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MAORI BUSINESS ORGANISATIONS
—
MANAGEMENT AND OWNERSHIP
STRUCTURES FOR MAORI LAND ASSETS

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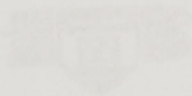
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ABSTRACT

This paper deals with the commercial utilisation of Maori land in New Zealand. The traditional relationship between Maori people and their land differs from the way landowners with a European background deal with land assets. Maori tribes used to exercise rights in their land in a more communally based system than the European settlers, who imposed on them a land ownership law based on individual ownership and transferability of title.

These differences have led to the current situation, in which New Zealand land blocks are owned by a multiplicity of individual Maori tribe members. The New Zealand legislation regarding Maori land has changed over the decades. Its main target today is the retention of Maori land in the hands of these individuals. However, large amounts of Maori land today are mismanaged.

The traditional relationship between Maori and their land, the multiplicity of ownership and the political desire to retain Maori land in the hands of Maori form severe problems in regard to successful commercial utilisation of the land. This paper will show ways in which these problems could be overcome. It will argue that if business is what is actually wanted by the owners of Maori land, there will need to be changes in regard to the attitude of many Maori towards their land. Furthermore, there will be a need to find corporate structures for the management and utilisation of Maori land enabling landowners to deal with it efficiently. The corporate structures most capable of improving commercial land utilisation for Maori landowners are structures that reduce both the impact of New Zealand's Maori land legislation on Maori land management and the interference possibilities and supervision of the Maori land administering authorities.

WORD LENGTH

The text of this paper (excluding contents pages, abstract and bibliography, including footnotes) comprises approximately 13,000 words.

I INTRODUCTION

Today Maori own approximately 1,5 million hectares of New Zealand land worth some 4 billion New Zealand dollars.¹ Due to differences between the European and the traditional Maori understanding of asset utilisation and management and complicated ownership structures, these vast amounts of land are not maintained and used in the way they could be and do not yield the profits they might be able to yield to its owners. Accordingly, the land does not provide the degree of employment and does not cause the amount of revenues and income tax for the New Zealand State that it might be able to. Additionally, great land areas lying idle displease parts of the New Zealand population. There is a growing misunderstanding among New Zealanders regarding the utilisation of land that has been given back to Maori by the Crown.

Asset managers and investors involved in trade with Maori land are compelled to deal with different types of Maori land and different statutory requirements whichever land status is concerned.² Additionally, they have to contend with the Maori Land Court, a Court administering and supervising all transactions regarding Maori land. This paper will describe the historical reasons that led to the current situation. It will ask what asset management is actually desired by the multiple owners of Maori assets today and what changes might be necessary within tribal structures to achieve better utilisation of tribal land. The paper's focus will be on what the appropriate management structures for Maori business organisations could be. It will examine to what degree the commonly used corporate bodies meet both the demands of a European commercial system aiming at profit and based on transactional flexibility and the traditional Maori land asset ownership structures and functions.

¹ Maori freehold land comprises approximately 6% of the New Zealand land area (1.514 million hectares). It consists of 25890 titles and every title has 62 owners on average. 20% of Maori land has no formal management structure. Information obtained from the Maori Land Court, March 2002.

² Most importantly the Maori Land Act 1993 (Te Ture Whenua Maori Act 1993).

II HISTORICAL BACKGROUND

In order to understand the current situation and the problems of Maori asset management it is necessary to take a look at the traditional Maori land ownership system and the way it has been changed, the assets that have been involved, as well as the process of returning those assets into Maori hands.

A *Maori and Their Land*

In the middle of the nineteenth century would-be settlers seeking land faced difficulties purchasing land from Maori due to the traditional Maori land ownership system. Under this system land was occupied by Maori people in a tribal or communal manner. Although the boundaries of each tribal area were not defined with any accuracy of survey necessary under English law, they were nevertheless known to each tribe sufficiently well to prevent encroachment by other tribes. According to Maori custom, no individual owned land in a sense that the person would hold all rights in the land to the exclusion of others. Rather, different levels of the tribe's social order exercised different kinds of rights in the same piece of land.³ A family group was allowed to enclose an area necessary for cultivation and food supply. Afterwards this group had the undisturbed right to occupy and utilise it. The land was theirs in possession and its produce was theirs in property. Apart from that there was no individual personal tenure of tribal land. Maori land was owned by the community as a whole.⁴

The spiritual relationship between a Maori people and its land was strong and important. The land provided Maori with a sense of continuity and belonging. Identity came not so much from a person's individual exploits but rather from the land.⁵

³ Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith *Maori Land Law* (Butterworths, Wellington, 1999) 27.

⁴ Russell Feist, Gina Rudland and Hon Judge Smith "Maori Land – What Every Practitioner Needs to Know" (New Zealand Law Society Seminar, Wellington, May 1997) 2.

⁵ S Te Marino Lenihan "Maori Land in Maori Hands" (1997) 8 Auck U LR 570, 572.

B *The Native / Maori Land Court*

Due to the land ownership system under Maori customary law settlers faced difficulties in acquiring ownership of land from Maori people in English terms of land alienation based on individual ownership and transferability of title. Therefore settlers increased pressure on the government of the day to provide legal certainty and legal means to facilitate land transfers. This resulted in the implementation of the Native Land Act in 1865. This Act constituted the Native Land Court (later known as the Maori Land Court) that was to determine who was the customary occupier of any particular land and then issue certificates of title in favour of the particular individuals. The Court determined ownership of land prior to sale and it apportioned the land to individuals as opposed to the Maori tribe or subtribe as a whole.⁶ The Act also provided that the persons named in the certificate were able to dispose of the land by way of sale or lease or by way of exchange to any person whomsoever.

The creation of titles enabled settlers as well as land developers to deal directly with individual Maori landowners. Nevertheless the result was far from satisfactory in that it was impossible to impose a land title system aiming at the facilitation of land alienation on a society knowing neither individual ownership of land nor the possibility to separate the right of land utilisation from the owning community. Many Maori sold land for their own advantage without consultation of others having rights in the land. Land alienations were often related to the supply of liquor, arms or ammunition, and many times the result of unauthorised land alienations was that insufficient land remained for the adequate support of the former owning tribe.

Thus, in the late 19th century the Maori people of New Zealand lost most of their communally held land. Their traditional profitable and culturally satisfying management of land was denied by a paternalistic state, their culture seldom honoured and respected.⁷ Today, the individualisation of Maori land is regarded

⁶ Lenihan, above, 576.

⁷ Andrew Sharp *Justice and the Maori – Maori Claims in New Zealand* (2 ed, Oxford University Press, Auckland, 1998) 5.

as one of the major factors in the breakdown of the Maori social system and in the gradual alteration of the traditional Maori idea of communal ownership.⁸

C *The Return of Maori Assets*

In the 1970s and 1980s Maori rights organisations increased their demands to publicly address unjust land alienations to the Crown and to private settlers. The Maori rights renaissance started in 1975 and initiated a gradual process of attitudinal change in the New Zealand society, political innovation, judicial activism and legislative recognition of Maori demands, more rapidly under one government than under another.⁹ In 1975, the Treaty of Waitangi Act came into force. It constituted the Waitangi Tribunal. The Tribunal's role is to make recommendations to the Crown on claims brought by Maori related to the practical application of the Treaty of Waitangi. The permanent commission of inquiry has the jurisdiction to investigate claims by Maori or Maori tribal groups that they were prejudicially affected by Acts or practice by or on behalf of the Crown which were inconsistent with the Treaty. Since 1975, applicants lodged almost 800 claims in the Tribunal, almost 200 of which have been disposed of.¹⁰ The results of many inquiries have been settlements between the claimants and the Crown and, finally, the return of land to Maori tribes. Altogether land worth approximately 1 billion New Zealand Dollars has been subject to Treaty of Waitangi settlements with the Crown or is subject to negotiations now.

However, the land was returned to a different people than it was taken from. Nowadays, Maori are to 75 per cent an urban people, many tribal structures are lost, and they only form about 10 per cent of New Zealand's population. And given that only a quarter of the New Zealand land that is owned by Maori today derive from negotiations with the Crown, one gets the impression that the purpose of the Waitangi Tribunal's constitution is at least partly a symbolic one. Many Maori today might be better off if some of the time and the money that has

⁸ Lenihan, above, 581.

⁹ Kenneth A Palmer "Law, Land, and Maori Issues" (1988) 3 Canterbury LR 323, 346.

been spent on the Waitangi negotiations would have been spent on the restoration and the improvement of tribal land ownership and representation structures and the development of the land that has always been in Maori hands.

