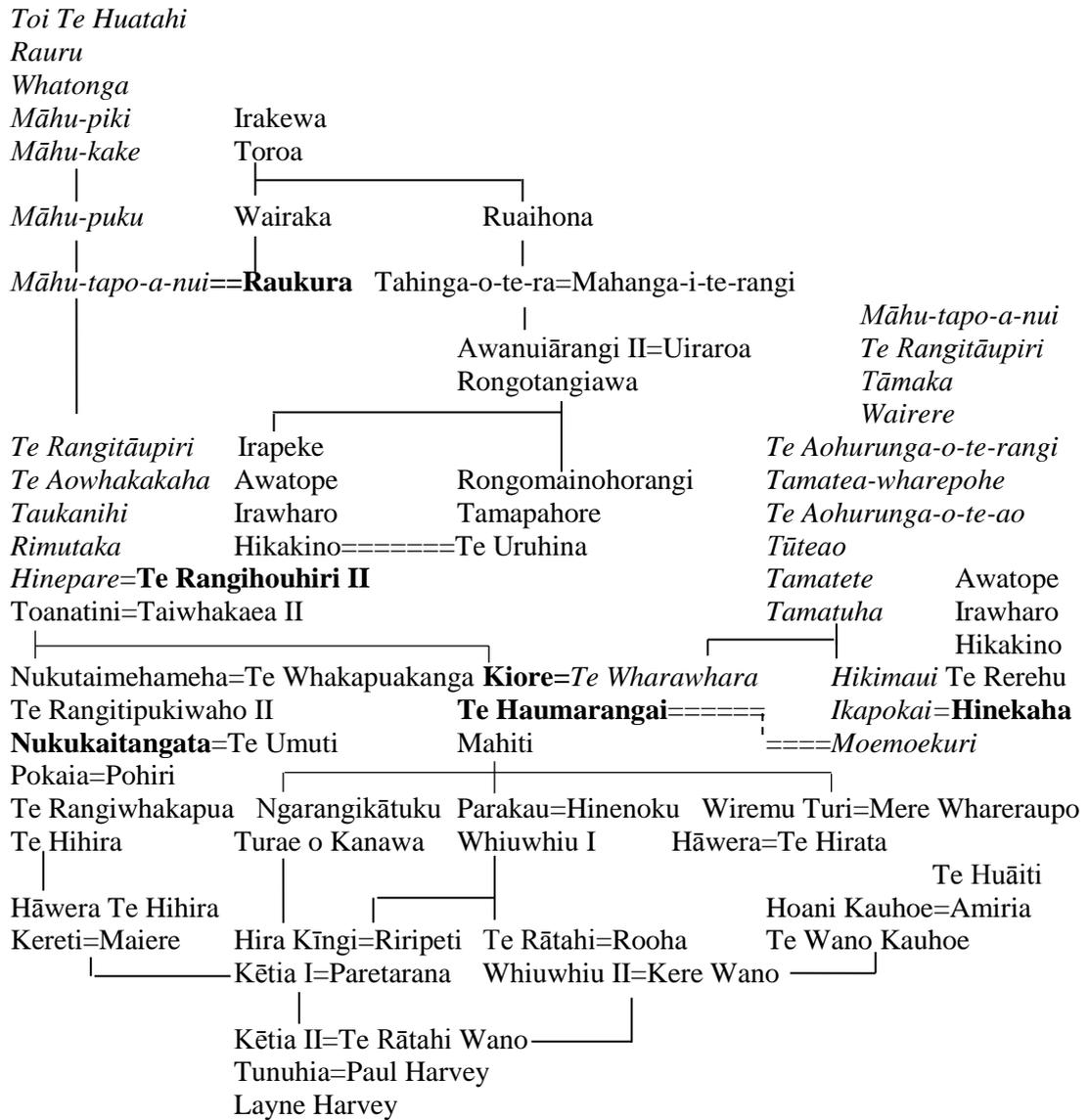


Figure 2: Whakapapa 1

Te Heke o Te Rangihouhiri I (The migration of Te Rangihouhiri I)

A turning point in the migration patterns of the tribes and of the history for the lands of the Hapū between Te Awa a te Atua or Matatā and Ōtamarākau (between present day Whakatāne and Maketu) began with the return of the Ngāti Awa ancestor Te Rangihouhiri I from the East Coast in what became known as Te Heke o Te

36 Judge Scannell MB 24 (36 JSC 24) dated 9 December 1893. These genealogical tables are compiled from several sources which do not always align.

Rangihouhiri I (the migration of Te Rangihouhiri I) and his tribes.⁵⁶ After leaving Whangarā, north of present day Gisborne, and traversing Te Tairāwhiti (the East Coast), the iwi stopped at Torere between Ōpōtiki and Te Kaha.

They continued to Ohiwa where the ancestor Irawharo was living at the time, before moving west to Whakatāne to stay amongst their close Mataatua kin.⁵⁷ Tensions soon arose after several incidents involving Tamapahore, (the brother of Te Rangihouhiri I). Irawharo and Te Rangihouhiri I then moved to Te Awa a te Atua or Matatā.⁵⁸ Irawharo also returned to Ōtamarākau from time to time.⁵⁹ Te Rangihouhiri I then established and occupied the important pā known as Whakapaukōrero.⁶⁰ After a short stay he led his tribes on to Maketu, where after several conflicts, they eventually took possession following the battle of Poporohuamea where he was killed.⁶¹ Sometime after this his iwi, it is said on the initiative of Tamapahore, became known as Ngāi Te Rangi (the descendants of Te Rangihouhiri I) eventually moving on to the Tauranga region where they displaced several of the tribes living there. Today Ngāi Te Rangi hold mana whenua of the area.⁶² However, the area around Matatā and Ōtamarākau was not abandoned. Other related groups arrived or continued to occupy the land including Ngāti Whakahemo, Ngāti Irawharo and Ngāti Pūkeko.⁶³ Ngāti Awa retained ties to the land right up to the time of the raupatu (confiscation) and the Compensation Court

⁵⁶ Layne Harvey, Tuhapo Tipene and others *Te Rau Tau o Taiwhakaea II Tipuna Whare* (Mann Printing, Whakatāne, 2013) at 15-16. See Gudgeon, W. “Notes on the paper by Timi Waata Rimini, ‘On the fall of Pukehinahina’ and other pas” (1893) 2 JPS 2 at 109-112.

⁵⁷ Te Roopu Whakaemi Korero o Ngati Awa *Cultural History of the Western Lands*, Research Report No.14 (Te Runanga o Ngāti Awa, Whakatane, 1994) at 10-13.

⁵⁸ Stokes, Evelyn “Te Heke o Rangihouhiri” (undated) <www.econtent.tauranga.govt.nz>.

⁵⁹ It was called Maungatia but Irawharo re-named it Ōtamarākau. See Te Roopu Whakaemi Korero o Ngati Awa *An Investigation into the Alienation of Lot 63, Parish of Matata* Research, Briefing Paper No.1 (Revised) (Te Runanga o Ngati Awa, Whakatane, 1993) at 23. Accompanying Te Rangihouhiri during the heke were several important chiefs including Awatope, father of Irawharo; Taiwhakaea I (a nephew of Awatope) and his father in law, Maruahaira.

⁶⁰ H Palmer Te Heke o Rangihouhiri (Te Rūnanga o Ngāi Te Rangi, Mount Maunganui, 2009).

⁶¹ Ngāi Te Rangi “Our korero” (undated) Ngāi Te Rangi <www.ngaiterangi.org.nz>.

⁶² Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004) at 29. See also Ngai Te Rangi “Our korero” above n 61.

⁶³ Te Roopu Whakaemi Korero o Ngati Awa *Cultural History* above n 57 at 20-24.

Hikakino and his sons established their hapū at Matatā. It was these hapū led by Te Rangi-i-paia, Te Rangitākina, Te Umukohukohu and Te Hura who were resident at Te Awa a te Atua-Matatā prior to 1840 and up to 1866.⁶⁷

Te Rangihouhiri II

Te Rangihouhiri II was a famous fighting chief like his illustrious namesake Te Rangihouhiri I. He had at least three wives: Hinepare, and the sisters Te Rangihākua and Awapāea. His most notable progeny were his sons Puani and Ruaroa and his daughter Toanātini, the *whare tangata* (childbearing house) of all the hapū of Ngāti Awa.⁶⁸ It is said that the pre-migrations tribes of Te Tini o Toi merged with the Mataatua arrivals through marriages like that between Te Rangihouhiri II and Hinepare. Te Rangihouhiri II established critical customary rights for the Hapū in the Western rohe of Ngāti Awa including an important pā at Otitapu in the present day Mangaone Scenic reserve between Kawerau and Lake Rotomā.⁶⁹ A whakapapa of Te Rangihouhiri II was immortalised in the famous *ngeri* (chant); *Te Tangi a Tamapahore*:⁷⁰

Ko Awa[nuiarangi] II
 Ko Rongo[tangiawa]
 Ko Rongo[mainohorangi]
 Ko Tama[pahore]
 Ko Uru[hina]
 Ko koe ra [Te Rangihouhiri II]

Taiwhakāea II

Taiwhakāea II was the son of Te Rangitipukiwaho I and Tumatawera. He and his siblings held mana over most of Whakatāne including on both sides of the Whakatāne and Rangitāiki rivers.⁷¹ Tiaki Rēwiri of Te Patuwai hapū stated that even

⁶⁷ Compensation Court “Evidence of Thomas Black and others” in Waitangi Tribunal, *Raupatu Document Bank* above n 66, at 46806-46807; Te Roopu Whakaemi Korero o Ngati Awa, *Cultural History* above n 57 at 20-24.

⁶⁸ See Hiriweteri Motutere, 36 Judge Scannell MB 63-64 (36 JSC 63-64) dated 12 December 1893.

⁶⁹ In 1920, the principal chief of Ngāti Awa, Te Hurinui Apanui confirmed that the customary rights to the Rūrima islands off the coast of Matatā and west of Whakatāne, came from Te Rangihouhiri II and his grandchildren: 19 Whakatāne MB 39 (19 WHK 39) dated 12 October 1920.

⁷⁰ Te Roopu Whakaemi Korero o Ngati Awa, *Otitapu* Research Briefing Paper No.7 (Te Runanga o Ngati Awa, Whakatane, 1993) at 24-32.

⁷¹ Taiwhakāea II had six siblings - Te Puia, Whetenui, Paraheka, Te Ratuahāhana, Te Rangikāwhiua and Ruatiki: Harvey, Tipene and others, *Te Rau Tau o Taiwhakāea II* above n 56 at 7-9.

the famed ancestor Te Rangikawēhea and his grandson Te Rangitūkehu held their authority over parts of Whakatāne and Rangitāiki through their descent from Taiwhakāea II.⁷² According to nineteenth century experts, it was through descent from Awanuiārangi II, and then Te Rangitipukiwaho I and his sons like Taiwhakaea II that rights in lands at Whakatāne derive.⁷³ Tiaki Rēwiri relates how Taiwhakaea II and his siblings, parents and grandparents maintained rights in lands east of the Whakatāne River through Awanuiārangi II and then through descent to Tumatawera, wife of Te Rangitipukiwaho I, and the mother of Taiwhakaea II.⁷⁴

Summary

Taiwhakāea II, Hikakino and Te Rangihouhiri II are independent and autonomous hapū of Ngāti Awa. They also connect by whakapapa to the ancestors Waitahariki-nui, Waitaha-turauta and Tūwharetoa.⁷⁵ Since the time of Hikakino and Te Rangihouhiri II, their descendants say that they have been tangata whenua of Ōtamarākau, Matatā, Kawerau and the surrounding regions in the western rohe of Ngāti Awa. They occupied territory in the Te Awa a Te Atua region in the general vicinity of present day Matatā, inland to Tauaroa and Te Umuhika where their interests intersect with those of Te Tāwera, another important hapū of Ngāti Awa.⁷⁶ Taiwhakāea II and his children occupied territory at Otamāuru, Whakatāne, Te Rae o Koohi and further inland to present day Awakeri at Te Tiringa, to Edgecumbe and Te Teko.⁷⁷ Before the Treaty of Waitangi and the onset of colonisation, Taiwhakaea II, Hikakino and Te Rangihouhiri II maintained their own rangatiratanga (self-government) over their rohe.⁷⁸ Battles were fought with neighbouring tribes where the mana of Taiwhakaea II, Hikakino and Te Rangihouhiri II was tested. Other

⁷² At 218. Te Rangikawēhea was a leader of Taiwhakāea II hapū in his day: Phillis, O. *Maata Te Taiawatea Reunion* (Whakatane Printers 2000 Ltd, 2007) at 377. See also Hairama Haweti in 7 Opotiki MB 173-175 (7 OPO 173-175) dated 2 April 1895.

⁷³ 5A Whakatāne MB 218 (5A WHK 218).

⁷⁴ 5A Whakatāne MB 131 (5A WHK 131). Regarding the land on both sides of the Whakatāne River from the confiscation boundary to the sea T Rēwiri replied: “Taiwhakaea, Te Puia, Te Ratuahana, Whetenui and Paraheka. Paraheka owned most of the land.”

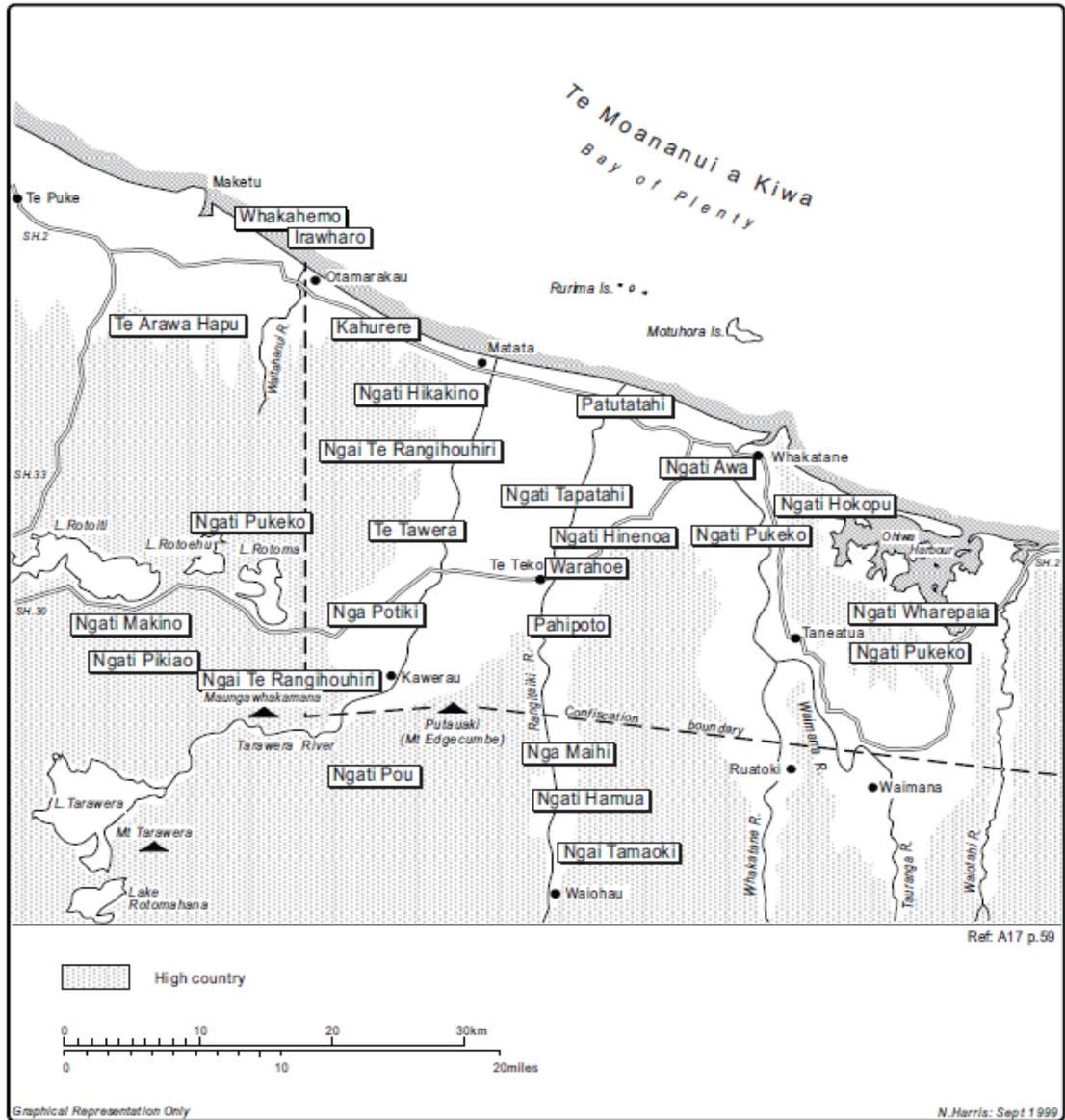
⁷⁵ Te Roopu Whakaemi Korero o Ngati Awa *Cultural History* above n 57 at 3, 7-10.

⁷⁶ See 119 Whakatāne MB 131-148 (119 WHK 131-148).

⁷⁷ When T H Smith met the Rangitāiki hapū to discuss the Rūnanga system at a hui arranged by Te Rangitūkehu, chief of Te Pahipoto, Te Patutātahi were also in attendance: “Further papers relative to Governor Sir George Grey's plan of Native government. Report of officers” [1862] I AJHR E-09 at 21.

⁷⁸ Ngāti Awa Claims Settlement Act 2005, Preamble.

tribes also sought recognition in the western rohe of Ngāti Awa.⁷⁹ The map following gives a thumbnail sketch of the locations of the principal hapū groupings of Ngāti Awa prior to colonisation.



Map 3: Location of hapu at 1840, based on information supplied by Ngāti Awa claimants

Figure 4: Location of Ngāti Awa Hapū in 1840.⁸⁰

⁷⁹ See the Ngāti Tūwharetoa (Bay of Plenty) Claims Settlement Act 2005 and the Ngāti Rangitihi claim area depicted at <www.ngatirangitihi.iwi.nz>.

⁸⁰ Waitangi Tribunal *The Ngāti Awa Raupatu Report* (Wai 46, 1999) at 15.

The coming of colonisation

Traders, missionaries and the Crown

Soon after the arrival of Europeans in Aotearoa, traders, missionaries and Crown emissaries also travelled into the area for the purposes of trade, religion and settlement.⁸¹ In 1839 a number of traders ventured into the western Ngāti Awa rohe attempting to secure land and other concessions from the chief of Te Rangihouhiri II, Te Rangitākina, who was resident at Matatā.⁸² Following that, in June 1840 Crown representatives brought the Treaty of Waitangi to Whakatāne where chiefs of Ngāi Tōnu and Ngāti Pūkeko were persuaded to sign.⁸³

Edward Shortland,⁸⁴ Protector of Aborigines at Maketu, travelled throughout the Bay of Plenty in the early 1840s and kept a record of what he witnessed.⁸⁵ He recorded that at Matatā the chiefs were Te Puehu, whom he describes as Ngāti Hikakino, and Te Rangitākina of “Ngāti rangiowiri” [Ngāti Rangihouhiri]. He also referred to a pā at Tapahoro on Lake Tarawera, traditionally a Ngāti Rangitahi stronghold, and how it had been abandoned (presumably by Ngāti Rangitahi) because of a threat of conflict with Ngāti Awa. Shortland also recorded that Ngāti Rangitahi travelled down the Tarawera River from the Lake to the coast and that the mountain Putauaki, near present day Kawerau, appeared to be the edge of Ngāti Awa’s influence.⁸⁶

Contrast that with the Reverend Thomas Chapman, who Ngāti Rangitahi say referred to two distinct tribes living in the region in 1846.⁸⁷ Later, in 1860, Chapman would write on behalf of a Ngāti Rangitahi woman, Pareraututu, to Thomas Smith, Civil Commissioner in Tauranga, seeking assistance to defuse another possible conflict

⁸¹ Harvey, Tipene and others *Te Rau Tau o Taiwhakaea II* above n 56 at 16-17. See also Waitangi Tribunal *The Ngati Awa Raupatu Report* above n 80 at 24-28.

⁸² Compensation Court, ‘Te Awa a Te Atua (Matata)’ in Waitangi Tribunal, Raupatu Document Bank above n 66, at 46807. Te Roopu Whakaemi Korero o Ngati Awa, *Te Putere Maori Reserve* Research Briefing Paper No.4 (Revised Ed) (Te Runanga o Ngati Awa, Whakatane, 1992) at 11.

⁸³ Waitangi Tribunal *The Ngati Awa Raupatu Report* above n 80 at 25.

⁸⁴ See Atholl Anderson “Shortland, Edward” (December 2013) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>.

⁸⁵ Edward Shortland, Letterbook above n 66.

⁸⁶ Diary of Edward Shortland, 29 March to 3 April 1842 (Alexander Turnbull Library) at MS-Micro-0356.

⁸⁷ “Ngāti Rangitahi Story” <www.ngatirangithi.iwi.nz>.

between Ngāti Awa and Ngāti Rangitīhi. Te Rangitūkehu, one of the principal chiefs of Ngāti Awa, had threatened to build a pa at Te Pakepake (Te Pakipaki)-o-te-Whenua on the Tarawera river, inland toward Lake Tarawera.⁸⁸ There is no record of the outcome of those events. From this evidence, two points emerge. First, even missionaries like Chapman and officials like Shortland acknowledge an important Ngāti Awa interest at Putauaki including interests outside of the 1866 confiscation line. Second, Ngāti Rangitīhi acknowledge that Ngāti Awa's interests include the area along the Tarawera river inland of the coast at least as far south as Otamaka.

Further evidence is provided by Thomas Smith, Protector in Maketu in 1845 and then Civil Commissioner, who made regular detailed reports of the Bay of Plenty area, especially around the early 1860s, noting where tribes were living, their chiefs, iwi affiliations and general status.⁸⁹ He reported in May 1862 that he had met with the "Ngāti awa tribes residing in the eastern portion of this district on the Awa o te Atua, Rangitāiki and Whakatāne rivers". He met firstly: "the three principal tribes residing at the various settlements on that river [Tarawera]; the Ngāti rangihorihori, Ngāti Hikakino and Te Tāwera". No reference is made to any other iwi group.⁹⁰ Part of the reason for his visit was to present a proposal for the creation of district rūnanga, under the system created by Grey in the late 1850s. Following that visit, the leading chiefs of the Hapū, including Te Hura, Petera Te Rangitākina, Utuku te Rangi and Raharuhi were then persuaded to take up important positions within their respective rūnanga.⁹¹ There is no reference to Ngāti Rangitīhi or (TKK) Tūwharetoa ki Kawerau being consulted or considered for a rūnanga at Te Awa a Te Atua.

On the contrary, the report of Henry Clarke dated 28 May 1862, the Resident Magistrate at Tauranga, confirmed that rather than including Ngāti Rangitīhi as part of the Ngāti Awa rūnanga at Matatā, he brought to the meeting the Ngāti Rangitīhi

⁸⁸ "Letters to T. H. Smith 1844-1892, T. Chapman to T. H. Smith, 3 February 1860" (Alexander Turnbull Library) MS-1839 at 66. Chapman claimed that, according to his Ngāti Rangitīhi informants, the correct extent of Ngāti Awa's interest was just below the 1866 Bay of Plenty confiscation line at Otamaka whereas where Te Rangitūkehu was proposing to build was some distance from Putauaki and closer to Maungawhākama, another important mountain.

⁸⁹ Harvey, Tipene and others *Te Rau Tau o Taiwhakaea II* above n 56 at 16-18.

⁹⁰ Further papers relative to Governor Sir George Grey's plan of Native government, above n 77 at 20. Smith also recorded a list of "Native Officers nominated by the "Ngāti awa [sic]" tribe as members of the local Rūnanga Assessors, Wardens and Kareres".

⁹¹ Harvey, Tipene and others *Te Rau Tau o Taiwhakaea II* above n 56 at 23.

and Tuhourangi chief, Mokonuiārangi, to persuade Ngāti Awa as to the virtues of the rūnanga system. Mokonuiārangi was the assessor of the Tarawera rūnanga, where Ngāti Rangitahi and Tuhourangi were based in the 1860s. In an earlier report dated 25 January 1862, Smith confirmed that he had, after considerable effort, convinced the Ngāti Rangitahi and Tuhourangi tribes to agree to a combined rūnanga at Tarawera and how he visited the former at their “principal settlement” Te Tapahoro, on the shores of Lake Tarawera.

Prior to that in October 1861, Clarke reported to the Government that “the country between these two rivers [Te Awa o te Atua and the Whakatāne] is occupied by the Ngāti Awa”.⁹² Several years later J.A. Wilson, Crown Agent, undertook a survey of the population in the area claimed by Ngāti Awa in preparation for the sitting of the Compensation Court in 1867. Wilson's census lists the hapū present at Te Awa o te Atua as Ngāti Rangihouhiri and Ngāti Hikakino, being divided further into Ngāti Rangihouhiri and Ngāti Hāmua and Ngāti Hikakino and Ngā Pōtiki respectively.⁹³ He does not list any other groups there such as Ngāti Makino, Ngāti Pikiāo, Ngāti Tūwharetoa or Ngāti Rangitahi. Then in 1879, when the death of the Reverend Thomas Grace was reported, newspapers confirmed that, during the conflicts of the 1860s, Grace took refuge at Matatā under the protection of the chiefs Te Hura and Te Pitoiwi, with no mention made of any other chiefs providing such shelter in 1865.⁹⁴

If local and Crown figures are to be relied upon, the combined population of Ngāi Te Rangihouhiri II and Ngāti Hikakino at Te Awa a te Atua was in the region of three hundred persons while the Otamāuru community numbered about one hundred.⁹⁵ In 1867, two years after the raupatu, the combined population of Taiwhakāea II and Te Patutātahi was 107.⁹⁶ Since the time of the raupatu in 1866, Te Rangihouhiri II, Hikakino and Taiwhakāea II have become synonymous as a single community, which today is based within the rohe of Taiwhakāea II at Te Pāroa, Whakatāne.

⁹² Governor Sir George Grey's plan of Native government, above n 77, E-07 at 41.

⁹³ Further papers relative to Governor Sir George Grey's plan of Native government, above n 77.

⁹⁴ “Death of the Rev T S Grace” Waka Maori (New Zealand, 24 May 1879)

⁹⁵ Te Roopu Whakaemi Korero o Ngati Awa *An Investigation into the Alienation of Lot 63* above n 59 at 28, Tamihana Wahu: “When I came here first [in 1837] there were about 300 men of Hikakino [Rangi]Houhiri, Te Pahipoto, Te Tawera and Te Patutatahi living at Te Matata”.

⁹⁶ Following the raupatu the Crown commissioned a number of census report on the population of Ngāti Awa. These occurred in 1867, 1878 and 1881.

Conflict and confiscation

Te Kaokaoroa 1864

Following the Crown's attacks on the Waikato tribes in 1863, elements of the Mataatua (Bay of Plenty) and Tairāwhiti (East Coast of the North Island) iwi sought to lend assistance with some eight hundred men.⁹⁷ However, on their way to Waikato this Tairāwhiti force was blocked at Maketu by the hapū of Te Arawa of the Rotorua and Lakes district later supported by two government gunboats, *Falcon* and *Sandfly*.⁹⁸ The battle of Te Kaokaoroa which occurred between 27 and 28 April 1864 was decisive and the Tairāwhiti force suffered a heavy defeat.⁹⁹ Hikakino also suffered a significant number of casualties including their chief Te Rangi-i-paia.¹⁰⁰ The position at the conclusion was that the Tairāwhiti force, which included the Hapū, had been repulsed and halted from advancing over an aukati (boundary) that Te Arawa had established near Maketu – and not at Matatā or Ōtamarākau.¹⁰¹

Sometime later, a rūnanga (meeting) was held at Tauaroa Marae near Matatā following the arrival of Horomona, a prophetic leader from Taranaki.¹⁰² Horomona was a convert of Te Ua Haumene, founder of the Pai Marire faith.¹⁰³ Many chiefs of the Hapū including Te Hura, Hāwera Te Hihira, Hoani Poururu, Tikitū II and Tāmihana attended that hui.¹⁰⁴ It was then decided that an aukati (boundary) be established to preserve the tino rangatiratanga (authority) of Ngāti Awa and keep others out of the tribe's territory. The Waitangi Tribunal described this aukati as “fantastic” since it reached into Taranaki with no prospect of its being enforced.¹⁰⁵

⁹⁷ Waitangi Tribunal *The Ngati Awa Raupatu Report* above n 80 at 30.

⁹⁸ James Cowan *The New Zealand Wars. A History of the Maori Campaigns and the Pioneering Period* (1845-64) (R. E. Owen, Wellington, 1955) vol 1 at 417.

⁹⁹ Te Rangihouhiri II hapū lost over 30 men: Evidence of Te Hura, Judge Arney's notes of proceedings and evidence of R v Te Hura Te Tai and Others, JC22-3B AG66/968, NA Wellington at 416–419, 471–477.

¹⁰⁰ Many were eventually buried along the coast between Ōtamarākau and Matatā: Te Roopu Whakaemi Korero o Ngati Awa ‘*Memoirs of Valentine Savage*’ (Te Runanga o Ngati Awa, Whakatane, 1995) at 17-18.

¹⁰¹ Waitangi Tribunal *The Ngati Awa Raupatu Report* above n 80 at 38. Today a memorial erected by Ngāti Awa is one of the few reminders of that battle.

¹⁰² At 30.

¹⁰³ Head, L “Te Ua Haumene” (1990) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>.

¹⁰⁴ Judge Arney's notes in R v Te Hura Te Tai and Others above n 99 at 416–419, 471–477.

¹⁰⁵ Waitangi Tribunal *The Ngati Awa Raupatu Report* above n 80 at 48.

Hemi Te Mautaranui Fulloon

On 22 July 1865, a cutter called the *Kate* carrying James Fulloon (a relative of the Ngāti Awa senior chief Apanui Te Hāmaiwaho) sailed into Whakatāne, crossing the aukati.¹⁰⁶ Fulloon was in the service of the Government. In the events that followed, he managed to insult his own relatives, which ultimately led to his own death and the deaths of most of the passengers on board the *Kate*. Soon after, a warrant of arrest was issued by the Civil Commissioner in Tauranga, Smith, for the apprehension of those persons responsible and in general “rebellion” against the Crown.¹⁰⁷ After Fulloon was killed, Mair confirmed that Ngāi Te Rangihouhiri II and Ngāti Hikakino were at Matatā. He described the killing of Fulloon as being done by “the Hauhau and a party of Ngāti Awa from Te Awa o te Atua under Te Hura”.

Crown and Loyalist invasion 1865

Wepiha has gone to Opotiki to prevent the Whakatoheas from joining Te Hura in the event of his being attacked. The Arawa are also gone back inland being very indignant at the murder of Fulloon. They will now turn round upon the Ngatiawa. The tribes concerned in this murder were Te Rangihouhiri, Hikakino, and Te Patutetahi [sic]— the people here are for an immediate attack on Te Awa o te Atua - the pa of Te Hura, Te Matapihi, the Whakatane portion of Ngatiawa took no part in the murder but were too weak to prevent it.¹⁰⁸

The Crown then assembled a force of over five hundred soldiers with reinforcements provided principally by Te Arawa on the pretext of executing the warrant of arrest.¹⁰⁹ This act led to several attacks by the Crown led force against Ngāti Awa. One of the first sites to fall was Otamāuru in September 1865 and the last stand by the Hapū and others was at Te Kupenga. On 20 October 1865, after a battle lasting several days, at 5.00am, the remnants of the Hapū finally laid down their arms and surrendered.¹¹⁰

¹⁰⁶ Harvey, Tipene and others *Te Rau Tau o Taiwhakaea II* above n 56 at 34-36. Te Mautaranui also known as Te Maitaranui was an important Ngāti Awa and Tūhoe ancestor.

¹⁰⁷ Waitangi Tribunal *The Ngati Awa Raupatu Report* above n 80 at 55.

¹⁰⁸ “Letters to T. H. Smith 1844-1892, T H Smith to W G Mair, 30 July 1865” (Alexander Turnbull Library) at MS-3330.

¹⁰⁹ Harvey, Tipene and others *Te Rau Tau o Taiwhakaea II* above n 56 at 35.

¹¹⁰ Waitangi Tribunal *The Ngati Awa Raupatu Report* above n 80.

The Trials

A court martial was then held in Ōpōtiki, in December 1865, followed by criminal trials in the Supreme Court at Auckland, in March 1866.¹¹¹ The courts martial deemed that most of the accused were guilty and sentenced them accordingly.¹¹² However, later Governor Grey, on the advice of the Attorney General, James Prendergast, found that the courts martial themselves were invalid and had the accused tried in the criminal courts instead. Like the preceding courts martial, these trials attracted much public interest.¹¹³ The result was that most of the Ngāti Awa accused were found guilty and sentenced to death.¹¹⁴ Eventually, most served terms of imprisonment. However, Mikaere Kirimangu from Te Rangihouhiri II was executed and three more died in prison due to illness, Tamati Hoko, Rawiri Paraharaha and Hepeta Te Tai.

The aftermath: Raupatu

In January 1866, the Bay of Plenty confiscation district was proclaimed under the New Zealand Settlements Act 1863 where a significant part of the tribal domain of Ngāti Awa was confiscated, including the vast majority of the lands of the Hapū.¹¹⁵ With most of the leadership removed, others had to assume authority. Wiremu Te Whatāpapa of Te Patutātahi was one such person.¹¹⁶ Leadership for Ngāi Te Rangihouhiri II fell on Te Metera Te Ti, Te Hura's brother, who sought to ensure that the Hapū used the judicial system to retain their customary interests.¹¹⁷ Their leaders had been killed in battle, remained imprisoned or were executed, even though they considered the death of Fulloon an act of war.¹¹⁸ Their principal lands had not

¹¹¹ Harvey, Tipene and others *Te Rau Tau o Taiwhakaea II* above n 56 at 35.

¹¹² Waitangi Tribunal *The Ngati Awa Raupatu Report* above n 80 at 71-76.

¹¹³ They were reported extensively in the *New Zealand Herald* (13 March 1866) vol III, Issue 726; (28 March 1866) vol III and Issue 729; (30 March 1866), vol III, Issue 741.

¹¹⁴ Five were executed including Horomona of Taranaki and Mokomoko of Whakatōhea and three more died in prison including Hepeta and Paraharaha of Te Rangihouhiri II and Te Patutātahi respectively. They were then buried in the precincts of the prison and not returned until 1989.

¹¹⁵ Waitangi Tribunal *The Ngati Awa Raupatu Report* above n 80 at 64-70. See also Richard Boast and Richard S. Hill (eds) *Raupatu: The Confiscation of Maori Land* (Victoria University Press, Wellington, 2009).

¹¹⁶ Wiremu had been nominated by Te Rangitūkehu: 3 Whakatāne MB at 274 (3 WHK 274).

¹¹⁷ Waitangi Tribunal *Raupatu Document Bank* above n 66 at 46795-96.

¹¹⁸ Mikaere Kirimangu made this statement during the criminal trials in Auckland. There was also the execution without trial of the Whakatōhea chief Te Aporotanga by Ngapi, the widow of Tohi Te Ururangi of Te Arawa, who was killed in battle at Te Kaokaoroa in April 1864. There is no

only been confiscated but given to their traditional foes in return for military service.¹¹⁹

Ngai Te Rangihouhiri and Ngati Hikakino were to be less fortunate. The two hapū most implicated in the Fulloon murder and the subsequent harbouring of suspects were most harshly dealt with. Wilson arranged for virtually all their land to be taken and awarded to Te Arawa, excepting the island pa of Omarupotiki and Te Matata. The area returned to them was a mere 278 acres, most of which was either coastal sandhills or swampy lowlands. Wilson did, however, allocate to these hapu highly prized eel weirs, which he had been able to prevent Te Arawa taking over. He later admitted that the lands were ‘liable to an occasional flood; but that the Government cannot help; nor is it any gainer, the whole of the dry lands of these tribes having been given to the hapus of the Arawa, in reward for military service rendered in 1865’.

Three decades later, Apirana Ngata, visiting the area in 1899, would write:¹²⁰

He iwi mate a Ngāti Awa i nga whiunga a te ture; a, i tangi toku ngakau mo ratou i tino whakamamae rawatia e Te Kawanatanga mo nga hara o mua.

Ngāti Awa is a sick people because of the punishments of the law, and I wept for them because of the harshness of the Government against this tribe for their past sins.’

By the time of the Sim Commission of the 1920s, it was evident that the Hapū, and especially Te Rangihouhiri II and Hikakino retained virtually none of their traditional lands, except for two island pā of thirteen acres each. From once vast holdings, this was a calamitous outcome. Combined with the losses suffered at the battle of Te Kaokaoroa in April 1864, the invasion of September 1865 and the subsequent executions and imprisonments in 1866, the loss of practically all the land base of Hikakino and Te Rangihouhiri II hapū resulted in the near disintegration and extinction of these two subtribes. It was a near fatal blow which would render the two hapū virtually invisible and consequently ineffective for the next five generations.

evidence that Ngapi faced any consequences: Curnow, J “Tohi Te Ururangi” (1990) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>.

¹¹⁹ Waitangi Tribunal *The Ngati Awa Raupatu Report* above n 80 at 82.

¹²⁰ Te Ara – The Encyclopedia of New Zealand *Māori Peoples of New Zealand: Nga Iwi o Aotearoa* (Bateman Publishing, Wellington, 2006) at 149; Harvey, L “Ngāti Awa – Ngāti Awa i ēnei rā” (2007) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>.

CHAPTER THREE – COMPETING CLAIMS 1867-1999

Introduction

There are many important studies that discuss definitions of customary land tenure and what is sometimes referred to as Native title. Durie, Williams, Hickford, Boast, Bennion and McHugh have all made important contributions to the conversation on the establishment and evolution of traditional land tenure systems and the definitions of customary title.¹²¹ Rather than repeating those discussions, this chapter instead has a focus on the competing customary claims of the historical rivals of the Hapū and provides an examination of the efforts by Ngāti Awa to reconstruct themselves in the context of successful claims to the Waitangi Tribunal using the records of the very courts that had helped denude them of their lands.

It is now commonplace that iwi and hapū have traditionally contested lands and resources, according to tikanga Māori, over countless generations, like many indigenous communities worldwide.¹²² This is especially the case where an overlapping area might give rise to a dispute over custodianship and use rights. That process of contesting continues to this day often because of, inter alia, resource management frameworks and Treaty settlement negotiations.¹²³ Boundary issues

¹²¹ ET Durie “Custom Law: Address to the New Zealand Society for Legal & Social Philosophy” (1994) 24 VUWLR 326; “Justice, Biculturalism and the Politics of Law” in M Wilson and A Yeatman (eds) *Justice & Identity: Antipodean Practices* (Bridget Williams Books, Wellington, 1995) at 36; “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 Otago Law Review at 449, 460–461; Williams, *Te Kooti Tango Whenua* above n 16; Richard Boast, Andrew Erueti and others *Maori Land Law* (2nd ed, Butterworths, Wellington, 2004); Boast, *Buying the Land* above n 16, at 1-19 and 104-117; Richard Boast *The Native Land Court A Historical Study. Cases and Commentary 1862-1887* Vol 1 (Thomson Reuters, Wellington, 2013); T Bennion, D Brown, and others *New Zealand Land Law*, (2nd ed Brookers, Wellington, 2009); Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, New York, 2004); Paul McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011); Mark Hickford *Lords of the Land Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, 2011); Joe Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato Law Review 1. See also Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

¹²² See Tidwell, A and Zellen, B (eds) *Land, Indigenous Peoples and Conflict* (Taylor & Francis Ltd, London, 2015); Tindall, D Trospen, R and Perreault, P (eds) *Aboriginal Peoples and Forest Lands in Canada* (UBC Press, Vancouver, 2013); Larissa Behrendt, Loretta Kelly *Resolving Indigenous Disputes – Land conflict and beyond* (The Federation Press, Sydney, 2008).

¹²³ See for example, Waitangi Tribunal *The Ngati Maniapoto/Ngati Tama Settlement Cross Claims* (Wai 788, 2001); Waitangi Tribunal *The Ngati Awa Cross Claims Report* (Wai 958, 2002);

over customary and commercial fisheries also give rise to competing claims of traditional authority over such resources or mana whenua.¹²⁴ Even the ability to provide social services and gain iwi accreditation with government agencies overlaps into the exercise of mana whenua.¹²⁵

In the end, the intentions have remained unchanged: the protection of the lands and resources that tribes consider their core, secondary or peripheral areas of influence. The practice now is for tribes to extend their claims into areas that expand beyond what traditional sources might regard as sustainable. This technique is adopted with the understanding that the wider the claim area at the outset, the more likely that core interests will be recognised. Put another way, tribes will sometimes assert claims into the traditional territories of their neighbours, often unsupported by independent or documentary evidence, in the hope that the body making decisions on settlement assets, or other forms of resource and influence, will reduce the claim area to something that is ultimately more palatable.

Overview: The competing claims of Ngāti Rangitihi and Tūwharetoa ki Kawerau

Two examples relevant to the Hapū are the claims made by Ngāti Rangitihi and, as foreshadowed, a group calling themselves Tūwharetoa ki Kawerau (TKK).¹²⁶ Two further examples of cross or competing claims are the claims of Tūhoe and Te Whakatōhea.¹²⁷ However, there is an important distinction. Te Whakatōhea and Tūhoe have a long history of both cooperation and conflict with Ngāti Awa, alliances and marriages notwithstanding. Ngāti Awa does not deny that their Mataatua kin have claims and many areas of overlapping interests with their own including for example, the Ohiwa Harbour. It is simply a question of where to recognise each other's rohe at any given time and for any given purpose.

The claims of Ngāti Rangitihi and TKK, however, are quite different. Ngāti Awa, and especially the Hapū, who are directly affected by the mana whenua claims of

Waitangi Tribunal *The Ngati Tuwharetoa ki Kawerau Cross Claims Report* (Wai 996, 2003); and Waitangi Tribunal *The Tamaki Makaurau Settlement Process Report* (Wai 1362, 2007).

¹²⁴ *Tau - Ngai Tahu Trust Board* (1990) 4 South Island Appellate Court MB 673 (4 APTW 673).

¹²⁵ Oranga Tamariki Act 1989, ss 396-402.

¹²⁶ Since renamed as Ngāti Tūwharetoa – (Bay of Plenty) but called Tūwharetoa ki Kawerau or TKK here. See the Ngāti Tūwharetoa – (Bay of Plenty) Claims Settlement Act 2005.

¹²⁷ See Waitangi Tribunal *The Ngati Awa Raupatu Report* above n 80 at 66 and Waitangi Tribunal *Te Urewera* (Wai 894, 2009) vol 1 at 7,19, 26-27, 36-41 and 46.

TKK, do not recognise any other tribes using the name Tūwharetoa other than the iwi that identifies itself in customary terms:

Tongariro te maunga	Tongariro is the mountain
Taupō nui a tia te moana	Lake Taupo is the sea
Ngāti Tūwharetoa te iwi	Ngāti Tūwharetoa is the tribe
Te Heuheu te tangata	Te Heuheu is the man

The position of Ngāti Awa is that the group receiving land grants from the Crown in the post confiscation environment of the late 1860s in the Kawerau area called Matatā Lot 31 and Lot 39 were never a tribe but were simply a group who took advantage of the circumstances that presented themselves to receive land at the expense of Ngāti Awa.¹²⁸ The evidence confirms that most of this group were in fact Ngāti Rangitihi and Ngāti Pikiāo by whakapapa, amongst others, while being able to connect by whakapapa to the ancestor Tūwharetoa. The evidence confirms that they were not the *tūturu* (legitimate) members of the iwi Ngāti Tūwharetoa who acknowledge Tongariro as their maunga.¹²⁹ A further consideration are the marriages between tribal members that have resulted in a considerable proportion of Ngāti Rangitihi and TKK also holding dual whakapapa with Ngāti Awa.¹³⁰ This is unsurprising given the history of interaction, due to the proximity of each tribe.

It is also important to acknowledge that Te Tāwera hapū includes individuals and their whānau who prefer to support TKK rather than Ngāti Awa. This division is also reflected in the settlement agreements of both Ngāti Awa and TKK and in the fact that there are two marae located near Matatā, Umutahi and Iramoko, who affiliate to

¹²⁸ Curiously, some of the Crown census data of the period is also confusing. For example, the census of 1874 refers to 76 and 44 persons respectively as members of Te Tāwera and Ngāti Peehi hapū of Ngāti Tūwharetoa living at Umuhika: [1874] I G-07 at 8. Yet five years later, the 1881 census, 88 persons affiliating to Te Tāwera at Umuhika were referred to as being under the tribal affiliations of “Arawa and Ngatiawa” while 35 individuals were described as belonging to “Ngatitūwharetoa” living at Tawhitinui. That same census recorded another group of 25 persons of Te Tāwera living at Matatā and affiliating to Ngāti Awa: [1881] I AJHR G-03 at 20 and 25. See also the evidence and submissions in *Te Rūnanga o Ngāti Awa v Paul - Otara o Muturangi (burial ground)* [2014] Chief Judge's MB 615 (2014 CJ 615) dated 2 December 2014.

¹²⁹ This group, who were awarded 2,396 acres on the west bank of the Tarawera River for military service returned to their residences at Taupō. Ironically, a group of Tūwharetoa from Taupō were reported to have been with Te Hura and the “rebels”. ‘G. Mair to T. H. Smith, 20 October 1865’ in Waitangi Tribunal *Raupatu Document Bank* above n 66 at 4055-6.

¹³⁰ The most obvious example being Arama Karaka. His father Te Kuru o te Marama, was Ngāti Rangitihi chief, while his mother Te Iwikaikai was Te Rangihouhiri II hapū of Ngāti Awa. It is said that Arama’s wife was also a daughter of the chief of Te Rangihouhiri II, Te Rangitākina, which seems unusual if Arama’s mother was the sister of Te Rangitākina. These links therefore have a practical impact on the loyalties of those holding dual affiliations.

TKK and Ngāti Awa respectively.¹³¹ Moreover, while Ngāti Rangitihi may have acquired, by occupation following a Crown grant for military service, rights associated with customary interests, those rights are not exclusive, given the historical and current mana whenua asserted by Ngāti Awa. Regarding Ngāti Rangitihi, Ngāti Awa acknowledges that over the last one hundred and twenty years by occupation, regardless of how it was acquired, Ngāti Rangitihi have secured some form of customary rights for themselves at Matatā. Ngāti Awa also says, however, that those rights are shared.¹³² The difficulty has been that, over time, Ngāti Rangitihi has been reluctant to recognise the interests of Ngāti Awa, despite the facts and the abundance of evidence contrary to their position.

What follows is the evidence and the arguments that confirm the primacy of the hapū of Ngāti Awa, from the perspective of those tribes, to mana whenua at Te Awa a te Atua (Matatā), at Te Ahiinanga (Onepu) and Pokerekere, inland to Putāuaki (Kawerau) and Te Pokohū and on to Ōtamarākau on the coast. This evidence is based on the testimony given by tribal chiefs and elders before the Compensation and Native Land Courts who were the traditional holders of such customary knowledge. Despite this evidence, the interests of the Hapū were ignored in favour of the Crown's loyalist allies who had been promised such spoils, as the reports of officials such as Wilson confirmed.¹³³

The Compensation Court

The Arawa, as may be supposed, are very whakahihi [arrogant] just now – and are going to swallow all the other tribes to the East in a twinkling – & of course *take their land* (emphasis in original).¹³⁴

In summary, the Compensation Court was created under s 8 of the New Zealand Settlements Act 1863. Under ss4-7 of that legislation the Governor was empowered to confiscate the land of tribes deemed to have been “in rebellion” against the Crown. Under ss 5-7, persons claiming to be affected by the confiscation of land

¹³¹ Ngāti Awa Claims Settlement Act 2005 and Ngāti Tūwharetoa (Bay of Plenty) Claims Settlement Act 2005.

¹³² See *Te Rūnanga o Ngāti Awa v Paul* above n 128 at 615.

¹³³ J. A. Wilson “Report on Settlement of Confiscated Lands” [1872] I AJHR C-04A at 4.

¹³⁴ “Letters to T. H. Smith 1844-1892, T. H. Smith to McLean, 28 May 1864” (Alexander Turnbull Library) MS 0535 091, ATL doc 15(b), at 257.

could apply to the Compensation Court for, in effect, the return of any lands said to have been wrongfully taken. In other words, it heard the claims of individuals who asserted that their land had been improperly taken when they had not been in rebellion.

Matatā Lot 63

On 10 December 1867, claims to the Waitahanui lands, situated between present day Matatā and Ōtamarākau, were held at Te Awa a te Atua (Matatā) before Judge William Mair, one of the commanders of the Crown forces against Ngāti Awa. The chief of Te Rangihouhiri II, Te Metera Te Ti, was attempting to defend the Hapū interests in the Ōtamarākau and Matatā regions against Te Arawa. He described the interests of Ngāti Awa:¹³⁵

I am a Te Rangihouhiri. I am the younger brother of Te Hura. I know Ngāti Pikiaio but I do not know that they have any rights to the land claimed. When the late war commenced we were in possession of all that land. We had lived there for many generations. I am a Ngāti Awa.

All the land from Te Awa a te Atua to Otamarakau and on to Maketu belonged to Ngāti Awa by conquest. The defeated tribe were Waitaha. Ngāti Irawharo were of Ngāti Awa. They fought against Te Arawa and lived at Otamarakau for which they were later driven by Nga Puhī. We brought them back from Tauranga and placed them at Otamarakau...All this land had been in the possession of Ngāti Awa for 11 generations.

Ngāti Awa support for Te Rangihouhiri II and Hikakino

Te Metera was supported by Te Rangitūkehu and Hori Kawakura, chiefs of Ngāti Awa.¹³⁶ There were numerous other witnesses in support of Te Metera's defence including members of Ngāti Whakaue, Ngāti Rangitihi and Pākehā traders.¹³⁷ One of these was Arama Karaka of Ngāti Awa and Ngāti Rangitihi who said that “the land from Te Awa a Te Atua to Ōtamarākau belongs to Hikakino and Rangihouhiri.”¹³⁸ Patene Te Whakamatai, of Ngāti Awa, also confirmed that the

¹³⁵ Compensation Court ‘Te Awa a Te Atua’, 3-19 December 1867 Waitangi Tribunal *Raupatu Document Bank* above n 66 at 46795-6; Te Roopu Whakaemi Korero o Ngati Awa *An investigation into the alienation of Lot 63* above n 59 at 21-22.

¹³⁶ Te Roopu Whakaemi Korero o Ngati Awa *An investigation into the alienation of Lot 63* above n 59 at 25-26.

¹³⁷ Compensation Court, Te Awa a Te Atua, above n 135 at 46804-7. See Te Roopu Whakaemi Korero o Ngati Awa *An investigation into the alienation of Lot 63* above n 59 at 26-27.

¹³⁸ Compensation Court, Te Awa a Te Atua above n 135 at 46513 and 46554.

northern boundary of Ngāti Awa commenced at Waitahanui and that Ngāti Pīkiao had no right to the land on the eastern side of that boundary.¹³⁹

Te Arawa support for Ngāti Awa

Another witness supportive of the Ngāti Awa position concerning these lands was Hoani Te Hauiti of Ngāti Pīkiao.¹⁴⁰ Likewise, the Ngāti Whakaue chief of Rotorua and Maketu, Petera Pukuatua, made the position perfectly plain:¹⁴¹

I know something about Te Awa a te Atua and Otamarakau. Between the land belongs to Ngati Awa. They owned the land through them being in war. Hikakino, Rangihouhiri and Te Tarawera [sic] are the hapu's of Ngati Awa that I know in connection with these lands. I know Ngati Pīkiao and they have nothing to do with the land of Ngati Awa...I remember when we wanted to get ship timbers for Thomas Black. The arrangement was made with Te Rangipaia and Turiri.

So even non-Ngāti Awa witnesses acknowledged that, first, Hikakino and Te Rangihouhiri II were hapū of Ngāti Awa who had important customary rights between Matatā and Ōtamarākau. Second, that these same witnesses were aware that land would be awarded to the loyalist tribes for military service and taken from “the murderers”. In addition, in the context of overlapping claims and interests, there is no mention of TKK having a right over the Hapū or in fact any claim at all, until Lot 31 and Lot 39 are considered. However, despite this evidence from both Ngāti Awa and Te Arawa witnesses, the Court awarded the bulk of these lands to Te Arawa, especially Ngāti Pīkiao, and others, while the Hapū were excluded, along with any recognition of a Ngāti Awa interest.¹⁴² Given the absence of any reasons provided in the “judgment” it seems probable that the award of the land to Te Arawa tribes was confirmation of the earlier arrangements struck with Crown officials that the rebels needed to be punished and that the inland tribes should be rewarded with their land, which would also assist them gain a foothold on the coast. In this way, the

¹³⁹ Te Roopu Whakaemi Korero o Ngati Awa *An investigation into the alienation of Lot 63* above n 59 at 24-25.

¹⁴⁰ At 19-20.

¹⁴¹ Waitangi Tribunal *Raupatu Document Bank* above n 66 at 46808-9; Te Roopu Whakaemi Korero o Ngati Awa *An investigation into the alienation of Lot 63* above n 59 at 27. He would go on to say: “The Arawa have fought against the enemies of the Queen, first at Te Kaokaoroa, then after the murder of Fulloon we captured the murderers after which the Governor said that the Arawa were to have the land of the murderers, if Ngati Pīkiao prove this claim to a larger piece there will still be a great deal left to divide among the other hapus of the Arawa.”

¹⁴² At 46851; Te Roopu Whakaemi Korero o Ngati Awa *An investigation into the alienation of Lot 63* above n 59 at 30.

Compensation Court process was used as a device to confirm out of Court arrangements and the result was the extinguishment of the customary rights and interests of the Hapū in their traditional lands.

Matatā 31 and 39 and the cross claims of Tūwharetoa ki Kawerau

The Matatā 31 and 39 blocks are significant from a TKK perspective. The main claimant to Matatā 31 during the Compensation Court hearings during 1867 was Tangirau Te Rākau who was included in the owners for Lot 63 as a Ngāti Pīkiao. However, at the time, Tangirau's exact position appears to be a mystery to the Crown Agent J. A. Wilson as he notes, in a memo to another Crown official, Dr Daniel Pollen.¹⁴³ No evidence is given at the hearings into Lots 31 and 39 of ancestral occupation or connection with Ngāti Tūwharetoa. This was not an investigation of title. These blocks were awarded because of an arrangement with Wilson – he said so himself:¹⁴⁴

The lands in the Lower Rangitaiki have all been surveyed for the Ngatirangihouhiri (Te Hura's tribe), Ngatihikakino and Patutatahi Tribes. None of them had been surveyed before, and the Natives did not seem to think they belonged to them, and instead of occupying them lived elsewhere among friendly Natives and among other tribes. Certainly, the lands are liable to an occasional flood, but that the Government cannot help; nor is it any gainer, **the whole of the drylands of these tribes having been given to the hapus of the Arawa, in reward for military service rendered in 1865.** They have, however, the islands of Omarupotiki and the Matata not subject to inundation, and these they prize very much.

My recent census schedules show that these Awa-o-te-Atua tribes are much dispersed to Tauranga, Hauraki, and other places; but Te Metera Te Ti, Te Hura's brother, is endeavouring to reassemble them.
(Emphasis added)

¹⁴³ Pollen served as Commissioner of Crown Lands, Deputy Superintendent of Auckland and as a member of the Legislative Council during this period. Waitangi Tribunal *Raupatu Document Bank* above n 66 at 47270: “Tangirau ... is the principal man of a small party of natives ... They are not a hapū, but form connecting links between several tribes; and the individuals of the party sometimes call themselves by the name of one tribe, and sometimes by the name [of] another. Tangirau stated his case and the extremely indefinite nature of the claims before the Court enabled him to claim for “certain persons” at Tarawera” all the land he liked for all the people he thought proper to name. I might remark that the extraordinary latitude with which the claims were worded gave Tangirau a very great advantage ...”

¹⁴⁴ J. A. Wilson, Report on Settlement of Confiscated Lands above n 133, at 6. See also [1867] I AJHR A-18 where Wilson states that the 87,000 acres west of the Tarawera River had been given to Te Arawa in return for military service.

Hōhepa Rokoroko was another claimant before the Compensation Court for Lot 39. He based his claim on the occupation of his cousin, Ngāti Rangitihi chief Arama Karaka. Karaka interestingly gives evidence for the defence and stated that “Rokoroko's ancestors were not permanent residents ... Te Hura had the mana of all the land claimed”.¹⁴⁵

Before the Compensation Court, Rokoroko described himself as a Ngāti Tūwharetoa and a Ngāti Rangitihi and as a person of little importance". In any event, the real emergence of a separate and distinct group claiming lands solely under Tūwharetoa begins with the 1922 Native Land Court hearings into Matatā Lot 39 to consider whether the land was originally granted in trust.¹⁴⁶ During the intervening forty-seven years it had become evident that to claim land within the confiscation boundary as Ngāti Awa, particularly in the Western area, was likely to be futile. Realignments of hapū and iwi became a necessity if land retention remained the aim. Interestingly, throughout the 1922 hearing and appeal, Ngāi Te Rangihouhiri II and Ngāti Hikakino are not claimed as hapū of Tūwharetoa. That claim would only occur in 1994-1995 during the hearings before the Waitangi Tribunal.

The Hapū dispute that there is any Ngāti Tūwharetoa group that had interests at Matatā prior to the raupatu of 1866 independent of the interests of Ngāti Awa. The suggestion that Hikakino and Te Rangihouhiri II were under the authority of Ngāti Tūwharetoa is also contrary to the evidence. This is significant because these two hapū were pivotal to claims to the coastal area. While some members of Ngāti Awa descend from Tūwharetoa, this does not automatically make them Ngāti Tūwharetoa. Descent must also be followed by traditional rights in land, amongst other things. There is no reference to Ngāti Tūwharetoa in relation to Matatā or further inland, beyond a brief mention by Grace.¹⁴⁷ There is an absence of evidence regarding any

¹⁴⁵ Waitangi Tribunal *Raupatu Document Bank* above n 66 at 46870-1.

¹⁴⁶ Te Roopu Whakaemi Korero o Ngati Awa *An investigation into the alienation of Lot 63* above n 59; See also Brief of evidence of Jeremy Gardiner concerning grantees of Lots 31 and 39 Parish of Matata 10 November 1995 (Wai 416-K12).

¹⁴⁷ In 1863, Grace says he encountered a group of Ngāti Tūwharetoa on his way to Matatā. He also referred to reports on 11 March 1865 confirming that “the Ngati Awa’s of Whakatane and Matata” were expected shortly and to set him free to travel out of the district. Grace records that it was Te Pitoiwi (of Ngāti Awa) who ensured that he and his party were protected: S J Brittan, GF, CW and AV Grace (eds) *A Pioneer Missionary among the Maoris 1850-1879 – Being Letters and Journals of Thomas Samuel Grace* (G H Bennett, Palmerston North, 1928) at 110.

entity under the name Ngāti Tūwharetoa operating in the nineteenth century operating as a functioning tribe in the Ngāti Awa rohe. There is no evidence of any Tūwharetoa involvement in the raupatu events other than as a part of a contingent from Taupō that comprised part of the Crown's invasion force. Mair made it clear that these people came from Taupō, not the Bay of Plenty. This group of Tūwharetoa people benefited from their participation in the invasion through the award of Matatā 7 and 23. Lot 23 was subsequently sold to the Crown. Lot 7 was later gifted to people in the Bay of Plenty area and is now the site of the Oniao marae.¹⁴⁸

Research into the historical claims of the Hapū confirms that the Danish trader Hans Tapsell acquired land from Te Patutātahi at Te Putere on the coast near Matatā in December 1839 through the authority of the Ngāti Awa rangatira, Apanui Te Hāmaiwaho. This was despite subsequent protestations from Arama Karaka that Apanui had no right to sell any land belonging to Hikakino or Te Rangihouhiri II.¹⁴⁹ The following month George White, a trader at Matatā, acquired lands there for a trading post from the Ngāti Awa rangatira, Te Rangitākina, although subsequently, T. H. Smith would tell the Compensation Court that Te Rangitākina would prevent the survey of the land.¹⁵⁰ The Deed for the transaction records Otamarōroa, Oheu, Omarupōtiki and Otaramuturangi among other place names. There were no complaints from any other iwi at that time. Then in 1855, the Missionary Thomas Grace acquired an interest in land or property at Matatā which, it was claimed, he had arranged with Te Rangi-i-pāia of Ngāti Hikakino, another rangatira of Ngāti Awa.¹⁵¹

Ngāti Rangitihī

The Hapū argue that there is little if any evidence of a substantial and permanent Ngāti Rangitihī occupation at Matatā before 1866. Moreover, claims of *continuous* occupation of Matatā are unsustainable. For instance, there is little evidence or even

¹⁴⁸ Matata Parish, Lot 7A, 63 Rotorua MB 362 (63 R 362) dated 27 March 1917. In 1899 when Apirana Ngata travelled into the Ngāti Awa rohe he prepared a table of hapū, marae and ancestral meeting houses where he included Oniao within the Ngāti Awa list of marae: Te Puke ki Hikurangi (New Zealand, 15 August 1899).

