



Te Kaunihera Māori o Aotearoa
New Zealand Māori Council

Te Ture Whenua Maori Act 1993 Review Panel Discussion Document March 2013

Submission of the New Zealand Maori Council

Introduction

1.1 This is a statement for the New Zealand Maori Council pursuant to s18(1)(a) and s18(3) Maori Community Development Act 1962, to Te Ture Whenua Maori Act 1993 Review Panel, in response to the Panel's Discussion Document of March 2013.

1.2 The Council led the review in the late 1970s, resulting in the Brown Paper on Maori Land which was eventually transformed into Te Ture Whenua Maori Act 1993. The Council accepts it is now time to move on from that Act.

1.3 The Council considers a large vision is necessary to move Maori land law forward and congratulates the Panel for seeking such a vision.

1.4 The Council broadly supports the propositions which the Panel has proposed. However, this is not an exact response to the Panel's issues but follows the order of the Council's deliberations.

1.5 In addition members were not unanimous on issues so that this statement represents the perceived mood. Council therefore reserves the right of any District Maori Council to express a contrary or further view on any aspect.

1.6 In the representations which follow the Council responds in kind to the Panel's broad brush approach; but wishes to be heard in person on the more detailed application of such of the Panel's proposals as are carried forward into the second stage of the Panel's review.

1.7 In moving to the second stage the Council hopes that the Panel will not be discouraged by any criticism that may follow its discussion

document and which is likely to reflect the natural caution of a people who have experienced dramatic land losses.

1.8 The Council's starting point is to uphold the principle of rangatiratanga or self determination in the Treaty of Waitangi and the right of indigenous peoples to govern themselves through institutions of their own choosing as expressed in those parts of the UN Declaration on the Rights of Indigenous Peoples to which New Zealand has subscribed.

Land Use through engaged owners

Principle

2.1 Council agrees land use should be decided by engaged owners, and accepts the criteria for determining the necessary level of engagement. Council agrees that utilisation should not be thwarted by quorum failure as at present.

2.2 The customary principle as we see it is that hapu were not defined by those who were absent from the battle but only by those who were there to carry the fight. The second point is that the rights of absentee owners are Pakeha given rights. Under tikanga, and the principle of ahi ka, the absentee's assumed right transposes to a duty to support those who maintain the home base. It should be noted that UNDRIP acknowledges the right of indigenous communities to determine the duty of its members to the group.

2.3 We must strive for consistency in the application of customary values even though that may be difficult in today's world. Land is not taonga tuku iho if we do not accept the tikanga that goes with taonga tuku iho.

Thresholds

3.1 Council accepts the 50% threshold as the minimum criteria for ordinary decisions and 75% for sales, but adds that the 75% threshold should extend as well to leases over 50 years and to mining licenses (unless it is plain that the mining licence will have no lasting ill-effects on the land). Council accepts such thresholds as necessary having regard to the extent that the modern descendants of the former close knit communities are now dispersed; but would hope that in rebuilding customary values owners would gradually search for consensus decision

making through the leadership of tikanga trained whanau representatives (the koromatua system).

3.2 Council proposes as an exception to the 75% rule for sales to a tribal authority, post settlement governance entity, Maori Trust Board or similar body where the land will be held for the benefit of a general class of Maori. In such a case, Council submits that the usual rule of 50% of engaged owners should apply.

First Refusal

4.1 Council also accepts that on a sale those within the preferred class of alienees should have a right of first refusal. The panel correctly notes that this means that they have a right to purchase before the land is offered to external purchasers. This needs emphasis because of the practice of some lawyers of taking the land straight to the market and then calling on the preferred class to match the offered price. That means the preferred class may need to meet an exalted price. The present provision in the Act is deficient in this respect in failing to define the terms which constitute the first right of refusal. We say it should refer to a fair price as determined by valuation, or by the umpire of competing valuers in the event of a dispute.

4.2 The right of first refusal also enables the preferred class to call upon the sellers to grant a concessionary purchase price.

4.3 Council would also extend the preferred class to include the tribal authorities, post settlement governance entities, Maori Trust Boards or similar bodies operating in the district where the land is situated.

Notices and Disclosure

5. Council notes and supports the Panel's condition of adequate disclosure prior to decision-making. There should be a similar condition about notices. While many Maori may not have access to computers, we think it necessary to allow for notices to go only to those who have provided an email address to the Registrar, which could well be that of a trusted whanau member.

Polls

6.1 Council identifies as a risk, in the simple majority rule, of persons bussing in whanau members with a view to taking over a meeting. To help guard against such practices, any owner present should be able to call for a vote according to a poll.

6.2 A decision by poll should be a right for other reasons too. Whanau who arranged successions to consolidate holdings in one place, or took other measures to offset share fragmentation, should not be prejudiced by whanau who allowed for fragmentation and who now have the greater number of owners but each with small shareholdings.

Review of Process

7.1 Council agrees with the Panels view that the decisions of the community of owners, once fairly made, should be final. No Court confirmation is required. However, Council flags that the issue is not the decision but the process by which the decision was made. For example, there may be questions about the adequacy of notice, the adequacy of disclosure of information, gerrymandering or unfair practices like bussing, promotion of the meeting by an interested third party including the offer of benefits to certain owners, the consideration given to minority interests and the opportunity for dissenting owners to partition.