D The Situation Today

Today about 1.5 million hectares of land worth some 4 billion New Zealand dollars are in Maori hands again. The 1.5 million hectares of Maori land are comprised of approximately 1.6 million ownerships. Since the land inheritance system is governed by the conventional law of succession, most of the ownerships are divided among the owner's children on the owner's death.¹¹ This causes a further increase of ownerships of about 100,000 per year.¹² At the same time, due to the constant subdivision of land titles, land shares become smaller and smaller. This reduces the income per share and thus the economic interest of the owner. In many cases the administration costs of land assets are already higher than the profit they yield. In commercial terms, the multiplicity of owners is the major problem in Maori land asset management today.

When we talk about Maori land we mean land subject to the jurisdiction of the Maori Land Court, as opposed to general land, meaning ordinary private land and Crown land, meaning land held in dominium by the Crown.¹³ Maori land is subdivided into Maori customary land, Maori freehold land and Maori reserved land. Maori customary land is land still held by Maori in accordance with Maori custom.¹⁴ Such land is inalienable, but today there is almost no Maori customary land in existence. Maori reserved land is land of diverse historical origins, additionally subject to the Maori Reserved Land Act 1955. The most important cate-

¹⁰ Claim statistics obtained from the Waitangi Tribunal website <<http://www.knowledge-basket.co.nz/waitangi/about/clmstats.html>> (last accessed 21 May 2002).

¹¹ For a discussion of the conventional New Zealand succession law's effect on Maori land shares, see generally J H Hudson *Maori Land Management – The Present Situation and Possible Future Problems* (MPP Research Paper, Victoria University of Wellington, 1995) 53.

¹² Information obtained from the Maori Land Court. See also supra footnote 1. In traditional Maori society rights in land (such as the right to occupy and to benefit from the land) were passed down the male line, leading to less fragmentation.

¹³ Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith *Maori Land Law* (Butterworths, Wellington, 1999) 47.

¹⁴ Maori Land Act 1993, s 129(2)(a).

gory is Maori freehold land. This is land the beneficial ownership of which has been determined by the Maori Land Court by freehold order.¹⁵

Over the years the law relating to Maori land has been altered by more than 270 Acts.¹⁶ This development culminated in the current Maori Land Act (Te Ture Whenua Maori Act), which came into effect on 1 July 1993.¹⁷ Compared to the Maori land legislation of 1862, the principle of the new Act has turned full circle. In its preamble it promotes the retention of Maori land in the hands of its owners and the facilitation of occupation, development and utilisation of that land for their benefit. The Maori Land Act 1993 has a strong impact on the management and commercial use of Maori land. It contains several provisions that make Maori land differ from general land dealt with by private owners.¹⁸ Those special provisions contribute to the complications in the commercial use of Maori land. They in fact reduce its value and make it harder to use as security for venture capital.¹⁹ Due to these provisions, banks are not likely to grant loans against Maori land because they cannot be sure that they will be able to sell the land as a last means of saving the invested money. Although a creditor with a valid mortgage security is able to exercise his or her rights outside of the stringent alienation provisions of the Act,²⁰ Maori freehold land sold under a mortgagee's power of sale retains the status of Maori freehold land. A purchaser would need to apply to the Maori Land Court to change the land's status into general

¹⁵ Maori Land Act 1993, s 129(2)(b).

¹⁶ Major legislation took place in 1908, 1931, 1953 and 1967.

¹⁷ This Act made history as the longest running Bill in any Commonwealth Parliament (15 years).

¹⁸ One of these provisions relating to land alienation is section 147(2) (together with section 4) of the Maori Land Act 1993. It incorporates the right of first refusal granted to those persons falling within the preferred classes of alienees as defined in the section. The preferred classes of alienees are descendants of the alienating owner, blood relatives of the alienating owner who are associated in accordance with Maori custom with the land, other beneficial owners of the land who are members of the subtribe associated with the land, trustees of those persons, or descendants of any former owner who is or was a member of the subtribe associated with the land. Another example is part VIII of the Act, which requires planned alienations of Maori freehold land to be confirmed by the Maori Land Court. The Court can give its consent, modify or dismiss the alienation according to its general objectives, which are the retention of Maori land in Maori hands and the effective utilisation of the land (s 17(1)).

¹⁹ *The Valuer-General v Mangatu Incorporation and Others* [1997] 3 NZLR 641, 642 (CA) Richardson P; Kenneth Palmer "Local Government and Resource Management" (1999) NZ Law Rev 487, 490. For a discussion of the effect of multiple ownership on Maori land value, see generally Pita Rikys "Valuation of Maori Land for Rating Purposes: Time for a Change?" (1992) NZLJ 26, 28.

²⁰ Maori Land Act 1993, s 4(c)(vii).

land, which is not likely to be successful.²¹ Moreover, potential creditors often fear adverse publicity in the event that they wish to enforce their security. But venture capital is needed to utilise land in a profit-yielding way.

The stringency of the provisions of the Maori Land Act 1993 has even led to claim settlements between Maori and the Crown in which Maori negotiated that the Act would not apply to any of the returned assets. An example for this is the Waikato Raupatu Claims Settlement Act 1995, a special Act passed in order to settle the historic grievance of the Waikato confiscations made under the New Zealand Settlements Act 1863.²² Section 22 of this Act excludes the returned land completely from the reach of the Maori Land Act 1993. The claimants rather wanted their land to have the status of general land than Maori freehold land. The exemption of the application of the Maori Land Act 1993 to Maori land is, of course, not a normal condition in negotiations between Maori and the Crown. However, this example shows that not all Maori are willing to accept the adverse effects of the Act on the utilisation of their land.

III MAORI, LAND AND BUSINESS

Problems in drawing profits from the utilisation of Maori land do not only derive from external circumstances and the legal framework. Impediments also lie within many Maori tribes themselves due to the traditional relationship between Maori and their land. In the traditional Maori land utilisation system land was not seen as a profit-yielding asset. Today, many Maori still have problems regarding their tribal land as business capital. For example, it is already difficult to convince bankers to accept security over Maori freehold land for investment credits. Moreover, there is reluctance within many members of Maori tribes to use tribal land as security for loan finance.

²¹ It has been considered recently, though, to amend the Maori Land Act 1993 in a way to facilitate the change of status of Maori land into general land in the event of a mortgagee sale. Even automatic land status declarations on mortgagee sales have been suggested.

²² Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith *Maori Land Law* (Butterworths, Wellington, 1999) 286-287.

A difficult issue unique to Maori land ownership structures derives from the multiplicity of owners of Maori land. A title of Maori freehold land has 62 owners in average, and structures with hundreds and even several thousands of owners are not uncommon.²³ This problem concerns the representation of owners, decision-making in complex business structures, as well as the distribution of benefits. The large number of owners shows the need for better governing bodies.

Many members of land asset owning tribes and subtribes have difficulties in seeing themselves as part of a business enterprise. But many assets are so large that they need a business enterprise's corporate structure and professional management. With many Maori there is a belief that when representatives work for the people there should be little or no charge, or that Maori should accept lower payments than non-Maori. But attracting the right people to become managers of land assets is an important issue. Reasonably sized assets need reasonably skilled managers. To attract such managers it is necessary to make appropriate payments possible for the expertise these people bring along. But often trust deeds, for example, require trust managers to work voluntarily or for representation allowances only. Such provisions, based on the traditional Maori understanding of dealing with land, do not attract people with high-calibre business skills.²⁴ What is needed are managers who provide direction, monitor results and arrange resources for an enterprise to meet its goals. Once such managers are found and paid appropriately, one can expect reasonable work.

The lack of appropriate business structures incorporates another problem, which is the lack of accountability of Maori land asset managers. Once corporate structures according to an asset's size are provided, accountability and performance measures like audits, reviews of board capacities and evaluations to identify board members' skills and training can be introduced like in every other substantial enterprise.

²³ Information obtained from the Maori Land Court.

²⁴ Jim Gray "Trouble Upcountry: The Thorny Issue of Maori Land Management" (2001) 80 Chartered Accountants J NZ 31, 32.

At the present time the Maori Land Court has the task of overseeing the management and utilisation of Maori land. The Maori Land Act 1993 requires the Court, in deciding whether to appoint any individual or body to be a trustee of a trust, to have regard to the ability, experience and knowledge of the individual or body and to not appoint an individual or a body unless it is satisfied that the appointment of that individual or body would be broadly acceptable to the beneficiaries.²⁵ Practitioners criticise the Maori Land Court for paying too much attention to the broad acceptance of representatives and too little attention to their economic capabilities.²⁶ This practice basically means that if the majority of beneficiaries want to nominate people who are not up to the economic task, they can do so.

