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TE TURE WHENUA MAORI 1993

LLM RESEARCH PAPER

INDIGENOUS PEOPLE AND THE LAW

LAW FACULTY

VICTORIA UNIVERSITY OF WELLINGTON

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Note, it was precisely this type of inter-hapu rivalry that led to the Taranaki Land Wars of 1850.

See Part A A Show of Justice (1974) at 125.

## INTRODUCTION

Te Ture Whenua Maori charts a new course in Maori land legislation. At the heart of the Act is the retention of Maori land and the Maori philosophy that land is a treasure, a taonga tuku iho to be preserved and passed on to future generations within whanau, hapu and iwi structures. Still, these values have been reconciled with the need to operate in a modern context.

Part I of the paper describes the court's inception and illustrates how English notions of land tenure were imposed upon Maori; Part II describes the methods used to overcome the fundamental 'problem' with Maori land- multiple ownership of small uneconomic shares in the land; Part III considers Kaupapa - Te Wahanga Tuatahi. The paper set out the principles which Maori desired for the management and use Maori land; emphasis was on retention of Maori land for use at whanau, hapu and iwi levels. Part IV outlines the provisions of the first draft to give legislative effect to the spirit and intent of Kaupapa's proposals. Most of the provisions of the 1984 Bill were brought forward into the 1987 Bill which is considered in Part V. Part VI describes the changes made to the Bill after the Select Committee process it also outlines the important additions made by the Supplementary Order Paper.

## I THE LAND COURT'S INCEPTION AND INDIVIDUALISATION OF TITLE

Metge describes Maori customary land tenure:<sup>1</sup>

Under the Maori system of land tenure, rights of occupation and usufruct were divided among sub-groups and individuals, but the right of alienation was reserved to the group. Each hapu of the tribe controlled a defined stretch of tribal territory, which it guarded jealously ... within the hapu, whanau, nuclear families and individuals held rights of occupation and use over specific resources: garden plots, fishing stands, rat-run sections, trees attractive to birds, clumps of flax, and shell-fish beds ... The rights of individuals and lesser groups were always subject to the oversight of the greater group.

The communal nature of Maori land tenure presented a considerable obstacle for a colonial government under pressure to facilitate the alienation of Maori land for the growing influx of Pakeha settlers. The Crown had difficulty in determining who had the right to alienate the land on the hapu or tribes behalf. Inter-hapu or inter-iwi rivalry often caused one group to offer land, knowing full well that another hapu or iwi also had rights of use in the block.<sup>2</sup> Further, once the appropriate owners were found, the Crown's Land Purchase Commissioners experienced considerable difficulty securing the tribal chief or Ariki's assent to the sale.<sup>3</sup>

Problems with the direct purchase by the Crown, via the pre-emptive right encouraged

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<sup>1</sup> Metge J *The Maoris of New Zealand* (revised edition) (Routledge & Kegan Paul, 1967, 1976) at 12.

<sup>2</sup> Note, it was precisely this type of inter-hapu rivalry that led to the Taranaki Land Wars of 1860.

<sup>3</sup> See Ward A A *Show of Justice* (1974) at 125.

the government to adopt legal measures to deal with Maori land: the alienation of Maori land and de-tribalisation<sup>4</sup> of Maori was to be achieved through a Native Land Court. The government would abandon its pre-emptive right and effectively privatise the right to buy and sell Maori land by providing a mechanism that would transmute Maori customary title into a title cognisable under English law.

The 1865 Act was the first step in visiting the English concept of individual title upon Maori communal ownership.<sup>5</sup> Title was to be awarded to ten Maori or fewer.<sup>6</sup> These owners, although intended to hold title on behalf of the tribe, frequently became absolute owners, free to dispose of the land at their will.<sup>7</sup> The *coup de grace* was delivered in 1873, the Native Land Act of that year replaced certificates of title with memorials of ownership. These listed the individual names of every member of the tribal hapu interested in a particular block of land. Although the memorials restricted alienation of land by providing that no contract or agreement, no lease sale or mortgage could be valid unless executed by every person on the memorial,<sup>8</sup> the memorials cut across the tribal infra-structure; Maori now found themselves possessed of an individual interest or marketable parcel of land. As all guardians were now listed, it was impossible for chiefs the traditional guardians of the land, to prevent tribal members from disposing of their individual interests. For the first time Maori were faced with the problem of the management of their land inter se. As the 1891 Royal Commission into Native Land observed:<sup>9</sup>

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<sup>4</sup> Sewell, when introducing the Native Land Fraud Act in 1870, described the object of the Native Land Acts as being: to bring the great bulk of the northern land in the northern island which belonged to the Maoris ... within the reach of colonisation. The other great object was the detribalisation of the Maori - to destroy if it were possible the principle of communism which ran through the whole of the institution, upon which their social system was based and which stood as a barrier in the way of all attempts to amalgamate the Maori race into a social and political system.

<sup>5</sup> The procedure to establish the land court was set out in the 1862 Native Land Act. However, the court was not finally formed until 1865. Ward A, above n X, noted that the 1862 legislation contemplated a different court from that finally established; local Maori chiefs would have played a prominent part in the court's decisions.

<sup>6</sup> Section 23 Native Lands Act 1865.

<sup>7</sup> Section 23 of the Native Lands Act 1865 it possible to vest a block of land greater than 5000 acres in favour of a tribe. However, this provision was never used by the court. The Rees Commission, see below n 12, later noted that the court, in failing to make use of s 23 had effectively destroyed the only safeguard which the 1865 Act contained for the tribal rights of Maori.

<sup>8</sup> Ward, above n X at 255, notes that although the memorials made it easy for agents to begin to purchase a title it made completion of the purchase difficult and in fact slowed the rate of alienation.

<sup>9</sup> *Report of the Commission Appointed to Inquire into the subject of the Native Land Laws* [Rees Commission], 1891 AJHR G-1.

In its occupation [Maori] found themselves in a galling and anomalous position. As every single person in a list of owners comprising perhaps over a hundred names had as much right to occupy as anyone else, personal occupation for improvement or tillage was encompassed with uncertainty. If a man sowed a crop, others might allege an equal right to the produce. If a few fenced a paddock or small run for sheep or cattle, the co-owners were sure to turn their stock or horses into the pasture. The apprehension of results which paralyses industry cast its shadow over the whole Maori people. In the old days, the influence of the chiefs and the common customs of the tribe afforded a sufficient guarantee to the thrifty and provident; but when our law forced upon them a new state of things, then the lazy, the careless and prodigal not only wasted their own substance, but fed upon the labours of their more industrious kinsmen.

The court then attempted to devise a procedure for ensuring that Maori beneficiaries acquired title to Maori land in a manner that resembled Maori custom. Traditionally, beneficiaries could only inherit a right to use the land in the village where they resided. One could not derive an equal share from both parents - Maori notions of communal ownership prevented this. Control of the land remained with the tribal chiefs or elders for the benefit and use of the tribe as a whole.

However, the court adopted the practice of apportioning the estate of Maori who died intestate among all the children of the deceased in equal shares. The spouse had no right to succession. Hence, with each succeeding generation the land proceeded to split in geometric progression. Interests became increasingly smaller and more difficult to manage. The individualisation of title and the court's fluid interpretation of the Maori succession process has resulted in the most distinctive feature of Maori land today: multiple ownership of fragmented and uneconomic interests. As noted by one commentator:<sup>10</sup>

Maori titles have become congested because of [fragmentation]; the difficulties of searching them with accuracy have magnified; the presence of large numbers of owners in a title tends to create litigation over disputes as to occupationary rights for which partition is not always possible or even a practicable remedy; and the owners are frequently persuaded to sell because fragmentation has reduced their shares in the land to such an uneconomic standard that no real use can be made of them by the owners.

## II AVERTING THE EVIL OF FRAGMENTATION

### A *The Maori Affairs Act 1953*

The Maori Affairs Act 1953 consolidated the plethora of legislation governing the Maori land court and Maori people. The Act also proposed a legislative solution to the problem of fragmentation by providing a number of procedures and mechanisms designed to arrest further land fragmentation. These may be divided into two groups.<sup>11</sup>

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<sup>10</sup> Smith N, *Maori Land Law* (A.H and A.W Reed 1962) cited in the Royal Commission of Enquiry (1980) AJHR.

<sup>11</sup> See McHugh PG "Maori Land Laws of New Zealand: two essays" *Studies in Aboriginal Rights*, No.7, University of Saskatchewan Native Law Centre, 1983.



<sup>8</sup>The first was concerned with establishing legal devices that would lead to better management of land. Incorporations and trusts were the main legal entities used to facilitate dealing with land held in multiple ownership. Described as a 'hybrid possessing the features of both a private limited liability company and a trust',<sup>12</sup> the incorporations provided Maori land owners with the means of bringing fragmented interests together under the management of a committee appointed by the land owners. Section 275(2) of the Act provided that 'Every body corporate shall hold the land for the time being vested in it as aforesaid in trust for the incorporated owners, in accordance with their several interests in the land'. Accordingly, Maori interests in incorporations were represented by shares in the land, not the incorporation. A concept that accorded with Maori notions of turangawaewae.

