

Financing Maori land development: The difficulties faced by owners of Maori land in accessing finance for development and a framework for the solution

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I INTRODUCTION

FROM the day he first set foot in New Zealand, perhaps a thousand years ago, land has given the Māori a sense of identity and of purpose. Until the twentieth century, the individual was one with the tribal group and the group survived or perished by the extent to which it could hold its land against the depredations of its rivals. Only now, with most of his land gone and a majority working out a salvation in town or city, has the Māori turned to other symbols of identity such as his language, religious associations, welfare committees, and much else that propel him towards a pan-Māori nationalism. Yet when tomorrow comes it is possible that the landed minority will still be recognized as the principal custodians of the cultural heritage, the wellspring of tradition and of personal identity—‘*te hukinga o te wai matua*’.¹

Owners of Maori land throughout Aotearoa/New Zealand are facing difficulties in accessing finance to develop their whenua. Time and time again, applications are being made to the Maori Land Court seeking an order to change the status of Maori land to general land. The reason most often cited is that the owners cannot get finance on their whenua because it is Maori land. There is a clear market failure and what is required is a Maori financial institution, specifically a mutual society or ‘Maori Mutual’, designed to take into account the realities and complexities of Maori land in order to ensure the widespread development of Maori land and of Maori.

The importance of the whenua as the life force of Maori is the overarching principle to be considered when looking at issues of Maori land development. It is not just about developing the land for economic gain, but also for social, spiritual, and collective gain. Maori and whenua are inextricably linked. As Sir Hugh Kawharu writes,² the whenua provides Maori with identity and purpose. There is a deep spiritual connection to the whenua; it embodies our ancestors, both physically and meta-physically. By linking ourselves with the whenua, we link ourselves to our ancestors, and through this we identify as Maori. The whenua also provided, and continues to provide, sustenance to Maori. The land was cultivated, crops were grown, and the whenua was cared for. As kaitiaki over the whenua, Maori ensure that our ancestors are well cared for, and that the whenua will continue to provide sustenance for the people of Aotearoa.

Identity and purpose.

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Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (1977) preface.

² Ibid.

The whenua has sustained Maori society, and it is unsurprising that the widespread confiscation of whenua in the 19th and 20th centuries almost led to the end of the Maori race. In 1769, there was an estimated 100,000 Maori in Aotearoa; by 1878 that number had fallen to 45,542.³ By 1865, 188,000 square kilometres or 70 per cent of all land in Aotearoa had either been ‘purchased’ (by the Crown) or confiscated.⁴ Today, only 6 per cent of land in Aotearoa/New Zealand remains Maori land,⁵ however, the Maori population has steadily increased and, according to the 2006 Census of Population and Dwellings, 565,329 people identified themselves as Maori.⁶

While Maori have survived, and New Zealand has developed into a thriving economy, all economic, social and political indicators show that Maori are being left behind. In 1998, Te Puni Kokiri reported on the state of the Maori people, and highlighted the division between Maori and non-Maori in several key economic indicators.⁷ Summarizing the key findings: in 1992, the life expectancy of Maori was 68 years for males and 73 years for females, compared to 73 and 79 years respectively for non-Maoris; in 1997, the average Maori household income was \$10,000 per annum less than non-Maori households; and 41 per cent of Maori children live in families earning less than \$20,000 per annum compared to 20 per cent of non-Maoris. Further, the 2006 census reported a Maori unemployment rate of 11 per cent,⁸ compared to 5.1 per cent for people aged 15 years and over.⁹

A Maori financial institution is needed to address the difficulties faced by owners of Maori land in accessing finance to develop their whenua, and to improve the standard of living of Maori. Development could also realize Sir Hugh Kawharu’s vision that one day the whenua will once again be “the principal custodians of the cultural heritage, the wellspring of tradition and of personal identity”¹⁰ of Maori.

Calls for a Maori financial institution have been frequent over the past 20 years,¹¹ but nothing has eventuated. This is due to a lack of funds available within Maoridom, and by governmental refusal to institute such a scheme.¹² Treaty settlements are providing iwi with much needed funds. Maori are now able to provide for the development of the whenua independently of government.

What follows is a discussion of the issues involved in Maori land development. This article discusses the issues, and critiques recent government initiatives to show the basis on which a Maori financial institution should be based.

³ “Population” in McLintock (ed), *An Encyclopaedia of New Zealand* (1966) vol 2, 822.

⁴ Controller and Auditor-General *Maori Land Administration: Client Service Performance of the Maori Land Court Unit and the Maori Trustee* (2004) 26-27.

⁵ Ibid 25.

⁶ Statistics New Zealand, *Quick Stats about Māori: Census 2006* (2007) Statistics New Zealand <<http://www.stats.govt.nz/census/2006-census-data/quickstats-about-Maori/2006-census-quickstats-about-Maori-revised.htm>> (at 27 August 2008).

⁷ Te Puni Kokiri *Whakapakari No 1* (1998) Te Puni Kokiri <<http://www.tpk.govt.nz/publications/factsheets/default.asp>> (at 28 January 2008).

⁸ Statistics New Zealand, *Quick Stats about Māori: Work and Income* (2007) Statistics New Zealand <<http://www.stats.govt.nz/census/2006-census-data/quickstats-about-Maori/2006-census-quickstats-about-Maori-revised.htm?page=para017Master>> (at 27 August 2008).

⁹ Statistics New Zealand, *Quick Stats National Highlights: Work* (2007) Statistics New Zealand <<http://www.stats.govt.nz/census/2006-census-data/national-highlights/2006-census-quickstats-national-highlights-revised.htm?page=para007Master>> (at 27 August 2008).

¹⁰ Kawharu, *supra* note 1.

¹¹ See Milroy, “Judge’s Corner” (2007) 36 *Te Pouwhenua* 3.

¹² “Maori bank proposal ‘not being progressed’”, *The Press*, Christchurch, New Zealand, 6 March 2004, C3.

II THE ACCESS TO FINANCE PROBLEM

Change of Status Orders

It is through applications made under section 135 of Te Ture Whenua Maori Act 1993 (“TTWMA”), that the problem of accessing finance on Maori land becomes apparent. Section 135 allows owners to apply to the Maori Land Court for an order changing the status of their land from Maori freehold land to General land. The effect of this is to take land outside the jurisdiction of the Maori Land Court where it can be sold outside the whanau, hapu or iwi without restriction, further advancing the loss of land held by Maori.

Given the importance of the retention of Maori land, as recognized in the kaupapa of the Act, the power to make any such order is discretionary and tightly prescribed. Under section 136, land owned by no more than 10 persons, where such land is not held under any trust or incorporation,¹³ can have its status changed to general land, provided that “[t]he land can be managed or utilised more effectively as General land”.¹⁴ Under section 137, land vested in a trust or Maori incorporation can have its status changed to general land if the status change is “clearly desirable for the ... rationalisation of the land base”.¹⁵ Such rationalization will involve the acquisition of other land by the trust or Maori incorporation,¹⁶ and the requirements imposed with regards to quorum and voting under the alienation provisions¹⁷ are impractical.¹⁸

An analysis of 21 applications between 2004 and 2006 under section 135 indicates judicial awareness of the problem:¹⁹

The Maori Land Court ‘is very well aware of the difficulties in obtaining funding to develop Maori freehold land. It is a recurrent theme before all Judges throughout Aotearoa. Almost all Maori freehold land would be more attractive security to a lender were it General land.’

The evidence from the applications indicates that owners are having great difficulty accessing finance to develop their land while the land is classified as Maori land. Judge Harvey²⁰ went so far as to say that “if the status change is contemplated, nine times out of ten it is to raise finance to develop that block”.²¹ In asking the Court for a change in status order, applicants will cite a financial institution’s refusal to lend on the land while it is classified as Maori freehold land. To counter this, a procedure has been developed that involves changing the status of the land from Maori freehold land to general land under s 135, and instituting a trust over the land.²² This requires the trustees to apply to the Maori Land Court for an order returning the land to Maori freehold land once the mortgage has been repaid. These are commonly known as

¹³ Except where the trust is imposed by s 250(4).

