
LEGAL DEVICES TO MANAGE CUSTOMARY MAORI LAND: OVERCOMING THE CONFLICT BETWEEN RETENTION AND DEVELOPMENT

I. Introduction

The management of customary Maori land is a key factor in the economic development of Maori people. Development of Maori land with the restriction that the land be retained in Maori ownership seems plausible enough but problems arise, where land is both an economic resource to be used efficiently and also the identity and well of spirituality for its owners.

Land has special spiritual and cultural significance to Maori in addition to its economic value. Coupled also with the huge loss of land suffered by Maori over the last 150 years since colonisation, retaining the remaining areas customary land in Maori ownership is important. However, not only does restricted alienation place a constraint on the economic development of the land owning community it also creates difficulties for the management of that land, particularly in its capacity to be used as loan security.

The conflict of development or retention is given much more significance with the governing legislation for Maori land, *Te Ture Whenua Maori Act*, 1993 requiring this conflict to be acknowledged and reconciled. In its long title, Maori land is recognised as a *taonga tuku iho* (treasure) of special significance and as such the Act is "to promote the retention of that land in the hands of its owners..." while at the same time "...facilitate the occupation, development and utilisation of that land for the benefit of its owners".

The conflict underlying these two statements is not readily apparent. It is caused however, from two distinct and often divergent points

of views underpinned by two separate systems of property rights. Bringing these two systems together is fraught with difficulties and has resulted in management structures with inherently high transaction costs, inadequate systems of accountability and poorly defined and often conflicting organisational objectives. One of the main problems, is the difficulty encountered by Maori organisations in accessing capital because of the reluctance by both banks to accept Maori land as security and the owners to risk Maori land.

This paper aims to give a description of the legal devices most commonly used by Maori to manage customary land and the history behind the development of these structures. Given the constraints of restricted alienation and the limitations of the current structures, this paper will give a brief introduction to some of the options being developed by Maori to overcome these limitations.

II. Maori Land and Economic Development

It should come as no surprise that economic development is a goal of the Maori people - an aspiration shared by many communities. To the extent that economic development requires 'economic efficiency', development also requires the particular systems of property rights and the particular economic system that leads to economic efficiency.¹

Economic efficiency is an entirely abstract concept derived from inductive observation primarily in Western economies. It is the outcome of a theoretical model of resource allocation through voluntary exchange in competitive markets and depends on key assumptions, all of which must be satisfied before we can say that efficiency can be said to exist. Among these assumptions are exclusive and transferable property rights and the emphasis on the individual holding the property rights. Neither of these exist under the current legislative framework of Maori land nor have they ever existed in traditional land tenure systems. Ownership is not held by the individual but by the group and the capacity to transfer the land (outside of the owning

¹Maughan, C. W; The economics of property rights, (1995) *N. Z. Business Law Quarterly*, 1, 78-91; Maughan, C. W; Meat, competition and efficiency: an economist looks at Commerce Commission Decision; (1996) No. 273. *N. Z. Business Law Quarterly*, 2, 216-236.

group) is restricted.² This constraint on exclusivity and transferability impacts on the ability of Maori land owners to manage customary land.

Since the introduction of legislation governing Maori land last century the difficulties in its management have continued mainly because group ownership is inconsistent with the Western model of economic efficiency. Although marginal changes have been made (and continue to be made) to the legislation, the fundamental clash of systems will continue. Given the key role that land plays in the identity of Maori and the history of alienation of Maori land, any radical change to the notion of limited transferability is unlikely to occur.

If however, the constraint is accepted fully i.e. that customary land should not be used as security for loans, then it becomes clear that there are a number of promising options for development, many of which are already being explored by Maori. Before these alternatives are discussed a brief description of Maori land and its governing legislation will be given in the next part of the paper.

A. Maori Land

Maori Land currently owned in multiple-ownership under the jurisdiction of the *Maori Land (Te Ture Whenua) Act*, 1993 and registered with the Maori Land Court is approximately 1.515 million hectares (Table 1) or 5.5% of the total New Zealand land area of 26.9 million hectares (Table 2).