Section 438 of the Act provided for the creation of hapu trusts 'for the purpose [of] facilitating the use, management, or alienation of any Maori freehold land, or any customary land owned by Maoris'. The court was conferred wide powers in defining the terms of the trust which provided the court with flexibility to tailor the terms to suit the land owner's particular circumstances. Judge Durie in his submission to the 1980 Royal Commission noted how the court took advantage of the wide terms of section 438 to provide effective and appropriate management structures:<sup>13</sup>

When the court is hearing an application and it appears that the block of land involved is not under any proper management, is neglected, or is being used in a manner that is unfair to owners or any section of them, then the court becomes concerned to ensure that some form of management is eventually settled upon and established. Sometimes, if the individual is not an economic unit by itself, the court will endeavour to establish several blocks in the vicinity under one system of management. And so there are a variety of trusts, from the small family ones, to larger and more tribal concerns. In this way too, the court has been able to effectuate the Maori propensity to do things as a body or group. While there are many Maori who prefer to have their own farms, and should be given assistance to that end, there are many others who are content to manage farms for large concerns with some relief from administrative detail, or to live and work in groups on large forest and farm schemes.

<sup>1</sup>The second approach focused on providing procedures for preventing succession to, or removing, an individual's interest in the land.

#### 1 Uneconomic interests

The 1953 Act introduced the concept of uneconomic interests to prevent succession to land viewed as being too small for effective use. Section 137(3) of the 1953 Act defined uneconomic interests to mean a 'beneficial freehold interest, the value of which, in the opinion of the court, does not exceed the sum of fifty dollars'. Under section 137 the court could not, subject to specified circumstances, vest an uneconomic interest in anyone except the Maori Trustee who purchased them out of a conversion fund.<sup>15</sup> A Maori land owner could then purchase an uneconomic interest from the Maori Trustee. It was also possible to remove uneconomic interests via other means - for instance, the court in partitioning land, or giving effect to a scheme of consolidation, could recommend that an uneconomic interest be acquired by the Maori

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<sup>12</sup> Above n X, at 67.

<sup>13</sup> E.T.J. Durie, Submission 11.

Trustee.<sup>14</sup>

## 2 Arrangement on succession

Section 136 of the 1953 Act provided the procedures for preventing the further division of an interest upon succession. Section 136(2)(b) provided that the courts could, with the consent of the beneficiary, vest their interest in any other person, whether that person was a beneficiary or not. Section 136(2)(c) provided that the court could give effect to any arrangement to vest a beneficiary's share in any other beneficiary without the consent of any excluded person and without payment, provided the value of the shares did not exceed ten pounds.

Another device provided by the Act was the 'live buying' of Maori land by the Maori Trustee: the Trustee could purchase land from any Maori out of the conversion fund and subsequently sell it to another Maori (there was no need for a court order effected by certificates issued by the Trustee). Live buying could also take place directly between the owners of the land.<sup>15</sup> Part XVIII of the 1953 Act made provision for consolidated schemes: the main purpose of the schemes was the consolidation and redistribution of the interests of several Maori owners in Maori freehold land so that the land would be held by the owners in suitable and convenient areas for profitable use to their advantage and the public interest.<sup>16</sup> However, the schemes simply consisted of regrouping the fragmented shares in another region where the fragmentation process would simply resume.<sup>17</sup>

## B *Retrenchment in the 1960s*

The Hunn Report on the Department of Maori Affairs<sup>18</sup> noted that the original need for protection afforded by the court towards Maori land was no longer necessary and called for a review of the court's functions. The review took place in 1964 with a committee of inquiry headed by former Chief Judge of the Maori land court, Ivor Prichard, and H T Waetford of the Department of Maori Affairs.<sup>19</sup> The committee was to consider whether the powers of the court should be reduced or increased as

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<sup>14</sup> See for example s 181 (partition); s 200 (consolidation of land); and s 445 (consolidation of orders of title).

<sup>15</sup> Section 213 provided a simple procedure for the transfer of an undivided interest by sale or gift to another Maori. Note, the Maori in receipt of the land did not have to be from the same hapu or whanau. Later amendments were made limiting the disposal of interests under s 213. The Rata White Paper, see below n X, stated that these restrictions were to preserve the kin-group concept in a block of land.

<sup>16</sup> Section 194.

<sup>17</sup> See Hugh Kawharu reference- 'the schemes were administratively unwieldy, and only temporarily checked fragmentation, for the process started anew on the consolidated shares'.

<sup>18</sup> Report on the Department of Maori Affairs by Hunn J.K. (August 1960, Government Printer).

<sup>19</sup> The Report of the Committee of Inquiry into the laws affecting Maori land (December 1965).

well as the more general question of how Maori land could be better developed. The committee's report, published in 1965, repeated the Hunn Report's suggestion that the court had outlived its function. The report proposed an increase in the cut-off figure for the compulsory acquisition of uneconomic interests in Maori land by the Maori Trustee and, significantly, the application of the English doctrine of succession for Maori land owners who died intestate. These and other recommendations were eventually enacted under the Maori Affairs Amendment Act 1967.

The 1967 Amendment Act made a number of fundamental changes.<sup>23</sup> Incorporations now resembled pakeha private companies. Under section 41 of the Act the open market trading of Maori incorporation shares became possible.<sup>20</sup> Whereas formerly beneficial ownership in incorporations represented a share in the land and not the incorporation, now by order of incorporation, the court would vest the land in the incorporation for a beneficial estate of freehold in fee simple.<sup>21</sup>

Persons entitled to succeed to Maori land interests of Maori dying after 1 April 1968 were to be determined on the same basis as if the deceased were a European.<sup>22</sup> In addition, the Act made a number of amendments to the 1953 Act in relation to the use of the conversion fund. The Maori trustee could now acquire an uneconomic interest during the exercise of the court's jurisdiction in certain cases without the recommendation of the Maori Land Court.<sup>23</sup>

One of the more controversial changes under the Act was the provision for the registration of 'status declarations' for land not beneficially owned by more than four persons, whereupon registration the land in question would cease to be Maori land, and accordingly no longer subject to the court's confirmation.<sup>24</sup> The power of the court regarding confirmation of dealings in Maori land was also restricted to the alienation of land by way of transfer alone.<sup>25</sup>

### C *Maori Affairs Amendment Act 1974*

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<sup>20</sup> Furthermore, under section 41(2)(c) incorporation shares could be transferred to the Maori Trustee.

<sup>21</sup> Section 31(2) Maori Amendment Affairs Act 1967.

<sup>22</sup> Section 76 Maori Affairs Amendment Act 1967.

<sup>23</sup> The Trustee could now acquire an uneconomic interest during the exercise of the court's jurisdiction under s 181 (the partition of land); s 200 (consolidation of land); s 445 (the issue of consolidated title orders) and s 475 (amalgamation of titles). Previously, the trustee could only acquire interests on the recommendation of the court. The trustee could also acquire uneconomic interests in Maori reserved land and Maori vested land.

<sup>24</sup> Section 6 of the Act. Note, more than 96000 hectares of land was compulsorily converted from Maori freehold land to general land. Seven years later, after the 1974 Amendment Act a mere 4500 hectares was reconverted to Maori freehold land.

<sup>25</sup> Section 98 of the 1967 Act.

Maori strongly objected to the Prichard-Waetford Report and the changes subsequently made under the Maori Affairs Amendment Act 1967. Accordingly, much of the 1967 Act was later repealed by the Maori Affairs Amendment Act 1974. The 1974 Amendment Act provided Maori with the opportunity to have their say in the framing of substantive land legislation for the very first time. Matiu Rata (Minister of Maori Affairs) on presenting a White Paper on Maori land legislation to the House of Representatives,<sup>26</sup> expressed that the objective of the paper was to ensure that Maori were 'accorded the fullest opportunity of genuine consultations on any legislative proposals affecting them'.<sup>27</sup> Under section 25 of the 1974 Amendment Act, succession to undivided interests in Maori land on intestacy became determined once again by Maori custom with a life interest vesting in the surviving spouse. Provisions in the 1953 Act relating to the '10 pound rule' of uneconomic interests were repealed<sup>28</sup> along with the provisions defining uneconomic interests and providing for their disposal.<sup>29</sup>

#### D *Recommendations of the 1980 Royal Commission*

In 1980 a Royal Commission was established to inquire into the role and functions of the Maori Land Court.<sup>30</sup> The Commission was required by item 1 of the Warrant to determine:

Whether or not any part of the jurisdiction of either of the Maori Land Courts could be better exercised by some other court or tribunal and whether or not the subject-matter of any part of that jurisdiction could be better dealt with by a judicial body

##### 1 Retention of the Maori Land Court

The Commission acknowledged that opinion regarding the retention of the Maori land court was diverse; many important Maori institutions such as the New Zealand Maori Council supported the court's continued existence, while others viewed it as paternalistic, or out of step with modern needs.<sup>31</sup> The Commission saw the court's

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<sup>26</sup> Government White Paper on proposed amendments to the Maori Affairs Act 1953, the Maori Affairs Amendment Act 1967, and other related Acts, E.20 presented to the House by leave 21 November 1973.