¹⁴ Te Ture Whenua Maori Act 1993, s 136(d).

¹⁵ Ibid s 137(1)(c).

¹⁶ Ibid s 137(1)(d).

¹⁷ Ibid ss 145-150.

¹⁸ Ibid s 137(1)(e).

¹⁹ *Re Papamoa 2A1* (2003) 20 APWM 167, as cited in Bennion (ed), “Commentary: Change of Status Cases” [2004] Maori Law Review 3, 4.

²⁰ *Re Ruaohinetu 25* (1 June 2005) unreported, Maori Land Court, 162 GIS 17.

²¹ Ibid 19.

²² For example, see *Waikokopu 3B2* (1 March 2006), unreported, Maori Land Court, 164 GIS

183.

‘whata’ orders.

While sufficient to satisfy the financial institutions, whata orders are problematic for two reasons. First, if the owner of the land fails to satisfy the debt, the land can be sold in a mortgagee sale as general land with no requirement on the new owners to apply to the Maori Land Court for an order changing the status of the land back to Maori freehold land. Secondly, it is a tacit acceptance by the Maori Land Court that Maori freehold land is a lesser class of land holding in Aotearoa/New Zealand, because it is unacceptable for use as security.

The problem is not confined to small land blocks or blocks with no management structures. In *Re Kohuturoa 3A Block*,²³ the Hanita Incorporation²⁴ applied for a change in status order on the basis that an existing mortgage had expired, and the Incorporation was unable to refinance because of the status of the land. A Maori incorporation is designed to deal with the problems associated with Maori land, including the problem of accessing finance. An incorporation would bring together all the owners into a single entity and establishes a governance and management structure to organize and run the business. This is similar to the way an incorporated company is organized and run. It could be argued that there is a clear market failure if the entity designed to provide legal and structural certainty is unable to access finance for development.

Analysis of the Problem

Judge Milroy has observed²⁵ that borrowing on the security of Maori land is the main impediment to the development of Maori land. Many writers agree that accessing finance is difficult when land is classified as Maori land. However, there is disagreement as to the reasons why such difficulties exist.

According to a 2004 Report of the Controller and Auditor-General,²⁶ Maori land comprises approximately 1.5 million hectares or about 6 per cent of all land in Aotearoa²⁷ and about 12 per cent of all land in the North Island.²⁸ In regions such as Waiariki, Aotea and Tairāwhiti, about 25 per cent of all land is Maori land.²⁹ Only 0.3 per cent of land in Te Waipounamu remains as Maori land.³⁰

The Report also notes that Maori land is characterised by multiple ownership, a limited range of productive use and a lack of development, with large tracts of landlocked land. Bennion sets forth four characteristics of Maori freehold land:³¹ multiple ownership, the control of the Maori Land Court, restrictions on alienation, and the incompleteness of registration.

To some, the problem is structural: the problem lies with the inherent characteristics of Maori freehold land. To others, the problem is non-structural: the

²³ Hanita Incorporation, “Application A20660013740 to the Maori Land Court for a change of status order under section 135 of Te Ture Whenua Maori Act 1993” (26 April 2006).

²⁴ The Hanita Incorporation manages two land blocks in the Aotea district: the 17.8 hectare Horowhenua XIB 41 North A3A and 3B1 Block and the 0.3 Kohuturoa 3A Block. The application for a change in status was granted on 2 November 2006 (177 AOT 152-165).

²⁵ See “Maori Bank Needed for Big Developments – land court judge”, Waikato Times, Hamilton, New Zealand, 18 November 2006, A5.

²⁶ Controller and Auditor-General, *supra* note 4.

²⁷ *Ibid* 8.

²⁸ Boast, “The Implications of Indefeasibility for Maori Land” in Grinlinton (ed), *Torrens in the Twenty-first Century* (2003) 101.

²⁹ Controller and Auditor-General, *supra* note 4, 25.

³⁰ Controller and Auditor-General, *supra* note 4, 27.

³¹ Bennion, “Maori Land” in Bennion et al (eds), *New Zealand Land Law* (2005) 306-308.

problem lies with a lack of management and business skills, alongside other factors. If we accept the former, then there is little that can be done within the current financial system to enable widespread development, without radical changes to the TTWMA. As discussed below, this article is working on the premise that the balance struck by the drafters of the TTWMA is the appropriate one. Thus, the former option is untenable. What is required is a financial institution designed to account for the specific inherent characteristics of Maori land. If we accept that the problem is non-structural, then resolving the issue is a matter of education and training. However, to posit this without an analysis of the empirical evidence and a deep understanding of the issues involved is to cast an unjustified shadow over the expertise of the managers and trustees responsible for Maori land.

The reality is that the problem is likely to be a combination of structural and non-structural issues. What follows is a discussion of the issues, focusing primarily on the structural issues. Non-structural issues, where they exist, can be addressed through education and training as appropriate to the specific issues facing the individual trust or incorporation.

1 Structural Issues

A 2003 report³² on Maori economic development prepared for Te Puni Kokiri, identified multiple ownership, asset location, and asset specificity and quality as issues which “may place a greater constraint on asset development”.³³ In 2004, the Controller and Auditor-General reported on the client service performance of the Maori Land Court and the Maori Trustee.³⁴ The report identified multiple ownership and restrictions on alienations as the reasons why Maori land is sometimes not considered sufficient collateral for lending.³⁵ In order to understand the problem, these issues need to be discussed.

(a) Multiple Ownership

Multiple ownership is often advanced as the main reason for problems in accessing finance.³⁶

The Report of the Controller and Auditor-General notes that the ownership of Maori land is divided into an excess of 2.3 million interests - this is comparable to the number of interests represented in the remaining 94 per cent of New Zealand’s land area. Further, 10 per cent of land blocks have an average of 425 owners.³⁷ The average number of owners for a block of Maori land is 62³⁸ and some Maori land incorporations have over 5000 beneficial owners.³⁹ An additional problem is the incomplete nature of ownership records for many land blocks. Of around 26,000 blocks of Maori land, some 50 per cent have not been surveyed, and 58 per cent are

³² New Zealand Institute of Economic Research *Māori Economic Development – Te Ōhanga Whanaketanga Māori* (2003) New Zealand Institute of Economic Research <<http://www.nzier.org.nz/files/883.pdf>> (at 27 August 2008).

³³ Ibid 84.

³⁴ Controller and Auditor-General, *supra* note 4.

³⁵ Controller and Auditor-General, *supra* note 4, 28-29.

³⁶ See Controller and Auditor-General, *supra* note 4, 28; New Zealand Institute of Economic Research, *supra* note 31.

³⁷ Controller and Auditor-General, *supra* note 4, 28.

³⁸ Ibid.

³⁹ For example, the Wellington Tenths Trust has over 5000 beneficial owners.

not registered under the Land Transfer Act 1952.⁴⁰ Of the 111,000 client accounts operated by the Maori Trustee, only 37 per cent have valid contact addresses.⁴¹ While this is merely a snapshot of the true position, it indicates that even locating the owners of Maori land blocks is going to be difficult, adding to the complexities involved in accessing finance for development.

The Auditor-General Report notes that multiple ownership “can lead to problems with obtaining agreement about land use and development, and also reduces the economic return to individual owners”.⁴² Gray argues⁴³ that the multiple ownership issue is no longer convincing, citing that over 80 per cent of all Maori land is under some sort of management structure. However, the mere existence of a management structure will not be sufficient; it is the type of structure that is all important.

The problem of multiple ownership is addressed within the Maori land system by land trusts and Maori incorporations:⁴⁴

Essentially, Incorporations and Trusts are devices to reduce the high transaction costs of managing fragmented lands with numerous owners, by amalgamating the land titles under a single holding company, and by delegating the management of the company to a committee of owner representatives. Thus Incorporations and Trusts are designed to perform much the same functions as joint stock companies and cooperatives.