¹⁴⁹ Te Roopu Whakaemi Korero o Ngati Awa *Te Putere Maori Reserve* above n 82 at 11, 14.

¹⁵⁰ Waitangi Tribunal *Raupatu Document Bank* above n 66, at 46861.

¹⁵¹ Waitangi Tribunal *Raupatu Document Bank* above n 66.

oral traditions of Ngāti Rangitihī pā, kāinga or other sites at Matatā prior to 1860 in any meaningful and substantive way. The areas that have been referred to in the Ngāti Rangitihī evidence are in fact well known Ngāti Awa sites. The witnesses could not refer to any rangatira that were associated with any of the pā in Matatā at any time until after the raupatu. Following the confiscation, Ngāti Rangitihī did not make any claims to lands on the coast between Te Awa a Te Atua and Ōtamarākau. Arama Karaka, one of the key Ngāti Rangitihī rangatira, supported the Ngāti Awa claims to these lands during the 1867 hearings, in no small part because of his dual affiliation to the Hapū.¹⁵²

Ngāti Awa traditions confirm that the Hapū and their ancestors before them were already established at Matatā, both through association with Te Tini o Toi and directly through the Mataatua waka.¹⁵³ Furthermore, according to the respected local historian Don Stafford, Te Arawa waka and its passengers did not remain at Matatā but went on to Maketu and eventually inland to the Lakes district.¹⁵⁴ It also does not follow that because Te Arawa waka landed there, Ngāti Rangitihī have occupied Matatā since 1350. The Otaramuturangi urupā for example was associated with the Ngāti Awa pā, Omarupōtiki, Otamarōroa, Te Kōhika and Matapihi at present day Matatā. The lands around that urupā were awarded to Ngāti Awa in 1874 following the arrangements of Crown agent J. A. Wilson. Indeed, the closest pā site to the urupā is Omarupōtiki, still in the ownership of Te Rangihouhiri II hapū to this day. The evidence simply does not support the claim that Ngāti Rangitihī have occupied the pā Whakapaukōrero at Matatā continuously since 1350. First, Te Rangihouhiri I and the other Ngāti Awa hapū on Te Heke o Te Rangihouhiri occupied that pā without resistance. Secondly, the Putāuaki block was awarded to Ngāti Awa and

¹⁵² Compensation Court, Whakatāne 9 September – 1 October 1867 in Waitangi Tribunal, *Raupatu Document Bank* above n 66, at 46513; 46554. It is said that his wife was also a daughter of the Te Rangihouhiri II chief Te Rangitākina.

¹⁵³ Ngāti Awa Claims Settlement Act 2005, Preamble. During the Compensation Court hearings in 1867, Retireti Tapsell, the Ngāti Whakaue leader, confirmed that when his father Hans Tapsell bought land near Matatā in 1839 from Apanui: “Ngati Rangihouhiri were living at the Matata at the time, it was their pa. Rangitakina was their great chief. Do not know the boundaries of their land. Ngati Rangihouhiri and Hikakino were cultivating at Rangatai and Waitepuru at that time.” Waitangi Tribunal *Raupatu Document Bank* above n 66, at 46507-10.

¹⁵⁴ Don Stafford *Te Arawa – A History of the Arawa People* (Reed Books, Auckland, 1967).

Ngā Maihi by the Native Land Court in 1881, despite the competing claims of Ngāti Rangitihi.¹⁵⁵

There is, however, evidence of Ngāti Rangitihi interests around Lake Tarawera and further inland at Kaingaroa.¹⁵⁶ This supports the view that Ngāti Rangitihi, after leaving Maketu, resided primarily inland, and only ventured out to the coast from time to time without year-round permanent settlements. The traditions of the Hapū, supported by testimony in the Native Land Court, record that Ngāti Awa interacted with Ngāti Rangitihi inland around Tarawera and in the upper reaches of the Tarawera river. Stafford provides a map of the important sites of Te Arawa which tellingly does not include any at Matatā.¹⁵⁷ It is only following the eruption of Tarawera in 1886 that Ngāti Rangitihi moved more permanently to Matatā in significant numbers and established a presence on the land awarded to them by the Crown in 1867.¹⁵⁸

Ngāti Awa have argued that the Te Arawa position at Matatā today is not because of customary interests but because of the military award of those lands to them for services rendered to the Crown against Ngāti Awa. These awards were not a regrant of lands to Te Arawa. Ngāti Awa have also contended that because in defining the confiscation boundary, the Government would have relied on the views of the officials closest to the conflict: Smith, Clarke and William Mair (the sometime Resident Magistrate in charge of the Te Arawa force sent to capture Te Hura as set out in Chapter Two).

That these officials, who had spent significant time in the area, would have included Te Arawa land in the confiscations seems unlikely. Correspondence from officials is clear that the lands from the western boundary of the confiscation line to Matatā were to be handed over to Te Arawa in payment for their services during the arrest of those named in the warrant setting out the charges in relation to the death of James

¹⁵⁵ 1 Whakatāne MB 270 (1 WHK 270). The Court stated that: "it appears that the claim made by Ngāti Rangitihi is purely fictitious" at 273.

¹⁵⁶ Waitangi Tribunal *He Maunga Rongo - Report on Central North Island Claims Stage One* (Wai 1200, 2008) vol 1 at 54-57, Waitangi Tribunal *Te Urewera* above n 127 vol 1 at 59.

¹⁵⁷ Don Stafford *Landmarks of Te Arawa: Rotorua Vol 1* (Reed Books, Auckland, 1994).

¹⁵⁸ Waitangi Tribunal *The Ngati Awa Raupatu Report* above n 80 at 105. In a footnote the Tribunal records: In 1886, at the time of the Tarawera eruptions, there were around 500 living at Umuhika, near the flour mill.

Fulloon.¹⁵⁹ The grants were the result of complaints about payment. There were no complaints from Te Arawa about the confiscation of what they considered was their land. Smith, in a report to the Native Secretary, on 12 March 1866 outlines awarding the confiscated lands of Ngāti Awa to Te Arawa:¹⁶⁰

[As to] the question of remuneration, I would suggest ... setting apart portions of the recently confiscated territory for the Arawa. I believe that many of the inland tribes would gladly come to the coast if they could obtain land there ... The Taupo and Tarawera people especially are anxious to obtain a location on the coast.

Smith's intention for re-establishing these tribes on the coast was to secure the advantage of having 'friendly' settlements located on Ngāti Awa land between Maketu and Ōpōtiki "...preventing any reoccupation by an enemy." As foreshadowed, Wilson also confirmed the nature of the grants and in respect of the Ngāti Awa hapū, Te Rangihouhiri II, Hikakino and Te Patutātahi, confirmed that "...the whole of the dry lands of these tribes have been given to the hapus of the Arawa for military service rendered in 1865."¹⁶¹ The Waitangi Tribunal said effectively the same thing.¹⁶²

In summary, the Hapū had suffered serious losses during the battle of Te Kaokaoroa in 1864; they had endured further losses in 1865 following the issue of the warrant to arrest those responsible for the death of Fulloon; they then suffered the execution and imprisonment of their leadership in 1866 as set out in Chapter Two; they had all their lands confiscated and then they failed at every significant hearing of the Compensation Court in 1867 to recover their customary lands. By the time the Native Land Court sat in 1878 for title determinations into lands where they had legitimate claims, including Waitahanui, Tahunaroa and Te Haehaenga, they had become so demoralised, facing disintegration, that they could not even mount a claim. Indeed, as a corporate entity, Hikakino and Te Rangihouhiri II effectively ceased to exist, apart from the attempts by Te Hura's brother, Te Metera, to regroup during the 1870s and 1880s. As mentioned, the result was the near total loss of their

¹⁵⁹ J. A. Wilson, 'Report on Settlement of Confiscated Lands' above n 133 at 6.

¹⁶⁰ "Letters to T. H. Smith 1844-1892, T. H. Smith to Native Minister, 1 March 1866" (Alexander Turnbull Library) Lel11866/100.

¹⁶¹ "J. A. Wilson to Native Minister, 29 March 1872" in Waitangi Tribunal *Raupatu Document Bank* above n 66 at 49991.

¹⁶² Waitangi Tribunal *The Ngāti Awa Raupatu Report* above n 80 at 80.

customary lands at the hands of the Crown through confiscation in favour of their traditional foes.

Crown grants

Rangitāiki 28, 31 and Matatā 100,101 and 102

Following their gradual release from incarceration, several grants of land were made to the Hapū by arrangement with Wilson and Sir Donald McLean.¹⁶³ The only other land block of any significance awarded to members of the Hapū was Rangitāiki 31 which was originally 8,040 acres. However, this block is not solely owned by the Hapū. As mentioned, the only other lands granted were Omarupōtiki and Te Matatā (Matatā 100, 101 and 102 respectively) in 1905 comprising fifty acres.

Waimana 266

Within the confiscation boundaries most of the land returned to the Hapū was contained in the Rangitāiki 28 and 31. McLean had promised one hundred acres in Whakatāne near Kopeopeo but along with Brabant, the Resident Magistrate, refused to honour that undertaking. Some fifty-eight acres, called Waimana 266, was granted with part acquired by the local council for public works. In 1964, a trust was established, it was said, to facilitate its sale for the payment of rates. The land was eventually sold by the trustees, a local lawyer, accountant and two owners' representatives. Only a fraction of this block remains in Māori hands today.¹⁶⁴

The Native Land Court

The Native Land Court was established in 1862 but did not properly commence its role until 1865. Its purpose was to investigate title to Māori customary lands and, eventually, convert them into individualised titles, following the passing of the Native Land Act 1873. The impact of the Court, and its allied institutions, the Compensation Court and the Validation Court, was profound as it affected far more Māori land than confiscation. Ironically, despite its damaging and deleterious impacts, the Native Land Court still stands today as one of the most important

¹⁶³ “Brabant to Native Minister, 21 December 1882” in Waitangi Tribunal *Raupatu Document Bank* above n 66 vol 79 at 30540-43. Rangitāiki 28 (2,570) acres was vested in Apanui Te Hāmaiwaho, Wēpiha Apanui, Hāwera Te Hihira and others for Ngāti Awa, Whakatāne Section.

¹⁶⁴ Waimana 266A 3C3 is 1.12 hectares with 64 owners created by partition order on 26 November 1963: 37 Whakatāne MB 313 (37 WHK 313).

sources of information on Māori custom. Three major land blocks where Ngāti Awa had significant interests, were heard before the Native Land Court at Whakatāne in 1881 – Matahina, Putauaki and Te Pokohū, located south of the 1866 confiscation line. At the time of hearing, they covered a vast area exceeding 140,000 acres. In 1879, several chiefs had engaged in pre-hearing negotiations to sell some of these lands, which caused major conflict within the iwi and eventually an attempted but unsuccessful reversal of the sale and refund of the purchase monies.¹⁶⁵

Matahina

The Matahina lands located south of Putauaki mountain near Kawerau were originally estimated at 85,834 acres.¹⁶⁶ The principal Ngāti Awa witnesses were Hāmiora Pio, Te Rangitūkehu Hātua and Penetito Hawea. The Court awarded the block almost entirely to Ngāti Awa.¹⁶⁷ A subsequent rehearing did not alter the substance of the original decision although small areas were awarded to Ngāti Rangitūkehu and Ngāti Hāmua and the overall acreage of the block was reduced.¹⁶⁸ Then, in 1894, hearings were held to partition the block which would continue into the early twentieth century. Oke Pukeroa was the principal witness for the Hapū and told that Court that they had cultivations at Matahina, that they hunted in the forest there and used its timber for building war canoes including one called *Umutaorua*.¹⁶⁹ Members of the Hapū were subsequently included in the list of owners. By the 1930s most of the land had been sold and today barely 100 hectares remains of this once vast block of Māori land.¹⁷⁰

Putāuaki

The investigation of the 7,800-acre Putāuaki block was heard in September 1881. Penetito Hawea led the claim based on ancestry, conquest, burial rights and

¹⁶⁵ Tony Walzl “Ngati Awa Lands 1870-1970” Wai 46, M18 (September 1996) at 19-29; Boast *The Native Land Court* above n 121 at 906.

¹⁶⁶ Boast *The Native Land Court* above n 121 at 905-910.

¹⁶⁷ 1 Whakatāne MB at 267 (1 WHK 267).

¹⁶⁸ 2 Whakatāne MB 197 (2 WHK 197).

¹⁶⁹ 3 Whakatāne MB 121 (3 WHK 121) dated 21 May 1894.

¹⁷⁰ Walzl, ‘Ngati Awa Lands’ above n 165, at 52-58. The prophetic leader and founder of the Ringatū faith Te Kooti Arikirangi wrote a waiata (song) that mentioned Matahina as did Te Araroa with Te tangi mo Matahina – the Lament for Matahina.

occupation.¹⁷¹ He asserted rights through Pou and Aotahi, sons of Tūwharetoa, but not *as* a Tūwharetoa. Makarini Te Waru (Urewera), Niheta Kaipara (Rangitihī), Rawiri (for his wife) and Hakopa Takapou (Aotahi) cross claimed. The judgment dismissed the claims of the first three, noting, in the case of Te Urewera, that “it is distinctly proved by other evidence that the block lying to the north of the boundary line which is in dispute between Ngāti Awa and Ngāti Rangitihī was obtained by Ngāti Awa by conquest and has ever since remained in possession of that tribe.”¹⁷²

Te Pokohū

Ngāti Rangitihī laid claim to this 60,600-acre block on 29 September 1881 with Ngāti Awa, Ngā Maihi and Ngāti Pou objecting.¹⁷³ Most the block was awarded to Ngāti Pou, Ngāti Pūkeko and Ngāti Awa when the judgment was issued on 11 October 1881.¹⁷⁴ However, Ngāti Rangitihī secured a rehearing in 1884. Curiously, given his previous evidence and statements that he was Ngāti Awa, Raimona Petera, a leader of Te Tāwera hapū, claimed the whole of Te Pokohū through Tūwharetoa, while Penetito Hawea claimed part of the block on behalf of Ngāti Awa. Ngāti Pou (a hapū of Ngāti Awa) claimed *separately* from the rest of Ngāti Awa, contrary to a previous stance. By the time of the rehearing the block boundaries had reduced to 38,120 acres. The Court eventually awarded half of the block to Ngāti Rangitihī and a quarter each to Ngāti Awa and Ngāti Pou respectively.¹⁷⁵

Summary

The Matahina, Putauaki and Te Pokohū blocks were the subject of largely successful claims by Ngāti Awa except for the rehearing over Te Pokohū. Even so, Ngāti Awa and its hapū, Ngāti Pou, were still awarded close to half of the block. There had been lease and sale negotiations prior to the 1881 hearings. Eventually, sizeable parts of all three blocks were alienated. When the iwi became aware of these

¹⁷¹ 1 Whakatāne MB 165 (1 WHK 165). See also Boast *The Native Land Court* above n 121 at 911-915. As early as 1879 leading Ngāti Awa chiefs were discussing sale: Walzl, ‘Ngāti Awa Lands’ above n 165 at 19-29.

¹⁷² 1 Whakatāne MB 271 (1 WHK 271). Hāmiora Tumutara Pio stated “I belong to the Ngāti Awa tribe and the Ngāti Pou hapū... I claim on behalf of Ngāti Awa, Ngāti Pou and Ngāti Pūkeko (Ngāti Pou and Ngāti Pūkeko are hapū of Ngāti Awa).”

¹⁷³ Boast, *The Native Land Court* above n 121, at 916-920.

¹⁷⁴ 1 Whakatāne MB 276 (1 WHK 276).

¹⁷⁵ 2 Whakatāne MB 216-217 (2 WHK 216-217).

transactions they petitioned the Governor for relief.¹⁷⁶ Even those responsible for the sales would join in the requests for return, but to no avail:¹⁷⁷

This is an appeal of ours to you to return to the Maoris the following three blocks of land, Putauaki, Te Pokohu, Matahina. If you agree to do this we will refund the monies advanced upon them, and the expense of the surveys. Now therefore do you give effect to the appeal of your Maori friends, be kind to the orphan and the indigent. From your loving friends.

While certain individual members were included in the ownership lists of Matahina, Putauaki and Te Pokohū, by the end of the nineteenth century, Hikakino and Te Rangihouhiri II as hapū had been left virtually landless because of the Compensation Court and the Native Land Court. All that remained was the island pā of Te Matatā and Omarupōtiki. In time, even they would become subject to public works takings.¹⁷⁸ Taiwhakaea II fared marginally better receiving 10,000 acres with their Ngāti Awa ki Whakatāne relations. However, individuals within hapū who were included in these grants eventually alienated those lands by sale but were left in the remnant blocks by the Native Land Court.¹⁷⁹

As mentioned above, while the Hapū were included in the Putauaki No.2, Matahina and Te Pokohū lands, by the 1920s most of the Matahina block had been alienated.¹⁸⁰ In time, the last significant areas of tribal lands outside of the Omataroa block became subsumed into the Tarawera forest project in the late 1960s.¹⁸¹ By that process the Hapū interests in these important southern blocks including Te Pokohū D and E were lost.¹⁸²

¹⁷⁶ Nihotahi Manihera and 26 other to the Native Minister (23 October 188) MA/MLPI 811498 found in MA/MLPI at 1893/46.

¹⁷⁷ 16 August 1882, Rangitukehu and others to Bryce, Native Office 8212819 found in MA/MLPI at 1888/50. Hamiora Tumutara, another leading chief, would try again in 1882, 17 August 1882, Hamiora Tumutara and others to Bryce, Native Office 8212812 found in MA/MLPI 1888/50: “This is a renewal of our application made in 1881 for a sitting of the NLC to be held at Whakatane, to enable us to refund to the Government the monies advanced upon the Putauaki, Matahina, and Pokohu blocks. Please reply soon.”

¹⁷⁸ The island pā was cut in half by the state highway that still runs through the block today.

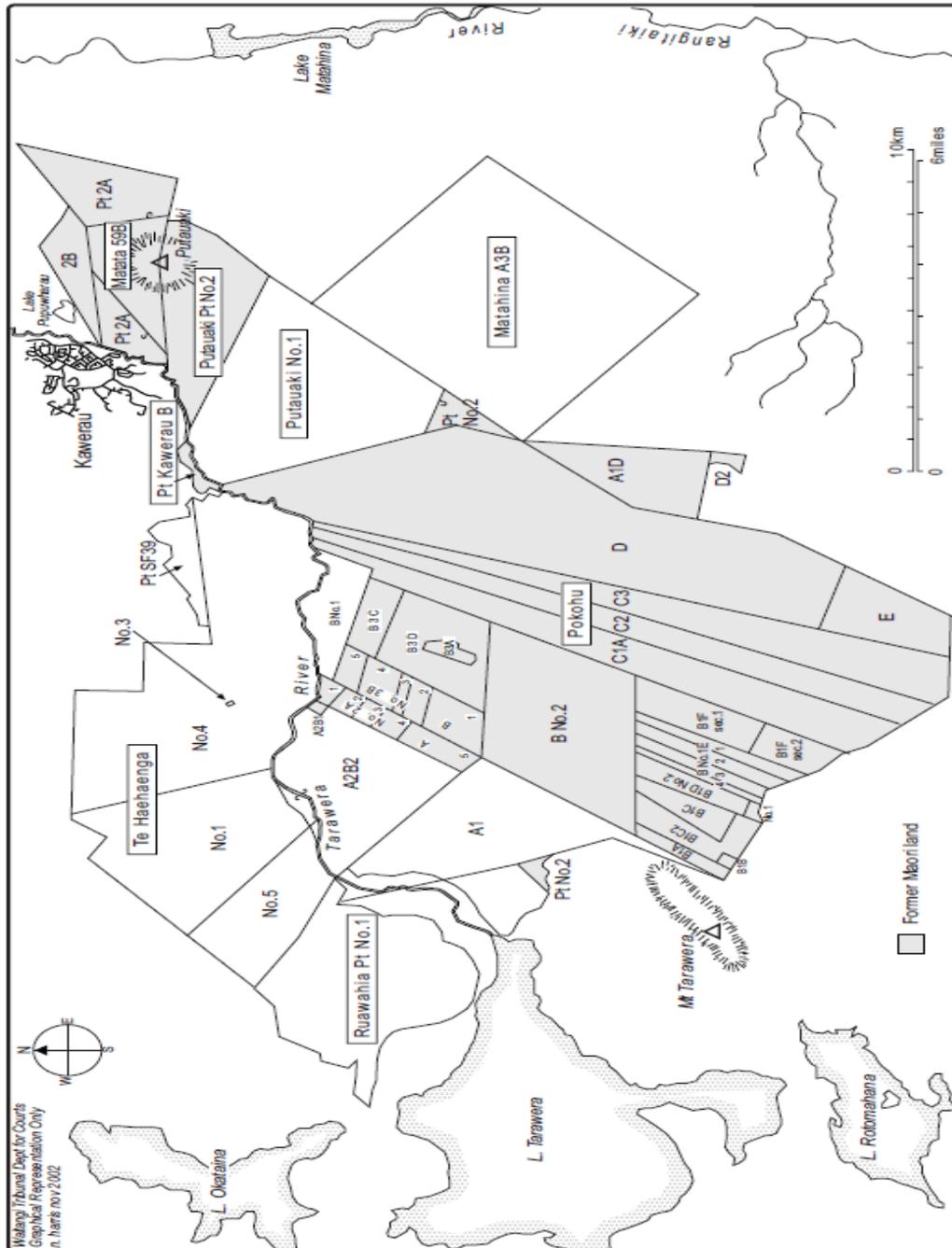
¹⁷⁹ Yet with less than fifty per cent of the original area still in Māori hands, it appears some of that tension remains See Walzl, ‘Ngati Awa Lands’ above n 165, at 76, 86.

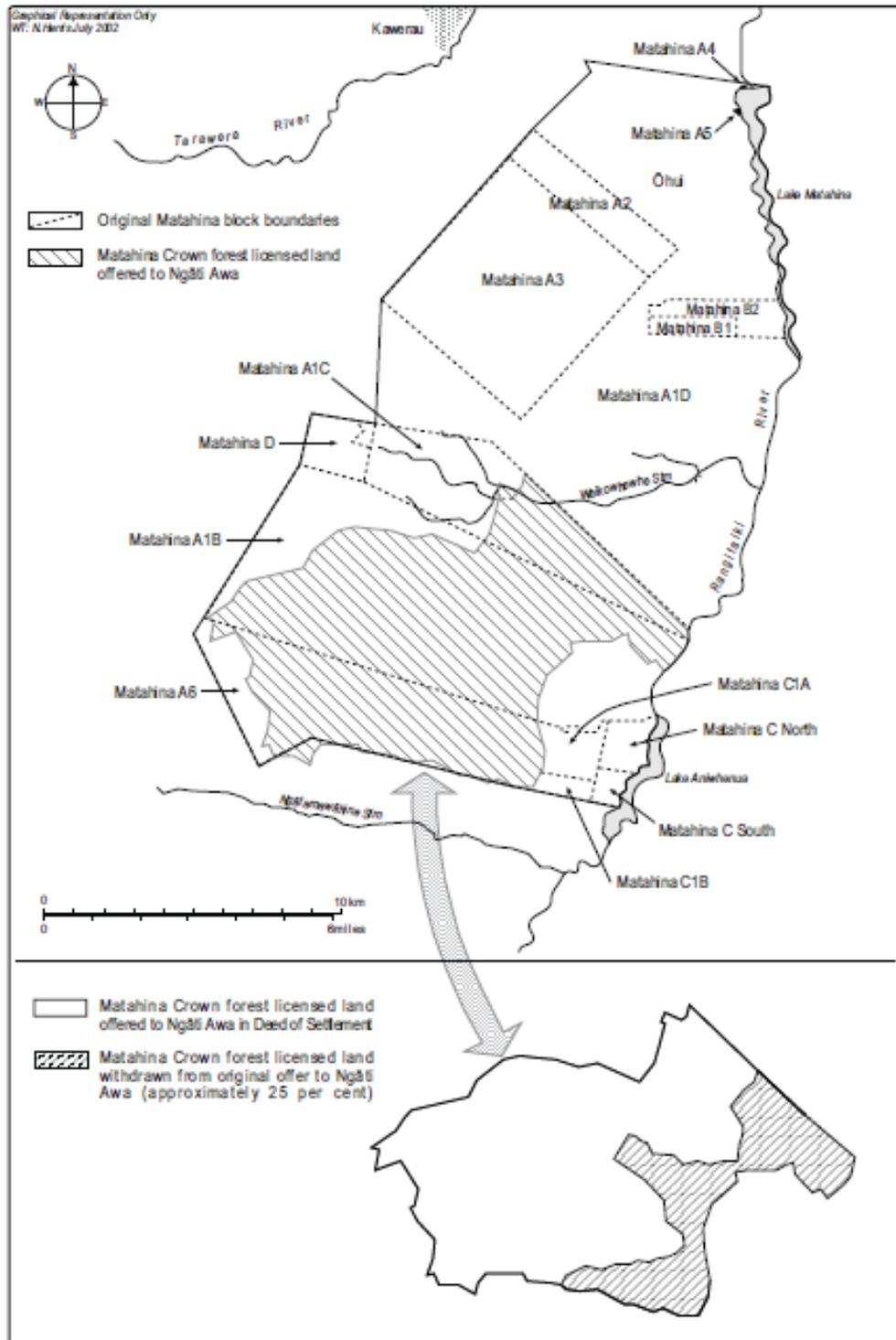
¹⁸⁰ Walzl ‘Ngati Awa Lands’ above n 165 at 44-66.

¹⁸¹ For the background to this complex issue see Waitangi Tribunal *The Tarawera Forest Report* (Wai 411, 2004) at 55-96. See also the Tarawera Forest Act 1967.

¹⁸² Eventually title to Tarawera No.1 would revert in the Tarawera Land Company Ltd which is now owned by Māori Investments Ltd: <www.maoriinvestments.co.nz>.

Thus, by the beginning of the end of the twentieth century, the landholdings of the Hapū had been reduced to one block of any size, Rangitāiki 31P3F known as Kiwinui (1,488 hectares), as well as various partitions of Rangitāiki 28B of less than five hundred hectares in total and twenty two hectares of the Matatā 100 and 101 blocks (Omarupōtiki pā) and Matatā 102 (Te Matatā pā).





Map 2: Original Matahina blocks showing Crown forest licensed land offered to Ngāti Awa

Figure 6: The Matahina blocks¹⁸⁴

¹⁸⁴ Waitangi Tribunal *The Ngāti Awa Cross Claims Settlement Report* above n 123 at 5.

It was against this background of land loss that the tribal Treaty claims against the Crown, including those of the Hapū, had to be pursued in the Waitangi Tribunal. As events unfolded, following the filing of the Wai-46 Ngāti Awa comprehensive claim, once the hearings commenced, the process ironically would come to resemble a rehearing of the original Compensation Court and Native Land Court title determinations, where tribes would be pitched against their neighbours. Questions would also be raised internally over funding and the nature of the claims and how these might address existing tribal inequities. What the process required from the perspective of the iwi, was a credible leadership team capable of keeping the tribe together during what would be one of the most important turning points in its history.

The raupatu claims of Taiwhakaea II, Hikakino and Te Rangihouhiri II

Commencing in July 1994, Taiwhakaea II, Hikakino and Te Rangihouhiri II, presented claims together to the Waitangi Tribunal at Te Whare o Toroa Marae in Whakatāne and concluded their evidence at Umutahi Marae, Matatā the following year.¹⁸⁵ While the tribal claims were presented via the iwi authority, Te Rūnanga o Ngāti Awa and their counsel, the Hapū, like others, made their own presentations. That evidence, while largely complementing the claims of the iwi, nonetheless referred to material that some found uncomfortable, especially regarding the roles played by other hapū of Ngāti Awa during the 1860s and in the context of land returns following confiscation.

The evidence of the Hapū emphasised a range of issues including:

- (a) the ill treatment of tribal leaders during their arrest, trials, imprisonment and executions including their interment of their remains in the prison until 1989;
- (b) the unlawful military campaign and confiscation as a double punishment;
- (c) the award of Hapū lands to the Crown's loyalist allies in return for military service, the persistent denials by the descendants of those grantees of any such

¹⁸⁵ Waitangi Tribunal, *The Ngati Awa Raupatu Report* above n 80 at 183, referring to document A33 in the Wai-46 Record of Inquiry. A whānau claim, Wai-79 Pukaahu Domain – the Awakeri Hot Springs Claim was heard at Kōkōhīnau Marae, Te Teko in 1995.

- conduct and their refusal to accept a Ngāti Awa interest in those lands on either side of the Tarawera river;
- (d) the transfer of lands to other hapū of Ngāti Awa despite an absence of customary rights and their subsequent alienation;
 - (e) the largely landless state of the Hapū in comparison to others in the tribe who still retained significant and valuable land holdings despite the confiscation and operation of Native land laws; and
 - (f) the consequences of these events for the Hapū in the late twentieth century.

Preparing for the hearings

The preparation for the hearings understandably occurred over several years while the research and evidence to support them was being prepared.¹⁸⁶ The original iwi claim, Wai-46, had been filed in 1988 once the jurisdiction of the Waitangi Tribunal had been extended to include claims dating back to 1840.¹⁸⁷ Its overall coordination remained with the tribal authority, Te Rūnanga o Ngāti Awa, the successor to the Ngāti Awa Trust Board, under the leadership of its chairman, Professor Hirini Mead. Then there were the seemingly inevitable delays with the Crown Forest Rental Trust (“CFRT”), the body established to fund Treaty claims by Māori if they included Crown forest licenced land.¹⁸⁸ The Trust was understandably cautious in its initial approach to developing funding criteria and policies and this added to decision making delays which affected the readiness of claimants to proceed.

For the wider claims, the creation of an enormous data base of resources, as a part of the process before the Tribunal would have a significant impact on Crown-Māori relationships that were not contemplated when the original 1975 legislation was enacted. Writing almost two decades ago, the late Professor Alan Ward, considered that the influence of the claims process, the Tribunal’s reports and the research that had been undertaken, would be profound:¹⁸⁹

¹⁸⁶ Ngāti Awa Claims Settlement Act 2005, Preamble, (4)-(7).

¹⁸⁷ Treaty of Waitangi Amendment Act 1985, s 3.

¹⁸⁸ For details see Crown Forestry Rental Trust <www.cftrt.org.nz/about/>.

¹⁸⁹ Alan Ward *An Unsettled History – Treaty Claims in New Zealand Today* above n 8, at 171-172. See also Giselle Byrnes *The Waitangi Tribunal and New Zealand History* (Oxford University Press, New York, 2004).

In the space of 12 years the Tribunal, the Crown Forestry Rental Trust, and claimant and Crown researchers have built up a formidable information-base on issues ranging from customary Maori rights in land and waters, and early interactions between Maori and settler, to the role and functions of modern agencies such as the Maori Trustee. Many issues never previously examined or only superficially so, have been explored in depth, and Maori understandings of historical experience revealed. Much of this is wholly new knowledge, yet to be fully assimilated into Tribunal reports and public discourse. But already it is influencing the courts' interpretations of the respective legal rights of Maori and the Crown, and this will continue.

Unsurprisingly, for the equivalent of a major civil proceeding against the Crown involving multiple claimants, their counsel and experts, the preparation of the claim for hearing and maintaining its momentum once the proceedings began in July 1994, was a Herculean task. It required centralised planning and management through the iwi authority and its leadership who needed to maintain the support and confidence of the elders, the marae and the hapū.¹⁹⁰

Relearning tribal history from the Compensation and Native Land Courts' records

More importantly however, both for Ngāti Awa generally, and for the Hapū, the claim process had two critical impacts – reconstituting the tribal knowledge base and facilitating tribal unity. First, the provision of significant funding from the CFRT enabled detailed and extensive research to be undertaken on tribal histories and overlapping interests, as well as on Crown breaches of the principles of the Treaty of Waitangi, the criteria by which the Tribunal attempts to assess Crown acts and omissions.¹⁹¹ For the first time, probably since the original hearings themselves in 1867 and 1881, the vast array of evidence stored in the archives and records rooms of the Māori Land Court was resurrected as researchers and counsel poured over tens of thousands of pages of material to breathe new life into their claims. The Raupatu Document Bank, a series of volumes prepared by the Waitangi Tribunal to assist claimant groups who had been subjected to confiscation, was another important source of material for the re-telling of tribal histories and the interaction of hapū with the Crown and its agents. For some hapū histories and whakapapa, along with details

¹⁹⁰ Personal communication from Professor Sir Hirini Mead to Layne Harvey (25 March 2015). See also Professor Mead's chairman's reports and reports of the Claims Manager in Te Rūnanga o Ngāti Awa *Annual Report* 1994, 1995, 1996 and 1997 (Mann Printing, Whakatāne)

¹⁹¹ In total, Te Rūnanga o Ngāti Awa received \$2,075,568 from the Crown Forest Rental Trust from 1993 to 2005: <www.cfrt.org.nz/doclibrary/public/thestorehouse/CFRTRTA20162017>.

of customs and definitions of critical words like “mana”, the records of the Native Land Court and the Compensation Court are *the* premier source, especially for those tribes who, for whatever reasons, have suffered near terminal disconnection from their oral traditions and the stories that should have been recounted down through successive generations.

The simple reality was that, when the tribal historians born in the nineteenth century and who survived into the early twentieth, had passed away, their knowledge and expertise was lost, with the exception, largely, of their evidence in the Native Land Court.¹⁹² While it is correct to acknowledge that several of them had detailed accounts recorded by S. Percy Smith and Elsdon Best, to name two of the early ethnographers, beyond that and their evidence in Court, little else remained.¹⁹³ Even today, Ngāti Awa has few historians who understand the history of tribal dynamics within the iwi. Arguably, the traditional social structures and systems that had flourished and remained largely intact in the region prior to the onset of the Land Wars era, had been left shattered. The necessary training grounds for gaining customary knowledge and traditional wānanga had disintegrated.¹⁹⁴ Some hapū barely survived and others that did were severely depleted in terms of their traditional knowledge bases, which had become degraded as largely irrelevant curiosities belonging to another time, much like *te reo* Māori during the twentieth century. Some iwi and hapū even had to resort to adopting the waiata of their neighbours, which was a sign that they had lost their own traditions. It was also not unusual for the speakers of hapū to include their in-laws due to their own diminishing pool of skilled whaikōrero experts. This too was another example of how depleted the customary knowledge base had become. Exactly how and why this occurred could be the subject of its own thesis.

¹⁹² Leaders and historians like Hāmiora Tumulata, Penetito Hawea, Tiaki Rēwiri, Timi Waata Rimini, Te Hurinui Apanui, Oke Pukeroa, Hiriweteri Motutere, Himiona Tikitū and Hoani Tuhimata. Very few of these tribal experts passed their knowledge on to their descendants.

¹⁹³ Some personal whakapapa books and notes were eventually copied by the next generation but barely a handful have survived. This researcher would estimate that less than six possibly seven genuine whakapapa books exist within Ngāti Awa that contain original genealogical records based on the oral testimony of those ancestors listed in the above footnote. For biographies on Smith and Best, see Giselle M. Byrnes. 'Smith, Stephenson Percy' (1993) *Te Ara – the Encyclopedia of New Zealand* <www.teara.govt.nz>; and Jeffrey Sissons. 'Best, Elsdon' (1993) *Te Ara – the Encyclopedia of New Zealand* <www.teara.govt.nz>.

¹⁹⁴ Personal communication from Te Hau o Te Rangi Tutua to Layne Harvey (22 February 2008).

For Ngāti Awa generally, and certainly for Taiwhakaea II, Hikakino and Te Rangihouhiri II, that disconnect was practically all encompassing. But for the bare fragments of tribal history written in faded ink or colouring pencils in dog eared and watermarked notebooks stored under beds in equally unimpressive suitcases, long past their best, the Hapū would have been completely bereft of evidence of their own histories and genealogies.¹⁹⁵ So, when the preparations for a claim to the Waitangi Tribunal began in earnest in the late 1980s, the rich vein of resources from the Native Land Court began to be mined heavily by all claimant communities – none more so than the Hapū. The revelations began with the completion of the numerous research papers and reports by Te Roopu Whakaemi Korero o Ngāti Awa, the Ngāti Awa Research Unit established under the aegis of Professor Mead’s inspired leadership during the 1990s. These reports brought the historical events back to life not only on the tribal stage, but were revealed to a whole new and hitherto uninformed audience of iwi members who had been unaware of these histories and were anxious to learn and to engage with their tribal connections and responsibilities.¹⁹⁶

The research uncovered and revived, for the first time in generations, the many stories, sayings and songs for lands long since lost from Hapū control.¹⁹⁷ The whakapapa spanning centuries and the ancestral exploits that connected them became relevant once more, as the iwi contested influence and resources with their neighbours, much as their forebears had done over a century earlier. This reconnection with the past and the customary knowledge so critical to Māori identity, let alone the claims process, led to a new assertiveness and self-awareness at the inter-hapū and inter-tribal level. It also influenced the revival of traditional forms of expression including in the performing arts, where a new creativity was inspired by the events of 1865 and 1866, with haka and waiata being composed to commemorate those times. Like the Native Land Court evidence on iwi and hapū lands and

¹⁹⁵ These include the whakapapa books or part thereof as belonging to Hoani Ngamanu, Himi Takotohiwi, Awanuiārangi Rātahi, Rēneti Hawira and Matarena Rēneti, copies of which were provided to the researcher during 1997- 2002.

¹⁹⁶ See *Pu Kaea* 1994-1997. First published in 1992, it remains one of the few tribal newspapers still in print. It remains an important archival record for the iwi.

¹⁹⁷ For example, ‘Tangi mo Matahina’ by Te Araroa: Ngāti Awa Claims Settlement Act 2005, Preamble, recital (49); ‘Te Tangi a Tamapahore – Kei Otitapu’ and ‘Ka mahi, ka mahi’ both ngeri or chants that were revived during the claims process and now form a central part of the tribal repertoire, so much so that both were chosen at successive inter-hapū kapa haka festivals as the set piece mōteatea (traditional songs or chants) in 2015 and 2017.

whakapapa, these forms of cultural expression are a central part of the essential building blocks of the ‘tribal brand’. So, this tribal renaissance, was, in part, as a direct result of the vast and at that time uncovered knowledge base of the Hapū being rediscovered and redeployed in the conflicts that would play out before the Waitangi Tribunal as claimant groups argued for preferment and acknowledgment of their tribal domains.

In short, as a result of its Treaty claim to the Waitangi Tribunal, with the detailed evidence given in the Matahina, Putāuaki and Te Pokohū cases in 1881 and 1884 discussed previously, Ngāti Awa were able to regain substantial parts of the Kaingaroa Northern Boundary licence as it did, as part of its settlement.¹⁹⁸ Even so, in the absence of the evidence to the Compensation Court in 1867, given by Te Metera Te Tii, corroborated by none other than the Ngāti Whakauae chiefs Henare and Petera Pukuatua, as well as a slew of other witnesses, it is doubtful whether the claims of Hikakino and Te Rangihouhiri II to the Rotoehu Forest Western licenced land would have been successful.¹⁹⁹ Ironically, the records of the Compensation Court and Native Land Court were central to the efforts of Ngāti Awa and the Hapū in successfully securing the return of ancestral lands and in restoring the traditional knowledge base of the tribe. Equally significant was the fact that such evidence could then be used in various other fora – cultural, legal and political – to enhance and strengthen the position of the iwi and the Hapū in critical debates with their neighbours over traditional and contemporary rights.²⁰⁰ This demonstrates, therefore, that one of the key advantages in traversing the pathway to the Tribunal was that a large base of research was made available that had been previously inaccessible due to financial constraints – until the advent of the CFRT with its large amounts of funding, few tribes could afford to engage professional historians to undertake the task of recreating from the historical record the tribal knowledge base that was essential to the prosecution of claims in fora that included the Waitangi Tribunal.

¹⁹⁸ See the discussion in Chapter Three above.

¹⁹⁹ Waitangi Tribunal *The Ngāti Awa Raupatu Report* above n 80 at 135-136.

²⁰⁰ Those records and evidence would called on regularly to assist in protecting tribal interests for example, see *Ngāti Hokopu Ki Hokowhitu v Whakatāne District Council* [2002] NZEnvC 421; Waitangi Tribunal *The Ngāti Awa Cross Claims Report* and *The Ngāti Tuwharetoa ki Kawerau Cross Claims Report* above n 123; Proposed Whakatāne District Plan Determination Report on Opihi Structure Plan, Marina Precinct Activities and Related Matters in terms of the Resource Management Act 1991, June 2014; and *Te Rūnanga o Ngāti Awa v Paul* above n 128.

Enhancing hapū and iwi cohesiveness

The second important effect of the claims process and the hearings on the iwi and the hapū was to enhance and strengthen tribal cohesiveness. This was because the research process involved regular consultation with iwi members and with hapū and marae. Whenever a hearing was scheduled, the preparation had to include hui and wānanga at marae throughout the tribal district both to consult with the people as to the content and the details of the reports but to also ensure that the communities directly affected were engaged and responsive to the evidence as it was being prepared.²⁰¹ In addition, the claims process also meant that the iwi and its hapū, while learning about Crown breaches of the Treaty against tribal interests, learnt as much about themselves, their shared history and connections. This too influenced improving relations between hapū, dispelling, in part at least, elements of mistrust that had developed over time because of circumstances, as well as limited knowledge and understandings.

The preparations for the Tribunal process also provided an unprecedented degree of transparency and openness at the tribal and hapū level about the aims, intentions and objectives of the claims and the entire process, including how it would impact on any future settlement. The iwi authority even entered into a memorandum of understanding with its constituents, at the request of the Hapū, that any settlement with the Crown should recognise the near landlessness of those three subtribes Taiwhakaea II, Hikakino and Te Rangihouhiri II as compared with others; a move that demonstrated a singular maturity of approach by the political leadership; an approach that would ensure the continuing unity of the iwi at a time when it could so easily have ended very differently. Eventually, these events would lay the groundwork for the settlement of the claims of the Hapū, in part at least. In the words of one tribal leader, the iwi and its hapū “needed fusion not fission.”²⁰²

The short point is that, for many tribal communities, like Ngāti Awa, without the cathartic and unifying effect of both the centralised leadership of the iwi authority and the Tribunal process, there might have been real risks to the ongoing

²⁰¹ Personal communication from Professor Sir Hirini Mead to Layne Harvey (24-26 March 2015).

²⁰² Personal communication from Professor Sir Hirini Mead to Layne Harvey (10 June 2008).

cohesiveness of the tribe, let alone its mandate to continue with any post hearing negotiations. The fact that the Tribunal could report in 1999 that the Crown should negotiate for the settlement of the Ngāti Awa claims and that it should do so with the Rūnanga, sent a powerful message to the Crown and to tribal neighbours.²⁰³ Ngāti Awa had also seen first-hand, the result of proceeding without a Tribunal hearing and without securing the mandate of the iwi *before* signing a deed of settlement.²⁰⁴ The evidence of the strength of the Ngāti Awa mandate is reflected in the fact that there were no successful challenges either before the Courts or Waitangi Tribunal disputing the right of Te Rūnanga o Ngāti Awa and its five elected negotiators to negotiate a settlement for iwi ratification.²⁰⁵

Waitangi Tribunal - The Ngāti Awa Raupatu Report 1999

After a four-year wait, in late 1999, the Waitangi Tribunal finally issued its report, said to be interim in nature, and intended to assist in the settlement negotiations with the Crown.²⁰⁶ In summary, the report supported the overall arguments of the Ngāti Awa claims – that the confiscation had been unlawful and unjust because the iwi was not in rebellion and so there was no proper justification for the confiscation of 1866. Moreover, it was, when combined with the trials, a double punishment.²⁰⁷ The Tribunal also found that the system of land tenure imposed on Māori inevitably resulted in further serious land loss which would affect generations of the tribe.

On the claims of Ngāi Te Rangihouhiri and Ngāti Hikakino the Tribunal found:²⁰⁸

Ngāi Te Rangihouhiri and Ngāti Hikakino suffered more than other hapū from the confiscations. This may be seen as just, in view of the more prominent role of some of these hapū in the killing of Fulloon. But here two points must be born in mind.

²⁰³ Waitangi Tribunal *The Ngāti Awa Raupatu Report* above n 80 at 131.

²⁰⁴ See Ranginui Walker *Opotiki mai Tawhiti – Capital of Whakatohea* (Penguin Books, Auckland, 2007). The Whakatōhea Deed of Settlement of 1996 was rejected by the iwi. The Waikato tribes secured a settlement because they had the unifying influence of the Kingitanga: see David McCan *Whatiwhatihoe – The Waikato Raupatu Claim* (Huia Publishers, Wellington, 2001).

²⁰⁵ Two hapū out of twenty-two sought to withdraw their support in 1996. However, this reduced to one by the time of the first Crown settlement offer. When the formal vote by beneficiaries and hapū took place in 2003, only one hapū voted against the settlement. Personal communication from Professor Sir Hirini Mead to Layne Harvey (25 March 2015).

²⁰⁶ Indeed, compared to the mammoth reports other have received, it was, with the benefit of hindsight, somewhat anti-climactic. See Waitangi Tribunal *Turanga Tangata, Turanga Whenua* above n 4 and Waitangi Tribunal *Te Urewera* above n 127.

²⁰⁷ Waitangi Tribunal *The Ngāti Awa Raupatu Report* above n 80 at 135.

²⁰⁸ At 137.

First, those responsible for Fulloon's death paid with their lives or their freedom. There is no basis on which the crime could be visited on other than those convicted of it.

Secondly, the land was confiscated for a subsequent rebellion but on the facts, the hapū were not in rebellion; they were reacting to an invasion by their former enemies. There was no basis for confiscating the land of any of the hapū so imagined degrees of culpability are irrelevant. Then, during the drainage of the Rangitāiki swamp a further 187 of the mere 278 acres returned to them was taken under the Public Works Act 1908. While the Sim Commission thought that Ngāi Te Rangihouhiri and Ngāti Hikakino were deserving of some further compensation, that recommendation was not implemented.

More than any other section of Ngāti Awa, the people of these hapū were deprived of their sacred sites and that necessary for their future well-being. The settlement must be such as will guarantee to them a land base for their future identity and economic development.

For completeness, it should be noted that the claims of Taiwhakaea II were argued at the same time using the same evidence and submissions. There was no separation between the Hapū as to their cases before the Waitangi Tribunal. However, for reasons known only to themselves, the members of the Tribunal saw things differently and made the findings that only mentioned Hikakino and Te Rangihouhiri II.²⁰⁹

Ngāti Awa Deed of Settlement, 2003

A six-year period of negotiation with the Crown between 1997 and 2003 toward a deed of settlement followed the Tribunal's interim decision.²¹⁰ Clause 7.1.1 of the Ngāti Awa deed states:

After discussions with Ngāti Awa negotiators, the Crown notes that it is an objective of the two hapū, Te Rangihouhiri II and Hikakino, to acquire land within their traditional area of interest. The Crown therefore offers, in response to the specific claims of those two hapū, to pay any balance of funds remaining from the \$1 million sum after settlement of the ancillary claims to the Ngāti Awa governance entity to make available to Te Rangihouhiri and Hikakino. For the avoidance of doubt, all three ancillary claims must be settled before any of this residual amount will be paid to the Ngāti Awa governance entity.

Deed of Settlement with Ngāti Awa, 2008

These matters lay for several years while the deed became settlement legislation through the enactment of the Ngāti Awa Claims Settlement Act 2005. Then, after a

²⁰⁹ This omission, inadvertent or otherwise, of any reference to the claims of Taiwhakaea II hapū has created concerns. No doubt, conversations will continue.

²¹⁰ Ngāti Awa Claims Settlement Act 2005, Preamble, recitals (8), (9), (12) and (13).

further period of hui and negotiation, on 28 February 2008, Hikakino and Te Rangihouhiri II signed a deed with Te Rūnanga o Ngāti Awa.²¹¹ The agreement included the transfer of the lands and the excess accumulated rentals to the hapū once a suitable governance entity had been created. For the two hapū involved, this was a significant turning point, and the first of several steps towards their reconstruction and revival.

Prologue: Te Pāroa Lands Trust

This trust was formed on 1 July 1997 as an amalgamation of trust per s 221 of the 1993 Act (rather than as an aggregation or amalgamation of titles) where seven separate ahu whenua trusts were combined under a set of common trustees.²¹² The rationale for this was to consolidate the disparate and largely uneconomic individual titles of the Hapū under the management of a single entity for advancing common Hapū objectives. Economies of scale would also result in cost savings, since there would only be one set of accounting, trustee and related expenses.

The impetus for the amalgamation and the more coordinated approach to the land management, tribal, cultural and social activities of the Hapū was derived primarily from the Ngāti Awa Treaty claims process during the early 1990s. As an increasing awareness of the historical claims issues began to expand, this coincided with a resurgence of Hapū identity. What followed was an increase in the coordination of Hapū activities which were precipitated by leading kaumātua in fostering networks between the tribal leaders and tertiary-educated, largely urban-based uri (descendants) who had been encouraged to provide direction and support, particularly concerning the historical claims process.²¹³

The amalgamation of trusts was part of a broader strategy of unification and collectivisation of limited tribal resources for improved returns and increased local influence. In short, a larger Hapū landholding entity would have more resources to coordinate tribal initiatives. But to create such an entity the Hapū leadership and their advisers would need to firstly, navigate the legal requirements of the 1993

²¹¹ Te Rūnanga o Ngāti Awa *Annual Report* 2009 (Mann Printing, Whakatāne, 2009).

²¹² 90 Whakatāne MB 74-75, 88 (90 WHK 74-75, 88).

²¹³ *Pu Kaea* (Whakatāne, New Zealand, 1994-1995).

legislation and secondly, present a relevant strategy to the owners and the Hapū to secure their support. Understanding the Act and its predecessor, and how the Māori Land Court operated both in theory and in practice, would therefore be critical to realising those development aspirations. Given the experience with the Compensation Court and Native Land Court during the previous century and a half, however, the prospects were hardly inspiring.

CHAPTER FOUR - AN OVERVIEW OF THE MĀORI LAND COURT

Toi te kupu, toi te mana, toi te whenua
The permanence of the language, the mana and the land
Without which Māori culture will cease

Tinirau, no Whanganui

Introduction

This chapter provides a brief snapshot introduction to the concept of Māori land, the evolution of Māori land legislation and the of the 1993 Act itself. It also considers the operation of the Māori Land Court and the key aspects of the Court’s procedure and jurisdiction that make the Court distinct from mainstream Courts.

The nature of Māori land

In their 2013 submission to the Review Panel, appointed by the then Associate Minister of Māori Affairs, the Hon Christopher Finlayson QC, the Judges of the Māori Land Court contended that it is generally accepted by owners that the management of Māori land almost invariably includes some degree of consideration of ngā tīpuna, the ancestral forebears, the present owners, and the future generations of potential owners and beneficiaries.²¹⁴ This perspective is often reflected and recorded in annual reports, mission and vision statements of Māori land entities.²¹⁵ Notions of retention, utilisation and development of Māori land must be considered in light of how the land can be used for the benefit of all three generations. The Judges, in their submission, expressed the view that Māori land is held as a tāonga tuku iho - a cultural property in which owners can trace their whakapapa to the tīpuna that held the land before them, and which, they will in turn pass on to their uri (descendants).²¹⁶ Further, land is also held to enable owners to derive a financial benefit either for themselves through dividends, education grants and distributions to

²¹⁴ <www.beehive.govt.nz>; Māori Land Court Judges “Submission of the Māori Land Court Judges to Review Panel” (2013).

²¹⁵ For example, see several large trusts and incorporations include a series of aspirational goals in the vision and mission statements - Lake Taupo Forest Trust, Turangi, vision and mission statements: <www.lfft.co.nz/whakatauki.html>; Tuaropaki Trust, Mokai, mission and vision statements: <www.tuaropaki.com/our-story/organisation-values/>; Wakatu Incorporation, Nelson <www.wakatu.org/#vision-purpose>.

²¹⁶ Māori Land Court Judges “Submission to Review Panel” above n 214.

the elderly or for communal purposes including for marae.²¹⁷ In their submission, the Judges also pointed out that all of these considerations must be borne in mind when addressing the challenges of effective utilisation of Māori land without compromising the kaupapa that lies behind it.²¹⁸

It is also important to underscore that Māori land is almost invariably held in multiple ownership and necessarily involves dealing with owners' rights in real property, rather than personal property such as shares in a company. There is also a critical distinction between multiply owned Māori land and General land: as a matter of law, for multiply owned General land, one owner in common is unable to bind another owner in common in the absence of consent. According to Bennion et al, this stems directly from their unity of possession.²¹⁹ The Act, however, uniquely empowers the Court to, effectively, circumvent that general law and to order such arrangements as are appropriate in the circumstances, provided the Court is satisfied that there is a sufficient degree of support amongst the owners, following due process. Without this legislative authority, 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.²²⁰ The Waitangi Tribunal summarised the distinction:²²¹

At general law, the situation is basic and powerfully simple. No other co-owner or trustee can use another co-owner's interest without their agreement unless a statute provides otherwise. The principal statutory provisions in respect of co-owned land are to be found in the Property Law Act 2007, at section 339 and the related section 343. In the event of disagreement between co-owners, this Act empowers a court to make orders for sale or division, but on terms that ensure reasonable outcomes in price terms if one co-owner is required to buy the other out. The aim of those provisions then is to ensure a means is available through court order for the relationship to be severed, one or other co-owner or sets of co-owners to be bought out with compensation, or for the land to be sold.

...

²¹⁷ Te Ture Whenua Māori Act 1993, s 218.

²¹⁸ Māori Land Court Judges "Submission to Review Panel" above n 214.

²¹⁹ Bennion *Land Law in New Zealand* above n 122 at [6.6.01].

²²⁰ Paul McHugh 'The Fragmentation of Maori Land', Volume 48, Issue 1 (Legal Research Foundation, Auckland, 1980); Evelyn Stokes *The individualisation of Maori interests in land* (Te Matahauriki Institute, University of Waikato, Hamilton, 2002).

²²¹ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 283-285.

However, aside from those statutory mechanisms which all utilise court involvement, at general law no co-owner can utilise another co-owner's interest in land without his or her agreement. And importantly in each of those situations recourse can only be had to utilise the court's power where the joint relationship that has led to the agreement to enter co-ownership has broken down, resulting in an inability to reach agreement between co-owners. The purpose then of the court involvement is to sever the relationship.

Māori land, however, according to the Tribunal, was a totally different proposition in several key respects, commencing with a connection through whakapapa:²²²

However, the situation with Māori land co-ownership is fundamentally different. For a start, the relationship that has given rise to the co-ownership is not one of agreement. It is one of whakapapa linking all co-owners to the whenua involved. Furthermore, some of the most common barriers to the ability to reach agreement in respect of the land are not matters necessarily of active disagreement between co-owners, although obviously that too can be as common among Māori as with the general community.

...

However, where the essential difference lies is that the present 1993 regime does not leave the situation there. Instead there is a series of safeguards in place utilising the impartial involvement of the Māori Land Court. The first of those is that, for alienation decisions, court confirmation is required. That has to be considered against the principle of retention to facilitate occupation, use and development. The next is that the court also has the discretionary power to protect the minority against the oppression of the majority and to protect the majority against an unreasonable minority. In relation to governing entities, the court has the power to appoint or not appoint suggested trustees, and to set the framework of the terms under which a trust or incorporation is to operate. None of those protective features exist at all in the current reform proposals.

...

Perhaps the most important arrangement under the current Act, in this respect, is the ability of owners to have an ahu whenua trust created and trustees appointed. This can be done without the knowledge or agreement of co-owners, so long as the specialist court is satisfied that certain criteria have been met, including that there is no meritorious objection.

Another essential consideration is the reality that te reo Māori, tikanga Māori and whenua Māori are inseparable elements of Māori identity that pre-date colonisation and remain vital to the present day. Where one element is diminished the other two invariably become compromised and degraded. He Whakaputanga o te Rangatiratanga (Declaration of Independence) and Te Tiriti o Waitangi (Treaty of Waitangi) guaranteed to Māori, at a minimum, tino rangatiratanga over Māori lands

²²² At 284-285.

and resources, language and customs. Despite these assurances, history attests to the destruction of customary land tenure, the loss of the majority of the Māori land base and the resulting erosion of tribal autonomy and cohesiveness as a consequence of the imposition of discriminatory laws and policies.²²³ As late as 1967, the Crown continued to pass laws which were contrary to the wishes of Māori owners (and inevitably caused significant losses of Māori land) in an effort to assimilate Māori land into the General land system.²²⁴ Both the Waitangi Tribunal and the Crown have repeatedly acknowledged, in reports and settlement legislation, that early Māori land legislation aided the wholesale loss of lands and resources that severely affected all tribes across Aotearoa (New Zealand).²²⁵ Despite, or because of this history of loss, to this day, Māori land remains the single most important kin-owned resource for hapū, whānau and Māori land owners.

Early Māori land legislation

The idea of the retention of land as a tāonga for future generations has often been absent from historical Māori land legislation, so much so that the 1993 Act was perhaps the first to do so to any real and practical extent. While from time to time, alienation restrictions could be applied, history has shown that there were always means to get around them, given the fundamental alienation purpose of the Native Lands Acts of 1862 and 1865 and their successors. Accordingly, it is necessary, at this point, to touch briefly on previous Māori land laws and their impact on the nature of Māori land.

After the effects of early statutes including the 1862, 1865 and 1873 versions, the Native Land Act 1909 represented the first real reform and consolidation of Māori land law. Its content was informed by the reports of the Stout-Ngata Commission.²²⁶ According to *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare*

²²³ See Williams *Te Kooti Tango Whenua* above n 16 at 51-100.

²²⁴ The Māori Affairs Amendment Act 1967 enabled the status Māori land that had four owners or less to General land without the consent of the owners: see Boast *Māori Land Law* above n 121 at 112-114; Richard Hill *Maori and the State: Crown-Maori relations in New Zealand-Aotearoa 1950-2000* (Victoria University Press, Wellington, 2009) at 159.

²²⁵ For examples, see Waitangi Tribunal *Turanga Tangata, Turanga Whenua* above n 4 at 745-747; *The Wairarapa ki Tararua Report* (Wai 863, 2010,) vol III at 1045-1065; Ngāti Awa Claims Settlement Act 2005, Part 1, s 8 and the Rongowhakaata Claims Settlement Act 2012, 7 (12).

²²⁶ *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero 150 years of the Māori Land Court* (Ministry of Justice, Wellington, 2015) at 53.

Kōrero 150 years of the Māori Land Court, the 1909 Bill was essentially a bipartisan measure steered through the house by James Carroll.²²⁷ Then, in 1931 a further consolidation of Māori land legislation resulted in the Native Land Act 1931 and the start of Māori land development schemes spearheaded by Sir Apirana Ngata.²²⁸ This era of development continued through to the Māori Affairs Act 1953. The 1953 Act also saw the implementation of trusts per s 438 and the Part XXIV development schemes, which provided development finance and departmental oversight for Māori land development initiatives.

In response to concerns about administrative problems associated with Māori land, the Hunn and Prichard-Waetford reports were commissioned in the 1960s. In *He Pou Herenga* it is recorded that “Hunn believed that multiple ownership was a barrier to economic development ‘Everybody’s land’ he wrote is ‘nobody’s land’”. The subsequent Prichard and Waetford Report also pointed out many practical problems of managing Māori land. However, the recommendations made in that Report were rejected and the government passed the Māori Affairs Amendment Act 1967. This included changes to s 438 trusts. However, some more radical amendments were made which, inter alia, allowed, as foreshadowed, the Registrar to change the status of Māori land owned by up to four owners to General land without the consent of those owners – a situation that owners of General land would regard as outrageous. The Court also had its longstanding probate jurisdiction removed. Added to this, the powers of the Māori Trustee were expanded and allowed for a conversion fund to enable him to buy shares that were, effectively, deemed uneconomic’.²²⁹ Then in 1974 the Labour government reversed some of the more unpopular 1967 changes. This amendment also made the alienation of Māori land more difficult.²³⁰

Te Ture Whenua Māori Act 1993

Overview

Following the Land March of 1975 and repeated calls by Māori to cease the continuing alienation of their lands, Te Ture Whenua Māori Act 1993 was enacted

²²⁷ At 53.

²²⁸ At 71.

²²⁹ At 72.