Table 1 shows, that although the greatest area of Maori land 49.5% (750,187 ha) is managed under a Trust structure, and 13.7% (207,156 ha) is managed under the Incorporation structure, almost 19.4% (293,886 ha) has no formal organisational structure.

² Maughan, C. W., & Kingi, T. T., *Efficiency and Maori Land: A Conceptual Framework for Economic Development*. Department of Agribusiness and Resource Management, Massey University: Occasional Publication No. 5, (1997). The issue of Maori land and economic efficiency is discussed further in a paper published by C. W. Maughan and T. T. Kingi titled: 'Te Ture Whenua Act: Reconciling the conflict between retention and development' in the (1998) *New Zealand Law Journal*, January (27-31).

Table 1 Percentage of Maori land (hectares) by Structure

| Structure | Hectares | % of Total Area |
|------------------------------|------------------|-----------------|
| Ahu Whenua Trust | 750,187 | 49.5 |
| No Structure | 293,886 | 19.4 |
| Maori Incorporation | 207,156 | 13.7 |
| Whanau Trusts | 87,840 | 5.8 |
| Maori Trust Board | 66,347 | 4.4 |
| Not Described | 55,983 | 3.7 |
| Other | 28,003 | 1.8 |
| Whenua Topu Trust | 25,515 | 1.7 |
| Kai Tiaki Trust | 154 | 0.01 |
| Total Area (hectares) | 1,515,071 | 100 |

Source: Ministry of Maori Development, Maori Land Information Database (1996), Wellington.

Maori land is registered with the Maori Land Court which are located in seven regions. The regions are listed in Table 2. While the total area of Maori land is no more than 5.5% of the total land area in New Zealand, in some regions the area of Maori land can be as much as 26%. The Te Wai Pounamu (South Island) region has the highest proportion of New Zealand's land mass of 62% but the lowest proportion of Maori land at 0.43%.

Table 2: Area of Maori Land by Maori Land Court District (hectares)

| Maori Land Court District | Total Land Area | Total Maori Land | % of Total Land | % of Maori Land |
|---------------------------|-----------------|------------------|-----------------|-----------------|
| Tai Tokerau | 1,732,192 | 139,873 | 8.07 | 9.23 |
| Maniapoto | 2,156,583 | 143,388 | 6.65 | 9.46 |
| Waiariki | 1,936,270 | 426,595 | 22.03 | 28.16 |
| Tairawhiti | 1,169,091 | 310,631 | 26.51 | 20.50 |
| Takitimu | 1,936,492 | 88,608 | 4.58 | 5.85 |
| Aotea | 1,284,284 | 334,207 | 26.02 | 22.06 |
| Te Wai Pounamu | 16,715,185 | 71,769 | 0.43 | 4.74 |
| TOTAL | 26,930,097 | 1,515,071 | | |

Source: Ministry of Maori Development, Maori Land Information Database (1996)

B. Maori View of Land

Although Maori society has been affected in many ways since the arrival of the European, one aspect still remains undiminished: the attachment to the land illustrated in the following *whakatauki* (proverb): *Ko te whenua te wai-u mo nga uri whakatipu* (Mother earth through her placenta, provides nourishment and sustenance for her offspring).³ Maori place special significance to the role that land plays in the geneological history of a tribe. Land is the source of identity for Maori with its permanency providing a link between past, current and future generations. This sentiment is also captured in another well known *whakatauki*: *whatu ngarongaro nga tangata, toi tu te whenua* (man will perish, but the land is forever).

The traditional concept held by Maori of the origin of mankind from the union of *Ranginui* (sky-father) and *Papatuanuku* (earth-mother)

³The placenta and land are referred to in Maori as 'whenua' symbolising nurturing and life giving force.

prompted Sinclair in 1975 to state that Maori identified with land perhaps more closely than any other race of people⁴ and by Asher and Naulls in 1987 that Maori did not consider land to be a part of life but life itself⁵.