Where trusts and incorporations differ from companies is in their transparency and accountability. Companies are characterised by audits, contestable directors and by voluntary transfer of shares.⁴⁵ The restrictions on alienations and the preference for directors to be elected based on whakapapa and not necessarily on expertise, can operate to reduce the accountability and transparency of the trust or incorporation. This serves to reduce the efficiency of the organization,⁴⁶ and the confidence of any financial institution when dealing with the organization. It is for this reason that multiple ownership is classified as a structural issue. The devices designed to deal with multiple ownership reduce accountability and transparency, because of the requirement under the TTWMA for the retention of Maori land.

Hone Harawira, speaking to the Farmers’ Mutual Group Bill in the House of Representatives,⁴⁷ while commenting on the argument that multiple ownership is a constraint on accessing finance, called it a “strange argument”⁴⁸ considering that “companies with multiple shareholders seem to get finance easily for the development of their businesses”.⁴⁹ While this is undoubtedly the case for established companies, start-up ventures also face substantial difficulties in accessing finance. A 2003 report prepared by Pricewaterhouse Coopers⁵⁰ stated: “Banks will lend to start-ups only if

⁴⁰ Controller and Auditor-General, *supra* note 4, 28.

⁴¹ *Ibid* 75.

⁴² *Ibid* 31.

⁴³ Gray, “Māori Land as Collateral – A Problem Definition” [2003] *Te Whakahaere* 47, 48.

⁴⁴ Maughan and Kingi “Te Ture Whenua Maori: Retention and Development” [1998] *NZLJ* 27, 30.

⁴⁵ *Ibid*.

⁴⁶ Maughan and Kingi, *supra* note 44, 31.

⁴⁷ (15 August 2007) 641 *NZPD* 11154-11155 (Hone Harawira).

⁴⁸ *Ibid* 11155.

⁴⁹ *Ibid*.

⁵⁰ Pricewaterhouse Coopers *Bank Lending Practices to Small and Medium Sized Enterprises* (2003) Ministry of Economic Development <<http://www.med.govt.nz/upload/2512/lending-practices.pdf>> (at 27 August 2008).

there is guaranteed or likely cash flow *and* sufficient collateral (such as residential property) backing the loan.”⁵¹

The report noted that the reluctance of banks to lend was based on the following reasons:⁵²

- (a) the risk involved (it is not the role of banks to fund start-up ventures);
- (b) a high proportion of start-up ventures fail within a few years;
- (c) it is often difficult for start-up ventures to satisfy bank lending criteria; and
- (d) banks often do not have the necessary skills to deal with the new venture.

The issue is not merely one of multiple ownership. Rather, difficulties most likely arise, because Maori land development is, in many ways, akin to new business ventures. A 2004 report by Infometrics⁵³ for the Ministry of Economic Development, looked at the issue of financing start-up ventures, and noted that the traditional avenues for finance are often closed:⁵⁴

Capital is a fundamental input to business and economic growth. A lack of capital is often blamed for frustrating the growth of small, start-up businesses.... The traditional sources of capital for businesses are retained earnings, debt provided by banks or the bond market, publicly traded shareholder equity, and venture capital. Small, young businesses can find it difficult, or impossible, to access capital from these sources, and therefore rely more heavily on informal supplies of capital.

The key, therefore, to Maori land development is to identify the informal supplies of capital to fund development. Taking that a step further, it is to recognize that the informal supplies of capital can be provided by established Maori entities (land trusts and incorporations, iwi entities and Maori businesses), and by making the informal formal through the creation of a Maori financial institution, the problems inherent in financing Maori land development can be overcome.

(b) Restrictions on Alienations

The preamble to the TTWMA states that “land is a taongo tuku iho of special significance to the Maori people” and all efforts must be made “to promote the retention of that land ... for the benefit of its owners, their whanau, and their hapu”. It is for this reason that the TTWMA sets out strict restrictions on the alienation of Maori land. These restrictions are a major contributor to the access to finance problem.

Alienation is defined in section 4 of the TTWMA as including: any sale of land, any granting or varying of a lease, and any contract to dispose of Maori land. Any person wishing to alienate any of their interest in Maori freehold land by sale or gift must first offer the land to the preferred class of alienees.⁵⁵

The preferred class of alienees include: the children of the alienating owner, whanaunga of the alienating owner who are associated with the land in accordance with tikanga Maori, other beneficial owners of the land who are members of the associated hapu, and descendents of any former owner who is or was a member of the

⁵¹ Ibid 49. Emphasis in original.

⁵² Ibid.

⁵³ Infometrics *New Zealand's Angel Capital Market: The Supply Side* (2004) Infometrics <<http://www.infometrics.co.nz/reports/Angel%20investors.pdf>> (at 27 August 2008).

⁵⁴ Ibid 4.

⁵⁵ Te Ture Whenua Maori Act 1993, s 147A.

hapu associated with the land.⁵⁶ Thus, the land remains in the hands of the hapu that has historical and ancestral ties to the land.

Trusts, incorporations, and owners in common of a land block wishing to dispose of land require the consent of at least three quarters of the owners; if no owner has a defined share in the land; or of the owners who together make up 75 per cent of the beneficial freehold interest in the land.⁵⁷ Given that many land blocks have large numbers of beneficial owners or incomplete ownership records, this requirement can be difficult for owners to satisfy. All land alienated, either to Maori or non-Maori, remains as Maori freehold land, until an order changing the status of the land to general freehold land is made.

Economic development rests on the idea of economic efficiency. One of the characteristics of efficiency is the ability to voluntarily transfer assets from one party to another:⁵⁸

Property rights must be voluntarily transferable from one party to another ... so that resources and goods can move to their highest valued use. In the absence of transferability there can be no exchange and no benefits from exchange. Since efficiency is the outcome of a resource allocation based on exchange, lack of transferability is incompatible with economic efficiency.

The Torrens system of land tenure, introduced into New Zealand by the Land Transfer Act 1870 (now the Land Transfer Act 1952), “sought to cure the defects of uncertainty and insecurity of title”⁵⁹ that previously plagued land tenure in the Commonwealth. The purpose of the Torrens system can be stated:⁶⁰

... give security and simplicity to all dealings with land by providing that the title shall depend upon registration, that all interests shall be capable of appearing or being protected upon the face of the registry, and that a registered title or interest shall never be affected by any claim or charge which is not registered.

Thus, the cornerstone of the Torrens system is that registered interests trump all other interests that may exist. If it is not recorded, it is not a legal title or interest. The Torrens system, by providing a system of land tenure based on a register of land titles, allows for certainty of land title. This certainty allows for the free and voluntary transfer of land which provides economic efficiency.

Under the current system of Maori land tenure, the restrictions on alienations are such that they operate to reduce the economic efficiency of the land. The lack of transferability of Maori land results in Maori land having a lower economic value. This lower value reduces the desirability of the land as collateral, from the perspective of financial institutions. This is because, on default of any debt obligations, it may be difficult to first sell the land, and secondly, to sell and recover the debt. The land

⁵⁶ Ibid s 4.

⁵⁷ See Te Ture Whenua Maori Act 1993, s 150A(1)(a) for trusts; s 150B(1)(a) for incorporations; s 150C(1)(a) for owners in common.

⁵⁸ Maughan and Kingi, supra note 44, 28. The authors write that economic efficiency requires property rights to have the following characteristics: exclusivity; universality; enforceability; transferability and acceptability. With regards to property rights in Maori land, the authors conclude that the only constraint on economic efficiency, and thus on economic development, is the lack of transferability.

⁵⁹ Toomey, “The Land Transfer System” in Bennion et al (eds), *New Zealand Land Law* (2005) 38.