<sup>27</sup> Above n 26 at 5. The paper's proposals were based primarily on the Labour government's election manifesto on Maori Affairs: With the strong ties between people and their land, Labour recognises the right of kin groups to remain proprietors of their land and firmly believes in the retention of Maori land ownership and management in every practical instance.

<sup>28</sup> Section 22(2).

<sup>29</sup> Section 23.

<sup>30</sup> *The Maori Land Courts: Report of the Royal Commission of Enquiry* (1980) AJHR.

<sup>31</sup> For example, Matiu Rata (former Minister of Maori Affairs) proposed to substitute the court with a runanga whenua in each judicial district; this would be administered by three

eventual integration into the central judicial system. The need for the court's separate existence would disappear in 'little more than a decade'.<sup>32</sup> However, the court still had an important task to complete:<sup>33</sup>

We have evidence that at the present time the record system is in severe disarray, with thousands of blocks of Maori land unsurveyed, records of ownership and succession incomplete, and a very large number of partitions and other orders of the court unregistered... Plainly there is an urgent need for the Government to ensure that the Maori land records are incorporated into the land transfer system without further delay.

The complex work necessary to bring these records to a condition that would allow for their transfer to the land transfer system could only be carried out by a body with specialist knowledge in the area - the Maori Land Court. No other court or administrative body had the necessary expertise and experience. Given the current state of affairs, it would take some years to fully merge the Maori land records with the land transfer system. The Commission was satisfied that until this was achieved it would be wholly impractical to do away with the Maori Land Court.

## 2 The role of the Court in the future

The Commission noted that over the years the court had assumed many roles. From the court's inception it was primarily concerned with determining the ownership of Maori land which required the court to adjudicate over an adversarial process. However, the court had moved on from this role and now its functions were 'mixed; judicial, social and administrative'.<sup>34</sup> Again there was diversity of opinion as to the court's proper role. Some judges thought the court should be confined to exercising a purely judicial function. On the other hand, Judge Durie submitted that the court was fulfilling a definite social purpose; the core of which was to 'assist the retention of Maori land in Maori ownership by facilitating its better use and management'.<sup>35</sup> The Commission noted that many instances were quoted where judges had gone out of their way to advise owners about the best way to use their lands for modern enterprises. Nonetheless, the Commission opined that in attempting to fulfil an administrative function, the court was undermining its judicial independence:<sup>36</sup>

The Maori Land Court should be a *court of justice* with traditional judicial standing and independence. But if it is to be that, it must strive to be predominantly a judicial and less an administrative body. Once a court involves itself substantially in administrative action, especially in areas which are traditionally the fields of State administration, it places in jeopardy its claim to independence and sows the seeds of conflict between itself and the machinery of the State.

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persons - a judge and two lay person representatives of the district concerned.

<sup>32</sup> Above n 31, at 73 chapter 12.

<sup>33</sup> Above n 31, at 72 chapter 12.

<sup>34</sup> Above n 31, at 79 chapter 12.

<sup>35</sup> Above n 31, at 80.

<sup>36</sup> Above n 31, at 81.

Moreover, there was already an administrative body equipped with the necessary services and structure to provide effective advice on the efficient use and management of Maori land. The Department of Maori Affairs was now a sophisticated department with strong divisions. Accordingly, the Commission advocated that the department fulfil its proper administrative role and leave the court to carry on its judicial function. Separation of power was integral to the efficient execution of the judicial and executive functions.<sup>37</sup>

### III KAUPAPA - TE WAHANGA TUATAHI

Past efforts to arrest the further fragmentation of Maori land had met with strong resistance from many Maori. Compulsory conversion of uneconomic interests and other extreme measures introduced by the Maori Affairs Act 1953 resulted in increased groundswell support for the retention of Maori land as a spiritual base, or turangawaewae. The Royal Commission noted the concept of turangawaewae had assumed increased importance despite the growing number of Maori towards urban centres.<sup>38</sup> Further the increased fragmentation of Maori interests was no longer anathema to many Maori land owners but consistent with traditional notions of Maori land tenure. As Judge Durie remarked in his submission to the Royal Commission:<sup>39</sup>

It is felt that when an individual's share is so small that it is not worth his sharing in the return, then his share might be applied to tribal or family projects with which the land is most clearly associated, such as maintenance of the local marae and recreational reserves or resorts, the provision of special scholarships or in further development of the land. Successions to that shareholder should cease and he and his descendants would instead have the right to seek a scholarship, or return to the ancestral marae, or top holiday on certain grounds as the case may be, on proof to the administering body of descent from a shareholder on the ownership lists.

These notions of turangawaewae, and tribal ownership and use of Maori land gained momentum and in 1983 the New Zealand Maori Council published a Maori land policy paper entitled 'Kaupapa - Te Wahanga Tuatahi'.<sup>40</sup> The paper was the result of the introduction of a new Maori Affairs Bill consolidating the Maori Affairs Act

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<sup>37</sup> Eight years later, in a submission to the Law Commission on the structure of the courts, the Maori Land Court agreed in principle, with the McCarthy commission's findings. Still, the court noted the legislature had provided the court with the broad authority in drafting the terms of sections 438 trusts under the 1953 Act, and the mandate and power was 'taken up by the courts because the administration was lacking. If the court had not moved the Maori people would have been denied their aspirations'.

<sup>38</sup> Above n 31, at 36 chapter 5.

<sup>39</sup> Above n 38.

<sup>40</sup> New Zealand Maori Council 'Kaupapa - Te Wahanga Tuatahi' February 1983.

1953 and the Maori Housing Act 1935.<sup>41</sup> In a submission to the Bill, the New Zealand Maori Council proposed that a special committee be appointed to 'redraft legislation incorporating Maori traditional values more cognisant with Maori customary title rights as we know them'.<sup>42</sup> The Bill did not proceed, and the government of the day invited the Maori Council to consider and make recommendations on existing legislation. A sub-committee of the Maori Council prepared a kaupapa paper, however, a major hui at Turangawaewae failed to obtain a mandate from all tribes. The committee continued with its work, consulting with iwi representatives and experts on Maori land, and eventually produced a paper to establish 'a set of principles that [would] serve as a guide for laws determining our use of our land in accordance with our customs and traditions'.<sup>43</sup>

### A *Turangawaewae*

At the heart of Kaupapa is Maori affinity with the land:<sup>44</sup>

[Maori land] provides us with a sense of identity, belonging and continuity. It is proof of our continued existence not only as a people but as the tangata whenua of this country. It is proof of our tribal heritage and kinship ties. Maori land represents turangawaewae.

It is proof of our link with the ancestors of our past, and with the generations yet to come. It is an assurance that we shall forever exist as a people, for as long as the land shall last.

If we are true Maori we must insist that Maori land ownership be viewed entirely differently from ownership as it is understood in British law. Our land interests are an inheritance from the past entrusted to the future in which we have no more than certain rights to enjoy the fruits of the land in our own lifetimes, and a duty to convey those rights to succeeding generations.

Maintaining turangawaewae and the principle of kaitiakitanga, required the implementation of policies and laws that would ensure Maori land was kept in Maori hands. To that end, kaupapa advocated an approach that would 'emphasis and consolidate Maori land ownership and use by the whanau or kin-group'.<sup>45</sup> Yet these considerations were juxtaposed against the recognition that Maori land was a valuable resource capable of providing 'even greater support for our people - to provide employment - to provide us with sites for our dwellings - and to provide an income to help support our people and to maintain our marae and tribal assets'.<sup>46</sup> These two principles: the retention of Maori land and its effective economic use were the central themes underlying kaupapa's broad proposals.

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<sup>41</sup> Maori Affairs Bill 1978.

<sup>42</sup> New Zealand Maori Council 'Looking towards the 1980's' - submission on the Maori Affairs Bill 1978, at 3 para 9.

<sup>43</sup> Above n 42.

<sup>44</sup> Above n 40, at 10.

<sup>45</sup> Above n 44.

<sup>46</sup> Above n 44.