This is a problem that Maori can address and solve within the tribal structure by making a decision to aim at maximising the returns from Maori owned land. If this is wanted then key positions in the management will have to be based on expertise. But is profit what is actually wanted by the majority of owners? Within the tribes the differences between the traditional Maori view of land utilisation and the economic view of land as a resource to be used efficiently need to be reconciled. The constraints of these differences need to be pointed out and addressed in order to enhance economic efficiency within these constraints.²⁷ In this process, the prospect of providing employment for tribe members through an enhanced commercial utilisation of land could play an important role. Once a decision in favour of commercial utilisation of land is made, the next issue will be to choose the appropriate corporate structure for the particular enterprise.

Finally, many problems Maori face in leading business with their land are not unusual ones. The primary cause of business failure in general is bad management and poor corporate governance with a lack of financial skills at board level or accurate accounting information.²⁸

²⁵ Maori Land Act 1993, s 222(2).

²⁶ Gray, above, 32.

²⁷ Bill Maughan and Tanira Kingi "Te Ture Whenua Maori: Retention and Development" (1998) NZLJ 27.

²⁸ Mike Ross *Corporate Reconstructions* (CCH New Zealand Limited, Auckland, 1999) 2.

IV MAORI BUSINESS ORGANISATIONS

What is the right type of corporate structure for the commercial land asset management of Maori tribes? In general, different legal structures are available for different legal purposes, whether for commercial trading purposes (for example companies), non-commercial administrative purposes (for example incorporated societies), or asset protection purposes (for example trusts).²⁹ Maori land, however, has characteristics that make the corporate structuring of its management differ from other asset management projects.

The improvement of Maori land utilisation is of interest not only for Maori owners. There is a public interest involved as well. Better land utilisation leads to greater employment, more revenues for the New Zealand state and greater exports, especially in the agricultural sector. The task is to find appropriate business structures for the owners to achieve better utilisation.

The commercial organisation of owners of Maori land is a measure for two principal and important purposes. The first purpose is to enable Maori land to be more effectively utilised and administered through nominated managers of incorporated bodies and, secondly, to overcome what probably is the most important characteristic of Maori land, the problem of multiplicity of ownership of Maori land.³⁰ The fact that Maori assets in general tend to be owned by many individuals leads to severe problems in the utilisation of assets. For example, ownership structures often lack adequate processes for decision-making. Internal conflicts frequently occur between owners, especially between more traditionally and more commercially orientated parts. Moreover, large groups of owners often do not provide appropriate representation to the public and would-be business partners and investors.

Another unique characteristic is the multiplicity of functions that assets have in Maori societies. It is not only the commercial function that plays a role. Assets

²⁹ John Walters, Matanuku Mahuika and Grant Powell "What Ownership Structure is Best for Settlement and Development" (Maori Business Development Master Course, Auckland, 20 June 2000) 1.

³⁰ Norman Smith *Maori Land Corporations* (A H & A W Reed, Wellington, 1962) preface.

have a social, a cultural and a representative role as well. These characteristics make it very difficult to find the right type of business organisation that best fit the needs of a particular asset development project. This chapter will describe the most commonly used corporate structures for Maori land management. It will describe their legal characteristics in regard to decision-making and representation, accountability of managers, distribution of benefits to Maori landowners and share alienation possibilities, and it will comment on each structure's value for Maori asset management.

A *Maori Incorporations*

The oldest corporate structure designed for the special demands of Maori land management is the Maori incorporation.³¹ The incorporation was regarded as a compromise between the retention of Maori land in Maori ownership and the providing of a corporate structure to enable effective management and the raising of business finance.³²

1 *Nature*

If the Maori Land Court considers it to be in the interest of the owners of any area of Maori freehold land it can, on application of landowners or by their consent, make an order incorporating the owners as a Maori incorporation with its own legal personality.³³ The order of incorporation fixes the total number of shares relating to the assets' value and the total number of shares to be allocated among the shareholders.

Incorporations treat landowners similar to shareholders in a body corporate. The asset owners become shareholders in the incorporation and the incorporation becomes the owner of the assets. The shareholders nominate a committee of

³¹ Provisions regarding Maori Incorporations were introduced by the Native Land Court Act 1894. They are now covered by part XIII of the Maori Land Act 1993.

³² Russell Feist, Gina Rudland and Hon Judge Smith "Maori Land – What Every Practitioner Needs to Know" (New Zealand Law Society Seminar, Wellington, May 1997) 33.

³³ Maori Land Act 1993, s 247(1).

management to administer the land block and receive a dividend according to their share. After the incorporation order of the Maori Land Court the land block is vested in the incorporation as a legal estate.³⁴ The incorporation holds the land on trust for the owners in accordance with their interests in the land. A Maori incorporation is bound by every act of its management committee and no person dealing with the incorporation needs to be concerned whether the committee is authorised by a resolution of the shareholders.³⁵ There is no personal liability of the shareholders in respect of debts or liabilities of or claims made upon the incorporation.³⁶ The concept of limited liability protects the shareholders from the actions of the management. The incorporation is to have a constitution that governs its internal management.³⁷ General meetings of shareholders are held regularly.³⁸

The incorporation may transfer Maori freehold land that is vested in it. It can do so by way of sale or gift, or it can grant a lease, licence, or forestry right (for a term of up to 21 years). Sale or gift of the incorporation's assets require an authorising resolution of more than 75 per cent of the total shares and the confirmation of the Maori Land Court.³⁹

2 Management

A Maori incorporation acts by and through its committee of management, appointed by the shareholders in the incorporation's inaugural annual general meeting. The management members hold office in accordance with the incorporation's constitution. These members are responsible for the proper administration and management of the incorporation's affairs.⁴⁰ The managers can be external

³⁴ Maori Land Act 1993, s 250(2).

³⁵ Maori Land Act 1993, s 271(1) and (2).

³⁶ Maori Land Act 1993, s 262.

³⁷ Maori Land Act 1993, s 268(1). The constitution must be in a form as prescribed by the Maori Incorporations Constitution Regulations 1994.

³⁸ Maori Land Act 1993, s 275 (1).

³⁹ Maori Land Act 1993, s 254.

⁴⁰ Maori Land Act 1993, s 269(2) and (3).

specialists and do not have to be shareholders in the incorporation.⁴¹ The general meeting of shareholders can authorise them to receive fees in respect of their services.⁴²

3 *Accountability*

The Maori incorporation's management committee is obliged to keep proper books of account. It produces a profit and loss account for the incorporation. Required is an auditor's report, a report on the state of the incorporation's affairs, a statement on the estimated market value of the incorporation's assets and a statement of liabilities.⁴³ If necessary, the Maori Land Court has the power to remove members of the committee from office and to appoint additional members to the management.⁴⁴ As a less stringent means it may appoint examining officers to investigate an incorporation's affairs and give directions in regard to the incorporation's business conduct.⁴⁵

4 *Distribution of Benefits*

Maori incorporations distribute accumulated profits and realised capital profits to the shareholders by way of dividends according to their share in the incorporation. Due to the little shares many Maori have in land assets dividends often remain unclaimed. These unclaimed dividends become the absolute property of the incorporation.⁴⁶

⁴¹ Any person can become member of the committee of management except for persons subject to compulsory treatment under the Mental Health Act, bankrupts who have not obtained an order of discharge and persons serving a sentence for an offence punishable by six months or more, Maori Land Act 1993, s 272(1) and (2).

⁴² Maori Land Act 1993, s 274.

⁴³ Maori Land Act 1993, s 276(1)-(4).

⁴⁴ Maori Land Act 1993, s 280(7)(a) and (b).

⁴⁵ Maori Land Act 1993, s 280(1) and (7)(d).

⁴⁶ Maori Land Act 1993, s 267(5) and (6).

5 Share Alienation

Shares of a Maori incorporation may be transferred as long as the transferor is the registered holder of the shares. However, the transfer needs to comply with part VII of the Maori Land Act 1993 and its strict provisions on the sale of Maori land.⁴⁷ Most importantly, the shares must be offered to the preferred classes of alienees.⁴⁸ This is to ensure that shares in the incorporation remain in the hands of the tribal descendants of the transferor.⁴⁹

6 Advantages / Disadvantages

The Maori Land Act 1993 further increased objects and powers of Maori incorporations that used to be limited by part IV of the Maori Affairs Amendment Act 1967. Now incorporations have the power to do what all bodies corporate lawfully can with all the powers conferred on them under the Act. This has facilitated Maori land management and development for the benefit of the shareholders.⁵⁰

A Maori incorporation is a legal entity and therefore is able to perform all the functions of a person, such as holding, buying and selling of property. It can sue and be sued. It solves some of the problems in dealing with Maori land by its governance through a management committee making business decisions representing the multiplicity of owners. The former owners still have a say in the decision making in regard to the asset management by participating in the regularly held meetings and by nominating managers. The management is supervised by the Maori Land Court and is bound by the strict provisions of the Maori Land Act 1993 and the incorporation's constitution, resulting in greater accountability.

⁴⁷ Maori Land Act 1993, s 264(2)(a) and (b).