⁶⁰ Opening Statement in the Report of the Real Property Commission (SA), (Parliament Paper No 192, 1861), as cited in Toomey, supra note 59.

cannot simply be transferred to the most valued use, as under the economic efficiency model. Land has spiritual and cultural significance alongside its economic potential. It is these spiritual and cultural dimensions which dictate how the land is to be used:⁶¹

Where goals other than efficiency are more important, for instance where the preservation of land for spiritual reasons is paramount, other systems of property rights may be more appropriate, even though those systems may act as a constraint on efficiency (and hence on economic development).

The spiritual and cultural significance of land to Maori is well-documented and discussed in detail below. It is sufficient to say here that Maori land is a taonga tuku iho – it is a treasure of great importance to be passed down through the generations. One of the key themes of the TTWMA is the retention of Maori land in Maori hands. The alienation provisions of the TTWMA⁶² seek to give effect to this. Section 4 of the Act defines alienation as, among other things, “every form of disposition of Maori land, or of any legal or equitable interest in Maori land, whether divided or undivided”.

For greater certainty, the TTWMA sets out what is, and what is not an alienation. A mortgage is an alienation, and the TTWMA requires the Maori Land Court to be notified of any mortgage. A mortgagee sale, on the other hand, is explicitly defined under section 4 as not being an alienation. Thus, prima facie, there appears to be no restrictions on financial institutions selling Maori land in order to satisfy debt obligations that have been defaulted on. It is on this superficial analysis that commentators have been quick to point out that there are no structural constraints operating on the land. Since Maori land can be sold through a mortgagee sale, there is no problem. Linkhorn writes:⁶³

There is a regulatory environment constraining the manner in which Māori freehold land can be lawfully mortgaged. Once it is mortgaged, however, it may be sold in the event of default by a mortgagee in possession, as for general land. The availability of this conventional legal remedy does not appear to have changed lenders’ attitudes as a group in any fundamental sense. Instead there appears to be a reluctance to regard undeveloped Māori freehold land as adequate or appropriate security by itself. For business rather than legal reasons the category of Māori land does not appear to be assured as bankable.

While Linkhorn is correct in stating that a mortgagee sale is a “conventional legal remedy” available to financial institutions on default, he fails to appreciate that the land remains Maori land after a mortgagee sale and therefore, is still subject to the jurisdiction of the Maori Land Court. Financial institutions are able to sell the land at a mortgagee sale without restriction. However, the market to which they can sell is severely restricted, because the land has the status of Maori land. Any further alienation by the new owners requires them to offer a first right of refusal to the preferred class of alienees, and to seek confirmation of alienation from the Maori Land Court.⁶⁴ This lack of transferability limits the economic efficiency of the land, resulting in a cautious approach being taken by financial institutions when

⁶¹ Dr Bill Maughan and Tanira Kingi “Te Ture Whenua Maori: Retention and Development” [1998] NZLJ 27-28..

⁶² Sections 145-150.

⁶³ Linkhorn *Maori Land and Development Finance* (Discussion Paper No 284, Centre for Aboriginal Economic Policy Research, Australian National University, 2006) Australian National University <http://www.anu.edu.au/caepr/Publications/DP/2006_DP284.pdf> (at 27 August 2008) 22.

⁶⁴ Te Ture Whenua Maori Act, 1993, s 150.

considering applications for finance, and thus constraining economic development.

(c) Location and Quality of the Land

The size and location of individual blocks of Maori land is another issue constraining attempts to access finance. Metge succinctly summarises the quality of Maori land:⁶⁵

Most of it is located in the central sector of the North Island: in the King Country, the Central plateau, the central and eastern Bay of Plenty, and the Northern East Coast. Northern Northland also has a considerable amount but holdings are small and discontinuous. Little is found in the rich farming areas of the Waikato, where land was lost by confiscation, Hauraki Plains and Southern Northland. Much 'Māori Land' is inferior in quality and located in heavily dissected areas difficult of access ...

Six hundred thousand hectares of Maori Land (or 40 per cent of all Maori land) are under-developed, while 80 per cent of Maori land is considered non-arable, and thus can only support a limited range of productive uses, and/or are in remote areas. Finally, up to 30 per cent of Maori land is landlocked. This reduces the use of Maori land because of access issues.⁶⁶

2 Non-Structural Issues

While non-structural issues are important constraints on the development of Maori land, the influence of these is waning, and there are numerous agencies working to address these issues. As these issues can be addressed through education and training, their relevance to this discussion is minimal. It is still important to note that such issues do exist, and to highlight the work being done to address them because anecdotal evidence suggests that even when highly-skilled Maori managers are in charge of the project, there still remains a difficulty in accessing finance

The 2003 report on Maori economic development prepared for Te Puni Kokiri, identified the following non-structural issues as constraints on accessing finance.⁶⁷

- (a) a lack of understanding about the process of securing finance;
- (b) a failure to meet a lending institution's credit criteria;
- (c) a lack of complete knowledge about financing options – both debt and equity;
- (d) an inability to identify an agent or agency from which to seek advice and assistance; and
- (e) a diffidence or fear about dealing with unfamiliar people or systems.

3 Alternative forms of security?

Mark Gray, an academic and practitioner in the Maori financial sector, has concluded that the difficulties in accessing finance stem not from multiple ownership, but from, among other things, an inability to convince financial institutions that the owners have the ability to service the loans.⁶⁸ The more important constraints arise from the restrictions on alienation, and on the size and location of the land. Having noted that the difficulties owners of Maori land face are no different than those faced by other

⁶⁵ Metge, *The Maoris of New Zealand: Rautahi* (Revised ed, 1976) 110.

⁶⁶ Controller and Auditor-General, *supra* note 4, 28.

⁶⁷ New Zealand Institute of Economic Research, *supra* note 32, 84.

⁶⁸ Gray, *supra* note 43, 61.

borrowers,⁶⁹ Gray goes on to advocate alternative forms of security:⁷⁰

If you eliminate Māori land as an option to secure finance, 90% of the problems in satisfying these criteria are eliminated. ... Māori land is simply not an appropriate form of security. The effort and cost that is applied to understanding this in a loan application should be applied to exploring the alternative security arrangements, which are not difficult to develop. ... The key is to simply take Māori land out of the banking equation.

This approach may be satisfactory for large land trusts and incorporations that have alternative forms of security available to them, upon which finance can be secured.⁷¹ However, with 40 per cent of all Maori land under-developed, and 80 per cent classified as non-arable, it is apparent that, for a large amount of Maori land blocks, no alternative forms of security will exist.

III LAND TENURE IN AOTEAROA/NEW ZEALAND

Having analyzed the problem, it is important to now focus on the issue of land tenure in Aotearoa/New Zealand. Two systems of land tenure operate side by side – general land and Maori land. The nature and characteristics of whenua need to be discussed in order to place the problem in context, prior to the design of a framework solution. The concept of whenua that informed pre-contact Maori land tenure is a system that had no conception of ownership, and where alienation (sale or disposition) of the whenua was non-existent. Instead, a complex system of occupation and use-rights existed to govern the relationship between tangata and whenua.

Whenua

The whenua is integral to Maori identity. To Maori it is our ancestor, our creator, our source of life, and our final resting place. Maori are Tangata Whenua – the people of the land,⁷² and the whenua does not belong to Maori: Maori belong to the whenua. There is an ancient custom of returning a newborn child's whenua (placenta) to the whenua (land) to affirm this relationship. The placenta is the lining of the womb which nourishes the foetus during pregnancy, correspondingly, the whenua is the provider of nourishment and sustenance to humanity.⁷³ The whenua was our support during pregnancy, it is our support during life, and it will take our remains in death.

A distinction can be drawn between the Maori conception of whenua, and the Western conception of land. Whenua encompasses a multi-faceted reflection of the values, concepts and ideas connecting people, and the environment within Maori

⁶⁹ Ibid.

⁷⁰ Ibid 62. "These criteria" refers to the bank's criteria.