C. Maori Customary Land Tenure

Prior to the introduction of the land registration system in 1862 with the establishment of the Native Land Court, land was owned collectively by *iwi* (tribe), *hapu* (sub-tribe) and *whanau* (extended family). Establishing claims to land by the first Maori arrivals was done by a formal appropriation and right of discovery (*whenua kite hou*). Right of occupation (*ahi ka*) 'lighted fire' was recognised by all *iwi* as a legitimate right of ownership. Continuous occupation (*ahi ka roa*) 'long burning fire' transformed ownership into *take tipuna* (ancestral right). If the land was abandoned and the fires become cold (*ahli mataotao*) the rights to occupation were lost.⁶ Other rights included right of conquest (*take raupatu*) or and right of gift (*take tuku*).⁷

III. Legislation and Maori Land

The current structures used by Maori to manage customary land have their origins in legislation passed over 150 years from the signing of the Treaty of Waitangi in 1840. Although there has been in excess of 270 Acts of Parliament introduced since 1840,⁸ only 5 Acts will be referred to directly in the following section.

⁴Sinclair, D.: Land: Maori view and European response; in M. King (ed.), *Te Ao Hurihuri: The World Moves On*. (Wellington: Hicks Smith and Sons Ltd 1975).

⁵Asher, G., & Naulls, D. *Maori Land*. Wellington: New Zealand Planning Council. (1987)

⁶The length of time varied between *iwi* but rights were usually lost after three generations of absence.

⁷Kawharu, I. H. *Maori Land Tenure: Studies of a Changing Institution*. (London: Oxford University Press 1977).

⁸Williams D. V., Basset H. and Steel, R. *The Database of Maori Land Legislation: Te Puka Ako Hanganga Mo Nga Ture Whenua Maori*. Crown Forestry Rental Trust, Auckland, (1994)

Common property rights is a concept that is in general, inconsistent with Western ownership. The primary objective of the early pieces of legislation from the signing of the Treaty of Waitangi in 1840 to the turn of the 20th Century focused on the individualisation of communal ownership into a form recognisable under English Common Law.⁹

A. The Treaty of Waitangi

Many of the exchanges of land between Maori and the early European settlers prior to the signing of the Treaty¹⁰ in 1840 were conducted in an ad-hoc manner. The Treaty provided the foundation from which the Crown not only introduced regulating legislation, but also entered the realty market as a major player. This was achieved through Article Two of the Treaty which in addition to (supposedly) giving guarantees of '*... full, exclusive and undisturbed possession their lands, forests, fisheries etc.*', it also granted the Crown the power of 'pre-emption' i.e. exclusive right of purchase. Exclusive right of purchase allowed

⁹Lyne, M. *Ownership and control of Maori land: some lessons for South Africa*. (Report No. 138). (Canterbury: Lincoln University Press (1994); see also Rice, G. W. *The Oxford History of New Zealand* (2nd. ed. Wellington: The Clarendon Press 1992).

¹⁰Although there are only three articles in the Treaty, controversy still continues over the Maori and English versions. Article one in the English version states that Maori are to cede all rights and powers of Sovereignty to the Queen of England; the Maori version states that Maori are to give up the Governorship (*kawanatanga*) of their lands. As *kawanatanga* was a new concept to Maori at the time (the word is a transliteration of governorship) doubts arise as to whether the Maori signatories appreciated the full meaning of the term. Article two in the English version states that Her Majesty the Queen confirms and guarantees the chiefs and tribes of New Zealand the '*full, exclusive and undisturbed possession of the lands, estates, forests and fisheries and other properties that they may collectively or individually possess*'. The Maori version used different terminology including: '*full chieftanship (rangatiratanga) of their lands, villages and all their possessions (taonga): everything that is held precious*'. The term *rangatiratanga* implies self-governorship and self-determination rather than the more passive implication of a caretaker owner that retained 'undisturbed possession'. Article three guarantees the Maori the same rights and privileges of British subjects. This is the least ambiguous and contentious of the three articles of the treaty.

the Crown to bring the land within the scope of English land law, and to create simultaneously a ready source of finance through monopoly sales.¹¹