⁴⁸ Maori Land Act 1993, s 147(2) and s 4.

⁴⁹ Shares may be purchased by the incorporation itself in case no member of the preferred classes of alienees is willing to buy them. All transfers are registered in the incorporation's share register.

⁵⁰ Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith *Maori Land Law* (Butterworths, Wellington, 1999) 194.

Where an incorporation acquires land, it can determine whether this land should be used as investment land or whether to apply to the Maori Land Court for an order declaring it part of the incorporation. When treated as an investment, the land is not subject to the Maori Land Act 1993 and the incorporation can manage it in any manner.⁵¹ This means that the investment land is not subject to the alienation provisions of the Act regarding compliance with preferred classes of alienees and Court confirmations. Furthermore, the investment land is vested solely in the incorporation, not in the shareholders. This provides possibilities to enhance the commercial activities of a Maori incorporation beyond the tribe's or subtribe's traditional assets. Additionally, it may provide investors with land security for their credits without facing the disadvantages of Maori freehold land.

A frequent criticism of incorporations used to be that they turned Maori landowners into no more than shareholders.⁵² And previously, under the Maori Affairs Amendment Act 1967, land that was vested in a Maori incorporation ceased to be Maori freehold land.⁵³ However, since the enactment of the Maori Land Act 1993 landowners retain their beneficial interest in the land and their shares in an incorporation are deemed for all purposes to be interests in Maori freehold land. Unless it is expressly provided, all the provisions of the Maori Land Act 1993 relating to the alienation of or succession to interests in Maori freehold land apply to the shares of Maori incorporations as well.⁵⁴ However, with this change of the ownership structure, managers acting on behalf of an incorporation must be regarded as having a fiduciary-like obligation to the shareholders, which imposes a duty of care in regard to the way in which the management conducts the incorporation's business.⁵⁵

The Maori Land Court's right to supervise the major decisions of the management can be a disadvantage in commercial terms. It might slow down the process of organisational decision-making and scare away would-be business partners and investors. Moreover, the strict provisions of the controlling Act, especially

⁵¹ Maori Land Act 1993, s 256(1) and (4).

⁵² A L Mikaere "Maori Land" (1993) NZ Recent LR 312.

⁵³ Maori Affairs Amendment Act 1967, s 31(3).

⁵⁴ Maori Land Act 1993, s 260.

its limitations on the ability to alienate Maori freehold land, hamper the incorporation's commercial flexibility. Generally, banks are reluctant to accept security over Maori freehold land. Additionally, due to the historic origins of many incorporation orders of the Maori Land Court, these orders often contain restrictions regarding the powers and objects given by section 253 of the Maori Land Act 1993, resulting in legal uncertainty in terms of the incorporation's capacity to pursue commercial activities.

Another disadvantage is the unclear position of creditors in case of a winding up of an incorporation. For example, it is not certain to what degree creditors can rely on the Maori Land Court in terms of approvals to mortgagee sales. The Maori Land Act 1993 basically sets out the powers of a liquidator but it remains silent on the rights of creditors in the event of a winding up.⁵⁶

Maori incorporations lack some of the flexibility of other legal bodies. Whereas other kinds of organisations would be able to be governed by their own rules, a Maori incorporation underlies the additional provisions of the Maori Incorporations Constitution Regulations 1994.⁵⁷ Additionally, it is still often doubted that the ownership structure of a Maori incorporation is a truly representative one for a whole tribe or subtribe. Moreover, the Maori incorporation does not seem to be legally constrained in regard to the delivery of benefits to its shareholders.

B Maori Land Trusts – Ahu Whenua Trusts

Another vehicle for Maori business activities is the trust. Part XII of the Maori Land Act 1993 includes five types of trusts relating to Maori land.⁵⁸ The ahu

⁵⁵ Russell Feist, Gina Rudland and Hon Judge Smith "Maori Land – What Every Practitioner Needs to Know" (New Zealand Law Society Seminar, Wellington, May 1997) 37.

⁵⁶ Feist, Rudland and Hon Judge Smith, above, 42.

⁵⁷ A notable provision of the Maori Incorporations Constitution Regulations 1994 is regulation 27, under which shareholders by special resolution may fix a specified number of shares as a "minimum share unit" that they are not allowed to cut into. Such provisions prevent further increase of owners (shareholders), but hamper trade at the same time.

⁵⁸ Although these trusts mainly relate to Maori land, general land and shares in a Maori incorporation can also be subject of some Maori trusts. The Maori Land Act 1993 contains provisions

whenua trust is designed to promote the use and administration of land assets.⁵⁹ Secondly, whenua topu trusts are tribe based trusts, designed to administer land in the interest of a tribe or subtribe and are used for receiving Crown land as part of a settlement. The third form is the kai tiaki trust, relating to individuals unable to manage their affairs. Fourthly, the whanau trust is oriented to the wider family to bring together its members' land interests for the benefit of the family and its descendants. The fifth trust form is the putea trust, allowing owners of small and uneconomical land shares to pool their interests together.⁶⁰

A different option available for Maori is to form their own structure through a special Act of Parliament, resulting in a statutory body. This way a Maori tribe may draft the provisions establishing and governing its own trust. This Bill would be debated in Parliament later enacting a statutory trust. This is a possibility to express a tribe's individuality with special provisions appropriate to a tribe's or subtribe's particular demands. However, the Bill is subject to public and political scrutiny and time and costs involved are considerable, especially for amendments that might be required. These disadvantages make a statutory trust a less desirable structure for business activities.

This chapter will focus on the most flexible and therefore most common Maori land trust used for commercial purposes, the ahu whenua trust. The Maori Land Court has exclusive jurisdiction to create ahu whenua trusts.⁶¹ The Court must be satisfied that the creation of the trust will promote and facilitate the use and administration of the land assets in the interest of the persons beneficially entitled to the land.⁶²

that only apply to Maori trusts, but the provisions of the Trustee Act 1956 and the general law relating to trusts also apply to them, unless they are clearly excluded or inconsistent with the provisions of the Maori Land Act 1993.

⁵⁹ The ahu whenua trust is the equivalent of the s 438 trust under the Maori Affairs Act 1953.

⁶⁰ John Grant, Ngatata Love "A Guide to Maori Land Trusts" (joint publication by the Department for Courts and Te Puni Kokiri, June 1997) 1.

⁶¹ Maori Land Act 1993, s 211(1).

⁶² Maori Land Act 1993, s 215(2). This is a move away from the Maori Affairs Act 1953, where one of the criteria for creating trusts was to facilitate the alienation of land.

1 *Nature*

In general, a trust is an equitable obligation binding the trustee, on whom the trust assets are settled, to deal with the property for the benefit of persons, the beneficiaries, of whom the trustee can be one. The trustee is the legal owner of the assets whereas the beneficiaries enjoy the assets' profits. The trustee can deal with the business assets only in compliance with the terms of the trust.⁶³ The beneficiaries may enforce the obligation.

The owners of a property can decide to set up a trust to administer their property interests by nominating trustees. They need to agree to the terms of a draft trust order setting out the trustees' powers, rights and obligations. Then the owners apply to the Maori Land Court to set up the trust.⁶⁴ The trust is created by a constituting order of the Court. In another order it declares the terms of the ahu whenua trust. The legal title to the land and the other assets of the trust are now vested in the appointed trustees. They hold and manage the assets on behalf of the beneficiaries, who have an undivided beneficial interest in the trust's assets as tenants in common.⁶⁵

2 *Management*

The trust is managed by the trustees. The responsible trustees carry out the terms of the trust, administer, preserve and manage the asset business and collect and distribute the income of the trust to the beneficiaries.⁶⁶ Anyone can be nominated to become a trustee, either individuals or corporate bodies.⁶⁷ However, the Maori Land Court must be satisfied that the trustee would be broadly acceptable

⁶³ Susan Watson *The Law of Business Organisations* (3 ed, Palatine Press, Auckland, 1999) 679.

⁶⁴ John Grant, Ngatata Love "A Guide to Maori Land Trusts" (joint publication by the Department for Courts and Te Puni Kokiri, June 1997) 3. Applications cannot only be made by the owners. Any person claiming to have an interest in the creation of the trust can apply to the Maori Land Court, Maori Land Act 1993, s 37(1)(a).

⁶⁵ Russell Feist, Gina Rudland and Hon Judge Smith "Maori Land – What Every Practitioner Needs to Know" (New Zealand Law Society Seminar, Wellington, May 1997) 27.

⁶⁶ Maori Land Act 1993, s 223.

⁶⁷ The Court may appoint as trustees an individual, a Maori Trust Board, a Maori incorporation, the Maori Trustee, the Public Trustee, or a trustee company within the meaning of the Trustee Companies Act 1967, Maori Land Act 1993 s 222(1).

to the beneficiaries. In appointing trustees, the Court shall have regard to the ability, experience and knowledge of the individual or body.⁶⁸ The trustees do not have to be landowners.

