

Te Ture Whenua Maori Act Submission

Equal Justice Project – Communications Team

The Equal Justice Project (EJP) is a pro-bono student-run initiative operating out of the University of Auckland's Faculty of Law. Members of the EJP Communications team, as authorised by the organisation's Communications Managers (Rebecca Hallas and Eugenia Woo) have considered the amendments proposed in the Te Ture Whenua Maori Bill. Feedback from the Communications Team (Daniel Gambitsis, Meg Williams, and Naushyn Janah) is summarised below by section.

This bill submission has the support of the Executive members of the Equal Justice Project, and we welcomed the consultation and feedback of Andrew Erueti, Senior Lecturer in Law at the University of Auckland.

Māori Customary Land

Existing Legislation and Proposed Amendments

- 1.1 Subpart 1 of the Bill defines Maori customary land as land held by Maori in accordance with tikanga Maori, which excludes Maori freehold land. This retains the definition provided in the current Te Ture Whenua Maori Act 1993.¹
- 1.2 The previous Act allowed Maori customary land to be sold if converted to Maori freehold land (s 135(1)).² The Bill prevents the disposition of, or vesting under an Act (sale or gifting) of Maori customary land, with 'limited' exceptions (Section 13).
- 1.3 The Bill allows the Maori Land Court to determine whether land is Maori customary land, provided that it describes the land in terms of parcels (s 14), which is slightly more precise than the current Act.³ The court may also determine the class of collective owners of such land (s 15).
- 1.4 The Bill allows the Court to change the status of Maori customary land to Maori freehold land. Unlike the current Act,⁴ it requires a meeting of the owners about such a change, and that this meeting must meet certain criteria to be applicable (s 16).
- 1.5 The Bill also covers the appointment of Kaiwhakahaere (s 17), which should aid administrative efficiency.
- 1.6 The Bill, like the current Act, covers trespass or injury to Maori customary land (s 18- compare s 144 current Act).

EJP Recommendations

- EJP submits that the retention of the current definition of Maori customary land will provide valuable certainty for Maori customary land owners.
- EJP also submits that the Bill preventing the disposition of, or vesting under an Act, or Maori customary land (with 'limited' exceptions) is a positive change to promote the retention of Maori customary land.
- However, there is a need for clarity as to how to decide in what circumstances a change in the class of collective owners would not be in accordance with tikanga Maori, and who would make this decision (s 13(2)(a)).
- Under s 14 there is a need for directions concerning how a court may determine whether evidence points to the land being Maori customary land held in accordance with tikanga Maori. The explanatory note explains that the statute specifically avoids defining tikanga and that this will be a matter of fact for the court to decide. However excessive ambiguity may hamper the desire to create greater simplicity and efficiency concerning Maori Customary Land.
- The s 16(a)(3) requirements concerning whether to change the status of Maori customary land to Maori freehold land are not sufficiently stringent. The requirement of the agreement of 50%

¹ Te Ture Whenua Maori Land Act 1993, s 129(1)(a).

² Above, s 135(1).

³ Above, s 132.

⁴ Above, s 132.

of landowners to change the status may not be high enough if several or many of the landowners cannot be present at the meeting. Moreover, there should be a subparagraph requiring the Court to balance the interests of retention of Maori land and the beneficial development of that land. The court *must* keep in mind the purpose of the Bill, which already embodies the aforementioned concerns, when considering whether the conversion to Maori freehold land is being exploited in order to further alienate Maori land, rather than to serve Maori interests. Thus although the purpose of the Bill already addresses our concern, restating the relevant competing interests would assist the court in decision-making.

- Therefore, EJP submits that 100% of owners should have to agree to change the status of Maori freehold land in order to prevent further alienation.
- Section 18 (2)(a) should allow multiple members or the entire class of collective owners to bring proceedings, as if the land is Maori customary land all members are concerned and all may wish to do so.

