

Ngāti Mutunga o Wharekauri Iwi Trust

DRAFT TE TURE WHENUA MAORI LAND ACT 1993 REVIEW PANEL

***To: Te Ture Whēnua Maori Land Act 1993
Review Panel
C/- Te Puni Kōkiri
WELLINGTON***

Submission – May 2013

*Papaki ngā ngaru ki Waitangi tai
Kau mai te pa a Tangaroa
Rere mai te Toroa ki uta
Pupuhi te hau moana o te ha o Tawhirimatea
Tera! Koia te motukohu
Wharekauri e!*

Introduction

The Ngāti Mutunga o Wharekauri Iwi Trust ("Iwi Trust") represents the collective interests of Ngāti Mutunga o Wharekauri (NMOW), and is a mandated iwi authority for the purposes of the Resource Management Act 1991 and the Māori Fisheries Act 2004. Although the Trust speaks for NMOW on a number of matters, the mana and decision-making powers remain with Ngāti Mutunga o Wharekauri Iwi. This then forms the basis for this submission from the Trust to the Te Ture Whēnua Maori Act 1993 Review Panel.

Our Purpose

- To be the repository of the collective Tino Rangātīratanga of Ngāti Mutunga O Wharekauri
- To represent the collective interest of Ngāti Mutunga O Wharekauri and be the legal representative of Ngāti Mutunga O Wharekauri in relation to the collective interest
- To make and pursue the settlement of claims on behalf and for the benefit of Ngāti Mutunga O Wharekauri under the provisions of the Treaty of Waitangi Act 1975
- To be the mandated iwi organisation for Ngāti Mutunga O Wharekauri

Benefit Provision

To advance the social and cultural development of Ngāti Mutunga o Wharekauri beneficiaries and distribute benefits directly or indirectly to beneficiaries, irrespective of where they may reside, when and where the Trust may decide.

Tikanga

To promote and preserve, protect and maintain the identity, mana, Tino Rangātīratanga, culture, history, traditions, arts and crafts, tikanga, reo, and taonga tuku iho of Ngāti Mutunga o Wharekauri.

Overview

The Iwi Trust has engaged in consultation with the Iwi of Ngāti Mutunga to arrive at the responses provided within this submission. This 'kanoahi-ki te-kanoahi' process underpins the mana of the whakaaro put to you from Ngāti Mutunga o Wharekauri. The Iwi Trust recognises that the very concept of Tino Rangātīratanga and tikanga Maori require that all views, whether consistent with a 'majority view' or not, are given voice and recognition.

Accordingly, the whakaaro of this submission represent all the views put to the Iwi Trust by ngā tangata o Ngāti Mutunga o Wharekauri who attended the consultation process. It is not only the ‘majority view’ of attendees.

Outlay of Submission

The Iwi considered the discussion document using the structure of patai provided by the panel. Each question has been carefully considered by participants at the consultation hui. Responses are summarised in each section and additional structure to the answers have been provided through the Office of Ngāti Mutunga o Wharekauri Iwi Trust.

The Panel should note that in the comments section added to participant comments, references to **Ngāti Mutunga o Wharekauri** reflect a ‘general’ clarification of views from participants at consultation hui. Conversely, references to **Ngāti Mutunga o Wharekauri Iwi Trust** refers specifically to considerations of the secretariat and Trustees only.

The submission follows the propositions and responds to the specific questions raised by the panel in each section.

Key Messages to the Panel

The Iwi Trust appreciated the opportunity to respond to specific questions posed by the review panel. Equally the Iwi expressed strong concern that the very essence of tikanga Maori, kanohi-ki te-kanohi, has not occurred. This view underpins the key message the Iwi wishes the panel to receive.

Key Messages to the Review Panel

What issues do you wish to raise with the Review Panel?

Submission:

- The Iwi must be reassured the panel has not already decided the path it wishes to take in potentially reforming the Te Ture Whēnua Māori Act Review.

Comment: Too often consultation and submission processes are used as a tick box or 'compliance' process. Good consultation requires that it be early, it is conducted in good faith, it is meaningful, it is ongoing, and that those seeking to consult with Maori are prepared to change their mind on the basis of sound reasoning provided by Iwi.