B *Extension of the trust principle.*

Kaupapa stressed that the law should reflect Maori communal and tribal heritage. Although individual interests were to be respected, the law should encourage the retention and use of Maori land by the tribal group. It was recognised that as fragmentation continued with each succeeding generation eventually land would become communally owned again. Accordingly there was a need to produce structures that could coordinate the numerous land-owners and record their interests. So far, section 438 trusts, the pakeha concept that resembled traditional Maori land tenure the most, had proved of great use; Kaupapa advocated an extension to the trust concept, and a return to traditional concepts of communal ownership.<sup>47</sup>

We propose that the owners of fractional interests be permitted to have their shares held in a trust wherein fractional shareholdings can be combined. The combined income of the trust shares would then be retained for use for the benefit of the owners, their marae or for assistance to individual beneficiaries.

No expensive recording of increasing numbers of fractional shares would be required. The owners upon transferring personal shares to the trust would remain identified. All descendants could prove their rights to assistance from the trust by providing evidence of their ancestry. The vital link back to the land of their ancestors - to their very being - is retained and yet the call for more economical recording of ownership is answered.

The costs associated with recording individual interests would be considerably reduced - now the descendants of the original transferor would have the onus of adducing evidence of an ancestral link. Moreover, the solution provided the means to revert Maori land interests back into a corpus for the whanau or kin-group as a collective whole. Accordingly *turangawaewae* was preserved.

In addition, Kaupapa proposed that the court, on application, should have authority to order that the shares of a deceased owner be held *unsucceeded* as whanau shares, provided that there were no objections by persons entitled to succeed, and the court considered that succession to the interest was either uneconomic or impracticable.

Kaupapa recommended that the court should play a pivotal role in the administration of these trusts: the court could approve a minimum share figure - interests below this would become whanau shares; the court was to safeguard the interests of owners who were either dead, or unable to be contacted; and establish procedures to allow former dispossessed owners (through compulsory conversion, or arrangement made without sufficient consent) to re-establish ownership rights. The principle would also be extended to include former owners who lost an interest through a disposition made by a forebear, subject to the consent of current owners.

Kaupapa envisioned similar structures being established at a tribal or hapu level. Once a sufficient consensus was achieved among land-owners, or incorporation shareholders land could be held on trust for:<sup>48</sup>

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<sup>47</sup> Above n 40, at 14.

<sup>48</sup> Above n 40, at 17.



[G]eneral or specific tribal purposes, [the Maori land court] may appoint trustees, a tribal authority or a trust board to administer those lands, and may define its powers, duties and the manner in which its income or assets may be applied or used, and where the beneficiaries represent a tribe or hapu, it may declare the same as a charitable trust. Successions to the land shall cease and the land shall be vested in the trustees.

however the court must be satisfied that the interests of any major owners are adequately protected, and may partition the interests of the major owners, or, provide for payment and successions to specified shareholders to continue.

### C *Papakaiinga*

Kaupapa suggested it was time for the Maori land court to resume its authority to partition land for the housing and settlement of Maori. For some time this power had been entrusted with local authorities - bodies with little knowledge of the complexities inherent in Maori title and ownership structures. The Maori land court, on the other hand, was a specialist body with a wealth of experience to call on. Accordingly Kaupapa proposed a 'less expensive and simpler proceeding for Maori land through the land court to overcome many of the present barriers to rural settlement under existing town planning, local authority and Maori land laws'.<sup>49</sup> It was recommended that the current process be retained, that is, when owners sought an unrestricted title they would require the approval of a local authority first before approaching the court. However, Kaupapa also proposed that the court have authority to issue 'occupational licenses' and 'delineate specific areas for owners needs subject to restrictions on alienation'.<sup>50</sup> Development of the land would be promoted by giving the owners freedom to borrow against the land.

The court was conferred broad authority to make orders that accorded with the respective needs of the land-owners, provided a reasonable degree of support was obtained from land-owners. For instance, if an individual's shares was insufficient for the allotment sought, the court would direct payment of a cash sum or a ground rent to any trustees for the land. In addition, where existing subdivisions or Maori villages were of special significance the court could appoint 'over-all' trustees to oversee matters such as ground rents and building designs.

Kaupapa further suggested that when Maori land was subject to a lease agreement and the court was satisfied that it was 'practicable for homes to be erected on parts of the land without unduly prejudicing the operations of the leasee, and that an abatement of rental or other allowance to the leasee was practicable',<sup>51</sup> it could exclude land from the lease for Maori occupation.

Kaupapa noted that the implementation of these proposals needed the support of the Department of Maori Affairs.<sup>52</sup> The Department could guarantee loans from other sources, provide finance, or it could establish a town planning section to consult with local authorities, the Maori land court and Maori owners.

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<sup>49</sup> Above n 40, at 25.

<sup>50</sup> Above n 49.

<sup>51</sup> Above n 40, at 26.

<sup>52</sup> Above n 40, at 27.

#### D *Disposition of Individual Interests by Will or Succession*

Kaupapa envisioned that the court would continue to play a key role in supervising the disposition of Maori land. Succession to Maori land could only be effected by a vesting order of the Maori land court, irrespective of the existence of a will and the value of the interest. Kaupapa proposed that rights of intestate succession should continue to be determined in accordance with Maori custom.<sup>53</sup> The emphasis was on maintaining the blood-line, thus keeping the land within the family and tribal group. Kaupapa also proposed that provisions devising any absolute interest in Maori land in a will should be of no effect, unless the interest was to vest or eventually vest in any one or more of the testator's children.

#### E *Leases of Maori land*

Kaupapa proposed substantial changes to the leasing of Maori land. Policies needed to focus on the use of the land by one or more of the Maori land owners, and not some other person. The current procedure for granting leases was seen as inadequate.<sup>54</sup> Kaupapa offered a new procedure to be set in motion at least 2 years before the end of the lease agreement. First, a feasibility study of the land's potential use was required - this could be funded by either the Department (of Maori Affairs), or rents receivable under current lease. Further, the Department could provide the expertise necessary for completion of the feasibility studies. Secondly, the court could appoint additional trustees to consider possible use of the land, or appoint trustees with authority to lease. Kaupapa also advocated that land be leased for shorter periods and with much more rent reviews than occurred in the past.

#### F *Retention of Maori land*

Kaupapa proposed tighter restrictions on the alienation of Maori land:<sup>55</sup>

The proposal that all future sales of Maori land be prohibited seemed outlandish at first. It is not outlandish to those attuned to Maori values who recognise we are but custodians of our tribal lands. They are not ours to sell and talk of sale should be firmly discouraged.

We are concerned that present law allows a simple majority of shares to decide to sell (provided a quorum of 75 per cent of shares are represented at the meeting). This could allow as few as 38 per cent of the shareholders to dispossess the remaining shareholders. This contrasts with general law where all joint owners must agree to sell and we ask that the law affecting Maori land also require 100 per cent agreement of shareholders before sale.

Kaupapa recommended that the Maori land court, having regard to the principal objective of retention, and satisfied that special circumstances exist, should approve the sale. Although these measures would mean that land would be very difficult to alienate. Kaupapa stressed that the rights of a part-owner to sell could not over-ride

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<sup>53</sup> See s76A of The Maori Affairs Amendment Act.

<sup>54</sup> Above n 40, at 21.

<sup>55</sup> Above n 40, at 11.

the rights of the shareholder who wished to retain the land.

### G *Maori Incorporations and Section 438 Trusts*

Kaupapa recognised the utility of incorporations and trusts in dealing with fragmented interests, and advocated that they continue as options for the future administration of land. However, Kaupapa saw the need for greater flexibility to ensure incorporations could adapt to changing circumstances - for example, the objects of many incorporations were unduly restrictive, limiting the incorporation's commercial viability.

For incorporations it was recommended that greater flexibility would be obtained by, inter alia, reducing the quorum restriction on the formation of an incorporation to 15 per cent, allowing the applicant to put forward a constitution for the court's approval, and permitting the objects of an incorporation to be broadened to allow incorporations to enter new fields and undertake entrepreneurial risks.<sup>56</sup>

### H *Title Improvement*

Kaupapa stressed that it was imperative that all Maori land court titles be duly registered to provide owners of Maori land with secure title. Kaupapa also noted that there was a need to improve titles - this would be achieved through the Maori land court by exchanges, consolidation of family interests, amalgamation of small blocks into economic areas and subdivision or partition.

Kaupapa also recommended that the court should not consider applications for partition without first allowing all owners to consider the proposal either before, or during the hearing. The court should then have regard to (i) whether or not the owners were opposed to the partition; (ii) whether or not the proposed partition would affect any existing or proposed group development programme; and (iii) the partition was being made in accordance with an overall plan for the future development or division of the land affected.<sup>57</sup>

### I *The Maori Land Court*

Kaupapa's principal objectives of retention and effective use and management of Maori Land turned upon the Maori land court's continued existence. Contrary to the 1980 Royal Commission's conclusions,<sup>58</sup> Kaupapa advocated that the court maintain its integral role in the administration of Maori land.<sup>59</sup>

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<sup>56</sup> Above n 40, at 19.