⁷¹ A Te Puni Kokiri list of alternative security options includes non-Maori freehold land, life insurance policies, leasehold interests, shares and bonds, debentures, forestry rights, fishing quota, stock, ships, vehicles and chattels. See Te Puni Kokiri *A Guide To Loan Securities* (1998) Te Ouna Kokiri <[www.tpk.govt.nz/publicatios/subject/subject heading Business](http://www.tpk.govt.nz/publicatios/subject/subject%20heading%20Business)> (at Date).

⁷² Jackson, "Land Loss and the Treaty of Waitangi" in Ihimaera (ed), *Te Ao Mārama* (1993) vol 2, 71.

⁷³ National Museum of New Zealand, *Taonga Maori: Treasures of the New Zealand Maori People* (1989) 40.

culture.⁷⁴ Land, on the other hand, is a simple commodity, a property right that can be traded for money.

The whenua was life itself. All aspects of Maori society revolved around the whenua. As Kawharu notes,⁷⁵ the whenua was important for food, for fighting, for hospitality towards guests, and for various spiritual reasons. The importance of whenua is explained through the creation story.⁷⁶

It was a sacred gift from *Tāne*, a heritage passed down from the tribal ancestors, a possession that could never be sold, bartered or alienated. The close bond with the land was established long ago, at a time when the world was taking shape – when the world was still evolving. The attachment of the land derived from the loving union of *Papatuanuku* (the Earth Mother) and *Ranginui* (the sky father) and their subsequent separation by their children. ... Thus to understand what land means to the Māori is to know and understand the meaning of the separation of *Rangi* and *Papa*, and to realise that this act validates our existence and gives meaning to our life. ... The land is a source of strength, dignity and *mana* (power) for the people – it is their life-blood. ... The physical and spiritual well-being of a Māori is linked to the land that he or she belongs to and relates to.

Tane fertilised the whenua and gave it its life; Tane took a portion of Papa, and gave life to the first human. Thus, both whenua and tangata are linked through Tane and through Papa.⁷⁷ Lenihan writes⁷⁸ that because of this relationship between whenua and tangata, Maori view whenua holistically. Everything in Maori society is connected through our tipuna, and an appreciation of this connection allows an understanding of the value placed by Maori on whenua:⁷⁹

When Maori looked at the land they did not see an area of so many hectares which could be divided, subdivided, rented, leased, or sold. Instead, they saw certain resources which could be used to feed, house, clothe, and equip them, as well as the many places where births, lives and deaths of their people had occurred.

Maori Customary Land Tenure

The significance of whenua in Maori society resulted in a vastly different land tenure system from that which had developed in Western society. Fundamental to this difference was the notion that tangata and whenua were linked through their common ancestry. Whenua was not a mere economic resource; rather, it “provided Maori with a sense of identity, belonging, and continuity”.⁸⁰ Individual ownership was unknown; occupation and use rights were allocated with the consent of the group, and alienation was rare.

1 Ownership

The notion of individual ownership was completely foreign to Maori society prior to European contact. The whenua is of great significance, and is viewed as, amongst other things, our ancestor. The whenua did not belong to Maori; Maori belonged to

⁷⁴ Kawharu, supra note 1, 40.

⁷⁵ Kawharu, supra note 1, 40-41.

⁷⁶ National Museum of New Zealand, supra note 74, 36, 38, 40. Emphasis in original.

⁷⁷ Kawharu, supra note 1, 41.

⁷⁸ Lenihan “Maori Land in Maori Hands” (1998) 8 Auckland U L Rev 570.

⁷⁹ Ibid 572.

⁸⁰ Ibid.

the whenua, and no individual owned land to the exclusion of others.⁸¹

However, hapu and iwi exercised manawhenua over tribal territories. Lenihan writes that manawhenua embodies political authority over the whenua, and the spiritual connection with the whenua.⁸² Authority over the land was exercised by the rangatira, although such authority was an expression of his social status, and not an expression of any claim to ownership of the whenua.⁸³

An often cited example of manawhenua is that of Wiremu Kingi who, in speaking for the people of Te Atiawa, overruled the claimed authority of Te Teira to sell Waitara to the government. Wiremu Kingi emphasised on many occasions that Waitara was not for sale, and on one occasion stated emphatically: “Governor, Waitara shall not be yielded to you. It will not be good that you should take the pillow from under my head, because my pillow is a pillow that belonged to my ancestors.”⁸⁴ Thus, it was the iwi interest that was paramount, and any individual rights were subject to that interest. Te Teira’s right to the use of certain resources did not equate to a right to sell the land without the consent of the iwi. The ability of Maori to exercise manawhenua is an important principle in the design of any response to the access to finance problem.

2 Occupation and Use Rights

While it may be the case that no one person ‘owned’ any defined section of the whenua, there did exist a clearly defined system of occupation and use-rights.⁸⁵ Metge writes that hapu, whanau, and individuals held rights over specific resources such as “garden plots, fishing stands, rat-run sections, trees attractive to birds, clumps of flax, and shell-fish beds”.⁸⁶ Such rights could be, and commonly were, transferred by individuals through inheritance or gift,⁸⁷ although at all times, such individual rights were subject to the authority of the hapu.⁸⁸ Further, the principle of ahikaa required that for individuals or whanau to maintain their rights, “people were expected to reside within the hapū locality, comply with group norms, and when required participate in group activities”.⁸⁹ Maori society was a communal society, and participation within the group was required for individuals and whanau to benefit from the resources of the group.

3 Alienation

The whenua was very rarely alienated. When it was, it was often by way of gift. The idea that the whenua should not be alienated is based on the cultural, physical and political significance of whenua to Maori. Lenihan writes of the important links between Maori and the whenua, and provides an insight into why the whenua was not

⁸¹ Erueti, “Maori Customary Law and Land Tenure: An Analysis” in Boast et al (eds), *Maori Land Law* (2 ed, 2004) 42.

⁸² Lenihan, supra note 78, 573.

⁸³ Firth, *Economics of the New Zealand Māori* (2 ed, 1959) 375.

⁸⁴ As cited in Martin, *The Taranaki Question* (2 ed, 1861) 41 in Firth, supra note 85, 369.

⁸⁵ Maughan and Kingi, supra note 44, 28.

⁸⁶ Metge, supra note 65, 13.

⁸⁷ Erueti, supra note 81, 53.

⁸⁸ Metge, supra note 65, 13.

⁸⁹ Erueti, supra note 81, 47.

to be alienated.⁹⁰

The general sentiment of Māori for the land is reflected in the association of the names of natural features with the memories of bygone years, the arrival of eponymous ancestors, the linkage with tribal fights, burial grounds of ancestors and in the knowledge held by members of a hapū, of the landscape.

Land was gifted to celebrate peace, as compensation for a breach of tapu, for a murder or for people killed in war, for assistance in war, and to help relatives who had suffered a calamity.⁹¹ Firth concludes: “In general the cession of land to another tribe seems to have been regarded as one of the most valuable of gifts, to be made only on occasions of great significance.”⁹²

This ideal that the whenua should not be alienated is reflected today in the principle of retention in the TTWMA. The Act does allow for alienation, but tightly prescribes the conditions under which land can be alienated. The restriction against alienation in the TTWMA is based not just on the traditional conceptions of the whenua, but also as a response to the widespread loss of Maori land throughout the 19th and 20th centuries.

The Two ‘Revolutions’

Aotearoa/New Zealand land law, in its current form, owes its existence to two revolutions:⁹³ the victory of William I at the Battle of Hastings in 1066, and the acquisition of sovereignty over New Zealand by Queen Victoria in the 1800s.⁹⁴ Both revolutions replaced allodial (or absolute) ownership of land with the doctrine of tenure and estates.

In 1066, William I introduced a feudal land system to England. Feudalism is based around relationships between classes: the land is held by a lord under the authority of the Sovereign, and tenants are granted use rights.⁹⁵ The Sovereign became the “absolute owner of the soil and all others held interests directly or indirectly from him. All titles could be traced back to the one supreme overlord, a system that became known as tenure”.⁹⁶ Individuals did not own the land itself, rather they owned an estate in land “which confers certain rights to use of the land”.⁹⁷ While the feudal system was abolished in the 1600s,⁹⁸ the Sovereign remains the absolute owner of the land.