²³⁰ At 73.

after fifteen years of comprehensive consultation and review. For the first time in history, legislation was passed acknowledging that Māori land is a tāonga tuku iho, (an historical treasure). The Act also enshrined the principles of retention, utilisation and development that have ensured the retention of the bulk of the remaining Māori land base for the benefit of future generations. What remained of the Māori land estate was therefore seen as being of critical importance to the survival of Māori.

The Act represented a seismic shift in the legislative framework for Māori land with the introduction of the dual and sometimes conflicting underpinnings of retention and utilisation.²³¹ The alienation of Māori land by sale now required the consent of seventy-five per cent of the owners. The thresholds for the partition of Māori freehold land and status change to General land were also made more onerous. This led to a decline in the sale, change of status and partition of Māori land when compared with the effects of the previous legislation. The Act also extended the range of governance entities for the management of Māori land with the addition of whānau, kaitiaki, putea and whenua tōpu trusts. Existing trusts created under s 438 of the Māori Affairs Act 1953 continued in the form of ahu whenua trusts. In addition, provisions concerning tribal representation were also enacted which finally provided an outlet for many vexing mandate disputes. The use of land for dwellings through occupation orders was also introduced. One of the more succinct summaries as to the purpose of the new legislation came from the Hon Sir Douglas Kidd, Minister of Māori Affairs, who inherited responsibility for its progression.²³²

In the two decades since the Act was passed, Māori communities have, themselves, undergone significant change. According to census data from 1991 to 2013 the Māori population by ethnicity increased dramatically from 434,847 to 598,605 while

²³¹ See Jacinta Ruru and Anna Crosbie “The key to unlocking landlocked Maori land: the extension of the Māori Land Court’s jurisdiction” [2004] 10 Canterbury Law Review 13 and 318; Tanira Kīngi “Māori land ownership and economic development” [2009] NZLJ at 396-400;

²³² (1993) 533 NZPD 13656: Retention of Māori land in Māori ownership is at the heart of this Bill. Retention has, however, been reconciled where necessary with the need to operate in a modern context. The Bill empowers Māori landowners with the means to decide upon and facilitate the retention, development, use, and occupation of their lands. Te Ture Whenua Māori is the first major legislation framed according to what Māori have said they need. It has as its foundation the Treaty of Waitangi, and reflects the Māori philosophy that land is a treasure, a taonga tuku iho, to be preserved and passed on to future generations and that it should remain within whānau, hapū, and iwi structures.”

those of Māori descent increased from 511,278 to 668,724.²³³ In contrast, the radical economic reforms of the mid 1980s and 1990s wrought havoc on numerous Māori communities dependent for employment, over generations, on state industries in mining, forestry, public works, rail and shipping.²³⁴ Intergenerational unemployment and educational “underachievement” - along with negative social statistics continue to affect these communities which have been forced to look inward for solutions.²³⁵ With the acceleration of Treaty settlements and the devolving of service provision to iwi, many Māori communities now have increased capability and access to infrastructure, commercial development and educational resources including kohanga, kura kaupapa and wānanga. The capacity of Māori entities to engage in revitalising Māori communities has improved significantly.²³⁶

Returning to the issue of Māori land development, the evidence confirms that Māori trusts and incorporations have flourished under the Act. Their income and asset bases have expanded exponentially and their economic and social value to Māori continues to rise.²³⁷ As foreshadowed, they now have a significant commercial footprint, and when that is combined with the impacts of post settlement governance entities, represent a major economic force, employing thousands of people, injecting millions of dollars into local economies through the purchase of goods and services and by providing dividends and grants to Māori land owners, their whānau and hapū. The function of Te Tumu Paeroa (the Office of the Māori Trustee) has also undergone important legislative, structural and management change.²³⁸ His role in the development of Māori land remains pivotal. Having regard to these developments, it is essential that an insight into the legal regime under which these

²³³ See 2013 census results, Statistics New Zealand <www.stats.govt.nz>.

²³⁴ Jane Kelsey *A Question of Honour* above n 8.

²³⁵ Mason Durie *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* above n 24.

²³⁶ See Mason Durie *Ngā Tai Matatū: Tides of Māori Endurance* (Oxford University Press, Australia, 2005); Huia Tomlins-Jahnke and Malcolm Mulholland (eds) *Mana Tangata – Politics of Empowerment* (Huia Publishers, Wellington 2011) and Veronica Tawhai and Katarina Gray-Sharp *Always Speaking – The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011).

²³⁷ Parininihi ki Waitotara Incorporation *Annual Report 2017*: <www.pkw.co.nz>; Wakatu Incorporation *Annual Report 2015*: <www.wakatu.org.nz>; Pukeroa Oruawhata Trust *Annual Report 2016*: <www.rotorua.deloitte.co.nz>.

²³⁸ Māori Trustee Amendment Act 2009. Following the appointment of Jamie Tuuta as Māori Trustee in 2011 and his decision to rebrand the institution as Te Tumu Paeroa, the profile of the new Māori Trustees and the activities of the office have increased significantly.

multiple and overlapping activities are undertaken is warranted, to comprehend the significance of Māori land to its owners.

Jurisdiction

Overview

The Preamble of the 1993 Act provides:

Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.

Section 2, in similar vein, underscores the cornerstone principles of retention and development and how these must always be considered when exercising any of the Act's provisions. The legislation must therefore be interpreted to give effect to the principles of retention, development and utilisation of Māori land by the owners, their whānau and hapū:

2 Interpretation of Act generally

(1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble.

(2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.

(3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail.

As foreshadowed, the Māori Land Court is primarily a titles court, and a court of record.²³⁹ It has also been famously called a Court of “social purpose.”²⁴⁰ In

²³⁹ Te Ture Whenua Māori Act 1993, s 6.

²⁴⁰ Judge E T Durie “Submission to the Royal Commission of Inquiry into the Maori Land Courts” 1979: “The social purpose appears to require that the Court should strive always to achieve some

addition, it is a forum for resolving disputes primarily over Māori land and General land owned by Māori and has general jurisdiction to hear and determine claims in relation to Māori land. The Court exercises several specific and sometimes exclusive jurisdictions including the provision of injunctions and other relief, the administration of estates, title reconstruction, improvement and the alienation of Māori land, and jurisdiction in relation to trusts over Māori land including Māori reservations.²⁴¹ The Court also retains important jurisdictions over a specific range of disputes involving fisheries matters and commercial aquaculture.²⁴² There is also the jurisdiction relating to tāonga tūturu under the Protected Objects Act 1975.²⁴³

Section 17: General objectives

As mentioned, the objectives of the retention of Māori land on the one hand and its utilisation and development are central to the 1993 Act. These objectives mirror the kaupapa (purpose) set out in both the Preamble and s 2 of the Act. Section 17(2) (a)-(f) sets out specific objectives the Court seeks to achieve, which is also somewhat of a contrasting approach when compared to the role of the general Courts in relation to land. These objectives illustrate the focus of ascertaining and giving effect to the wishes of the owners by providing a means of informing them of proposals relating to their land, and a forum in which they might discuss such proposals.

As alluded to above, given the nature of Māori land in multiple ownership, the Court is obligated to ensure fairness in dealings between owners, protecting minority and majority interests, one against the other. This is because it is rare for owners to

practical result that will advance the interests of the owners and the better use of the land in a manner compatible with both Maori aspirations as well as the national endeavour.”

²⁴¹ Te Ture Whenua Māori Act 1993, Part 1, Part 3, Part 4, Parts 7-8 and Part 17.

²⁴² Te Ture Whenua Māori Act 1993, ss 26A-26ZB. These provisions, particularly in the context of fisheries and aquaculture, have been used relatively infrequently: *Taipari v Hauraki Māori Trust Board* (2007) 114 Waikato Maniapoto MB 34 (114 WMN 34); *Te Rūnanga o Ngāti Hine v Te Rūnanga a Iwi o Nga Puhi* [2013] Māori Appellate Court MB 89 (2013 APPEAL 89); *Te Ohu Kaimoana Trustee Ltd v Te Rūnanga nui o Te Aupōuri* (2014) 78 Taitokerau MB 112 (78 TTK 112); *Te Ohu Kaimoana Trustee Ltd v Ngāti Maru (Taranaki) Fisheries Trust* (2015) 341 Aotea MB 211 (341 AOT 211); *Shaw v Ngāti Huarere Ki Whangapoua—Ngāti Pu representation* (2016) 124 Waikato Maniapoto MB 3 (124 WMN 3) and (2016) 130 Waikato Maniapoto MB 22 (130 WMN 22).

²⁴³ Protected Objects Act 1975, ss 11-12. See *Holden – Ngā Tāonga Tūturu* (2009) 245 Aotea MB 230 (245 AOT 230); *Acting Chief Executive for the Ministry of Culture and Heritage – Tāonga Tūturu found at Kerikeri* (2015) 106 Taitokerau MB 210 (106 TTK 210); and *Chief Executive for the Ministry of Culture and Heritage – Tāonga Tūturu found at Cook’s Cove, Tolaga Bay* (2017) 71 Tairāwhiti MB 267 (71 TRW 267).

wield anything approaching a fifty per cent ownership of the land. Where required, the Court must facilitate the settlement of disputes among owners, and promote practical solutions to such problems arising in the use and management of the land. There are also the provisions concerning recovery of land, proceedings in tort or contract, and the concept of the preferred class of alienees that can affect the trustees of ahu whenua and whenua tōpu trusts from time to time. However, space constraints prevent a discussion of those issues here.

The operation of the Māori Land Court

Background

A snapshot of Māori land is set out in *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero 150 years of the Māori Land Court*, a publication produced to acknowledge the history of the Court:²⁴⁴

There are 27,343 individual Māori land titles, and 2.9 million ownership interests in those titles, in New Zealand today. The average size of a Māori land block is 51 hectares, with the smallest 10 percent of blocks averaging 0.0723 hectares and the largest 10 percent averaging 451 hectares. In order to manage land with multiple owners, management structures such as trusts and incorporations are often established by owners to oversee and direct the use of their land. There are currently 5,835 trusts, 2,276 reservations and 159 incorporations in place over Māori land, covering 1,106,625 hectares or 78 percent of all Māori land. Only 311,208 hectares, or 22 percent of Māori land, have no formal management structure in place.

The day to day administrative management of Māori land involves owners, and their representatives and interested parties, such as prospective lessees, utilising the records of the Court and seeking the assistance where necessary of registry staff, particularly in respect of title reconstruction and improvement, wills and succession, housing and land occupation and advisory services.²⁴⁵ Such persons attend registries every day to search the title records, the annual accounts of trusts and incorporations, verify lists of owners, examine wills and estate files of their tīpuna and inspect the

²⁴⁴ *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero 150 years of the Māori Land Court* above n 226 at 98.

²⁴⁵ In 2003-2004, the New Zealand Law Commission undertook a major review of the country's court structure which resulted in the publication Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004). The Judges of the Māori Land Court provided a detailed submission to the Commission. The present researcher had significant involvement in the preparation of that submission, which is referred to in the following sections of this thesis, in some detail and with updated information and additional analysis and commentary.

minutes of meetings held on Court files.²⁴⁶ Owners, lawyers, students, researchers and professional historians (contracted by the Crown Forestry Rental Trust or the Waitangi Tribunal for Treaty claims) also frequent the Court for research purposes, settlement negotiations and whānau and hapū wānanga.²⁴⁷

The Māori Land Court's records contain over four thousand-minute books and thousands of block order files, maps, survey plans, assessors' note books including the vast array of primary source material held in the seven registries of the Court.²⁴⁸ The registries are located in areas where there are significant land holdings including Whangarei, Hamilton, Rotorua, Whanganui, Gisborne, Hastings and Christchurch. Most of this access is provided at a nominal charge. One of the reasons behind this practice is the recognition that the individualised current title system was imposed on Māori without their consent and contrary to their preferences.²⁴⁹ Minimal costs also help ensure ease of access to the largely lay audience who use the registry records. Part of this important record can be accessed online. Copies of minute books are also held by libraries, and in universities and wānanga.

Similarly, the cost of maintaining the lists of individual owners for the 27,343 Māori land titles is also borne by the Court, as might be expected. This is comparable to the title registry in Land Information New Zealand who perform a similar function over General land. The difference is that Māori land blocks can have thousands of owners recorded on their titles with the lists changing in some cases every week as owners succeed to their parents, grandparents, siblings and other close whānau.²⁵⁰ Changes in ownership are also made through vesting by way of sale or gift.

Courtroom practice and procedure – contrasts with mainstream courts

Over the last two decades, the Māori Land Court, when sitting for hearings and judicial conferences, has become increasingly an unmistakably Māori court. Beyond

²⁴⁶ *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero* above n 226 at 104-107; 108-110.

²⁴⁷ See Richard Boast "The Native Land Court and the Writing of New Zealand History" [2017] 4 *Law & History* 145; and "The Waitangi Tribunal in the Context of New Zealand's Political Culture and Historiography" [2016] 18 *Journal of History of International Law* at 1-23.

²⁴⁸ Māori Land Court <www.maorilandcourt.govt.nz/about-mlc/our-record/accessing-our-records>.

²⁴⁹ Waitangi Tribunal *Turanga Tangata, Turanga Whenua* above n 4 at 533. See also Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 235-236.

²⁵⁰ For an extreme example, Matahina A1D1 of 104 hectares has over 9,120 individual owners.

the actual courtrooms, which in the case of the Rotorua, Hastings, Gisborne, Whanganui and Christchurch, are richly adorned with whakāiro (carvings), tukutuku (latticework panels) and kowhaiwhai (patterned rafters), the obvious difference in Court procedure is that te reo Māori is used regularly and tikanga Māori is expected to be applied. This includes the karakia (prayers) and mihimihi (formal speech making) at the commencement and closure of each Court sitting.²⁵¹

As the Judges highlighted in their 2003 submission to the Law Commission during the latter's consultation round over its report into the Court structure of New Zealand, kaumātua from the local tribes invariably lead the formalities. Waiata are performed and less frequently, presentations to the Court can be punctuated and resolved through rhetorical flourishes and haka that are relevant to the proceedings, or sometimes, completely irrelevant to them.

Many participants will confirm that there is often more emphasis on, and respect for, kawa (marae protocol) than orthodox procedural formality. Unsurprisingly, this is because the legislation directs the Judge to *avoid* unnecessary formality, to apply the rules of marae kawa, and to encourage where appropriate the use of te reo Māori.²⁵² This approach to procedure is also evident before the Waitangi Tribunal.

Another important distinction from its mainstream counterparts, emphasised by the Judges, is the ability of the Māori Land Court to receive almost anything relevant as evidence, whether admissible or not in an orthodox litigation setting. This is because much of the evidence given during the 1860s and up to the early twentieth century, which remains central to many current applications before the Court, concerned events and individuals from previous centuries, bound together in oral traditions handed down over generations without recourse to written records. This approach then takes into account the impact of formalities, like the rules concerning hearsay, when dealing with whakapapa and historical matters beyond the living memory of participants. In addition, another important procedural aspect is that the Court can make such inquiries of its own motion, as the Judge considers necessary, to deal

²⁵¹ Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* above n 245 at 210. Fiona Wright "Law, Religion and Tikanga Māori" (2007) 5 NZJPIL at 261.

²⁵² Te Ture Whenua Māori Act 1993, s 66.

effectively with the matters before it.²⁵³ This can include the Court commissioning its own expert evidence where required, which occurs regularly, especially where the parties themselves are unable to do so and the matters in question require such evidence.²⁵⁴ The Judge can also direct the registrar, per s 40 of the Act, to provide a report from Court records which then forms part of the evidence.

As the Judges underscored in their 2003 submission, this degree of flexibility, which is not entirely congruent with mainstream courts, recognises both the practical realities of dealing in a court room setting with a largely lay audience while requiring the Judge to ensure that the requirements of natural justice and procedural fairness are properly observed. This approach also acknowledges the important distinction that much of the proceedings before the Court involve transactional and administrative processes - which is discussed later. Evidence and submissions can sometimes be received unsworn from the public gallery, unless the issue becomes contentious, which in that case, will require more formality including evidence on oath and by affidavit. In addition, evidence will sometimes be given by kaumātua and tribal experts who are community leaders and who may not even be owners but who will often hold important knowledge of the land, the parties and the relevant customs— sometimes with greater detail and depth than the parties themselves.²⁵⁵

Contentious applications will often require the parties to make reference to their understandings of tikanga Māori, history and whakapapa to support their arguments, which will often be emotive and at times highly personalised, leading to bitter and acrimonious conflicts that can become intergenerational.²⁵⁶ Occasionally, tempers

²⁵³ Te Ture Whenua Māori Act 1993, s 69.

²⁵⁴ *Proprietors of Mangakino Township v Māori Land Court* CA65/99, 16 June 1999. See for example *Henare v Horowhenua District Council – Hokio A, Part Hokio A and Hokio Māori Township* (2013) 310 Aotea MB 292 (310 AOT 292) where a surveyor and historian with expertise in Māori roadways were commissioned to provide independent evidence. Usually, it is accountants and auditors who are commissioned to provide independent evidence: see *Hunia v Skerrett- White – Kawerau A8D* (2016) 146 Waiāriki 281 (146 WAR 281).

²⁵⁵ See *Taueki v McMillan - Horowhenua 11 (Lake)* (2014) 324 Aotea MB 144 (324 AOT 144) at [85] to [96] where Sir Hirini Mead gave evidence as an expert on the definition of wāhi tapu.

²⁵⁶ For example, see the numerous proceedings involving Lake Horowhenua dating back to 1895: *Hunia v Keepa* [1895]14 NZLR 71 (CA); *Hunia – Horowhenua 11* (1898) Otaki Appellate MB 377; Judge Smith in *Horowhenua 11* (1982) 84 Otaki MB 258 (84 OTI 258) and Judge Marumaru in *Horowhenua 11* (1989) 10 Aotea MB 177 (10 AOT 177); *Taueki v McMillan – Horowhenua 11* (2014) 324 Aotea 144 (324 AOT 144), *Taueki v R* [2012] 3 NZLR 601 (CA); *Taueki v R* [2013] NZSC 146; *Paki v Māori Land Court* [2015] NZHC 2535. See also “Report

can also become frayed and arguments erupt into personal and irrelevant attacks and in such an event, much will depend on the experience of the Judge and registry staff in managing the process to ensure an environment where any party having a submission relevant to the proceedings, usually, is permitted the opportunity to address the Court.²⁵⁷ On these occasions knowledge of the local communities, the personalities and their dynamics, built up over many years of interaction, can prove critical to promoting a pragmatic process for managing the proceedings and facilitating some form of practical outcome. These realities become even more relevant in the context of Te Ture Whenua Māori Bill 2016 and the proposed Māori Land Service and the independent mediation proposals, which are discussed later.

Another important distinction with mainstream courts is the fact that the Māori Land Court hears “applications” not cases, and most are unopposed. This is because traditionally a significant element of the Court’s jurisdiction involved title and registry related issues rather than orthodox litigation. This “transactional” or administrative aspect of the Court’s work makes up a significant proportion of the applications filed and heard every week. It will invariably include:

- (a) applications to transfer shares from one owner to another by sale or gift;
- (b) successions to Māori land whether by will or intestacy;
- (c) the creation of trusts and incorporations;
- (d) the confirmation of resolutions of owners to lease or sell land;
- (e) the granting of orders of occupation of Māori land for dwellings; and
- (f) the partition of Māori land and its change of status to and from General land;

While it is correct to observe that any one or more of these transactional applications can become contested, leading to conventional litigation including the exercise of rights of rehearing, appeal and review, the records of the Court confirm that most

and Evidence of the Horowhenua Commission” [1896] III AJHR G-2 at 4’. Then there were the highly contested estate proceedings of Ngāti Kahungunu and Mokai Patea leader Renata Kawepo discussed by Richard Boast in “The Omaha Affair, the Law of Succession and the Native Land Court” (2015) 46 VUWLR 841.

²⁵⁷ This too is historic. See the 1867 title investigation into Motiti Island off the Bay of Plenty coast: 1 Maketu MB 37, 45 (1 M 37, 45). The parties almost resorted to armed confrontation.

administrative applications of this kind are unopposed.²⁵⁸ The Bill, on the other hand, seeks to remove these transactional and title functions from the registry and place them in the proposed Māori Land Service, which is discussed in Chapter 7.

There is also, according to the Judges' 2003 submission, the role of the Court as 'protector' of the interests of a silent majority – usually through the imposition of procedural safeguards in decision-making, including where possible, appropriate notice – where that majority has not participated in decisions in relation to the proposal in question.²⁵⁹ Invariably, the Court will endorse majority decisions by owners where notice and proper process have been followed. There are exceptions to this, especially in the context of the appointment of trustees. From time to time, relevant considerations that may arise include taking into account the required skills needed for particular trusts and the need to be mindful of conflicts of interest.²⁶⁰ Owners and trustees will often seek directions from the Court on how to proceed in any given set of circumstances.

The roles of Registrars and Judges

In their 2003 submission, the Judges opined that the Court plays the role of an inquisitor, which by analogy might be more akin to the civil law jurisdictions of European states.²⁶¹ It has been less than commonplace for counsel to appear except in the most complex cases, although this has been subject to change as the number of more complicated cases being brought before the Court have begun to increase. A further contrast with the general courts is how over ninety percent of applications are prosecuted by lay persons without counsel, the highest percentage for any New

²⁵⁸ The Māori Land Court National Pānui is published every month. It is a list of applications that are ready to proceed. In addition, monthly returns of outcomes of the applications confirm that the vast majority are either confirmed on the day or by orders in chambers by the Judge or Registrar: <www.maorilandcourt.govt.nz/about-mlc/publications/national-panui>.

²⁵⁹ See *Proprietors of Mangakino Township* above n 254. For a contrary view see Dewes, quoted in Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 115.

²⁶⁰ See *Clarke v Karaitiana* [2011] NZCA 154, [2011] NZAR 370 and *Fenwick v Naera* [2016] 1 NZLR 354 (SC).

²⁶¹ Maori Land Court Judges, Submissions to the New Zealand Law Commission above n 245. For a summary of the contrasting approaches in civil and common law procedure see Caslav Pejovic "Civil Law and Common Law: Two different paths leading to the same Goal" (2001) 32 VUWLR at 830-835.

Zealand Court.²⁶² The great majority of the Court's decisions are delivered orally, especially those that are transactional and concern applications for transferring shares, succession and the creation, maintenance and disestablishment of trusts.²⁶³

The Judges, in their submission, also highlighted another difference which is that, usually, the primary burden of producing sufficient evidence to support an application falls not with the applicant but with the Registrar and the Court staff. This is especially the case where the proceedings are largely administrative or transactional in nature and where the registrar prepares orders for endorsement based almost exclusively on the records of the Court. For example, with an application for succession on intestacy, the applicant will produce a death certificate and sign a statement confirming that to the best of their knowledge there is no will. The case manager will then undertake what is termed a 'Part 4 search' which entails a review of the records of the Court to ascertain the Māori land interests of the deceased based on earlier succession orders deriving usually from the deceased's parents, grandparents, siblings, aunts, uncles and cousins.²⁶⁴ A draft order is then issued to the applicant for confirmation and is then ordered in open Court or at a Judge only sitting.

The short point is that all the necessary information to complete the succession by intestacy is almost exclusively evidence in the Court record, based on titles derived from Native Land Court investigations or Crown grants from the nineteenth and early twentieth centuries.²⁶⁵ This is yet another difference between the Māori Land Court and mainstream courts and as between General land and Māori land where familiarity with the historical record is essential to the present day administration and management of Māori land. Rather than having to work between several agencies, most relevant title information concerning Māori land is held within the registry along with a dedicated team of advisory staff who, where necessary, can always seek

²⁶² See Melissa Smith, Esther Banbury and Su-Wuen Ong "Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions" (Ministry of Justice, Wellington, 2009).

²⁶³ For example, in 2016, 6,000 applications were received, 5,888 were concluded while 140 reserved judgments were issued: Ministry of Justice Annual Report (Wellington, 2016) and Māori Land Court <www.maorilandcourt.govt.nz>

²⁶⁴ Māori Land Court <www.maorilandcourt.govt.nz/your-maori-land/succession>. Personal communication from Chief Registrar, Julie Tangaere to Layne Harvey (14 March 2015).

²⁶⁵ See Boast, *Māori Land Law* above n 121, at 155-162.

directions of a Judge should any question arise that requires a direction or decision. Once again, the contrast with mainstream institutions in this context is self-evident.

Even in terms of staffing profiles, there is also a difference, given that, compared with the mainstream courts, there are many Māori staff employed in the Māori Land Court who have a wealth of institutional knowledge of the complexities of Māori land law due to their long tenure, significant ability in te reo Māori and a sound understanding of tikanga Māori.²⁶⁶ It is their role to assist parties with their applications and to understand what applicants are seeking to achieve

That said, not all the work of the Court is transactional and administrative. Indeed, a considerable amount of its current caseload involves contentious litigation that can also, in rare instances, be subject to three levels of appeal.²⁶⁷ Where cases become complex and the parties are without means, the Court will often appoint counsel to assist and will pay reasonable witness costs.²⁶⁸ These can be considerable. Where trusts have become mired in accountability challenges, the Court will appoint accountants and auditors to prepare proper accounts.²⁶⁹ The same applies to boundary disputes where the Court or a Crown agency in an earlier time that has made an error. The Court will appoint a surveyor to correct its own errors so that the burden does not fall on the Māori land owners.²⁷⁰ From time to time it is also necessary to appoint examining officers for incorporations or receivers and their costs can also be met. In mandate cases, and matters filed under the Māori Fisheries Act 2004, the costs of a mediator can also be paid by the Court.²⁷¹

In their 2003 submission, the Judges expressed the view, based largely on historical examples, including Judges Jones, Acheson and Harvey, that these realities cast the Judge in the role of facilitator of land development and occupation proposals and as

²⁶⁶ *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero* above n 226 at 150-161. See also Shannon Haunui-Thompson “Concern at proposed job losses at Māori Land Court” (7 October 2016) Radio New Zealand <www.radionz.co.nz>.

²⁶⁷ For example, see *Fenwick v Naera* above n 260 and *Adlam v Savage* [2017] NZSC 11. Since the time of the first title investigations before the Native Land Court, a continuous stream of contentious cases continues to populate the pages of the Court’s minute books.

²⁶⁸ Te Ture Whenua Māori Act 1993, s 98.

²⁶⁹ See *Tupe - Manunui No 1 Fourth Residue* (2015) 334 Aotea MB 227 (334 AOT 227).

²⁷⁰ See *Bristol - Rangipō North 8* (2006) 178 Aotea MB 80 (178 AOT 80).

²⁷¹ *Te Ohu Kaimoana Trustee Limited v Te Rūnanga Nui o Te Aupōuri* (2014) 78 Taitokerau MB 112 (78 TTK 112).

a mediator of inter-owner, whānau and hapū disputes.²⁷² As the authors of *Māori Land Law* confirmed, during the period 1919 to 1955, two Judges, Frank Acheson, appointed in 1919,²⁷³ and John Harvey,²⁷⁴ (no relation to the researcher) appointed in 1933, sitting in different parts of the country, were involved in providing the impetus and oversight for several Māori land development projects.²⁷⁵ Judge Acheson became familiar with the local Māori communities where he presided, including the central North Island and later Northland and this proximity, it was said, brought him into close contact with the economic and related social challenges facing those communities. Regarded as a maverick in government circles, Acheson became directly involved as a promoter of development programmes, including a dairy scheme that was intended to provide some relief to the serious impoverishment prevalent at the time.²⁷⁶

Judge Harvey took matters even further, presiding over a significant housing development scheme in Rotorua involving joinery and tile factories, storage facilities and timber felling on Māori land “all run by Harvey and his staff.”²⁷⁷ While this may appear excessively paternalistic to modern eyes, it does underscore the historic role of judges in even the actual oversight and management of Māori land during the first half of the twentieth century. As the example of John Harvey demonstrates, he was not inexperienced in the administration of Māori land prior to his appointment to the Bench, given his earlier role as registrar and his involvement with the East Coast Lands Trust.

In another contrast with mainstream civil courts, the Judges’ submission underscored that the Judge in the Māori Land Court is often an active promoter of legal solutions to challenges faced by owners and is usually the last and only point at which a check

²⁷² Māori Land Court Judges, “Submissions to the New Zealand Law Commission” above n 245.

²⁷³ See John Acheson and Richard Boast ‘Acheson, Frank Oswald Victor’ (1998) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>.

²⁷⁴ www.maorilandcourt.govt.nz/assets/Documents/Publications/MLC-2016-Past-present-judges

²⁷⁵ Boast, *Māori Land Law* above n 121, at 112-113;

²⁷⁶ See John Acheson, Acheson, Frank Oswald Victor above n 273.

²⁷⁷ Boast *Māori Land Law* above n 121 at 113. Harvey had been a registrar of the Court and during the period 1921-1934 and was responsible for a significant period for the day to day management of the East Coast Native Trust: Waitangi Tribunal, *Turanga Tangata, Turanga Whenua* above n 4 at 548.

is made to ensure considerations of and compliance with the law.²⁷⁸ Invariably, Māori land owners will have had limited if any access to legal advice and so the Judge is often the first and often the only lawyer they will see during the proceedings.

As foreshadowed, a further relevant consideration and point of difference, is that Māori land is almost always multiply owned by whānau (families and extended families) and hapū and in rare cases by iwi.²⁷⁹ So, where Māori land owners are in conflict, they are invariably in dispute with their close relatives – siblings, parents, children, cousins, uncles and aunts.²⁸⁰ As Judge Durie expressed in 1979 - even though the law may offer a clear win or lose result, such an outcome may not always be in the best interests of the whānau or hapū. This was because the Māori Land Court, he submitted, was:²⁸¹

as distinct from most Courts of law, it could be said that the main function of the Māori Land Court is not to find for one side or the other, but to find social solutions for the problems that come before it, to settle differences of opinion so that co-owners might exist with a degree of harmony, to seek a consensus viewpoint rather than to find in favour of one, to pinpoint areas of accord, and to reconcile family groups.

So, faced with lay applicants and objectors who are related to each other and seeking to make decisions on matters that give rise to a disjunction between custom and law, the Judge's role is invariably a complex one. It has been said that the skills required include relationship management, the ability to explain and persuade litigants, with often significantly varying understandings of procedure, custom and law, the ability to understand the overlay of customary and legal concepts, and to deliver a decision that addresses all relevant considerations, while being acutely aware of the need to constantly maintain strict impartiality.²⁸² That is, a decision that maintains, to the extent possible in the circumstances, important whānau relationships, upholds

²⁷⁸ Te Ture Whenua Māori Act 1993, s 17.

²⁷⁹ For example, Te Mānuka Tūtahi, site of the Mataatua Whareniui and Te Mānuka Tūtahi Marae complex at Whakatāne: 88 Whakatāne MB 131-133 (88WHK 131-133) dated 6 October 1995.

²⁸⁰ For examples, see *Phillips v Trustees of Mohaka A4* (2008) 195 Napier MB 137 (195 NA 137), *Gemmell - Mohaka A4 Trust* (2011) 11 Tākitimu MB 86 (11 TKT 86); *Matthews v Matthews – Estate of Graham Ngahina* [2015] Māori Appellate Court MB 512 (2015 APPEAL 512); *Blayney v Taueki – Ihaia Taueki Trust* (2013) 303 Aotea MB 81 (303 AOT 81).

²⁸¹ Judge E T Durie “Submission to the Royal Commission of Inquiry into the Māori Land Courts” above n 240 at 48.

²⁸² Māori Land Court Judges, Submissions to the New Zealand Law Commission above n 245.

tikanga and applies the law.²⁸³ This is because, unlike most Courts, with proceedings in the Māori Land Court, when the case has ended, the parties remain in ongoing relationships because of their whakapapa to one another and to the land.²⁸⁴

It is therefore in the interests of all affected parties that durable outcomes are achieved which consider the overlays of law, lore, whakapapa and tikanga.²⁸⁵ Ultimately, when compared to all other courts, the Māori Land Court is unique because it is a *Māori* institution. Its customers are almost all Māori, and as foreshadowed, te reo and tikanga Māori are integral to its proceedings. The Court employs a high proportion of Māori staff, often originating from the tangata whenua tribes of the districts who have extensive networks within the local Māori community. Nine out of eleven judges of the current Bench are Māori, the highest proportion in the history of the Court.²⁸⁶ The issues the Court confronts are whānau orientated and have important tribal overlays and so unsurprisingly, Māori values are near the centre of the six thousand applications the Court receives every year.²⁸⁷

As foreshadowed, arguably one of the strengths of the current law concerns the accessibility and cost effectiveness of the Court as an independent and impartial forum populated with staff and judges who have a long history of involvement in Māori land tenure practice and who have more than a passing knowledge of their local Māori communities, their land and whakapapa. In *He Pou Herenga Tangata*,

²⁸³ See *Hohua – Estate of Tangi Biddle or Hohua* above n 29 concerning entitlement based on hapū affiliation; *Perenara v Pryor – Matata 930* (2004) 10 Waiāriki Appellate MB 233 (10 AP 233) about inter-tribal disputes over the iwi’s sole marae; *Mihinui – Maketu A 100* (2007) 11 Waiāriki Appellate MB 230 (11 AP 230) concerning hapū affiliation; *Nicholas v Kameta – Estate of Whakaahua Walker Kameta – Te Puke 2A2A3B1* [2011] Māori Appellate Court MB 500 (2011 APPEAL 500) involving whāngai; *Muraahi v Phillips – Rangitoto Tuhua 55B1B Manu Ariki Marae* [2013] Māori Appellate Court MB 528 (2013 APPEAL 528) which concerned transfers of land to a Māori reservation trust contrary to the claims of the deceased donor’s children.

²⁸⁴ *Taueki – Horowhenua 11(Lake) Māori Reservation* (2005) 154 Aotea MB 96 (154 AOT 96) at 99.

²⁸⁵ Māori Land Court Judges, Submissions to the New Zealand Law Commission above n 245.

²⁸⁶ Chief Judge Isaac (Ngāti Porou, Ngāti Kahungunu, Tūhoe); Deputy Chief Judge Fox (Ngāti Porou, Rongowhakaata); Judge Savage (Ngāti Porou), Judge Harvey (Ngāti Awa, Rongowhakaata, Te Aitanga a Māhaki, Ngāti Kahungunu, Te Whānau a Apanui); Judge Milroy (Tūhoe, Ngāti Whakaue); Judge Clark (Ngāti Haua, Ngāti Maniapoto); Judge Reeves (Te Aitiawa); and Judge Armstrong (Te Whānau a Apanui). Māori Land Court <www.maorilandcourt.govt.nz/about-mlc/judges>; and *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero* above n 226, at 132-149.

²⁸⁷ In 2016, it was estimated that the Māori Land Court would receive 5,600-5,900 applications for the year but in fact received 6,055 and disposed of 5,888: Ministry of Justice, Annual Report (Wellington, 2016) at 81.

He Pou Herenga Whenua, He Pou Whare Kōrero 150 years of the Māori Land Court, the Hon Justice Williams, reflecting after seven years on the High Court, recounted some highlights of his time as Chief Judge of the Māori Land Court during 1999-2008. In his view, one of the most distinctive features of the Court were the registry staff and judiciary, who he said possessed:²⁸⁸

deep deep knowledge of Māori communities and [their] evolving knowledge of te reo and tikanga. The judges and staff everywhere I went were students of the Māori community and loved the Māori community. I don't think there's a group of staff or judges in any other jurisdiction who loved their work so much, who felt committed to the mission of the Court, and that's an incredibly valuable thing. I doubt whether people outside the system understand that or what a great taonga it is. I've always thought the Court has a key role to play in unlocking the power of the Māori community if only it could be given that job.

Summary

The Māori Land Court remains an unusual and unique institution in many ways. As the successor to the Native Land Court, its reputation had been one of facilitating land alienation on a monumental scale, leaving Māori communities bereft of the means of production while the sale proceeds themselves failed to improve the overall wellbeing of Māori land owners. It was not until the land development schemes of Ngata took hold that some slight arresting of the rapid decline of the Māori land base started to occur. With the passage of the 1931 and the 1953 Acts the Department of Māori Affairs continued with land development programmes, with the Court often playing a central role in the oversight of such development schemes as the examples of Judges Acheson and Harvey have demonstrated. Then after many years of debate and consultation the passage of the 1993 Act and its objects of retention, utilisation and development, dramatically altered the landscape. Alienation was made more difficult, as was partition and the change of status from Māori to General land. The concepts of 'whāngai' and preferred class of alienees were introduced into the legislation, along with the whānau trust, underscoring the principle of retention for owners, their whānau and hapū. New land management entities were also provided

²⁸⁸ *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero* n 226 at 88. See also Chief Judge Joe William "The Maori Land Court – a Separate Legal System?" ("Speech to the Faculty of Law Zealand and the New Zealand Centre for Public Law, Victoria University, Wellington) 10 July 2001.

for under the Act which enabled owners to continue to develop their lands in accordance with their own priorities.

All the while the Court continued to function in accordance with its own customs and practices as a distinctly Māori court, often adopting marae kawa in its procedures, while continuing to sit on marae where appropriate. It also provides an accessible forum for debating land matters and facilitating outcomes between land owners, their whānau and hapū. From time to time, the Court is required to adjudicate disputes consistent with orthodox litigation principles but even then, important differences and distinctions often remain evident when compared with mainstream courts. That a major part of the dispute resolution aspect of the Court's work involves land management entities and their relationships with their owners is unsurprising, given the importance and scale of those trusts and incorporations to the owners and shareholders.

Māori land trusts have continued to develop and prosper since the Act came into force. Many measure their assets in the tens and hundreds of millions with incomes to match and some are even larger than tribal post settlement governance entities. They provide employment, dividends, grants and other forms of support for their owners and local communities and are often seen as advocates for the interest of their respective owners and hapū. The most popular form of trust in this context is the ahu whenua trust and the great majority of Māori land blocks under management invariably have an ahu whenua trust administering their activities. While there are several Māori land incorporations that are also significant in size and in the scale of their operations, it is the ahu whenua trust that is the vehicle of choice for the great majority of Māori land owners. How those trusts operate under the Act including their supervision by the Court is therefore of considerable importance to the trustees and owners of those lands.

CHAPTER FIVE - AHU WHENUA TRUSTS

The institution of ahu whenua trust was created by the Te Ture Whenua Maori Act 1993 and replaced what had previously been known as “s 438 trusts”, a reference to s 438 of the Maori Affairs Act 1953. Section 438 trusts were a favoured method of the Maori Land Court in achieving efficient management of Maori land. They were a pragmatic response to fragmentation of often absentee ownership interests. All existing s 438 trusts became ahu whenua trusts when the Te Ture Whenua Maori Act came into force. As of 2012, some 5,575 ahu whenua trusts were in existence.²⁸⁹

Introduction

With the background of the proposed reform process in mind, consideration of the existing legislative regime as to whether the Act impedes utilisation is necessary to contrast its key provisions with those of the Bill. One of the central questions for assessment therefore is whether the current law provides an appropriate balance and a sufficiently broad framework to enable trustees and owners to develop their land, while at the same time ensuring that the necessary checks and balances exist and are applied. It is also a question, this researcher suggests, of whether the appropriate balances exist or need reform, between a continuing paternalism (perceived or otherwise) inherent in the oversight of ahu whenua trusts by the Court, and an essentially unregulated approach where trustees are relatively unconstrained by legal frameworks and accountability. By way of explanation, while it is correct to observe that trustees of ahu whenua trusts are bound by general trust law principles and their own trust orders, rules are only as effective as they are capable of enforcement. This issue will be discussed further in Chapter Eight.

Background

It is settled law that the duties and obligations of governors to the trust beneficiaries are paramount and none more so than the duties of acquaintance and prudence.²⁹⁰ Trustees of Māori land trusts have the same obligations as trustees of General law trusts as well as having to understand and be responsive to cultural considerations sometimes involving complex overlays of tikanga and lore.²⁹¹ This is especially the case with trusts over Māori reservations, including marae, urupā, wāhi tapu and other

²⁸⁹ *Fenwick v Naera* above n 260 at [146] per Young J.

²⁹⁰ See generally, Garrow & Kelly *Law of Trusts and Trustees* (7th ed Lexis Nexis, Wellington, 2013) at Chapter 29.

²⁹¹ *Rameka v Hall* [2013] NZCA 203 at [78].

places of cultural and historical significance to the owners.²⁹² That said, it is also clear that these considerations do not override the trustees' orthodox legal obligations and duties.²⁹³ Under the Act, trustees hold office at the discretion of the Court, which must be satisfied as to their ability, experience and knowledge and that they are "broadly acceptable" to the beneficiaries, per s 222 of the Act. While they may retain that mandate, in time and due to changing circumstances, that broad acceptability may alter and even be lost. Where a trustee no longer commands the support of the trust beneficiaries, removal from office is usually inevitable.²⁹⁴

Moreover, as a point of general principle, it is also important to note that neither trustees nor the Court are bound by the outcomes of meetings of owners, except in a limited range of situations.²⁹⁵ Most ahu whenua trusts will function efficiently and profitably for generations and without conflict or controversy. Others will become mired in disputes that continue over years rather months.²⁹⁶ A further group may need assistance to dispose of difficulties precipitated by a previous regime of maladministration and this is where the registrar, per s 40 of the Act, can be of considerable support. While it is correct that only owners or trustees may activate reviews, the Court can always, where appropriate, invoke s 238 of the Act, which enables a Judge to request a report from trustees on their activities "at any time" and to answer any questions that may be relevant.²⁹⁷

When applying to establish a trust, owners often ensure that the terms of trust are current and relevant to the particular land and its beneficiaries, considering the purpose of the trust and the nature of its land and other assets. Many trusts, however, still operate with outdated terms that can be problematic, invariably

²⁹² See *Gibbs v Te Rūnanga o Ngāti Tama* (2011) 274 Aotea MB 47 (274 AOT 47) and *Taueki v McMillan - Horowhenua 11* (Lake) (2014) 324 Aotea MB 144 (324 AOT 144).

²⁹³ *Rameka v Hall* above n 291 at [78].

²⁹⁴ See *Ellis v Faulkner – Poripori Farm A Trust* (1996) 57 Tauranga MB 7 (57 T 7); *Rātima v Sullivan – The Tatarakina C Trust* (2015) 41 Tākitimu MB 102 (41 TKT 102); and *Rameka v Hall* above n 291.

²⁹⁵ *Hemi v Proprietors of Mangakino Incorporation* (1999) 73 Taupō MB 30 (73 TPO 30). For example, the Court can no longer vary trust orders of its own motion but must be satisfied that the sufficiency of notice, opportunity for discussion and support tests have been met.

²⁹⁶ See for example, *Paki v Māori Land Court* above n 256; *Fenwick v Naera* above n 260; *Papaaroha – Nicholls v Nicholls - WT Nicholls Trust* (2013) Māori Appellate Court MB 598 (2013 APPEAL 598) and *Pue v Kīngi - Te Rūnanga o Ngāti Maru (Taranaki) Whenua Tōpu Trust* (2015) 335 Aotea MB 1 (335 AOT 1).

²⁹⁷ See *Rameka v Hall* above n 291 at [43].

because they do not speak to the issues confronting trustees. It is also important for owners and trustees to ensure that the terms of trust include provisions for a range of accountability mechanisms as, left unchecked, the consequences can be destabilising and in extreme examples, catastrophic for the trust and the owners.²⁹⁸

Objects and purposes

There are in excess of five thousand ahu whenua trusts in existence compared with some 159 Māori incorporations and thirty three whenua tōpu trusts.²⁹⁹ They hold the largest amount of Māori land currently administered by a management structure and, as their annual reports confirm, are involved in a wide range of activities including leasing, cropping, dairy, sheep and beef farming, viticulture, aquaculture, geothermal and wind farm energy generation, hotels, hospitality and tourism, as well as more orthodox investments in commercial property, equities and term deposits.³⁰⁰

The role of the Māori Land Court

In *Fenwick v Naera* the Supreme Court commented on the overarching jurisdiction of the Māori Land Court contrasted with the High Court, over ahu whenua trusts in the following terms:³⁰¹

Ahu whenua trusts are also unusual in the way in which they are established and closely supervised by the Māori Land Court. The beneficiaries argue that, while the Māori Land Court has broad powers, the High Court has similar broad powers of review, but these do not supplant the specific rules of the common law and equity setting out what forms of relief ought to be available and in what circumstances. While that may be true, the Māori Land Court's role is very different from that of the High Court. The Māori Land Court is actively involved in setting up of trusts under the Act, sets the contents of the trust order, appoints the trustees, and has a major role in the governance and review of Māori trusts. While the High Court has jurisdiction over trusts, its role in trusts is not comparable to the Māori Land Court's special involvement in trusts created under the Act.

²⁹⁸ See *Adlam v Savage* above n 267 where a former trustee must repay \$14 million to an ahu whenua trust following an exhaustive trial process that eventually ended in the Supreme Court.

²⁹⁹ *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero* above n 226. However, see Dewes, Martin and Walzl, *Owners' Aspirations Regarding the Utilisation of Māori Land* above n 14, at 61, which refers to 51 whenua tōpu trusts. See also T Juliet Chevalier-Watts "New Zealand and Maori Land Trusts" *Trusts & Trustees*, Vol. 22, No. 2, March 2016, at 211–226.

³⁰⁰ See Pukeroa Oruawhata Trust *Annual Report 2016*: <www.rotorua.deloitte.co.nz>; Tuaropaki Trust: <www.tuaropaki.com/home>; Palmerston North Maori Reserve Trust: <www.tekau.maori.nz/PalmerstonNorthMaoriReserveTrust>.

³⁰¹ *Fenwick v Naera* above n 260 at [120]. The High Court retains oversight of all trusts in accordance with its inherent jurisdiction per *Te Ture Whenua Māori Act 1993*, s 237(1).

The role of the Māori Land Court in its supervisory jurisdiction is therefore quite distinct. It is important to trustees and beneficiaries alike, given the circumstances of Māori land tenure, the impacts of individualisation and the large percentage of disengaged owners. Even so, the case law demonstrates that, while many proceedings continue to be pursued before the Court, the great majority of ahu whenua trusts, like incorporations, continue to perform and function perfectly adequately and even beyond owners' expectations without any need for recourse to or intervention by the Court.

In any event, the Act provides a legislative regime that certainly contrasts with that under the general law to some extent; and as foreshadowed, that is because of the practical reality that with most trusts, especially the medium and larger scale entities, only a tiny fragment of the ownership is engaged, if at all. So, the election and appointment of trustees and their supervision sits at the centre of much of the orthodox litigation before the Court.³⁰² At the risk of belabouring the point, this should always be borne in mind when considering the role of the Court and its oversight of ahu whenua trusts.

In this context, and in terms of the proposed reforms, a critical mechanism to assist owners in maintaining the accountability of their trustees are the powers of review and removal and the ability of trustees and owners to seek directions from the Court at any time. This is where the accessibility of the Court becomes important, since a remedy that is inaccessible is not a remedy at all. The filing fee in the Māori Land Court is \$61 which can be waived on application. Counsel are not mandatory and, as foreshadowed, up to ninety percent of applications heard before the Court are led by the affected owners themselves. Where owners seek directions, a review, replacement, removal and even the termination of a trust are possible, since, unlike the situation with Māori incorporations, there are no mandate thresholds.³⁰³ In other

³⁰² In recent years, many of the appeals and proceedings for judicial review from the Māori Land and Māori Appellate Courts concern trusts over Māori land, the activities of the trustees and their election. For examples, see *Fenwick v Naera* above n 260; *Adlam v Savage* [2016] NZCA 454; *Paki v Māori Land Court* above n 256; *Te Aute Trust Board v Hauraki & Ors* [2014] NZCA 532; *Rameka v Hall* above n 291; and *Clarke v Karaitiana* above n 260.

³⁰³ Where a shareholder in a Māori incorporation seeks an investigation by the Court, 10 percent of the shareholding must support the application or a special resolution at a general meeting endorsing an investigation application must have been passed: *Te Ture Whenua Māori Act 1993*,

words, it takes only one owner to bring an application for directions, review, replacement, enforcement, removal and termination. This low threshold has been criticised, with the result that, under the Bill, higher thresholds were proposed that, had they been in place at the relevant times, would have prevented many of the cases discussed in this chapter from being heard.³⁰⁴ This issue is discussed further in Chapter Eight.

The powers of trustees of ahu whenua trusts

Trustees of ahu whenua trusts invariably possess all the powers and authorities of legal owners; including the ability, where provided for in their trust orders, to alienate the land by lease or licence, to make provision for owners, to invest, borrow and create subsidiaries. Trustees can also mortgage the land or any lease or licence in place, since under the Act a mortgagee sale is not an alienation. In short, trustees can do anything an owner can do except alienate the freehold, unless the strict alienation provisions of the Act are met. That will involve securing the support of seventy-five per cent of the owners of the land before any sale can be contemplated. Thus, once a trust is created or its terms of trust modified to a wide powers trust order, then the trustees can undertake any number of activities, without the need for recourse to the Court.

This position was confirmed by the Māori Appellate Court in *Karena – Owhaoko C1, C2, C4, C5 & C7* where the Court held that cl 3 of the standard wide powers trust order empowered the trustees to act as absolute owners:³⁰⁵

Put simply, the Trustees have the powers of absolute owners. They can do anything an absolute owner is entitled to do except sell the land. Sub clauses 3(b)(i) to (xviii) provide an inclusive rather than exclusive list of powers "for emphasis and clarification". In other words, the inclusion of the phrases "without limiting the generality" and "to extend the powers" underscores the need for a broad interpretation.

s 280(3)(a) and (b). See also *Morrison – Ngāti Whakaue Tribal Lands Incorporation* (2004) 283 Rotorua MB 264 (283 ROT 264).

³⁰⁴ See Waitangi Tribunal *He Kura Whenua Ka Rokohanga* above n 41 at 309-315.

³⁰⁵ *Karena – Owhaoko C1, C2, C4, C5 & C7* (2004) 14 Tākitimu Appellate MB 4 (14 ACTK 4) at 14.

Then in *Naera v Fenwick* the Court of Appeal confirmed the scope of cl 3, endorsing the view of the Māori Appellate Court that it means what it says – trustees can undertake a wide range of activities short of selling the freehold:³⁰⁶

[33] We are satisfied that the interpretation given by the Appellate Court is correct and for the reasons given. Such interpretation is consistent with the language of cl 3(b) which not only explicitly recognises the generality of cl 3(a) but also emphasises, clarifies, and extends the powers of the trustees. Any other interpretation would be strained.

Moreover, as trusts like Tuaropaki, Lake Taupō Forest, Palmerston North Reserves and Pukeroa Oruawhata have demonstrated, using the wide powers trust order, considerable financial success can be achieved under the Act, contrary to unsubstantiated assertions that “the current regime poses significant transactional barriers and costs to executing decisions, even when a group of owners have informed, empowered management.”³⁰⁷ Indeed, many successful trusts, even those with only middling results – such as the trusts that belong to the Hapū that is the subject of this research – have achieved those outcomes with minimal involvement of the Court.

What follows is a discussion of key provisions that directly affect the operation of ahu whenua trusts, including those of the Hapū, taking into account limitations of space, including:

- (a) the appointment, review and removal of trustees;
- (b) the enforcement of obligations of trust;
- (c) trust orders and trustee remuneration; and
- (d) the termination of trusts.

Section 220 and 222: Appointment of trustees

Consistent with orthodox trust law principles, the role of a trustee is critical to the success or failure of the trust because it is the trustee who is the legal owner entitled to make all the decisions about the land. The evidence of the relevant case law also confirms that the success of a trust will depend on the ability and skills of the

³⁰⁶ *Naera v Fenwick* [2013] NZCA 353 at [33].

³⁰⁷ Waitangi Tribunal *He Kura Whenua Ka Rokohanga* above n 41 at 115.

trustees.³⁰⁸ Under the Act, a trustee may be an individual, a Māori Trust board established under the Māori Trust Boards Act 1955, a Māori incorporation, the Māori Trustee, the public trustee or a trustee company.³⁰⁹ It is also important to underscore that the role of a trustee formally appointed by the Court following an election by the owners can take one of three separate statuses: responsible, advisory or custodian.³¹⁰

Under the Act it is the Court that must formally appoint trustees. Under the general law trustees are appointed according to the trust instrument. In this way, Māori land is unique, or as some have posited, archaic in the context of owner autonomy.³¹¹ It is certainly arguable, this researcher would contend, that given the significant increase in the number of settlements between the Crown and tribal interests (where the appointment of trustees and directors is an internal process), that the continuing necessity for Court endorsed appointments for ahu whenua trusts may no longer be appropriate.

The decision of the Court of Appeal *Clarke v Karaitiana* is the leading authority on the appointment of trustees to ahu whenua trusts.³¹² It was confirmed by this case that the Māori Land Court is not bound to appoint the leading candidates from an election because a nominee who has support from the owners might nonetheless be unsuitable because of lack of ability, experience and knowledge or for other reasons, including conflicts of interest. The *process* of election during a meeting is therefore pivotal, since it is important that owners are properly informed as to not only the skills a nominee may possess, but whether there are any other relevant considerations. This might only be apparent once a close questioning of a candidate occurs. So, it will be important for the process to include appropriate notice to the owners; and ideally, the attendance of nominees at owners' meetings.

³⁰⁸ For example, compare the 2016 financial performance of the Pukeroa Oruawhata Trust with Parengarenga 3G: <www.rotorua.deloitte.co.nz> and Lois Williams "Pair charged with fraud over disappearing \$1m" (12 October 2017) Radio New Zealand <www.radionz.co.nz>.

³⁰⁹ Te Ture Whenua Māori Act 1993, s 222

³¹⁰ Te Ture Whenua Māori Act 1993, ss 224-225.

³¹¹ Waitangi Tribunal *He Kura Whenua Ka Rokohanga* above n 41, at 167.

³¹² *Clarke v Karaitiana* above n 260. See *Perenara v Pryor* above n 283 and *Marino – Repongaere 4G (Part) – Rongopai Marae* (2004) 10 Waiāriki Appellate MB 233 (10 AP 233) for decisions concerning the appointments and the role of trustees to Māori reservations.

In that context, *Baker – Tatarakina C Block* is relevant as it involved the appointment of trustees where the Court considered that nominees must be present at the meeting, consistent with custom that communication and discussion should be *kanohi ki te kanohi* (face to face).³¹³ Moreover, the importance of ascertaining the views of the owners before deciding on who to appoint was reiterated in *Tito v Tito* where it was determined that the Court could not invoke s 237 of the Act as a means of avoiding the requirements of s 222.³¹⁴ The Māori Trustee could only be appointed, the Court of Appeal decided, if he was broadly acceptable to the beneficiaries; and since in this case he was not, the appointment would have to be revoked.

General meetings and voting

General meetings of owners are the principal means by which the beneficial owners in the land (or the beneficiaries of the trust in the case of a *whenua tōpu* trust), can receive information on the performance of the trust, including the opportunity to inspect accounts and any annual or strategic plans, question the trustees as to their activities, express support or no confidence in them and generally to provide feedback to trustees on any current projects or proposals. General meetings are also the venue for the election of replacement trustees. They are therefore regarded as very important by owners and trustees alike, since it is the only time usually where the two groups can meet formally and discuss within a structured setting any issues that require consideration. Trust orders of many trusts, especially the larger ones, contain mandatory provisions about annual, biennial or triennial general meetings and some even include details of the methods of advertising and the conduct of the meeting generally.³¹⁵ With the increase in Treaty settlements and the use by some *iwi* and *hapū* of the *whenua tōpu* trust, trust orders are starting to resemble the constitutions and charters of post settlement governance entities and include a high

³¹³ *Baker – Tatarakina C Block* (1995) 11 Tākitimu Appellate MB 50 (11 ACTK 50).

³¹⁴ *Tito v Tito* [2012] NZCA 493. See *Procter - Horowhenua 11* (2012) 293 Aotea MB 165 (293 AOT 165); *Wall v Karaitiana - Tauhara Middle 15* (2011) 38 Waiāriki MB 218 (38 WAR 218); *Re Muaupoko Land Trust* (2006) 169 Aotea MB 237 (169 AOT 237) and *Rudd Senior v Procter - Horowhenua 11 (Lake) Trust* [2012] Māori Appellate Court MB 107 (2012 APPEAL 107).

³¹⁵ See for example, clause 6 of the trust order for the large Lake Taupo Forest Trust which includes details on which newspapers must be used for general meeting notices, namely the New Zealand Herald and The Dominion Post: 351 Aotea MB 100-103 (351 AOT 100-103) dated 18 April 2016.

level of prescription as a means of avoiding unnecessary dealings with the Court or more commonly as a way of providing for a greater degree of owner control and supervision.³¹⁶

In any case, a further complication in the context of elections is where a trust order is silent on the mode of voting, as well as the matters that can properly be put up for a vote and indeed, the effect of any vote. In *Thomson v Newton – Pokuru IA1B2 and IA2D2* the Māori Appellate Court noted that a meeting of beneficial owners had no formal requirements as to quorum or voting as the trust order was silent on the point. Moreover, neither the Trustee Act 1956 nor the Act itself make provision as to the *manner* of voting.³¹⁷ The Appellate Court then made the point that in such a void voting by ‘one owner one vote’ equally weighted, would be the default position:³¹⁸

Trustees are appointed in accordance with statute or the trust document. In this present instance the trust document is silent as to the matter of appointment of trustees and neither the Trust Act 1956 nor the Te Ture Whenua Māori Act 1994[sic] make any provision as to the manner or voting on these matters. A vote by poll is not essential nor warranted and a consensus is more appropriate and better meets the provisions of section 17 (2)(c) of the Act, whereby a balance is achieved between major and minor owners.

This general point, as to the relevance, purpose and effect of voting within ahu whenua trusts, was highlighted by Judge Savage in his well-known decision *Hemi v Proprietors of Mangakino Township*:³¹⁹

Some may argue for one man one vote and others for voting by shares. Both have only dubious validity in Maori tradition. They are both the logical consequence of individualisation of title and ownership by this Court. The very idea of voting and majority rule whether by number or shares has doubtful validity in Polynesian tradition. In a legal sense also, the voting is of doubtful use. Voting by beneficiaries is not orthodox in general trust law. It has been grafted onto the Trust system by this Court to make the structure conform to an extent with the Incorporation mode and to give owners the opportunity to have their say. The result however except in some very specific circumstances does not decide anything. Voting is a device for making

³¹⁶ See the trust orders for Ngāti Te Whiti Whenua Tōpu Trust: 325 Aotea MB 17-23 (235 AOT 17-23) dated 22 August 2014; Rotoehu Forest Trust: 42 Waiāriki MB 140-141 (42 WAR 140-141) dated 31 October 2011; and Pakaitore Trust: 235 Aotea MB 189-192 (235 AOT 189-192) dated 21 July 2009.

³¹⁷ *Thomson v Newton – Pokuru IA1B2 and IA2D2* (1997) 19 Waikato Maniapoto Appellate MB 66 (19 APWM 66). That said, see Te Ture Whenua Māori Act 1993, s 215(5) which refers to trustees holding the assets in trust “for the persons beneficially entitled to the land in proportion to their several interests in the land”.

³¹⁸ At 67-68.

³¹⁹ *Hemi v Proprietors of Mangakino Township* above n 295.

the views and the strength of those views known to the Trustees and the Court. It gives the owners a venue and structure for discussion. One only has to look at the Trust order in this particular case. There is provision for voting by show of hands and the use of proxies. The Trust order is however silent as to what may be voted on and the effect of that vote.

As the Judge notes, there are the core issues of what exactly beneficiaries or owners in a Māori land trust, holding less than fifty percent of the shares, can vote on, where both the legislation and the trust order are silent, in addition to the question of what is the *effect* of their vote on the trustees and the Court? That said, the superior courts have confirmed that, certainly in terms of elections, the views of the owners will be a major consideration, not easily departed from when appointments are made, notwithstanding the lower levels of participation from amongst the owners of the land. In any event, these observations emphasise the unique challenges that the owners and governors of Māori land must deal with, where far less than a majority of the ownership will ever participate and where, because of succession, the numbers of owners will only ever increase, notwithstanding the popularity of whānau trusts.³²⁰

The obvious comparison in terms of participation levels and therefore mandates from the relevant constituency is with post settlement governance entities; bodies that also hold kin owned assets – resources that are held invariably on trust for a group of individuals related by blood.³²¹ For example, with Te Rūnanga o Ngāti Awa, the iwi authority for the Ngāti Awa tribe, the quorum for a general meeting is seventy registered beneficiaries, with at least five hapū represented, and a majority of trustees being present (twelve out of twenty two).³²² With over eighteen thousand registered beneficiaries, this represents less than one percent of the ownership, yet at a general meeting, resolutions for the changing of the terms of the tribal charter or constitution can be made, including the addition or removal of hapū as well as altering the thresholds for major transactions. Where an election is held for board members on a triennial basis; on average well below twenty percent of a possible constituency will participate, or less than the participation levels for local body elections.