Additionally, it is possible to appoint advisory and custodian trustees. An advisory trustee is appointed to advise the responsible trustee on the administration of the trust generally or on particular matters.⁶⁹ The appointment of advisory trustees is common when the responsible trustee is a professional one, meaning not one of the landowners or a member of the tribe or subtribe. The advisory trustees then work as a link between the trust management and the beneficial owners. The provisions relating to advisory trustees are included in the Maori Land Act 1993 in section 224. They may be consulted by the responsible trustees on any matter relating to the trust. When following their advice the responsible trustees are not liable for the actions relying on that advice. Where the responsible trustees see a conflict between the advice and the terms of the trust or the law or when the advisory trustees are not unanimous in their advice, the responsible trustees may apply to the Maori Land Court for directions binding on both the responsible and the advisory trustees.

A custodian trustee is a trustee in whom trust property is vested and who is not responsible for the administration of the trust.⁷⁰ The custodian trustee's function is to hold the trust property, to invest trust funds and to dispose of assets as the responsible trustees direct.⁷¹ The custodian trustee is not liable for actions on the responsible trustees' direction and it is possible to apply to the Maori Land Court for directions in case of conflicts with trust terms or the law in general.⁷²

The responsible trustees have all powers necessary for the effective management of the trust and the achievement of its purposes, subject to express limitations imposed by the Maori Land Court.⁷³ Thus the powers of the trustees depend on the terms of the particular trust. Recently though, trust orders give the

⁶⁸ Maori Land Act 1993, s 222(2)(a) and (b).

⁶⁹ Maori Land Act 1993, s 210.

⁷⁰ Maori Land Act 1993, s 210.

⁷¹ Maori Land Act 1993, s 225(c).

⁷² Maori Land Act 1993, s 225(f).

trustees most of a natural owner's wide powers. This usually excludes the power to sell land.⁷⁴ No trustee is allowed to alienate Maori land without the consent of 75 per cent of the owners,⁷⁵ and all land alienations must be confirmed by the Maori Land Court.

As a general rule, trustees are not allowed to delegate their duties on others. But the particular trust order may authorise the trustees to a certain degree of delegation. Especially commercially orientated ahu whenua trusts occasionally require the assistance of accountants, business advisors and lawyers.

Trustees usually do not receive remuneration from the trust assets unless the terms of the trust order permit payment. For ahu whenua trusts this is normally the case. There are special provisions for the remuneration of advisory and custodian trustees as well as the Maori Trustee.⁷⁶

3 Accountability

Trustees are bound by the Maori Land Act 1993 as well as the Trustee Act 1956. Their key duty is to maximise the assets and to minimise its liabilities. Beneficiaries have the right to hold the trustees personally liable for financial losses brought about by their mismanagement. They can submit cases either to the Maori Land Court or to the High Court.⁷⁷

Maori land trusts are subject to regular reviews by the Maori Land Court, which has the possibility to investigate a trust, enforce or vary the terms of the trust, replace trustees, or even terminate the trust.⁷⁸ Such actions can be brought forward by beneficial owners applying to the Court.

⁷³ Maori Land Act 1993, s 226(2).

⁷⁴ Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith *Maori Land Law* (Butterworths, Wellington, 1999) 151.

⁷⁵ Maori Land Act 1993, s 228(1).

⁷⁶ Maori Land Act 1993, s 224(h), s 225(k) and Maori Trustee Act 1953, s 48.

⁷⁷ John Grant, Ngatata Love "A Guide to Maori Land Trusts" (joint publication by the Department for Courts and Te Puni Kokiri, June 1997) 6.

The trust order of a trust with substantial assets usually contains the obligation of the trustees to keep proper accounts. The beneficial owners of a trust are entitled to receive full information about the trust's affairs. It is the trustees' duty to provide this information on request.

As a general rule, trustees must act jointly. In the exercise of powers by trustees though, decisions can be made by a majority of the trustees. They share responsibility for wrongdoings and all of them are accountable to the beneficiaries. However, a trustee can absolve himself from personal liability arising out of a particular majority decision of the trustees by dissenting in writing before the decision is implemented.⁷⁹

4 *Distribution of Benefits*

Ahu whenua trusts are flexible in the delivery of income to its beneficiaries. The trustees make distributions out of the trust's capital or income according to the provisions of the particular trust deed. Due to the continuing fragmentation of ownership often large amounts of dividends remain unclaimed.

5 *Share Alienation*

The beneficiaries do not own a certain amount of shares in the trust assets. With the setting up of the trust the rights of the owners become subject to the rights of the trustees. Still, the owners remain beneficial owners of interests as tenants in common. Within the limits of the Maori Land Act 1993 regarding the alienation of Maori land these interests can be alienated without impediment and succession to individual shares in a land block continues.

⁷⁸ Maori Land Act 1993, s 240, s 241 and s 244.

⁷⁹ Maori Land Act 1993, s 227(1) and (6).

One of the main advantages of using the ahu whenua trust structure for business activities is its flexibility. It allows the trustees to conduct business in a professional way. At the same time it is able to provide for the cultural demands of the beneficiaries.

The trustees may acquire additional land and then have the choice to determine this land as investment land or as part of the trust. Should the land become part of the trust, it becomes Maori freehold land and it is held on trust for the beneficiaries in proportion to their interests in the trust's other assets. Should it be held as investment land, none of the Maori Land Act 1993 provisions on alienations apply.⁸⁰ This possibility gives ahu whenua trusts more flexibility, especially in raising finance as venture capital.

A problem in using a trust as a corporate structure for business activities is that in the traditional Maori understanding of dealing with tribal land, trustees are not supposed to personally benefit from being a trustee. They may only be entitled to payment of their reasonable expenses that incur in the execution of their role.⁸¹ At this point the Maori Land Court is reluctant to set fees at a commercially competitive rate. This does not attract commercial experts to act as managing trustees. Thus, although the trustees could be professional ones, they are often not. They are usually private trustees, meaning landowners or persons known to the owners and members of the same tribe. For those people it is often hard to resist pressure exerted on them by major owners within the tribal relationship. At this point trustees must remember that they represent all owners of the land and that the major aim should be to maximise the assets.

Another problem is that many business advisers are unfamiliar with the use of a trust as a business structure. The amount of duties imposed on trustees discourages many people from taking over this position. And there are no standard busi-

⁸⁰ Maori Land Act 1993, s 243(2) and (7).

⁸¹ John Grant, Ngatata Love "A Guide to Maori Land Trusts" (joint publication by the Department for Courts and Te Puni Kokiri, June 1997) 8.

ness trusts comparable to standard-form constitutions used for other corporate structures such as companies.⁸² The conservative view of the powers of trustees also creates uncertainty for third parties entering into commercial arrangements with trusts. And because the powers of the trustees are contained in the trust deed, they are not transparent and readily available.

The relationship between the responsible trustees and the advisory trustees does not seem to be entirely clear. Especially their liabilities, both the one of responsible trustees taking advice from advisory trustees and the one of advisory trustees in general, have not been tested in the courts.⁸³

A time consuming and costly problem in land asset management through trusts is that trustees need to be replaced from time to time. Whenever this is the case all property needs to be physically transferred in terms of certificates of title, contractual obligations and similar rights and obligations. Additionally, as the trust exists the fragmentation of the beneficial ownership continues.

In practice it is difficult to terminate Maori trusts. They are terminated by orders of the Maori Land Court, but the Court is reluctant to do so unless it is completely convinced that the termination is in the interest of the owners. The Maori Land Court Rules contain detailed provisions for the application to create a trust but remains silent on the application to its termination.⁸⁴

A major disadvantage for the commercial management of Maori land through ahu whenua trusts is, again, the stringency of the rules of the Maori Land Act 1993 regarding the alienation of Maori land blocks and the possibilities of the Maori Land Court to intervene. Additionally, the high level of the beneficiary participation can make a trust's business operations cumbersome.

⁸² Boast, Erueti, McPhail and Smith, above, 153.

⁸³ Incorporated Societies Act 1908, s 4(1) Members of an incorporated society may be named in the instrument of incorporation. Incorporated Societies Act 1908, s 20.

⁸⁴ Susan Watson *The Law of Business Organisations* (3 ed, Palatine Press, Auckland, 1999) 679.

⁸⁵ Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith *Maori Land Law* (Butterworths, Wellington, 1999) 156.

C *Incorporated Societies*

A corporate structure not covered by the special provisions of the Maori Land Act 1993 is the incorporated society. Although the incorporated society falls outside the reach of Maori land legislation, it is not an uncommon structure for Maori landowners. The reason for this is that Maori tribes often use the incorporated society as a representation vehicle for Treaty of Waitangi claims. Once land is returned by the Crown the question arises whether or not this structure is capable of providing an appropriate framework for business activities with the tribes' land.