In the 1800s, Queen Victoria acquired sovereignty over New Zealand. The acquisition of sovereignty imported the English common law doctrines of tenure and estates, although these were subject to Maori customary law.⁹⁹ The Queen acquired what is known as ‘radical’ title to the land in New Zealand, although Maori remained

⁹⁰ Lenihan, *supra* note 78, 572.

⁹¹ Firth, *supra* note 83, 388.

⁹² *Ibid* 390.

⁹³ Bennion, “Introduction” in Bennion et al (eds), *New Zealand Land Law* (2005) 2.

⁹⁴ *Ibid* 4-5. Bennion, citing Joseph, *Constitutional and Administrative Law in New Zealand* (1993), writes that there was no one defining document or date on which sovereignty was transferred. Rather, it occurred through a number of local and Imperial instruments; Te Tiriti o Waitangi being one such document.

⁹⁵ Bennion, Introduction, *supra* note 93.

⁹⁶ Bennion, Introduction, *supra* note 93, 3.

⁹⁷ *Rural Banking and Finance Corporation of New Zealand Ltd v Official Assignee* [1991] 2 NZLR 351, 356.

⁹⁸ Maughan and Kingi, *supra* note 44, 31.

absolute owners until the title was extinguished. Accordingly, “[t]he doctrines of tenure and estates only come into existence when the Crown has extinguished the Maori customary interest, and not before.”¹⁰⁰ Radical title is “a technical and notional concept”,¹⁰¹ and differs from the absolute title enjoyed by King William I. Bennion writes:¹⁰²

[I]t is a constitutional matter that has nothing to do with any legal interest of the Crown in the land itself. ... radical title only provides a theoretical basis for tenure and estates. It merely sets out the Crown’s basic authority to deal with territory within which the customary interest exists.

Two systems of land tenure were able to co-exist in Aotearoa/New Zealand: Maori held land according to customary law, and the English system of tenures and estates operated over land whose customary interest had been extinguished by the Crown. The Maori land system, although still separate, has changed from the pre-contact Maori customary land tenure system, into its current form set out in the TTWMA. Consequently, all land in New Zealand has one of six statuses:¹⁰³

- a) Maori customary land: land held by Maori in accordance with tikanga Maori,¹⁰⁴ or
- b) Maori freehold land: land in which the beneficial ownership has been determined by the Maori Land Court by a freehold order;¹⁰⁵ or
- c) General land owned by Maori: land alienated from the Crown for a subsisting estate in fee simple and owned by a Maori, or a group of which a majority is Maori,¹⁰⁶ or
- d) General land: land alienated from the Crown for a subsisting estate in fee simple;¹⁰⁷ or
- e) Crown land: land that has not been alienated from the Crown for a subsisting estate in fee simple;¹⁰⁸ or
- f) Crown land reserved for Maori: Crown land that has been set aside or is reserved for the use or benefit of Maori.¹⁰⁹

The first two categories are known collectively as “Maori land,” and such land holdings are subject to the jurisdiction of the TTWMA and the Maori Land Court. General land owned by Maori is simply general land, general land is any other land alienated from the Crown. Crown land is land still held by the Crown

Te Ture Whenua Maori Act 1993

The kaupapa of the TTWMA is set out in the preamble, section 2, and section 17. The

⁹⁹ In *R v Symonds* (1847) NZPCC 387, the Privy Council held that the King is the only source of private title, and this principle was imported with the common law, on acquisition of sovereignty. This was also recognized in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA), although the nature of the Crown title differs, because of New Zealand’s unique circumstances.

¹⁰⁰ Bennion, Introduction, supra note 93, 9. See also Elias CJ in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA), where her Honour said at page 652: “... [T]he Crown’s notional “radical” title, obtained with sovereignty, was held to be consistent with and burdened by native customary property”

¹⁰¹ *Ngati Apa v Attorney-General* [2003] 3 NZLR 643, 655 (CA) per Elias CJ.

¹⁰² Bennion, Introduction, supra note 93, 9.

¹⁰³ Te Ture Whenua Maori Act 1993, s 129(1).

¹⁰⁴ Ibid s 129(2)(a).

¹⁰⁵ Ibid s 129(2)(b).

¹⁰⁶ Ibid s 129(2)(c).

¹⁰⁷ Ibid s 129(2)(d).

¹⁰⁸ Ibid s 129(2)(e).

¹⁰⁹ Ibid s 129(2)(f).

kaupapa is based on two main concepts: retention and utilization. Maori land is a taonga tuku iho to be passed down through the generations, and as such it should not be alienated outside of the whanau, hapu, or iwi. It is also the life force of Maori society, and needs to be utilized to continue to provide practical, economic sustenance for Maori.

There is room to argue that retention and utilization cannot go hand in hand. However, these are the two important principles on which it was decided that the Maori land legislative framework should be based. This article is written on the premise that this balance is the appropriate one. The challenge is to provide a solution that takes this balance into account. The balance between retention and utilization goes to the very core of the problem facing owners of Maori land. How can they ensure that the land is developed so that it can provide sustenance for Maori, while at the same time ensuring that the land remains in Maori hands, and can be passed on to future generations?

IV THE CURRENT GOVERNMENT RESPONSE

Having analyzed the problem, and discussed the nature of Maori land tenure in Aotearoa/New Zealand, both in pre-colonization and colonized times, the focus now shifts to a critique of the proposed government intervention: the proposed Maori Business Aotearoa New Zealand economic entity (“MBANZ”). The government has recognized the need for a specific entity to deal with Maori economic development. However, the vehicle they propose is flawed, as the focus is solely on economic development, to the exclusion of land development. It is likely that the land trusts and incorporations that face difficulties in accessing finance to develop their land holdings, will not have access to the services of this entity, because of the legislative constraints placed upon it. Further, the Maori Trustee, who has a statutory duty to ensure the development of the land blocks which it is administering, is under-performing in its role. This, alongside the difficulties owners of Maori land face in accessing finance from the private sector, point to a market failure that needs to be addressed.

The Maori Trustee

The Maori Trustee is an office under the Maori Trustee Act 1953, responsible for the administration of 2125 largely uneconomic Maori land blocks.¹¹⁰ Approximately 105,000 of the 1.5 million hectares of Maori land are administered by the Maori Trustee.¹¹¹ Of the 2125 land blocks, 1809 are leased for not more than \$10,000 per annum. These land blocks total 75,920 hectares, covering 143,601 beneficial owners, and earn a total rental of \$4,730,611. This amounts to an average of \$32.94 per owner per year.¹¹² This is less than one quarter of the average income across all owners of Maori land.¹¹³ Across all land holdings of the Maori Trustee, the average yearly

¹¹⁰ Māori Trust Office *Annual Report of the Māori Trust Office April 2005 – March 2006* (2006) 13.

¹¹¹ Ibid 4.

¹¹² Ibid 13. It should be noted that clients will sometimes have shares in more than one property.

¹¹³ Section 1 noted a combined income of \$300 million from Maori land trusts and incorporations in 2001, spread across 2.3 million beneficial owners. This provides an average income of \$130.43 per annum.

income is only \$60.23. The Maori Trustee is clearly underperforming in the role of promoting the development of Maori land. Indeed, when 81 per cent of land blocks administered by the Maori Trustee are leased, it is difficult to envisage how the Maori Trustee can carry out widespread development activities.

Maori Business Aotearoa New Zealand

The Maori Trustee and Maori Development Amendment Bill was introduced to the House of Representatives in November 2007 by the Minister of Maori Affairs, Parekura Horomia. The Bill intends to amend the Maori Trustee Act 1953, by modernizing the operations of the Maori Trustee, and establishing a statutory incorporation known as Maori Business Aotearoa New Zealand.¹¹⁴ Clause 15 of the Bill inserts into the 1953 Act a new part 2 establishing the MBANZ. The purpose of the MBANZ is set out in the proposed section 55 of the 1953 Act:¹¹⁵

55 Functions of MBANZ

(1) The principle function of MBANZ is to administer the MBANZ Fund so as to further the economic development of Māori by utilising the potential of resources available to Māori.