³²⁰ This is in part due to the rise in voting in person rather than by shares, and where grants and other forms of distribution require ownership in the land for entitlement.

³²¹ See Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase: An Advisory Report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP 13, 2002); *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, 2006).

³²² Te Rūnanga o Ngāti Awa Charter, cl 14.9.

In *Te Rimu Trust*, the law on voting at meetings was summarised, and the Court decided to take into account both voting by shares and by show of hands.³²³ To underscore the complications that arise in this important area of administration for ahu whenua trusts, several cases highlight the different issues that can arise from time to time. For example, *Parihaka X* considers voting by shares or show of hands, where once again a trust order provides no guidance.³²⁴ In *Goldsmith – Matatā 63Z* the use of powers of attorney and proxies was discussed, with an opinion differing from an earlier decision on the issue of one individual possessing numerous powers of attorney and attempting to use them on a ‘one person one vote’ basis.³²⁵ Then, in *Trustees of Lake Horowhenua Trust – Horowhenua Block 11 (Lake Horowhenua)*, the Court considered the election of trustees and voting by ballot, noting that the test in s 222 of the Act refers to nominees being “broadly acceptable” to the trust’s beneficiaries.³²⁶ A complex historical process of voting by hapū on a representative basis was discussed in the recent decision *Rihia v Te Rūnanganui o Ngāti Hikairo* in relation to the appointment of trustees, and the voting procedure that had been provided for in the trust order for several decades.³²⁷

All these cases demonstrate the complexities that can arise where overlapping interests exist based on shareholding or ‘one owner one vote’. The cases, arguably at least, also underscore the utility for trustees and owners of having ready access to an independent and inexpensive judicial forum for the, ideally, prompt determination by direction or decision of issues that can and do arise from time to time. As the authors of *Garrow & Kelly* comment, it is often more efficient for trustees and beneficiaries to seek directions on trust issues from the Māori Land Court rather than any other.³²⁸

³²³ *Bidois v Trustees of Te Rimu Trust* (2013) 31 Tairāwhiti MB 95 (31 TRW 95).

³²⁴ *Parihaka X* (2005) 154 Aotea MB 45 (154 AOT 45).

³²⁵ *Goldsmith - Matatā 63Z* (2006) 110 Whakatāne MB 295 (110 WHK 295). See also *McLelland – Ngāti Hine H2B* (2011) 21 Taitokerau MB 57 (21 TTK 57) the appointment of trustees, voting methods and procedural irregularities that included non-owners participating in the election.

³²⁶ *Trustees of Lake Horowhenua Trust – Horowhenua Block 11 (Lake Horowhenua)* (2012) 285 Aotea MB 135 (285 AOT 135).

³²⁷ *Rihia v Te Rūnanganui o Ngāti Hikairo* (2012) 287 Aotea MB 44 (287 AOT 44).

³²⁸ *Garrow & Kelly, Law of Trusts and Trustees* above n 290 at 897.

Section 226: Trust orders and trustee remuneration

Another area of considerable case law and comment for ahu whenua trusts, where the supervisory role of the Court is apparent, concerns fees and expenses and how these may be provided for in the terms of trust. This is because, as foreshadowed, given the tiny minority of the ownership that engages in the business of a trust, it is essential that appropriate guidelines and rules are laid down and adhered to as a means of ensuring that the principles of trust law are applied to enable the trust to remain viable. In the absence of such supervision, problems can and do arise. Indeed, even where there is the jurisdiction for supervision, matters can go awry in disastrous fashion where significant sums of trust funds are either put at risk or lost to the trust as a direct result of the actions of trustees.³²⁹ The example of *Adlam v Savage* involved a successful claim for breach of trust against a former trustee who was ordered to repay in total some \$14 million back to the trust. Further down the scale are those examples where payments have been made by trustees to themselves in breach of the trust order and, in some cases, have had to be repaid.³³⁰

In any event, it is well settled that, inherent in the office of trustee is the prohibition against payment and profit.³³¹ Even so, it is also accepted that trustees are entitled to reimbursement for costs properly incurred in undertaking legitimate trust business and, in certain circumstances, fees.³³² Exceptions are permitted per s 237 of the Act, taking into account the conditions set out in s 72 of the Trustee Act 1956.³³³ One important example is *Tauhara Middle 4A2B2C (Opepe Farm Trust)* which concerned an application for relief of liability for the retention of unauthorised trustees' fees.³³⁴ Judge Savage held that the onus was on the trustee seeking relief to

³²⁹ See *Adlam v Savage* above n 267 and *Adlam v Savage & Ors* [2016] NZCA 454; *Slade – Parengarenga 3G* (2014) 87 Taitokerau MB 46 (87 TTK 46).

³³⁰ *Horsfall v Marino* above n 312; *Moeahu v Winitana – Waiwhetu Pā No 4* (2014) 319 Aotea MB 166 (319 AOT 166); *Tupe Snr v Everton – Manunui No.1 4th Residue Ahu Whenua Trust* above n 269; *Rātima v Sullivan – Tātaraakina C Trust* (2017) 64 Tākitimu MB 121 (64 TKT 121).

³³¹ *Robinson v Pett* (1734) 3 P Wms 249.

³³² *Re Grimthorpe* [1958] Ch 615 (Ch) at 623. See also *Turner v Hancock* (1882) 20 Ch D 303 (CA) at 305. In *Paehinahina Mourea* (1995) 237 Rotorua MB 114 (237 ROT 114) the Court affirmed the general rule that trustees should not profit and are not entitled to remuneration.

³³³ *In re Waipapa 9* (1995) 67 Taupō MB 10 (67 TPO 10) it was determined that trustees do not have a right to obtain income as trustees, except insofar as the trust order specifically permits.

³³⁴ (1996) 68 Taupō MB 27 (68 TPO 27).

establish that he or she has acted honestly and reasonably, per s 73 of the Trustee Act 1956; an approach followed in other comparable cases of trustee overpayments.³³⁵

In *Trustees of Tuaropaki Trust – Tuaropaki E* the Court determined that the trustees and owners needed to be involved in deciding whether directors of subsidiaries of trusts should be paid a fee.³³⁶ Invariably, this requirement will include the approval of the owners given at annual meetings, and appropriate disclosure in the annual accounts. This is an area of continuing development since it has been suggested that it could be *ultra vires* the trust order for trustees to pay themselves through a subsidiary company contrary to the terms of trust, especially where the trust order required approval.³³⁷ Then in *Trustees of Pukeroa Oruawhata Trust – Pukeroa Oruawhata Trust* the Court noted that a trustee should not suffer loss from the discharge of this or her trusteeship, and that an annual rather than a ‘per meeting’ fee basis was likely to prove a more practical approach.³³⁸ One trustee had attended over sixty-nine meetings in a year, and so it would eventually be resolved by the owners that an annual stipend should be paid to all trustees regardless of the number of meetings they attended. In this way, the trust would become more self-regulating, since it was assumed that any significant absenteeism would not be tolerated.

This can be contrasted with *Trustees of Pukeroa Oruawhata – Pukeroa Oruawhata Trust* which dealt with the rejection of proposals to award retiring trustees with ‘golden handshakes’ or the proposed payment of a retirement honorarium, which had been approved at an owners’ meeting.³³⁹ The notion of an ex gratia payment was also discussed in *Mika – Te Manawa o Tūhoe* where, as in the *Pukeroa* case, it was

³³⁵ See *Tupe Snr v Everton* above n 269 at 227.

³³⁶ *Trustees of Tuaropaki Trust - Tuaropaki E* (2002) 77 Taupō MB 25 (77 TPO 25). The Tuaropaki Trust is the largest ahu whenua trust by value with net assets exceeding \$600 million. Tellingly, the trust, in its submission on the Bill, argued that it could see no value in the change and demanded and was granted an exemption from the Bill in its entirety: Te Ture Whenua Māori Bill, Schedule 1, cl 12.

³³⁷ The trust order for Pukeroa Oruawhata Trust provides in cl 1 that the trust applies to all assets of the trust including land and shares in any company established by the trustees: 28 Waiāriki MB 204-224 (28 WAR 204-224) dated 14 March 2011.

³³⁸ *Trustees of Pukeroa Oruawhata Trust – Pukeroa Oruawhata Trust* (2003) 277 Rotorua MB 285 (277 ROT 285).

³³⁹ *Trustees of Pukeroa Oruawhata Trust - Pukeroa Oruawhata Trust* (2010) 5 Waiāriki MB 297 (5 WAR 297).

proposed that trustees be rewarded for past services.³⁴⁰ Then in *Walters - East Taupō Lands Trust* the issue of the approval for payment of fees retrospectively, that fees were paid in breach of the terms of trust was considered. It was highlighted in that case that over forty percent of the trust's gross income was being consumed by administrative costs and expenses, and that that included the fees paid to trustees in breach of their trust order – hardly an attractive outcome for the owners or the trustees.³⁴¹ In some cases, trustees have also been ordered to repay fees that have been received contrary to the trust order and general trust law principles.³⁴²

The short point is that the Court will exercise its supervisory jurisdiction regarding costs, as well as ensuring appropriate terms are included in the trust order that either require the Court's approval for any fee increases or set in place a process that includes owner input and the procuring of independent expert advice on remuneration changes. Many of the larger and more sophisticated trusts opt for the latter approach and even where the Court retains an approval function; subject to the two-step approach of obtaining independent advice and obtaining the approval of owners, it is rare for changes to remuneration to be declined. As with the *East Taupō Lands Trust* and *Manunui* examples, there are unfortunately, all too many cases of lay trustees acting either without advice or in defiance of such advice to pay themselves more than the amounts their terms of trust permit, or to incur expenses found to be unreasonable, for the benefit of the trustees.³⁴³ This may occur even to the point where the financial viability of the trust is put at risk by repeated fee payments in consecutive years that result in continual loss-making and therefore an inexorable erosion of the trust capital.

Section 231: Review of trusts

One of the ways owners can petition the Court to monitor the success or otherwise of a trust is through the provision of regular reviews, especially where their own efforts have been unsuccessful in that trustees have either failed to respond meaningfully or

³⁴⁰ *Mika – Te Manawa o Tūhoe* (2012) 54 Waiāriki MB 16 (54 WAR 16).

³⁴¹ *Walters - East Taupō Lands Trust* (2011) 271 Aotea MB 241 (271 AOT 241).

³⁴² See above n 294.

³⁴³ See *Rātima v Sullivan* above n 294 at 121 where the former trustees ignored legal advice that they could not pay themselves for particular purposes. They are now required to repay some of those funds back to the trust. See also *In re Waipapa 9* (1995) 67 Taupō MB 10 (67 TPO 10) and *Tupe Snr v Everton* n 269.

have not replied at all – not an uncommon occurrence. Under s 351 of the Act, all s 438 trusts, (being those created under s 438 of the Māori Affairs Act 1953) and the predecessor to ahu whenua trusts, were subject to compulsory review within three years.³⁴⁴ However, many did not comply, invariably because they were unaware of the provision. It should be noted that not all ahu whenua trusts are required to hold annual general meetings and while many trust orders contain mandatory clauses on the preparation and filing of audited annual accounts, there has been a high level of noncompliance in some districts.

A review of the Act was undertaken in 1998-1999 which eventually resulted in the Te Ture Whenua Māori Amendment Act 2002 which, amongst other things, removed the ability of the Court to initiate reviews on its own motion.³⁴⁵ This policy developed during a period where it was believed that the Court, especially during the 1980s under the 1953 Act and in the 1990s, was intervening too regularly in the business of trusts and removing trustees, even where the trust had taken advice.³⁴⁶ The 2002 Amendments reduced the number of times owners can initiate reviews to once every twenty four months.³⁴⁷ That said, many trusts include an automatic review clause in their trust orders. In short, the powers of the Court to review trusts on the initiative of owners or trustees themselves is an important means of ensuring that the process of inquiry can begin as to whether trustees are acting prudently and in accordance with their trust orders and general trust law principles.

A seminal case on the jurisdiction of the Court over trusts in the context of review is *Proprietors of Mangakino Township v Māori Land Court* where the Court of Appeal confirmed that the Māori Land Court possesses all of the same powers and authorities as the High Court in respect of trusts.³⁴⁸ Section 237 provides that the Court shall have “all the same powers and authorities as the High Court has (whether by statute or by any rule of law or by its inherent jurisdiction) in respect of trusts

³⁴⁴ Te Ture Whenua Māori Act 1993, s 351(1).

³⁴⁵ Te Ture Whenua Māori Act 1993, s 231(1). See also Waitangi Tribunal *He Kura Whenua Ka Rokohanga* above n 41 at 104.

³⁴⁶ Minutes of a Meeting between the Federation of Māori Authorities and the New Zealand Māori Council 1997. See also Waitangi Tribunal *He Kura Whenua Ka Rokohanga* above n 41 at 104-109.

³⁴⁷ Te Ture Whenua Māori Act 1993, s 231(2).

³⁴⁸ *Proprietors of Mangakino Township* above n 254.

generally.” In other words, the Court is said to have the most extensive supervisory powers, a view echoed by the Supreme Court in *Fenwick v Naera*.³⁴⁹ The Court of Appeal considered the nature of a s 231 review in this way:³⁵⁰

[19] We entirely agree with McGechan J that a review of the trust cannot sensibly be conducted unless the Court pays some regard to its performance — how well or how badly have its affairs been running? That necessarily requires the Court to look at the competence of the trustee(s). What Parliament has called for in ss 231 and 351 is a general review of the trust's governance and management of its assets on behalf of the beneficial owners. Are those assets being administered in the best interests of the beneficiaries? Is the trust fulfilling its purpose as an ahu whenua (care of the land) trust, as that purpose appears from the statute (s 215, read in the light of the preamble to the Act and s 2) and from the objects stated in the trust order? ...

[21] In carrying out a general review of this kind the Court ought to concentrate on the broader picture and not become drawn into matters of detail, but it is in our view impossible to see any bright line between matters of governance and policy, on the one hand, and questions of operational management, on the other. As McGechan J appreciated and as is reflected as well in comments of Judge Savage during one of the hearings, it comes down to a question of common-sense how far into the affairs of a trust the Māori Land Court should burrow. Certainly, its primary focus ought to be on the policies that the trust is pursuing and on how in a general way those policies are being implemented, but in order to see whether a policy is working at ground level in the best interest of the beneficiaries the Court can hardly avoid some consideration of particular operational matters.

In the context of review, the Court of Appeal also noted that, where appropriate, the Māori Land Court could commission its own evidence, per s 69 of the Act. This decision is therefore authority for the Māori Land Court to approach a review of trust in broad terms while reserving to itself the right to explore more detailed performance issues that can and do involve a careful assessment of a trust's financial situation as against general trust law principles and the trust order, as the following cases demonstrate.

In *Hall v Opepe Farm Trust*, following a bitterly contested claim of trustee incompetence and failure, the Court extended the tenure of interim trustees and set their fees while directing them to convene a general meeting of owners to provide an update as to progress.³⁵¹ This was against a background of adverse findings against former trustees who had caused millions of dollars in losses to what had been a

³⁴⁹ *Fenwick v Naera* above n 260 at [114] and [121].

³⁵⁰ *Proprietors of Mangakino Township* above n 254.

³⁵¹ *Hall v Opepe Farm Trust* (2010) 22 Waiāriki MB 47-55 (22 WAR 47).

successful ahu whenua trust.³⁵² Then, in *Puriri – Okaihau No3C No2* the Court considered the powers of responsible trustees as part of the review of the trust in a case where there was only one remaining trustee in his eighties who struggled to ensure that the terms of the trust order were being adhered to consistently.³⁵³ The trust order also stipulated that there had to be a minimum of three trustees and so Mr Puriri was permitted to remain until a meeting of owners could be convened and additional or replacement trustees elected. As there were suggestions that Mr Puriri may have been subject to undue influence the Court ordered that he could no longer issue payments without approval.

Sometimes a review of trust can reveal, inadvertently or otherwise, serious shortcomings, both in terms of the conduct of trustees and in the context of the ability of the registry to effectively police compliance by trustees with their trust orders on something as important as the filing of annual accounts. In *Wetini v Hunia – Matatā Parish 39A4* on an application filed by one of the trustees, the Court had to consider whether the trustees had acted in breach of the trust order in failing to have the accounts audited and filed; failing to conclude the lease negotiations with Norske Skog, a large paper production company; of acting contrary to best practice by signing cash cheques and by failing to seek directions. The trustees could not properly explain expenditure exceeding \$1 million over seven years, the location of the trust's accounts and supporting papers or their propensity for writing cash cheques including one for \$40,000 paid to a close associate of one of the trustees for work said to have been completed for the trust.³⁵⁴

As foreshadowed, this example highlights the extent to which a failure to file accounts over time can, by default, enable conduct in breach of the express terms of a trust order, especially where the registry lacks sufficient staff to review any failure

³⁵² See *Hall v Opepe Farm Trust* (2010) 19 Waiāriki MB 258 (19 WAR 258); *Biel v Hall – Opepe Farm Trust* [2011] Māori Appellate Court MB 535 (2011 APPEAL 535); and *Rameka v Hall* above n 291. By the time the proceedings commenced in the Māori Land Court, the bulk of the trust funds in question had already been lost.

³⁵³ *Puriri - Okaihau No3C No2* (2013) 28 Tākitimu MB 129 (28 TKT 129). See also *Te Paa – Ahipara A33* (2012) 47 Taitokerau MB 3 (47 TTK 3) where the Court dealt with various trust issues on review of the trust order concerning the use of the land; *Pou – Eru Moka and Te Owai Pou Whānau Trust* (2013) 61 Taitokerau MB 247 (61 TTK 247); and *Tito – Mangakahia 2B2* [2011] Māori Appellate Court MB 86 (2011 APPEAL 86).

³⁵⁴ *Wetini v Hunia – Matatā Parish 39A4* (2011) 38 Waiāriki MB 244 (38 WAR 244) at [5]- [7].

to comply.³⁵⁵ This can be compounded where, for whatever reasons, owners are sufficiently disengaged from a trust's activities that they do not raise concerns or alternatively, are satisfied by the incorrect responses provided to them by trustees.³⁵⁶

Another important decision in the context of review was *Wall v Karaitiana*, which involved a serious dispute between trustees over entry into an agreement for the purchase of land where one of the trustees refused to sign the necessary documents, claiming, inter alia, conflict of interest as between certain trustees as well as one of their solicitors.³⁵⁷ The case eventually involved the convening of a meeting of owners to elect trustees following adverse findings against the incumbents. One of the points at issue on appeal was whether the Māori Land Court had the jurisdiction to call a meeting.

In a further appeal, the Court of Appeal agreed with the Māori Appellate Court that the inherent jurisdiction conferred by s 237 of the Act in respect of trusts is sufficiently wide to empower the Māori Land Court to convene such a meeting.³⁵⁸ It did not accept that the jurisdiction is limited by the inclusion in Part 9 which concerned meetings of assembled owners where no management structure like an ahu whenua trust had been established.³⁵⁹ The Court of Appeal considered that Parts 9 and 12 are discrete parts of the Act and so the Māori Land Court, it decided, was entitled to call a meeting for the election of trustees under Part 12 and was not obliged to proceed under Part 9. Indeed, as the Māori Appellate Court pointed out, the quorum requirements set out in the legislation and regulations would be virtually impossible to achieve, given the ongoing impacts and effects of fragmentation through succession.

³⁵⁵ It is unclear how the recent restructuring of the Māori Land Court registry will assist in the enforcement of trust order obligations that include filing accounts. Shannon Haunui-Thompson, 'Concern at proposed job losses at Māori Land Court' above n 266.

³⁵⁶ See also *Hunia v Skerrett- White – Kawerau A8D* above n 254 where it was alleged that over \$800,000 had been improperly accounted for including a payment in excess of \$330,000 to a trustee for services rendered regarding a geothermal power project.

³⁵⁷ *Wall v Karaitiana - Tauhara Middle 15* (2011) 38 Waiāriki MB 218 (38 WAR 218).

³⁵⁸ *Clarke v Karaitiana* above n 260.

³⁵⁹ See Māori Assembled Owners Regulations 1995.

Section 238: Enforcement of obligations of trust

Another related and oft-used provision in the context of the supervision of trusts is s 238 of the Act, which provides:

238 Enforcement of obligations of trust

(1) The court may at any time require any trustee of a trust to file in the court a written report, and to appear before the court for questioning on the report, or on any matter relating to the administration of the trust or the performance of his or her duties as a trustee.

(2) The court may at any time, in respect of any trustee of a trust to which this section applies, enforce the obligations of his or her trust (whether by way of injunction or otherwise).

This is one of the most important provisions of the Act in the context of ahu whenua trusts and the accountability of trustees to their owners. It provides that the Court may “at any time” order the production of a report on the administration of a trust by the trustees.³⁶⁰ This point was underscored in *Paki v Māori Land Court* where the High Court discussed the scope of s 238 and confirmed that the Court has the duty to look to the enforcement of the obligations of the trust even in the absence of an application.³⁶¹ In its 2011 judgment, *Clarke v Karaitiana*, the Court of Appeal reiterated its 1999 view that the Māori Land Court possesses important supervisory powers including those available under s 238.³⁶² The trustees can then be compelled to attend to answer questions on any such report, and in appropriate circumstances the Court can then enforce the obligations of trust by way of injunction or otherwise. In short, this provision enables the Court, of its own motion, to initiate, in effect, a review of a trust’s activities if it considers that approach necessary, based on evidence provided, usually, by an owner, a trustee, an adviser or an interested party.

Section 238 can also be invoked even where trustees have provided annual accounts which can then raise new issues for consideration. For example, in *Tupe Snr v Everton – Manunui No.1 4th Residue Ahu Whenua Trust*,³⁶³ the proceedings began as

³⁶⁰ See the discussion in *Mikaere - Toto v Te Reti B and Te Reti C Residue Trust - Te Reti B and Te Reti C* [2014] Māori Appellate Court MB 249 (2014 APPEAL 249) at [50].

³⁶¹ *Paki v Māori Land Court* [1999] 3 NZLR 700.

³⁶² *Clarke v Karaitiana* above n 260 at [36] and [38].

³⁶³ *Tupe Snr v Everton* above n 269.

a replacement of trustees per s 239 of the Act in 2012.³⁶⁴ They soon developed into a review per s 231 and, eventually, the Court relied on s 238 of the Act to direct the trustees to report on their activities and expenditure. Ultimately the trustees were found to have acted contrary to their duties sufficient to warrant their removal and were replaced. Several were also required to refund monies to the trust. Then in *Hall v Opepe Farm Trust*, s 238 was applied in directions to the then trustees to provide answers to a series of questions on the financial position and investment activities of the trust.³⁶⁵ The importance of this step, of giving notice to the affected trustees in sufficient detail, that particular events and transactions were being examined, was seen as necessary by the Court of Appeal in further proceedings before that Court in 2013.³⁶⁶

In the context of remedies, Judge Clark held in *Urwin v Te Kura – Te Reti B and C Block* that the Māori Land Court does have the jurisdiction to order equitable remedies if it considers such an approach is justified. That view was upheld in the Māori Appellate Court.³⁶⁷ While this decision has not been subject yet to any scrutiny or review by the higher courts it does provide some guidance to trustees and owners as to the potential range of remedies that may be available. This is also relevant in the context of the nature and scale of disputes that do come before the Māori Land Court, which at a monetary level alone can far exceed the \$350,000 civil limit of the District Court.³⁶⁸

Section 240: Removal of trustees

Where a trustee's conduct is so unacceptable and in breach of core trust duties, then in the absence of any tenable defence, one of the few sanctions available under the Act is the removal of that individual from office. As foreshadowed, where there has

³⁶⁴ 280 Aotea MB 93 (280 AOT 93).

³⁶⁵ *Hall v Opepe Farm Trust* above n 352.

³⁶⁶ At [43]- [44].

³⁶⁷ *Mikaere - Toto v Te Reti B and C Residue Trust - Te Reti B and Te Reti C* above n 360.

³⁶⁸ District Court Act 2016, s 75. See for example important cases mentioned previously including *Fenwick v Naera* above n 260 which involved a proposal for a \$120 million geothermal power station; *Adlam v Savage* above n 267 which also involved a dispute over a geothermal power station and where a former trustee was ordered to repay \$14 million; *Slade – Parengarenga 3G* above n 301 which concerned an alleged theft of \$1 million by two former trustees; *Hunia v Skerrett- White – Kawerau A8D* above n 254 which concerned trust funds exceeding \$800,000 and a payment of \$335,000 to a trustee.

been a breach of trust involving improperly obtained trust funds and assets, orders for restitution can also be made. In extreme cases, the criminal law is invoked.³⁶⁹ While there is no dispute that the High Court retains the power to remove a trustee, nonetheless, in the Māori Land Court, the authority to do so remains somewhat contentious. One of the reasons for this perspective is the view that removal should only ever be a last resort and that it is the role of owners, not the Court, to do so. This was especially the case in previous decades where there was considerable criticism of the Court for acting precipitously and removing trustees for cause, even where they acted reasonably and honestly and on advice.³⁷⁰ Even so, as the following discussion will demonstrate, the case law has developed significantly since the coming into force of the Act in 1994. Two important themes emerge: firstly, the Court will only remove trustees where the high threshold for doing so has been met and there is no defence and no successful application for relief under the Trustee Act 1956. Second, where necessary, the Court will act swiftly to suspend or remove trustees and to enforce by injunction the obligations of trust and to preserve the trust assets where this is still possible.

Ellis v Faulkner – Poripori Farm A Block is an early leading authority on the removal of trustees, dating from 1996, since it underscores the need to assess whether the trustees' overall conduct in the performance of their duties was 'satisfactory' in the context of s 240 of the Act. Judge Carter also provides a useful discussion on the powers of the Court in relation to trustees, underscoring the view that removal is almost invariably a last resort.³⁷¹ In that same year Judge Savage, in *Tauhara Middle 4A2B2C (Opepe Farm Trust)*, had to deal with a group of trustees who had acted in breach of trust, including improper expenditure, and now sought relief for their misconduct per s 73 of the Trustee Act 1956.³⁷²

³⁶⁹ See *Slade – Parengarenga 3G* above n 329 and Serious Fraud Office "Parengarenga 3G Trust 201-440" <www.sfo.govt.nz/parengarenga-3g-trust>. See also the case of Te Huia Te Pīkikotuku Whānau Trust where a former trustee was sentenced to 9 months imprisonment for fraud: Sean Hoskins "Jail term for Maori trust fraudster" Wanganui Chronicle (Wanganui, 15 November 2005).

³⁷⁰ See the 1997-1999 discussions on Te Ture Whenua Māori Act 1993 in Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 101-108.

³⁷¹ *Ellis v Faulkner* above n 294 at 7.

³⁷² *Tauhara Middle 4A2B2C (Opepe Farm Trust)* above n 334.

Then in *Perenara v Pryor – Matatā 930 (Rangitihī Marae)* the Māori Appellate Court confirmed that a careful approach requires that rules of natural justice have been observed, the appropriate legal thresholds have been met, and there is no positive defence.³⁷³ In essence, that case involved what was essentially a mandate dispute between competing tribal factions over who should control the iwi's sole marae. Because the trustees had not been notified that their removal was a very real prospect, that proceeding had to be remitted back to the court below for further hearing. Another decision from the Appellate Court concerning trustee removal from a Māori reservation is *Horsfall v Marino – Repongaere 4G (Part) – Rongopai Marae*.³⁷⁴ In that case, the court below had appointed the appellant, despite concerns from marae beneficiaries, but on condition that she not hold any office including chairperson, secretary or treasurer. The appellant sought relief from the Appellate Court. However, that Court reversed the earlier decision and removed the appellant for cause, commenting that as she owed money to the trust, her duty to the beneficiaries would inevitably conflict with her personal interests.

Following that, in 2005, in *Wickliffe v Pearce – Paengaroa North B4B & K Aggregated* allegations were made of breach of trustees' duties including claims of conflict of interest, trustees mixing trust funds with their own and paying themselves interest out of trust funds.³⁷⁵ Unsurprisingly, the trustees were removed. A similar situation occurred in *Taueki – Horowhenua 11 (Lake) Māori Reservation* when the Court was confronted with a scenario of trustees to a Māori reservation (Lake Horowhenua) paying themselves over \$270,000 during a six-year period without the approval of the beneficiaries – no general meetings had been held for some years, and the expenditure included \$34,000 worth of cell phone bills. The inevitable outcome was removal of the trustees for breach of the non-conflict and non-profit duties.³⁷⁶

³⁷³ *Perenara v Pryor* above n 283.

³⁷⁴ *Horsfall v Marino* above n 312 at 98. See *Te Rongomau v Nikau - Whangape Parish Lot 23B (Horahora Marae)* (2011) 23 Waikato Maniapoto MB 3 (23 WMN 3).

³⁷⁵ *Wickliffe v Pearce - Paengaroa North B4B & K Aggregated* (2005) 289 Rotorua MB 236 (289 ROT 226).

³⁷⁶ *Taueki – Horowhenua 11 (Lake) Māori Reservation* (2005) 163 Aotea MB 99 (163 AOT 99).

In *Te Whata v Paku – Akura Lands Trust*³⁷⁷ the Māori Appellate Court considered the exercise of discretion to remove trustees and determined that the court below could not appoint the Māori Trustee without that appointment being acceptable to the beneficiaries; an approach consistent with that Court’s decision in *Tito – Mangakahia 2B2*.³⁷⁸ The Appellate Court also observed that the Māori Land Court should never leave a trust without trustees and that appointing trustees even on an interim basis was necessary.

In the context of the removal of trustees, *Rameka v Hall* is an example *par excellence* of how, when things go wrong, they can do so disastrously. The case originally involved removal proceedings in the Māori Land Court which eventually escalated up to the Māori Appellate Court and finally to the Court of Appeal. The then trustees of the Opepe Farm Trust, a valuable \$50 million farming property of some 4,876 hectares located just outside Taupō along the Napier Taupō Highway had, amongst other things:

- (a) loaned \$1 million of trust funds without security;
- (b) entered into a ‘partnership’ for property exceeding \$4 million in value without any written agreement;
- (c) agreed to make themselves personally liable for loans exceeding \$7 million for a property purchase without undertaking appropriate due diligence, because the land was said to be ‘ancestral’;
- (d) lost over \$3 million in a failed mussel farm investment;
- (e) lost a further \$1 million in a failed property venture; and
- (f) spent \$140,000 on legal costs in conflict amongst themselves in the High Court.

In the subsequent appeal, the approach of the Māori Appellate Court when dealing with applications for removal was cited with approval by the Court of Appeal.³⁷⁹ It

³⁷⁷ *Te Whata v Paku – Akura Lands Trust* [2011] Māori Appellate Court MB 55 (2011 APPEAL 55).

³⁷⁸ *Tito – Mangakahia 2B2* [2011] Māori Appellate Court MB 86 (2011 APPEAL 86).

³⁷⁹ *Rameka v Hall* above n 291. See *Apatu v Trustees of Owhaoko C1 and 2C* [2010] Māori Appellate Court 34 (2010 APPEAL 34). Unfortunately, over the last three decades, there are worse examples of loss. In 2009, the Paranihi ki Waitotara Incorporation lost \$31 million in a failed property investment in Australia: www.stuff.co.nz/taranaki-daily-news/714546/PKW-Gabba-loss-now-up-to-31m. Then there was the *Matauri X* fiasco in 2003 where a \$2.5 million loan against the incorporation land in a failed water bottling plan spiralled into a \$15 million

agreed that the prerequisite for removal of trustees was not a simple failure or neglect of duties, but a failure to perform them satisfactorily, consistent with *Ellis v Faulkner*.³⁸⁰ Therefore, an assessment of the trustee's performance was essential when applying s 240. The Court will also need to consider the impact of the trustee's actions on the beneficiaries and any apprehension of risk to the assets, following *Bramley v Hiruharama Ponui Inc – Committee of Management – Hiruharama Ponui Inc*.³⁸¹ In *Bramley*, the Appellate Court pointed out that wholesale removal is not always the only remedy and that the nature and extent of any breaches were often just as important as their frequency.

Another important authority in the context of conflicts of interest claims is *Naera v Fenwick* where the Court of Appeal discussed the key principles when a conflict of interest arises.³⁸² That Court, citing *Re Thompson's Settlement*, emphasised the prophylactic nature of fiduciary obligations, that prevention is better than the cure.³⁸³ That decision was then appealed to the Supreme Court.³⁸⁴ Interestingly, all three appellate courts agreed with the Māori Land Court that, in that case, the removal of the existing trustees was not appropriate. They also confirmed that the trustees had acted within their powers to enter into the agreement in question, regarding the proposal to build a geothermal power station in partnership with other local Māori land trusts and a third party. That said, the Court of Appeal and the Supreme Court both found that the conflicts of interest issue needed to be considered further in the context of whether, inter alia, the agreement was void or voidable.

debt: see www.radionz.co.nz/news/te-manu-korihi/281007/sale-could-salvage-ancestral-land-at-matauri-bay; the \$2 million failed investment by Rotoiti 15 Trust in a Bartercard style venture in 2000 and in 1988 the disastrous Okawa Bay Hotel investment that eventually ended up in the Court of Appeal in *HCNZ v Māori Trustee* [1988] 2 NZLR 662.

³⁸⁰ *Ellis v Faulkner* above n 294.

³⁸¹ *Bramley v Hiruharama Ponui Inc – Committee of Management – Hiruharama Ponui Inc* [2006] 11 Waiāriki Appellate MB 144 (11 AP 144).

³⁸² *Naera v Fenwick* above n 306. For other examples see *Taueki v Procter - Horowhenua 11 (Lake) Trust* [2012] Māori Appellate Court MB 107 (2012 APPEAL 107); *Pue v Kīngi – Te Rūnanga o Ngāti Maru (Taranaki) Whenua Tōpu Trust* (2012) 291 Aotea MB 257 (291 AOT 257); *Severne – Lake Rotoaira Trust* (2013) 298 Aotea MB 267 (298 AOT 267); *Waimana 1C1A2B2 Trust v Tuna – Waimana No 1CNo1ANo2BNo2* (2013) 76 Waiāriki MB 19 (76 WAR 19); *Moses – Hopuruahine East* (2014) 37 Tairāwhiti MB 238 (37 TRW 238).

³⁸³ *Naera v Fenwick* above n 306. See *Re Thompson's Settlement* [1986] Ch 99 at 115.

³⁸⁴ See *Naera v Fenwick* above n 306 and *Fenwick v Naera* above n 260.

Section 241: Termination of trusts

When relationships between trustees, owners and third parties, have broken down irretrievably, or the need for the continued existence of a trust is no longer relevant, then the appropriate remedy is the termination of that trust. Occasionally, where a major dispute has arisen, owners will decide that, for the time being, the best solution is simply to vest the land back into the owners, have an agent appointed to negotiate a lease, and then have the proceeds distributed. As the cases demonstrate, termination of trusts is surprisingly infrequent, and more so for ahu whenua trusts. Indeed, a *partial* termination of trust is far more common for whānau trusts where, for reasons of family arrangements or conversely relationship breakdowns, one or more of the beneficiaries seeks their ‘share’ of the interests in the trust vested in their own name, often to form their own individual whānau trust.³⁸⁵ So, the principles that apply to termination of trust can vary slightly between larger ahu whenua and whānau trusts.

A leading authority on termination of trust is *Larkins v Kaitaia – Waihou Hutoia D2A Block*.³⁸⁶ In its judgment the Appellate Court distilled three core principles of application:³⁸⁷

- (a) a change of mind is usually insufficient as a ground for termination unless there is an absence of opposition;
- (b) termination should be refused where it is likely to result in detriment or create unreasonable disadvantage to affected parties;
- (c) evidence of a trust failing to adhere to their terms of trust and core accountabilities may be sufficient grounds for termination.

In *Tawhai - Wharawhara 27* the Court considered s 241(2) of the Act where on termination the corpus vests in those persons who were beneficial owners in the land

³⁸⁵ *Green – Trustees of Te Kou Tiaki and Tangi Ataahua Green Whanau Trust* (2014) 92 Waiāriki MB 183 (92 WAR 183); *Chambers v Keepa - Te Hinau a Pura Whanau Trust* (2016) 350 Aotea MB 74 (350 AOT 74) at [45].

³⁸⁶ *Larkins v Kaitaia – Waihou Hutoia D2A Block* [2013] Māori Appellate Court MB 159 (2013 APPEAL 159).

³⁸⁷ At [27]. See also *Rata – Te Rongoroa A7 Block* (1991) 13 Aotea Appellate MB 228 (13 APWG 228) at 244; and *Edwards v Te Aute Trust Board – Mangatāinoka No 1BC No 2C, Tāmaki 2A2A (Balance)* [2013] Māori Appellate Court MB 243 (2013 APPEAL 243) at [53].

at the time of creation of the trust or their successors.³⁸⁸ In *Mason – Tukehu Miriama Whānau Trust* the trust was terminated because the trustees had fallen out to such a degree that the trust was dysfunctional; a not uncommon occurrence particularly between siblings in whānau trusts. Tellingly, most of the beneficiaries endorsed the termination.³⁸⁹

Summary

The evidence confirms that ahu whenua trusts continue to operate successfully in the post settlement environment. As Treaty settlements increase in number and iwi and hapū become better resourced, successful trusts are exploring the means of collaborating intra and inter-tribally within the framework that is the current Act.³⁹⁰ They do so using subsidiaries and partnerships under the general law but even so, the parent body remains the ahu whenua trust in the examples cited below. The more sophisticated and well-resourced trusts continue to prosper, and develop, while operating under trust orders confirmed by the Māori Land Court - their trustee appointments continue to be confirmed by the formality of a Court order and should any dispute arise they remain subject to the jurisdiction of the Court. That said, in practice, the reality is that their interaction with the Court is often confined to administrative functions like noting changes of trustees, new encumbrances on titles and the filing of annual accounts with the registry. Indeed, many of the larger trusts have not had any serious proceedings before the Court for many years.

Even so, despite the numerous successes for trust and incorporations, challenges arise from time to time that require directions or decisions. Often, trustees and owners will simply seek a judicial conference to discuss current or future issues and seek directions to ensure that they remain within the parameters of their trust orders

³⁸⁸ *Tawhai - Wharawhara* 27 (1996) 70 Ōpōtiki MB 217 (70 OPO 217).

³⁸⁹ *Mason – Tukehu Miriama Whānau Trust* (2008) 133 Otorohanga MB 141 (133 OT 141). See *Pou – Eru Moka and Te Owai Pou Whānau Trust* (2013) 61 Taitokerau MB 247 (61 TTK 247).

³⁹⁰ For example, see the Māori owned dairy producer Miraka: <www.miraka.co.nz/who-are-we-.html>. Tuaropaki Trust and Te Huarahi Tika Trust are also important investors in cellular communication company 2Degrees. In terms of geothermal power generation partnerships between ahu whenua trusts and third parties, Nga Awa Pura is the largest single shaft geothermal power plant in the world. At peak capacity it provides significant electricity to power Hamilton, Rotorua, Tauranga and Taupo and it is owned by a Joint Venture between Mighty River Power (65)% and Tauhara North Number 2 Trust (35%): <www.tauharano2.co.nz/rml-commercial/nga-awa-purua-power-station>.

and trust law principles. Many such written and verbal directions, for medium sized and smaller ahu whenua trusts, are not readily in the public domain and so this aspect of the Court's function, to promote practical solutions to problems arising in the use or management of any land, often goes unremarked upon, even by those wary of the perceived interventionist tendencies of the Court. When disputes do arise, the Court invariably does all it can to facilitate an alternative dispute resolution pathway, with adjudication often seen as a last resort. This can include the engagement of independent facilitators to sit with the Judge or completely separately as a means of exploring solutions to problems that can arise in the administration of ahu whenua trusts

Then there are the largely accountability focused applications where, in the absence of agreement or cooperation of the trustees, some form of therapeutic intervention without recourse to the formality of orthodox litigation, is explored. This approach is relevant regarding the provision of information that beneficiaries are often entitled to receive. It can also include facilitated meetings of owners with independent chairpersons and secretaries brought in to assist by shielding, as far as is possible, the incumbents from any potential claims of bias, bullying or predetermination. When that approach fails or where there is an apprehension of real risk to the trust assets, then appropriate measures can be and are taken to secure the interests of the beneficiaries.

The short point is that the Act ensures that the Māori Land Court continues to provide two essential services to land owners. First, it is the custodian of invaluable records on Māori land and custom as to current title information and ownership details, which are always accessible to the owners and their representatives. Those records assist with both current land use and development as well as with cultural revitalisation and reconstruction. Second, it provides owners and trustees with an accessible and cost-effective forum which is available where necessary to ensure that the governance of Māori land is overseen by an independent Court that is itself subject to appropriate procedural safeguards including appeal, review and rehearing. The ways that Māori land owners and their whānau and hapū use its accessibility, services and records to their advantage, is one of the subjects of Chapter Six.

CHAPTER SIX - THE HAPŪ LAND TRUSTS

Introduction

This chapter explores the late twentieth century response of the Hapū to the challenges of managing their remaining lands and how they have sought to utilise and develop them under the Act while seeking at the same time to restore traditions and customs. This discussion includes consideration of three trusts that include both pre- and post-settlement tribal assets – Rotoehu Forest Lands Trust, a whenua tōpu trust; Te Pāroa Lands Trust and Kiwinui Trust, both ahu whenua trusts. All were established under the Act or its predecessor, the Māori Affairs Act 1953.

Overview

The Rotoehu forest western licence lands - returned to Hikakino and Te Rangihouhiri II as part of the Ngāti Awa claims settlement process - are the only blocks in Hapū ownership west of the Tarawera River since 1866.³⁹¹ They are now part of a cluster of lands, including those parts of Rangitāiki 28 and Rangitāiki 31 that have survived, that lie at the foundation of the identity of the hapū. From as early as 1830, 1842, and 1862, Ngāti Awa, through Hikakino, Te Rangihouhiri II and Te Tāwera, were one of the tangata whenua tribes of this region. However, since the confiscation an entirely new tradition has developed where the victors have reconstructed a history to suit themselves.³⁹² The return of these lands is seen by the Hapū as one of the steps to restore some balance to the tribal landscape.

Rotoehu Forest Lands Trust

Background

During 2005-2008, Hikakino and Te Rangihouhiri II held hui to discuss the settlement and the creation of a trust to hold any lands to be returned as part of the Ngāti Awa negotiations that had been in train since 1995. After receiving advice, it was agreed that a whenua tōpu trust established under the Act by the Māori Land Court, would be the appropriate entity. As the trust would not have a list of owners,

³⁹¹ J. A. Wilson 'Report on Settlement of Confiscated Lands' above n 133 at 8.

³⁹² See Waitangi Tribunal *He Maunga Rongo* above n 156.

it was necessary to include in the trust order a process of beneficiary identification. More so, given that the lists of owners prepared by the Native Land Court with Hapū input for the Omarupōtiki blocks, Matatā 100 and 101, were often incomplete. These two blocks, along with Te Matatā or Matatā 102, were returned to Ngai Te Rangihouhiri II and Te Patutātahi hapū respectively in 1874 under the arrangements of J. A. Wilson described in Chapter Three. In addition, succession laws had often meant that siblings were scattered around various blocks to the point where some might be included in one but not another. The whenua tōpu trust was a means of re-enfranchising members of these hapū who, for whatever reasons, had not been identified in lands determined by the Court. There was unanimity that as soon as practicable, the status of the land, once vested in the trust, would be changed to Māori freehold land following a further application to the Court. Ensuring that the land returned would be secure for future generations was a paramount priority.

On 29 April 2008, Maketu John Simpson on behalf of himself and the proposed trustees, being Te Hau-o-te-rangi Tutua, Jim Studer, Enid Rātahi-Pryor and Makuini Hohāpata, made submissions to the Court at Whakatāne for the creation of a whenua tōpu trust to be called the Rotoehu Forest Lands Trust.³⁹³ On 21 April 2009, Judge Clark signed the orders creating the trust.³⁹⁴ At the inaugural annual general meeting in 2011, held at the Te Tāwera Marae, Iramoko in Matatā, the beneficiaries of the trust conducted a hikoi over the Rotoehu Forest lands to reconnect members of the hapū with their ancestral lands, given their disconnect since 1866, a period of some 144 years since confiscation. At this meeting, the trust's strategic priorities were also agreed to in broad terms and included:

- (a) reinvestment of trust funds for long term sustainability;
- (b) protection of wāhi tapu including urupā and other sacred sites
- (c) repurchase of hapū lands where feasible;
- (d) support for marae rebuilding and maintenance;

³⁹³ 119 Whakatāne MB 131-148 (119 WHK 131-148) dated 29 April 2008 and varied at 42 Waiāriki MB 140-141 (42 WAR 140-141) dated 31 October 2011.

³⁹⁴ Unfortunately, during the intervening year, Te Hau Tutua passed away in May 2008 and John Simpson followed in October 2008. In November 2010 a general meeting was held at Iramoko Marae, Matatā for the election of replacement trustees, amendments to the trust order and grants and distributions: Rotoehu Forest Trust *Annual Report* 2011.

- (e) support for education and hapū wananga;
- (f) support for hapū based cultural activities including advocacy;

On 3 October 2011 Judge Coxhead issued orders appointing Pouroto Ngaropo and Wilhelm Studer as replacement trustees and amending the trust order in accordance with the general meeting of the beneficiaries. With the resignation of Makuini Hohāpata, Lytle Hall was appointed replacement in 2014. The current trustees are Wilhelm Studer and Jim Studer, representing Te Rangihouhiri II; Enid Rātahi-Pryor and Lytle Hall representing Hikakino; and Pouroto Ngaropo as the cultural adviser.

Financial performance

In summary, the financial performance of the trust is set out below:

	2013	2014	2015	2016
Income	352,961	307,979 ³⁹⁵	40,316 ³⁹⁶	75,801
Expenses	133,557	13,720	20,635	18,621
Tax	115,251	51,076	4,036	6,378
Distributions	115,257	210,242	21,821	30,798
Surplus	104,153	32,941	(6,176)	20,005
Assets	3,488,929	3,870,833	4,166,935	4,846,743
Liabilities	111,226	201,760	152,991	154,039
Net assets	\$3,377,703	\$3,669,073	\$4,013,945	\$4,692,704

Figure 7: Rotoehu Forest Trust annual account summary 2013-2016

The trust has made a significant investment of \$1 million in the Tumurau Farm Partnership, a joint venture between the iwi asset holding company, Ngāti Awa Group Holdings Ltd and several other hapū and whānau based ahu whenua trusts.³⁹⁷ This was significant because it meant that the trust was buying back traditional land that had been either confiscated or alienated through the Native Land Court. Re-establishing a tribal footprint in the traditional rohe of these hapū is an important medium and long-term priority. In 2017 the trust also contributed to a fund to

³⁹⁵ This figure includes two years of rental for the forest lands of \$152,076 and \$153,655.

³⁹⁶ This includes a loss of \$114,669 on the Tumurau Farm investment.

³⁹⁷ Te Rūnanga o Ngāti Awa *Annual Report* 2017 at 57.

purchase some of the Whakatāne Golf Course land located near the three marae of the Hapū, for cultural, historic and strategic reasons.³⁹⁸

The trust's principal income is from the rental for the forest lands, and while it was receiving the benefit of profitable dairy prices, a comparable income from that source too. Given that prices have fluctuated over the last four years, the trustees see the investment in the Tumurau Farm as a long-term prospect.³⁹⁹ The trust also holds approximately \$1 million in carbon credits and at the time of writing is considering participation in a large joint venture project to develop some of the lands (recently purchased in collaboration with local trusts) for a retirement village.

Hapū revival and reconstruction

From its beginnings, the trustees have seen the value in supporting students with the costs of tertiary education, and so scholarships and education grants have been provided to trust beneficiaries from the outset. This has included all levels of study from pre-degree certificates to post-graduate certificates, diplomas, master's and doctoral studies. In addition, the trust also supports hapū wānanga where historical events, whakapapa and waiata are shared and discussed in a traditional forum for the dissemination of customary knowledge as another key aspect of the revival of the Hapū.⁴⁰⁰ Further, the Rotoehu Forest Trust, like its partner trusts, provides financial assistance to local schools, including Te Kura Kaupapa Māori o Te Orini ki Ngāti Awa and Te Kura o Te Pāroa, where a high proportion of trust beneficiaries, their children and grandchildren are enrolled.⁴⁰¹

Arguably, the most significant contribution of the Rotoehu Forest Trust in terms of hapū reconstruction, literally, has been its support for the rebuilding and renovation of marae.⁴⁰² The principal beneficiary of marae grants from the trust has been Te Rangihouhiri II Marae, near the airport turn-off at Whakatāne. The last time the hapū had a functioning marae was in September 1865. While it is correct to record

³⁹⁸ See 'Tangata Whenua buy back land' (29 September 2017) Whakatane Beacon, <www.whakatanebeacon.co.nz/2017/10/wake-up-council/>.

³⁹⁹ Rotoehu Forest Trust *Annual Report* 2015.

⁴⁰⁰ 'Ngāti Awa hikoi at Iramoko Marae' (22 September 2016) <www.facebook.com/Rangihouhiri/>.

⁴⁰¹ Rotoehu Forest Trust *Annual Report* 2016; 'Hui-a-tau, Iramoko Marae, Matata' (30 April 2017) <[www.facebook.com/Rangihouhiri/Rotoehu Forest Trust](http://www.facebook.com/Rangihouhiri/Rotoehu-Forest-Trust)>.

⁴⁰² The trust's beneficiary marae are Puawairua, Te Rangihouhiri II, Te Pāroa and Iramoko.

that a wharenuī bearing the name ‘Te Rangihouhiri’ was erected at the Otamāuru pā site following the Land Wars and confiscation era, there was no functioning marae complex for Te Rangihouhiri II hapū or for Hikakino until meeting houses were built on their present sites in 1922. The trust’s accounts record that the Te Rangihouhiri II Marae rebuilding project has received the greatest share of the trust distributions since its establishment – more than \$650,000. Without these funds, along with contributions from Te Pāroa Lands Trust, Kiwinui Trust and Umuhika Lands Trust, the project would still be languishing. Lotteries Marae Heritage Fund grants of approximately \$800,000 over three years have also been pivotal in bringing the twenty-five year rebuilding marae project back to life.⁴⁰³

Rotoehu, like Te Pāroa and Kiwinui, have also had a significant effect on supporting Hapū initiatives including at the Ngāti Awa Hapū Challenge, (a ‘top town’-style obstacle course competition where hapū must include all age groups in their teams) and the Ngāti Awa Te Toki Haka Festival.⁴⁰⁴ Hikakino and Te Rangihouhiri II had been unable to field a team into the fledgling iwi haka festival for many years and so with the support of the trusts like Rotoehu, a major achievement in both 2015 and 2017 was for these hapū to finally be able to enter a combined team into the competition, including into the tamariki (children’s) division of the event.⁴⁰⁵ Prior to this, it would have been inconceivable that these two hapū would have even contemplated attempting to field a team, so scattered, disorganised and under-resourced they had become. Allied to this has been the involvement of the Hapū in the Te Kupenga (New Zealand Wars) Commemorations. This event, held on 20 October 2016 and again in 2017 over two days, is to acknowledge and remember the surrender of the Hapū leaders at Te Kupenga pā in 1865 following the arrival of a Crown led force in September, as discussed in detail in Chapter Two.

In summary, having the means to coordinate and engage meaningfully in that commemoration also assists in promoting tribal cohesiveness within the community

⁴⁰³ Te Rangihouhiri II Marae Trust *Annual Report* 2016

<www.facebook.com/groups/310941579075335/>.

⁴⁰⁴ ‘Ngāti Awa pride on the line’ (May 2016) Whakatane Beacon,

<www.whakatanebeacon.co.nz/2016/05/ngati-awa-hapu-pride-on-the-line/>.

⁴⁰⁵ ‘Ngati Awa to showcase pride’ (October 2017) Whakatane Beacon

<www.facebook.com/Rangihouhiri/; whakatanebeacon.co.nz/2017/10/ngati-awa-to-showcase-pride/>

while recognising a critical historical event that was a turning point in the fortunes of Ngāti Awa and its hapū, these three in particular.⁴⁰⁶ These events, supported by the trusts like Rotoehu, facilitate the renaissance and awareness of the Hapū both internally within their own communities as well as on the wider tribal stage. This also contributes to reinforcing tribal identity, assertiveness and commitment – a far cry from the near invisibility of the Hapū a century earlier, as described in Chapters Two and Three.

Te Pāroa Lands Trust

Background

Prior to 1997, there were multiple trusts administering the land of the Hapū including the Matatā Lands Trust, Taiwhakaea-Orini Lands Trust, Awanui Lands Trust, Taiwhakaea A Trust, Taiwhakaea D Trust, Taiwhakaea C Trust and Rangitāiki 233 under the Māori Trustee. Most of this land, apart from Rangitāiki 233 and the Matatā blocks, were originally part of Rangitāiki 28, returned to Ngāti Awa, Whakatāne section in 1878. At that time, it comprised 2,510 acres.⁴⁰⁷ The records of the Māori Land Court and the Māori Trustee confirm that these lands provided negligible returns to the owners and to the Hapū, especially during the twentieth century.⁴⁰⁸ Their principal purpose, however, was for pā and kainga – places where the Hapū continued to live, then as now. Much of the land was low lying and, in an economic sense, of poor quality, close to the sea or in areas prone to flooding. Eventually, some of the land was sold, including eighty acres being Rangitāiki 28B6B to the Whakatāne Golf Club on 9 June 1928.⁴⁰⁹ The largest single sale occurred on 27 January 1936 when 129 owners sold 305 acres of Rangitāiki 28B 2D1 to Herbert Carter.⁴¹⁰ The owners had become divided into ‘sellers’ and ‘non-sellers’, according to evidence given at the Court, with Taiwhakaea II being the latter.⁴¹¹ The pre-colonisation urupā Ohuirehe and Utaora were excluded from the

⁴⁰⁶ ‘Te Kupenga Marked’ (October 2017) Whakatane Beacon <www.whakatanebeacon.co.nz/2017/10/te-kupenga-marked/>; Te Rūnanga o Ngāti Awa *Annual Report 2017* <issuu.com/terunangaongatiawa/docs/2017_trona_20annual_20report_20down>.

⁴⁰⁷ Walzl ‘Ngāti Awa Lands’ above n 165 at 76.

⁴⁰⁸ At 77-87.

⁴⁰⁹ At 81.

⁴¹⁰ At 83. See also *Ngāti Hokopu ki Hokowhitu v Whakatane District Council* (2003) 9 ELRNZ 111.

⁴¹¹ *Ngāti Hokopu ki Hokowhitu v Whakatane District Council* at [134] and [135].

sale. After that, the various hapū lands were administered as separate trusts – if at all. During the 1970s and 1980s several s438 trusts (established under the Māori Affairs Act 1953) had been created - Matatā Lands Trust, Awanui Lands Trust, Taiwhakaea - Orini Lands Trust, Taiwhakaea D Trust, Taiwhakaea B Trust and Taiwhakaea C, all managed by separate sets of trustees. Another Hapū block, Rangitāiki 233, had been in the hands of the Māori Trustee for many years. These matters lay until 1992.

The idea for amalgamation of trusts began to take hold following Hapū hui held in 1994 and 1995, during the Treaty claims preparation period described in Chapter Three. During 1994-1996, three separate meetings were held to discuss and confirm the amalgamation proposal, two at Te Pāroa Marae and one at Puawairua Marae. Once the detail of the proposal had been explained the majority of owners supported the amalgamation. Even after the creation of the trust in 1997, a well-attended combined hui-a-iwi of the Hapū held at Te Pāroa Marae in 1998, confirmed the principle of a single entity to administer tribal lands collectively.

Establishment of Te Pāroa Lands Trust

Then on 1 July 1997, Judge Hingston issued the orders to create Te Pāroa Lands Trust over Matatā 100, 101 and 102; Rangitāiki 28B, 20A, B, C, D, E, F; Rangitāiki 28B1A2; Rangitāiki 233; Taiwhakaea A; Taiwhakaea D.⁴¹² In an unusual move, at the request of the trustees, Judge Hingston used the infrequently invoked amalgamation of trusts provision of the Act, s 221 which provides:

221 Power of court to amalgamate trusts

(1) The court may order the amalgamation of 2 or more trusts (other than kai tiaki trusts) constituted under this Part, if—

(a) all trustees of the trusts to be amalgamated apply for the order; and

(b) the court is satisfied that—

(i) the beneficiaries of the trusts to be amalgamated have had sufficient notice of the proposal to amalgamate and sufficient opportunity to discuss and consider it; and

(ii) there is a sufficient degree of support for the application among the beneficiaries of the trusts to be amalgamated.

(2) Where any 2 or more ahu whenua or whenua topu trust are amalgamated, the income shall be held for such purposes as are specified in the order for the amalgamation of the trusts.

⁴¹² 90 Whakatāne MB 74-75, 88 (90 WHK 74-75, 88). Allan Pakau and Materoa Dodd objected.

The original trustees were Wiremu Maunsell, Meketarana Keepa, representing Ngāi Taiwhakaea II; Bill Paki and Tuterangi Hohāpata representing Ngāti Hikakino; and Wi Parata Tawa and Te Auhi Wahapango representing Ngāi Te Rangihouhiri II while Layne Harvey became trust secretary.⁴¹³ The original purpose of the trust was to place of all the lands of Taiwhakaea II, Hikakino and Rangihouhiri II under one body to consolidate them, to ensure that the best use was achieved and that costs were reduced. The trust's strategic objectives, as approved by owners' meetings in 1994-1997 included:

- (a) protection of urupā and other wāhi tapu including Ohuirehe and Te Pāroa;
- (b) Retention of lands and their prudent management by the trustees;
- (c) Maintenance and upkeep of marae;
- (d) Repurchase of Hapū lands where feasible;
- (e) Advocacy on behalf of Taiwhakaea II, Hikakino and Te Rangihouhiri II.

Financial performance

The financial performance of the trust over the last four years is set out below:

	2013	2014	2015	2016
Income	286,572	336,800	288,928	286,628
Expenses	153,292	145,106	211,616	182,597
Tax	23,566	34,476	16,384	19,850
Distributions	36,000	13,750	24,226	9,067
Surplus	109,714	158,440	60,967	84,181
Assets	11,912,154	10,493,701	10,547,576	10,544,592
Liabilities	851,420	795,653	797,025	805,109
Net assets	11,060,734	9,697,853	9,750,551	9,739,483 ⁴¹⁴

Figure 8: Te Pāroa Lands Trust annual account summary 2013-2016

⁴¹³ By 2002 all the trustees except two had either passed away or resigned, leaving Wiremu Maunsell and Te Auhi Wahapango. Then in 2003 Stan Rātahi and Jim Studer were added as interim trustees and their appointments were confirmed by the owners at a hui held on 13 December 2003. They, along with Te Auhi Wahapango, are the current trustees.

⁴¹⁴ Changes in the net asset value over the last four years is because of land revaluation changes in the context of local authority rates: personal communication from Jim Studer, trustee, (17 July 2017).

The trust derives its income from several sources, including leasing of land, residential tenancies, maize cropping and through the leasing of commercial tractors owned by the trust. Like Rotoehu and Kiwinui, the trust has also repurchased Hapū lands, at Matatā and Pekatahi near Taneatua and the Rangitāiki 233 block. It has also contributed to joint purchases with its two partner trusts – Kiwinui and Rotoehu - in recent years.

Community support

The trust has provided grants for marae, kaumātua travel including the purchase of a van, and for hakinakina (sports) and maintenance of urupā. Like Rotoehu, the trust has supported the Taiwhakaea II Tipuna Whare Centennial, the Ngāti Awa Hapū Challenge, Te Kupenga (New Zealand Wars) Commemoration and Ngāti Awa Te Toki Haka Festival.⁴¹⁵ The trust supports housing initiatives by paying the mortgage on the four kaumātua flats at Te Pāroa (Taiwhakaea II) marae where the rental income does not cover that cost. The trust also maintains several mowers and tractors and takes responsibility for maintaining the urupā and marae lawns. In recent years, the trust has also supported educational initiatives including marae based wānanga, as well as providing grants for tertiary studies. In the context of this research, the trust has never been to Court in over twenty years (and even before then) for any contentious matter from either within the ownership or with third parties. It has continued to develop throughout this time while providing support for Hapū revival.

When the prophetic leader Te Kooti Arikirangi Te Turuki travelled through the Whakatāne district in April 1893 on his way to the Ohiwa Harbour, he called on Hoani Poururu or Taupe, an old associate from the time of his sheltering in the King Country between 1872-1882.⁴¹⁶ Arriving at Otamāuru pā, a traditional residence of Taiwhakaea II, (and following the confiscation, of Hikakino and Te Rangihouhiri II), on 29 March 1893, Te Kooti uttered one of his kupu whakaari (prophetic sayings):⁴¹⁷

⁴¹⁵ Te Pāroa Lands Trust *Annual Accounts* 2016.