1 *Nature*

An incorporated society is a group of at least 15 persons associated for a lawful purpose that is not pecuniary gain, which has been registered under the Incorporated Societies Act 1908.⁸⁵ With consent of the majority of its members a society can apply to the registrar of incorporated societies to become incorporated. The registrar issues a certificate of incorporation under the Incorporated Societies Act 1908 and registers the society's rules.⁸⁶ The Act and the rules govern the incorporated society. The rules constitute a contract between all members and the society itself.⁸⁷ They contain provisions on the society's objects, the way in which persons become and cease to be members, the way in which the rules may be altered, the appointment of the society's officers, the control and investment of the society's funds, the procedures for the disposition of the society's property, its powers to borrow money and other provisions not inconsistent with the Incorporated Societies Act 1908 and that members or the registrar may require.⁸⁸

⁸⁴ Boast, Erueti, McPhail and Smith, above, 153.

⁸⁵ Incorporated Societies Act 1908, s 4(1). Members of an incorporated society may be natural persons as well as corporate bodies, Incorporated Societies Act 1908, s 29.

⁸⁶ Incorporated Societies Act 1908, s 8(b) and (c).

⁸⁷ T F Paul *The Law and Administration of Incorporated Societies* (2 ed, Butterworths, Wellington, 1986) 27.

⁸⁸ Incorporated Societies Act 1908, s 6.

From the issue of the certificate on the incorporated society is a legal entity with its own legal personality. The incorporated society status provides for perpetual succession and the society is capable of exercising all rights and functions of a body corporate and of holding land.⁸⁹ Generally, the membership of a society does not impose any liability on the members in respect of contracts, debts, or other obligations made by the society.⁹⁰

An incorporated society owns the legal titles to its assets. The membership of a society does not confer any rights, title, or interest in the society's property upon the members.⁹¹ However, members have the right to participate in the society's affairs. This includes the right to vote at society meetings. The members' rights are outlined in the society's rules. The rules can provide for the assets to go back to the members in case of the winding up of a society.

No incorporated society is allowed to enter into transactions that would involve any pecuniary gain for its members.⁹² However, the society itself may make pecuniary gains provided that the monetary profits are neither divided among nor received by its members.⁹³

2 Management

The officers of a society manage the society's affairs. But there are no particular provisions for the management of an incorporated society in the Incorporated Societies Act 1908. The members can freely set out the rules of the society's management structure, determining who may be officer and how officers are appointed and removed.

⁸⁹ Incorporated Societies Act 1908, s 10.

⁹⁰ Incorporated Societies Act 1908, s 13. Where debts or obligations incur from operations aiming at or involving financial gain to members, those members may be personally liable.

⁹¹ Incorporated Societies Act 1908, s 14.

⁹² Incorporated Societies Act 1908, s 4(1).

⁹³ T F Paul *The Law and Administration of Incorporated Societies* (2 ed, Butterworths, Wellington, 1986) 4.

3 Accountability

The Incorporated Societies Act 1908 does not contain any provisions regarding the accountability of officers, secretaries, or other members of a society's management. The members of a society may implement security measures in the rules as they think is appropriate. Thus, the level of regulation and accountability can be set by the society's members.

4 Distribution of Benefits

Incorporated societies are not allowed to make cash payments such as dividends to their members. However, there are possibilities to make indirect payments. For example, a society may grant social benefits such as scholarships or health benefits.

Members have no interests in the property of their society. But members may use the society's assets in conjunction with the other members of the society.⁹⁴

5 Share Alienation

There is no possibility to alienate shares of an incorporated society. The society is not divided into shares, it rather consists of its members. There is no succession of membership in an incorporated society and there is no right to transfer membership of an incorporated society, although this could be provided for in the society's rules. The rules usually contain provisions on how membership can be obtained. Additional members may be admitted without having to issue new shares and the rules may restrict persons who can become members. Membership ceases on death of the member or on resignation.

⁹⁴ Paul, above, 43.

6 Advantages / Disadvantages of a tribe or subtribe can be convinced to do an

Incorporated societies are very flexible in terms of their organisational structure. They are free to set up rules concerning representation, management and the management's legal capacities and powers. This is especially useful where the development focus of an incorporated society consisting of members of a Maori tribe aims more on cultural and social objectives.

The powers and capacities which may be set up in a society's rules regarding

An incorporated society is simple, easy and inexpensive to incorporate, and there are tax exemption possibilities.⁹⁵ As a safety measure for the societies' members there is a possibility to involve the registrar of incorporated societies in respect of certain breaches of the Incorporated Societies Act 1908 and the incorporation rules.

A corporate body is regarded as three subscribers or members of an incorporated society.⁹⁶ Accordingly, an incorporated society could be used as a vehicle to pull together a number of land holding blocks or land trusts or other Maori organisations for common purposes. The society could then itself own further subsidiary organisations.

The disadvantages mentioned above, especially the prohibition of the pursuit

A disadvantage of an incorporated society as a corporate structure for Maori land assets is the role of the society's members. The members do not have legal or equitable rights in the society's property. All they have is the right to participate in the society's activities. Having in mind the strong connection between Maori people and their land this is an unfavourable situation.

D Companies

The ownership structure of an incorporated society is not always a truly representative one for a Maori tribe or subtribe as a whole. To become a registered member of an incorporated society each person needs to sign the society's forms. By signing the membership form the person agrees to be bound by the society's

Over to members in Maori land related matters

⁹⁵ Income Tax Act 1976, s 61(34). As long as the incorporated society does not carry on business for its members' profit and its rules contain a provision that prohibits distributions to them, a tax exemption is available of up to \$500 of an incorporated society's income. Remaining income is taxed at the company tax rate of 33 per cent.

⁹⁶ Incorporated Societies Act 1908, s 31.

rules. It is not likely that all members of a tribe or subtribe can be convinced to do so.

Additionally, flexibility regarding the internal rules of a business organisation may result easily in legal uncertainty for third parties. Undefined legal capacities and powers deter investors and make it hard to attract venture capital and loans.

The powers and capacities which may be set up in a society's rules regarding benefits to its members are restricted in that no members are to receive any monetary profits. Members are only allowed to receive a pecuniary gain in the case of a winding up of the society. For a Maori tribe having just made a decision in favour of a commercial utilisation of its assets this is an unfavourable legal framework, since the tribe's members would normally expect a returning profit from the business activities with their land. Additionally, a danger lies in the way societies often try to evade the prohibition of payments to members. The granting of social benefits such as scholarships or health benefits is hard to distinguish from granting prohibited payments and thus may contravene the Incorporated Societies Act 1908.

The disadvantages mentioned above, especially the prohibition of the pursuit of pecuniary gain, result in a lack of commerciality of incorporated societies. This corporate structure seems to be less capable of providing a legal framework for commercial activities.

D Companies

A promising corporate structure also outside the reach of the Maori Land Act 1993 is the company. This body is getting more and more common to be used for Maori business activities since it reduces the possibilities of the Maori Land Court to intervene to Maori land related matters.

1 Nature

A company is a group of individuals associated together for the purposes of trade or business, who are deemed in law to be a single legal entity.⁹⁷ Companies are regulated by a comprehensive code, the Companies Act 1993, which deals with a wide range of matters including capacity and powers, constitutions, shares and shareholders, administration, accounting and creditor arrangements.

To set up a company, the promoters apply for registration to the Companies Office.⁹⁸ In return they receive a certificate of incorporation. From this date on the company is created in law.⁹⁹ It has a legal personality in itself, thus can sue and be sued, hold property, enter into contracts and incur liability. The corporate entity is legally distinct from the composing individuals. Associated with this is the idea of limited liability, which means that the shareholders' liability is limited to the value of their shareholdings in the company. Apart from that there is no personal liability of the shareholders. The company is registered (or reregistered) under the Companies Act 1993.

Companies are owned by their shareholders, who usually contribute some form of capital for their shares, which they hold as personal property.¹⁰⁰ A share confers on the holder the right to one vote in a meeting of the company on any resolution, the right to an equal share in dividends authorised by the board of directors and the right to an equal share in the distribution of the surplus assets of the company.¹⁰¹ In shareholders' meetings they can act together as the company.¹⁰² Thus, shares generally serve two primary functions. The first function, to raise capital, does not play a major role when the company is used to manage Maori assets. However, the second function, the use of shares as a control device, plays an important role.

⁹⁷ Susan Watson *The Law of Business Organisations* (3 ed, Palatine Press, Auckland, 1999) 101.

⁹⁸ A company must have at least a name, at least one shareholder, at least one director and a registered office and address.

⁹⁹ Companies Act 1993, s 14(b).

¹⁰⁰ Companies Act 1993, s 35.