<sup>57</sup> Above n 40, at 18.

<sup>58</sup> Above n x.

<sup>59</sup> Above n 40, at 34.

The Court is the only forum with the experience and understanding to properly facilitate Maori's aspirations for its land. Created to Anglicise Maori title, it became an instrument of the Crown and Colonist, used to separate the Maori from his turangawaewae. The role changed with time and as we see the Court's future through the eighties and beyond, its primary role must be to ensure that all Maori land has effective administrative bodies charged with the dual responsibility of retention of Maori land in Maori ownership and its proper utilisation. Trust and Incorporation legislation must be adapted to further these purposes. The Court must continue to be the forum wherein disputes and misunderstandings between Maori over their lands are resolved and agreements effected.

The Court must have jurisdiction to do "anything" and "everything" subject to restrictions particularly in respect of sales of Maori land. Without this discretion the court will frustrate Maori endeavour; other courts, tribunals and ad hoc bodies must be subordinate to this all embracing jurisdiction over Maori land.

#### J *Maori Reservations*

Kaupapa finally addressed Maori Reservations. Under the present law the land was inalienable. However, Kaupapa proposed that the court sanction the leasing of Maori Reservations in limited circumstances - for example, a lease necessary to support the completion of improvements consistent with the reservation.

#### IV MAORI AFFAIRS BILL 1984.

★ Most of Kaupapa's proposals were accepted in principle by the government. Accordingly the task was to turn these broad recommendations into detailed legislation. In December 1983 a Maori Affairs Bill was introduced. Described as the first stage of the process in giving legislative effect to Kaupapa's proposals,<sup>60</sup> the bill dealt primarily with the Maori Land Courts and the general principles that were to apply in the interpretation and application of the legislation.

Further work was done, and in 1984 another bill was ready for introduction, but never introduced due to the 1984 election. The Maori Affairs Bill 1984 subsumed the provisions from the 1983 bill. More importantly, it contained 'the heart of the new legislation';<sup>61</sup> it dealt with the vital questions of ownership and use of Maori land in the best interests of the owners, including succession to Maori land and restrictions on the alienation of Maori land. Accordingly, as expressed by the bill's explanatory note it was 'the most important part of the legislation in terms of the spirit and intent of the proposals in Kaupapa'.<sup>62</sup>

#### A *Extension of the Trust Concept*

Part XII of the 1984 Bill governed the court's authority to constitute and administer

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<sup>60</sup> See Explanatory note - Maori Affairs Bill 1983 (No. 124-1).

<sup>61</sup> See Explanatory note - Maori Affairs Bill 1984.

<sup>62</sup> Above n 61.

trusts. Kaupapa acknowledged that of all the concepts of English law, the trust was the one that most resembled the Maori concept of rangatiratanga: the intelligent administration of the assets possessed by a group for the group's benefit.<sup>63</sup>

The 1953 Act only provided for section 438 trusts. Although the broad terms of the provisions provided the Court with scope to shape trusts to meet the particular needs of the owners, it failed to recognise that trusts may be desirable for a range of different reasons dependant on the circumstances surrounding different blocks of land. Further, it was thought that trustees had too much power, and were not sufficiently accountable to the owners. There was also a call for trusts that had attributes consistent with Maori concepts of stewardship.

The Bill, in the spirit of Kaupapa, significantly extended the trust concept to promote the retention and effective use of Maori land, at whanau, hapu, and iwi levels. Five different trust were proposed: Putea trusts (basket trusts for fragmented interests); Whanau trusts (broadly equated with family trust); Ahu Whenua trusts (equivalent to s 438 trusts); and Whenua A Iwi trusts (tribal trusts). In each case, the constitution of the trust did not sever the owner's ties with the land, thereby preserving turangawaewae. Further, for three of the trusts, succession to individual interests would cease, arresting the fragmentation process.

#### 1 Putea Trusts

The Bill followed Kaupapa's recommendations to establish trusts to deal with fractional interests that had become uneconomic to administer as separate interest. Putea trusts could be constituted in respect of any interest in Maori land, or in general land owned by Maori, or in shares in an incorporation.<sup>64</sup> Under clause 183(2) of the bill, a putea trust could be established where it was 'uneconomic, impractical, or otherwise undesirable' to pay the income from the interest or allow further succession, because of the small value of interest, or the owner could not be located.

The court was required to be satisfied that the owners had been adequately informed of the proposal and had sufficient opportunity to consider it.<sup>65</sup> Succession to the interest would cease.<sup>66</sup> The assets of the putea trust would be held for 'Maori community purposes', and the income derived from the assets applied the trustees for the general benefit of the beneficiaries.<sup>67</sup>

Presumably to overcome difficulties involved in locating absentee owners, the Bill provided that, inter alios, the trustees of the interest could apply for the creation of the Putea trust.<sup>68</sup> The Bill also adopted Kaupapa's proposed minimum share figure:

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<sup>63</sup> Above n 40, at 5.

<sup>64</sup> Clause 183(1).

<sup>65</sup> Clause 183(5).

<sup>66</sup> Clause 183(8).

<sup>67</sup> Clause 183(6).

<sup>68</sup> Clause 183(3).

where a putea trust was constituted for an interest held by a trust or incorporation the court could, on application of the incorporation of trustees, fix a minimum value for interest in land or shares in the incorporation - interests below the minimum figure would be transferred to the trustee of the putea trust.<sup>69</sup>

## 2 Whanau Trusts

Whanau trusts provided the means for families to collate their land interests or shareholdings. Emphasis was on preserving the family's turangawaewae while extinguishing their interests in the land. Again succession to interest would cease.<sup>70</sup> All income derived from the trust assets was to be applied for the purposes of promoting the health, social, cultural, and economic welfare, education and vocational training and general advancement in life of the descendants of any tipuna (living or dead) named in the order constituting the trust.<sup>71</sup> The court could also empower trustees to hold trust income 'not required for the purposes of the trust, for Maori community purposes and apply it for the general benefit of the beneficiaries.'<sup>72</sup>

## 3 Ahu Whenua Trusts

Ahu Whenua trusts were similar to section 438 trusts with one important difference. Section 438 trusts could be used as a 'double edged sword':<sup>73</sup> although the hapu trusts could assist in the use and management of Maori land, they could also be used to alienate Maori land. Consistent with Kaupapa's central objective of retention, the Ahu Whenua trust could only be constituted once the court was satisfied that the trust constitution would 'best promote and facilitate the use and administration of the land in the best interest of the persons beneficially entitled to the land'.<sup>74</sup>

Ahu Whenua trusts could only be constituted in respect of a whole block or blocks of land - not individual interests in the land.<sup>75</sup> The court was required to be satisfied that there was a sufficient degree of support for the creation of the trust - however, unanimity was not required.<sup>76</sup> Assets of an Ahu Whenua trust were to be held in trust for persons beneficially entitled to the land in proportion to their several interest in it.<sup>77</sup> Again, similar to Whanau trusts, the court retained a residual discretion to empower trustees to hold any portion of the income for Maori community purposes,

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<sup>69</sup> Clause 183(4).

<sup>70</sup> Clause 184(6).

<sup>71</sup> Clause 184(3).

<sup>72</sup> Clause 184(4).

<sup>73</sup> Above n x, at 72.

<sup>74</sup> Clause 185(2).

<sup>75</sup> Clause 185(3)(a).

<sup>76</sup> Clause 185(4).

<sup>77</sup> Clause 185(5).

and apply it for the general benefit of the beneficiaries.<sup>78</sup>

#### 4 Whenua A Iwi Trusts

Whenua A Iwi trusts fulfilled Kaupapa's recommendation that land be held in trust for 'general or specific tribal purposes'.<sup>79</sup> Like Ahu Whenua trusts a Whenua A Iwi trust could only be constituted in respect of a block or blocks of Maori land, or general land owned by Maori.<sup>80</sup> The court was also required to satisfy itself that the interest in land constituted 'the whole or a substantial part of the total interest in land owned by the members of any iwi or hapu, and that the constitution would promote and facilitate the use and administration of the land in the best interest of the iwi or hapu'.<sup>81</sup> Succession to individual interest would cease. However, the court could order that income from any interest or shares be applied for specific persons, when satisfied that this was 'necessary to protect the interest of any owners of a large interest'.<sup>82</sup> Again the owners of the land must have had sufficient notice and time to discuss and consider the application; further, the court would only grant the application if there was a sufficient degree of support.<sup>83</sup> Finally, the land, money, and other assets were to be held in trust for Maori community purposes and applied by the Iwi trustees for the general benefit of the members of the iwi or hapu.<sup>84</sup>

#### 5 Kai tiaki Trusts

Kai tiaki trusts were carried over from Part X of the Maori Affairs Act 1953. Kai tiaki trusts were to be established to protect the interests of Maori who, due to disability were unable to manage their affairs. The court was required to be satisfied that the constitution of the trust would 'best protect and promote the interests of the person under disability'.<sup>85</sup> Under the Bill rights of succession were maintained.<sup>86</sup>

#### 6 Trustees' power of alienation

Clause 198 of the Bill provided that trustees had no power to sell land vested in them unless approved by the specified percentage of owners, that is, at least three quarters where no owner had a defined share in the land, or owners who together were

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<sup>78</sup> Clause 185(6).