- This is the opening position in a process of continuing kanohi-ki te-kanohi korero.
- You must come to consult personally with us
- Show your face

Comment: The integrity of those proposing change is directly related to the willingness to be physically scrutinised for the 'tika' and 'pono' of the words that flow from those proposing change. This can only be adjudged in person. A key value of tikanga Maori, and your ability to get agreement to consider alternative ways of managing our lands, is your ability to respond to robust scrutiny not just of your proposal, but of the manner in which you deliver it.

- The road to hell is paved with good intentions!
- God forbid this leads to alienation
- What are the risks associated with the questions you ask?
- What are the benefits that your proposal will bring?

Comment: Previous Crown led initiatives to release the wealth held in Maori land ownership has seen a corresponding rise in Maori alienation from that land. The well-intentioned, but hopelessly flawed process of releasing Maori land value began in the 1860s with the rise of the Native Land Court, was accelerated with the 10 owner rule, and reached its zenith with uneconomic shares approach of the Maori Affairs Act 1953. How can Ngāti Mutunga be assured this is not another iteration of those disastrous policies of yesteryear? The very fragmentation of land is one outcome of the well-intentioned but disastrous policies employed to protect' Maori landowners.

- What is your timeframe

Comment: The fear held on Wharekauri is that this is the last we will see or hear from you. No timeframe for ongoing korero is provided. Ngāti Mutunga o Wharekauri agrees on the need to get better land utilisation and more involvement from all land owners. But this is a korero that must be ongoing and be prepared to occur within the timeframe as required by all Iwi. What is your timeframe?

Proposition 1: Utilisation of Māori land should be able to be determined by a majority of engaged owners

The current regime governing Māori land is such that many decisions cannot be taken by Māori land owners themselves because they are subject to endorsement by the MLC and the vagaries of disengaged land owners (in the case of multiply owned land). This serves to disempower owners and makes decision-making processes unnecessarily complex for the majority of the decisions affected.

Definition:

An engaged owner is defined as an owner who has actively demonstrated their commitment to their ownership interest by exercising a vote either in person or by proxy or nominee.

Panel Question 1: What is your view on an engaged owner being defined as an owner who has actively demonstrated their commitment to their ownership interest by exercising a vote either in person or by proxy or nominee?

Submission:

- How can people be engaged if they are not even properly notified?
- Your criteria of voting is too narrow
- How can landowners be assured that the rules of engagement are known to them?

Comment: Ngāti Mutunga o Wharekauri is not hostile to the concept of engaged owners and ahi kaa having ultimate say over the governing of their Maori lands. That said, engagement is not just voting. It is also:

- ✓ Attendance at hui
- ✓ Submission of letters to hui
- ✓ Apologies
- ✓ Social media communication (e.g. contact through facebook)

Ngāti Mutunga o Wharekauri draws to the panel's attention, their strong objection to the requirement to have to go to Aotearoa to discuss land on Wharekauri. Those that wish to make decisions for land on Wharekauri must do so through a forum that is conducted on Wharekauri. Participation may be through other means (whether by proxy, skype, etc). This includes Maori Land Court judges who rule 'in absentia' on the lands they profess to have jurisdiction over. Jurisdiction under tikanga Ngāti Mutunga is physical.

This sentiment should inform and be the basis of what 'engagement' truly is. The intrinsic value of land, and your ability to make good decisions for it, is based on your spiritual connection to the land. And this can only be understood by walking directly upon it and explaining directly to your koiwi why you have taken the course of action and decisions that you have. There is no other way!

Panel Question 2: What is your view on any decisions, not including sale or permanent disposition of land, being undertaken without the need for endorsement by the MLC?

Submission:

- The very concept of tino rangatiratanga means our decisions on the land must not be 'confirmed' by an administrator of the Maori Land Court
- External oversight can give independent assurances that good decisions have been made
- Protection of landowners must be considered
- Efficiency in administration vs tino rangatiratanga – tino rangatiratanga is paramount
- Your criteria of voting is too narrow

Panel Question 3: What is your view on one role of the MLC being to ensure that 75% agreement has been obtained from all registered owners and that those who affiliate to the land have been given first right to purchase the land before Māori land can be sold?

