

# Reflections after nearly 20 years as a Māori Land Court

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Rights to land have always been a pivotal driver in Polynesian society. It is inconceivable that that will not continue. But the part that Māori land plays in the day to day life of Māori people has changed considerably over the last few generations.

It is basic that Māori land is not simply a commodity. It is also well recognised that when issues relating to Māori land fall to be discussed and decided, there are usually three entities in the room. First there are the tipuna who are the source of the land. Second, there is the present generation who are very much here today and gone tomorrow. And third, there are future generations whose rights to the land must be recognised and protected.

Consider the following facts:

- Most land that Māori owned has gone. Only roughly five percent of Aotearoa is now Māori land.
- Most Māori land is rural and much of it is remote. The eyes were picked out of Aotearoa's available land by successive Native Land Court regimes and rapidly converted to European land in the 19th and 20th Centuries.
- In practical terms there is almost no customary land, ie land that has not gone before the Court and to which title has been issued to particular owners in defined shares, remaining.
- Since 1993 there has only been a trickle of Māori freehold land that has changed to European title. To achieve this change is possible only in particular circumstances and strict rules apply.
- Similarly, partition of land, ie cutting it up into smaller parcels, has become particularly difficult and happens rarely.
- Shares in Māori freehold land are rarely transferred. Most pass by inheritance.
- Māori freehold land is owned in common in unequal shares. This means that each owner owns each piece of the land in that share. By that, I mean we have the position that shareholding in relation to each rock and each teaspoon of soil on the land is owned by everybody in their respective shares. Nobody owns any particular portion, nook or corner of the land in

their own right. To European eyes the practical effect of that is that where everybody owns everything, nobody owns anything. The Māori perspective is different.

- Most Māori freehold land used for agriculture or forestry is managed by incorporations which operate like public companies with shareholders, or by trusts, or under leasing arrangements through the Māori Trustee. Incorporations appear to have fallen out of favour and I know of only one that has been formed in the last 20 years. In contrast new ahu whenua trusts for the management of Māori freehold land are regularly set up through the Māori Land Court.
- Shareholdings have become highly fractionated. Ownership lists grow exponentially generation by generation. This problem has been recognised for well over 100 years and there is no immediate cure. In the early 20th Century consolidation was seen as the answer. The idea was that an individual or a whānau could consolidate their shares across a large area and in a large number of blocks with many owners, down into a particular piece of land that they would call their own. There were many of these schemes and all have proved ultimately to be futile. They only worked for a generation or two and then the shares were fractionated again, particularly with the large families that were evident in the mid 20th Century. As an example, I know of a block in the Eastern Bay of Plenty that was the product of consolidation in the 1920s. There are shareholdings in that block fractionated down to 4,000ths. The block itself is only about 5 hectares in size.
- Very few Māori now live on Māori freehold land. This is at least part of the result of urbanisation and more recently the drift of Māori people across the Tasman. This is not a Polynesian phenomenon. It is part of a worldwide drift to the cities. Perhaps it is also partly the result of difficulty in obtaining mortgages on Māori freehold land, which prior to 1993 drove people to shift title into the Land Transfer title system. The problem we face is not quite as dramatic as I see in the Cook Islands and Niue where I also serve. As an example of the way things have shifted, the Māori Land Court staff at Rotorua have 31 members whose ages range from early 20s through to being close to retirement. Of those, 14 spent a significant part of their young life living on Māori freehold land. Now only 3 live on Māori freehold land.

- Income from Māori freehold land is no longer significant as a regular source of income to Māori families. The vast majority of Māori families receive no income from land at all. Some are more lucky than that, usually in circumstances where they are something in the nature of an only child of an only child of large owner. The vast majority of Māori receive no income at all from Māori land. The income usually goes to pay those concerned with the management of the land with the balance being used to awhi marae or to provide education grants and kaumatua grants. There are perhaps 20 or 30 large and successful trusts and incorporations, which are an exception to this.
- The fact that Māori do not live on or receive substantial income from Māori land has not diminished the importance of that land in cultural terms.
- There is a myth that seems to be reborn about every 20 years that there is a large pool of unused or under-used Māori freehold land out there that could be made markedly more productive. In my experience this land does not exist!

One hundred years ago this misconception was responsible for the Crown purchasing much of Te Urewera lands. It did this in the belief that hundreds of farms could be created. Huge amounts of time and money were expended but then it was discovered that no farms could be created. This is of course is all now largely forgotten and the old adage that if we forget history we are doomed to repeat our mistakes, seems particularly apt.

Having stated all the positive and less positive factors, it seems that we have a situation that makes absolute sense in a cultural context but, which is becoming increasingly difficult in an economic sense. It could be that we are running the risk of becoming what is called a “row-boat society.” In other words, we are moving slowly forward but steadfastly looking backwards. In this context, the current review of Te Ture Whenua Māori Act 1993 and Māori land law in general is to be welcomed.

From my perspective, the most sensible long term plan would be to encourage the retention of land interests in kin groups rather than individuals. Provision was made for that in the Te Ture Whenua Māori Act 1993, which allowed for whenua tōpu trusts. These were to be created where land of iwi and hapū could be held collectively without individual shareholding within that kin group. Uptake of this trust structure, however has been minimal. It seems that within those larger kin groups the idea of individual shares has become deeply entrenched.

But a workable and popular model for kin group holding without individual shares has been found in the whānau trust. Here an individual can form the trust and appoint trustees and the shareholding, which maybe across many blocks, is held for the uri

of that individual down through the generations. I often see this done by the children of a deceased parent. The land interests are held in the whānau trust in a common pool for the uri of that parent, but none of the kin group has in his or her own right, any particular shareholding.

With shares held by individuals becoming increasingly fractionated but shares held in whānau trusts being relatively stable, I foresee a time when these whānau trusts will be major shareholders in trusts and incorporations.

I know that presently there are difficulties for members of whānau trusts in relation to grants for education or to kaumatua, and in voting at meetings. These matters could be resolved relatively simply by legislation.

To sum up then, we have reached a position where Māori land is no longer being lost into the general land system, or fragmented by partition. It is also rarely being used by owners in their capacity as owners. If they have possession of the land they will have, in most cases, an Occupation Order or a leasing arrangement with the owners.

The most pressing problem is in relation to individual shareholdings and participation of shareholders in the management of their land. Perhaps the answer to the problem is that we must view land ownership as a consequence of membership of a kin group, rather than possession of a shareholding. This is the essence of a whānau trust. In that sense whakapapa and land rights are restored to the close relationship that they once had.