Urupa Reservations

Urupā reservations (Māori burial grounds) have a special status in legal terms as well as having family, spiritual, cultural and historical importance. Many urupā are traditional burial grounds, and are the places where whānau and hapū members expect to be buried when their time comes. However, especially where older urupā are concerned, and as the generations increase, there may no longer be sufficient land left to receive the bodies of all those who wish to be buried in their ancestral urupā. As a result, from time to time the Māori Land Court receives applications to extend existing urupā, or to set aside Māori freehold land, or sometimes General land owned by Māori, as new urupā reservations.

Apart from the general principles underlying the statute, and the general objectives that the Court must take account of, there is very little guidance in Te Ture Whenua Māori Act 1993 as to the matters the Court should consider when deciding whether to set aside land as a new urupā. Recently, the Law Commission published a paper titled The Legal Framework for Burial and Cremation in New Zealand: A First Principles Review (NZLC IP34, 2013). This paper brought together over two years of research and preliminary consultation with the Ministry of Health (which administers the Burial and Cremation Act 1964), local authorities, the cemetery and funeral sector, experts in Māori customary law and representatives of various ethnic communities. The reform options proposed in the paper deal with every stage of the decision making process. The review also assesses how the primary legislation interfaces with other key statutes, and the respective roles central and local government and private groups should play in the provision and management of cemeteries. This article looks at the relationship between the existing laws relating to cemeteries and the powers of the Māori Land Court to constitute urupā reservations under Te Ture Whenua Māori Act 1993.

Legislative history

The Law Commission's report notes that the first comprehensive burial law was passed in 1882. The 1882 statute brought all land used for burial – except urupā – under a common legal structure irrespective of how the land had come to be set aside. It became the local authority's responsibility to meet the community's burial needs in cases where there was inadequate provision, although many cemeteries continued to be managed by trustees. The Act also made provision for portions of public cemeteries to be set aside for the exclusive use of different denominational groups, and in that way allowed for religious diversity within the secular framework of a public cemetery.

The reforms enacted in the Burial and Cremation Act 1964 retained this basic structure but further entrenched the role of local authorities by extinguishing the right of other entities, such as trusts, to open new public cemeteries. The only exception under the 1964 Act is for religious groups, who are still entitled to apply to the Minister of Health for permission to set up burial grounds on private land for the

exclusive burial of their members. Urupā continued to be exempt from the operation of the Act.

The Commission now proposes that the laws prohibiting burial on private land should be repealed. A person wishing to be buried on private land would still need prior approval, but decisions would be made at a local authority level in accordance with the relevant district or regional plans, rather than by central government officials under the current "exceptional circumstances" criteria.

Te Ture Whenua Māori Act 1993

As stated above the Burial and Cremation Act 1964 does not apply to urupā. Prior to 1993 the Court had the ability under s 439 of the Māori Affairs Act 1953 to recommend land be set apart as a Māori Reservation for the purposes of a burial ground. This power continues pursuant to s 338 of Te Ture Whenua Māori Act 1993 and it does not appear that the Law Commission proposes changes to this power.

Sometimes land has been used as an urupā for a considerable period of time without being formally set aside as a reservation. This can happen when, at the time the land was partitioned, an area was set aside for an urupā but, through an oversight, the application for reservation status was never made or completed. During the Māori Freehold Land Registration Project the Court came across a number of instances of this kind. In a small number of cases with the consent of the owners of the land the Court was able to formalise the situation. In such circumstances the Māori Land Court will usually have no difficulty in granting a recommendation that such land be given reservation status. In other cases the current owners were aware of the existence of ancient urupā on their land but preferred not to go through the formal process.

Setting aside new urupā

A number of well established principles in relation to Māori reservations have been developed by the Court – these principles apply to urupā reservations as much as to marae or papakāinga.