⁴¹⁶ Binney *Redemption Songs* above n 1, at 492-493.

⁴¹⁷ At 492-493

E Úpe, he aha koe i whakatā ai i to whare i runga i te timutimu, wehewehe whenua, wehewehe tangata, wehewehe tikanga?

O Upe (Taupe) why have you built your house on the stump, dividing the land, the people and their beliefs?

Binney records that Te Kooti was using the metaphor of the stump to warn against discord and division, noting that soon after this visit, the community would move due to flooding and separate into three marae based communities. She also records in a footnote that “the three marae today (1995) are trying to recover their unity”.⁴¹⁸ The efforts of the trust, like those of its two partners, over the two decades following can also be seen to be contributing to those attempts to restore that consensus and solidarity, despite the ongoing challenges that arise from time to time. Even then, the evidence confirms that any such challenges and complications have nothing to do with the Act or the Court, which are discussed later.

Kiwinui Trust

Background

Kiwinui is the name of the pā on the hills between present day Awakeri and Taneatua outside of Whakatāne.⁴¹⁹ At one time it was used by the Ngāti Awa tipuna Rongokarae. This land was returned to Ngāti Awa, Whakatāne section in 1878, following the confiscation of 1866, and originally comprised 8,043 acres known as Rangitāiki 31 with 229 owners, as determined by the Native Land Court following the issue of a Crown grant of land returned to surrendered ‘rebels’ and ‘others’. This meant in traditional terms Te Patutātahi-Taiwhakaea II and Ngāti Hokopū-Wharepāia hapū.⁴²⁰ However, by 1930, Ngāti Hokopū and Ngāti Wharepāia had the bulk of their interests in the land separated out by partition and then sold.⁴²¹ Strictly speaking, because of the partition and sale, what remains, in hapū terms, belongs to

⁴¹⁸ At 634.

⁴¹⁹ Elsdon Best ‘The Story of Hape, the Wanderer, as told by Tama-rau and Tutaka-ngahau, chiefs of the Tuhoe Tribe’ (1899) 8 JPS 49-57. See Tikitū Tutua-Nathan *Kiwinui: A case study of Land Administration by a Maori Land Trust* (MSocSc thesis, University of Waikato, 1993).

⁴²⁰ Hapū of Ngāti Awa: Waitangi Tribunal, *The Ngāti Awa Raupatu Report* above n 80, at 16-18.

⁴²¹ Walzl ‘Ngati Awa Lands’ above n 165 at 135-137.

Taiwhakaea II, even though the Native Land Court kept the ‘selling’ owners in the residue or remainder of the block, despite the sale of their interests.⁴²²

The trustees had leased the land for twenty-one years to a Captain Frederick Swindley in 1878. However, disagreements soon arose as to the terms of the lease and whether it was valid.⁴²³ What followed was a series of internal disputes, including claims that rent, as well as sheep, had not been properly accounted for or paid to the owners by the trustees. These issues were eventually brought before an inquiry 1886, the Barton Commission.⁴²⁴ In the event, the owners soon became divided as sellers and non-sellers. Wēpiha Apanui, one of the leaders of Ngāti Hokopu-Wharepaia and Ngāti Awa, made it plain that he saw advantage in selling only part of the block so that the proceeds could be applied by the Ngāti Hokopu owners to develop other lands.⁴²⁵ In the end, instead of a sale the land was leased again for proposed periods of thirty-three and then fifty years commencing on 26 October 1904 until a final lease was signed with Thomas Bush on 24 October 1907 for fifty years. Attempts to sell a substantial part of the block would remain dormant until 1920.

Walzl records that several minor partitions of mostly under fifty acres took place in 1907-1909.⁴²⁶ Then in late November 1909, Rangitāiki 31 was subdivided into three severances, Rangitāiki 31P1 of 3,381 acres; Rangitāiki 31P2 of ninety-four acres and Rangitāiki 31P3 of 3,934 acres. Then between 1912-1926 a further round of minor subdivision and sales occurred. However, the major alienations occurred in 1920 with the largest being the sale of Rangitāiki 31P1 comprising 3,381 acres to I Saunders and T R Bond for £ 2 per acre.⁴²⁷ More applications for partition were granted by the Native Land Court in 1929 when, on 20 May 1929, Rangitāiki 31P3F,

⁴²² Tutua Nathan, above n 419, refers to Ngai Taiwhakaea and Ngāti Pūkeko as mana whenua but this is disputed: personal communication from Te Hau o Te Rangi Tutua to Layne Harvey (22 February 2008).

⁴²³ Walzl ‘Ngati Awa Lands’ above n 165 at 116.

⁴²⁴ ‘Removal of Restrictions on Sale of Native Lands (Report by Mr Commissioner Barton on)’. [1886] I AJHR G-11.

⁴²⁵ Walzl ‘Ngati Awa Lands’ above n 165 at 119-120.

⁴²⁶ At 134-135.

⁴²⁷ At 135.

the present Kiwinui block, was created.⁴²⁸ The block continued to be leased for long periods from the 1920s to the 1950s.

The Māori Trustee and the Luttrell lease

Tutua Nathan records that, by 1957, the owners had become dissatisfied with leasing arrangements. The rental returns were often negligible with administrative costs consuming the value of any payment. The land was also marginal in terms of farming and so the income was barely sufficient to pay the rates and related costs. Lack of development finance and the usual problems of multiple ownership made developing the land impractical during the early twentieth century and so leasing was perceived as the only practical option. The owners eventually sought the assistance of the Māori Trustee. In due course, he was appointed responsible trustee and proceeded to lease the land out to a local farmer, S. R. Luttrell, for twenty-one years from 1 May 1957 to 30 April 1978.⁴²⁹ During the lease negotiations, it was agreed that there would be no compensation for improvements and that there would be four inspections of the land every five years.⁴³⁰

Two inspections were carried out in 1967 and 1973 and both gave a generally favourable report on the lessee's compliance with the lease.⁴³¹ However, by 30 April 1978, following a further report by the Māori Trustee, it was ascertained that breaches of the lease would cost \$3,400 to remedy. Further inspections were carried out on 18 August 1978 and 7 June 1979 which identified breaches amounting to \$45,000 and \$36,620 respectively.⁴³² Tutua Nathan records that the owners had notified the Māori Trustee of lease breaches but noted the tardy response of the latter in pursuing Luttrell. Proceedings did not commence until 1985. In the event, in the High Court before Bisson J the Māori Trustee obtained a judgment of \$3,400 plus interest and costs.⁴³³ Unsurprisingly, the owners had become disillusioned with the Māori Trustee's role in the supposed management of their lands.

⁴²⁸ 23 Whakatāne MB 176 (23 WHK 176).

⁴²⁹ 32 Whakatāne MB 59-60 (32 WHK 59-60).

⁴³⁰ Tutua-Nathan 'Kiwinui' above n 419 at 30-32.

⁴³¹ At 35-37.

⁴³² At 38.

⁴³³ *Maori Trustee v Luttrell* HC Rotorua, A.123/79, September 1985.

What then followed during the period after the Luttrell lease expired was a concerted effort by interested parties to lease the Kiwinui block to one of two competing companies, Caxton and Tasman Pulp & Paper Ltd, for afforestation purposes. In the end, it was Caxton which filed proceedings for the appointment of a replacement for the Māori Trustee and for the Māori Land Court to convene a meeting of owners to discuss a lease of their lands to the company.⁴³⁴ A hearing was then held on 16 June 1979 but not only were both forestry companies present, also in attendance were representatives for the local catchment board, environmental groups, the Department of Māori Affairs, iwi spokespersons and of course, the owners.⁴³⁵ The minutes of the hearing record that, after receiving submissions from interested parties, the Judge decided to withdraw and let one of the registry staff facilitate discussions amongst the owners in te reo Māori for a debate on options.

The establishment of Kiwinui Trust

The owners agreed to form their own trust per s 438 of the Māori Affairs Act 1953, and three days later Romana Kīngi, Stanley Newton, Hare Rēneti, Waikura Herewini, Lancaster Grace, Manu Paul, Kairau Ngahau, Peter Rikys, John Wilson, Te Hau Tutua, Pio Stanley Keepa and Maria Copeland were appointed trustees.⁴³⁶ Then in 1981, at the request of the trustees, the Court made Messrs Rēneti, Grace and Kīngi, along with Waikura Herewini, advisory trustees while adding Roger Kinley and Charles Ingraham as responsible trustees. The trust order was also varied to empower the trustees to sell a small section of the block.⁴³⁷ This was the first time, since 1878, that the owners had actual control of their lands that were not subject to any lease or other encumbrance. It was an important milestone.

During the first five years of the trust's operation, options to develop the land were considered, including farming. However, it soon became apparent that lending institutions were not prepared to provide development finance so forestry was the only remaining option. On 26 June 1984, the trust and Caxton, through Kiwinui Forests Ltd, signed a formal lease for seventy-five years from 29 March 1984.

⁴³⁴ 67 Whakatāne MB 115 (67 WHK 115).

⁴³⁵ 68 Whakatāne MB 126-160 (68 WHK 126-160).

⁴³⁶ Ibid. Mrs Copeland passed away soon after and was replaced by Keith Smith: 75 Whakatāne MB 322 (75 WHK 322) dated 5 June 1984.

⁴³⁷ 72 Whakatāne MB 342-344 (72 WHK 342-344) dated 7 October 1981.

In 1995, following a trust led inquiry, it was confirmed that during the period 1981-1985, approximately \$100,000 of trust funds, being rental for the lease, appeared to have been misappropriated by one of the trustees. No formal police complaint was ever made by the remaining trustees, despite serious criticism from the owners. In addition, it was found that at least two trustees had been paying themselves fees in breach of the trust order.⁴³⁸ Eventually, after an exhaustive review of the trust's available financial records, all the former trustees, apart from Stanley Keepa, were removed by Judge Hingston, and replaced with Jackie Aratema, Joe Mason, Enid Leighton and Layne Harvey.⁴³⁹

Following the death of Stanley Keepa in May 1998 and the resignation of Jackie Aratema, on 1 December 1998, Wilhelm Studer and Parehuia Aratema were appointed trustees.⁴⁴⁰

Originally, the trust's sole source of income was the rental from the forestry lease and as at the date of this thesis, the annual amount is approximately \$154,000. It can be capitalised providing the trustees with a lump sum of \$750,000. This was done on several occasions and the proceeds used to purchase commercial properties in Auckland on the advice of Stanley Keepa, himself a well-known property developer. When they were eventually sold, those properties provided a high return to the trust, in one instance achieving approximately double the purchase price after some five years. So, at the 1993 annual general meeting, the trustees reported assets of \$1.065 million on net income of \$80,773.⁴⁴¹ Even so, disquiet remained over the allegations of trust funds unaccounted for by the trust's previous secretary, who had not provided any explanation at all, let alone a reasonable one, as to what had happened to the missing trust funds.

⁴³⁸ One trustee, Manu Paul, was eventually ordered to repay approximately \$10,000 in fees paid without authority: 88 Whakatane MB273-275 (88 WHK 273-275) dated 4 March 1996; and 244 Rotorua MB 42—71 (244 ROT 42-71) dated 19 June 1996.

⁴³⁹ 88 Whakatane MB 178-188 (88 WHK 178-188) dated 8 November 1995.

⁴⁴⁰ 91 Whakatane MB 28 (91 WHK 28) dated 1 December 1998. Layne Harvey resigned as a trustee in October 2002 so the current trustees are Joe Mason, Enid Rātahi-Pryor, Wilhelm Studer and Parehuia Aratema.

⁴⁴¹ Kiwinui Trust *Annual Report* 1993.

Financial performance

The trust therefore has its corpus lands leased to Carter Holt Harvey Ltd, which bought Caxtons, and has invested the proceeds in shares, bonds, commercial property (the KFC building in Gisborne) and former Hapū land repurchased and used for maize cropping, as well as investments in kiwifruit. This has ensured that the trust's income has remained stable over the last decade. Recently, the trust has invested with the iwi and other related hapū entities to support two joint ventures; firstly, a dairy farm called Ngakauroa, and secondly, the purchase of former hapū lands that were lost through confiscation and that are also currently operating as a farm, Tumurau. The trust's financial performance over the last four years is summarised below:

	2013	2014	2015	2016
Income	439,824	569,435	566,231	404,648
Expenses	112,577	201,952	121,826	166,786
Tax	43,324	64,555	61,915	35,404
Distributions	43,250	38,570	61,363	58,111
Surplus	240,673	264,358	321,127	144,347
Assets	6,066,130	7,440,700	6,923,073	6,855,231
Liabilities	419,668	1,560,995	704,744	492,555
Net assets	5,646,464	5,879,705	6,218,329	6,362,676

Figure 9: Kiwinui Trust annual account summary 2013-2016

The 2016 accounts provide a more detailed breakdown of the trust's balance sheet:

	2016	2015
Current assets	439,685	496,734
Non-current assets	4,460,151	4,464,056
Shares	825,788	829,871
Bonds	271,105	223,768
Ngakauroa JV	539,844	554,890
Tumurau JV	315,487	350,603
TOTAL	\$6,855,231	\$6,923,073

Figure 10: Kiwinui Trust asset class summary 2015-2016

After the challenges of the 1980s, by the late 1990s, the trust had consolidated its position and used its income in a series of diverse investments. By 2016, according to the annual accounts, the trust had increased its income to \$569,453 and \$404,648 for the 2015 and 2016 financial years respectively. While Kiwinui is second in terms of value in this trio of trusts, it has the most diversified investments. This is

because the trustees decided to hold a range of investment types as a precaution against inflation and the cyclical nature of commodities and property, consistent with the decision of the High Court in *Re Mulligan* (deceased).⁴⁴²

Community involvement

Continuing with the theme of hapū revitalisation - like Rotoehu and Te Pāroa - the Kiwinui Trust continues to contribute to the rebuilding of hapū capacity across a range of fronts including cultural, economic, social and political. The trust has made substantial contributions to marae rebuilding and restoration including a \$100,000 capital grant to Te Rangihouhiri II Marae and annual grants for marae insurance and maintenance. The trust pays a kaumātua grant to all owners aged 65 and over, and education grants. Kiwinui is one of the few trusts that also distributes a tangi grant for deceased owners. Like Rotoehu and Te Pāroa, Kiwinui has a general grant for group events and activities that are not covered by the previous categories.

Over the last twenty-five years, Kiwinui Trust has grown from being the owner of only a wild and hilly, largely uneconomic block of land, with seemingly limited development potential during the 1960s and 1970s, to a \$7 million trust with diversified investments and regular distributions while experiencing reasonable capital growth over the last decade. All of this has been achieved under the Act, without the need for some of the detailed prescription and procedure inherent in the reform proposals. After several false starts, the trust continues to consolidate its strategic objectives and contribute to Hapū development.

Can the Hapū further consolidate their land use under the Act?

Further amalgamation of trusts

An obvious next step for the Hapū would be to explore the benefits of amalgamating their three existing trusts into a single whenua tōpu trust, given that the trusts are unlikely to pay a dividend to owners. With the continuing effects of fragmentation, it is difficult to see how a dividend could be justified, given the increasing numbers

⁴⁴² *Re Mulligan* (deceased) [1988] 1 NZLR 438. Then, continuing to adopt a cautious approach the trust was granted approval of the Court for a new venture per s 229 of the Act to deposit up to \$1.9 million with the private banking division of the National Bank: 91 Whakatane MB 111 (91 WHK 111) dated 16 April 1999.

of owners and the high proportion who are disengaged and for whom current addresses are not held. There are two obvious potential benefits of the Hapū trusts consolidating their assets under a single entity. Economies of scale and size ensure the combined trusts will firstly save money and secondly be better placed to undertake more significant investments. The average income and surplus of a combined trust over the last four years would have been \$989,030 and \$383,682 and net assets of \$20,034,805:

Combined	2013	2014	2015	2016
Income	1,079,357	1,214,214	895,475	767,077
Expenses	399,426	360,778	354,077	368,004
Tax	182,147	150,107	82,335	61,632
Distributions	194,507	262,562	107,410	97,976
Surplus	454,540	455,739	375,918	248,533
Assets	21,467,213	21,805,234	21,637,584	22,246,566
Liabilities	1,382,314	2,558,408	1,654,760	1,451,703
Net assets	20,084,901	19,246,631	20,012,825	20,794,863

Figure 11: Combined trusts annual accounts summary 2013-2016

A combined trust is therefore likely to have more, not fewer investment opportunities. Amalgamation will mean that the land assets of the Hapū are managed by one set of trustees resulting in greater coordination and deployment of resources. The evidence confirms that Te Pāroa Lands Trust has been doing so successfully for the last two decades. Its asset base and income have grown substantially from when the trust was first created.⁴⁴³ Combining the three trusts will create an entity worth the size of smaller Treaty settlements, while still retaining the entitlement to draw from the benefits of the tribal settlement of Ngāti Awa.⁴⁴⁴

Administrative and management costs would clearly be reduced through amalgamation with only a single set of accounting, trustee and related administrative expenses. Te Pāroa Lands Trust has made significant savings over the last twenty years by having one set of trustees manage ten different blocks. Amalgamation is likely to mean that more money would be available for investments, and would improve efficiency for owners as they would need to attend only one annual hui each

⁴⁴³ Te Pāroa Lands Trust *Annual Accounts* 1998.

⁴⁴⁴ Te Rūnanga o Ngāti Awa *Annual Report* 2004 (Mann Printing Ltd, Whakatane, 2004)

year. Owners and beneficiaries frequently complain of a lack of information and meetings, or alternatively that there are too many meetings to attend, meaning that it is difficult to keep track of the business of each or even to be available to attend on multiple dates.

Summary

Over the last twenty-five years, as their annual reports and related evidence confirms, the land trusts of the Hapū – Te Pāroa, Kiwinui and Rotoehu – have continued to prosper under the Act. Consistent with their strategic objectives, they have:

- (a) repurchased Hapū lands lost through confiscation and sale;
- (b) assisted in the rebuilding and renovating of Hapū marae;
- (c) protected and maintained urupā and other important wāhi tapu;
- (d) supported traditional wānanga, hikoī, haka, commemorations and related events;
- (e) provided advocacy support for Hapū interests to external bodies; and
- (f) funded education, kaumātua, sporting and community grants.

In the context of Rotoehu, the evidence confirms that the whenua tōpu model is appropriate, given that there are no beneficial owners of the land but instead trust beneficiaries. As the shareholding in Te Pāroa and Kiwinui trusts is so fragmented, it is unlikely that there will ever be a dividend payment. The next step for the owners to consider, therefore, is a further amalgamation of all three trusts and whether to adopt the whenua tōpu trust structure to rid the Hapū finally of the impracticality and burden of individualisation and return to collective tribal title.

In the context of the role of the Act and the Māori Land Court during the period in review, the Hapū have sought to continue to engage with what remained of their lands from the late nineteenth into the twenty first century. For the last half century, during the operation of the 1909, 1931, 1953 and the 1993 Acts, the Hapū rarely had any need to commence proceedings or to request the Court's intervention at a tribal level. When the Māori Trustee sought to sue a former lessee of Kiwinui it did so in the High Court. In 1995, the owners and trustees of Kiwinui sought to make former trustees accountable for the loss of substantial trust funds, but there are no other

recorded instances of orthodox litigation involving these three trusts or their predecessors for decades.

In terms of administrative functions, there have also been few instances where the Hapū and their trustees have had to seek the approval of the Court to manage their lands, beyond the perfunctory replacement of trustees' applications and the filing of accounts. As foreshadowed, a single s 229 new ventures application was filed out of an abundance of caution following *Mulligan* and not as the result of a Court prompted intervention or review. In short, the Hapū trusts have gone about their business over the last quarter century with very little engagement needed with the Court. Unlike many of the trusts referred to in Chapter Five, mired in conflict, dispute and risk, these three trusts have remained free of serious litigation.

In summary, the trustees confirm that the Court does not and has not made the decisions for them on any major or even minor trust activity. The trustees and the owners all know that the Court is there if it is required, but the trustees have become experienced enough now to take advice where appropriate and make their own decisions. So, for these trusts, the suggestion that the Court should make their decisions or constrain their activities is not supported by the evidence. In addition, on major policy issues or proposals, the evidence confirms that the trustees will always consult with their beneficiaries and seek their feedback. It is against this background therefore, that the – now lapsed – Bill and the reforms it contained, as they affect ahu whenua trusts, can be properly considered.

CHAPTER SEVEN – A RADICAL APPROACH TO REFORM

Introduction

This chapter discusses the impetus for the radical approach to reform that occurred between 2012 and 2017 where the then National-led government decided to replace rather than amend the 1993 Act with completely new legislation. The chapter also explores where the actual drivers came from for the complete re-write of Māori land laws. Rather than attempting to be a detailed analysis of the entire 448 pages of the Bill, and the events that led to its creation, this chapter will outline certain key events and issues including the critical ‘Five Propositions’ developed by the Ministerial Review Panel on Te Ture Whenua Māori Act 1993.⁴⁴⁵ This is because the work of the Panel was central to the developing reform proposals that ultimately resulted in the Bill.

The Law Commission

The reform process, including the underlying policy development and the preparation of the numerous drafts of the Bills, was unusual to some extent because of the absence of the Law Commission.⁴⁴⁶ As the principal law reform body of New Zealand it has been perplexing for some Māori land owners, their advisers and representatives, that its resources and expertise had not been deployed on such a fundamental review of important property rights. Major change to laws involving such rights have in the past invariably been subject to the scrutiny of the Commission including reviews of the Property Law Act, the Land Transfer Act and the law relating to trusts.⁴⁴⁷ The Judges also recommended in their submissions to the Review Panel, the Ministerial Advisory Group and the Māori Affairs Select Committee that such an important reform should have been overseen by the Law

⁴⁴⁵ The Waitangi Tribunal in its 368-page report *He Kura Whenua ka Rokohanga* above n 41 provides the most detailed history of the development of the Bill to date.

⁴⁴⁶ Law Commission Act 1985. According to s3 of that Act, the purpose of the Commission is to “promote the systematic review, reform and development of the Law of New Zealand.” The last significant initiative of the Commission concerning Māori assets dates to *Waka Umanga* above n 321. This was a set of proposals led by the then Justice E T Durie intended to provide a range of choices for the establishment and review of governance bodies for collectively-held assets. The proposals did not find favour with the then National-led government following the 2008 election and were discarded.

⁴⁴⁷ See Law Commission *A New Land Transfer Act* (NZLC 130, 2010); Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2009).

Commission because it has the statutory mandate, the expertise and the resources to undertake such a review in its usual careful and considered way. There had been speculation that the Commission has not been included because there were concerns as to the delays that could result from its inquiries. Given the complications that arose throughout the drafting process, as outlined by the Waitangi Tribunal in its report on the reforms, and the delays in producing both the Bill and the detail of the proposed Māori Land Service, the support of the Law Commission, even within an extended timeframe, might have been preferable.

Also puzzling, given the terms of reference of both the Review Panel and the Ministerial Advisory Group, is that the work of both committees appears to have been disadvantaged by an evident lack of research capacity. While it is correct to claim that some research had been undertaken on the ‘barriers’ to Māori land development, much of that lacked an empirical base.⁴⁴⁸ As subsequent events have demonstrated, including an urgent hearing before the Waitangi Tribunal, the reforms have suffered from that lack of relevant evidence on the extent to which the barriers that have been identified *do* in fact impede the development of land.⁴⁴⁹

The Waitangi Tribunal, the Judges, various stakeholder groups and submitters on the Bill have underscored the dearth of empirical research properly analysed to identify the real barriers to Māori land development. The Commission would have been well placed to undertake and source the necessary independent reviews and research to provide the robust and informed process that such an important reform required. Given recent developments following the election, it may yet prove both sensible and necessary for the Commission to be included in any future discussions on the reform of Māori land laws.

Background

The evidence confirms that between 2008 and 2014 the Associate Ministers of Māori Affairs, the Hon Georgina Te Heuheu QSM and the Hon Christopher Finlayson, had

⁴⁴⁸ Waitangi Tribunal *He Kura Whenua Ka Rokohanga* above n 41 at 102. During cross-examination before the Waitangi Tribunal hearing of an urgent claim into the current reform proposals, Mr Dewes accepted that recent research on the barriers to land development was not based on empirical data and was not statistically reliable.

⁴⁴⁹ At 286.

responsibility for oversight of the Act and eventually the reform and repeal process during that seven-year period. Curiously, in its brief to the incoming Minister of Māori Affairs following the 2008 election, Te Puni Kōkiri makes little mention of the Act and certainly does not refer to any reform proposals.⁴⁵⁰ Yet by 2011, in her valedictory speech, Te Heuheu made clear her concerns about the Māori Land Court and the existing legislation and how the two were, in her opinion, shackling the growth of Māori enterprise.⁴⁵¹

Over the years the National Party has worked to rid New Zealand of excessive controls that inhibit private enterprise. Going forward there will be a need to review the Māori Land Court's role in the administration of Māori land. I think there are no businesses in the country that are so constrained by external control, nor do I know of any enterprise anywhere that would want to manage its business through the vagaries of judicial decision-making.

I was raised in the backblocks of Tūwharetoa in the middle of the North Island, observing leaders who were committed to the principle of autonomy in all matters, including land administration. Enterprising measures will eventually be developed to replace the outworn system of the Māori Land Court, so that Māori enterprise can blossom.

Even following the 2011 election, the Ministerial briefing referred to the 1993 Act in the context of reform in one line, noting that “scoping [was] underway”.⁴⁵² When the Review Panel was announced in 2012, Associate Minister Finlayson also made it clear that a substantial rewrite of the law governing Māori land was central to the Government's policy, as the Waitangi Tribunal observed.⁴⁵³ Moreover, the 2014 National Party manifesto spoke of improving the “productivity” of Māori land, repeating the assertion taken from a Ministry for Primary Industries report of 2013 that such land “had the potential to contribute around \$8 billion to the economy and create 4,000 jobs over the next 10 years.”⁴⁵⁴ By contrast, the Māori Party had no

⁴⁵⁰ Te Puni Kōkiri “Brief to incoming Minister 2011” Parliament Website <www.beehive.govt.nz>.

⁴⁵¹ Georgina Te Heuheu “Valedictory Statement” (5 October 2011). The most successful of these entities where the former Minister may have interests were all established by Court order including Lake Taupō Forest Trust, Lake Rotoaira Forest Trust and Tuaropaki Trust and they have all flourished under the Act and its predecessor as their respective annual reports confirm.

⁴⁵² Te Puni Kōkiri Briefing to the Incoming Minister 2011 above n 450 at 17.

⁴⁵³ Waitangi Tribunal *He Kura Whenua Ka Rokohanga* above n 41 at 129: On 15 June 2012, several days after the press release, the Associate Minister was quoted in the media as saying that 70 per cent of Māori land titles had no governance structure, more and more land was held by absentee owners, and much of this potentially profitable land was unproductive, hence the ‘legislation is failing Māori land owners and a superficial fix-up will not suffice. I want fundamental change.’

⁴⁵⁴ <www.nationalparty/legacy_url/201/maori-affairs>. It will be remembered that the figure of \$8 billion was contained in the Ministry for Primary Industries *Growing the Productive Base of*

such policy in place until following the 2011 elections. Even then, it was in more muted terms since, as foreshadowed, oversight of the Act and eventually its intended reform and repeal were delegated to the Associate Ministers.

After the 2014 elections, responsibility for the reforms shifted to the Minister of Māori Development, the Hon Te Ururoa Flavell. Before then, according to one of its then co-leaders, the Māori Party had had limited input into the reform proposals.⁴⁵⁵ But by 2015, the Māori Party was giving its unequivocal endorsement to the reforms. In a February 2016 newsletter, the Māori Party extolled the virtues of the Bill, describing it as promoting the road to “mana motuhake” (self-determination), while strengthening the anti-alienation provisions, encouraging increased owner engagement and providing dedicated support services.⁴⁵⁶ In time, the Māori Party’s fortunes would become tied to the reforms and to the Bill.

Overview

Since the passing of the Act in 1993, several reports prepared by the Crown and related agencies including the Law Commission, as well as Māori land owner groups like the Federation of Māori Authorities for example, have identified areas for improvement and reform.⁴⁵⁷ These discussions eventually led to an important amendment to the Act in 2002. However, some of the more serious proposed changes were eventually dropped at the Select Committee stage of the process, as detailed by the Waitangi Tribunal in its report *He Kura Whenua ka Rokohanga-Report on Claims about the Reform of Te Ture Whenua Māori Act 1993*.⁴⁵⁸ By 2011, however, the Government was starting its second term and had decided, as part of its overarching business growth strategy, that the productivity of Māori land was

Māori Freehold Land (Wellington, 2013). Subsequently, the 2014 update asserted that the more likely figure was \$3.5 billion. See Ministry for Primary Industries *Growing the Productive Base of Māori Freehold Land – Further Evidence and Analysis* (Wellington, December 2014).

⁴⁵⁵ Personal communication from the Hon. Pita Sharples to Layne Harvey (Ratana, January 2011).

⁴⁵⁶ Māori Party “Ture Whenua Māori Bill-Key Changes” <www.maoriparty.org>.

⁴⁵⁷ For example, New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* above n 245; and Dewes, Martin and Walzl *Owners’ Aspirations regarding the use of Māori Land* above n 14.

⁴⁵⁸ Waitangi Tribunal *He Kura Whenua Ka Rokohanga* above n 41 at 109-112. Crown official John Grant highlighted the importance of the Select Committee process, how major change was affected regarding the 2002 amendments, and how with the Bill the same thing was possible. History confirmed this opinion to be rather misplaced, given the fundamental rewrite of Māori land law that the Bill exemplified remaining essentially intact up to the Third Reading stage.

an area ripe for reform. It is important to note in this context that, despite all the reviews of the Act that has been undertaken since 1998, none of them recommended the repeal of the entire framework and its replacement by a completely new law.

Government commissioned Māori land productivity reports 2011-2014

In 2011 the Ministry of Agriculture and Forestry (MAF) produced a report, *Māori Agribusiness in New Zealand: A Study of the Māori Freehold Land Resource*.⁴⁵⁹ As foreshadowed, this was followed in February 2013 with a report commissioned by the Ministry for Primary Industries (MPI) entitled *Growing the Productive Base of Māori Freehold Land*.⁴⁶⁰ An updated report was issued in December 2014 *Growing the Productive Base of Māori Freehold Land – further evidence and analysis*.

In summary, the reports argued that up to eighty percent of Māori land was significantly under-performing from an economic perspective and that the Act played a role in impeding growth. The first report suggested that up to \$8 billion in gains to the economy overall through improved performance was achievable over a ten-year period while the more circumspect version of December 2014 referred to \$3.5 billion.⁴⁶¹ Both reports acknowledged that any such gains would require substantial capital input of \$3 billion and \$900 million respectively, without identifying where such capital might come from. In any event, despite this, as subsequent events would confirm, it was these reports that provided the impetus for the reform proposals that would eventually result in the Bill.

As an overview comment, it appears that the figures used in these reports and their methodology, have resulted in a broad-brush approach largely relying on secondary sources and unsupported by detailed evidence and data. This is acknowledged in the reports themselves. They also make some significant assumptions, in the absence of relevant supporting evidence. The utility of these reports, consequently, as to how much Māori land is underutilised or under developed must therefore be considered in light of such limitations. Interestingly, the 2013 report noted that thirty-one per cent

⁴⁵⁹ Ministry of Agriculture and Forestry *Māori Agribusiness in New Zealand: A Study of the Māori Freehold Land Resource* (Wellington, 2011).

⁴⁶⁰ Ministry for Primary Industries *Growing the Productive Base of Māori Freehold Land* above n 454.

⁴⁶¹ Ministry for Primary Industries *Growing the Productive Base of Māori Freehold Land – Further Evidence and Analysis* above n 454.

of Māori land was suitable only for forestry and another fifteen percent was unsuitable for any form of forestry or agriculturally related exploitation.⁴⁶² The report also claimed that only three percent of Māori land was “highly versatile” while a further sixteen percent was suitable for pastoral use and another forty-five per cent would be useful for grazing or forestry. These conclusions were reached notwithstanding that a considerable component of this total land base of over one million hectares was already in use by Māori land entities, including significant areas of land, and all operating successfully.

In short, the three MAF/MPI reports are heavy on assumptions and generalisations and light on detail and evidence to support their conclusions. They do not for example explain whether – and if so *how* – Māori land laws are impeding land development. Rather, they generalise and identify the improvements that could be made, including changes to land laws in broad terms. Inevitably then, these reports are of limited utility. More so, given the dramatic change concerning the \$8 billion productivity gain claim, that shrank to less than half that figure within a year, once the authors had begun to unpick their earlier research and examine their assumptions and data more closely.⁴⁶³ As the Waitangi Tribunal observed:⁴⁶⁴

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

Yet the Tribunal has not received any significant evidence as to where that major funding resource is expected to be found – other than the vague implication that if decision-making ‘barriers’ were removed from governance entities for Māori, banks would be more willing to lend to Māori.

Yet, despite these limitations, the reports would provide one of the important considerations for both the Government and the Review Panel it established in 2012 to consider the Act, and would provide part of the justification by the Panel for not

⁴⁶² Ministry for Primary Industries *Growing the Productive Base of Māori Freehold Land* above n 454 at 18.

⁴⁶³ This report was released in December 2014. See also Professor Richard Boast, Deborah Edmunds, Tai Ahu and David Jones ‘Submissions to the Māori Affairs Select Committee on Te Ture Whenua Maori Bill’ (2016) at 12-14.

⁴⁶⁴ Waitangi Tribunal *He Kura Whenua Ka Rokohanga* above n 41 at 186.

undertaking its own research. In any event, in the period between these reports, the Associate Minister of Māori Affairs made it plain that an overhaul of the current legislation was necessary to unlock the potential economic and related benefits of “underperforming” Māori land, repeating the theme of the 2011 report. On 23 November 2012, the Minister is also reported to have said that the current law had failed to make Māori land productive.⁴⁶⁵ He would go on to say that he wanted “fundamental change.” Taken together, these and subsequent statements, including private conversations with members of the Review Panel, confirm that the *replacement* of the Act was, from the beginning, the principal objective of the reform programme that commenced in earnest in 2012.

Te Ture Whenua Māori Act 1993 Review Panel

Discussion Document

As foreshadowed, in 2012, the Minister of Māori Affairs and his Associate decided to establish a panel to review the Act. The background to the establishment of the Review Panel is set out in its initial *Discussion Document* dated March 2013 which also refers to the two earlier MAF/MPI reports on the barriers to Māori land productivity. From the outset, it was claimed that the focus was on increasing productivity while ensuring the retention of Māori land.⁴⁶⁶

The Review Panel, consisting of lawyers and consultants Matanuku Mahuika, Toko Kapea, Patsy Reddy and Dion Tuuta, the latter a former historian and then Chief Executive of Parininihi ki Waitotara Incorporation, was given a wide brief, with a focus on land utilisation “driven by owners”. Comment was also made on the need to ensure that the protections against alienation remained intact.⁴⁶⁷ A process of consultation would include discussions with a wide variety of stakeholders and so to that end, the Review Panel developed five propositions for that purpose on 3 April 2013.⁴⁶⁸ In addition, the decision of the Review Panel to rely on the 2011 and 2013

⁴⁶⁵ “Unlocking value of Māori farmland essential – Finlayson” *Radio New Zealand* (23 November 2012).

⁴⁶⁶ Mahuika, M. Kapea, T. Reddy, P. and Tuuta, D. *Te Ture Whenua Māori Act 1993 – Review Panel Discussion Document* (Te Puni Kōkiri, Wellington, 2013).

⁴⁶⁷ At 6.

⁴⁶⁸ At 3.

MAF/MPI commissioned reports and other “existing research” rather than undertaking its own, is also of significance.

As the Waitangi Tribunal commented:⁴⁶⁹

The review panel also decided that its terms of reference permitted it to take a ‘first principles’ approach rather than ‘constraining our thinking by focusing on the specific provisions of Te Ture Whenua Māori Act’. As Mr Mahuika put it in his evidence: ‘As a first step we decided we should go back to fundamentals and ask ourselves, in an ideal world, what sort of a regime should we have for the administration of Māori land?’ Hence, the panel did not, as its terms of reference required, ‘assess the extent to which the current regulatory environment is enabling or inhibiting the achievement of Māori land owner aspirations in general as well as specifically in the cases of ownership, governance, and access to resources’.

Both of these decisions were strongly criticised by the claimants, who considered that there was insufficient empirical research to underpin the panel’s later analysis and recommendations. **We note in particular that the research on Māori Land Court decisions called for by the McCabe report in 1998 had still not been carried out. Marise Lant suggested that there has only ever been an ‘assumption that the Māori Land Court is restricting or hampering Māori decision-making authority and utilisation of our land’. In response, Crown witnesses could not point to any empirical research on this question.**

(Emphasis added)

Given the centrality of the propositions to the theory behind what eventually became the Bill, it is important that the Review Panel’s views are scrutinized from the practical perspective of trustees, landowners and their advisers, as well as member of the judiciary. What follows is a review of the propositions, drawn in part from the interviews and surveys, and from the experiences of the researcher.

Māori land utilisation should be determined by a majority of engaged owners.

Two important points arise from this proposition. The first is the proposal that, under the Bill, without any fiduciary relationships protecting the majority, a minority of owners, and in some cases a tiny minority, were to be empowered to alienate Māori land by lease, and otherwise affect the legal interests of *all* the other owners, without recourse to any court, contrary to the general law. Second, the evidence confirms that, under the Act, owners engaged with their land *do* make the decisions

⁴⁶⁹ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 130.

with the Court often simply affirming their choices. That affirmation could often occur as an administrative process on the papers without the need for a hearing.⁴⁷⁰

Minority owners will be able to bind the majority without Court oversight

Regarding the first point, the Bill sought to empower what would be, invariably, a tiny minority of owners to commit the interests of the majority with no fiduciary or agency relationship to hold those owners making the decisions to account. As mentioned above, under the general law, no owner of land can commit another or interfere with the latter's interests except with the oversight of a court.⁴⁷¹ As the Judges pointed out in their submission to the Māori Affairs Select Committee:⁴⁷²

The participating owners' regime will empower a minority of owners to make decisions that are binding on all owners outside of any governance structure and without any accountability to their co-owners, and without any Court process to ensure the decision is fair to all owners. In addition, the "second decision-making process" in cl 51(8) means that there may in effect be no quorum requirement in relation to decisions concerning land in multiple ownership.

The Judges go on to make three important points about why the engaged owner model is flawed. First, they say that the Bill enables a minority, once they have met notice and related requirements, to make decisions that will commit all the owners, without the safeguard of an independent Court process to ensure that the decision is in the interest of all owners. The general law protects the interests of *all* owners and that is the case under the Act. What the Bill proposed is to *remove* that equal treatment and protection under the existing law, in the belief that this would somehow improve the productivity of land without any independent empirical data to support such a conclusion. This reduction in property rights, it is argued, would inevitably have consequences and cause uncertainty and risk.⁴⁷³

⁴⁷⁰ Examples include appointment of agents, confirmation of a resolution of owners to lease land, creation and disestablishment of trusts and incorporations, appointment and replacement of trustees, partition, vestings by way of sale or gift and change of status. These examples are especially relevant where all the owners or over 50% agree with the proposal or, where having gone through a thorough process of notification and meeting, there are no meritorious objections.

⁴⁷¹ Bennion *Land Law in New Zealand* above n 121 at [6.6.01].

⁴⁷² Māori Land Court Judges "Submission of the Judges of the Māori Land Court to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill 2016" (2016) at 8(b).

⁴⁷³ At 23-25.

Their second point is that the engaged or participating owners' provisions would enable a minority to make decisions binding on all owners outside of *any* governance structure. By this, the minority could avoid any of the core duties and accountabilities owed by governors to Māori land owners. It is well settled that co-owners of land owe only limited duties to each other, and certainly do not owe each other fiduciary duties. So, where a self-interested set of owners make decisions concerning land without any accountability, because the Bill would empower them to do so without any governance body, this is likely lead to poor decision making.⁴⁷⁴ Under the existing law there are already many examples of where this occurs but the Bill appeared to incentivise self-interested decision making because unscrupulous individuals could proceed with such a scenario safe in the knowledge that they owed no duties to their co-owners and that the risks of a court reviewing the decision were minimal.

The Judges' third point is that the lack of protection for owners' rights was severely compounded by the "second decision-making process" per cl 51(8). The second chance process was, it is understood, intended to be a protection mechanism against a minority of owners deciding at a meeting of owners called for such a purpose, that would seriously affect the interests of all owners, in some cases without their consent or knowledge. If a proposal failed for want of a quorum at the owners' meeting, within twenty days, a second meeting could consider the same proposal but *without* the requirement of a quorum. The result would be that the intended safeguard was rendered meaningless – and thus the current protections Māori land owners possess under the Act were being removed by the provisions of the Bill. The Judges therefore argued that the Bill would undermine existing property rights that Māori land owners currently enjoy; and to do this, they assert, would ultimately prove counterproductive.⁴⁷⁵ A last-minute change to the Bill to provide some Court oversight required an owner being aware of the transaction and filing an application for review. Even if that were to occur, the jurisdiction would be limited and

⁴⁷⁴ At 26-28.

⁴⁷⁵ At 30. The Judges proposed that the second decision-making process be deleted and, where a meeting failed for want of a quorum the promoters of the proposal could apply to the Court to be heard on their proposal, having regard to all the circumstances, including ownership and consultation. The addition of cl 51B (3) -(5) into the Bill goes some way toward meeting this concern, but this is not a complete answer.

uncertain because it would be new and untested. By way of contrast, under the Act, governors can be held accountable for their decisions and agents have accountability terms set out on their appointment.⁴⁷⁶

Dealing with the second point – in the researcher’s experience, and that of many of the Judges, trustees and their advisers, this is what frequently occurs now – those owners who attend a meeting will make the decisions on land utilisation. Invariably, they will decide to either create an ahu whenua trust or appoint an agent. The trustees or agent are then free to develop the land in accordance with the decisions of the meeting of owners and, in the case of an ahu whenua trust, in accordance with the terms of trust.⁴⁷⁷ Where a proposal involves, for example, an alienation by long-term lease; in the absence of appropriate thresholds being met under the current Assembled Owners regime, a trust is created and the trustees are empowered under the trust order to enter leases of less than fifty years. Should the term exceed fifty years then under the Act the trustees are required to secure the approval of fifty percent of the owners. For many blocks that would be an impossibility.

In addition, under the Māori Assembled Owners regime, beneficial owners already have decision making abilities on land utilisation.⁴⁷⁸ In practice however, often the quorum requirements for leases, by way of example, are increasingly difficult to achieve. A lease of between seven and fifteen years requires a quorum of thirty percent of the shareholding in the land, not thirty per cent of the engaged owners. A lease of up to forty-two years the quorum is fifty percent. When those levels were originally set in 1993, fragmentation was problematic enough. Those difficulties to achieve the necessary quorums for decision making under the 1995 regime will only increase over time with continuing fragmentation, as identified by the Māori Appellate Court in *Wall v The Maori Land Court – Tauhara Middle 15 Trust and Tauhara Middle 4A2A Trust*.⁴⁷⁹

⁴⁷⁶ See Chapter Five above at 116-128.

⁴⁷⁷ Personal communication from Chief Judge Isaac to Layne Harvey (6 October 2016).

⁴⁷⁸ Part Te Ture Whenua Māori Act, 1993; Māori Assembled Owners’ Regulations 1994.

⁴⁷⁹ *Wall v The Maori Land Court - Tauhara Middle 15 Trust and Tauhara Middle 4A2A Trust* [2010] 2010 Māori Appellate Court MB 55 (2010 APPEAL 55).

Moreover, the judgments of the Māori Land Court on this issue confirm that a pragmatic approach to owner decision-making is applied. Where a meeting of assembled owners fails for lack of a quorum, the owners present can decide to form a trust or an incorporation or to appoint an agent. Provided the notice requirements have been satisfied, and the prospective nominees comply with s 222 of the Act; almost without exception, a trust will be established and the persons nominated by the meeting will be appointed. The role of the engaged owners in deciding to create a trust and appoint trustees or to establish an incorporation is consequently critical. The same applies to the appointment of an agent. Owners have the option of appointing an agent to avoid the costs of a trust or incorporation where the land is leased for example and the need for active trustees is essential. An agent will also be appointed where no one is willing to accept the responsibilities of trustee, especially where there may be latent exposure to risk and unknown liabilities.

In any case, as set out above, many trusts have gone on to build enviable reputations for development and for increasing owner wealth to unforeseen heights using the wide powers trust order.⁴⁸⁰ Their efforts have not required the approval or other endorsement of the Court after the trusts were created, often decades before.⁴⁸¹ Unsurprisingly, because of their scale, underlying resource base and the quality of governors, these trusts rarely hold undeveloped land except by design, where wāhi tapu and reserves have been protected. They have not experienced, it would appear, the detrimental constraints and impediments that the Court and the Act are perceived to impose. As foreshadowed in Chapter Five, those trusts have limited interaction with the registry and continue to develop without any Court endorsement or regular oversight beyond filing annual accounts. The views of the trustees and the owners and their advisers are what inform the trust's decision making, not the Court.

⁴⁸⁰ Examples include Tuaropaki Trust, Pukeroa Oruawhata Trust, Rotoiti 15 Trust, Lake Taupō Forest Trust, Lake Rotoaira Forest Trust, Wellington Tenths Trust, Palmerston North Reserves Trust, Omataroa Rangitāiki No. 2 Trust, Putauaki Trust, Ngāti Hine Forestry Trust and Te Awahohonu Trust.

⁴⁸¹ For example, the Lake Taupo Forest Trust was created in the 1968. Since then it has gone on to develop into one of the premier Māori land trusts engaged in forestry. In 2016 its value was \$185 million held on behalf of over 13,000 owners. The trustees have had little reason to involve the Māori Land Court in its activities since its establishment: <www.ltft.co.nz>.

Any new proposals that further enshrine a legislative threshold for decision-making are likely to generate further challenges rather than mitigate or eliminate them. The Bill's series of thresholds for the engaged owners model is likely to prove impractical over time because of the rigidity of those requirements. As foreshadowed, with the second chance meeting provisions recently amended, however, the Court now has the jurisdiction to declare a decision invalid, provided an owner applies for such a review. The difficulty would arise where there has been inadequate notice and therefore the diminished likelihood of a review and then the question of determining whether the notice was adequate. Clause 51B (3) (b) of the Bill provided that the notice to owners of a proposed second chance meeting must notify them "in a way that clearly explains its effect (that is, that the resulting decision will be valid if it is agreed to by the required majority of the participating owners, regardless of how many owners participate, and it is confirmed by court order)."

With incorporations, the Court has even less ability to intervene under the 1993 Act as ten percent of the shareholders must agree to activate the Court's investigatory jurisdiction.⁴⁸² While the removal or replacement of committee of management members is possible, this too is a rare event. The Court does not lightly remove trustees or committee of management members.⁴⁸³

In summary, the underlying thesis behind the proposed participating or engaged owners model – that it is necessary to replace the current framework of Court controlled decision making – is not accurate. There is simply no empirical evidence that it is the Act, the Court or its processes that are the primary or even secondary cause of underdevelopment of Māori land. On the contrary, the Court often does all it can to encourage owner participation, the resolution of disputes without adjudication and the development of land by the owners and their trustees. In short,

⁴⁸² For examples, see *Rotoma No 1 Incorporation – Rotoma No 1* (1996) 1 Waiariki Appellate MB 25,42 (1 AP 25,42); *McCleery v Waihaha 3D2 Incorporation* (1997) 1 Waiariki Appellate MB 67 (1 AP 67) at 77; *Watson v Parker - The Proprietors of Torere 64 Incorporated* [2015] Māori Appellate Court MB 543 (2015 APPEAL 543); *Hipango v Peehi - Atihau-Whanganui Incorporation* (2008) 221 Aotea MB 152 (221 AOT 152) and *Firmin v The Committee of Management of Atihau Whanganui Incorporation - Atihau Whanganui Incorporation* (2016) 352 Aotea MB 233 (352 AOT 233).

⁴⁸³ *Bramley v Hiruharama Ponui Inc* above n 381.

owners, their agents, trustees and committee of management members have a broad discretion to undertake a wide range of development activities, which, following appointment and establishment, requires limited, if any, involvement, of the Court.

All Māori land should be capable of utilisation and effective administration

The views of those individuals interviewed to assist with this research confirm that much of what is intended to be cured by the Bill can be achieved already under existing legislation. However, for the avoidance of doubt, it can be argued that some clearer definition of the jurisdiction to appoint agents or managers would be helpful in minimising the risk of successful challenges of orders being made without jurisdiction. The most common impediment is not jurisdictional, however. Agents are reluctant to accept appointment if there is little prospect of being paid. Even the Māori Trustee, until recently, has usually refused to accept appointment as either agent or trustee where the subject land is “unproductive”. The key point is that, while changes to the legislation would be helpful to make the policy imperatives of owner led development more precise, the Act does not prevent land utilisation and effective administration. In short, it appears that there remains a dearth of empirical data as to the actual impediments to successful land development beyond unscientific anecdotal assertions.

For example, where a plan exists for the development of land, if the proposal requires finance, and the owners acting through an agent, trust or incorporation, cannot raise the funds for that development because lending institutions may regard such a new venture without a record of success more cautiously, no law change will alleviate that concern. It has been suggested that a wider range of financing related options could be included in the Bill to make the development of Māori land more attractive to investors and financiers alike. This was part of the rationale behind the promotion of the, initially at least, compulsory rangatōpu model.⁴⁸⁴ That proposal involved imposing a new and untested formal legal structure over existing entities without their consent. In any event, if a development proposal is sound, history has shown that from time to time, development finance has been made available from lending institutions during the initial stages of a development proposal. In any event,

⁴⁸⁴ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 336.

once again, there is no evidence that the Act and the Court are significant impediments to the utilisation and effective administration of Māori land, as set out above in the discussion on the first proposition of the Review Panel.

Māori land should have effective, fit for purpose governance

As foreshadowed throughout much of this research, the evidence confirms that the body of choice for the development of Māori land is the ahu whenua trust. There are many reasons for this, including historic familiarity with kin based ownership structures that emphasise collective aspirations rather than an overemphasis on the individual dividend requirement as a primary measure of success. In short, such trusts are the vehicle of choice for Māori land owners, with incorporations a very distant alternative. Indeed, more incorporations have been wound up than have been created since the Act came into force and many have been replaced with ahu whenua trusts in accordance with the wishes of the owners.

Yet, contrary to these realities, the Bill actively promoted a regime more akin to companies than trusts, including a default provision for triennial elections, an explicit framework of threshold compliance before relief from the Court is available to even investigate and a complex process of full and partial distribution schemes where an entity is disestablished.⁴⁸⁵ As discussed in Chapter Eight, some of the elements of the regime for governance entities proposed under the Bill, including the distribution mechanism on termination, seem elaborate and unnecessary.

As foreshadowed, ahu whenua trusts (and incorporations) can create subsidiary companies and certainly for many larger and intermediate size trusts, this is their invariable practice. Once a trust is established with a wide powers trust order, trustees do not need the approval of the Court to create subsidiary companies. Pukeroa Oruawhata Trust and Tuaropaki Trust are two obvious examples where the trustees engage in commercial activities involving millions in revenue and assets. As their annual reports confirm, the largest incorporations including Parininihi ki Waitotara, Mangatu, Wakatu, and Atihau have also regularly utilised subsidiary

⁴⁸⁵ It will also be remembered that the Waka Umanga Bill proposed a further legal entity for the management of kin based assets, but that proposal went unsupported Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* above n 321.

companies. They need no approval from the Court for those company based activities, where a considerable amount of commercial engagement is undertaken.

Some trusts have also adopted the regular trustee election regime so that, in effect, they have adopted both the trust and incorporation model which provides for regular owner input on the composition of boards. Examples include Lake Taupō Forest Trust, Lake Rotoaira Forest Trust, Opepe Farm Trust, Pukeroa Oruawhata Trust, Wellington Tenths Trust, Palmerston North Reserves Trust and Rotoiti 15 Trust. The election process is usually contested, although there is often a high degree of trustee re-election, suggesting considerable stability and an often conservative approach of Māori land owners to their choices. Rotation of trustees is, however, the exception for ahu whenua trusts. Once again it is the owners who have determined, in accordance with their preferences, the appropriate trustee selection regime. Under the Bill, a minimum term of appointment would have been required and where no term had been confirmed by the owners, a default period of appointment of three years was imposed.

Another example of owner input into trustee selection and decision-making is that of Te Rūnanga o Ngāti Awa which is more like a corporate trustee. This body is an ahu whenua trust over a 1,500-hectare farming block valued at \$19 million and it holds triennial elections of its board members.⁴⁸⁶ However, as it is the Rūnanga that is the trustee and not the individuals, the election of board members is a matter for the beneficiaries of the Rūnanga, not the Court. The Court is not involved in the election of the board members who constitute the Rūnanga as ahu whenua trustee. Once again owner decision-making is paramount while, in the absence of legitimate disputes, the Court simply performs its registry function regarding changes for noting on the title.

The laws that apply to trusts and incorporations mirror in large part the general law. Moreover, as set out in Chapter Five, the ss 238, 239, 240 and 241 regimes on enforcement of obligations of trust, replacement and removal of trustees, and the

⁴⁸⁶ Te Rūnanga o Ngāti Awa *Annual Report* 2017. The land was returned to the tribe in 1990 as part of the devolution policy of the then Labour government to restore to traditional owners' land that the Department of Māori Affairs had previously managed as Part XXIV development schemes under the Māori Affairs Act 1953.

termination are arguably more sophisticated than the provisions under the Trustee Act 1956. For example, the removal of trustees requires an assessment of a trustee's performance and a determination as to whether that trustee has performed the duties of that office "satisfactorily."⁴⁸⁷ While there have been criticisms over delays in Court processes; the Court's accessibility and cost-effectiveness overall, cannot be underestimated. In addition, if proposals that are discussed in depth in Chapter Nine are adopted, to transfer administrative and transactional roles from Judges to the Registrar, these changes can only expedite the orthodox dispute resolution aspect of the Court's function and promote more timely decision-making.⁴⁸⁸

In contrast with the Act, however, the Bill would introduce a high level of uncertainty surrounding the creation of Māori land management entities. If there were competing development proposals, as is often the case, the Bill originally provided that voting by shares would prevail, even if the margin were narrow. What if there were to be a dispute over the process or the eligibility of the nominees, agents or prospective lessees due to, for example, claims of conflict of interest or undervalue? Were the owners to retain the right to seek relief from the Court and if so, how would they have overcome the thresholds that were to be enshrined in the Bill? And would such a challenge to process or the bona fides of applicants have been classed as a "dispute" requiring mediation? If so, how long before any delay would have become a risk that may have frustrated one of the two competing proposals, thus creating an incentive to delay in favour of the default answer to the dispute? Many unanswered questions will require careful consideration if at some time in the future the present proposals are resurrected, wholly or in part, and are to have any practical application for the benefit of Māori owners.

⁴⁸⁷ See *Rameka v Hall* above n 291 and *Fenwick v Naera* above n 260.

⁴⁸⁸ This could also include the increased use of registrar's conferences with parties at the earliest stages of an actual or potential dispute to sift between issues that legitimately require judicial involvement. Time savings can be achieved where, as occurs in some districts, the registrar will meet with the parties to prepare what are essentially statements of issues that can then be used to determine what points require adjudication, mediation or facilitation for example.

An enabling institutional framework should be created to support owners of Māori land to make decisions and resolve any disputes.

A key impediment to the efficient resolution of disputes under the current legislation is the reality that the Court deals with the highest proportion of unrepresented litigants of any New Zealand court. Whatever regime is adopted, that reality is not likely to change and indeed will probably increase, with continuing fragmentation and a greater awareness of both actual ownership of land and the legal rights that attach to such ownership. The impact of significant volumes of lay litigants prosecuting applications without the assistance of counsel where important issues of tikanga Māori, legal rights and assets of high value are involved, cannot be underestimated. That would change if judicial and administrative roles were redefined, as discussed in Chapter Nine.

Another issue related to this significant group of lay litigants – often without means – is the concept of access to justice. Reducing the ability of Māori to have access to an independent and cost-efficient forum for resolving disputes through the imposition of new thresholds to trigger the jurisdiction of the Māori Land Court should be approached with caution. Put another way, a diminishing of the ability of owners to seek relief will act as a disincentive to owners to pursuing their current legal rights. They simply could not afford to go to court. Challenges to decisions may become the preserve of the well-heeled; the antithesis of improving owner engagement, participation and rangatiratanga.

While the current Family law regime involves mediation, unless the operative agreement between the parties to non-Family litigation includes compulsory mediation, it is difficult to see how forcing Māori litigants into mediation – which was proposed under the 2016 Bill - is congruent with the law applicable to non-Māori parties, except for employment disputes. It would be surprising, for example, if companies engaged in a commercial dispute over say a forestry lease, in the absence of an earlier agreement to do so, could be forced into mediation without their consent. In addition, mediation, while strongly preferred by Judges, is not appropriate for every dispute. Compulsory mediation is likely to be less so, especially where the “enabling framework” under the Bill is untested, as discussed by FairWay Resolution Ltd, the independent Crown-owned company that provides

specialist conflict management and dispute resolution services, in their submission on the Bill:⁴⁸⁹

FairWay supports the inclusion of a dispute resolution process in the Te Ture Whenua Māori Act and for the provision of a default resolution process where parties are unable to agree on a referral to dispute resolution or agree on the process to be used. FairWay does not believe that the dispute resolution service as proposed in the Bill is appropriate and if implemented may replicate some errors made in the past where dispute resolution has been imposed on Maori using a European construct.

And as the Arbitrators' and Mediators' Institute submitted:⁴⁹⁰

We also note that the dispute resolution process inserted into the Bill creates a structured model which may hinder rather than encourage effective dispute resolution for Māori. The model is complex and multi-layered, capable of leading to dissatisfaction and grievance. It may be effective to clear a clog of proceedings in the Court and address concerns about delay, inconsistency and cost but AMINZ is not convinced the model is flexible to the extent it purports to be a dispute resolution model for all purposes and for all disputes in Māori land.

More disconcerting were the provisions of the Bill that, contrary to the general law, appeared to give the "kaitakawaenga" or person engaged to provide dispute resolution services, the ability to determine a dispute, even in the absence of legal advice to the parties:⁴⁹¹

Once decided, then the terms are final and binding on the parties (clause 336(3)(a) and "no party may seek to bring those terms before a court, whether by action, appeal, application for review, or otherwise (clause 336(3)(b)). The other issue is that once agreed, there is no recourse for either party. These wideranging immunities on a kaitakawaenga can leave participants open to improprieties including bullying tactics and other tactics that could be used by a kaitakawaenga to get agreement by the parties and to sign an agreement. Under contract law, acts of undue influence for example can be challenged in a court of law. However, the way in which clause 336(3)(b) is drafted means that acts by a kaitakawaenga or allowed by a kaitakawaenga including issues of undue influence cannot be challenged.

In this respect a kaitakawaenga has more power than, say, the Court of Appeal. Kaitakawaenga moreover have wide immunity in civil and criminal proceedings (clause 335(3) and 339 (3).

⁴⁸⁹ Fairway Resolution Ltd 'Submission to Māori Affairs Committee on the Te Ture Whenua Māori Bill' (2016) at 1.

⁴⁹⁰ Arbitrators' and Mediators' Institute of New Zealand Inc 'Submissions Te Ture Whenua Maori Bill 2016 (2016) at 2.

⁴⁹¹ Professor Richard Boast, Deborah Edmunds and others 'Submissions to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill' above n 463 at 52.

In certain cases, alternative dispute resolution may simply lengthen the process where parties obdurately turn away from compromise, as is their right. Some litigants, are not able according to their tikanga to agree to settlement proposals (for example recognition of a whāngai where the whānau are split or where unsavoury historical considerations, sometimes of a criminal nature, are present). Mediation may only compound existing tensions for those cases rather than uncover a pathway toward resolution.

Similarly, with mandate and both inter- and intra-tribal disputes, few mediation attempts have proved enduring or successful, even in the short term. For example, formal mediations involving independent mediators failed to resolve disputes between Ngāti Awa and Tūwharetoa ki Kawerau, Ngāti Pīkiao and Ngāti Makino, Ngāti Tama and Ngāti Maniapoto and Tūwharetoa ki Kawerau and Ngāti Rangitīhi. Te Atiawa were also embroiled in costly and protracted litigation over mandate in the High Court.⁴⁹² Ngāti Paoa and the Hauraki Māori Trust Board knew mediation would not provide any solutions to their mandate dispute and opted instead for adjudication.⁴⁹³

There are ongoing disputes between several of the CNI (Central North Island) settlement tribes over the allocation of forest lands.⁴⁹⁴ Under their settlement legislation, the iwi affected opted for a dispute resolution process that was “tikanga-based” and included provisions for “rangatira ki te rangatira” dialogue, and that was more akin to arbitration than mediation or adjudication.⁴⁹⁵ In these cases, none of the tribes could agree to the compromises proposed and maintain their own sense of integrity and the support of their iwi. The invariable outcome, which the litigants acknowledged by their conduct, was that either the Crown, the Waitangi Tribunal or a Court needed to make the decision. Mediation or arbitration, in these cases simply

⁴⁹² *Te Runanga O Te Atiawa and Others v Te Atiawa Iwi Authority* P 13/99. High Court New Plymouth. 10 November 1999, Robertson J.