Submission:

- Does this mean 75% of engaged owners, or all owners including disengaged?
- Affiliation to that land, whether as existing shareholders, or as Iwi who live on the land requires they be given first right of refusal
- What role does the administrator for the disengaged play in making decisions over alienation?
- The Maori Land Court has been an agent for dispossession through erratic judgements
- The considerable resource of the Maori Land Court must be used, first and foremost, to ensure that all people who have rights are aware that those rights exist and can be exercised, rather than just scrutinising decisions of the majority after the fact.

Comment: Ngāti Mutunga o Wharekauri Iwi Trust is of the view that whilst the goal of economic utilisation is laudable, for example in choosing to alienate so a factory can be built for the betterment of all Iwi affiliated to the land, even one landowner wishing to buy the land from those wishing to alienate for the betterment of the Iwi must have first priority. That is, a type of 'first right of refusal' at market rate. Their whakapapa right is sacrosanct so long as even one engaged person wishes to retain control of their own whakapapa entitlement.

Panel Question 4: What is your view on utilisation decisions other than sale requiring the agreement of at least 50% of engaged owners, provided there has been full and timely disclosure of the proposal to all registered owners?

Submission:

- Wouldn't this make it easier to get decisions to build on your own Maori land? If so that's a good thing

Comment: Ngāti Mutunga o Wharekauri Iwi Trust has no objections nor noted any from its Iwi members. Accordingly the Iwi Trust looks forward to greater clarification on 'full and timely disclosure'.

Panel Question 5: What is your view on utilisation decisions only being able to be challenged on the basis of whether fair value has been obtained or where there has been a conflict of interest or other breach of duty?

Submission:

- To make this work better support must be provided for those taking on a lease (if it is a whānau / landowner member) and / or for those leasing out.
- Good decisions require good support
- No! Other criteria for challenging must be included. This is too narrow. Future generations have to be considered so other criteria have to be included.

Comment: Ngāti Mutunga o Wharekauri notes issues with current lease management that underpin the sentiments expressed by the Iwi. Whilst it is incumbent on lessees and lessors to know their lease arrangements, often the cost of employing external legal advice can see cursory treatment given to lease arrangements. A key area of concern is unscrupulous whānau land owners who brush over lessee land improvement provisions, only to use those improvements to raise the rental as a result of those improvements. It is not enough to say land owners (in any capacity) should seek legal advice. The Crown has a duty to provide resource so good lease decisions can be made by all parties. This would help whānau members understand what is proposed by the legal process associated with taking on a lease (or leasing out).

Panel Question 6: What is your view on some types of utilisation decisions (e.g. long-term lease) requiring the consent of a larger group of engaged owners (e.g. at least 75%)?

Submission:

- All owners must have a say whether engaged or not
- The role of the administrator in representing the interests of the disengaged must be clarified
- Long term lease options (33, 66, & 99 years) must be allowed.

Comment: Ngāti Mutunga o Wharekauri understands the concern should long term leases be allowed that impact future generations. A 66+ year lease will have a dramatic impact on disengaged owners who seek to become engaged by finding out they have a right.

Equally however, utilisation of land for the purposes of building (for example) fish processing plants requires longer term leases be available to the developer to ensure their investment is protected. How these are balanced is an area the review panel must consider.

Panel Question 3: What is your view on the MLC approving the appointment of and retaining oversight over the external administrators of under-utilised Māori land?

Submission:

- I think it should be the Maori Land Court.
- We need to protect ourselves even if we should have the tino rangatiratanga right to act as administrators over land we either own or are affiliated to

Comment: Ngāti Mutunga o Wharekauri generally agrees that some judicial scrutiny can have a positive effect on safeguarding individual landowners, and those who believe they can best administer on behalf of those individuals who are disengaged. It is understood that this question relates to land that is 'wholly' owned by disengaged owners.

Panel Question 4: What is your view on the powers of external administrators and the rights of registered owners to resume administration of Māori land?