¹⁰¹ Companies Act 1993, s 36(1).

¹⁰² Companies Act 1993, s 107.

A company may have a constitution, for which there is no standard form. However, it does not need to have one, if the shareholders do not desire it. In this case the company is governed by the Companies Act 1993 alone. The Act provides wide powers to the actions of a company. It has full capacity to undertake any business activity and to enter into any transaction. For these purposes it has all rights, powers and privileges.¹⁰³

2 Management

The company's affairs are run by the board of directors. The directors receive payments by way of director's fees or under the terms of their employment contracts as remuneration. A company must have at least one director, who must be a natural person. Minors, undischarged bankrupts and other disqualified persons are excluded from becoming directors.¹⁰⁴ The directors are appointed and removed by resolutions of the shareholders.¹⁰⁵

The directors' powers depend on the company's constitution and the Companies Act 1993. The board of directors has all powers necessary to manage the business and affairs of the company.¹⁰⁶ However, major transactions such as the acquisition or disposal of assets the value of which is more than half the value of the company's assets, are subject to special resolutions.¹⁰⁷ Although the directors are primarily responsible for all business affairs, they may delegate their powers to other persons.

3 Accountability

According to the wide powers directors have they owe onerous duties to the company and its shareholders, which enables shareholders to retain some control

¹⁰³ Companies Act 1993, s 16(1)(a) and (b).

¹⁰⁴ Companies Act 1993, s 150 and s 151.

¹⁰⁵ Companies Act 1993, s 155(1) and s 156(1).

¹⁰⁶ Companies Act 1993, s 128(2).

¹⁰⁷ Companies Act 1993, s 129(1) and (2).

over the company's affairs. The board of directors is accountable to the shareholders for the management of the company. When acting as directors they must act in good faith and in what they believe to be the best interests of the company.¹⁰⁸ They have a duty not to place themselves in a position of conflict and to disclose any interest they may have in transactions with the company. A director must not agree to the company acting in a way that contravenes the Company Act 1993 or the company's constitution. Directors must not create substantial risks of loss to the company's creditors. They are obliged to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances.¹⁰⁹

6 Advantages / Disadvantages

Shareholders may invoke different types of remedies in case they deem their rights or the directors' duties towards the company to be in breach. For example, they have the right to make written requests to inspect the company's records and to obtain information about the company's affairs. Shareholders may also apply to the High Court for an order to prevent directors from taking actions that would contravene the Company's constitution or statutory obligations, or to compel the directors to take an action required.¹¹⁰

4 Distribution of Benefits

The main objective of a company is to yield profits to its shareholders. The shareholders receive profits of the company as distributions, usually made as cash payments. These dividends vary according to the commercial performance of the company in the particular year.¹¹¹ However, the structure of a company allows it to create other means in order to deliver benefits to its shareholders.

¹⁰⁸ Companies Act 1993, s 131(1).

¹⁰⁹ Companies Act 1993, s 134, s 135 and s 137.

¹¹⁰ The possibilities of shareholders to take personal actions against directors are described in section 169 of the Companies Act 1993.

¹¹¹ Susan Watson *The Law of Business Organisations* (3 ed, Palatine Press, Auckland, 1999) 103.

5 *Share Alienation*

In general, shares in companies are freely transferable subject to limitations in the company's constitution.¹¹² Especially in small companies it is common to impose restrictions on share transfers, usually to other shareholders or to the company itself. For companies managing Maori land assets the transfer of shares may be restricted so that only Maori, a Maori trust or a Maori incorporation holding land in the tribal region may acquire shares.

6 *Advantages / Disadvantages*

The requirement that the owners hold shares in the company is seen to make the company structure inappropriate for Treaty settlements. Furthermore, companies are comparably expensive to set up and to maintain. Thus they are an appropriate corporate vehicle rather for large land asset management projects.

A company is a conventional business vehicle not dealt with in the Maori Land Act 1993. Thus it is able to operate largely outside the reach of the Maori Land Court and the provisions of the Act. Commercial operations undertaken through ahu whenua trusts or Maori incorporations come under the direct supervision of the Maori Land Court to an extent not faced by conventional businesses. Under a company structure, matters directly related to Maori land remain subject to the land provisions of the Act. But there are no intervention possibilities of the Court concerning the appointment of managers or the supervision of business activities, as there are in regard to Maori incorporations or ahu whenua trusts, for example. Naturally, less possibilities for the Maori Land Court to intervene mean less protection in regard to the aims of the Maori Land Act 1993. Again, a land-owning tribe is asked to decide what commercial utilisation and what degree of protection by the Court and the Act is wanted.

¹¹² Companies Act 1993, s 39(1).

A company structure provides the possibility to have a specific constitution. The Companies Act 1993 allows the establishment of ownership and management structures that best suit the shareholders' needs. This allows Maori shareholders to create legal structures that fit perfectly into the ownership structure of the tribe or subtribe. For example, a restriction of share transfers and share issues to Maori, Maori trusts or Maori incorporations that already hold land in the tribal region would ensure that a company (and therefore the company's land assets) remains in the control of tribe members. It is also possible to prohibit the acquisition of additional shares by shareholders to prevent that one of the shareholders gains control of the company.

There is also great flexibility in terms of the share shape. It is possible to develop shares for very specific purposes emphasising on control and representation as opposed to using them as capital devices and distribution rights only.

Many Maori consider it best for the administration of a tribes' land assets to keep the governance separate from the business management. In a company, business decisions are usually made by the board of directors. However, there is a possibility to delegate powers to other persons. For Maori business structures, in which governing board positions are often taken by persons based on traditional rights and seniority rather than business skills, this may lead to the favourable situation in which the board of directors consists of representative members of the tribe whereas a management committee controls the actual commercial activities. Such a committee may consist of professional economics, whose rights, powers and accountability are explicitly defined in the company's constitution and in the contracts they have with the company.

The wide powers a company has also create legal and commercial certainty for shareholders, business partners and creditors. Additionally, a company is flexible in the way of distributing benefits to its shareholders. At the same time shareholders enjoy a high degree of protection through the shareholder remedies of the Companies Act 1993. Without reducing the wide discretion of the directors in matters of business judgement, this Act provides accountability of directors to shareholders by imposing restrictions on the directors' powers. The duties and

restrictions of the directors can be even further enhanced by the company's constitution.¹¹³

An important advantage of a company structure is its flexible financing capability. Generally, the well-defined legal structure of a company comforts potential lenders. In particular, there is the possibility to secure third parties' loans or venture capital over the company's assets by granting a floating charge under a debenture to creditors.¹¹⁴

Many Maori consider it inappropriate to represent tribal interests by creating a company. And it is often difficult to adopt a company's share structure to the special ownership structure of Maori tribes' assets. But a Maori tribe company could issue a share to every subtribe or family of its own. These groups could then exercise their rights according to their shares, including the right to have a vote in managing the land assets. In this way a company could be able to provide appropriate representation of tribal interests. Additionally, shareholders would enjoy all the commercial advantages of a company structure.

Using a company structure for the management of Maori land assets might even further facilitate the commercial use of Maori land. A group of landowners could build up a company that they would be the shareholders of. They could then lease their own land to this company, which would utilise it. This model would divide the affairs relating to a block of Maori land into two sides. The one side would be the Maori landowners' side, governed by the Maori Land Act 1993 and under the supervision of the Maori Land Court. The other side would be the company managing the land block under normal commercial conditions. The management would largely be free from disturbances of the Maori Land Court, which would only need to be convinced to agree to a long-term lease of the Maori land to the company. However, a model like this would leave the company with no assets to grant a floating charge over as security for credits.

¹¹³ Mike Ross *Corporate Reconstructions* (CCH New Zealand Limited, Auckland, 1999) 5.

¹¹⁴ Andrew Beck and Andrew Borrowdale *Guidebook to New Zealand Companies and Securities Law* (6 ed, CCH New Zealand Limited, Auckland, 1998), 165. A floating charge does not attach to a particular asset of a company. It is a charge over assets or property that may be constantly

Additionally, Maori landowners might be taxed twice, firstly for their lease revenues and secondly for their dividends. Still, the model could be taken into consideration for land management projects entering joint ventures, for example. This type of agreement between entrepreneurs will be dealt with in the next chapter.

E **Joint Ventures**

A management structure for Maori land utilisation projects that has been used more often recently is the joint venture. Although the term "joint venture" is frequently used in the commercial world, it does not have a settled common law meaning. According to the High Court of Australia it is an association of persons for a particular trading, commercial, mining or other financial project, aiming at mutual profit, with each participant usually contributing property, skill or capital.¹¹⁵ The relationship between the joint venturers is normally spelt out in a participation agreement, which describes the contributions expected from each participant and the shares in assets, proceeds, costs and liabilities.