This very broad function is defined somewhat in the proposed s 55(2):¹¹⁶

- (2) In carrying out its principal function, MBANZ may-
- (a) provide business advisory and mentoring services for Māori starting up new businesses or consolidating and developing existing businesses:
 - (b) identify opportunities with a significant potential for the economic development of Māori:
 - (c) make payments and grant loans to assist Māori to start up new businesses, or to consolidate and develop existing businesses as a means of contributing to the success of those businesses:
 - (d) undertake research, monitoring, and evaluation to ensure that the services provided by MBANZ meet, and continue to meet, the business needs of Māori:
 - (e) provide other services that are identified by MBANZ as being likely to contribute to MBANZ fulfilling its principal function.

The MBANZ is solely concerned with economic development. Indeed, it appears from the language of the Bill that any act by the MBANZ that does not further economic development will be ultra vires, and therefore, unlawful. This strict focus on economic development is the primary failing of this proposed organization. Sir Apirana Ngata, in establishing the land development schemes in the 1930s, was concerned not solely with the economic development of Maori, but also with the social and cultural development of Maori.¹¹⁷ The source of funding for the MBANZ requires that the focus be on social and cultural development, alongside the economic development of Maori, but the MBANZ itself, does not require such development.

The MBANZ Fund was initially intended to be established by the transfer of

¹¹⁴ Maori Trustee and Maori Development Amendment Bill 2007 (2007 No 181-1), explanatory note, 1.

¹¹⁵ Ibid cl 15.

¹¹⁶ Ibid.

¹¹⁷ Report on Native Land Development [1931] AJHR G10, vii. Ngata, in describing his vision for Maori land development, said: “The efforts to educate the youth of the race, ... to correct the malign influences of certain elements in European culture – all these would fail to produce enduring results unless they centred round and assisted in an industrial development based principally upon the cultivation of land.”

money from the Maori Trustee, along with a contribution from the Crown.¹¹⁸ The Maori Trustee has agreed to transfer \$35 million from the General Purposes Fund (“GPF”) to establish the fund to be used by the MBANZ to pursue its functions. The government will provide a “significant contribution”¹¹⁹ to the fund. The transfer of funds from the GPF, to an organization whose sole focus is one of economic development, is problematic for two reasons. First, the GPF is used for goals wider than economic development, and secondly, it should not be assumed that the GPF is there for the Maori Trustee to transfer.

The GPF is available to be used for a wide range of purposes. Loans were able to be made “for the benefit of Maoris”,¹²⁰ a very wide-ranging power that theoretically entitles the Maori Trustee to lend or grant funds for social and cultural development. The fund could be used to provide hostels to accommodate Maori, and to “[e]stablish and maintain training centres or farms for the care and instruction of Maoris”.¹²¹ The fund could also be used to purchase and maintain properties and buildings,¹²² to maintain and develop properties vested in the Maori Trustee,¹²³ to acquire land on behalf of Maori,¹²⁴ and to acquire land to provide sites for Maori dwellings.¹²⁵ Thus, the GPF is not solely concerned with economic development, but also with social and cultural development. Further, the predominant use of the funds is for development - based on the development of the whenua.

The issue of who “owns” the GPF is problematic. The Maori Trust Office considers the GPF to be the funds of the Maori Trustee,¹²⁶ and thus, his to deal with. Most of the land controlled by the Maori Trustee is, and has been, leased land. The Maori Trust Office organizes leases on behalf of the owners, collects the funds from the lessees, and distributes the proceeds to the beneficial owners of the land. The rents collected by the Trust Office are not paid as they are received by the Maori Trustee, the funds are invested until payment occurs. While the Maori Trustee is required to pay interest on the money distributed, the rate is set by regulation, and it has been common for this rate to be set lower than the interest rate received on the money invested by the Maori Trustee. This is referred to as the interest rate differential.

The GPF fund comprises fees and commissions earned by the Maori Trustee in his dealings with Maori freehold land, held under trust by the Maori Trustee, and money earned as a result of the interest rate differential. The money arising from the interest rate differential prompts a close look into the ownership of the fund.

This interest rate differential results in a surplus of funds to the Maori Trustee, and over time, a substantial amount of money has accumulated in the GPF. In this sense, the GPF properly belongs to the beneficial owners of the land, and not the Maori Trustee. However, with no individual records, the fund cannot be allocated to individuals or to land blocks. This is important, because the proposal is for an institution designed to promote economic development; yet it appears unlikely that it will be used as a vehicle to develop the land held by the Maori Trustee. As noted

¹¹⁸ Maori Trustee and Maori Development Amendment Bill 2007 (2007 No 181-1), cl 15 (Inserting s 59 into the 1953 Act).

¹¹⁹ Ibid explanatory note, 2.

¹²⁰ Maori Trustee Act 1953, s 32(1)(a).

¹²¹ Ibid s 33(2)(a), s 33(2)(b).

¹²² Ibid s 36.

¹²³ Ibid s 38.

¹²⁴ Ibid s 39.

¹²⁵ Ibid s 40.

¹²⁶ Maori Trust Office *Annual Report of the Maori Trust Office April 2005 – March 2006* (2006).

above, the Maori Trustee leases 81 per cent of the land blocks that he manages. 85,000 hectares of Maori land is being leased out at minimal rentals, while the Maori Trustee is about to transfer a fund worth \$35 million to an institution that has no obligation to further the development of Maori land.

The functions of the MBANZ, all relate to the establishment of new businesses, or to the provision of support to existing businesses. While such a fund may be beneficial to Maori businesses, it is unlikely to concern itself with individual land blocks seeking funds to clear the land for agrarian purposes, or to achieve social goals, such as housing and training activities, based on the land.

The proposed MBANZ is applying funds to the development of Maori business at the expense of wider social and cultural development opportunities based on the whenua. The government should be applauded for its intentions to help progress Maori economic development, through its contribution to the MBANZ fund. However, the GPF is designed to be used to develop the economic, social and cultural well-being of Maori, using the whenua as the basis of such development. The fund would be better utilized in an entity designed to provide financial services to owners of Maori land who desire to develop their land, not only for economic development, but also for the social and cultural development of Maori.

V FRAMEWORK

The asset base of Maori land trusts and incorporations is substantial. Te Puni Kōkiri reports¹²⁷ that in 2001, Maori land trusts and incorporations controlled \$1.52 billion of total assets, and reported a total combined income of \$300 million, with an increase of 55 per cent from 1998. Gross profit over the same period increased by 122 per cent to \$51 million. Maori-owned commercial assets were estimated to be worth nearly \$9 billion in 2001. Thus, Maori land assets account for approximately 17 per cent of total Maori assets.¹²⁸ These figures highlight the importance of Maori land in providing the continued sustenance of Maori. With 40 per cent of Maori land under-developed, and 80 per cent of Maori land classified as non-arable, the potential benefits from the development of Maori land are substantial.

The previous sections have defined the problem facing owners of Maori land in accessing finance to develop their land. The overarching theme is that of market failure. The public and private sector have failed to provide a suitable organization through which owners of Maori land can access finance for development. This section looks at a possible solution - an institutional entity that often arises when there is a market failure: a mutual society. It will then be argued that a mutual society is an appropriate organizational entity to pursue the development of Maori land. A discussion of the recent changes to the Farmers' Mutual Group will be used to highlight how a mutual society can be successful in providing specialized services to a specific group.

Principles

¹²⁷ Te Puni Kokiri, *The Maori Asset Base* (2006) Te Puni Kokiri <<http://www.tpk.govt.nz/en/in-print/our-publications/fact-sheets/the-maori-asset-base/download/tpk-maoriasset-2006-en.pdf>> (at 27 August 2008) [*"The Maori Asset Base"*].