B. Maori Land Court

The Maori Land Court (originally the Native Land Court) has been one of the most influential on Maori and Pakeha relations. There have been no shortage of critics on the conduct of the Court particularly its role in facilitating the Crown purchase and confiscation of Maori land in the 1860's. Additionally it has been criticised for its part in orchestrating the complex land tenurial system by which Maori held on to its over-diminishing amount of land. Professor Hugh Kawharu referred to the Court as '*a veritable engine of destruction for any tribe's tenure of land, anywhere*'.¹²

While the Maori Land Court is referred to as a 'court' it is technically a specialist tribunal with limited jurisdiction. It does not have any authority to determine whether there are Maori rights to land and/or whether the land in question is Maori land.¹³

In 1862, the *Native Land Act* was introduced and was the first piece of legislation aimed at establishing the Native Land Court (now known as the Maori Land Court). The Court was eventually established under the *Native Land Act, 1865* which laid the foundation for the Court with its preamble stating its objective as: '*to encourage the extinction of (native) proprietary customs*'. The focus of the Act was on the individualisation of Maori title, a concept incompatible with communal Maori ownership.

¹¹Gilling, B. D. Engine of destruction? An introduction to the history of the Maori Land Court. (1994) *Journal of Victoria University of Wellington Law Review*, 24(2)(July), 115-139; Orange, C. *The Story of a Treaty*. (Wellington: Bridget Williams Books Ltd.1992).

¹²Kawharu, (1977) *supra*. n. 7 at p. 15

¹³McGuire, J. *The Status and Functions of the Maori Land Court*; (1993). Orsman, H.W. (ed.) *The Maori Land Courts: Report to the Royal Commission of Inquiry*. (Wellington: Government Printer,1980).

In a society where tribal knowledge, culture and traditions were passed between generations orally, the foundation to hold title to land was in the memorising of minute details. This was particularly important where outside tribal groups held rights to land within the boundaries of a tribe. The depth of knowledge required to assert a tribe or family's right to land was immense and included not only the natural boundaries and topographical features but also detailed accounts of the genealogical descent of its original founders.¹⁴ This traditional 'recording system' was undermined by the introduction of the 1862 Act.

The period from the Court's establishment in 1865 to the early 1900's saw a number of amendments to the governing legislation although its focus on the individualisation of title had not diminished. By the time the 1953 *Maori Affairs Act* was introduced, the emphasis had now changed with the Maori Land Court actively involved in the retention of Maori land and its development. In doing so however, the actions of the Court generated further grievances with the compulsory purchase of uneconomic interests i.e. land with a value of no more than 25 pounds by the *Maori Trustee* (also established in 1953). These actions were strongly resented by Maori.

In 1967 a piece of legislation was introduced that was to become the most controversial Act of Parliament affecting Maori land since the establishment of the Maori Land Court over 100 years earlier. The *Maori Affairs Amendment Act, 1967* made several recommendations for the 'better use' of Maori land including: the compulsory change of status to European (General) land for Maori land with less than four owners; the expansion of the powers of the Maori Trustee to compulsorily acquire uneconomic interests and sell leases without the consent of the owners; and the conversion of owner interests in a Maori incorporation to shares similar to that of a corporate body effectively cutting a family's traditional link to particular sites.¹⁵

¹⁴Best, E. . *The Maori*. (Wellington: Wellington Board of Ethnological Research, 1924).

¹⁵Prichard, I., & Weatford, H. M., *Report of the Committee of Inquiry into the Laws Affecting Maori Land, and the Powers of the Maori Land Court*. (Wellington: Government Printer, 1965).

Te Ture Whenua Act, 1993

In July 1993, *Te Ture Whenua Maori Act* was introduced (also referred to as the *Maori Land Act, 1993*). The Act had a prolonged gestation and the unenviable distinction of the longest running Bill in any Commonwealth Parliament having been presented before the House of Representatives in 1978.

The Act provides management structures for the organisation of Maori landowners in two broad categories: (1) share or owner interest structures; and (2) land management structures.