⁴⁹³ *Ngāti Paoa Whānau Trust v Hauraki Māori Trust Board* (1995) 96A Hauraki MB 155 (96A H 155). The Court’s eventual decision provided a compromise outcome and was not appealed.

⁴⁹⁴ See *Te Rūnanga o Ngāti Manawa v CNI Holdings Ltd* [2016] NZHC 1183 and *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] 3 NZLR 770 (Harrison, Winkelmann and Gilbert JJ). See also *Rapata (Robert) Leef as representative of Ngāti Taka v Colin Bidois as representative of Pirirākau and Ors* [2017] NZSC 202.

⁴⁹⁵ Central North Island Forest Lands Collective Settlement Act 2008.

exacerbated existing tensions, consumed scarce resources and only delayed the inevitable. This reality was tacitly acknowledged even by the New Zealand Māori Council members who had advocated arbitration, provided it was state-funded. Some of their membership, directly or otherwise, had played a role in the CNI dispute resolution processes that had been attempted, with a mixed set of results.⁴⁹⁶

Excessive fragmentation of Māori land should be discouraged

While successions are only one element of Māori land tenure, albeit, one of the most important, they are still central to fragmentation because it is through that process, or vestings by way of gift or sale, that the ownership list increases. The Panel proposed that minimum shareholdings could be one of the solutions. However, during the subsequent submission process on the Bill, this option found little favour amongst landowners. Incorporations can determine a minimum shareholding before they are prepared to consent to a transfer from a deceased estate to the successors but few if any trusts seek to do so. This is often because, in many larger trusts, shareholdings are irrelevant to anything other than dividends (where such payments are made), voting and for occupation orders.

The report proposed two solutions. Firstly, that succession should be simplified with little judicial involvement other than perhaps noting changes to owner in a registry function. The second proposal was that, like some incorporations, a minimum shareholding could be introduced across all titles.⁴⁹⁷ In their submission to the Review Panel, the Judges contended that, without empirical data, no sound conclusions could be drawn from assertions of delay, cost and complexity.⁴⁹⁸ A succession involving intestacy will usually take two months from filing to the issuing of orders. Where there is a will, other issues may arise, especially where there is not

⁴⁹⁶ “On the issue of mandatory mediation, the NZMC agreed that commercial matters were increasingly subject to specialist arbitrators rather than courts, and that ‘state funded arbitration is the best option for the future.’” Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 197. No doubt after some of the more disastrous outcomes under CNI model, including the ‘start again from the beginning’ result of the latest *Ngāti Wahiao* litigation, this opinion would be even more stridently supported by members of the Council and their advisers. For a background see *Wall v Karaitiana – Tauhara Middle 15 Trust* (2008) 87 Taupo 107 at [82] to [97] (87 TPO 107).

⁴⁹⁷ Mahuika, M. Kapea, T. Reddy, P. and Tuuta, D. *Te Ture Whenua Māori Act 1993 – Review Panel Discussion Document* above n 466 at 26-27.

⁴⁹⁸ Māori Land Court Judges “Submission of the Māori Land Court Judges to Review Panel” above n 214.

equal distribution to the successors. Judges then encourage the successors to form a whānau trust and that solution often provides a practical result without the stress and costs of challenges in the High Court or Family Court.

There is also the reality that delays can result from insufficient information when applications are filed. Another cause of delay is where an applicant seeks an adjournment out of district. More importantly, delay can result where the parties request an adjournment to discuss either challenging a will, creating a whānau trust or an agreed solution out of court. Clearly, the increased use of audio visual hearings where required will expedite the process, along with on line filing and related procedural improvements.

In addition, while Court can be time consuming and seemingly unnecessary for many applicants, there are also situations where the process can be seen to benefit those affected through a publicly notified hearing. This is because, from time to time, litigants are untruthful. The most common situation is where a child will assert that there are no other children entitled to succeed and has signed a statutory declaration to that effect. Alternatively, just as commonplace a situation is where the applicant child *did not know* that there were other siblings. Only when a hearing is publicly notified through the Court's National Pānui do potential successors, relatives or other close whānau emerge to point out that there are in fact other living successors entitled on an intestacy. Even where there is a will leaving the Māori land interests to a sole successor, the hearing process can be the start of a facilitated dialogue between siblings where the successor under the will eventually agrees to either the formation of a whānau trust or for the disinherited successors to be included, thus avoiding protracted and costly proceedings in the High Court or Family Court.⁴⁹⁹

⁴⁹⁹ For an extreme example see the Parehuia June Durie Estate litigation including *Deputy Registrar v Graham - Parehuia June Durie Kaitiaki Trust* (2015) 334 Aotea MB 201 (334 AOT 201). Parehuia Durie had been in state care since 1949, when she was aged 16, for having a child out of wedlock. In 2003 her niece, Gloria Graham, was appointed kaitiaki trustee in place of the Māori Trustee. From then until when Ms Durie died in June 2007, Mrs Graham spent over \$150,000 of funds belonging to Ms Durie without suitable financial reports or receipts. Prior to her appointment as trustee, Mrs Graham took Ms Durie to sign a will leaving all her interests to Mrs Graham. She saw no reason to disclose this fact when appointed a kaitiaki trustee. The will also disinherited Ms Durie's son, Robert Sainsbury, the child she was taken into care for having in 1949. Mr Sainsbury took unsuccessful family protection proceedings in the High Court

Even so, and despite the delays that can occur regarding successions, the evidence confirms that the effects of fragmentation, while at times problematic and challenging, have not been a fatal impediment to land development and use. History confirms that sound land development proposals implemented according to best practice will usually secure owner support. Moreover, once the owners have met to consider any development proposals, and have mandated a governance group, the owners' representatives will then have responsibility for the management of the land and the implementation of the proposal. The role of the Māori Land Court is then simply that of a dispute resolution forum. As the Court has held, if trustees are complying with their trust orders and acting prudently according to the general law, the Court will have no right in law to interfere in the activities of that trust or incorporation.⁵⁰⁰

Summary

The then government decided to reform Māori land laws sometime between 2009 and 2011. During this period, two reports concerning Māori land were released by Te Puni Kōkiri and the Ministry of Agriculture and Forestry, which discussed the aspirations of land owners and improving the economic performance of Māori land. The government then appointed a Panel to review the current legislation. Given the strong signals sent from the Ministers, that only fundamental change would be acceptable, the Panel, unsurprisingly, recommended a complete replacement of the Act. Central to the proposals were the five propositions that the Panel developed for consultation purposes. While that consultation was taking place, the government released another report in 2013 which claimed the contribution to the economy over a ten-year period from Māori land could be increased to \$8 billion if, amongst other things, the Act was replaced.⁵⁰¹

By September 2013, the government had decided to repeal the Act and replace it with a completely new law that would fundamentally change the way in which

concerning his late mother's \$1.2 million estate. Following further proceedings in the Māori Land Court, and a Court supervised settlement discussion, Mrs Graham and Mr Sainsbury eventually settled the estate lands on a 60:40 basis in favour of Mrs Graham. Soon after, she sold the major interests she received under the will.

⁵⁰⁰ *Eriwata v Trustees of Waitara SD s6 and 91 Land Trust - Waitara SD s6 and 91 Land Trust* (2005) 15 Aotea Appellate MB 192 (15 WGAP 192).

⁵⁰¹ In 2014 that figure was downgraded to \$3.5 billion.

Māori land would be administered. Eventually, after the release of an exposure draft Bill in 2015, and a further period of review by officials and their advisers, including the preparation of numerous drafts and following a period of “co-drafting” with Māori interest groups, the Bill was introduced into Parliament almost three years later, on 14 April 2016. The publicity surrounding the Bill underscored owner self-determination and the reduction in the need for Court “approval” for ownership decisions. Te Puni Kōkiri undertook an extensive public education campaign and even developed a page on its website entitled “Te Ture Whenua Māori Myths” to counter the campaign opposing the 2016 Bill spearheaded by ex-Court employee Marise Lant using social media and through the urgency claim to the Waitangi Tribunal.⁵⁰² Lant and her supporters would travel the country attending many of the consultation meetings on the reforms challenging the content of the presentations. At one point, even the Minister of Māori Development attended meetings to encourage support for the Bill.

At a fundamental level, the proposals advocated a reduction in intensive judicial oversight in favour of a participating owners’ regime supported by an enabling institutional framework designed to give owners more control over their land. A whole range of discretions vested in the Maori Land Court would be replaced with an owner-focussed enabling framework. The Court would have been retained but in a much-reduced form, and would have focussed on ‘points of law’ rather than administrative functions, so that owners no longer needed any ‘judicial imprimatur’ when managing their land. Successions to interests in Māori land would have been managed administratively rather than judicially as would occupation of land, leasing and related forms of alienation.

Regarding governance, a wider range of legal entities would have been made available to manage Māori land and the creation and disestablishment would have been by registration at the behest of the owners rather than by Court order. Initially, existing trusts and incorporations would have become rangatōpu, a new body

⁵⁰² Lant and her supporters would travel the country attending many of the consultation meetings on the reforms challenging the content of the presentations. At one point, even the Minister of Māori Development himself attended meetings, seeking to shore up support for the Bill. Ms Lant was the administrator of the Facebook page ‘Ture Whenua Māori Land Grab’ which became a forum for those opposed to the Bill.

corporate intended to facilitate improved land development but after considerable opposition, this was abandoned. In their advice to the Māori Affairs Select Committee, officials highlighted the virtues of the new process and contrasted this with what they described as the costly, uncertain and litigation-prone current procedure under the Act. Creating a legal entity under the Bill, they claimed, without any evidence, would be “a purely administrative process” and that it would “carry no litigation risk and ... be quick and inexpensive.”⁵⁰³

Compulsory mediation in certain disputes would have been mandatory as would whānau trusts on intestacy, with an opt out provision being added following further consultation. Alternative dispute resolution including mediation would have been strongly preferred and ‘kaitakawaenga’ or persons engaged to provide dispute resolution services, would have been given considerable authority to decide disputes with the consent of the parties, even where they had not received independent advice. Access to the Court was to be curtailed by the imposition of new thresholds that had to be met before the Court’s jurisdiction could be activated. The result would have been reduced rather than enhanced access simply because the new thresholds in many instances were likely to have been impossible to meet. Even where the Court could have intervened, its powers under the Bill would have been limited in comparison with its existing equitable jurisdiction.

The Government was to have transferred most of the current registry and advisory functions of the Court to a new Māori Land Service, initially through online engagement with Land Information New Zealand as the principal service provider. Following feedback from stakeholders, however, that approach was dispensed with in favour of a multi-agency service delivery model that would include both LINZ and TPK. At the same time, the Ministry of Justice undertook a restructure, and many senior managers’ positions within the Court were disestablished, which meant losing a considerable amount of institutional knowledge.

At the centre of the reform theory lay, in large part, the five propositions developed by the Review Panel in 2013 and enlarged upon in its 2014 report. Indeed, much of

⁵⁰³ Te Ture Whenua Māori Bill - Additional Advice requested by the Māori Affairs Committee 10 October 2016 – Appendix Three.

the theoretical underpinnings of those reports became the basis for the core foundations of the Bill. Yet, as the evidence confirms, much of what the reforms and the Bill intended to remedy, could, with key adjustments, be achievable under the Act. At the risk of belabouring the point, those owners engaged in the management of their land do in fact make the decisions, with the Court invariably confirming their choices in the absence of improper process, conflict of interest or other illegality. Moreover, in the context of governance, an important issue of existing rights and the principle of choice and self-determination requires consideration. That a substantial part of the Māori land base does not have a governance structure is not proof-positive that the land is not being developed or utilised. More fundamentally, as one of their rights, owners also have a right to maintain their land *without* a governance structure.

But what neither the Bill nor the Act could remedy in the context of developing Māori land, are the important structural deficiencies of the Māori land regime and its historically second-class status. That it took a five year \$30 million project overseen by former LINZ Minister John Tamihere under the last Labour-led government to ensure Māori land orders and titles were accurately reflected under the Land Transfer Act 1952, system, underscored the priority of making Māori land akin to its general law counterpart in terms of status and utility.⁵⁰⁴ That to this day many titles lack a legitimate survey is also inexplicable, given the vast amounts of land taken under the Native Land Act regimes for survey costs.

Then there are the access impediments that include paper roads, landlocked land and the role of local authorities in attempting to find practical solutions to the problems associated with both access issues and the rating of Māori land. It was also recently claimed during the Taihape district inquiry before the Waitangi Tribunal, by independent expert researchers, that at least seventy percent of the Māori land in the inquiry district was landlocked. In any event, however, it appeared that the proposed changes to the landlocked land provisions set out in the Bill were not significantly

⁵⁰⁴ Māori Freehold Land Registration (MFLR) Project (2005-2010) – a five year project to ensure orders affecting Māori land were correctly captured in the LINZ title together with survey records:<https://maorilandcourt.govt.nz/your-maori-land/maori-land-titles-status-and-linz/maintain-linz-titles-and-parcels>.

better than those under the Act. This is because one of the practical obstacles to access are the compensation provisions.⁵⁰⁵

Where land is incapable of a return because it is landlocked; gaining access to explore development opportunities still requires compensation to the affected landowner, as well as the cost of putting in a road. If the land has not made a return for a generation or more, then the owners are without the means to pay for the process, the compensation and any road. The Bill, like the Act, did not address this problem. The issues regarding landlocked land may ultimately require a political solution, much like the Māori reserved lands issue of the late 1990s.⁵⁰⁶ Even the Ministerial Advisory Group recognised that compensation to adjoining owners was a core issue to be resolved, along with access through Crown lands, in the context of facilitating access to landlocked Māori land, as the Waitangi Tribunal recorded.⁵⁰⁷

In respect of landlocked land, the MAG recommended giving the Māori Land Court, the MLS, or iwi and hapū authorities the power to enforce access to landlocked land. The Crown could create a fund to compensate adjoining landowners. In particular, many Māori land blocks are landlocked by Crown lands, and the Crown could insert a clause in the Bill to grant ‘enduring access’ across Crown lands ‘through a simple process’. At the same time, paper roads and unused designations, which were ‘practical barriers to pursuing development opportunities’, could be removed by granting the court power to do so. Such a clause (and one for enabling access via Crown land) would not be ‘technically difficult to draft’.

There are also the problematic issues of quality of governors and access to finance for those lands that either do not have a governance entity or that do not generate sufficient income to support lending. As is the case with private trusts under the general law, there are no statutory requirements as to eligibility or competence, beyond acting prudently.⁵⁰⁸ Apart from seeking to align the duties of Māori land governors with those of comparable entities, and including disqualification, the Bill

⁵⁰⁵ Ture Whenua Māori Bill, cl 319. The most significant difference compared with the Act on this issue is that under the Bill the Court “must have regard to” the cultural and historical connection of the owners seeking access to their lands, and that the Court may appoint expert valuers or assessors as lay members to assist in the calculation of any compensation.

⁵⁰⁶ See the Māori Reserved Land Amendment Act 1997.

⁵⁰⁷ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 201, footnotes omitted.

⁵⁰⁸ “Under the case law, any person with legal capacity to hold property may be appointed as a trustee. This includes the settlor, and any of the beneficiaries. The only restriction is that there will not be a valid trust if the sole trustee is also the sole beneficiary, because the legal and beneficial ownership will exist in the same person”: Law Commission *Review of the Law of Trusts – Preferred Approach* (NZLC IP31, 2012) at 114.

does not deal with improving the quality of governance, apart from potentially creating more confusion with its reference to ‘kaitiaki’ rather than trustee or ‘committee of management member’. While the law is clear as to what a trustee or director is, or even a member of an incorporation committee of management, ‘kaitiaki’ can mean different things depending on the circumstances, with the default definition under the Bill being a person who is akin to a company director.⁵⁰⁹

The real issue however is that trusts are often populated with lay persons without any relevant qualifications and experience. This remains a perennial challenge that legislative change alone cannot address effectively. The Ministerial Advisory Group had recommended that the Crown provide funding for training purposes, a call also unanimously echoed by relevant stakeholders. However, as the Waitangi Tribunal recorded, no assurances had been given at the time of the release of their report that any such funding would be provided:⁵¹⁰

No assurance was given, as [had been] recommended, that the Crown would fund or even assist with the transition costs for the 6000 or so entities that would have to become rangatōpū. Nor did the May consultation document promise funding for the training of Māori land governors, as the MAG had recommended. Training had been mentioned as an MLS role in the April pre-consultation material, but it was left out of the May public consultation documents.

Even with accessible finance, the Judges have argued that the Bill is likely to cause uncertainty which may undermine the confidence of lending institutions; while Wakatu Incorporation argued that the rangatōpu model proposed does not inspire confidence either, because of the uncertainties surrounding that form of entity.⁵¹¹ In any case, many Māori trusts and incorporations do not experience the kinds of barriers in accessing finance that the reforms, indirectly at least, seek to influence.

⁵⁰⁹ Under the interpretation section of the Bill is the following definition: kaitiaki, in relation to a governance body or proposed governance body, means—(a) if the body is Public Trust, or a Māori Trust Board (as defined in section 2(1) of the Māori Trust Boards Act 1955), a member of the board of the body: (b) if the body is the Māori Trustee, the Māori Trustee: (c) if the body is a Māori incorporation, a member of the committee of management: (d) if the body is 1 or more trustees of a trust, a trustee (other than an advisory trustee, an associate trustee, or a custodian trustee): (e) in any other case, a person occupying a position in the body that is comparable with that of a director of a company.”

⁵¹⁰ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 203, footnotes omitted.

⁵¹¹ Wakatu Incorporation ‘Submission on Te Ture Whenua Māori Bill 2016’ (2016).

In short, the real impediments to land development are not considered by the Bill or are dealt with in a manner similar to the current regime under the Act. Much of what the reforms intend to remedy can be achieved under the current law. Moreover, at the risk of belabouring the point, there is no empirical data to confirm that it is the Act and the Court that are the impediments to development. The question then is whether these fundamental changes that involve an entirely new legislative framework result in improving or impeding the development of land by Māori land trusts?

CHAPTER EIGHT – ASSISTING OR IMPEDING?

In this chapter, Te Ture Whenua Māori Bill 2016, as it relates to key aspects of the operation of ahu whenua trusts, is critiqued as to whether its provisions were likely to impede Māori land owners. More specifically, this Chapter will discuss the constraints contained in the Bill that could have been detrimental, directly or indirectly, to hapū land development, had the Bill been enacted. This Chapter therefore compares the relevant parts of the Act with the Bill. The following four key areas of concern will be examined:

- (a) complexity of the Bill;
- (b) introduction of new terms;
- (c) increased compliance requirements; and
- (d) reduced ability to access the Court.

The views of those individuals interviewed for this research have had a particular relevance to this Chapter. Some of the issues addressed here have also briefly been traversed in Chapter Five, especially the appointment of trustees and their accountabilities to the owners and the Court.

Te Ture Whenua Māori Act 1993, Part 12

Overview

Part 12 of the Act is headed “Trusts” and comprises thirty-five sections, (ss 210-245) divided by four separate headings: constitution of trusts (ss 211-221); appointment and powers of trustees (ss 222-228); miscellaneous provisions relating to trusts constituted under Part 12 (ss 229-235); and provisions relating to trusts generally (ss 236-245).⁵¹² This Part contains all of the key operative sections of the Act that control the creation, operation and termination of the great majority of trusts over Māori land. As the following discussion will demonstrate, these provisions are far less complex than those proposed by the Bill, even though provisions in the Bill

⁵¹² For completeness, it is noted that Part 13 of the Act deals with incorporations in thirty-eight sections (ss 246-284).

were intended to provide a simpler governance framework for Māori land entities such as trusts.

Constitution of trusts

Sections 211-221 of the Act provide the Court with exclusive jurisdiction to constitute five forms of trust – putea, whānau, ahu whenua, whenua tōpu and kaitaiki trusts. As the Waitangi Tribunal has found, trusts constituted under the Act by the Court are very different from those private trusts created under the general law. However, the Tribunal noted that there are sound reasons for this:⁵¹³

Perhaps the most important arrangement under the current Act, in this respect, is the ability of owners to have an ahu whenua trust created and trustees appointed. This can be done without the knowledge or agreement of co-owners, so long as the specialist court is satisfied that certain criteria have been met, including that there is no meritorious objection. Such an arrangement would not be tolerated under general law, unless the co-owners were under some form of disability, and it underlines the need for special arrangements not just because Māori land is a taonga tuku iho, but because of the significant title problems that have been inherited from the past (as discussed in chapter 2).

In general terms, the process for creating an ahu whenua trust involves satisfaction of the sufficiency tests – notice, opportunity for discussion and support, and that there is no meritorious objection. The purpose of the trust must be to promote and facilitate the use and administration of the land in the interests of the beneficial owners.⁵¹⁴ The process involves convening a meeting of owners and securing their support for the proposal to establish a trust. Importantly, there are no minimum quorum requirements. The time between filing the application to the orders being granted can vary from several weeks in exceptional circumstances to several months if the application is incomplete or there are meritorious objections that may require a remedy – for example, the convening of a further meeting or meetings. One recent example took less than two months (including the inevitable delays caused by the end-of-year holiday period).⁵¹⁵

⁵¹³ See also Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 285-286.

⁵¹⁴ Te Ture Whenua Māori Act 1993, s 215(2) and (4).

⁵¹⁵ An application to create a trust over Waipuka 2N was filed in the Hastings registry of the Māori Land Court on 13 December 2017, notified in the January 2018 National Pānui then ordered on 1 February 2018.

Appointment and powers of trustees

Once the owners have elected nominees and approved the terms of trust, trustees are then appointed and the trust order is confirmed by the Court.⁵¹⁶ Where the owners do not have access to counsel, they are provided with options for trust orders by the registrar, including wide powers all purpose trusts orders as well as those that are more prescriptive and akin to constitutions for post-settlement governance entities.⁵¹⁷ The general functions of trustees are set out in the Act in any event, along with confirmation of trustees acting by majority and provisions dealing with conflicts of interest.⁵¹⁸ The decisions regarding voting by show of hands, ballot (including postal) or by shares, as well as the tenure of trustees and the objects of the trust are matters for the owners to decide and are almost invariably approved by the Court. The only occasions where the Court's approval is not granted are circumstances where the terms of a proposed trust orders are likely to cause the trustees to act in breach of trust or to avoid fundamental trustee duties including the obligation to account to the beneficiaries and to keep proper records.

Miscellaneous provisions relating to trusts constituted under Part 12

In addition to the broad powers set out in the trust order; for added protection, the trustees may apply to the Court for the approval of new ventures.⁵¹⁹ The duty of keeping accounts is also underscored by the legislation.⁵²⁰ More importantly, the power of the Court to periodically review ahu whenua and other trusts is set out in the Act.⁵²¹ This is essential because it provides owners with the ability, every two years, to call their trustees to account if there have been concerns about their activities. As set out in Chapter Five, a significant amount of case law has been generated over reviews of trust. For completeness, ss 232-235 concern kaitiaki trusts and their review as well as the rule against perpetuities.

⁵¹⁶ Te Ture Whenua Māori Act 1993, ss219, 220 and 222. However, where trustees are appointed long after the trust was originally created, decades earlier, the trust order can be hopelessly out of date and irrelevant to the current operation of the trust: John Koning, response to interview questions, 8 February 2018.

⁵¹⁷ For example, see the trust orders for Ngāti Te Whiti Whenua Tōpu Trust: 325 Aotea MB 17-23 (235 AOT 17-23) dated 22 August 2014; Rotoehu Forest Trust: 42 Waiāriki MB 140-141 (42 WAR 140-141) dated 31 October 2011; and Pakaitore Trust: 235 Aotea MB 189-192 (235 AOT 189-192) dated 21 July 2009.

⁵¹⁸ Te Ture Whenua Māori Act 1993, ss223, 226, 227 and 227A.

⁵¹⁹ Ibid, s229.

⁵²⁰ Ibid, s230.

⁵²¹ Ibid, s231.

Returning to the issue of reviews; many if not most trust orders already contain provisions for compulsory review, which Judges have referred to as a trust “warrant of fitness” test. In any event, most trust orders contain mandatory provisions that the owners approved when the trust was constituted, including the keeping, auditing and filing of annual accounts, the holding of regular general meetings, the approval of trustee fee changes by the owners in general meeting or by the Court or both, as well as provisions governing conflicts of interest. When disputes do arise under this provision, the Court often acts as facilitator of dialogue between the parties and can sometimes appoint independent persons to convene meetings of owners as a means of exploring pathways for resolution without adjudication. Because such processes are invariably private and confined to the trustees and owners, their effectiveness or otherwise has never been independently measured. Research into the effect of the Act and the Court on Māori land development might reveal answers to some of these issues.

Provisions relating to trusts generally

Sections 236-245 include some of the most important provisions of the Act relating to trusts. Sections 236, 237 and 238 are key in providing avenues for the accountability of trustees. Section 236 is jurisdictional in that it confirms that ss 237-245 apply to every trust constituted under Part 12 as well as to “every other trust constituted in respect of any Māori land or any General Māori land owned by Māori.” This is critical because it provides the jurisdiction to deal with trusts over Māori land created by will or by separate legislation as well as General land that often includes a family home where the beneficiaries under a will seek to include such land into a whānau trust. It also means Māori owners of General land in trust have the option of using either the High Court or the Māori Land Court.

Section 237 gives the Māori Land Court “all the same powers and authorities as the High Court” by statute, any rule of law or by the High Court’s inherent jurisdiction. As foreshadowed, this provides the Māori Land Court with “extensive” supervisory powers.⁵²² The importance of this jurisdictional scope cannot be under estimated. In addition, as the Supreme Court has confirmed, because of the statutory framework

⁵²² *Proprietors of Mangakino Township v Māori Land Court* above n 254.

that governs Māori land trusts, the role of the Māori Land Court is very different in key respects to the role the High Court plays in supervising trusts.⁵²³

Sections 238, 240 and 241 concern another set of essential powers – to enforce the obligations of trust, to remove trustees for cause and to terminate trusts. As discussed in Chapter Five, these brief provisions have been of considerable significance and application to many trusts, trustees and land owners over the previous twenty-five years. An important body of caselaw, reaching up to the Court of Appeal and Supreme Court, has developed over the last two decades, delineating the parameters of the Court’s jurisdiction and the extent of its ability to provide appropriate remedies to owners and trustees. Most contested proceedings before the Māori Land Court that involve trusts include consideration of these provisions.

As set out above, one of the key advantages of the present system concerning trusts is that there are no quorum requirements or thresholds for concerned owners to activate the Court’s jurisdiction. In addition, under s 238 of the Act, the Court may “at any time” require trustees to report on their activities. In appropriate circumstances, the Court can then enforce the obligations of trust, remove trusts and on rare occasions, terminate the trust. Remembering that counsel are not mandatory in the Māori Land Court, regardless of the complexity of the proceedings, the cost effectiveness of the Court inevitably promotes its accessibility to a largely lay audience of Māori land owners when concerns over trusts arise.

With the termination of trusts under s 241, as set out above in Chapter Five, a set of legal principles of general application have now been developed including:

- (a) A change of mind is usually insufficient as a ground for termination unless there is an absence of opposition;
- (b) Termination should be refused where it is likely to result in detriment or create unreasonable disadvantage to affected parties;
- (c) Evidence of a trust failing to adhere to its terms of trust and core accountabilities may be sufficient grounds for termination.

⁵²³ See *Fenwick v Naera* above n 260 at [120] – [121].

Once again, there are no quorum or threshold requirements so this provides a necessary flexibility for the different scenarios that can arise from time to time. As with s 238, this provision enables the jurisdiction of the Court to be invoked “at any time”. The advantage is that owners can access the Court with relative ease, often on an urgent basis where concerns over some aspect of a trust’s operations and trustees’ conduct have arisen. That said, the imposition of security for costs, as well as costs generally, have also been on the rise, along with what are, in effect, strike out applications being considered and granted more regularly. Put another way, despite anecdotal evidence to the contrary, the Court can deal with claims that may be an abuse of process or frivolous and vexatious.⁵²⁴

Section 244 of the Act concerns variations to trust orders. It was amended in 2002 to prevent the Māori Land Court from varying a trust order of its own motion and this was confirmed by the Court of Appeal in *Short v Mitchell – Pukeroa Oruawhata Trust*.⁵²⁵ Like many of the provisions of the Act requiring the input of owners, s 244 requires satisfaction of the three sufficiency tests – notice, opportunity for discussion and support.⁵²⁶ By this provision, in conjunction with s 231, it is the owners and the trustees who decide if and how their terms of trust will be amended, not the Court.

As would be expected, in all situations where the jurisdiction of the Court is invoked, judicial conferences and hearings are held, a record of the hearing is kept and every decision the Court makes is subject to the independent scrutiny of appeal and review. The hearings are recorded and transcribed verbatim and entered into the permanent record of the Court, its minute books. In other words, the processes of the Court, while occasionally cumbersome and time-consuming in the eyes of some Court users, are transparent in that a permanent record is kept of every interaction that is publicly available, unless, for confidentiality and privacy reasons, the evidence is

⁵²⁴ In addition, see s 98C-G of Te Ture Whenua Māori Act 1993, new provisions inserted by Te Ture Whenua Māori Amendment Act 2016 (2016 No 69). They provide the Court with the ability to, in effect, expressly deal with frivolous and vexatious litigants and where proceedings are an abuse of process.

⁵²⁵ *Trustees of the Pukeroa Oruawhata Trust v Mitchell* [2008] NZCA 518.

⁵²⁶ *Naera v Fenwick - Whakapoungakau 24 block* (2010) 15 Waiāriki MB 279 (15 WAR 279) at [65] – [75].

suppressed.⁵²⁷ It is arguably one of the strengths of the current law that any person can access the records of the Court at any time and read about what occurred without editing, filters or claims of privacy and confidentiality. Put another way, the actions of judges and registry staff are always open to independent scrutiny without the necessity for costly judicial review proceedings for actions undertaken ‘departmentally’ by officials.

Summary

The legal framework that affects the creation, operation and termination of trusts, including the duties and obligations of trustees, is set out in Part 12 of the Act. Many of the operative provisions require owner input through satisfaction of the three sufficiency tests. In key aspects, the Court is prevented from exercising its jurisdiction unless those tests have been satisfied. In short, the framework set out in Part 12 provides a simple and accessible ‘code’ by means of which owners, trustees and the Court can navigate through the many challenges and opportunities that arise from time to time. Even those provisions which may appear complex have nonetheless had the benefit of judicial interpretation over the last almost quarter century, providing a pool of settled law that owners can draw from where necessary. That there will always be room for improvement is undeniable, provided that such changes are supported by appropriate and compelling research and evidence. However, when contrasted with the provisions of the Bill, the Act is simpler and consequently more accessible for owners and their advisers to engage with as they manage their lands.

⁵²⁷ In the experience of the researcher, and those Judges appointed prior to 1996, there have only ever been two examples of evidence being suppressed. One was where whakapapa evidence was presented, and it was nonetheless made available to opposing counsel. The other was where the spouse of a trustee was standing for election to Parliament and the name association might have had an impact on the election result. On that occasion the suppression lasted only until after the general election.

Te Ture Whenua Māori Bill, Parts 5 and 6

Overview

Several submissions filed with the Māori Affairs Select Committee that comment on Part 5 and 6 of the Bill, underscore its complexity.⁵²⁸ As the Tribunal observed:⁵²⁹

As can be seen from the descriptions above, the Bill’s provisions [regarding governance bodies] are highly complex, and require constant cross-reference between various clauses in the body of the Bill and in the schedules. The complexity of that outcome has arisen from the need to somehow endeavour to craft protective mechanisms to replace the impartial oversight of the Māori Land Court as to the merits of decisions which Te Ture Whenua Māori Act 1993 provided in those cases where trusts or incorporations were not in place. The mechanisms utilised for owner and participating owner decisions in the new Bill have been a combination of participating and voting thresholds in differing circumstances. As we have seen, even where a governance body exists, some of those thresholds, or variants of them, apply also to some specified decisions, sometimes depending on the terms of the actual governance agreement, and in other settings as fixed by the proposed statutory provisions, particularly in clause 7 of schedule 4.

The history of the exposure draft of the Bill; the version that was introduced into the House, the version amended following the report of the Māori Affairs Select Committee and the version that was heavily amended by a lengthy supplementary order paper filed in April 2017, also emphasises what some critics have suggested was the Bill’s overall lack of coherence and consequently the continual need to redraft important provisions.⁵³⁰

Part 5 of the Bill

Turning to some of the relevant provisions; in summary, Part 5 of the Bill would have broadened the range of entities able to act as “governance bodies” over Māori land, including hapū and iwi representative organisations. Part 5 was divided into two subparts, (contrasted with three subparts set out in the original Bill introduced into Parliament.) Subpart 1 (cl 154 – 188) was significantly rewritten and covered the creation and disestablishment processes for governance bodies as well as the

⁵²⁸ Wakatu Incorporation ‘Submission on Te Ture Whenua Māori Bill 2016’ above n 509; Ngai Tāhu Māori Law Centre Submission on the Te Ture Whenua Bill (TTWMB) 11 August 2016; and Professor Richard Boast, Deborah Edmunds and others ‘Submissions to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill’ above n 463 at 4.

⁵²⁹ See also Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 300.

⁵³⁰ This has been as a result, invariably, of submissions from key stakeholder groups, which, it should be acknowledged, demonstrated that the promoters of the Bill were prepared to consider the concerns of landowners, their advisers and other interested groups.

registration of governance agreements and the jurisdiction of the Court. Subpart 2 (cl 189-201) dealt with the appointment of Kaiwhakahaere (agents).

Part 6 of the Bill

Part 6 provided for the operation of governance bodies including:

- (a) the powers, duties and responsibilities of governance bodies and their kaitiaki;
- (b) changes to Māori land holdings of governance bodies;
- (c) the application of revenues;
- (d) access to information held by governance bodies;
- (e) distribution schemes; and
- (f) the powers of the Court.

Clauses 157 – 188 enabled owners to appoint governance entities over their lands. However, when compared with the existing provisions of the Act concerning ahū whenua trusts, whenua tōpu trusts and incorporations, once again, the processes set out in the Bill were much more complex. As foreshadowed, Parts 12 and 13 of the Act set out the mechanisms for creating and managing five forms of trust and incorporations. That regime was contained in some thirty-five and thirty-eight sections respectively – and the relevant operative sections number twenty and thirty-five.

Continuing with the analysis: Part 5, sub part 1 has forty-one clauses of; there are thirty-five clauses in Part 6, and thirty-seven under Part 3 relating to whānau trusts and the equivalent of kaitiaki trustees. Added to these are the twenty-three clauses of Schedule 1, the fourteen clauses of schedule 2, the twenty-seven clauses of schedule 3 and the thirteen clauses of schedule 4. In total the Bill contains some 183 provisions that owners and governors would have had to navigate. At present under the operative legislation; even when the largely obsolete Māori Assembled Owners Regulations 1995 are taken into account, along with the Māori Incorporations Constitution Regulations 1994 that include a thirty-eight clause model constitution, the total number of provisions concerning trusts and incorporations would be 162, still fewer than under the Bill. In any event, given that most incorporations have adopted their own individual constitutions and since no new incorporations have

been created for decades (and indeed, some have been wound up in favour of ahu whenua trusts);⁵³¹ those regulations, like the assembled owners' provisions, have become largely redundant. The practical comparison is therefore between seventy-three relevant and operative provisions under the Act and almost 150 under the Bill. It is self-evident that a vastly increased number of provisions to consider was likely to render a replacement statute more complicated than the one it was to have repealed.

Replacing well-defined terms may create confusion and uncertainty

Turning to specific issues; the Bill, including Parts 5 and 6, would have introduced almost fifty new terms to the area of governance over Māori land. Some of these terms, and what might be assumed are their equivalents under the Act, are set out below.⁵³²

Under the Bill	Under the Act
Asset base	Lands or corpus lands
Governance agreement	Trust order
Governance body	Trust or incorporation
Governance certificate	Vesting, trust and appointment orders
Kaitiaki	Trustee or committee member
Kaiwhakahaere	Agent
Rangatōpū	No equivalent

The use of these new terms including for example “asset base” in the context of management bodies over Māori land introduced an entirely new language to the legislation which did raise concerns amongst some owners, including from a philosophical perspective. This is because the corpus lands of any Māori land entity

⁵³¹ For example, on 14 August 1995, a liquidator was appointed per s 282 of the Act over Te Onetu Pihama Incorporation, a valuable and closely held family entity, to enable the servicing of debt. Eventually it was wound up and replaced by a trust on the decision of the then shareholders of the incorporation: *Te Onetu Pihama Incorporation* (2011) 266 Aotea MB 20 (266 AOT 20). At the date of hearing the incorporation had repaid its debt and had net assets of almost \$6 million and income of almost \$300,000 for five owners, all siblings.

⁵³² See also Māori Land Court Judges “Submission of the Judges of the Māori Land Court to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill 2016” above n 472 at 7(b): “The Bill creates entirely new and untested legal concepts such as “kaitiaki” of governance bodies, “rangatōpu”, and “relationships of descent”, amongst others. It would introduce an extensive new lexicon of statutory terms previously unknown. No fewer than 47 new terms are added to the corpus of Māori land law by the Bill. It otherwise grafts onto Māori land law legal concepts borrowed from other areas of the law, such as company law. In taking this approach, the Bill abandons well-established legal concepts and terms particular to Māori land law for which there is well-settled jurisprudence and precedent.”

will have a significance to the owners that transcends economic value and commercial opportunities. For many owners, the very concept of sale or long-term alienation inherent in the elements of an “asset base” is an anathema. As the reports of the Waitangi Tribunal and the deeds of settlement between the tribes and the Crown confirm, owners have for generations criticised continuing attempts to further commodify Māori land since this, historically, was often synonymous with and a prelude toward permanent alienation. Linked with references to “company director” responsibilities in terms of “kaitiaki” roles as well as to “partial” and “full distribution schemes” the connotations regarding terms like “asset base” are those of commercial imperatives and processes. This will not necessarily be the principal objective of the owners, their whānau and hapū or indeed, amongst their top priorities.

Moreover, as the above terms would have been new and therefore without any caselaw setting the parameters of their meanings, these terms would have been subject to judicial interpretation and until that occurred, there would have been uncertainty. The key point is that there did not appear to be any rationale for the adoption of such terms when the existing equivalents are well understood and have the benefit of a considerable body of caselaw that had been determined under the Act and its predecessors. Even more confusing was the notion that “kaitiaki” under the Bill were, in certain circumstances, more like company directors than trustees, yet initially at least, their accountabilities were going to be less.⁵³³

Is a kaitiaki a trustee, a director or something else?

One of the difficulties in referring to aspects of a well-defined role under the catch-all name of “kaitiaki”, like those of trustee and director, is that inevitably there will be complications due to the differing nature of the roles. The purpose, powers and function of trustees and directors, while having similarities in terms of fiduciary responsibilities, also have important differences. It is well-settled that, amongst

⁵³³ Professor Richard Boast, Deborah Edmunds and others ‘Submissions to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill’ above n 463 at 41. As the editors of the Māori Law Review observed, the incorporation-shareholder-company model never found favour with owners on anything other than a minority basis, beyond the very limited uptake of that form of governance entity under the previous legislation, since no new incorporations have been formed since the passing of the Act: (2016) June Māori LR.

other things, the role of a director is to act in the company's best interests, and ideally where appropriate, make a profit for the shareholders.⁵³⁴ In contrast, the role of a trustee is to preserve the trust property and, in general terms, to make investments that are, overall, more conservative than speculative.⁵³⁵

That said, the definition under the Bill refers to a "kaitiaki" being a trustee, where the governance body is a trust. The definition then goes on to confirm that, in any other case, (outside of the Māori Trustee, an incorporation, the Public Trust, or a Māori Trust Board), a kaitiaki will be a person occupying a position in the body that is comparable with that of a company director. Allied to this was the uncertainty over what precise duties would apply to "kaitiaki" as set out in the letter of Chief Judge Isaac to Kīngi Smiler, the chairperson of the Ministerial Advisory Group, when commenting on an earlier version of the Bill in March 2016.⁵³⁶

The reason we remain concerned about governors' duties is that the Bill creates a new statutory governor, the "kaitiaki", without any precedent at law, and whose express duties in the Bill do not reflect the full duties of trustees at common law. It is true that the Bill provides that governance bodies hold their assets [sic] base on trust, as we noted at para 2.11 of our February 2016 paper. But the fact that the express duties of kaitiaki set out at cl 192 of the Bill do not align with those of trustees will in our view invite legal argument about what exactly is the extent of, and primary duties of kaitiaki. The stated intention of the Advisory Group's predecessor, the Te Ture Whenua Māori Review Panel, was that the law in this area should be rewritten to clearly set out the duties of governors. We are accordingly unsure why the duties set out in the Bill vary so markedly from the articulation of the duties of trustees set out in the Law Commission's *Review of the law of Trusts* report, which the government has indicated will be included in the forthcoming revision of the Trusts Act.

More importantly perhaps, it was a curious definition to apply when considered against the plain and ordinary meaning of "kaitiaki" in a Māori context.⁵³⁷ The short point is that there appears to be no real reason why trustees, committee of

⁵³⁴ Companies Act 1993, Part 8. See also J D Heydon & M J Leeming *Jacob's Law of Trusts in Australia* 8th ed (Lexis Nexis Butterworths, Australia, 2016.) at Chapter 2 'The Distinction Between a Trust and Certain Other Legal Institutions'; and G E Dal Pont *Equity and Trusts in Australia* 6th ed (Thomson Reuters, Australia, 2015) at 101-124.

⁵³⁵ Nicky Richardson and Lindsay Breach *Nevill's Laws of Trusts, Wills and Administration* 12th ed (LexisNexis, 2016) at 285-289; and Alistair Hudson *Equity and Trusts* 7th ed (Routledge, United Kingdom, 2013) at 445-446.

⁵³⁶ Letter to Kingi Smiler from Chief Judge WW Isaac, 5 April 2016: www.parliament.nz/resource/enNZ/51SCMA_EVI_00DBHOH_BILL68904_1_A530474/5822ae324733c4a96b7df4ad6b71b569bbed1784

⁵³⁷ Māoridictionary.co.nz defines "kaitiaki" as a trustee, minder, guard, custodian, guardian, caregiver, keeper, steward.

management members and Māori Trust Boards for example, were to be referred to as kaitiaki.

Compulsion may create risk

Imposed terms of office for trustees undermines self-determination

It was said that the Bill promoted rangatiratanga (self-determination) by empowering owners to make their own decisions and limiting the ability of the Court to do so. Retention and paternalism would be replaced by retention and rangatiratanga. Yet, in several critical places, the Bill imposed new compulsions absent from the present legislation that include provisions contrary to those under the general law. For example, the Bill sought to impose a default term of office of three years in the absence of a defined term in an entity's governance agreement (trust order).⁵³⁸ It also imposed a regime of voting by shares, even where a trust order was silent on the point or where a 'one person one vote' system, the most common form of electing trustees, was already in place. The drafters of the Bill appeared to be drawing on the post-settlement governance entity model which includes regular elections but without the 'voting by shares' mode of electing governors.

Under the Act, for ahu whenua trusts, there is no prescription as to the process of voting and nomination or the term of office. This provides a degree of flexibility that can only be curtailed by the owners themselves through changes to the trust order, which, as mentioned, the Court can no longer unilaterally change in any event. Contrast the compulsory terms of office model under the Bill, for what are essentially private property trusts, with the general law. It would be an anathema if a government were to unilaterally impose compulsory elections and terms of office for private trusts. So, the question arises, why was this regime to be imposed on Māori land owners, without giving them the option of electing to do so if that was their wish? Mandatory frameworks that constrain autonomy and that do not apply to general land owners and trustees and beneficiaries of trusts created under the general law appear somewhat misplaced and even inexplicable against assertions of owner autonomy and decision-making.

⁵³⁸ Te Ture Whenua Māori Bill 2016, Schedules 3 and 4.

Again, it is also relevant that the most financially successful Māori land entity of all time, Tuaropaki Trust, sought and were granted an exemption from the Bill in its entirety. This was publicly explained as necessary because of the special commercial arrangements of the trust.⁵³⁹ On close examination, those arrangements are nothing more than the ability of the trust and its owners to decide for themselves what are the appropriate terms of trust in the circumstances regarding succession planning and its internal governance arrangements. For example, Tuaropaki Trust has instituted a process whereby what might be described as ‘apprentice’ trustees are included in the governance activities of the trust as a means of creating a pool of potential future trustees. This is an entirely understandable policy which other trusts have begun to emulate.⁵⁴⁰

More importantly, in the context of this discussion, it should be noted that Tuaropaki Trust hold elections only where a vacancy arises. Until 2006, the equally successful Pukeroa Oruawhata Trust in Rotorua did not have regular elections, until the owners themselves decided to include elections at five-yearly intervals; along with minimum eligibility criteria regarding experience and qualifications. Similarly, none of the major ahu whenua trusts in the Ngāti Awa tribal district hold elections unless there is a vacancy. There are many other examples. The point is that the owners themselves have decided in these examples that a regular election of trustees does not suit their circumstances and so they have not included any such provision in their trust orders, as is their right as an exercise of their own self-determination. The Bill sought to impose so-called ‘best practice’ on extremely successful Māori land trusts without their consent – surely the antithesis of self-determination and land owner autonomy?⁵⁴¹

⁵³⁹ Tuaropaki Trust ‘Submission on Te Ture Whenua Māori Bill’ 11 August 2016.

⁵⁴⁰ The Omataroa Rangitāiki No 2 Trust at Te Teko, the largest Ngāti Awa ahu whenua trust, has now adopted a system of associate or apprentice trustees. Concerns however have been expressed by some owners over the appearance of incumbent trustees appearing to ‘choose’ their successors in the absence of a transparent process of nomination and election.

⁵⁴¹ Given its scale, understandably, the Tuaropaki Trust is not short of influence and it is entirely understandable that it sought to exclude itself from the Bill. Indeed, the Tuaropaki Trust underscored that it saw no benefit in the Bill which is why it sought to be excluded.

Voting by shares is contrary to custom and undermines owner autonomy

For the Hapū, the compulsory elements of the Bill as they would have applied to ahū whenua trusts might have resulted in significant instability in the governance of their lands. This could have occurred because of the risk of imposing effectively ‘outsider’ trustees simply because their modest number of supporters may have had a marginally greater ownership of the land than those who populate the marae and land trusts of the Hapū and who have kept those marae-centric communities alive, and the customs and traditions central to tribal identity. Put another way, voting by shares may be contrary to the preferences of the owners, their whānau and hapū, yet the Bill would have, initially at least, imposed that outcome. The result might then have been the wholesale replacement of trustees of considerable experience and commitment with individuals hitherto disconnected from their tribal homelands, simply because a handful of owners held say five percent of the shares in the land compared with a hundred owners who support the marae, holding four per cent.

In short, the Bill would have imposed a governance framework that, in part at least, would have perpetuated the inequities of individualisation and fragmentation – the shareholding described was largely an accident of fate and had little correlation to Māori custom and tradition. Inevitably, disputes over elections by shares compared with the ‘one owner one vote’, equally-weighted regime that had endured for decades and thus had been customary, would become a distraction for the trustees and owners of the Hapū and similarly in other districts in similar circumstances.

Moreover, at a ‘first principles’ level, it is argued by the researcher that compulsion is the antithesis of self-determination or rangatiratanga. That includes the curious concept of “compulsory mediation” something akin to compulsory choice no doubt? While some Māori owners who supported the Bill cited the words of the late Ngāti Porou leader, Apirana Mahuika, they did not seem to be able to discern the contradiction of endorsing a Bill that sought to do the opposite of the sentiments he expressed.⁵⁴² The claimed “paternalism” of the Court, it can be argued, would have been replaced with the paternalism of Parliament. If the owners decide to have

⁵⁴² Te Rūnanganui o Ngāti Porou “Submission to the Maori Affairs Select Committee on the Te Ture Whenua Maori Bill 2016” 2016 at 4.

regular elections, then that should be a decision for them, not the Court or the legislature. The point is that while many trusts have also opted for regular elections, it was *their* decision to do so. As foreshadowed, compulsory elections are also contrary to how trusts under the general law operate. In summary, the imposition of terms for trustee appointments is undesirable for two reasons: it creates the risk of instability and it undermines owner autonomy in terms of the content of trust orders.

It is contended further that the imposition of terms of office for trustees risks undermining much of what the trustees of Te Pāroa Lands Trust, Kiwinui Trust and Rotoehu Forest Trust have achieved to date. This is because an election may descend into a popularity contest with candidates seeking support through promising increased distributions and related vote securing techniques. While it is correct that, originally, the trustees were elected on to each trust, usually this was when the trusts were early in their development. As time has progressed and the trusts have become more successful, the Lectorian maxim “we covet what we see every day” is likely to have application.⁵⁴³ In other words, the more successful a Māori land trust or incorporation becomes, the greater the interest in challenging for governance roles, often by those least equipped to fulfil the role. That the trustees may stand or fall on their record is a laudable sentiment but one that is not always rewarded in the ever-changing caldron of the Māori tribal political dynamic. Moreover, it would be a requirement out of step with the majority of General law trusts, as discussed previously.⁵⁴⁴

The imposition of new compliance regimes may undermine the intent of the Bill

The Bill would have imposed a series of new requirements that would mean added and unnecessary compliance costs for ahu whenua trusts. The requirement for the creation of land management plans, partial or full distributions schemes in certain circumstances, and the process for cancelling a governance agreement and revoking the appointment of a governance body without the ‘checking ‘mechanism of the Court, would also create uncertainty, costs and risk for successful trusts. Indeed, the cancellation-revocation provisions were referred to by the largest and most

⁵⁴³ [https://en.wikiquote.org/wiki/The_Silence_of_the_Lambs_\(film\)](https://en.wikiquote.org/wiki/The_Silence_of_the_Lambs_(film)).

⁵⁴⁴ See also Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 282-285.

successful Māori land entities as a key reason for their concerns about the Bill.⁵⁴⁵ Changes to the Bill by Supplementary Order paper in April 2017 had gone some way to alleviate those concerns but the potential for disruption by recalcitrant owners and trustees remained, and for no real gain except as a trade-off from accessing the Court to deal with such matters. As foreshadowed, much of the success of the trusts risks being undone by the intervention of owners disconnected from the lands and the marae that are central to the Hapū identity, simply because they have marginally more shares in the land. There seems to be little rationale for this potential upheaval other than ideological grounds.

Constraining access to the Court may cause unintended consequences

It has been a *cause célèbre* for some time in certain circles that the Māori Land Court has been known to usurp the authority of owners of Māori land, substitute its own decisions against the will of those owners, and appoint and remove governors of land, in some cases, contrary to law and due process.⁵⁴⁶ In fairness, some counsel and academic lawyers have commented to the researcher during the interview process for this research that, if particular examples are considered, that belief is perhaps unsurprising. In any event, the reality is that from time to time, trustees and owners are required to seek directions from the Court. This can involve a range of day-to-day issues that confront trustees and their beneficiaries as well as providing a forum to discuss potential risks and challenges that might arise in the ordinary course of business. More fundamentally, parties are entitled to have their disputes determined by an independent judiciary, according to law and due process. Thus, access to the courts is critical to any legitimate legal system.

⁵⁴⁵ Parininihi ki Waitotara Incorporation ‘Submission by Parininihi ki Waitotara Incorporation re: Te Ture Whenua Māori Bill’ 14 July 2016

⁵⁴⁶ See Federation of Māori Authorities and Crown Forest Rental Trust joint meeting minutes 1996 and see also Waitangi Tribunal *He Kura Whenua Ka Rokohanga* above n 41 at 104-109. There have been criticisms over certain decisions of some of the Māori Land Court judiciary up to 1997 as the FOMA-CFRT meeting minutes confirm. Judge Carter was complimented for his 30 decisions while Judge Hingston was criticised heavily. In any event, Judge Hingston would often joke to counsel, including the researcher prior to 1999 when he retired, that he was “the most appealing judge”. As the evidence of the minute books confirm Judge Hingston and then Judge Savage did not hesitate to remove trustees who they considered had acted in breach of trust sufficient to warrant removal. Their decisions were from time to time subject to appeal and review. Not all such appeals or reviews were successful.

Even so, some commentators and stakeholders have contended that plainly the Bill sought to curtail the jurisdiction and role of the Māori Land Court in the context of the activities and oversight of governance bodies. As foreshadowed in Chapter Five and earlier in this section, under the Act, Part 12 provides a broad array of remedies by which trustees can be held to account, including the equivalent jurisdiction of the High Court in terms of both its inherent and statutory powers. In addition, as mentioned previously, there are no threshold requirements that owners must meet before they can seek assistance from the Court.

Turning to the example of ‘kaitiaki’ under the Bill – kaitiaki were to have less accountability than trustees currently have under the Act.⁵⁴⁷ That was because kaitiaki were to be given statutory immunity from personal liability for any act done by the governance body, provided it was done in good faith. According to some critics, the immunity could conceivably cover good faith actions committed in breach of a duty.

Under the Bill, many thousands of trusts would have become immune to owners’ concerns, including concerns about the conduct of kaitiaki, because historically, there might have been fewer than five percent of the ownership engaged in the affairs of the trust. While it could be a simple matter of securing the support of fifteen owners; in large trusts with significant shareholdings, it would be virtually impossible to procure five percent of the ownership to support an application to the Court under the Bill. This is somewhat comparable to the existing regime under the Act in respect of incorporations, where ten percent of the shareholding is required before the Court can commence an investigation into any of the activities of a committee of management. With large incorporations, this threshold is impossible or at least extremely difficult to meet, which is why incorporations can make immense losses without the shareholders being able to hold those governors to account.⁵⁴⁸

⁵⁴⁷ Professor Richard Boast, Deborah Edmunds and others ‘Submissions to the Māori Affairs Select Committee on Te Ture Whenua Maori Bill’ above n 463 at 40-42.

⁵⁴⁸ In 2009, the Parininihi ki Waitotara Incorporation of Taranaki lost \$31 million in a failed property investment in Australia: www.stuff.co.nz/taranaki-daily-news/714546/PKW-Gabba-loss-now-up-to-31m. See also the *Matauri X* line of cases.

In summary, it could be argued that for beneficial owners of Māori freehold land, particular aspects of the Bill presented as a perfect storm. Governors were to have diminished accountabilities compared with those under the Act and comparable legislation, and would have had immunity from any act done in good faith even if it breached some of their duties. The ability of the owners to first, be eligible to invoke intervention by the Court and secondly, obtain a suitable outcome had also been made more difficult under the Bill by the imposition of new trigger thresholds and a diminishing of the range of remedies available to the Court that would have been appropriate for the circumstances.

Inflexible voting regimes may undermine decision making processes

Process for appointing governance body

A simple majority of “participating owners” can appoint a governance body to:⁵⁴⁹

- (a) approve a governance agreement that must comply with Schedule 4;
- (b) authorise the governance body to manage the land under the governance agreement; and
- (c) apply to the CE to register the governance agreement under cl 168 from which point the governance body takes effect and control.

Clause 13 of schedule 2 sets out the quorum requirements. These are comparable to the Māori Assembled Owners’ Regulations 1995. It will be remembered that it took only a generation to have those regulations rendered largely irrelevant to most owners, once the effects of succession and fragmentation had taken hold. Clause 12 of schedule 2 then sets out the quorum requirements:

- (a) 10 or fewer owners – all the owners;
- (b) more than ten but less than 100 owners with ten holding at least twenty five percent of the shares;
- (c) between 100 and 500 owners, at least twenty owners holding twenty five percent of the shares;

⁵⁴⁹ CI 159 and Part 1 of Schedule 3

- (d) more than 500 owners, at least fifty owners who hold at least ten percent of the shares.

At the risk of belabouring the point, the danger of imposing in a statute or its schedules a rigid formula for determining quorums means that, in time, these formulae will inevitably become obsolete. This was the very point made in the Māori Appellate Court decision *Wall v The Maori Land Court – Tauhara Middle 15 Trust and Tauhara Middle 4A2A Trust*.⁵⁵⁰ Any attempt to enforce the regime of the Māori Assembled Owners’ Regulations 1995, except in rare situations, will fail because the quorum requirements will not be met. A brief assessment of the numerous reviews undertaken by the Māori Trustee and by the Registrar over the last decade reveals an inability to achieve quorum requirements as set out in the current regulations as well as, from time to time, in the current trust orders prior to review. Many examples can be given of how entities that have been before the Court for review would simply fail to meet these quorum requirements. So, will a heavily prescribed regime assist empowering owners by imposing a rigid mechanism for determining quorums that are likely to fail in due course?

The real risk is the potential uncertainty that is created not only for owners, but for third parties who treat with the governance body, where the threshold for revoking appointments has been set at a relatively low level. While the appointment of a governance body requires a fifty percent majority of “participating” owners, the revocation of its appointment has a low threshold.⁵⁵¹ Difficulties will be immediately apparent where factions seek to revoke the appointment of one group of kaitiaki in favour of their own nominees. It would not be difficult to imagine factions of owners creating an almost permanent siege on trustees by taking the steps necessary to commence a revocation and then doing so without limitation.⁵⁵²

Clause 188 of the Bill enabled owners to review appointment and revocation decisions, provided they did so within twenty days of the original decision. Unless

⁵⁵⁰ *Wall v The Māori Land Court* above n 479.

⁵⁵¹ CI 174(2).

⁵⁵² Several examples spring to mind including *Lake Horowhenua* – above n 256, 284, 292, 314, 326, 376, 382; *Ngāti Maru* – above n 242, 376 and 382; and *Tataraakina* - above n 294, 313 and 330.

there was an ability to exercise a discretion and extend the timeframe, this remedy would be likely to be illusory for many owners who were not notified of the decision to appoint or revoke an appointment. Contrast that with the twenty-eight day time frame for a rehearing, or two months for an appeal provided for under the Act, either of which may be extended for good reasons. Under the Bill the Court could only order a recommencement of the process and issue directions as to procedure. It had no ability to declare that the appointment or revocation was, in effect, an abuse of process and should be set aside. Put another way, the Bill's emphasis on checking procedural compliance denudes the Court of the ability to assess, based on evidence and submissions in an open process, whether the decision is in the best interests of most owners.

Under the Bill, those owners seeking revocation need not provide a reason. The revocation then starts the process of cancelling the governance agreement where the Court is required to approve a full distribution scheme. It would appear that the Court may not enquire into *why* revocation is sought, only that it is required to approve or decline a full distribution scheme (cl 175). In some cases, it would not be difficult to find scenarios where conflicting factions would simply seek appointment and revocation on a near continuing basis. The Bill does not appear to provide any means to sanction such conduct or to refuse to approve a full distribution scheme on the ground that a continuing mandate dispute and appointment and revocation process was depleting the entity's resources, contrary to the interests of the owners.

Since the 1865 Act, serious conflicts over control of management entities are common. They continue to this day.⁵⁵³ The difference is that, currently, only by Court order can a trust be disestablished and even then, only after the application of the principles of natural justice; and the parties have been afforded the right to be heard. There are also rights of appeal and review. Where there are existing obligations and liabilities, at the request of the parties, or where intervention is required to protect the interests of the owners, an independent caretaker trustee or agent can be appointed to oversee any necessary transition to a new entity with governors elected by the owners. The short point is that once an entity is created it

⁵⁵³ For examples, see *Fenwick v Naera* above n 260; *Adlam v Savage* above n 267.

cannot simply have its authority revoked by dint of a seventy-five per cent majority of “participating” owners who may have even less of a mandate than the group originally appointing the entity. It can therefore be argued that these provisions would incentivise dissent, because all a disenchanted owner would need to do would be to restart the process, causing significant distraction and cost for the trust.

Registration of governance agreements

Clause 162 of the Bill authorised a governance body to apply to the “Chief Executive” (of the proposed Māori Land Service) for registration of its governance agreement or updated agreement to finalise its appointment. Such agreements had to satisfy various provisions including those set out in Part 4 of Schedule 3. This required that the governance agreement complied with Schedule 3 and stated the names and contact details of all kaitiaki, who had been required to declare their eligibility for office under the Oaths and Declarations Act 1957. A new agreement needed to be accompanied by evidence that each decision of the owners was made in accordance with Schedule 4, which set out detailed requirements of compliance.