¹²⁸ Ibid.

The Law Commission in its report, *Waka Umanga: A Proposed Law for Māori Governance Institutions*,¹²⁹ devoted significant time and energy to the principles that should be applied in the formation of representative Maori entities. The principles correspond to tikanga Maori, and to international standards of indigenous rights. As such, these principles should be considered in the formation of a Maori financial institution. The principles are:¹³⁰

- a) The principle of autonomy;
- b) The principles of cultural match and mandated vision;
- c) The principles of community empowerment and participatory democracy;
- d) The principles of consensus and assisted dispute resolution;
- e) The principles of fair process, protection of minorities and access to law;
- f) The principle of choice;
- g) The principle of diversity;
- h) The principle of maintaining economies of scale;
- i) The principle of rationalization;
- j) The principle of early entity development;
- k) The principle of recognition; and
- l) The principle of ensuring good governance.

These principles ensure that Maori are able to freely order their own affairs without the interference of the State, while simultaneously ensuring that the entity operates in a commercially sound manner to protect the assets entrusted to it.

Mutual Societies

A mutual is a specific organizational form where the stake-holders (customers) are the owners – not shareholders who may not have an interest in the organization outside their ownership in it. Mutual societies often arise when the market is failing producers and consumers.¹³¹ The Farmers’ Mutual Group (“FMG”), discussed below, arose from the failure of foreign firms to provide affordable fire insurance to New Zealand farmers in the early 1900s. According to Arun et al, there are five “attractions” of a mutual:¹³²

- a) reciprocity, or the inbuilt provision of borrowing at short notice which serves as a kind of access to a liquidity-guaranteeing function which is especially important to business;
- b) being able to save in small instalments;
- c) provision of a disciplined environment for saving;
- d) convenience and absence of formalities; and
- e) meeting liquidity preferences by permitting savings to be hidden away from the demands of friends and relatives.

Mutual societies enable individuals within a group to pool their money

¹²⁹ New Zealand Law Commission *Waka Umanga: A Proposed Law for Maori Governance Institutions: Report 92* (NZLC R92, May 2006).

¹³⁰ Ibid 67-77.

¹³¹ Brown, “Mutuality for the 21st Century” (1999) 519 Law Talk 8.

¹³² Arun et al, “Finance for the poor: The way forward?” in Green, Kirkpatrick and Murinde (eds), *Finance and Development: Surveys of Theory, Evidence and Policy* (2005) 307.

together, and to use that fund to provide loans or assistance when needed. It operates in a similar fashion to a bank; except that the customers are the owners of the entity, and any profit made is used for the benefit of the customers. Thus, over time, the assets of the group accumulate, and the ability of the mutual society to provide for its owners increases.

While it is the case that large tracts of Maori land are undeveloped or underdeveloped, it is also true that there are many trusts, incorporations, and iwi with substantial assets. By pooling together some of the assets controlled by these Maori organizations, a mutual society can develop. This mutual would be able to provide finance to owners of Maori land who want to develop their land, as well as for Maori generally, in establishing, or growing a business. Such an institution will remove the need to rely on the government to fund Maori economic development as it is proposing to do with the MBANZ entity.

Not only would a mutual society provide Maori with autonomy in controlling our own affairs, it would enable Maori to operate according to tikanga, and it could be a key institution in the drive towards tino rangatiratanga. Maori will have the choice of investing in our own financial institution designed to benefit our own people. It would also negate any problems associated with using Maori land as security for loans. A “Maori Mutual” would have the necessary expertise and knowledge to understand the complexities of working with Maori land, and would be able to design solutions that incorporate this challenge. One possible response to any default on the debt would be for the mutual itself to take over operations; drawing on the expertise of its customers throughout Aotearoa; until the debt is repaid. This reciprocity is a cornerstone of both mutual societies and Maori society.

Farmers’ Mutual Group

The Farmers’ Mutual Group is a mutual society governed by the Farmers’ Mutual Group Act 2007. It provides “general insurance, risk protection and financial services to farmers and members of the rural community”.¹³³ The FMG was formed in 1903, when a group of farmers rebelled against excessive prices and poor service provided by fire insurance companies.¹³⁴ In 2007, FMG sought to modernize its powers and functions. The previous regime was considered to be too inflexible, and constrained the activities of the Mutual. The 2007 Act gives the Mutual the same powers as a company registered under the Companies Act 1993, and establishes a governance regime based on that in the Companies Act 1993.¹³⁵

Although the main function of FMG is to provide risk insurance,¹³⁶ it also provides loans to finance the purchase of farming equipment. Being a farming-centred organization, FMG is able to tailor the terms of its loans to suit the realities of the business environment that its customers operate in. Recognizing that cash flows in the rural community fluctuate over the seasons, FMG provides flexible repayments tailored to suit the individual’s cash flows.¹³⁷ Such flexibility is one of the advantages of a mutual society.

The changes to the FMG provide an example of how a mutual society designed to deal with Maori economic, social and cultural development, could be

¹³³ Farmers’ Mutual Group Bill 2007 (2007 116-1) explanatory note, 1.

¹³⁴ Farmers’ Mutual Group, *History* FMG <<http://www.fmg.co.nz/19.html>> (at 27 August 2008).

¹³⁵ Farmers’ Mutual Group Bill 2007, *supra* note 136.

¹³⁶ Farmers’ Mutual Group Act 2007, s 6.

¹³⁷ Farmers’ Mutual Group, *Finance* FMG <<http://www.fmg.co.nz/4.html>> (at 27 August 2008).

established. Like the FMG, the ‘Maori Mutual’ would be a creature of statute, with the capacity, powers, and validity of actions of a company registered under the Companies Act 1993,¹³⁸ as well as being subject to the requirements of the Financial Reporting Act 1993.¹³⁹

These provisions provide the framework for a sound governance and management structure, and ensures that the entity operates according to sound financial and business practice. Being subject to these two 1993 Acts would mean that the ‘Maori Mutual’ would be accountable to Maori: to its owners/customers. This is in direct contrast to the MBANZ entity which is only accountable to the government.

VI CONCLUSION

This article began with a passage from Sir Hugh Kawharu who spoke of the identity and purpose that the whenua provided Maori and how, because of the loss of the whenua, Maori had to turn elsewhere to rediscover their identity. His vision was of the whenua continuing as the life force of Maori society. Thirty years later, Judge Milroy wrote of the difficulties faced by owners of Maori land in accessing finance to develop their land blocks. With iwi beginning to receive settlements arising out of breaches of Te Tiriti o Waitangi, the time has come, she said, for the establishment of a Maori bank to serve the needs of owners of Maori land, and Maoridom as a whole.

In an attempt to address Maori economic development, the government has proposed the establishment of Maori Business Aotearoa New Zealand. The government has recognized the need for a specific entity to deal with Maori economic development. However, the vehicle they propose is flawed, in that the focus is solely on economic development, to the exclusion of land development. Further, money for the establishment of the MBANZ is being taken from a fund that can be used to further social and cultural development together with economic development, and is being employed in a fund solely concerned with economic development. Given that Maori society addresses problems holistically, such an approach is deeply flawed.

The overarching theme is that of market failure. The public and private sector have failed to provide a suitable organization through which owners of Maori land can access finance for development. A ‘Maori Mutual’ is needed: a mutual society formed using the pooled funds of iwi, land trusts, and incorporations to further the economic, social, and cultural development of Maori. A ‘Maori Mutual’ will provide Maori with a vehicle to control our development. Unlike the MBANZ, a ‘Maori Mutual’ will be accountable to Maori, and not the government. Within Maoridom, there exists the resources and the expertise to establish a financial institution that can respond to the needs of Maori in a way that no other institution can. What we need is vision, leadership and co-operation within Maoridom to realize this potential, by returning to the whenua as the life force of Maori society.

¹³⁸ See the Farmers’ Mutual Group Act, s 7(2).
¹³⁹ Ibid s 37.