Māori Reservations or Whenua Tāpui

Existing Legislation and Proposed Amendments

- 2.1 The Bill continues provisions relating to the creation of Māori reservations which are to be called whenua tapui (or in some circumstances kawenata tiaki whenua). Such reservations may be created without the involvement of the Māori Land Court (Part 2, Subpart 2, Clauses 29-44).
- 2.2 In the original exposure draft of this Bill, whenua tāpui was potentially vulnerable to Public Works Act takings. The Crown has amended the relevant provisions in the Bill so that Public Works Act taking of land reserved as whenua tāpui will be prohibited.

Recommendations

- EJP acknowledges that carrying over provisions in the current Act, which make Māori reservations inalienable (including for public works) is a fundamentally good idea.
- Continued, clear protections of Māori reservations, or whenua tāpui, from alienation are important to the idea of retention in the Bill and should not be compromised for the purposes of the idea of utilisation.
- The Bill should not be amended back to the state in which it was in the original exposure draft where Māori reservations/whenua tāpui were vulnerable to Public Works Act takings. It is recommended that provisions prohibiting Public Works Act takings of whenua tāpui are kept in the Bill.

Bona Vacantia

Existing Legislation and Proposed Amendments

- 3.1 Section 295 of the Te Ture Whenua Maori Bill provides that a parcel of Maori freehold land does not vest in the Crown if it has no owner. This section has no equivalent in the previous Act.
- 3.2 Instead, the land will vest in the class of collective owners who would in accordance with tikanga Maori hold the parcel if it became Maori customary land. It will remain Maori freehold land.
- 3.3 Whereas other elements in Part 8 of the Bill seek to reduce the burden on the Maori Land Court by transferring some of its current functions to the new Maori Land Service, this section creates a new jurisdiction for the Court.

Recommendations

- Generally, EJP approves of this amendment. This section contributes positively towards the retention of Maori land for future generations. The benefits of the retention of Maori land outweigh any conceivable administrative burden.
- However, we note there may be a lack of clarity concerning the determination of the class of collective owners of the parcel of land in accordance with tikanga Maori. Although there is a desire to avoid defining tikanga, the Act should provide some general pointers to help the Court make its decision. This same issue arises in sections 14 and 15 of the Bill.

- The Court should be given the power to determine whether the land should become Maori Customary land or Maori Freehold Land, depending on what would best suit the situation, and seeing as the court is already determining the class of collective owners *as if* the land had become Maori customary land.

Kaiwhakamarumaru for Owners Needing Protection

Existing Legislation and Proposed Amendments

- 4.1 Clause 73 of the Bill provides that the Maori Land Court may make an order appointing a kaiwhakamarumaru to act as the manager of the property of a person who is an owner needing protection. This replaces the provision under the 1993 Act for the Court to establish kaitiaki trusts for owners under a disability.
- 4.2 An owner needing protection is defined under clause 74(1) as including persons less than 18 years of age. A kaiwhakamarumaru is a person who provides protection or guardianship to prevent harm to another person, and in the context of the Bill, a person who assists an owner in the management of their land.
- 4.3 Under clause 52, owners who under 18 years old and who do not have a kaiwhakamarumaru appointed to manage their beneficial interest in the land cannot vote on decisions relating to the land and are not counted as participating owners. The clause however explicitly provides that minors may participate in a meeting of owners about such decisions.

Recommendations

- As noted by the Waitangi Tribunal,⁵ without being able to vote, minors' participation in the decision-making process is meaningless.
- The EJP submits that greater protection is needed for minors. This might occur through allowing a minor's guardian to vote on their behalf in decisions relating to the land.

Ownership Presumption: Tenancy in Common

Existing Legislation and Proposed Amendments

- 5.1 In the proposed legislation, clause 46 sets out a presumption that multiple owners (other than a class of collective owners) of the beneficial interest in a freehold estate in a parcel of Māori freehold land, will all hold beneficial interests in the land as tenants in common, and each owner's beneficial interest is an equal share of the land (Part 3, Subpart 1, Clause 46).