When the owners or trustees of a block of land make an application to set aside an urupā reservation over land that has not previously been used for burials, the applicants will need to show that they have called a well-notified meeting of the owners to discuss the proposal with them. A Court will not make a recommendation to set aside an urupā unless it is certain that the owners have had sufficient notice of the proposal and have had a reasonable opportunity to discuss and give their views on it. That is because once the urupā is created, trustees will be appointed to administer the reservation and the underlying beneficial owners will no longer have legal responsibilities in relation to that land. Therefore the Court must make sure that a sufficient majority of owners are in favour of the reservation application. The

beneficial owners will also need to nominate the trustees who are to be responsible for the urupā reservation once it is created.

If the Court is satisfied that there is no significant objection to the creation of the reservation, the Court must still consider the technical aspects of application. The applicants will need to provide either a surveyor's plan or a sketch plan which is sufficient to clearly identify the dimensions of the urupā. Where the urupā is not to consist of the whole block of land, the plan needs to show the siting of the urupā as accurately as possible on the block. The owners may also need to consider whether a right of way is required in order to ensure proper access to the urupā. Any lessees of the block will have to be consulted with regard to the proposal as it may affect their use of the block. Similarly, any mortgagees will also have an interest in the proposal as it may affect their security over the block.

While the Māori Land Court is not required to consider the local authority district plan when determining an application for an urupā reservation on Māori freehold land, a stricter approach may be taken if the urupā is proposed to be placed on general land. In such a case the applicants would be wise to check the local authority district plan to see whether any restrictions on land use may be applicable to the area proposed for an urupā. For example the Frankton District Plan (now coming under the wider ambit of the Waikato District Plan) provides that cemeteries are a controlled activity in the rural zone (23A.1.2) and therefore require resource consent. The Western Bay of Plenty District Plan provides that existing urupā and new urupā adjoining existing urupā are permitted activities in the rural zone (18.3.1) and do not require resource consent.

The Court will also need to be sure that there are no health issues related to the siting of the proposed urupā. For example if there is a nearby water course the Court is likely to require the applicant to make inquiries with the Health Department and the local authority about any issues that such a feature might present in relation to a proposed burial ground.

Once the technical aspects of an application have been considered the Court will then look at issues relating to who may use the urupā in future.

Beneficiary class and underlying ownership

The Court must have regard to Māori customary concepts relating to tūrangawaewae and ancestry in determining the beneficiaries of a Māori reservation. Only in special circumstances will a Māori reservation be set aside for anyone other than the whānau, hapū, and iwi traditionally associated with that particular land. The usual beneficiary class is the owners of the land and their descendants.

Questions may arise as to whether spouses, civil union partners, de facto partners or whāngai are also eligible to be buried in an urupā when they may have no affiliation to the hapū associated with the land. These are matters which need to be carefully considered by owners when creating an urupā reservation.

The advantages of constituting an urupā reservation

The main advantage of setting aside an urupā as a reservation is that it provides strong protection for that land so that it cannot be alienated in any way, thus ensuring that those buried there are unlikely to be disturbed.

A further advantage is that an urupā that is constituted as a Māori reservation and which does not exceed 2 hectares in size is, pursuant to the Local Government (Rating) Act 2002, non-rateable.

Conclusion

Setting aside land for a new urupā is a significant undertaking for the beneficial owners of the land. Apart from the legal process outlined above, once a person is buried on that land important and weighty cultural considerations come into play. The Court has had to deal with a number of situations where an existing urupā is full and disputes have occurred where neighbours adjacent to the urupā object to an extension or encroachment onto their land. Other disputes may also arise if the issue of who may be buried in the urupā has not been carefully considered. It is far better if owners or trustees resolve these matters well before they become issues at a crisis point such as at tangi, where emotions are heightened in any case. For these reasons the Court will facilitate an application for an urupā reservation but will also make sure that the owners and trustees have also considered these difficult but not uncommon issues.

[1] *Otene – Tauhara Māori Reservation* (1977) 58 Taupo MB 168 (58 TPO 168); *Trustees of Waipahihi Reserve - Waipahihi Māori Reservation* (1978) 59 Taupo MB 184 (59 TPO 184); and *Pihema v Ngāti Whatua of Orakei Māori Trust Board – Section 722,790,792,793 and 794 Town of Orakei Blocks IX Rangitoto Survey District* (1990) 3 Taitokerau Appellate Court MB 44 (3 APWH 44).