<sup>79</sup> Above n 40, 17.

<sup>80</sup> Clause 186(3)(a).

<sup>81</sup> Clause 186(2).

<sup>82</sup> Clause 186(8).

<sup>83</sup> Clause 186(4).

<sup>84</sup> Clause 186(5).

<sup>85</sup> Clause 187(3).

<sup>86</sup> Clause 187(8).

beneficially entitled to at least 75 percent of the land. The sale was also subject to the court's confirmation under Part VII of the Bill.<sup>87</sup> Alienation by any other means required the confirmation of the Registrar of the court.<sup>88</sup>

## B *Maori Incorporations*

Part XV of the Bill signified a return to the basic concept of Maori incorporations which existed before the 1967 Amendment Act was passed. As noted earlier, the 1967 Act equated Maori incorporations more with companies, so that the owners became shareholders rather than land-owners. The 1984 Bill empowered the court to vest the legal estate in the land in the incorporation while the beneficial interests in the land would remain vested in the several owners.<sup>89</sup> Accordingly, the owners maintained their link with the land. The incorporation would hold land and other assets in trust for the incorporation owners.<sup>90</sup>

In line with Kaupapa's call for greater flexibility in the management of incorporations, the Bill provided that every incorporation could now have a constitution governing its internal management.<sup>91</sup> The court either on making an incorporation order, or on application at any time thereafter, could approve any variation to the incorporation's constitution.<sup>92</sup> In addition, Maori incorporations were no longer required to state objects. Under the Maori Affairs Act 1953 this had the effect of confining the incorporations operations and, accordingly hindered their ability to work in the best interests of shareholders.

At the heart of Part XV of the Bill were the expansive powers conferred on the incorporations: every incorporation now possessed 'such powers as are reasonably necessary to enable it to discharge the obligations of the trust in the best interest of the shareholders'.<sup>93</sup> This included the power to alienate, mortgage, or otherwise dispose of, or deal with the land and other assets vested in it, as if it were a private person of full capacity. However, the power of alienation was subject to a resolution of owners and the court's confirmation.<sup>94</sup>

Under the incorporation's constitution set out in the first schedule, a resolution including a special resolution to alienate land could be obtained by simple majority of shareholders. This not only cut across the philosophy of the bill, but conflicted with clause 140 which required presence and consent of at least 75 per cent of the beneficial freehold interest in the land before the sale of any land by a meeting of

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<sup>87</sup> Clause 198 (2) .

<sup>88</sup> Clause 198 (3) .

<sup>89</sup> Clause 217 (2) .

<sup>90</sup> Clause 217 (4) .

<sup>91</sup> Clause 230 .

<sup>92</sup> Clause 230 (3) .

<sup>93</sup> Clause 220 .

<sup>94</sup> Clause 220 (2) (a) .



owners.

Kaupapa advocated that the quorum for incorporation be reduced to 15 per cent.<sup>95</sup> Nonetheless, the Bill required a resolution passed by assembled owners owning at least 30 per cent of the beneficial interest in the land.

### C Powers of Assembled Owners

Where neither a trust or incorporation existed, owners could only sell land with the agreement of the other owners. Tight restrictions were imposed on the alienation of land via a meeting of owners. Although Kaupapa proposed that sales should be limited to where the owners were unanimous, the Bill provided that a meeting of owners proposing a sale of land or any part of it, required a quorum of 75 percent and at least 75 percent of the owners had to vote in favour of the proposed sale.<sup>96</sup>

The Bill, similar to the 1974 Amendment Act, required a sliding percentage of owners to be present where a proposed resolution related to the lease of the land.<sup>97</sup> For example, if the assembled owners proposed to lease land for more than 42 years, the necessary quorum was at least 75 percent of the beneficial freehold interest in the land. Nonetheless, for the resolution to pass, a simple majority was sufficient.<sup>98</sup> The resolution also required the courts' confirmation before alienation was possible.

### D Confirmations

Under Part VIV of the Bill, all alienations were required to pass through the Maori Land Court, whether by way of application of confirmation of an instrument of alienation, or an application for a vesting order. Accordingly, only those alienations that complied with the Bill would occur.

Traditionally, the court used this power to do equity or to exercise its 'quasi-parental jurisdiction'.<sup>99</sup> Section 227(1)(b) of the Maori Affairs Act 1953 stated that the court should not confirm any alienation if it was contrary to equity or good faith or the interest of the Maori alienating. In 1967 the Waetford-Prichard Report<sup>100</sup> thought section 227 was too protective and suggested that it be repealed. Section 227 was subsequently removed by the 1967 Amendment Act. Accordingly, the court's power of assessment was limited to a number of specified categories that were generally considered by the court any way in confirming or modifying a resolution of alienation

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<sup>95</sup> Above n 40, 19.

<sup>96</sup> Clause 140.

<sup>97</sup> Clause 141.

<sup>98</sup> Clause 139.

<sup>99</sup> See P.G McHugh, "The Alienation of Maori Land under Part XXIII and section 438 of the MAori Affairs Act 1953" (1979), 10 V.U.W.L.R. 153.

<sup>100</sup> Above n X.

under the pre-1967 power. These provisions were carried over to the 1984 Bill.<sup>101</sup>

Significantly, the Bill contained a new provision giving the court authority to decline an application for confirmation when satisfied that alienation would not be consistent with the objects of the Bill, having regard to such matters as:<sup>102</sup> the historical importance of the land to alienating owners, and the application by the owners of the principle of ahi ka.

#### 1 Preferred class of alienees

The Bill introduced the concept of a class of preferred alienees. This ensured that land was retained in the hands of the whanau or kin-group. Broadly, the classes were defined in terms of the relationship of persons to the alienating owner and to their membership of the particular hapu associated with the land. Where a block of land was to be alienating by transfer or lease, preference was to be given to Maori who belonged to one or more of the preferred classes of alienees, ahead of persons who do not belong to any of these classes.<sup>103</sup> Further, undivided interests in Maori land could only be disposed of to persons who belonged to one or more of those classes.<sup>104</sup>

#### E *Leasing Maori land*

Provisions in Part XI of the Bill (governing alienation, by way of lease) broadly followed Part XX of the Maori Affairs Act 1953. Formerly, the court could appoint the Maori Trustee as agent for owners leasing Maori land. The Bill now empowered the court to appoint some other person as an agent.<sup>105</sup>

The Bill adopted Kaupapa's call to ensure that persons seeking to assign the lease first offered the lease to the kin-group of the lessor, or other Maori. Clause 70 provided that no lease could be assigned unless the Maori Trustee or other agent was satisfied that: the proposed alienee belonged to one or more of the classes of preferred alienee; or the proposed alienee was a Maori incorporation and there was a sufficient link between the land of the incorporation and the land to which the lease relates; or no member of the class of preferred alienees was willing to acquire the interest under the lease, and the assignee was a fit and proper person to acquire the lease.

#### F *Administration of Estates and Succession*

The Bill ensured that succession was effectively limited to direct line descendants of the person making the will. Rights of intestate succession continued to be determined

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<sup>101</sup> Clause 113.

<sup>102</sup> Clause 115.

<sup>103</sup> Clause 82(2).

<sup>104</sup> Clause 87.

<sup>105</sup> Clause 156.

in accordance with Maori custom,<sup>106</sup> that is, section 76A of the 1974 Amendment Act was repealed; however, that provision was limited to undivided interests in Maori freehold land. Pursuant to clause 91(1) the principle was extended to any beneficial interest in Maori freehold land.

The Bill largely adopted Kaupapa's recommendations on dispositions of Maori land by will. Now the testator was confined to disposing any interest in Maori freehold land to a specified class of persons, that were either direct line descendants or inter alios, members of the particular hapu associated with the land.<sup>107</sup> Provisions in the will purporting to confer interests on those other than the specified class of persons, would be void and of no effect and the interest would pass to persons entitled upon intestacy.<sup>108</sup> Although a spouse was not entitled to the capital of the land, a testator could still devise interest for life or until remarriage.<sup>109</sup>

The Bill also empowered the Maori land Court to determine whether a person was recognised as a whangai of the deceased owner.<sup>110</sup> If a person was regarded as whangai of the deceased owner, the court could order that that person was entitled to succeed to the owners interest, or in any shares in an incorporation to the same or lesser extent as would have been the case if that person had been a child of the deceased. Conversely, the court could reduce or deny that person's interest in the estate.