An application to register an updated governance agreement under the Bill had to identify the agreement already registered and evidence that the updated agreement was approved in accordance with the requirements of the registered agreement (cl 24 of Schedule 3). It needed to identify the Māori freehold land, investment land (if any) and other assets or liabilities (if any) that were intended to vest in the governance body on the issue of a governance agreement. It had to also identify any known lease, licence, mortgage, easement, or other assets or liabilities referred to above (cl 22). Under cl 206 (whereby a governance body decides to hold acquired land or investment land as Māori freehold land) the application to register an updated governance agreement needed to include a copy of the allocation scheme confirmed by the Court (cl 211).

The concept of a “governance agreement” is new to Māori land law and consequently, there is little case law on them. Currently, land entities are governed by trust orders and constitutions, some of which have been affirmed by the superior courts as providing all the powers and authorities required to undertake anything an

owner can do except alienate the freehold.⁵⁵⁴ The Bill is also silent on who is to provide governance agreements, whereas at present trusts may take advantage of several versions of trust orders available without cost from registries including the standard ‘wide powers’ trust order.⁵⁵⁵ Publicity has confirmed that it was intended that the proposed Māori Land Service would provide support in this context. Several of the currently available trust orders are very detailed where the trust’s activities are commercially or culturally complex or where the trust is the recipient of Treaty settlement assets. Others are more standardised but contain the full range of powers enabling trustees to manage their land in accordance with their owners’ objectives.

Moreover, such trust orders have now had the benefit of decades of case law and precedent whereas the proposed governance agreements remain a mystery outside of some standard terms. It is difficult to see how this proposal advances the interests of land owners. Once again, owners will be faced with costs that they rarely need to pay at present, and they will need to seek advice on what might be suitable for their needs. Currently they can seek the assistance of the Advisory Services division of the registry or seek directions from a Judge. Neither process involves significant costs for owners. Will the Māori Land Service provide such information at no cost, and if so, how can owners be assured it is accurate? Once again, as an overview observation, these provisions are unnecessarily cumbersome and convoluted.

At present, the registrar retains in the record of the Court the trust orders of all trusts. There is no need to deal with any other agency to access this record. Where trust orders are varied, following adherence to the statutory tests of sufficiency of notice, opportunity for discussion and support, then an amendment is made to the record which is readily available to trustees and owners. Where owners or trustees are dissatisfied with any decision to accept or decline a new trust order or changes to an existing version, they have rights of appeal and review. By contrast, the convoluted provisions of the Bill would have added further layers of compliance, for no apparent gain.

⁵⁵⁴ *Naera v Fenwick* above n 306.

⁵⁵⁵ The standard ‘wide powers’ orders had been reviewed by Paul Heath QC as he then was and more recently by Andrew Butler of Russell McVeagh.

Rangatōpu certificate

Rangatōpu certificates were to be issued by the ‘Chief Executive’ and needed to state, amongst other things, whether a rangatōpu was a body corporate or a private trust and whether it was a former Māori incorporation, ahu whenua or whenua tōpu trust.⁵⁵⁶ If it were any of those, the certificate had to state the date upon which, and the method by which the incorporation or trust was first established. What difference that made is unclear. A rangatōpu certificate issued or certified by the ‘Chief Executive’ was to be conclusive evidence that the rangatōpu was registered under the Bill.⁵⁵⁷ Clause 166 created a legal personality for new rangatōpu not previously body corporates (such as incorporations). Once a certificate issued, it specified that the rangatōpu was a body corporate with perpetual succession under the name specified in the certificate. Such a body corporate could do anything a natural person might have done unless restricted by the Bill.

Summary

Once more this is an unnecessarily cumbersome set of processes. They were *less* not more efficient than the existing Māori land management regime set out in the Act. The benefits of these changes were not obvious. They would simply create an entirely new bureaucracy with no evidence of improved outcomes for Māori land owners. In addition, as foreshadowed, the ability of the affected owners and trustees to seek relief from the Court would have been more limited under the Bill than at present under the Act. The access to the Court’s more informal processes of dispute resolution without adjudication were to be replaced by a new untested mediation service. The relevant provisions of the Bill regarding alternative dispute resolution were not without their problems and even raised the concerns of the Arbitrators and Mediators Institute and Fairway Resolution Ltd.⁵⁵⁸ In short, it is argued that reducing access to the Court seems counterintuitive where a goal of the reform is to empower owner decision-making, which presumably includes the decision on when to seek assistance from a Court.

⁵⁵⁶ Cl 2 of Schedule 3.

⁵⁵⁷ Cl 167.

⁵⁵⁸ Arbitrators’ and Mediators’ Institute of New Zealand Inc ‘Submissions Te Ture Whenua Maori Bill 2016’ above n 490 and Fairway Resolution Ltd ‘Submission to Māori Affairs Committee on the Te Ture Whenua Māori Bill’ above n 489.

The Hapū submission on the Bill

To conclude this Chapter on whether specific parts of the Bill would have impeded the Hapū in the development and utilisation of their land, it is necessary to consider what the Hapū said themselves on the issue. The trustees of Te Pāroa Lands Trust filed a submission on the Bill on 12 July 2016.⁵⁵⁹ The trust opposed the Bill for the same reasons articulated by many submitters to the Māori Affairs Select Committee. The trust's overarching submission was that the Bill went too far in seeking to cure problems that either do not exist or are so rare that they do not warrant replacement of the entire Act:⁵⁶⁰

9. Our key submission is that the Bill is seeking to fix something that is not broken. The Bill will create new uncertainties and risk for owners, trustees and other stakeholders including banks and lending institutions. The ability of so called engaged owners to start the cancellation of a trust will be a backward step and has the potential to distract trustees from their main role of looking after the land. The Bill is so hard to understand let alone operate under we will have to go to our lawyers just to get something explained to us. The Bill imposes all kinds of cumbersome processes that are worse than those under the current Act. These will all create the outcome of making our business all the more difficult to run. It will in effect become a tax on our energies and efforts as trustees and thus compromise our ability to manage of resources as we currently do for the benefit of our owners.

...

The trustees also argued, as did Wakatu Incorporation, that if the aim was to make unproductive lands more productive, then the Bill should have targeted those lands, not entities that were operating successfully:⁵⁶¹

22. If the purpose [of the Bill] is to make unproductive land more productive – why do you need to change what we are doing? Go and fix those blocks, not ours. We are functioning well and will continue to do so. What we do not need is a whole new process, framework and structure when the current Act only needs minor changes here and there. If you do go ahead with the Bill as it is then we ask for the alternative of being able to opt out of the Bill and remain under the Ture Whenua Māori Act 1993. Anything else will be forcing changes on us without our consent concerning the oversight of one of our most important tāonga – surely another modern day Treaty breach?

On the argument that the Court constrained land development through excessive discretion, the trustees confirmed that they made their own decisions, not the

⁵⁵⁹ Te Pāroa Lands Trust 'Submission on Te Ture Whenua Māori Bill', July 2016, Whakatāne.

⁵⁶⁰ At 2.

⁵⁶¹ Ibid.

Court.⁵⁶² Then on the challenging issue of voting by shares – the default position under the Bill – the trustees argued against that proposal, as they did for compulsory elections, highlighting the contrast with general law trusts.⁵⁶³ On the equally controversial dispute resolution processes, including compulsory mediation, the trustees were highly critical, pointing out that compulsion was the antithesis of the choice and the rangatiratanga the Bill was intended to embody:⁵⁶⁴

Dispute resolution

23. Compulsory anything when you're trying to settle disputes under your own mana is a contradiction. Do the General land owners have to submit their disputes to compulsory mediation? Hardly and so why should we? This is again the opposite of rangatiratanga, trying to force us to do anything. If we want to mediate we will. If we want to undergo our own process we will. When those fail we need ready access to the Court. We should also have the mana, each party, to decide ourselves whether a dispute is suitable to mediate or not. So if both parties to a dispute agree that mediation is unsuitable, who is the Māori Land Service to tell us, well no, sorry, you're going whether you want to or not. Kei te tino he tēnā. Why is the government trying to interfere with our rights and impose a discriminatory process that owners of General land - mostly tauwiwi – are not subject to in the same way?

24. The explanatory note to the Bills talks about this process being useful and popular in places like Ontario. Well this is Aotearoa. Why is the government trying to push other systems on us when what we have works okay? Yes, add mediation to the powers of the Māori Land Court and make sure we don't have to pay for it.

Summary

The added complexity of the significantly increased number of provisions under the Bill would have meant greater use of professionals and therefore more costs for entities and owners to explain this complicated new regime where many would have been unable to afford such information. In short, the current trust and incorporation framework for the management of Māori land is far simpler than what was proposed and involves less compulsion, compliance and cost. Accordingly, the question could be asked: what were the actual benefits for trusts and incorporations of such a regime?

In addition, it is difficult to see how the aim of simplicity of process and more efficient mechanisms were reflected in the convoluted provisions of Parts 5 and 6

⁵⁶² Ibid.

⁵⁶³ At 2-3.

⁵⁶⁴ Ibid.

and the accompanying schedules. Under the Act, all that trustees are required to do is adhere to their trust orders, convene general meetings from time to time and file their accounts with the registrar. Yet under the Bill entities managing Māori land would have been required to produce governance agreements, land management plans, allocation and distribution schemes at increased cost to the owners – which are not required now – as well as complying with existing obligations. There is no evidence that these requirements might have improved outcomes for those owners. Part 5, like other provisions of the Bill, appeared to create remedies and processes for problems that either do not exist or that rarely occur.

In summary, the compliance and transition regimes imposed under the Bill would have undermined the objectives of the reforms by adding new costs, and forced entities to undergo processes that many medium-sized and smaller trusts could ill afford, yet with little practical gain for owners. This had been one of the principal criticisms from Māori landowners, and from governance groups including the Federation of Māori Authorities. It has also been said by some critics, that several of the impositions were potentially discriminatory in that they would have forced Māori land owners into compliance regimes that do not apply to the owners of General land or to private trusts. Coupled with the more complicated dispute resolution process that involved compulsory mediation, the prospect of delay and added costs cannot be a desirable outcome.

If the aim of the reforms was increased owner empowerment, supported by simple and efficient processes that removed the need for judicial discretion and oversight, then what was proposed was a more complicated and compliance-driven regime intended to cure mischief that has not been objectively identified, supported by empirical evidence or articulated by most Māori land owners and their representatives.

CHAPTER NINE – ALTERNATIVE PROPOSALS

Introduction

The key conclusion of this research is that the replacement of the current legislation with an entirely new statute, is unnecessary to achieve the aims of the reform. Indeed, it is contended that such an approach might have proved counterproductive. As the Judges of the Māori Land Court submitted to the Māori Affairs Select Committee, the ‘replacement’ approach to critical law reform designed to increase productivity of Māori land could instead risk causing the opposite outcome by creating uncertainty, extra costs and unintended consequences.⁵⁶⁵

A related conclusion is that unengaged Māori land owners do not impede development as there are, under the Act, the means of proceeding with development plans without the consent of a majority of the owners, a concept inherent in the participating owners’ model that the Bill envisaged. This chapter outlines a series of alternative proposals involving amendments to the Act and related policy changes intended to improve the utilisation of Māori land by its owners. Some of these proposals go beyond the discussion of ahu whenua trusts, but nonetheless are considered because they affect, directly or indirectly, how trusts might function.

Overview

Progressive reform of the laws governing Māori land, that is responsive to the needs of Māori owners and their communities of interest, must have at its foundation the principles of rangatiratanga, empowerment and equity of options for Māori land owners, their whānau and hapū.⁵⁶⁶ This is consistent with the guarantees in Te Tiriti o Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples, that policies must facilitate and enhance the ability of Māori land owners to retain,

⁵⁶⁵ Māori Land Court Judges ‘Submission to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill 2016’ above n 427 at 2-4.

⁵⁶⁶ See Waitangi Tribunal *Matua Rautia – The Report on the Kohanga Reo Claim* (Wai 2336, 2013) at 67 for a discussion on the principle of equity of options.

utilise and develop their lands and resources in accordance with their own customs and preferences.⁵⁶⁷

At a conceptual level, in the context of ahu whenua trusts, to some extent the researcher argues that it is not always appropriate to borrow other Western co-owner models (like shareholdings under the Companies Act 1993) and apply them to multiply-owned ancestral land, and its uses by kin-group owners, without acknowledgment of the cultural imperatives inherent in Māori land tenure. Predominantly, in this context ownership is hereditary, rather than by choice or consent as in the case of company shareholders. The land is held as a tāonga tuku iho (ancestral treasure) handed down from owners' tīpuna (forebears) and, since the passing of the Act, is not usually bought and sold like general land and company shares. The owners have no choice about where this land is located or how it came to be held by the forebears. It is theirs by birth through whakapapa, except where land has been held through the provision of exchange.⁵⁶⁸

Therefore, an economic ownership model alone, based on the pursuit of economic outcomes and founded on individuals' financial choices, is inadequate to deal with the cultural and historical overlays and obligations inherent in the concept of whenua tuku iho for Māori owners. Indeed, 'ownership' per se is arguably an inadequate framework for tangata whenua dealing with land as lifetime custodians. With these points in mind, the alternative proposals set out below are intended to reflect this researcher's position that changes to the existing Act can nonetheless achieve important aspects of the objectives set out in the Bill without the need for a complete replacement of the Act. It is also important to underscore that several of these proposals have been suggested to governments before now, with some, in the case of mediation, even dating back to 1999.

⁵⁶⁷ See Matthew Palmer QC 'The Status and Effect in New Zealand Law of the Declaration on the Rights of Indigenous Peoples' Symposium on UNDRIP 'Implementation of the United Nations Declaration on the Rights of Indigenous Peoples in Aotearoa - Theory and Practice (UNDRIP)' Hamilton, New Zealand, July 2014.

⁵⁶⁸ For examples of Māori land-owning entities where a significant part of the land holdings involves limited if any actual historical connection to the current owners, see Wairarapa Moana Incorporation: www.wairarapamoana.org.nz and the Palmerston North Reserves Trust: www.tekau.maori.nz/PalmerstonNorthMaoriReserveTrust/AboutUs/History.

Summary of proposals

In summary, it is argued that, given the events of the last five years regarding the previous government's policy of reform, and the responses of Māori land owners to the Bill, considered in their totality, any argument for retention of the status quo is untenable. There is undoubtedly an appetite for change within the land-owning community – it is simply the extent and nature of such change that is at issue. In addition, while some landowners, commentators and advisers have expressed the view that there was much that was wrong with the Bill, many agreed that it also contained some ideas worth exploring. Those initiatives included the expansion of the Court's jurisdiction regarding land valuation, local authority and roading related matters including landlocked land as well as restoring the probate and succession jurisdiction that the Court possessed for most of its existence. As such, this research considers the following categories of reform and offers alternative proposals for each:

- (a) enhancing online connectivity for Māori land owners;
- (b) realigning administrative and judicial roles;
- (c) expanding dispute resolution options;
- (d) streamlining existing judicial processes; and
- (e) increasing the choice of forum for Māori land owners.

Enhancing online connectivity for Māori land owners

Establishing a single Māori land information online portal

While much of the day-to-day business of Māori land owners involves visits to the registry, greater use could be made of online services following the creation of a multi-agency online platform. Such a portal could include Māori Land On Line, a read-only version of an upgraded and rebuilt Māori Land Information Service, the My Whenua site managed by Te Tumu Paeroa, Manaaki Whenua – the Landcare Research land use site and the integration of The University of Auckland Native Land Court database searching system.⁵⁶⁹ All these tools are very useful but

⁵⁶⁹ For maorilandonline see <www.maorilandonline.govt.nz/gis/home>; for My Whenua see <www.tetumupaeroa.co.nz>, for the prototype Māori land visualisation Tool by Landcare Research help Māori land owners make more informed decisions about how to use their land to

including them in a single platform of Māori land information is likely to prove more efficient as a means of enhancing data accessibility for Māori land owners. The quality and accessibility of relevant information remains an impediment to informed decision making on land use and development.

Digitisation of all Court records

Along with an overhaul or replacement of the registry's outdated and at risk platform, Māori Land Information Service or MLIS, the digitisation of more of the Court's record to enable greater use of online searching should be a key objective of any reform agenda. This could include for example maps and survey plans, both current and historic, minutes of hearings and all related orders, block order files and other title information as well as annual accounts and reports and minutes of hui-a-tau (annual general meetings). Enhancing the ability of land owners' online experience in the context of accessibility to the Court's record can only be positive. In this context, the Waikato-Maniapoto (Hamilton) and Aotea (Whanganui) offices have converted many of their Native Land Court minute books into TIFF (Tagged Image File Format) a format that is comparable to PDF (Portable Document Format) but is more readily accessible and user-friendly; and that initiative could be rolled out nationwide given its relatively modest cost.

In short, digitisation should enable the online searching of all Court-held records as another element of enhancing the accessibility of the record to land owners. In the year 2018, it is inefficient to continue with a system that always requires owners to attend the Registry in person simply to search the minute books and the block order files on their lands and on the details of their ancestors' exploits concerning those lands, rather than providing them with the online option.

Personalised Māori land owner log in

As a central part of a technology update, the development of an individual owner log-in should be a priority. This would enable land owners to have their own user ID and password which would log them into a portal that displayed all their Māori land

support whanau and fulfil and balance its economic and cultural potential. see
 <www.whenuaviz.landcareresearch.co.nz/>;
 <www.magic.lbr.auckland.ac.nz/mlcmbi/guide/comp_guide.htm>

data with links to PDF versions of maps, annual reports, minutes of hui-a-tau and related documentation. The portal would also include the ability for owners to email feedback to governors of their lands from time to time as well as receiving notifications for meetings. Ideally, the log-in would also include a change and update function that populated the address books of the Registry and Te Tumu Paeroa to ensure that they were up-to-date and that there was sufficient cross-over of data between these agencies to eliminate duplication. More importantly, this initiative would seek to ensure that owners are kept informed. One of the more serious practical challenges when seeking to engage with Māori land owners is the ability to maintain current contact details. A self-policing log in including the regular updating of contact details will always prove responsive where owners can see that it is to their advantage to remain connected.

Increased access to audio-visual resources for meetings and hearings

Greater use of AV links and technology for meetings of owners convened by the registrar, conferences and hearings should be encouraged, given that mainstream courts have had access to this facility for some time, both in the criminal and civil jurisdictions.⁵⁷⁰ One of the criticisms of the current system is the need for owners to have to attend Court in person for the most mundane matters that hardly warrant the inconvenience of travel and time off work. Owners of general land need not attend a court in person for simple and uncontested transactional matters. The use of AV technology for landowner meetings should also be encouraged and facilitated by upgrading courtrooms to enable owner interaction with each other and the registry staff through that medium. As it happens, many land owners' hui are held in the courtrooms of Māori Land Court registries simply as an accessible, cost-effective and neutral location, with advice on hand when required.

⁵⁷⁰ See the Courts (Remote Participation) Act 2010, ss 5 and 7. According to the Ministry of Justice website, AV can be used in both criminal and civil trials at the discretion of the Court. It is understood that this facility will finally be available in most Māori Land Court registries by May 2018.

Realigning administrative and judicial roles

Overview

The researcher argues that the role of the Judiciary should be refined to deal with genuine dispute resolution through adjudication, mediation, facilitation and, where appropriate, arbitration. The Court can also be empowered to provide advice, binding or non-binding as the parties or other courts, commissions and tribunals, may require. This jurisdiction currently exists in the context of representation disputes, under s 30 of the Act. In any event, a considerable amount of judicial time is often spent on what are essentially administrative and transactional functions that should be devolved to registrars. If such a change were made, the ability of the judiciary to further enhance the timeliness of producing judgments would be improved. There is no evidence that supports the current position that much of the administrative functions under the Act *must* be processed by a Judge. While there is obviously some advantage in having someone who is legally trained oversee some of these important functions, this is simply a hangover from previous legislation and from a policy that any matter concerning land titles required continual judicial oversight. Given the history of Māori land legislation, this is not entirely surprising. In addition, there is always the unique power of the Chief Judge under ss 44 and 45 of the Act to correct errors or mistakes.

This research proposes that existing Registrar positions within the Court be re-designated by amending the Act, as District Māori Land Registrars (DMLRs) and that they be given the power to deal with title issues, succession, trusts and incorporations and advisory services. In this way, they would continue to function as a Māori Land Service, but within the current registry, without the need for an elaborate and costly new structure, whatever that was going to look like.⁵⁷¹ In any

⁵⁷¹ “Documents released under the Official Information Act reveal the National-led government spent \$5.2 million on investigating how to establish a Māori Land Service despite widespread opposition and the bill not being passed into law... In eight months from February last year, the then government spent more than \$600,000 dollars a month on programme costs and a further \$35,000 a month on personnel.” Mihingarangi Forbes “Millions spent on controversial Māori land bill” (19 January 2018) Radio New Zealand <www.radionz.co.nz/news>

event, the power to delegate functions to Registrars already exists under s 39 of the Act, which provides:

39 Powers of Registrars

(1) Without limiting section 38, the jurisdiction and powers conferred on the court by this or any other Act may be exercised by any Registrar of the court especially designated for the purposes of this section by the Chief Judge with the concurrence of the Chief Registrar, in all or any of the classes of case specified by the rules of court, as the Chief Judge may determine.

(2) Every order made by a Registrar in the exercise of any jurisdiction or power pursuant to subsection (1) shall be deemed for all purposes to be an order of the court.

The current practice in most registries is that the Judges *already* devolve many important administrative functions to registrars including the completion of a range of orders.⁵⁷² Registrars can also take evidence, where a Judge is unavailable, and orders can subsequently be made in reliance on that evidence. So even under the current Act there is considerable flexibility. This proposed realignment of roles is likely to increase efficiencies for Māori land owners where much of their transactional business can be dealt with, at their election, on line, or with increased use of audio-visual facilities and where a formal hearing can be dispensed with in uncontested applications, thus minimising delays between current sitting dates.

District Māori Land Registrars

Accordingly, it is proposed that the Court could be reorganised so that there is a clear delineation and separation between the land title registry division and advisory services on the one hand, and the Court in the context of dispute resolution services, on the other. As foreshadowed, the current district managers could become District Māori Land Registrars, like their counterparts at Land Information New Zealand, and custodians of the Court record including its responsibilities for all Māori land title information and registration matters, as they have, in effect, been doing for decades. In each registry, below the DMLR, could be four deputy registrars, for

⁵⁷² For example, per r 7.6(1)(a) of the Māori Land Court Rules 2011, Judges can delegate the completion of orders under ss 18(1)(a) (life interests only), and in terms of successions and consolidation orders per s100(2)(e), 111, 112, 115, 117, 118, 128, 164; regarding Part 12 trusts and Māori reservations, per ss 214, 215, 216, 217, 219, 220, 222, 231, 239, 242, 244 and 338(7) of the Act and its amendments. Orders can also be made by registrars per ss 135-136 of the Māori Affairs Act 1953 and s 78A of the Maori Affairs Amendment Act 1967 by delegation.

Land Titles, Probate and Succession, Māori Land Trusts and Incorporations and Advisory Services.⁵⁷³

That said, a variation on this proposal would be for registry staff to have a generic position description (for case management, advisory services, land registry and court takers) whereby all frontline staff are also deputy registrars. At present, staff are rotated through the various divisions of the registry to ensure that all the core business functions are serviced as a matter of course. If this system became the norm it would increase overall registry cohesiveness and flexibility with formalised training consistent with appropriate accreditation standards. The short point is that a significant amount of administrative and transactional processing could, with relative ease, be transferred from judicial to registrarial oversight. This would then improve overall efficiencies within the registry for the benefit of Māori land owners.

Māori land entities created by registration

There are compelling arguments that the creation of Māori land entities (such as Māori land trusts and incorporations and the appointment of agents) should be an administrative rather than a judicial act by registration through the Registrar. Given that most applications to constitute trusts and for the appointment of agents are uncontested, there is no reason why these cannot be processed by the Registrar. That is not to say that, where appropriate – for example, where a dispute arises and part of the remedy is the creation of an entity – that the Court cannot still exercise the jurisdiction to remedy such situations. In such circumstances, Māori land owners seeking to establish a governance entity would either convene meetings of owners seeking their endorsement or procure support on the papers and then file their application with the registry to have the governance body constituted. This is what the Bill envisaged.

Appropriate notice would be provided, including a period of objection, and failing the receipt of meritorious objection, the Registrar would then proceed to register the entity, in a manner not dissimilar from that proposed under the Bill. With whānau

⁵⁷³ In smaller district registries like Hastings and Christchurch, where there is far less Māori land, a pragmatic approach would suggest that there would need to be a double-up so that one deputy registrar would hold two roles.

trusts for example, much of this could be undertaken online without even the need to visit the registry or discuss any issues with staff, unless there were queries. This would be a far more efficient process, with the proviso that meritorious objections would need to be considered by the Registrar and that his or her decision whether to accept the objection would be subject to review by the Court. Uncontested changes to trust membership, reviews and changes to trust orders could also be processed administratively by the registry, subject to appropriate notice.

In addition, the Advisory Services division of the registry could actively promote the whenua tōpu trust as a hapū title mechanism to facilitate decision-making and development proposals where excessive fragmentation has led to unmanaged land and unengaged owners. The number of whenua tōpu trusts have increased only in districts where they are promoted actively by the resident Judges.⁵⁷⁴ With increased awareness and active promotion of the whenua tōpu trust as a viable alternative to ahu whenua trusts and incorporations, especially where shares have become so cumbersome that dividends are not likely to be paid and in cases where whānau have become disenfranchised through succession or by being excluded from the original title determination, the whenua tōpu trust option can have real attraction.

Regarding ‘unutilised’ or ‘underutilised’ land, the Advisory Services division could also facilitate the calling of owners’ meetings for land without a management structure, and discuss amongst the owners the appointment of experienced trustees or agents including Te Tumu Paeroa, tribal authorities, trusts and incorporations and external Māori land management agencies to provide preliminary assessments as to land development potential following owner consultation. The Judges’ experience is that the registry staff in fact do this now and, but for staffing cuts and budget reductions, could do much more to promote the creation of management structures to benefit Māori land owners.⁵⁷⁵

⁵⁷⁴ Taitokerau, Waiāriki and Aotea have the largest number of whenua tōpu trusts, in part due to their promotion by the local Judges as a means over overcoming some of the actual or perceived challenges of fragmentation.

⁵⁷⁵ “Māori land owners concerned over Māori Land Court job losses” *Te Karere* (Television New Zealand, 5 October 2016). See also Report of the Justice and Electoral Committee ‘2015/16 Annual review of the Ministry of Justice at 4: “The [Bill] would introduce broad changes to the jurisdiction of the Māori Land Court, establishing a new Māori Land Service to take on some of the functions carried out by the Māori Land Court. The chief executive said that regardless of the

In short, the jurisdiction could be exercised either administratively or judicially but the creation of an entity by registration through a registrar would be the rule. The current District Managers could also be designated the Registrar of Māori Trusts and Incorporations, like their counterparts in the Companies, Incorporated Societies and Charities agencies. The result would be a more efficient experience for land owners.

Governance obligations and training

Further considerations regarding land governance could include a range of improvements, for example the codifying with greater clarity the duties of trustees to improve accountability and increasing the penalties for breach of those duties. This is especially relevant where individuals persist in breaching their terms of trust over more than one entity and yet are often re-elected by their faction of the owners who may have a bare majority of support, but a majority nonetheless. The provisions of the Bill enabling the disqualification of governors for persistent infringements could be included in any amendments to the Act.

The improving of governance skills has long been identified as a priority for Māori land owners. Promotion of the use of governance training developed and offered through the Wānanga system and related sectors and employing marae-based learning that incorporates tikanga Māori as well as best practice models, can only be positive. In the experience of several Judges, trustees, their counsel and this researcher, the reality is that many trusts are populated with governors who rarely understand their obligations and are even less interested in complying with them. The gulf between successful trusts and those that fail is often dependent almost wholly on the quality of governors. There is general agreement therefore, across the sector, that the improvement of governance performance requires enhanced training and development opportunities. There are few credible courses or programmes available now that meet a wide range of needs and competencies, and so developing

outcome of the bill, restructuring the Māori Land Court is necessary to streamline management systems across all the courts in New Zealand. He acknowledged that the Māori Land Court has done an exemplary job over the last three years in reducing the time taken to resolve its cases.”

portable Level 3 and higher courses, full and part-time and capable of distance learning mode, should also be a priority.⁵⁷⁶

Successions processed administratively

Successions should also be processed by the Registrar except in cases of genuine conflict and even where there is such dispute, the option of mediation should be explored as a first step. As the great majority of successions by intestacy are uncontested, they could be processed by the Registrar without delay or need for a hearing. The case would be notified in the National Pānui in the usual way so that anyone seeking information or wishing to make an objection could still do so, but the applicant need not attend in person with the use of audio-visual options. In the case of wills, there would need to be adequate provision for notice or even formal service on the affected parties. As foreshadowed, the current District Managers could take on the responsibilities of succession much like the High Court Registrar in Wellington regarding probate matters.

For example, where a land owner dies leaving a will that excludes all but one of the deceased's children, custom dictates that it is appropriate for the disinherited children to receive notice so that they may consider filing claims under the Law Reform (Testamentary Promises) Act 1949 and the Family Protection Act 1955, or seek a mediated outcome. All that a successor would need to do is file an online application which could include a request for a Part 4 search by registry staff to ascertain the full extent of the deceased's Māori land interests. The Registrar, on being satisfied as to the veracity of any will, could then notify in the National Pānui receipt of the application and of the intention to issue orders for succession in favour of the beneficiaries under the will with a one-month period of the lodging of objections.

In the absence of any such concerns, the Registrar would then issue orders for succession. In this scenario, where the application has been filed online, the successors need not have spoken to any of the registry staff. The only time the Court

⁵⁷⁶ There are at least two generic Māori governance qualifications currently available including the New Zealand Certificate in Māori Governance (Level 4) and the Diploma in Māori Governance (Level 6). Te Wānanga o Aotearoa offers a Diploma in Māori Governance and leadership.

would be involved is where an objection had been lodged and the Registrar determined that the objection had merit and referred the application to the Court for its consideration. Alternatively, where the Registrar considered the objection lacked merit it would be dismissed, which would then trigger a right of appeal by the objector to the Court.⁵⁷⁷

The importance of notice cannot be underestimated. Hearings for successions are notified in both the National Pānui and the Pānui in the district where most of the deceased's interests are located. This provides whānau members with the opportunity to make submissions in writing or in person where this may be a relevant consideration. For example, in the case of estranged siblings, one may have an older will while another has the latest version, yet it is the former who is processing the succession. Without notice the incorrect will could be applied, to the disadvantage of the other siblings. Notice of succession applications also provides disinherited children with the opportunity to file family protection or related proceedings to protect their interests. Without notice they can become permanently disinherited from their ancestral entitlements. Notice also provides a means by which the children or siblings of a deceased can be drawn together with minimal cost and delay for exploring alternatives facilitated by or through the Māori Land Court, without the need for time-consuming, costly and often aggravating litigation outcomes through the general courts.

Other transactional matters including s 164 vestings by way of sale or gift could also be devolved to the Registrar. The critical element in each process is that appropriate notice is provided to persons who may be affected by the application. The minute books of the Chief Judge and of the Māori Appellate Court are littered with examples of successions and vestings by gift or sale that have gone awry where incorrect wills have been provided, where a subsequent will later emerges or where successors incorrectly claim that they are the only child of a deceased owner or where they assert, without evidence, that by way of family arrangement they should

⁵⁷⁷ For the devolution of successions, creation of legal entities by registration and related transactional matters including vestings, Registrars would need formal training and certification to ensure that they understand the relevant legal principles. The necessary information could be included in a Registrars' handbook as through rewriting some of the rules to ensure compliance, particularly in terms of notice to affected and potentially affected parties.

succeed to the estate wholly or in part. Despite the criticisms by those promoting the Bill, one of the strengths of existing processes under the Act is the transparency provided by notification and, where necessary, a hearing in open Court, which is then available for scrutiny through the minute books and their verbatim transcript of the proceedings. Contrast that with the more ‘departmentalised’ process that the Māori Land Service would likely adopt.

Expanding dispute resolution options

The proposed dispute resolution method likely would have benefits but needs to be further refined and developed. The appointment of a kaitakawaenga may reduce litigation and time spent in the Court, but the people providing this assistance must have sufficient knowledge and understanding of Māori land law. They must also have a particular expertise of the Tikanga of those involved in the dispute. Avoiding recourse to the Courts for resolution is usually desirable but it must be remembered that the level of expertise found in the Court is unlikely to be rivalled with respect to the interface of Māori land law and values with the general law.⁵⁷⁸

Enabling alternative dispute resolution and settlement by owners

There appears to be a consensus amongst Māori land owners and their advisers that, where possible, litigation should be avoided and alternatives to resolve conflicts should be made available and indeed, actively promoted.⁵⁷⁹ This thesis proposes that the Act be amended to encourage the settlement of disputes by owners through tikanga-based processes that can include facilitation, mediation and other forms of resolution; including, where appropriate, arbitration or a combination of several of these options. The aim is to provide options and an environment where the resolution of conflicts, wholly or in part, can be achieved by the parties with adjudication by the Māori Land Court used as a last resort, unless the parties, properly represented, decide to proceed straight to adjudication.

Another possibility, in terms of seeking alternatives to adjudication, would be to enable the Māori Land Court or the Māori Appellate Court, with lay members appointed, to provide non-binding advice to parties involved in mediation or alternative dispute resolution consistent, with the Court’s existing jurisdiction in

⁵⁷⁸ Ngāti Makino and Ngāti Pīkiao elder Te Ariki Morehu, quoted in Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 325.

⁵⁷⁹ Responses to surveys and interviews, Sir Hirini Mead, Clinton Hemana, Leo Watson, Cara Bennett, Spencer Webster and John Koning (2017) and (2018).

mandate and fisheries-related disputes. From time to time, during a process of alternative dispute resolution such as mediation, an issue might arise that required an independent opinion or determination. The provision of indicative but non-binding advice or findings on issue specific matters might assist in facilitating a resolution without recourse to conventional litigation.⁵⁸⁰

Mediation

There is no sensible reason why the current mediation provisions set out in the Act as they apply to fisheries and mandate disputes cannot have application across the Court's entire jurisdiction. As the discussion on ahu whenua trusts in Chapter Five confirmed, there are numerous opportunities where formal mediation, within a clear legislative mandate, might provide a sensible alternative to adjudication. In addition, Court-facilitated mediation, comparable to that used by the Environment Court, should be assessed as to its utility for the Māori Land Court. A submission by Wakatu Incorporation on the Bill advocated the adoption of that regime.⁵⁸¹ The Waitangi Tribunal also made the pointed remark that it was "bemused" by the Crown's policy in the Bill that, while the Māori Land Court was empowered to deal with mediation for fisheries and aquaculture disputes, mediation relating to land would instead be sent to a completely new and untested service.⁵⁸²

Further, the appointment of suitable experienced and qualified mediators (in the absence of another label) – akin to either hearing commissioners or Environment Court commissioners – would enable the development of a code of practice and minimum standards for alternative dispute resolution surrounding kin-based Māori assets. The Bill provided little by way of detail as to how practitioners of alternative dispute resolution would be certified and appointed, except at the discretion of the

⁵⁸⁰ See Central North Island Forest Lands Collective Settlement Act 2008 where, as foreshadowed, a 'tikanga based' resolution process that envisaged decisions being made 'rangatira ki te rangatira' was included in the legislation to avoid protracted and costly conventional litigation. However, see also *Bidois v Leef* [2015] 3 NZLR 474 as discussed by Baden Vertogen in 'Arbitration – adjudication of mana whenua dispute made subject to arbitration – Bidois' (2015) Māori LR at 6-9; and *Te Rūnanga o Ngāti Manawa v CNI Holdings Ltd* above n 494.

⁵⁸¹ Wakatu Incorporation 'Submissions to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill 2016' above n 511.

⁵⁸² Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 325. The Tribunal also noted that there was no meaningful response from Crown witnesses as to why the experience of the judges and registrars of the Māori Land Court would not be used in mediation given their obvious expertise and knowledge, having worked directly with Māori land owners for decades.

Chief Executive of the Māori Land Service. That approach leaves too much discretion in the hands of the officials rather than having a transparent process of application and appointment.⁵⁸³ It might be more appropriate, as with s 30 applications under the Act, to provide for the appointment of kaumātua and lay expert members in proceedings generally to ensure tikanga Māori was applied and where external expertise is required due to the nature of the dispute or issue for determination.

It is also important to contrast mediation with other forms of dispute resolution, including arbitration. Where appropriate, there can be no reason why this form of resolution is not made available with terms consistent with those under the general law, especially where the issue is narrow in focus and may have a more commercial or legal dimension. The advantage of Court-supervised mediation would be that the costs of the mediator are not borne by the parties, many of whom will be self-represented without the means to fund their own representation, let alone a mediator. Invariably with arbitration, the parties not only pay for their own costs, but also for the arbitrator. Moreover, the recent decisions concerning the long-running saga of the Central North Island claimant groups, especially in the Rotorua district, have demonstrated the limitations of that form of dispute resolution where the panel, by failing to give reasons for its determination, has had its decision reversed because of that omission to the point where the process must now commence afresh from the start.⁵⁸⁴ This cannot have been anything other than a very costly exercise for all the parties involved, directly and indirectly.

⁵⁸³ Arbitrators' and Mediators' Institute of New Zealand Inc 'Submissions Te Ture Whenua Maori Bill 2016' (2016) at 5: "We know of no other New Zealand legislation that imposes dispute resolution as a precursor or alternative to the court, but does not impose on dispute resolvers standards for appointment, standards for the dispute resolver and/or the necessity to be overseen by a professional dispute resolution body."

⁵⁸⁴ *Ngāti Wahiao v Ngāti Hurungaterangi and Ors* [2017] NZSC 200, 21 December 2017 where leave was refused for an appeal against *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] above n 494. See also *Rapata (Robert) Leef as representative of Ngāti Taka v Colin Bidois as representative of Pirirākau and Ors* [2017] NZSC 202 where leave again was refused to appeal against *Bidois v Leef* [2015] 3 NZLR 474 concerning an arbitration between post-settlement groups. Ironically, these processes were intended, partly at least, to avoid litigation, especially in fora like the Māori Land Court, the Waitangi Tribunal and the civil courts generally.

Streamlining existing processes

Fastrack hearing processes within statutory timeframes

Delay in both setting down and concluding hearings and issuing decisions are often cited as criticisms of the Māori Land and Māori Appellate Courts. It is proposed, in this thesis, that there be provisions for a ‘fast track’ adjudication process with statutory time frames of twenty days from receipt of an application for the proceedings to be referred to a Judge for directions and a further twenty days for the setting down of a preliminary interlocutory conference, where the parties have already attempted (unsuccessfully) to resolve their issues by alternative dispute resolution. With s 30 and related applications there are already legislative timeframes that apply and they have been effective in expediting proceedings.⁵⁸⁵ If the proposals to transfer administrative and transactional functions from Judges to Registrars proceeds, then there will be an increase in judicial capacity, it can be assumed, for the uptake of such ‘fast track’ processes where appropriate.

Improvements to appeal procedure

Another initiative could be the establishment of a permanent coram for the Māori Appellate Court, being the Chief Judge and Deputy Chief Judge and one another Judge, and to provide statutory time frames for the appointment of a coram, the convening of a first judicial conference and the setting down of a hearing within two months from the date of either the first interlocutory conference or the filing of the appeal. Changes to the relevant rules could also be made where an appellant must certify at the time of the filing of the notice of appeal that they are ready to proceed. While appeals are usually set down four times a year, this is purely a policy decision for administrative practicality. Where parties have adjourned their appeals, usually part-heard, then alternative dates are often found. Where the Appellate Court consisted of the Chief and Deputy Chief Judges then the prospects of finding another unconflicted Judge to form a coram for more regular appeal sittings would not be unreasonable or impractical.

⁵⁸⁵ Te Ture Whenua Māori Act 1993, ss 30B and 30C for example.

Increased use of Registrars for taking of evidence

From time to time proceedings can be delayed due to scheduling challenges in the Māori Land and Appellate Courts and the Waitangi Tribunal, which can often detract from the efficient disposal of proceedings. Where appropriate, Registrars should be empowered to take evidence more frequently if doing so will expedite the process. This is especially relevant where witnesses, for various reasons including illness, employment and caregiving, or transportation issues, cannot attend the registry.

Increasing the choice of forum for Māori land owners*Restoring succession jurisdiction*

The Bill proposed the restoration of the Māori Land Court's former jurisdiction in respect of claims under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 to give Māori owners a choice of forum and the ability to have such claims concerning wills determined expeditiously where it directly relates to Māori land. As foreshadowed, the Māori Land Court and its predecessor had this jurisdiction for over a century.⁵⁸⁶ There is the potential for increased efficiencies for landowners where challenges to wills could be made in a choice of fora, at the election of the affected party.

Land valuation and resource management matters

The Bill proposed that, where an issue of valuation arises over Māori land, a Judge of the Māori Land Court could preside in the Land Valuation Tribunal. Providing this option as an alternative seems sensible. Māori land owners could also be provided with the option, where resource consent appeals involve their land, of having the matter determined in the Māori land Court. At least two Judges of the Māori Land Court hold Environment Court warrants and so providing the Māori Land Court with concurrent jurisdiction with the Environment Court to hear any resource consent proceedings where the issue or dispute directly relates to Māori

⁵⁸⁶ Boast *The Native Land Court* above n 121 at 201-202; *The Native Land Court A Historical Study. Cases and Commentary 1888-1909 Vol 2* above n 121 at 14. In a personal communication, Professor Boast has confirmed that in preparing volume three of his Native Land Court series he has uncovered a plethora of important and unreported judgments on the Court's probate jurisdiction.

land would give Māori owners a choice of forum and the ability to have such proceedings determined expeditiously.

Enhancing the Court's civil jurisdiction

Efficiencies could also be gained from aligning the Māori Land Court with the District Court's civil jurisdiction so that the Land Court could enforce its own judgments including injunctions; and encouraging the increased use of interlocutory telephone conferences with registrars as well as costs awards to improve efficiency and cost-effectiveness. Delays are often experienced by the, in effect, double-handling of enforcement from one Court to the other.⁵⁸⁷ Exploring the practicality of providing concurrent jurisdiction for the Māori Land Court with the District Court civil jurisdiction generally may also provide efficiency gains.

Australasian accessibility

Another practical challenge is the reality that a significant proportion of the Māori land-owning population and their whānau reside in Australia, with many increasingly born in Australia and many also confirming that they have no intention of returning. Even so, they still have interests in Māori freehold land and from time to time are required to engage with their trustees and co-owners as well as with local authorities and the Court. This often involves the engaging of counsel or agents to attend Court on their behalf or travel back to New Zealand, often for quite mundane applications of a transactional and administrative nature. To combat this challenge, this thesis proposes an extension of the jurisdiction to permit registrars and Judges to take evidence or hold sittings outside of New Zealand and by audio-visual link, given the growing Māori population domiciled in Australia.

Coastal Marine Title Act 2011

While not strictly relevant to ahu whenua trusts (although, depending on how these applications progressed, it is not difficult to see such trusts securing rights and interests) the Court's jurisdiction could be expanded to include new responsibilities. The Coastal Marine Title Act 2011 has resulted in almost four hundred coastal marine title (CMT) applications being filed with the High Court or for direct

⁵⁸⁷ See Te Ture Whenua Māori Act 1993, ss 81 and 85.

negotiation with minimal resource allocation to progress them, it is said.⁵⁸⁸ One suggestion is that the 2011 legislation could be amended to enable parties to elect to have their application heard in either the High Court or the Māori Land Court. If the devolving of largely uncontested and transactional matters to Registrars were to proceed, then there would be capacity for Judges to deal with an expanded jurisdiction, either sitting alone or with lay members as a panel.

At the very least, consideration could be given to amending the 2011 Act to enable mediations and other forms of alternative dispute resolution to be conducted by the Māori Land or Māori Appellate Courts or for the provision of non-binding advice. The High Court already has the jurisdiction to refer any matter of tikanga Māori to the Māori Appellate Court, yet this provision is not often used. With the proliferation of CMT claims currently before the High Court, these proposals might be worth exploring.

Summary

As late as July 2015, the influential Federation of Māori Authorities acknowledged that it might prove to be a more pragmatic approach to amend rather than replace the existing legislation and that any reform also needed to deal with capacity issues for Māori land owners, especially in a governance context. They also suggested that a multi-agency approach may not be as effective as the status quo:⁵⁸⁹

FOMA represented the ‘largest collaboration of Māori landowner groups affected by the reforms’. Its position therefore carried considerable weight. FOMA advised the Crown that it did not support the Bill in its current form, and feared that the Bill would not achieve the stated aims of the reform. Instead, FOMA’s ‘emerging’ view was that amending the 1993 Act might achieve the intent of the reforms ‘more easily and cost-effectively than the wholesale changes being proposed’. If the reforms were to go ahead, they *might* achieve some of the desired ends, but only if properly resourced and implemented. Importantly, FOMA also considered that without capability building on a major scale for Māori land governors, the Māori Land Court’s protective jurisdiction was still required at present. The Māori Land Court

⁵⁸⁸ See Audrey Young ‘Ngati Whatua's Auckland claim among hundreds to test coastal rights’ *The New Zealand Herald* (online ed, 4 May 2017); Evan Harding ‘High Court action means Maori must be consulted’ *The Southland Times* (online ed, 6 June 2017).

⁵⁸⁹ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 219-220. In its 2016 submission to the Māori Affairs Select Committee, the Federation, while continuing to support the aims of the reform in principle, remained concerned as to the purpose and function of the proposed Māori Land Service, recommending that many of the functions performed by the registry including successions should remain with the Court.

might also prove more effective than a split-agency MLS at delivering the enhanced services needed by Māori landowners.

Because of its submissions, and those of other stakeholders, important parts of the Bill were changed, both at the officials and Ministerial level and by the Māori Affairs Select Committee. In any case, even if, as many critics have contended, replacement legislation were to be abandoned, it is evident that several key areas of the Act need reform to improve the ability of Māori owners to retain and develop their land. Several changes could be implemented within a short time frame following further consultation with Māori land owners and stakeholders. They include facilitating decision-making by land owners, the active promotion of management structures where none exist and refining the role of the Māori Land Court to judicial rather than many of its current administrative functions. Adding lay members for both mediation and within the Court's ordinary jurisdiction, as had been proposed many years before, needs to be explored. Communities are more likely to acknowledge and even accept more readily, processes for decision-making made by bodies where their own elders and experts are properly recognised and represented.

Other more fundamental proposals, because of their very nature, will require more in-depth research and analysis that requires further consultation with Māori land owners. The views of owners and stakeholders will be essential to inform any further refinement of such proposals. In this context, the Law Commission is best suited to undertake a proper assessment of both incremental amendments to the Act and more far-reaching proposals including the expansion of the jurisdiction of the Māori Land Court to mirror that of the District Court civil jurisdiction and the Environment Court in respect of resource consent proceedings that concern Māori land. The views of the Commission and its Māori Advisory Committee should also be sought on any detailed proposals that are eventually developed, both in terms of immediate changes and more substantive reforms.

In summary, the most important theme of reform is in the context of rangatiratanga – to provide for the increased empowerment of Māori land owners to have more direct decision-making power in the creation of management entities, the appointment of governors and in setting their terms of trust. The development and implementation of best practice models for governance training will also assist in improving the

capacity of Māori land owners to retain and develop their land. Expanding the range of legal entities available to Māori owners will improve their choices as would the further aligning of their accountability requirements, where appropriate, and the ability for Court intervention within the general law, while considering the distinctiveness of Māori land tenure and customary practices.

As foreshadowed, the streamlining of processes for succession is another key change required to empower owners and limit the need for Court involvement except in contested cases. The use of advisory officers to facilitate the promotion of succession needs to be expanded to encourage owners to succeed and therefore become engaged in Māori land decision-making. Other areas of improvement could include reducing the quorum requirements for meetings of owners and the high thresholds for partition and other forms of title improvement as this may also facilitate increased land development. Simplifying the rules for occupation orders and aligning these requirements with the Whenua Kāinga housing loan schemes will encourage the increased use of Māori land for dwellings and papakāinga.⁵⁹⁰

Despite its dubious historical past, the Court remains the only specifically Māori court for Māori people, who appear invariably without counsel, and where the use of te reo Māori, tikanga Māori, marae sittings and marae kawa in its processes are the norm. The availability of the Māori Land and the Māori Appellate Courts to Māori land owners should be maintained as a principle of access to justice. To facilitate the timely hearing the disposal of appeals the Appellate Court should be reformed to include two permanent members and to operate within statutory time frames. The appointment of kaumātua, pūkenga and other experts to sit as lay members of the Court can only enhance both its capability and its standing in the eyes of Māori owners, their whānau and hapū.

The registry should also continue to serve as the central repository of irreplaceable historical records, tribal and whānau histories, whakapapa and trust and incorporation annual reports. It has performed this role for over a century, has had its facilities upgraded and improved and with further capacity and infrastructure can

⁵⁹⁰ Housing New Zealand “Kainga Whenua Loans for individuals” <www.hnzc.co.nz>.

expand its services to Māori owners by becoming a ‘one stop shop’ for all information concerning Māori land. Improved communication and liaison with Te Tumu Paeroa and trusts and incorporations to align ownership records and contact details through the registry can only advantage Māori owners. Making provision for online and email access by owners to their Māori land information including notice will also enhance owner participation and engagement. In this way, it is already functioning effectively as a service to Māori land owners, as distinct from the Court as a dispute resolution forum, and with the changes proposed in this chapter, could in fact properly be called, the Māori Land Service.

CHAPTER TEN - CONCLUSIONS

Introduction

On Friday 22 December 2017, the Māori news service *Te Kaea* reported that the incoming Minister of Māori Development had confirmed that the Bill would not be progressed.⁵⁹¹ Parliament's website now records that the Bill was discharged from the Government's legislative programme on 20 December 2017. Considering that development, this chapter discusses a series of overall conclusions about the reforms as they might have affected key aspects of the operation of ahu whenua trusts. Included in that discussion is consideration of the following questions:

- (a) was there effective consultation?
- (b) was there a mandate for change?
- (c) would the Bill have simplified Māori land laws?
- (d) is fragmentation an impediment to development?
- (e) is a separate Māori Land Service necessary?
- (f) would the Bill have impeded hapū in the retention and development of their lands?

Te Ture Whenua Māori Bill 2016

The question is, it is submitted, is whether an entire new Bill on this scale really is required to achieve these objectives, or whether they could be achieved more readily by careful amendments to the existing Act. The compliance costs of the new legislation appear likely to be high in the sense that most owners will have very great difficulty in understanding it. A related issue is whether the array of new technical terms are supported by enough real changes in direction to make the whole exercise sufficiently worthwhile.⁵⁹²

Overview

The Bill represented the most significant rewrite of Māori land laws since the ground-breaking 1993 Act with its cornerstone principles of retention and utilisation. Advocates believed that the reform was part of the natural progression of Māori development in a post settlement environment with land owners being empowered to

⁵⁹¹ Heta Gardiner 'Ture Whenua Bill has been binned' *Te Kaea* (Māori Television, New Zealand, 22 December 2017). For Opposition comment on the Bill, see: 'Korako fights on for Ture Whenua Bill' *Radio Waatea* (online ed, 20 December 2017).

⁵⁹² Professor Richard Boast, Deborah Edmunds and others 'Submissions to the Māori Affairs Select Committee on Te Ture Whenua Maori Bill' above n 463 at 10.

make their own decisions without the need for Court approval or input.⁵⁹³ If iwi and hapū can oversee and manage major Treaty settlement resources without judicial oversight then, according to this rationale, the legislative regime governing Māori land should be reformed to enable the same outcome. If settlement tribes can create their own entities and subsidiaries without the need for Court approval then, the proponents argue, so too should the owners of Māori land have the same rights. There is some force in this argument, premised in the notion that the Bill was going to impart rangatiratanga (self-determination) for owners and create a new framework for facilitating owner-led decision making. They argued that, eventually, this would result in the increased utilisation of land for the benefit of Māori land owners.

Conversely, those critical of the Bill have argued that the rationale for the wholesale change of Māori land laws is unsupported by any independent and persuasive evidential foundation. Moreover, the principal basis argued for change relies on reports of narrow scope and limited utility. An assessment of the Review Panel reports and the work of the Ministerial Advisory Group confirmed that the case for the replacement of the Act with an entirely new statute, rules of Court and accompanying regulations, raised many important questions that at the date of writing remained unresolved. The critics contended that the original rationale for the reforms – the unlocking of up to \$8 billion in productivity gains over a decade – provided capital of between \$1-3 billion could be found – was premised on limited research devoid of empirical data and any reasonable evidence based approach for such sweeping change.⁵⁹⁴ According to Warbrick, a significant flaw with the reforms has been the absence of any rigorous analysis of the underlying assumptions set out in the 2011 and 2013 reports:⁵⁹⁵

The major problem with the literature in the Bill's explanatory note is that it contains some general ideas with some economic assumptions about Māori land that are never subject to rigorous academic testing. An example is the comment that Māori freehold land has the ability to realize \$8 billion in gross output (Ministry for Primary Industries, 2013). These general ideas and assumptions are then perpetuated in subsequent discussions and the effect is that a powerful narrative builds up to become so ingrained in general discussion about Māori land that the tenets of those

⁵⁹³ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 167.

⁵⁹⁴ At 151-152.

⁵⁹⁵ Paerau Warbrick, 'A cause for nervousness: The proposed Māori land reforms in New Zealand', *AlterNative: An International Journal of Indigenous People*, (2016), Vol.12 (No.4) 369 at 375.

ideas are rarely challenged. The point about these generalizations is that they should never be used to justify comprehensive legislative change for Māori land.

In addition, the critics argued that given the dearth of empirical data, there is no evidence that it is the Act and the Court that are causing the “underdevelopment” or “underutilisation” of Māori land.⁵⁹⁶ While there will always be one-sided anecdotal evidence from land owners or their advisers dissatisfied with decisions of Registrars and Judges, this does not translate into a convincing thesis that the current Act is the *cause* or even one of the *principal* reasons for the claimed underdevelopment of Māori land. Those critical of the Bill also argued that the challenges facing Māori land owners are more complex than the remedies proposed under the Bill. They include governance capacity and training, access to finance and issues of topography and physical access to the land. The real difficulty, it was contended, was that the Bill did not appear to engage convincingly with those challenges. Ironically, it was also argued, the Bill might have created an entirely new set of difficulties for Māori land owners.⁵⁹⁷

The Māori Affairs Select Committee submission process revealed serious concerns among many conservative Māori land entities and community groups including the Federation of Māori Authorities (who gave heavily qualified and conditional support);⁵⁹⁸ the Māori Women’s Welfare League (who took their concerns to a United Nations forum);⁵⁹⁹ and several of the largest and most successful Māori land trusts and incorporations.⁶⁰⁰ Regarding this last category, as foreshadowed, the largest Māori land owning entity by value, Tuaropaki Trust, even secured an exemption from the provisions of the Bill, so complete was its opposition.⁶⁰¹ Others

⁵⁹⁶ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 130-139.

⁵⁹⁷ See Warbrick, 'A cause for nervousness: The proposed Māori land reforms in New Zealand' above n 595 at 375-376. Leo Watson, counsel for the Wai 2478 claim also commented on the problems with the Bill including unintended consequences: I consider the Bill to be underpinned by false assumptions that the exercise of MLC discretions have impeded owner aspirations. I do not consider that to be the case. The Bill itself is cumbersome, introduces new terminology and requirements on landowners which will lead to cost, and has internal inconsistencies.

⁵⁹⁸ Federation of Māori Authorities “Submission to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill, the Māori Land Service and other areas of Te Ture Whenua Reform” 2016.

⁵⁹⁹ ‘Maori complain to UN over land reforms’ *Radio New Zealand* (online ed, New Zealand, 25 March 2016).

⁶⁰⁰ Examples include Tuaropaki Trust, Wakatu Incorporation, Wellington Tenths Trust, Palmerston North Reserves Trust and Taheke 8C Incorporation. Their submissions can be found on the Parliamentary website: www.parliament.nz.

⁶⁰¹ Te Ture Whenua Māori Bill, Schedule 1, cl 12.

including the Wellington Tenth Trust and Wakatu Incorporation, holding hundreds of millions of dollars in assets, were unequivocal in their criticism of the Bill while even those entities supporting its overarching aims expressed concerns over its detail.⁶⁰² In the Waitangi Tribunal's assessment, support was mixed at best.⁶⁰³ Against this background of dissent, the Tribunal's assessment is difficult to categorically dismiss. In any event, as Boast and Edmunds have summarised, despite its aims, it appeared in some quarters at least that the Bill failed to engage with the real impediments to land development challenges:⁶⁰⁴

One of the greatest existing challenges facing management of Māori land, from our experience of acting for Māori land bodies for over three decades, is not so much the legal regime or land holding structure, but the lack of governance capability, knowledge or sufficient access to support structures. Most landowners or governors are laypeople without professional or technical training. The Bill fails to engage with the real issues which require reform including the required investment in capacity and capability building for Māori landowners.

Understandably, supporters of the reforms were positive in their promotion of the Bill and sought to underscore the cooperative approach to the Bill's drafting, its benefits to Māori land owners in promoting self-determination and owner led decision making and its break with the past and the oversight of the Court. According to the Tribunal, the joint meeting with Ministers in June 2014 was one such example of the 'cooperative approach' in action where the previous legislation was referred to as paternalism and alienation, the current Act, retention and paternalism whereas the Bill needed to encapsulate retention and self-determination.⁶⁰⁵ This approach, evident in the media and at consultation meetings and wānanga even spilled over into some of the advice given to the Māori Affairs Select Committee by officials from Te Puni Kokiri – the Ministry of Māori

⁶⁰² See Ngāti Ranginui Iwi Society Incorporated 'Submission on Te Ture Whenua Bill' 14 July 2016; Parininihi ki Waitotara Incorporation 'Submission by Parininihi ki Waitotara Incorporation re: Te Ture Whenua Māori Bill' 14 July 2016; Te Rūnanga o Ngāti Ruanui 'Submission on Te Ture Whenua Māori Bill' 14 July 2016; Tauhara North No. 2 Trust 'Submission on Te Ture Whenua Māori Bill' 14 July 2016; and even Wakatu Incorporation 'Submissions to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill 2016' (2016) above n 509.

⁶⁰³ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 359: "As a result of this unacceptable level of uncertainty, we found that Māori will be unable to offer properly informed, broad-based support for the Bill to proceed, as Treaty principles require." See the discussion at 190, 222, 241 and 354.

⁶⁰⁴ Professor Richard Boast, Deborah Edmunds and others 'Submissions to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill' above n 463 at 5.

⁶⁰⁵ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41.

Development. For example, there is a clear preference in favour of the Bill's provisions on meetings of owners to create governance entities contrasted with the procedure under the Act.⁶⁰⁶ Officials claimed that the process for creating an ahū whenua trust under the Act was costly and time consuming and involved considerable risk.⁶⁰⁷

The proposers face the uncertainty of not knowing what the court will consider is "sufficient" notice and engagement by owners until after they have carried out those steps and proceeded to a hearing in court – whether a trust is established, what its terms are and who its trustees are is ultimately at the discretion of the court – the proposers face litigation risks of opposition, appeals and cost awards if the application is unsuccessful – the filing fee is \$60 – the proposers must meet the costs of giving notice to opposing owners – the process stretches over many months.

Anyone experienced in Māori land administration will know that, except in extreme cases, the above scenario is quite untypical. In many districts, trusts are created at the first call of the application, in the absence of procedural irregularity or meritorious objection.⁶⁰⁸ But under the Bill officials asserted, without any evidence, a quite different scenario would unfold– the procedure "will be a purely administrative process – it will carry no litigation risk and will be quick and inexpensive."⁶⁰⁹ Yet cls 186-188 of the Bill, regarding the appointment of kaitiaki and the appointment of a governance body, provide clear opportunities for legal challenges. Any decision the Court then made on such a proceeding would itself be subject to at least two levels of appeal. So, the idea that the process under the Bill "will carry no litigation risk" is not entirely accurate. Then there were the equally strident claims that the Bill amounted to a 'land grab' intended to promote alienation and land loss. The short point is that there has been a degree of latitude

⁶⁰⁶ See Appendix Three.

⁶⁰⁷ Ibid.

⁶⁰⁸ For example, an application (A20170007292) to create a trust over Waipuka 2N was filed in the Hastings registry of the Māori Land Court on 13 December 2017 and was notified in the January 2018 National Pānui then heard and processed by 1 February 2018, in less than two months, notwithstanding the usual delays caused by the end of year holiday period.