EJP Recommendations

- EJP approves of the proposed presumption of land owners being tenants in common.
- A presumption of tenancy in common as opposed to, for example, joint tenancy, prevents the kinds of disputes that can arise from each individual having an undefined share in the land.
- Furthermore, a presumption of tenancy in common ensures that each individual's beneficial interest in the property may be passed down to a person of their choice through their will, thus ensuring the individuals with beneficial interests have full control over who holds the right to their interest in the estate, rather than an automatic passing on of the interest to others with interests in the estate.
- It is recommended that this presumption remain in the Bill.

Succession

The Bill makes changes to the way eligible beneficiaries are determined on intestacy and the way in which individual freehold interests or parcels of Māori freehold land devolve on intestacy.

⁵ Waitangi Tribunal Report on Claims about the Reform of Te Ture Whenua Māori Act 1993 (Wai 2478, 2016) at 321.

Determination of Eligible Beneficiaries

Existing Legislation and Proposed Amendments

- 6.1 The determination of who might be an eligible beneficiary does not go further back than the descendants of the deceased owner's grandparents, after which the interest vests in all the other owners of the relevant land.
- 6.2 This differs from Te Ture Whenua Maori Act 1993 under which the determination traces back through the chain of title of the deceased owner until a beneficiary is found.

Recommendations

- EJP expresses concern at the change from the current Act with regards to determination of eligible beneficiaries; under the current legislation, by tracing the train of title of the deceased owner, it is certain that title to the land stays in the possession of the intended whanau.
- Furthermore, through failing to search further than the descendants of the deceased owner's grandparents, there is arguably an infringement of the property rights of certain individuals.
- EJP recommends the Bill be amended to reflect the current legislation⁶ on this matter.

Eligibility to Succeed

Existing Legislation and Proposed Amendments

- 6.3 Clause 246 states that when an individual dies intestate, those eligible to succeed under the Bill must associate with the land in accordance with tikanga Maori.

Recommendations

- EJP expresses concern at the potential effect of clause 246 in the proposed Bill. In the current Act, section 109 prohibits half siblings from being entitled to succession of the land only when they have descended from the parent or other ascendant through whom the deceased received those interests.
- While clause 246 in the Bill is less certain than section 109, EJP still expresses concern that entitlement to succession being determined on the bases of tikanga may reinforce this restriction.⁷
- EJP recommends the Bill be re-worded so as to ensure that all half siblings are eligible to succeed.

Māori Land Register

Proposed Amendments

- 7.1 The Bill establishes a formal Māori land register of Māori land title, ownership, and governance and provides for all matters relating to the operation of the register and the registration of Māori Land including the recording of registration on a computer freehold register (Part 8, Clauses 268-327).
- 7.2 Under the current Act, the main registration responsibilities in relation to Māori land belong to the Māori Land Court.
- 7.3 With the Bill changing the role of the Māori Land Court (see below in 'Māori Land Court'), the responsibility of the Māori land register will be assumed by the alternative dispute resolution service (see below in 'Dispute Resolution').

Recommendations

⁶ Te Ture Whenua Maori Act 1993, s 109(1)(c).

⁷ Toni Love, "Review of Te Ture Whenua Māori Act 1993 - Te Ture Whenua Māori Bill - succession." Māori Law Review <http://maorilawreview.co.nz/2016/06/review-of-te-ture-whenua-maori-act-1993-te-ture-whenua-maori-bill-succession/>.

- Further consideration is needed of the ways in which the Māori land register will more easily assist landowners to gain reasonable access to landlocked Māori land.