The Bill embraced Kaupapa's proposal that succession to Maori land only be effected by vesting order of the land court. Under clause 103, no vesting order could be made until the Maori Land Court determined beneficial entitlement to Maori land. Accordingly, an administrator could not transfer an interest in Maori land without the court's determination. The Bill also adopted Kaupapa's recommendation to empower the court to provide any person, who would not otherwise be entitled to any interest, with income derived from any interest in Maori freehold land.<sup>111</sup> Another important provision, clause 104 provided that where the court thought no person was primarily entitled to succeed to any interest in Maori land, it could determine the persons entitled to succeed in accordance with Maori custom.

## V MAORI AFFAIRS BILL 1987

### A Overview

Although the Maori Affairs Bill 1984 was never introduced it provided the basis for the fine tuning of Kaupapa's recommendations. Further work was done, and in 1987 the government introduced another Bill which contained most of the provisions of the

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<sup>106</sup> Clause 91.

<sup>107</sup> Clause 90.

<sup>108</sup> Clause 90(4).

<sup>109</sup> Clause 90(3).

<sup>110</sup> Clause 105.

<sup>111</sup> Clause 106.

## 1984 Bill.

The Maori Affairs Bill 1987 made a number of substantial changes. It contained several new Parts: Part I now governed the administration of the bill - under this head provision was made for the Department of Maori Affairs, Board of Maori Affairs, and Maori land Advisory Committees. A new Part II, *Nga Mahi Tuturu Me Nga Mahi Kokiri*, largely subsumed Part I of the 1984 bill (*Tikanga-A-Iwi*). Part IV provided for the constitution and jurisdiction of the Maori Appellate Court. Part VII, Recording of ownership, contained new provisions ensuring that records of ownership were brought up to date and registered under the land transfer system. Part VIII was concerned with the status of land - under this part, the court could oversee the transition of Maori land to General land and vice versa. Part XVI contained numerous provisions relating to the Maori Land Board. Part XVII governed title reconstruction and improvement, and Part XVII re-enacted provisions for the establishment of Maori reservations.

In line with Kaupapa's proposals, the Bill prescribed a new quorum of 15 per cent of the beneficial interest in respect of proposals to incorporate.<sup>112</sup> Further, the Bill provided trustees with greater flexibility in leasing land held in trust. Under clause 246 of the Bill, only alienations of land by sale, or lease for a term of 42 years or more require the court's confirmation. Formerly, every alienation regardless of the term required the court's approval.<sup>113</sup>

### B *Status of Land*

- Part VIII governed the status of land and was of considerable importance for several reasons: first, to ensure Maori land was retained in Maori hands it was necessary to identify what land constituted Maori land. Secondly, if Maori land could lose its status too easily, the legislative objective of retention would be undermined. Thirdly, the court's jurisdiction turned upon the status of the land rather than the question of whether the owner of the land was Maori.

Part VIII provided the means for Maori land to be converted to general land and vice versa. Although the Maori Affairs Act 1953 set out a cumbersome procedure for the conversion of general land into Maori land, the Bill made it relatively easy for such conversion. Emphasis was now placed on sufficient agreement between the owners of the land, and owner affinity with the land.<sup>114</sup>

The court on a number of specified occasions, could change the status of general land to Maori land by vesting order upon a change of ownership.<sup>115</sup> The provision would apply if an owner wished to have land vested in or for the benefit of any Maori where land was either - acquired for any Maori; taken for public work; or Crown land reserved for Maori.

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<sup>112</sup> Clause 193.

<sup>113</sup> Clause 198(3) Maori Affairs Bill 1984.

<sup>114</sup> Clause 145.

<sup>115</sup> Clause 146.

The Bill made it more difficult to change the status of Maori land to General land.<sup>116</sup> The court was required to be satisfied that (i) the land was owned by not more than 10 persons as tenants in common; (ii) Neither the land nor any interest was subject to any trust; (iii) that the title to the land was registered under the Land Transfer Act 1952, or was capable of being so registered (iv) the land could be managed or utilised more effectively; and (v) the owners had enough time to consider the proposed change of status and a sufficient proportion of the owners agreed.

### C *Recording of Ownership*

Part VII of the 1987 Bill was largely new and directed at the 1980 Royal Commission and Kaupapa's recommendations that the Maori land court records of ownership be brought up to date and transferred to the land transfer system.<sup>117</sup> Orders relating to the legal ownership of Maori freehold land were to be registered under either the Land Transfer Act 1952 or the Deeds Registration Act 1908.<sup>118</sup> The Bill adopted Kaupapa's recommendation that where there were more than 10 owners, the Maori land court for the district in which the land was situated, would be recorded as the registered proprietor. When the number of owners dropped below 10, the owners would again be recorded as the registered proprietors.<sup>119</sup> (note struck out by sop)

The Bill also made special provision for cases where registration was impracticable due to unavailability of an adequate survey plan. Clause 134(1) provided that where an order was not supported by a plan of the land 'prepared in the form and manner sufficient for registration' the district land Registrar was to note the fact of making the order on the title of each parcel of land that appeared to be affected by the order. Clause 134(2) permitted the 'provisional registration' under the Land Transfer Act 1952 of an order made by the court in respect of land for which no title was issued under that Act.

### D *Maori Reservations*

Maori Reservations were governed by Part XVIV of the Bill which re-enacted, without substantive amendment, sections 439 and 349A of the Maori Affairs Act 1953. The Secretary could now set aside Maori freehold land or general land as a Maori Reservation for the purpose of a 'place of cultural, historical, or scenic interest'.<sup>120</sup> Similarly, under clause 393(1), the court, on application by the Minister, was empowered to consider whether any area of land should be set aside because of its historical significance, or spiritual association with the Maori people.

### E *Nga Huanga Mai i te Poari*

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<sup>116</sup> Clause 147.

<sup>117</sup> Above n X, r\c - 110 chapter 19.

<sup>118</sup> Clause 133.

<sup>119</sup> Clause 135.

<sup>120</sup> Clause 392(1).

Part XVI of the Bill re-enacted without substantive amendment many of the provisions contained in Part XXIV of the Maori Affairs Act 1953 (governing Maori Land Development), and provisions in the Maori Housing Act 1935. Clause 293 declared that the principal purpose of part XVI of the bill was to promote the retention and effective use, management and occupation of Maori freehold land by Maori, and the provision of better housing for Maori.

#### F *Title Reconstruction and Improvement*

Part XVII of the Bill governed title reconstruction and improvement. The provisions consolidated various, scattered provisions relating to partitions, amalgamations, aggregation, exchange, roadways, tramways, easements, and encroachment and boundary adjustment. Many of the provisions simply re-enacted, without substantive amendment, many of the pertinent provisions from the Maori affairs Act 1953. Nonetheless, a number of changes were made. Clause 354 specified the criteria that the court had to take into account, when exercising its jurisdiction to make any partition, amalgamation, or aggregation order. Consistent with Kaupapa's proposals, the court was required to consider the opinions of the owners and the effect of the partition on the overall use and development of the land.<sup>121</sup>In addition, the court had to ensure that the owners had sufficient notice of the application and time to consider it, and that there was a sufficient degree of support for the application, having regard to the nature and importance of the matter.

Part XVII also gave legislative effect to the Court of Appeal decisions of *R v Waiariki District Maori Land Board*<sup>122</sup> and *re Hine No.3 Block*<sup>123</sup>; the Court of Appeal held that a partition order made by the Maori Land Court established a legal estate and not merely an equitable estate capable of transformation into legal estate by registration. Under clause 55(2) the registration of a partition order constituted legal title to the parcel or the several parcels of land included in it.

## VI SECOND READING - TE TURE WHENUA MAORI 1992

On the 12 November 1992 - some five and a half years after its introduction, the Maori Affairs Bill (renamed Te Ture Whenua Maori) was reported back to the House Of Representatives. A number important changes were made to the Bill in response to numerous submissions made to the Maori Affairs Select Committee.

The 1984 Bill contained a new provision requiring persons assigning a lease of Maori land to first offer the lease to the classes of preferred alienees or other Maori. Under the 1992 Bill the principle was extended to the sub-leasing of any lease of Maori freehold land.<sup>124</sup>

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<sup>121</sup> Above n 40, 18.

<sup>122</sup> [1922] NZLR 417.

<sup>123</sup> (1922) GLR 591.

<sup>124</sup> Clause 220.

Whereas under the 1984 and 1987 Bills, it appeared that an incorporation could alienate Maori land by a simple majority, the 1992 Bill removed any doubt. Under clause 268A of the Bill a Maori incorporation needed a special resolution authorising the sale and voted for by at least 75 per cent of the total shares in the incorporation. Further, the incorporation could not transfer; make a gift of; or lease Maori land for a term of more than 21 years. Again, alienation of the land was subject to the court's confirmation.