I **Nature**

A joint venture may consist of natural persons or corporate bodies. The legal characteristics and the body of law that is applicable to a particular joint venture depend on the corporate vehicle the parties choose. They may embody the joint venture in a company, in which each participant would have a shareholding. If they decide to join in a company, the Company Act 1993 will apply. If the joint venturers decide to form a partnership, the Partnership Act 1908 will govern the joint venture's activities. However, "true joint ventures" (that is an unincorpo-

changing, leaving the company free to deal with its assets within the limits of the charge creating instrument.

¹¹⁵ *United Dominions Corporation Ltd v Brian Pty Ltd* [1985] 60 ALR 741, 746 (HCA) Mason, Brennan and Deane JJ.

rated joint venture, which is not a partnership), are governed by the general principles of contract law.¹¹⁶

In incorporated joint ventures the management is done by directors, who are appointed by the shareholders. Their rights, powers and obligations depend on the joint venture company's constitution and the Companies Act 1993. True joint ventures are managed solely according to the joint venture agreement between the participants. The parties usually install an operating committee and nominate its members. These managers are responsible to the participants as their agents. The agreement contains provisions on their accountability as well as the general rights of the participating parties in terms of profit distribution, liability and the joint venture's termination.

2 *Advantages / Disadvantages*

A true joint venture may be a very useful structure wherever a Maori tribe owns land and a third party is interested in becoming a participant in a land development enterprise. This could very often be the case, since Maori own a respectable amount of New Zealand land yet in many cases lack the capital to utilise it. Thus Maori could provide land and other entrepreneurs could provide investment capital and technology.

True joint venture structures are very flexible in terms of all details the participants may desire since it is regulated by a contract between the participants. However, an incorporated joint venture, where the participants join in a management company, is also flexible in terms of setting up its own constitution governing the company's internal affairs, although this freedom is set boundaries by the Companies Act 1993.

A true, unincorporated joint venture provides no limited liability of the participants. It may therefore be best to first set up a company, which owns the land

¹¹⁶ Susan Watson *The Law of Business Organisations* (3 ed, Palatine Press, Auckland, 1999) 669.

assets and is owned by the Maori shareholders. This company as a corporate body with its own legal personality may then participate in joint ventures with other private corporate bodies, natural persons, or even the New Zealand State. A joint venture consisting of a company, which leases Maori land from the Maori owners and is owned by the same Maori people might even be able to operate largely outside the Maori Land Court's supervision. This is an important point because the possibilities of the Court to intervene form a risk to joint venture parties that choose to participate with Maori tribes in the development of their land.

VI CONCLUSION

A visitor coming to New Zealand finds a unique situation. A large area of New Zealand's land is administered by the Maori Land Court and governed by the stringent provisions of the Maori Land Act 1993, an Act designed to retain Maori land in Maori hands, yet hampering commercial utilisation and trade. Great parts of this land are managed inefficiently and do not yield the appropriate profits to its owners. The situation appears artificial. It results from the political desire to protect, restore and retain Maori land structures and traditions within, or side by side with the English based land ownership system implemented in New Zealand.

It is not clear what role the legislation regarding Maori land and the Maori Land Court will play in the future. There is no doubt that in many cases interventions of Maori Land Court judges have been of advantage to shareholders of Maori incorporations and beneficiaries of Maori trusts. But interventions have also often ended up hampering the commercial activities of land enterprises. Moreover, they have the effect that many Maori do not obtain the commercial experience necessary to run a business independently. An expansion of the Court's jurisdiction on anything that has to do with Maori and Maori land bears the danger of establishing a separate legal system for Maori, which cannot be desirable. Time will show if the political intention to retain Maori land in Maori hands and the Maori land provisions implementing this intention may really con-

tribute to an integrated New Zealand society of Europeans and Maori. Until then, landowners and investors will have to deal with it. At the same time it is difficult to imagine what changes will take place within the Maori tribes. Trends to retain Maori land in the hands of Maori owners by making Maori land inalienable by both the statutory provisions of the Maori Land Act 1993 and provisions that Maori land-owning corporations set up for themselves may not be appreciated by future generations of Maori, who could disagree with today's conservatism. There lies a danger in preserving Maori assets without leaving enough space for other, perhaps more commercially-orientated developments.

This paper has shown that there are suitable corporate structures available for a profit-yielding utilisation of Maori land assets, capable of reducing the impact of the Maori Land Court and the Maori Land Act 1993 on the management of Maori land. Once within a tribal structure, where a decision has been made in favour of a commercial utilisation of the tribe's land assets, the business form of a company is a promising vehicle to implement this decision. The commercial actions of a company are less likely to be disturbed by the Maori Land Court than structures under the Maori Land Act 1993, such as Maori trusts and Maori incorporations. The problem of multiplicity of owners of Maori land assets can be overcome by the distribution of shares in a company owning tribal assets. The many possibilities of structuring a company leave space for traditional functions of Maori land and traditional tribal representation without hampering an assets' commercial utilisation. At the same time tribe members are protected by a sophisticated and comprehensive Act, the Companies Act 1993. With the possibility of granting a floating charge over its assets, a company is able to provide security for loans. This facilitates another major problem in Maori land management, which is the attraction of third parties' investment capital. Furthermore, in a joint venture structure Maori tribes may find a form of commercial arrangement with other parties that could enable them to bring together their land and a partner's technology and capital for the profit of both.

Finally, more successful Maori land management will be for the benefit not only of a particular Maori tribe and investors. It might even result in better land utilisation of New Zealand land in general. It would lead to higher revenues for

the New Zealand State, greater employment and the enhancement of job chances for young Maori especially in the agricultural business sector. Thus it might even contribute to a more integrated society of Maori and Europeans.

BIBLIOGRAPHY

Textbooks

Andrew Beck and
Andrew Borrowdale

*Guidebook to New Zealand Companies
and Securities Law*
(6 ed, CCH New Zealand Limited,
Auckland, 1998)

Richard Boast,
Andrew Erueti,
Doug McPhail and
Norman F Smith

Maori Land Law
(Butterworths, Wellington, 1999)

T F Paul

The Law and Administration of Incorporated Societies
(2 ed, Butterworths, Wellington, 1986)

Mike Ross

Corporate Reconstructions
(CCH New Zealand Limited, Auckland, 1999)

Andrew Sharp

*Justice and the Maori – Maori Claims
in New Zealand*
(2 ed, Oxford University Press, Auckland, 1998)

Norman Smith

Maori Land Corporations
(A H & A W Reed, Wellington, 1962)

Susan Watson

The Law of Business Organisations
(3 ed, Palatine Press, Auckland, 1999)

Articles

- Jim Gray
*Case Studies and
New Zealand Law*
"Trouble Upcountry: The Thorny Issue of
Maori Land Management"
(2001) 80 Chartered Accountants Journal
New Zealand 31-33
- S Te Marino Lenihan
Systemic Law
"Maori Land in Maori Hands"
(1997) 8 Auckland University Law Review
570-581
- Bill Maughan and
Tanira Kingi
Case Studies
"Te Ture Whenua Maori: Retention and
Development"
(1998) New Zealand Law Review 27-31
- A L Mikaere
*MPP Research Paper, Victoria Uni-
versity of Wellington, 1993*
"Maori Land"
(1993) New Zealand Recent Law Review
312-315
- Kenneth Palmer
*What Ownership Structure is Best for
Environment and Development?
New Zealand Development Monitor*
"Law, Land, and Maori Issues"
(1988) 3 Canterbury Law Review 323-346
- Case*
"Local Government and Resource Man-
agement"
(1999) New Zealand Law Review 487-505
- Pita Rikys
*The Mayor-General v Mangere Inc
642 (K.A.) Richardson P*
"Valuation of Maori Land for Rating Pur-
poses: Time for a Change?"
(1992) New Zealand Law Journal 26-29

Seminar Papers, Research Papers and Public Guides

Russell Feist,
Gina Rudland and
Hon Judge Smith

“Maori Land – What Every Practitioner Needs to Know”
(New Zealand Law Society Seminar,
Wellington, May 1997)

John Grant and
Ngatata Love

“A Guide to Maori Land Trusts”
(Joint Publication by the Department
for Courts and Te Puni Kokiri, June
1997)

J H Hudson

“Maori Land Management – The Present Situation and Possible Future Problems”
(MPP Research Paper, Victoria University of Wellington, 1995)

John Walters,
Matanuku Mahuika and
Grant Powell

“What Ownership Structure is Best for Settlement and Development”
(Maori Business Development Master Course, Auckland, 20 June 2000)

Cases

The Valuer-General v Mangatu Incorporation and Others [1997] 3 NZLR 641, 642 (CA) Richardson P

United Dominions Corporation Ltd v Brian Pty Ltd [1985] 60 ALR 741, 746 (HCA) Mason, Brennan and Deane JJ

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