Dispute Resolution

Existing Legislation and Proposed Amendments

- 8.1** The dispute resolution mechanism of the Bill being proposed in Part 9 appears to look to replacing the Māori Land Court as the primary body for dealing with disputes. This mechanism is based on one that has been used in other jurisdictions (Canada), though adaptations have been made to reflect tikanga Māori.
- 8.2** The goal behind this change seems to be to increase the flexibility of the dispute resolution services to ensure that they will be able to cater to the specific needs of Māori landowners. The next section of the submission deals more extensively with the redefined role of the Māori Land Court.
- 8.3** This new service aims to reduce litigation and to promote dispute resolution solutions that are initiated and dealt with in a way that places the landowner at the forefront of safe, informal, and confidential proceedings.
- 8.4** The Bill purports to refer all disputes to the Chief Executive, who is then obligated to provide mandatory dispute resolution services to assist Māori landowners to resolve said dispute post-haste. (cl 328). This resolution has to be consistent with mātūranga takawaenga – consistent with the tikanga, values, and kawa of the hapu or whanau (cl 329).
- 8.5** Those party to a dispute initiated under this procedure have the choice of appointing an intermediary to assist them. If they do not appoint one themselves, then the Chief Executive will appoint one or more for them on their behalf. Any unsuccessful outcomes under this process have to be duly reported to the Chief Executive (cl 337).
- 8.6** Parties also have the option of withdrawing from proceedings and discontinuing the matter if the dispute remains unresolved; at that stage, the Chief Executive is obligated to refer that unresolved issue to the Māori Land Court.
- 8.7** Both the Chief Executive and the intermediary - kaitakawaenga - have the power to use their discretion to act or carry out a variety of dispute resolution procedures to resolve the problem quickly and effectively (cl 333). At the resolution of issues, the kaitakawaenga signs “agreed terms of resolution” which are final and binding on, and enforceable by, the parties of the dispute (cl 336).
- 8.8** This type of dispute resolution procedure is limited to disputes on the topic of Māori land that do not concern questions of law.⁸ The Court has the option of enforcing the outcome of a dispute resolution process if it deems fit (cl 336). There is some concern over the vagueness of direction and safeguards surrounding this dispute process contained within the Act. The lack of a right of appeal and review should also be questioned.
- 8.9** A kaitakawaenga is required under the Act to have working knowledge and experience of tikanga (cl 332). However, this is to be determined on a case-by-case basis and does not require formal education. Submitters have stressed that formal training is necessary to ensure that Māori would trust the process.⁹
- 8.10** Requiring a compulsory process solely to disputes revolving around points of law may be problematic. It is rare that disputes involve only points of law. Making a decision on whether dispute resolution proceedings have to be referred to mediation appears to require significant knowledge of Māori land issues.¹⁰ In some situations concerning issues of import, adjudication may be the most appropriate route to resolve a dispute instead of engaging in the lengthier process being introduced.
- 8.11** The compulsory aspect of mediation does not appear to be consistent with the principle of owner autonomy. The Māori Land Court has the necessary legal experience to decide any matters of law or fact that arise in the realm of disputes over customary land, and the addition of this new process may not add enough value to justify the curtailing of the abilities of the Māori Land Court, nor does it appear to significantly improve access to justice or positive outcomes for Māori landowners.

⁸ Answers to written question of John Grant, WAI 2478, #A32, 27 November 2015, at 42.

⁹ TPK, ‘Te Ture Whenua Reform: Summary of Submissions’, September 2015, at [603].

¹⁰ He Kura Whenua Ka Rokohanga - report on claims about reform of Te Ture Whenua Māori Act 1993 (Pre-publication) at 324 and 325.

Recommendations

- Review of the compulsory resolution of disputes that take place as a part of this new process. There have been concerns that this removes autonomy and choice from the landowners involved in the dispute should they be forced to discontinue the dispute completely or escalate it to the courts.
- There should be a reconsideration of the application of this newest dispute resolution process to points of law. The nature of proceedings is that most of them will contain matters of law and fact, and that limiting the access of landowners to this new process via that criteria will be contrary to its aim of implementation - to improve access to justice.
- EJP recommends that the adjudication be available to landowners on a case-by-case basis if it is assessed that their dispute requires urgent resolution. No dispute resolution process will be appropriate to the needs of all landowners - identifying and approving an adjudication alternative to the new process would expedite the process for parties who may have matters beyond the expertise or reach of the new procedure.
- There should be a formal qualification of some sort that for kaitakawaenga to undertake before being able to act in that capacity. Expertise in professional dispute resolution would go a long way to ensure that Māori will trust the new process, and this requirement should be standardised across the board.
- EJP recommends that any changes to the jurisdiction and reach of the Māori Land Court as part of the dispute resolution process should be re-evaluated in light of the fact that it is the institution with the most legal expertise and experience in dealing with disputes of this nature. To diminish the role of the Māori Land Court to this extent may well be inappropriate.