Share management structures recognise that the vast majority of shareholdings in multiple owned Maori land are small and provide little financial return but are nonetheless *turangawaewae* (ancestral land) and as such are important. The two structures are:

1. *Whanau Trust*: allows the *whanau* to pool shares and eliminate the need for *whanau* members to succeed to individual shares in the land.
2. *Putea Trust*: allows the owners of small uneconomical shares in Maori land to pool their shares. Owners need not be from the same *whanau*.

These structures are designed to facilitate continued ownership and to halt further fragmentation by doing away with the need for succession to individual interests.

Once the trust is formed the owners lose their defined land or share interests and consequently difficulties can arise affecting decision making.

Land management structures enable the land owners to manage Maori land on a collective basis. The three types of structures are:

1. *Ahu Whenua Trust*:¹⁶ designed to manage blocks of multiple owned Maori land and are the most common structure used by Maori landowners.

¹⁶Previously 438 Trusts under the former *Maori Affairs Act, 1953*.

2. *Maori Incorporation*: a body corporate with perpetual secession and with powers which, in form and basic structure, are similar to the joint stock company.
3. *Whenua Topu Trust*: is similar to the *Ahu whenua* trust in that its structure is designed to manage the entirety or major proportion of a tribal estate. It differs in one aspect however, in that the individual's land owning interests are not maintained. In this respect it is not dissimilar to the *whanau* or *putea* trusts.

Ahu whenua trusts and Maori incorporations are the most common structures used to facilitate decision making over Maori land.¹⁷ While they are considered the most commercially orientated of the structures under *Te Ture Whenua Maori Act*, they nevertheless have a number of inherent weaknesses when compared to non-Maori structures. One of the most significant problems faced by Maori incorporations and *Ahu whenua* trusts is the difficulty in accessing finance. The problem is compounded by: (a) uncertainty surrounding the legal capacity of the trustees or committee of management members; (b) difficulty of the Maori structures to enter into security arrangements; (c) lack of separate credit policies for Maori structures.¹⁸

C. Legal Capacity of Maori Structures

Uncertainty surrounding the legal capacity of the structures stem from the involvement of the Maori Land Court in the management of Maori land. Both *ahu whenua* trusts and Maori incorporations are subject to the scrutiny of the court with Section 17 of the act stating that in addition to the primary objective of promoting the retention and development of Maori land, the court (among other things) is to '*...give effect to the wishes of the owners.... provide a means whereby owners may be kept informed...to promote practical solutions to problems arising in the use or management of any land...'*. This involvement of the Maori Land Court in management decision making creates uncer-

¹⁷The trust and Maori incorporation were in existence prior to *Te Ture Whenua Maori Act*, 1993 and have their origins in legislation passed in 1929.

¹⁸*Te Puni Kokiri*, 1996.

tainty particularly with the accountability and responsibilities of the trustees and committee members.

IV. Maori Land as Security

Under *Te Ture Whenua Maori Act*, Maori land can be used as security by a trust or Maori incorporation. Financial institutions however, see a number of difficulties with this option including the limited market willing to purchase Maori land at a mortgagee sale, the potentially negative media coverage associated with the forced sale of Maori land and the uncertainty surrounding the legal capacity of trustees and committee members to use Maori land as security. For these reasons, financial institutions have been reluctant to accept Maori land as security. Additionally, Maori landowners find the concept of risking the loss of Maori land by using it as security to be unacceptable and it goes against the retention principle of the *Te Ture Whenua Act*.

Alternative security mechanisms are in use by Maori incorporations and trusts including the use of General land,¹⁹ commercial property, harvesting rights (e.g. forestry right) and liquid assets such as debentures and livestock.²⁰

A. Credit Policies

Many banks have not developed credit policies for Maori incorporations or trusts because of lack of experience in dealing with these structures. The uncertainty of the legal capacity of the structure and difficulties with accepting land as security exacerbate an already cautious perception. Lack of experience with Maori structures and the preference to deal with the more accepted structures such as the incorporated society or the company²¹ have not provided banks with the incentive to develop credit policies specific to Maori.