Provisions in the 1987 Bill relating to an incorporation's powers were struck out and replaced with a new provision; pursuant to section 268 of the 1992 Bill every incorporation had 'full capacity in the discharge of the obligations of the trust in the best interests of the shareholders, to carry on or undertake any business or activity, do any act, or enter into any transaction; and full rights, powers, and privileges.

The 1987 Bill provided that only trustee alienations of land by lease for a term of 42 years or more required the court's confirmation. The 1992 Bill imposed tighter constraints on the alienation of land held in trust - every alienation of land by way of sale, transfer, or gift, or lease for a term of at least 21 years now required the court's confirmation.<sup>125</sup>

#### A *Status Orders*

A number of submissions made on the Bill noted that the owner representation and consent requirements regarding alienation were a significant impediment to the transfer of Maori land. Given the large number of shareholders in some incorporations, obtaining the 75 per cent quorum and voting requirement to alienate would prove extremely difficult and could jeopardise the incorporations commercial viability. In some circumstances rationalisation of the land base could lead to more efficient use of the land. Nevertheless, it was decided not to relax the voting and consent requirements - such action would cut across the Bill's philosophy of retention. Instead, the Select Committee proposed a compromise: provision was made in the Bill to allow incorporations, in tightly prescribed circumstances, to change the status of the incorporation's land from Maori freehold land to general land to facilitate alienation. The status change could only be granted if the court was satisfied that (i) the legal estate in fee simple in the land was vested in the Maori incorporation; and (ii) title to the land was registered under the Land Transfer Act 1952 or capable of being so (iii) the alienation of the land was clearly necessary for the purpose of rationalisation of the land base or of any commercial operation of the Maori incorporation in which the legal estate in fee simple was vested (iv) the rationalisation involved the acquisition of other land; and (v) the voting and consent requirements of the bill are not able to be obtained.<sup>126</sup>

#### B *Amendment to the Limitation Act 1950.*

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<sup>125</sup> Clause 426(2).

<sup>126</sup> Clause 147B.

The Select Committee expressed its concern at the omission from the bill of sections 155 to 158 of the Maori Affairs Act 1953.<sup>127</sup> Section 155 basically provided that Maori customary title was not enforceable against the Crown.<sup>128</sup> It had been suggested that the repeal of section 155 could result in past transactions being litigated in the courts and the government becoming liable for the large sums in compensation. It was argued that if customary title became enforceable against the Crown, land wrongfully acquired by the Crown from Maori could still constitute Maori customary land.<sup>129</sup> Accordingly, the Crown would either have to return the land or provide compensation. The Limitation Act 1950 provided that the standard period for recovering land from the Crown was 12 years; however, Maori customary land was expressly exempted from the Act's provisions. In theory the repeal of section 155 may have allowed the review of transactions dating back to 1840. To overcome this, the Select Committee recommended that the provisions of the Limitation Act 1950 be extended to Maori customary land - any action against the Crown for the recovery of Maori customary land was to be brought within 12 years of its alienation.

### C Additional Members

The 1992 Bill introduced the new concept of appointing additional lay members to assist the court in the determination of issues that required special expertise or knowledge. Pursuant to the Bill, the High Court could state a case for the opinion of the Maori Appellate Court on any question of tikanga Maori.<sup>130</sup> In such a case the Chief Judge upon request could appoint 1 or 2 lay members possessed of knowledge and expertise of tikanga maori to the Maori Appellate Court.<sup>131</sup> Before appointment, the Chief Judge was required to consult with the parties to the proceedings about the knowledge and experience of tikanga Maori that the additional members should possess.<sup>132</sup>

Clause 51(1) of the Bill<sup>133</sup> gave the Governor-General authority, by Order-in-Council to confer upon the court jurisdiction to 'determine any claim, dispute, issue, question, or other matter affecting the rights of Maori in any real or personal property' or any other matter that in the Governor-General's opinion, fell within the special expertise of the court. The Order-in-Council could also provide that 1 or 2 additional lay

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<sup>127</sup> The Minister of Maori Affairs (Hon.Koro Wetere) when introducing the 1987 bill, expressed that the provisions were to be dropped as they were contrary to the principles of the Treaty of Waitangi.

<sup>128</sup> The provision had its genesis with section 84 of the Native Lands Act 1909 - a statutory codification of the Supreme Court of *Wi Parata v Bishop of Wellington*.

<sup>129</sup> P.G McHugh

<sup>130</sup> Clause 75B.

<sup>131</sup> Clause 75B.

<sup>132</sup> Clause 75C(3).

<sup>133</sup> This provision had its genesis with the Maori Affairs Bill 1984.



members be appointed to the Maori land court - each additional member was required to possess knowledge, and experience relevant to the issue.<sup>134</sup>

The Bill further empowered the Minister (of Maori Affairs) the Secretary, or the Chief Judge to refer any matter to the court for inquiry.<sup>135</sup> The Chief Judge could appoint 1 or 2 additional members to the court for the purpose of the inquiry.<sup>136</sup> Again the appointed persons had to possess knowledge and experience relevant to the subject-matter of the inquiry and the Chief Judge was required to consult with the parties to the inquiry about the knowledge and experience that any such person should possess.<sup>137</sup>

#### D *Occupation Orders*

The Bill adopted Kaupapa's broad proposals to grant occupation orders for the use and occupation of land as a site for a house. The court could only vest exclusive use and occupation of land to either the owner of any beneficial interest in the land, or any person entitled to succeed to the beneficial interests of any deceased person in the land. Before granting an order, the court was required to consider several matters: the opinions of the owners as a whole; the effect of the proposal on the interests of the owners of the land; and the best overall use and development of the land. The court was also required to satisfy itself that the owners had sufficient notice of the application and time to consider it and that there was a sufficient degree of support for the application.

#### E *Supplementary Order Paper - March 1993*

On 2 March 1993 a Supplementary Order Paper was introduced making a number of substantial changes to Te Ture Whenua Maori. The paper considerably extended the court's jurisdiction and authority to appoint additional members.

A new clause 52AA empowered the Maori land court to give advice or make determinations on matters of representation. Under clause 52AA(1)(a) any court, tribunal, or commission could request the court to supply advice as to the most appropriate representatives of any class or group of Maori in respect of any proceedings before the court, commission, or tribunal. In addition, the court at the request of the Chief Executive of Chief Judge could determine who were the most appropriate representatives of any class or group of Maori in relation to any negotiations, consultations, allocation of funding or other matter.<sup>138</sup> Upon such a request the Chief Judge of the court was required to appoint 2 or more additional

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<sup>134</sup> Clause 51A.

<sup>135</sup> Clause 52. Above n,134 -this clause was also originally included in the 1984 Bill.

<sup>136</sup> Clause 52A.

<sup>137</sup> Clause 52A(3).

<sup>138</sup> Clause 52AA(1)(b).

members (not being Judges of the Maori land court) to the Maori land court.<sup>139</sup> Again the members were required to possess knowledge and experience relevant to the request and the Chief Judge was required to consult with the parties to the proceedings, or persons involved in negotiations, and consultations, about the knowledge and experience that the additional members should possess.

The Bill also provided for the appointment of additional members where any matter of tikanga Maori was referred to the court for inquiry by the Minister, Chief Executive or Chief Judge of the Maori land court.<sup>140</sup> As with the other provisions governing the appointment of additional members, persons appointed were required to possess knowledge and experience of tikanga Maori.

The paper struck out many of the Bill's provisions relating to meetings of assembled owners. These were to be provided for in regulations made by Order-in-Council by the Governor General.<sup>141</sup> The regulations would set out the procedures to be followed at a meeting of assembled owners and quorum and voting requirements for the alienation of land and other matters such as leasing and proposals to incorporate. In addition, the regulations would prescribe the form of constitution for each incorporation, instead of setting it out in the First Schedule to the Act.

The paper also provided incorporations with the power to alienate land without shareholder approval, where the sale was necessary to effect minor boundary adjustments.

## CONCLUSION

Te Ture Whenua Maori has had a long and protracted history. The Act contains the administrative structures designed to implement Kaupapa's call for the retention of Maori land at whanau, hapu, and iwi levels. Contrary to the 1980 Royal Commission's expectations, the Maori Land Court maintains a central role in the management and administration of these structures. However, Maori may question how effective these provisions are at providing an economic base for their iwi. The Act's core philosophy of retention of Maori Land is difficult at times to reconcile with Maori need to use their land for the social and economic benefit of iwi. Further, a number of controversial additions were made at the last stage of the Bill's passage. Providing the Court with the authority to determine representatives of iwi significantly extends the court's jurisdiction into unchartered territory.

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<sup>139</sup> Clause 52AC.

<sup>140</sup> Clause 52AB.

<sup>141</sup> Clause 201.

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