⁶⁰⁹ See Appendix Three. Contrast this with the process explained by the Judges in their submission: "The process to establish a trust under the Act is simple and involves satisfying the tests for sufficiency of notice, of opportunity for discussion and of support. Unlike the existing Māori Assembled Owners' regime or that proposed in Part 5 of the Bill, there are no quorum requirements for the establishment of Māori land trusts. This provides owners with flexibility in seeking to create trusts where, due to the numbers involved, arbitrary quorum requirements would not be able to be met."

in what both sides of the debate have asserted were the merits of the Bill and the Act that might have been minimised if the necessary empirical research had first been completed into how, if at all, the Act impedes the development and utilisation of Māori land. The continued absence of such research continues to undermine any realistic assessment as to the impediments to land development and therefore any responsive proposals for reform.

Was there effective consultation?

Much has also been made of the number of consultation meetings that have been held during the current reform process, the number of attendees and the claims that the reforms commenced in 1998 with the first series of review exercises.⁶¹⁰ As to the question of whether the consultation was effective, supporters of the Bill will answer in the affirmative while opponents will disagree. That is simply recognition of where the debate had concluded. While it is correct that many meetings were called, reports from those hui – outside of the Te Puni Kōkiri overviews – were that some owners felt disengaged with the process and were not provided with the detail of the Bill until toward the end of consultation.

It was also argued that, in any event, the evidence is inconclusive as to whether those meetings did provide the support required for such a major rewriting of the law. This is undoubtedly in part because many of the consultation meetings were held *before* the Bill was released and so owners were only being provided with the reform plans at a conceptual level devoid of any details of several of the key components including the Māori Land Service. As the Waitangi Tribunal observed:⁶¹¹

Crown counsel was critical of the claimants' view that the exposure draft 'came a little bit out of nowhere', arguing that this was not sustainable in light of the 'iterative process' that had taken place since 2013. But the April 2015 discussion paper and pre-consultation process had been restricted to the leaders of five key

⁶¹⁰ See Te Ture Whenua Māori Bill 2016, Explanatory note. See Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at Chapter 3, 99-112.

⁶¹¹ At 205, footnotes omitted. The Tribunal went on to comment that the extremely short timeframe was counterproductive: "We are baffled as to why so little time was given. Mr Grant suggested that the hui 'were held early in the consultation process in order to give people a better appreciation of the reforms and the bill and better to inform those who wish to make a [written] submission in advance of completing those submissions'. This statement does not really explain the *timeframe*, which gave attendants at the first six hui less than a week to consider around 400 pages of highly technical information. The remainder of hui participants only had up to an extra fortnight or so, with written submissions due just nine working days after the final hui."

stakeholder groups and had been confidential. Māori in general had received *no information* since the high-level powerpoint slides at the hui back in August 2014. And suddenly they were confronted at the end of May 2015 with a 282-page Bill, a 65-page discussion document, and a 42-page information pack. They had very little time to read and assimilate this material, take professional advice, hui among themselves, and prepare for the consultation hui – some had less than a week.

Once the exposure draft was finally presented, the social and mainstream media reports from the meetings confirmed an unsurprising lack of understanding of the detail of a 495 clause Bill and its twelve schedules. There were also concerns expressed that the timeframes for providing considered responses to such a complex draft were insufficient.⁶¹² There were even claims of misinformation being presented at some of the consultation meetings, as Cara Bennett, an experienced Māori land law practitioner from Hastings, observed:⁶¹³

The facilitator/presenter actively promoted the Bill as the cure all to things that ail Māori land owners. The meeting was formally told by the facilitator presenter that legislatively there is currently no ability to obtain access to landlocked Māori land. Even when section 326B/93 was pointed out, the facilitator still continued to deny that there was a mechanism to access landlocked Māori land.

...

At both hui, I was informed that this was difficult if not impossible and that there was currently no way for Māori land to be utilised without management structures. My personal experience is completely contrary to this.

In summary, there are arguments either way as to the effectiveness or otherwise of the consultation that was undertaken. While there was serious criticism of the processes intended to provide information, and encourage feedback from landowners, the release of exposure drafts, the consultation meetings and the Select Committee process all point to the reality that there was a desire to engage on both the reforms at a conceptual level as well as on the substance and detail of the Bill itself. It is also arguable that additional time for the provision of responses may have improved both the quality of consultation and the level of engagement with the Bill that could have led to greater compromises over those parts of the Bill that appeared to cause the most angst amongst land owners. In other words, even a slightly longer conversation spanning perhaps another twelve to twenty-four months might have

⁶¹² At 360.

⁶¹³ Cara Bennett, written response to questionnaire, 22 December 2017.

produced a more fruitful outcome and lessened some of the more strident opposition to the Bill. Given the breadth of the opposition that remained, leading up to the Third Reading of the Bill prior to the September 2017 election, it is suggested that the consultation was not as effective as it could have been had the Bill been discussed more fully, including after the last set of major changes, as the minority report of the Māori Affairs Select Committee highlighted.

Was there a mandate for change?

Once again, there are compelling arguments on both sides of the discussion. The evidence suggests that, while there was support for the Bill, it appeared to be without majority endorsement of Māori land owners and contrary to the express opposition of significant Māori land owning entities and organisations who filed submissions with the Māori Affairs Select Committee and presented them in person.⁶¹⁴ Consistent with the findings of the Waitangi Tribunal, it appeared that the reforms were proceeding without the broad-based support necessary for such a sea change in the legislative regime governing Māori land.⁶¹⁵ In addition, this imposition of a new regime without the consent of landowners, their whānau and hapū, was not in accord with their preferences and was therefore contrary to the principles of the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples.

Conversely, the Iwi Leaders Group and Iwi Chairs Forum, amongst others, have largely endorsed the reform programme and their constituency is not insignificant. Major tribal groupings and land management entities also supported the reforms, while making suggestions of their own, including Ngāti Porou of the East Coast, Ngāti Ranginui in Tauranga, the Parininihi ki Waitotara Incorporation in Taranaki, Ngāti Ruanui in South Taranaki, the Tauhara No.2 Trust in Reporoa and several of the Waikato iwi.⁶¹⁶ That said, those critical of the process have argued that iwi

⁶¹⁴ Eruera Rerekura “Select committee hears strong opposition to Ture Whenua bill’ Te Karere (Television New Zealand, 13 September 2016).

⁶¹⁵ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 237-240; and Chapter 5.

⁶¹⁶ Te Rūnanganui o Ngāti Porou ‘Submission to the Maori Affairs Select Committee on the Te Ture Whenua Maori Bill’ above n 542; Ngāti Ranginui Iwi Society Incorporated ‘Submission on Te Ture Whenua Bill’ above n 602; Parininihi ki Waitotara Incorporation ‘Submission by Parininihi ki Waitotara Incorporation re: Te Ture Whenua Māori Bill’ above n 545; Te Rūnanga o Ngāti Ruanui ‘Submission on Te Ture Whenua Māori Bill’ 14 July 2016; Tauhara North No. 2 Trust ‘Submission on Te Ture Whenua Māori Bill’ 14 July 2016; and Ngāti Koroki Kahukura Trust, Taumata Wiiwii Trust, Pōhara Pā, Maungatautari Marae, Pōhara Station Trust, Heketanga

authorities, despite their assertions to the contrary, do not speak for Māori land owners. Yet, as foreshadowed, even those groups who supported the reform objectives in principle, invariably qualified their endorsement. For example, the Wairarapa Moana incorporation underscored that its support was conditional on a range of critical issues being addressed if the Bill were to succeed, echoing many of the themes evident since the passing of the Act in 1993:⁶¹⁷

- (a) significant upskilling and development will be required at both governance and management / technical levels;
- (b) significant resourcing from the Crown will be required to assist in building this capability;
- (c) that these reforms must not impose additional costs and administrative burdens on Māori land owners;
- (d) the proposed Māori Land Service (MLS) must be adequately resourced by the Crown; and
- (e) that the services and resources delivered by the MLS should be focussed specifically on the development of MFL. [Māori freehold land].

This heavily qualified endorsement was also the position adopted by the largest Māori land entity association, the Federation of Māori Authorities in their submission to the Māori Affairs Select Committee.⁶¹⁸ Their conditions for support would have rendered key elements of the Bill in its present form largely impotent. In any event, while it is inaccurate to suggest that the reforms had no support, even on a cursory review of the summary of the submissions on the Bill to the Māori Affairs Select Committee, despite the media campaign mounted to persuade land owners and their communities as to the merits of the reform, the evidence confirmed that

Whānau Trust (the Trusts) ‘Submission to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill’ July 2016. That said, some of the submissions appear to simply repeat the information provided by the promoters of the Bill without engaging in the detail. For example, one submission supports the earlier version of the second chance decision making process without properly considering, it would appear, how the quorum requirements can be ignored by simply holding a second meeting in 20 days where no quorum is necessary. It was also noticeable that several submissions bore a close relationship with each other.

⁶¹⁷ Wairarapa Moana Incorporation Committee of Management ‘Submission on Te Ture Whenua Māori Bill, the Māori Land Service and other areas of Te Ture Whenua Reform’ July 2016 at 3.

⁶¹⁸ Federation of Māori Authorities “Submission to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill, the Māori Land Service and other areas of Te Ture Whenua Reform” above n 598.

significant opposition remained unresolved by the time of the September 2017 New Zealand general election.

Added to this background was the defeat of the Māori Party not only from Government but from Parliament on 23 September 2017 when newcomer Tamati Coffey, contrary to most poll predications, unseated long time Waiāriki electorate MP, Māori Party co-leader and Minister of Māori Development, Te Ururoa Flavell.⁶¹⁹ It will be remembered that since 2014, the Bill has been a flagship policy of the Māori Party that it promoted between 2014 and 2017. From that time forward, and especially during the election campaign, the Māori Party frequently underscored the importance of the proposed Māori land reforms to their overall development and policy platform.⁶²⁰ Some of its candidates argued publicly that the Bill was superior to the Act, without providing any explanation for that position.⁶²¹ The party's links with groups that included the Iwi Chairs Forum that endorsed the Bill was also highlighted during the campaign.⁶²² Some commentators have even drawn a link between the demise of the Māori Party in 2017 and, amongst other things, its association with the Bill.⁶²³

The Waitangi Tribunal, in its assessment of the support of the reform proposals, relying largely on evidence provided by Te Puni Kōkiri, noted that, at the time of

⁶¹⁹ <www.electionresults.govt.nz/electionresults_2017/electorate-details-71.html>. Coffey secured a majority of 1,719 votes. See Claire Trevett 'Māori party leader Te Ururoa Flavell leaving politics' *New Zealand Herald* (online ed, Auckland, 24 September 2017).

⁶²⁰ Te Ururoa Flavell 'Bill to expand Māori landowner rights' *The New Zealand Herald* (online ed, Auckland, 8 May 2017); Patrick Smellie 'Flagship Māori Party land reform bill left to voters' mercy' *National Business Review* (online ed, 7 July 2017); Matthew Martin 'Waiariki Candidates debate issues on TV' *The New Zealand Herald* (online ed, Auckland, 16 July 2017); 'Labour guilty of flip flop on Ture Whenua Māori Bill': <www.maoriparty.org>.

⁶²¹ In a Radio New Zealand debate hosted by Wena Harawira, Māori Party Te Tai Hauauru candidate Howie Tamati remarked "Anything is better than what they've got now." <www.radionz.co.nz/national/programmes/teahikaa/audio/201855257/te-tai-hauauru-the-te-wero-debate>.

⁶²² Bryce Edwards: "Criticism that the Māori Party was, primarily, the political voice of the Iwi Leader's forum has been around for many years. Way back in 2010 Annette Sykes gave the Bruce Jesson Memorial Lecture on The Politics of the Brown Table, in which she comprehensively examined the strategy that both iwi leaders and the Maori Party had adopted" in 'Why the Māori Party failed' *The New Zealand Herald* (online ed, Auckland, 27 September 2017).

⁶²³ Bryce Edwards 'The emotional Māori Party demise' *National Business Review* (online ed, 27 September 2017); 'Why the Māori Party failed' *The New Zealand Herald* (online ed, Auckland, 27 September 2017).

writing its report, real opposition to the core aspects of the reforms – participating owners, alienation of land, and compulsory rangatōpu – remained unresolved:⁶²⁴

Thus far, on TPK’s analysis, there had been significant opposition to the central concept of the participating owners model, general concern or disagreement with arrangements for disposition, polarised views on decision-making thresholds, general opposition to compulsory measures (managing kaiwhakarite and ‘forced’ whānau trusts), and significant concern about losing Māori Land Court protections in respect of both dispositions and successions.

Submitters were also generally opposed to key features of the new governance model. The idea of best practice governance structures and a model governance agreement would, it was felt, help more whānau to engage with their lands. So would simplifying the process for establishing a governance body. But the proposal for a ‘one size fits all’ rangatōpū was viewed as ‘too assimilatory in nature’. It failed to distinguish between the different requirements of large and small blocks, and did not allow for the fact that there were well-functioning trusts and incorporations already operating successfully under the current Act. In particular, the element of compulsion was resisted as ‘unfair’ and in breach of the ‘mana whenua and tino rangatiratanga of those entities’. At the least, many submitters wanted the Crown to cover the costs of enforced transition to the new governance model. It was also ‘widely considered’ that changing the structure of governance bodies would do nothing to actually achieve good governance. The true solution was seen as ‘[e]xtensive training schemes’ for Māori land governors.

At the centre of this opposition was the contention that there was no evidence of any overwhelming call by Māori land owners for the *replacement* of the Act. On the contrary, many owners and their representatives expressed dismay at the current approach and the parallel loss of institutional knowledge from the Court.⁶²⁵ Added to this was the fact that none of the previous reviews of the Act had advocated entirely new replacement legislation. Without exception, those reviews had articulated arguments for the *amendment* of the existing law, not its replacement. At best, the *Owners’ Aspirations Report* argued for consideration of the ability of larger and sophisticated entities to be able to opt out of the Act, once they had reached a certain level of compliance and accountability.⁶²⁶ In fairness, once again, it is not as though the Bill is devoid of support since it does have endorsement from particular owners and interest groups.⁶²⁷ Even so, it is clearly arguable that the evidence

⁶²⁴ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 215, footnotes omitted.

⁶²⁵ Shannon Haunui-Thompson “Concern at proposed job losses at Māori Land Court” *Radio New Zealand* above n 266.

⁶²⁶ Dewes, Martin and Walzl, *Owners’ Aspirations Regarding the Utilisation of Māori Land* above n 14 at 64.

⁶²⁷ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 222 - 238.

suggests that the mandate for such sweeping change was not without serious challenge and arguably fell short of the resounding support for what became the current Act, secured as it was during a lengthy process of debate that spanned over a decade.

Did the Bill simplify Māori land law?

The stated aims of the Bill included the empowerment of land owner decision making and a corresponding decrease in the involvement of the Court, increased protections against alienation of land, the provision of comprehensive support services, the restatement of the law concerning Māori land and the simplification of that regime as it affects Māori land owners and their governance bodies including ahu whenua and whenua tōpu trusts.⁶²⁸ That said, the Bill was so large (458 pages incorporating 495 clauses and twelve schedules) that it required separation during the Committee of the Whole House stage into three individual Bills. As foreshadowed, one of the criticisms made by submitters has been the length and complexity of the Bill and its sometimes confusing drafting. With respect to the officials involved, it is arguably counter intuitive that a reform intended to “simplify” the existing law should be over one hundred clauses longer than the Act it was intended to replace. To compound matters, a whole new set of unknown Māori Land Court rules and regulations would also have needed to have been drafted to complement the operations of the new legislation.

Critics of the Bill have argued that it does not simplify Māori land law and that it would have required a major investment in community education and upskilling for Māori land owners simply to understand how it would function in practice.⁶²⁹ These realities provide a sobering counterpoint to the claims that the Bill was going to simplify the law and ensure its accessibility to owners to make their own decisions. That the Bill required over sixteen drafts before an exposure version was released, followed by further significant changes at Select Committee stage and then numerous additional modifications through four supplementary order papers during the third reading and the Committee of the Whole House stage of the process,

⁶²⁸ Te Ture Whenua Māori Bill, Explanatory note.

⁶²⁹ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 347-350.

underscores the arguably disjointed approach to the drafting of the Bill. More importantly, the complexity of the Bill, it was argued, might have undermined the very aim of simplicity that it was intended to achieve.⁶³⁰

4.1 The Bill is extremely long and complex, and will generate three separate statutes. While large trusts and incorporations will be in a financial position to obtain legal advice on the effects of the new legislation (and the Bill), most owners and landowning entities, often with difficulties in understanding and complying with the existing law, will not be able to do so. Owners and landowning bodies are going to require a great deal of assistance understanding the new legislation, and making the necessary changes. Even lawyers who specialise in the field of Māori land law find the Bill something of a challenge to understand.

4.2 We have concerns whether this extremely complex code can be readily understood by owners and kaitiaki of Māori land on a day to day basis.

As an alternative, a review of the Act by the Law Commission over several years was a pathway that could have been traversed but this possibility did not find favour. The Bill was therefore a complicated replacement for a well understood regime supported by decades of settled case law founded on principles that date back even earlier. The Bill would have created entirely new terms and concepts that would have rendered parts of the existing caselaw irrelevant or at least unclear. It is difficult to see how the consequent uncertainty would have supported the core objectives of the Bill.

Against this background, therefore, it is inaccurate to assert that the Bill simplified Māori land law. It is more complex than the existing law, as many leading practitioners, land owners and governors have underscored in their submissions.⁶³¹ The evidence demonstrated that the Bill, because it was more complicated, would have been more challenging for Māori land owners to engage with than the current law. Owners have said so themselves in their submissions to the Māori Affairs Select Committee and in hundreds of posts on websites and in social media.⁶³² It is therefore the conclusion of this research that the evidence supports the argument that the Bill would not have simplified Māori land law and indeed, was likely to have achieved the opposite had it been passed into law.

⁶³⁰ Professor Richard Boast, Deborah Edmunds and others ‘Submissions to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill’ above n 463 at 4.

⁶³¹ See also Maori Land Court Judges ‘Submission to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill 2016’ above n 472; Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 290-294, 300.

⁶³² Te Puni Kokiri, Te Ture Whenua Māori Bill - Detailed Submission Analysis for the Māori Affairs Select Committee 10 October 2016; www.facebook.com/groups/maoriland.

Is fragmentation an impediment to development?

Another feature was the growth in recent years of a ‘more popular’ form of management by section 438 trusts. Increasingly, single trusts were covering numerous blocks, and there had also been moves to form more tribal trusts. The commission felt that the successful establishment of these entities showed that, ‘contrary to a view widely held in the early 1960s’, multiple ownership was not necessarily a bar to the economic use of land. In fact ‘fragmented incorporation and trust ownership [could] contribute to the gross national product just as efficiently as land that is individually owned’.⁶³³

One of the myths of the Māori land law reform discourse is that fragmentation is an impediment to development. For those owners, trustees, advisers and stakeholders involved in the management of Māori land utilisation, the evidence confirms that this is incorrect. If an idea exists to develop Māori land and there is no current governance structure in place, it is simply a matter of a hui being arranged to agree that either an agent be appointed or that an ahu whenua trust be established for that purpose. Unlike the Bill, the provisions of the Act are more flexible when it comes to decision making thresholds of meetings of assembled owners.

While it is accurate that the quorum requirements of the Māori Assembled Owners Regulations 1995 have outlived their usefulness, as discussed by the Māori Appellate Court in its decision *Wall v The Maori Land Court*, on a regular basis that impediment is readily overcome by the device of the agent or the ahu whenua trust.⁶³⁴ This is because s 215 and Part 9 of the Act are couched in such terms as to enable greater flexibility when appointing agents or establishing trusts than would otherwise be possible under the Bill. For example, under s 215, the Court need only be satisfied that the proposal meets the sufficiency of notice, opportunity for discussion and support tests *and* that there is no “meritorious objection”.

While it is correct to acknowledge that under the present legislation the discretion on whether to establish an ahu whenua trust or to appoint an agent, rests with the Court, the decision of the owners is what determines, except in the rarest of cases, the eventual outcome. In the researcher’s experience, being fifteen years as a Judge, and

⁶³³ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 56.

⁶³⁴ *Wall v The Maori Land Court - Tauhara Middle 15 Trust and Tauhara Middle 4A2A Trust* above n 479.

before then, fifteen years as a student and practitioner specialising in Māori land law, very few applications for the appointment of agents or the establishment of trusts have ever been declined, except on the rare occasions where the owners have changed their minds, have withdrawn the application or where the proposed agents or trustees are, by their previous conduct, un-appointable. The advantage of the establishment of a trust or appointment of an agent is that it does not require minimum thresholds of engagement, unlike the Bill, which includes rigid quorum requirements, much like the near obsolete Māori Assembled Owners Regulations 1995.

If only a minute fraction of the ownership participates in considering a development proposal, in the absence of objections, an ahu whenua trust can be established or an agent appointed because there is the presence of independent Court oversight of the process. Trustees or agents could then be appointed and, unlike the participating owners' proposal, trustees and agents would owe duties to the owners as a whole and be subject to the enforcement of such duties. Owners need not secure majority support for either outcome thus diminishing the effect of fragmentation as an impediment to development. As foreshadowed, the trade-off is Court oversight as to process. Where a meritorious objection is received, the Court can order a further meeting or issue directions or both.⁶³⁵

Curiously, after considerable lobbying, the second chance meeting provisions in the Bill were eventually changed to restore Court oversight, which raises the question as to why this original approach was pursued so vigorously. Setting a quorum for decision making that could simply be ignored at a second meeting within twenty days was never going to protect the interests of land owners. On the contrary, it would have incentivised unscrupulous conduct as the promoters of a conflict laden proposal could simply wait for the second meeting to approve their plans in the absence of the majority of owners and Court oversight. In short, under the Act, mechanisms exist to ensure that fragmentation and disengaged owners need not

⁶³⁵ Under s 67 of Te Ture Whenua Māori Act 1993 the Court can issue directions at any time, with or without an application and at the request of a party or intended party. It is a provision that is used almost daily to provide owners, their whānau and hapū with access to the Court at little if any cost, for the purposes of seeking directions.

impede utilisation and development proposals. Therefore, this research concludes that fragmentation is not an impediment to the development of Māori land.

Is a standalone Māori Land Service necessary?

It was noted, however, that the Court has the capacity, structure and legislative framework to undertake the roles envisaged for the Māori Land Service. Some submitters felt the Court should retain its current role as the judicial forum for Māori land issues. Issues associated with the Court could be addressed with better resourcing, along with improved management and performance monitoring. Although it was acknowledged some minor changes to the current legislation were needed, these measures would be a sufficient and cost efficient alternative to establishing the Māori Land Service.⁶³⁶

Central to the reforms was the proposed Māori Land Service, intended to replace many of the functions currently undertaken by Court staff, particularly in the important areas of title registry, the maintenance of the register of trusts and incorporations and advisory services.⁶³⁷ In other words, all the core functions of the Court except for dispute resolution and mediation case management were to be taken over by the Māori Land Service. As foreshadowed, when the Review Panel issued its first report the suggestion remained that the existing Registry would remain the central register for Māori land interests. However, within a relatively short time, that intention was replaced by a proposal to create an entirely new entity, to be called the Māori Land Service. The original proposal was that the Māori Land Service would exist over several government agencies including Land Information New Zealand, Te Puni Kōkiri and the Ministry of Business Innovation and Employment in the context of providing oversight of mediation services. So, rather than having a single one-stop shop to provide such services, it was initially envisaged that the core functions would be shared across a range of providers. At the outset, much of the service was intended to be provided on line until feedback suggested that such an approach would be incongruent with the experiences, practices and expectations of Māori land owners.

During this period, representations were made by the Iwi Chairs Forum and the New Zealand Māori Council. Submissions made to both the Minister for Māori

⁶³⁶ Te Puni Kōkiri 'Te Ture Whenua Māori Reform - Summary of Submissions' September 2015, Wellington.

⁶³⁷ Te Ururoa Flavell 'Te Ture Whenua Māori Bill – next steps': www.scoop.co.nz 15 April 2016.

Development and his advisory group from the ICF leadership included detailed proposals for the Bill and the Māori Land Service. According to this group, the Māori Land Service should be a non-governmental but government funded entity overseen by a board of Māori governors selected from tribal regions for their expertise. This idea also found favour with several submitters on the Bill including the Federation of Māori Authorities and the Wairarapa Moana Incorporation.⁶³⁸ The proposal also included plans to regionalise the Māori Land Service while retaining a common resource based including IT and related infrastructure. Interestingly, this submission included the proposal that the title registry function of the Māori Land Service should be “subcontracted” back to the Crown. Even the ICF acknowledged that any proposed Māori Land Service would require a Crown guarantee, in effect, for the critical responsibility of maintaining the integrity of the Māori land title system.

One of the criticisms of the Bill from Māori land owners, their whānau and hapū, as well as key court users, was its lack of detail on the Māori Land Service. Even the Ministerial Advisory Group expressed concerns to officials over the lack of progress with the development of the Service.⁶³⁹ In an open letter to the relevant Ministers, a group of Māori legal academics and practitioners underscored their continuing concern with the approach of passing a Bill before the relevant and necessary policy work and budget approvals, including the Māori Land Service, had been finalised.⁶⁴⁰ It is fair to say that, according to media reports, the Ministers were far from impressed with these submissions.

In any event, it is suggested that much of what was intended to be achieved with the Māori Land Service is still a real possibility with a restructuring of the current registry of the Court, as set out in Chapter Nine. That would include a realignment of administrative and judicial roles and a clear separation between the two so that the

⁶³⁸ Federation of Māori Authorities “Submission to the Māori Affairs Select Committee on the Te Ture Whenua Māori Bill, the Māori Land Service and other areas of the Te Ture Whenua Reform” above n 598; Wairarapa Moana Incorporation Committee of Management ‘Submission on Te Ture Whenua Māori Bill, the Māori Land Service and other areas of Te Ture Whenua Reform’ above n 617.

⁶³⁹ Personal communication with Spencer Webster, member of the Ministerial Advisory Group, July 2016.

⁶⁴⁰ “Māori land law should not be rushed, say lawyers, academics” *Radio New Zealand* (online ed, New Zealand, 1 April 2017).

necessity for formal hearings for transactional matters would be eliminated creating increased efficiencies and cost effectiveness. The upgrading of existing IT infrastructure and the creation of a centralised Māori land information portal across agencies, including the Māori Trustees and Te Puni Kōkiri, would facilitate access to better quality information and improved land development outcomes. The expense of such change can be contrasted with the costs proposed for the Māori Land Service.⁶⁴¹ Advisory services would also need to be overhauled to ensure Māori land owners received all the necessary management information relevant to their land, thus promoting the potential increase in the range of development options.

It should also be emphasised that current registry staff have, over decades, accumulated unique and detailed expertise and knowledge of their local tribal communities and so ready access to this network of information can only but enhance the efforts of Māori land owners to reconnect with and develop their lands assisted by a restructured registry. In summary, from a whole of government expenditure and best practice perspective, as well as for the reasons mentioned above, it is suggested that an entirely new and separate standalone Māori Land Service may have proved counterproductive to the overall aim of improving Māori land utilisation and development for owners.

Would the Bill have impeded hapū in the development of their land?

In a word, yes. Comparing the Bill in its entirety with the existing Act, the potential benefits to governance entities and, in particular, trustees of such entities are clearly outweighed by the risk of impediment to owners and their hapū in the retention and development of their land. Four key points are relevant in the context of ahu whenua trusts.

⁶⁴¹ The actual costs of the proposed service were commented on in a Lawtalk article in May 2016: "New Māori land service to be created with \$17.8 million www.lawsociety.org.nz/news-and-communications/latest-news/news/new-maori-land-service-to-be-created. "\$14.2 million will go into supporting the establishment of the new Māori Land Service, which is a key element of the current reform of Te Ture Whenua Māori Act 1993. Announcing the Budget 2016 initiative, Māori Development Minister Te Ururoa Flavell says \$8 million of operating funding over two years, plus \$6.2 million of capital, will be used to engage with Māori landowners and others in the design and establishment of the new Māori Land Service." The Treasury referred to a budget allocation of \$6 million in the 2016-2107 year while the 2017-2018 estimates referred to \$8.7 million revised downward to \$1.7 million: www.treasury.govt.nz/budget/2017/estimates.

First, at the risk of belabouring the point, the Bill was overly and unnecessarily complicated. Creating a governance entity and registering a governance agreement requires land owners to navigate through the provisions of nine Parts of the Bill and three Schedules, whereas under the current law, trust provisions are contained within one Part of the Act. It is without doubt that the complexity of the Bill would have required governance entities and owners to seek out professional services to explain such a complicated framework. Inevitably, this would mean increased costs. Many simply would not be able to afford such assistance and the Māori Land Service would not, it is assumed, have been able to provide independent legal advice to owners, particularly where there were competing applications.

Second, the Bill introduced a whole new set of terms, not all of which are precisely defined. For example, trustees would become “kaitiaki”, trust orders “governance agreements” and a Court vesting order a “governance certificate”. In addition, Māori reservations would become “whenua tāpui” and agents would become “kaiwhakahaere”. Then there was the new “rangatōpu” entity, intended to be made compulsory until a backlash from the very trusts and incorporations who would have been forced into this new framework successfully lobbied to have the rangatōpu model optional only. The new terms would have created confusion and uncertainty until authoritative decisions as to their meaning had been made. The benefits of adopting over forty new terms have never been clear.

Third, the increased compliance requirements in the Bill created significant risk and uncertainty for trustees, owners and third parties including lessees and lessors, lenders and partners. This is evident in five key areas: creating a governance entity, voting provisions for entities, terms of office for trustees, the duties of trustees and terminating an entity.

- (a) The Bill proposed that trusts be required to adhere to a wholly new and untested compliance regime that required governance bodies to produce governance agreements, land management plans, allocation schemes, distribution schemes, and interest registers, all at increased cost to the

owners. Currently governance bodies are not required to produce such documents.⁶⁴²

- (b) In addition, the voting by shares regime that the Bill introduced also cuts across the rights of owners to decide for themselves what mode of voting suits their circumstances best. Under the Act, the Court retains a discretion to find a compromise solution that can include taking into account both voting regimes – by shares and by votes equally weighted. From a more fundamental perspective, as Judge Savage articulates in his *Mangakino* decision, the very notion of voting in Polynesian culture has limited application because it is not based on custom or tradition but rather is part of the imposed individualisation land tenure framework.⁶⁴³ Voting by shares risks the wholesale removal of successful governors by individual owners disconnected from their tribes but who by accident of fate, may have fractionally more shares in the land than those who have maintained the hapū and their marae for generations.
- (c) Added to that is the compulsory rotation regime for trustee elections, which is counterintuitive for those seeking autonomy. While it is said that the default option of triennial elections could be altered through changing the relevant governance agreement; for many trusts, including some of the largest, compulsion of this kind at a first principles level is the antithesis of the self-determination and autonomy that was supposedly a cornerstone of the reforms. The risk of instability is very real for some trusts which would find themselves descending, like some incorporation elections, into tawdry popularity contests linked to short-term financial gain for individual shareholders rather than medium- and long-term visions about securing the future of the owners and their descendants.
- (d) Regarding the duties of trustees or rather kaitiaki, cl 203 of the Bill sets out their core duties including to act honestly and in good faith; to act for a

⁶⁴² Māori Land Court Judges “Submission of the Judges of the Māori Land Court to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill 2016” above n 472 at 30.

⁶⁴³ *Hemi – Proprietors of Mangakino Township Incorporated* above n 295 at 32.

proper purpose; to ensure that the governance body acts in accordance with its governance agreement and Parts 1-9, and to exercise the same degree of care and diligence that a reasonable person “with the same responsibilities” would exercise. Yet as the Tribunal pointed out, these duties are “far less” than those for prudent trustees.⁶⁴⁴ Where owners are required to hold kaitiaki to account, the Bill creates a complicated process for doing so and with arguably diminished duties compared to those under the Act.⁶⁴⁵ It is difficult to see how that outcome advances the objective of improved and increased land utilisation and development.

- (e) In the context of cancelling a governance agreement, the Bill would have enabled owners holding five percent of the shares in the land to commence the process. Using the examples of the highly contested proceedings involving the Lake Horowhenua Trust and the Te Rūnanga o Ngāti Maru (Taranaki) Whenua Tōpu Trust discussed in Chapter Five, it would not be impossible to imagine the trustees and owners of those lands to become drawn into continuing acrimonious litigation, effectively paralysing the operations of the trust while the trustees are diverted into a potentially endless stream of cancellation proceedings. For the trusts involved, the costs, both in terms of attempting to defend against such applications for cancellation, and in having to notify owners of the proceedings, would not be insignificant. Contrast that with the ability of the Court to, effectively, strike out a proceeding at an early stage of the process for being vexatious, frivolous or an abuse of process. Arguably, there is some advantage in having a judicially supervised termination of trust process that can both provide an opportunity for genuine grievances to be aired or can expedite disposal of an inappropriate proceeding before costs have begun to rise and

⁶⁴⁴ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 320. The Tribunal went on to say that while it had a limited role in commenting on safeguards, except where they could contravene Treaty duties, “it is our role to identify at this stage that the new Bill does not have the same safeguards in respect of kaitiaki or trustees as the existing Act. To that extent, then, the present Act’s protection of owners will be reduced somewhat by the new Bill’s provisions. Having said that, though, the court can – in the complex manner described above, and in limited circumstances – disqualify a kaitiaki if he or she has acted in a ‘reckless or incompetent manner in the performance’ of their duties.”

⁶⁴⁵ At 310-314.

the trustees have become distracted from their core duties. Alternatively, the parties to an application for termination under the Act can seek directions per s 67 which then activates the independent forum that is the Court for the issues to be explored to assess whether there is any substance to the reasons an owner is seeking termination. Under the Bill, once the process is activated, it must continue to a conclusion, which, if the outcome does not favour cancellation, can be restarted.

In all the areas outlined above, the compliance requirements would impede hapū developing their land by increasing the costs to such entities and owners seeking professional services to navigate the Bill, ensure their compliance and to defend ongoing litigation costs for entities mired in dispute. In this researcher's view, the costs involved, the potential risks and uncertainties, and the inevitable delays, may not have been properly considered by the authors of the Bill and the benefit to trusts for such compliance were never articulated with any precision, certainty or persuasiveness during the reform process. For many smaller trusts, the costs would have been prohibitive. It would have also raised the risk of trusts becoming drawn into ongoing legal challenges over elections, which at present, are held only where a vacancy arises. In a broader context, considered cumulatively, the changes set out in the Bill, as discussed in this Chapter and Chapter Eight, risk setting back Hapū revitalisation and reconstruction by generations.

Fourth, access to the Court in the case of conflict or dispute would have been reduced by the imposition of new thresholds that, for some trusts, would render such provisions nugatory. In some instances, the thresholds would be impossible to achieve. For example, with a block of ten owners or less, all the owners would need to apply. But where one of the owners is also the trustee whom the owners say should be investigated, there can never be compliance with the threshold given the unlikely event of a recalcitrant trustee refusing to acquiesce to review by the Court. Another example is where nine owners agree but the tenth is long deceased last century and potential successors cannot be found. At the opposite end of the spectrum, where the land has more than fourteen owners, fifteen owners holding five percent of the shares in the land are required to activate the jurisdiction. For many trusts and land blocks this too will be impossible to achieve, thus rendering the

remedy illusory. Again, the application and enforcement of rigid statutory thresholds under the Bill leaves little practical room for exceptions, which would be counterproductive to one of the central aims of the reform – owner empowerment.

For the Kiwinui Trust, as an example, it may have proved difficult for the owners seeking an inquiry into the alleged misappropriation of funds, given the five percent threshold and the ability of those trustees then under a cloud to maintain the endorsement of their supporters (invariably through misinformation). Seeking an injunction from the Court would have proved futile since the funds had already been dissipated.⁶⁴⁶ So, while owners may seek directions from the Court, if the issue concerned an investigation into kaitiaki appointments or decisions of owners, the threshold requirements would still have to be met. The Court could conceivably become aware of a serious issue but be prevented from inquiry because the arbitrary thresholds could not be met – surely an unintended potential outcome.

Where owners might succeed in obtaining access to the Court by reaching the thresholds required under the Bill, the range of remedies available would not have been the same as under the Act, or are at least unclear. For example, s 238 of the Act enables the Court, at any time, to enforce the obligations of trust by injunction or otherwise. The Bill contains no such equivalent provision. At the time of the completion of its report, The Tribunal found that the removal of the Court's equitable jurisdiction without any rationale would not serve the interests of Māori land owners.⁶⁴⁷ The extent to which cl 375 of the Bill alleviates this uncertainty would be a matter for future judicial determination. It also raises concerns over the rationale for excluding a provision like s 237 of the Act in the first place.

In summary, the Bill, it is argued, would have promoted the potential for considerable upheaval and risk within the Hapū community for the reasons set out above. As the trustees of the Hapū land trusts said in their submission, why try and fix something that it not broken, for the many entities that function effectively under the Act? If the objective was to facilitate improved outcomes for Māori land owners and increased use and productivity of their lands, why was it deemed necessary to

⁶⁴⁶ Te Ture Whenua Māori Bill 2016, cl 216(6) and 407.

⁶⁴⁷ Waitangi Tribunal *He Kura Whenua ka Rokohanga* above n 41 at 317-319.

interfere with the activities of well run and profitable entities, against their wishes, instead of focussing on supporting those lands that were said to be unproductive? They make a fair point.

Conclusion

In 1967 following release of the Pritchard Waetford Report that resulted in the discredited Māori Affairs Amendment Act 1967, the Ngāti Whātua chief and Māori anthropology and land tenure expert Professor Sir Hugh Kawharu (as he became) provided a characteristically insightful and eerily prophetic assessment, that provides a useful comparison, by way of analogy, to the Review Panel Reports and the Bill.⁶⁴⁸

Seldom has a document been so eagerly awaited by the Māori people as the Prichard-Waetford Report on their lands. Yet it contains little to reward them, for although much of the Report is good, much is also bad and all has been put together with evident haste. But since haste had been imposed upon them, the authors at least must be exonerated. Not only were they presented with a questionnaire—a political *fait accompli* in itself—but also they were invited to solve social, economic, philosophical and legal problems that had grown daily more complex for one hundred years; and, they were invited to do so “within six months”. However, hasty offers of solutions should not be met by hasty acceptance, for to repent at leisure will be no solace for those who make mistakes.

...

The Commission also reports extensively on administrative matters, and in the process makes the very radical proposal that in the work of the Māori Land Court, Judges be phased out and replaced by lay personnel. Finally, and in some contrast to the detailed treatment of these topics, it makes no recommendation about how the Māori might use his land himself. Nothing is said, for instance, about problems of finance, training, management, diversification or amalgamation of holdings—let alone requirements of housing estate development. Yet all are of particular moment to the Māori people, as debate will soon reveal.

Ironically, despite the passage of almost four decades, most of the issues identified by Professor Kawharu were the very same challenges identified by Māori land owners throughout the reform process and by officials in their briefings to Ministers on how legislative change alone was insufficient to resolve challenges over the increased development of Māori land. As this thesis argues, it is not fragmentation or the Act or the Court that are the real impediments to land development, as the examples of Te Pāroa, Kiwinui and the Rotoehu Forest Trust confirm. Like their much larger counterparts including Tuaropaki, Pukeroa Oruawhata and Lake Taupo

⁶⁴⁸ Prichard and H. T. Waetford, “Report of Committee of Inquiry into Laws Affecting Māori Land and Powers of the Māori Land Court.” (Department of Māori Affairs, Wellington, 1965).

Forest Trusts to cite some examples, the ahu whenua trusts of the Hapū continue to develop and prosper. They provide financial support to their communities to ensure that many diverse revitalisation and cultural recovery programmes are given real impetus while at the same time ensuring that the land is protected from permanent alienation and risk, through appropriate advocacy and the implementation of risk management strategies to protect the diverse interests of the Hapū. They have done so under the Act and its 1953 predecessor without any constraint, which emphasises the reality that the Act has not stopped them from utilising and developing their land in accordance with their own strategies and priorities.

As the Federation of Māori Authorities itself said, according to the Waitangi Tribunal, the Act in fact *enabled* Māori land entities to achieve their objectives.⁶⁴⁹

FOMA was, however, in support of the reforms but felt that the ‘current Act generally enables their members to meet their aspirations for their land’ (which seems like a significant shift in position).

This research contends that the evidence is clear: there are more relevant structural and policy barriers that continue to constrain land use that are not given sufficient attention under the Bill – to the extent that such matters can be provided for in legislation in any event. Some of those impediments for particular scenarios remain access to finance, to reliable qualitative data, the quality of governors and management and their skill base, and at a fundamental level, the obstacle of actual access to land itself, as discussed by the Waitangi Tribunal:⁶⁵⁰

Another important risk, which Cabinet had acknowledged in September 2013, was that ‘legislative change alone will not be sufficient to achieve the step change in Māori land utilisation the Government is seeking’. Access of Māori landowners to development finance, building the capability of Māori land governors, and the ‘provision of robust data’ were included in the category of ‘other issues’ that would have to be addressed. ‘This risk can be managed’, reported TPK, ‘by continuing to consider policy options to address these issues.’

Regarding finance, those promoting the reform continued to argue, without evidence, that the Bill would have improved governance overall, (despite the inconsistencies highlighted by submitters to the Māori Affairs Select Committee in 2016, and notwithstanding the changes to the Bill made in April 2017), and that this would

⁶⁴⁹ Waitangi Tribunal *He Kura Whenua Ka Rokohanga* above n 41 at 196.

⁶⁵⁰ At 160.

make lending on Māori land more attractive, while recognising the importance of security and income:⁶⁵¹

The reforms also address one of the perennial issues for Māori land-owners: access to finance. In short, our consultations with the creditor community told us that they were looking for better governance models and clearer accountabilities, in addition to collateral and cash flow. By improving the standard of governance models and governance itself, the reforms should improve their access to credit

Once again, those experienced with the day to day operations of ahu whenua trusts understand that lenders can and do provide finance using Māori land as security. Indeed, none of the largest and most successful trusts and incorporations could have achieved their current levels of performance without access to mainstream lending. However, much will depend on the nature of the project, its likelihood of success and whether the governors are credible and have a track record of success, and that the trust possesses the income sufficient to service the debt.

This is exactly the experience of the trustees for Te Pāroa Lands Trust, Kiwinui Trust and Rotoehu Forest Trust. Their annual accounts confirm that, from time to time, these trusts have sought and were given loans from trading banks for investments, improvements and diversification. The trustees confirmed during the interview process that their requests for funding have never been declined. And all of this has been achieved under the Act – raising the obvious question, that if it is the Act and the Court that constrain Māori land utilisation and development, how was all this possible? Much like the failure of the Bill to recognise the experience of the Judges and Registrars in a mediation context over land issues (much like the role the judiciary plays in mediation in the Environment Court), there has never been a convincing response to this core question, apart from a reference to an outdated 2004 government report.⁶⁵² This limited response inevitably raises further concerns as to the real purpose of the reforms.⁶⁵³

Added to that is the reality that the proposed changes to the landlocked land regime were barely an improvement on the current provisions under the Act. They failed to deal with the issues of the cost of access, both in terms of compensation payable to

⁶⁵¹ At 349, citing the evidence of Matanuku Mahuika.

⁶⁵² At 247.

⁶⁵³ See the evidence of Kerensa Johnston, at 207.

affected landowners and the expense needed to construct roads. Significant areas of Māori land have no legal access let alone practical access, yet the Bill did not appear to provide much of a change, compared with the Act, to one of the most challenging impediments to Māori land use.

This research concludes that if the Bill had been enacted without further significant amendment; rather than achieving some of the purposes of the reforms, there was a risk that it might have instead unleashed a series of unintended consequences obstructive to the aspirations of Māori land owners and its own aims. In an extreme scenario, it might have left some owners mired in confusion, delay and additional cost which would have served only to frustrate and thwart land owners and their hapū from achieving their aims. While it is acknowledged that the original proposals were designed with the best of intentions, that there was a need for something to be done to “unlock” the productive potential of “underperforming Māori land” – if history has taught anything, it is that often the status quo and incremental change is less harmful to communities than far-reaching and seismic reform.

In short, it is contended that, for the reasons stated, the evidence supports the conclusion, Ture Whenua Māori Bill 2016 would have impeded hapū in the development and retention of their land. For Taiwhakaea II, Hikakino and Te Rangihouhiri II, impediments and risks contained in the Bill, like those outlined in Chapter Eight, might potentially have set back the development and revival of the Hapū by another generation – hardly an edifying prospect under any circumstances, given the parlous state of the Hapū cultural resource base. Without the initiatives and coordination provided by the Hapū land trusts over the last quarter century, many of the positive changes that have taken place during that period would not have happened.

The evidence confirms that it has taken initiative, expertise, leadership, foresight and the broad support of the individual hapū to enable the many important changes that have taken place to bear fruit. At the centre of those changes has been the amalgamation of land trusts and the populating of the boards of the three trusts with a group of experienced trustees operating cohesively while retaining the independence of action of each individual trust. The raising of awareness of the identity of each hapū internally and externally, the revival of traditional knowledge

and art forms, the reassertion of the Hapū autonomy and rangatiratanga throughout the district and region, the rebuilding and refurbishment of marae complexes and the financial and moral support for tribal initiatives that affect young and old alike, cannot be underestimated. The very building blocks of tribal identity and knowledge have been recast and rediscovered, firstly, through the process of the Tribunal and settlement and secondly, through the activities of ahu whenua and whenua tōpu trusts coordinating their functions and objectives for the benefit of the collective.

Equally relevant, all those advances and developments have been achieved under the Act. The role of the Māori Land Court has been simply that of an enabler, an inexpensive and accessible forum for seeking directions and guidance, and for disposing of genuine conflicts and disputes in a cost-effective manner. As one trustee commented:⁶⁵⁴

The Māori Land Court is a familiar setting where we can debate, argue and reconcile using our tikanga and kawa with the help of the Judges and their staff. Some of our cousins, they are more regular in their attendance, usually at their own instigation and so they are in greater need of the services of the Court. Some need more intensive support while others, like us, most of the time at least, are less frequent attendees. 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.

Some of the conclusions that the Hapū might draw from this discussion when looking toward the future might include consideration of the following questions:

- (a) Is a further amalgamation of all three trusts examined in this research the next logical and natural step of progressing in seeking to maintain and increase notions of hapū development?
- (b) Alternatively, what additional steps, short of amalgamation, could each trust take in concert with the other two or totally independently that might enhance further cohesion and development for the wider collective?
- (c) From an administrative and transactional perspective, how can the trusts improve their owners experience of the legal processes for succession, estate

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Maketu John Simpson, personal communication to Layne Harvey, 12 August 2008.

planning, the gifting of shares and the creation of whānau trusts that would benefit landowners?

- (d) If the Bill should ever be resurrected, wholly or in part, how the Hapū insulate itself from the risk of potential bureaucratic interference, excessive compliance and uncertainty?

The Hapū can draw some comfort from the reality that their trusts have never been embroiled in serious conflict or dispute to warrant the commencement of orthodox litigation, apart from holding the former trustees of Kiwinui Trust to account. Even so, the need to maintain the confidence of owners and the Hapū generally cannot be underestimated. One area that requires improvement is the need to ensure general meetings are held regularly and in accordance with the terms of the trust orders. History demonstrates that that has not always been the case and the principal means by which support is maintained is through open and regular communications with owners and the Hapū.

Further conclusions that the Hapū can draw from the research are the need for future proofing, risk management and succession planning. This will include ensuring further investment diversity to shield against market fluctuations and external global influences including the impacts of climate change; adopting a risk management approach that protects and secures the cultural resources of the Hapū just as much as the land base by investing in a targeted manner in those groups and individuals who will act as custodians of Hapū traditions and identity in the future; and by adopting transparent and robust processes for the identification of successors to governance roles in a carefully planned manner. This will then provide some security for the Hapū that their resources remain in safe hands both now and into the future.

The events of the last five years have confirmed that reform of the current Māori land laws is necessary, especially in the context of lands that are unmanaged, have no legal access and are too small to be realistically administered for any economic gain. As several critics have argued, focussing on underperforming lands without formal management structures might prove a more fruitful pathway for reform, rather than a blanket series of changes that may impede rather than assist. In any event, it is contended that the momentum created by the reform process requires

change and it is evident that the new Government intends to make changes, just not on the same scale, it would appear, as the previous government had proposed. In short, the status quo is simply untenable, given the momentum that the previous Government's reforms have created during the last five years.

This research argues that there are significant efficiencies that can be gained by a transfer of a substantial volume of administrative and transactional roles from the judiciary to the registry. Widening the choice of fora for probate and successions issues, land valuation, resource consent appeals and civil matters generally, may also assist in promoting increased efficiencies and minimising unnecessary delay. Reforming the appeal process to include a permanent Appellate Court and including statutory timeframes for the orderly conduct of proceedings will improve the services available to owners. Similarly, increasing the range of dispute resolution options will also provide owners with a greater choice of processes that could be made available for resolving conflicts without recourse to litigation. The online experience for owners, including the holding of meetings and hearings via audio visual means must also be greatly enhanced and brought into the twenty first century through greater use of technology and online interactions. through embracing technological innovation and change can the expectations of Māori land owners be exceeded.

Unfortunately, in the view of many of its critics, the Bill, even in its final form, bore all of the hallmarks of apparent haste, with its confused drafting, major rewrites and revisions over a short period of time, significant changes throughout the process including the abandonment of flagship concepts like rangatōpu, managing kaiwhakarite and second-chance decision-making without judicial oversight (following strident criticism from landowners) – in many ways it demonstrated an overall incoherence of structure. Yet there were some ideas that are worth continued examination, including governance entities being established by registration, and transactional and administrative functions including successions being transferred to registrars while expanding the jurisdiction of the Court to deal with the enforcement of legal rights.

Even now, with a change of government, the Bill, wholly or in part, could still be referred to the Law Commission for review, following the appointment of new

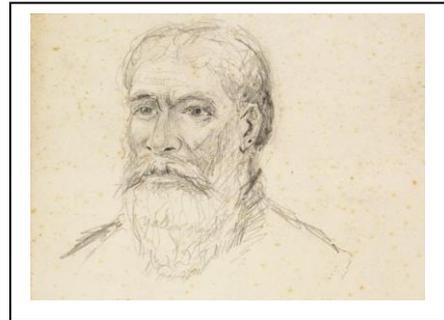
members possessing specialist expertise in Māori land policy and practice.⁶⁵⁵ The Commission could procure the necessary empirical data and research base to properly identify and understand the real impediments to Māori land use. During that hiatus, the policy framework and design of a Māori Land Service within the existing registry could be concluded to ensure an optimal level of scrutiny and a corresponding fit for purpose final structure. Given the legacy of catastrophic land alienation, dispossession and disempowerment of the last 178 years, especially for Taiwhakaea II, Hikakino and Te Rangihouhiri II, and all through ‘legal’ means, then surely all Māori land owners, their whānau and hapū, deserve no less. After all, it is only through the law can the rights of the people be recognised and their aspirations to determine their own future eventually be fulfilled.

Ka kuhu au ki te ture, hei matua mo te pani.

I seek refuge in the law, for it is a parent to the oppressed.

Te Kooti Rikirangi Te Turuki

Wairoa, 1 January 1885



⁶⁵⁵ Obvious candidates include Justice Joseph Williams of the Court of Appeal, a former Chief Judge of the Māori Land Court, Chairperson of the Waitangi Tribunal; Professor Jacinta Ruru of Otago University and Co-director of Ngā Pae o Te Maramatanga Māori Centres of Research Excellence; and senior Treaty claims practitioner and adviser to the Federation of Māori Authorities, Deborah Edmunds, a partner in law firm Kensington Swan.

Appendix One – Fieldwork Research

The fieldwork conducted during the research on current and proposed laws affecting Māori land trusts was approved by the AUT Ethics Committee in May 2017 and ultimately by the Faculty and University Postgraduate Boards.

Ten participants agreed to be interviewed on a voluntary basis as part of the fieldwork research. The interviews with key informants explored and analysed their experiences and perspectives on the current and proposed laws. The selection of participants for interview was based on one or more of the following criteria:

- (a) Membership of the Hapū who are governors and/or beneficiaries of land trusts.
- (b) Tribal membership of Ngāti Awa who are governors and/or beneficiaries of land trusts.
- (c) Individuals outside of Ngāti Awa regarded as being influential in Māori land management.
- (d) Advisers to Māori land trusts.

The process for ensuring that interviews were conducted and analysed appropriately included the following:

Interviews were recorded and transcribed. The researcher took notes that also provided a descriptive record of each of the interviews for subsequent analysis and interpretation.

The researcher then read through all the transcribed data to assess the key themes and meaning of the information provided.

A standardised coding process was then implemented to segment the data into categories such as general themes, sections and related topics.

When the data had been coded, and segmented, topics were listed and categories created to simplify the analysis and interpretation process. Preliminary interpretations were then developed and reviewed against the interview transcriptions to test the analytical process and veracity of those interpretations.

Once the analysis was validated initial conclusions were then drawn and these conclusions were related back to the research issues set out at pages 26-27.

The analysis, interpretations and conclusions were then incorporated into the writing up of the fieldwork research chapter. The key informants who participated in the interviews and the reasons for their inclusion in the fieldwork research are covered in the following table:

Name	Reason for interview
Sir Hirini Mead	Leading Māori academic, educator and tribal leader
Sir Harawira Gardiner	Political perspectives and tribal leadership
Pourotu Ngaropo	Cultural perspectives and tribal leadership
Enid Rātahi-Pryor	Experienced trustee and management professional
Wilhelm Studer	Experienced trustee
Nathan Milner	Adviser
Leo Watson	Adviser
Cara Bennett	Adviser
John Koning	Adviser
Clinton Hemana	Professional trustee and management consultant

Appendix Two – Interview Questions

QUESTIONNAIRE

Overview

1. What is your role as a trustee/adviser to a trust and what exactly do you do?
2. How frequently do you meet as a trust and with your beneficiaries?
3. What is the purpose of your trust and who sets that purpose?
4. If your trust holds hapū land, how are the views of the hapū considered – are they different from the views of the owners?
5. Can you think of particular duties and obligations you/your client may have as a trustee?
6. Where do they arise from, these duties, to whom are they owed and how do those persons enforce such duties?
7. How do the current laws governing your trust assist or impede you in firstly, the performance of your duties/as an adviser and second, in achieving the aspirations of the trust and its beneficiaries?
8. Do you know what Te Ture Whenua Māori Bill 2017 says about the operation and functioning of trusts and if so what are your views?

Trust management

1. How does the trust set its priorities and budgets?
2. How does your trust make investment decisions –how are differing views resolved?
3. What processes if any of self and external review does the trust undertake?
4. How do the beneficiaries have input into such reviews if at all?
5. How does the trust measure success and failure?
6. Does your existing trust order assist or impede you in the performance of your duties – can you give examples?
7. How will that change, if at all, under Te Ture Whenua Māori Bill 2017?
8. Do you know what Te Ture Whenua Māori Bill 2017 says about trust management and if so what are your views?

Hapū

1. How does your trust assist, if at all, in supporting hapū aspirations- give specific examples?
2. Does your trust include any pre or post settlement assets?
3. How does your trust distinguish between the two classes of asset, if at all, and are they treated differently?
4. Does the trust apply the same or similar standards of prudence when managing pre and post settlement assets – are there any tensions and if so what are they?
5. How does Te Ture Whenua Māori Act 1993 assist or impede first, the achieving of hapū aspirations, and second, the prudent management of trust assets?
6. What are the views of your hapū on how the current law assists or impedes the achieving of hapū aspirations for the land?

7. How does Te Ture Whenua Māori Bill 2017 differ from the current law over how your trust can achieve the aspirations of the hapū?
8. How does Te Ture Whenua Māori Bill 2017 assist or impede the achieving of hapū aspirations for the land?

Conflicts

1. Have the trustees ever been to Court because of action by trust beneficiaries or by another trustee?
2. Can you describe your experience of the process including any alternative dispute resolution that may have been attempted?
3. What was your experience of any counsel your trust engaged and how did he/she relate to the Judge?
4. Has your trust ever had a conflict of interest issue – please describe including how it was managed.
5. In what circumstances will your trust seek legal advice and/or directions from the Māori Land Court?
6. Are there any examples where your trust has declined to take such advice or direction – what were the circumstances?
7. What does your trust order and Te Ture Whenua Māori Act 1993 say about conflicts of interest and how they are to be managed?
8. Do you know what Te Ture Whenua Māori Bill 2017 says about conflicts of interest and if so what is your opinion on that?

Reform

1. Have you read Te Ture Whenua Māori Bill 2017 or explanatory materials and what is your view of them?
2. What opinions on the Bill are you aware of from the media or any other source?
3. Have you attended any of the consultation hui and if so what comments can you make about the content of those meetings and the views that were expressed?
4. Does your trust have a view on the Bill, wholly or in part, and if so, what is that view?
5. Is there support or opposition within the hapū and if so why?
6. How do you think the Bill will directly or indirectly affect your trust?
7. What changes to either the Bill or the current legislation do you think would assist your trust?
8. Which do you think is preferable and why:
 - (a) A complete re-write of the 1993 Act or
 - (b) Amendments to the 1993 Act?

Appendix Three – Advice from Te Puni Kōkiri to the Māori Affairs Select Committee on Te Ture Whenua Māori Bill dated 16 October 2016

1993 ACT

Creating a trust

- Ahu whenua and whenua tōpū trusts are established by the Māori Land Court.
- The proposers have to file an application with the court and include:

- A statement of the grounds on which they are making the application.
- the names of the proposed trustees and a description of the process by which they were selected.
- A schedule describing the land to be vested in the trustees.
- The written consent of each proposed trustee to act as trustee.
- A statement describing how they gave notice of the meeting of owners.
- A list of owners who voted against the proposal or dissented or objected in the course of consultation about the proposal.
- A copy of the minutes of the meeting, including a list of the people who attended the meeting.

The Māori Land Court sets an initial hearing date and notifies the application in its pānui – the proposers themselves are required to notify every owner who voted against the proposal or dissented or objected in the course of consultation about the proposal.

The Māori Land Court has to be satisfied that:

- The owners have been given what the court considers “sufficient” notice of the application to the court.
- The owners have been given what the court considers “sufficient” opportunity to discuss and consider the application.

Establishing the trust would, in the court’s view, promote and facilitate the use and administration of the land in the interests of the beneficial owners (ahu whenua trust) or the relevant iwi or hapū (whenua tōpū trust).

If the court is satisfied about those matters, the court may establish the trust, fix the terms of trust and appoint trustees – the court’s decision to, or not to, do those things is subject to a right of appeal.

The proposers face the uncertainty of not knowing what the court will consider is “sufficient” notice and engagement by owners until after they have carried out those steps and proceeded to a hearing in court – whether a trust is established, what its terms are and who its trustees are is ultimately at the discretion of the court – the proposers face litigation risks of opposition, appeals and cost awards if the application is unsuccessful – the filing fee is \$60 – the proposers must meet the costs of giving notice to opposing owners – the process stretches over many months.

BILL

All governance bodies

- The proposed governance body has to apply for registration with the Māori Land Service unless it is an existing Māori incorporation, ahu whenua trust or whenua tōpū trust (in which case registration is automatic).

- The registration application has to be signed by each kaitiaki and include:
 - The approved governance agreement.
 - The name and contact details of each kaitiaki.
 - Statutory declarations by each kaitiaki that:
 - The information in the application is complete and correct; and
 - The applicable procedural requirements (above) have been met.
 - A description of the Māori freehold land, other land (if any) and other assets and liabilities (if any) that are to vest in the governance body.
 - A description of any known lease, licence, mortgage, easement, or other interest affecting the land, assets or liabilities that are to vest.

Rangatōpū

- If the proposed governance body is a rangatōpū the registration application must also include:
 - Statutory declarations by each kaitiaki that he or she is eligible to be a kaitiaki.
 - A request for registration in the name given in the application.
 - A statement to confirm whether the rangatōpū is to be a body corporate or a private trust.
 - If the rangatōpū is to be a body corporate already registered under another Act (e.g. a company), evidence of registration.

Representative entity

- If the proposed governance body is a representative entity the registration application must also include a declaration by one or more of the kaitiaki confirming the following:
 - The entity represents at least one of the hapū or iwi associated in accordance with tikanga Māori with the Māori freehold land to be managed under the agreement.
 - The entity is recognised by the members of the hapū or iwi as having authority to represent the hapū or iwi.
 - If the entity has an existing trust deed, constitution, or other governing document, that document permits (whether expressly or by implication) the entity to enter into a governance agreement.

Māori incorporation, ahu whenua trust, whenua tōpū trust

- Māori incorporations, ahu whenua trusts and whenua tōpū trusts automatically become governance bodies and will not need to take any steps to be registered but before the transition period of 3 years ends each kaitiaki will have to lodge a statutory declaration that he or she meets the eligibility requirements.

Registration will be a purely administrative process – it will carry no litigation risk and will be quick and inexpensive.

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