7.2 Consistent with the Council's opinions expressed below, Council contends that aggrieved owners should have recourse to one of three options, as agreed with the elected owner representatives, of arbitration, mediation or Maori Land Court.

External managers

Who initiates?

8.1 Council supports the Panel's proposals for the appointment of external managers and strongly endorses the engagement of tribal authorities, post settlement governance entities, Maori Trust Boards or similar bodies undertaking such functions, subject to the assumption of appropriate fiduciary duties.

8.2 However, the Panel should consider who, in the absence of engaged owners, might initiate the appointment of an external manager. The governing principle, as we see it, is that the initiative should come from within the iwi, or local community, rather than from a national body, like the Maori Land Court, the Maori Trustee or a Department of State. While such agencies might advise and assist, the proposal must come from, or must at least have the support of, a local tribal authority, post settlement governance entity, Maori Trust Board or similar body having some oversight of the hapu most associated with the land.

Complaints

Who hears complaints about the external managers?

9.1 Council considers the complaints process should be at the option of the owners. The principle is that of tribal rangatiratanga. The Maori Land Court should not be able to intervene except upon a substantial complaint, and should not have a monopoly on the hearing of complaints.

9.2 The Council supports the proposition that the Maori Land Court should not intervene where there owners have a sound, dispute resolution process provided for in its constitution or in its authority to act. Further the complainant should not be limited to accessing the Maori Land Court but in association with the external manager may opt for private mediation or arbitration.

Resumption of control

10.1 Council agrees that where land has passed to such managers, the owners must be able to recover the land and appoint alternative managers. However, Council considers that those seeking recovery should establish that recovery is in the best interests of the owners and is not prejudicial to the external manager. They must point to adequate governance and business proposals for example, obtain the consent of secured creditors and provide appropriate covenants to the external manager.

Governance, Judicial Oversight and Dividends

Good governance is sometimes bad governance

11.1 Council is unable to support the proposals to match governance to standard business practice. Governance of Maori land entities must be equally matched to kaupapa, and the culture of the ownership community and governance bodies must be peppered with persons of sound practical experience in working with Maori people. Some of the most successful trusts and incorporations were established through the enterprise of Maori leaders who lacked formal training or secondary schooling.

11.2 For buy in, governance bodies may need to contain whanau representatives. We consider this section needs further work to marry standard, governance experience and expertise and Maori cultural and practical experience and expertise.

Judicial Oversight

12.1 Once again, the Council's view is that the Maori Land Court should not have a monopoly on managing breaches of governance rules. The Council would rather open to owners the option of arbitration, especially where the issues are predominantly commercial.

Dividends

13.1 Council considers that the profits accruing to missing owners and to shares under a minimum value, set by the engaged owners, should be applied to rates, capital improvements on the land, debt reduction and for the purchase of individual shares for the general benefit of an associated hapu. The principle is that to the extent possible, the benefit of the land stays with the people of the land and is not dissipated, for the benefit of people as a whole through the survival of the culture at the home base.

Purchase of individual shares

14.1 Included in the preferential class for the purchase of shares should be the land management entity, tribal authorities and post settlement governance entities which hold the shares for the general benefit of the hapu and iwi.

Supportive Infrastructure

15.1 The profits accruing to missing owners, and to shares under a minimum value, should be applied to capital improvements on the land, or for community purposes which benefit the community customarily associated with the land.

15.2 The Council supports an institutional framework to assist governance training, and dispute resolution including assistance in the funding of arbitration in needy cases. It supports the training of lawyers willing to serve as arbiters in relation to Maori land disputes.

15.3 The Council emphasises arbitration as an option along with mediation and reference to the Maori Land Court; and would put arbitration ahead of mediation in commercial cases.

15.4 The Council sees the most important function of the Maori Land Court as being in the management of a Registry which should provide a one stop shop for all information which Maori owners may seek with regard to their land, which records the outcome of arbitration decisions

supported by appropriate orders, and which receives regular reports from land administrators.

Fragmentation

16.1 Succession to Maori Land should be managed in much the same way as Maori incorporations manage the devolution of its shares.

16.2 There should be simpler provisions for owners to cluster their shares under the name of a common ancestor from whom those shares derive and to appoint representatives for the whanau which descends from that ancestor. Successions then cease to those shares.

16.2 Council does not support whanau trusts which bring together the shares which whanau have in diverse blocks. Each land block represents a particular community and the primary duty of each owner in that block is to that community.

Conclusion

17.1 The Council considers a large vision is necessary to move Maori land law forward and congratulates the Panel for seeking such a vision.

17.2 The Council broadly supports the propositions which the Panel has proposed. Our submissions are not an exact response to the Panel's issues but follows the order of the Council's deliberations.

17.3 In addition members were not unanimous on issues so that this statement represents the perceived mood. Council therefore reserves the right of any District Maori Council to express a contrary or further view on any aspect.

17.4 The Council wishes to be heard in person on the more detailed application of such of the Panel's proposals as are carried forward into the second stage of the Panel's review.

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17.6 The Council's starting point is to uphold the principle of rangatiratanga or self-determination in the Treaty of Waitangi and the right of indigenous peoples to govern themselves through institutions of their own choosing as expressed in those parts of the UN Declaration on the Rights of Indigenous Peoples to which New Zealand has subscribed.

Tena koutou mo ou mahi nunui mo te iwi