Submission:

- This question is not very clear
- No matter what, the primary role of the administrator is to engage owners and ensure succession

Comment: Ngāti Mutunga o Wharekauri is clear that a whakapapa (and succession) right supersedes that of judicially scrutinised administrators. At the point registered owners exercise control then that should occur without delay. Therefore, a record of utilisation decisions is a bare minimum to ensuring continuity and/or understanding of why decisions were taken by the administrators.

Panel Question 5: What is your view on the MLC being given responsibility for approving the appointment and retaining oversight of the external administrators?

Submission:

- Need to take the word 'external' out. The word is 'administrators' if local people are to exercise that responsibility on behalf of their disengaged whanaunga.
- Shouldn't engaged owners be the first to agree to external administration? Therefore should approval and appointment begin with engaged owners and not just the Maori Land Court.
- The role of Ahi Kaa is critical to getting better quality decision making on lands 'externally' administered. Ahi kaa administrators wouldn't necessarily (by definition) do a worse job than an external administrator.

Comment: Ngāti Mutunga o Wharekauri reiterates the points in makes in question 4.

Proposition 3: Māori land should have effective, fit for purpose, governance.

This would involve providing for capable governors with an appropriate level of oversight. Improved governance will drive greater utilisation of Māori land.

Panel Question 1: What is your view on the duties and obligations of trustees and other governance bodies who administer or manage Māori land being aligned with the laws that apply to general land and corporate bodies?

Submission:

- The question occurs in isolation. What else is proposed that would see alignment of laws not needing to apply to general land or corporate bodies?
- We want a fit for purpose governance arrangement for Maori land!

Comment: Ngāti Mutunga o Wharekauri Iwi Trust is aware of other models of Maori land tenure being proposed. Without greater clarification on what that might be (and the WAI64 report proposed that for Wharekauri) it is difficult to answer this question. If there is no other land tenure system proposed, then the answer is self-evident – they must be aligned for certainty.

Panel Question 2: What is your view on the need to take a balanced approach to the issue of improving governance capability in terms of providing both incentives and disincentives for governors of Māori land?

Submission:

- These are serious roles. There must be incentives and disincentives in the performance of trustee duties and administrator duties.
- External administrators and engaged trustees must be treated and remunerated equally.
- Actions must be accountable

Comment: Ngāti Mutunga o Wharekauri is aware that any external administrator will be compensated. Yet that is not the case for engaged land owners who take on trustee roles. The most highly experienced governors are not necessarily the ones who put themselves forward for trustee roles as the reward / risk ledger is seriously unbalanced and weighted away from 'reward'.

Panel Question 3: What is your view on specifying in detail the duties, responsibilities, and required competence of governors of Māori land, including introducing civil penalties for negligence (e.g. not filing returns) and criminal penalties in the case of fraud?

Submission:

- Fraud and criminal penalties is a red-herring in this question. Who would not advocate for criminal penalties for ripping off your own people? Don't need this as it's self-evident.
- If there are penalties for negligence then there must be rewards for full compliance
- So who pays the reward? It should be the same as those who pay the administrators for their roles. If it's through the Crown then all administrators / trustees are remunerated or rewarded for good mahi

Comment: Ngāti Mutunga o Wharekauri reiterates the sentiments from question 2.

Proposition 4: There should be an enabling institutional framework to support owners of Māori land to make decisions and resolve any disputes.

By giving the Maori Land Court jurisdiction over successions, the legislature gave the MLC a duty of on-going involvement in the administration of a title once the original title order had been made. From this small beginning was to grow the elaborate supervisory jurisdiction of Te Ture Whēnua Maori Act.

Definition:

The current regime governing Māori land is structured so that most matters relating to Māori land have some sort of judicial involvement. This can hinder choices about utilisation for Māori land owners as judicial involvement can be time consuming, expensive, and complicated.

Panel Question 1: What is your view on all disputes relating to Māori land being referred, in the first instance, to mediation?