The Māori Land Court

Existing Legislation and Proposed Amendments

- 9.1** The Bill provides for the “continuation of the Māori Land Court in its present form and largely with its present jurisdiction.” Parts 10 to 15, which apply to the Māori Land Court and the Māori Appellate Court, are expected to be enacted as a separate statute to be called the Te Kooti Whenua Māori Act.
- 9.2** The Bill, as a new matter, provides that for the purposes of, or as a result of, exercising jurisdiction conferred on it by or under any Act, the court may make an order for equitable relief, if in the particular circumstances of the case, the court is satisfied that the order is necessary to achieve a just outcome, any other available relief is insufficient to achieve that outcome, and such an order for equitable relief must not be inconsistent with the Act concerned. The Bill provides for the appointment of Judges and the making of rules. The Bill makes particular provision for judicial conferences and directions and the right of use of te reo Māori in proceedings and other machinery, representational and procedural matters (Parts 10-15, Clauses 343-454).
- 9.3** Parts 10 to 15 of the Bill provide for the continuation of the Māori Land Court. However, under the Bill there is a large refocusing of the Court’s jurisdiction which needs to be taken very seriously. The Court will retain the discretion to consider the merits of decisions which would permanently affect ownership interests, but it will have less of a role in decisions that reflect the land owners exercising autonomy/rangatiratanga.

Recommendations

- Currently the Court is a “trusted mechanism that is considered impartial, fair, and transparent.”¹¹ It is not clear why the changes are necessary to the encouragement for greater utilisation of land.
- EJP submits there is no basis for the Crown’s argument that the new governance mechanisms will be more likely to put land into production.
- The motives for changing the role of the Māori Land Court need to be looked at in order to determine whether this Bill is suitable to pass into legislation. It seems to be that there is a view that the Māori Land Court is “paternalistic” and that this is detrimental to the idea of

¹¹ Toni Love, “Review of Te Ture Whenua Māori Act 1993 - Te Ture Whenua Māori Bill - registers and the Māori Land Court.” Māori Law Review <http://maorilawreview.co.nz/2016/06/review-of-te-ture-whenua-maori-act-1993-te-ture-whenua-maori-bill-registers-and-the-maori-land-court/>.

utilisation.¹² The view has motivated the changing of the role of the Māori Land Court, meaning there is an attempt to take away the Court's protective power. This could ultimately mean a move away from the goal of retention of Māori land, consequently making it easier for Māori land to be further alienated. It should be understood that this is a huge risk.

- The Crown, however, has not been clear about how exactly the Māori Land Court decisions constrain rangatiratanga of land owners, which would be the justification for the reduction in the Court's jurisdiction.
- A very thorough look is further needed into the motives behind the changing of the role of the Māori Land Court. While a relaxation of the protective role may seem, to some, to be an effective way to promote the idea of utilisation, the Crown must be clear as to the link between the Māori Land Court's decision-making powers and the apparent under-utilisation of Māori land.
- A change in the role of the Māori Land Court would arguably have the biggest practical effect in this Bill, and so much more consideration and analysis is needed.
- EJP submits that instead, legislators should consider the ways in which the land can be better utilised (if Māori land is, in fact, under-utilised) while maintaining the Court's protective role.
- An emphasis on the Māori Land Court's role to protect Māori land from alienation should remain at the heart of the provisions regarding the Court.

¹² Waitangi Tribunal *Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 321.