¹⁹The three main categories of land in New Zealand are: Maori land, Crown land General land. The latter category includes all privately owned land.

²⁰Kingi, T. T, Maori agribusiness: Origins and Future Challenges (1997). *Agricultural Science*, 10(2), 22-25.

²¹As of 30 June 1996 there were approximately 178,000 registered companies in New Zealand.

The company structure has a number of features which make it particularly suited for commercial activities. One of the key features of interest to banks is the protection of shareholders and creditors under the *Companies Act 1993* and the *Financial Reporting Act 1993*. Accountability of management to shareholders and creditors are clearly laid down in these acts. Transparent governance structures and the relative freedom from outside influences gives greater certainty in the decision making process.

Lack of experience with Maori organisations by financial institutions has resulted in the greater proportion of Maori organisations without a credit history and lacking in development capital. This has effectively led to organisations with a lack of commercial experience and the capacity to develop or attract the managerial skill required to enter into business enterprises.

B. Overcoming the limitations

While alternative forms of security help to overcome the problem of using Maori land as collateral, other efforts are being made by Maori to overcome the limitations. These include the use of alternative legal structures and the recognition by Maori landowners of the need to develop managerial capability.

Alternative legal structures such as a company are in limited use by Maori trusts or incorporations in an effort to separate ownership of the land from the business activity of the land. This allows the title to be retained in the Maori incorporation or trust and the structural improvements, plant and machinery, livestock, and in some cases a lease, to form the assets of the company. The formation of a company then enables the restrictions and guidelines of the *Companies Act, 1993* to be applied to the management and board of directors of the subsidiary company are given greater clarity along with an improved level of management transparency and accountability.

With the establishment of a company also comes the separation of commercial activities from the social and cultural responsibilities of the trust or incorporation. The intrusion of land ownership issues and

related social concerns is a distraction to the successful management of a business. By allowing the company to get on with generating a sustainable financial return, the distribution of the profit can then be decided by the owners through the trustees or committee members.

Managing land-based business requires highly skilled people. The primary industry sector contributes nearly 60% of the annual export returns for New Zealand and is a significant employer. Unfortunately, Maori are substantially under-represented within the industry.²² As the number of tertiary trained farm owners and managers increase in New Zealand, the number of Maori students enrolled in tertiary agricultural related courses has not increased to the same degree. Although the area of Maori land in New Zealand is currently 1.5 million hectares, this area is expected to increase as settlements are made under the *Treaty of Waitangi Amendment Act, 1985*. It is vital that the number of Maori students enrolled in tertiary education in general, but in particular the science and technology field need to be increased.²³ A number of initiatives have been developed which are addressing this problem including joint ventures between *iwi*, polytechnics, community colleges and Universities.

Maori land and its associated Maori agricultural business are an integral part of the New Zealand primary industry sector and a key component to the economic development of Maori. The ownership structures currently used by Maori to manage customary land have a long and somewhat controversial history behind their development. As legal devices they have a number of limitations and while they've emerged as imperfect answers to very complex issues, any radical changes to their fundamental make-up is unlikely to occur.

Multiple-owned Maori land with its limited transferability produces a constraint on economic efficiency and consequently on the requirements for economic development. This constraint is not likely to be relaxed as further alienation of Maori land is abhorrent to the majority of Maori people. The concept of retention and development

²²Kingi, T. T., Parker, W. J. P., & Anderson, R. D. *Maori and Tertiary Education in Agriculture: The Development of the Te Arawa, Waiariki Polytechnic and Massey University Applied Science Programme*. Faculty of Agricultural and Horticultural Sciences, Massey University, 1995.

²³Statistics from Massey University show that the proportion of Maori students enrolled in science and technology courses in 1996 is less than 3%.

is also firmly entrenched in the governing legislation. While limited transferability places a constraint on the management of Maori land, the constraint needs to be accepted albeit with minor changes and improvements to the legislation. The major gains however, will be made with use of alternative structures and assets for loan security and the improvement of management capability.

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