Submission:

Comment: The response in proposition 3 question 6 applies. Ngāti Mutunga o Wharekauri believe Maori dispute resolution processes should be tried (and supported) first before the recourse to external dispute resolution processes. Equally the Iwi is mindful that some disputes can be so bitter as to have to move straight to external processes. There is no easy answer but expression of Iwi mana and tino rangatiratanga has to have a strong role and be supported externally.

Panel Question 2: What is your view on parties to a dispute being required to demonstrate that they have attempted to resolve the dispute themselves before they are able to access mediation?

Submission:

Comment: Ngāti Mutunga o Wharekauri believes this is a minimum requirement. Moving straight to external processes can undermine tino rangatiratanga and the ability of the people to heal within their Iwi body by using traditional marae based interventions.

Panel Question 3: What is your view on MLC Judges being empowered to conduct judicial settlement conferences and refer all disputes to mediation?

Submission:

Comment: The alignment with family court processes has merit. Having an initial judicial conference to require parties to head back to Iwi based and / or external mediation has merit.

Panel Question 4: What is your view on the MLC being able to determine the dispute if the dispute remains unresolved following mediation?

Submission:

Comment: Ngāti Mutunga o Wharekauri sees this as being a sensible solution. A judicial process where all other methods fail is the only certainty that can be contemplated. That said, all efforts must be made to pursue other avenues of dispute resolution including redirection back to mediation. Judges should be quick to spot ‘bloody mindedness’ and address it accordingly by redirecting back to mediation with appropriate admonishment to those who refuse to modify their position when that position is unlikely to be supported by the Court.

Panel Question 5: What is your view on the MLC having a general role for matters of process and points of law?

Submission:

Comment: Ngāti Mutunga o Wharekauri sees the proposal to have a quick and relatively cost efficient / affordable process of access to judicial support, where it has the effect of heading off disputes before positions and views become entrenched, as vital. A quick direction from a judge can have the effect of pouring oil on troubled waters.

Proposition 5: Excessive fragmentation of Māori land should be discouraged.

Succession to Māori land should be able to occur without endorsement by the MLC while providing for any disputes to be managed appropriately (dispute resolution is covered in more detail in proposition 4). The intent is to streamline the process of succession as much as possible to encourage engagement with Māori land.

Definition:

A key issue is multiple ownership interests, which increase with each generation. The 27,308 Māori freehold land titles are currently held in 2,710,214 individual ownership interests – this is comparable to the number of interests represented in the rest of New Zealand’s land area. This trend will continue, resulting in greater dissociation of owners from their land as well as presenting issues regarding administration and decision making, even if engaged owners are able to make decisions, unless succession processes are simplified.

Panel Question 1: How could succession to Māori land be simplified?

Submission:

Comment: Nil

Panel Question 2: What is your view on the MLC undertaking the role of a central registry that records Māori ownership interests?

Submission:

Comment: Nil

Panel Question 3: What is your view on decision making rights in respect of Māori land being limited to those engaged owners with minimum threshold interests?

Submission:

- They’ve got to be kidding right? Does ‘uneconomic shares’ ring a bell?
- This will never fly. Your land rights are not a measure – they are a consequence of whakapapa
- Engagement is the key – your engagement is more important than your ‘holdings’.
- Size doesn’t matter!
- Why is the panel creating a rod for its back that being an engaged land owner already deals with?

Comment: Ngāti Mutunga o Wharekauri is mystified as to why minimum thresholds are even raised? It is fully aware of the negative impact of fragmentation. But the ‘engaged’ owner concept, coupled with the external administrator roles will adequately cover this if the administrator is an iwi or ‘adjacent land owner’. That is, increasing fragmentation will by definition, lead to increased disengagement. Share holdings will eventually become so small that disengaged land owners (particularly tauiwi) will eventually alienate their share to engaged land owners. And in the meantime, external administrators, if Iwi based, will work with remaining engaged iwi land owners to best utilise land.

That being said, clarification is sought as to the role of the external administrator. It is the view of the Ngāti Mutunga o Wharekauri Iwi Trust that the external administrator should ordinarily support the decisions of engaged owners. Greater clarification or consideration on how this might occur is required from the panel.

Panel Question 4: What would an appropriate threshold be?

Submission:

Comment: See above